**The Undergraduate**

**Law Review**

**at**

**The Ohio State University**

Volume III, Issue II

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EDITOR’S NOTE

Dear Reader,

These articles are published amid a unique moment in American history; rapid technological development and evolving sociopolitical attitudes have clear legal implications and potential to radically alter American jurisprudence. In this issue, we hope to help readers explore the extension of existing law into a new technological frontier, as well as the continued struggles of demographic groups still seeking to secure rights and freedoms so many of us know as inalienable. From copyright law to free speech to mass incarceration, our spring publication seeks to pick apart the constitutional, statutory, and case law that weighs in on some of the defining issues of our time.

I would like to thank the authors for their willingness to share their ideas with fellow undergraduate students and other readers. Their patience and eagerness to work with the editorial team were invaluable to making the journal as polished and fluid as possible. As students from an assorted collection of universities and academic disciplines, the authors whose articles are published herein bring to the discussion unique knowledge and perspectives – two elements which are vital to an informed conversation about any legal issue.

I would also like to thank my editorial team for their dedication and drive in working on the articles in this publication. The newly expanded team has demonstrated a commendable ability to learn how to work with complex writing in a short period of time.

For readers interested in more basic legal analysis from a variety of academic backgrounds, our blog is updated weekly with stories covering pressing legal issues and law school admissions – both topics that are constantly on the minds of pre-law students. The blog also contains interviews that we have had with distinguished legal professionals. In maintaining a constant stream of legal and pre-law dialogue, our aim is to engage undergraduate students around the country.

In the few years since the creation of the Undergraduate Law Review at The Ohio State University, we have witnessed the growth of our editorial team in both size and experience. We hope to continue learning how to most effectively bring issues of critical importance to a wide and diverse audience.

Very Respectfully,



Adam Scheps

Editor-in-Chief

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MISSION STATEMENT

The Undergraduate Law Review at OSU was created with the intent of giving college students the opportunity to have their work published in a journal edited by fellow undergraduates. We hope to give students an outlet through which they can discuss and consider a variety of important legal issues. In addition, we aim to publish articles that are accessible to a wide audience and that encourage critical thinking, so as to reach many and inspire change.

DISSECTING THE APPLICATION OF THE MERGER DOCTRINE TO DECLARING SOURCE CODE IN ORACLE V. GOOGLE

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Abstract

This paper will criticize the Federal Circuit’s application of the merger doctrine in its copyrightability analysis of declaring code. I will begin by reviewing the context of the case and the Federal Circuit’s decision. Subsequently, I will break down the Federal Circuit’s analysis and reveal the flaw that belies and compromises its merger analysis, and conclude by explaining how this flaw, in reality, motivates a finding consistent with not the Federal Circuit, but rather the district court.[[1]](#footnote-1)

**I. Introduction**

Copyright law has quite the tortured relationship with the software industry. The fact that much of copyright law precedent “developed in the context of literary works such as novels, plays, and films,” as Judge Boudin put it two decades ago, has not simplified anything. If anything, it makes the application thereof akin to “assembling a jigsaw puzzle whose pieces do not quite fit.”[[2]](#footnote-2) The Federal Circuit’s recent – and highly controversial[[3]](#footnote-3) – decision in *Oracle v. Google* upholding Oracle’s software copyrights is not only the most recent development in this strained relationship, but also an incredibly significant and dangerous one. Indeed, the Federal Circuit advances many contentious claims about copyright law when reaching this decision, among them[[4]](#footnote-4) the finding that “the district court erred when it... concluded that each line of declaring code is uncopyrightable because the idea and expression have merged.”[[5]](#footnote-5) Unfortunately, this particular conclusion[[6]](#footnote-6) is premised in a fundamentally unsound assumption about the idea embodied within declaring code.

**II. Background**

Oracle claims copyright to a large collection of human-written, human-readable computer program expressions (the Java source code). These expressions are organized using a particular set of grammar and syntax rules (the Java programming language). They are comprised of discrete sets of instructions, known as “methods,” which contain sufficiently specific instructions that dictate how a computer might perform a specific function or set of functions, such as adding numbers together. These methods can, in turn, be called upon to command a computer to perform such function or functions by executing said instructions.

This collective whole is referred to as the Java Application Programming Interface (API),[[7]](#footnote-7) as it offers an interface – methods and a means by which they may be called – through which one might program an application. Oracle and Google, and by consequence the courts, separate the literal elements into two categories: declaring source code, which “declares” the names by which methods will be called, and implementing source code, which “implements” those methods by specifying those instructions which a computer follows when those methods are called.[[8]](#footnote-8)

Google subsequently, when developing the Android platform for smartphones, sought to obtain a license to include the Java API in the Android platform. Negotiations, however, fell through, after which Google subsequently decided to develop its own implementation of the Java API for Android. To do so, Google copied the declaring source code from Java, but wrote its own implementing source code to complement the copied declaring source code.[[9]](#footnote-9) In doing so, as Oracle claims, Google infringed its copyright on, *inter alia*, the declaring source code of Java.

**III. Decisions of the Courts**

Judge William Alsup, writing for the district court, found that under the merger doctrine, it was impossible to justify the validity of Oracle’s copyright on Java’s declaring source code, arguing that “the declaration line... is entirely dictated by the rules of the language. In order to declare a particular functionality, the language demands that the method declaration take a particular form.” He continues this explanation later in his opinion, citing as an example the method declaration “java.lang.Math.max,” which declares a method that may be called using that exact name, and only that exact name, when he explains how critical it is to make this distinction when applying merger: “[t]he method [declaration] is the idea. The method implementation is the expression. No one may monopolize the idea... [t]o carry out any given function, the method specification as set forth in the declaration must be identical under the Java rules... Any other declaration would carry out some other function... when there is only one way to write something, the merger doctrine bars anyone from claiming exclusive copyright ownership of that expression.”[[10]](#footnote-10)

On appeal, the Federal Circuit sharply rejected this application of the merger doctrine. Although it agrees with the district court that “merger cannot bar copyright protection for any lines of declaring source code unless Sun/Oracle had only one way, or a limited number of ways, to write them,”[[11]](#footnote-11) it contends that the district court’s analysis suffered from two fatal flaws. The district court’s mistakes, the Federal Circuit argues, were that, first, it “misapplied the merger doctrine”[[12]](#footnote-12) and, second, that it “erred in focusing its merger analysis on the options available to Google at the time of copying.”[[13]](#footnote-13)

Judge O’Malley, writing for the Federal Circuit, explained the reasoning thus: “copyrightability and the scope of protectable activity are to be evaluated at the time of creation, not at the time of infringement,” and since there were “unlimited options” for the declaring source code that Oracle could have chosen from when the code was originally written, there was no merging of the idea and expression of the declaring source code.[[14]](#footnote-14) As an example, O’Malley notes that “once Sun/Oracle created ‘java.lang.Math.max,’ programmers who want to use that particular package have to call it by that name,” and explains that Google could have easily written its own declaring source code “to achieve the same result.”[[15]](#footnote-15) Therefore, the argument goes, not only does the merger doctrine not preclude Oracle’s copyright to its declaring source code, because – at the time of the creation thereof – there were alternative options available for the declaring source code, which Google might have gone with.

**IV. The Federal Circuit’s Flawed Application of Merger**

The Federal Circuit’s opinion states that that because “alternative expressions were available,”[[16]](#footnote-16) the merger doctrine does not invalidate Oracle’s copyright on declaring source code. It is curious that the opinion never directly refutes the district court’s characterization of the idea embodied by declaring source code. Indeed, although it finds that “the district court... misapplied the merger doctrine”[[17]](#footnote-17) and explains how it finds that merger does not exist under its own application of the doctrine thereto, its own merger analysis is nowhere near as comprehensive, and significantly, offers no hint as to why Judge Alsup’s explanation that “[t]he method declaration is the idea”[[18]](#footnote-18) is wrong, or even mistaken.

The lack of a rebuttal, or any such resemblance thereof, is in fact quite telling: it shows that the Federal Circuit first, considers method declarations to be expressions, rather than ideas, and second, claims “alternative expressions are available”[[19]](#footnote-19) for the idea which a method declaration embodies, but never clearly defines what that idea is. It is not immediately clear, then, what exactly the Federal Circuit thinks the idea expressed by a method declaration is. The Federal Circuit does offer a hint, though as to what it considers the idea to be: “[in] the district court’s ‘java.lang.Math.max’ example... the developers could have called it any number of things, including ‘Math.maximum’ or ‘Arith.larger’... Oracle was [not] selecting among preordained names.”[[20]](#footnote-20)

Going by the Federal Circuit’s logic, it follows that the method declarations “java.lang.Math.max,” “Math.maximum,” and “Arith.larger” are all expressions of the same idea. Reading these method declarations as semantic English – albeit with a curious syntax – it certainly seems to be so. They all, evidently, have something to do with mathematics or arithmetic and choosing a maximum or larger value. It seems only natural to conclude, thusly, that these are but a few of the many alternative expressions which embody the idea of choosing a maximum, and that because such a variety exists, that “java.lang.Math.max” cannot possibly merge with this idea.

This would be true if a method declaration could be read as semantic English. The problem, however, is that method declarations cannot, and should not, be read as semantic English. Method declarations are computer program expressions that obey a very strict set of grammar and syntax rules – specifically, the rules of the programming language in which they are written in, which here is the Java programming language. Any idea which a method declaration expresses, therefore, is first and foremost fixed using the programming language – not the English language. If there is to be any analysis of the idea which a method declaration embodies, then, it must be considered as an expression within the programming language.

