THE
GEORGE WASHINGTON
UNDERGRADUATE
LAW REVIEW
# The George Washington Undergraduate Law Review

## Articles

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
<th>Author</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Power in the United States</td>
<td>1</td>
<td>Daniel Lyng</td>
</tr>
<tr>
<td>What’s Right for Robots’ Rights: Examining the Future of the Law Regarding Developing Robotic Technology</td>
<td>30</td>
<td>Emily Horak</td>
</tr>
<tr>
<td>Obergefell: A Catalyst for Judicial Expansion of Fundamental Liberties</td>
<td>53</td>
<td>Amanda Urban</td>
</tr>
<tr>
<td>Hamiltonianism: A Critical Examination of the Governing Philosophy and its Impact on American History</td>
<td>71</td>
<td>Bri Mirabile</td>
</tr>
<tr>
<td>“Disparagement” Versus Free Expression: Bringing the Lanham Act into the Twenty-First Century</td>
<td>94</td>
<td>Talia Balakirsky</td>
</tr>
<tr>
<td>Accessing Attorneys: Arguing for an Inalienable Right of Undocumented Persons in Removal Proceedings</td>
<td>109</td>
<td>Robert Wu</td>
</tr>
<tr>
<td>The Growing Legal Disconnect Over Marijuana: Evaluating the Effects of the Marijuana Revolution</td>
<td>146</td>
<td>Itiel Wainer</td>
</tr>
<tr>
<td>Climate Change and Human Displacement: International Law Reform on the Brink of a Crisis</td>
<td>187</td>
<td>Kendall Keelen</td>
</tr>
<tr>
<td>Victims’ Rights within the Framework of Theoretical American Justice</td>
<td>209</td>
<td>Kaarish K. Maniar</td>
</tr>
<tr>
<td>The Injustice of Profit: A Legal Review of the Private Prison Industry</td>
<td>241</td>
<td>Margaret Meiman</td>
</tr>
</tbody>
</table>

## Think Piece

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
<th>Author</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Pollen Problem: The Marginalization of the Organic Farmer in the Biotechnology Liability Debate</td>
<td>266</td>
<td>Swetha Ramesh</td>
</tr>
</tbody>
</table>

© Copyright 2017, The GWU Pre-Law Student Association. All rights reserved.
THE
GEORGE WASHINGTON
PRE-LAW STUDENT
ASSOCIATION

BOARD OF EXECUTIVES

Martin McSherry
President

Zoe Goldstein
Law Review Director

Jarrod Carman
Law Review Editor-in-Chief

Nikhil Venkatasubramanian
Law Review Editor-in-Chief

Abigail Shriver
Treasurer

Katie Muth
Events Director

Zach Sanders
Vice-President

Zach Sanders
Law Review Editor-in-Chief

Josh Kirmsse
Justice Journal Editor-in-Chief

Robert Dickson
Justice Journal Director

Nilofar Vakili
Freshman Representative
BOARD OF ADVISORS

The George Washington Undergraduate Law Review is privileged to have the support of the following professors and legal professionals. Their contributions are tremendously appreciated and have greatly enhanced the quality of this journal.

Kenneth Carman, Esq.
Keith Diener, Esq.
Michael Gabriel, Esq.
Ioana Luca, Esq.
Alan Morrison, Esq.
Jayna Rust, Esq.
William D. Sanders, Esq.
Cary Silverman, Esq.
Andrew Stewart, Esq.
Collin Swan, Esq.
Zachary Wolfe, Esq.

ASSOCIATE EDITORS

The articles of the George Washington Undergraduate Law Review would not be published without the hard work of the student editors. Their dedication throughout the yearlong publication effort is evident in the quality of writing in this law review.

Alex Nelson
Daniel Lyng
Emily Horak
Hope Mirski
Mackenzie White
Monica Iskander
Talia Balakirsky
William Innes
Zachary Bass
Dear Reader,

As President of the Pre-Law Student Association this year, I could not be more proud of the hard work our writers, editors, and leadership put into creating this publication. Our flagship publication, The Undergraduate Law Review, is a unique undertaking that demands diligence, superb time management, and a superbly sharp mind well suited to a legal education and career.

The task of selecting writers and guiding them through every step of this journey was not an easy one for the publication’s leadership and editorial staff. From our organization’s consultation with the leadership of law reviews at top law schools, we have designed a process that directly mirrors the work of trained legal scholars. Each year, every participant in our process experiences a steep learning curve as they volunteer for a workload typically reserved for the highest-achieving 2L and 3L law students.

As any reader of this publication will quickly learn, that work paid off. Each article is well written, thought provoking, and advances legal scholarship in their respective subject areas. What readers may not know, however, is just how beneficial writing for The Undergraduate Law Review will be for writers, editors, and the leadership team as they apply to law school. As an applicant myself this year, every interview I had with admissions directors focused heavily on my involvement with the Pre-Law Student Association and our publications. Because participation in law reviews and journals at law school is highly predictive of career success, admissions teams are keen to recruit students with legal research and writing experience. Further, the demanding nature of participating in our publications while maintaining decent grades and even internships demonstrates maturity, intelligence, and unparalleled work ethic.

It is with great pleasure and enthusiasm that I present the final product of months of preparation from our entire team.

Sincerely,

Martin M. McSherry
Introduction

For four years now, I have had the privilege of being part of the George Washington University Undergraduate Law Review (ULR). To say that this experience has helped shape my undergraduate career would be a gross understatement – as a testament to the many years I have dedicated to the publication, I can honestly say that the hard work I have put into my various positions on the ULR has paid off in ways I never expected. Now, I am eager to present the final product of my tenure on the publication’s leadership, and I could not be more proud of all of the staff on my team this year that helped to make it happen.

After receiving over seventy applications last fall, the grueling, year-long publication process has now ended with twelve beautifully written, thoughtful, and intriguing pieces by some of the best and brightest GW undergraduate students. These students, freshmen through seniors, had a passion for a legal subject and took the time out of their incredibly busy schedules to craft well-argued, detail-oriented, and closely-edited articles. However, they did not do it alone – our team of nine associate editors, also students, worked with the writers every step of the way to ensure that their pieces maintained the high standard of quality that we require on the ULR, down to every last legal Bluebook citation. Now, each of these writers and editors can say they have been published as an undergraduate, with their work placed in prestigious institutions including the Library of Congress, American Bar Association Library, and the George Washington University’s Gelman Library.

There are so many people to thank for the success of this year’s publication, but first and foremost, I must thank my three Editors-in-Chief: Zach Sanders, Nikhil Venkatasubramanian, and Jarrod Carman. Without them, and the countless hours they spent editing articles this year, this volume of the ULR would be nowhere near what it is today. I would also like to thank my fellow Executive Board members at the Pre-Law Student Association for their support throughout the year, especially our president Martin McSherry, whose leadership and assistance has been integral to this process. This year, we also had eleven legal professionals assist us in a round of editing, which helped every article tremendously. I owe a considerable amount of thanks to them for volunteering their time to support us. I have learned so much this year while serving as Director of the ULR – a role I stepped into with a considerable legacy of past leaders before me, to whom I am extremely grateful. And, of course, I must thank everyone on the ULR staff this year that trusted me in guiding the process to its final destination, which is the publication you now hold in your hands.

Sincerely,

Zoe Goldstein
Director, George Washington University Undergraduate Law Review
ARTICLES
Judicial Power in the United States

Daniel Lyng

“… the importance of the administrative side of the courts, if not as great as the subject of the substantive law, is such that it holds at least the position of very close second.”
— John J. Parker, Senior Circuit Judge

Introduction

Congress’s refusal to hold hearings on the nomination of Judge Merrick Garland to fill the almost year-long vacancy on the Supreme Court bench made the judiciary a flash point of the 2016 presidential campaign. During the campaign, President Donald Trump repeatedly promised to nominate conservative jurists to the Supreme Court, nominations which he vowed would result in the overturning of the landmark cases Roe v. Wade and Planned Parenthood v. Casey.¹ This sort of campaign rhetoric, especially considered against the backdrop of congressional foot-dragging, cast harsh light on the duty of Congress to “advise and consent” on judicial nominations and sparked a broad discussion on the robustness of judicial independence despite the judiciary’s reliance on the elected branches of government to operate effectively.²

That the judiciary is considered to be so impactful on American life is a recent phenomenon in United States politics. For most of the nation’s history, the judiciary was considered to be, or even designed to be, “a feeble institution,” rather than one that is “prestigious . . . , powerful, and politically important” as it is today.³ Relatively few scholars have attempted to explain the growth of the federal judiciary as an important actor in

² U.S. Const. art. 2, § 2; see also Helaine Scheweitzer, Partisan Politics Infiltrates Judicial Independence, HUANQI (Trevor Cook, trans.), February 17 2016 and The Editorial Board, A Coup Against the Supreme Court, N.Y. TIMES, Nov. 7, 2016.
American politics over time, and those who have placed great emphasis on the role of Congress in delegating authority to the federal courts. These explanations focus excessively on congressional control of the courts in the early United States and fail to consider institutional change in the judiciary over time. Considering these deficiencies in existing scholarship, this article argues that, while congressional involvement through legislation is a necessary part of any explanation for the judiciary’s institutional growth, congressional action is not a sufficient explanation for how the judiciary has become so well-institutionalized.

A full explanation of the growth of judicial power cannot assume the judiciary is a “static institution” but instead acknowledge it as dynamic and changing.4 Though it is easy to clearly describe the overarching trend of judicial development by simply stating that the judiciary has become a powerful institution from a weak one, no single explanation can adequately account for the 240 years of change and growth that caused such development. Instead, different periods of time require unique explanations that adequately capture the changes to the institutional judiciary throughout history.

Judicial development can be divided into three such periods. The first period, spanning from the foundation of the Republic to the late 19th century, is one of congressional supremacy. Political conflict between nationalist and localist legislators led to a weakly institutionalized judiciary firmly under the control of Congress. The second period, running from the late 1800s to the mid 20th century, is one of transfers of power from Congress to the courts. The rapid institutionalization of the judiciary allowed it to develop and pursue self-generated preferences. The judiciary used its capacity to further drive institutional development; institutionalization beget institutionalization. The final period, ranging from the mid 20th century to the present day, is one of a well-institutionalized judiciary with the ability to proactively diagnose and react to threats to the institution.

A Note on Terminology

This article uses “judiciary,” “courts,” “judicial branch,” and other like terms synonymously to refer to the whole of the federal judicial system. Such a definition emphasizes the “institutional character [of the federal judiciary] that is separate and distinct

4 Id. at 3.
from ... individual [judges]” and includes so-called “extra-judicial” activities and organs of the federal judicial system, such as judges’ court management activities and administrative bodies such as the Judicial Conference of the United States and the Administrative Office of the U.S. Courts.\(^5\) Because scholars, and especially legal scholars, assume that “the judiciary ... is institutionally thin” and “evaluate it as a more or less static institution,” this definition is much broader than is typical in academic literature.\(^6\) However, if the judiciary is to be thought of as an institution with depth, both the line functions (that is, the conduct of the daily business of case management) and the staff functions (that is, administrative support, extra-judicial policymaking, and other activities) must be fully considered.

I. Institutionalization of the Judiciary

As the courts have become more institutionalized over time, the process of institutional development has shifted from being exogenous (externally-driven) to being endogenous (internally-driven). The early judicial branch was weakly institutionalized because of political conflict between Federalists and Anti-Federalists (and the later Democratic-Republicans) over its role and purpose in the young nation; Congress chose to assert itself over the courts in order to preserve political control.\(^7\) The rise of nationalists during and after the Civil War resulted in the judiciary becoming more institutionalized. Crucially, the judiciary developed preference-forming capacity at this time, allowing it to set and pursue autonomous policy goals. In the post-World War II United States, the judicial branch has become extremely well-institutionalized with legitimacy and a clear, exclusive mandate.

A. The Judiciary in the Early United States: Foundations of Congressional Supremacy

Article III of the United States Constitution, “the shortest of the articles of the Constitution dealing with the three branches of government,” is the foundation of the federal judiciary. The brevity of the Article was the result of conflicts among the delegates to the Constitutional Convention, who fundamentally disagreed about the scope, structure,

\(^5\) Lori Johnson, *Institutionalization of the Judicial Branch*, 1-5 W. Pol. Sci. Assoc. (2004). Note: Unless otherwise qualified, I use the term “judge” to mean any person filling a judgeship, Article III or otherwise. This includes Supreme Court justices. The term “judicial officer” refers to judges, court clerks, and other administrators.


\(^7\) Crowe, supra note 3, at 4.
and character of the federal judiciary. Delegates, split between Federalists and Anti-Federalists, either supported a strong federal judiciary at the expense of the states or favored strong state judiciaries with minimal federal presence. While the Convention was able to broadly agree in Article III that “independence, decentralization, and individualism” were to be the core principles of whatever system was created, it was unable to resolve the fundamental differences between the factions. To avoid imperiling the passage of the Constitution, the Convention deferred detailed resolution of these contested matters to the First Congress. Congress was thereby left to geographically and hierarchically organize and establish a system of inferior courts, clarify the purpose and jurisdiction of federal courts vis-à-vis state courts, and decide how to administer the nascent federal court system.

The Founders’ reliance on Congress to flesh out the brief outline of the judiciary provided in Article III gave the legislature impressive control of the judicial branch. Every matter ranging from the times and places federal courts could sit to the jurisdiction of those courts would be, by necessity, determined by legislation because the entire undertaking was as new as the Republic itself. That is, Article III was not merely vague. It established no rules at all for these foundational, institutional questions. Congress was free to ignore or simply not request the input of affected judicial officers. Though the Convention was sensitive to the need for judicial independence, the judiciary’s reliance on Congress was the intended result of a political “compromise by postponement” between the Federalists and the Anti-Federalists. Consequently, while the Convention’s attempt to protect the independence of the judiciary in the Constitution was successful in ensuring the “decisional independence of federal judges, [Article III] served to undermine the branch independence and institutional autonomy of the judiciary from the outset” to deliberately check judicial power.

---

8 While Article III is the only article of the Constitution dedicated to the judicial branch, Articles I, II, and IV also affect the judiciary. These Articles allow the creation of non-Article III tribunals, describe the process of appointment of Supreme Court justices, and provide for the establishment of federal courts in United States territories respectively. See RUSSEL R WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 2 (2005).

9 Crowe, supra note 3, at 3.


11 Id. at 7.


13 Crowe, supra note 3, at 28.
B. The Genesis of the Federal Courts

The Convention’s deference to the First Congress was necessary to garner sufficient support for Constitution. However, the ratification of the document did nothing to stop the debate over the role of the judiciary in the early United States. In fact, “48 of the 173 amendments proposed in the first session of Congress called for changes in Article III,” a figure that highlights the continued discomfort many anti-Administration congressmen (that is, anti-Federalists) had with the possibility of powerful federal courts.14 And in the first fifteen years after the founding of the Republic, Congress debated dozens of bills to modify the judiciary in some way and passed three after extensive and bitter debate: the Judiciary Acts of 1789, 1801, and 1802.15 Even without considering the content of the bills passed by the Congress, the very number of proposed changes betrays the uncertainty of judicial identity. Each proposal entailed major changes to the structure and procedure of federal courts, and so underscored the judiciary’s lack of autonomous control of, or even meaningful input in, its own affairs.

Those in the First Congress had widely divergent views of what the role of the courts should be in the Republic, with Federalists “envision[ing] a strong centralized justice system and [anti-Administration legislators] believ[ing] the administration of justice should be handled primarily at the state level.”16 The wide rift between the two factions is evident in the competing proposals advanced by legislators. Anti-Administration legislators proposed bills that would have created a federal judiciary without any inferior courts and with extremely limited jurisdiction, warning that a more extensive system would be too expensive and “pose a fatal threat to states' rights.”17 Federalists proposed an expansive system of federal courts with broad jurisdiction — Alexander Hamilton went so far as to call for “an army of powerful judges to bring federal law to every community” — in order to consolidate power in the federal government and enable commercial prosperity.18

The outcome of the debate was the Judiciary Act of 1789, a political compromise that “invent[ed] a federal judicial system” from the ground up and exercised congressional prerogative to, among other things, establish and organize inferior courts, limit the

---

14 Wheeler & Harrison, supra note 7, at 2. Note: Because there were no political parties in the First Congress, anti-administration is a term used to describe the vestiges of the Anti-Federalist movement.
15 The Judiciary Act of 1802 repealed the Judiciary Act of 1801 with only minor changes.
17 Bordewich, supra note 16, at 107 and Crowe, supra note 3, at 32.
jurisdiction of federal tribunals, and deal with the administrative matters of the whole federal judiciary.\textsuperscript{19} Politics motivated this first piece of judicial institutionalization, not concerns for efficiency or performance. The Act combined the nationalists’ desire for a geographically expansive judiciary with the anti-Administration faction’s wish for limited jurisdiction. The system of federal courts was intentionally left without a central administrative entity in order to “preserv[e] state legal traditions” while preventing the federal judiciary from becoming “a powerful agent of nationalization.”\textsuperscript{20} The result was a decentralized judiciary comprised of a federal district court in every state, three circuit courts (which simultaneously held limited original and appellate jurisdiction) made up of a district court judge and two traveling Supreme Court justices, and a six-member Supreme Court.\textsuperscript{21}

However, there was no provision in these laws for how the business of the federal courts was to be conducted. Where would the courts sit? Who would lease or build those buildings? Who would supervise hiring of administrative staff? And, perhaps critically, how would the foregoing be financed? Because the legislation did not answer those questions, in lieu of a centralized administrative organ, the judiciary depended on local administrators, some under the control of the executive branch. Individual courts had only two administrative officers: Clerks, responsible for record-keeping and overseeing the filing of cases, and marshals, responsible for disbursing funds, providing courtrooms, and executing judgments.\textsuperscript{22} Critically, while clerks were judicial officers “appointed and removable by the judge alone,” marshals were administrative officers under the Executive Branch’s control and were ultimately responsible to the Department of the Treasury.\textsuperscript{23} That responsibility for the day-to-day management of the courts was vested in an officer of the executive branch, who ultimately controlled the disbursement of funds and procurement of supplies, led to a great deal of conflict within the courts. Many judges simply “ignored standards set

\textsuperscript{19}FELIX FRANKFURTER \& JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 10-13 (1928) and Crowe, supra note 3, at 30.

\textsuperscript{20}BRUCE A RAGSDALE, DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY (vol. 1) 54 (2013), and Crowe, supra note 3, at 40.

\textsuperscript{21}Crowe, supra note 3, at 30. It is a fact little known outside of the small world of judicial/legal historians that the U.S. Supreme Court Justices “rode circuit” for many years. The latter often resulted in the Justices reviewing Circuit Court decisions which they themselves had adjudicated.

\textsuperscript{22}An Act to establish the Judicial Courts of the United States 1 Stat. 73. (Hereinafter the “Judiciary Act of 1789”)

\textsuperscript{23}Fish, supra note 9, at 91-93. \textit{Note:} Before the establishment of the Department of Justice, administrative control of the courts was the responsibility of the Department of the Treasury and, later, the Department of the Interior. See Crowe, supra note 3, at 226.
by the [Secretary of the Treasury] and resisted the Department’s fiscal policies,” and marshals retaliated by withholding funds or reducing next year’s budget requests.24

The 1789 Act included two other controversial provisions. First was the practice of the “circuit-riding” of Supreme Court justices, a measure pushed for by the anti-Administration faction intended both to force the Supreme Court “to remain in contact with the great number of district courts and judges spread across the nation” and to contain costs.25 Circuit-riding was necessary because the 1789 Act required circuit courts to be composed of a district court judge and two Supreme Court justices. Circuit-riding was “immediately recognized as an imperfect solution,” no more so than by Supreme Court justices themselves, who strongly protested the requirement as “denying the [Supreme] Court what Chief Justice Jay called its ‘energy, weight and dignity.’”26 Despite this protest, circuit-riding undeniably increased the visibility of judiciary. Justices took the opportunity to educate the public about the role of the judiciary in the new United States government, thereby strengthening the identity of the federal courts even as circuit-riding testified to its weak autonomy.27

The second provision in question was one that restricted the jurisdiction of the federal courts from what was allowed by the Constitution. The Constitution authorized Congress to grant the judiciary broad federal-question jurisdiction. This appealed to both Federalists and the judiciary because it would allow it greater authority. However, anti-Administration congressmen were able to include in the first Judiciary Act a limitation of the courts’ jurisdiction to those cases “thought to be essential for the maintenance of national government; state courts would have to deal with all other matters.28 The question of jurisdiction had important implications for the courts’ institutional identity beyond the obvious implications for the institutional autonomy of the judiciary when carrying out its mandate. “Because much of the federal jurisdiction granted was … concurrent with state jurisdiction,” the federal judiciary had but a tenuous claim to an exclusive mandate and

24 Fish, supra note 9, at 99.
25 Crowe, supra note 3, at 38.
26 Crowe, supra note 3, at 39, 44 and McGuire, supra note 6, at 130.
28 Crowe, supra note 3, at 40.
certainly was not perceived by Congress or the several states as “exercising powers not found elsewhere.”\textsuperscript{29}

Congress intended the structure and jurisdictional scope of the 1789 Act to preserve power in the legislature at the expense of the courts. Because both Federalists and anti-Administration legislators were unhappy with the outcome of the compromise, neither wished to empower the judiciary beyond what was needed to perform its basic function. So long as the judicial branch’s place in tripartite government was uncertain, Congress was able to maintain close control of the judicial system. While Congress recognized the flaws in the 1789 Judiciary Act, the bitterly divided legislature that produced the Act was itself the obstacle to reform.

\textbf{C. Unsuccessful Attempts at Revision \& Reform}

The widespread dissatisfaction with the Judiciary Act prompted Congress to charge Attorney General Edmund Randolph with reviewing the federal judicial system in order to make recommendations as to what “matters relative to the administration of justice under the authority of the United States … may require to be remedied.”\textsuperscript{30} The Randolph report suggested that circuit riding be abolished and federal courts be given broad exclusive jurisdiction over questions of federal law. But this conclusion was motivated by “performance rather than policy or politics.” The report was responsive to the judiciary’s complaints that a member of the executive branch was tasked by Congress to suggest improvement to the judicial branch. This speaks volumes about judicial autonomy and identity.\textsuperscript{31}

Many Supreme Court justices echoed the suggestions of the Randolph report, and especially the abolition of circuit riding, in a letter to President George Washington.\textsuperscript{32} The Justices’ letter included a litany of complaints that they expected the President to take up with Congress on their behalf.\textsuperscript{33} They also noted in three separate letters to the President and to Congress the deficiencies in the current system. Among their concerns was the requirement that justices “correct in one capacity the errors which they themselves may

\textsuperscript{29} Id. at 42.
\textsuperscript{31} Frankfurter \& Landis, \textit{supra} note 18, at 16-18 and Crowe, \textit{supra} note 3, at 45, 46.
\textsuperscript{32} Wheeler \& Harrison, \textit{supra} note 7, at 8.
\textsuperscript{33} Crowe, \textit{supra} note 3, at 52.
have committed in another … a distinction unfriendly to impartial justice.” In order to resolve their complaints, the Justices obliquely suggested the creation of a dedicated appeals court with its own judges. However, the judiciary repeatedly “declined to propose specific legislation, and no one in Congress proposed changes in the circuit system.” The courts’ unwillingness or inability to formulate and express its own preferences implied a deficiency in preference-setting capacity, providing more compelling evidence of the institutional weakness of the judicial branch of government.

In any event, neither the suggestions of the Randolph report nor the complaints of the justices made headway with Congress because the proposals were not sensitive to politics. The proposed expansion of jurisdiction for federal courts angered the anti-Administration faction, even while a suggested curtailment of review of state court decisions was “unacceptable to the [Federalists].” Even though the Randolph report, like the successful 1789 Act, offered concessions to both sides, the polarization of the political climate made compromise unlikely. The judiciary’s complaints were also unable to overcome the political deadlock. Though both factions in Congress recognized the many imperfections of the 1789 Act, neither was “willing to budge in order to alter it.” The fact that political conflict frustrated the policy goals of judicial officers illustrates how the weak autonomy of the young judiciary was the result of political battles over the extent of judicial power.

As a result, the judiciary was unable to enact even minor changes in internal policy. While the justices’ inability to convince Congress to abolish circuit-riding is a classic example of their inability to influence policy decisions, even those decisions not determined by statute came under the purview of Congress rather than simply an internal matter for the courts. For example, Justice James Iredell, frustrated that his colleagues on the Supreme Court refused to rotate circuit assignments, requested and received from Congress “a small statute mandating precisely [what] Iredell desired.” By doing so, Iredell contributed to the norm that even the smallest questions of internal procedure were the

34 Wheeler & Harrison, supra note 7, at 8.
35 Fish, supra note 9, at 11.
36 Ragsdale, supra note 19, at 76.
37 Bickford & Bowling, supra note 11, at 49.
38 Crowe, supra note 3, at 47.
39 Id. at 52.
business of Congress rather than simply an issue to be settled with colleagues. 40 Iredell’s inability to internally resolve such a simple dispute reinforces the conclusion that the early federal judiciary lacked institutional power.

Political deadlock meant that the judiciary was not meaningfully changed in the 1790s, aside from these minor skirmishes. For this reason, most texts on judicial development in the early United States make no mention of the interim period between the 1789 Act and the 1801 Act. 41 Congress continued to pass politically uncontroversial legislation dispensing with minor issues arising in the federal judiciary. But, it did not consider any wholesale reform of the judicial system during this time. The judiciary itself took no action to resolve problems arising in its business beyond pointedly admonishing a few dawdling judges and clerks to resolve cases more quickly. 42 The stagnant state of judicial development left the judiciary with weak autonomy, coherence, complexity and identity. It was at the mercy of Congress to increase its stature.

The rout of the Federalists in the 1800 election gave the impetus for speedy judicial reform. The lame-duck Congress passed Judiciary Act of 1801 (also known as the “Midnight Judges Act” for the last-minute judgeships it created) in what the Democratic-Republicans (who inherited the anti-Administration mantle) saw as an attempt to leave a rearguard of Federalist judges stacked in the courts. 43 Aside from the additional judgeships, the 1801 Act: a) radically expanded the jurisdiction of federal courts; b) increased the number of circuit courts; c) gave the circuit courts dedicated circuit judges; and d) abolished circuit riding by the Justices. All those changes were friendly to the institutional interests of the judiciary. 44

These changes, however, were short-lived. The incoming Democratic-Republicans promptly passed the Judiciary Act of 1802 to repeal nearly the entire 1801 Act, eliciting strong protest from Justice Samuel Chase. 45 The Democratic-Republican Congress was concerned that the Supreme Court would rapidly strike down the 1802 Act. As further evidence of the judiciary’s dependence upon Congress for institutional regulation, that

40 Id. at 52.
41 Crowe, supra note 57. See Ragsdale and Wheeler and Harrison, which make no mention, or only brief mention, of the 1790s.
42 Fish, supra note 9, at 11-12.
43 Crowe, supra note 3, at 61.
44 Wheeler & Harrison, supra note 7, at 9. Note: Because district judges could sit as circuit judges if allowed by statute, increasing the number of courts did not necessarily increase the number of judges.
45 Crowe, supra note 3, at 71. Note: The 1802 Act preserved minor provisions such as the additional courts — but not the judgeships — created by the 1801 Act.
Congress simultaneously “replaced the June and December terms with a single February term, thereby preventing the Court from … passing judgment on the constitutionality of the repeal until February of 1803.”

The Democratic-Republican maneuver immediately changed what might have been a positive step for judicial institutionalization to a profound setback. Political control passed from the Federalists, who were friendly to the interests of the federal judiciary to President Jefferson’s followers. They were either deeply suspicious of, or even openly hostile to, the judiciary, which they perceived to be a Federalist-dominated institution. On its own, this perception — not helped by the “arrogance of Federalist judges … and a common-law libel suit initiated by Federalist judges against a Jeffersonian newspaper” — caused a regression in credibility of the judiciary because of its image as a Federalist mouthpiece. As noted, the change in when the Supreme Court was authorized to sit was a naked challenge to the institutional autonomy of the courts.

The judiciary had only a muted response to the repeal of the 1801 Act and the change to the term of the Supreme Court. In private letters to his colleagues on the bench, Chief Justice John Marshall considered defying Congress but expressed his “reluctance to challenge the repeal act and the new organization of circuit courts” for fear of further congressional interference. Almost every Supreme Court justice, and evidently a vast majority of lower court judges, agreed with the Chief Justice and chose to respect the 1802 Act without protest. However, the ever-bellicose Justice Chase and a handful of disgruntled circuit judges made their displeasure well known. They published articles in newspapers and directly petitioned Congress to reverse the Repeal Act. The ad hoc and conflicting nature of the judiciary’s response, coordinated through personal correspondence and the public press, placed the judicial branch’s lack of lack of institutional cohesion into sharp relief.

Chief Justice Marshall’s reluctance to confront Congress also seeped into the decisions of the Supreme Court. Despite Jeffersonian hopes that judicial posturing would provide the impetus for further congressional intervention, the judiciary issued decisions

---

46 Crowe, supra note 3, at 73.
47 Id. at 73.
48 Wheeler & Harrison, supra note 7, at 126. Note: Justice Chase was later impeached (though not convicted) by angered Jeffersonian legislators.
49 Id. at 126.
50 See id. at 125-130. Note: While there is no direct evidence that most lower judges accepted the 1802 Act without protest, I take the lack of evidence to the contrary as convincing.
favorable to the Jeffersonians in order to sidestep conflict. For instance, in *Marbury v. Madison*, widely thought to have established judicial review, the Court in fact “did almost nothing to establish judicial review and said almost nothing that was not already accepted as uncontroversial.”51 By issuing such decisions, the judicial branch avoided “a constitutional crisis that might have weakened … the power of the federal judiciary.”52 The dissatisfaction of a more powerful branch highlighted the “weakness and vulnerability of the judiciary as a coequal branch of government” and forced the courts to recognize that Congress had firm control over the administration of the judicial branch.53 This argument does not discount the importance of *Marbury* in Constitutional Law and scholarship, but simply suggests that the landmark nature of the case did little to ameliorate the judiciary’s institutional reliance on Congress and the presidency.

Despite a chorus of demand for reform over the next fifty years after the 1802 Act, attempts to restructure the judiciary languished in Congress. By 1838, a Supreme Court Justice could have traveled up to 10,000 miles annually during the performance of his duties. The size of the Supreme Court docket swelled from fifty-one cases in 1809 to 250 cases in 1850.54 Congress considered several bills that would have substantially modified the judiciary to accommodate the increase in its workload. But, each proposal failed. Justice Joseph Story, after conferring with his colleagues, submitted a “Judge’s Bill” that would have, among other things, expanded federal jurisdiction to the fullest extent permitted in Article III.55 Such a nationalist proposal was, at best, ignorant of the political climate in the Democratic-Republican Congress. Consequently, the proposal was not taken seriously. Despite the efforts of the increasingly overworked judicial branch, the federal judiciary was more or less fixed as it was in 1789, with no change coming until the 1860s.

**D. Territorial Expansion and the Civil War**

In judicial history, the 19th century is remembered for Chief Justice Marshall’s enormous influence on constitutional law and is recognized as “a key period when the [judiciary] increased its own power.”56 However, the flurry of legal activity and landmark cases belied the institutional failures of the judicial branch and the judiciary’s inability to fix

---

51 Crowe, *supra* note 3, at 76 and 5 U.S. 137 (1803).
52 Id. at 76.
53 Id. at 78.
54 Frankfurter & Landis, *supra* note 18, at 34, 49. Note: The docket of the Supreme Court is a useful stand-in for that of the whole judiciary, from which data is much less forthcoming.
55 Id. at 36.
56 Crowe, *supra* note 3, at 86.
them.\textsuperscript{57} In fact, the resultant rapid increase judicial business (the size of the Supreme Court docket almost tripled between 1850 and 1880; earlier data is not available), only heaped more pressure on the already-struggling court system.\textsuperscript{58} Congress ignored the pleas of the judiciary for relief, including the perennial request for replacement of circuit riding. The Judiciary Acts of 1807 and 1837 each ignored the concerns of judges and court officers in favor of political expediency.\textsuperscript{59}

Despite having been admitted in 1792, 1796, and 1802 respectively, Kentucky, Tennessee, and Ohio sat peculiarly outside the circuit courts. The Judiciary Act of 1807 was an uncontroversial bill that extended the circuit court system to include them.\textsuperscript{60} Congress failed, however, to take the 1807 Act as an opportunity to preemptively deal with the admission of still more states to the Union. As a result, the next decade saw the admission of five more states, each with one judge acting as a district and circuit court. The arrangement exacerbated the “structural problems caused by territorial expansion.” The judiciary recognized the problem, it but was powerless to resolve it on its own.\textsuperscript{61}

The 1837 Act, in large part, simply extended the 1807 Act to ten more newly admitted states.\textsuperscript{62} The Act also reorganized the circuits in response to the judicial complaints that the circuits were unequal in size and posed problems for dividing workload. The Act also reduced the amount of circuit-riding required of the justices and lengthened the term of the Supreme Court to allow for more cases to be heard.\textsuperscript{63} Each of these relatively uncontroversial changes met needs the judiciary had identified. For the first time in their history, the Congress had deferred to the Courts in making these changes. However, the limited scope of the changes reflects a congressional tendency to delay until “needs have gone unremedied for so long a time as to gather compelling momentum for action.” Even then, the scope of the legislation was minimized in order to maximize political support.\textsuperscript{64}

As seen with the development of the Judiciary Acts of 1807 and 1837, the judiciary lacked the institutional means to respond on its own to the challenges posed by the

\begin{itemize}
\item \textsuperscript{57} \textit{Id.} at 86.
\item \textsuperscript{58} Frankfurter & Landis, \textit{supra note} 18, at 60.
\item \textsuperscript{59} Crowe, \textit{supra note} 3, at 86.
\item \textsuperscript{60} Fish, \textit{supra note} 8, at 6-7; 2 Stat. 420 (1807).
\item \textsuperscript{61} Crowe, \textit{supra note} 3, at 93.
\item \textsuperscript{62} 5 Stat. 176.
\item \textsuperscript{63} Crowe, \textit{supra note} 3, at 127.
\item \textsuperscript{64} Frankfurter & Landis, \textit{supra note} 18, at 36, 37.
\end{itemize}
The George Washington Undergraduate Law Review

The evolution of the American nation. In particular, the nation’s territorial expansion posed significant issues for the operation of the federal system as a whole. Examining those issues in the judicial context is instructive when considering judicial institutionalization. The inability of the judiciary to reorganize or streamline the court system on its own is characteristic of a lack of administrative decision-making capacity, let alone means to carry out administrative decisions. The courts’ reliance on piecemeal legislation to expand its reach to new parts of the country, and Congress’s reluctance to act until the disarray and delay in the courts could not be ignored without political consequences, is a testament to the absence of control or influence held by the judicial system over its affairs.

The state of judicial institutionalization continued in this way, that is, with little overall progress, until after the Civil War. Dramatic political change in the aftermath of the conflict manifested in a congressional supermajority intent on subordinating state authority to national interest in order to preserve the fragile Union. In pursuit of this goal, the dominant Republican Congress — which favored a strong national government — broadened the jurisdiction of the judiciary and increased its caseload. The Judiciary Act of 1866 and the Circuit Judges Act of 1869 gave the judiciary the footing to build substantial institutional clout. The 1869 Act was especially notable: it created a slate of separate circuit court judges to allow district court judges and Supreme Court justices to focus on their own growing caseloads. While the Act neither completely eliminated circuit riding nor created true appellate courts as the justices had hoped for, it was a critical inflection point in the progression of judicial institutionalization and was “the single most significant episode of judicial institution building” in the 19th century. Crucially, judicial institutionalization during this period was the result of political change external to the judiciary, rather than the result of action by the judiciary itself.

During Reconstruction, the Republican supermajority passed several laws intended to diminish the role of state courts and bring federal authority to the whole of the United States. Federal courts, which had a presence in every state, were natural vehicles for this authority. Congress went out of its way to “nationalize federal judicial power.” The Jurisdiction and Removal Act of 1875 conferred on federal courts what is believed to be

---

65 Id. at 60, 61 and Crowe, supra note 3, at 160.
66 Frankfurter & Landis, supra note 18, at 60, 61.
67 Crowe, supra note 3, at 157; 14 Stat. 209; and 16 Stat. 44.
68 Id. at 157.
69 Crowe, supra note 3, at 166.
the full jurisdiction authorized in Article III. The Act gave federal courts the “primary authority to interpret and develop law” and spreading the reach of the federal government in unprecedented ways.\(^7^0\) The resultant increase in stature and caseload of the judiciary, while divisive, gave the courts a strong external identity with a clearly defined, respected, and exclusive mandate. However, the continued absence of institutional complexity and coherence tempered the strengthening of judicial identity. Courts remained extremely decentralized and unable to cope with the influx of cases. Ironically, the rise in judicial power was accompanied by a precipitous decline in the efficiency of judicial administration. Further, the continued absence of meaningful institutional autonomy prevented the courts from standardizing procedure and making other helpful administrative changes.\(^7^1\) The judiciary’s continued dependence on Congress prevented it from taking the mantle of institutional maturity.

Moreover, the judiciary maintained its dependence on the executive branch for efficient administration. In 1870, President Ulysses S. Grant signed into law an act creating the Department of Justice.\(^7^2\) This Act was notable for its transfer from the Secretary of the Interior to the Attorney General of the responsibility to supervise the disbursement of accounts for the courts.\(^7^3\) It was bad enough that an agency of the federal government, a frequent litigant in the courts, had overseen court finances. The new law shifted the responsibility the most frequent litigator before the courts: The Department of Justice. The point here is not ethical misconduct on the part of federal government attorneys, but that the courts were co-dependent upon the federal government’s lawyers.

The first hint of judicial autonomy appeared in 1891 with the passage of the sweeping Circuit Courts of Appeals Act, also known as the Evarts Act.\(^7^4\) The Act was apparently motivated by the desire to remedy a breakdown in judicial efficiency. But in fact it was more likely a “part of the Republican Party’s efforts to restructure national institutions” in its favor. The Evarts Act fundamentally changed the structure of the federal judiciary by creating the modern-day United States Courts of Appeals.\(^7^5\) The courts of appeals subsumed the appellate jurisdiction of the circuit courts and relieved the

\(^{70}\) Id. at 166. *Internal punctuation omitted.*  
\(^{71}\) Crowe, *supra* note 3, at 167.  
\(^{72}\) 24 Stat. 162.  
\(^{73}\) See id. § 11.  
\(^{74}\) 26 Stat. 828 (1891).  
Supreme Court of much of its mandatory appellate business. After the passing of the related Judicial Code of 1911, the federal judiciary was clearly separated in three strata: district courts exercised basic trial jurisdiction, the courts of appeals exercised appellate jurisdiction, and the Supreme Court exercised final appellate jurisdiction by direct appeal and writs of certiorari. With the elimination of the circuit courts came also the elimination of circuit-riding, more than a century after such elimination was first requested by the justices. Both pieces of legislation were primarily motivated by political considerations. However, each was first “submitted … to the justices of the Supreme Court and several circuit court judges for criticism and suggestion.”

If the Jurisdiction and Removal Act gave the courts increased importance and a strong external identity, the Evarts Act and the Judicial Code gave the courts “the foundation for judicial and administrative ascendency” by providing a “systematic statement of the structural principles … of the federal courts.” The legislation gave the courts complexity by providing for clearly differentiated subunits with deliberate organization. It clarified and standardized the many disparate statutes controlling judicial administration, thereby strengthening the coherence of the judiciary. Moreover, the fact that the judiciary was consulted demonstrates the increased concern of the legislature that the judicial branch should know and approve of imminent changes. Though politics was still the principal driver of judicial institutionalization, such a gesture hinted at Congress’s increased deference to the courts.

II. Judicial Self-Administration

To this point, the pace of judicial institutionalization was slow and fitful. Political considerations drove almost all institutional development in the judiciary. The core features of the Judiciary Act of 1789 persisted unchanged for almost 100 years. However, the 20th Century transformed the judiciary from an “institution that did little more than adjudicate disputes into an institution that recommended policy, lobbied political officials, and

---

76 Fish, supra note 8, at 11.
77 In the 20 years before the passing of the Judicial Code, the original circuit courts exercised parallel trial jurisdiction with the district courts. The resultant “multiplicity of courts” was confusing and inefficient and was relatively quickly eliminated.
78 Crowe, supra note 3, at 184.
79 Fish, supra note 8, at 11 and Frankfurter & Landis, supra note 18, at 145. Note: However, note that the revisions were first suggested by a presidential commission. See 30 Stat. 58 (June 4, 1897): “The President, by the advice and consent of the Senate, shall appoint three commissioners whose duty it shall be, under the direction of the Attorney-General, to revise and codify the criminal and penal laws of the United States.”
governed its own affairs in addition to adjudicating disputes.” Such a transformation was predicated on the transfer of administrative power from Congress to the judiciary. Once institutional autonomy was achieved, the judicial branch rapidly increased the coherence and identity of the judicial system and increased the complexity of the judicial administrative structure. During this period, institutionalization begat further institutionalization, shifting the locus of institutional development from Congress to the courts themselves.

