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Cover art courtesy of Isabella Calise.

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Editor's Note: Volume XIV No. II of the *Bellarmine Law Society Review*

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EDITOR'S NOTE: VOLUME XIV NO. II OF THE *BELLARMINE LAW SOCIETY REVIEW*

ISABELLA CALISE

It is with great pleasure that I invite you to this second issue of the Bellarmine Law Society Review's fourteenth edition, where we present three thought-provoking articles that engage with pressing legal and societal issues from diverse perspectives.

In our first feature, "Affirmative Action Revisited: The Future of Collegiate Admissions," senior Will Dee examines the evolving landscape of affirmative action in U.S. higher education. With the landmark case *Students for Fair Admissions v. Harvard* fresh in public discourse, Dee provides an insightful analysis of the tension between diversity goals and the principle of equal treatment under the law. Next, in "Unconstitutional Constitutional Amendments: Is the Application of this Doctrine Always Justified?" exchange student Pablo Galindo Lema tackles the complex issue of constitutional amendments and the controversial doctrine of unconstitutional constitutional amendments. By exploring sovereignty, constituent power, and Carl Schmitt's constitutional law theory, Lema builds a case for when this doctrine should apply. Finally, senior Jenna Gilhooly's "Censoring Film and Filming Censorship: A Legal Analysis of the Origins and Legacy of Film Noir" delves into the intersection of law and cinematic art. Through an exploration of early 20th-century film regulation and the Hays Code, Gilhooly reveals how the Film Noir genre both challenged and adapted to censorship.

As we wrap up this issue, Tommy Dee and I are excited to share that we welcomed two new copyeditors this semester, Alisa Fixler and Syesha Swani, in anticipation of this publication, and we are grateful for their hard work and fresh perspectives. This fall, BLSR saw a record-breaking number of submissions, making the selection process highly competitive, which speaks to the exceptional talent of our contributors. The Board is proud to present a diverse range of insightful pieces that not only engage with important legal issues but also encourage critical reflection on their societal implications. We hope our readers enjoy these articles and find them as thought-provoking as we do. As we close out this edition, we wish all our readers a happy, healthy, and prosperous New Year!

Bellarmine Law Society Review

Volume XIV | Issue II Article I

Affirmative Action Revisited: The Future of Collegiate Admissions

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AFFIRMATIVE ACTION REVISITED: THE FUTURE OF COLLEGIATE ADMISSIONS

WILLIAM DEE [1]

Abstract: This paper examines the evolving debate over affirmative action in U.S. college admissions, focusing on its legal, economic, and societal implications. Rooted in the historical context of systemic racial inequities, affirmative action policies have aimed to bridge the disparities in access to higher education. However, recent legal challenges, such as Students for Fair Admissions v. Harvard, have highlighted conflicts between diversity objectives and principles of equal treatment under the law. This analysis explores arguments for and against affirmative action, the measurable benefits of diverse educational environments, and concerns about meritocracy and efficiency. Alternative policies, such as programs to increase access to social capital and socioeconomic-based admissions schemata, are proposed to reconcile opportunity with inclusivity. Ultimately, the paper advocates for strategies that enhance diversity while aligning with constitutional law.

INTRODUCTION

The persistent racial disparities in access to higher education present a serious challenge to the ideals of equality and opportunity in the United States. For decades, affirmative action policies have been implemented to address these gaps by using race as a factor in college admissions. However, this approach has sparked intense debate over its fairness, legality, and effectiveness, culminating in significant recent legal challenges, such as The Supreme Court of the United States (SCOTUS) *Students for Fair Admissions v. Harvard* case. The Court's decision in this case emphasized the need for admissions policies to comply with the Equal Protection

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Clause. This moment presents a critical opportunity to explore innovative strategies that aim to close these gaps without relying on racial bias.

This paper provides an overview of the historical circumstances, laws, and rulings that led to the existing system of race-conscious college admissions. From there, we will provide the logical structure of the most compelling arguments for and against affirmative action, analyzing their merit and coherence. Those for affirmative action contend that racial inequality exists, that higher education is necessary for generational wealth and stability, that affirmative action successfully increases minority enrollment, and, therefore, it addresses inequality, creating broad benefits. Those against it believe some combination of the arguments that affirmative action either harms minority students, exhibits illegal racial preferences or is inefficient. We attempt to reconcile these contradictory positions through policy proposals that seek to increase diversity on campuses without violating the current legal interpretation of Equal Protection.

This issue shapes the course of individual lives, as well as the country's future. Education is a requisite for future success and social mobility. In America's post-industrial economy, workers with a bachelor's degree now have median lifetime earnings 75% greater than workers with only a high school diploma.[2] Elite institutions are of particular importance: they produce the next generation of leaders who shape policies, create economic growth, and drive culture.

Affirmative action has legal, economic, and political ramifications. Legally, it tests the boundaries of the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act, compelling courts and policymakers to balance the need for diversity with principles of nondiscrimination. Economically, it raises questions about how unequal access to education perpetuates wealth gaps and how to balance the competing interests of morality and economic

[2] Anthony P. Carnevale, Ban Cheah, and Emma Wenzinger. *The College Payoff: More Education Doesn't Always Mean More Earnings.* Washington, DC: Georgetown University Center on Education and the Workforce, 2021.

efficiency. From a public policy perspective, the debate highlights the challenge of crafting solutions that both include marginalized individuals and maintain the meritocratic spirit of the country. By engaging with this issue, we seek policies where higher education serves as both an engine of mobility and an efficiency maximizer, fulfilling its promise to all segments of society.

HISTORY

Differential access to education has a long and sordid history in the US during the Antebellum period. In the 1830s, as the future of slavery began to be debated, Southern states enacted a spate of laws designed to prevent access to education for Black Americans. North Carolina passed a law entitled *An Act to Prevent All Persons from Teaching Slaves to Read or Write* in 1830. States such as Georgia, Virginia, Alabama, and South Carolina quickly followed suit, enacting laws that imposed financial penalties for White people caught teaching Black Americans, and whipping for Black people caught in the same act. The US is the only country to have codified anti-literacy laws.[3] It was recognized by slaveholders and abolitionists alike that education was a tool of emancipation. As Frederick Douglass wrote in *The Blessings of Liberty and Education,* "Education means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free."[4]

Reconstruction: Slavery was officially abolished under the Thirteenth Amendment in 1865. Recognizing the importance of education for the recently emancipated, Congress passed the Freedmen's Bureau Act in 1865 and expanded it in 1866. This act established a federal agency to provide benefits for "persons of African descent."[5] The act was vetoed by President

[3]Christopher M. Span and Brenda N. Sanya, "Education and the African Diaspora," in *The Oxford Handbook of the History of Education*, edited by John L. Rury and Eileen H. Tamura, 402. Oxford: Oxford University Press, 2019.
[4] Frederick Douglass. *The Blessings of Liberty and Education*. 1894.
[5]Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16, 1866, ch. 200, 14 Stat. 173.

Andrew Johnson, who was then overridden by Congress. The Bureau would educate about 100,000 Black Americans per year following its establishment and provided the funding and land for the first Historically Black Colleges and Universities.[6] The Freedmen's Bureau Act was the first instance of preferential racial treatment to redress disparities that arose from the unequal treatment of racial groups. Congress also overrode Johnson's veto to pass the Civil Rights Act of 1866, which acknowledged that White people had benefited from rights excluded from others. It stated that Americans "shall have the same right… enjoyed by white citizens."[7] Advocates for affirmative action contend that these laws support legal racial preferences in certain circumstances. They emphasize that the Civil Rights Act of 1866 established the privileges of White Americans as a benchmark and that the same Congress which passed the Fourteenth Amendment also passed the Freedmen's Bureau and Civil Rights Acts by an overwhelming majority.

In 1868, Congress ratified the Fourteenth Amendment, establishing a pivotal consideration in the affirmative action discourse: the Equal Protection Clause -- "No state shall...deny to any person within its jurisdiction the equal protection of the laws" (U.S. Constitution, amend. 14). The Equal Protection Clause prohibits discrimination based on what is now commonly referred to as "protected characteristics," i.e. age, race, religion, etc. Opponents of affirmative action believe that the practice constitutes a violation of Equal Protection by discriminating against racial groups, specifically White and Asian individuals. Modern jurisprudence is based on a series of SCOTUS opinions that have come to define the interpretation of these statutes.

[6]E. Schnapper. "Affirmative Action and the Legislative History of the Fourteenth Amendment." *Virginia Law Review* 71 (1985): 753–781.
[7] Act of Apr. 9, 1866, 14 Stat. 27.

Modern to Present: The first major application of Equal Protection to education occurred in 1896 in *Plessy v. Ferguson*. Homer Plessy, a 1/8th Black man, was convicted of violating segregation laws by sitting in a "whites only" train car. He appealed to SCOTUS, claiming that the law was unconstitutional under the Thirteenth and Fourteenth Amendments. The Court ruled 7-1, that racial segregation was not itself a violation of Equal Protection, so long as separate facilities were of equal quality. Separate but equal would become the law of the land until *Plessy* was overruled in 1954 by the Warren Court's 9-0 decision in *Brown v. Board of Education of Topeka (1)*. The *Brown* opinion held that the segregation of public education based solely on race was a violation of Equal Protection.

The *Brown* ruling led to the first instances of affirmative action in education. Many school systems were uncertain to what extent *Brown* necessitated desegregation, and some attempted to resist the Court's order. A series of cases emerged through which SCOTUS clarified its position. The Court stated that schools have an "affirmative duty" to desegregate schools, allowing race-based policies when formal neutrality failed to create equality.[8] Following the Court's guidance, Congress passed the 1964 Civil Rights Act (Civil Rights Act) which became the legislative framework for affirmative action in education. Title VI of the Civil Rights Act prohibits ethnic discrimination in all programs receiving federal assistance, including public or private educational institutions. These edicts, along with the broader trend towards acceptance furthered by the Civil Rights Movement, caused colleges and universities to adopt affirmative action. The practice became commonplace by the late 1960s at elite universities, replacing

[8] *Green v. School Board of New Kent County*, 391 U.S. 430 (1968), Supreme Court of the United States; *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), Supreme Court of the United States; *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), Supreme Court of the United States; *Keyes v. School District No. 1, Denver*, 413 U.S. 189 (1973), Supreme Court of the United States.

previous admissions schemata that had discriminated against Jewish, Catholic, Black, and Asian identities, among others.[9]

Affirmative action faced its first legal challenge in *California v. Bakke (1978)*. A medical student sued UC Davis for reserving Freshman class seats for minority applicants. The Court issued six opinions, none of which carried a majority, with Justice Powell's framework ultimately setting the precedent. The *Bakke* opinion affirmed the consideration of race as one factor among many in admissions but barred strict quotas. Powell's opinion was affirmed in 2003; in *Grutter v. Bollinger* the Court held that the University of Michigan Law School's use of affirmative action passed "strict scrutiny," i.e. diversity was a *compelling governmental interest* and the admission plan was *narrowly tailored* (necessary to achieve the interest). The majority opinion also stated that affirmative action programs were to be temporary. In 2023, *Students for Fair Admissions* (SFFA) *v. President and Fellows of Harvard College*, the Court ruled that Harvard's admission plan violated both the Civil Rights Act and the Fourteenth Amendment's Equal Protection Clause by discriminating against Asian applicants. The 6-3 majority found that Harvard failed to demonstrate a compelling interest in diversity measurably, did not offer a timely termination of affirmative action, and engaged in racial stereotyping, failing strict scrutiny. The Court allows for race to be included in personal narratives as part of holistic review, but not as an automatic plus for applicants. The results in the 2024 undergraduate admissions classes, affected directly by this ruling, have been mixed. Some schools, such as MIT and Brown, saw an increase in Asian enrollment and a decrease in Black enrollment. Others, such as Yale, Duke, and Princeton, had a decline in Asian enrollment; SFFA issued a notice that they must maintain all records, indicating possible future litigation.[10]

[9] Stulberg, Lisa M., and Anthony S. Chen. "The Origins of Race-conscious Affirmative Action in Undergraduate Admissions: A Comparative Analysis of Institutional Change in Higher Education." *Sociology of Education* 87, no. 1 (2014): 36–52.
[10] Edward Blum. *SFFA Letters to Princeton, Duke, and Yale*. Students for Fair Admissions, September 17, 2024.

Public opinion on the issue remains divided, with 68% of Americans supporting the *SFFA* decision, including 52% of Black Americans. Yet support for affirmative action for racial minorities has steadily grown from 47% in 2001 to 61% as of 2018.[11]

ANALYSIS

Policy views on affirmative action present two starkly contrasting approaches: those for the use of race in deciding college admittance (pro) and those against considering race in admissions (con). The pro line of thinking is as follows; the inclusion of race as a factor serves to redress disadvantages created by historical mistreatment of minority groups. By supporting marginalized groups' access to education, the proponents seek to recover the promise of equality for all and create opportunities for those who have been held back. Lyndon B. Johnson summarized the argument in his 1965 Howard University commencement speech in which he said, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."

The counterposition contains two main schools of thought: those who argue that affirmative action does not actually benefit minority students, and therefore should be eliminated, and those who argue that affirmative action erodes meritocracy and is illegally discriminatory. What follows is the presentation and analysis of these arguments.

PRO: Racial disparities in the US are broad and persistent. The unemployment rates by ethnicity are: Asian - 2.6%, White - 3.1%, Hispanic - 4.3%, Black - 5.3%.[12] Median household income: Asian - $94,903, White - $77,999, Hispanic - $57,981, Black - $48,279.[13] The same

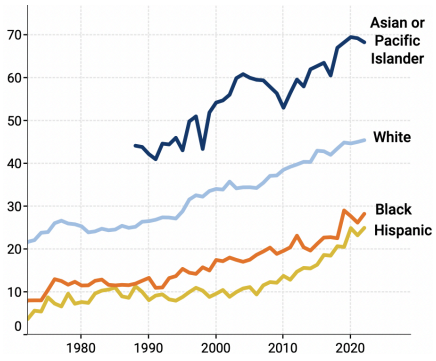
[11] Lydia Saad. "Post-Affirmative Action Views on Admissions Differ by Race." *Gallup*, October 3, 2024; Frank Newport. "Affirmative Action and Public Opinion." *Gallup*, July 7, 2020.
[12] *ProQuest Statistical Abstract of the United States.* Table 622, 2023, p. 402.
[13] *ProQuest Statistical Abstract of the United States.* Table 259, p. 173.

trend holds for wealth, homeownership, healthcare outcomes, and access. While differences in outcome do not necessarily mean discrimination has occurred, the results allow for a reasonable inference of discrimination. All of the differences are statistically significant, and their consistent appearance across fields implies systemic factors. US history is replete with systemic discrimination from exclusionary hiring, to redlining, and yes, educational restrictions. The history of the US has not lived up to its ideals, but advocates for affirmative action believe that allowing for the consideration of race will reduce these disparate outcomes, and create a future with opportunity and equality for all. Having established the existence of racial inequalities in the US, we turn to the current state of disparities in higher education and the argument that access to higher education is an appropriate solution to broader inequality.

