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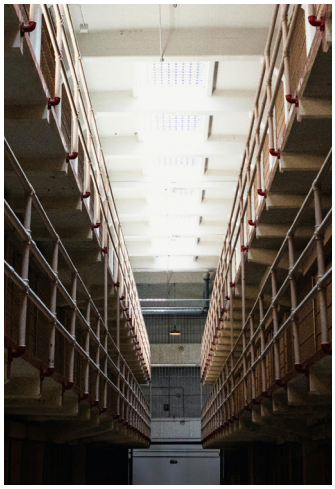
The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and beyond. Together, we foster a community of like-minded students who are passioantely engaged in learning and debate about the critical issues of our time.



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BEHIND THE COVER



This photo courtesy of Claremont McKenna College shows a picture of the campus during the day.

LETTER FROM THE EDITOR

Dear Reader,

It is my honor to present to you the culmination of months of writing, editing, revising–and more editing–undertaken entirely by the student members who comprise the Claremont Journal of Law and Public Policy (CJLPP). As we wrap up our eleventh year in print, it is only thanks to the tireless dedication of our writers and editors that we may look forward to yet another stellar publication. I am also pleased to announce Graham Robbins (PO '27) as the winner of this edition's Byron Cohen Prize for excellence in research, writing, and analysis.

While the geopolitical climate in which we find ourselves is anything but the same as it was eleven months ago–let alone eleven years–I am proud that this Journal's dedication to showcasing high-quality policy analysis by undergraduates at the Claremont Colleges remains constant. Written policy analysis will never be a panacea for the problems of our time. That said, the myriad topics in this issue, and the diverse frameworks through which our writers explore the topics, showcase the unparalleled value of a liberal arts education, not only in identifying policy predicaments but also in prescribing pragmatic solutions.

Look no further than the first piece in this issue, by Dannhi Nguyen (PO '27), which examines the decades-long failure to ratify the Equal Rights Amendment (ERA) to the Constitution. Nguyen positions this as a symptom of a much broader problem within the United States Constitution and raises several possible remedies. Another systemic, and uniquely American problem, mass incarceration takes us to Norway–and to our next piece, by Emma Newman (PO '26). The Norwegian state, Newman argues, just might hold the key to addressing America's overreliance on prisons for addressing myriad deeply-rooted social issues. Returning stateside, Grace Zheng (PO '26) also critically examines the Constitution, specifically the prevailing "third-party doctrine" for privacy rights under the Fourth Amendment. In an increasingly digital age of mass data, Zheng calls for abandoning the woefully-outdated doctrine, but not before providing several novel alternatives. Finally, Graham Robbins (PO '27) explores the law governing the last frontier. Amid a time experts are dubbing "the outer space gold rush," international law can no longer remain ambivalent to a realm increasingly at the forefront of for-profit exploration, Robbins argues. Without a doubt, Issue 11.2 greatly expands the aperture of the CJLPP in both established and emerging fields, and I am so proud of the direction we took with this edition.

Before I conclude, I hope you briefly indulge my nostalgic side. Issue 11.2 also marks the culmination of my membership in the Journal, the only on-campus organization to which I have belonged since my freshman year at Pomona. The Journal community provided me, and many others, with an unparalleled sense of community during the yearlong campus closure due to the Covid-19 pandemic. As such, it has been a unique joy to carry on that community-building tradition as I worked my way up through journal leadership, and I harbor no reservations in passing the torch to incoming Editors-in-Chief Grace Zheng and Ari Strivastama. CJLPP's future is undoubtedly promising with them at the helm.

Now, without further ado, the writing you came for…

Sincerely,

Jon Burkart
Editor-in-Chief

POST AMENDMENT POLITY:

HOW THE EQUAL RIGHTS AMENDMENT EXEMPLIFIES THE FAILURE OF THE AMENDMENT RATIFICATION PROCESS

INTRODUCTION

Women today continue to experience many forms of pushback and gender discrimination in the workplace.[1] They are roughly four times as likely as men to say they have been treated as if they were not competent due to their gender,[2] and three times as likely as men to say they have experienced repeated small slights at work because of their gender.[3] Women are also much more likely than men to believe that a major reason for the gender pay gap is that employers treat women differently.[4] Although the Equal Pay Act and Diversity, Equity, and Inclusion (DEI) programs have combated workplace discrimination to a certain degree, this form of discrimination is still commonplace, and the pay gap has barely narrowed since the 90s.[5][6] Gendered-based workplace discrimination is one of the many problems that the proposed Equal Rights Amendment (ERA) would have combated if it was successfully adopted into the Constitution. However, as exemplified by attempts to ratify the ERA for nearly a hundred years, the amendment ratification process is outmoded.

The ERA's long fight to eradicate gender discrimination highlights a larger issue: can we amend the Constitution in the 21st century? This paper contends that the Equal Rights Amendment exemplifies the outdated structure of the ratification process. One could never see the ratification of an amendment ever again due to the post-amendment polity we are in. Section I outlines the history of the ERA and its contents. Section II discusses the constitutional ratification process and how it has affected the ERA's ratification or lack thereof. Section III discusses the legal viability of the amendment. Section IV discusses the in-depth controversies of the amendment ratification process. Section V discusses the concept of a "frozen" Constitution and potential solutions. Section VI concludes the paper with an outlook on the post-amendment polity.

I. THE HISTORY OF THE EQUAL RIGHTS AMENDMENT

On July 13, 2023, Kirsten Gillibrand reintroduced the Equal Rights Amendment (ERA) into the U.S. House of Representatives with the ERA Now Resolution,[7] which would certify the ratification of the ERA into the Constitution. Virginia was the last state to ratify in 2020,[8] meeting the requirement of thirty-eight states to adopt the amendment into their state constitutions.[9] However, due to the increasing bipartisan polarization in U.S. Congress and legal uncertainties, the Joint Resolution has yet to move forward in the congressional process.[10]

Prior to Representative Gillibrand's bill, the ERA had a lengthy history of deadline extensions and legal queries. The ERA was first proposed to Congress in 1923,[11] led by suffrage movement leader Alice Paul.[12] Paul moved

1 Isabela Salas-Batch, *Ending Discrimination and Harassment at Work*, Center for American Progress, (March 14, 2024), https://www.americanprogress.org/article/playbook-for-the-advancement-of-women-in-the-economy/ending-discrimination-and-harassment-at-work/#:~:text=The%20problem,which%20tends%20to%20be%20underreported, (last visited April 20, 2024).

2 Kim Parker, Cary Funk, *Gender discrimination comes in many forms for today's working women*, The Pew Research Ctr., (December 14, 2017), https://www.pewresearch.org/short-reads/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/, (last visited April 19, 2024).

3 *Id.*

4 Carolina Aragão, *Gender Pay Gap in U.S. hasn't changed much in two decades*, The Pew Research Ctr., (March 1, 2023), https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/, (last visited April 19, 2024).

5 Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56., 1963.

6 *See*, Aragão, *supra* note 4.

7 S.J. Res. 39, 118th Cong. (2023).

8 Ratifying the Equal Rights Amendment to the Constitution of the United States, H.J. Res. 1, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

9 U.S. Const. art. V.

10 *See* S.J. Res. 39 A joint resolution expressing the sense of Congress that the article of amendment commonly known as the "Equal Rights Amendment" has been validly ratified and is enforceable as the 28th Amendment to the Constitution of the United States, and the Archivist of the United States must certify and publish the Equal Rights Amendment as the 28th Amendment without delay., Congress.gov, https://www.congress.gov/bill/118th-congress/senate-joint-resolution/39?q=%7B%22search%22%3A%22equal+rights+amendment+equal+rights+amendment%22%7D&s=2&r=1, (last visited December 4, 2023).

11 H.J. Res. 75, 68th Cong. (1923).

12 *See Equal Rights Amendment*, Alice Paul Inst., https://www.

quickly after the 19th Amendment was ratified to ensure that the ERA would be included in the United States Constitution because she believed that equality for women could not be established without it.[13] Paul also advocated for the 19th Amendment but continued to advocate for the ERA as the 19th Amendment did not ensure equality. It only gave women the right to vote, but did not ensure broader legal protections against gender discrimination for all women in the United States.

The first proposed amendment written by Paul read: "Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction."[14] The 1923 proposal did not make much progress in Congress.[15] No states moved forward to ratify it.[16] Paul then reintroduced and rewrote the ERA so it would align with legislation that was recently passed: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[17]

In the 1950s, both Democrats[18] and Republicans[19] showed support for the ERA by including it in their party platforms. Some women believed that it wouldn't go far enough.[20] Eleanor Roosevelt contended that the ERA "was impractical and ignored political and social realities of sexism and, particularly, the everyday experience of working women."[21] Regardless of numerous oppositions, the National Organization for Women disrupted hearings of the U.S. Senate Subcommittee on Constitutional Amendments in February 1970 and demanded that the ERA be heard in Congress.[22] Martha Griffiths, U.S. House Representative from Michigan, reintroduced the ERA to Congress on January 26, 1971.[23] This version of the ERA had three sections: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex. Sec. 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article. Sec. 3. This amendment shall take effect two years after the date of ratification."[24]

The final version of the ERA was passed by the House on October 12, 1971 and the Senate on March 22, 1972,[25] before being sent to the states for ratification.[26] However, as of December 2023, the ERA has yet to be ratified into the Constitution.

Recently, there has been a resurgence of interest in the amendment. In 2018, a record number of women not only ran but won elections.[27] More women in legislatures means more opportunities for the introduction of ERA legislation to support ratification efforts.[28] The 2017 "Me-Too" movement allowed women to bring their experiences into discussions and encourage the ratification of ERA,[29] as the amendment aligns with the movement's purpose. With the rise of technology and social media, it is also becoming easier to mobilize support for political causes.[30]

Still, the delay of the ratification of the ERA is a pressing issue, as illuminated by recent Supreme Court decisions. In the Court's *Dobbs v. Jackson Women's Health Organization* decision to restrict abortion rights,[31] there was no federal judicial standard for the court to reference in the opinion. In the decision, the Court contended that nowhere does the Constitution give the right to an abortion. If ratified, the ERA would provide a federal judicial standard to allow women to have the right to abortion.[32] If the ERA was enacted, restrictions on abortion access would fall under law that "perpetuate[s] harmful and discriminatory gender stereotypes that limit equal participation in society,"[33] and thus be unconstitutional. Former Associate Supreme Court Justice Ruth Bader Ginsburg stated that stereotypes made women out to be " the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution. Those views are no

alicepaul.org/equal-rights-amendment-2/ (last visited December 4, 2023).

13 *Id.*

14 *See supra* note 7.

15 Thomas Neale, Cong. Res. Serv., R42979, The Proposed Equal Rights Amendment: Contemporary Ratification Issues 9 (2019), https://sgp.fas.org/crs/misc/R42979.pdf.

16 *Id.*

17 *See supra* note 7.

18 *See, e.g.*, John Wooley, Gerhard Peters, 1944 Democratic Party Platform, The Am. Presidency Project, https://www.presidency.ucsb.edu/documents/1944-democratic-party-platform, (last visited Decermber 4, 2023).

19 *See, e.g.*, John Wooley, Gerhard Peters, 1956 Republican Party Platform, The Am. Presidency Project, https://www.presidency.ucsb.edu/documents/republican-party-platform-1956, (last visited Decermber 4, 2023).

20 *Eleanor Roosevelt and Women's Rights*, Nat'l. Park Service, https://www.nps.gov/articles/eleanor-roosevelt-and-women-s-rights.htm (Last visited June 25, 2024).

21 *Id.*

22 *See Chronology of the Equal Rights Amendment*, 1923-1996, Nat'l. Org. For Women, https://now.org/resource/chronology-of-the-equal-rights-amendment-1923-1996/#:~:text=of%20the%20ERA.-,1970,ERA%20under%20Senator%20Birch%20Bayh, (last visited December 4, 2023).

23 *See*, H.J. Res. 208, 92nd Cong, (1971).

24 *Id.*

25 *See Martha Griffiths and the Equal Rights Amendment*, Nat'l Archives, https://www.archives.gov/legislative/features/griffiths, (last visited December 4, 2023).

26 *Id.*

27 *Press Release, Results: Record Number of Women Elected to State Legislatures Nationwide*, Ctr. For Am. Women & Pol., (Jan. 8, 2019), http://cawp.rutgers.edu/sites/default/files/resources/press-release-state-legislatures-results-2018.pdf.

28 *See, e.g.*, Deborah Machalow, *The Equal Rights Amendment in the Age of #MeToo*, 13 DePaul J. for Soc. Just. 31 (2020) ("Additionally, more women are serving in elective office than ever before, meaning they have a more meaningful say in policy and legislative priorities.").