This important period in judicial history began inauspiciously. The rapid economic growth of the United States in the Gilded Age and the early twentieth century, two World Wars, and a vastly expanded federal government created by the New Deal led to an eruption in the business of the judiciary. Caseloads began to far exceed the capacity of the judicial system, a familiar situation that historically prompted extremely limited congressional action to improve efficiency with the judiciary reluctant to lobby its own cause. This historic pattern of judicial passivity might have continued if not for the appointment of former president William Howard Taft as Chief Justice of the United States. Chief Justice Taft believed his office to have the responsibility “to take the lead in promoting judicial reform.” He broke the precedent of past office-holders of deferring to Congress in administrative matters. To that effect, the Chief Justice created a committee of several Supreme Court justices to draft and submit a bill to Congress that would increase the efficiency and effectiveness of the judiciary.

Congress added only one revision to the Justices’ bill. Two factors contributed to its success. First, at the time of the bill’s passage, progressive Republicans amenable to judicial reform held both houses of Congress and the Presidency. The bill promised to increase the efficiency and “administrative precision” of the judicial branch, all “ideas that were consonant with the progressive romance with the science of organization and management.” Second, Chief Justice Taft, the “principal author of, chief lobbyist for, and leading expert on” the bill, used his substantial political connections in order to secure its

80 Crowe, supra note 3, at 198.
81 Crowe, supra note 3, at 171-175.
82 Id. at 171-175.
83 Frankfurter & Landis, supra note 18, at 259.
84 William Howard Taft. The Jurisdiction of the Supreme Court under the Act of February 13, 1925. 35 YALE L. J. 2, 3 (1925).
85 Crowe, supra note 3, at 204.
86 Official Congressional Directory of the 67th Congress, First Session.
87 Crowe, supra note 3, at 207.
passage. The Chief Justice was also well-connected with legal professionals and convinced the American Bar Association to release a statement saying that “the bill was too technical even for lawyers and that legislators should simply defer to the judiciary, pass the bill, and observe its effects in action.” Thus, while the institutional development of the judiciary still depended on congressional assent and could be impeded if politically unpopular, the source of institutionalization became endogenous to the courts.

The bill became known as the Judiciary Act of 1925 or the “Judge’s Bill” after its creators. It radically redefined the role of the appellate courts in the federal judiciary. Under the terms of the bill, the vast majority of judgments of the Circuit Courts of Appeals would be final. The Supreme Court gained almost complete control of its docket by moving almost exclusively to the writ of certiorari to hear cases.

Using the same means as he achieved the passage of the 1925 Act, Chief Justice Taft also lobbied for and received a bill to create what is now known as the Judicial Conference of the United States. This was a deliberative body of federal judges from across the country that would set internal policy for the judiciary, compile statistics the individual courts would collect, and communicate with Congress and the Executive Branch. The creation of the Judicial Conference gave the judiciary the “capacity for self-study, criticism, and reform.” The courts were no longer a loose conglomeration of judges; the judiciary became a single, directed branch. The same act that gave the judiciary the Judicial Conference also gave the Chief Justice the “authority to transfer judges from overstaffed districts in one circuit to understaffed districts in another circuit.” Both the Judicial Conference and the increase in the power of the Chief Justice were institutionalizing features that allowed the judiciary to pursue further institutional development on its own.

---

88 Id. at 203-208.
89 Id. at 207.
90 The Supreme Court constitutionally retained original jurisdiction in cases involving foreign diplomats and litigation between states. Until 1983, The Court was also statutorily required to hear direct appeals on constitutional questions from state supreme courts and is still required to hear direct appeals from federal district courts in an extremely limited situations. In the past century, only a handful of such direct appeals have been heard.
91 Frankfurter & Landis, supra note 18, at 242, 243. Note: The Judicial Conference was called the “Conference of Senior Circuit Judges” until 1948, but I will call it by its current name to avoid confusion.
93 Crowe, supra note 3, at 210.
The 1925 Act and the act creating the Judicial Conference reflected profound transformations in judicial power. The 1925 Act is less notable for what it accomplished than for how it was accomplished. Chief Justice Taft’s efforts in lobbying legislators meant that the judiciary proposed, lobbied for, and received a bill to meet a need its members diagnosed. Even if dependent on a former President, this was an impressive feat that leveraged the limited institutional resources of the judiciary. Such behavior shows a normative shift within the judiciary from passivity to activism in the realm of judicial administration. Further, because of Chief Justice Taft’s political entrepreneurship, the 1925 Act “[did not] endure a particularly challenging legislative fight, with perfunctory committee hearings and limited floor debate.” Congress’s ready acceptance of the bill shows that the Chief Justice’s efforts earned a respect for the institutional space and identity of the judiciary that did not exist before the turn of the century.

Even more notable was the creation of the Judicial Conference, which endowed the courts with an institution capable of pursuing judicial development. The Conference provided a venue for institutional communication and acted to standardize judicial policy across the United States. It significantly strengthened the coherence of the judiciary and provided the groundwork for further convergence in procedure and policy. The Conference’s role as a policy-making body capable of making recommendations to the other branches of government supplied the judiciary with preference-forming capacity and, as demonstrated with the 1925 Act, the ability to act upon its preferences. While the judiciary was still reliant upon the executive branch for day-to-day administration of its budget and upon Congress for enactment of its recommendations, the Conference conferred upon the judiciary an unprecedented degree of autonomy. Finally, the Conference laid the groundwork of a distinctive judicial identity by fostering, in the words of Chief Justice Taft, a sense of “judicial team-work” and unity in mission.

The Conference was immediately successful in fulfilling its potential to improve the indicators of institutionalization. The Conference vastly increased the amount of communication between federal judges, especially between the Chief Justice and his lower court colleagues, who “increasingly looked to the Chief Justice for relief from crowded

---

94 Id. at 209.
95 See Starr, supra note 87, at 966.
dockets and for general guidance in conducting judicial business.” To Congress, the Conference “served as an authoritative advisor on legislation concerning the judiciary; [to] the lower federal courts [it served as] a promoter of effective standards of judicial administration.” To achieve the latter, Chief Justice Taft used the authority of the Conference to collect and publish statistics from individual courts that showed how quickly business was being completed.

For example, the Judicial Conference lobbied for and received the Rules Enabling Act of 1934, which permitted the standardization of the rules of procedure across the country. Prior to the Enabling Act, rules of procedure of courts varied depending on the state that the court was located. In an effort to increase the efficiency of the administration of justice and lower the cost to litigants in federal court, the 1934 Act delegated to the judiciary the power to create consistent national rules of procedure. Though the 1934 Act shared the goals of efficiency and judicial empowerment with the Act creating the Judicial Conference and the 1925 Act, its passage was less certain because of the death of Chief Justice Taft and the advent of Democratic control of Congress and the election of President Franklin Roosevelt. Ultimately, Chief Justice Taft’s legacy as an effective administrator and the network he left of political and civilian supporters led the Judicial Conference’s rules proposal to receive vocal support from civil society as part of a “larger push to give judges greater control over judicial administration.” Such support allowed the 1934 Act to overcome political opposition; the Act passed over the loud protest of a small number of legislators.

A. Bureaucratization

The judiciary then turned its attention toward freeing itself from administrative dependence on the executive branch. Because the Justice Department was responsible for critical parts of judicial administration, such as budget requests and procurement, it had enormous influence in each court through the marshals. They served as “the chief administrative and financial officers of the judicial branch” but reported to the Attorney

---

97 Crowe, supra note 3, at 210.
98 Frankfurter & Landis, supra note 18, at 243.
100 Id. at 213. Note: The Rules Enabling Act only allowed the creation of consistent rules of civil procedure; consistency in criminal procedure came in an amendment to the Act in the 1930s.
101 Holt, supra note 19, at 164.
102 Fish, supra note 8, at 152-156.
General, not the judges they served. The Great Depression made the judicial branch acutely aware of its financial subservience to the Justice Department. In 1934, the Attorney General ordered the courts to reduce their expenditures by twenty-five percent halved the pay of secretaries to retired judges, and attempted to reduce the salaries of retired judges by fifteen percent in a move the Supreme Court later declared unconstitutional. The courts were forced to negotiate with the Justice Department for adequate staffing to efficiently dispense with judicial business.

As a result, the Judicial Conference, under the leadership of Chief Justice Charles Evans Hughes, “sought to place some distance between the executive and judicial branches of government.” Their attempt was motivated both out of dissatisfaction with the quality of administrative support the Justice Department provided, and out of concern for the independence of the courts. To do so, the Conference designated a special committee of its members to draft what would become the Administrative Office Act to submit to Congress. Through the committee, the Conference proposed to Congress that an administrative agency be created to perform the judicial administration duties of the Justice Department, both to reduce costs and “guarantee the independence of the judiciary as a coordinate branch of government.” In keeping with the tradition of decentralization in the federal judiciary, the Conference recommended that a judicial council be created in each circuit and delegated to each council a measure of administrative authority. In 1937, President Franklin Delano Roosevelt’s infamous court-packing plan expedited the bill’s success.

President Roosevelt sought to “save the Constitution from the [Supreme] Court and save the Court from itself” by filling the bench with New Deal supporters. Judges immediately decried this naked attempt to “mitigate the [judiciary’s] obstruction of his congressional program” because it threatened the core principles behind the separation of powers. Chief Justice Hughes penned a letter to the Senate that made the judiciary’s

---

103 Crowe, supra note 3, at 226.
104 Fish, supra note 8, at 108, 109.
105 Crowe, supra note 3, at 226.
106 Id. at 226.
107 53 Stat. 1233.
108 Hale, supra note 19, at 243.
110 Crowe, supra note 3, at 228.
111 Fish, supra note 8, at 112-113.
displeasure known and repudiated Roosevelt’s proposal as at best inefficient and at worst unconstitutional. The executive’s “hostile and power-grasping” action spurred legislators to quickly take up and pass the Judicial Conference’s proposed bill that became the Administrative Office Act of 1939. That Act was one of the most sweeping grants of administrative autonomy to the judiciary in history. The Act created the Administrative Office of the United States Courts (AO), a Judicial Conference-supervised administrative agency that was delegated the financial and administrative tasks the Justice Department had performed. The AO was also given the responsibility to collect judicial statistics and to perform such other duties as directed by the Judicial Conference.

The AO’s diligent performance of its administrative function made it an essential engine of the growth of judicial autonomy. The AO used its autonomy to collect information, make diagnoses, and prepared solutions that enabled it to pursue further institutional development for the judiciary. Critically, this role did not come at the expense of reducing the “decisional independence” of individual judges. When the Justice Department had served as judicial administrator, “judges had answered to bureaucrats, [after the creation of the AO] bureaucrats answered to judges.”

The second major staff organ of the judiciary, the Federal Judicial Center (FJC), was created in response to caseload backlogs caused not by inefficient court administration but by inefficient case management. The Judicial Conference, concerned that the AO was the inappropriate means to give judges suggestions on how to hear cases, created a special committee (the “Reed Committee”) to consider alternatives. Through the Reed Committee, the Judicial Conference submitted to Congress legislation that would create the Federal Judicial Center, an organization that would provide “continuing education, training, [and] research” to the judiciary. The proposal, which coincided with a “tough on crime” message from the President and the Congress, was enthusiastically embraced and became the Federal Judicial Center Act of 1967 with only perfunctory debate and minor revision.

---

113 Fish, supra note 8, at 125 and Crowe, supra note 3, at 229, 230.
114 Fish, supra note 8, at 125, 126.
115 Crowe, supra note 3, at 233.
116 Fish, supra note 8, at 370.
117 Wheeler, supra note 103 at 38.
118 See 81 Stat. 664.
In contrast with the Judicial Conference’s oversight of the AO, the management of the FJC was vested in a board of seven members: “two judges from the courts of appeals, three from the district courts (none of whom may be a member of the Judicial Conference of the United States) and *ex officio* the Director of the Administrative Office of the United States Courts and the Chief Justice.”119 The separation of the FJC from the AO and the Judicial Conference was deliberately done to preserve the FJC’s independence in the event that it was asked to evaluate their work.120 By statute, the FJC was tasked with studying the operation of the several courts in the federal judiciary, providing for the continuing education of federal judges, and suggesting innovative advancement in case management in the federal courts, with a special emphasis on the use of technology.121 The FJC consolidated the various *ad hoc* research programs in the federal judiciary into one functional subunit for more “effective policy planning and implementation.”122

The FJC fulfilled two important needs from the perspective of the judiciary. First, the creation of the organization enabled the judiciary to “assert and strengthen judicial control over the direction and management of the judicial branch.”123 While the FJC was not intended to be an administrator per se, it considered itself to be “an operations center for the judiciary, designing its programs and overseeing their proper execution rather than performing them.”124 The creation of an organization with the capacity for such long-range thinking provided the judiciary “opportunity to be seen in control, so as to foster the impression of an agency of government able to handle its own affairs.”125 Second, the FJC allowed the development of research and long-range planning capacity under terms favorable to the judiciary rather than favorable to other organizations or interest groups. While the FJC could leverage the technical expertise of non-judges, it would be directed by judges themselves and be responsive to — and only to — the needs of judges, rather than the needs of litigants or the needs of the legislature or executive.126

The growth of judicial bureaucracy in the early- to mid-20th century created the capacity for the continued institutional development. During this period, the judiciary

120 Fish, *supra* note 8, at 372.
121 Wheeler, *supra* note 103 at 41-43.
122 Id. at 42-44.
123 Id. at 44.
124 Clark, *supra* note 113 at 745.
125 Wheeler, *supra* note 103 at 45.
126 Wheeler, *supra* note 103 49.
pursued and received administrative organs that enabled the judiciary to set its own policy, self-administer the decentralized system of courts, and pursue long-term planning and modernization projects. The result was that unprecedented levels of institutional development empowered the courts to emerge in the middle of the century as a powerful force in the nation.

III. The Contemporary Institutional Judiciary

The aforementioned “capacity for self-study, criticism, and reform” allowed the continued institutional self-improvement of the judiciary. The persistence and growth of judicial staff testifies to this period’s success in achieving lasting change for the third branch. The three central staff arms of the judiciary have solidified their place as important players in judicial administration, each with expanded mandates, large professional staff, and seasoned leadership. Recently, two new institutional additions have been made to the burgeoning support system of the federal courts: The United States Sentencing Commission and the Office of the Counselor to the Chief Justice. The former’s role is devoted to research and advice concerning the constitutional imperative for uniform sentencing guidelines. The latter supports the Chief Justice’s role as the chief administrator for the courts with, particularly assisting in his extra-judicial responsibilities such as Chancellor of the Smithsonian. Additionally, more decentralized administrative structures have cropped up throughout the federal judiciary in order to better manage the unique needs in each circuit. In the contemporary United States, the judiciary is an active defender of the unique norms and mandate of the federal judicial system and commands respect from other branches of government.

The judiciary staffs have matured over time to become principal actors in judicial institutionalization. The Judicial Conference, composed of just nine members at its inception, now includes twenty-seven members and two observers, with the director of the AO acting as conference secretary. The Judicial Conference is organized into twenty-two committees, not including subcommittees and ad hoc committees, covering subject matter

---

127 Starr, supra note 87.
128 It is worth noting that two more central staff organs now exist: The United States Sentencing Commission, which develops sentencing guidelines, and the Office of the Counselor to the Chief Justice, which assists the Chief Justice in his capacity as chief administrator of the federal court system.
ranging from the rules of practice and procedure to facilities.\textsuperscript{129} The committees perform the bulk of the policy-making business of the Judicial Conference because the size of the conference impedes actual deliberative discussion. These committees give the Conference important functionally specialized subunits, adding yet another layer of complexity to the judicial system. The functional breadth of the committees is also indicative of the strength of judicial autonomy because it demonstrates the wide range of material over which the Conference has control.

The Chief Justice, the chair of the Conference, retains substantial control over its business, particularly through the appointment of conference members to committees.\textsuperscript{130} This power is consistent with the conception of the Chief Justice as the chief administrator of the judicial system which is complimentary with his substantive role on the High Court. The Chief Justice’s delegation of important administrative tasks to lower judges rather than outside professionals solidifies the identity of the judicial branch. The judiciary, even in its staff function, is recognized as having a unique set of values and preferences, which are best expressed through judges themselves.

The AO has also significantly expanded from an organization directly managed by its director to one with over twenty-six offices with three levels of management.\textsuperscript{131} Its budget has grown to over eighty-five million dollars in 2016. While historic funding levels are not readily available, the AO now represents the third largest item of the judicial branch’s discretionary appropriations after defender services and court security.\textsuperscript{132} The AO specifically highlights in its annual report 14 of its many functions, including creation of guides and publications, coordination of communication to Congress and the President, and provision of information technology programs.\textsuperscript{133} The first AO directors were pulled from the ranks of the Justice Department or American Bar Association. Since 2000, two of the three have been federal judges and the other had accumulated forty years of service in


\textsuperscript{130} Wheeler, supra note 103, at 44.


\textsuperscript{132} Administrative Office of the United States Courts. “Funding/Budget.” Annual Report of the Director of the Administrative Office of the U.S. Courts. 2015. Note: The AO’s third place finish is contingent on each court being considered a discrete budget item. If considered in aggregate, the expenses of the several courts far exceeds that of any other account.

the judiciary. Such figures emphasize both the independence of the judicial branch and the importance of its administrative function.

Conclusion

The agents of institutional development in the federal judiciary have shifted in importance over time. The early judiciary was only weakly autonomous and even less complex. Political considerations, without regard for the preferences in the judiciary, drove institutional development. As time passed, a friendly political environment and strong judicial leadership enabled the development of institutional autonomy and coherence in the judiciary. The fruition of those historical processes was that, finally, judges were able to agree upon and pursue means to institutionalization on their own.

Recognition of endogenous institutional development in the judiciary is uncommon in contemporary scholarship. Most authors simply describe the role of Congress in delegating tasks to the judiciary, often with the explanation that such action allows politicians to hand off unpopular issues to the judicial branch. Others place the emphasis on Supreme Court litigation. They posit that the landmark cases that create rules and expand jurisdiction account for the judiciary’s growth in political power. Both of these explanations are incomplete because they do not recognize the importance of the courts’ administrative activities in its institutional development. Justice Anthony Kennedy, testifying before Congress to oppose to a bill that would mandate court proceedings be televised, spoke of the “etiquette” of “deference … between the branches….” His Honor referred to “the norms of behavior that … help sustain constitutional governance.” Such norms were not the result of legislation or case law, but were instead the outcome of steady institutional growth driven by the judiciary itself.

The result of the 2016 election has caused some to fear for the political independence of the judiciary. In particular, President Trump’s repeated attacks on the credibility of judges and his accusations of the politicization of courts, has been described

135 Bruce Peabody. “Constitutional Etiquette and the Fate of Supreme Court TV.” 106 MICHIGAN L. REV., 19, 20 (2007). *Note*: Out of deference to the judiciary, Congress passed a bill simply allowing the courts to televised proceedings if they so chose.
as “demoralizing” and “disheartening” by his own Supreme Court nominee.\textsuperscript{136} The strength of judicial institutions, and the trends in judicial institutionalization, should allay such fears. A recent meeting of the House Judiciary Committee showed a concern for judicial independence, a reluctance to act without the acceptance of the judicial branch, and a profound respect for the institutional judiciary.\textsuperscript{137}

Administrative control is firmly vested in the judiciary itself. In the wake of mandatory budget “sequestration,” the Judicial Conference is attempting to decentralize judicial administration in the United States in order to trim costs and increase the resiliency of the courts.\textsuperscript{138} For instance, the AO has been directed to delegate “substantial budget and administrative responsibility” to each court or circuit council.\textsuperscript{139} Additionally, circuit councils appoint a non-judge “circuit executive,” who works with the chief circuit judge “to coordinate a wide range of administrative matters in the circuit.”\textsuperscript{140} The decentralization effort has the potential to be damaging to the coherence of the federal judiciary because it increases the number of administrative decision-makers. But, it allows courts to make decisions independent of Washington. That increases the autonomy and resilience of the judicial branch.

Second, Congress continues to be reluctant to embroil itself in the intricacies of judicial administration. For instance, when some claimed that the Ninth Circuit Court of Appeals encompassed too large an area, Congress passed an act in 1997 creating the Commission on Structural Alternatives to the Federal Courts of Appeals.\textsuperscript{141} The Commission was primarily made up of judges and ultimately recommended against splitting the Ninth Circuit.\textsuperscript{142} Congress has respected the recommendation of the Commission to leave the Ninth Circuit intact. Congress’s willingness to delegate legislative responsibility to a “power that is separate from and outside the realm of democratic politics” and demonstrates both the high regard for the judiciary held by the other branches and the recognition that the administration of justice in the United States is the

\begin{flushleft}

\textsuperscript{137} Andrew Hamm, House members discuss judicial transparency under shadow of recent executive statements, SCOTUSblog (2017).

\textsuperscript{138} Federal Court System (2010), p. 41.

\textsuperscript{139} Id. at 41.

\textsuperscript{140} Id. at 39.


\textsuperscript{142} Id. at 75.
\end{flushleft}
exclusive realm of the federal judiciary.\footnote{Crowe, supra note 3, at 271.} In short, “Congress [has] continued to address problems [in the judiciary] … in the manner judges desire.”\footnote{Id. at 257.}

The strength of the institutional judiciary in the contemporary United States is the result of the coordinate branches of government recognizing, perhaps belatedly, that the courts have correctly sought to pursue institutional development. Although Congress still has an important role in scrutinizing and ratifying the proposals of the courts, the judicial branch is no longer beholden to the winds of partisanship as it was in the early United States. The extent to which Congress has removed itself from the business of judicial administration has prompted some commentators to criticize the “unhealthful form of deference practiced by legislators” towards the judiciary.\footnote{Peabody, supra note 129 at 23.} One may argue that Congress’s ready acceptance of the courts’ own preferences has in fact undermined the checks and balances of our constitutional system. While that position merits further examination, the strength of judicial identity, autonomy, coherence and complexity has ensured that the opposite problem — the respect for the separation of powers — is not at issue.

\footnotesize

143 Crowe, supra note 3, at 271.
144 Id. at 257.
145 Peabody, supra note 129 at 23.
What’s Right for Robots’ Rights: Examining the Future of the Law Regarding Developing Robotic Technology

Emily Horak

“Whether we are based on carbon or on silicon makes no fundamental difference; we should each be treated with appropriate respect.” —Arthur C. Clarke, 2010: Odyssey Two

I. Introduction

Humans have robot anxiety. We make robots the villains in our fiction to play into the primal fear of humans no longer being the dominant species. It is not an uncommon storyline. From science fiction novels to movies, we consume this media to satiate our imagination as we ponder what the future holds.

As technology rapidly advances, scientists are designing robots that will redefine the way humans interact with technology. From machine learning algorithms that allow computers to make decisions to robots that drive cars and care for the elderly, it is hard to imagine the future without our mechanical counterparts. Although these machines are not yet perfected, rapid advances are making futuristic fiction meet reality. Soon, the robot character children once read about in books will be the assistant in their classroom.

Technology is not without its imperfections. Ultimately, robots are human creations and are therefore subject to human error. Accidentally or intentionally, robots can be programmed to harm humans, animals, and property. Software can malfunction leading to abnormal behavior. Like humans, some robots have the capacity to learn and

---

apply what they have learned. This decision-making ability allows robots to make autonomous decisions, which, like any decision, can be beneficial or costly. Scientists are on the cusp of breakthroughs in robotics, so it is imperative that society makes quick but informed decisions about the future of robotics.

There are many ways to define rights, as the term has become conflated. In this article, rights will refer to the broader category of human rights as defined by the Universal Declaration of Human Rights. Although some argue for constitutional rights, that topic requires an extensive debate and would be better addressed in its own law article. For this reason, “rights” will refer to a broader category that encompasses basic protections to which all humans are entitled.

This raises the essential question, do robots have these fundamental rights? Many scholars have fiercely debated this issue, as robots have a variety of abilities and functions. Therefore, it is impossible to provide a universal answer to this pressing inquiry. What is agreed, however, is that as robots enter our daily lives, the law must adapt to consider how they are incorporated into human society. To address this, I will first layout what capabilities a robot must have to bear rights in Part II. Then I will discuss the historical context that would provide the basis for robots’ rights in Part III and the legal steps that must be taken to grant said rights in part IV. Throughout this review, I argue that consciousness bears a unique burden on personhood and that, ultimately, conscious robots are deserving of rights.

II. Man, or Man-Made?

A. Definition of a Robot

Robots are portrayed in fiction as cold, metal objects that wish to overthrow humanity. In fact, the word “robot” itself is derived from fiction. In January 1921 in Prague, Karel Capek’s play Rossum’s Universal Robots (R.U.R.) opened and introduced the character of “robots” to the world. The word was derived from the Czech word for “serf” because Capek’s image of a robot was basically a mechanical slave to humans. However,
technology is radically different than it was in 1921, and now robots are vastly different than Capek imagined.

By definition, robots are "reprogrammable, multifunctional manipulator[s] designed to move material, parts, tools, or specialized devices through various programmed motions for the performance of a variety of tasks." They have also been described as “an automatic device that performs functions normally ascribed to humans or a machine in the form of a human.” These definitions are vague because robots have an array of functions and can be used in infinite ways. The function of a robot informs its place in society. Artificial Intelligence (AI) is the programming tool that allows robots to interact with the world around them and allows robots to complete complex tasks that require split-second decision-making. AI is found in all robots and nearly anything that involves computer coding, even Facebook.

Without examining the current successes in technology, this article might seem ahead of its time or, worse, obsolete. Robots are being designed to see with similar depth perception to that of humans, have comparable dexterity, and understand voices. Researchers are attempting to replicate the way animals track scents through sensors to give robots the sense of smell. One group of researchers is even working to build an artificial brain they have named “Kei,” which would be a momentous breakthrough because it would marry robotics and biology. Although these robots work in laboratories, they are still unable to function in real-world settings. The best example of a humanoid robot comes in the form of Nadine, a product of research at Singapore’s Nanyang Technological University. Nadine is both “socially intelligent and human looking.” Her capacity for social intelligence means that she understands language and etiquette, contributing to her human-likeness. She even has “her own personality, mood, and

---

5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
“emotions” that can fluctuate. For instance, her mood can switch from content to angry during a single conversation. Her memory is substantive and she can recall people she has met and their previous conversations. Nadine was designed to serve as a companion who is aware of what is happening. Those not following the progress of the robotics community might theorize that human-like robots are still decades away, but innovations like Kei and Nadine illustrate the rapid progress being made in this field. Computer scientists believe that artificial intelligence emulating human behavior will be achieved within thirty years. But how is this possible?

B. How Robots Work

For robots to challenge humans or even become human-like, they will need to develop consciousness, which is arguably the most difficult challenge programmers must overcome. Scientists and philosophers alike debate how to measure consciousness. The benchmark was crafted by Alan Turing in 1950. He contended that “a computer could be considered intelligent when its responses were indistinguishable from those of a person.” The Turing Test examines simply that: are the computer’s responses able to pass as human? However, other scientists have developed nuanced mechanisms to measure consciousness. For instance, Dr. Hans Moravec of Carnegie Mellon University declared, “if it acts conscious, it is.” He also claims that humans are just fancy machines and future technology will be able to build machines with the same features as humans, including “brains and biological flesh.” Ultimately, both conceptions of consciousness depend on imitation and how to differentiate between illusion and true understanding.

Despite these explanations, scientists still ask “What is consciousness? Can you put it in a machine? And if you did, how could you ever know for sure?” The first question is quite complex and the answer thus far is only speculative. One explanation is that human-like consciousness is an illusion and therefore any robot could imitate this

---

12 Id.
13 Id.
14 Id.
16 Id.
17 Id.
18 Id.
19 Id.
illusion to become conscious. If this is the case, the Turing Test would not be fit to
evaluate consciousness. This theory of consciousness rests on the understanding of
humans as memes who imitate the behavior of other humans. It is currently thought that
only humans are capable of imitation, and human imitation abilities would need to be
incorporated into robots to make them human-like. The second question is the challenge
that computer scientists must overcome. However, programmers have already developed
the concepts needed to create consciousness. At their core, computers are designed to
process information. Consciousness will require information processing at a deeper and
more meaningful level. Search, Pattern-Recognition, Learning, Planning, and Induction are
the five key tools that allow computers to operate at higher levels of functioning.
Computers are limited in that they can only do what they are programmed to do. However,
they can overcome this limitation by searching for solution attempts. This means
machines can overcome human limitations and are capable of higher-level thinking.

Those who believe robots are only for human use would question why robots
need consciousness. However, robots used for human interaction need to have human-like
social interactions. Robots will be used in workshops, homes, offices, hospitals, museums,
and schools. In these environments, it is essential that robots can mimic human care or
else they will not be effective. Consequently, even those who argue that robots should only
serve humans must support consciousness for the machines to fulfill their duties.

C. Robot Personhood

Consciousness leads to the contentious issue of robot personhood and how that
would function in the legal system. Personhood is characterized by autonomy and self-
ownership. Specifically, legal personhood is “the capacity of a person, system, or legal
entity to be recognized by law sufficiently to perform basic legal functions.” There are

20 Susan Blackmore, Consciousness in Meme Machines, 10 JOURNAL OF CONSCIOUSNESS STUDIES 19, 19
(2003).
21 Id. at 19.
22 Id. at 23.
24 Id. at 8.
25 Id.
27 F. Patrick Hubbard, “Do Androids Dream?”, Personhood and Intelligent Artifacts 83 TEMP. L. REV. 405,
407 (2011)
two types of personhood: private law and constitutional. Private law personhood is not as comprehensive and covers legal actions such as owning property, entering a contract or lawsuit, or serving in a legal capacity. Constitutional personhood covers rights. Just because an entity has private law personhood does not mean the entity also has constitutional personhood, for one does not guarantee the other. For instance, some boats are given legal personhood but that boat would not have freedom of speech, protected under the Constitution. Personhood is a serious status and the scope of personhood must be carefully decided. In the case of robots, personhood would classify the robot as a person rather than property, which is why the definition must be incredibly deliberate.

The Turing Test is the benchmark for consciousness, but another important test to consider is a test for personhood. Ronald Motley, Professor at University of South Carolina School of Law, recommends a comprehensive three-part test to distinguish personhood for robots. First, the robot must be able to “interact with its environment and to engage in complex thought and communication.” There is no reason a robot would need rights if it could not engage with its surroundings. Additionally, a robot could not possibly function as a rights-bearing member of society without such ability. The second burden requires the robot to have a “sense of being a self with a concern for achieving its plan of or purpose in life.” A life plan is defined as “a plan for living a unique life story over a relatively substantial period of time.” The plan must be creative and unique to the individual. This builds off the previous test in that the ability for complex thought is a prerequisite for crafting a plan for one’s life. Life plans also require speculative thought, which is beyond what computers are currently programmed to do. The second test necessitates consciousness because without a sense of self, no meaningful life plans can be created. The being must also care about the success of the plan, which demands the entity care about survival and believe that “there is a purpose or reason beyond mere survival for its life.” Essentially, the robot must feel that its life has meaning. Third, to have

29 Id. at 95.
31 Bayern, supra note 28, at 95.
32 Hubbard, supra note 27, at 419.
33 Id.
34 Id.
35 Id.
36 Id.
personhood, a robot must be able to “live in a community based on mutual self-interest with other persons.” This is critical because rights have historically been used to protect people from other people or groups. If robots cannot organize into communities, there is no reason for them to have rights. Whereas robots will be expected to operate in habitats with both humans and other robots, this test will likely be met by design and without extra programming. All three of these tests must be met for a robot to become a legal person rather than property.

In our legal system, however, personhood is not granted to every entity. Animals do not have personhood, for instance. This was recently confirmed by the Ninth Circuit’s evaluation of Naruto v. Slater, which held that Naruto, a Crested Macaque, did not own the selfie he took on Slater’s camera because the Copyright Act does not apply to animals. The court postulated that although the Copyright Act does not apply to animals now, there is no Constitutional reason to limit the addition of animals. To withhold personhood from an entity, there must be a compelling reason to do so. Some have staunchly objected to personhood for robots, citing three concerns: only humans can be legal persons, robots fail to meet the requirements for personhood, and AI will always be human property because it was created by humans. Humans cannot assume that they will always be the dominant species and to repress other species to secure our own dominance raises serious ethical concerns. Despite these apprehensions, there are also benefits to granting right to robots who pass the above test. First, personhood places a sense of civic responsibility on the robot. With duties such as joining and participating in a community, personhood can increase stability and decrease conflict because robots will feel responsible for improving their community. It is crucial for robots who interact with humans as social beings to have a sense of equality, and only personhood can provide this. There is also an important distinction between full and partial personhood. Companies, associations, funds, and ships have all been given personhood. Although these entities have rights, they do not have the same rights as human beings. Similarly, robots can have rights without having the same rights as humans and can instead have adapted rights that more specifically address their

---

37 Id.
38 Id.
40 Id. at 431.
condition. Because we give rights to humans who might not pass the above test due to disabilities or mental health challenges, there must be an adequate response to robots requesting rights after pointing out their possibly more advanced capabilities.

III. We the Robots: Exploring Robots’ Rights

A. Rights for Persons

Upon establishing robots as entities capable of personhood, should they pass the three tests established above, the next step is to discuss what rights, if any, such personhood entails. Just because an entity is eligible for personhood does not necessitate that the entity is also entitled to constitutional rights, as private-law personhood is not inextricably linked to rights under a constitution. To better examine what rights robots might qualify for, it is crucial to examine the rights of humans and how robots are homogenous.

The consistent argument against granting robots rights is that robots are human creations. Because humans are needed to program robots, some argue that robots cannot be deserving of their own rights. After all, humans can reprogram or disable a robot at their discretion. This argument establishes robots as mere property of humans, and, just like a home or cell phone, property does not have rights. Such thinking is understandable for creations like drones, but, as outlined in Part I, the robots this article considers are ones with consciousness. These robots would have the ability to learn and therefore would deviate from how humans originally programmed the robot. Although the robot was originally anthropogenic, the robot would use its learning and creativity skills to determine its own fate. Similarly, it can be contended that children are made by their parents. Adults raise children and “program” them to behave a certain way and influence the way in which children view the world around them. However, children are still given rights from birth. Meanwhile, people who have certain capacities switched off maintain their rights as well. If a person suffers from a traumatic brain injury, for instance, and no longer has certain cognitive abilities, that individual is still endowed with his or her rights. Animals, particularly pets, are a natural comparison to robots in this situation, where pets are raised by humans to be companions. However, conscious robots would have a mental capacity

---

42 Bayern, supra note 28, at 95.
43 Hubbard, supra note 27, at 444.
44 Id. at 444.
tantamount to humans and superior to animals, deeming the comparison between robots and pets inaccurate. Moreover, the law protects animals from abuse and torture, so if robots can internalize pain, they ought to be protected from maltreatment at the minimum. It is inconsistent with how people and animals are treated to suggest that a robot with features that can be switched off by humans is less worthy of having rights.

Perhaps the most compelling reason to grant robots rights, however, is our ethical objection of slavery. To consider robots as mere property, especially when the robot can internalize the meaning and cultural significance of its status, would be a form of futuristic slavery. Without any rights, robots could be forced to work against their will for no compensation. Their programming could be changed at any time, which would equate to fundamentally changing the personality of a human being. Finally, robots could also be shut down at any time by humans, or, essentially the robot could be killed without any repercussions for the person ordering the robot’s decommission. Rights for robots are essential then for mankind and robot-kind, alike. As a society that has tirelessly worked to end slavery and protect the natural rights of all humans, enslaving robots would be a step backwards in history’s progress. Moreover, just because society does not think robots are deserving of rights in 2017 does not mean that in 2117 people will have the same perspective. When conscious robots are in existence, they could very well change the way the law defines people and personhood. Yet, preventing robots from obtaining rights could also be dangerous for mankind, as, like slave revolts, robots can demand rights and emancipate themselves. For the benefit of robots, rights will serve as a form of protection. And fortunate for the robots, non-persons entitled to personhood are already given constitutional rights. The Equal Protection Clause and Due Process Clause in the U.S. Constitution also apply to legal persons like corporations. Supreme Court rulings in June 2015 further extended the Constitutional rights of corporations in *Horne v. Department of Agriculture* and *Los Angeles v. Patel*. Under the Fifth Amendment, the Court ruled that the Department of Agriculture could not require raisin growers to allocate a percentage of their crop for redistribution because the Fifth Amendment requires the government to

---

65 Koops, Hildebrandt, and Jaquet-Chiffelle, supra note 41, at 526.
66 Id. at 531-532.
67 Id. at 525.
68 Id. at 526.
provide just compensation for any property it seizes.\textsuperscript{50} In \textit{Los Angeles v. Patel}, the Fourth Amendment was extended to corporations, preventing the Los Angeles Police Department from obtaining hotel guest lists without a proper warrant.\textsuperscript{51} If corporations, who are not human, are protected under several amendments of the United States Constitution, it is not unreasonable to demand robots be protected in a similar fashion.

Beyond corporations and non-human legal persons, animals and nature are given limited rights as well. Animal abuse laws protect animals from maltreatment by humans while environmental advocates have been attempting to get various natural entities, such as streams, legally recognized.\textsuperscript{52} Even if robots are found unable to have the full spectrum of rights that are bestowed upon humans, animal abuse laws can serve as a model for protecting robots. Even if lawmakers do not find robots capable of carrying the legal responsibilities of personhood or rights at first, protection from abuse is an essential first step.

Personhood defines the ways in which an entity interacts with the law. Robots will naturally have different interactions due to their incredible thinking ability. The roles that robots hold in the legal system will likely determine the types of rights robots are guaranteed. However, the similarities between robots and humans could lead to a similar historical struggle for rights.

\textbf{B. Cases Involving Robots}

Although robotics is still a relatively new topic and no conscious robots have been created, the law is quickly transforming to ask the requisite questions needed to later deliberate the status of robots’ rights.

In the Supreme Court Case \textit{Skinner v. Oklahoma}, the Court established that people have a right to procreate.\textsuperscript{53} This has led many theorists to question if this right would also pertain to robots, who could build other robots and essentially procreate.\textsuperscript{54} Whereas robots can infinitely copy themselves, the right to procreate would be especially problematic. Every species has a desire for dominance, but consciousness necessitates a being to care

\textsuperscript{50} \textit{Horne v. Department of Agriculture} 135 S. Ct. 2419, 2422 (2015).
\textsuperscript{52} Kate Darling, \textit{Extending Legal Protection to Social Robots}, \textit{WE ROBOT CONFERENCE} 1, 16 (2012).
\textsuperscript{53} \textit{Skinner v. Oklahoma} 316 U.S. 535, 541 (1942).
about survival. People are apprehensive about unlimited procreation for robots, as humans could quickly become outnumbered and the inferior species. The right established in *Skinner v. Oklahoma* has yet to be seen in courts dealing with robots, but this precedent illuminates the larger question of how the legal system will adapt to consider robots.

The criminal justice system is also working to consider the question of how robots ought to be held accountable for their actions, or rather, if humans should be punished for the actions of robots. Criminal liability looks to find who is responsible for the crime in question. Similarly, the legal system must decide whether robots should be held responsible for criminal actions. On the one hand, humans program robots and thus could be held liable for robots that have gone rogue. Such was the case with Michigan factory worker Wanda Holbrook. In July 2015, Holbrook was working on her typical duties in Section 140 of the factory when a robot from a different section entered and “crushed Wanda’s head between a hitch assembly it was attempting to place in the fixture of section 140.” Holbrook was pronounced dead at the scene, and her husband is currently suing six robotics companies who built the machine that led to her death. This is a timely example of how manufacturers can be held accountable for their creations. However, conscious robots would be able to delineate right from wrong and have knowledge and intent, all of which are prerequisites for criminal liability. Thus, if a conscious robot were to decide to kill a factory worker like Holbrook, the liability would likely not fall on the manufacturer. This is distinct from the issue of parents being liable for their children’s actions because robots are programed with superior knowledge and judgment to that of children. Next is the question of whether humans and robots can be joint abettors and commit a crime in tandem. Such a finding would signal that there are similarities between robots and humans under the law. If so, then robots are entitled to legal protections in the court systems tantamount to those given to people, such as the right to a free and fair trial. Criminal law also begs the inquiry of just punishment for robots. Imprisonment is the

---

55 Hubbard, supra note 27, at 422.
57 Jenna Green, This is the Most Terrifying Lawsuit Ever, LITIGATION DAILY, Mar. 15, 2017, http://www.litigationdaily.com/id=1202781389432/This-is-the-Most-Terrifying-Lawsuit-Ever?dr=20170230214133.
58 Id.
59 Id. at 26.
most common form of punishment assigned to humans for wrongdoing.\textsuperscript{60} Whereas imprisonment limits people’s freedom, robots would need to be limited in a likewise manner. A robot’s freedom lies in its ability to operate. A comparable punishment to imprisonment would therefore be to put the robot out of use for a given period of time.\textsuperscript{61} However, this is not to argue that decommissioning a robot is by any means ethical. After all, the argument here is that robots are deserving of rights. Cruel or unusual punishment violates basic human rights and thus parallel punishment must be closely examined to ensure equality and justice. Criminal law will realistically evolve before other areas of the law, as courts must consider surgical robots who mistakenly harm patients or drones that malfunction. Therefore, criminal law will be the area where robots and programmers test the extent of the law and build the foundation for robots’ rights.