Access to higher education, particularly the most elite universities, significantly increases students' opportunity to create wealth. While Black people generally earn less than other Americans, college-educated Black graduates earn 7% more than their White counterparts.[14] In addition to earning higher salaries, the graduates of these universities often go on to occupy influential positions in American society. They become policymakers, business leaders, scientists, academics, and artists. They drive culture and become the *de facto* gatekeepers of the upper echelon. Using average standardized test scores to define the top thirty-four elite US universities, a study found that 40.0% of Senators, 41.9% of Fortune 500 CEOs, 60.5% of the National Academy of Medicine, and 70.5% of the National Academy of Science attended elite schools.[15] Graduates of these schools account for ~3% of the national population. These results demonstrate the importance of seeking diverse student bodies in college admissions. Given the disproportionate impact of graduates, collegiate student bodies must reflect the diversity of the

[14] Peter Arcidiacono. "Affirmative Action in Higher Education: How Do Admission and Financial Aid Rules Affect Future Earnings?" *Econometrica* 73 (2005): 1477–1524.
[15] Jonathan Wai, et al. "The Most Successful and Influential Americans Come from a Surprisingly Narrow Range of 'Elite' Educational Backgrounds." *Humanities & Social Sciences Communications* 11, no. 1 (2024): 1129.

population at large. When decision-makers do not understand the needs of those they impact, they are more likely to create unharmonious and inefficient results. While access to these universities allows graduates to drive the future of the US, Black and Hispanic students are vastly underrepresented relative to their share of the population. The average percentage of Black and Hispanic undergraduates in these universities are 5.7% and 14.1% respectively.[16] These figures are well below the 2022 census figures for the Black and Hispanic share of the population ages 18-24, those being 14.5% and 20.3%. That trend is reflected across all collegiate institutions.



The graph above represents the percentage of 25-29-year-olds with a bachelor's degree.[17] The overall share of the population attending college has steadily increased since 1972. Over time, the rate of increasing enrollment has been greater for Black and Hispanic students, closing the gap in educational attainment. But have these gains been the result of affirmative action policies? While the literature on the weight given to race in admissions is scarce due to the closed nature of admissions decisions, there are examples of how the removal of affirmative action considerations affects class demographics.

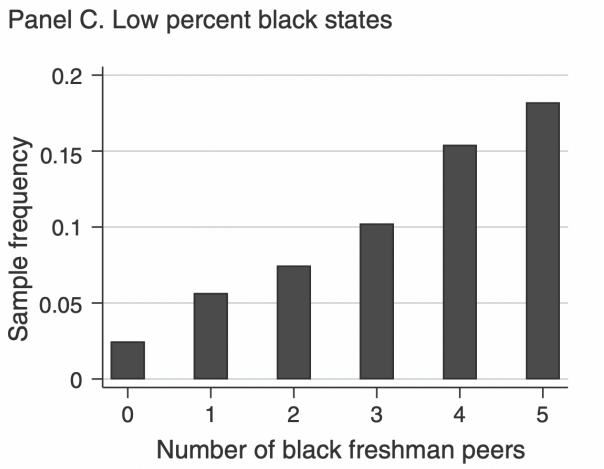
[16] Integrated Postsecondary Education Data System. National Center for Education Statistics, U.S. Department of Education.
[17] Sarah Reber and Ember Smith. "College Enrollment Disparities." Brookings Institution, January 2023.

After implementing affirmative action in the mid-1960s, admissions at the University of California system were restricted by Proposition 209. Proposition 209 was a voter referendum passed in 1996 that forbade the consideration of protected characteristics in public employment, contracting, and education. Underrepresented group enrollment immediately declined; the number of accepted minority students fell by 60% at the most selective campuses and 12% system-wide [18]. Michigan passed a similar referendum in 2006, Proposal 2, which led to a 33% decrease in Black enrollment at the University of Michigan from 2006-12. The affirmative action programs that had been in place were effective in boosting minority enrollment, given the impact of their removal. Despite the law in these states requiring total neutrality towards race in admissions decisions, in 2021 both school systems fielded their most diverse class of freshmen on record. While opponents of affirmative action herald this as a successful example of the lack of need for the consideration of race, the results are likely due to continued unofficial affirmative action policies, such as the consideration of personal background, which SCOTUS upheld in *SFFA*. Studies show that race-neutral and race-proxy admission schemes inevitably reduce minority enrollment or lower GPAs and graduation rates.[19] Since neither of these occurred, and since admissions protocols are obscure, race is likely still an unofficial plus in these systems.

It has been demonstrated that racial disparities abound, college degrees are an important stepping stone to redress these, and affirmative action programs succeed in increasing minority enrollment. Additionally, increased minority enrollment has broad social benefits.[20]

[18] University of California Office of the President. *UC Affirmative Action.* University of California, January 2014.
[19] Mark C. Long. "Is There a 'Workable' Race‐Neutral Alternative to Affirmative Action in College Admissions?" *Journal of Policy Analysis and Management* 34, no. 1 (2015): 162–183.
[20] Scott E. Carrell, Mark Hoekstra, and James E. West. "The Impact of College Diversity on Behavior Toward Minorities." *American Economic Journal: Economic Policy* 11, no. 4 (2019): 159–182.

The figure below reports that as White freshmen are exposed to Black peers, they become increasingly more likely to select a Black roommate for their Sophomore year.[21] While the trend could be explained by social network composition, the study's analysis found that it indicated a behavioral change in White students' attitudes toward their Black peers. The study implies that



the existence of diversity in learning institutions is a powerful force for eliminating racial out-group bias. The effect was stronger when the Black peers were of high ability. This presents a unique opportunity for the cohort subject to affirmative action benefits, namely college-bound minority students. These individuals have been filtered through the admissions process so that they are disproportionately of high ability. Thus, especially in higher education, diverse student bodies can increase intergroup understanding and reduce racist tendencies. These conclusions have been supported by research that found that classroom diversity improved intellectual engagement, academic skills, and the belief that difference is compatible with democracy. The last finding is especially encouraging in our increasingly heterogeneous and fractious society.

This data supports the case for affirmative action. By demonstrating that racial disparities abound, college education offers an opportunity to shrink disparity by driving opportunity, and

[21] Scott E. Carrell, Mark Hoekstra, and James E. West. "The Impact of College Diversity on Behavior Toward Minorities." *American Economic Journal: Economic Policy* 11, no. 4 (2019): 159–182.

affirmative action successfully increases college diversity. Hence, we show that affirmative action policies partially reconcile America's discriminatory past and diverse future. An increase in diversity allows for better policy by policymakers of any race because increasing the number of minority students creates a more representative leadership base and advances intergroup understanding.

Although affirmative action yields benefits, the issue remains divisive. Some contest the studies demonstrating the educational benefits of diversity, citing the poor standardized testing performance of diverse high schools. Both sources are subject to scrutiny. The broad scope of studies analyzing lower standardized test scores in majority-minority communities introduces confounding errors. These scores are explainable in terms of socioeconomic circumstances, which affect the quality of education.[22] The narrow scope of studies reporting diversity benefits in schools, and their reliance on self-reported information, casts doubt on their universality and replicability. In *SFFA* SCOTUS ruled that Harvard was unable to prove that diversity was a compelling interest due to a lack of concrete measurable outcomes. SCOTUS determined that Appellee's studies were too abstract and qualitative. The zealous advocacy of the proponents and opponents of affirmative action may seem confusing given the uncertainty of the direct impacts of these programs. But it reflects that the core issue at stake for these polemicists is one of values.

CON: Some critics of affirmative action insist that racial preference in admissions is harmful to the minorities it purports to help. This is largely due to the mismatch hypothesis: affirmative action lowers the standards of minority applicants for entrance into educational institutions, these individuals are then underprepared for the rigors of university and suffer from

[22] Gwyne W. White, et al. "The Increasing Impact of Socioeconomics and Race on Standardized Academic Test Scores across Elementary, Middle, and High School." *American Journal of Orthopsychiatry* 86, no. 1 (2016).

lower GPAs, higher attrition, and decreased future earnings. An analysis of law school admissions shows that Black students, whose test scores were within the median range for Tier 3 law schools (ranks ~32-50 of ABA-accredited law schools by selectivity and prestige), but attended Tier 1 law schools, suffered as a result. The removal of race-conscious policies would cause Tier 1 Black students to, at worst, fall to Tier 3 schools, where the 21% earnings decrease from lower school prestige would be offset by a 25% increase due to higher grades.[23] This does not factor in the attrition rate increase from attending more selective schools, which would further incentivize students to attend schools where their GPA and test scores are not lower than peers'. The figure below displays the impact of the removal of racial preference in law school admissions on the actual number of law students who pass the bar.[24] While these policies would create a less diverse student body, they increase the actual number of Black lawyers every year.

TABLE 8.2: ESTIMATING THE EFFECTS OF ELIMINATING RACIAL PREFERENCES ON BLACK ADMISSIONS TO LAW SCHOOL—2001 MATRICULANTS

Stage of the System	Number of Blacks in the System Under Current Policies	Number of Blacks in the System with No Racial Preferences	% Change Caused by Moving to No Preferences
Applicants	7404	7404	—
Admittees	3706	3182	-14.1%
Matriculants	3474	2983	-14.1%
Graduates (2004 or Later)	2802	2580	-8.1%
Graduates Taking the Bar	2552	2384	-6.8%
Passing the Bar, First Time	1567	1896	+20.1%
Passing the Bar, Eventual	1981	2150	+7.9%

The system of affirmative action creates a mismatch and leads to a decrease in minority GPAs, graduation, bar passage, and earnings. Tier 1 law schools enrolling students below their normal standards creates a cascading effect; minority students with scores in the Tier 2 average range are no longer available to those schools, so the school must lower their standards to achieve diversity

[23] Richard Sander. "A Systemic Analysis of Affirmative Action in American Law Schools." *Stanford Law Review* 57 (2005): 367–483.
[24] Ibid.

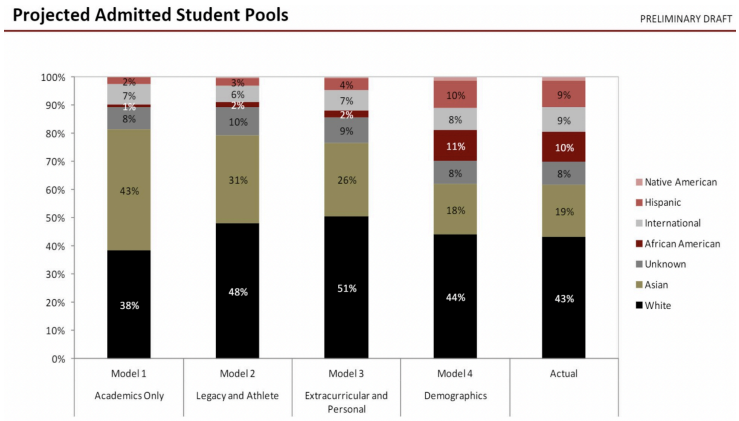
amongst a mismatched pool of applicants. Opponents of affirmative action conclude that this cascading effect exacerbates the harmful effects on the intended beneficiaries of these programs.[25]

There is also the harm of worsening negative stereotypes. By allowing racial preference, there is a risk of patronizing minorities. This patronization can hinder the development of minority students by not holding them to a higher standard– leading to an underdevelopment of academic and career-focused skills.[26] This result can reinforce negative stereotypes because, in such cases, racial preference acts as a self-fulfilling prophecy, disincentivizing the educational attainment of minority students by lowering standards and making existing discrepancies worse.

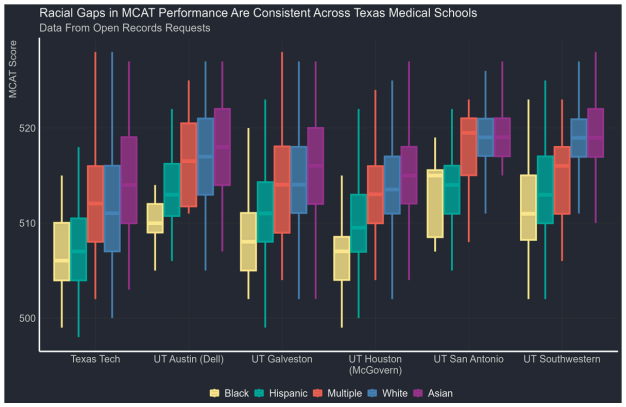
These arguments rely on the proposition that some minority applicants who are admitted are less qualified based on the traditional metrics for academic achievement, GPA, and standardized test scores. These scores have predictive validity in outcomes such as academic performance, nonacademic accomplishments, leadership in college, and post-college income.[27] They are the two most heavily weighted considerations in most admissions decisions.

[25] Ibid.
[26] Ibid.
[27] Nancy W. Burton and Leonard Ramist. "Predicting Success in College: SAT® Studies of Classes Graduating since 1980." Research Report No. 2001-2. College Entrance Examination Board, 2001.

These three figures below visualize the preferential weighting of race-conscious policies. The first figure below demonstrates that a Harvard admissions schema based solely on GPA and standardized test scores would result in the Black student population decreasing by 90%, Hispanic by 78%, and Asian increasing by 126%.[28]

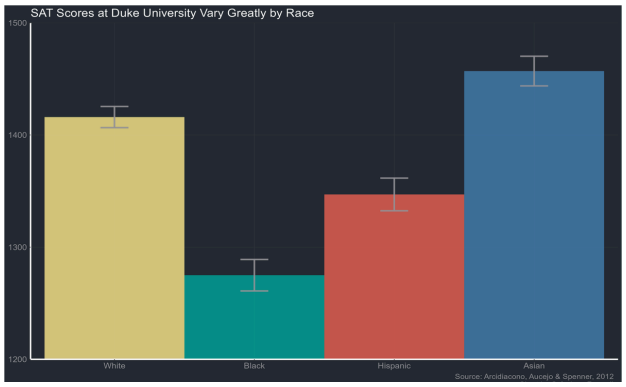


The second figure below displays MCAT score gaps in accepted students at Texas medical schools. Black and Hispanic students are routinely accepted with scores well below the Asian and White average.[29]



[28] Students for Fair Admissions, Inc. *Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment.*Case No. 1:14-cv-14176-ADB. U.S. District Court for the District of Massachusetts, June 15, 2018.
[29] *Memorandum Opinion and Order.* Case No. 5:23-cv-00007-H. U.S. District Court for the Northern District of Texas, July 17, 2024.

The final graph below displays accepted Duke University student SAT scores by race, with the average White student scoring 0.66 SD higher than Hispanic students, and 1.35 SD higher than Black students.[30]



Since test scores and GPA positively predict job performance, better colleges confer superior job opportunities, and better job opportunities allow individuals to have an increased impact, society should want to maximize the impact of the most productive individuals by allocating them to policymaking and influential positions - an aim that affirmative action does not serve.[31] From a perspective of pure efficiency maximization, affirmative action appears inefficient when not considering the second-order effects of diversity.