Naturally, then, this begs a re-examination of how merger applies to a method declaration. The first question that must be asked, of course, is whether a method declaration is even an expression, and it is clear that the answer to this is a resounding yes: method declarations are, after all, fixed in a “tangible medium” from which they “can be perceived, reproduced, or otherwise communicated”, the minimum threshold for copyrightability in an “original work of authorship” per 17 U.S.C. §102(a). The second question – that of the nature of the idea which a method declaration embodies – is now reached, and can thus be considered.

Recall that the function of declaring source code is to specify how methods are called, that the function of a method declaration is to specify a name, which must be used exactly as it is declared, when calling that method. The idea which a method declaration embodies is then clear: that the exact name specifiedmust be used to call the method corresponding to that method declaration. Indeed, with this understanding in mind, it becomes clear that there are absolutely no possible alternative expressions of this idea.

Returning again to the “java.lang.Math.max” example used by both the district court and Federal Circuit, it is clear that this method declaration embodies the idea that its corresponding method can be called only with the specified name, “java.lang.Math.max.” There is no alternative method declaration that embodies this idea, and in fact, this example illustrates quite clearly that changing a method declaration also changes the idea which it embodies. In other words, the fundamental idea which a method declaration embodies is specific to that method declaration.Not only is the embodied idea specific to, but it is also intrinsic to the method declaration itself. It follows, then, that at least insofar as method declarations are expressions fixed within the programming language, they may only be expressed in exactly one way.

**V. Conclusion**

It is difficult, no matter the context, to apply laws – and substantial, complex ones at that, in the case of copyright law – to subject matter which they were not drafted to address, much less computer source code, which is not only highly technical but also defies numerous norms and assumptions about the very nature of creative works in which copyright law is premised.

Oracle is a case closely intertwined with one of the most pressing challenges of copyright law today: the application thereof to software, a domain for which it was never designed. It is cases precisely such as these, which future controversies about the nature of intellectual property

protections for software – in which copyright law has assumed an irreplaceable position – will look to for guidance. As such, it is important for courts to not only apply the relevant law to cases and controversies as appropriate, but also for courts to be cognizant about the precedents they set.

In this respect, the Federal Circuit has been derelict in its duty: this is a case with implications about the copyrightability of source code itself, and for its decision to be deficient in its analysis of any component of the question reflects poorly on its jurisprudence. An insufficiently developed and inherently flawed argument about the applicability of the merger doctrine not only has implications relevant to how the Federal Circuit should ultimately have ruled in Oracle, but also sets a very poor precedent. Software is complex and, in the broader context of copyright subject matter, unique, in how closely its form is intertwined with its function. It is important for not only the law to address this, but also the courts, and in this respect, the Federal Circuit’s opinion in *Oracle* has failed.

Of particular concern, moreover, is that although the Supreme Court has not yet addressed a question of this nature – about the copyrightability of source code – it is extraordinarily likely that we will see a case of this nature in the coming years. In recent years, it has seen cases about related issues: in *Alice v. CLS*, the patentability of a so-called algorithm, and in *American Broadcasting Companies v. Aereo*, the definition of a copyright owner’s exclusive right to the public performance of the copyrighted work. With the increasingly dominant role of technology in our world, this trend will only continue. When such a case does eventually make its way to the Court, it will – as it does for every issue which it sees for the first time – draw on the jurisprudence of the lower courts, and included among such precedent will, inevitably, be the Federal Circuit’s decision in *Oracle*. One can only hope that when that day comes, the Federal Circuit’s flawed application of the merger doctrine in *Oracle* will not be used to establish unsound law, but held up as a cautionary tale of how jurists should not analyze source code copyrightability issues.

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THE FOREMOST AMENDMENT: WHY WE VALUE FREE SPEECH, AND WHAT IT MEANS FOR THE BRITISH AND AMERICAN CONSTITUTIONAL SYSTEMS

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Abstract

Freedom of speech is a paramount feature of modern liberal democracy, yet it can come at a cost. Modern social ills such as fake news, Islamic radicalization, and racial hate speech have brought the right to free expression into conflict with the equally sacrosanct values of truth, democracy, and equality. How is a government to resolve this dilemma? The world’s two longest standing democracies, the United Kingdom and the United States, have come down on opposite sides of the clash between individual right and social good. Analyzing legal precedents in the two countries on issues like counter-radicalization, hate speech, and libel, we will see that while the British government has frequently subordinated free speech to other values deemed more worthy, the United States Supreme Court has defended freedom of expression absolutely, even at significant peril to other social goods. Britain ostensibly views freedom of speech as a means to an end, able to be curtailed as soon as it fails to advance or even actively hinders that cause, while the American legal tradition seems to value freedom of speech as an end in itself. This philosophical divergence, as we will see, can be traced back to the very founding principles of government in either country. Paternalistic and libertarian, the two free speech doctrines reflect core constitutional beliefs that have held steadfast for centuries, yet enterprising politicians on either side of the Atlantic may not be thus aware.

**I. Introduction**

Free speech is ostensibly a straightforward principle: everyone in society ought to be able to voice opinions free of censorship or persecution. Beyond this simple veneer, free speech is perhaps one of the thorniest and most divisive legal issues in the Western world. What constitutes speech? Is it merely spoken word and text, or does it include abstract media such as art, film, and physical action? How far must we go to ensure that this expression is *free:* do we merely remove prior restraints and censorship, or abstain from punishing it after the fact lest it have a ‘chilling effect’ on future speech? Our resolution of these technicalities depends to a great extent on our answer to a more fundamental question: why do we value free speech in the first place? If we value free speech because it enables democracy, then we have no reason to protect forms of speech, such as sedition and extremism, which undermine democracy. Alternatively, if we value free speech because it advances equality and autonomy, we should restrict hate speech because it undermines the dignity of others. If free speech is merely a means to some other social end, our protection of it should “cover all those actions that are most conducive” to that goal and exclude those which “actively and substantially impede” it.[[21]](#footnote-21) Yet free speech might also be considered an end in itself: the need to express opinions so vital to man “if life is to be worth living”.[[22]](#footnote-22) If free speech has intrinsic value, how should it be weighed against other more immediate social goals? Free speech is a “penumbra” upon which restrictions are ill-defined and uncertain.[[23]](#footnote-23)

Within this substantial grey area, boundaries between private right and public harm drawn by the United States and the United Kingdom have fallen widely apart. Broadly speaking, Britain’s free speech protections are some of the weakest in the Western world while America’s are among the strongest.[[24]](#footnote-24) This divergence can be explained by two distinct free speech doctrines for the United Kingdom and the United States: utilitarian and fundamentalist, respectively. Britain, having no identifiable constitutional free speech clause, appears to value the liberty purely for instrumental reasons – as a means to advancing other social goods like democracy and equality. When confrontations arise between these values and free speech, the latter is almost invariably subordinated, reinforcing its worth as a means but not an end. American courts, by contrast, have frequently upheld First Amendment rights even at high social cost, sacrificing virtues like truth, autonomy, and democracy to the abstract principle of free speech. The latter can thus hardly be considered merely a means to the former; contrary to British law, American law evinces an intrinsic or fundamental value of free expression as an end in itself. After framing these two doctrines in the context of contemporary legal issues such as hate speech, defamation, and extremism, we will trace them further back to each country’s constitutional foundations. As we will see, the divergence is so profound, rooted in the origin of sovereignty itself, so as to lead James Madison to view the First Amendment as the “essential difference between the British Government and the American constitution”.[[25]](#footnote-25)

**II. General Principles of Free Speech in the U.S. and U.K.**

What does each country’s constitution have to say directly on the issue of free speech? The U.S. Constitution is direct and unambiguous. Speech was the first domain which the Founding Fathers thought to protect from the reach of their newly created state, decreeing that “Congress shall make no law…abridging the freedom of speech, or of the press.”[[26]](#footnote-26) This unconditional language has effected a lasting legal and psychological restraint on legislation that seems to venture too near this sacrosanct principle. The degree of free speech protection in the United States has been variously called “absolutist,” “fundamentalist,” and at the very least “exceptional” among the Western world.[[27]](#footnote-27) To see the salience of the constitution in action, we need only consider that a country commonly accused of patriotism to the point of jingoism nevertheless upholds the right to burn its flag as a form of expression.

The contrast with British law is striking. Even within the relatively loose European Convention system, Britain has been found in breach of free speech standards “in more significant cases than any other country belonging to the Convention system”. [[28]](#footnote-28) It is unclear even whether free speech has a constitutional basis in the United Kingdom at all, being one of the many “tacit understandings”which Sidney Low warns are “not understood”.[[29]](#footnote-29) In the landmark libel case *Reynolds v. Times Newspapers Ltd.,* Lord Steyn asserted that there existed a “constitutional right to freedom of expression in England”.[[30]](#footnote-30) Yet late constitutional scholar Albert Dicey retorts that “at no time has there in England been any proclamation of the right to liberty of thought or freedom of speech”.[[31]](#footnote-31) Dicey posits instead that free speech, should such a right exist in England, only came about at the close of the 18th century and lies merely in the negative space contoured by common law, in the words of Lord Bingham, “permitting that which was not prohibited”[[32]](#footnote-32). The nearest constitutional claim to this civil liberty is the principle of legality, which affirms that rights may not be infringed without legal justification.[[33]](#footnote-33) In America, free speech is specifically protected from the law; in Britain, it is specifically subject to it. Today, a legitimate albeit qualified protection for freedom of speech in Britain exists in the Human Rights Act of 1998, which enunciates the right to free expression. Even still, it is followed quickly by nine sweeping bases for restriction, including national security, public safety, the prevention of disorder, and the protection of “morals”.[[34]](#footnote-34) As we will see, the absence of an “enforceable constitutional protection” for free speech has frequently allowed British courts and legislators to subordinate free speech to other social goods as enumerated above.[[35]](#footnote-35) Thus, in contrast with “absolutist” American devotion, British constitutional provision for free speech protection are at best conditional and, at worst, illusory.