Criminal liability naturally yields a conversation about civil liability. Although I argue that criminal liability will be a precursor to other forms of liability because of the already developing case law, civil liability must also be considered. If robots are found to have civil liability, accidental incidents, such as a car crash where the driver is a conscious robot, will warrant equal responsibility. Issues such as negligence can no longer be solely delegated to computer programmers because a robot’s decision is autonomous, removing control from the programmer. However, one can still question if the developer should have programmed the robot to make its own decisions. This also raises the question of who robots will be compared to. Whereas civil liability relies on a reasonable standard, the law must decide whether robots are compared to humans with equal thinking capacity or other robots with equal computing capacity. Law is complex because different situations yield different decisions, and these questions will be answered on a case-by-case basis.

Human error is inevitable with any creation, including robots. In the case \textit{State Farm Mutual Automobile Insurance Company v. Bockhorst}, the Tenth Circuit considered human and robot responsibility.\textsuperscript{62} State Farm’s insurance computer program retroactively reinstated clients’ insurance policies unbeknownst to employees.\textsuperscript{63} Customers were then given notification of their resumed policy. The Tenth Circuit court found that State Farm

\textsuperscript{60} Id. at 31.

\textsuperscript{61} Id. at 32.


was still liable for the insurance policies, even though they were issued in error.64 A court reached conclusion in McEvans v. Citibank, N.A. when an ATM malfunctioned and did not properly deposit McEvans’s money.65 However, Citibank was still responsible for the funds deposited. Although these cases do not involve humanoid robots, they indicate that the law regards injuries resulting from technology as the liability of its owner. Such a ruling can become problematic for robots’ rights because if humans are held accountable, then robots remain mere property. However, these two cases do not consider complex and conscious robots, where such technology might yield a different ruling.

The most famous case involving robots is White v. Samsung.66 Samsung ran an advertising campaign in the early 1990s featuring a robot in a long gown with a blonde wig on the set of the game show, Wheel of Fortune.67 The printed advertisement depicting the future read “Longest-running game show. 2012 A.D.”68 Vanna White, a host of Wheel of Fortune, sued Samsung in federal court for using her likeness and violating her right of publicity.69 The Ninth Circuit Court of Appeals found that Samsung’s advertisement did not violate California Civil Code §3344 because the robot was clearly mechanical. However, had the robot been a manikin modeled after White, the ruling would have been different.70 White v. Samsung is significant because it signifies that the courts view robots as fictional and without human-likeness. The interesting part of this ruling is not necessarily the connection to privacy rights, but rather the legal limitations the court created to distinguish robots from humans. Courts will need to recognize robots as human counterparts for robots to ever have rights. Advances in technology might change this precedent, but there would need to be sufficient evidence that robots and humans have overwhelming similitude.

Another case brought to the Ninth Circuit, Wendt v. Host International, Inc. further supported the finding in White v. Samsung that human-looking robots can violate a person’s right to privacy.71 There, airport bars installed two animatronic robots resembling Cliff and

64 Id. at 450.
67 Ryan Calo, Robots in American Law, UNIVERSITY OF WASHINGTON 1, 8 (2016).
68 Id. at 8.
69 Id.
70 Id. at 9.
Norm from the show *Cheers.* The actors who play Cliff and Norm sued the company responsible for the robots, alleging that the robots closely resembled the likeness of their television characters. The robots were coined Hank and Bob, but the courts found their human-like appearance to deviate from the metal robot printed in Samsung’s advertisement. Rather, the animatronic robots closely resembled the plaintiffs and were found to violate California’s laws protecting a person’s likeness. This is largely because there was no exposed metal on the wax-covered machines. *Wendi v. Host International, Inc.* established in the Ninth Circuit that the crux of the issue is whether a reasonable person could determine likeness between the person and the robot. Even if a robot has consciousness, the non-metal requirement could prohibit a robot from gaining rights.

Problems remain in adjudicating cases involving robots. Robotics requires a great deal of technical knowledge from a jury. Whereas technology is rapidly changing and the youths who are the most technologically savvy are too young to serve on a jury, many juries struggle to properly decide a case due to a lack of knowledge. Judges struggle with the detailed and nuanced technology as well. The fictional aspect of robots proves perplexing, as juries must change their preconceived notions about robots to properly evaluate a case. *Louis Marx & Co. v. United States* exhibits many of the quagmires faced by courts when a novel technology is in question. A customs court was faced with the issue of whether a “mechanical walking robot” was an animate object. If the robot was considered animate, the company only faced a 35% tariff as opposed to the original 50% tariff. The Court of Special Appeals of Maryland relied on the precedent in *Comptroller of the Treasury v. Family Entertainment Center of Essex, Inc.* and turned to the dictionary to settle the dispute. In its ruling, the court declared that a robot is “not a living thing; it is not endowed with life. A robot is a mechanical device or apparatus, a mere automaton, that operates through scientific or mechanical media.” Rather than relying on experts or considering creative argumentation, the court used simplistic dictionary definitions, revealing perhaps a

---

72 Id. at 809.
73 Id. at 808.
74 Id. at 809.
75 Id. at 43.
76 Id. at 14.
78 Id. supra note 67, at 14.
79 Id. at 15.
lack of technical understanding or an unwillingness to take a new stance on evolving technology.

How the law considers robots will also change the way people are considered. It is probable that humans will be able to substantially alter themselves by the time robots are conscious.\textsuperscript{80} In fact, humans might be able to utilize advances in medicine in such ways that change how humans are even defined. If a person can prolong his or her life or develop super-human strength or knowledge, the question arises of whether this super-human should be treated in the same manner as unaltered humans. This future technology is speculative now but begins the conversation on how to create an inclusive legal system that upholds equity under the law.

The path to rights for different groups have varied throughout history. The civil rights movement relied on peaceful demonstration and legislation while the LGBT movement gained equality through the courts. Robots will need to forge their own path to rights. Courts will likely play a central role in creating the legal apparatus for robots’ personhood and rights.

\section*{C. Ethical Framework for Robots’ Rights}

Beyond legal precedent and the guideline of human rights, there is serious ethical and philosophical reasoning that substantiates robots having rights. Robots with consciousness vary vastly from the robot toy a child might play with. These robots would have mental capability on par, if not superior, to the capabilities of the human mind. With emotions and understanding, rights are crucial for both the robot and the humans who interact with the robot.

With consciousness comes morality. Once an individual is conscious, that individual is then both a target and agent of morals.\textsuperscript{81} Torrance argues that the reason humans are treated ethically is because we are aware of their consciousness.\textsuperscript{82} Thus, robots ought to be treated with the same respect as people recognize robots’ consciousness. It is maintained that robots are merely a metal, human creation. Despite such an assertion, humans inherently treat robots differently. Studies have revealed that people give robots


\textsuperscript{81} David Levy, \textit{The Ethical Treatment of Artificially Conscious Robots} 1 INT J SOC ROBOT 209, 210 (2009).

\textsuperscript{82} Id. at 210.
“intent, states of mind, and feelings.”83 More importantly, these characteristics are given to all robots, not just those that are human-looking. To many, harming a robot feels wrong, even if people know the object does not have feeling.84 People naturally project human qualities to inanimate objects to make them seem more relatable.85 This is what makes social robots especially useful for caregiving tasks. When robots do evolve to have intent, state of mind, and feeling, there is little reason to suggest that humans and robots will not become counterparts.

The issue of personhood also raises ethical concerns. In his 1985 essay The Legal Rights of Robots, Robert Freitas Jr. notes that African Americans, “gypsies, children, women, foreigners, corporations, prisoners, and Jews were not considered people.”86 Solum contributes to Freitas by drawing the analogy of slavery. Solum reasons that considering AI to be property is “dangerous” because it necessarily means that the robot is a human’s slave.87 Following this slavery reasoning, robots would likely revolt to demand their rights.88 However, the conflicts with altering and enslaving robots do not end here. One philosopher asks an abundance of pressing inquiries:

Do we have any right to enslave them simply because they are not human? Is it fair and reasonable to deprive them of an existence full of pleasure and relaxation? Are we able to program a robot to have a soul and, if so, should we have the right to exercise influence and control over that soul? Even worse, if our robots have souls, do we have the right to switch off their souls if the mood takes us, or is that murder? If robots have consciousness, is it reasonable for us to argue that, because we gave them their ability to think for themselves, we should be able to command them to do our bidding, to enslave them?89

These questions center around the theme of how robots cannot be limited simply because they are human creations. Although humans have historically enslaved other humans, as a society we have decided that this is inhumane and morally wrong. The same holds true for robots. Denying robots rights would contradict our moral code and could yield a slippery

---

83 Darling, supra note 52, at 4.
84 Id. at 13.
85 Id. at 1.
86 Levy, supra note 81, at 213.
87 Id. at 213.
88 Id.
89 Id. at 212.
slope where society condones revoking rights from marginalized groups. This would be a tremendous setback in the campaign for human rights and would be detrimental for mankind and robots alike. Robots’ rights are a return to natural rights, which the enslaved have fought tireless to gain.\textsuperscript{90}

This slavery analogy requires robots to not only have rights, but also some form of compensation. Although robots are created to help people complete complex tasks, robots would need to be adequate compensated for their work to not be considered slaves. The form of compensation and the labor laws surrounding robot work will need to be adjusted to reflect how robots integrate into society. If traditional money is of no value to robots, then a paycheck would be unjust. Also, because they are made of more durable parts, robots will be able to work longer hours without experiencing fatigue. Whereas regulations limit how long nurses caring for the elderly can work, for example, robots would be able to manage longer shifts without compromising patient care. Robots will require different labor regulations and payment, but both are necessary to prevent enslavement.

How robots are treated has a greater implication for how people are treated. Seeing as robots are given human attributes, there is a relation between how robots and humans are treated. If children find that it is acceptable to kick or abuse a robot, this can translate to the child harming his or her classmates.\textsuperscript{91} This is consistent with the concept that conscious beings are deserving of ethical treatment. Ultimately, robots with rights could prevent the maltreatment of others.\textsuperscript{92}

Again, this is not suggesting that the only ethical solution is to give robots rights identical to that of humans. Rather, robots’ rights will likely differ.\textsuperscript{93} Under the United States entitlement system, people are given Medicare and Social Security benefits.\textsuperscript{94} It is unlikely that robots, who do not age in the same manner, would be allotted the same benefits. Robots will also need some type of representation in government.\textsuperscript{95} Whether robots create their own representative bodies or assimilate into people’s government systems remains unknown.

\textsuperscript{90} Phil McNally and Sohail Inayatullah, The Rights of Robots Futures 119, 123 (1988).
\textsuperscript{91} Darling, supra note 52, at 13.
\textsuperscript{92} Id. at 19.
\textsuperscript{93} McNally and Inayatullah, supra note 90, at 123.
\textsuperscript{94} Levy, supra note 81, at 212.
\textsuperscript{95} Calo, supra note 54, at 529.
Ethics largely regulate society and human interactions. Robots will be subject to a similar moral code and will need to be incorporated into society accordingly. There are many reasons for robots to have rights, but one of the most compelling is the ethical implications it would have for human society.

**IV. Propelling Policy: Possible Legislative Solutions**

**A. Passing Legislation to Regulate the Programming of Robots**

As technology evolves at an unprecedented rate, humans must consider their own livelihood. Do conscious robots pose a threat to humanity’s existence? If so, society might have a compelling interest to consider legislative options to pave the road for the future of robotics.

Isaac Asimov was a leading theorist renowned for his three rules of robotics. Law One states that a robot may not injure humanity or allow a human to be harmed due to inaction.\(^6\) An example of this concept is self-driving cars. Self-driving cars are technically robots—although not in the sense of humanoids that this article discusses—and therefore would be held to Asimov’s law. If the car were to purposely crash or not act to prevent a collision, law one would be violated. Law Two stipulates that robots must obey all human orders unless the order conflicts with the first law.\(^7\) Essentially, a robot should override a human command only if the person tells the robot to murder, for example. The third law reasons that a robot must protect its own life if protection does not violate the first or second laws.\(^8\) A robot can therefore defend itself so long as the robot does not harm or override a human in the process. Groundbreaking at first, these laws have been difficult for programmers to maintain, as illustrated by the self-driving cars example. A car can be programmed well, but some accidents are inevitable and the car cannot perform a miracle to prevent the people inside from being injured. There is also the case where a car must decide who will be more severely injured in a wreck, its passengers or passengers in another vehicle. There is no way for a car to be coded for a situation like this, where both results are equally devastating. Additionally, robots are created by humans and subject to human error. Asimov’s laws require human perfection, which is outside the realm of possibility.

---

\(^6\) Dowling, supra note 3.

\(^7\) Hubbard, supra note 27, at 464.

\(^8\) Id.
Using Asimov’s principles as a guide, state and federal lawmakers could develop laws to shape parameters for programmers. Robotics will play an essential role in national security and modern warfare so it is vital that programmers are not too severely limited. However, should most of society decide that it is in humanity’s best interest to prevent conscious robots, steps must be taken now before such robots are developed.99 As discussed in Part II(C), once a conscious robot is created, ethical boundaries would make it difficult to undo the creation. Some suggestions for robot limitations include mandating signals of a robot’s capabilities, requiring robot identification that ties the bot to its owner, and banning weaponized bots.100

Another legislative option is to outline what rights robots should have in legislation. Rather than waiting for robots to demand rights or attempt emancipation, precursory legislation could mitigate the strife of incorporating robots into the legal system. This legislation would require deliberation about new definitions of personhood and the distribution of rights. Additional benefits to legislation outlining robots’ legal standing include a mainstream conversation about how robots and humans can coexist and creation of a norm for robot treatment.

Courts decide issues in retrospect, after an incident has already occurred. The judicial system will play a significant role in the development of robots, but if preventative measures are to be taken, legislators must be the initiators.101 However, this is not to suggest that legislation is the solution. Should people decide that conscious robots are a benefit to society, perhaps no restrictions should be implemented, allowing developers to innovate. It is imperative that the masses become educated about robotics so people can make informed decisions about the appropriate next steps, if any.

B. Implications of Giving a Robot Rights

Thus far, this article has routinely advocated for granting robots legal rights should they prove their consciousness. There is formidable opposition, however, to such ideas. Ranging from ethical inquiries to human responses to robots, there are an array of considerations when examining robots’ rights.

99 Id.
100 A. Michael Froomkin and P. Zak Colangelo, Self-Defense Against Robots and Drones 48 CONN. L. REV. 1, 6 (2015).
101 Brenner, supra note 80, at 235.
The boundaries created by modern ethicists might conflict with the progress of robotics. First, robots’ design poses a challenge. Recognizing the legal rights of robots could allow for the mechanical alteration of humans. When the lines are blurred between robots and man through technology and the two species are regarded as equal, the gateway to extreme human modification is opened. People have already objected to severe genetic modification of children, so adult human modification may also be considered problematic.

Next is the question of robots and humans mixing in the workplace and whether there should be a hierarchy. If robots are granted rights and considered equal, humans could not impose superiority in the workplace, even if the workplace is in the business of designing robots.

The right to privacy is also in question, as robots function by constantly accessing the internet. Humans evaluate situations often using limited knowledge, but a robot who can sort infinite information in seconds has a definite advantage. Rights are understood to end where another entity’s rights begin. Robots would need to restrain their computing power when interacting with humans to maintain a person’s right to privacy.

Another legal complexity is the issue of responsibility. As discussed previously, courts have found that human owners are responsible for their robots. A robot with consciousness and rights would carry legal responsibility, but would human developers bear no responsibility in turn? Giving robots rights might be beneficial for the robot’s sake, but many complexities are created for human civilization as a result.

Human perception of robots also complicates what rights the law will grant to robots. Humans wish to preserve their species and when robots pose a threat to survival, mankind has an extensive interest in mitigating that threat. One author asks whether robots should need a license to kill, even when deployed in military operations. When Nadine, the previously discussed social robot, was unveiled, internet users described her as “creepy, scary, and potentially dangerous.” Conversely, as examined in Part III(B), humans empathize with robots. In 1981, Judge Charles Brieant of the U.S. District Court in the Southern District of New York ordered that a robot be dismantled above the torso,

---

102 Tamburrini, supra note 26, at 121.
103 Id. at 2.
104 Id.
105 Tan, supra note 11.
evoking headlines about beheading.\textsuperscript{106} The muddled perspectives people have about robots reflects confusion as society attempts to reconcile what a future with robots will hold.

Despite these understandable hesitations, robots make positive contributions to human society. From economic development to the responsibility of citizenship, the threat robots pose to people is mitigated by their benefits to society.\textsuperscript{107} Civic responsibility is an essential component that comes with legal rights.\textsuperscript{108} The interests that must be weighed are between the possible dominance of robots and the definite benefits they will bring. Hence, there is great need for discourse contemplating robots’ place in society.

V. Conclusion

Technology is like an avalanche—once developments are made, progress and discoveries cannot be reversed. The same will prove true for robots, who have become a focal point of modern technological development. As humans become more reliant on technology, robots will become an integral part of society. From classrooms to hospice care, robots will change the way humans interact with one another and the world around them. Revolutionary changes in technology will also dramatically change legal systems.

This article centers around a future world where robots have consciousness. Although this development is pure fantasy in 2017, it will eventually be attainable. In a reality where robots can think, process information, understand the world, and feel their emotions, as humans we must ask how we can best coexist in our new milieu. More importantly, we must consider the values we want to uphold by asking ourselves a series of questions. Are conscious robots property or individuals? Are robots an inferior species? What are the benefits of granting robots rights? How do we want our children to treat robots? These questions have no certain answers. In fact, the answers to these questions will change over time to represent how humanity’s values adapt to futuristic technology.

As case law and technology progress, perhaps the argument made in this article will become obsolete. Nevertheless, as more scholars ask important questions about the future of mankind amid metal-kind, the conversations will trickle down to mainstream conversation. Shows like \textit{Westworld} are already prompting people to think about what the

\textsuperscript{106} Calo, \textit{supra} note 67, at 11.
\textsuperscript{107} Brenner, \textit{supra} note 80, at 249.
\textsuperscript{108} Hubbard, \textit{supra} note 27, at 432.
future may hold. Moreover, prominent court cases like *White v. Samsung* are forcing courts to begin determining the legal structures that will define robots’ interactions with the law. Fiction will soon become reality, and the thrilling robot characters we once cheered for will be our caretakers, educators, and companions. Society must start to consider the implications of technology and the right way to write robots’ rights.

---

109 *Westworld*, HBO (2016). The show centers around an amusement park where humans can go to interact with human-like, conscious robots called “hosts.” The series raises the questions of humans’ treatment of robots and the rights of robots to fight back when harmed by people.
Obergefell: A Catalyst for Judicial Expansion of Fundamental Liberties

Amanda Urban

Introduction

Justice Anthony Kennedy’s opinion in Obergefell v. Hodges argues, “When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.” Under an unenumerated liberty interest, which is found in the Due Process Clause and intertwined with the Equal Protection Clause, Obergefell eradicated state bans on same-sex marriage, immediately legalizing it in all fifty states. However, its long-term impact will stretch far beyond the context of marriage. Serving as a significant shift in substantive due process jurisprudence, the decision deviates from the standard of review used in Washington v. Glucksberg, instead analyzing the fundamental right to marriage using a top-to-bottom methodology. The top-to-bottom approach introduces a fundamental right that is broad enough to protect more narrowly tailored, specific rights, such as same-sex marriage. For example, Justice Kennedy argues that the right to marriage protects the more specific right to same-sex marriage. Thus, the echo of Justice Kennedy’s interpretation of substantive due process, which circumvents the specificity and tradition requirements of Glucksberg, will reverberate in cases regarding fundamental liberties. Illustrating an activist style of constitutional interpretation, the identification of fundamental liberties will reflect new understandings of evolved national values. Applying Justice Kennedy’s top-to-bottom analysis in Obergefell, litigants will likely be able to identify a generalized, broad fundamental right, deeply rooted in national history.

2 Id.
4 Id.
and tradition, to advance a more specific right. Therefore, the Court’s protection of fundamental liberties will likely reflect social progress, resulting in the transformative expansion of substantive due process.

This essay seeks to delineate the far-reaching consequences of Kennedy’s due process analysis in Obergefell. Section I analyzes two predominant approaches to due process that preceded Obergefell. Section II summarizes the facts and key points of the Obergefell ruling. Section III provides a detailed explanation of Justice Kennedy’s top-to-bottom due process methodology, which differs from the two predominant approaches prior to Obergefell. Section IV discusses implications of the due process analysis adopted in Obergefell, and argues that Justice Kennedy’s approach will serve as a catalyst for judicial expansion of fundamental liberties.

I. Pre-Obergefell: Two Dominant Methodologies

For over a century, the Court has repeatedly grappled with the doctrine of substantive due process, which refers to the Court’s power to recognize unenumerated fundamental rights not explicitly written in the plain text of the Constitution. The Ninth Amendment affirms the existence of these rights, stating that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Justice John Marshall Harlan contends that due process encompasses more than a simple guarantee of procedural fairness, and instead broadly protects life, liberty, and property. The vagueness of this clause extends immense responsibility to the Court, creating the potential for boundless judicial discretion when identifying these rights. Defending its discretionary power, the Court has articulated that it “has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended.” Prior to Obergefell in 2015, which initiated a revolutionized standard of analysis, the two distinct

---

6 U.S. CONST. amend. IX.
methodologies established in *Poe v. Ullman* and *Washington v. Glucksberg* served as unclear guideposts.\(^\text{10}\)

\[ A. \] The Poe v. Ullman Dissent

Justice Harlan’s influential dissent in *Poe v. Ullman* provides a lengthy description of the substantive due process analysis. The Court assessed whether a series of Connecticut criminal statutes, which banned the use of contraceptives, violated the Fourteenth Amendment.\(^\text{11}\) Although the majority determined the case lacked a justiciable question, Justice Harlan’s dissent questioned the rigid role of tradition in analysis and argued that a criminal ban on contraception would violate the Fourteenth Amendment. Justice Harlan’s argument about personal liberties in the dissenting opinion later guided the Court’s majority opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which used a common-law framework of analysis.\(^\text{12}\) Importantly, Justice Harlan defined tradition as a “living thing,”\(^\text{13}\) arguing that the past should not fully restrain current decisions about individual liberties.\(^\text{14}\) He called for the consideration of “what history teaches are the traditions from which it developed as well as the traditions from which it broke.”\(^\text{15}\) In other words, he articulated that the right to same-sex marriage is guaranteed under the Due Process Clause, despite it not being deeply rooted in history and tradition. Additionally, Justice Harlan emphasized the broad nature of substantive due process, proposing that

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.\(^\text{16}\)

Justice Harlan’s inexact definition, which fails to offer a precise formula for the jurisdiction or exact definition of due process, widens and protects judicial discretion.\(^\text{17}\) Thus, this approach recognizes the relevance of U.S. history and traditions, but also leaves room for

\(^{10}\) See *Obergefell*, 135 S. Ct. at 2631-32 (THOMAS, J., DISSENTING); *Casey*, 505 U.S. at 998-1002.


\(^{12}\) Id.; *Casey*, 505 U.S. at 848-49.

\(^{13}\) Poe, 367 U.S. at 524.

\(^{14}\) Yoshino, *supra* note 3, at 150.

\(^{15}\) Poe, 367 U.S. at 542 (HARLAN, J., DISSENTING).

\(^{16}\) Id.

\(^{17}\) Bird, *supra* note 7, at 583.
progress and innovation through judicial discretion. Further challenging the level of authority afforded to historical tradition, in 1997, Justice Souter concurred in *Glucksberg*, which offered a second method of due process, prior to *Obergefell*. Interestingly, he contended that the Court should have followed the standard found in the dissenting opinion of *Poe*.

B. Washington v. Glucksberg

Nevertheless, *Glucksberg* diverged from the methodology used in the *Poe* dissent, instead establishing a new guide for a substantive due process analysis. Justice William Rehnquist’s majority opinion referred to precedent, arguing that fundamental liberties are only constitutionally protected if they are central to American tradition and history. Disagreeing with Justice Souter, he asserted his disapproval of the *Poe* methodology by highlighting the importance of precedent:

In Justice Souter’s opinion, Justice Harlan’s *Poe* dissent supplies the “modern justification” for substantive-due-process review. But although Justice Harlan’s opinion has often been cited in due process cases, we have never abandoned our fundamental-rights-based analytical method. Just four Terms ago, six of the Justices now sitting joined the Court’s opinion in *Reno v. Flores*; *Poe* was not even cited. And in *Cruzan v. Director, Mo. Dept. of Health*, neither the Court’s nor the concurring opinions relied on *Poe*; rather, we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment. True, the Court relied on Justice Harlan’s dissent in *Casey*, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court’s opinion in *Casey* would seem to fly in the face of that opinion’s emphasis on stare decisis.

It follows that *Glucksberg* favored a more stringent, narrow standard based on specificity and tradition. The decision used a two-part inquiry, requiring a “careful description of the alleged right” and evidence that the right was “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” Importantly, Justice Rehnquist’s assertions implied that all fundamental liberty cases should be subject to the same method of judicial review. He did not consider that cases involving life’s most

---

18 Id.  
19 *Casey*, 505 U.S. at 848–49 (quoting *Poe*, 367 U.S. at 543 (HARLAN, J., DISSENTING)).  
21 Id.  
22 Nicolas, supra at 336; *Glucksberg*, 521 U.S. at 720-21; Yoshino, supra note 3, at 164.
intimate decisions, such as same-sex marriage, may require a unique type of analysis. *Obergefell* failed to strictly adhere to this two-pronged standard of review by circumventing its requirements through a top-to-bottom methodology. In his dissenting opinion, Chief Justice Roberts disapproves of the Court’s deviation from the standard set by *Glucksberg*, arguing that the majority opinion effectively overrules *Glucksberg*, the leading modern case setting the bounds of substantive due process.” Stretching the limits imposed by *Glucksberg*, the Court in *Obergefell* reaffirmed the assertion in *Poe* that challenged the influence of tradition in fundamental rights cases, due to its evolving nature. Thus, Justice Kennedy’s top-to-bottom methodology cleverly reduced the roles of specificity and tradition, which previously served as obstructions in litigation by restricting judicial expansion of personal liberties.

II. The Landmark Case that Legalized Same-Sex Marriage

In *Obergefell*, six different cases from Michigan, Kentucky, Ohio, and Tennessee challenged state prohibition of same-sex marriage. After all but one federal court determined the state bans were unconstitutional, state officials who enforced the disputed laws prohibiting same-sex marriage appealed to the Sixth Circuit. The circuit court consolidated these six cases, reversing the judgments of the district courts. Upon granting certiorari, the U.S. Supreme Court agreed to answer two questions: whether the Fourteenth Amendment requires a State to 1) “license a marriage between two people of the same sex” and 2) “recognize a same-sex marriage licensed and performed in a state which does grant that right.” The majority opinion asserted affirmative answers to both questions, securing the legalization of same-sex marriage.

The majority opinion articulates that same-sex marriage bans violate both the Due Process Clause and the Equal Protection Clause, stressing the intertwined nature of liberty and equality. Justice Kennedy argues that these two clauses are “connected in a profound way” and this interrelation “furthers our understanding of what freedom is and must

---

25 *Id.* at 31.
27 *Obergefell*, 135 S. Ct. at 2593.
28 *Id.* at 2607-08.
29 Yoshino, *supra* note 3, at 147.
The George Washington Undergraduate Law Review

become.”

Under this premise, the opinion only briefly addresses equal protection analysis and concentrates on due process analysis. Accordingly, I will explore the substantive due process component of the Court’s ruling, which invokes a top-to-bottom methodology to conclude that the fundamental right to marriage is guaranteed to same-sex couples.

The majority opinion begins by noting the “transcendent importance of marriage” throughout history, describing its centrality to the human condition. Significantly, this broad emphasis on the historical tradition of marriage deviates from precedent, which does not justify a narrowly tailored fundamental right by citing a more general right. Next, the Court acknowledges four enumerated reasons to conclude that marriage exists as part of the liberty “to define and express” one’s identity. These four principles involve 1) the concept of individual autonomy, 2) the fundamental uniqueness of a two-person union through marriage, 3) the safeguarding of children and families, and 4) the role of marriage as a “keystone” of social order. The decision depends upon the doctrine of fundamental rights, which holds a state cannot deprive any citizen of a fundamental right unless necessary to serve a compelling governmental interest. In sum, the court relied on the intertwined nature of substantive due process and equal protection principles to determine that state bans on same-sex marriage unjustly intrudes on an individual’s autonomy to partake in intimate decisions, actions, and relationships.

III. Future Courts Will Apply Justice Kennedy’s Top-To-Bottom Methodology to Fundamental Rights Cases

The Obergefell opinion utilizes a top-to-bottom methodology, in which the generalized fundamental right to marriage, woven into the fabric of national history and tradition, serves as a tool to advance the right to same-sex marriage. Essentially, this decision defies the precedent of Glucksberg, which was primarily concerned with the identification of a fundamental right based on its relation to tradition and specificity. Although Justice Kennedy does not explicitly overrule Glucksberg, he disregards the rigid

---

30 Obergefell, 135 S. Ct. at 2602-03.
31 Id. at 2602-05 (discussing Equal Protection Clause).
32 Obergefell, 135 S. Ct. at 2588.
33 Craig Green, Turning the Kaleidoscope: Toward a Theory of interpreting Precedents, 94 N.C.L. REV. 379 (2016); Obergefell, 135 S. Ct. at 2597.
34 Obergefell, 135 S. Ct. at 2596-2600.
35 Zachary Wolfe, Marriage equality and peoples’ struggles to win at the Supreme Court, Liberation News, June 26, 2015, at 1.
framework of the case, and refuses to narrowly define the right at issue as the right to same-sex marriage.\(^{37}\) Instead, the majority opinion considers precedent, such as the \textit{Loving v. Virginia}, which legalized interracial marriage by appealing to the broader fundamental right to marriage, to determine the appropriate level of generality for substantive due process analysis.\(^{38}\) In \textit{Obergefell}, Justice Kennedy’s deviation from the precedent of \textit{Glucksberg} expands future substantive due process jurisprudence by redefining the role of tradition and specificity.

\subsection*{A. Justice Kennedy’s Methodology Redefines the Role of Tradition}

Although same-sex marriage is not deeply rooted in history, the broad institution of marriage is firmly entrenched. Justice Samuel Alito argues in his dissent that the specific right to same-sex marriage does not encompass an unenumerated right because \textit{Glucksberg} determined that “liberty” in the Due Process Clause only protects rights “deeply rooted in this nation’s history and tradition.”\(^{39}\) Despite this, Justice Kennedy’s majority opinion evades this hindrance and satisfies \textit{Glucksberg}’s tradition requirement by refusing to narrowly define the contested right as the right to same-sex marriage. Justice Kennedy’s deviant departure from the \textit{Glucksberg} framework, which had dictated previous substantive due process analyses, has established the top-to-bottom analytic method. Emphasizing the role of marriage as a “keystone of social order,” Justice Kennedy argues the sacred institution of marriage has been ingrained in national history.\(^{40}\) The opinion refers to Alexis de Tocqueville’s assertion, made almost two-hundred years ago:

\begin{quote}
There is certainly no country in the world where the tie of marriage is so much respected as in America . . . When the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace . . . . He afterwards carries [that image] with him into public affairs.\(^{41}\)
\end{quote}

Justice Kennedy elaborates on the historical significance of marriage as an institution, but ultimately calls into question the long-standing precedent favoring the tradition

\begin{footnotes}
\footnote{Bird, supra note 7, at 607.}
\footnote{Id.}
\footnote{Id.}\(^{38}\)
\footnote{Id. at 2600.}
\footnote{Id. (quoting de Tocqueville).}
\end{footnotes}
requirement in substantive due process analysis. Because same-sex marriage has been historically denied to citizens, Justice Kennedy challenges the Glucksberg standard by elaborating on the universal tradition of marriage. Thus, a narrowly-tailored right does not need to be prevalent throughout history if it is supported by a more generalized right, such as the right to marriage. Furthermore, this enables the Court to affirm the existence of certain fundamental liberties, which have consistently been unfairly denied to citizens throughout history. More specifically, the majority opinion suggests a potential caveat that results when tradition serves as a controlling factor in a case outcome. Articulating perhaps the most paramount lesson to be learned from Obergefell, Justice Kennedy urges:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

This argument warns against excessive reliance on the use of history and tradition as guideposts because various inequalities, once socially permitted and accepted, were once transcribed into federal and state laws. The top-to-bottom methodology, focused less rigidly on history and tradition, accounts for the law to potentially be blind to such inequalities. This approach allows the Justices to exercise their human discretion when identifying substantive due process rights. Therefore, through top-to-bottom judicial review, a right can only be constrained due to reasoned judgment, rather than an excessively stringent methodology.

U.S. law has historically denied same-sex couples the right to marriage; thus, reliance on this unjust tradition prevents society from advancing as new social understandings of freedom develop. In other words, the past should not dictate the future of substantive due process jurisprudence. Instead, Obergefell reduces the influence of tradition in substantive due process analyses. In sum, Justice Kennedy implies that excessive reliance on the Glucksberg requirement of tradition enables injustices, grounded by deep historical roots, to inhibit the Court from granting fundamental liberties to classes of historically subjugated citizens.

---

42 Yoshino, supra note 3 at 163.
43 Obergefell, 135 S. Ct. at 2598.
44 Bird, supra note 7, at 608.
B. Justice Kennedy’s Methodology Eradicates the Requirement of Specificity

Justice Kennedy’s top-to-bottom approach also deviates from the Glucksberg standard of review by dismissing the role of specificity in analysis of alleged fundamental rights. Alternatively, this methodology first identifies a higher-level right at issue and then moves downward to more narrow versions, rather than beginning with a narrow definition of a right to be interpreted more abstractly and generally.\(^{45}\) Justice Kennedy states that the Court “must respect the basic reasons why the right to marry has been long protected.”\(^{46}\) This methodology of Obergefell differs from Glucksberg because the narrow interpretation of a right to same-sex marriage is only considered in the shadow of the greater fundamental right to marriage.\(^{47}\) Under this standard, no rationale could justify that same-sex marriage is intrinsically inconsistent with the central meaning of the right to marriage.\(^{48}\) Thus, the majority opinion does not affirm a new right, but rather extends an ancient, long-acknowledged one to same-sex couples.\(^{49}\)

The majority opinion deviates from the specificity standard described in Glucksberg by denying its applicability to the same-sex marriage context. In addition, arguing that analysis of the specific right to same-sex marriage does not reflect an appropriate framing of the issue at large, Justice Kennedy elaborates:

> They [the respondents] assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this court has used in discussing other fundamental rights, including marriage and intimacy. Loving did not ask about a “right to interracial marriage”; Turner did not ask about a “right of inmates to marry”; and Zablocki did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was sufficient justification for excluding the relevant class from the right.\(^ {50}\)

In Loving v. Virginia, the substantive due process analysis of the right to marriage, rather than the right to interracial marriage, heavily influenced Justice Kennedy’s top-to-bottom

\(^{45}\) Bird, supra note 7, at 599.

\(^{46}\) Obergefell, 135 S. Ct. at 2588.

\(^{47}\) Bird, supra note 7, at 601.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Yoshino, supra note 3, at 165; Obergefell, 135 S. Ct. at 2602 (citations omitted).
approach in *Obergefell*.\(^5\) Importanty, Justice Kennedy contends that cases regarding marriage and intimacy should be assessed differently than other fundamental rights cases, such as *Glucksberg*. This distinction between fundamental rights cases elevates the issue of same-sex marriage. In other words, this assertion “reinforces that impression in presenting “marriage and intimacy” as exemplary rather than exhaustive instances of rights for which Glucksberg methodology would not obtain.”\(^5\) The application of a top-to-bottom methodology on cases specifically concerning marriage and intimacy allows the Court to grant abstract, higher-level rights to all citizens.

Justice Kennedy’s methodology, which emphasizes the significance of a higher and abstract right, will serve as the dominant substantive due process paradigm in future litigation.\(^5\) This implies that judges must define both general and specific rights, and then compare the narrowly tailored right to the central meaning of the broad, pre-existing right. Under this framework, future litigants will likely identify broadly framed rights, rather than specific concepts, to gain the greatest argumentative advantage.\(^5\) For example, a litigant can argue that the broad access to marriage, a fundamental right, cannot be denied without a compelling reason. Through reference to precedent or discretionary power, judges must then discern whether the general or specific right should be subjected to a substantive due process inquiry. In *Obergefell*, Justice Kennedy illustrates this process by utilizing tradition as a guidepost to determine if a recognized right in an already existing precedent would throw out the case.\(^5\) More specifically, he argues that because the generalized right to marriage is deeply rooted in this nation’s history and tradition, the more narrowly-defined right to same-sex marriage is protected. Thus, the broadly defined right to marriage, serves as a starting point for analysis of the specific right to same-sex marriage.\(^5\) This methodology therefore utilizes tradition as a guide, rather than a restraint, to select the level of generality at which to begin substantive due process analysis.\(^5\)

---

\(^{51}\) Loving v. Virginia, 388 U.S. 1, 12 (1967).
\(^{52}\) *Yoshino*, *supra* note 3, at 166.
\(^{53}\) *Bird*, *supra* note 7, at 602.
\(^{54}\) *Id*.
\(^{55}\) *Id.* at 603.
\(^{56}\) *Id*.
\(^{57}\) *Id*.
IV. The Court Implies that Understandings of Marriage Adjust and Emerge Over Time

Through a top-to-bottom methodology, Justice Kennedy classifies the right to marriage, rather than the right to same-sex marriage, as an unenumerated right. This approach prevents substantive due process jurisprudence from becoming a mechanical endeavor, and empowers the Court to use discretion when identifying the “central meaning” of an alleged fundamental right.\(^{58}\) Furthermore, the Court considers the evolving nature of social understandings of marriage. Arguing that the institution of marriage, even confined to opposite-sex relations, has evolved over time, Justice Harlan explains, “[T]he history of marriage is one of both continuity and change.”\(^{59}\) If substantive due process reflects the evolution of national values, then a constitutional right, or the understanding of that right, can transform over time.\(^{60}\)

Justice Kennedy explains that social conceptions of marriage as an institution have been reframed throughout history in response to social progress. He articulates that prior to the founding of the United States, marriage was socially understood as a political, religious, or financial arrangement.\(^{61}\) However, illustrating a shift in social understandings, marriage became defined as a “voluntary contract” between a heterosexual couple by the late eighteenth century.\(^{62}\) Importantly, the law of coverture, which enabled the State to treat a married couple as a single, male-dominated legal entity, was rendered obsolete as the legal, political, and property rights of women gained recognition.\(^{63}\) This supports Justice Kennedy’s proposition that people may be blind to the social inequalities of today.\(^{64}\) More specifically, the evolution of marriage implies that the law ought to possess adaptive, malleable qualities, enabling contemporary social concepts to shape the future. Therefore, because Justice Kennedy advocates an activist approach to constitutional interpretation of fundamental liberties, the impact of Obergefell will extend far beyond the same-sex marriage context.

\(^{58}\) Id. at 608.

\(^{59}\) Obergefell, 135 S. Ct. at 2590.


\(^{61}\) Obergefell, 135 S. Ct. at 2590.

\(^{62}\) Id.

\(^{63}\) Id.

\(^{64}\) Id. at 2598.
The activist interpretation of the Fourteenth Amendment in Obergefell increases the influence of changing social understandings in substantive due process jurisprudence. Justice Kennedy endorses the view of the Constitution as a living document, in which the concept of “liberty” can adapt to new social understandings. The activist perspective reduces disharmony between the law and inevitable evolutions of social norms. This approach assumes that the Fourteenth Amendment mentions “due process of law” and “liberty” with the understanding that the definitions of these imprecise terms will transform over time, based on developing enlightened understanding. Therefore, Obergefell implies that Court’s role involves listening to the demands of the people and making “a thoughtful determination of what ‘liberty’ means today.”

However, as Justice Frankfurter argued, “It is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations of its own power, and this precludes the Court’s giving effect to its own notions of what is wise or politic.” Rejecting activist constitution interpretation, he also states that Justices are not justified in writing their private notions of policy into the Constitution, even if they cherish them or deem their disregard as mischievous. Justice Frankfurter’s argument does not hold because activist interpretations should reflect societal notions of fundamental liberties, rather than the private views of the Justices. His view also does not consider the duty of the Court to ensure that all citizens are protected by the Constitution. As Obergefell depicts, a top-to-bottom methodology that emphasizes activist constitutional interpretation and judicial discretion can lead to the expansion of fundamental liberties. Illustrating this notion, Chief Justice Marshall described the Supreme Court as “the ultimate interpreter of the Constitution,” arguing that “it is emphatically the province and duty of the judicial department to say what the law is.”