College admissions are a zero-sum game. The admittance of one applicant necessitates the rejection of at least one other applicant under consideration. So affirmative action does not just offer a leg up for minority students, but generally disadvantages White and Asian students. As seen in the recent figures, the disadvantage of Asian students is especially pronounced. It was under a violation of Asian students' right to Equal Protection and nondiscrimination under the Fourteenth Amendment and Civil Rights Act that SCOTUS decided *SFFA*. Under their

[30] Peter Arcidiacono, Esteban M. Aucejo, and Ken Spenner. "What Happens After Enrollment? An Analysis of the Time Path of Racial Differences in GPA and Major Choice." *IZA Journal of Labor Economics* (2012): 1–5.
[31] Frank L. Schmidt and John E. Hunter. "The Validity and Utility of Selection Methods in Personnel Psychology: Practical and Theoretical Implications of 85 Years of Research." *Psychological Bulletin* 124, no. 2 (1998): 262–274.

interpretation, no discrimination based solely on race is a permissible policy for institutions, regardless of the intended goal.

Both positions on affirmative action claim their legitimacy from the American project. Those in favor of affirmative action believe it must be done to ameliorate the racial stratification of society and to promote equity. Those who argue against affirmative action, on the other hand, argue that colorblindness is the only way to treat people equally. The issue has a strong moral element. While most agree that discrimination is wrong, it is also true that minorities have been caught in what is aptly called the cycle of poverty, which the college admissions system intensifies. Wealth impacts and increases students' standardized test scores via access to higher quality education and test preparation, and wealthier school districts have displayed a higher rate of grade inflation.[32] This leads to differential access to colleges, which we have shown to be a requisite for success in modern America. The collegiate system further favors the wealthy by considering legacy status. At Harvard, accepted legacy students have worse academic records (a synthetic factor containing GPA and SAT scores) than their Black peers.[33*] Some action is necessary to allow for increased social mobility and college access. No one can reasonably claim that the nation benefits from entrenching classes and denying opportunity to groups that have been set back through no fault of their own. Yet, discrimination by race is an unsavory solution that contradicts established legal principles. In the next section, we discuss workable alternatives to the status quo. These are of increased importance following the heightened scrutiny of affirmative action programs post-*SFFA*. We seek to provide solutions that balance competing

[32] University of California, Academic Senate. *Report of the UC Academic Council Standardized Testing Task Force (STTF).*January 2020.
[33] Peter Arcidiacono, et al. "Legacy and Athlete Preferences at Harvard." *Journal of Labor Economics* 40, no. 4 (2022): 133–153.
*The repeated use of Black Americans as a stand-in for minority students throughout this paper is not meant to emphasize this particular group. They simply have provided the best data for this topic as a larger and more scrutinized subset.

interests, have net benefits greater than the net costs they impose, and address the problems that have created the demand for affirmative action.

CONCLUSION

The best way to accomplish the stated goals of both sides of the issue would be to elevate minority applicants' competitiveness in college admissions without disadvantaging other groups. The reason White and Asian students score significantly better on tests and present higher GPAs is largely due to social factors. These wealthier demographics have increased access to social capital and information that allow them to efficiently allocate their effort towards ends that increase their chances of college admission. That is, they have a better understanding of how to work the system.

Mentorship programs are an excellent policy to offer more equitable access to social capital. These programs connect underprivileged individuals to willing mentors, resulting in broad benefits, including scholastic achievement.[34] The potency of those benefits correlates with mentors' experience and age, indicating that successful mentors have more positive impacts.[35] There is a strong alignment of incentives to promote mentorship programs. For instance, corporations that further the social good receive a slate of publicly conscious investors and generally benefit from good PR. Additionally, there are many possible mentors for whom this issue reflects a genuine altruistic concern. That fact further supports the impact of mentor programs because mentor willingness and mentor-mentee similarity compound beneficial effects. Should further incentives be needed to produce mentors, the government can offer them through wage subsidies or tax breaks. In this scenario, Congress would act as a choice architect.[36]

[34] Limor Goldner and Adar Ben-Eliyahu. "Unpacking Community-Based Youth Mentoring Relationships: An Integrative Review." *International Journal of Environmental Research and Public Health* 18, no. 11 (2021): 5666.
[35] Ibid.
[36] Richard H. Thaler and Cass R. Sunstein. *Nudge.* Penguin, 2009.

Bringing these incentives together creates a productive environment in which decision-makers are more likely to engage in socially beneficial behaviors. While these programs currently exist, they are not large enough to make a meaningful impact. Approximately 0.425% of Hispanic and Black youths participate in a mentorship program aimed at academic enrichment, college access, or career exploration.[37] Of existing mentoring programs surveyed, only 1.02% are offered by private corporations and 2.98% by institutions of higher education. The underdevelopment of these programs means that the addition of more programs, and enhancing outreach, holds great potential to reduce the racial differences in pre-college academic performance.

While mentorship programs are especially desirable, any program that successfully addresses existing racial inequalities would likely have the desired effect of increasing minority enrollment. We do not include outright increased education expenditure due to ambiguous data on its efficacy and efficiency. Studies have shown that in pre-collegiate education, "There appears to be no strong or systemic relationship between school expenditures and student performance."[38]

Tailoring admissions schemata to balance the interests of all parties represents a more daunting task. Despite this, college institutions seem to be the least-cost-avoider. Changes to admissions at one university affect thousands, if not tens of thousands, who would otherwise all be forced to alter their behavior. The recent saga of test-optional admissions at American universities elucidates the difficulties of tailoring admissions plans. Schools sought to emphasize other elements of applicants' profiles in an attempt to address the impact of wealth inequality on standardized test scores, which worsened the problem of collegiate diversity. This decision was

[37] Michael Garringer, Sam McQuillin, and Heather McDaniel. *Examining Youth Mentoring Services across America: Findings from the 2016 National Mentoring Program Survey.* MENTOR: The National Mentoring Partnership, July 2017; U.S. Census Bureau. *2022 Census of Population and Housing.* U.S. Department of Commerce, 2022.
[38] Eric Hanushek. "The Economics of Schooling: Production and Efficiency in Public Schools." *Journal of Economic Literature* 24 (1986): 1141–77.

quickly reversed by many prominent universities including half of the Ivy League, MIT, Georgetown, and the University of California. The decision to reverse course was caused by two main factors: not including standardized tests lowered schools' ability to predict the collegiate success of applicants, and it failed to create meaningful diversity benefits. Other plans, such as programs that accept the top-X% of students from high schools for state universities also fail to recreate the diversity benefits of affirmative action. Neither party in the *SFFA* claim disagreed with the earlier statement that alternative admissions schemes reduce average GPA and standardized test scores of accepted classes. The disagreement was to what degree the decrease was justifiable under strict scrutiny.

Given these difficulties, we suggest at least one palatable admissions reform: the removal of legacy and parental donor status as a plus in admissions. Data from *SFFA* revealed that athletes, legacies, children of donors, and faculty (ALDCs) represent "only a small portion of applicants," but "account for approximately 30% of Harvard's admitted class… ALDCs are overwhelmingly white."[39] As previously mentioned, legacies tend to have lower overall academic performances than accepted minority students. Under plans proposed by SFFA, which eliminate preference for legacies and children of faculty/donors, as well as halve the strength of preference for athletes, there would be an increase in Black, Hispanic, and Asian-American students, while decreasing only the share of White students. It would also substantially increase socioeconomic diversity. The average high school GPA would be unchanged, and class SAT averages would decrease by <1%.[40] Harvard rejected this proposal, arguing that it would reduce donations and impact the school's identity. While these are sympathetic considerations, the broader interest outweighs these particular ones. There are no purely beneficial options in this

[39] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, and Students for Fair Admissions, Inc. v. University of North Carolina, et al., *Brief for Petitioner.* Nos. 20-1199 and 21-707, Supreme Court of the United States, May 2, 2022.
[40] Ibid.

arena, simply lesser evils. Among the available options, we recommend that less preference be given to ALDCs, particularly the children of alumni and donors.

These recommendations seek to further the American Dream in a way that is amenable to all. Exclusion is not palatable nor commensurate with that dream, yet current admissions plans rely on it. In the wake of *SFFA*, admissions programs need direction and there exists a unique opportunity to create new alternatives. Policymakers in Congress must turn their attention to this issue. Despite their unwillingness to navigate these contentious and turbulent waters, this issue is of national importance. It is not just the fate of individuals in the college admissions process, but the future of our nation which is impacted by the course to be taken. Congress has the opportunity to enact laws in gray areas, such as implementing racial floors that don't allow for enrolled minority percentages to drop below fixed metrics. While these may be taken as violations of the Fourteenth Amendment's Equal Protection Clause, they are also in line with precedents set after the passage of *Brown.* The willingness of courts to reverse previous interpretations further complicates the issue but allows for a possible return of admission decisions that consider race in a limited scope to aid diversity.

The appropriate policy direction is clear, if difficult. Policymakers, judges, and institutions must act in a way that seeks to uplift the disenfranchised and enable institutions of higher education to fulfill their promise to all. Although the proposed solutions above do not mark an end to the issue, they would create significant improvements. These plans seek to increase diversity without harming others. Differential racial treatment has a history of reinforcing stereotypes and exacerbating intergroup tensions. America needs neither.

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Unconstitutional Constitutional Amendments: Is the Application of this Doctrine Always Justified?

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UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: IS THE APPLICATION OF THIS DOCTRINE ALWAYS JUSTIFIED?

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Abstract: The question of who and by what can amend a constitution has been widely discussed by scholars around the world. In this debate, the doctrine of unconstitutional constitutional amendments has gained particular relevance in recent years. To understand its argument, this paper begins by examining the theories of sovereignty, constituent power, and Carl Schmitt's constitutional laws doctrine. Thereafter, the contemporary argument for the doctrine will be reconstructed, followed by the proposal of two criteria—one legal and one historical-political—to determine in which cases it is worthwhile to apply the doctrine of unconstitutional constitutional amendments in a particular country. Finally, it will be concluded that despite potential criticisms and challenges, this doctrine plays a crucial role in protecting the integrity of constitutions and safeguarding democratic principles when it applies.

I. Introduction

A constitutional amendment will inherently conflict with the Constitution, as that is precisely its purpose. If someone seeks to modify a given article of a constitution, this necessarily implies contravening it because its content is being altered. For instance, if Congress in the United States sought to amend the First Amendment to allow laws that limit freedom of speech, such a modification would naturally contradict the Constitution's existing provisions, and for that reason, such an amendment could appear unconstitutional.

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This is because the validity of a legal norm partly depends on its substantial compliance with the rule of recognition, which in this case is the Constitution itself.[2]

However, if we accept this reasoning as correct, no amendment would be possible. All of them would, by this logic, be unconstitutional for contradicting what they intend to reform. Some argue that this is a paradox: assessing the constitutionality of a constitutional amendment involves reviewing it against equally constitutional norms.[3] Therefore, it is generally accepted that, in the case of constitutional amendments, the criterion of validity should be procedural rather than substantive, as it is only natural that if one seeks to amend a norm, the amendment will contradict the very norm it aims to change.

Nevertheless, a theory gaining international traction argues that the validity of constitutional amendments should be evaluated using substantive criteria. According to this theory, using the previous example, such an amendment to the First Amendment would be deemed unconstitutional. This notion is referred to as the doctrine of unconstitutional constitutional amendments. One of the main arguments supporting this theory–grounded in Emmanuel Joseph Sieyès' theory of constituent power and Carl Schmitt's view on constitutional amendments–posits that Congress, as the holder of secondary constituent power, is constrained by the fundamental principles or core elements outlined in the Constitution, as the latter is an expression of the people through primary constituent power. Likewise, the theory argues that Constitutional Courts, or equivalent bodies, may exercise judicial review of proposed amendments not only on procedural grounds but also on substantive grounds. If the amendment seeks to alter a fundamental principle of the

[2] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), 103.
[3] Mauricio González Cuervo, "La teoría de la sustitución constitucional," in *La sustitución de la constitución: un análisis teórico, jurisprudencial y comparado*, ed. Luis A. Fajardo y Mauricio González (Bogotá: Universidad Sergio Arboleda, 2015), 33.

Constitution, it would no longer be a mere "amendment" but a "replacement." Such a power, to create or replace a constitution, rests solely in the people as the primary constituent power. Thus, the central legal issue in this debate is whether the power to amend the Constitution has any limit.

This is a controversial topic because it implies an unwritten limit to the amendment's power. Nonetheless, many countries around the world have adopted this theory into their legal systems. Constitutional Courts in Brazil and the Czech Republic, among others, "have declared themselves competent to substantively review amendments, even without any expressed authority."[4] Similarly, the Constitutional Court of Colombia has claimed the authority to review constitutional amendments on substantive grounds, despite a clear statement in Article 241, §1, of the Colombian Constitution that the Constitutional Court may review such challenges only on procedural grounds. The Colombian court argues that when Congress passes an amendment seeking to alter or replace a fundamental principle of the Colombian Constitution, it has procedurally departed its sphere of competence.[5]

This paper will focus on reconstructing the argument that supports the doctrine of unconstitutional constitutional amendments, analyzing the theories of sovereignty, constituent power, and constitutional norms by Carl Schmitt. Furthermore, it will argue that, even if this type of judicial review may eventually be deemed legitimate, its implementation is not always feasible. It is necessary to consider the legal and historical-political context, as well as the particular needs of each specific case to determine

[4] Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (London: The London School of Economics and Political Science, 2014), 185.

[5] Colombia, Constitutional Court, *Sentencia C-551-03*, July 9, 2003, judge rapporteur Eduardo Montealegre-Lynett, available at https://www.corteconstitucional.gov.co/relatoria/2003/c-551-03.htm.

whether it is worthwhile to apply the doctrine of unconstitutional constitutional amendments within a given legal system.

II. The theoretical foundation of the doctrine of unconstitutional constitutional amendments

The question of who holds the ultimate power within a state, that is, sovereign power, is fundamental to understanding the arguments that justify the doctrine of unconstitutional constitutional amendments. The doctrine seeks to answer the question of who can create, replace, or modify a constitution. Thus, in this section, we will delve into the concept of sovereignty in light of classical social contract theory. We will understand how based on the aforementioned and drawing from Sieyes' theory of constituent power and Carl Schmitt's constitutional theory, the theoretical foundations of the doctrine of unconstitutional constitutional amendments have been established.

II.a The concept of popular sovereignty

Sovereign power was defined by the philosopher Jean Bodin as "the absolute and perpetual power of a republic."[6] The one who holds sovereignty within a State is the one who has no superior, and who, within the physical boundaries of the state, has no limits. Initially, it was held that sovereign power rested with the King. Sir Robert Filmer, one of the main defenders of this theory, argued in his book *Patriarcha, or The Natural Power of Kings* that "government over men was attributed by God to Adam, and, through him, in a direct line of descent, to the patriarchs and the kings.[7] Thus, the figure of the King (or Emperor, as the case may be) was conceived as the depositary of sovereign power in a State by divine mandate, either directly by God's will or mediated by the Pope as His earthly

[6] Jean Bodin,, *Los Seis Libros de la República* (Madrid: Tecnos, 1997), 47. Translation by author.
[7] Juan Carlos Esguerra, *Los Cimientos de la Constitución* (Bogotá: Tirant lo Blanch, 2023), 54. Translation by author.

representative. This conception represented the highest expression of monarchical absolutism in Europe: the theory of the divine right of kings.