29 *Id.* at 33.

30 *Id.* at 21.

31 Dobbs v. Jackson Women's Health Org., 597 U.S. (2022).

32 *Id.*

33 *ERA and Abortion Talking Points*, Columbia L. Sch. Ctr. for Gender & Sexuality Law, https://gender-sexuality.law.columbia.edu/content/era-and-abortion-talking-points#!#_edn3, (last visited December 4, 2023).

longer consistent with our understanding of the family, the individual, or the Constitution."[34]

Some opponents of the ERA contend that the 14th Amendment already provides a basis for gender equality in the Constitution.[35] However, protection for women under the 14th Amendment is not necessarily guaranteed. The 14th Amendment, however, does guarantee the "equal protection of the laws," and was applied in 1971 in *Reed v. Reed*,[36] a Supreme Court case that ruled that the Idaho Probate Code's preference of males over females when persons of the same entitlement class apply for appointment as administrator of a decedent's estate violated the Equal Protection Clause of the 14th Amendment.[37] However, some do not interpret the 14th Amendment as one that provides protections against gender discrimination. Former Associate Supreme Court Justice Antonin Scalia noted that the 14th Amendment does not necessarily prohibit sex discrimination.[38] Thus, the 14th Amendment cannot definitively provide protections for sex discrimination, stressing the importance of the ERA.

II. ROAD TO RATIFICATION

The current process for ratification is lengthy. An amendment has to pass both the House and Senate by a two-thirds vote and then ratified by three-fourths of states or thirty-eight states.[39] The ratification process for the ERA, in particular, has been complex and prolonged. Two hours after the Senate confirmed the vote in favor of the ERA, Hawai'i became the first state to ratify the amendment.[40] Twenty-two state legislatures had ratified the ERA in 1972, while eight more ratified it in 1973. In 1978, former President Jimmy Carter granted a deadline extension to 1982 after a joint resolution passed both the House and Senate. However, by the date of the deadline extension, there were still not enough ratified state constitutions.

Furthermore, five states also revoked their ratifications by passing bills through their state legislatures to remove the amendment. For example, Kentucky's legislature introduced rescission legislation and rescinded their ratification of the ERA on March 16, 1978.[41] STOP ERA movements were prevalent in the nation at this time, leading to widespread calls for state governments to revoke the ERA from their state constitutions.[42] These movements argued that traditional gender roles would be eradicated if the ERA were ratified. For example, they claimed there would be gender-neutral bathrooms, women would be able to be drafted in times of war, and other laws that benefit women more than men would be overturned.[43] These movements were convincing enough that four other states also ended up revoking the ERA ratification.[44] Unfortunately, the widespread federal support indicated by the thirty-three other states that kept the ERA in their state Constitutions was not enough to ratify the ERA into the Constitution. The rescission of the ERA in these states is just another example of obstacles an amendment can face, as this ultimately led to not enough states ratifying the ERA by the 1982 deadline.

It was only after the ratification deadline that some states began to ratify the ERA, contributing to a resurgence of interest in it. Nevada ratified the ERA in 2017 and became the first state to do so since 1977.[45] Illinois ratified the ERA into its state constitution in 2018,[46] and Virginia was the 38th state to approve it in 2020.[47] After Virginia ratified the amendment, meeting the state ratification minimum, it appeared as though there was hope for ERA to become included in the federal Constitution. However, numerous legal considerations questioned the validity of these recent states' ratifications.

III. PROBLEMS WITH RATIFICATION

From the complicated history of the ERA suggests that the the ratification process makes amending the Constitution difficult. Examining the history of the ERA's ratification has highlighted some significant issues.

The most significant challenge that the ERA faced was that not enough states had ratified it by the deadline. However, enough states ratified it after the deadline, which some argue should allow it to be ratified into the Constitution. One argument that validates these post-deadline ratifications is the 1992 ratification of the Madison Amend-

34 Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg dissenting).
35 U.S. Const. amend. XIV.
36 Reed v. Reed, 404 U.S. 71 (1971).
37 *Id.*
38 Paul Courson, S*calia comments show need for new rights amendment, backers say*, The Cable News Network, (January 6, 2011, 5:33 P.M.), https://www.cnn.com/2011/POLITICS/01/06/era.scalia/index.html.
39 U.S. Const. art. V.
40 An Act Proposing an Amendment to Article I of the Constitution of the State of Hawaii.
41 See Mary Russell, *ERA Deadline Extension Voted by House*, 233-189, The Wash. Post, (August 16, 1978), https://www.washingtonpost.com/archive/politics/1978/08/16/era-deadline-extension-voted-by-house-233-189/715fdc63-4ca1-469c-84a2-6817bb94c10a/.
42 *See* 10 Reasons to Oppose the Equal Rights Amendment, The Eagle Forum, https://eagleforum.org/topics/era/10-reasons-to-oppose-equal-rights-amendment.html, (last visited December 4, 2023).
43 *Supra* note 15.
44 *Id.*
45 Colin Dwyer, Carrie Kaufman, *Nevada Ratifies The Equal Rights Amendment ... 35 Years After The Deadline*, Nat'l. Pub. Radio, (March 21, 2017, 3:34 P.M.), https://www.npr.org/sections/thetwo-way/2017/03/21/520962541/nevada-on-cusp-of-ratifying-equal-rights-amendment-35-years-after-deadline.
46 Provides for the ratification of the proposed equal rights amendment to the United States Constitution, S.J. Res. 4, 2018 Gen. Assemb., Reg. Sess. (Il. 2018).
47 *See* Parker and Funk*, supra* note 2.

ment.[48] The Madison Amendment was originally proposed to Congress in 1789, meaning that Congress gave the amendment 203 years to be ratified.[49] Similar to the ERA, when the Madison Amendment was ratified, there were also some questions about its validity, as it had taken a lengthy amount of time to ratify it, or within a sufficiently contemporaneous time frame to reflect a national consensus of the amendment.[50] In Dillon v. Gloss,[51] the Supreme Court noted in Article V of the Constitution (which discusses the amendment ratification process),[52] "that the ratification must be within some reasonable time after the proposal."[53] Furthermore, The William & Mary Journal of Race, Gender, and Social Justice asserted how this ratification "suggests amendments [...] which do not contain a textual time limit remain valid for state ratification indefinitely."[54] Since there was no textual time limit or deadline set for the Madison Amendment—the text of the ERA does not establish a time limit for itself—the ratification of the Madison Amendment could allow for the ERA to be ratified.[55] However, wide acceptance of the Madison Amendment by Congress, the Archivist, and the Supreme Court suggests that an amendment does not need to be acted on in a contemporaneous time frame. Many of these governmental institutions did not question the extended time frame that the Madison Amendment had taken to be ratified. It remains unclear whether post-deadline ratifications are legal as there is no clear standard or written legislation that provides for the procedure in this type of situation.

Additionally, the legal status of state ratification rescinding is unclear. Neither the Supreme Court nor Congress determined whether or not the five states' rescission legislation was legal. However, Congress has the authority to overrule ratification deadlines. In *Coleman v. Miller*,[56] the Court asserted that Congress has the responsibility of imposing time limits on ratification, not the judiciary, because time limits were a political question.[57] Thus, Congress should recognize that post-deadline ratifications are legally viable. The case of South Dakota's sunset clause also brings up an important problem of federalism. The South Dakota legislature passed a "sunset" amendment to its 1973 ratification of the ERA.[58] This meant that their ratification of the ERA would expire if the required three-fourths of states did not ratify by the 1979 deadline. Again, the legality of these "sunset" provisions is unclear, and it brings up the issue of whether Congress is allowed to overturn states' "sunset" provisions since they do have the authority to overrule ratification deadlines.

Furthermore, there is unclear constitutional guidance. Article V of the Constitution states:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."[59]

There is little guidance on what to do when it comes to ratifying an amendment besides the two-thirds requirements of both chambers of Congress to approve the amendment and the ratification of the amendment into three-fourths of states' constitutions. It seems that Article V is insufficient for modern-day amendments as we look at the case of the ERA. The Constitution did not address many of the obstacles the ERA faced, and there is a lack of procedural legislation to guide how we should determine a fair and legal process of amendment ratification. Overall, the legality of ratification amendment obstacles, as demonstrated by the ERA is unknown, but they prove the broader point that the current amendment ratification process is difficult, and requires much time.

IV. OTHER ISSUES

Bureaucracy is also an obstacle in the process. Virginia and Illinois filed lawsuits against the Archivist of the United States for not publishing the ERA as part of the Constitution. According to 1 U.S.C. § 106b, the Archivist is required by law to publish the amendment when official notice is received that the amendment is adopted.[60] Both states ended up being dismissed by the lower court, and the Court of Appeals also affirmed the lower court's decision.[61] This brings up a federalism issue as it demonstrates how, at the state level, the amendment has been fairly successful.

48 *See supra* note 34, at 24.
49 *See supra* note 30, at 114.
50 Dillon v. Gloss, 256 U.S. 368 (1921).
51 *Id.*
52 *See* Parker and Funk *supra* note 2.
53 *Supra* note 48.
54 *See supra* note 40, at 114.
55 *Id.*
56 Coleman v. Miller, 307 U.S. 433 (1939).
57 *Id.* at 450, 452, 453.
58 S.J. Res. 2, 1979 Leg., 54th Sess. (Sd. 1999).
59 U.S. Const. art. V.
60 *See* 1 U.S.C. § 106b ("Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.").
61 Virginia v. Ferriero, 525 F.Supp.3d 36 (D.D.C. 2021); *see also* Illinois v. Ferriero, 60 F.4th 704 (D.C. Cir. 2023).

However, at the national level, the amendment's legality is still questionable.

Moreover, partisan polarization is ever prevalent in Congress. Political scientist Steven Smith describes Congress as a "troubled institution"[62] because more Republicans are becoming right-leaning while Democrats move further left.[63] Republicans and Democrats are ideologically farther apart than they have ever been in the past fifty years.[64] Because of partisan polarization, it is unlikely that legislation related to amendments will be passed. Researchers have found that because of polarization, the policy process is becoming increasingly unstable and is being characterized by slow periods of inaction.[65]

V. A CONSTITUTIONAL AMENDMENT-LESS FUTURE AND POTENTIAL SOLUTIONS

The ERA exemplifies contemporary difficulties in the process of amending the Constitution. There have been around 12,000 attempts to amend the Constitution, and only twenty-seven of those attempts have been successful, demonstrating a success rate of 0.002%.[66] Law Professor Richard Albert describes the Constitution as "frozen" and unable to be amended.[67] Albert points to two reasons for this: "The supermajority approvals required for an amendment create a formidable labyrinth that is hard to navigate. Second, the current dynamics of constitutional politics have thwarted coordination between the national and state governments and between the two national political parties."[68] The supermajority approvals that the ERA had to go through were made complex by the legality issues revolving around deadlines and rescinding of state ratifications. Moreover, attempts to introduce the ERA back into Congress have shown little to no effectiveness in progressing further into ratification.

Although the future of the ERA is unknown, the more significant issue is that we may not live to see another constitutional amendment. Some potential resolutions have been presented, such as presenting bills to Congress, like Kirsten Gillibrand did when introducing the ERA Now bill,[69] or amending Article V of the Constitution to address legal loopholes to clear up legal questions about "sunset" clauses and ratification deadlines, and other potential issues.[70] However, these solutions are unlikely to be successful because they require legislative action. Successful legislative action is not likely because of partisan polarization that afflicts our national government.

There is one solution that may be promising: a constitutional convention. Legal scholars have called for a potential constitutional convention focused on "amending how we amend our Constitution." Article V of the Constitution states that two-thirds of states may apply for a constitutional convention. An "Article V Convention" has never happened, as all twenty-seven current amendments of the Constitution were voted on by a two-thirds vote of both houses of Congress. This solution could change the whole Constitution, altering how the American government operates. Larger changes would become possible if amending the Constitution became easier.

CONCLUSION

The current state of the ratification process has slowed progress for ever-pressing American issues, like gender equality, as illustrated by the challenges that the ERA has faced. There is hope, but it seems as if the only viable solution is to change the ratification process. In broader terms, the issue of the ERA's ratification could address an opening towards an overhauled Constitution. The post-amendment polity we live in has only exemplified the national government's resistance to making significant changes, and how unclear constitutional guidance has complicated the legality and procedural workings of our nation's law. It is unclear what direction our nation will take as it pertains to the Constitution, but the current process raises questions as to how effective our democracy truly is and the consequences of an outdated mode of law.