Judicial discretion, which draws upon transformed social understandings of contemporary civil rights issues, serves a central role in Justice Kennedy’s top-to-bottom methodology. In Obergefell, the Court employs discretion by descending from a higher level...
of generality to a narrower version of a right. Emphasizing the importance of discretion in substantive due process jurisprudence, Justice Kennedy in *Lawrence v. Texas* states:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

It follows that *Lawrence v. Texas* heavily influenced the same-sex marriage debate by articulating that the drafters of the Constitution intentionally chose not to specify the exact meaning of the famous document. Instead, they wrote in vague, inexact terms to enable future generations to define “due process” and “fundamental liberties,” based on contemporary social understandings. For this reason, the role of the Court includes using discretion to define fundamental liberties, based on careful consideration of social norms and public demand.

Without discretion, the Court could have narrowly confined a right and greatly impacted the real-world liberties at stake. Justice Kennedy determined that the core reasons influencing society to respect the general right of marriage are clearly incompatible with the alternative lower-level version of that right. Furthermore, this discretionary approach implies that future interpreters will refer to nontextual tools, such as adjudicative context, contemporary reception, and subsequent applications. Because the Court analyzed substantive due process through an activist lens of interpretation, the decision in *Obergefell* reflects contemporary social attitudes that advocate for the equal rights of all citizens, regardless of sexual orientation. In future cases, the Court may utilize this top-to-bottom methodology to resolve other unanswered questions that *Obergefell* fails to address. Although the Court determined that states cannot ban same-sex marriage, the Court must eventually grapple with other highly debated topics, such as discrimination based on sexual orientation, polygamy, and other forms of constitutional liberty. For example, *Obergefell* does not articulate the level of scrutiny courts should apply to cases outside the context of

---

71 Bird, *supra* note 7, at 607.
72 Bird, *supra* note 3, at 599.
73 Green, *supra* note 33, at 389.
74 Id. at 467.
marriage rights, specifically involving government discrimination against LGBT people in government jobs or prisons.\textsuperscript{75}

The establishment of Justice Kennedy’s top-to-bottom methodology, which advocates judicial activism and discretion, will impact the future of substantive due process jurisprudence. In new cases regarding fundamental liberties, the \textit{Obergefell} approach will enable the extent to which a right is broadly or narrowly framed to ultimately determine the case outcome. For example, the Court may not affirm the right to physician-assisted suicide because it is narrowly phrased and therefore not deeply rooted in the history and traditions of the United States.\textsuperscript{76} However, illustrating Justice Kennedy’s top-to-bottom approach, litigants can pursue this specific right by arguing that historical evidence supports the more expansive right “to exercise autonomy over one’s body.”\textsuperscript{77} Importantly, the precedent of \textit{Obergefell} enables litigants to successfully articulate general rights, rather than specific rights absent from the nation’s history and traditions, in order to expand all fundamental liberties.

\textbf{Conclusion}

The long-term implications of \textit{Obergefell} will stretch far beyond the same-sex marriage context, and will ultimately impact the entire realm of substantive due process jurisprudence. Justice Kennedy’s top-to-bottom methodology deviates from the stringent standards established by \textit{Glucksberg}, and presents a transformative method of review. Essentially, the majority opinion of \textit{Obergefell} implicitly overrules \textit{Glucksberg} by defying the requirements that an alleged fundamental right be rooted in tradition and narrowly identified as a specific right. Instead, Justice Kennedy challenges the role of tradition in fundamental liberty cases by suggesting that contemporary society may not always recognize inequalities in law, but future generations will eventually perceive them as social injustices. Chief Justice Roberts asserts in his dissenting opinion that “to blind yourself to history is both prideful and unwise.”\textsuperscript{78} Although Justice Kennedy’s ruling does indeed defy national tradition, which has always condemned same-sex marriage, the majority opinion does not simply ignore history, as Chief Justice Roberts suggests. However, Justice

\textsuperscript{75} Wolfe, \textit{supra} note 35, at 1.
\textsuperscript{76} Jane R. Bambauer & Toni M. Massaro, \textit{Outrageous and Irrational}. 100 Minn. L. Rev 281, 338 (2015).
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Obergefell}, 135 S. Ct. at 2607.
Kennedy considers the instances in the past where the law unfairly denied constitutional protections to citizens, particularly those consistently subjected to persecution throughout history. Furthermore, the Court illustrates the important role of expansively defined fundamental rights. Through a top-to-bottom methodology that broadly frames fundamental rights, the Court can correct the social injustices that permeate throughout history. *Obergefell* will serve as a precedent, ultimately authorizing the Court to use discretion when expanding fundamental liberties so that decisions reflect the evolution of social understanding.
Hamiltonianism: A Critical Examination of the Governing Philosophy and its Impact on American History

Bri Mirabile

Introduction: An Overview of Hamiltonianism

For significant portions of American history, the colossal intellectual contributions made by Alexander Hamilton have largely been ignored. Although the rise of the Broadway musical Hamilton has increased public awareness of Hamilton’s role in the founding of the country, a play is not enough to fully communicate the impact that Hamilton’s theory of governance continues to have on the United States. In order to understand that impact, the Hamiltonian theory of government must first be defined and understood. Many scholars believe Hamiltonianism is “a close partnership between business enterprise and the government,” but I contend that its definition ranges beyond the economic. True Hamiltonianism is the philosophy of government characterized by active work toward greater economic and world prowess by strong leaders making appropriate and coordinated governmental decisions.

Perhaps the most important question to answer in seeking an understanding of Hamiltonianism is: what political and economic circumstances led to its creation? The answer can be found in the failures of the Articles of Confederation. Hamiltonianism is a reactionary approach to governing that aims to compensate for the flaws which made the

---

Articles such a disaster in achieving American unity and progress.\(^4\) Chief among those flaws was a weak federal government that lacked executives who could implement a vision for the country.\(^5\) Hamilton was a strong leader who envisioned the United States as a future world power. He imagined a political environment in which this goal could be fulfilled with the aid of an active national government. Thus, Hamiltonian theory strives to promote a strong economy as a necessary means to that end.

Hamiltonian economic theory ingrained itself in the background of American society when it took form in the arguments surrounding the establishment of the First Bank of the United States. It has had a significant impact on Supreme Court decisions involving banks throughout United States history as well as legislation that attempts to deal with financial crises. History shows that Hamiltonian intervention helps to repair economies in times of crisis when applied correctly, but being both a political and economic phenomenon, is subject to political and social whims.

This article will examine the progression of Hamilton’s ideology throughout American history, starting with the debates at the Constitutional Convention. It will trace a Hamiltonian reading of the Necessary and Proper Clause and the Commerce Clause throughout Supreme Court cases concerning banking over United States history. Finally, it will examine laws with Hamiltonian elements and their effect on three major economic crises: The Long Depression of the late 1800s, the Great Depression, and the Great Recession of 2008. The article works to show that Hamiltonianism, while helpful in times of crisis, is also subject to the political whims of its time and therefore has not always been viewed with the favorability it deserves.

I. Establishing Hamiltonianism

A. Origins of Hamiltonianism

Since Hamilton formed his ideas of government in the late eighteenth century, Hamiltonianism’s origins lie in the political debate over the ratification of the Constitution and particularly the Necessary and Proper Clause in Article I. The addition of the Necessary and Proper Clause to the Constitution was controversial because it was widely perceived as giving the federal government too much power. Edmund Randolph, then the

\(^4\) Id. at 310.  
Governor of Virginia, felt that he could not “promote the establishment of a plan which he verily believed would end in Tyranny.” There was serious concern among certain Founding Fathers that the loose language in the clause would allow the federal government to “justify the passing almost any law... [which could] be exercised in such manner as entirely to abolish the state legislatures.”

Alternatively, Alexander Hamilton and others like him were worried that if the Necessary and Proper Clause were not included in the Constitution, the states would be able to effectively overtake the federal government through overregulation. They viewed the clause as an essential means of “self-preservation” for the federal government that would ensure the Constitution would not fail to centralize power like the Articles of Confederation. In order to convince the public of this belief, Alexander Hamilton, John Jay, and James Madison undertook the massive task of writing The Federalist Papers. The Federalist Papers outline the clear beginning to the idea of Hamiltonianism, and Federalist No. 31 contains a succinct summary of the initial approach to government of Hamilton:

A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the people.

Federalist No. 31 shows a clear endorsement of the spirit of national empowerment contained in the Necessary and Proper Clause. However, it is important to note that Hamilton believed in making governing decisions that aligned with the will of the general population. This desire suggests a policy approach that includes balancing the power of the federal government with that of individuals. It also begins to shape a central idea of Hamiltonianism: that the government should be doing everything in its power to effectively help its people. For Hamilton, this meant passing laws and creating relevant regulations in the sphere of commerce in addition to “every other matter which [the federal government’s] jurisdiction is permitted to extend.” In fact, James Wilson’s “main objective in drafting this clause was to... cancel the inference that Congress' other

---

8 Id. at 465-69.
9 Id. at 465-69.
10 THE FEDERALIST NO. 31 (Alexander Hamilton).
11 Id.
12 THE FEDERALIST NO. 23 (Alexander Hamilton).
enumerated powers were exhaustive.” By doing so, Wilson created a constitutional assurance that would later allow the federal government to expand its power to help the country in times of crisis. Thus, once the Constitution was ratified, it gave legitimacy to the Hamiltonian idea of a strong federal government.

B. The Constitution

After ratification, proponents of state governments’ rights continued their fight against consolidated national power. However, subsequent legal interpretations of the Constitution in *McCulloch v. Maryland* and *Gibbons v. Ogden* ultimately tipped the legal scales in favor of Hamiltonianism. In *McCulloch*, which “fit within a broad political consensus” of the time, Chief Justice John Marshall wrote:

> It would be difficult to sustain this proposition. . . that the powers of the General Government. . . are delegated to the States, who alone are truly sovereign, and must be exercised in subordination to the States, who alone possess supreme dominion.

As his conclusion illustrates, Marshall knew that the states could seek to exercise sovereignty and thus endanger the supremacy of the federal government. The *McCulloch* decision eliminated the legal grounds in which such an idea could have taken root. In addition, the Court ruled that the federal government’s power is granted by the people and as such is supreme over that of the states, further weakening their claim to sovereignty.

*Gibbons v. Ogden* also expanded the Hamiltonian idea of national power. The decision articulated that a narrow construction of the Constitution would be detrimental as it “would cripple the government and render it unequal to the object for which it is declared to be instituted.” A strong memory of the failures of the Articles of Confederation is clearly present in the ruling, as it implies that the federal government would be ineffective if the Court ruled in favor of Ogden. Again, this

---

16 Id. at 403.
17 *Gibbons v. Ogden*, 22 U.S. 1, 233 (1824).
ruling set legal precedent consistent with Hamiltonianism that justified a more active federal government in the new Republic.

C. The First Bank of the United States

The proposal to create the First Bank of the United States was a cornerstone of Hamiltonian theory. The Bank was designed to strengthen the power of the federal government while reducing economic inefficiency and legitimizing America’s financial institutions on the world stage. However, there was an extensive debate over its constitutionality. Thomas Jefferson argued it would create an unconstitutional monopoly in addition to being an unconstitutional government corporation. Furthermore, Jefferson argued that the bank would violate the Tenth Amendment because the power to create a national bank was not expressly given to Congress. Hamilton argued that the federal government was sovereign and both the Necessary and Proper Clause and Commerce Clause justified the creation of the Bank. Not one to leave himself open to attack, Hamilton cited successful national banks in other countries, such as England, to prove that one was essential in America. He contended that a national bank would give “greater facility to the Government in obtaining pecuniary aids, especially in sudden emergencies...and can at once be put in motion, in aid of the Government.” Hamilton had a unique ability to understand which financial systems would be critical to the success of the United States in the future, and his plan for a national bank was no exception. He justified his case for the creation of the first national bank with arguments that would continue to be relevant throughout the course of history.

Others would soon agree with Hamilton that a bank was necessary and constitutional. In addition to a Hamiltonian expansion of national power, McCulloch
The George Washington Undergraduate Law Review

unequivocally supported the constitutionality of a national bank.\textsuperscript{25} Legally, the Bank was a “choice of means” to an end that was necessary and proper, and therefore the federal government was allowed to establish the First Bank of the United States.\textsuperscript{26} The victory did not stop for Hamilton there, however, because as J. Randy Beck explains, “Marshall tracked...the phrasing of Hamilton's 1791 Treasury opinion. In many respects, McCulloch appears to be a judicial repackaging of the argument first made by Hamilton.”\textsuperscript{27} After the McCulloch decision, Hamiltonianism expanded from existing as a mere political and economic theory to a legal reality. The Bank was a product of “defensive, union-preserving nationalism” that was necessary and proper because “the country require[d] it to have fiscal stability.”\textsuperscript{28} The legal embrace of commerce-specific Hamiltonianism that expanded the federal government’s commercial control continued as the Court ruled in Gibbons v. Ogden that the power of commerce “acknowledges no limitations other than are prescribed in the Constitution.”\textsuperscript{29} This refuted any lingering objections to the Bank on the grounds of the Tenth Amendment and implies that the federal government is the central authority on the economy. Even before the Supreme Court explicitly granted these rights to the federal government, Hamilton operated as Treasury Secretary in a manner consistent with these ideas.\textsuperscript{30}

Hamilton utilized his unique power as the nation’s first Treasury Secretary to consolidate the national debt, build national credit, and create the first national stock exchange.\textsuperscript{31} In doing so, he satisfied “two critical preconditions for economic development. . . the existence of predictable laws governing the marketplace and a legal regime that protects capital formation and ensures property rights.”\textsuperscript{32} These conditions are essential because they encourage citizens’ participation in the economy.\textsuperscript{33} The stock exchange was particularly important, as a fundamental part of economic security in a capitalist economy is a secure “predictability interest,” which

\textsuperscript{25} McCulloch, 17 U.S. at 406.
\textsuperscript{26} Id. at 415.
\textsuperscript{28} David S. Schwartz, Misreading McCulloch v. Maryland, 18 PENN. J. CON. L. 1, 39 (2015).
\textsuperscript{29} Gibbons, 22 U.S. at 196.
\textsuperscript{31} Id.
\textsuperscript{33} Id. at 82.
creates incentives to invest.\textsuperscript{34} By establishing a successful stock exchange, Hamilton satisfied this requirement.\textsuperscript{35} He also used the First Bank to strategically increase America’s financial legitimacy in the world and stabilize the post-Revolution economy. This end was accomplished through very Hamiltonian means: activist intervention on the part of the federal government that ultimately helped the United States.

Unfortunately for Hamilton, this honeymoon period for the Bank would not last, and he died before the vote to recharter it came before Congress in 1811. Left vulnerable without Hamilton’s brilliant personal defense, Vice President George Clinton cast the tie-breaking vote against the rechartering.\textsuperscript{36} According to David Schwartz, “[Clinton] and Hamilton were enemies, fuel[ing] the political dismantling of the Bank rather than a constitutionally justified dismantling.”\textsuperscript{37} This attack on Hamiltonian policy for political reasons was the beginning of a legal and political trend throughout history which affected the prevalence of Hamiltonianism. Hamilton’s philosophy was embraced in waves throughout history depending on the social, political, and economic forces active at the time, even though it continued to remain an undercurrent in American society.

\section*{II. Tracing Hamiltonianism in the Supreme Court}

\textit{A. The First and Second Banks}

The era of the First and Second Banks of the United States lasted from 1791 to 1836. During this time period, the Marshall Court (1801-1835) largely supported Hamiltonianism by strengthening the national banks. In one of its most far-reaching cases, \textit{Osborn v. Bank of the United States}, the Court drew an analogy between the Bank, the law that created it, and a naturalized citizen.\textsuperscript{38} This analogy conveys the argument that the Bank of the United States was not subject to additional whims of Congress simply because it was created by an Act thereof. Therefore, the National Bank was free to operate as an independent entity under its charter. This included the explicit right of the Bank to sue in the courts of the United States. In permitting the Bank to operate independently of excess

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 82.
\item \textsuperscript{35} \textit{Gibbons}, 22 U.S. at 196.
\item \textsuperscript{36} George Clinton, 4\textsuperscript{th} Vice President, United States Senate (last visited Feb. 6, 2017), https://www.senate.gov/artandhistory/history/common/generic/VP_George_Clinton.htm.
\item \textsuperscript{38} \textit{Osborn v. Bank of the United States}, 22 U.S. 738, 207 (1824).
\end{itemize}
\end{footnotesize}
regulation and empowering it with the ability to sue in court, the Supreme Court cleared a path for an active and independent Bank characteristic of Hamiltonianism. This judicial philosophy was consistent with the strengthening of the federal government facilitated by Marshall’s jurisprudence.

Since the Supreme Court is often largely isolated from political pressure, Marshall did not have to excessively consider the displeasure expressed by the Ohioans who lost the *Gibbons* ruling.\(^{39}\) State political pressures are relatively weak compared to national pressures, as national pressures involve a larger and more diverse group of individuals working toward the same cause. This coalition often increases the legitimacy of the cause and its prominence on the world stage, thus creating a stronger political force. Interestingly, Democratic-Republicans nationally (who would be expected to oppose the ruling) took little notice of the case at all.\(^{40}\) Therefore, none of the Supreme Court rulings in the period of national banking prompted coordinated national opposition to the banks.

**B. Multiple National Banks**

Between 1863 and 1913, the United States was home to a system of national banks.\(^{41}\) Similar to the Court in the era of the First and Second Banks, the Court in the era of multiple national banks ruled in ways that affirmed and expanded their power. The primary legal justification used during this period was the distinction between the powers of the legislative and judicial branches of government. This legal logic was very similar to Hamilton’s justification for the formation of a national bank; Congress has a right to establish government corporations due to the fact that they are “within the *sphere and in relation to the objects of their power.*”\(^{42}\) In *Veazie Bank v. Fenno*, the Court made a landmark ruling consistent with Hamiltonianism that stated “the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.”\(^{43}\) This ruling gave more power to the legislature to interpret how its powers could be exercised, rather than strengthening excessive judicial oversight.


\(^{40}\) Id. at 106.


\(^{42}\) Hamilton, supra note 21.

\(^{43}\) Veazie Bank v. Fenno, 75 U.S. 533, 548 (1869).
However, the use of the word “acknowledged” left some room for ambiguity, as the power to create a national bank was not explicitly given to Congress in the Constitution.\textsuperscript{44} In subsequent cases such as \textit{The Chesapeake Bank v. The First National Bank of Baltimore}, the Court affirmed the constitutionality of a national bank due to concerns that arose from the National Banking Act of 1864.\textsuperscript{45} The case also set the precedent that Congress was empowered to promote the efficiency of the banks and reaffirmed Osborn’s ruling that states could not interfere in the operation of a national bank.\textsuperscript{46} Osborn was again reaffirmed in \textit{Easton v. Iowa}.\textsuperscript{47}

These affirmations are significant, but it is important to note that they carried with them qualifying statements, such as one in \textit{Easton} specifying that states cannot interfere with “the exercise of the powers bestowed upon them by the national government.”\textsuperscript{48} The Court was very careful in expanding the power of national banks so long as they did not perform functions outside what Congress allowed them to, lest those functions be unconstitutional. In Hamiltonian spirit, the Court worked to expand the power of those functions by giving Congress the authority to decide how much power the banks should have.\textsuperscript{49} This ruling in \textit{Easton} was a clever decision by the Court. While the decision did not allow the Court to “legislate” their agenda, it gave a sympathetic Congress free reign to do so. In this way, the Court exemplified the savvy nature of Hamilton himself, working within the Constitution to find power not explicitly granted to the federal government.

\textbf{C. The Federal Reserve}

In 1913, the United States transitioned to the Federal Reserve system. The Federal Reserve has remained the national banking system of the United States through two World Wars, the Great Depression, and the rise of globalization. As a result, one might expect the Court to deviate from previous concerns about how much power to allocate to the national bank. However, the rulings on national banking in the era of the Federal Reserve are very similar to past rulings, in that they concern the power of the Federal Reserve relating to the states and Congress.

\textsuperscript{44} U.S. CONST. art I.
\textsuperscript{45} Chesapeake Bank v. First National Bank of Baltimore, 40 Md. 269, 273 (1874).
\textsuperscript{46} Id. at 273.
\textsuperscript{47} Easton v. Iowa, 188 U.S. 220, 229 (1903).
\textsuperscript{48} Id. at 238.
\textsuperscript{49} Id. at 234.
In continuing to assert the supremacy of a national bank over any state banks or regulations, the Court upheld the Hamiltonian precedent set in previous cases. In *First National Bank of San Jose v. State of California*, the Court ruled “any attempt by a state to define [the Federal Reserve’s] duties or control the conduct of their affairs is void.”50 This ruling affirmed the doctrine of national supremacy seen in other cases such as *Osborn* and *McCulloch*.51 It also expanded upon an important Hamiltonian precedent set forth in *Chesapeake*, that regulations should not diminish the efficiency of a national bank.52 However, the ruling in *Chesapeake* only applied to Congressional regulation. *San Jose* applied the precedent to any state activity as well, expanding the Fed’s right to operate in a way that would enhance the economy of the United States.53 This doctrine was reaffirmed twenty-one years later in *Anderson National Bank v Luckett*.54

Deviating from traditional defenses of Hamiltonianism, however, the Court also stated in *Luckett* that “national banks are subject to state laws unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks’ functions.”55 This anti-Hamiltonian decision worked, to some extent, to reduce the power of national banks by functioning similarly to the Tenth Amendment of the Constitution. Any power not possessed by the national banks (or in this case, any regulation that did not impair its ability to function) was left to the states in an effort to decentralize power. This trend against excess national control over the banking system was also prevalent in *Barnett Bank of Marion County v. Nelson*, in which the Court ruled that states possess “the power to regulate national banks, where...doing so does not prevent or significantly interfere with the national bank’s exercise of its powers.”56 Thus, the Court began to expand the power of the states relative to the national banks while maintaining the doctrine of supremacy established in past cases. This decision probably came about as a result of a Court whose Reagan appointees changed the balance of power.57 A known states’ rights advocate,58

51 *Osborn*, 22 U.S. at 175; *McCulloch*, 17 U.S. at 436.
52 *Chesapeake*, 40. Md at 273.
53 *San Jose*, 262 U.S. at 369.
55 Id. at 248.
President Reagan used his political office to appoint justices who would advance his agenda in giving the states more power to regulate banking.\textsuperscript{59}

While the Court somewhat weakened the Fed’s power relative to the states during the preceding century, it clarified the reading of the commerce clause in such a way that gave the national banks more power. In \textit{United States v. Darby Lumber Co.}, the Court ruled that Congress was allowed the power to regulate interstate commerce as an “appropriate means to the attainment of a legitimate end.”\textsuperscript{60} It clarified and expanded upon this interpretation of the commerce clause one year later in \textit{United States v. Wrightwood Dairy Co.}. This ruling explicitly stated that “the commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce.”\textsuperscript{61} It also again affirmed Congress’s power to use its legislative means to a “legitimate end.”\textsuperscript{62} In doing so, the Court expanded the power Congress had over commerce in states and allowed for discretionary expansion of banking activities, if Congress so chose.

As such, Court rulings in the era of the Fed have mostly expanded the power of national banks in American society. Consistent with Hamiltonianism, this approach to giving the federal government more power was not immune to efforts to “check” the power of the national banks. However, true Hamiltonianism will only expand federal power when it is effective in furthering the interests of the United States. In order to judge the Court’s rulings, one must understand the impact that they and the national banking systems have had on American society throughout history.

\section*{III. Hamiltonian Policy and its Impact on the American Economy}

\textit{A. Origins of Change}

Before each shift toward or away from Hamiltonian banking policy in United States history, certain preconditions were met. One such precondition was economic inequality, which led to copious amounts of political strife. This phenomenon was prevalent during the rise of Andrew Jackson shortly after the death of Hamilton, and it had

\textsuperscript{60} United States v. Darby Lumber Co., 312 U.S. 100, 118 (1941).
\textsuperscript{62} Id. at 119.
its roots in the McCulloch ruling.\textsuperscript{63} McCulloch found that states could not regulate federal banks, and, in doing so, it left little opportunity other than elections for citizens to voice their discontent.\textsuperscript{64} In addition, the Second Bank of the United States was poorly managed, compounding various associated economic problems.\textsuperscript{65} However, politicians resisted efforts to reform the bank because a large number of Congressmen held shares of its stock.\textsuperscript{66} These factors explained the rise of Jackson in the 1820s. He claimed to have the interests of working-class Americans in mind and promised to deliver them from “the oppression of a wealthy elite epitomized by the central bank.”\textsuperscript{67} The subsequent economic recession of 1819-1822 was blamed largely on bankers and solidified his appeal.\textsuperscript{68}

The economic inequality created by the ineptitude of the managers of the Second Bank led to a political shift in American society. Andrew Jackson was the inheritor of the Democratic-Republican party’s legacy, which vigorously opposed Hamilton’s Federalist party earlier in the century.\textsuperscript{69} Since economic problems were largely a result of the banking system, Jackson exploited national political sentiment and turned the electorate against it. As a result, in 1836 the bank’s charter was left to expire.\textsuperscript{70} The bank would eventually completely liquidate in 1841, ushering in a new period of United States history in which there was no national banking system.\textsuperscript{71}

As visible and damaging as the mismanagement of the Second Bank was, it was not nearly as harmful as Jackson’s political decision to dismantle it, which caused the Panic of 1837.\textsuperscript{72} Contrary to Hamiltonian doctrine, Jackson moved funds to state banks by passing the Deposit Act of 1836.\textsuperscript{73} These banks’ credit policies led to massive amounts of land speculation in the West, causing the Panic.\textsuperscript{74} Without a national bank, the federal government lacked the proper tools to address the situation, and the economy suffered.
This time period was perhaps the most dramatic example of the consequences of a complete absence of Hamiltonianism. As illustrated by the aforementioned example, the country experienced adverse economic conditions, causing a shift in policy.

This phenomenon is apparent in other times in American history, most notably during economic crises in 1913 and 2008. Congress enacted the Federal Reserve Act as a response to the Panic of 1907. In defense of the average citizen, politicians worked to ensure that private bankers would not be able to dictate the nation’s economic policy without some form of democratic oversight. In response to the crisis of 2008, the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) was passed.

Such large shifts in the American monetary system were largely due to changing economic conditions and politicians who capitalized on them. However, they are also indicative of broader cycles of change and backlash that have occurred regularly throughout history. These cycles help explain why Hamiltonian principles fluctuated in influence and can help place Hamilton’s philosophy in an appropriate context to evaluate.

B. Crises

An economic crisis, for the purposes of this paper, will be defined as any economic recession or depression severe enough to warrant significant economic intervention by the federal government. These crises include global economic crises, which are defined as situations in which actors decide their international contracts are unlikely to be honored, leading to significant contraction of global business, trade, and economic prosperity. An understanding of crises is essential because they provide a standard by which the effectiveness of Hamiltonian economic policy can be measured. If a crisis is understood fully so that the vehicles towards the end of the crisis may be evaluated, then policymakers can have a better understanding of what type of economic intervention, if any, is best for the country.

According to modern economic theory, there are two widely accepted methods by which an economy can be artificially lifted out of a recession. A central bank can cut

---

77 Id., at 1264.
interest rates to stimulate borrowing to finance investment and large consumer purchases or combine tax cuts and increased government spending to stimulate the economy. In either case, the government would be employing a Hamiltonian method of using the federal government to lift the economy out of a crisis. In order to evaluate the merits of Hamiltonianism as an approach to economic policy, the results of Hamiltonian policy enacted during past crises must be evaluated.

C. How Hamiltonianism Impacts the Economy in Times of Crisis

As stated in the introduction, this paper will evaluate Hamiltonianism’s effectiveness in solving the crises of the Long Depression, Great Depression, and Great Recession. Each crisis was unique and occurred under different political circumstances, which provides a relatively broad background against which Hamiltonianism can be evaluated.

1. The Long Depression

The Long Depression was a result of American expectations exceeding actual investment from Europe coupled the failure of a large railroad company, J Cook and Co. To manage this crisis, Congress repealed the Sherman Silver Purchase Act of 1890, which drastically increased the amount of silver in the economy and was a direct threat to U.S. gold reserves. The Secretary of the Treasury took an active role in monetary policy, working to use small denominations of bills to help halt the crisis. It is important to note that serious federal intervention in the economy only took place after 1893, twenty years after the Long Depression began. Before 1893, there were no serious Hamiltonian efforts to fix the economy. Perhaps that is the reason for the depression’s great length.

Regardless of the effectiveness of action taken before 1893, an important political shift began in 1885. Republican leaders worked to shape the laissez-faire government into a

---

83 Id.
84 Id.
more centralized and active one.\textsuperscript{85} For example, the banking panic of 1882-1885 “ended with the issuance of clearinghouse loan certificates and U.S. Treasury quasicentral banking operations.”\textsuperscript{86} The Treasury played a Hamiltonian role in banking affairs to effectively alleviate some of the economic problems caused by the banks themselves.\textsuperscript{87} These actions began to give a political basis to the kind of centralized government characteristic of the Hamiltonian reforms that took place shortly after. Much of this change was brought about by the disturbing Treasurer’s Report for the fiscal year 1890-1891, which found that there was a massive net loss of gold in the economy even though other forms of money had made large gains.\textsuperscript{88} This report was so effective in part because it served as a catalyst for the Hamiltonian reaction already taking place. It quantified the problems created by the Sherman Silver Purchase Act\textsuperscript{89} and gave concrete justification for Hamiltonian reform.

The economic effect of these reforms was clear: Hamiltonian intervention in the economy helped end the Long Depression. The brief banking panic of 1882-1885 was stopped when the Treasury intervened to manage banks effectively.\textsuperscript{90} The government’s decision to repeal the Sherman Silver Purchase Act addressed underlying problems with the money supply,\textsuperscript{91} and the Treasury took measures to control the money supply, which helped the economy and prevented future problems.\textsuperscript{92} Each reform was Hamiltonian in nature, and each (enhanced by fortunate trade circumstances with Europe) was responsible for part of the economic recovery.\textsuperscript{93} These reforms would not have been possible without corresponding political shifts, which emphasize the dual economic and political nature of Hamiltonianism.

\textsuperscript{87} Id. at 552.
\textsuperscript{89} Bordo, \textit{supra} note 87, at 6.
\textsuperscript{90} Bordo, \textit{supra} note 87, at 5
\textsuperscript{91} Bordo, \textit{supra} note 87, at 6
\textsuperscript{92} Bordo, \textit{supra} note 87, at 6
\textsuperscript{93} Bordo, \textit{supra} note 87, at 5.
2. The Great Depression

The causes of the Great Depression were numerous, including worldwide reliance on the gold standard, isolationism, and international economic failure. These trends led to bank failure in the United States, which decreased confidence in the economy and ultimately led to a downward spiral of reduction in demand and production. As a result, national income fell by more than fifty percent between 1929 and 1932, with key economic populations such as manufacturers seeing declines of more than seventy percent.

These problems manifested early in the depression, but were not handled effectively by the Hoover administration. Hoover believed that businesses were the key to solving the crisis in the late 1920s, having told business owners that “it is action that counts.” However, in the early stages of the depression, the federal government failed to act. Some scholars believe that “the Federal Reserve System could have mitigated the banking panics of the early stages of the Depression had it acted as a lender of last resort.” This finding is consistent with a Hamiltonian approach to government, as it advocates active and effective management of the economy by the national banking system. By the time Franklin Delano Roosevelt was elected, the economy was in such dire condition that the electorate clearly demanded a new approach. The political stage was set for a surge of Hamiltonian philosophy in Washington.

Roosevelt’s style of government differed from Hoover’s in that it favored more activist intervention in the economy by the federal government. On the surface, Roosevelt’s philosophy appears to be a very Hamiltonian one. One of the first actions of his administration was to declare a national “banking holiday,” during which banks were closed in an effort to give the government time to figure out how to reinvigorate the financial system.

---

95 About the Great Depression, Modern American Poetry (last visited Feb. 8, 2017), http://www.english.illinois.edu/MAPS/depression/about.htm.
97 Id.
98 Margaret O’Mara, Pivotal Tuesdays: Four Elections that Shaped the Twentieth Century 61 (2015).
The next issue Roosevelt faced was lingering resistance to his activist national policies. The Supreme Court was unwilling to allow him the power to pass the New Deal. In *United States v. Butler*, the Court struck down a key provision of Roosevelt’s Agricultural Adjustment Act as unconstitutional because it violated the Tenth Amendment. In addition, the Court recognized the political undercurrents of the debate over Hamiltonianism. It decided not to rule on the philosophy:

This court has...never found it necessary to decide which [philosophy] is the true construction. Between Hamilton and Jefferson, Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one.

Decisions such as this prompted Roosevelt to attempt his infamous Court-Packing scheme. While the attempt to increase national power to help the economy was ideologically aligned with his policies, the Hamiltonian philosophy works exclusively within the parameters of the Constitution. Hamilton worked to stretch the meaning of certain clauses such as the Necessary and Proper Clause particularly in matters of banking, but never acted in such a way that blatantly violated the Constitution. Thus, Roosevelt strayed from Hamiltonian ideals in trying to pack the Court.

Even though Roosevelt’s plan to significantly alter the Court did not have its desired effect, by 1937 the Court was confronted with the reality that there was little sign of an impending economic recovery. Faced with such dire circumstances, in combination with the retirement of some more conservative justices, it began to rule more in Roosevelt’s favor. In *Steward Machine Co v. Davis, Collector of Internal Revenue*, the Court justified its arguments based on ideas espoused by Hamilton a century and a half earlier. One of the most important phrases of the ruling states, “It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys…to relieve the unemployed and their dependents is a use for any purpose narrower than the

---

102 Id. at 297.
103 Franklin D. Roosevelt, 1937 State of the Union Address (Jan. 6, 1937).
104 Hamilton, supra note 21.
105 Berg-Anderson, supra note 57.
promotion of the general welfare.”

This logic regarding government intervention in the economy is an echo of Hamilton’s and Marshall’s beliefs that the government can use more power than explicitly granted to it in the Constitution in order to promote the wellbeing of its citizens. In another decision the same year, West Coast Hotel Co. v. Parrish, the Court ruled with the same logic. By declaring that it could “take judicial notice” of the need for “the bare cost of living to be met” and “unparalleled demands for relief” from the crisis, the Court continued to draw on the judicial philosophy of Hamilton and Marshall. The Supreme Court was finally responding to the changing political mood of the country in a severe depression, and this change was largely an increase in demand for the federal government to take action in the crisis.

Congress also felt pressure to act and tried to relieve some of the poverty plaguing the nation by passing the Glass-Steagall Act of 1933. Subject to reelection unlike Supreme Court justices, Congressmen were affected by the political pressures of the Great Depression more directly. One of the most prominent examples of these political pressures occurred when Senator Arthur Vandenberg of Michigan reversed his refusal to support the Glass-Steagall Act after experiencing the failure of banking in Michigan. As Jacob Gutwillig notes in his analysis, this reversal of positions was a triumph for Hamilton’s style of “cooperative federalism banking.”

Congress continued to respond to rising demand for federal action with the passage of the Security Act of 1935. This act was also Hamiltonian in nature because it placed all reserve funds in the Treasury and authorized the Secretary of the Treasury to invest and liquidate those funds in a manner that would “promote business stability.” Hamilton himself was the first Secretary of the Treasury, and during his tenure worked to increase the power of the office. However, Hamilton could not have enacted most of his economic agenda had he faced significant opposition from the legislature. Likewise,
Roosevelt only succeeded in implementing his agenda with the support of a friendly Congress.\footnote{James M. Banner Jr., Reviewed Work: The Historical Atlas of Political Parties in the United States Congress 1789-1989, 21 THE J. OF INTERDISC. HIST. 345, 345 (1990).}

The cases of Hamilton and Roosevelt are similar in that they both increased government intervention in the economy. However, their degrees of effectiveness differ. Hamilton was able to pay off the United States’ Revolutionary War debt,\footnote{Brian Murphy, The Rise of an American Institution: The Stock Market, The Gilder Lehrman Institute of American History, (last visited Feb. 9, 2017) https://www.gilderlehrman.org/history-by-era/economics/essays/rise-american-institution-stock-market.} help create a national banking system,\footnote{Hamilton, supra note 20.} and create a thriving stock market\footnote{Murphy, supra note 123.} during his tenure; Roosevelt was not as completely successful. Even after the New Deal was passed and implemented, employment never fell below fourteen percent.\footnote{David M. Kennedy, The Great Depression and World War II, 1929-1945, The Gilder Lehrman Institute of American History, (last visited Feb. 9, 2017) https://www.gilderlehrman.org/history-by-era/essays/great-depression-and-world-war-ii-1929-1945.} By the start of the second World War in 1939, fifteen percent of the workforce in America remained unemployed.\footnote{About the Great Depression, Modern American Poetry (last visited Feb. 10, 2017) http://www.english.illinois.edu/MAPS/depression/about.htm.} The state of an economy does not depend solely on its unemployment rate, but the ability of the average citizen to gain employment serves as a strong indicator of how the economy is faring as a whole. In fact, the economy did not fully recover until World War II despite Roosevelt’s massive Hamiltonian intervention in the economy.\footnote{Id.} This has led some scholars to declare the New Deal a failure if it is judged solely on the metric of achieving an economic recovery.\footnote{Kennedy, supra note 126.} However, the New Deal succeeded in normalizing Hamiltonianism as an enduring economic philosophy. From the creation of Social Security to additional banking regulation, the government was restructured in such a way that prevented a return to the laissez-faire economic philosophies that characterized the nineteenth century.\footnote{Alan Trachtenberg, The Incorporation of America 166 (2007).}

3. The Great Recession

As with the Great Depression, the dire economic situation many Americans faced during the Great Recession of 2008 helped spark political change that led to an increase in federal government involvement in the economy. The cause of this crisis is rooted in
banking, as “an influx of money into the United States from the world market...encouraged risky bank practices that eventually led to a housing bubble that subsequently burst.”

Assuming office in the winter of 2009, President Barack Obama wasted no time in working with a friendly Congress to enact federal legislation in an attempt to stop the crisis. Among key legislation passed was the American Recovery and Reinvestment Act which authorized a massive amount of deficit spending in an effort by the federal government to stimulate the struggling economy. The actions taken by the federal government were Hamiltonian in nature, as they worked to resolve the crisis on a federal level much like Hamilton’s repayment of the United States’ war debt. However, the government also passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which increased regulation on banking. Since the banking sector of the United States was extremely young during Hamilton’s time, it is impossible to make a definitive assumption of what his thoughts would be on such regulation. However, his philosophy would indicate that, in general, any sort of excess regulation of the banking industry would be averse to the goals of Hamiltonianism. Therefore, the response of President Barack Obama and the federal government to the Great Recession was a mix of Hamiltonian and non-Hamiltonian policy.

Since the policy response to the Great Recession is nuanced and not entirely Hamiltonian, it is impossible to determine exactly how effective the Hamiltonian policies were. However, when one reduces Hamiltonianism to the simplistic definition of effective federal intervention in the economy, a more general conclusion may be reached. Leading scholars find that, while the economy has recovered very slowly, the policy enacted during the recession helped prevent a depression. Leading economists also generally agree that the American Recovery and Reinvestment Act of 2009 lowered the unemployment rate of

---


128 Barack Obama, President, Inaugural Address (Jan. 21, 2009).

129 Banner, supra note 120.


131 Murphy, supra note 121.


133 Id.
the country, indicating a measure of Hamiltonian success.\textsuperscript{134} As a whole, economists have found the policies enacted in response to the crisis to be effective but not ideal.\textsuperscript{135} Government intervention was able to prevent a further downward spiral of the economy but only minimally assist in increasing economic growth.\textsuperscript{136}

**Conclusion**

Hamiltonianism has existed largely in the background of American society since its inception in the early 1800s. Its influence is deeply rooted in some of the most important financial Supreme Court cases in United States history, though its enormous impact is often overlooked. Hamilton’s legal theory set important precedent which allowed its more prominent economic theories to exist. In times of economic crisis, the federal government tends to implement Hamiltonian economic policy because of the demands of citizens that the economy be fixed, in addition to its overall effectiveness when it becomes policy. However, demands for Hamiltonian policy are largely dependent upon the existence of such a crisis. The American people naturally favor independence, and increasing government control over the economy is only politically feasible when the situation is dire. Therefore, the success of Hamiltonian economic philosophy depends heavily upon political sentiment. Hamiltonian legal policy is different because the justices of the Supreme Court are appointed for life and, as a result, are somewhat isolated from political pressures.\textsuperscript{137} Nonetheless, the Great Depression demonstrates that in some cases political pressures caused by economic crises can be so extreme that even the judiciary will change its decisions.

Moving forward, federal officials should be mindful of the nature of political pressures. Calls for effective Hamiltonian policy should be heeded, but the government should be careful to implement Hamiltonianism in its true form. This means that it should only intervene as much as is necessary to avert economic crises or increase American economic standing within the world. Increasing the role of the federal government in the economy is often costly, and the Great Recession demonstrates that sometimes Hamiltonian policy can be less effective. As a staunch opponent of national debt,


\textsuperscript{135} Blinder, supra at 10.

\textsuperscript{136} Id. at 10.