Since the previous theory allowed rulers to abuse their power without any restraint, in addition to other socio-political factors such as the Protestant Reformation or the Glorious Revolution, social contract theory emerged as a reaction to monarchical absolutism, offering an alternative to justify the legitimacy and sovereign power of a State.[8] Classical social contract theory argues that individuals agree among themselves "the manner in which they are to be governed, yielding part of their natural freedom to the State in order for it to regulate their relations."[9] The first to formally speak of a social contract was the Englishman Thomas Hobbes in *Leviathan*, arguing for the need for a pact through which the instability generated by the "war of all against all" in the state of nature could be overcome. Therefore, the people authorize a person or assembly to govern them.[10] This theory began to have a great influence, and philosophers such as John Locke, Jean- Jaques Rousseau, Emmanuel Kant, Baruch Spinoza, and even Marchese Beccaria, each adapted the theory to their thinking, accepting that the legitimacy of a State derives from the consent of the people. Thus, the theory of the social contract is built on the foundation of creating "a form of association that defends and protects the person and property of each member from all common force, and by virtue of which each individual, joining with all, obeys no one but himself and remains as free as before."[11]

[8] Daniela Sanclemente Machado and Carlos José Lasprilla, *El juez de tutela como arquitecto del Estado Social de Derecho* (Bogotá: Editorial Ibañez and Pontificia Universidad Javeriana, 2014), 27.
[9] Pablo Galindo Lema, "El mito del contrato social y de la legitimidad del Estado basada en el consentimiento," *Revista Universitas Estudiantes*, December 2023, 128, At. 123. Translation by author.
[10] Thomas Hobbes, *De Cive* (Madrid: Tecnos, 2014), 35. Translation by author.
[11] Jean-Jacques Rousseau, *El contrato social* (Bogotá: Comcosur, 2018), 39. Translation by author.

Although I do not agree with the social contract theory, its influence is undeniable.[12] Its arrival not only meant the end of absolutism and the divine right of kings but also marked the beginning of popular sovereignty, where the people decide who shall govern them. Therefore, the people are primary to their rulers; they hold the final word within a state. If sovereign power implies the people's ability to establish their own government, and since a constitution establishes how they are to be governed, then the people have the power to create a constitution. This last point is what constitutionalists refer to as constituent power, and it will be addressed in the next section.

II.b The theory of the constituent power

In 1789, France was undergoing a deep social, economic, and political crisis. Among many other things, the nobles and politicians enjoyed wealth and privileges, while the common people sunk into misery. In response to this, Emmanuel-Joseph Sieyès wrote his famous work *Qu'est-ce que le Tiers-État?*, arguing that the *états généraux* as the French constituent body should consist of only one estate: that of the Nation, because it is unjust that the Nation (the people) should have to abide by what is established by the other estates, especially since it is the Nation that holds sovereign power within the State.[13] Thus, the Nation is the only entity legitimate to establish the Constitution that will govern France, and both the nobility and the clergy must submit to the will of the people.

This is how the theory of constituent power originates. Sieyès, though his work did not explicitly develop the theory, laid the foundation for later scholars to systematize it. In short, the theory claims that the people, as the collective holder of primary/original

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[12] Galindo Lema, "El mito del contrato social y de la legitimidad del Estado basada en el consentimiento". Translation by author.

[13] Emmanuel-Joseph Sieyès, *What Is the Third Estate?* (Indianapolis: Hackett Publishing Company, 2003).
I am aware that some parts of academia have attempted to distinguish between the concept of "nation" and "people"; however, I adhere to Juan Carlos Esguerra's position that it is not truly a distinction worth making.

constituent power, have no limits on what they constitute, whereas the constituted powers (secondary or derived) do have limits. They must not contradict what has been established by the former. Therefore, this section will focus on unraveling the modern arguments of this theory, which serves as the theoretical foundation for the limitations on constitutional amendment power.

IIb.a The constituent power

Constituent power is the authority to create a constitution and, consequently, to establish the fundamental norms within a State. Following the social contract argument, the people, having associated through a pact, must now determine how they will govern themselves.[14] To achieve this, they must establish the "rules of the game" that will govern such an association. The set of these rules, organized in a document, is what we generally refer to as a "constitution." Thus, constituent power is merely a necessary consequence of sovereign power.

As such, the first manifestation of constituent power is conceived as the authority to enact a new constitution through the *constitution-making act*, where it "determines the entirety of the political unity regarding its peculiar form of existence through a single instance of decision."[15] Now, the power to enact presupposes the absence of an existing constitutional regime, either because there was none beforehand or because the previous one has been repealed. In this sense, the power to enact has been argued to constitute a "power that cannot be conferred by a pre-existing legal or non-legal constitutional rule, or at least by a rule that belongs to the constitutional order being changed (replaced)."[16] This

[14] George Duke, "Can the People Exercise Constituent Power?," *International Journal of Constitutional Law* 21, no. 3 (July 2023): 768.
[15] Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008), 75.
[16] Mikolaj Barczentewicz, "Constituent Power and Constituent Authority," *Connecticut Law Review* 52, no. 5 (2021): 1319.

implies that the absence of a pre-existing constitutional order means that, at the moment of enacting a constitution, there are no material limitations from the perspective of domestic law.[17]

This absence of limitations means that the primary constituent power can construct the structure of the state at will and establish the rights and obligations that it deems appropriate since such power is not bound by any other authority. Similarly, the lack of internal constraints is further justified by the fact that, as the people hold sovereign power, they are unrestricted in exercising it, particularly when expressed through constituent power. This is why authors like Pérez Royo assert that the act of creating a constitution is the culmination of a political process, as it represents the organized consent of the people and serves as the starting point for the legal order.[18] By rising as the *norma normarum*, the constitution becomes, in Hart's words, the rule of recognition through which validity within the legal system is determined.[19] For this reason, some civil law scholars refer to it as "original" or "primary" constituent power, as it establishes the fundamental framework of the state and the legal relationships within it.[20]

The constituent power does not only imply the ability to issue a new constitution "from scratch," because, as that Roman law maxim states, *Qui potest minus potest plus*– "who can do more can do less." In this way, whoever has the power to create something also has the power to modify it. Consequently, if the people wish to amend the constitution they have created, they can do so without any limitation. Thus, "If constituent power

[17] This is because, from the perspective of public international law, there can indeed be limits, as well as possible arguments for moral constraints (Antonio Negri, *El Poder Constituyente* (Quito: Secretaría de Educación Superior, Ciencia, Tecnología e Innovación, 2015), 28).
[18] Javier Pérez Royo, "Del derecho político al derecho constitucional: las garantías constitucionales." *Revista del Centro de Estudios Constitucionales* 12 (1992): 233.
[19] H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012).
[20] Javier Marcelo Ayala, "La problemática del poder constituyente y la reforma constitucional," *Revista de Derecho de la Facultad de Ciencias Jurídicas y Políticas de la Universidad Central de Venezuela* 134 (2009).

produces constitutional laws that govern constituted powers, then amending those constitutional laws is an exercise of constituent power."[21] In that sense, constituent power not only involves the constitution-making power but also the power of *amending* the constitution; both of which without restriction.

II.b.a The constituted power

The constituted powers are all those powers that have been created through the Constitution.[22] The people are no longer the only ones in the panorama; they are now accompanied by, for example, a parliament or congress that will issue laws, administrative authorities that will issue regulations, or a court that will resolve disputes between individuals or even interpret the Constitution itself. The major difference between the people (or the Nation, according to Sièyes) and the other powers, the constituted ones, is that the latter are limited by the former. In this regard, Loughlin has said that "while the law of the constitution may take effect as fundamental law with respect to the institutions of government, no type of delegated power can alter the conditions of its own delegation."[23] This is why the constituted power is also called derived (or even secondary) constituent power. It depends on, or rather must rely on, the original constituent power and is limited by it.

Apart from the existence of limitations, the constituted power differs from the constituent power in the sense that the former presupposes the existence of an active constitutional order. There cannot be constituted power without a constitution that grants such powers. In this way, the different branches of public power, as constituted powers, are

[21] Yaniv Roznai, "Towards a Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers," *Oxford Journal of Legal Studies* 27, no. 4 (2017).
[22] Oran Doyle. Populist constitutionalism and constituent power. *German Law Journal* (2019), 20, p 162.
[23] Martin Loughlin, "The Concept of Constituent Power," *European Journal of Political Theory* 13, no. 2 (2014): 220.

subjected to what is established in the constitution as a manifestation of the people's sovereign power. Ultimately, this theory also justifies the existence of the rule of law, as the law stands above any ruler since the ruler holds power only because the people consented to it, either directly by electing them or indirectly by delegating such power through the constitution. Thus, while the constituent power is a limitless creative or modifying power, the constituted power is a power that both depends on the former and is limited by it.

There are legal systems that admit the possibility of constitutional reform in the hands of Congress. However, wouldn't this imply that a constituted power, by reforming the constitution, would materially contradict what the primary constituent established in it? Initially, the answer is no; in this case, Congress would be authorized to reform the Constitution because the primary constituent wanted it that way, meaning that the Constitution itself contains a clause or article granting Congress the power to amend it. However, the previous answer has likely left the reader unsatisfied, as it does not directly address what would happen if such a reform by Congress seeks to modify a fundamental or important part of the Constitution. To answer that question, we must delve deeper into what these limitations of the constituted power consist of, and for that, we will explore the theory of Carl Schmitt.

II.c Carl Schmitt constitutional theory.

The Constitution of the Weimar Republic of 1919 was, in many ways, a milestone for constitutional law. Nevertheless, what is relevant to this article is the study conducted by the German jurist Carl Schmitt on its content, particularly regarding the distinction between the Constitution and constitutional law. This distinction is crucial, as it will allow for a deeper understanding of the limitations to which the secondary constituent power is subject when amending the constitution.

To begin with, it must be assumed that Schmitt conceives of the constitution as a political decision. In this regard, the Constitution does not create itself but always depends on an external will that precisely embodies such political decisions within it. This is why it is stated that "Prior to the establishment of any norm, there is a fundamental political decision by the bearer of the constitution-making power. In a democracy, more specifically, this is a decision by the people."[24] Thus, in a democracy, the one responsible for making such political decisions is the people. Now, such political decisions are reflected in the constitution. In the case of the Weimar Constitution, Schmitt states that the German people chose to establish themselves as a democratic government, as stated in the preamble. Similarly, the German people decided to organize themselves as a Republic, as determined in Article 1, §1, and to be a Federal State as stipulated in Article 2. Likewise, the principles, fundamental rights, and separation of powers were political decisions made by the German people when establishing how they would be governed. The importance of these assertions lies in the fact that they involve "concrete political decisions providing the German people's form of political existence and thus constitute the fundamental prerequisite for all subsequent norms, even those involving constitutional laws."[25] Thus, for Schmitt, these political decisions constitute the criterion of validity for the rest of the norms within the legal order, even within the constitution itself. As we will see, there is a normative hierarchy within it. In this way, these types of provisions, in Kelsen's terms, would be found at the top of the pyramid of sources of law, even determining the validity of the other provisions contained in a constitution.[26] For these reasons, Schmitt refers to these types of provisions as the "constitution," since they are the political decisions of the people reflected

[24] Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008), 75.
[25] Carl Schmitt, *Constitutional Theory*, 78.
[26] Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1978).

in the constitutional text, where the essential and fundamental elements of how they should be governed are determined.[27] This is why these political decisions are considered "the substance of the constitution."[28]

Another type of constitutional postulate is also distinguished, which is of a lower hierarchy than those previously mentioned: the constitutional laws. Schmitt describes these as "additional norms, enumerations, and detailed delimitations of competencies," which, although they are part of a constitutional text, are not fundamental elements of it.[29] They are considered "secondary" because they presuppose the existence of the Constitution. While the Constitution derives its validity from the expression of the people's will, the validity of the constitutional laws is determined through the Constitution.

An example provided by Schmitt to understand the difference between the two is fundamental rights, or as he calls them, "basic rights." He explains how one thing is the enshrinement of the right itself, and another is the concrete norms that implement or regulate those rights. While the right itself constitutes a fundamental political decision by the people to protect a value, the regulation of its scope and application is constitutional law. In this sense, it is constitutionally permissible to limit the scope of a right. For example, under a *state of exception* or through a constitutional amendment, as this "does not impinge on the fundamental political decisions and the substance of the constitution."[30]

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[27] It is necessary to clarify that in this context, Schmitt understands the word "constitution" in two ways. The first meaning refers to the written document where the structure, principles, rights, and duties of a State are enshrined—essentially, the meaning we are accustomed to. On the other hand, he also uses "constitution" to refer to the postulates that express the fundamental decisions of the people. In this sense, to ensure clarity for the reader, when I write constitution without quotation marks, it will refer to the first meaning, and when I write it in quotation marks, it will refer to the second.

[28] Carl Schmitt, *Constitutional Theory*, 77.

[29] Carl Schmitt, *Constitutional Theory*, 78.

[30] Carl Schmitt, *Constitutional Theory*, 80.

Conversely, if the aim is to eliminate such a right, it constitutes an inadmissible violation of the Constitution itself.[31]

The aforementioned distinction becomes particularly significant when discussing constitutional amendment, especially when the power to amend is granted to the Congress or Parliament. The Weimar Constitution, in its Article 76, establishes that "The Constitution may be amended by law," and that the German Parliament (*Reichstag*) is empowered to do so if it meets a quorum of two-thirds, and the decision is accepted by at least two-thirds of those present.[32] Now, what does the text mean when it states that the law may amend the Constitution? Does it refer to the "constitution" as the fundamental political decision, to the constitutional laws, or both? According to Schmitt, "that the constitution can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision."[33] In other words, the power to amend the "constitution" granted to the *Reichstag* is limited to the constitutional laws. Thus, Schmitt asserts that the German Reich cannot be transformed into an absolute monarchy or a Soviet republic, even if two-thirds of the Parliament agrees, since such decisions are of a fundamental political nature and can only be made by the people. Legislation is not omnipotent when it comes to amending the Constitution.

Ultimately, what Schmitt argues is that Parliament, as a constituted power, is not authorized to modify the fundamental political decisions of the state. Only the people, as sovereign and constituent, are legitimized to alter the substance or essence of the constitution. In this way, Parliament's power to amend is limited to constitutional laws due

[31] Carl Schmitt, *Constitutional Theory*, 81.
[32] Constitution of the German Reich, August 11, 1919, https://digital.library.cornell.edu/catalog/nur01840.
[33] Carl Schmitt, *Constitutional Theory*, 79.

to their secondary nature and lower hierarchy compared to the "constitution."[34] This implies the recognition of implicit limitations to the power of amendment; the Weimar Constitution does not contain an express provision regarding the limits of the *Reichstag's* amending power. However, it is possible to identify within the Constitution certain fundamental political decisions made by the German people that, under no circumstances, can be altered by anyone other than the people themselves.