What underlying social values justifies the divergence between these two national doctrines? Justification there must be, for even the most “self-evident and self-justifying” social concepts, explains John Stuart Mill in *On Liberty,* are driven by value judgements. [[36]](#footnote-36) Propounding his own justification for the value of free expression, Mill focuses on its instrumental contribution towards the attainment of truth, eschewing “the idea of abstract right as a thing independent of utility”.[[37]](#footnote-37) Later thinkers have found other justifications for free speech: Alexander Meiklejohn considers it necessary primarily for effective self-governance, and Ronald Dworkin champions its role in autonomy and “moral agency.”[[38]](#footnote-38) These philosophers share the conviction that the value of free speech lies in its instrumental contribution to more tangible or perhaps more important social goods. Yet Zechariah Chaffee, a prominent American free speech advocate in the early half of the twentieth century, asserts an intrinsic value for free speech~~,~~ rooted in the “individual interest in the need of many men to express their opinions on matters vital to them if life is to be worth living.”[[39]](#footnote-39) The choice of motivating doctrine, whether truth, democracy, autonomy, or the intrinsic value of free expression itself, should be traceable in hierarchies drawn between these values when they come into conflict. Analyzing these decisions, we will try to intuit an underlying free speech doctrine in the American and British systems.

**III. Protection of Speech for Truth**

What might be thought of as the ‘classic’ justification for the value of free speech is Mill’s truth-discovery argument. A staunch relativist, Mill repudiated the existence of objective truth, especially the idea that the government, or even the majority, might be thought to possess it. He contends that “we can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still”.[[40]](#footnote-40) That evil, Mill argued, consisted of “robbing the human race; posterity as well as the existing generation” of the truth which might be arrived at only through open and unfiltered debate. If truth discovery is indeed the reason society values free speech, we should see this manifested in legal protections that enable open debate and eschew ‘official’ declarations of truth and morality.

The value of truth discovery in free speech protections is most evident in the area of defamation law, where ‘truth’ is now held as a defense for libel in both British and American jurisdictions. Yet in the former, this has not always been the case; until the close of the 18th century, it was sufficient for a defendant to have “publish[ed] blame” against a public official, because it was generally considered “unlawful [for a man] merely to find fault with his masters and betters.”[[41]](#footnote-41) Moreover, the plaintiff was only required to produce a “bare preponderance of evidence that the defendant had uttered words tending to injure the alleged victim’s reputation,” without proving negligence, malice, or even falsity.[[42]](#footnote-42) Only as recently as 2013 was the defense of “truth” explicitly established in libel law, and even still it remains merely an affirmative one, with the burden of proof on the defense.[[43]](#footnote-43)

American libel law, by contrast, is tilted staunchly in favor of the defense, holding the “public’s right to know…paramount over the danger of irreparable harm that might be done to an individual.”[[44]](#footnote-44) Plaintiffs are not only required to prove that the claim against them was false, but that it was motivated by actual malice.[[45]](#footnote-45) While these extensive protections might be taken as evidence that American courts prize truth as a justifiable end of free speech, the law goes further still, protecting even false and harmful speech so long as its original intent was pure. This staunchly speaker-oriented philosophy suggests that although truth discovery is certainly important in American society, it is “not a core value” of the free speech doctrine, which goes beyond merely what would be necessary for truth-finding.[[46]](#footnote-46)

More broadly, the approach taken by both governments to the issue of truth in free speech is reflected in their attitude towards content-based or viewpoint-discriminatory restrictions. American law is staunchly opposed to judicial pronouncements which seem to betray a bias towards one particular opinion, no matter how evidently wrong or immoral that belief may appear. In adherence to the Millian ideal of relativism, the Supreme Court has instead proclaimed that “under the First Amendment, there is no such thing as a false idea.”[[47]](#footnote-47) In an effort to maintain viewpoint impartiality, American free speech law has protected a number of shocking, derogatory, and even literally inflammatory acts like the burning of a cross on the lawn of an African American family in Minnesota, which the Court ruled in the landmark case *R.A.V. v. City of St. Paul* could not be prosecuted without unconstitutionally adjudicating based on the ‘content’ of the act rather than its medium.[[48]](#footnote-48) The First Amendment thus explicitly “forbids the government from ordaining any official orthodoxy.”[[49]](#footnote-49)

The British government has done precisely that. In an effort to stymie radical Islam, the government has asserted a definitive list of “British” values including “democracy, the rule of law, individual liberty” and without irony, “free speech.”[[50]](#footnote-50) Anyone found in “vocal and active opposition” to these values may be labeled an extremist and prevented from speaking on university campuses, traditionally a haven of intellectual freedom. Moreover, Prime Minister Theresa May has contravened the Millian principle of legal relativism by promising to “expos[e radical Islam] for the lie it is,” thereby asserting an authoritative political truth and discounting the value of free speech to seek an independent truth.[[51]](#footnote-51)

**IV. Protection of Speech for Autonomy**

 If, as Eric Barendt suggests, Mill’s ‘truth-discovery’ argument from 1869 is anachronistic in contemporary politics, we might consider that another justification for free speech in “allowing all citizens an equal right to engage in open public discourse.”[[52]](#footnote-52) Barendt’s supposition can be broken down into two objectives: “equal” rights, and “engage[ment]” in discourse: in other words, equality and democracy. We will consider these elements sequentially. Political equality, first of all, is advanced by free speech insofar as the lack of it would give the government vast discriminatory power to shape the public discourse and exclude certain minority viewpoints from policymaking. Closely linked with equality is individual autonomy, which is similarly aided by a public right to voice opinions free from external constraints. Yet, as often as free speech advances these ends, it can also undermine them on such occasions that one individual’s threatening or intolerant speech silences another’s rights to security, belonging, and even expression itself. If free speech is valued only as a means to the end of equality, we should expect that unequal, intolerant, or threatening speech is restricted.

The United Kingdom has proven amenable to claims of superseding individual rights in the area of race and religion. For instance, the Race Relations Act of 1976 prohibits distributing “threatening, abusive, or insulting” statements likely to inspire hatred towards racial and religious groups. Tony Blair’s Labour government of the early 2000s even proposed balancing free speech against “multiculturalism,” which would mean criminalizing any statements interpreted as “insulting” by a religious group.[[53]](#footnote-53) The British value for autonomy is mirrored in libel law with a strong bias towards upholding reputation and dignity, elaborated previously, above journalistic freedom of expression. Unsurprisingly, Barendt estimates that many such British laws designed to protect equality would “certainly be struck down in the United States for violating the First Amendment.”[[54]](#footnote-54) Meanwhile, U.S. protections of racial, religious, and gender equality have been severely limited by free speech protections. James Weinstein writes: “Despite the harm that the following types of expression can cause, American citizens currently have a right … to advocate lawless conduct up to the point of incitement and to deliver racist or anti-Semitic diatribes as part of public discourse”.[[55]](#footnote-55) The recent *Citizens United* *v. Federal Election Commission* case before the Supreme Court, which upheld the right of corporations to anonymously fund political campaigns, further evinces a preference for free speech above equality, this time economic equality. Unlike the United Kingdom, the United States has consistently aired on the side of protecting free speech above other social goods like dignity and autonomy, suggesting that it sees the former as more than merely a means to the latter, but worthy of independent value. By contrast, the British preference for personal dignity and racial equality above free speech suggests that when free speech is protected, it is only as a means to that end.

**V. Protection of Speech for Democracy**

Perhaps the most practical justification for free speech’s instrumental value is in facilitating democracy. Without the ability to voice opinions, express ideas, and contribute to the political debate, democracy is rendered more or less “meaningless.”[[56]](#footnote-56) It was this reasoning advanced by U.S. Supreme Court Justice Louis Brandeis in his famous *Whitney v. California* concurrence, when he recognized the “freedom to think as you will and speak as you think” as an indispensable component of democratic deliberation as intended by the founders. Indeed, the Founding Fathers were explicit that free speech be protected at least in part because it preserved the integrity of the democratic process, which in turn preserved liberty. Madison justly viewed “free communication” as the “guardian of every other right.”[[57]](#footnote-57) Free speech was undoubtedly seen by the founders as possessing the extrinsic potential to enhance and enable the governmental system they had created.