\textsuperscript{137} U.S. CONST. art III, § 1.
Hamilton favored federal policy that would work toward its elimination. Therefore, Hamiltonian policymakers should be mindful of the nuanced approach Hamilton took to government and actively search to find the correct level of interference in the economy, minimizing its costs and maximizing its benefits.
“Disparagement” Versus Free Expression: Bringing the Lanham Act into the Twenty-First Century

Talia Balakirsky

“The ideal trademark is one that is pushed to its utmost limits in terms of abstraction and ambiguity, yet is still readable. Trademarks are usually metaphors of one kind or another. And are, in a certain sense, thinking made visible.”
– Saul Bass (1920-1996)

Introduction

Trademarks are often called one of the world’s oldest human institutions.¹ Edward S. Rogers, a prominent intellectual property scholar, wrote, “Wherever are found the remains of early civilizations, in Egypt, Crete, Greece, or Rome, things with trademarks on them turn up.”² Today, trademark protections continue to be the prized possession of many businesses; and many Americans—whether they realize it or not—come in contact with trademarks every day. Without a trademark, anyone can use a mark without permission, making protection crucial if a company expects to sell a product exclusively or if a business wants to ensure that it is the only one with a certain mark.³ While trademarks

² Id.
³ A trademark, for the purposes of this article, is defined as a “word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods of one party from those of others.” See Trademark, Patent, or Copyright, UNITED STATES PATENT AND TRADEMARK OFFICE - AN AGENCY OF THE DEPARTMENT OF COMMERCE, https://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright (last visited Feb 9, 2017).
have certainly ensured that companies can thrive economically without worrying that another entity is using a mark to its own benefit, the process through which trademarks are approved has become highly controversial in recent years.

The controversy surrounding the approval process is largely due to Section 2(a) of the 1946 Lanham Act, which provides the guidelines for denying or approving a trademark. According to Section 2(a), a trademark will not be accepted if it:

[C]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.4

While this was likely welcomed during the 1940s when racial bigotry was on the rise, it presents a problem because it allows the United States Patent and Trademark Office (USPTO) to reject a trademark application if the name may disparage a group, while providing the USPTO with substantial discretion to decide what is “disparaging.”5 This ability has consequently caused some groups to struggle to gain protection even if they are not trying to insult a specific group of people (blacks, Muslims, Jews, the LGBTQ community, etc.), producing waves of free speech battles.6 For example, some trademarks that have been denied protection because they were deemed “disparaging” include “Dough-Boy,” a medicine “to treat sexually transmitted diseases” which was denied because it apparently “disparaged American soldiers in World War I, commonly described as “doughboys.””7 The USPTO also denied HAVE YOU HEARD SATAN IS A REPUBLICAN protection because it was deemed disparaging of the Republican Party.8 The list goes on. These issues have become so prevalent in recent history that the Supreme Court is now involved.

The rules and regulations outlined by the Lanham Act with regard to denying a trademark request are problematic for two reasons. First, they are too general. Second, they can cause many well-meaning American businesses and groups to undergo substantial difficulties when looking to differentiate themselves from a competitor if they are denied

---

6 Joe Garofoli, Attorney finds Dykes on Bikes patent offensive, reject name, SFGATE, July 14, 2005.
7 Fred Barbash, Warning: This article on trademarks may include language deemed ‘scandalous, immoral or disparaging’, WASH. POST, September 30, 2016.
8 Id.
protection. While it is crucial to ensure that the United States remains a welcoming country, it is equally as important to ensure that laws do not unnecessarily overstep common boundaries. Ultimately, to remedy this issue, the Act must be amended to better and more clearly outline what marks are considered to be disparaging. By making this change, the USPTO will be able to continue helping businesses, entrepreneurs and others thrive in an age of increased creativity and innovation.

Section I provides the historical background of trademarks and Section 2(a), Section II addresses the growing controversy surrounding Section 2(a) and the consequences that come from the denial of federal trademark protection, Section III proposes a solution to Section 2(a)’s current provisions, and Section IV presents a conclusion. In short, this paper will seek to suggest remedies to a statute that is, in many ways, compromising the rights of well-meaning Americans.

I: Historical Background of American Trademark Laws

A. Constitutional Coverage and the Creation of the Lanham Act

The Constitution does not provide the federal government with authority over trademarks, although it does provide power over copyrights and patents. Legislation was thus necessary to have some control over the issues that arose as U.S. businesses continued to grow, especially as the world became more industrialized and intertwined following the Reconstruction Era and Civil War. As the United States became entrenched in trading practices with other countries, domestic sellers wanted to ensure that their marks and products were protected overseas. Talks of establishing an American trademark statute arose in the 1860s when the country entered into trademark treaties with Belgium, Russia, and France.\footnote{A Brief History of Trademark Law in the USA, SPIEGEL AND UTRERA LAWYERS.} At this time, the United States did not have a set trademark law. Because of this, Belgium, Russia and France were left with inherently more power over the trade deals as there were set rules within those countries that needed to be abided by. In order to assuage the concerns of domestic sellers while protecting American interests, Congress passed H.R. 1714, otherwise known as the Trademark Act of 1870.

The Trademark Act of 1870 did not last. Even after an amendment in 1878, the Supreme Court struck down the law in the Trade-Mark Cases in 1879, a set of three cases
heard together concerning trademarks. The Trademark Act of 1870 declared that the Copyright Clause of the Constitution provided Congress with the power to regulate trademarks. The Supreme Court found that the 1870 law “exceed[ed] the powers granted by the patent and copyright clause of the Constitution” and ruled the Act unconstitutional.

After the 1870 Act was declared unconstitutional, several lawmakers attempted to create a sustainable national trademark law. The Trademark Act of 1905 was another attempt, but was riddled with issues and, in the end, was not approved. In 1920, the Patent Section of the American Bar Association (ABA) met and sought to create an offshoot of the 1905 bill. It became known as the “Vestal Bill.” Although it was technically a new bill, it still had major problems:

The major amendment [to the Vestal Bill] was the Act of 1920, which was supposed to correct the problem of American citizens registering marks in foreign countries. But even with the 1920 amendments, the basic 1905 Trademark Act remained inadequate to cope with the realities of twentieth-century commerce and brand names.

In essence, the Vestal Bill proved again to be an ineffective mechanism in reviewing trademarks. The bill never moved passed discussion.

In 1937, nearly seventy years after the first attempt to create an American trademark law, Fritz Lanham, the Democratic congressman for Texas’s 12th congressional district for over a decade and the chairman of the House Patent Committee, introduced his own legislation after using notes that he took from the ABA meeting in 1920. Once he decided to create another law, Lanham conducted committee meetings for eight years to fine tune his proposal and to pinpoint exactly what would ensure the Act passed

---

10 Trademark Cases, 100 U.S. 82 (1879)
11 Id.
12 Id.
13 MARY LA FRANCE, UNDERSTANDING TRADEMARK LAW, 6, 2nd ed. 2011.
The Lanham Act successfully passed in 1946. According to Congressional Committee records, the stated purposes of the Lanham Act were to:

1. Put all existing trademark statutes into a single piece of legislation;
2. Carry out by statute [America’s] international commitments;
3. Modernize the trademark statutes so that they will conform to legitimate present-day business practices;
4. Remedy constructions of the prior Acts which have, in several instances, obscured and perverted their original purpose; and to
5. Simplify trademark practice, to secure trademark owners in the good will they have built up, and to protect the public from imposition by the use of counterfeit and imitation marks and false trade descriptions.

President Harry Truman signed the act into law on July 5, 1947.

As the first trademark act that has truly withstood the test of time despite nearly thirty amendments since its passage, the Lanham Act has constituted the Bible and Commandments of the trademark world. In the twenty-first century, however, it has come under considerable fire concerning the constitutionality of Section 2(a) and needs to be altered to align with a changing world.

II: The Growing Controversy Surrounding Section 2(a)

A. The Washington Redskins and The Slants

One of the most controversial cases surrounding Section 2(a) involves the Washington Redskins. In the 1930s, sports teams were named after the field on which they played. First based in Boston, the Redskins received their name after settling at Boston Red Sox Stadium. Because the baseball team that played there had already taken the name, it was determined that the football team would be named the Redskins instead of the Red Sox. As the team gained prominence in the football world, it decided to register for six trademarks, covering clothing, merchandise, its logo and more.

While the Redskin’s rise to prominence was a positive for the team, Native American activists began to argue that its name was disparaging to Native Americans.

---

Activists were finally successful in the 2012 case *Blackhorse v. Pro-Football, Inc.*, where they provided enough evidence to the Trademark Trial and Appeals Board (TTAB) that the board rescinded the trademark protections on all six trademarks. Since then, the Redskins have petitioned several times to reverse the ruling but have been denied.

Most recently in 2015, however, the Redskins found a way that it might be able to prove that Section 2(a) of the Lanham Act is unconstitutional. An Asian-American rock band called “The Slants” has been fighting the same battle for more than six years. According to the USPTO, the band’s name may be disparaging to Asians and was therefore denied trademark protection. The band appealed the ruling to the U.S. Court of Appeals for the Federal Circuit who, in a major 9-3 ruling, determined that the band could not be denied a trademark. According to the court, “It is a bedrock principle underlying the First Amendment that the government cannot refuse to register disparaging marks because it disapproves of the expressive messages conveyed by the marks.” The USPTO argued in a petition for a writ of certiorari that the Lanham Act, “does not prohibit any speech, proscribe any conduct, or restrict the use of any trademark. Nor does it restrict a mark owner’s common law trademark protections. Rather, [it] directs the [US]PTO not to provide the benefits of federal registration to disparaging marks.” In essence, the government was looking to both ensure that it was not being charged with violating the First Amendment while protecting its interests and power over the trademark approval process.

The Supreme Court agreed to hear The Slant’s case, leading the Redskins to submit amicus curiae against the Supreme Court taking up the case because the Federal Circuit Court had already ruled that The Slant’s trademark should be granted. At least sixteen other amicus briefs have been submitted. One argument in favor of The Slants comes from Stuart Banner, Eugene Volokh, John C. Connell, Ronald D. Coleman and Joel G. MacMull and argues that, “In choosing that name, Tam [the band’s leader] was following in the long tradition of reappropriation, in which members of minority groups have

---

22 Id.
23 In re Simon Shiao Tam, 808 F.3d 1321 (Fed. Cir. 2015).
reclaimed terms that were once directed at them as insults and redirected the terms outward as badges of pride.” Others, like the National Bar Association, the Hispanic National Bar Association, and the National LGBT Bar Association argued:

Racial discrimination has a depressing effect on the economy. Thus, while the Redskins may be a professed homage to the noble savage for some, it is a painful reminder for Native Americans of their place in American society.

The Slants is no better. While empowering to a young social justice rock band, that same mark may be debilitating to those who remember life in American internment camps during World War II. At its core, Section 2(a) does not operate as a ban on certain types of speech, but rather a mechanism for dealing with the harmful effects of racial, national origin, and religious discrimination on interstate commerce.27

B. The Role of the USPTO and TTAB

Understanding the role of the USPTO is crucial to truly appreciating the controversy surrounding Section 2(a). In a perfect world, the USPTO is supposed to reassure the public, or those who might be offended by a trademark, that the trademark is not, in actuality, disparaging or scandalous in nature. It also is supposed to hold hearings after a passage if a group tries to challenge the trademark.28 In reality, examiners have much more discretion regarding the amount of evidence they use to approve to disapprove a trademark request. Some examiners will use precedent and past case law to determine a trademark’s validity while others will rely on Internet sources and dictionary definitions.29 The varying practices can lead to rulings that are inconsistent and thus highly controversial.

According to the Trademark Manual of Examining Procedure, however, “previous decisions by examining attorneys in approving other marks are without evidentiary value and are not binding on the agency or the Board,” which legally permits an examiner to use his or her personal discretion when reviewing a trademark application rather than being bound by past rulings, even if the case at hand is similar to a previous one.30 For example, the USPTO, as stated above, has rejected HAVE YOU HEARD SATAN IS A REPUBLICAN but approved THE DEVIL IS A DEMOCRAT.31

29 Id. at 521.
30 Catherine P Cain, 1207.01(d)(vi), in TRADEMARK MANUAL OF EXAMINING PROC. (11 ed. 2017).
31 Fred Barbash, Warning: This article on trademarks may include language deemed ‘scandalous, immoral or disparaging’; WASH. POST, September 30, 2016.
Despite these differences, all examiners must, according to Section 2(a), determine if there is a significant level of scandal or disparagement coupled with a phrase.32

If the TTAB approves the trademark request, any group or person who feels the trademark is disparaging can file for a petition to have the trademark cancelled within five years of its approval.33 Historically, groups have had difficulty successfully canceling trademarks because the group requesting cancellation has to provide extensive evidence as to why the mark is disparaging or scandalous.34 Moreover, after five years, the trademark holder can file for “incontestable” status.35 This status provides holders with protection from the cancellation of their trademark and serves as “conclusive” evidence that 1) the trademark is valid; 2) the trademark is registered; 3) the holder owns the mark; and 4) the owner holds the exclusive right to use the mark with “registered goods and services.”36

C. The Free Speech Argument

Arguments in favor of ruling Section 2(a) unconstitutional generally take one of two paths. One path concerns the specificity of the statute. In reading the statute, it becomes obvious that it is extremely vague in nature. Through the use of the word “may,” the decision is, as previously stated, essentially up to the examiner as to what is or is not disparaging and rulings upon words that may disparage have been inconsistent.37 Another example is the word “faggot,” which has been denied trademark protection 100 percent of the time, yet “fag” has only been denied sixty-three percent of the time, with only eighteen percent of the denial being attributed to Section 2(a) violations.38

A second common argument is that the government, by holding such a heavy influence over trademark applications, is encroaching on Americans’ free speech rights. The government has posited time and again that registered trademarks are government speech. The USPTO muses that by granting a trademark, it is essentially agreeing with

---

35 Id. at 443.
37 Kustina, infra note 27, at 537.
38 Kustina, infra note 27, at 513.
every line of speech it approves. This, in essence, allows the USPTO to disallow trademarks that are not consistent with “American values” because the trademarks serve as a type of “government endorsement.” The story is similar in many other countries. In the Great Britain Trade Marks Act of 1994, a trademark that is found to be “contrary to public policy or to accepted principles of morality” is ground for absolute refusal. The major issue with this policy is quite stark: it is difficult to define “accepted principles of morality.” It can easily be argued that accepted norms of morality differ from person to person, and can be rooted in one’s religion or upbringing. Nowhere in the Trade Marks Act of 1994 is it clearly noted what these purported principles are. Further, Afghanistan’s Trademark Registration Law Act of 2000 notes states that a mark will be denied registration if it is “repugnant to chastity, morality and public order.” Given the fact that every country has its own customs and cultures, it would be almost impossible for a person, especially a new citizen or visitor, to truly ensure that they are abiding by the law. Further, customs are constantly changing as society changes. Simply put, these laws are crafted to provide the governments with more bandwidth over incidents. The First Amendment does not protect government speech, thus technically providing the government with the discretion to ban or allow whatever it would like. The U.S. Court of Appeals for the Federal Circuit ruled recently that approving a trademark does not qualify as government speech. But, the Supreme Court will make the final decision when it rules on the case of The Slants.

Many opponents of the government’s stance note that while the government does play a hand in providing or rejecting a trademark for a business, it is only providing the license and should otherwise be exempt from the process. Opponents also look to Walker v. Tex. Div., Sons of Confederate Veterans, Inc. to provide evidence for their argument. In the case, which concerned the desire of some Texas residents to create license plates with the Confederate flag on them, it was ruled that the state was able to reject the proposals because the license plates could both be seen as government speech and where the confederate flag would be seen as “acceptable” by the state government. The opinion

41 Trade Marks Act of 1994, c. 26, § 3, (Gr. Brit.).
42 Trademark Registration Act of 2009, c. 1, § 6, (Afg.).
noted, “License plate designs are often closely identified in the public mind with the State.” There is a growing opinion, however, that trademarks should not be handled with such a heavy hand because trademarks are technically not identified with the government and do not hold designs that can be considered the doing of the government. For example, in the past, the USPTO has accepted trademark applications for names such as, CAPITALISM WILL DESTROY THE WORLD and I AM THE ANTITRUMP. Of course, the fact that the USPTO approved these trademarks does not mean that the government believes or endorses any ideas coupled with the phrases. Further, in the Supreme Court oral arguments for Lee v. Tam, Justice Anthony Kennedy noted that should the UPSTO be allowed to make such decisions where all “positive” messages are allowed to enjoy government protection yet none that may be even slightly offensive are, then it should be equated to an “omnipresent schoolteacher.” As Justices Elena Kagan and Ruth Bader Ginsburg considered during the hearing, these decisions could very well be considered as “viewpoint discrimination.”

D. The First Amendment and the Economic Value of Trademark Protection

As previously noted, a trademark that can survive both the TTAB stage and possible contestation is highly valuable for a business for several reasons. First, a trademark provides a business with credibility while keeping the business accountable. A trademark allows a product to be easily and unmistakably identifiable to a customer, which incentivizes the business to continue to produce high-quality products so that they may continue to encourage customers to use their products. Nicolas S. Economides writes:

Trademarks facilitate consumers’ choice among experience goods and transmit quality signals for infrequently consumed goods. Trademarks are indispensable for the efficient provision of products with the wide range of variety and quality combinations demanded in a modern economy. Trademarks allow firms to tie in desired mental images with the advertised goods and to compete in perception advertising.

44 Walker, 135 S. Ct. at 2248.
47 Id.
48 Thomas, supra note 33, at 436.
49 Nicholas S. Economides, The Economics of Trademarks, 78 TMR 523 (1988).
Second, trademarks increase the economic value of a brand. When the Redskins were looking to reverse the decision that voided their trademark protections in federal court once again in 2015, its lawyers noted that team’s expected value in 2016 would fall around $2.4 billion with $214 attributable to its brand, meaning that the Redskin’s value would be much lower if the team was once again barred from receiving trademark protection. These numbers prove just how influential a trademark—or lack thereof—can be. Trademark registration is also beneficial because it requires the USPTO to keep up-to-date records of where a specific trademark is being used in commerce so that should there be any issues, it would be easy to locate or contact the user, while also knowing exactly where to request royalties from. Because it should be clear that a mark coupled with the ® symbol is protected by the USPTO, any infringer, if caught, will have to pay at least $1,000 and may be forced to pay up to $200,000 for each mark he or she has illegally produced.

For the National Football League, the economic repercussions of the loss of trademark protections from its teams also have the potential to be major. John C. Thomas III writes:

For example, if the Washington Redskins were to lose their federal trademark protection, Pro-Football may not have the financial incentive to bring suit very often, allowing infringing and counterfeit marks to creep into the market without much deterrent. Pro-Football would lose nationwide constructive notice and border protection against the importation of product with infringing or counterfeit marks. Additionally, the loss of federal protection means Pro-Football will have to sue in state courts and find personal jurisdiction for each defendant, while prosecuting under inconsistent state laws.

E. The Issue of Denying a Trademark But Allowing Use

Without making constructive efforts to solve the ongoing issue of Section 2(a), problems will continue to arise because of the clause’s inherent lack of specificity. While it is true that businesses can still use a USPTO-rejected trademark by utilizing the ™ symbol, several large economic repercussions are likely if a mark lacks protection.

---

51 Thomas, supra note 33, at 442.
53 Thomas, supra note 33, at 458.
The first of these possible repercussions includes the issue that a business is held to a higher standard to prove that there was an infringement than it would be if its trademark were registered.\textsuperscript{54} Approval creates a legal presumption that the mark actually belongs to the owner and it would have been included in the USPTO’s trademark database, therefore significantly lessening the accused infringer’s ability to argue that they were either unaware of the trademark or that their own phrase is different. Further, a business cannot claim exclusive rights to a trademark if it is not registered. This means that if it is believed that someone other than business that created it is using the unregistered trademark illegally, the business itself or its lawyer must take the issue to the court with no help from the USPTO.\textsuperscript{55} Further, no action can be taken in federal court if the trademark is not federally registered, meaning that a business may only be able to bring alleged infringers to court that used the trademark in the state where the business is located, given the differences in each state’s laws.\textsuperscript{56}

Similarly, when a trademark is federally registered, the information is sent to the U.S. Customs and Border Protection (USCBP) agency, which will help to ensure that no product entering the country is possibly infringing on an American mark.\textsuperscript{57} Currently, the USCBP only provides temporary protection for unregistered trademarks if a trademark is currently pending the USPTO’s approval.\textsuperscript{58}

Last, by federally registering a trademark, businesses may also be eligible to receive protection in several other countries, which is something that is not possible with unregistered marks.\textsuperscript{59} This, again, poses an economic issue for businesses if they find themselves being successful both domestically and internationally yet cannot be sure that no one in other countries are not using their mark illegally.

Provided these issues, it is clear that while the USPTO can claim that a denial does not mean that a business cannot use the trademark, the economic downside of a mark not enjoying a federal registration is vast and serious. As such, significant steps must be taken.

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} 19 C.F.R. § 133.0 (2017).
\textsuperscript{59} Id.
to ensure that well-meaning businesses and Americans are able to enjoy the protections and benefits they deserve.

III. Solution

From the evidence provided, it is clear that the only way to truly ensure that the Lanham Act aligns with First Amendment speech protections is to amend the Act to clearly outline what marks are considered to be disparaging. By doing this, marks can be more accurately ruled upon, thus significantly cutting down the time spent in front of the TTAB or in court. Further, by amending the Act, there will be less of a likelihood that the TTAB continues to hand down widely differing rulings as members will have a significantly less freedom to rule based on their own judgments or dictionary definitions. Finally, it will ensure that minority groups or others are not faced with dealing with hurtful and targeted actions through a mark.

When the U.S. Court of Appeals for the Federal Circuit ruled that The Slants could not be denied trademark protection, the Court referenced the Unconditional Conditions doctrine. The doctrine says that the government cannot impose “a condition on the grant of a benefit requiring the waiver of a constitutional right.” 60 For example, the Court ruled in Pickering v. Board of Education that a teacher could not be fired from a school for expressing his or her First Amendment rights. 61 In essence, a school could not create an ultimatum where the teacher keeps his or her job but surrenders his or her free speech rights or vice versa. 62 The Lanham Act, however, at its core, violates the doctrine by allowing the government to create an economic ultimatum. Regarding trademark protection, the government’s role over the trademarks and the level of free speech enjoyed by businesses, Eugene Volokh writes:

[Accepting the government’s argument would create] an end-run around the unconstitutional conditions doctrine, as virtually all government benefits involve the resources of the federal government in a similar sense. Nearly every government act could be justified under this ground, no matter how minimal. For example, the government could also claim an interest in declining to spend resources to issue permits to racist, sexist, or homophobic protests. The government cannot target speech on this basis,
even if it must expend resources to grant parade permits or close down streets to facilitate such speech.\textsuperscript{63}

Given this, and because trademarks are not inherently government speech, the Unconstitutional Conditions doctrine cannot and should not be applied to trademarks. The government can, however, ensure that it keeps its hand in the process by taking several steps outlined below.

At the core, the Lanham Act needs to be restructured to be more specific and ensure that First Amendment rights are being protected. As with all other First Amendment-related issues, strict scrutiny needs to be applied to all trademark cases where a specific denial of a trademark could be considered as a violation of free speech. By applying strict scrutiny, which requires the government to prove that there is a compelling government interest in the matter to make a certain ruling, the TTAB can help ensure that free speech rights are maintained.

Further, besides more clearly defining what is considered to be disparaging, the application process itself must be revamped to better determine if a mark is in fact disparaging. For example, the application should include a section that requires applicants to describe their business, its main goals and audience, why the specific mark was chosen, what purpose the trademark will serve and who the main audience will be. Currently, the online application only consists of a few general steps. These include selecting a mark, choosing whether the mark is “standard character” mark, a “stylized/design” mark, or a “sound” mark, determining to what goods or services the trademark will apply, ensuring that there is not already a similar mark registered in the USPTO database, creating a JPG image of the mark and paying the fee.\textsuperscript{64} By revamping the application, the TTAB can work to ensure with higher accuracy that those who are not looking to disparage a group through their trademark are able to register without issue.

Finally, another test, which will ensure that the average person would not find the mark disparaging, should be added and conducted after the business in question has its application approved through the above process. In this case, it would be wise borrow part of the Miller Test, which was created by \textit{Miller v. California}, where the Supreme Court ruled

\textsuperscript{63} Eugene Volokh, \textit{Supreme Court will hear ‘Slants’ trademark case, which is directly relevant to the Redskins controversy}, WASH. POST, September 29, 2016.

that the distribution of obscene materials—like explicit brochures selling illustrated adult books being sent to Californians without prior consent—are not protected by the First Amendment. The Court created the Miller Test to outline exactly how it came to find the brochures to be obscene material. Although the Lanham Act deals with disparaging marks and not obscene material, the Miller Test does provide steps that can prove to be helpful in determining whether or not a mark is disparaging. As part of the Miller Test, courts must decide whether the work, “‘taken as a whole,’ lacks serious literary, artistic, political, or scientific value.” As stated above, many groups use names that may be seen as “disparaging” as a way a symbol of pride, not as a way to harm a group of people. In the case of the lesbian motorcyclist group, Dykes on Bikes, the group’s trademark application was first denied because it was considered to be “patently offensive” to lesbians, even though those involved in the organization are lesbians themselves. Had the application process during the time of the filling included the questions outlined above and had court been required to apply strict scrutiny and part of the Miller Test to all cases, it’s likely that the trademark would have been approved by the USPTO at first consideration, instead of after appeal by the group. It is likely the same for The Slants.

IV: Conclusion

Given the current issues surrounding free speech in the United States, it is more important than ever before to ensure that the First Amendment rights of all Americans are protected. The Lanham Act unquestionably provides businesses the opportunity to be prosperous through their own inventions and ideas, but it has become outdated since its passage in 1964. If the Lanham Act remains as is, it will continue to cause First Amendment conflicts, as proven in the cases of the Washington Redskins, The Slants and various others, as well as countless economic issues for both businesses and the United States court system. The United States is certainly not the only country with issues surrounding its trademark laws, but it can serve as a positive example for other countries by standing strongly by its Constitutional protections, amending the Lanham Act and

67 Joe Garofoli, Attorneys find Dykes on Bikes patently offensive, reject name, SFGATE, July 14, 2005.
ruling faithfully and clearly on today’s controversial trademark cases so that Americans can continue to prosper as a result of their own creations and diligent work.
Accessing Attorneys: Arguing for an Inalienable Right of Undocumented Persons in Removal Proceedings

Robert Wu

“We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos’s labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”

— Judge Irving Robert Kaufman

Introduction

An estimated eleven million individuals currently live in the United States without authorization. Every day, each of these undocumented persons faces an uncertain future: one where any misstep, legal infraction, casual encounter with a police officer, or knock on the door could launch them into one of the most complicated processes within the United States judicial system. During the 2016 fiscal year, U.S. immigration courts issued 237,000 new Notices to Appear to alleged undocumented persons. Over twenty-one percent of the individuals sent a Notice to Appear, 50,566 summons total, failed to show at their removal hearings. Of the 186,434 alleged undocumented persons who did appear at their removal

---

1 Lok v. I.N.S., 548 F.2d 37, 38 (2nd Cir. 1977) (Kaufman, J.).
3 U.S. DEPT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICS YEARBOOK (2017). Figure 2.
hearings, 73,524 of them, just over thirty-nine percent, appeared without any form of legal representation. In total, 173,342 of these 186,434 individuals who appeared at their removal hearings were ordered to be removed, deported, or excluded from the United States. Ultimately, in the 2016 fiscal year, U.S. Immigrations and Customs Enforcement (ICE) removed 65,332 undocumented persons who had previously been residing in the United States. In separate but similar proceedings, ICE also removed 174,923 individuals who were apprehended at or near the U.S. border or ports of entry.

While these deportation numbers rank among the lowest in decades, they are slated to rise in the years ahead. The election of Donald Trump as the forty-fifth President of the United States has ushered in a new era of immigration policies: ones that favor the deportation of undocumented persons to improve the nation’s security. Trump made this platform explicitly clear in his first Joint Address to Congress:

My administration has answered the pleas of the American people for immigration enforcement and border security. By finally enforcing our immigration laws, we will raise wages, help the unemployed, save billions and billions of dollars, and make our communities safer for everyone. We want all Americans to succeed, but that can’t happen in an environment of lawless chaos. We must restore integrity and the rule of law at our borders. For that reason, we will soon begin the construction of a great, great wall along our southern border. As we speak tonight, we are removing gang members, drug dealers, and criminals that threaten our communities and prey on our very innocent citizens. Bad ones are going out as I speak, and as I promised throughout the campaign.

In the first months of his presidency, President Trump has issued numerous Executive Orders to implement the nativist policies for which he advocated during his presidential campaign. He has twice attempted to ban nationals of six-Muslim-majority countries from entering the United States (the first Executive Order was blocked by the Ninth Circuit and later withdrawn, and the second is, as of publication, currently on appeal in multiple circuit

---

4 Id. at Figure 10.
5 Id. at Table 4.
7 Id.
8 President Donald Trump, Joint Address to Congress (February 28, 2017).
Arguing for an Inalienable Right of Undocumented Persons in Removal Proceedings

courts). He has also sought funding and proposals to construct a wall along the U.S.-Mexico border. These orders are examples of measures designed to protect U.S. security by preventing perceived threats from entering the country.

Trump has also issued an Executive Order that expands the powers of federal agents in removing undocumented persons from the country. The policies establish a new set of enforcement priorities for federal agents to follow when removing noncitizens from the country. Specifically, the order broadens the classes of noncitizens deemed to be removal priorities to virtually anyone living without authorization in the United States. This policy is a stark change from President Obama’s enforcement policies, which instructed federal agents to focus their efforts on removing undocumented persons who were accused of committing serious visa abuse, convicted of serious crimes, or identified as threats to the nation’s security. The Executive Order also called for the establishment of additional immigration courts to conduct more removal hearings and potentially deport noncitizens. As long as this Executive Order continues to be enforced, the number of undocumented persons facing deportation will likely grow under the Trump administration.

In legal writing and political discourse, the term “alien” is often used to refer to undocumented persons. The term is widely accepted in the legal community: it is commonly used to refer to someone who is not a citizen or national of the subject country. Yet the usage of the term is problematic due to its primary definitions: “a hypothetical or fictional being from another world” and “unfamiliar and disturbing or distasteful.” These colloquial connotations unfairly alienate undocumented persons from their identity: ordinary individuals who lack legal documentation for residing in the United States.

---

12 Id.
States. These individuals’ defining differences – that they are undocumented – should not strip them of their humanity and deprive them of justice in the eyes of the law.

This article will not engage in such dehumanizing discourse. No matter what the accepted customs of legal writing are, authors and editors alike must consider not only the merits of every argument presented but also the implications of each word selected for print. Previous generations have used derogatory terms such as “Negro,” “cripple,” and “retard” to unfairly refer to individuals who are African-American, disabled, or mentally ill, respectively. These disparaging labels have been replaced in legal writing with acceptable terms that fairly depict an individual’s unique characteristics. For this paper, the terms “undocumented person” and “noncitizen” will be used – and that other term will only be printed in areas where a cited quote uses it.

It is important to recognize that while U.S. media largely focuses on deportation figures and negative stories of noncitizens, these fixations fail to illustrate the reality that each undocumented person bound in this deportation crisis faces. Take the story of a Mexican immigrant, Tiffany, and the account of her removal hearing. Many years before her removal hearing, Tiffany had been convicted of a misdemeanor – a single case of fare evasion – and immediately accepted a plea deal to avoid immediate deportation. After that incident, she traveled frequently between Mexico and the United States to visit her family – trips that created breaks in continuous residence that violated the current rules of the Immigration and Nationality Act. At her removal hearing, the judge informed Tiffany that she might qualify for relief due to her prior plea deal, but that the burden of proof and the presentation of evidence for her to stay would fall upon her. Tiffany quickly realized the reality of her situation: she could not afford a lawyer and needed to return to work immediately to generate income for her two children. Consequently, Tiffany ended up accepting removal.

If Tiffany had obtained counsel, she would likely have received far more detailed advice during her removal hearing. She may have been notified that her previous plea deal, which happened over two decades ago, would likely qualify her for relief under the Supreme Court’s decision in *I.N.S. v. St. Cyr* - specifically, that the provisions and protections that existed when she agreed to her plea deal would be the ones determining her deportability, not the current Immigration and Nationality Act that the judge had

---

18 Pseudonym.
Arguing for an Inalienable Right of Undocumented Persons in Removal Proceedings

cited. She may have been advised that accepting removal would bar her from returning to the United States for at least a decade; if her children remained in the United States, she would not be allowed to visit them. Instead, without counsel, Tiffany was left a vulnerable defendant who was quickly overwhelmed by the complex nature of the U.S. deportation process.

A noncitizen who is unable to obtain counsel for his or her removal hearing faces a tremendous challenge. Many undocumented persons who appeared at their removal hearings without legal representation give accounts similar to Tiffany’s: feelings of isolation, anxiety, and an absence of knowledge of potential legal options to pursue relief. Unfortunately, the absence of counsel for noncitizens in removal hearings is common. This should not be the case: a failure to guarantee legal representation for undocumented persons involved in removal hearings is, as argued in this article, unconstitutional.

The Supreme Court has previously ruled in favor of granting due process to all persons, regardless of nationality (in the context of criminal proceedings). In recent decades, this guarantee of due process has been interpreted to the point where individuals who are incapable of sufficiently defending themselves – even in civil proceedings – have the right to a provided attorney. Many immigrants are unfamiliar with their legal options within a removal hearing; most would require some form of legal assistance to clearly present a sufficient case in an immigration court. The United States should establish a simple standard that provides legal counsel to all individuals facing deportation. Such a move, ideally performed by Congress, would not only grant noncitizens a right to legal counsel in a life-changing, if not life-threatening, removal hearing, but also, allow the nation to uphold its constitutional guarantee of due process for all persons.

This article will first provide a historical background of noncitizens’ rights within the U.S. legal system. It will then address key opinions, both from the Supreme Court and lower courts, that suggest that the unique consequences that deportation possesses require appointed counsel to ensure due process. The next section will illustrate the unique challenges that noncitizens in removal hearings face: both the difficulty in finding an attorney, and the daunting challenge that awaits of self-representation. Finally, it will

\[21\] U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, supra note 5.
\[22\] Lok v. I.N.S., supra note 1.
present a solution: the establishment of a nationwide program that provides any noncitizen with representation in a removal hearing.

II: The Status Quo: A History of the Progression of Noncitizen Procedural Rights

A. Criminal Prosecutions and Constitutional Rights

The Immigration and Nationality Act (1952), the most current statute that addresses a vast array of immigrant and noncitizen rights, makes explicitly clear the parameters regarding access to counsel for any noncitizen involved in a removal proceeding. When addressing the rights of undocumented persons in removal hearings, the statute states:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.23

The rationale behind the establishment of the presence of counsel in removal hearings as a privilege, and not a guaranteed right, comes from Fong Yue Ting v. United States (1893). In that case, the Supreme Court ruled that deporting any undocumented person back to his or her home country is not a punishment for a criminal offense, but an enforcement procedure for noncompliance with U.S. law.24 By classifying deportation as simply a method of return, and not as a punishment for a crime, the Court determined that residing without authorization within a country is also not a criminal offense.

I.N.S. v. Lopez-Mendoza is the next Supreme Court case that directly considers the rights of undocumented persons in removal hearings. In a 5-4 decision, the Court ruled that the existing classification of removal hearings as a civil proceeding bars undocumented persons from accessing similar rights offered to defendants in a criminal trial. Writing for the majority, Justice Sandra Day O’Connor wrote:

The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws. Consistent with the civil nature of a deportation proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.25

24 Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).
It is crucial to clarify that *I.N.S. v. Lopez-Mendoza* does not necessarily establish that removal hearings are strictly civil proceedings (even if it did, this classification was challenged by a more recent Court opinion, *Padilla v. Kentucky*, which will be presented later). Rather, the Court’s opinion was that based on *Fong Yue Ting*’s classification of removal hearings as a civil proceeding, undocumented persons did not have a constitutional right to all protections offered to those involved in criminal prosecutions.

In particular, *Lopez-Mendoza* blocks undocumented persons from accessing the constitutional rights established under *Gideon v. Wainwright* (1963), a landmark Supreme Court case that granted access to court-appointed counsel to all defendants involved in a criminal trial.\(^26\) In a unanimous decision, the Court determined that the ability of the accused to prepare a proper defense was essential to ensuring due process and found it constitutional to mandate that states appoint attorneys for all defendants who lacked counsel.\(^27\) Notably, this promise of counsel applies to both citizens and undocumented persons, as mentioned in the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.\(^28\)

All of the protections of the Sixth Amendment, including those espoused in *Gideon*, are available to any defendant involved in a criminal prosecution, citizen or not.\(^29\) However, in removal cases, which are considered civil trials, the ability to have legal counsel is strictly considered a privilege, and not a guaranteed right.\(^30\)

Despite this limiting distinction, noncitizens involved in removal proceedings do have the right to a handful of constitutional protections; many of these protections were established by Supreme Court rulings. *Yamataya v. Fisher*, a case popularly known as the “Japanese Immigrant Case,” became the first notable one of these decisions.\(^31\) In *Yamataya,*


\(^{27}\) Id.

\(^{28}\) U.S. CONST. amend. VI.

\(^{29}\) See *Yick Wo v. Hopkins,* 118 U.S. 356, 356 (1886) (where constitutional guarantees contained in the Fourteenth Amendment (which incorporated aforementioned parts of the Sixth Amendment) extend to all persons within the territory of the United States, regardless of race, color, or nationality).

\(^{30}\) 8 U.S. Code § 1362.

\(^{31}\) *Yamataya v. Fisher,* 189 U.S. 86, 100-102 (1903).
the Court affirmed that the U.S. government possessed the authority to deport undocumented immigrants in a manner that was consistent with existing federal law, and that a court is unable to interfere with a final order of deportation unless a due process violation occurred.\textsuperscript{32} The derivative of \textit{Yamataya} is clear: if an undocumented person felt that his or her deportation was the result of an trial that denied due process, he or she had the ability to appeal through the court system. Through the \textit{Yamataya} decision, the Court established that noncitizens also have the right to due process and may appeal pending deportations based on a denial of such.\textsuperscript{33}

The recent case of \textit{Reyes Mata v. Lynch} reaffirmed this crucial right of due process for noncitizens. In this case, Petitioner Noel Reyes Mata attempted to appeal his deportation, but his attorney failed to file a brief stating such. Reyes Mata then chose to fight his case, claiming ineffective assistance of counsel, but the Board of Immigration Appeals denied his motion due to tardiness: a petition to reopen the case was due within ninety days of the decision.\textsuperscript{34} Finally, after the U.S. Fifth Circuit Court of Appeals claimed that it lacked the jurisdiction to rule on a case from the Board of Immigration Appeals, Reyes Mata brought his case to the Supreme Court, which reversed the appellate court’s refusal to hear the appeal. In the opinion, Justice Stephen Breyer noted that noncitizens have due process rights, and that federal courts have an “unflagging obligation” to exercise their jurisdiction on such cases if they arise.\textsuperscript{35} The decisions in \textit{Yamataya} and \textit{Reyes Mata} create a crucial framework: an undocumented person has legal rights and all entities must respect all legal rights that apply to a person, regardless of their citizenship status. In particular, the right of due process will be invoked in later arguments that call for the appointment of counsel for noncitizens in removal hearings.

The Supreme Court has also frequently ruled in favor of undocumented persons when considering their rights in criminal trials. In \textit{Wong Wing v. U.S.}, the Court outlined how to apply parts of the Fifth and Sixth Amendments to noncitizens, stating that a person’s protections against a state that aims to deprive anyone of life, liberty, or process are universal, without exceptions made for race, color, or nationality.\textsuperscript{36} The Court held:

\begin{itemize}
  \item \textit{Id.} at 102.
  \item \textit{Id.}
  \item \textit{Id.} at 2156.
  \item \textit{Wong Wing v. United States}, 163 U.S. 228, 238 (1896).
\end{itemize}
All persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.\textsuperscript{37} Later Courts have also expanded other Fifth and Sixth Amendment rights and Fourteenth Amendment protections directly to noncitizens. The Court determined in \textit{Almeida-Sanchez v. United States} that undocumented persons are protected by crime-related protections of the Constitution, such as those against search and seizure, trial by jury, and due process.\textsuperscript{38} This ruling helped guarantee that noncitizens could not have their rights infringed upon despite their nationality, and ensured that undocumented persons would be treated as fairly as a citizen would in criminal trials.

Even more recently, in \textit{Padilla v. Kentucky}, the court ruled that noncitizens involved in a criminal hearing must be advised that any conviction or guilty plea could lead to deportation.\textsuperscript{39} The \textit{Padilla} ruling noted how the consequence of deportation is so unique that all noncitizen defendants must be informed of its possibility – and that failing to do so would be a denial of due process.\textsuperscript{40} Both \textit{Almeida-Sanchez} and \textit{Padilla} are crucial because they level the playing field for accused noncitizens: they make clear that a defendant's disputed immigration status has no bearing on their rights in a criminal trial. Hence, undocumented persons involved in criminal cases must be provided with attorneys, who have an obligation to disclose that accepting a plea deal or losing a trial could result in deportation.