Thus, the existence of limits to the power of amendment is acknowledged, "arising from the immunity enjoyed by certain fundamental ideological values, whether implicit, immanent, or inherent to a constitution."[35] Similarly, other more recent German authors, such as the former judge of the Federal Constitutional Court of Germany, Konrad Hesse, hold a view similar to Schmitt in this regard, as he asserts that "In any case, a constitutional amendment presupposes that the fundamental decisions shaping the identity of the Constitution remain intact."[36]

III. The modern formulation of the argument in favor of implicit limitations on the power to amend the Constitution: The Formal Enshrinement of the Doctrine of Unconstitutional Constitutional Amendments

So far, we have studied the necessary concepts to understand the arguments supporting implicit limitations on the power to amend the Constitution. However, we have not yet formally discussed the central argument of the doctrine, nor how the distinction between explicit and implicit limitations is relevant to this matter. In the next section, we will analyze this, along with the applications that some constitutional courts around the

[34] Eloy García López, "El derecho constitucional como lenguaje que articula conceptos," in Luis Andrés Fajardo and Mauricio González Cuervo, eds., *La sustitución de la constitución: un análisis teórico, jurisprudencial y comparado* (Bogotá: Universidad Sergio Arboleda, 2015), 24.
[35] Karl Lowenstein, *Teoría Constitucional* (Barcelona: Ariel, 1979), 192. Translation by author.
[36] Konrad Hesse. "Constitución y Derecho Constitucional." In *Manual de Derecho Constitucional*, 1–15. Madrid: Marcial Pons, 2001. Translation by author.

world have given to it. For this latter point, reference will be made to the cases of Colombia, South Africa, and Argentina, to have a brief perspective on how it has been used in various countries.

To begin with, contemporary constitutional theory distinguishes between two types of limitations on constitutional amendments: explicit and implicit. Explicit limitations are those that are directly expressed in the content of the Constitution. One of the most famous examples of such provisions is Article 79, §3 of the Basic Law for the Federal Republic of Germany, which establishes that "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."[37] Thus, in Germany, it is explicitly prohibited, for example, to modify or eliminate the principle of human dignity enshrined in Article 1.

This concept has been given various names worldwide. In Germany, it is referred to as *Ewigkeitsklausel*, which translates into English as "eternity clause." However, Roznai disagrees with this name. It suggests that what is protected by such a clause is completely unalterable when in reality, it is not.[38] The reason for this is that such a limitation "serves as a mechanism for limiting the amendment power, they do not – and cannot – limit the primary constituent power."[39] In other words, the establishment of a clause of this kind does not necessarily imply that it is definitively unchangeable, as the primary constituent power can alter it since it has no limitations within domestic law. Instead, such a limitation only binds the amendment power of the derived constituent power. That is why Roznai believes that names such as the one given in some South American countries, where it is known as

[37] *Basic Law for the Federal Republic of Germany* (Grundgesetz, GG), Art. 79(3).
[38] Yaniv Roznai. *Unconstitutional Constitutional Amendments*, 23.
[39] Yaniv Roznai. *Unconstitutional Constitutional Amendments*, 23.

cláusula pétrea (something like "stone clause" in English), are more appropriate for this concept. This name emphasizes the rigidity that characterizes these types of clauses but also implies that "even rocks cannot withstand the volcanic outburst of the primary constituent power."[40] In this sense, Roznai proposes that, for the English language, this concept be referred to as "unamendable clauses" to better express its meaning and avoid the imprecision made by the Germans.

When a limitation on the amendment power is established through an unamendable clause, there is no doubt about its existence and legitimacy; it has been the will of the primary constituent who has expressly incorporated it into the Constitution. However, the situation becomes more ambiguous when we talk about implicit limitations. When I refer to implicit limitations, I mean those restrictions on the amendment power of the derived constituent, which, although not explicitly stated in the text of the constitution, are assumed to exist. Nowadays, the idea of such limitations is controversial. On one hand, particularly scholars from the United States, often do not accept this theory because they do not accept natural law theory; the acceptance that there is a "higher law" that restricts amendments and protects the basic principles of the Constitution is somewhat naturalistic.[41]

Nevertheless, there is a minority in the United States, as well as many other scholars around the world, who defend such implicit limitations through an argument that incorporates all the previously mentioned concepts. This argument is that he people, as the holder of the original constituent power, are sovereign and are not subject to limits within domestic law, which grants them the authority to create or modify the constitution in its

[40] Yaniv Roznai. *Unconstitutional Constitutional Amendments*, 23.
[41] Wright, R. George. "Could a Constitutional Amendment Be Unconstitutional?" *Loyola University Chicago Law Journal* 22, no. 4 (1991): 756.

entirety, including its fundamental elements. In contrast, the constituted power, derived from the constitution, operates within the limits set by the original constituent power. Although this constituted power can amend the constitution, the power is restricted by the fundamental principles defined by the original constituent power. These principles, which determine the political identity of the state, cannot be modified by the constituted powers. Their reform is exclusively within the competence of the original constituent power due to their significance. Thus, the constituted powers cannot alter these essential postulates, as their power to amend is limited by the original constituent power, which is the only one with the authority to modify such fundamental postulates of the Constitution.

III.a Judicial review and the doctrine of unconstitutional constitutional amendments

Thus far, we have navigated through the realm of ideas and explored abstract theories so that now, practical applicability is possible According to the theory of implicit constitutional limits, the judge tasked with conducting judicial review of constitutional amendment acts proposed by a constituted power is legitimized not only to evaluate such amendments on procedural grounds but also on substantive grounds. This means that if the amendment seeks to alter one of the fundamental principles of the Constitution, it is deemed unconstitutional – a constituted power lacks the legitimacy to amend such principles.

The proponents of this theory argue that the absence of an expressly conferred power in the Constitution—such as the authority to evaluate the constitutionality of an amendment originating from a constituted power based on whether it alters the fundamental principles of the Constitution—does not mean that such power does not exist. In this regard, A.M. Bickel writes, “the authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is

not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there.*'*"[42]

To illustrate this, consider the case of *Marbury v. Madison (1803)*, where the United States Supreme Court conferred upon itself the authority to exercise judicial review over laws to safeguard constitutional supremacy. In this sense, the assertion is not legally inconceivable.[43] For all the above reasons, Roznai argues that "when unamendable provisions exist, the judicial enforceability of these explicit limitations seems, if not self-evident, then at least less contentious."[44] Let us consider the application of the doctrine of unconstitutional constitutional amendments by the Colombian Constitutional Court. The Colombian case is particularly interesting. It initially seemed that judicial review based on substantive criteria regarding amending acts to the Constitution was expressly prohibited within the legal framework. However, the Court ultimately applied the doctrine.

III.b Colombian Case: The "Substitution" Theory.

According to Article 1 of the Constitution, "Colombia is a social state under the rule of law."[45] Similarly, Article 4 establishes that "In all cases of incompatibility between the Constitution and the statute or other legal regulations, the constitutional provisions shall apply," affirming the Constitution as the supreme norm and the rule of recognition of the legal system.[46] Moreover, the Constitution explicitly recognizes that sovereign power resides with the people, thereby acknowledging them as the holders of the original constituent power.[47]

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[42] A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1986), 1.
[43] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
[44] Yaniv Roznai. *Unconstitutional Constitutional Amendments*, 23.
[45]Political Constitution of Colombia, July 7, 1991, art. 1, https://www.constituteproject.org/constitution/Colombia_2015.
[46] Political Constitution of Colombia, art. 4.
[47] Political Constitution of Colombia, art. 3.

On the other hand, the Constitution grants Congress the authority to carry out constitutional amendments, provided that the required quorum and majorities are met.[48] Thus, Congress in Colombia composed of a Senate and a House of Representatives, can amend the Constitution through a more rigorous procedure than that of ordinary legislation. However, given the system of checks and balances, the Constitution also entrusts the Constitutional Court with "the safeguarding of the integrity and supremacy of the Constitution."[49] Article 241 outlines several functions for this purpose, emphasizing that these duties must be carried out "in the strict and precise terms of this article."[50] One such duty includes exercising judicial review over amendment acts, regardless of their origin.[51] Nevertheless, the same provision stipulates that this review is limited to procedural criteria. This means that judicial review involves analyzing, for instance, whether the required quorum and majorities were met during the reform's congressional debates. Consequently, as Colombia adheres to the rule of law, it might initially appear that exercising judicial review on substantive grounds in this context would contravene the Constitution. In other words, a constitutional amendment passed by Congress following all procedural requirements would seem valid, even if it modifies fundamental aspects of the Colombian Constitution.

Despite the previous limitations on judicial review, seemingly insurmountable as they are enunciated in the Constitution itself, the Constitutional Court of Colombia today applies the doctrine of unconstitutional constitutional amendment through what has been called *teoría de la sustitución constitucional,* in English, the "constitutional replacement

[48] Political Constitution of Colombia, art. 374.
[49] Political Constitution of Colombia, art. 241, §1.
[50] Political Constitution of Colombia, art. 241.
[51] Political Constitution of Colombia, art. 241.

doctrine." This doctrine was explicitly established for the first time through Constitutional Court ruling C-551 of 2003, although it is important to highlight that there are numerous historical precedents of this theory in Colombia. In this ruling, the Court begins by reaffirming that judicial review of acts amending the Constitution should only be conducted based on procedural criteria. However, it states that "every democratic constitution, even if it does not explicitly contain unamendable clauses, imposes material limits on the power of reform of the derived constituted, since it is a constituted power and not the original constituent power."[52]

Accordingly, the following question arises: how can judicial review be conducted on a constitutional amendment act by a derived constituent power that includes, as a criterion, these implicit limitations to the power of amendment, if judicial review based on material criteria is constitutionally prohibited? It is then that the Court creates the distinction between "reform" and "replace" the Constitution. While both terms generally refer to amendments to the Constitution, "reforming" means amending the Constitution without altering its core principles, while "replacing" implies altering these core principles, and thus, replacing the Constitution with another. In other words, the "core principles" are what Schmitt calls "fundamental political decisions," which in Colombia have been defined as those fundamental constitutional principles that are part of the Constitution's identity and distinguish it from the rest. If modified, the Constitution would be replaced by a different one. In Colombia, the Vice President of the Constitutional Court, Jorge Enrique Ibañez, has stated that, in general terms, the core principles of the Constitution are: the political system, government system, economy, territorial form of the state, the bill of rights and duties,

[52] Colombia, Constitutional Court, *C-551-03*, para. 28. Translation by author.

public functions, and the merit-based system for accessing public positions.[53] The Court has stated:

> "It is one thing that any article of the Constitution can be reformed – which is authorized since that is the power of amendment when the Constitution has not expressly included unamendable clauses or intangible principles, as is the case in Colombia – and it is another thing that, under the pretext of reforming the Constitution, it is in effect replaced by another completely different Constitution – which distorts the power to amend a Constitution and exceeds the competence of the holder of that power."[54]

In this regard, if Congress as a constituted power, seeks to pass a constitutional amendment that aims to alter one of the core principles of the Constitution, such an amendment is unconstitutional. Only the people, as the original constituent power, are authorized to carry out such an amendment.[55] Therefore, based on the above, and to circumvent the constitutional limitation of Article 241, §1, the Court has stated that when the derived constituent power seeks to modify a core principle through a constitutional amendment, it is not a material contravention of the Constitution, but rather a procedural defect. This is because, among the various types of procedural errors that may exist, besides those related to quorums and majorities, there is also the defect of competence, which occurs when a constituted power attempts to carry out a reform for which only the original constituent power has the competence, such as a reform to the core principles.

[53] Jorge Enrique Ibañez, lecture on Colombian Constitutional Law, 2023, Pontificia Universidad Javeriana.
[54] Colombia, Constitutional Court, *Sentencia C-551-03*, para. 33.
[55] Manuel Fernando Quinche, *El control de constitucionalidad*, 2nd ed. (Bogotá: Ibañez y Pontificia Universidad Javeriana, 2014), 111.

The Constitutional Court of Colombia applies the doctrine of unconstitutional constitutional amendments through the constitutional replacement doctrine, circumventing the constitutional limitation on the exercise of judicial review by arguing that it is a review of the procedure, particularly due to issues of competence. this stance has been criticized in Colombia, because the Constitution prohibits judicial review of constitutional amendments based on a material criterion, among other reasons. Despite this, the Court's reasoning and application of this doctrine are valuable for academic discussion.[56]

IV. When is it worth applying the doctrine of unconstitutional constitutional amendments in a country?

The fact that a constitutional court is empowered to conduct a judicial review of constitutional amendments based on both procedural and substantive criteria grants such a court significant power. This power is because the courts then have the final say on the constitutionality of an amendment, even if it has followed the established procedure correctly; it is a handful of judges who decide what is part of the Constitution and what is not. In certain countries, granting such power to a court may be viable given the country's circumstances; however, in many other countries, the application of this doctrine may not be worthwhile or even dangerous. In this section, I will focus on explaining the criteria that should be considered when evaluating the implementation of the doctrine of unconstitutional constitutional amendments in a country. Such criteria will be twofold: legal and historical-political.

IV.a The legal criterion: the flexibility or rigidity of the constitution

[56] Santiago García Jaramillo and Francisco Gnecco Estrada. "La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislativo." *Vniversitas* 133 (2016): 68.

The first criterion analyzes whether the constitution of the state in which we want to implement this doctrine is "flexible" or "rigid." According to James Bryce's theory, a constitution is flexible when the procedure required for its reform is the same as that for an ordinary law and it is a relatively easy constitution to amend.[57] In Bryce's words, such constitutions "are unstable, with no guarantee of solidity or permanence. They are in a state of perpetual flux, like Heraclitus' river, into which a man cannot step twice."[58] On the other hand, a constitution is rigid when its reform requires a special procedure, usually more rigorous than that of an ordinary law, and the intervention of a specialized body for this purpose.[59] In short, a constitution is flexible when it is easy to amend, and rigid when it is not.

The first thing that must be analyzed when evaluating the feasibility of implementing the doctrine lies in the fact that, if the Constitution is flexible, there is a greater likelihood that a constitutional amendment may threaten the core principles of the Constitution. Conversely, if the constitution is rigid, such risks are reduced. In this context, when a constitution is flexible, judicial review of constitutional amendments must adopt a stricter standard, as constituted powers, such as Congress, are more inclined to pursue reforms driven by self-interest rather than the common good, because it is easier for them to issue such reforms. Additionally, the lack of rigor in the amendment process within a flexible system could make such amendments less democratic, necessitating stricter judicial review. In the case of a rigid constitution, the more demanding and complex procedure serves as a safeguard, reducing the likelihood that a constitutional amendment would

[57] Vladimiro Naranjo Mesa. *Teoría Constitutucional e Instituciones Políticas,* 9th ed. (Bogotá: Temis, 2003), 324.
[58] James Bryce. *Studies in History and Jurisprudence*, vol. 1 (Oxford: Oxford University Press, 1901), 163.
[59] Vladimiro Naranjo Mesa, *Teoría Constitucional e Instituciones Políticas, 323.*

negatively impact the constitution's core principles. As a result, while judicial review need not be as stringent in these circumstances, it must still maintain a high level of rigor, given the critical nature of constitutional amendments.