62 *See* Steven S. Smith, Jason M. Roberts and Ryan J. Vander Wielen, *The Troubled Congress* (2012) ("At the moment, Congress appears handcuffed by deep partisan polarization, seems to thwart the will of the people in failing to act on important problems.")

63 *See, e.g.,* Drew DeSilver, *The polarization in today's Congress has roots that go back decades*, The Pew Research Ctr., (March 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/, ("Both parties have moved further away from the ideological center since the early 1970s. Democrats on average have become somewhat more liberal, while Republicans on average have become much more conservative.").

64 *See supra* note 63.

65 Francisco Tutella, *Political polarization may slow legislation, make higher-stakes laws likelier*, Penn. St. Univ. (January 26, 2024), https://www.psu.edu/news/research/story/political-polarization-may-slow-legislation-make-higher-stakes-laws-likelier/.

66 Drew DeSilver, *Proposed amendments to the U.S. Constitution seldom go anywhere*, The Pew Research Ctr., (April 12, 2018), https://www.pewresearch.org/short-reads/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/.

67 Symposium, *The World's Most Difficult Constitution to Amend?*, 110 Calif. L. Rev. 2005 (2022).

68 *Id.*

69 *See supra* note 8.

70 *Id.*

PUNISHMENT AND REHABILITATION:

WHY THE U.S. SHOULD ADOPT THE NORWEGIAN STYLE OF PRISONS

INTRODUCTION

Since the 1980s, a period defined by mass incarceration, the United States has built the world's largest prison system.[1] This prison system operates on the idea that criminals deserve to be punished harshly in order to prevent future criminal activity and make the country safer. However, as the nation has locked up an increasing number of criminals, the country's crime rate, as well as the rate of re-incarceration, or recidivism, has not decreased.[2] On the opposite side of the world lies Norway's prison system, Kriminalomsorgen, which is widely stated to be the most humane prison system in the world.[3] Essentially, what sets Norway's prison system apart is its radical and complete focus on rehabilitation rather than punishment. This approach has resulted in low recidivism rates, lower crime rates, and an overall positive relationship between the Norwegian people and their prisoners.[4]

In this paper, I will argue that the United States should shift its prison system to one that focuses on rehabilitation instead of punishment, focusing on the ways in which Norway has proven this model to be effective. In the first section of this paper, I will highlight why the United States prison system is so ineffective, explaining its strategy in approaching crime and its results. Then, I will explain how Norway's prison system works and the efficacy of its humanizing approach to crime. Afterward, I will point out the structural and political barriers to adopting Norway's prison system, emphasizing the reasons why America's approach to crime has lasted despite its nonsensical nature. In the last section of the paper, I will explain how American politicians, judges, and citizens could overcome these barriers and adopt a version of a rehabilitation-focused prison system.

I. THE AMERICAN PRISON CRISIS

In the past, the American prison system had a central goal: to rehabilitate prisoners into functioning members of society.[5] However, recently, instead of operating on the idea that "prisons ought to serve as houses of reformation where inmates could be rehabilitated and prepared for a return to society," incarceration is now operated with the goal of "deterrence" and "incapacitation."[6] This shift has resulted in three major side effects: an increase in prisoners, a culture of punishment within prison systems, and a decrease in compassion for prisoners. "Tough on crime" and "law-and-order" rhetoric became increasingly influential over the last few decades in response to public fear of felons and "super-predators."[7] As a result, politicians have passed laws, and criminal justice professionals have enforced these laws, with the goals of punishing minor crimes more harshly, lengthening prison sentences, decreasing prison reform initiatives, and making supermax prisons more widely used.[8] These laws and policies have created the modern reality, in which 716 out of every 100,000 people were housed in the American prison system as recently as 2013.[9]

Within these prisons, inmates are treated harshly, with guards being legally sanctioned to treat prisoners with little to no regard for their physical well-being. One of the most egregious examples of mistreatment in prisons is the use of solitary confinement, where prisoners can be forced into isolation for up to 23 hours a day for reasons that range from a form of punishment to a vague concern for the safety of the individual or the facility itself.[10] This practice can be extremely psychologically damaging to prisoners because of

1 Michael J. Lynch, Big Prisons, Big Dreams: Crime and the Failure of America's Penal System (Raymond J. Michalowski ed., 2007), https://www.jstor.org/stable/j.ctt1hch85p.
2 *Id.*
3 Ryan Alexander Berger, *Kriminalomsorgen: A Look at the World's Most Humane Prison System in Norway*, SSRN J, (2016), https://www.ssrn.com/abstract=2883512.
4 *Id.*
5 Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 L. & Soc. Rev. 33 (2011).
6 *Id.*
7 *Id.*
8 *Id.*
9 Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 Emory Int'l. L. Rev (2017).
10 Craig Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. of Criminology 285 (2018).

the ways that they both socially isolate prisoners and utilize sensory deprivation.[11] Moreover, the prison staff can extend a prisoner's time in solitary if they "shout or scream," "hurt [them]selves by refusing to eat or mutilating [their] body," or "complain to officers or say anything menacing or inappropriate."[12] Essentially, instead of trying to help prisoners when they express signs of distress in a situation that is absolutely warranted, prison guards react by prolonging their suffering. Through these harmful measures, the justice system effectively dehumanizes inmates, separating them from their fellow inmates and treating them no better than animals.

Inmates also face abuse in the carceral system not only at the hands of their fellow prisoners, but also at the hands of prison guards. This state-sanctioned abuse can manifest itself as beatings, sexual abuse, and murder.[13] However, prison abuse can also take the form of depriving inmates of proper medical care, sanitation, and nutrition. Through these conditions, prisons effectively become unsafe for prisoners, as they are continuously deprived of safety and security.

Moreover, media outlets, politicians, and citizens have embraced the idea that criminals are an "other," meaning that they don't deserve the same rights, freedoms, or sympathies that other Americans do.[14] This has led to American citizens ignoring the inhumane treatment of prisoners, with their concerns lying squarely with the desire to protect themselves. Instead of arguing for the humanity of the prisoners, politicians and other policy-makers use the apathy of their constituents to make prison life harsh, terrifying, and practically unlivable.

Through the American prison system, the United States government has created a culture of punishment in which prisoners are labeled as "separate and different from the rest of society."[15] Placed in situations in which they are constantly dehumanized and demonized, inmates are given no incentive to change their behavior. Instead of receiving encouragement, prisoners are subject to treatment that causes them to feel fear, anxiety, anger, helplessness, and depression, none of which are conditions conducive to law-abiding behavior.[16] Moreover, because they are not given the tools to succeed, prisoners often resort to criminal activities once they are released. Lastly, the more society turns its back on criminals, the more they feel like they are separate from it, and therefore do not need to abide by its rules. After all, why would someone who was rejected by society, and is already treated like a criminal, care to act like a law-abiding citizen?

These conditions lead to high rates of recidivism in America. According to the U.S. Department of Justice, in 2012, the United States's 1-year recidivism rate was 36.8%, 2-year recidivism rate was 52.9%, 3-year recidivism rate was 61.5%, 4-year recidivism rate was 67.0% and 5-year recidivism rate was 70.8%.[17] These numbers clearly represent a failure of the American prison system to reform its criminals. And, with the country's number of housed prisoners still being abnormally high, these harsh conditions clearly do not deter citizens from committing crimes; instead, they encourage them to continue committing them after prison. These facts, along with the horrors that take place in the U.S. prison system, all point to an undeniable conclusion: America's prisons have failed both the prisoners they house and the community at large.

II. THE TRIUMPH OF NORWEGIAN PRISONS

In contrast to America's large prison population, Norway's is unusually small, with only 72 out of every 100,000 people being housed in prisons. This number is 10 times smaller than the US's. Moreover, their rates of violent crime are much lower, with homicides occurring at a rate of .9 per 1,000 people, as opposed to the U.S., where there is a rate of 7.1 homicides per 1,000 people.[18] Perhaps the most startling example of the success of Norwegian prisons is the nation's 2-year recidivism rate, which, according to the University College of Norwegian Correctional Service, was 17.6% in 2018.

Many factors contribute to the success of the Norwegian prison system. The factor that perhaps most differentiates Norwegian prisons from United States prisons is that in their effort to rehabilitate prisoners, they use a principle called normalization. Normalization's goal is to "allow prison life to resemble life in the outside world."[19] One way that the Norwegian government has normalized prisons is through the creation of open prisons, or low-security prisons, where movement is less restricted both inside and outside the prisons, and inmates are given a degree of "autonomy and trust."[20] The government also normalizes its prisons

11 *Id.*
12 Bryan Stevenson, Just Mercy: A Story of Justice and Redemption (2014).
13 *Id.*
14 Leigh E. Rich & Michael A. Ashby, *Crime and Punishment, Rehabilitation or Revenge: Bioethics for Prisoners?*, 11 Bioethical Inquiry 269 (2014).
15 Tina Bloom & G. A. Bradshaw, *Inside of a Prison: How a Culture of Punishment Prevents Rehabilitation*, 28 Peace & Conflict: J. of Peace Psychology 140 (2022).
16 *Id.*
17 Lynch, *supra* note 1.
18 Labutta, *supra* note 9.
19 Meagan Denny, *Norway's Prison System: Investigating Recidivism and Reintegration*, 10 Bridges: A J. of Student Research (2016), https://digitalcommons.coastal.edu/bridges/vol10/iss10/2.
20 Kristian Mjåland, Julie Laursen, Anna Schliehe, Simon Larmour, *Contrasts in freedom: Comparing the experiences of imprisonment in open and closed prisons in England and Wales and Norway*, 20 Eur. J. of Criminology, https://journals.sagepub.com/doi/epub/10.1177/14773708211065905.

by allowing prisoners to choose their own jobs in prisons and have competitive wages.[21] This is highly different from American prisons, in which prisoners are often forced to work with little to no pay in jobs that are given against their will.[22] With this money, prisoners are able to choose which items to purchase within prisons. Finally, prisoners are provided with multiple rooms, workout equipment, materials to study, their own televisions, laptops, and access to prison libraries, depending on their circumstances.[23] Prisoners are also allowed to go to a grocery store, have furniture that resembles the outside, and have access to daily items that other prisons often view as potential weapons. Essentially, through this process of normalization, prisons are designed to humanize inmates, providing them with independence and as much connection to life outside prison as possible. In theory, this process allows prisoners to preserve their sanity and dignity while maintaining their connection to a world they will eventually return to.

Another aspect of the Norwegian prison system that contributes to their rehabilitative culture is their "import model" in which they bring professionals from the outside world to work in prisons.[24] The idea behind this is that prison services "should be offered by the same organizations as society as a whole."[25] The goal of this process is to make the transition back into regular society as smooth as possible and to make rehabilitation "a part of the community's job" in an effort to reduce apathy and fear toward prisoners.[26] The import model is the most extensively used in the educational services offered to prisoners, with educators coming from outside of prisons to teach inmates. It is also used by other prison staff, like doctors and guards.

All of these efforts work toward a greater purpose: to reduce the "us versus them" mentality, where prisoners view themselves as different from society because of the way society rejects them.[27] After all, prisoners are, at least in theory, more likely to want to follow the rules of society if they feel welcomed by it, rather than rejected by it. The last major differentiator between the United States prison system and Norway's is the length of their prison sentences. According to the U.S. Department of Justice, the average length of time served by state prisoners in 2018 was 2.7 years.[28] The average length of imposed prison sentences in Norway, however, was consistently seven months from 2018-2022.[29] Even more specifically, one in seven U.S. prisoners are currently serving life sentences, with the number totaling 1.4 million.[30] However, in Norway, not a single member of the prison population is serving a life sentence, as the highest sentence one can receive is 21 years.[31] With less time in prison, these prisoners are less isolated from the outside world, allowing them to more easily re-enter society once they are released.

III. STRUCTURAL BARRIERS

As I have outlined, the Norwegian prison system is both more humane and more successful at reducing crime than its American counterpart. Logically, our country should follow Norway's example and adopt a similar prison system.

There are many reasons that America's prison system has only grown in size and harshness in the last 50 years, despite the plethora of evidence that proves the irrationality of such an approach. One of the most powerful factors in resisting prison reform is the presence of interest groups who have little to no interest in prison reform. The most powerful of these groups are private corporations that operate and own prisons, prison officer unions, the bail industry, county clerks, legislators from rural communities that house prisons, and state agencies.[32] Specifically, private prisons spent over 25 million dollars on lobbying from 1989 to 2015, which can sway legislatures into passing laws that are adverse to prison reform and friendly toward longer sentences and mass incarceration.[33] All of these groups have a financial interest in keeping prisoners behind bars regardless of the consequences, and they use any resources they have — power, money, influence — to maintain this status quo.