\textbf{B. Civil Removal Hearings}

While the Supreme Court has affirmed the rights of noncitizens in criminal trials, it has not established a similar right to counsel for undocumented persons in civil removal hearings. Removal hearings and criminal prosecutions possess a similar consequence for noncitizens: while the direct result of a criminal proceeding is a loss of liberty, such as incarceration, current U.S. immigration laws espouse that undocumented persons who are convicted of any crime are automatically placed as priorities for deportation from the

\textsuperscript{37} Id.
\textsuperscript{38} Almeida-Sanchez v. United States, 413 U.S. 266, 273-274 (1973).
\textsuperscript{40} Id.
This similarity of the likely consequences for noncitizens who lose in either criminal prosecutions or removal proceedings was noted by the Court in *Padilla*:

Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, *supra*, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context.42

Despite this similarity, the Supreme Court has not yet extended the guarantee of appointed counsel, already provided to criminal defendant noncitizens, to their counterparts involved in removal hearings. This means that undocumented persons involved in removal hearings are not guaranteed access to a crucial right that virtually guarantees that their legal options are explained and pursued before a life-changing decision is rendered.

While the Supreme Court has remained relatively silent on the right to appointed counsel in removal hearings, some smaller courts in recent years have begun to address the issue. To date, the most successful case is *Franco-Gonzalez v. Holder*, a District Court decision that granted the right to legal representation for all immigration detainees with a serious mental disorder which makes them unable to sufficiently represent themselves.43 *Franco-Gonzalez*’s landmark decision paved the way for mentally disabled undocumented persons to access appointed counsel for defense against deportation.44 In the *Franco-Gonzalez* opinion, the U.S. District Court for the Central District of California wrote:

The Court finds it significant that Plaintiffs themselves define what they consider to be adequate representation. Plaintiffs ask that the representative (a “Qualified Representative”) meet five criteria, including that he or she:

"(1) be obligated to provide zealous representation; (2) be subject to sanction by the EOIR for ineffective assistance; (3) be free of any conflicts of interest; (4) have adequate knowledge and information to provide representation at least as competent as that provided by a detainee with ample time, motivation, and access to legal materials; and (5) maintain confidentiality of information." (*Id.* The Court finds that a Qualified Representative would be a reasonable accommodation for Plaintiffs…45

The District Court made it clear that in any removal hearing, mentally disabled individuals have the right to legal assistance, provided by the government. In doing so, it recognized

42 See *Padilla*, 559 U.S. at 366.
44 *id.*
45 *id.*
that there are groups that, based on capacity and reasonable presentation concerns, necessitate appointed counsel, and clearly identified one major group that required it: mentally disabled undocumented persons.

A similar path was recently paved in the state of Washington, where *J.E. F.M. v. Lynch* made its way through the U.S. District Court for the Western District of Washington and into the Ninth Circuit Court of Appeals. Like *Franco-Gonzalez*, *J.E. F.M.* argues for a class-specific right to legal representation in removal hearings; in this case, it is for unaccompanied, unrepresented minors.\(^{46}\) In 2015, the U.S. District Court for the Western District of Washington ruled that the group of children had the right to form a class action suit, and allowed the case to proceed. Yet upon appeal, the Ninth Circuit overruled *J.E. F.M.* on the procedural decision that class-action lawsuits could only be filed after a deportation decision was issued.\(^{47}\) Despite this setback, *J.E. F.M.* still represents a promising step forward in the fight to grant unaccompanied minors appointed counsel in removal hearings. Some of that hope stems from a quote from a separate, clarifying concurrence to the ruling, written by the Ninth Circuit Judge who also delivered the majority opinion, Margaret McKeon:

> Jurisdictional rulings have an anodyne character that may suggest insensitivity to the plight of the parties, particularly in a case involving immigrant children whose treatment, according to former Attorney General Eric Holder, raises serious policy and moral questions. But we must heed the Supreme Court’s admonition that “[f]ederal courts are courts of limited jurisdiction…” We did not reach the merits here because we hewed to the statute channeling federal court jurisdiction. That said, I cannot let the occasion pass without highlighting the plight of unrepresented children who find themselves in immigration proceedings.\(^{48}\)

Judge McKeon’s concurrence highlights the troubling circumstances that exist for unrepresented children in the U.S. removal court system. She goes on to explain, in bold detail, her concern in having unaccompanied children such as J.E. and F.M. be unrepresented in removal proceedings.\(^{49}\) Yet those circumstances were not considered by the Ninth Circuit: judicial standing serves as a prerequisite to judge these merits, and since that requirement was not fulfilled, the case was dropped.\(^{50}\) While *J.E. F.M.* may have failed

\(^{46}\) *J.E. F.M. v. Lynch*, 837 F.3d 1026, 1033-1034 (9th Cir. 2016).

\(^{47}\) *Id.* at 1051.

\(^{48}\) *Id.* at 1052.

\(^{49}\) *Id.* at 1053.

\(^{50}\) *Id.* at 1052.
on procedural grounds, its core values – that unaccompanied children should have appointed attorneys in removal hearings – continue on in court, buoyed by Judge McKeon’s call for increased consideration of the youth trapped in this crisis.

While all of these rulings demonstrate progress, they hardly foreshadow any bold, broad moves that the Supreme Court could take to give noncitizens the right to appointed representation. However, by analyzing previous decisions, a pathway to arguing for this essential right emerges, along with the reasons for why such representation is crucial.

III: Why Denying Appointed Counsel is Unconstitutional

A. The Court’s Account of Deportation

The Supreme Court has repeatedly acknowledged that deportations bring not only the possibility of losing liberty, but also potential for loss of other fundamental qualities of life.51 Removal hearings are part of an exclusive group of court trials whose outcome may fundamentally destroy a person’s livelihood.52 Despite the life-changing stakes that a removal hearing involves, representation is not guaranteed because of a simple classification: the difference between a civil and criminal trial – determined by Fong Yue Ting v. United States, and confirmed and reasserted by every immigration-related statute to date.53 Yet this classification has not prevented the Supreme Court from showing its concern with the current system of removal hearings, and by piecing together a series of opinions, a constitutional argument for appointed counsel for noncitizens can be woven together.

The following section is composed of three pairs of court decisions – two pairs by the Supreme Court, and then a pair of standards by two different Courts of Appeals – that help illustrate the necessity of ensuring undocumented persons with appointed attorneys in removal hearings. They are arranged not in chronological order, but instead grouped together in a logical manner to easily illustrate the impact of each opinion.

B. Bridges and Padilla: Illustrating Deportation’s Unique Character and Calling for Meticulous Care

---

51 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
53 Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893).
Bridges v. Wixon provides an initial insight into the Court’s characterization of deportation hearings as uniquely crucial. When determining the fate of Petitioner Harry Bridges, an undocumented person who faced deportation on the grounds of formerly being associated with the Communist Party, the Court made an overarching analysis on the harsh realities and consequences embedded within deportation hearings. In his opinion, Justice William Douglas wrote:

Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

This excerpt highlights two crucial features of removal hearings. First, the consequences of deportation are so severe that when deportation is a possible outcome in any trial, the judicial system must exercise meticulous care to ensure fairness. The call for meticulous care is significant: while the specific term has been relatively undefined in legal matters, its phrasing implies that removal hearings must provide undocumented persons with equitable protections and oversight that guarantee a fair trial—implying a call for due process.

The second takeaway from Bridges is the examination of the classification of a removal. The Court notes that while deportation is “not technically a criminal proceeding,” the potential consequences of a removal are so significant that they are far beyond the scope of most civil matters. By dropping the “technical” disclaimer that Justice Douglas includes, the opinion likens the nature of deportation to one under traditional criminal proceedings, where, under the aforementioned Gideon, defendants are guaranteed the right to counsel. Justice Douglas’ opinion attempts to define what a removal hearing is: while it may not be a criminal matter, a deportation has consequences so severe that it requires beyond-normal treatment of undocumented persons to ensure fairness. While Gideon did come after Bridges, the call for meticulous care in removal proceedings can be interpreted to reference all constitutional rights in

---

55 Id.
56 Id.
criminal prosecutions – both the current ones at the time, and future ones deemed necessary to ensure due process.

Nearly sixty-five years after Bridges, the Court revisited this classification dilemma in Padilla v. Kentucky.\(^{57}\) At first glance, the case may appear irrelevant to the rights of undocumented persons in removal hearings. In Padilla, Petitioner José Padilla successfully claimed that he received ineffective assistance of counsel in his criminal defense case, a violation of a right to effective counsel established in Strickland v. Washington, when his defense attorney incorrectly advised that accepting a plea deal would have no consequence on his immigration status.\(^{58}\) While remanding the conviction back to the Kentucky courts, Justice John Paul Stevens noted that the Strickland holding of effective counsel applied to Padilla because the magnitude of deportation pushes it beyond the classifications of direct or collateral consequences, the former of which are required to be disclosed for effective counsel, and the latter of which are more optional. He wrote:

\[\text{Whether that distinction [between direct and collateral consequences] is appropriate is a question we need not consider in this case because of the unique nature of deportation. We have long recognized that deportation is a particularly severe “penalty,” Fong Yue Ting v. United States, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see INS v. Lopez-Mendoza, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process.}\(^{59}\)

The Court’s opinion in Padilla is crucial for two reasons. First, it appears to overturn portions of Fong Yue Ting and Lopez-Mendoza; specifically, those that establish or presume the classification of deportation as a purely civil matter. As mentioned earlier, it is these two cases that prevent noncitizens from accessing the right to counsel espoused in Gideon. Padilla also suggests that criminal-like protections should apply to removal hearings, given the intimate relationship that deportation has with the criminal process. Such protections would include a right to counsel, currently granted to criminal defendants under Gideon.

Additionally, Padilla dismissed the categorization of deportation as either a direct or collateral possible consequence of the sentencing, and instead focused on the “unique

---

\(^{59}\) See Padilla, 559 U.S. at 366-367
nature of deportation.” While this term was left mostly unexplained, the opinion’s vagueness still identifies several factors that contribute to deportation’s uniqueness. The Court acknowledges that while removal proceedings are classified as civil cases, the consequence of these proceedings is a “practically severe penalty,” drawing upon the characterization of deportation in Fong Yue Ting. Additionally, the Court noted that deportation was so closely tied to the criminal process that it was “most difficult to divorce the penalty from the conviction.” The Court determined that the ramifications of deportation are so harsh that it truly is unique among all possible consequences of a criminal trial or removal hearing and thus should not be boxed into categories of direct or collateral consequences. Yet all the factors that contribute to deportation’s unique character are also present in removal hearings, regardless of whether they occur following a criminal trial. It could therefore be argued that the Court views any trials that involve deportation as something beyond the parameters of a civil case, and may even encompass elements of a criminal case, potentially leading to protections under Gideon.

Peter Markowitz reaches a similar inference in the Padilla judgment. When analyzing the Court’s opinion, Markowitz writes, “Instead, Padilla suggests that the Court is moving toward a recognition that ‘deportation is different’—it lives in the netherworld between civil and criminal proceedings, not truly belonging to either.” Markowitz’s interpretation of the Padilla judgment focuses on the Court’s refusal to classify deportation as a direct or collateral consequence; specifically, he extends its clarification to encompass removal hearings themselves: they cannot be boxed into civil or criminal cases, but instead become their own sort of proceeding.

A note in the Harvard Law Review analyzing Padilla reaches an even more powerful interpretation:

Supreme Court Justices have acknowledged the harshness of deportation for over a century, but in Padilla the Court went further by stressing the “unique” character of deportation and by giving teeth to its previously hollow observations in the form of tangible constitutional protections. Indeed, much of the Court’s opinion was devoted to recounting changes that have expanded the frequency and mandatory nature of deportation — considerations that strongly

60 Fong Yue Ting v. United States, 149 US. 698, 709 (1893).
61 See Padilla, 559 U.S. at 365-366.
62 Peter Markowitz, Deportation is Different, 13 U. Pa. J. Const. L. 1299, 1333 (2011) (discussing the idea that the Padilla ruling suggests that removal hearings are neither criminal nor civil cases).
63 Id. at 1332-1334.
support greater protections for noncitizens in removal proceedings. Moreover, in recognizing that deportation is “sometimes the most important part” of the penalty imposed on noncitizens in criminal proceedings, the Court acknowledged — if impliedly — the illogic in continuing to treat deportation as civil sanction rather than criminal punishment.⁶⁴

This view also suggests that the Court believes that the consequence of deportation deserves a class of its own for cases, one that takes into account the impact and magnitude of a removal hearing. Linking this viewpoint to Bridges’ call for meticulous care implies that the Court truly believes there ought to be additional protections for any individuals involved in a case with deportation at stake.

C. Wade and Turner: Extending Gideon to Civil Removal Hearings

The Supreme Court has also outlined that under certain circumstances, the distinction between a civil and criminal case is unimportant in determining whether an individual requires appointed counsel. Wade v. Mayo was an instrumental case that defined these circumstances: while ruling that an eighteen-year old involved in a criminal case had the right to representation despite his tardy request for appointed counsel, the Court declared:

There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves in a prosecution of a relatively simple nature. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law.⁶⁵

This opinion is notable because it suggests that the right to appointed counsel for those who are incapable of representing themselves is essential to ensuring due process. While the context of Wade applies to a criminal proceeding, the guarantee of due process is one that has been affirmed for individuals involved in civil hearings as well.⁶⁶ In the decades following Wade, multiple smaller courts have used the case as rationale for providing specific groups with appointed representation in removal hearings.⁶⁷

⁶⁴ Developments in the Law: Immigrant Rights and Immigration Enforcement, 126 Harv. L. Rev. 1565, 1669-70 (2013) (commenting on how the Padilla opinion suggests the Court believes that treating removal hearings as civil cases is illogical).
⁶⁶ See Yamataya, 189 U.S. at 102.
⁶⁷ See Michelson v. I.N.S., 897 F.2d 465, 468 (10th Cir. 1990); Barthold v. I.N.S., 517 F.2d 689, 690-91 (5th Cir. 1975).
Wade sets the standard that there are certain groups of individuals who require appointed representation due to various shortcomings.68 While the Court left these shortcomings unspecified, classifying them in vague categories briefly described as “age,” “ignorance,” and “mental capacity,” its decision opens the door for future groups to be designated as ones that require a universal right to representation, including possibly those involved in removal proceedings.

Even if removal hearings remain boxed out of the category of criminal cases, other Court decisions have suggested that an obligation for the government to provide counsel in civil cases may exist under particular circumstances. Many of these qualities, as outlined in Turner v. Rogers, are also inherent in any removal hearing. In Turner, Petitioner Michael Turner argued that he was entitled to a court-appointed attorney during his child support case due to his alleged inability to afford both child support and legal payments as well as the possibility of incarceration for civil contempt. While ruling against Petitioner, the Court explicitly confined its decision to cases that specifically involved Turner’s scenario: situations in which an unrepresented custodial parent is found in civil contempt. Justice Stephen Breyer authored an opinion that specifically analyzed three factors to determine whether denying Petitioner Turner an appointed attorney was a violation of the Due Process Clause. Justice Breyer first addresses the concern of how attorney fees would be incredibly burdensome for a poor defendant:

First, the critical question likely at issue in these cases concerns, as we have said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many--but not all--cases is sufficiently straightforward to warrant determination prior to providing a defendant with counsel, even in a criminal case.69

Justice Breyer then remarks on the consideration of equity that counsel could bring to the petitioner:

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent unrepresented by counsel…A requirement that the State provide counsel to the noncustodial parent in these cases could create an

---

68 See Wade, 334 U.S. at 684.
asymmetry of representation that would “alter significantly the nature of the proceeding.”

Finally, Justice Breyer notes the readily available programs and legal protections that existed in the Petitioner’s state, South Carolina. These programs assisted individuals who had difficulties paying child support payments:

“Third, as the Solicitor General points out, there is available a set of “substitute procedural safeguards,” which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty.”

Although Turner ultimately lost his appeal, Justice Breyer’s narrow opinion suggests the Court’s acknowledgement of particular types of civil cases that may require an individual to have appointed counsel. Three factors were considered in making the Turner decision: the cost of representation; the symmetry of representation in the case between the two parties involved, and the existence of “substitutable safeguards,” such as existing procedures that ensure some form of equity. The Supreme Court noted that Turner’s case was, at its core, a suit between a divorced couple, and thus the analysis of the three factors lead to the decision that the appointment of counsel was unnecessary. The situation could be equally resolved without appointing counsel, thus negating the affordability issue. Giving one party and not the other the right to appointed counsel would create an asymmetry of representation, and the state had various laws and procedures in place that helped ensure a fair trial, regardless of the Petitioner’s circumstances.

While the analysis of these three factors led to the loss of Turner’s appeal, the same factors can be analyzed in removal hearings with the opposite result. In terms of affordability, and its extension, the possibility of resolving a case without the expenses of counsel; such is rarely the case with a removal hearing, especially when an undocumented person has no firm understanding of his or her available legal options. Granting counsel to undocumented persons is also necessary to provide symmetry in removal hearings. Unlike Turner’s situation, where both parties lacked access to appointed counsel, a removal hearing features the government, which is always represented by a qualified
attorney, against an undocumented person, who has no guarantee of one. Without
counsel, there is an asymmetry against undocumented persons that jeopardizes their right
to a fair trial.

Finally, the safeguards that exist for noncitizens who lack counsel are insufficient: while Petitioner Turner had easy access to a variety of free, state-sponsored
programs to help relieve his overdue child support payments, individuals facing
deporation who cannot afford a lawyer generally seek representation from a law school
clinic or an immigrants’ rights organization. These agencies are often overwhelmed with a
tremendous number of cases that greatly exceeds their maximum capable workload.\textsuperscript{76}
Thus, many undocumented persons seeking assistance from these organizations find
themselves turned away due to factors beyond the unique details of their individual cases.
While these agencies exist, and can be claimed as substitutable safeguards in lieu of
counsel, access to them is incredibly limited to a small fraction of undocumented persons
that seek assistance. It can be argued that applying the three considerations used to deny
Turner’s appeal to the context of removal hearings would yield the opposite result, and
therefore, undocumented persons would need to have a right to court-appointed counsel
to ensure due process.

It is important to acknowledge that the factors used to construct the Turner
judgment are not a perfect match for removal hearings. While the decision suggests that
there may be civil cases that warrant appointed representation to ensure fairness, the
Court’s history has indicated a clear distinction between punishments that deprive one’s
liberty, such as incarceration, and other punishments, including deportation.\textsuperscript{77} Specifically,
punishments that deprive one of their liberty are classified as criminal cases, which are
constitutionally required to provide counsel.\textsuperscript{78} Yet it is important to consider that the
Supreme Court has signaled that the consequence of deportation is in a class of its own,
one whose ramifications are truly unique and beyond the penalties of an ordinary civil
trial.

\textsuperscript{76} Capitol Area Immigrant Rights Coalition, 2015 ANNUAL REPORT FINAL (February 14th, 2017,
8:00 PM),

\textsuperscript{77} See Fong Yue Ting, 149 U.S. at 709.

\textsuperscript{78} See Gideon, 372 U.S. at 346.
At the very minimum, the *Turner* opinion acknowledges that the right to an appointed attorney is not one that is exclusive to criminal cases.\(^{79}\) Instead of rejecting Turner’s appeal based on the distinction between criminal and civil cases, the Court chose instead to identify a set of circumstances that could create a deprivation of liberty if unmet, and demonstrated how in this particular case, these factors were satisfactorily met so that appointed counsel was unnecessary. This choice suggests that the Court may consider that appointed counsel may be necessary in some civil cases to guarantee a fair trial – and one of those types of civil cases is, arguably, a removal hearing.

**D. Lower Court Criterion: The Pro Se Competency Standard & Fundamental Fairness Test**

Despite their geographically limited jurisdiction, lower courts have provided major rulings that have created a framework for providing noncitizens involved in removal hearings with appointed counsel. These decisions have not only granted access to counsel for certain groups of noncitizens involved in removal hearings, but also set standards that suggest future expansion of these liberties to other groups. By defining parameters that determine whether a noncitizen can have access to an attorney in removal hearings, these decisions have also outlined rules that may apply to other groups of noncitizens as well.

The first of these standards is the Pro Se Competency Standard, established by a subsequent ruling in *Franco-Gonzalez v. Holder*.\(^ {80}\) The standard specifically seeks to outline the circumstances that determine whether a noncitizen can sufficiently self-represent in a removal hearing. While *Franco-Gonzalez* itself granted the right of appointed counsel to mentally disabled noncitizens involved in removal hearings, the Pro Se Competency Standard suggests that this crucial access can be extended beyond those that are mentally disabled:

*First*, the respondent must be able to meaningfully participate in the proceeding as set forth in *Matter of M-A-M*. To meaningfully participate, the respondent must have a rational and factual understanding of: the nature and object of the proceeding; the privilege of representation by counsel; the right to present, examine, and object to evidence; the right to cross-examine witnesses; and the right to appeal.

*Second*, for an unrepresented respondent to be competent to represent him or herself in an immigration proceeding, he or she must also be able to perform additional functions necessary for self-representation. (…) [T]he respondent must have sufficient present ability to exercise the

---

\(^{79}\) Id.

rights listed above; make informed decisions about whether to waive the
rights listed above; respond to the allegations and charges in the
proceeding; present information and evidence relevant to eligibility for
relief; and act upon instructions and information presented by the
Immigration Judge and government counsel."

Undoubtedly, both of the qualifications defined in the Pro Se Competency Standard apply
to noncitizens with mental disorders. Yet they also appear applicable to all noncitizens
involved in removal hearings. The first consideration is, more or less, an ability to
understand the proceeding: the ability to rationally comprehend what is occurring, the
ability to present evidence and question witnesses, and the ability to appeal. Many
noncitizens involved in a removal hearing have no knowledge of these rights, and even
when some are aware of the possibility of relief, many fail to exercise them for various
reasons, including confusion or fear. Maryam Kamali Miyamoto describes this barrier,
arguing, “Because of the high stakes involved for the alien being deported, deportation can
have a significant chilling effect on speech and association.”

One way of measuring the number of undocumented persons who fail to exercise
their rights is to analyze the number of undocumented persons who exercise a stipulated
removal, a procedure in which a noncitizen waives his or her right to a hearing and
immediately agrees to have a removal order submitted against them. Using information
obtained by a Freedom of Information Act submitted to the Executive Office of
Immigration Review, Jayashri Srikantiah and Karen Tumlin determined that the use of
stipulated orders has been dramatically increasing, rising 535% between 2004 and 2008.
Some of their qualitative findings are just as startling:

Advocates routinely encounter immigrants who do not understand
that they signed these orders, much less the impact these orders have
on their right to remain in or reenter the United States lawfully in the
future. Worse, immigrants have reported being coerced to sign
stipulated orders of removal. According to press reports, federal
agents have pressured detained immigrants to sign stipulated orders as
a way of getting out of immigration detention. In reality, however,
many of these immigrants may have claims to remain in the United
States based on a variety of factors, including the length of their
presence, their family ties to the country, their status as crime victims,

81 Id.
82 Maryam Kamali Miyamoto, The First Amendment After Reno v. American-Arab Anti-Discrimination
83 JAYASHRI SRIKANTIAH AND KAREN TUMLIN, BACKGROUNDER: STIPULATED REMOVAL, STAN.
IMMIGRANTS’ RIGHTS CLINIC AND NATIONAL IMMIGRATION LAW CENTER (2008), at 1.
or their fear of being persecuted or tortured if they are returned to their home country.\textsuperscript{84}

Simply put, there is a barrier between noncitizens and knowledge of their legal options in removal hearings. Without counsel, undocumented persons are likely to make uninformed decisions during the removal process: from the surrender of rights in a stipulated removal, to an acceptance of deportation in the opening parts of a removal hearing, or a prolonged trial against a seasoned government attorney.

The second qualification of the Pro Se Competency Standard is essentially an extension of the first one: the ability for one to competently self-represent, make informed decisions, and present relevant testimony defending their case. These additional functions are ones that, again, are beyond the capabilities of most noncitizens, especially when in a high-pressure, high-stakes setting against a government representative with a vast amount of legal knowledge and deportation experience.\textsuperscript{85} Without appointed counsel, many noncitizens fail to understand the exact circumstances for their deportation, are fearful of objecting to any potential challenges, or may not exercise any of their legal options for trial or relief.\textsuperscript{86} The implication of the Pro Se Competency Standard is simple: if any class is unable to meet both qualifications, they must be appointed counsel. As a whole, noncitizens are generally in such a vulnerable position that they fail either qualification within the Pro Se Competency Standard.

The other instrumental circuit court standard is the Fundamental Fairness Test, established by the Sixth Circuit Court of Appeals in \textit{Aguilera-Enriquez v. I.N.S.}.\textsuperscript{87} The decision essentially established the right to due process for all noncitizens participating in removal hearings:

\begin{quote}
If procedures mandated by Congress do not provide an alien with procedural due process, they must yield, and the constitutional guarantee of due process must provide adequate protection during the deportation process. The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide fundamental fairness -- the touchstone of due process.\textsuperscript{88}
\end{quote}

\begin{flushright}
\textsuperscript{84} Id.
\textsuperscript{86} Srikantiah and Tumlin, \textit{supra} note 84.
\textsuperscript{87} Aguilera-Enriquez v. I.N.S., 516 F.2d 565, 568 (6th Cir. 1975).
\textsuperscript{88} Id.
\end{flushright}
However, beyond the guarantee of due process for non-citizens, Aguilera also suggests that in certain cases, counsel is essential to ensuring due process because of the “fundamental fairness” that it provides. While this term is deliberately left unspecified, even basic interpretations of the fundamental fairness requirement suggest that a noncitizen should be able to explore his or her legal options, adequately present his or her position in front of a judge, and be aware of precisely what is going on. Perhaps a more likely interpretation is the one suggested in the previously mentioned Bridges decision by Justice Breyer: one in which there are no safeguards present to protect those in civil trials, and counsel is essential to ensuring due process.

IV: Why Appointed Counsel is Essential

A. Attorneys are Necessary to Navigate a Complex System

Moving beyond court opinions and established standards, the nuances that compose immigration law are so complex that appointed counsel is almost always required to successfully navigate noncitizens through all of their legal options. This system has become even more complex in recent years, as political attitudes about immigration and undocumented persons have shifted frequently, creating varying swaths of policy that have left undocumented citizens in limbo. Adding these constant changes to a process that is arguably stacked against a noncitizen, as described above, creates a system where counsel is necessary to ensure that undocumented persons can fully exercise all of their legal options and adequately present their position.

The complexity of immigration law has not been lost among important decision makers and legal scholars. In his concurring opinion in Padilla, Justice Samuel Alito noted, “Nothing is ever simple with immigration law.” A note in the Harvard Law Review chose to provide a sharper critique of the system, writing: “This complexity has rendered the presence of competent counsel even more important for safeguarding immigrant interests and promoting fairness in immigration proceedings.”

The same piece specifies two nuanced rules to illustrate just how complex U.S. immigration policies are. The first example centers on the changes that the Illegal

---

89 Id.
90 See Lok v. I.N.S., 548 F.2d 37, 38 (2nd Cir. 1977).
Immigration Reform and Immigrant Responsibility Act of 1996 (IRIRA) brought to the nation’s standards for relief from deportation. Among the overhauls that the IRIRA brought included a lengthening of the minimum period of residency that noncitizens had to demonstrate to possibly waive deportation based on prior residency. Under the IRIRA, immigrants had to demonstrate that they had “seven years of continuous residence, and five years of lawful permanent residence,” as well as a clean criminal record, to remain in the United States.

While the IRIRA’s lengthened requirements were made explicitly clear, exceptions existed, so long as a noncitizen could discover them. In I.N.S. v. St. Cyr, the Court clarified that any noncitizen who accepted and entered into a plea deal before the IRIRA’s implementation would be subject to prior standards of residency to waive deportation. Even today, discrepancies exist between certain classes of noncitizens in their inclusion under the IRIRA. Some courts have found that if an undocumented person has pleas that existed both before and after the implementation of the IRIRA, then the commencement date of their immigration proceeding would act as the date for applying the proper standard. Yet all of these exceptions are so vague and complicated that typically only lawyers that readily access immigration information know them; experience that is far beyond the knowledge of an average undocumented person facing deportation.

A similar confusing exception applies to the Stop-Time Rule, a condition established by the IRIRA that aimed to better track and enforce the duration of residency that an undocumented person could claim when applying for deportation relief. The rule established that the time accumulated to meet the requirement of “seven years of continuous residence” ended immediately when an undocumented person was served with a Notice to Appear. But unbeknownst to most noncitizens and citizens alike, the Stop-Time Rule does not apply to the other residency condition of the IRIRA – the five-year lawful permanent residence in the United States. This discrepancy created a loophole where noncitizens with more than seven years of continuous residence but less than five

96 Pascua v. Holder, 641 F.3d 316, 321 (9th Cir. 2011); Enriques-Gutierrez v. Holder, 612 F.3d 400, 412 (5th Cir. 2010); Garcia-Padron v. Holder, 558 F.3d 196, 204 (2nd Cir. 2009).
years of permanent residence were served with Notices to Appear – and unknowingly qualified for the waiver under the IRIRA while waiting for their removal hearing.

The essential takeaway from the Harvard Law Review’s two examples - of the *St. Cyr* exception to the IRIRA and the nuances of the Stop-Time Rule – is far beyond the simple conclusion that immigration law is complex. It is that immigration law is always morphing; constant adjustments and interpretations frequently arise, requiring counsel to properly understand to ensure each noncitizen has the best possible chance of proving their case for obtaining relief from deportation. Failing to do so not only neglects a right to due process, but also ignores the Supreme Court’s stance on immigration: that deportation is “unique” and requires “meticulous care” to ensure “fundamental fairness” for all involved.99

**B. Correlating Counsel with Successful Representation**

Due to the constantly increasing complexity of immigration law, representation seems necessary more often to achieve success in removal hearings. A litany of studies conducted on various groups in different locales associate counsel with successful representation. The link between the two is straight-forward: the knowledge and counsel that immigration attorneys provide to undocumented persons allows them to better execute their legal options and understand the motions that occur in a deportation hearing. While a causal link has not yet been proven between attorneys and successful representation, the data accumulated by numerous studies suggests that there is, at the minimum, a strong association between the two. In particular, there are three major studies that explain the positive correlation.

One study was published in 2016 by the American Immigration Council, an organization that chose to focus its analysis on noncitizens involved in removal hearings in New York City.100 The study found that from 2007 to 2012, of the nearly 272,500 noncitizens who chose to fight their removal hearings, just over half of them - 144,544 individuals - were successful in obtaining relief. However, only 6,597, or nearly five percent, of those noncitizens who obtained relief did so successfully without counsel. The other 137,947 undocumented persons who obtained relief did so with the assistance of an

---


100 INGRID EAGLY AND STEPHEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT, AMERICAN IMMIGRATION COUNCIL (2016).
attorney or similar counsel.\textsuperscript{101} The study’s findings imply that it is incredibly rare for noncitizens who lack attorneys to prevail in removal hearings.

A 2014 Stanford Law School study, which examined a group of noncitizens facing deportation over a year in the San Francisco Bay Area, drew a similar conclusion.\textsuperscript{102} In their report, “Access to Justice for Immigrant Families and Communities,” the authors concluded, “Those with lawyers are three times more likely to win their deportation cases than those without attorneys, yet two-thirds of detained immigrants have no legal representation at any point in their removal proceedings.”\textsuperscript{103}

Even when limiting the overall pool of subjects to a particular group of noncitizens, the same association between counsel and successful representation holds. Syracuse University’s Transactional Records Clearinghouse (TRAC) performed a study on unaccompanied minors involved in removal hearings.\textsuperscript{104} They concluded that from 2012 through 2014, seventy-three percent of minors who received representation were allowed to stay in the United States, against fifteen percent who appeared alone without any representation.\textsuperscript{105} It is crucial to note a causal link between the presence of counsel and an individual’s ability to obtain relief from deportation has not yet been established. However, the research and data presented so far illustrate a clear association between counsel and success in removal hearings.

\section*{C. Lack of Solvency: The Status Quo’s Dearth of Representation}

Critics of providing a right to counsel for noncitizens in removal hearings point out that the association between counsel and successful applications for relief do not necessarily warrant a constitutional guarantee of appointed counsel. Many point out that in the status quo, undocumented persons can access outside organizations that may provide representation. While this is true to a certain extent, as noncitizens in removal hearings are given information about local immigration attorneys and law clinics to contact for possible support, this patchwork quilt of resources still leaves plenty of undocumented persons

\begin{flushleft}
\footnotesize
\textsuperscript{101} Id.
\textsuperscript{102} STAN. LAW SCHOOL’S IMMIGRANT RIGHTS CLINIC AND NORTHERN CAL. COLLABORATIVE FOR IMMIGRANT JUSTICE, ACCESS TO JUSTICE FOR IMMIGRANT FAMILIES AND COMMUNITIES: STUDY OF LEGAL REPRESENTATION OF DETAINED IMMIGRANTS IN NORTHERN CALIFORNIA (NOV. 2014).
\textsuperscript{103} Id.
\textsuperscript{104} Syracuse University Transactional Records Clearinghouse, Part II of TRAC Series on Juveniles and Families in Immigration Court, \textit{REPRESENTATION FOR UN-ACCOMPANIED CHILDREN IN IMMIGRATION COURT} (February 13, 2017, 10:25 AM), http://trac.syr.edu/immigration/reports/371/.
\textsuperscript{105} Id.
\end{flushleft}
falling through the system’s cracks. The Department of Justice’s annual report on removal hearings in 2016 noted that nearly forty percent of noncitizens who appeared at their initial removal hearing did so without any sort of legal representation. This figure demonstrates the shortcomings of the status quo: while some purport that existing resources are sufficient to meet the legal needs of undocumented persons, the reality is that a large portion of noncitizens go unrepresented in their removal hearings.

Additionally, the immediate availability of legal counsel for noncitizens has been limited to certain demographics and locales. In their piece, “A National Study of Access to Counsel in Immigration Court,” Ingrid Eagly and Steven Shafer of the University of Pennsylvania Law Review determined that access to a free attorney or legal clinic is highly dependent on a noncitizen’s geographical proximity to a metropolis, with larger cities associated with a higher likelihood of representation. A similar association arises with nationality, with noncitizens of Asian descent having far more access to cultural-based legal support than their Latino counterparts. This means that if a noncitizen happens to be in a rural area far from a major city, their chances of finding any form of affordable representation plummet – along with their chances for obtaining relief.

Even if a noncitizen can get in contact with a legal clinic, his or her chances of obtaining representation are still slim. Across the country, legal clinics are strained, both by limited resources and a constantly increasing number of potential clients. At the George Washington University Law School’s Immigration Law Clinic in Washington, D.C., clients must be arraigned for just one of the locale’s multiple removal courts to be eligible for the clinic’s services, a massive limit that reflects the overwhelming number of cases across the entire D.C.-Maryland-Virginia area. Those who are eligible for a law school clinic’s services are still at somewhat of a disadvantage: the representation offered by these clinics are mostly composed of law school students, assisted by a legal professor, seeking

106 U.S. DEPT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, supra note 5.
108 Id.
additional experience in a particular field of law; a far cry from federal immigration lawyers who have both years and experience on their side.\textsuperscript{110}

A similar situation arises for nonprofit organizations that specialize in immigration law. The Capitol Area Immigrant Rights (CAIR) Coalition is an organization located in the nation’s capital that, among other services, provides relief assistance for detained noncitizens facing deportation as part of their sentencing. Currently, the agency, at maximum efficiency, can only serve a fraction of the undocumented persons that reside in the seven jails that compose its service area. In 2015, the CAIR Coalition reported that out of 1,600 adults screened for deportation relief over ninety-one jail visits and countless phone calls, just 176 received full pro-bono representation by the agency due to staffing issue.\textsuperscript{111} Everyone else is simply read an explanation, a strong contrast to the supposed widely available resources that noncitizens can access to obtain counsel in removal hearings.

These gaps in representation force noncitizens to either show up unrepresented or take a gamble on other legal agencies or resources that offer support. However, by desperately turning to an “any means possible” search for representation, noncitizens are often hurting themselves even more, and losing money for it. In clinic-less areas, noncitizens often turn to law firms that appear to offer immigration services. Yet some of these firms are anything but: offering expensive services without any legal background to vulnerable noncitizens and ultimately accomplishing nothing.\textsuperscript{112} A recent white paper article in the South Carolina Law Review describes these fraudulent organizations in the context of the Latino community:

"Individuals and firms frequently market themselves as "notarios" or "immigration consultants" to take advantage of people within insular immigrant communities who lack awareness with regard to the United States' legal system. Unauthorized practice of immigration law (UPIL) continues to be rampant in the United States. Many of these practitioners "capitalize on the status of the notario público [literally translated from Spanish to "notary public"] in some Latin American countries, where..."

\textsuperscript{111} Capitol Area Immigrant Rights Coalition, \textit{supra} note 77.
\textsuperscript{112} Mendoza-Mazariegos v. Mukasey, 509 F.3d 1074, 1077 footnote 4 (9th Cir. 2007) (stating that the "immigration system in this country is plagued with 'notarios' who prey on uneducated immigrants").
these legal professionals enjoy formal legal training and authority to provide legal assistance.\textsuperscript{113}

All of these accounts, opinions, statistics, and reports illustrate a few simple truths of our nation’s removal court system. First, immigration law is incredibly complex, to a degree that a seasoned lawyer is almost always necessary for establishing a solid case for relief. Second, attorneys do make a significant difference in these hearings. Finally, the current framework established to have undocumented people access counsel is riddled with holes: at the minimum, noncitizens turn to overworked clinics to seek support; and at the worst, they become victims of scams designed to take advantage of this vulnerable population. The status quo is problematic, and a clear-cut legal solution is long overdue.

\textbf{V: Illustrating a Solution for Undocumented Persons to Access Attorneys}

\textit{A. Possible Solutions}

Providing access to counsel for noncitizens could come from either the Supreme Court or Congress. The Court could issue a decision in a noncitizen rights case that unilaterally grants all undocumented persons the right to an appointed attorney during a removal hearing. This move would not exactly be unprecedented in terms of the discourse that the Court has provided in previous opinions. The Court has made it clear that at various points in its history, it has not been content with the United States’ removal hearing system. It states that deportation as a consequence is uniquely harmful and should be treated carefully, that deportation itself is not strictly a civil manner, and that if massive imbalances between both parties exist in a major civil trial, counsel may be needed to ensure due process.\textsuperscript{114} No matter what the statutes that govern removal hearings state, the Court has expressed its concern with the process, and has often suggested that there are constitutional liberties that may be at risk during them. This view is also expressed in a Harvard Law Review note, which states:

\begin{quote}
It cannot be overemphasized that while the statutory right to counsel fails to provide counsel at government expense, the federal courts have recognized that the Constitution provides an independent basis for determining whether an individual is entitled to assigned counsel. The
\end{quote}


\textsuperscript{114} \textit{See} Bridges, 326 U.S. at 154; \textit{Padilla}, 559 U.S. at 366-367; and \textit{Turner}, 131 S.Ct. at 2519 (2011).
statute does nothing to undermine constitutional claims for assigned counsel.\textsuperscript{115}

While the Supreme Court has demonstrated concern for the current state of removal hearings, it is unlikely that it will, in the near future, issue a landmark decision that gives all noncitizens the right to counsel. This is mainly because previous Courts have chosen to avoid granting sweeping rights to noncitizens, instead issuing decisions on a case-by-case basis. In \textit{Turner}, the Court passed over the opportunity to define the types of civil cases that warrant appointed counsel, and instead limited its decision to an evaluation of the Petitioner’s situation: a civil case in South Carolina between two divorced parents.\textsuperscript{116}

Similarly, lower courts have tended to grant these rights to specific sub-groups of noncitizens: \textit{Franco-Gonzalez} for the mentally disabled and, potentially, a future version of \textit{J.E. F.M.} for unaccompanied children.\textsuperscript{117} Even \textit{Aguilera-Enriquez v. I.N.S.}, a case that confirmed the right to due process for all noncitizens, clearly stated that the determination of what constituted “fundamental fairness” and what necessitated appointed counsel would likely be made on a case-by-case basis by the courts, not in broad, sweeping decisions.\textsuperscript{118}

Notably, some justices have made it explicitly clear that the responsibility of resolving the removal hearing crisis lies not with the judiciary, but rather, with the other two branches of government. In her previously mentioned concurrence to \textit{J.E. F.M. v. Lynch}, Judge McKeown added:

\begin{quote}
Congress … should not simply wait for a judicial determination before taking up the “policy reasons and . . . moral obligation” to respond to the dilemma of the thousands of children left to serve as their own advocates in the immigration courts in the meantime. The stakes are too high.\textsuperscript{119}
\end{quote}

Judge McKeown’s statement, which calls for Congress to take immediate action and consider the rights of unaccompanied children in removal hearings, illustrates the belief that the burden of action for resolving this crisis lies in the legislative branch of the U.S. government. This opinion can be expanded to include all noncitizens: Congress

\begin{itemize}
\item \textsuperscript{116} \textit{Turner v. Rogers}, 131 S.Ct. 2507, 2519 (2011).
\item \textsuperscript{117} \textit{Franco-Gonzalez v. Holder}, 767 F. Supp. 2d 1034, 1058 (C.D. Cal. 2011); \textit{J.E.F.M. v. Lynch}, 837 F.3d 1026, 1033-1034 (9th Cir. 2016).
\item \textsuperscript{118} \textit{Aguilera-Enriquez v. I.N.S.}, 516 F.2d 565, 568 (6th Cir. 1975).
\item \textsuperscript{119} \textit{Id.} at 1057.
\end{itemize}
possesses the unique ability to change current immigration law in a clear, quick, and effective manner.