Let us consider the cases of the United States and Colombia. First, the Constitution of the United States is rigid, as the process for its amendment outlined in Article V requires a qualified majority of "two-thirds of both Houses (…) or, on the Application of the Legislatures of two-thirds of the several States" to convene a Convention to propose a constitutional amendment.[60] In this regard, "the formal amendment process is notoriously cumbersome (…) a process that social scientists consider perhaps the most difficult currently existing in the world," which is why, during a conversation I had with Professor Aziz Rana, he mentioned that in the United States, the application of this doctrine is not viewed favorably.[61] If a reform has met all the requirements, demanding one more would be counterproductive, or rather, useless.[62] Therefore, when a constitution is rigid, it suggests that there is no need for the doctrine of unconstitutional constitutional amendments to be applied in judicial review.

In the same way, Professor Berger maintains that it does not make sense to apply this doctrine due to the particular characteristics of the American legal system. That way:

> "The idea of an unconstitutional constitutional amendment is an oxymoron for the Constitution of the United States because the US federal government has no authority to unilaterally amend the US Constitution—amendments must be ratified by the States before they become part of the Constitution. The people may amend

[60] U.S. Const. art. V.
[61] Aziz Rana. *The Constitutional Bind: How Americans Came to Idolize a Document That Fails Them*, 1st ed. (Chicago: The Chicago University Press, 2024).
[62] Aziz Rana, conversation with author, November 13, 2024.

the Constitution through their elected representatives at the State level because the People and the States are the primary constituent power of the United States. Likewise, no State (except Delaware) may amend its own constitution without the consent of its People."[63]

The Colombian case is different. On paper, the constitutional amendment procedure appears to be strict, as the Colombian Constitution requires twice the number of debates in Congress compared to an ordinary law, as well as much stricter majorities. However, the reality seems to tell a different story; since 1991, the year the Constitution was enacted, Congress has amended the Constitution 53 times, and many of these reforms have been far from constitutional in nature.[64] Thus, in practice, the Constitution of Colombia tends to be more flexible than rigid. In this sense, it is important to clarify that when analyzing this criterion, one should not be guided by what the paper indicates, but rather by what happens in practice. Therefore, the relative frequency of constitutional reforms in Colombia suggests that the application of the doctrine of unconstitutional constitutional amendments may be relevant.

IV.b The historical-political criterion

The legal criterion is merely an indication, but it is the historical-political criterion that will ultimately help us to determine whether the doctrine of unconstitutional constitutional amendments should be applied in a country. What needs to be analyzed at this point is whether there is a real need to apply this doctrine in our current moment. If Congress has, for example, repeatedly tried to blatantly extend the number of presidential

[63] Christopher Berger, conversation with author, October 30, 2024.
[64] Kenneth Burbano Villamarín, "Reforms to the Constitution, Power, and Political Pugnacity," *Ámbito Jurídico*, September 1, 2023, https://www.ambitojuridico.com/noticias/columnista-online/constitucional-y-derechos-humanos/reformas-la-constitucion-poder-y.

re-election terms, or eliminate the checks and balances by weakening the separation of powers, then applying the doctrine does not seem unreasonable. On the other hand, there may be cases where a constituted power has historically not shown authoritarian behaviors, but in recent times has begun to exhibit signs of such tendencies. For example, if a government is democratically elected and in its early years respects the Constitution, but at some point begins to show authoritarian signs or directly proposes constitutional reforms to remain in power, then applying the doctrine of unconstitutional constitutional amendments becomes viable, and it will serve as a way to protect the people from an authoritarian government. On the contrary, if a country has a democratic government, shows no signs of authoritarianism, and generally respects the rule of law, applying the doctrine of unconstitutional constitutional amendments does not make sense.

Let's return to the Colombian case to illustrate the argument with a real example. As mentioned earlier, historically, Congress has sought and achieved constitutional reforms dozens of times. Today, corruption is a phenomenon that has permeated the legislative power, and combined with its inefficiency in enacting laws, a 2022 survey showed that 70% of Colombians distrust Congress.[65] Such circumstances provide fertile ground for irregular constitutional changes, which occurred in the following example.

In 2002, former Colombian President Álvaro Uribe Vélez proposed a constitutional reform through Congress, which, granted extraordinary legislative powers to the President to "issue, modify, or add" laws related to fundamental rights, the Criminal Code, and more.[66] The issue with this proposal is that Article 150, §10 of the Constitution explicitly

[65] *El Nuevo Siglo*. "Instituciones se han fortalecido frente a desbordes gubernamentales." *El Nuevo Siglo*, 2022. https://www.elnuevosiglo.com.co/politica/instituciones-se-han-fortalecido-frente-desbordes-gubernamentales.

[66] Congress of Colombia. *Legislative Act 03 of 2002 (December 19)*, art. 4. December 19, 2002. https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6679. Translation by author.

prohibits Congress from granting such extraordinary legislative powers to the President, particularly when it comes to modifying or issuing laws related to fundamental rights. The rationale behind this prohibition is straightforward: given the importance of the matters regulated by these laws, they must be created or amended through a democratic process, not by administrative regulation. In this sense, the constitutional reform undermined democracy. However, what is striking about this case is that when the Constitutional Court of Colombia conducted a judicial review on this reform, it decided not to rule on the matter substantively, as the complaint lacked sufficient clarity in its arguments.[67]

Setting aside the fact that the actions of the Constitutional Court in this particular case are highly questionable, the point is that such constitutional reforms are relatively frequent in Colombia; many attempts have been made to undermine the democratic system and the rights of individuals. It is for this reason that the Constitutional Court, as the guardian of the integrity and supremacy of the Constitution, must have the power to exercise judicial review over constitutional reforms based on procedural and material criteria, applying the doctrine of unconstitutional amendments.

IV. Conclusion

The doctrine of unconstitutional constitutional amendments is not a new concept in constitutional law and legal philosophy. The question of who can amend the Constitution and how it can be done ultimately determines how the people can be protected from agents seeking to alter the Constitution they created. This issue is particularly relevant today; in some countries, the rights of individuals are systematically violated, sometimes by the state itself. The doctrine of unconstitutional constitutional amendments appears to be one way to

[67] Colombia, Constitutional Court, *Sentencia C-1200-03*, December 9, 2003, judge rapporteur Manuel José Cepeda Espinosa and Rodrigo Escobar Gil, available at https://www.corteconstitucional.gov.co/relatoria/2003/c-1200-03.htm.

protect the people from tyranny. However, its application is not always necessary. The decision to apply it depends on legal and historical-political criteria. While this paper proposes two criteria, there may be others that also help determine the viability of applying the doctrine. Nonetheless, I believe these two serve as a foundation for theorizing on the matter. On the other hand, there are several important issues related to this topic that, due to their indirect relevance to the argument of this article, have not been addressed. The legitimacy of Constitutional Courts in applying the doctrine of unconstitutional amendments, or how to apply it to specific cases, are issues that could contribute to the discussion.

Despite the above, it is undeniable that granting such power to any institution can be dangerous, if not exercised with the proper caution and justification. Apart from that, we cannot idealize judges; above all, they are people. They can be corrupt, pursue personal interests, and, in general, make mistakes. We must be aware that, no matter how appealing the theory might seem, in practice, it may not turn out well. However, it is equally undeniable that Constitutional Courts in recent years have played as defenders of the Constitution and the rights of individuals. We no longer live in a "viceroyalty" governed solely by the legislative and executive powers; now, the constitutional judge has emerged as both a legal and political actor of fundamental importance. The doctrine of unconstitutional constitutional amendments is a mechanism through which democracy and the rights of individuals are protected.

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Censoring Film and Filming Censorship: A Legal Analysis of the Origins and Legacy of Film Noir

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CENSORING FILM AND FILMING CENSORSHIP: A LEGAL ANALYSIS OF THE ORIGINS AND LEGACY OF FILM NOIR

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Abstract: This paper explores the intersection of law and film, specifically how early 20th-century case law and the Hays Code provoked the genre of Film Noir. The genre's themes of crime, corruption, and moral ambiguity conflicted with the regulations on cinema at the time, which demanded moral decency. However, filmmakers dodged the censors by implying risque content in the subtext rather than in explicit presentation. In discovering this underground opportunity, filmmakers not only evaded censorship but attacked the system that necessitated such subtlety in the first place. In doing so, noir employed the pillars of both film formalism and legal realism to critique the regulatory culture of the time. The genre's ambiguous style and content served as a battleground for censorship politics, becoming vehicles to speak out against the country's legal frameworks and advocate for the freedom of expression.

INTRODUCTION

Faint lamplight on a rained-on boulevard. A hat's brim tips towards shadowed brows and inscrutable eyes. The last cigarette, burning out. A knuckled flick resigns it to the tar; its final breath billows into the wooly night. This cinematic vision is recognizable to many, yet murky in definition. Films of crime, passion, and corruption with such somber moods have come to fame as *Film Noir.* However, film critics are unsure if this title constitutes a period, a genre, a cycle, a style, or simply, a "phenomenon."[2] Film noir came to popularity in the wake of World War II, when filmmakers and audiences alike struggled with feeling a loss of innocence, and in effect,

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[2] James Naremore, "American Film Noir: The History of an Idea," *Film Quarterly* 49, no. 2 (December 1995): 12–27, 12. https://www.jstor.org/stable/pdf/1213310.pdf?refreqid=fastly-default%3Aaa4ea302305f6c59d86849355b453818&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&initiator=&acceptTC=1

turned to representations of disillusionment. Presenting a cynical view of society and complex characters, noir operated in the art of both visual and moral darkness. Period, genre, and style all compounded to form noir's characterization, but it was still an ambiguous one, which begs the question: what was the reason for such an enigma?

Noir blossomed with the curbing of cinematic freedom of expression. After a threat of federal censorship and in an attempt to mitigate the image of Hollywood after several scandals, the Motion Picture Producers and Directors Association of America wanted to enforce self-censoring rules on the film industry to regain control and reinstate morality in Hollywood. In 1930, the MPPDA set forth a series of guidelines that limited what could be shown in movies, barring references to obscenity, immorality, and unpunished criminality, among others.[3] The guidelines would become popularly known as The Hays Code, named after the president of the association at the time. It would seem that these stipulations which limited what Americans could say would undermine the right to freedom of speech. However, the issue of whether film was protected under the First Amendment was already decided in the 1915 Supreme Court decision in *Mutual Film Corp. v. Industrial Commission of Ohio*.[4] This case took on the First Amendment question and ultimately decided that film was not included in such constitutional protections.[5] This became a landmark case in American law, setting the precedent that film was subject to censorship, which the Hays Code actualized in full force. Decades after this decision, film noir came onto the scene and dealt with the exact topics that the Hays Code prohibited and the First Amendment could not protect. This was not a coincidence; film noir was created in rebellion against such suppression. As the genre was popularized in the 1940s and 50s, noir has

[3] Martin Quigley, Daniel A Lord, and William H Hays, *The Motion Picture Production Code* (Motion Picture Association of America, 1930).
https://digitalcollections.oscars.org/digital/collection/p15759coll11/id/10780
[4] Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230.
(https://supreme.justia.com/cases/federal/us/236/230/ February 23, 1915).
[5] Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230.

always had to negotiate its subject matter per both federal case law and the Hays Code. How were filmmakers able to make moral films in terms of the code, but morally ambiguous films as the genre demanded? The answer is very creative. Instead of making their intentions explicit, filmmakers relied on subtext and charged visual language to seemingly comply with censors while smuggling in the risque themes, plots, and characterizations they truly desired. While the written screenplays remained mostly tame, sly facial expressions, suggestive lighting, and double-meaning dialogue pushed the boundaries of what the code was able to control. But these films did not just *evade* censorship, they *condemned* it.

Authors of noir exploited the genre's distinct, ambiguous style as a vehicle to meta-criticize the precedents and codes of the time, insisting upon a different type of justice than the nation's guidelines recommended: justice that served human complication and freedom rather than superficial morality. Though many film scholars have written about the subtext of noir in how the films were able to work around the code, there is also an *additional* layer of subtext: film noir was really about censorship. By placing noir in its distinct era, not by timeline or by style, but by the legal framework of the country during the 1900s-1950s, it becomes clear that the genre was a battleground for censorship politics. Formal analysis of the films' subtle techniques reveals that the filmmakers behind such choices targeted the lawmakers that necessitated this subtly in the first place. Though noir has been a shadowy puzzle many film scholars have pieced together and pulled apart relentlessly, much of the criticism is missing the key framework that explains the genre's purpose and impact. The legal and regulatory climate of early twentieth-century America energized film noir, the genre defiant in content, form, and message advocating through the grates in its muzzle for artistic freedom.

BACKGROUND ON FILM NOIR

Film noir has always been more of a mood, an aura of classy noncompliance and refined eroticism, than it has been a definable category. Though the genre was certainly ambiguous, its origins were not. "Whatever noir 'is'...it originated in America out of a synthesis of hard-boiled fiction and German Expressionism."[6] Hard-boiled fiction was a style of American crime writing starting in the 1920s that introduced a tone of realism and unsentimentality to conventional detective stories of the time.[7] With this more realistic influence on content, film noir was also inspired by the surrealistic style of German Expressionism. Starting as an anti-bourgeois movement by fine artists upset with German society in the early twentieth century, expressionism then moved to the screen. German Expressionist films such as *The Cabinet of Dr. Caligari* abandoned traditional ideas of naturalism "in favour of distortions and exaggerations of shape or colour that urgently express the artist's emotion, subjective reactions above the observation of the external world."[8] Noir took inspiration from German Expressionism's use of stark chiaroscuro lighting with a focus on shadows to visually express gloom and corruption and to act as a veil for ambiguity. By combining the two existing genres, American noir filmmakers manifested their concerns with real societal injustices by fictionalizing and stylizing crime, detectives, and immorality on the screen. With the credibility and fused potential of these two movements, as well as the cultural climate of the time, noir was poised to become its powerhouse.