Yet, if we would like to know whether free speech is valued purely for its instrumental advancement of democracy or as an end itself, we should ask how the government has resolved dilemmas where these values have come into conflict. Some of the earliest and most formative free speech cases before the U.S. Supreme Court centered on the promotion of communism, which was then viewed as a radical ideology teaching the overthrow of democratic government and liberal values. What made these questions so perplexing was that they brought into direct conflict two values theretofore believed to be mutually reinforcing: free speech and democracy. The Supreme Court’s decisions during this period represent some of the greatest exceptions to American free speech doctrine in that the Court ostensibly opted to sacrifice freedom of speech to other abstract democratic ideals, to a degree that might appear odious even to the British system. The Smith Act, for instance, forbade “‘willfully and knowingly” conspiring to organize the Communist Party as a group to “teach and advocate the overthrow and destruction of the government.”[[58]](#footnote-58) Nonetheless, appeals soon led the court to clarify a standard of “clear and present danger” and threat of sedition “as speedily as circumstances would permit,” making the object of protection less an abstract ideal of democracy but rather the actual survival of the government – something we might expect any rational, self-preserving institution to value.[[59]](#footnote-59) Even with these qualifications, many convictions under the 1940 Act were overruled as unconstitutional by the Supreme Court several decades later, and the Act has been significantly amended.[[60]](#footnote-60)

Under President Obama, the U.S. government proved more reluctant to apply the anti-Communist framework to a modern analogue, radical Islam, instead relying on community action (in other words, more free speech) to counter extremist ideology. The longevity of such a policy under President Trump’s explicitly anti-Muslim administration, however, is dubious.[[61]](#footnote-61) Democratic values in the abstract have thus proven the greatest temptress of American free speech protection. Yet even after a time as fearful as in the Red Scare, Supreme Court checks and balances eventually prevailed to restore appropriate protections. America’s “constitutive” view of free speech and democracy, which, like the view of Ronald Dworkin, holds that free speech does not merely help to advance democracy, but is integrally constitutive of it. A “just political society [in which] government treat all its adult members, except those who are incompetent, as responsible moral agents” cannot be one that limits their speech.[[62]](#footnote-62)

The high value of democracy as an end of British free speech protection is clear. Announcing reforms to defamation law that tilted the balance slightly back towards the freedom of the press, Justice Secretary Kenneth Clarke called the “the right to speak freely and debate issues without fear of censure … a vital cornerstone of a democratic society.”[[63]](#footnote-63) Similarly, the European Court of Human Rights has held that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.”[[64]](#footnote-64) Two landmark cases in theEuropean Court of Human Rights have relied on democracy as a justification for protecting free speech: in *Handyside v. U.K.*, the court called freedom of speech “one of the basic conditions for the progress of democratic societies” and similarly in *Sunday Times v. U.K.* it was called “one of the essential foundations of democratic society.”[[65]](#footnote-65) Yet at the same time, democracy is also advanced as a justification for *limiting* free speech, suggesting that unlike the U.S., the U.K. prioritizes the end of “democracy” above the individual liberties that may or may not advance it. For instance, the Human Rights Act holds that free speech may be restricted “as necessary in a democratic society.” [[66]](#footnote-66) From this, it is clear that although democracy is prized as a worthy end justifying the preservation of free speech, should those two values ever come into conflict, it is the former ideal which British law champions. Free speech is valuable insofar as it advances democracy, but may be justly curtailed as soon as it ceases to do so.

**VI. Conclusions**

So far, we have examined to what degree the British and American governments prize three potential extrinsic justifications for the protection of free speech: truth, autonomy, and democracy. If free speech is valued purely for the instrumental reason of advancing these social goods, we should expect to see that it is abridged as soon as it ceases to be a benefit and instead actively impedes their attainment. This has largely been true of the British system, which subordinates free speech concerns to the ends of equality and democratic participation, if not so much Millian ‘truth-discovery’ reasoning. The United Kingdom evidently perceives individual liberties, or at least that of free expression in particular, as merely implements to a social end that when dulled, can be discarded in favor of more precise and effective government measures. This allows the British government to maximize what it conceives of as social welfare at the perhaps Faustian cost of personal rights. Conversely, the United States as a rule (the First Amendment, to be precise) sacrifices the immediate advancement of social welfare to the abstract protection of free speech. As Schnauer aptly summarizes,

The principles of freedom of expression impose entrenched second-order constraints not merely upon pernicious attempts to control communication, and not even merely upon well-intentioned but misguided attempts to control communication, but also, and most important, upon actually well-designed and genuinely efficacious attempts to control speech and the press in the service of important first-order policy preference.[[67]](#footnote-67)

Any potential benefit flowing from free speech towards the advancement of social goods like truth, autonomy, or democracy is of secondary interest to the American courts, who are charged with defending free speech until such a point that its “clear and present” danger jeopardizes the institutions of government itself.[[68]](#footnote-68) This “absolutist” protection flows from the “Kantian notion that the individual is an integral unit worthy of respect, not a means to an end.”[[69]](#footnote-69) Justice Brandeis confirms that was in indeed the intention of the founders, who held that the “final end of the State was to make men free to develop their faculties.”[[70]](#footnote-70)

We have identified the distinct motivating doctrines of British and American free speech protection as being, respectively, utilitarian and fundamentalist. Where did this divergence originate? We might posit that the major difference is institutional. In the U.K., the body most responsible for protecting free speech is also that which is accountable to the people for performance outcomes and social welfare, whereas in the U.S., these duties are bifurcated. Parliament, the highest court in the land, plays at once the roles of legislature and judiciary and so is necessarily divided between protecting abstract, long-standing civil liberties and achieving tangible, short-term social goals. Weinstein contends that this balancing act alone would be enough to “curtail the right Americans currently possess to voice unpopular, provocative, or even highly offensive views in public discourse.”[[71]](#footnote-71) Schnauer extrapolates that “when free speech ideas, however sound they may be, are in the hands of institutions…whose primary portfolio is the reflection of first-order policy interests, the ability to subjugate those interests to second-order values will be smallest.”[[72]](#footnote-72) Parliament, whose primary portfolio arguably consists of social programs and national defense, may inevitably trample over second-order civil liberties that impede the fulfillment of that mandate. The American separation of powers guarantees that the body charged with protecting civil liberties is insulated from considerations of immediate social good so far as is possible, and so will protect civil liberties even at the cost of “substantial harm.”[[73]](#footnote-73)

This divergence can be traced yet further, to the very origin of sovereignty in either country. In essence, the United Kingdom and the United States embody what Chaffee delineates as two views of government: that “government was master,” and that “government was servant, and therefore subjected to blame from its master, the people.”[[74]](#footnote-74) In Britain, Parliament is sovereign; in America, the people are sovereign.[[75]](#footnote-75) Bound by deep-seated values for democracy and the rule of law, Parliament certainly has a duty to the people and to their rights in an abstract sense. But in Britain, the people assert no claim to *fundamental* rights, circumscribed within a positive, predetermined scope as a condition of collective rule. Parliament exists above the people, and insofar as it is accountable to them, pursues the paternalistic goal of improving social well-being rather than preserving some pre-existing ‘free’ state of nature. When the government promises to punish “false” Islamist propaganda in favor of ‘true’ British values, it eschews the “epistemological humility” that Redish links fundamentally with “the principle of self-rule.”[[76]](#footnote-76) It was likely Madison’s recognition that in America, “the people and not the government possess absolute sovereignty,” that led him to see the First Amendmentas the “essential difference” between his new constitution and the old British government.[[77]](#footnote-77) The First Amendment is thus a “declaration of national policy in favor of the public discussion of all public questions” and the inherent right of all to engage in the political process.[[78]](#footnote-78) The British government is certainly accountable to the people and likely representative of their interests, yet it makes no claims to be *composed of* them, and thus does not risk being delegitimized by curtailing some of their freedom. Infringements on liberty in the United States on the other hand, even for the sake of improved social outcomes, are “viewed hostilely” as a breach of contract, substituting an unsought service for a contractually obligated duty.[[79]](#footnote-79)

 The differences between the American and British free speech doctrines are thus not merely political nor institutional, but rooted deeply in the origins of government legitimacy. A government responsible to the people might legitimately weigh civil liberties against other social goods, but a government composed *of* the people could not curtail their right to participate freely in political expression without rendering its self-governing nature “meaningless.”[[80]](#footnote-80) The profundity of this chasm is underappreciated in contemporary debate. For example, President Trump’s desire to conform American libel laws to the British system, wherein he claims “you can actually sue if someone says something wrong” and “have a good chance of winning,” would represent a major constitutional shift from the United States’ established free speech doctrine.[[81]](#footnote-81) The First Amendment’s unyielding language is a partial reassurance against such encroachments, but it too relies on interpretation and enforcement.

The hazy political thicket through which countries pass after the clarity of their founding can only be navigated with a comprehensive value doctrine, showing not only one’s values but also the reasons behind them. Both Britain and America value free speech, yet the former only as a means and the latter as an end. If this distinction once appeared insignificant, its consequences across a range of fields such as defamation, hate speech, and counter-extremism have been elaborated, and its deep constitutional roots unearthed.

Ultimately, the difference between the American and British conceptions of free speech is not just legal but cultural, and the responsibility to preserve or alter each founding doctrine is incumbent on society at large. An understanding of the American intrinsic view of free speech, especially as opposed to the British instrumental one, may ultimately guard equally well against attempted infringements as specific constitutional provisions, even one as eminent as the First Amendment.

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ERASURE & CRIMINALIZATION: NATIVE AMERICAN WOMEN AND THE U.S. CRIMINAL JUSTICE SYSTEM

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**Introduction**

Native American women in the U.S. experience higher rates of violent victimization, particularly sexual violence and assault, than any other social or ethnic grou[[82]](#footnote-82) At the same time, Native women are also being incarcerated at six times the rate of white women: a higher rate than any other group, across racial and gender lines.[[83]](#footnote-83) Despite these alarming statistics, Native Americans as a whole and Native American women in particular remain largely absent from the criminal justice literature. Early research on race and the carceral state focused on the experiences of Black men at the expense of any kind of gender analysis (Oshinsky, 1997; Western, 2006).