The second barrier to adopting such a policy is the simple reality of the political and economic systems in the United States as opposed to Norway. Penal systems often operate with an awareness of economic inequality, and in Norway, the reduction of economic inequality is a major priority.[34] Their government and their citizens believe that a

21 Denny, *supra* note 19.
22 Neveen Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 Va. J. Soc. Pol'y & L. 65 (2019).
23 Denny, *supra* note 19.
24 Torfinn Langelid, *The Sharing of Responsibility in the Rehabilitation of Prisoners in Norway: The Import-Model in Theory & Practice*, 50 J. of Correctional Educ. 52 (1999).
25 *Id.*
26 Denny, *supra* note 19.
27 Labutta, *supra* note 9.
28 *Time Served in State Prison 2018*, Bureau of Just. Statistics, https://bjs.ojp.gov/library/publications/time-served-state-prison-2018 (last visited Apr 2, 2024).
29 Ragnar Kristoffersen, *Correctional Statistics of Denmark, Finland, Iceland, Norway and Sweden 2018 - 2022*, 61 (2024), https://krus.brage.unit.no/krus-xmlui/handle/11250/3113788 (last visited Apr 2, 2024).
30 Ashley Nellis, *America's Enduring Reliance on Life Imprisonment*, The Sentencing Project (2021), https://www.sentencingproject.org/reports/no-end-in-sight-americas-enduring-reliance-on-life-sentences/ .
31 Labutta, *supra* note 9.
32 Katherine Beckett, *The Politics, Promise, and Peril of Criminal Justice Reform in the Context of Mass Incarceration*, 1 Ann. Rev. of Criminology 235 (2018).
33 Jacob F Israel, *For-Profit Prisons: How Lobbying Has Affected the Way America Houses Prisoners*.
34 Labutta, *supra* note 9.

"good social policy is the best criminal policy."[35] Therefore, they offer their prisoners employment opportunities, education opportunities, great housing opportunities, addiction treatment services, debt counseling, a guaranteed income, and proper medical services. In the United States, our citizens and government care far less about economic equality, and even less about providing social services to criminals. After all, services like housing accommodations and a guaranteed income aren't even offered to ordinary citizens, never mind current and former incarcerated individuals.

Lastly, Americans have a major concern about government costs, and the cost of humane prisons is not cheap. For example, more than $93,000 is spent on each inmate at Halden, which is considered to be Norway's most humane prison.[36] In contrast, only $31,000 is spent on the average American prisoner. With an already negative mentality toward prisoners, American citizens and legislators are unlikely to want to increase their spending on citizens that they already fear. This change is even less likely when economic times are tough, as states often reduce their spending on each prisoner when they are economically struggling.[37]

IV. OVERCOMING BARRIERS

Fortunately, these barriers are not insurmountable. One of the most promising signs that prison reform is possible is that most Americans believe that rehabilitation is a better system than punishment for reintegrating prisoners into society.[38] According to the ACLU, 91 percent of Americans believe that the criminal justice system has "problems that need fixing," 71 percent believe "it is important to reduce the prison population in America," two in three Americans "would be more likely to vote for an elected official if the candidate supported reducing the prison population and using the savings to reinvest in drug treatment and mental health programs," and 71 percent of American believe that incarceration is not necessarily productive to public safety because "sending someone to prison for a long sentence increases the chances that he or she will commit another crime when they get out because prison doesn't do a good job of rehabilitating problems like drug addiction and mental illness."[39]

With a positive mentality toward prison reform, Americans are likely to support small moves toward prison reform, specifically when they are given the opportunity to vote on reform initiatives. While legislatures may be influenced by their pocketbooks and the gridlock inherent in the political system, voters, when given the opportunity, have shown support "for some progressive ballot initiatives" related to prison reform, suggesting that "this mechanism may be a promising tool for any such movements that do materialize in states in which the ballot initiative process is available." Therefore, change can be achieved if voters propose widely supported measures like efforts to rehabilitate prisoners, give prisoners contact with the conditions of the outside world, and lower sentencing guidelines.

Secondly, the financial barriers to prison reforms can easily be overcome if there is a focus on reducing the prison population. After all, the largest reason why the prison system is expensive in the United States is because there are simply many people that the state has to financially provide for in prisons. If the United States were to adopt lower prison sentence structuring, specifically greatly reducing the life-in-prison sentencing it doles out, and lower their recidivism through Norway-like rehabilitation methods, their prison population would almost certainly drop. With less money tied up in housing such a large population of prisoners, the state would have more money to allocate to each prisoner, which could allow their treatment in prisons to drastically improve. After all, "if the incarceration rate in America were adjusted to that of Norway, the United States could spend the same amount per prisoner as Norway and save more than $45 billion per year."[40] While it is difficult to argue that America's incarceration rate would ever drop to Norway's, considering the politics and crime rate of the U.S., with positive steps toward prison reform, it could, at least, lower enough to moderately increase the state's spending on its prisoners.

With political pressure and knowledge of the financial benefits of prison reform, politicians would be more inclined to include prison reform measures as larger parts of their political campaigns and to advocate for more radical reform initiatives. In other words, these pressures may be enough to overcome the allure of interest group support, leading to politicians making the legislature a viable battleground for prison reform.

CONCLUSION

The United States and Norway are very different countries, with prison systems that are structurally unique and political systems that differ in a myriad of ways. However, the United States could still adopt a Norway-inspired prison system, if not one that exactly mirrors that of the

35 *Id.*
36 *Id.*
37 Beckett, *supra* note 32.
38 Denny, *supra* note 19.
39 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds, Am. C.L. Union, https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds.
40 Labutta, *supra* note 9.

Scandinavian country. After all, Norway's prison system is humane, financially reasonable, and undoubtedly effective, which are three traits that the U.S. prison system does not possess. If voters, politicians, and the U.S. as a whole want a lower crime rate and a better relationship with their prison population, they should start prioritizing prison reform and, perhaps, take a page out of Norway's book when doing so.

REVISITING THE THIRD-PARTY DOCTRINE:

SAFEGUARDING OUR RIGHT TO PRIVACY IN THE AGE OF DIGITIZATION

INTRODUCTION

Technology has revolutionized humanity's relationship with data. Not only have most physical barriers vanished, but information no longer has to be extracted. Instead, data is generated by users through online transactions, communications, and even browser searches. Though looking through someone's Google search history is drastically different from a traditional house search by police, the information that can be found is arguably even more revealing.

This is where the Constitution is supposed to step in. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] It protects civilians based on "reasonable expectations of privacy" from others, including the state. However, according to the third-party doctrine, individuals who voluntarily provide their information to third-party companies—such as banks, phone companies, and internet service providers—have no reasonable expectations of privacy under the Fourth Amendment.[2] This effectively allows law enforcement to circumvent the need for a warrant by obtaining information directly from third-party entities.

In light of shifts in data collection practices, this essay will argue that the third-party doctrine poses major threats to citizens' Fourth Amendment right to privacy, calling for a critical reassessment of the doctrine in the 21st century. First, it will introduce the cases that led to the development of the Fourth Amendment, followed by the third-party doctrine. Second, it will consider arguments for the third-party doctrine and how it fits within the larger landscape of the Fourth Amendment. Third, it will argue that new technological developments have expanded the third-party doctrine far beyond its original applications and highlight the dangers it poses to citizens' constitutional rights. Finally, it will review solutions proposed in the existing literature and their possible consequences.

I. AN OVERVIEW OF THE FOURTH AMENDMENT AND THE THIRD-PARTY DOCTRINE

To understand the motivations behind the third-party doctrine, we must first look at the Fourth Amendment. Having inherited the English tradition of the common law system, the Fourth Amendment is viewed as the constitutional embodiment of several well-celebrated British civil cases. One of these is *Semayne's Case* (1603), a case in which Sir Edward Coke of the King's Bench famously declared that "the house of everyone is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose."[3] *Semayne's Case* established the right of a homeowner to defend their home against intruders, but also the expectation for them to yield to those acting under lawful authority, such as a sheriff operating under the King's command.[4]

The decision to include the Fourth Amendment in the Constitution is thought to have arisen directly from the American colonial experience.[5] To enforce tax laws, British authorities made use of "writs of assistance," which were general warrants that gave an officer broad discretion to search and seize unspecified places or persons.[6] These illiberal warrants evoked strong resentment within American colonies and eventually contributed to the American Revolution.[7] After independence, James Madison introduced the Fourth Amendment to the First Congress in 1789 and it was ratified in 1791.[8] The Fourth Amendment directly seeks to limit the government's power to infiltrate citizens' privacy by ensuring:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

1 U.S. Const. amend. IV.
2 Grace Manning, *Alexa: Can You Keep a Secret? The Third-Party Doctrine in the Age of the Smart Home*, 56 Am. Crim. L. Rev. (2019).
3 Laura K. Donohue, *The Original Fourth Amendment*, U. Chi. L. Rev. Online (2015), https://lawreview.uchicago.edu/print-archive/original-fourth-amendment (last visited Mar 23, 2024).
4 *Id.*
5 *Id.*
6 General Warrant Law and Legal Definition, USLegal (2024), https://definitions.uslegal.com/g/general-warrant/ (last visited Apr 1, 2024).
7 Leonard W. Levy, *Origins of the Fourth Amendment*, 114 Pol. Sci. Q. 79, 79 (1999).
8 *Id.* at 100.

> issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." [9]

Initially, the Fourth Amendment was only applied to cases involving an individual's "persons, houses, papers, and effects." However, this was notably expanded in the landmark case *Katz v. United States* (1967).[10] The plaintiff, Charles Katz, was suspected of being a part of an interstate gambling operation.[11] After watching him frequently use a public payphone, agents from the FBI taped a recorder and two microphones to the outside of the booth, which allowed them to eavesdrop on Katz's side of the conversation.[12] Based on these recordings, Katz was charged with eight counts of transmitting gambling information across states.[13] In trial court, Katz's counsel argued that the recordings could not be used as evidence because his constitutional rights were violated.[14] They contended that the phone booth was a "constitutionally protected area" and that the FBI effectively performed an illegal search and seizure by placing the listening device on the booth without obtaining a warrant first.[15] Meanwhile, law enforcement argued that this phone booth was in a public space and the actions of the agents were no different from eavesdropping on a conversation taking place on a public sidewalk.[16] Both lower courts denied Katz's motion and admitted the recordings.[17]

However, the U.S. Supreme Court overturned this in a 7–1 decision for Katz. Writing for the majority opinion, Justice Potter Steward explained that both parties fixated on the characterization of the phone booth as a public or constitutionally protected area when "[t]he Fourth Amendment protects people, not spaces…what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[18] Justice Harlan's concurrence further established what would become the "reasonable expectations of privacy" rule. He argued that even individuals who use a public phone booth should be able to reasonably expect that their conversation will not be intercepted by others, which Katz certainly had the right to in this case.[19] Specifically, Justice Harlan created a two-prong test: first, a person must have an actual, subjective expectation of privacy, and second, that expectation must be one that society is prepared to recognize as reasonable.[20] As such, *Katz* not only established new standards for investigative protocols but also forced the courts to apply the Fourth Amendment to new technologies.

Whilst *Katz* clearly seeks to protect an individual's rights under the Fourth Amendment, it is heavily constrained by the third-party doctrine, which was established in *United States v. Miller* (1976). In *Miller*, the Bureau of Alcohol, Tobacco, and Firearms (ATF) thought the defendant, Mitch Miller, was carrying alcohol distilling equipment and whiskey on which liquor tax had not been paid.[21] Instead of obtaining warrants, the ATF issued subpoenas to the presidents of The Citizens & Southern National Bank of Warner Robins and the Bank of Byron, at which Miller maintained accounts.[22] They proceeded to charge Miller, who then made a pretrial motion to suppress any records relating to his bank accounts on the grounds they had been illegally seized in violation of the Fourth Amendment.[23] From law enforcement's perspective, no warrant seemed necessary; Miller did not personally own those records. Rather, they were information he voluntarily divulged to his bank.[24] Miller's request was denied in trial court but reversed by the Fifth Circuit Court of Appeals. In doing so, the Court cited *Boyd v. United States* (1886), a case in which the Supreme Court ruled that a court order could not be used to compel the plaintiff to provide their business invoices.[25]

The U.S. Supreme Court would go on to reverse the decision once more in a 6-3 decision.[26] They found that the documents subpoenaed failed both the "property" test and the "reasonable expectations of privacy" test.[27] First, it was evident that "the subpoenaed materials were business records of the banks, not respondent's private papers," and second, the checks and deposit slips concerned were "not confidential communications but negotiable instruments to be used in commercial transactions…[which] contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[28] This ruling officially established the third-party doctrine, which states that individuals who voluntarily provide their information to third-party companies lose the expectations of privacy they would otherwise have under *Katz*.