Noir was a collective style and genre operating within and against the Hollywood system that used distinct elements of film to do so.[9] Though one may come to predict particular traits

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[6] Naremore, "American Film Noir: The History of an Idea," 12.
[7] "Hard-Boiled Fiction," in *Britannica* , n.d. https://www.britannica.com/art/hard-boiled-fiction
[8] *The Oxford Dictionary of Art*, ed. vols. (2012), s.v. in Jiamu Yi, "Characteristics and Influences of German Expressionist Films in the Early Twentieth Century," *Journal of Humanities, Arts and Social Science* 7, no. 1 (February 8, 2023): 98–101, https://www.hillpublisher.com/UpFile/202302/20230208184932.pdf
[9] Naremore, "American Film Noir: The History of an Idea," 23

about a film noir— a dark color palette, brooding characters, an unsettled crime—each film deliberately mystifies itself. “The ‘vocation’ of film noir was to reverse the conventional norms thus creating a specific tension which resulted from the disruption of order and ‘the disappearance of psychological bearings or guideposts.’"[10] Noir became the contrary to American expectations of logic, honesty, and good defeating evil; it found its place in the “anti.” The main characters, for instance, were “anti-heroes,” those with questionable morals who toe the line between righteous and vengeful. Even this one noir element completely disturbed the glorious image of American cinema at the time. The anti-hero, the ideal noir hero, “was the opposite of John Wayne. Psychologically he was passive, masochistic, morbidly curious.”[11] Noir defied the other most popular genre at this time in America: Westerns. Noir traded in cowboy hats for cigarettes, damsels in distress for femme fatales, and effectively corrupted American idealism. Though interestingly, both types of films are still intensely American, just in opposite ways. While Westerns generally aimed to present a moral and legible plotline, upholding America as a land of sweeping grandiosity, noir dug into the American underbelly of temptation, frustration, and corruption to critique the country instead of pedestalizing it. This different perspective on the country allowed noir to do a few things. Along with its surrealist visual motifs and its deviation from national pride, the genre disoriented the American spectator, especially the censors. Though its racy suggestions in content should have been struck down by censors, noir’s genre-defining ambiguity acted as a loophole against such indictments. Consequently, noir held a remarkable place in the cultural sphere: as surreal in its existence as a genre in *reality,* as it

[10] "Six Characters in Search of auteurs," Cahiers du cinema: The 1950s, ed. Jim Hillier (Cambridge, MA: Harvard University Press, 1985), trans. Liz Heron, p. 37 cited in Naremore, “American Film Noir: The History of an Idea,” 19

[11] Naremore, “American Film Noir: The History of an Idea,” 19

appeared in its fictional representations. Its slippery nature allowed the noir to slide past censorship guidelines while simultaneously hurling piercing attacks on that very system.

FILM CENSORSHIP IN LAW

Film's history with censorship by the law is as long and fraught as the film's history itself. Though the film was immediately popular among audience members who witnessed such a grand technological feat, not everyone was thrilled about its potential. "Civic authorities felt threatened by the emergence of a mass media that took power and influence out of their hands and beyond their control."[12] The way to reclaim some control was for these authorities to create their invention: cinematic censorship. Scared of the supposed threat to morality that Hollywood films posed, self-proclaimed moralists took it upon themselves to protect their communities from the indecency of the screen. The first law passed in favor of these moralists became the first movie censorship law in America. In 1907 Chicago, religious groups called on governmental entities to restrict access to indecent movies that threatened morality. The city passed the country's first censorship law in 1907 as an ordinance prohibiting the "exhibition of obscene and immoral" moving pictures "commonly shown in mutoscopes, kinetoscopes, cinematography, and penny arcades."[13] This law required theaters to obtain a permit from the chief of police to show their films, who could refuse it based on obscenity. Theater owners sued the city of Chicago for

[12] Jeremy Geltzer, *Film Censorship in America: A State-by-State History* (Jefferson, NC: McFarland & Company, Inc., Publishers, 2017), https://books.google.com/books?hl=en&lr=&id=sNg5DwAAQBAJ&oi=fnd&pg=PP1&dq=history+of+film+censorship+in+america&ots=JDE0HYHwwn&sig=yhHKVLU21ksk8epP_tJfcrvOUfs#v=onepage&q=history%20of%20film%20censorship%20in%20america&f=false.

[13] State of Illinois Office of the Illinois Courts. "Illinois Supreme Court History: Movies and Censorship." Administrative Office of the Illinois Courts, July 23, 2018. https://www.illinoiscourts.gov/News/652/Illinois-Supreme-Court-History-Movies-and-Censorship/news-detail/#:~:text=The%20City%20of%20Chicago%20passed,of%20police%2C%20who%20had%20the.

an injunction to stop the ordinance because it was unconstitutional.[14] In *Block et al. v. City of Chicago* (1909), The Illinois Supreme Court upheld the city's ordinance.[15] Though this was one law in one city, the state Supreme Court ruling set the precedent for other states to follow. Just two years later in 1911, Pennsylvania became the first to enact state-wide movie censorship.[16]

By the early 1920s, censorship boards were convening across the country to suppress expression. State governments took the lead from the Pennsylvania legislature and deemed film censorship as a state's authority. Importantly, "these state censors were not advisory; they had actual legal authority to cut, edit, abridge, and even ban motion pictures before they ever reached their audiences."[17] However, these local boards were not exactly uniform. While pregnant characters or smoking scenes may be banned in one state, another would have allowed them.[18] The lack of agreement among the censors allowed for some borderline films to slip through the cracks, which inadvertently perpetuated the threat of federal film regulation.

However, censors found a unifying and affirming force in the form of one of the film's landmark U.S. Supreme Court decisions. In 1915, an Ohio statute created a board of censors under the Ohio Industrial Commission, granting them the authority to prohibit theatrical showings of films if they failed to meet the board's moral standards. Mutual Film Corporation, a film production company, brought suit because the Commission's broad ability to ban films was

[14] State of Illinois Office of the Illinois Courts. "Illinois Supreme Court History: Movies and Censorship." Administrative Office of the Illinois Courts, July 23, 2018. https://www.illinoiscourts.gov/News/652/Illinois-Supreme-Court-History-Movies-and-Censorship/news-detail/#:~:text=The%20City%20of%20Chicago%20passed,of%20police%2C%20who%20had%20the.
[15] Block et al. v. City of Chicago 239 Ill. 251 (Illinois Supreme Court February 19, 1909). https://www.courtlistener.com/opinion/7069938/block-v-city-of-chicago/
[16] Kristin Hunt, "The End of American Film Censorship - Jstor Daily," JSTOR Daily, February 28, 2018, https://daily.jstor.org/end-american-film-censorship/.
[17] Jeremy Geltzer, *Film Censorship in America: A State-by-State History*
[18] Jeremy Geltzer, *Film Censorship in America: A State-by-State History*

a violation of the First Amendment's right to free speech.[19] In a unanimous decision, the Supreme Court upheld Ohio's law. In the opinion, Justice Joseph McKenna wrote,

> "The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit like other spectacles, and not to be regarded as part of the press of the country or as organs of public opinion within the meaning of freedom of speech and publication guaranteed by the Constitution of Ohio."[20]

In this decision, the United States Supreme Court denied film protection under The First Amendment, making it vulnerable to censorship by states, local enforcement agencies, and censorship boards. This outcome had sweeping consequences. Though there was no federal censorship on film, this decision was a federal *implication* on how censorship was going to function in the country. Lower courts were, and still are, bound to the opinion of the Supreme Court through the principle of *stare decisis,* the Latin term meaning, "to stand by things decided."[21] This principle has been a pillar of our legal system as it promotes the predictability and integrity of the judicial process, authorizing the Supreme Court to make important decisions for the rest of the country's courts to maintain. While *stare decisis* is a vital part of our legal system, it was also the biggest blockade to film's freedom of expression. With the Ohio decision, all lower courts were bound to agree that film was vulnerable to censorship. Fittingly, these lower, state, local, or municipal courts were at the same, ubiquitous levels of the censoring

[19] Bob Pondillo, "Mutual Film Corp. v. Industrial Commission of Ohio (1915)," The Free Speech Center, July 5, 2024, https://firstamendment.mtsu.edu/article/mutual-film-corp-v-industrial-commission-of-ohio/.
[20] Mutual Film Corp. v. Industrial Comm'n of Ohio, 236 U.S. 230 (U.S. Supreme Court February 23, 1915). https://supreme.justia.com/cases/federal/us/236/230/#:~:text=Mutual%20Film%20Corp.-,v.,%2C%20236%20U.S.%20230%20(1915)&text=Later%20overruled%2C%20this%20decision%20held,subject%20to%20First%20Amendment%20protections
[21] "Stare Decisis," Legal Information Institute. https://www.law.cornell.edu/wex/stare_decisis#:~:text=Stare%20decisis%20means%20%E2%80%9Cto%20stand,with%20the%20previous%20court's%20decision.

boards. This 1915 decision threw a nationwide hush over the filmmakers' attempts to discredit censorship; now, it was part of the accepted law.

THE HAYS CODE

The Ohio decision was not just a landmark decision for the legal system, but for the film industry, as the permission of censorship allowed eager censors to usher in an infamous set of film guidelines known as the Hays Code. In the early 1920s, the scandal stunned Hollywood. From the "manslaughter trials of comedy star Roscoe 'Fatty' Arbuckle, the murder of director Willian Desmond Taylor, and the drug-related death of popular actor Wallace Reid," Americans began to see Hollywood as a cesspool for depravity and its devastating consequences.[22] As films in this period also started to become more "mature," showing drinking, gambling, and corruption, some political groups started to blame reality on fiction and decided to heal the image of Hollywood by controlling what audiences could see on the screen. The Ohio decision allowed them to do just that. With proposals for federal regulations appearing regularly before Congress, public outcry from religious and political groups, and an industry relentlessly pumping out controversial films, Hollywood was overwhelmed with disorder and compelled to create its form of jurisdiction. In 1930, the Motion Picture Producers and Distributors of America's Board of Directors formally ratified the Motion Picture Production Code. This document was more typically known as the Hays Code, named after its creator, William H. Hays, president of the MPPDA.[23] The board of directors acted as a quasi-governmental body in their enforcement of the code, demanding films adhere strictly to the restrictions in the document or else they would not

[22] Martin Smith, "Censorship and Film Noir ," *Mejiro University Literature and Linguistics Research,* 2006, 101–13, file:///Users/jennagilhooly/Downloads/KJ00005094770%20(3).pdf. 102

[23] Stephen Vaughn, "Morality and Entertainment: The Origins of the Motion Picture Production Code," *The Journal of American History* 77, no. 1 (June 1990): 39, 56. https://www.jstor.org/stable/2078638?seq=18

be sealed with the board's approval, and consequently, not be shown in theaters. The sixteen-page document detailed many areas of potential restriction, the most significant sections including any film's reference to crime, sex, obscenity, and religion. At the end of the pamphlet are multiple pages for "reasons supporting the Code," which the writers outline most succinctly in these two sentences: "Correct entertainment raises the standard of a nation. Wrong entertainment lowers the whole living conditions and moral ideas of a race."[24] This political culture of right and wrong, spoken and silent, submission and power is where the noir lived and prospered. It was a genre purposely designed on the edge. Noir in its definition avoided such rigidity that the Hays Code was based on; falling into neither one category nor another, noir could not be sanctioned.

FORMALISM IN TWO TYPES

Noir complicated morality rebelled without words, and overrode the written power dynamics of the legal and film institutions with its formal techniques. Law and film are inextricably linked. While legal decisions of the past affected the film industry, Hollywood responded by also enacting its own set of laws, creating a fluid and fervent relationship between both fields. The area of law and popular culture is an approach towards contextualization. In understanding that "popular culture gets its ideas of law, or at least some of them, from popular legal culture" it follows that the products of popular culture, like film, reflect popular legal culture.[25] With the federally sweeping decision from the Supreme Court and the addition of the nationwide Hays Code, film censorship law was as popular as it was repressive. The legal sphere often concerns itself with popular culture in terms of liability, regulating public products that

[24] Martin Quigley, Daniel A Lord, and William H Hays, *The Motion Picture Production Code*
[25] Steve Greenfield, Peter Robson, and Guy Osborn, *Film and the Law* (London, England: Zed Books, 2001). file:///Users/jennagilhooly/Downloads/10.4324_9781843142645_previewpdf.pdf

could cause harm. But the popular sphere, more specifically the film sphere, also concerns itself with legality and the concept of justice. This concern has shown up in explicit courtroom dramas and overtly political movies, but what is more interesting is the way these ideas have shown up *implicitly*, as necessitated by the censorship laws.

Though law and film are already connected, there is one concept that is the key to specifically unlocking how noir interacted with censorship: formalism. The concept of formalism exists in almost every field. It is an approach that focuses on the structure and rules of the content at hand. By name, formalism weighs the form something takes above all else. As both film and law place great importance on the wording and crafting of material, formalism is a naturally popular approach in both fields. Each field has a different definition of what formalism means to it. "Legal formalism, above all, seeks to enforce what the law says, rather than what it could or should say. It is a theory that the law is a set of rules and principles independent of other political and social institutions."[26] Film formalism follows a similar philosophy with a greater emphasis on artistic expression. "Formalism in film refers to an artistic approach that emphasizes the aesthetic and technical elements of the medium, often prioritizing visual style, composition, and sensory experiences over conventional narrative structures."[27] However, what is interesting about film formalism is that it embraces ambiguity in the visual language, asking viewers to engage with the material on a deeper level as the filmmakers contextualize the world we live in and comment on it. Though film formalism often takes an unnatural, unrealistic approach in its art style, its goals paradoxically align with legal realism, the opposite of legal formalism. Legal realism is "the concept that the law, as a malleable and pliable body of guidelines, should be

[26] "Legal Formalism vs. Legal Realism: The Law and the Human Condition," SFT Lawyers, February 4, 2013, https://sftlawyers.com/legal-formalism-vs-legal-realism-the-law-and-the-human-condition/.
[27] Jason Hellerman, "What Is Formalism in Film and TV," No Film School, September 1, 2023, https://nofilmschool.com/what-is-formalism-in-film.

enforced creatively and liberally so that the law serves good public policy and social interests."[28] In this way, film formalism bends the usual cinematic expectations of form and narrative to create underlying meaning, sparking emotions, questions, and determinations in its audience. Noir, in its ambiguous and artistic esteem, was the epitome of film formalism. And, during the early to mid-twentieth century, the strict approach to lawful censorship and the Hays code was the epitome of legal formalism. So, noir, by using its cinematic elements to comment on societal issues of the time, employed *film* formalism to critique this specific area of *legal* formalism. Filmmakers despised the strict restrictions of the Hays Code because they threatened to dismantle the artistry of the films. However, these restrictions kindled a passion in noir filmmakers; they used their creativity in film techniques to hide the messages they were not allowed to make explicit. In finding this underground avenue to make meaning in their films, the filmmakers were not going to stop at just evading the law: they were going to attack it. In effect, noir overturned the power of censorship, using film formalism as a weapon against its legal counterpart.

FILM ANALYSIS

Noir created a subtextual language through different film techniques to slyly criticize the censorship culture of the time. To fully understand noir, it is necessary to engage in the three aspects of film criticism at once: text, context, and subtext.[29] In any film, each factor intermingles with the next, relies on the last, and together they create the meaning of a narrative. In the case of noir, the film's artistic text and subtext commented on the context of legal codes and decisions, becoming a staple of the culture while also judging it. One of the ways noir

[28] "Legal Formalism vs. Legal Realism: The Law and the Human Condition,"
[29] Ishtiak Hossain, *Film Texture: Subtext and Art Direction*, *Google Books* (Amazon , 2024), https://books.google.com/books?hl=en&lr=&id=tmYjEQAAQBAJ&oi=fnd&pg=PA1&dq=film+noir+subtext+&ots=8p4nC_0Dss&sig=qRCnmdhF3ATjej6F0DiXI5fgBaA#v=onepage&q=film%20noir%20subtext&f=false.

filmmakers cut into the censorship culture was by including double-edged dialogue in the screenplay. The 1946 hit *Gilda,* directed by Charles Vidor, was the prime example of such dexterity. The film opens with wordplay to prime the viewer for what this story may be about, besides the glamor and the gambling. The plot of the film was already a risky choice as it features crime, adultery, and corruption and alludes to much more beyond that. A casino boss, Ballin, hires a down-on-his-luck gambler, Johnny, who becomes the classic noir anti-hero involved in a love triangle with a femme fatale. When the two men meet at the beginning of the movie, their coded conversation suggests multiple meanings, *all* in discordance with the Hays Code. After Ballin saves Johnny from being mugged, he gives him some advice.