Black men and youth remain the population most directly in the crosshairs of the War on Drugs and most directly impacted by mass incarceration, and this is reflected in the focus of the literature (Alexander, 2012, most notably). Still, a number of scholars have shifted their gaze to the intersection of race, class, and gender within the framework of the criminal justice system. That being said, the overwhelming majority of this work centers on criminalization of Black women, from welfare (Haney, 2004) to foster care (Roberts, 2012) to incarceration (Ritchie, 2012), as opposed to Native or Latina/Hispanic women.

Despite these important contributions to our understanding of the gendered effects of racialized mass incarceration, the paucity of literature on *Native American* women persists. This paper seeks to explain this paradox, arguing that the lack of focus on the entanglement of Native American women in the carceral state comes down to two central deficiencies: nonexistent or misleading data, and the jurisdictional maze resulting from tribes’ special legal relationship to the U.S. government. First, I marshal statistics on policing, corrections, and victimization to provide context and underscore the scale of Native American women’s concurrent socioeconomic vulnerability and criminalization. The paper subsequently highlights the impact of bad or altogether absent data at the national level. Next, an examination of Department of Corrections (DOC) data from three states (Montana, North Dakota, and South Dakota) serves to illustrate the disproportionate incarceration of Native Americans, and, where the data exists, of Native women. The paper goes on to highlight how federal jurisdiction and gender play into sentencing disparities for Native women. Ultimately, this paper shows how Native women experience both victimization and criminalization at vastly disproportionate rates, and makes the argument that the lack of attention in the criminal justice literature to Native American womenconstitutes a critical failing.

**I.\_Background on Native American Disparities**

 On virtually every measure of socioeconomic well-being, Native Americans come out near the bottom. Native Americans experience criminal victimization at two-and-a-half times the national rate, and twice the rate experienced by African Americans.[[84]](#footnote-84) The per capita incarceration rate for Native Americans is 38 percent higher than the national average.[[85]](#footnote-85) Crime rates on Indian reservations are two to three times higher than the national average.[[86]](#footnote-86) General socioeconomic and public health indicators are also significantly worse in Native American communities, with lower educational attainment and elevated rates of unemployment alcohol abuse, diabetes, and suicide. At 25.7 percent, the poverty rate for American Indians and Alaska Natives is over twice the national poverty rate of 12.4 percent; among two of the largest tribes, Sioux and Navajo, the rate is nearly 40 percent.[[87]](#footnote-87) A growing body of literature has emerged connecting these outcomes to Native communities’ experience of colonization, particularly in terms of the erosion of social ties and the effects of intergenerational trauma (Smith & Ross, 2004; Ogden, 2005; Deer, White Eagle, et. al, 2008; Smith, 2011).

 Native American women face additional marginalization, both within communities and by the criminal justice system. By dint of the interaction of their gender with the aforementioned group-wide socioeconomic disadvantages, Native women deal with some of the worst after-effects of racialized colonial domination, from rates of violent victimization to trends in incarceration.[[88]](#footnote-88) As noted in a 2009 report published by the Montana Governor’s Office of Indian Affairs, the destruction of Native cultures included the subjugation of Native women: “In many ways, the conquest of Native nations by Europeans was accomplished by making war on Indian women, who were raped, abused and killed.”[[89]](#footnote-89)

This multigenerational trauma and the disproportionate victimization of Native American women continues. According to Stormy Ogden, Native women find themselves at an “intersection of sexual and colonial violence that both generates and naturalizes the criminalization of Native women.”[[90]](#footnote-90) Sexual assault and incarceration are interrelated forms of violent control, and today many women who are survivors of domestic violence and sexual assault are revictimized by their interactions with the carceral state. The majority of women in prison have been the victims of male violence, particularly sexual violence, and as Vettern & Bhana note, the experience of confinement shares much with that of abusive relationships.[[91]](#footnote-91) When it comes to the criminal justice system, Native women currently experience incarceration at six times the rate of white women, outpacing the incarceration rates of Native men and Black men and women.[[92]](#footnote-92)

**II. Erasure of Native American Women from National Data**

Native American women are not included as a specific group in most statistics on crime and punishment in the U.S. Finding data on prison admission rates and inmates that is broken down by both gender andrace is extremely difficult, whether for Black or Latina or Native women. However, Native women also suffer from a serious demographic disadvantage: American Indians and Alaska Natives together make up .9 percent of the total U.S. population.[[93]](#footnote-93) Because Native Americans comprise a proportionally tiny part of the national population, their incarceration has rarely been a priority for researchers looking to critique the criminal justice system, given that the numbers of Black and Latinx individuals under correctional control are so much larger. Even if the will exists, collecting robust data on Native Americans’ interactions with the carceral state is often extremely difficult. The logistics and cost of conducting research on remote Indian reservations can be prohibitive; in addition, many correctional facilities do not indicate or do not have a standardized, reliable way of determining ‘Native American’ or ‘American Indian’ status for demographic data on prisoners. As such, Native Americans are often excluded altogether from statistics or relegated to the catch-all category of ‘Other’.

For instance, a 2013 report from the Bureau of Justice Statistics (BJS) on trends in prison admissions and releases reports data for inmates by race and Hispanic origin, but only includes the categories ‘White’, ‘Black’, and ‘Hispanic’.[[94]](#footnote-94) Similarly, multiple Sentencing Project reports on race and the criminal justice system exclude any mention of Native Americans.[[95]](#footnote-95) A BJS ‘Special Report on Women Offenders’ includes no data on Native American women, but instead groups them with Asians, Pacific Islanders, and persons identifying as two or more races.[[96]](#footnote-96) Besides the clear problems with excluding Native Americans from analysis altogether, inclusion in the category ‘Other’ is equally concerning, acting to obscure inter-group differences.[[97]](#footnote-97) Asian-Americans and Native Americans are particularly divergent groups in terms of crime, incarceration, and victimization rates: while Native Americans are much more likely than whites both to be incarcerated and to experience violent crime and sexual violence, Asian-Americans are less likely than whites on all measures.[[98]](#footnote-98) When combined, these variations cancel out, creating the impression that criminal justice statistics for Native Americans are much closer to those of whites than they actually are.

The national data that *are* available suggest that Native Americans —as a group, not specifically disaggregated by gender— are disproportionately represented in the criminal justice system. A 2013 BJS estimate put the number of Native Americans confined in local jails at 9,270, or between 1.3 and 1.6 percent of the total number of inmates, or between one-and-a-half and over one-and-three-quarters their share of the population.[[99]](#footnote-99) At the federal level, Native Americans in the aggregate make up 2.1 percent of the federal inmate population, or 2.33 times their share of the population.[[100]](#footnote-100) Additionally, despite a national correctional population that has been decreasing since its peak in 2007, the number of Native American offenders has increased by 18.2 percent over the last five years.[[101]](#footnote-101),[[102]](#footnote-102) National-level analysis can only go so far toward capturing these trends, however, given that they do not reflect the variation in concentrations of Native Americans across states. While some states have very low Native American populations, others, particularly in the West, are home to much higher numbers.

A new report from the BJS points to a stark imbalance between Native American men and women confined in Indian Country jails nationwide:

**Fig. 1: Inmates confined in Indian country jails, by gender, mid-year 2000 and 2010-2015[[103]](#footnote-103)**

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Inmate Gender | 2000 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 |
| Male | 1,421 | 1,639 | 1,743 | 1,831 | 1,699 | 1,631 | 1,590 |
| Female | 354 | 480 | 496 | 526 | 551 | 528 | 534 |
| Not reported | 0 | 0 | 0 | 7 | 37 | 221 | 0 |
| Totals | 1,775 | 2,119 | 2,239 | 2,364 | 2,287 | 2,380 | 2,124 |

These data demonstrate the gendered disparities *between* Native American inmates. While the number of Native American men incarcerated in Indian country jails rose by 12 percent from 2000 to 2015, the number of Native American women confined in the same jails rose *51 percent,* over four times the rate of increase for men. Still, these numbers lack the comparative context needed in order to evaluate whether or not they are distinct from trends for whites in general and white women in particular.

**III. Case Studies: Montana, South Dakota, & North Dakota**

 The following examination of three states —Montana, South Dakota, and North Dakota (hereafter MT, SD, and ND)— seeks to provide a degree of comparative context lacking in the national data. These three states were selected on the basis of the following characteristics: high concentrations of Native American residents; close geographic proximity; similarly conservative, rural populations; and similar population size. In MT, where Native Americans make up less than 7 percent of the total population, they nonetheless account for nearly one in five arrests, according to a March 2016 report by the Council of State Governments Justice Center.[[104]](#footnote-104) Furthermore, while Native American offenders make up 17 percent of MT’s total prison population, the 2015 Biennial report found that Native American women make up 35.8 percent of the female offender population (see Fig. 2).

**Fig. 2: MT prison population by race and gender, 2000-2014, by percentage[[105]](#footnote-105)**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Female** | **Ethnicity** | **2010** | **2011** | **2012** | **2013** | **2014** |
| White | 64 | 66 | 64 | 65 | 64 |
| American Indian | 33 | 33 | 36 | 35 | 36 |
| African American | 2 | 1 | 1 | .5 | 2 |
| Other minority | 1 | 1 | 0 | .5 | 1 |
| **Male** | White | 77 | 77 | 77 | 77 | 77 |
| American Indian | 19 | 20 | 20 | 20 | 20 |
| African American | 3 | 3 | 3 | 3 | 3 |
| Other minority | 1 | 0 | 0 | 0 | 0 |

In other words, Native American women are nearly twice as overrepresented in prisons as men, and they are overrepresented, as compared to white women, by over five times their share of the population.SD exhibits similar characteristics in terms of the disproportionate incarceration of Native Americans (see Fig. 3).