The third-party doctrine was also affirmed in subse-

9 U.S. Const. amend. IV.
10 Katz v. United States, 389 U.S. 347 (1967).
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 United States v. Miller, 425 U.S. 435 (1976).
22 *Id.*
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.*
28 *Id.*

quent cases such as *Smith v. Maryland* (1979).[29] In this case, a woman who experienced a robbery reported the incident with a description of her attacker's vehicle to the police.[30] Shortly after, she received threatening calls from a man who claimed to be her assailant.[31] From the model and make of the vehicle, the police found Smith and used a pen register at the telephone company to record the phone numbers that Smith had called from his home.[32] While Smith tried to suppress the call records, the Supreme Court held that the police use of a pen register did not constitute a search since the plaintiff "disclosed" his dialed numbers to the telephone company to connect his calls.[33] Thus, the police's actions fell under the third-party doctrine.

II. THE CASE FOR THE THIRD-PARTY DOCTRINE

First, it is important to clarify what falls under the third-party doctrine. An important differentiation to make is between the content of a record and its non-content information. For example, the content of a communication, such as an email, is protected under the Fourth Amendment. This is because the email service provider (ESP) is not the intended audience and it merely acts as a conduit by delivering the information.[34] However, non-content information, such as the email address of the recipient, is not protected because it is information exposed to a third-party "in the ordinary course of business."[35] In this case, an ESP needs the email address of the sender and the recipient to complete its task. This was affirmed in *United States v. Warshak* (2010), where the U.S. Court of Appeals for the Sixth Circuit drew parallels between an ESP and a post office.[36] Specifically, the Court noted that letters enjoy Fourth Amendment protection, which does not disappear even when they have to pass through an intermediary.[37] Furthermore, using Justice Harlan's two-prong test from *Katz*, they found that it was "very unlikely" that the defendant expected his emails to become public and agreed that was a reasonable expectation of privacy that society would be willing to accept.[38]

This differentiation between content and non-content information can also be used to explain the rulings in *Katz*, *Smith*, and *Miller*. The phone recordings made by the FBI in *Katz* were protected because they contained the content of Katz's conversations. This stands in direct contrast to *Smith*, where the police did not obtain the content of Smith's calls. Instead, they used a pen register to obtain the numbers that he dialed. This constituted non-content information as it was necessary information for the phone company to transmit those calls. The case in *Miller* is even clearer. The banks involved were both parties in transactions with Miller, which also made them recipients of the content of the checks and deposit slips. Moreover, under the Bank Secrecy Act of 1970, all financial institutions are required to keep documentation of bank transactions.[39] This meant the checks and deposit slips were documents owned by the bank, giving them the full right to disclose their content or non-content information.

This idea that information is no longer protected once it has been knowingly exposed to members of the public is well-rooted in the history of the Fourth Amendment. In *Ex parte Jackson* (1878), one of the first Fourth Amendment cases, the Court decided that anything on the outside of a mailed letter or parcel was not protected under the Fourth Amendment.[40] It was also established through a series of cases in the 20th century that individuals who share details in conversations with others cannot reasonably expect the other party not to reveal that information to the police.[41] To rule that parties could not willingly disclose information they have learned would not only constitute a First Amendment violation, but it would also seriously hinder police investigation. Recently, this has also been applied to a digital context. In *Commonwealth v. Delgado-Rivera* (2020), the Supreme Judicial Court of Massachusetts ruled that the defendant did not have a "reasonable expectation of privacy" in texts they sent to a co-defendant.[42] In doing so, the Court pointed to "the ease with which these messages can be shared with others," including the recipient's ability to "forward the contents of the message to hundreds and thousands of people at once."[43]

Furthermore, as legal scholar Orin Kerr argues, the third-party doctrine helps to strike a balance between privacy and security.[44] Specifically, evidence collection can be

29 Smith v. Maryland, 442 U.S. 735, (1979).
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 Richard M. Thompson II, The Fourth Amendment Third-Party Doctrine, 12, (June 5, 2024).
35 *Id.* at 13.
36 United States v. Warshak, 631 F.3d 266 (6th Cir. 2010)
37 *Id.*
38 *Id.*
39 Will Kenton, *Bank Secrecy Act (BSA): Definition, Purpose, and Effects*, Investopedia (March 4, 2024), https://www.investopedia.com/terms/b/bank_secrecy_act.asp (last visited April 19, 2024).
40 Ex parte Jackson, 96 U.S. 727 (1878).
41 Thompson II, *supra* note 34, at 7.
42 Ana Muñoz, *Text is not Talking: Supreme Judicial Court Holds that Individuals have no Reasonable Expectation of Privacy in Sent Text Messages*, Zalkind Duncan & Bernstein (June 3, 2021), https://www.bostonlawyerblog.com/text-is-not-talking-supreme-judicial-court-holds-that-individuals-have-no-reasonable-expectation-of-privacy-in-sent-text-messages/ (last visited April 19, 2024).
43 *Id.*
44 Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561, 574 (2009).

divided into two stages: less invasive steps the government can take at any time and more invasive steps the government can only take when they have illustrated probable cause.[45] For example, most states allow law enforcement to interview witnesses without having an arrest warrant or probable cause.[46] This is necessary for the police to gather enough evidence to take a more invasive step that requires a warrant, such as searching a defendant's home. Kerr points out that while criminals would previously have to expose themselves to the public in order to commit a crime, technology has allowed criminals to commit crimes from the vicinity of their own homes. This is exemplified by *Smith*: rather than waiting outside the woman's door, Smith harassed her through phone calls.[47] Thus, the third-party doctrine counters the effect technology has by allowing the police to capture criminal activity that would have otherwise been under the public gaze.

III. DANGERS OF THE THIRD-PARTY DOCTRINE

Following the development of new technologies, there are several aspects of the third-party doctrine that need to be revisited. The first is the reasonable expectations of privacy test. Previously, the Court reasoned that by revealing their affairs to another, a person assumes the risk that their information will be shared with the government. However, with technology now spanning every aspect of our daily lives, a person's decision to hand data over to a third-party has become increasingly less voluntary. A wave of digitization has transformed how we hand in our bills, complete our work, and communicate with each other. According to a recent survey by the Pew Center, 95% of U.S. adults used the internet and 90% owned a smartphone.[48] All this use of technology automatically generates data that is transmitted to the companies behind them, blurring the lines between voluntary choice and inevitable reliance.

In *United States v. Jones* (2012), a case involving the placement of a global positioning system device on a vehicle, Justice Sotomayor considered this exact problem.[49] In her concurring opinion, she writes: "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[50] Moreover, Justice Sotomayor was not the first to call into question the voluntariness of the third-party doctrine. In Justice Marshall's dissent opinion in *Smith*, he wrote: "[U]nless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance. It is idle to speak of "assuming" risks in contexts where, as a practical matter, individuals have no realistic alternative."[51] The dilemma is clear: the ubiquity of modern technology forces us to accept the terms and conditions of third-party companies or abstain from using these services completely. At the same time, if we "voluntarily convey" our information to these third-party companies, then it qualifies as information used "in the ordinary course of business," and we have to accept that we lose all reasonable expectations of privacy.

Another issue with the third-party doctrine is its notion of privacy. The third-party doctrine uses the principle of total disclosure, where "once privacy is disclosed to one person, it is lost to the world."[52] It does not acknowledge that individuals can disclose information to third parties for limited purposes. Legal scholar Ash Wold points out that courts largely ignore the first prong of the *Katz* test, which asks whether the individual had an actual, subjective expectation of privacy.[53] In a study of all cases that applied the *Katz* test in 2012, it was found that only three percent of opinions mentioned the first prong, and just twelve percent applied it.[54] As Justice Marshall also argues in his dissent in *Smith*, "[t]hose who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."[55] There ought to be a line drawn between information that is made publicly and readily available on an online forum and those released in a controlled environment for a specific purpose. Many legal scholars have described the justices' view of privacy as an "on-off switch" that takes a simplified view of individuals' expectations of privacy by disregarding the nuanced contexts in which information can be shared.[56]

The third-party doctrine carries serious implications, especially as what constitutes a third-party has

45 *Id.*
46 Derek Gray, *Can Police Bring You in for Questioning Without a Warrant?*, Graystar Legal, https://www.graystarlegal.com/police-questioning-without-a-warrant/ (last visited April 20, 2024).
47 Kerr, *supra* note 44, at 574.
48 Risa Gelles-Watnick, *Americans' Use of Mobile Technology and Home Broadband*, Pew Research Ctr., (January 31, 2024), https://www.pewresearch.org/internet/2024/01/31/americans-use-of-mobile-technology-and-home-broadband/#:~:text=In%20a%20far%20cry%20from,5%2C%202023 (last visited April 20, 2024).
49 United States v. Jones, 565 U.S. 400 (2012).
50 *Id.*
51 Smith, *supra* note 29.
52 Thompson II, *supra* note 34, at 17.
53 Ash Wold, *Katz in the Digital Age: Why the Katz Subjective Prong Must be Strengthened*, 52 Sw. L. Rev. 174, 174 (2023).
54 *Id.*
55 Smith, *supra* note 29.
56 Kerr, *supra* note 44, at 571.

expanded far beyond what the Court had imagined in their initial 1976 ruling in *Miller*. For one, many parallels have been drawn between data stored in a file cabinet and that of an online cloud storage service, such as Google Drive or Apple iCloud.[57] Situations like this are on the rise. Another prominent example of a rising third-party service is smart home devices. According to Amazon, the last player in the market for smart home devices, customers have connected more than 400 million smart home devices using their cloud-based voice service, Alexa.[58] Alexa is also used hundreds of millions of times each week to control those devices, completing tasks ranging from playing music to setting the temperature of bath water.[59]

In 2017, Alexa even served as a witness to a double homicide in Farmington, New Hampshire.[60] Local resident Christine Sullivan, along with her guest, Jenna Pellegrini, was found murdered in the backyard of her home on January 27th, 2017.[61] The Court granted the police's request for Amazon to produce any recordings made by Alexa—Amazon's cloud-based voice service—through the Amazon Echo Dot speaker inside the home.[62] Every time Alexa hears her name or another wake word, she begins recording and sends the interaction to the Amazon cloud.[63] The recordings made by Sullivan's Alexa captured a man, Timothy Verrill, joking and making song requests with her in the early morning hours of the 27th.[64] It could be argued that Alexa needs to know the content of the recordings in order to perform her tasks, which makes her the direct recipient of the information, not just an intermediary. Following this logic, the recordings were admitted and Verrill was ultimately convicted of second-degree murder for both women's deaths. While this served to benefit the homeowner in this case, examples like this no doubt illustrate how individuals can be left at the mercy of new technologies, directly challenging the age-old notion that "the house of everyone is to him as his castle and fortress."

IV. THE FUTURE OF THE THIRD-PARTY DOCTRINE

The third-party doctrine has come a long way since *Miller*. In 2018, the Supreme Court actually declined a defense under the third-party doctrine in the landmark case *Carpenter v. United States* (2018).[65] In *Carpenter*, the police suspected that the plaintiff, Timothy Carpenter was involved in a series of robberies and requested his cell-site location information (CSLI).[66] CSLI records are generated when a cell phone moves into the range of a cell tower, which is necessary for facilitating calls.[67] This gave the police access to 12,898 location points cataloging Carpenter's movements across 127 days.[68] By directly allowing the police to retrace his movements, CSLI helped to confirm that Carpenter was indeed a part of the criminals behind the robberies.[69] After being convicted, Carpenter made a motion to suppress the CSLI evidence and the case made its way to the U.S. Court of Appeals for the Sixth Circuit.[70] However, the Court cited *Smith* and upheld Carpenter's conviction. Carpenter appealed once more and the U.S. Supreme Court granted *certiorari*.