The alternative to the Supreme Court solution is to have Congress establish a broad-based categorical right to an appointed attorney for all undocumented persons in removal hearings. This could be done by simply creating an amendment to the INA that allows for noncitizens involved in removal hearings to have counsel at the expense of the government. Such a move would not be without precedent. In past years, Congress has granted a right to counsel for juveniles in delinquency proceedings, noncitizen violent felons in felony trials, and convicted sex offenders in civil hearings.\(^{120}\) Granting appointed counsel to all involved in removal hearings is certainly within the legislative body’s powers, and past Congresses have easily amended immigration legislation with a simple majority vote. Even if such a move appears unlikely in the status quo, Congressional opinions change quickly over time, and with a few cycles of turnover, any changes are possible.

Another option that is open to both Congress and the Supreme Court would be to grant the right to appointed counsel in removal hearings for limited groups of noncitizens, similar to how lower courts have operated.\(^ {121}\) If this were to happen, the likeliest groups to receive such rights would be those deemed most “vulnerable” or “entitled” in the entire process, such as unaccompanied children, the mentally disabled, or legal permanent residents.\(^ {122}\) The Harvard Law Review is an advocate of this option, writing:

First, if a broad categorical right to counsel were recognized, it would likely siphon away much-needed funds from criminal defense or other tightly constrained areas. Second, while neither a limited nor a categorical right to counsel appears easily achievable, the latter is likely to be substantially less feasible. Put otherwise, the possibility of persuading lawmakers or courts to embrace a right to counsel is likely higher where that right is tightly limited to certain groups. Third, and relatedly, the class-specific right to counsel is consistent with a common law approach in judicial decisionmaking, in that it counsels incremental — though not necessarily insignificant — changes in the law. The common law approach allows courts to test the wisdom of a right to counsel by initially extending it to limited groups without foreclosing the possibility of broadening the right in the future. Fourth, a class-specific right to counsel recognizes that there are particular classes of noncitizens who have a better claim than others to appointed counsel,

---

\(^ {120}\) *In re Gault*, 387 U.S. 1, 1-2 (1967); 18 U.S. Code § 3142; 18 U.S. Code § 4248.


\(^ {122}\) *Developments in the Law: Immigrant Rights and Immigration Enforcement*, 126 Harv. L. Rev. 1565, 1669-70 (2013) (commenting on how “vulnerable” cases are those most likely to be granted appointed attorneys).
either because they may be more vulnerable or because they may have a stronger entitlement to the right.123

While the concerns listed above are reasonable, they are hardly reasons to prioritize certain classes of noncitizens over others. Cost, which serves as the first concern, is always a major consideration in budgetary affairs, but as detailed later, a program that represents all noncitizens involved in removal hearings is relatively inexpensive.124 Feasibility is the second point; admittedly, it is always far easier to do less of something than more of something else; but when a consequence as unique as deportation is involved, the law should be adjusted to equalize the playing field for all, not just some. The third concern is judicial tradition – similar to feasibility, tradition is an understandable reason for why a limited solution is easier - but fails to accomplish the constitutional solution for all. Finally, the Harvard Law Review argues that some groups have a heightened need for entitlement to counsel. It can be argued, however, that everyone involved in removal hearings have a heightened need to appointed counsel: they require attorneys to ensure symmetry of representation and due process in a proceeding with life-changing consequences. The tipping point for granting the right to counsel should not be based on what qualities some noncitizens arbitrarily have, but rather, the unconstitutional inequity that plagues the entire system.

Simply put, while limited-group entitlement to appointed counsel would be a step in the right direction, it would still leave millions of noncitizens without representation in removal hearings. When considering the arguments made in this article, it can be concluded that counsel is required to ensure due process in every removal hearing, not just ones that involve a particular subset of noncitizens. A failure to extend the right to counsel to all noncitizens involved in removal hearings is simply unconstitutional.

B. Noncitizen Universal Right to Counsel Program

While granting all noncitizens a universal right to counsel in removal hearings would appear difficult, especially when considering the logistics that would be involved in ensuring such a law was enforced, the feasibility of such a project is not as far-fetched as it

123 Id. at 1672-1673.
124 The Bronx Defenders, NEW YORK IMMIGRANT FAMILY UNITY PROJECT (February 14th, 2017, 8:00 PM), http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/.
seems. A guarantee for appointed counsel could be met by simply providing a government-funded, well-equipped immigration legal agency within a reasonable distance of every removal court in the country. When presented with a Notice to Appear, noncitizens could also be provided with the location and contact information of their local area’s assigned legal agency that is equipped to provide counsel for removal hearings at no charge. Doing this would ensure that every noncitizen has the opportunity to seek free, appointed counsel when involved in a removal hearing, and has the voluntary choice to exercise that right.

Although such a program may appear expensive, logistically complicated, and unprecedented, a smaller version of it currently exists in New York City. The Immigrant Family Unity Project is an agency that provides “free, high-quality legal representation to every indigent immigrants facing deportation in the City of New York, as well as to detained New Yorkers facing deportation in the nearby immigration courts in New Jersey.” Founded in 2013, the Project costs about five-and-a-half million dollars each year to hire lawyers, paralegals, and staff, which provide representation to all New York City noncitizens that face the possibility of deportation. While the program is still in its beginning years, data has shown that the program has been quite successful: despite a large number of cases, the Project reported that its success rate in removal hearings was on par with the national average, around seventy percent. Indeed, the project has been such a success that other major cities are beginning to explore the prospect of creating a similar program: in March 2017, San Francisco’s Board of Supervisors approved a similar proposal that would allow the city’s Public Defender’s Office to run a pilot program and represent noncitizens facing removal hearings. The case of New York’s Immigrant Family Unity Project is one that can be cross-applied, with similar functions, to all cities in the United States; and most would require lower costs due to less need when compared against New York.

C: Creating an Efficient, Less-Costly Court System

Granting a right to appointed counsel in removal hearings would not only ensure due process for noncitizens, but also could provide tangible benefits for the general
population. There is a common misconception that providing noncitizens with attorneys during removal hearings would create a clogged court system where every undocumented person exercises their right to counsel and engages in a long, expensive trial. Instead, the opposite is true: immigration attorneys can quickly analyze cases and determine if a noncitizen has a viable path to relief. If one is unachievable, these attorneys would often inform noncitizens that any court battle would be long and ultimately unfruitful, and advise them to drop the case. While this statement appears counterintuitive to the goals of many lawyers, who may find it in their best interest to extend the length of cases to charge as much as possible. Yet this factor is nonexistent in court-appointed or nonprofit programs such as New York’s, where staff are paid an annual salary, not on a per-case amount. This pay structure not only relieves any undocumented persons of expensive legal fees, but also removes the incentive for an attorney to prolong a trial to earn more money. In the words of New York’s program:

While NYIFUP maximizes the number of families that can be kept together, some immigrants facing deportation have no viable claim under existing law. When there is no possibility of release or staying in the country, it often is in the best interests of individuals facing deportation not to unnecessarily extend their time in detention.\(^{129}\)

Even if a noncitizen chooses to fight for relief in court, merely having representation would increase efficiency in the removal court system. This is because respondents are far more likely to appear as long as they have representation, which may provide some level of confidence to noncitizens. According to a 2016 study conducted by the American Immigration Council, ninety-five percent of minors who had an attorney actually attended their removal hearings, a figure far larger than those who lacked representation and still appeared in court.\(^{130}\) By providing representation, the government could raise the number of noncitizens who appear for their removal hearing, and reduce the massive backlog of rescheduled cases that currently lies on most dockets.

Another major critique of creating such a massive guarantee of representation is cost: the amount of money needed to hire attorneys to defend all noncitizens involved in

---


\(^{130}\) Eagly and Schafer, supra note 101.
removal hearings is perceived to be massive. While the figure is large, it is not extraordinary: the anticipated maximum for any major U.S. city’s program could reach around six million dollars each year – with New York City’s five-and-a-half million dollar annual allocation for NYIFUP setting a high standard.\(^{131}\) Most jurisdictions and locales would see a far smaller cost due to a much smaller immigrant population; while these costs are difficult to estimate, they would be cheaper than New York’s current program, which serves one of the largest immigrant communities in the United States.

Furthermore, many of the costs required for such a program could possibly be offset by the savings accrued from removing current costs associated with deportation hearings. As asserted earlier, providing access to an attorney exponentially increases the efficiency of immigration courts by limiting the cases that reach a removal hearing to those that truly have a chance for relief, and ensuring that noncitizens actually appear for trial. Much of the backlog and costs currently associated with our court system are associated with constantly-rescheduled appointments for no-shows, as well as a massive number of relief petitions and trials – most of whom will never qualify for relief. By providing counsel, courts could potentially be able to offset the costs of providing lawyers by accruing savings from reducing massive inefficiencies elsewhere. Additionally, other savings could be reaped in other institutions, as noted by New York’s IFUP Program:

> A statewide system of universal representation would save New York State employers millions in costs associated with replacing employees who are lost due to deportation or detention; would reduce costs associated with students who drop out of school due to the deportation or detention of a parent; would reduce costs to the State Child Health Insurance Program (SCHIP) that result from the loss of a parent’s employer-provided coverage; would ease state costs related to foster care for children who are left without caregivers following detention or deportation of a parent.\(^{132}\)

While it may seem logical that creating programs to protect a large amount of noncitizens from deportation would generate massive costs and clog up our nation’s immigration courts system, the opposite appears to be the case. By determining what cases are truly viable for relief, ensuring that noncitizens appear for their court hearings, and reducing a


\(^{132}\) Id.
backlog of pending or rescheduled cases; appointed counsel could assist our nation’s removal hearings system in ways that are not simply limited to undocumented persons.

Conclusion

Despite the continued pleas of Court opinions and legal advocacy groups, the U.S. system of deporting individuals still rests upon a nearly 125-year-old ruling that has been upheld through decades of globalization and progress. The detriments of the current system are a product of its rules: by not providing noncitizens with appointed counsel, the removal system evokes fear and desperation in its targeted victims, creating unwanted consequences: constant rescheduling for those who fail to show, traditionally rash and uninformed decision making by those who do show, and a prolonged system of noncitizens blindly stumbling their way through a labyrinth of immigration law in search of relief.

The best solution to the aches of our immigration system is also the most straightforward one. Providing noncitizens with appointed counsel in removal hearings will dramatically expedite the system, saving money by removing consistent delays and unnecessary hearings. It would reduce the backlog of cases constantly rescheduled by our courts by helping increase the number of noncitizens who appear at removal hearings. Most importantly, it would address the constant calls of U.S. courts to treat noncitizens facing deportation fairly under the law, guaranteeing fundamental fairness and due process in cases where a loss can tear apart lives. Ultimately, the strongest solution that can grant all of these benefits is a full, unrestricted right to representation for every single noncitizen involved in a removal hearing. Providing undocumented persons with a universal right to counsel will ensure that each individual facing the prospect of deportation will be able to make an informed decision – unlike the one that Tiffany was forced to make.
The Growing Legal Disconnect Over Marijuana: Evaluating the Effects of the Marijuana Revolution

Itiel Wainer

Introduction

Since 1970, marijuana has been classified as a schedule I drug, the strictest classification available under the Controlled Substances Act (CSA). Ever since this classification, and the following government initiative to fight drug use, the success of the so-called “war on drugs” has been disputed. The rate of marijuana use among high school seniors is approximately the same as it was in the 1970s, yet the loathed economic and societal costs of the war on drugs, economic potential from profit off marijuana, and generational shifts in ideology questioning the racial motives of the war on drugs have radically changed public opinion of marijuana. This change in public opinion has culminated in a “marijuana revolution.” Twenty-one states and the District of Columbia have decriminalized marijuana, twenty-five states and the District of Columbia have legalized marijuana for medicinal use, and four states and the District of Columbia have legalized marijuana for recreational use.

The 2016 election was also a major success for advocates of medical and recreational legalization. Voters in California, Massachusetts, Maine, and Nevada all chose to legalize recreational marijuana. In Arizona, a similar initiative failed, but

---

found support among forty-eight percent of voters. Florida, North Dakota, and Arkansas all passed medical marijuana initiatives as well, with Montana rolling back restrictions on its existing laws. However, the election of President Donald Trump and the confirmation of Attorney General Jeff Sessions constitute a setback at the federal level for marijuana legalization, as Sessions is now free to enforce his long-held hardline stance regarding federal marijuana law enforcement.

With many states moving toward legalization and the federal government moving conversely, it is critical to review marijuana’s strict classification. The Drug Enforcement Agency (DEA) refuses to budge on this issue, consistently reaffirming its belief that marijuana should be classified as a Schedule I drug in an August 2016 announcement. The DEA’s insistence on marijuana’s current classification signals that while the government has been willing to allow medical and recreational legalization, it will not remove its oversight abilities. With the DEA refusing to reclassify marijuana, certain state laws will continue to contradict the federal enforcement of marijuana as a Schedule I drug, harming the burgeoning marijuana industry and its consumers.

The “marijuana revolution” has created a concerning dichotomy between state and federal laws regarding marijuana. The environment created by this dichotomy has made it extremely difficult for states to allow for the development of a medical or recreational marijuana industry. This in turn has damaged the lives of individuals at social and economic levels in states attempting to legalize. The increasingly prevalent legal contradiction between state and federal marijuana laws will only grow worse as more states move toward legalization unless the federal government takes action to clear up the legal confusion, and in doing so, clears the way for the marijuana revolution.

---

I. History of Marijuana Legalization

By classifying marijuana as a Schedule I drug, the Controlled Substances Act (CSA) prohibits the manufacture, distribution, dispensation, and possession of marijuana.\(^7\) A Schedule I drug, defined as “[a substance that has] no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and high potential for abuse,” has the strictest classification possible.\(^8\) Whether marijuana truly fits this classification is an important question that will be addressed in the final section of this article. Regarding punishment, the mere possession of marijuana generally constitutes a misdemeanor subject to up to one year of imprisonment and a minimum fine of $1,000.\(^9\) The cultivation and/or distribution of marijuana or possession with the intent to distribute is subject to up to five years’ imprisonment and fines of up to $250,000.\(^10\) However, state laws can provide much stricter punishment. In Oklahoma for example, mere possession of any amount of marijuana brings a minimum of one year of imprisonment. Sale or distribution in Oklahoma, depending on the amount in question, can lead to punishment anywhere between two years and life in prison.\(^11\)

While federal law has opposed marijuana since the 1980s, recent trends have shifted public opinion away from the federal law’s stringent stance under the CSA. In 1969, eighty-four percent of Americans believed the use of marijuana should be illegal. However, in 2014, only forty-five percent believed it should be illegal while fifty-two percent believed it should be legal.\(^12\) Many negative aspects of marijuana prohibition that have slowly gained more national attention are responsible for this shift in public opinion.\(^13\) For example, fewer people believe that marijuana is linked to hard drug use.\(^14\) Additionally, the cost of prohibition has

\(^12\) Mark Berman, how public opinion on marijuana has changed over the last half-century, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/02/24/how-public-opinion-on-marijuana-has-changed-over-the-last-half-century/?utm_term=.cc6eac9b51ef.
\(^13\) Id.
\(^14\) Id.
become widely unpopular.\textsuperscript{15} However, the most important aspect is generational shifts, with sixty-three percent of millennials supporting marijuana legalization.\textsuperscript{16} These trends illustrate that as time progresses and millennials constitute a larger portion of the voting population, marijuana will become more acceptable and calls for legalization will only amplify.

Growing popular support for marijuana has already yielded many different ballot initiatives and state laws moving toward both medical and recreational legalization. However, these state initiatives differ strikingly in implementation and scope. For example, Colorado’s Amendment 64 legalized private marijuana cultivation, possession, and consumption.\textsuperscript{17} The amendment also provided means for commercial regulation, allowing the licensing of marijuana facilities and stores.\textsuperscript{18} Similar to Colorado, Washington Initiative 502 legalized recreational use of marijuana for adults aged 21 and imposed taxes.

There are a few nuanced ways that the Washington Initiative differs from the Colorado Amendment. First, the Washington Initiative maintains clear separation between pot growers, processors, and retailers, while the Colorado Amendment allows for the vertical integration of the different sectors of the industry.\textsuperscript{19} Second, the Colorado Amendment allows counties and municipalities to opt-out, whereas the Washington Initiative controversially preempts local drug laws.\textsuperscript{20} Under the Colorado Amendment, tax revenue goes into a Marijuana Cash Fund, wherein the monies are used to fund school construction, expanded education, law enforcement, and most importantly subsidies to local governments that allow marijuana sales.\textsuperscript{21} Conversely, with the Washington Initiative, the money first goes to fund administrative costs, various research projects, and prevention or substance abuse programs. Later, the money is split between marijuana-specific programs,

\textsuperscript{15} \textit{Id.}
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{COLO. CONST. Art. XVIII, § 16 (2016).}
\textsuperscript{18} \textit{Id.}
\textsuperscript{20} \textit{Id.} at 1.
\textsuperscript{21} \textit{Id.} at 1.
general healthcare spending, and the state’s general fund. The Washington Initiative also limits the amount of retail stores statewide to 334, while states like Alaska, Colorado, and Oregon place no such cap. All in all, compared to other states that have legalized recreational marijuana, Washington seems to be the strictest.

A. Federal Government Reactions to Increasing Marijuana Support

With medical marijuana now legal in over half of all states, the executive and legislative branches have issued multiple responses to the marijuana revolution. Through the Office of National Drug Control Policy, the Obama Administration announced that it “steadfastly opposes legalization of marijuana and other drugs because legalization would increase the availability and use of illicit drugs, and pose significant health and safety risks to all Americans, particularly young people.”

While this did not clarify the lengths to which the Obama Justice Department was willing to defend the state legalization of controlled substances, the Office of National Drug Control Policy said, “As with state medical marijuana laws, it is important to note that Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime. The Department of Justice (DOJ) is committed to enforcing the CSA consistent with these determinations.” While this did not paint the clearest of pictures, it indicated that the DOJ was willing to reserve its right to enforce federal marijuana laws even when state laws contradicted it.

The DOJ also released a memorandum, colloquially known as the 2013 Cole Memorandum, outlining priorities for law enforcement regarding states legalizing marijuana. This was intended to signal a willingness to allow states to

---

22 Id. at 1.  
The Growing Legal Disconnect Over Marijuana

proceed with legalization uninhibited by the Federal Government. However, the memorandum stipulates:

The Department’s guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.26

While the 2013 Cole Memorandum outlined that the DOJ would allow states to legalize recreational marijuana, the DOJ reserved its ability to enforce federal law when it contradicts with state law. This memorandum prevents states from truly having the space to legalize marijuana without some form of federal intrusion.

While the Obama Administration’s stance on marijuana was defined by an unwillingness to definitively pursue any one side of this issue, the early signs show the Trump administration may be more willing to enforce the CSA when it comes to recreational marijuana. Attorney General Jeff Sessions has a history of ardent opposition to marijuana legalization. In April 2016 he claimed that marijuana is a “very real danger” and is “not the kind of thing that ought to be legalized.”27 Sessions has also called marijuana reform a “tragic mistake” and criticized the Obama White House for not committing to enforcing the CSA.28 When asked if he would use federal resources to prosecute people using marijuana in accordance with their state laws, Sessions responded, “I won’t commit to never enforcing federal law…”29 In terms of the Trump administration’s plans for CSA enforcement, White House Press Secretary Sean Spicer said that President Trump “understands the pain and suffering that many people go through who are facing

28 Higdon, supra note 5.
especially terminal diseases, and the comfort that some of these drugs, including medical marijuana, can bring to them.”

However, in regards to recreational marijuana, Spicer said, “I do believe that you’ll see greater enforcement of it.”

While this might seem disconcerting for advocates of recreational marijuana, a statement by Attorney General Sessions regarding the Cole Memorandum might provide hope. While speaking to reporters, Sessions said, “The Cole Memorandum set up some policies under President Obama’s Department of Justice about how cases should be selected in those states and what would be appropriate for federal prosecution, much of which I think is valid.”

While the Trump administration is yet to set a clear sign of where they’ll go regarding federal enforcement of the CSA, one can safely presume that the precedent regarding enforcement set by President Obama will continue.

Congress has attempted to respond to the growing tide of marijuana legalization. The Rohrabacher-Farr amendment (also known as the Hinchey-Rohrabacher amendment), which was initially introduced in 2003 and implemented in 2014, prohibits the use of federal funds to prevent certain states from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. This was a major win for advocates of medical marijuana legalization. However, similar to the Cole Memorandum, the actual effectiveness of this law is ambiguous at best. In United States v. Nixon, Nixon pled guilty to aiding and abetting a drug-involved premise and was sentenced to three years’ probation. The terms of probation required the defendant, Alan David Nixon, to refrain from use of a controlled substance.

After Congress enacted the Rohrabacher-Farr amendment, Nixon requested that the conditions of probation

---

31 Id.
32 Matt Ferner, Jeff Sessions Suggests a Crackdown Isn’t Coming for Legal Weed, HUFF POST (Mar. 15, 2017), http://www.huffingtonpost.com/entry/jeff-sessions-legal-marijuana_us_58c967e0e4b03b1fe5cf5ca8.
34 United States of America v. Alan David Nixon, 839 F.3d 885, 885 (9th Cir. 2016).
35 Id. at 885.
be modified on the ground that the amendment allowed him to use marijuana for medical purposes in compliance with California law.\(^{36}\) The court held that the Rohrabacher-Farr amendment does not impact the ability of a federal district court to restrict the use of medical marijuana as a condition of probation.\(^{37}\) This exemplifies how federal agencies avoid the amendment and complicate legalization efforts.

### B. Legal Precedent Regarding the Interplay of Federal and State Marijuana Laws

The Commerce Clause empowers Congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”\(^{38}\) The interpretation of the Commerce Clause has evolved over time. In *United States v. Lopez*, Alfonso Lopez, a twelfth-grade student who brought a firearm to his school in San Antonio, Texas, was charged under the Gun-Free School Zones Act of 1990, which prohibits “any individual knowingly to possess a firearm at a place that [he] knows...is a school zone.”\(^{39}\) The 5th Circuit ruled in favor of Lopez. The Supreme Court later ruled that Congress only has the power to regulate “the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce.”\(^{40}\) This same sentiment was upheld in *United States v. Morrison*, in which respondent Antonio Morrison was charged under the Violence Against Women Act of 1994 (VAWA) for raping a female student at Virginia Tech.\(^{41}\) The Supreme Court affirmed the district and circuit court decisions, overturning the VAWA provision allowing women the right to sue their attackers in federal court due to VAWA’s reliance on the Commerce Clause.\(^{42}\)

However, in *Gonzalez v. Raich*, the Court softened its stance that the Congress has jurisdiction over non-economic activity under the Commerce Clause.

\(^{36}\) *Id.* at 887.

\(^{37}\) *Id.* at 886.

\(^{38}\) U.S. Const. art. I, § 8, cl. 3.


\(^{40}\) *Id.* at 558.


\(^{42}\) *Id.* at 599.
and extended Commerce Clause jurisprudence to regulation of marijuana.\textsuperscript{43} After California legalized marijuana for medicinal use and the DEA seized doctor-prescribed marijuana from a patient’s home, a group of medical marijuana users sued the DEA, arguing that the CSA exceeded Congress’s Commerce Clause power since medical marijuana “did not substantially affect interstate commerce.”\textsuperscript{44} In a 6-3 decision, the Supreme Court overturned the Circuit Court’s ruling, deciding that the federal regulation of intrastate marijuana production is not an abuse of the Commerce Clause and that intrastate production of a good or commodity will likely affect an interstate commercial scheme.\textsuperscript{45}

In \textit{Gonzalez}, the Court only dealt with the question of whether the Commerce Clause permitted Congress to prohibit intrastate possession and use of marijuana, rather than the question of whether California law is preempted by the CSA.\textsuperscript{46} The question was somewhat answered by the court in \textit{United States v. Oakland Cannabis Buyers’ Cooperative}. The Court ruled that there “is no medical necessity defense under the CSA, even where state law recognizes such defense.”\textsuperscript{47} Essentially, this ruling furthered a parameter of preemption set under the CSA itself, being that the only situation where the CSA fully preempts state law is in cases where there is “a positive conflict” between state law and the CSA so that the “two cannot consistently stand together.”\textsuperscript{48}

Further, the Tenth Amendment states, “Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\textsuperscript{49} Therefore, the Tenth Amendment prevents the federal government from simply forcing states to prohibit marijuana.\textsuperscript{50} In \textit{New York v. United States}, the Supreme Court found that although Congress had the

\begin{flushleft}
\textsuperscript{43} Alberto Gonzales v. Angel Raich, 545 U.S. 1, 16 (2005).
\textsuperscript{44} \textit{Id.} at 4.
\textsuperscript{45} \textit{Id.} at 16.
\textsuperscript{49} U.S. CONST. amend. X.
\textsuperscript{50} Garvey, \textit{supra} note 46, at 6.
\end{flushleft}
authority under the Commerce Clause to regulate low-level radioactive waste, it had only the power to regulate the waste directly—Congress could not require that the states perform the regulation themselves. In other words, Congress cannot hijack the state legislative process. The Tenth Amendment bars the federal government from forcing states to implement federal policy, a distinction that will be important in the interpretation of the Supremacy Clause with regards to marijuana regulation.

Article VI, Section Two of the Constitution, known as the Supremacy Clause, establishes that the federal constitution and federal law takes precedence over state laws and constitutions. While this would generally mean state law is preempted, the classification of marijuana operates under a system of dual sovereignty. Under Title 21 U.S.C. §903 of the United States Code, Congress does not intend to exclude state law, “on the same subject matter which would otherwise be within the authority of the State.” Instead, the relationship between the federal ban on marijuana and state exemptions “must be considered in the context of two distinct sovereign bodies, each enacting separate and independent criminal regimes with separate and independent enforcement mechanisms, in which certain conduct may be prohibited under one sovereign and not the other.”

Marijuana regulation jurisprudence creates a unique situation in which state and federal marijuana laws are logically inconsistent, as both laws exist within the same sphere, yet the law in one entity does not alter the legality of that same conduct in the other entity. This muddled legal precedent concerning marijuana creates entanglements and confusion that risk damaging the developing marijuana industry and its consumers.

52 U.S. CONST., art. VI, §2.
54 GARVEY, supra note 46, at 8.
II. Implications of Legal Disconnect for the Different Phases of the Marijuana Industry

The multiple phases of the burgeoning marijuana industry, including production, dispensation, and consumption are all detrimentally affected by current legal ambiguities. The dual sovereignty system under which which marijuana law enforcement operates has posed several legal questions. Most importantly it asks, at what point does federal marijuana law preempt state law? This section attempts to both clarify and explain the detriments of the dual sovereignty system and answer the resulting legal questions.

A. Implications for Legal Marijuana Producers and Distributors

The US Bureau of Reclamation (BOR) announced that it would not allow any federally controlled water to be used on marijuana crops because of the drug’s illegal classification under the CSA. 55 This announcement has important consequences for states undergoing the process of legalizing marijuana. For example, two-thirds of Washington’s irrigated land is controlled by the BOR, which has major implications for marijuana farmers in the state. 56 In addition, five other states with BOR projects legalized marijuana for medical use. 57 As the marijuana revolution continues, this irrigation policy could impact increasingly more states, as the BOR is the largest water distributor in the country. 58

The BOR, in accordance with DOJ policy, is not taking any specific action to enforce their policy, instead opting to leave it up to individual irrigation districts. 59 However, the effectiveness of this BOR policy is limited by its legality in regards to enforcement by individual irrigation districts. For example, in Barker v. Sunnyside

---

56 Id.
Valley Irrigation District, the court claimed that rules adopted by irrigation districts “must be nondiscriminatory in their operation and effect, and be free from coercive aspects.” While this would not prevent the BOR from prohibiting water use for marijuana farmers, individual irrigation districts might be dissuaded by this discrimination clause. As of yet the Trump administration has made no comments regarding BOR marijuana policy; however, since their attitude toward marijuana legalization has so far been more aggressive than the Obama administration’s, it is safe to assume they will at the very least continue this policy.

Beyond inconvenience, impeding farmers from producing marijuana could dangerously limit the supply of legally produced marijuana. While states have been relatively transparent under their law as to who may possess and sell marijuana, they have very much ignored the issue of actually obtaining marijuana in the first place. Since states have reluctant to safeguard marijuana farmers and secure a legal supply of marijuana, medical dispensaries and patients must turn to the black market in order to obtain the medical marijuana to which they are legally entitled.

While it is challenging to legally grow marijuana, making a legitimate business out of the sale of marijuana is arguably much more difficult. Under federal law, banks and credit unions are prohibited from exchanging capital with marijuana related businesses. While marijuana law operates under dual sovereignty, banking laws and regulations do not. The United States operates under a banking system different from dual sovereignty known as “dual banking.” Banks can choose a federal charter issued by the Office of the Comptroller of the Currency or a state charter from a state banking regulator. State and federal financial institutions, unlike the marijuana industry, do not operate in distinct spheres. Rather, federal and state institutions coordinate enforcement efforts, creating a strikingly more

62 Id.
64 Id. at 604.
65 Id.
66 Id. at 605.
cooperative system. However, regarding certain issues, such as banking for legal marijuana businesses, federal regulation is pervasive and controlling.

The Money Laundering Control Act makes individuals and entities subject to criminal liability for money laundering. A financial institution commits money laundering if it conducts a financial transaction involving capital connected to a known “specified unlawful activity” while “knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity or to avoid a transaction reporting requirement under State or Federal law.” A financial institution also commits money laundering if it “knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000.” To remove any doubt, the money laundering statute defines the “manufacture, importation, sale, or distribution of a controlled substance” as “specified unlawful activity.” Therefore, a financial institution that knowingly processes any transaction for marijuana-related businesses commits the crime of money laundering. This creates a major hindrance for both distributors and consumers of legal marijuana, as it means many marijuana-related businesses cannot obtain loans, and consumers must pay in cash.

Another hurdle that marijuana businesses must overcome because of the ambiguity of the dual sovereignty system is presented in the form of taxation. Under Section 280E of the Internal Revenue Code, “no deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited.

---

67 Id. at 606.
68 Id. at 607.
70 Id.
71 Id.
72 Id.
73 Hill, supra note 62, at 617.
74 Id. at 601.
by Federal law or the law of any State in which such trade or business is conducted.” This means that marijuana merchants, unlike typical businesses, may not deduct their operating expenses when computing their federal income tax liability. This adds another inconvenience for a marijuana industry that was projected to have around $7.1 billion worth of sales in 2016.

B. The Implications for Legal Marijuana Consumers

The legal ambiguity and disconnect regarding marijuana law is made exceptionally clear in examining different legal questions that arise regarding how federal and state law affects consumers of legal marijuana. One such example arose in Colorado when Brandon Coats, a quadriplegic with a medical marijuana certificate who was employed by DISH Network, was fired for testing positive for marijuana during a random drug test. Coats filed suit against DISH Network, claiming his termination was in violation of state law, which prohibits an employer from terminating an employee for engaging in a lawful activity off the premises of the employer and during non-work hours. The main question before the Colorado Supreme Court was whether the Colorado “lawful activities statute” included medical marijuana, which was legal under Colorado law but illegal under federal law. The Court ruled against Coats, holding that “lawful activity” extends to both federal and state law. Several other courts have held similarly to Coats v. DISH Network, including Casias v. Walmart Stores Inc., Johnson v. Columbia Falls Aluminum Company, LLC, Ross v. Ragingwire Telecommunications, Inc., and Pernice v. City of Chicago. In each of these cases, the deciding court rejected claims that state anti-
discrimination laws prohibit private employers from terminating employees for state-authorized medical marijuana usage, indicating a clear nationwide legal trend.  

The next question for consumers of legal marijuana arises regarding federally assisted housing. The Department of Housing and Urban Development previously concluded that public housing agencies or owners “must deny admission” to applicants who are using any form of marijuana.  

In *Forest City Residential Management, Inc. v. Beasley*, the defendant, Kenyon Beasley, was diagnosed with multiple sclerosis and prescribed marijuana pursuant to the Michigan Medical Marijuana Act.  

Forest City later sought to terminate Beasley’s tenancy in the federally assisted housing complex. However, Beasley requested that Forest City grant her reasonable accommodation under the Fair Housing Act and allow her to use medical marijuana in her own rental unit. The court ruled that the CSA preempts the Michigan Medical Marijuana Act and that the Fair Housing Act does not require the plaintiff to grant a reasonable accommodation to use medical marijuana in its federally-assisted housing complexes.  

However, it is important to note that the basis of the court’s ruling regarding Fair Housing Act accommodation rested on the Department of Housing and Urban Development’s memo prohibiting medical marijuana use.  

III. Solution  

There are a multitude of ways the federal government can go about fixing the legal dis-connect affecting marijuana law. This section will review three plausible solutions: reclassifying marijuana, removing marijuana from the list of controlled substances, and amending the CSA. While each solution has its merits, the most

---

84 Id. at 725.  
85 GARVEY, supra note 81, at 34.
effective solution would be to amend the CSA to include exemptions for those abiding by state law.

A. Reclassifying Marijuana

Taking into account the standards set under the CSA, the classification that makes the most sense for marijuana is schedule III. The first standard set for a schedule III drug under the CSA is, “the drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.” Therefore, to see if marijuana meets this standard, one must compare the potential for abuse of marijuana to other substances in schedules I and II. The comparison most often pointed to is the one between marijuana and cocaine. Cocaine is currently classified as a schedule II drug, lower than marijuana’s current classification. However, the medical science is conclusive regarding cocaine’s higher potential for abuse than marijuana.\(^{86}\) Marijuana also has a lower potential for abuse than heroin, which is classified as a schedule I drug.\(^{87}\) Lastly, the synthetic version of THC, which is seen as more dangerous and potent, is listed as a schedule III drug.\(^{88}\) Marijuana has a lower potential for abuse than popular schedule I and schedule II drugs and is even found to be safer than a schedule III drugs that it bares similarities to.

The second standard marijuana must meet under the CSA to be a schedule III drug is, “The drug or other substance has currently accepted medical use in treatment in the United States.” Technically, one could argue this is a standard already met by marijuana, which has accepted medical use in twenty-fivefive states and the District of Columbia.\(^{89}\) that marijuana use has clear medical benefits. Medical marijuana can “control chronic non-cancer pain, alleviate nausea and vomiting associated with chemotherapy, treat wasting syndrome associated

\(^{86}\) Dirk W. Lachenmeier et al., *Comparative risk assessment of alcohol, tobacco, cannabis and other illicit drugs using the margin of exposure approach*, 5 SCI. REP. 1, 1 (2015).

\(^{87}\) Id.


\(^{89}\) Supra note 3.
with AIDS, and control muscle spasms due to multiple sclerosis.”90 Altogether, the positive effects of marijuana as medicine outweigh the negative ones.91

The third standard marijuana must meet is, “Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.” First and foremost, the potential for any dependence on marijuana at all is relatively low compared to other drugs with a similar classification.92 Second, the dependence on marijuana that is most often developed is characterized by psychological dependence rather than physical dependence.93 This characterization of dependence on marijuana coincides with the standard set forth by CSA for a schedule III drug. Lastly, for those who do gain dependence on marijuana, the experience of that dependence “tends to be less severe than that observed with cocaine, opiates, and alcohol.”94

Reclassifying marijuana as a schedule III drug would rectify some of the legal issues posed in this article. However, it would only do so for legal issues regarding medical marijuana in particular. While rescheduling may only solve issues facing the medical marijuana industry, this could be beneficial as doing so could help incrementally diminish the opioid epidemic in the United States. Deaths from drug overdoses have been rising over the past twenty years and have grown to become the leading cause of injury death in the United States.95 Medical marijuana consumption can act as a safer form of pain relief than opioids, since a marijuana overdose is virtually impossible.96 Rescheduling marijuana would allow medical marijuana to become more easily implemented across the United States, decreasing drug overdoses. In fact, among the ten states that enacted medical

---

90 Peter A. Clark et al., Medical Marijuana: Medical Necessity Versus Political Agenda, 17(12) MED. SCI. MONIT. 249, 249 (2011).
91 Id. at 252.
93 FRANJO GROTENHERMEN, CANNABIS AND CANNABINOIDS 237 (Ethan Russo, 1st ed. 2002).
94 Alan Budney, Marijuana Dependence and Its Treatment, 4 ADDICTION SCIENCE & CLINICAL PRACTICE 4, 13 (2007).
96 Wayne Hall, What has research over the past two decades revealed about the adverse health effects of recreational cannabis use?, 110 ADDICTION 19, 30 (2014).
marijuana laws between 1999 and 2010, states with medical marijuana laws had an almost twenty-five percent lower mean annual opioid overdose mortality rate compared to states without medical marijuana laws. 97 Beyond just opioids, marijuana can be used to reduce dependence on alcohol, prescriptions, and even illicit drugs. 98

From a recreational perspective, while reclassifying marijuana as a schedule III drug would alleviate some concerns in the marijuana industry (for example, the tax reduction restriction under section 280E of the Internal Revenue Code only applies to schedule I and schedule II substances), it would not be a sufficient fix as recreationally consumed marijuana would still effectively illegal for recreational purposes under the CSA. 99

B. Removing Marijuana from the List of Controlled substances

While completely legalizing marijuana at the federal level would fix the legal disconnect between state and federal marijuana enforcement, it would also create a new legal disconnect at the federal and international level. Through the 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the United States has long committed itself to a strict international drug control regime. 100 The United States’ role as a preeminent world power and major contributor to the international war on drugs ought to encourage policymakers to avoid collision between international treaties and domestic law. Specifically:

---

98 Amanda Reiman, Cannabis as a substitute for alcohol and other drugs, 6 HARM REDUCTION J. (2009).
[The United States] can summon powers that no other nation can summon, but it confronts risks that no other nation confronts. If you accept that premise, then the United States has a unique interest in securing reciprocal compliance from its treaty partners. It gets harder and harder to call out our partners for excessive flexibility within the drug treaty structures—or for that matter within other multilateral commitments—after we have claimed a lot of flexibility for ourselves.\footnote{Id.}

The International Narcotics Control Board (INCB), the body charged with enforcing the drug treaties, has already scolded the U.S. for becoming more lenient over federal enforcement of marijuana laws in recent years.\footnote{INT’L NARCOTICS CONTROL BD., REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 2012, at 11, U.N. Doc. E/INCB/2012/1, U.N. Sales No. E.13.XI.1 (2013).} However, it should be noted that in terms of enforcement mechanisms, the INCB is mostly limited to chastisements.\footnote{Keith Humphreys, Can the United Nations Block U.S. Marijuana Legalization?, HUFF. POST (Sept. 25, 2013), http://www.huffingtonpost.com/keith-humphreys/can-the-united-nations-block-marijuana-legislation_n_3977683.html}

While the possibility of contradicting international treaties is a negative, the financial benefits of removing marijuana from the list of controlled substances and allowing the “marijuana revolution” with less federal intrusion cannot be ignored. In savings from decreased spending on the “war on drugs” alone, not including revenue from taxation, the legalization of marijuana would save, both at the state and federal level, approximately $13.7 billion.\footnote{Jeffrey A. Miron, The Budgetary Implications of Drug Prohibition, DEPT OF ECON. HARV. UNIV. (Feb, 2010), http://scholar.harvard.edu/files/miron/files/budget_2010_final_0.pdf.} Regarding taxation, a mature marijuana industry could generate up to $28 billion in tax revenues for federal, state, and local governments.\footnote{Gavin Ekins, Joseph Henchman, Marijuana Legalization and Taxes: Federal Revenue Impact, 509 TAX FOUND. FISCAL FACT 1, 1 (2016).} For comparison, in Colorado marijuana brings in nearly double the amount of tax revenue that alcohol does.\footnote{Amy Gillentine Sweet, Marijuana brings more tax dollars than alcohol, COLORADO SPRINGS BUSINESS NEWS (Sept 15, 2015), http://www.csbj.com/2015/09/15/marijuana-brings-more-tax-dollars-than-alcohol/.} While not the most compelling reason for average Americans, the economic benefits of removing marijuana from the list of controlled substances could be a contributing factor in
taking a positive step in unifying the federal and state governments in a way beneficial to all Americans.

C. Amend the Controlled Substances Act

Through Congress, the Federal Government can amend the CSA and fix the legal issues plaguing marijuana law enforcement. A framework for how this would work is the Respect State Marijuana Laws Act of 2013, introduced by Congressman Dana Rohrabacher. This act would have amended the CSA so that certain provisions relating to marijuana enforcement would not apply to “any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marijuana.”107 This would ensure legal protection for every actor involved, from farmers to consumers.