**Fig. 3: South Dakota Adult Inmates by Race/Ethnicity, December 1, 2016[[106]](#footnote-106)**

|  |  |  |
| --- | --- | --- |
| **Race/Ethnicity** | **Male** | **Female** |
| White | 1,939 | 228 |
| American Indian | 918 | 232 |
| Black | 280 | 9 |
| Hispanic | 129 | 13 |
| Asian | 18 | 0 |
| Pacific Islander | 2 | 0 |
| Other | 5 | 1 |
| Total | 3,291 | 483 |
|  |

Though they make up 9 percent of the state population, Native Americans comprise over 30 percent of adult inmates. Even more staggering, Native women comprise 48 percent of the total female inmate population.

In ND, Native Americans also make up a disproportionate percentage of incarcerated individuals: 20 percent of all inmates, but just 5 percent of the population. North Dakota DOC data for state-held inmates specify gender and race, but do not interact the two, so it is not possible to quantify the share of Native American women in North Dakota prisons. See Fig. 4:

|  |
| --- |
| **Fig. 4: North Dakota Inmate Demographics, 2007-2015[[107]](#footnote-107)** |
|  | **2007** | **2008** | **2009** | **2010** | **2011** | **2012** | **2013** | **2014** | **2015** |
| Inmate Totals  | 1,439 | 1,470 | 1,504 | 1,505 | 1,440 | 1,536 | 1,576 | 1,718 | 1,795 |
| Male  | 1,292 | 1,310 | 1,330 | 1,326 | 1,292 | 1,335 | 1,419 | 1,514 | 1,587 |
| Female  | 147 | 160 | 174 | 179 | 148 | 171 | 157 | 204 | 208 |
| White  | 950 | 972 | 967 | 942 | 911 | 1,018 | 1,048 | 1,149 | 1,181 |
| American Indian  | 323 | 326 | 349 | 379 | 364 | 338 | 340 | 348 | 357 |
| Black  | 80 | 84 | 90 | 104 | 89 | 101 | 99 | 119 | 141 |
| Hispanic | 80 | 79 | 92 | 78 | 70 | 74 | 82 | 88 | 102 |

Despite gaps and inconsistencies in the extent of available demographic data from Montana, South Dakota, and North Dakota corrections, all three states exhibit the same overarching trend. Native Americans in these states, particularly Native women, experience consistently and markedly higher incarceration rates than their white counterparts.[[108]](#footnote-108) Still, a key piece of the puzzle is missing from these data on prisoner demographics, muting the gravity of the situation at hand: legal jurisdiction over Native American individuals.

**IV. Connecting the Dots: Jurisdiction**

The districts of Montana, South Dakota, and North Dakota are among the top five districts nationwide in terms of cases involving Native American defendants (see Fig. 5). The Native American caseload in Montana, South Dakota, and North Dakota is more than three times as high as it would be if it corresponded to the population share of Native Americans in each state; in Montana and South Dakota the Native American share of the caseload is over five and six times the population share, respectively.

**Fig. 5: Districts with highest proportion of total caseload comprising Native American Offenders, 2010-2014, compared to population share[[109]](#footnote-109)**

|  |  |  |  |
| --- | --- | --- | --- |
| **State** | Percent of caseload | Percent of total population | Caseload: population share |
| SD | 56.5 | 8.8 | 6.42 |
| MT | 32.9 | 6.3 | 5.22 |
| Eastern OK | 26.1 | 8.6\* | 2.51 |
| ND | 18 | 5.4 | 3.33 |
| Northern OK | 12.6 | 8.6\* | 1.47 |
| *\*Represents percent share for the whole state of Oklahoma* |

These data bring up the question: why is the share of Native American caseload often greater than the number of Native Americans represented in state prisons? In South Dakota, for example, Native Americans constitute nearly 60 percent of the caseload, but make up 20 percent of the state inmate population. This discrepancy is too large to be explained by acquittals and not-guilty rulings.

 Turning to the codes governing criminal jurisdiction over crimes committed by Native Americans provides the missing puzzle piece. Felony criminal justice for the majority of Native American defendants in the U.S. falls under federal rather than state jurisdiction under the Major Crimes Act (18 U.S.C. § 1153).[[110]](#footnote-110) Under the terms of this act, if the offender is Native American, the case goes to the federal level regardless of whether or not the victim is Native American and whether the crime was committed on or off an Indian reservation (see Fig. 6). Passed in 1885 and expanded in 1948, the Major Crimes Act covers a wide range of offenses: murder; manslaughter kidnapping, sexual abuse, incest, assault, assault against a minor, child abuse, arson, burglary, robber, and larceny.[[111]](#footnote-111) Two other statutes also limit tribal jurisdiction: *Oliphant v. Suquamish Indian Tribes* (1887), and the euphemistically-named Indian Civil Rights Act (1968).[[112]](#footnote-112) Federal Indian country prosecutions jeopardize a whole host of defendants’ constitutional rights, from the concept of trial by a jury of peers to due process to the right to a public trial.[[113]](#footnote-113)

|  |
| --- |
| **Fig. 6: Indian Country Criminal Jurisdiction[[114]](#footnote-114)** |
| **Offender** | **Victim** | **Juridiction** |
| Indian | Indian | **Federal**: Major Crimes. If the offense is listed as a major crime (under 18 U.S.C.A. §1153), there is federal jurisdiction concurrent with the tribe. **Tribal**: Other Crimes.  |
| Indian | Victimless | **Tribal**: Tribal courts have exclusive jurisdiction. |
| Indian | Non-Indian | **Concurrent Federal and Tribal:** If the offense is listed as a major crime or is applicable within federal enclaves, there is federal jurisdiction concurrent with the tribe (under the Major Crimes and General Crimes Acts). Otherwise, state law can be applied in federal court under the Assimilated Crimes Act.  |
| Non-Indian | Indian | **Federal**: Federal jurisdiction is exclusive. Tribal courts have no jurisdiction under Oliphant. |
| Non-Indian | Victimless | **State**: State jurisdiction is exclusive. |
| Non-Indian | Non-Indian | **State**: State jurisdiction is exclusive. |

When Native American defendants end up in federal court, besides being excluded from state prison statistics, they are ultimately subject to harsher sentencing guidelines.[[115]](#footnote-115) As Tredeau unequivocally states, “federal jurisdiction and sentencing systematically create harsher sentences for Indian defendants than for non-Indian defendants.” [[116]](#footnote-116) In South Dakota, for example, the average sentence for a defendant convicted of assault in state court is 29 months. However, if a Native American defendant were to commit that same offense, the defendant would be prosecuted in federal court, where the same crime carries an average sentence of 47 months.[[117]](#footnote-117) This phenomenon, whereby Native American defendants receive demonstrably harsher sentences than non-Native defendants for the *same offense* for no other reason than their race, is cause for concern and should be a priority for policy reformers.

Additional attention must be trained on the consequences of federal jurisdiction for female Native American defendants, given the glaring differences in cross-race incarceration rates for female offenders. Indeed, the most-cited case in the debate on Native American sentencing disparities involved a Native woman from North Dakota, who was sentenced in federal court to 121 months for committing neonaticide; two similar cases of neonaticide, which were adjudicated in North Dakota state court and involved white defendants, resulted in three years of probation and 24 months’ incarceration, respectively.[[118]](#footnote-118)

**V. Conclusion and Implications for Further Research**

 Beyond occupying a space of gendered, classed, and racialized marginalizations, Native American women are disproportionately impacted by mass incarceration as it interacts with the historical and legal legacies of American colonial domination. This paper began by connecting the lack of focus on Native American women in the criminal justice literature to enduring deficiencies in the available data. Subsequently, the paper briefly zoomed in on Montana, South Dakota, and North Dakota in order to illustrate the disparities Native American women face in their dealings with the carceral state, but also to demonstrate that neither national nor state-level analysis in isolation provides a complete picture. Instead, by bringing to the table the dynamics of federal jurisdiction as they pertain to Native American defendants, the relationship *between* the tribal, state, and federal levels comes into focus, revealing the extent to which sentencing disparities have become codified and normalized.

While analysis of state and national-level data strongly indicate that Native Americans, particularly women, are being victimized and criminalized by mass incarceration, bringing federal jurisdiction to bear on this phenomenon reveals that things are even worse than they first appear. Existing legislation, from the Major Crimes Act to the Indian Civil Right Act to *Oliphant vs. Suquamish Indian Tribe,* acts to obscure state-level data and legitimate sentencing disparities. Given that these interlocking forms of marginalization fall heaviest upon Native American women, greater attention by criminal justice scholars and social scientists is warranted. Further research could explore the following questions: How do tribal law, federal, and state law relate to one another as they pertain to Native women? When and with what frequency are Native female defendants prosecuted at the federal level for crimes that would remain in state court for non-Native defendants? Does the trend of marked overincarceration hold across states with sizable Native American population beyond those considered in this paper? Finally, in pursuing better answers to these and related questions, and in debates on criminal justice reform more broadly, from decarceration to justice reinvestment to sentencing reform, the voices of Native American women must figure more prominently.

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THE MOON, MARS, EARTH, AND BEYOND: REGULATION OF SPACE EXPLORATION

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**Introduction**

Humans have long been fascinated by the depths of outer space, and they have been trying to understand it since the beginning of mankind. Ancient astronomers developed theories to explain day and night, the passage of time, and the movement of stars. Throughout time, we have been able to learn more about outer space through new scientific discoveries and technologies, as well as by exploring our solar system. Regulation, both domestically and internationally, has been an important part of space exploration and it is becoming increasingly important as we continue to explore space and look towards manned trips to Mars and the Moon. Space exploration was previously a government-dominated area, but the private sector is beginning to play a larger role in the scientific exploration, potential settlement, and anticipated tourism of outer space. This rapid expansion of private space exploration creates an increased need for regulation.