First, the Court applied the *Katz* test. The majority of the Court agreed that CSLI "hold[s] for many Americans the 'privacies of life,' and that individuals have a reasonable expectation of privacy in their physical movements.[71] Next, the Court declined to apply the third-party doctrine, even though CSLI constituted non-content information. Specifically, it found that the Government's monitoring of Carpenter's location over four months was so extensive that it effectively constituted warrantless surveillance.[72] As Justice Roberts writes in the majority opinion, CSLI "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[73] As a result, Carpenter's criminal conviction was remanded to the Sixth Circuit.[74]

Notably, the opinion in *Carpenter* does not address the conflict between the third-party doctrine and the increasing prevalence of technology. Instead, the justices decided to make a carve out for CSLI under the third-party doctrine.[75]

57 Lucas Issacharoff and Jyle Wirshba, *Restoring Reason to the Third-Party Doctrine*, 198 Minn. L. Rev. 987, (2016).
58 Melissa Cha, *Introducing a new era for the Alexa smart home*, Amazon (September 20, 2023), https://www.aboutamazon.com/news/devices/amazon-smart-home-announcements-2023 (last visited April 18, 2024); Katie Tarasov, *Amazon dominates the $113 billion smart home market — here's how it uses the data it collects*, CNBC (September 28, 2022), https://www.cnbc.com/2022/09/28/amazon-dominates-the-smart-home-now-privacy-groups-oppose-irobot-deal.html#:~:text=Last%20year%2C%20the%20U.S.%20smart,came%20in%20third%20with%205.8%25 (last visited April 19, 2024).
59 *Id.*
60 Mark Osborne, *Judge orders Amazon to hand over Echo recordings in double murder case*, ABC News (November 9, 2018, 11:29 PM), https://abcnews.go.com/US/judge-orders-amazon-hand-echo-recordings-double-murder/story?id=59100572, (last visited April 18, 2024).
61 *Id.*
62 *Id.*
63 Manning, *supra* note 2, at 3.
64 *Id.* at 4.
65 Carpenter v. United States, 585 U.S. 296, (2018).
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*

In fact, Justice Roberts emphasizes that "[o]ur decision today is a narrow one…we do not disturb the application of *Smith* and *Miller*."[76] This means *Carpenter* does not actually resolve questions such as how courts will differentiate between choices that are individual and meaningful and those that are indispensable to participation in society. As it stands, the subjectivity of the two-prong test in *Katz* has made the Supreme Court the sole authority for determining what violates citizens' privacy. This has also caused lower courts across states to issue confusing and inconsistent rulings on what falls under the third-party doctrine.[77]

There has been no satisfying resolution to the dilemma of the third-party doctrine. As legal scholars Tonja Jacobi and Dustin Stonecipher argue, existing solutions to the third-party doctrine can be best described as a "Goldilocks zone."[78] Keeping the doctrine in its present state leans too heavily toward security, as it sacrifices the privacy of millions to investigate a subset of criminal activity.[79] Simultaneously, overturning it leans too heavily toward privacy by drastically limiting law enforcement's ability to investigate crimes.[80] Thus, an ideal solution needs to take an intermediate stance between these two positions.

One possibility is for the Congress to take action on this issue. In 2019, the state of Utah passed a first-of-its-kind bill that requires officers to get a warrant before accessing specific types of information that fall under the third-party doctrine.[81] Specifically, H.B. 57, or the Electronic Information or Data Privacy Act, states that Utah residents are presumed to be the owner of any electronic information or data that is transmitted through a remote computing service, and they can reasonably expect it to remain private.[82] The Act also prevents the warrantless use of "stingray devices" that trick phones in an area into sending their data to the stingray device rather than the cell tower.[83] This solution corresponds to that proposed by Justice Gorsuch in *Carpenter*, which is to adopt a property-based approach that would base Fourth Amendment protection on ownership rights.[84] Specifically, it grants property rights in the formation of digital information. This is the most democratic solution. Since the legislature theoretically represents the will of the people, it can be argued that they are best positioned to decide whether an expectation of privacy is "one that society is prepared to recognize as reasonable." A notable limitation lies in the fact that Utah is just a single state. Under the current climate of party polarization, legislation around this topic may encounter the problem of a gridlocked Congress within the larger legislature.

A court-based solution, proposed by Jacobi, is to focus on the "knowingly exposed" and "to the public" components of *Katz*.[85] In *Katz*, the Court emphasized that even though Katz knew he was visible through the glass booth, he did not knowingly expose his conversation to the public, as exemplified by his action of shutting the door behind him.[86] This standard helps to ensure that the individual made an informed choice in disclosing the information, making it a positive action.[87] It would also be particularly powerful in addressing situations where information has been kept by third-party entities unbeknownst to individuals. Jacobi gives the example of Snapchat, an app whose principal feature is that shared content becomes unavailable to senders and recipients after a short amount of time.[88] It was found in 2013 that the content shared on Snapchat doesn't actually disappear.[89] Instead, it is stored on users' devices in an unmapped but accessible form, which is also accessible to high-level Snapchat employees through a centralized database.[90] While this standard would still require courts to make rulings on what qualifies under this criteria, it helps to narrow the scope of the third-party doctrine and to protect users from potentially deceptive companies.

CONCLUSION

Advancements in technology have made the third-party doctrine a threat to privacy in the digital age. While the doctrine originated in *Miller*, its application has been extended far beyond bank records to a variety of information held by third-party entities, directly reflecting the ubiquity of technology in mundane life. At the same time, if we accept our reliance on third-party intermediaries as

76 *Id.*
77 Wold, *supra* note 53, at 175.
78 Tonja Jacobi and Dustin Stonecipher, *A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contact Tracing, and Mass Surveillance*, 97 Notre Dame L. Rev. 823, 866, (2022).
79 *Id.*
80 *Id.*
81 *Utah Governor Signs Electronic Data Privacy Bill Requiring Warrants to Access Certain Types of Data*, Hunton Andres Kurth (April 1, 2019), https://www.huntonprivacyblog.com/2019/04/01/utah-governor-signs-electronic-data-privacy-bill-requiring-warrants-to-access-certain-types-of-data/, (last visited April 22, 2024).
82 *HB 57: Protecting Your Digital Data with a Warrant*, Libertas Institute (2019), https://libertas.org/bill/hb-57-protecting-your-digital-data-with-a-warrant/, (last visited April 22, 2024).
83 *Can Utah Police Remotely Access Your Phone?*, Overson & Bugden (2019), https://www.utahcriminallaw.net/can-utah-police-remotely-access-your-phone/#:~:text=In%202019%2C%20the%20Utah%20legislature,kind%20in%20America%2C%20as%20transformational, (last visited April 22, 2024).
84 Carpenter, *supra* note 65.
85 Jacobi, *supra* note 75, at 873.
86 Katz, *supra* note 10.
87 Jacobi, *supra* note 75, at 875.
88 *Id.* at 876.
89 Alyson Shontell, *Actually, Snapchat Doesn't Delete Your Private Pictures And Someone Found A Way To Resurface Them*, Business Insider (May 9, 2013, 9:18 PM), https://www.businessinsider.in/actually-snapchat-doesnt-delete-your-private-pictures-and-someone-found-a-way-to-resurface-them/articleshow/21124054.cms, (last visited April 22, 2024).
90 *Id.*

inevitable, then the act of giving our data to third parties cannot be framed as a choice. Especially as third-party entities continue to emerge, the doctrine significantly undermines the protection we are entitled to under the Fourth Amendment.

On the other hand, overturning the doctrine completely can significantly hamper legitimate criminal investigations, especially for crimes that occur in the private vicinity of the home. Thus, a dilemma surrounds the third-party doctrine—how do we strike a balance between protecting citizens' privacy and ensuring security in society? Regardless of whether a court-based or legislature-based solution is adopted, it is evident that resolving the problems caused by the third-party doctrine is one that will require significant cooperation across stakeholders, including the government, law enforcement, the tech industry, the legal community, and the public. In the absence of a satisfactory solution, increasing dialogue between the parties is arguably the best step we can take to start moving beyond the outdated constraints of the third-party doctrine.

THE PROVINCE OF ALL HUMANKIND:

OUTER SPACE LAW IN THE TWENTY-FIRST CENTURY

INTRODUCTION

Since the early years of the Cold War-era Space Race between the United States and the Soviet Union, outer space has evolved from a distant and unpopulated zone to a key battleground for state-to-state competition at the frontier of scientific advancement. As tensions rise between leading spacefaring states like the United States, China, and Russia, increasing astropolitical crises showcase the new realities of statecraft in outer space and sovereign airspace. One such case made headlines in 2022, when the Chinese Lunar Exploration Program's Chang'e 5 lunar sample-return mission identified a new mineral, "Changesite-(Y)," which scientists say contains helium-3, a potential non-radioactive fuel for nuclear fusion reactions.[1] As leading states continue to eye the Moon as a valuable deposit of critical natural resources and private businesses aim for more outlandish programs like colonizing Mars, the international legal system is straining to interpret ambiguous decades-old laws in a rapidly changing outer space landscape.[2]

In this paper, I argue that the original laws regulating outer space exploration are ill-equipped to govern the region in the age of rapidly developing space technology, increasing competition for natural resources and property, and a surge in private business investment in areas like satellite services, communications, and mining.[3] In Section I, I describe the history and development of international outer space law. In Section II, I discuss the unresolved question of the delimitation between the atmosphere and outer space. Section III addresses the divergence between national and international outer space legislation. Finally, in Section IV, I consider how global commons legal precedents can help regulate the growing outer space mining industry.

I. HISTORY AND DEVELOPMENT OF INTERNATIONAL OUTER SPACE LAW

Many legal scholars classify outer space as one of four global commons, "resource domains or areas that lie outside of the political reach of any one nation State" in which "appropriation of any part of [them] as exclusively national territory is not permissible."[4] Several leading spacefaring states, though, do not officially recognize outer space as a global commons, suggesting a divergence between legal expectations and realities.[5] In addition to outer space, the atmosphere, Antarctica, and the high seas (areas beyond national jurisdiction, or ABNJ) are recognized as global commons.[6] While global commons law emerged in each of these regions under different circumstances, all four bodies of law are designed to prevent state overreach, resource monopolies, and sovereignty declarations in regions long understood to be the shared property of humankind.[7]

In 1967, concerned by the Space Race between the United States and the Soviet Union in the midst of the Cold War, the United Nations General Assembly (UNGA) authored the governing document on international outer space

1 *See* Mark R. Whittington, *China Has Returned Helium-3 from the Moon, Opening Door to Future Technology*, The Hill, Sep. 18, 2022, https://thehill.com/opinion/technology/3647216-china-has-returned-helium-3-from-the-moon-opening-door-to-future-technology/.

2 *See, e.g.*, Bruce Einhorn, *China, US Are Racing to Make Billions From Mining the Moon's Minerals*, Bloomberg, May 17, 2022, https://www.bloomberg.com/news/features/2022-05-17/china-us-are-in-a-space-race-to-make-billions-from-mining-the-moon-s-minerals?embedded-checkout=true; See, e.g., Kirsten Grind, *Elon Musk's Plan to Put a Million Earthlings on Mars in 20 Years*, The New York Times, Jul. 11, 2024, https://www.nytimes.com/2024/07/11/technology/elon-musk-spacex-mars.html.

3 *See generally*, Noah Poponak & Jake Siewert, *Space: The Next Investment Frontier*, https://www.goldmansachs.com/intelligence/podcasts/episodes/05-22-2017-noah-poponak.html (explaining the appeal of private investment in the outer space industry).

4 5 Keyuan Zou, Global Commons and the Law of the Sea (2018) at 1; Aikaterini Vakaki, *A New Gold Mining Rush?*, 46 J. Space L. 421 (2022) at 430.

5 *See* Daniel Patton & Secure World Foundation, *Is Space a Global Commons?*, (2022) at 2, https://swfound.org/media/207517/swf_brief_is_space_a_global_commons_pp2301_final.pdf ("the most significant space-capable actors—the United States, European Union, Russia, China, India, and Japan—have made conflicting statements on commons status."); *See generally* John S. Goehring, *Why Isn't Outer Space A Global Commons?*, 11 J. Nat'l Security L. & Pol'y 573 (2021).

6 *See* UN System Task Team on the Post-2015 UN Development Agenda, *Global Governance and Governance of the Global Commons in the Global Partnership for Development beyond 2015*, (2013) at 5, https://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf.