> Ballin: "With your luck why don't you go somewhere where there's some real gambling?"
>
> Johnny: "I thought it was illegal in Buenos Aires?"
>
> Ballin: "Oh, it is."
>
> Johnny: "Oh, I see. Just like home." [30]

On the surface, this interaction already breaks the code. In saving Johnny, Ballin uses his walking stick which is actually a pointed weapon, and the film makes a clear effort to exaggerate this object by cutting to it and zooming in. Though according to the Code, "excessive flaunting of weapons by criminals shall not be permitted," *Gilda* still gets away with it because this encounter is "essential to the plot":[31] Ballin is an arrogant businessman who Johnny looks up to and eventually takes over. In this scene, the two men also share an intimacy, aided by the inclusion of phallic cigarettes and weaponry. Though there is nothing in the script that would

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[30] *Gilda* (Columbia Pictures, 1946).
[31] Martin Quigley, Daniel A Lord, and William H Hays, *The Motion Picture Production Code* (Motion Picture Association of America, 1930).
https://digitalcollections.oscars.org/digital/collection/p15759coll11/id/10780

create such sexual tension, the subtext in the actors' performances implies it. Though the film evades the Hays Code in its content, what is of real interest here is what is whispered between the real world and the fictional. Though the two characters are explicitly talking about gambling, the *filmmakers* are talking about censorship. For them, the lines could be rewritten as,

"I thought it was illegal to violate the Hays Code?"

"Oh, it is."

Gilda in its first five minutes mocks the entire existence of the Production Code Association. The board approved this screenplay, these very lines, without realizing it was a clever attack on their beloved guidelines. So, not only did *Gilda* undermine the code by sneaking in famously sexual innuendos and corrupt relationships, but it laughed at the "rules" and exposed their weakness in its script. With their ambiguous and technique-driven approach to screenwriting, the noir creators resisted the Hays Code's attempt at censorship and sneered at the American legal system that allowed the code in the first place. *Gilda* reestablished who was really in control of expression. It was not those with clear-cut authority, but those who were passionate about freedom, and those with the creativity to work around the obstacles.

Gilda also meta-comments on the relationship of formalism between both law and film. At the end of this same conversation, Ballin tells Johnny he should go to a casino on the other side of town and informs him, "They won't let you in without a tie." [32] This loaded line ends their scene, and the film cuts to Johnny grooming himself and putting on a tie in the mirror: black and white striped. Ballin notifies Johnny to dress up in *formal* attire in the casino, just as film noir had to dress up in *formal techniques* to slink past the censors. Johnny in this moment stands in for the film industry and the tie for the censorship industry. Johnny's character is morally questionable, like Hollywood itself. The tie is a superficial attempt to corral his possibly

[32] *Gilda* (Columbia Pictures, 1946).

criminal intentions, but it does not change his character. Censorship was an attempt at lifting the film industry's morals, but it did not possess such authority. Johnny parades in his black and white tie, a stylish signal that the film is self-aware of its ambiguity, and its indecision to be morally and legally black or white. Film noir especially, due to its already suggestive content, had to be *tied* up and repackaged by the Production Code Association's standards. At the time, each film's script had to be submitted to the PCA for approval.[33] If not, the films found themselves out of luck. *Gilda* found a way out of that destiny. After the board denied its script twice already, on its third attempt, *Gilda* caught the pattern:[34] the words in the script were vulnerable to censorship, but everything else was fair game. A newly bare-bones script was perfect for board approval and rich for interpretation. The visuals became an opportunity for rebellion. For example, actors Rita Hayworth and Glenn Ford made suggestive faces and line deliveries on seemingly harmless dialogue and dark lighting hid what would otherwise qualify as indecent behavior. Even the inclusion of a simple but meaningful tie would have never been flagged by the board because it was never in the script. This focus on the film's style and aesthetic was the exact goal of noir's formalism and the foil to censorship.

Billy Wilder's *Double Indemnity* (1944) is another film noir classic that deals more explicitly with the law in the form of a criminal insurance scheme and the investigator who discovers it, and implicitly explores the complicated power of a censor. Concerning its legal themes, *Double Indemnity* producers directly situated the film in the real-life legal sphere, calling

[33] "University of Virginia Library Online Exhibits: Censored: Wielding the Red Pen," University of Virginia Library , 2001, https://explore.lib.virginia.edu/exhibits/show/censored/walkthrough/film1.
[34] "On Gilda and Getting around the Production Code - an Excerpt from Hollywood's Melodramatic Imagination: Film Noir, the Western and Other Genres from the 1920s to the 1950s by Geoff Mayer," On GILDA and getting around the Production Code - An excerpt from HOLLYWOOD'S MELODRAMATIC IMAGINATION: Film Noir, the Western and other Genres from the 1920s to the 1950s by Geoff Mayer, January 1, 2022, https://filmalert101.blogspot.com/2022/03/on-gilda-and-getting-around-production.html.

it "an emancipation for Hollywood writing" amidst the struggle of censorship.[35] In the film, an insurance salesman, Walter Neff, is seduced by a femme fatale to kill her husband for the payout money. He and an insurance investigator, Barton Keyes, ensue in a game of cat and mouse as the plot unfolds. Keyes is the moral nexus for the film. He functions within the story as the noir detective archetype, honing in on the criminals with his observations and hunches. His role within the insurance company is to make sure the rules are followed. By that nature, he embodies the legal system's pursuit of order, truth, and justice; as he functions as a detective on the fictional level, on another level, he represents the authority of the Hays Code. In the vein of commentary, one might expect the film to over-caricature Keyes, but he is the voice of reason and sympathy. His sincerity makes the film's commentary not only more concealed but more nuanced.

For example, we often see Keyes within the walls of the insurance agency. That is practically the *only* place we see him; as much as he tries to contain crime and fraud, he is also a product of containment. In an early scene, Keyes oversees paperwork to catch a fraudulent claim, but in the background, a tower of filing cabinets with even more paperwork oversees *him*. The stress his industry places on him dominates the screen. To augment this feeling, the camera composition insists on claustrophobia, confining Keyes in either medium or close-up shots or else physically enclosing him with his work. The film does not give him the space to breathe, to exist as anything else but a serviceable insurance investigator. He is just as trapped as the people he catches. As Keyes' role is the same as a film censor's, both people enforcing the rules according to written and moral standards, the film interestingly sympathizes with censors. But this sympathy is a clever power play. The film deems Keyes, and therefore a censor, as just one

[35] Stanley, Fred. "Hollywood Crime and Romance; Hollywood Round-Up." The New York Times, November 19, 1944. https://www.nytimes.com/1944/11/19/archives/hollywood-crime-and-romance-hollywood-roundup.html.

pawn in the entire system. Through its subtle camera work, the film asks censors if they wanted to be trapped by the desires of the higher power of William H. Hays, of PCA, of the Supreme Court decisions that led them here, or if they wanted a taste of freedom too.

The entire film is framed by Keyes and his precarious position as an enforcer of the law but paradoxically, also as a friend to criminality. The film opens with Neff's narration, which continues throughout the narrative.[36] He recounts the events of the film and his sentiments toward them into an audio recorder, specifically addressing his speech to Keyes. It is a blatant yet relaxed confession. Neff feels comfortable enough to admit his adultery, fraud, and murder to Keyes because he had been almost an ally throughout the entire process. Throughout the plot, Keyes has remarkable hunches about the fraud in the case of Mr. Dietrichson's death, which Neff is responsible for, yet still exonerates Neff. About halfway through the movie, Neff narrates this phenomenon about Keyes,

> "You were the only one we were really scared of and instead you were almost playing on our team."[37]

In the context of reality, was the law almost playing on the film's team? *Double Indemnity* was certainly making it out to seem that way. Though the Hays Code and censorship authority hunted films like *Double Indemnity,* aiming to catch immorality in its tracks, this film questions the censors' efficacy. Though the goal of censorship was to strip artists of their creative freedom, it had the adverse result of making the art *more* creative because artists had to work around the violations, engineering more interesting plots, mysterious characters, and captivating visuals to communicate their ideas. The censors might have been doing the opposite of what they intended, just like Keyes. In the film, a moment between Keyes and Neff visualizes this tension. The two

[36] Narration is one of the quintessential aspects of noir, as it sets the tone for contemplation and allows the film to muddle the linear narrative while maintaining some structure.
[37] *Double Indemnity* (Paramount Pictures, 1944).

occupy opposite sides of the screen in their conversation, Keyes sitting on the left and Neff standing on the right. Keyes says to him,

"Walter. I'm a very great man."[38]

But the camera composition has a second opinion. With Keyes in the lower position looking up to Neff, and Neff looking down on him, the expected power dynamic is completely inverted. Keyes may be a great man, but he is still limited by his industry, while Neff is proud and free in his immorality. While their faces are lit and darkened by the Venetian blinds, both men cast twin shadows on the wall behind them. Their silhouettes are personalityless and equalizing: shadows confined to the wall, men confined by the restraints of their institutions. If Keyes is like Neff, a simple insurance agent, he too has the potential to escape the expectations placed on him. He too has the opportunity to stand up, to defy. This subtext corrupts the whole premise of an agent of the law; it offers him the leeway he is supposed to deny others.

Though the film still positions Keyes as a moral and legal hero, it also underscores his position with conflict. This way, the film gets by the Hays Code by admirably portraying the law but it also meta-complicates the censors who enforced such a rule in the first place. [39] Censors were real people with real conflict, and if that conflict could be exploited, their very medium was the place to do it. At the end of the movie, this conflict about Keyes' character comes to such a boiling point that the audience almost expects him to let Neff get away with the crime. He does not let him go free, but he does not chase after him either. Throughout the film, Neff lights Keyes' cigarettes for him, the simple action becoming a visual motif of their bond. In Neff's final moments, Keyes reverses the pattern and lights Neff a cigarette. He takes on Neff's role. Though it may just be seen as a polite gesture, the work of noir never favors courtesy for

[38] *Double Indemnity* (Paramount Pictures, 1944).
[39] Martin Quigley, Daniel A Lord, and William H Hays, *The Motion Picture Production Code* (Motion Picture Association of America, 1930).

courtesy's sake. There is something underneath, kindling. By Keyes taking on Neff's role in the cigarette lighting, the film opens up the possibility that he can take on Neff's role in more significant ways too. As Keyes personifies a censorship authority figure, the film suggests that their role in reality can change too. By indirectly perverting the symbolic role of the censor, *Double Indemnity* calls for a revolution in the censorship culture, alluding to censors that there is a way to escape the industry of systemic restriction, to remove one's cog from the machine. If enough censors did so, the fragmented machine would cease to function at all.

END TO CENSORSHIP; END TO NOIR

Noir and film censorship came to an end just as they rose: together. "From the perspective of the mid 1950s, it appeared that noir was dying."[40] While some attributed its descent to exhaustion of the formula, others cited more economic and political reasons, like how "in response to television and a diversified leisure industry, Hollywood was turning to Cinemascope, color, and Biblical epics."[41] But in reality, noir was dying because censorship was dying. The American legal and cinematic landscape transformed when Joseph Bursytn imported the short film, *The Miracle,* from Italy.[42] The 1948 film follows a girl who is seduced and impregnated by a peasant she believes to be Saint Joseph, who is then harassed and dismissed by her community.[43] In 1951, the New York City license commissioner barred showings of the film because it was sacrilegious. Burstyn challenged the decision, but the New York Court of Appeals ruled against him. The case moved to the Supreme Court where it would change history. In *Joseph Burstyn, Inc. v. Wilson* (1952) the Supreme Court overturned their decision in *Mutual*

[40] Naremore, "American Film Noir: The History of an Idea," 20
[41] Naremore, "American Film Noir: The History of an Idea," 20
[42] Kristin Hunt, "The End of American Film Censorship - Jstor Daily,"
[43] "The Miracle / the White Sheik," Harvard Film Archive, 2022, https://harvardfilmarchive.org/calendar/the-miracle-the-white-sheik-2022-06.

Film Corp. v. Industrial Commission of Ohio (1915). The Court decided that movies deserved protection under the First Amendment. In the opinion, Justice Tom C. Clark directly refuted the language in the Ohio decision, writing "importance as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as inform."[44]

This new landmark decision made the banning of films unconstitutional and effectively weakened attempts at future censorship. However, this decision did not entirely disband the Hays Code. "The PCA would hobble into the 1960s, but by the time it was abandoned in 1968 to make way for a new MPAA rating system, it had already lost the culture war."[45] Though the code remained, most films after 1952 either ignored it or blatantly disobeyed it. Billy Wilder, director of *Double Indemnity,* made a 1952 sex-comedy called *Some Like It Hot* which featured men in drag, homosexuality, and scenes of passion, all in clear violation of the code. The film was an instant classic, making it clear that newly and overtly "indecent" cinema was overpowering the residual censorship authority. As showcased in just one director's filmography, Hollywood was moving away from noir and towards more leisurely, straightforward styles as the need for obscurity and censorship commentary fell away with the Burstyn decision.

CONCLUSION

The regulatory constraints of early to mid-twentieth century America sparked the rise of film noir, a genre so defiant in its content and style that it critiqued the very censorship that shaped it. Though many film scholars have tried to define noir in relation to war, artistic movements, cycles of fashion, and so on, it is essential to understand that noir was a product of the legal culture of the time. Without strict censorship regulations, films would have been free to

[44] Joseph Burstyn, Inc. v. Wilson 343 U.S. 495 (Supreme Court of the United States 1952).
[45] Kristin Hunt, "The End of American Film Censorship - Jstor Daily,"

lay their content and messages in the open. They would not have needed to shadow their settings, convolute their plots, symbolize their characters, or plant ciphers in the screenplay. These elements were the quintessential aspects of noir; they were all born out of necessity. As it turns out, repression backfired; restraint only triggered our human desire for autonomy and freedom. By insisting on the ambiguity in film formalism, film noir was able to confuse and cripple the strict nature of the barriers of the censorship codes. With a firm grasp on the regulatory culture of the time, noir used the vehicle of meta-film to essentially play both offense and defense, dodging censors and striking against them. So, in using its formal elements, noir also supported the realist determination to consider the social and political desires of the public. In doing so, the genre merged the film and legal fields to completely shatter the power of censorship. Noir gave a voice to Americans who refused to be silenced, pushed to change the law when it was unjust, and ultimately blazed a path for freedom of expression.