SpaceShipOne, developed by Elbert Rutan’s firm, Scaled Composites LLC, and financed by Microsoft co-founder, Paul G. Allen, was the first privately-funded manned spacecraft to leave Earth’s atmosphere. Rutan and Allen won the $10 million Ansari X Prize in October 2004 for launching two human, suborbital flights within two weeks of each other. This event catalyzed the private sector space industry.[[119]](#footnote-119) It also demonstrated that we had the technology needed for short-term human suborbital flight, therefore encouraging more ambitious plans for space tourism. Affluent individuals have demonstrated that they would be willing to pay large sums of money for a trip to space; over seven thousand people signed up to reserve a $275,000 seat on a spacecraft (Freeland, 2005). Additionally, a poll conducted in 2002 showed that 19 percent of affluent American adults would be willing to pay $100,000 for a 15-minute suborbital flight (Freeland, 2005). One commentator, Patrick Collins, an author for Space Future, has a vision of commercial space tourism that includes a sophisticated space travel infrastructure such as co-orbital hotels, orbital sports centers, and daily-scheduled lunar flights to lunar orbit and lunar pole hotels. After a successful project wherein a tourist was able to spend six days in the Russian section of the International Space Station (ISS), NASA became more open to the idea of space tourists in the context of the ISS.[[120]](#footnote-120) It proved that tourists could safely and victoriously travel to and vacation in space.

*Outer Space Development, International Relations and Space Law: A Method for Elucidating Seeds* provides a useful summary for the development of private space exploration regulation. Space lawmaking was originally started, negotiated, created, and codified by several different state actors including the Soviet Union and the United States. Dr. Edythe E. Weeks, J.D., Ph.D., the author of the book, is a professor of Outer Space Development and International Relations at Webster University Worldwide. She argues that the creation of international space laws stemmed from Cold War fears and that it was treated as an international affair.[[121]](#footnote-121) U.S. laws and policies during Reagan’s presidential administration caused space lawmaking to become more domestic rather than international. Thus, the U.S. aided commercialization through domestic space laws rather than deferring to the United Nations. When the Soviet Union fell, free-market ideology began to dominate the space development regime and allowed the United States to accelerate the commercialization and privatization of different entities related to space exploration, such as satellite telecommunications, the International Space Station, and the spaceport (sites for launching and receiving spacecraft) and space transportation industries. The United States space transportation industry is currently made up of private entities such as aerospace companies, entrepreneurs engaged in space-related business, and other viable business entities. In the post-Cold War era, new actors have emerged that have pushed for the legalization of hyper privatization of the space industries.[[122]](#footnote-122) This has then led to further privatization of the space industries and laws that regulate it.

**I.\_Background**

In 1958, a committee of four university scientists was created to formulate an American program that could lead to international space regulation. The group’s report was expected to be the foundation of the United States policy at the meeting of the International Council of Scientific Unions in Washington. Some scientists and experts expressed concern about the satellites that the United States and Soviet Union had recently launched without regulation, because they argued that a satellite could be seen on a radar screen and mistaken for a ballistic missile, which could trigger World War III (Space Trip Regulation is Weighed, 1958). Concerns like these were part of the reason why the committee was created.

Additionally, the 1967 Outer Space Treaty, formally known as the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, followed two non-binding resolutions passed by the United Nations General Assembly (UNGA) in 1961 and 1963. These treaties effectively said that the principles of the United Nations Charter extend to outer space. One of the goals of the 1967 Outer Space Treaty was to prevent an extension of the arms race to space. It prohibited space-based nuclear weapons, banned military uses of the moon or planets, asserted that exploration of space must take place in accordance with the Common Heritage Principle, placed a ban on territorial or other sovereign claims, and required cooperation on peaceful exploitation of space, among other principles. The treaty contains no verification or adjudication provisions, but it was adopted unanimously by UNGA in 1966.[[123]](#footnote-123) This treaty is important because it helped to start outlining guidelines for space exploration.

Law and policy surrounding space exploration further evolved when former President George W. Bush’s Vision for Space Exploration was announced on January 14, 2004. It called for human and robotic missions to the Moon, Mars, and other parts of space. Goals of the vision included sending a robotic lander and orbiter to the Moon; sending a human expedition to the Moon by 2020; conducting robotic missions to Mars to prepare for future human missions; and conducting robotic exploration across the solar system.[[124]](#footnote-124) The President’s Commission on Implementation of United States Space Exploration Policy wrote a report on the Vision and recommended that, in addition to other actions, NASA must transform its relationship with the private sector. The Commission said that NASA should recognize and implement a larger presence of the private industry in space operations with the goal of allowing the private industry to assume the primary role of providing services to NASA. Additionally, the preferred choice for operational activities would have to be competitively-awarded contracts with private and nonprofit organizations. NASA should only play a role when there is indisputable proof that only the government can perform the proposed activity. The Commission also suggested that NASA Centers be reorganized as Federally Funded Research and Development Centers to allow effective collaboration with the private sector and stimulate economic development. The Commission had suggestions for Congress as well, recommending that Congress increase the potential for commercial opportunities related to space exploration by giving incentives for entrepreneurial investment in space, developing monetary prizes for space missions and/or technology developments, and ensuring appropriate property rights for those who seek to develop space resources and infrastructure.[[125]](#footnote-125) This all proves that space exploration is becoming more commercialized and that many components of it are being moved to the private sector.

In December 2004, the Commercial Space Launch Amendments Act was passed, which provided a legal framework for the newly emerging private spaceship industry. This act set forth a series of principles and beliefs, which were that 1) federal space investments, policies, and regulations should be guided by the goal of opening space to the American people and to private companies, 2) the private industry had begun to create vehicles capable of bringing humans into space, 3) the commercial space transportation industry would be facilitated by greater investment in these efforts, and 4) space transportation is inherently risky. It also defined a series of terms, declared that the regulatory authority for space transportation should be carried out through the Associate Administrator for Space Transportation, provided for the issuance of experimental permits, and regulated the use of these permits.[[126]](#footnote-126) The act afforded more guidance for the private space industry as it continued to grow, in terms of what it would entail and how the federal government would regulate and invest in it.

The private space exploration industry was given a boost with the passage of the NASA Authorization Act in 2010, which authorized $58.4 billion in funds for the expansion and advancement of the process of outer space development and licensed NASA’s programs. It also complemented the New Vision for U.S. Space Exploration Policy implemented by George W. Bush. When Space Shuttle Atlantis made its last flight on July 21, 2011, the private industry had to be ready to effectively take over many of the roles that NASA previously held. In November 2010, SpaceX was granted an FAA license that authorized it to reenter the Earth’s atmosphere, making it the first private spaceship to return to Earth from orbit.[[127]](#footnote-127) The private sector continues to expand its role in space exploration, which makes policies, regulation, and laws even more important.

**II. Legal Implications**

Private exploration and settlement in outer space or on celestial bodies is legal in the United States and the rest of the international community. Yet, the 1967 Outer Space Treaty left uncertainty surrounding property rights for commercial entities, including resource and mining extraction. Under the treaty, efforts and investments of the private sector might not be legally protected. There is no assurance in the treaty that investments and efforts will receive legal protection in space, so businesses and investors are hesitant to get involved. The commercial space industry needs a set of clear and minimal standards and laws in order to thrive and expand. It would be beneficial for nations that want to encourage the private space industry to revise the treaty or enter into ancillary treaties to create well-defined transnational legal protections for private property rights and mineral exploitation in outer space.[[128]](#footnote-128) Doing so would allow actors within the commercial space industry to have a clearer idea of what is and is not legal, and what standards they need to meet, which would eliminate uncertainty that might stunt growth and expansion.

 Different players in the area of space exploration, one of the most notable being NASA, recognize the need for deciphering technology policy issues. They are aware of how government, industry, and other stakeholders are interconnected in terms of advancing human and robotic exploration and development of space. As evidence of this, NASA asked the National Research Council’s Aeronautics and Space Engineering Board to organize a series of workshops on these topics.[[129]](#footnote-129) The workshops were mainly centered around policy issues relating to the development and demonstration of space technologies, especially those related to a new framework for space technology and systems development-Advanced Systems, Technologies, Research, and Analysis (ASTRA) for Future Space Flight Capabilities. Another key subject of the workshop was the different rationales for long-term cultivation of advanced space systems. During the first four workshops, the policy issues covered were the reasoning and justification for human and robotic space exploration, technology as a driver for capability transformation, risk mitigation and perception, and international cooperation and competition. These were the issues covered because the steering committee found that they most related to the ASTRA framework.[[130]](#footnote-130) All of these issues were important for regulation because there needs to be a clear understanding of the policy issues in order to effectively regulate them.

 In February 2016, at a day of presentations on commercial-space developments hosted by the FAA’s Office of Commercial Space Transportation, House Republican Jim Bridenstein, who was drawing from his experiences as a member of the armed services subcommittee that oversees military space, urged government regulation of the space economy before it becomes uncontrollable. Bridenstein announced that although he is a conservative Republican and is not usually in favor of regulation, by doing nothing, the U.S. would still be regulating space by effectively denying ourselves a future where we could use all of the technologies that space enables. Bridenstein explained that although commercial enterprises are taking over areas within space exploration once reserved for the government, such as satellite communications and space launches, the government must still regulate it to prevent it from being overtaken with space debris and interfering communications. He suggests that space traffic management be turned over to the FAA, and that it should be given greater funding for its space transportation office, so the Air Force does not have to track spacecraft and debris for the benefit of civilian space operators.[[131]](#footnote-131) His views illustrate that there is at least some level of non-partisan support for regulation of space exploration. By not regulating space, the United States government would be allowing too much freedom for private industries to do whatever they wanted, without taking possible negative consequences, such as the depletion of resources, into account.