7 *See generally* Surabhi Ranganathan, *Global Commons*, 27 Eur. J. Int. L. 693 (2016).

law: the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty).[8] The document remains in use today. In the two decades following its conception, the UNGA enacted four additional agreements and conventions that, with the Outer Space Treaty, comprise the core instruments of international outer space law as determined by the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS).[9] These four include the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Rescue Agreement), the 1972 Convention on International Liability for Damage Caused by Space Objects (Liability Convention), the 1976 Convention on Registration of Objects Launched into Outer Space (Registration Convention), and the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement).[10] While the signatories and scope of each piece of legislation vary, they share a common purpose in setting the international legal norm of good-faith cooperation between spacefaring states based upon the principle of the region as "the province of all mankind."[11]

The five initial treaties are based upon Roman legal principle of *res communis omnium*, indicating that UNCOPUOS sought to distinguish international law in outer space from that on Earth, for "while every state has complete and exclusive sovereignty over the air space of its territory, national sovereignty cannot be extended to outer space."[12] This is codified in Article I and Article II of the Outer Space Treaty, which state that outer space "shall be free for exploration and use by all states," and that it "is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[13] Most importantly, the Outer Space Treaty establishes outer space as "the province of all mankind" to ease geopolitical tensions in an era already defined by state-to-state competition and territorial disputes.[14] The "province of all mankind" clause is expanded upon by regulations prohibiting the placement of nuclear weapons and other weapons of mass destruction in outer space (the "no bomb in orbit provision"), and banning military bases or structures for purposes other than "peaceful exploration."[15]

The four subsequent treaties expand upon the Outer Space treaty by promoting cooperative and safe spacefaring activities. Notably, they establish outer space as a region of free scientific investigation by both military and non-military researchers, a "fragile environment" that states are responsible for protecting, and a zone completely free from nuclear weapons and other weapons of mass destruction.[16] Such laws are designed to protect outer space from damage and to protect Earth from damage caused by spacefaring activities. The growth of the outer space industry has shown the necessity of these protective laws, with increasing concerns about space debris and the militarization of outer space.[17]

International treaty interpretation is subject to the guidelines set by Section 3 of the Vienna Convention on the Law of Treaties.[18] While the Outer Space Treaty technically does not fall under its jurisdiction owing to the non-retroactivity clause, the Convention nonetheless serves as a helpful guide for best practices.[19] Specifically, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," and this interpretation can be questioned if it "leads to a result which is manifestly absurd or unreasonable."[20] In the case of the Outer Space Treaty, the most important principles are arguably non-sovereignty and freedom of exploration in the spirit of

8 *See generally* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

9 *See generally* UNITED NATIONS OFFICE FOR OUTER SPACE AFFAIRS, *INTERNATIONAL SPACE LAW: UNITED NATIONS INSTRUMENTS*, (2017), https://www.unoosa.org/res/oosadoc/data/documents/2017/stspace/stspace61rev_2_0_html/V1605998-ENGLISH.pdf.

10 *See generally* Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, art. 2, Dec. 3, 1968 [hereinafter Rescue Agreement]; *See generally* Convention on International Liability for Damages Caused by Space Objects, Mar. 29, 1972, 961 U.N.T.S. 187 [hereinafter Liability Convention]; *See generally* Convention on Registration of Objects Launched Into Outer Space, September 15, 1976, [hereinafter Registration Convention]; *See generally* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 34 U.N. GAOR (89th plen. mtg.) at 1, U.N. Doc. A/RES/34/68 (1979) [hereinafter Moon Agreement].

11 Outer Space Treaty, *supra* note 8, art. 1.

12 Vakaki, *supra* note 4, at 424; See David Johnson, *Limits on the Giant Leap for Mankind: Legal Ambiguities of Extraterrestrial Resource Extraction*, 26 Am. U. Int'l L. Rev. 1477, 1483 (2011) (describing *res communis omnium* and *res nullius*); Marietta Benkö, Willem de Graaff & Gijsbertha Cornelia Maria Reijnen, Space Law in the United Nations (1985) at 130.

13 Outer Space Treaty, *supra* note 8, art. 1-2.

14 *Id*., art 1.

15 *Id*., art 4 ; Ogunsola O. Ogunbanwo, International Law and Outer Space Activities (1975) at 92.

16 Henry Hertzfeld, *Current and Future Issues in International Space Law*, 15 Int. L. Stud. Assoc. J. Int. Comp. L. 325 (2009) at 327–328.

17 *See generally* Hannah Thurston, *Space Trash: Legal and Economic Questions about the Collection of Orbital Debris*, 18 J. L. Econ. Pol'y (2023); *See generally* Space Debris, National Aeronautics and Space Administration, https://www.nasa.gov/headquarters/library/find/bibliographies/space-debris/ (last visited Jul 18, 2024); *See generally* Outer Space Becoming Contested Domain for Supremacy with Space-Based Communications, Intelligence Assets, Anti-Satellite Weapons, First Committee Hears, United Nations Meetings Coverage and Press Releases, Oct. 19, 2023, https://press.un.org/en/2023/gadis3722.doc.htm#:~:text=Outer%20space%20is%20becoming%20a,arms%20race%20in%20that%20realm.

18 *See generally* Vienna Convention on the Law of Treaties, § 3, art. 31–33, May 23, 1969, 1155 U.N.T.S 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

19 *Id*., art 4.

20 *Id*., art 31-32.

the region as "the province of all mankind."[21] While considering precedents set by other areas of global commons law, the unique character of the Outer Space Treaty and the four additional treaties concluded by UNCOPUOS—the Rescue Agreement, the Liability Convention, the Registration Convention, and the Moon Agreement—should be considered.[22]

II. WHERE IS OUTER SPACE?

Whereas global commons law in ABNJ and Antarctica clearly establishes the boundaries of these regions—state jurisdiction over international waters reaches no further than 200 nautical miles from its shoreline, and Antarctica is "the area south of 60º South Latitude, including all ice shelves"—no such legal delimitation exists between the atmosphere and outer space.[23] The two predominating approaches to delineating the boundary include the spatial approach and the functional approach.[24]

The UNCOPUOS Legal Subcommittee prefers the spatial approach because it is the most straightforward and thus easy to enforce.[25] The spatial approach is similar to UNCLOS' approach to ABNJ because it sets a universal measurable distance beyond which outer space law applies.[26] Scientists offer different suggestions for what this distance should be, and the "unofficial gold standard of Outer Space borders" is the Kármán Line at 100 kilometers above sea level, roughly determined by the altitude beyond which aircraft cannot operate.[27] Alternatively, other spatial approaches set the border as the altitude below which most spacecraft cannot operate, or "demarcation according to the lowest perigee of an orbiting satellite."[28] In other words, the spatial approach determines that the outer space jurisdiction is the region in which a satellite can remain in orbit without either drifting off into outer space or burning up in Earth's atmosphere, the current record for which is 81 kilometers from sea level as of 2018.[29] For reference, commercial airplanes reach cruising altitude around 10 kilometers above sea level, and scientific weather balloons around 30 kilometers above sea level, so, per the spatial approach, the atmosphere (i.e., international airspace) would presumably extend 40-70 kilometers above the altitude at which most aircraft operate.[30]

The functional approach, on the other hand, "maintains that the nature of the activity rather than the location of the activity should be the determinant" of what constitutes outer space.[31] Many scientists object to the functionalist approach because of potential legal loopholes by which states could employ high-altitude crafts like intercontinental ballistic missiles (ICBM) that are not subject to the laws of outer space owing to their intended use on Earth rather than celestial bodies.[32] Consider, for example, North Korea's 2017 Hwasong-15 ICBM launch that reached an altitude of around 2,800 miles (4,500 kilometers).[33] Under the functional approach, if not being used for outer space activities, it may not be subject to the Outer Space Treaty's prohibition of weapons of mass destruction in outer space (although it would be subject to other international non-proliferation agreements).[34]

Better defining the boundaries of outer space—and thus the vertical limits of state's sovereign airspace—would put the region on par with global commons law in ABNJ and Antarctica. As it stands today, "[t]he law regarding the atmosphere is clearly defined—nations have sovereignty over the air above their country. Through treaty agreements, no nation can claim sovereignty in outer space. The area in between remains undefined in law."[35] Despite residual interest in the functional approach, the spatial approach is both the most practical and widely agreed upon method of delimitation between outer space and the atmosphere, and UNCOPUOS officially adopting the approach would resolve the question of jurisdiction.

21 Outer Space Treaty, *supra* note 8, art. 1–2.
22 *See generally* Space Law Treaties and Principles, United Nations Office for Outer Space Affairs, https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html (last visited Jul 20, 2024).
23 *See* United Nations Convention on the Law of the Sea, art. 76, 1833 U.N.T.S. 397 (Dec. 10, 1982) [hereinafter UNCLOS]; See Antarctic Treaty art. 6, Dec. 1, 1959, 12 U.S.T. 794; See Hertzfeld, *supra* note 16, at 325 ("neither treaties nor most laws define exactly where the atmosphere ends and space begins.").
24 *See* Yaw Otu Mankata Nyampong & Legal and Regulatory Committee of the International Association for the Advancement of Space Safety, *The Definition and Delimitation of Outer Space: The Present Need to Determine Where "Space Activities" Begin*, (2014) at 5, https://www.unoosa.org/pdf/pres/lsc2014/tech-04E.pdf; *See also* Benkö, de Graaff, and Reijnen, *supra* note 12, at 130.
25 Benkö, de Graaff, and Reijnen, *supra* note 12. at 127.
26 *See* Nyampong and Legal and Regulatory Committee of the International Association for the Advancement of Space Safety, *supra* note 24, at 5.
27 Alex S. Li, *Ruling Outer Space: Defining the Boundary and Determining Jurisdictional Authority*, 73 Okla. L. Rev. 711, 725 (2021).
28 Benkö, de Graaff, and Reijnen, *supra* note 12, at 127.
29 13 Thomas Gangale, How High the Sky?: The Definition and Delimitation of Outer Space and Territorial Airspace in International Law (2018) at 195; *See generally* Jonathan C. McDowell, *The Edge of Space: Revisiting the Karman Line*, 151 Acta Astronaut. (2018).
30 Celine Hacobian, *Here's How High Planes Actually Fly, According to Experts*, Time, Jun. 27, 2018, https://time.com/5309905/how-high-do-planes-fly/; Leah Vredenbregt, *How Many Weather Balloons Are out There? Hundreds, It Turns Out*, ABC News, Feb. 13, 2023, https://abcnews.go.com/Politics/weather-balloons-hundreds-turns/story?id=97082985.
31 Nyampong and Legal and Regulatory Committee of the International Association for the Advancement of Space Safety, *supra* note 24, at 5.
32 *See*, e.g., McDowell, *supra* note 29, at 668 ("Suggestions that the purpose of a vehicle, not its location, should determine the legal regime may be appropriate for questions of licensing, but will not help if a vehicle classified as belonging to one regime collides or interferes with one from another regime.").
33 North Korea Missile Activity in 2017, https://armscontrolcenter.org/wp-content/uploads/2017/11/NK-2017.pdf (last visited Jul 19, 2024).
34 *See* Outer Space Treaty, *supra* note 8, art. 4.
35 Hertzfeld, *supra* note 16, at 325-326.

III. RISE IN NATIONAL LEGISLATION

Despite the broad project of international law being the creation and maintenance of a rules-based international order, a recent surge in national outer space legislation has prompted criticism by some spacefaring states that the U.S. subverts international outer space law for its own gain in what scholars warm may be a U.S.-led "race to the bottom."[36] Of interest here are one piece of national outer space legislation—the 2015 Commercial Space Launch Competitiveness Act—and one U.S.-authored non-binding multilateral agreement—the 2020 Artemis Accords.[37] In both the Competitiveness Act and the Artemis Accords, the U.S. takes an aggressive stance on treaty interpretation that may undermine the cooperative spirit of the Outer Space Treaty, subsequent agreements, and the very rules-based order the U.S. espouses.[38] As states turn towards "parallel lawmaking attempts: alternate claims about what the law is or should be," they introduce diverging interpretations of long-held international norms and promote the problematic maxim that "might makes right."[39]

Title IV of the Competitiveness Act—the Space Resource Exploration and Utilization Act—grants privileges to the federal government to "facilitate the commercial exploration for and commercial recovery of space resources by U.S. citizens" without asserting "sovereignty or sovereign or exclusive rights or jurisdiction over, or ownership of any celestial body."[40] Because Title IV effectively "recognizes the rights of U.S. citizens and companies over space resources once extracted on a first come, first served basis," it inherently assumes that these resources may be extracted in the first place and thus undermines the cooperative diplomatic process needed to adopt a good-faith interpretation of the Outer Space Treaty for the twenty-first century landscape.[41] The Act has sparked similar legislation in, *inter alia*, Luxembourg, the United Arab Emirates, and Japan, "showing that the international community is leaning toward the U.S. position that the extraction and ownership of such resources comply with the Outer Space Treaty."[42] Moreover, the Competitiveness Act may undermine good-faith Outer Space Treaty interpretations under the guidelines of the Vienna Convention which requires that international treaty interpretations take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[43] With a rapid increase in interest in the outer space mining industry and a surge in private sector investment, aggressive national laws that adopt contentious interpretations of long-established international outer space legislation may worsen geopolitical conflicts in the region.[44]

The U.S.-authored Artemis Accords seek to promote cooperation in outer space, but they also make assumptions about the previously unclear permissiveness of natural resource extraction in the Outer Space Treaty. Specifically, the Accords claim that "the extraction of space resources does not inherently constitute national appropriation under Article II of the Outer Space Treaty," but this assumption has not been agreed upon by many spacefaring states.[45] The U.S.' claim in the Accords that resources may be extracted and, by the Competitiveness Act, that they may be claimed "on a first come, first served basis," not only alludes to a new space race in the form of an extraterrestrial gold rush, but it may also signal a broader collapse of the cooperative norms that have maintained some semblance of order in outer space.[46] Future international legislation should discourage aggressive national legislation so that outer space may be preserved as "the province of all mankind."[47]

IV. GLOBAL COMMONS LEGAL PRECEDENTS FOR OUTER SPACE MINING

The now decades-old Space Race is morphing into a revitalized race for extraterrestrial land and natural resources in a zone that used to be considered an empty vacuum—and if no further regulations are instituted, some

36 Nelson Falkenburg, *A Precautionary, Preventative Framework for Outer Space Resources: Applying the Antarctic Treaty System's Madrid Protocol to the Unregulated Frontier of "Newspace"*, 49 Syracuse J. Int'l L. & Com. 305, 310 (2022).