 The area of space tourism may give rise to areas of legal uncertainty. Steven Freeland, a professor of international law at Western Sydney University, argues that the international space law that already exists provides a solid base from which to develop the legal tools necessary to properly regulate the next step of space activities. However, there are limitations that have already been established by the legal regime set up for outer space and by its status as a res communis, or “common-asset,” which says that outer space is to be shared amongst all humans of this generation and future generations (Freeland, 2005). This makes it harder to privatize space, because privatization means it belongs to one company or country rather than being shared by all. The law of outer space is a discrete body of law within international law. Following the launch of Sputnik 1 in 1957 by the USSR, the international community realized the importance of agreeing on rules to regulate the new frontier of space (Freeland, 2005). Since the Soviet Union was entering space and using it for its own needs, it became clear that to make sure that space would not be monopolized by one country, regulation was needed. Most of the international and domestic law principles that are currently in existence are contained in multilateral treaties, UNGA Resolutions, national legislation, decisions by national courts, bilateral arrangements, and determinations made by Intergovernmental Organizations. Five main multilateral treaties have been finalized through the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPOUS), which deal with various issues related to outer space but do not quite deal with specifics of space tourism, as they were developed during the Cold War era when it was not anticipated that space tourism would be something that would have to be dealt with in the future. Only a small number of countries at the time had space-faring capabilities.[[132]](#footnote-132) Now that more countries have access to space because they have developed more advanced technologies, more specific terms and specifications related to space tourism need to be included in our international laws.

 As activities have been planned for outer space, and private enterprises have begun to participate more, the international community has adopted different rules and laws on a largely ad hoc and reactive basis. Most are contained in a set of five principles adopted by UNGA, but these principles are considered “soft-law” because they are non-binding and contain no enforcement power. They are also of little direct importance to space tourism. Freeland suggests that what is needed is development of laws at the international level supplemented by laws at the national level. This would presumably prevent space tourism from being restricted by uncertainty and provide minimum standards while protecting and encouraging innovation.[[133]](#footnote-133) Since international law is often difficult to enforce, or is non-binding, laws at the national level could help to make sure that the regulations are effective.

 Focusing on what questions these laws should consider, as well as what provisions and stipulations they should include, it is imperative to discuss regulation of space exploration and tourism. International space law has always operated according to the idea that exploration and use of outer space “shall be carried out for the benefit and use of all countries,” so the question is, will this still be the case as space exploration and tourism expand?[[134]](#footnote-134) Dr. Edythe E. Weeks, a professor of outer space development and international relations at Webster University Worldwide, argues that key actors will become the primary shareholders of space in the future, thus leaving everyone else behind. She says that since not everyone is aware of the different opportunities that space offers, it is impossible for everyone to benefit from it. Weeks also points out that many have stated that this principle of mutual benefit for all is a hindrance to the free market and development of a booming space economy and of new infrastructure. She thinks this can, however, be somewhat mitigated through education of the public about how the space industry is developing.[[135]](#footnote-135) When not everyone has access to the resources and capital needed to get involved in space exploration, it follows that only some key stakeholders would have that opportunity. This is not something that can be easily remedied, but making sure to at least keep the general public informed about what is going on with space exploration is one way to get more people involved in some capacity.

**III. Environmental Concerns**

Another crucial question is how international space law will protect the natural environment of outer space. The Outer Space Treaty makes some reference to this topic, but does not sufficiently define the provisions for environmental protection nor does it provide a legal concept of “space debris” or a mechanism to regulate it. The Moon Agreement provides a little bit more, stating that parties have the obligation to protect “the existing balance of its [the Moon’s] environment.”[[136]](#footnote-136) The agreement was adopted by the General Assembly of the United Nations in 1979 by consensus. On December 18, 1979, it was opened for ratification, and on this date was signed by Chile, France, Romania, the Philippines, Austria, and Morocco. It was an attempt by the 152 nations involved to establish a basic legal framework for exploration and possible exploitation of the Moon and other celestial bodies and to uphold the United Nation’s principles of peace and development via international diplomacy (Bini, 2010). It is a step in the right direction, but more clear and strict laws must be implemented to truly prevent irreversible human harm from being done to outer space.

 Protection of the “heritage” of space is an additional topic that must be considered when discussing and planning regulation of space exploration, because there are important sites in outer space that are and will be significant in terms of human history and endeavors in space. There will need to be laws implemented to protect “heritage sites” and “national parks” like the site of the first lunar landing, from intentional and accidental damage that could be done by space tourists and others (Freeland, 2005). This could include the site of the first moon landing and more. Freeland proposes a “Space Heritage Treaty” to address this area of concern.[[137]](#footnote-137) Since it is unclear who or which countries these different parts of space belong to, a treaty might help to clear up these questions. It could also assist in developing laws that will effectively protect these sites. Both ethical and practical concerns, meaning what should we protect and how should we protect it, must be considered.

What some call the “new space race,” modern space exploration has catalyzed actions and policies like “hearings, policy statements, U.S. laws, international laws, domestic laws within other nations, and various historical, legal, ideological, institutional, political, economic, psychological, and structural factors.” The U.S. Congress, Senate, and President’s Commission Hearings have all held discussions for private actors that contend that they should be granted the legal right to own space resources, territories in outer space, and NASA’s assets so they can further develop this new frontier.[[138]](#footnote-138) This demonstrates that stakeholders within the private sector are not completely opposed to regulation, but have pushed for laws that would not limit their ability to explore and develop outer space.

**IV. Conclusion**

 To conclude, expansion of space exploration and the increased privatization of space industries has made regulation and laws all the more crucial. The international community seems to have recognized space colonization as inevitable, and has implemented different policies that encourage the development and exploration of outer space. U.S. domestic laws have helped privatization of the space industry to be successful and economic successes have been used to gain support of international bodies like the United Nations Committee on Peaceful Uses of Outer Space, the International Astronautical Federation, the International Academy of Astronautics, and the International Institute of Space Law. Conferences and workshops, among other arrangements, have been used to facilitate the commercialization of space in various countries. The United States led the process of domestic laws guiding space enterprises, and now other nations are doing the same.[[139]](#footnote-139) Therefore, since it is something that is already happening and is going to continue happening, it is all the more important for rules and regulations to be developed that prevent problems like environmental degradation and international conflict from arising in the future. If we are to protect the space environment, preserve the heritage of space, not restrict development through uncertainty, and prevent international conflicts, it is the responsibility of both domestic and international actors to formulate laws and treaties that can keep up with the rapid development and expansion of space exploration. Outer space has the potential to provide humanity with so many amazing opportunities, experiences, and discoveries, but we must take care to not destroy it the way we have harmed our own planet. If we neglect to regulate space, we could end up with a situation in which it is exploited and eventually destroyed. Alternatively, we could impair the growth of the private space industry and therefore not be able to appreciate all that space could potentially provide in terms of resources, scientific discoveries, tourism, and more. Researching the evolution of space laws throughout time facilitates a greater understanding of how they might evolve in the future and how we could effectively regulate and protect outer space.

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1. To be precise, this paper will not address the Federal Circuit’s finding that “[i]n the Ninth Circuit... merger [is an] affirmative [defense] to claims of infringement.” See Oracle, No. 13-1021 at \*25 (Fed. Cir. 2014), citing Ets-Hokin v. Skyy Spirits, Inc., 225. [↑](#footnote-ref-1)
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3. Of the seven amicus briefs filed with the Supreme Court – which represent the views of over forty intellectual law professors and industry giants Hewlett-Packard Company, Red Hat, Inc., and Yahoo! Inc. – not a single one concurs with the view taken by the Federal Circuit. [↑](#footnote-ref-3)
4. Two other particularly problematic components of the Federal Circuit’s opinion are its discussion of and failure to apply the abstraction-filtration-comparison framework in this case – as well as its subsequent citation thereof to reject arguments, despite never applying it – and its claim that “Section 102(b) does not extinguish the protection accorded a particular expression... merely because [it] is embodied in a method of operation.” See Oracle America, Inc. v. Google, Inc., No. 13-1021, at \*22 (Fed. Cir. 2014), citing Mitel, Inc. v. Iqtel, Inc., 124 F.3d 1366, 1372 (10th Cir. 1997). [↑](#footnote-ref-4)
5. Oracle, No. 13-1021 at \*26 (Fed. Cir. 2014). [↑](#footnote-ref-5)
6. Interestingly, as of date, only one brief amicus challenges the Federal Circuit’s application of the merger doctrine, and its challenge is premised in an alternative approach to merger, a distinctly different challenge than is presented here. See Brief for Intellectual Law Professors as Amici Curiae in No. 13-1021 at 4. [↑](#footnote-ref-6)
7. It is worth noting that there are instances in the technical literature where the distinction between “Java programming language,” “Java API,” and “Java” may not be emphasized – or even made – because it would not be significant in context. [↑](#footnote-ref-7)
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 foreign to the Indian community, who may very well speak different language and who are subject to a different

 set of laws? Does an Indian community have voice in issues of public safety when its local felonies are adjudicated

 in distant tribunals by officials who are not accountable to tribal leaders or the community? Are basic requirements

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