37 *See generally* U.S. Commercial Space Launch Competitiveness Act, 51 U.S.C. § 51303 [hereinafter Competitiveness Act]; *See generally* The Artemis Accords: Principles for the Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, *opened for signature* Oct. 13, 2020, https://www.nasa.gov/wp-content/uploads/2022/11/Artemis-Accords-signed-13Oct2020.pdf?emrc=653a00 [hereinafter Accords].

38 *See* Goehring, *supra* note 5, at 575 (describing the importance of global commons for the "'liberal rules-based international order."); *See generally* Brian-Vincent Ikejiaku, *International Law Is Western Made Global Law: The Perception of Third-World Category*, 6 Afr. J. Leg. Stud. (2014).

39 Melissa Durkee, *Space Law as Twenty-First Century International Law*, 6 J. L. Innov. 12, 25 (2023).

40 Competitiveness Act, *supra* note 37, §§ 402–403.

41 Vakaki, *supra* note 4, at 448.

42 *Id*. at 449–451.

43 Vienna Convention, *supra* note 18, art. 31(3)(b); *See* Vakaki, supra note 4, at 451 ("Even though national laws are subject to international *law* in this case, the mere existence of the former has an impact on the latter because States codify a certain practice as well as *opinio juris* by enacting national laws.").

44 *See generally* Rob Bland et al., *A Different Space Race: Raising Capital and Accelerating Growth*, McKinsey & Company, Nov. 16, 2022, https://www.mckinsey.com/industries/aerospace-and-defense/our-insights/a-different-space-race-raising-capital-and-accelerating-growth-in-space#/ (describing the changing nature of the private sector in relation to outer space).

45 Accords, *supra* note 37, § 3(2); *See, e.g.*, Durkee, *supra* note 40, at 25 ("In terms of protest, Russia has criticized the Artemis Accords as 'too U.S.-centric,' particularly in their purported legalization of resource extraction.").

46 Accords, *supra* note 37, § 3(2).

47 Outer Space Treaty, *supra* note 8, art. 1.

experts even warn of an extraterrestrial gold rush.[48] While the Outer Space Treaty clearly prohibits claims of state and non-governmental sovereignty in outer space, it does not address whether natural resources may be appropriated without claiming sovereignty over the area in which they are found.[49] With no internationally-accepted understanding of the legality of natural resource extraction in outer space, spacefaring states should resolve these disagreements through future legislative compromises based upon good-faith interpretations of the Outer Space Treaty and global commons precedents from ABNJ and Antarctica. While considering other bodies of global commons law is imperfect because international law treats each zone differently, these precedents offer insight into how to approach regulation in outer space to preserve the region as "the province of all mankind."[50]

A. The ABNJ Precedent

Whereas the current delimitation between the atmosphere and outer space is ambiguous, the borders between domestic and international waters are clearly established by UNCLOS. States never completely control the waters surrounding their coastlines because both state and private-owned vessels "enjoy the right of innocent passage through the territorial sea."[51] In general, within 200 nautical miles from their shorelines, states enjoy three different levels of control over international waters.[52] Specifically, coastal state sovereignty extends 12 nautical miles "beyond its land territory and internal waters," comprising the territorial seas.[53] Up to 24 nautical miles from its shoreline, a state maintains the jurisdiction to "prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea," comprising the contiguous zones.[54] Finally, states possess the exclusive rights for fishing, drilling, and natural resource extraction up to 200 nautical miles from their shorelines, comprising the exclusive economic zones.[55] Beyond 200 nautical miles are ABNJ (the high seas), covering 40 percent of the surface of the earth, 64 percent of the surface of oceans, and 95 percent of the volume of oceans.[56] Analogous to territorial seas—and to some extent contiguous zones and exclusive economic zones, over which states enjoy some control—is the atmosphere which is considered part of the sovereign territory of states.[57] The legal precedents of interest here are the laws governing natural resource extraction in ABNJ, analogous to future laws governing the same in outer space.

In ABNJ, UNCLOS prohibits states from exercising sovereignty in appropriated territory in international waters, including the seabed, subsoil, and natural resources which are "the common heritage of mankind."[58] However, states and individuals are allowed to extract natural resources like fish and minerals, provided they comply with a body of maritime, environmental, and international commerce law.[59] The reason acts such as deep sea fishing and mining are allowed, whereas building an artificial island and claiming sovereignty over it is prohibited, is because "public and private subjects, provided they comply with international law, have the right to fish on the high seas without claiming appropriation of the area in which the fishing took place."[60] In other words, it is the water in ABNJ over which states may not claim sovereignty, but the fish that live in ABNJ may be extracted.

If new natural resource extraction regulations in outer space follow the precedent set by UNCLOS regarding fishing in the high seas, then states, private businesses, and individuals would be permitted to mine natural resources in outer space without claiming sovereignty over the surface under which they are found. Applying the guidelines set by the Vienna Convention, namely that treaty interpretations should align with the "object and purpose" of the treaty, it seems reasonable that natural resource extraction can be allowed as long as it does not interfere with the spirit of outer space as "the province of all mankind."[61] Adapting global commons law on the high seas serves as a viable legal precedent upon which additional natural resource extraction laws in outer space can be written, although it should be considered alongside global commons law in Antarctica which brings to light environmental concerns.

B. The Antartica Precedent

48 *See* Hertzfeld, *supra* note 16, at 326 (describing various views on outer space); *See generally* Vakaki, *supra* note 4.
49 *See* Outer Space Treaty, *supra* note 8, art. 2, 6 ("The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.").
50 *Id.*, art 1.
51 UNCLOS, *supra* note 23, art. 17.
52 *See generally* National Oceanic and Atmospheric Administration, *Maritime Zones and Boundaries*, https://www.noaa.gov/maritime-zones-and-boundaries (last visited Jul 20, 2024).
53 UNCLOS, *supra* note 23, art. 2–3.
54 *Id.*, art. 33.
55 *Id.*, art. 55–57.
56 Areas Beyond National Jurisdiction, Global Environment Facility, https://www.thegef.org/what-we-do/topics/areas-beyond-national-jurisdiction.
57 Hertzfeld, *supra* note 16, at 325.
58 *See* UNCLOS, *supra* note 23, art. 136–137.
59 *See, e.g.*, International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 2; *See, e.g.*, Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285; *See, e.g.*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.
60 Vakaki, *supra* note 4, at 430; *See* Outer Space Treaty, *supra* note 8, arts. 116, 137 ¶ 2,60 ¶ 8.
61 Vienna Convention, *supra* note 18, art. 31; Outer Space Treaty, *supra* note 8, art. 1.

The Antarctic Treaty System—including the original 1959 Antarctic Treaty, the 1972 Convention for the Conservation of Antarctic Seals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources, and the 1991 Protocol on Environmental Protection to the Antarctic Treaty—places harsh restrictions on natural resource extraction in Antarctica for non-scientific purposes.[62] Specifically, "Any activity relating to mineral resources, other than scientific research, shall be prohibited," a clear contrast to ABNJ regulations.[63] Climate change has already caused severe ice mass loss on the West Antarctic Ice Sheet, with an average mass loss of 147 billion metric tons annually between 2002 and 2023, and treaties like the Protocol on Environmental Protection prioritize mitigating these effects over the potential energy gains from natural resource extraction.[64] While the environmental effects of deep sea mining on marine ecosystems are likewise harmful, the law remains permissive regarding natural resource extraction in part because it also offers solutions to achieving net zero greenhouse gas emissions through transition-critical raw material deposits.[65]

C. Applying Precedents to Outer Space

Not only is the outer space mining industry environmentally damaging, but it may also lead to an energy independent future by way of natural resources like Changesite–(Y).[66] One creative solution to balance environmental concerns with potential future benefits adapts the emissions trading system of the 1997 Kyoto Protocol of the United Nations Framework Convention on Climate Change (UNFCCC), now modernized as the Paris Agreement Crediting Mechanism.[67] The Paris Agreement takes after the Kyoto Protocol in allowing states to either purchase or sell emissions credits to meet their emissions targets.[68] In outer space, an analogous mechanism would involve setting a limit on the quantity of minerals that may be extracted by each state annually, and allowing states to use their credits or sell them to other states, private businesses, or individuals.

Such a program has three benefits. First, setting a limit on the annual extraction quantity would mitigate the harmful environmental impacts of space mining programs, including preventing overextraction and eventual resource depletion. Second, giving all states mining credits regardless of whether they have strong space programs is necessary because the Outer Space Treaty requires that outer space exploration "shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development."[69] Third, allowing private businesses and individuals to purchase mining credits from states would allow beneficial private investment in the industry while the extraction limits would simultaneously curb private sector resource monopolization.[70] With the outer space mining industry still in its nascent stage, such a program would ensure that agreeable regulations are put into place before a new extraterrestrial gold rush lifts off.[71]

CONCLUSION

In the face of a rapidly growing outer space industry amid already tense geopolitics on Earth, decades-old international agreements fail to offer answers to pressing questions of extraterrestrial jurisdiction, national legislation, and property rights. New regulations are urgently needed, and potential solutions lie in precedents from global commons law in ABNJ and Antarctica. With surging private sector interest and investment in outer space research, tourism, and mining, such solutions must be implemented to maintain a peaceful outer space landscape and preserve the region as "the province of all mankind."[72]

62 *See generally* Key documents of the Antarctic Treaty System, Secretariat of the Antarctic Treaty, https://www.ats.aq/e/key-documents.html (last visited Jul 20, 2024); *See generally* Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794; *See generally* Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441; *See generally* Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476; Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1461 [hereinafter Protocol on Environmental Protection].

63 Protocol on Environmental Protection, *supra* note 62, art. 7.

64 Antarctic Ice Mass Loss 2002-2023, (2023), https://www.youtube.com/watch?v=6PLBEz7o6wc&t=16s.

65 *See* International Union for Conservation of Nature National Committee of The Netherlands, *The Impact of Deep-Sea Mining on Biodiversity, Climate and Human Cultures*, Mar. 1, 2024, https://www.iucn.nl/en/news/the-impact-of-deep-sea-mining-on-biodiversity-climate-and-human-cultures/; See Lea Reitmeier, *What Is Deep-Sea Mining and How Is It Connected to the Net Zero Transition?*, The London School of Economics and Political Science Grantham Research Institute on Climate Change and the Environment, Jul. 27, 2023, https://www.lse.ac.uk/granthaminstitute/explainers/what-is-deep-sea-mining-and-how-is-it-connected-to-the-net-zero-transition/.

66 *See* Shannon Hall, *The New Space Race Is Causing New Pollution Problems*, The New York Times, Jan. 9, 2024, https://www.nytimes.com/2024/01/09/science/rocket-pollution-spacex-satellites.html; *See* Whittington, *supra* note 2; *See generally* Yuree Nam, *One-Way Ticket to Mars: The Privatization of the Space Industry and its Environmental Impact on Earth and Beyond*, 19 NW. J. L. & Soc. Pol'y. 150 (2023).

67 *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 17, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol]; See Paris Agreement to the United Nations Framework Convention on Climate Change, art. 6, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement]; *See* Vakaki, *supra* note 4, at 459.

68 *See* Paris Agreement Crediting Mechanism, United Nations Framework Convention on Climate Change, https://unfccc.int/process-and-meetings/the-paris-agreement/article-64-mechanism (last visited Jul 21, 2024) ("under article 6, countries are able to transfer carbon credits earned from the reduction of greenhouse gas emissions to help one or more countries meet their climate targets").

69 Outer Space Treaty, *supra* note 8, art. 1.

70 *See generally* Poponak and Siewert, *supra* note 3.

71 *See generally* Einhorn, *supra* note 2.

72 Outer Space Treaty, *supra* note 8, art. 1.



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