Amending the CSA would create a solution that clears up domestic legal disconnect, while preventing the U.S. from reneging completely on its international commitments regarding drug policy. While the INCB did scold the United States for allowing Colorado and Washington to legalize recreational marijuana, provisions under the international treaties in question would prevent the U.S. for being held legally responsible for state legalization of recreational marijuana. Compliance under the 1961 Single Convention on Narcotic Drugs is subject to "constitutional limitations" and is undertaken with "due regard to [signatories'] constitutional, legal, and administrative systems."108 The 1971 Convention on Psychotropic Substances and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances contain similar provisions.109 These provisions ensure that if marijuana is legalized under the protection of the United States’ federalist system clearly enshrined in the constitution, with the federal government only enforcing prohibition in states that have not legalized, the U.S.

can legally abide by its international commitments and clear up the legal disconnect between states and the federal government regarding marijuana.\textsuperscript{110}

Domestically, this solution is ideal as it allows the federal government to continue enforcing marijuana’s status as a schedule I substance under the CSA in states that prohibit marijuana while injecting flexibility into the CSA for states that do wish to legalize marijuana.\textsuperscript{111} Amendment would provide pathway for states to legalize marijuana in whatever capacity they desire without fear of federal intrusion or legal confusion.

\textbf{Conclusion}

The marijuana revolution is undeniably in full swing, but as support for medical and recreational legalization of marijuana grows, so does the potential for legal ambiguity and contradiction between state and federal law. Already, there have been instances of legal disparity, including conflicting Supreme Court cases regarding the interpretation of the Commerce Clause, both for marijuana and for similar situations.\textsuperscript{112} Although the reigning opinion of the Supreme Court regarding the Commerce Clause and marijuana sided with the federal government’s ability to regulate marijuana-related activities, the Tenth Amendment assists the states by preventing the federal government from directly dictating state actions regarding marijuana.\textsuperscript{113} So, if the Commerce Clause is a win for the federal government, and the Tenth Amendment a win for the states, then the Supremacy Clause could be seen as a tie, as it sets the unique legal dichotomy of dual sovereignty.\textsuperscript{114}

The legal dichotomy of dual sovereignty has presented a multitude of interesting legal questions and situations for producers, distributors, and consumers of marijuana. For producers of legal marijuana, obtaining key federal irrigation

\textsuperscript{110} Jacob Sullum, \textit{Does Marijuana Legalization Violate International Law?}, \textsc{Reason.com} (Mar. 25, 2014), http://reason.com/archives/2014/03/05/is-marijuana-legalization-illegal.


\textsuperscript{112} \textit{Lopez}, 514 U.S. at 551; \textit{Morrison}, 529 U.S. at 604; \textit{Alberto Gonzales}, 545 U.S. at 16; \textit{Oakland Cannabis Buyers’ Cooperative}, 532 U.S. at 483.

\textsuperscript{113} \textit{Lopez}, 514 U.S. at 551; \textit{New York v. United States}, 505 U.S. at 145.

\textsuperscript{114} \textsc{Garvey}, \textit{supra} note 46.
waters is becoming more difficult. For distributors, the conflict between the CSA and federal banking regulations complicates financial transactions, as well as taxes. Lastly, the line where federal marijuana law preempts state marijuana law seems to be drawn at the consumers of marijuana, as they face an increasingly confusing legal situation. This allows for labor and housing discrimination against consumers of legal marijuana, and courts have offered no reprieve.

These conflicts have wreaked havoc at multiple levels of the burgeoning marijuana industry, and more importantly, created confusing legal situations that can cost law abiding Americans their jobs and homes. There are multiple ways the government can fix this compounding legal confusion. One of the solutions is to reclassify marijuana from Schedule I to Schedule III. While marijuana does meet the prerequisites of being a Schedule III drug, rescheduling marijuana would only clear up issues relating to medical marijuana, leaving states that have legalized recreational marijuana in limbo. Another solution provides for removing marijuana from the list of controlled substances. This solution would effectively solve the issue of legal disconnect; however, it would put U.S. law at odds with international treaties to which it has committed. The last solution this article reviewed was amending the CSA so that actors following state law could not be targeted by the CSA. This solution offers the most appealing middle ground between the reclassifying marijuana and removing the drug form the CSA. It allows the U.S. to stay in compliance with international treaties while also effectively dealing with legal issues regarding medical and recreational marijuana.

While the host of solutions reviewed in this article had their benefits and detriments, any action is better than none. So far the responses to legal dissonance regarding marijuana law, from the Cole Memorandum to the Rohrabacher-Farr amendment, have mostly served as means of procrastination. The “marijuana revolution” is showing no signs of slowing down, and as the calls for legalization

---

115 Hotakainen, supra note 54.
116 Hill, supra note 62; supra note 74.
117 Magruder, supra note 80; GARVEY, supra note 81.
118 Supra note 99.
119 Sullum, supra note 109; SACCO et al., supra note 110.
grow louder, so too will the situations of legal conflict. If the federal government wishes to protect law abiding farmers, retailers, and consumers it must stop stalling, take concrete action in response to the marijuana revolution, and solve for the growing legal disconnect between state and federal marijuana laws once and for all.
Intellectual Property Rights in a Trade Deal: A Study of the Trans-Pacific Partnership’s Provisions and What to Consider for the Future

Karisa B. Anand

“The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property.”
— Judge Richard Allen Posner

Introduction

The Trans-Pacific Partnership (TPP) is a trade deal between twelve different nations: Australia, Brunei, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Vietnam, and the United States. Together these nations hold over 40 percent of the world’s gross domestic product. Although U.S. President Donald Trump signed an executive order on January 24, 2017, to withdraw the United States from the TPP, the deal is still on the table for the other potential member-states. The deal would reduce tariffs among member states and institute an investor-state dispute settlement (ISDS) mechanism, which would allow companies to sue countries. One noticeable absence from the trade deal is China. Although the state is not a part of the deal, instituting the deal would increase

4 Id.
regulatory rules and standards for a group of China’s primary trading partners. This “would pressure China to meet some of those standards and cease its attempts to game global trade to impede foreign multinational companies.” Despite the deal’s initial appeal, many Democrats, Republicans, and prominent companies were in opposition to the TPP, citing that it had the potential to hurt American workers by creating steep domestic competition for U.S. companies.

One primary area of concern regarding the TPP is its potential effects on intellectual property rights and law. There are three main facets of intellectual property law that the TPP will affect if it is ratified: patents, copyrights, and Internet service providers (ISPs). Patent law is a specific field of law that focuses on protecting patents. A patent is defined as “the right to exclude others from making, selling, offering for sale, or importing an invention for a specified period (20 years from the date of filing), granted by the federal government to the inventor if the device or process is novel, useful, and nonobvious.” The TPP had the capability to affect pharmaceutical product patents in the United States by imposing market exclusivity, which would have increased the price of drugs. The second field of law that the TPP will potentially impact is copyright law. Copyright law, similar to patent law, is “a form of protection provided by the laws of the United States for "original works of authorship." The TPP aims to increase the minimum copyright term, which will hardly benefit creators financially. The last field of law that the TPP will possibly affect is the presence of ISPs and their abilities to infringe on the privacy rights of individuals. ISPs are defined as “companies that provide their customers with access to the Internet and that may also provide other Internet-related services.” Examples of third parties include telephone companies, such as AT&T and Verizon Wireless.

---

6 Id.
7 Id. at 5.
11 Internet Service Providers, MERRIAM-WEBSTER DICTIONARY (11th ed. 2009).
I. Background

Intellectual property rights are outlined within Chapter 18 of the Trans-Pacific Partnership text. This section of the TPP aims to “balance the rights and obligations” of inventors by simultaneously creating an environment for the “promotion of technological innovation.”

A. Eleven Key Sections of the Trans-Pacific Partnership

Chapter 18 of the TPP includes individual sections that highlight the rules that states must follow if the deal were to be ratified. Section A outlines the General Provisions of the deal, which encompasses transparency and treatment of the rules. Section B focuses on Cooperation, which primarily includes “developments in domestic and international intellectual property policy, education and awareness relating to intellectual property, and policies involving the use of intellectual property for research, innovation and economic growth.” Section C features provisions regarding Trademarks. This section predominately focuses on developing “a system of trademark examination and registration, an electronic system, and a trademark classification system based on the existing international classifications.” Section D highlights Country Names and outlines that “Each Party shall provide the legal means for interested persons to prevent commercial use of the country name of a Party in relation to a good in a manner that misleads consumers as to the origin of that good.” Section E emphasizes Geographical Indications, which primarily includes the procedures that are necessary to protect geographical indications with regards to term usage within the text of the deal. Section F focuses on Patents, which predominantly includes the regulation of Agricultural Chemical Patents, Pharmaceutical Patents, and Biologics. Section G highlights the protection of “Industrial Designs” and “improving the quality and efficiency of [the Parties] respective industrial design registration systems.” Section H emphasizes Copyright and Related Rights, which focus on the fact that an individual’s work can be protected throughout the

12 Trans-Pacific Partnership, art. 8, Feb. 4, 2016.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
life of the author and 70 years after the author’s death.\textsuperscript{21} Section I highlights Enforcement of these rules and permits “effective action against any act of infringement of intellectual property rights covered by this Chapter.”\textsuperscript{22} Section J focuses on Internet Service Providers and the safe harbors and legal remedies that coincide with them.\textsuperscript{23} The text states that “Accordingly, each Party shall ensure that legal remedies are available for right holders to address such copyright infringement and shall establish or maintain appropriate safe harbors in respect of online services that are Internet Service Providers.”\textsuperscript{24} Lastly, Section K highlights the Final Provisions of Chapter 18, which primarily include accepting the rules outlined in the chapter and emphasizing that a Party cannot amend a law “that is less consistent with its obligations under the Articles.”\textsuperscript{25}

\textbf{B. Copyright International Treaties}

The four main international legal structures that focus on copyright law include the Berne Convention, the Universal Copyright Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty, and the WIPO Performances and Phonograms Treaty. The Berne Convention for the Protection of Literary and Artistic Works was signed in 1886 and is adhered by 172 nations.\textsuperscript{26} The main objective of the Berne Convention “was to internationalize copyright protection by requiring members to offer copyright protection for works first published in other Berne Convention countries and for unpublished works by nationals of Berne Convention countries.”\textsuperscript{27} Additionally, the Berne Convention states that all material that is capable of copyright will be protected throughout the life of the author and 50 years after the author’s death.\textsuperscript{28}

The second legal structure that governs copyright law is the Universal Copyright Convention, which was signed on September 6\textsuperscript{th}, 1952. The UCC was generated by the United States, which worked with The United Nations Educational, Scientific, and Cultural

\begin{flushleft}
\textsuperscript{21} Id.  \\
\textsuperscript{22} Id.  \\
\textsuperscript{23} Id.  \\
\textsuperscript{24} Id.  \\
\textsuperscript{25} Id.  \\
\textsuperscript{28} Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3.
\end{flushleft}
Organization (UNESCO) to create an alternative to the Berne Convention for states that did not agree with the terms of the Berne Convention.\textsuperscript{29} At the time that the Berne Convention was established, the United States did not sign the treaty, but instead “only provided protection on a fixed term registration basis via the Library of Congress, and required that copyright works must always show the © symbol.”\textsuperscript{30} Changing U.S. law in accordance with the rules stipulated by the Berne Convention would alter U.S. regulations surrounding moral rights.\textsuperscript{31} Moral rights refer to the “ability of authors to control the eventual fate of their works.”\textsuperscript{32} The UCC guaranteed that international protection was given to author states that were not signatories of the Berne Convention and set the copyright protection duration to twenty-five years after the author’s death.\textsuperscript{33}

The third and fourth treaties that helped to form current copyright laws were the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which were both signed on December 20\textsuperscript{th}, 1996. The WIPO Copyright Treaty added to the Berne Convention by detailing stronger and more explicit requirements relating to information technologies, requiring “protection for computer programs as literary works subject to copyright.”\textsuperscript{34} Similar to the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty addressed the fact that while copyright laws protect the rights of phonogram producers and the public-performance rights in many legal systems, in other legal systems they are clear “neighboring rights”.\textsuperscript{35}

\textbf{C. Patent International Treaties}

The four international legal structures that focus on patent law include the Paris Convention, the Patent Law Treaty, the Patent Cooperation Treaty, and the proposed Substantive Patent Law Treaty. The Paris Convention was signed in 1883 and determined the main standards for patent protection.\textsuperscript{36} Additionally, the Paris Convention created a “right of priority” that allows an applicant for an industrial property right a period of time

\textsuperscript{29} Id. at 26.
\textsuperscript{30} Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T 2731.
\textsuperscript{33} Id. at 29.
\textsuperscript{34} Id. at 26.
\textsuperscript{35} Id. at 26.
\textsuperscript{36} Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 305.
after an original application in a member country to apply in additional member countries with the same priority date.”

The second treaty that helped to establish current patent laws was the Patent Law Treaty (PLT) of 2000, which created the maximum set of prerequisites that countries may utilize. The main prerequisite that countries must adhere to is that they are “free to provide for requirements that are more generous from the viewpoint of applicants and owners, but that the requirements under the PLT are mandatory as to the maximum an office can require from applicants or owners.” In addition to this requirement, the PLT allows for the filing of “subsequent applications within 12 months of the first.”

The third treaty that has assisted in composing strong patent laws is the Patent Cooperation Treaty of 1970, which has created an effective system for filing patent applications within member states. The treaty stipulates, “Patents are still granted by the individual country patent offices, but these administrative mechanisms facilitate the filing of one application rather than requiring inventors to individually navigate the patent application systems in each country in which they wish to seek protection.”

The fourth treaty that helps govern international patent law is the Substantive Patent Law Treaty. The Substantive Patent Law Treaty focuses on instituting patent law harmonization, which aims to simplify procedures, improve patent quality, reduce prices for users, and decrease copies of work by patent offices among WIPO member states.

D. Introduction to Pharmaceutical Product Patents and Biologics

One main section of the TPP that has been highly contested is the trade deal’s presumed effect on Pharmaceutical Product Patents and Biologics. The United States has the highest per capita drug spending in the world, constituting over thirty to forty percent of the market. Since pharmaceutical products are a large portion of the U.S. economy, the industry has a large effect on the daily lives of U.S. residents. Pharmaceutical product patents give protection to medical drugs that do not contain “a chemical entity that has

37 Id. at 26.
38 Id. at 26.
39 Id. at 26.
42 Id. at 12.
been previously approved in that country.”

One of the primary provisions of the changes in pharmaceutical product patents is that the data exclusivity window (period of time where the data on drugs is not public) makes it viable for pharmaceutical companies to block their competition for at least five years — with another three years of “regulatory review.” This action prevents other companies from creating competing drugs that could possibly be cheaper and more favorable to consumers. The deal also addresses “evergreening,” which refers to “the pharmaceutical trade, when brand-name companies patent ‘new inventions’ that are really just slight modifications of old drugs.” It decreases requirement guidelines for patents and allows brand-name manufacturers to preserve evergreen patents through straightforward formulation changes.

Another section highlighted within pharmaceutical product patents is biologics. Biotechnology Innovation Organization describes, “Most biologics [as] very large, complex molecules or mixtures of molecules. A variety of biologics are produced using recombinant DNA technology.” The TPP protects biologics through two specific pathways. The first track allows parties to “choose to provide effective market protection through at least 8 years of data protection.” The second track states, “Parties can choose to provide effective market protection through at least 5 years of data protection.” Since there is no set track among the parties, the biologics component of the TPP lends itself into various levels of uncertainty.

E. Changes in Copyright Law

Another main section of the TPP that has received a large amount of criticism is the deal’s changes to copyright law. There are three specific rights outlined in the section that each member-state must abide by: The Right of Reproduction, The Right of Communication to the Public, and The Right of Distribution. The Right of Reproduction focuses specifically on phonograms, which refer to “the fixation of the sounds of a

---

42 Id. at 12.
45 Id. at 385.
48 Id.
performance or of other sounds” typically with regards to cinematography and audiovisual pieces.49 The right states that members must, “provide to authors, performers and producers of phonograms the exclusive right to authorize or prohibit all reproduction of their works, performances or phonograms in any manner or form, including in electronic form.”50

The second right explored in this section is the Right of Communication to the Public. The section states, “Each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works.”51 This includes having artists make their work public, in such a way that any individual can access the work at any time or place. The third right that is discussed is the Right of Distribution, where member states ensure that authors maintain the select right to approve or prevent the sale of their original performances, works, and phonograms to the public.52

F. Introduction to Internet Service Providers

The last primary section of the TPP that is highly criticized is Section J: Internet Service Providers. Internet Service Providers are in charge of “providing enforcement procedures that permit effective action by right holders against copyright infringement covered under this Chapter [18] that occurs in the online environment.”53 The section continues to outline that member states “shall ensure that legal remedies are available for right holders to address such copyright infringement and shall establish or maintain appropriate safe harbors in respect of online services that are Internet Service Providers.”54 Ultimately, countries are responsible for providing legal incentives for Internet service providers to prevent copyright infringement from occurring. Boston College Law School’s Intellectual Property and Technology Forum states, “The system envisioned by the TPP is one of notice and counter-notice, where the ultimate end for an ISP is to gain limitations on liability (monetary or otherwise) as well as other non-defined incentives.”55 The TPP emphasizes the fact that Internet Service Providers are not necessarily liable even if they

50 Id.
51 Id.
52 Id. at 48.
53 Id. at 48.
54 Id. at 12
reach the threshold for liability limitation. The Internet Service Provider section of the TPP, is “without prejudice” to any current restrictions in accountability for intellectual property infringement, and therefore does not replace those exemptions, but rather yields other methods to accountability exemptions.56

II. The Effects of the Trans-Pacific Partnership on Intellectual Property Rights

One objective of the TPP is to further advocate for sufficient and effective protection of intellectual property rights and law.57 If the deal is ratified, patent law, copyright law, and companies will all be affected. Section A explores the TPP’s effects on patent law with regards to the pharmaceutical industry in the United States. Since the United States has the largest pharmaceutical industry in the world, it is the best example to utilize when analyzing the TPP’s potential affects on drug prices. Section B highlights the TPP’s ability to increase copyright term limits, which could increase prices on consumers and hinder artistic progress within society. Section C emphasizes the TPP’s capability to cut off any individuals’ access to the internet if they are repeatedly caught infringing copyrights by ISPs.

A. The Effects on Patent Law

A critical area of patent law that could be affected by the TPP is pharmaceutical product patents. There are two primary effects on pharmaceutical product patents: the extension of patent terms and a reduction in generic competition.58 These effects ultimately increase the cost of pharmaceutical drugs, which can negatively impact low-income countries and individuals.59

Within the trade deal, patent terms are extended to all member states to conform to drug reimbursement protocols that are already set in the United States. These protocols refer to the way in which drugs are sold in a specific country. To illustrate this effect, the

56 Id.
difference in cost of chemotherapy agents for advanced-stage breast cancer in the United States and Australia can be analyzed. Trastuzumab is the primary chemotherapy agent used to fight Human Epidermal growth factor Receptor 2-positive (HER2+) breast cancer.\textsuperscript{60} The American Medical Association (AMA) Journal of Ethics explains that this drug is a strong example when discussing the effects of the TPP on pharmaceutical products. Breast cancer affects many individuals that live in potential TPP member states and utilizing treatment drugs, such as trastuzumab, have proven to improve chances of survival.\textsuperscript{61} Within the United States, most women who need trastuzumab will only receive partial coverage for the drug. According to AMA Journal of Ethics, the Centers for Medicare and Medicaid Services reported in 2014 that “the average Medicare beneficiary in the United States paid $5,971 out-of-pocket for a year’s supply of trastuzumab.”\textsuperscript{62} In contrast, Australia’s Pharmaceutical Benefit Scheme (PBS) is the country’s single-payer healthcare system that allows for the prices of drugs like trastuzumab to be negotiated.\textsuperscript{63} The Australian Government Department of Health reported that “the maximum patient copayment for trastuzumab was $38.30 (approximately $29.60 in US dollars).”\textsuperscript{64} If the TPP is ratified by the other potential member-states, the U.S. model for drug reimbursement will go into effect and the cost of pharmaceutical drugs will exponentially increase for consumers in all member states.

The second effect that the TPP could have on pharmaceutical product patents is a reduction in generic competition. The AMA Journal of Ethics states, “[The] TPP would hamper access to lower-priced medicines in member countries by delaying generic competition through expansions in patent-based forms of intellectual property protection.”\textsuperscript{65} With regards to patent-based expansions, the deal prioritizes the inclusion of new procedures of use for pharmaceutical drugs that already exist.\textsuperscript{66} This would ultimately allow for “patent systems to extend market exclusivity for six or seven years after the

\textsuperscript{60} Adjunct Breast Cancer, HERCEPTIN TRASTUZUMAB, http://www.herceptin.com/.

\textsuperscript{61} Id. at 31.


\textsuperscript{63} Id. at 31.


\textsuperscript{65} Id. at 59.

\textsuperscript{66} Id. at 31.
Overall, these patents are utilized within the United States to stall generic competition and make way for the production of brand-name drugs. The main reason for delaying generic drug patents is because generic drugs are traditionally cheaper than brand-name drugs. According to the National Association of Chain Drug Stores, “In 2008, the average price of a brand-name drug was $137.90, while the average generic prescription cost $35.22.”

The AMA Journal of Ethics states that “one review of patents relating to the HIV protease inhibitor combination ritonavir/lopinavir in the US found 210 patents and applications relating to peripheral aspects of the product, including 31 covering methods of use.” These patents have the capability of delaying generic competition “on the drug for more than 12 years after the expiration of the original patent on the active ingredient.”

Another effect with regards to the reduction of generic competition is the expansion of patent terms. Under the rules outlined in the TPP, member states are required to extend patent terms for patent office and drug approval delays. In 1984, the United States ratified the Hatch-Waxman Act, in which generic drug manufacturers could file abridged application for drugs to enter the market while brand-name drug companies “received market exclusivity extensions for up to five years to account for time spent in drug development.” This deal has appeased both generic brand-name drug manufacturers, as it has helped to sustain growth in both industries. The TPP utilized part of the United States’ strategy, but failure to provide a shortened application process for generic drug patents prioritizes patent exclusivity and therefore decreases the accessibility of generic drugs for consumers.

---

67 Id. at 31.
69 Id. at 31.
70 Id.
74 Id. at 31.
B. The Effects on Copyright Law

If the TPP is ratified by all member states, countries will have to change their copyright laws to abide by the United States’s minimum copyright term of life plus seventy years.75 By contrast, six TPP member states, Brunei, Canada, New Zealand, Malaysia, Japan, and Vietnam, utilize copyright terms of life plus fifty years and have previously been reluctant to amending their term limits. They argue that increasing copyright term limits will negatively affect consumers, as it can cost individuals more money and provides virtually no incentive for increased artistic work.

The first effect of increasing copyright term limits is increased cost on consumers. This is a concern because increased copyright term limits cause countries to pay a large price in continued royalties for material.76 This leads to nations losing out on massive amounts of revenue that could have gone into the country’s economy to further better the lives of its citizens. Dr. Philippa Dee of the Australian National University estimated that the net effect of increasing copyright terms in Australia could force the nation to “pay 25 per cent more per year in net royalty payments...This could amount to up to $88 million per year, or up to $700 million in net present value terms.”77 Furthermore, the estimated cost in New Zealand and Canada if copyright term limits are extended would be around $55 million per year in New Zealand and $454 million per year in Canada.78 The lack of money going back to consumers is a main reason why the TPP’s provision of increasing copyright term limits to life plus seventy years can have a negative effect on individuals.

The second effect of increasing copyright term limits is that the action offers no incentive for artistic work to be created. Thanks to digital distribution, public domain material is now globally available for almost zero cost for study, enjoyment, and reuse. Economists from the Brookings Institution argue, “Repeated copyright term extensions means decades of copyrighted material that might otherwise have passed into this universal

75 Id. at 12.
76 Michael Geist, The Trouble with the TPP, Day 3: Copyright Term Extension, (Jan. 6, 2016), http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-3-copyright-term-extension/.
library are now trapped in deteriorating analog formats.”79 Since artists cannot utilize pieces of these analog formats, it makes it harder for them to incorporate and build upon past creative work. This, in turn, prevents nations from fostering present creativity, which in turn decreases the amount of new creativity that can be utilized to improve the country.

C. **The Effects on Internet Service Providers**

One of the main goals of the TPP is to expand the roles of Internet Service Providers (ISPs). According to Consumer Affairs, “Internet service providers allow users to connect to the Internet, surf the web, check their emails and use many types of online services.”80 There are four main reasons for why increasing the power of ISPs directly affect individuals that live in potential TPP member states.

The first effect that the TPP could have on ISPs is that it gives them the power to cut off any individuals’ access to the Internet if they are repeatedly caught infringing copyrights.81 The second and third effects are that ISPs could have a greater hand in removing material and websites from the Internet that might be linked to copyright infringement.82 The last effect of the TPP on ISPs is that it will “disclose the identities of their customers to IP rights holders on an allegation of copyright infringement.”83 This disclosure has the potential to violate the Fourth Amendment of the United States Constitution, which stipulates that individuals have the right to be free from unwarranted seizure or searches.84 Ultimately, these new ISP rules harm individuals in potential TPP member states because they stray away from previous laws on ISPs. The Electronic Frontier Foundation reports that TPP regulations on ISPs differ from the rules determined in the Anti-Counterfeiting Trade Agreement and the Digital Millennium Copyright Act because they do not leave the rights of individuals in the hands of giant corporations like the TPP does.85 Although clamping down on copyright infringement is very important, the TPP’s rules on ISPs have been criticized for being too strict. Meghan Salis, Digital Rights

---

79 TPP’s Copyright Trap, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/tpps-copyright-trap.
82 Id.
83 Id.
84 U.S. CONST. amend. XIV.
85 Id.
Campaign Coordinator of OpenMedia, stated that the TPP could make Canadians and other citizens of potential TPP member states “liable for criminal or civil penalties for transferring content they own from one device to another and uploading or re-posting highlights from professional sports...adding that the deal could allow authorities to seize and destroy any device used for copyright infringement.” Overall, the TPP changes to ISPs focus on combating copyright infringement at the expense of infringing on the privacy rights of individuals. These searches and seizures would be unwarranted and thus in violation of individual’s liberties.

III. Mechanisms to Solve or Mitigate the Effects of the Trans-Pacific Partnership on Intellectual Property Rights

A. Solutions to Patent Law Effects

Although the TPP could have many negative effects on patent law, there are ways for the deal and other future deals similar to the TPP to be amended that will help alleviate these negative outcomes. The first effect that must be addressed is the extension of patent terms on pharmaceutical products. Instead of extending patent terms in all potential TPP member states to match U.S. patent law, a deal similar to the TPP should either let countries keep their existing patent laws or should move to enact law’s similar to Australia’s PBS single-payer healthcare system. This would allow for pharmaceutical products to be cheaper for consumers in potential TPP member states.

The second effect that must be addressed is the potential reduction in generic competition. In order to remedy this effect, countries need to put measures, such as specific laws, in place that will prevent companies from stalling on the production of generic pharmaceutical drugs. This will allow individuals to buy cheaper versions of drugs that they need if they cannot afford to purchase brand-name drugs.

One example of a proposed law that can help mitigate the affects of diminishing generic drug competition is the The Creating and Restoring Equal Access to Equivalent Samples (CREATES) Act. The CREATEs Act was introduced to the United States Congress on June 14, 2016 by Senators Patrick Leahy (D-Vermont), Chuck Grassley (R-

---

Iowa), Amy Klobuchar (D-Minn.), and Mike Lee (R-Utah). The bill aims to dissuade pharmaceutical drug companies from preventing generic drugs from being sold by permitting the secretary of Health and Human Services to evaluate any requests for drug samples. Once these requests are submitted, the secretary will develop a “cause of action,” which would attempt to make it simpler for generic drug companies to take larger pharmaceutical companies to court and get them to make their samples accessible. Although the bill has yet to pass in the U.S. Senate, other countries should look at implementing a similar law in order to increase accessibility of generic drugs.

B. Solutions to Copyright Law Effects

The main way to address the effects on copyright law within the TPP or any other future trade deals that are similar is rather straightforward. TPP member states should refuse to increase their copyright terms to life plus seventy years. Decreasing copyright term limits to life plus fifty years will still help the country maintain revenue that they earn through copyrights and will also help foster creativity in these nations. WIPO reported that Canada’s overall GDP increase from copyrights (life plus fifty years) was 3.87% in 1991 to 5.38% by 2002. Malaysia, which is another potential TPP member state that has life plus fifty years as their copyright term, has had their overall GDP increase to 5.8% in 2005. Conversely, the United States overall GDP increase from copyrights (life plus seventy years) was 2.40% from 1997 to 2002. All data relating to Canada and the United States was collected through a NAICS data classification system and the data utilized in the Malaysia study was collected by a myriad of sources through the World Intellectual Property Organization. These studies illustrate that nations can still benefit financially with copyright term limits set to life plus fifty years.

C. Solutions to Internet Service Provider Effects

---

89 Id.
Although ISPs are very important to combat copyright infringement, TPP rules can still be maintained while not infringing on the rights on individuals that live in potential TPP member states. A specific piece that should stay a part of the deal is that ISPs should be responsible for taking down material and websites from the internet that are possibly attached to copyright infringement. This part of the TPP text can remain, but some portions should be altered to preclude the possibility that individuals are thrown into jail or have their devices forcibly removed from them for frivolous copyright infringement. Ultimately, ISPs are a necessity to combat copyright infringement, but individual liberties should be preserved instead of actively stripped away.

**Conclusion**

The Trans-Pacific Partnership is a trade deal that aims to connect all member states “under one free trade agreement which eliminates tariffs and non-tariff barriers to goods, services, and agriculture.” Although the United States has recently withdrawn from the deal, analyzing parts of the deal remains crucial to understanding the future of intellectual property law and rights. Changes to patent law, especially in the pharmaceutical industry, have the ability to affect millions of lives. Countries should focus on keeping their citizens healthy by prioritizing easy access to generic drugs for individuals in need. Furthermore, pushing for copyright laws that foster human creativity and intelligence will help nations improve their overall economy. Lastly, utilizing ISPs are an important feature to fight against copyright infringement, but rules should be outlined that prevent ISPs from infringing on the rights of individuals. Despite the fact that states are beginning to move away from free trade agreements, it is important that countries that do choose to engage in such deals take these critiques and suggestions very seriously. Overall, the TPP has its flaws, but amending the flaws in the deal and in any other future trade agreements will help secure the rights of individuals and foster economic growth in nations.

---

93 Id. at 53.
Climate Change and Human Displacement:
International Law Reform on the Brink of a Crisis

Kendall Keelen

Introduction: Consequences of Climate Change

The unsustainable practices of industrialized countries throughout the last century have tested the limits of the environment. Despite international mitigation strategies, increases in global temperatures continue to occur and alter the climate. Consequently, scientists predict higher global temperatures will cause a rise in sea level and increased storm intensity and frequency. Scientific communities attribute most global ramifications to irresponsible human activity, specifically large amounts of carbon dioxide and other toxic gases released into the atmosphere. These untenable practices directly impact human welfare, especially in places of vulnerability, such as low-lying islands, coastal regions, and desert areas.

Populations in vulnerable areas will be unable to adapt to drastic changes, due to insufficient infrastructure, and will be forced to migrate in large numbers. Scientists predict a mass migration of over 250 million people by 2050 due to environmental displacement. The United Nations High Commissioner for Refugees (UNHCR) concluded that six million people are displaced per year because of climate change. New migration patterns will force countries to take in millions of immigrants, resulting in the first environment-connected refugee crisis. Additionally, global security will be threatened as regions

---

1 Andrew H. Altieri, Climate change and dead zones, 21 GLOBAL CHANGE BIO. 1395, 1398 (2015).
2 Id. at 1395.
4 David Adam, 50m environmental refugees by end of decade, UN warns: States urged to prepare for victims of climate change: Natural disasters displace more people than wars, LON. GUARDIAN, Oct 12, 2005.
experience heightened tensions and conflict because of mass migrations and limited resources. At the moment, international institutions do not recognize environmental refugees. Environmental refugees are thereby unprotected by international law because they are not included in the 1951 Convention and Protocol Relating to the Status of Refugees’ definition of a refugee. As a result, displaced populations therefore cannot obtain the financial aid or legal support that other refugees are guaranteed by the UNHCR.

Subsequently, the international community must adapt to such conditions and implement proactive policies to mitigate said consequences. International actors must reform current environmental institutions to include the welfare of environmental refugees and to provide funding for all states, to confront the crisis.

I. Background

A. Climate Change Science

Over the last 100 years, the average global temperature has risen by 1.5°F and projections show the temperature will continue to rise by a minimum of 0.5°F every year. Higher temperatures will drastically affect climates and will result in more floods and droughts. Increased temperatures will also modify the acidity of the ocean through the absorption of carbon dioxide into waters. The average sea level has risen at a rate of 0.6 inches each year and will accumulate to almost two feet by the end of the twenty-first century. Storm frequency and intensity will rise as a result of higher precipitation and extreme temperatures. Consequently, resources will become scarce and competition among regions will intensify. In low-lying coastal areas, massive amounts of land mass will be lost due to flooding and erosion. In wet rainforest regions, the forests will begin to dry up, and in desert areas the heat will intensify.

Industrialization efforts promoted the combustion of fossil fuels and deforestation, which directly release high levels of carbon dioxide and methane into the

---

8 Id.
9 Id.
10 Id.
atmosphere. Similarly, technological improvements have led to more industrialized agriculture that produced increased levels of carbon dioxide, methanol, and other toxic gases. Since the Industrial Revolution, atmospheric concentrations of carbon dioxide have risen by approximately 110 parts per million (ppm) to 390 ppm. Concentrations of methane have risen by over 980 parts per billion (ppb) to 1,770 ppb; these measurements are the number of molecules of a greenhouse gas per million or billion molecules. Increased concentrations of these chemicals have depleted parts of the ozone layer, the atmospheric layer that protects the Earth’s surface from harmful UV radiation. In consequence, surface temperatures have risen and triggered the global warming phenomena.

Drastic changes in temperatures, sea levels, and storm intensity also pose serious threats to the stability of economies. Higher temperatures lead to droughts and floods that destroy agricultural industries, especially in developing economies. The economic activities of developing regions are centralized in agriculture and forestry, which will the most susceptible industries to climate change. Additionally, these consequences promote the cultivation of disease and illness. Regional weather changes can include heat waves, polarized temperatures, and erratic precipitation. Heat waves and extreme weather will increase instances of heat exhaustion and asthma. Unpredictable temperatures and precipitation will make affected populations more susceptible to water and food shortages. As a result, water and foodborne illnesses, malnutrition, and other vector-borne diseases will plague these populations.

Members of the international community have recognized climate change as a threat to global security. In an emergency debate with the United Nations Security Council in April 2007, the United Kingdom (UK) described climate change as a threat to international stability that will produce border disputes, migration, and resource

12 Greenhouse gas changes, supra note 7, at 2.
13 Greenhouse gas changes, supra note 7, at 2.
14 FIFTH ASSESSMENT REPORT, supra note 11, at 154.
15 ROBERT MENDELSOHN, COMMISSION ON GROWTH AND DEVELOPMENT, WORKING PAPER NO. 60: CLIMATE CHANGE AND ECONOMIC GROWTH 9 (2009).
16 Watts, Nick et al., Health and climate change: policy responses to protect public health, THE LANCET (Nov. 2015).
shortages. More specifically, the UK concluded that climate change would create competition over scarce energy resources. The shrinking availability of freshwater supplies and cultivable land will provoke interstate conflict as populations cross borders for resources. Subsequently, these conflicts will contribute to international instability.

B. Displacements

Low-lying islands, coastal regions, and desert areas are the most vulnerable locations to extreme climate change effects. Unfortunately, the populations that reside in these areas are citizens of developing nations. Island-nations, such as Kiribati and Tuvalu, as well as coastal regions, including the Mekong and Bangladesh Deltas, make up approximately one-third of coastal countries to have upwards of ten percent of landmass within five meters of the sea. These countries are at risk of losing land to permanent flooding, storm surges, and erosion. On the other hand, desert regions, such as Nigeria and other Sub-Saharan African countries, are susceptible to desertification and land degradation. Vulnerable areas such as these are most likely to witness population displacement in upcoming decades.

Incidents of displacement have already appeared in several nations, namely Bangladesh, Kiribati, and Tuvalu. Each of these nations is susceptible to climate change as a result of their proximity to large bodies of water. Bangladesh government officials estimate that approximately six million citizens have already been displaced. Of the sixty-four government districts, twenty-four are producing environmental refugees. Moreover, in 2011, a single district experienced a displacement of 60,000 residents due to sea level rise. In Bangladesh, the primary causes of displacement are tidal height increases and tropical cyclones in coastal areas and riverbank erosion inland; approximately two-thirds of the country is less than five meters above sea level. The Chief Advisor of the

---

19 CLIONADH RALEIGH, HENRIK URDAL, CLIMATE CHANGE, DEMOGRAPHY, ENVIRONMENTAL DEGRADATION, AND ARMED CONFLICT 27, 28 (2009).
21 Id. at 4.
22 Id. at 10.
23 Id. at 10.
24 Nazmul Huq, et. al., Climate Change Impacts in Agricultural Communities in Rural Areas of Coastal Bangladesh: A Tale of Many Stories, 7 SUSTAINABILITY 8437, 8440 (2015).
25 Id. at 8442.
Government of Bangladesh predicts that should the sea level rise one meter, about one-third of the country’s total land mass will be submerged, uprooting twenty-five to thirty million people. Similarly, in coastal regions, continued sea level rise will inundate low-lying areas and further saline water intrusion into freshwater sources. In mainland regions, riverbank erosion will destroy homes, river flooding will increase sedimentation in riverbeds, and the melting of the Himalayan glaciers will increase saline water intrusion. Northern regions will experience droughts and hill regions will experience landslides as a result of erratic precipitation.

The island nation of Kiribati, which is composed of thirty-two low-lying atolls and one main island, is experiencing similar fears of devastation and relocation. The majority of these islands are less than three meters above sea level and only a few hundred meters wide. The concentration of the Kiribati population resides on the atoll of South Tarawa, and due to the encroachment of water the population will have to leave and relocate in another Pacific-Island nation. Sea levy programs established by the government have failed because of poor engineering. Sanitation and healthcare are already poorly funded by the government and will continue to worsen with predicted temperature and sea level increases. The government asked for financial support from the international community, but has yet to receive any funding.

The population of Tuvalu, another Pacific-Island nation, consists of approximately 10,000 citizens. The country has a physical territory of approximately twenty-six square kilometers. Due to increased environmental pressures, the nation hopes to re-establish itself in another country. Tuvaluan officials have requested support and land from neighboring islands, like New Zealand, in order to relocate the entire population. Moreover, rising sea levels and increasing salt-water inundation make resettlement inevitable. The Prime Minister of Tuvalu pleaded to the UN General Assembly during the

---

26 Id. at 8438.
27 Id. at 8439.
29 Id. at 51.
30 Id. at 51.
31 Id. at 52.
32 Id. at 52.
34 Id.
35 Id.
High Level Signing Ceremony for the Paris Agreement, on April 22, 2017, and stated that every country should ratify the agreement in an effort to mitigate climate change and save Tuvalu.36 Despite such a small population, Tuvalu cannot physically remain in its territory.

C. International Environmental Law

International environmental law stems from the 1972 United Nations Conference on Human Environment in Stockholm.37 It was the first intergovernmental conference that focused on environmental problems and addressed the conflict between economic development and environmental protection.38 The conference signified a global effort to protect the environment without hindering the economic development of developing countries.39 In an effort to address this conflict, the conference committee called for research on the environment, which produced the “Founex Report on Development and Environment.”40 The conference produced the United Nations Environmental Program (UNEP), the first intergovernmental organization focused on environmental protection. The UNEP is a subsidiary of the General Assembly and therefore holds no legislative powers.41 Following the conference, several major multilateral agreements were signed such as the 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora.42 The adoption of the UN Stockholm Declaration on the Human Environment set precedent for further development of the principles of environmental law.

In 1992, twenty years after the Stockholm Conference, international powers convened again for the United Nations Rio Conference on Environment and Development.43 The conference produced a document entitled “Our Common Future” that addressed, for the first time, sustainable development and the need for government action. The conference also produced four major international environmental laws: the Rio

---

38 Id. at 7.
39 Id. at 10.
41 Id.
42 Id.
43 Id.
Declaration on Environment and Development, the Convention on Biodiversity, the
Agenda 21, and the United Nations Framework Convention on Climate Change
(UNFCCC). The Agenda 21 led to the establishment of the Commission on Sustainable
Development that ensured states implement the actions outlined in the agenda.

The UNFCCC outlined carbon emission standards for international actors and
transformed into a major agreement in climate change law. The UNFCCC convened in
1997 to legislate the Kyoto Protocol, which consisted of 192 signatories and committed
these industrialized countries to limit and reduce green house gas emission in accordance
with individual targets. Almost twenty years later, international powers reconvened to
write the 2015 Paris Agreement that was produced to combat climate change and
accelerate the actions and investments needed for a sustainable low carbon future.
Additionally, the Paris Agreement aimed to keep the global temperature rise of this century
well below 2 degrees Celsius and limit the rise to 1.5 degrees. The agreement also aimed
to increase the abilities of countries to deal with the impacts of climate change and to
contribute financially to the cause. Signatories promised to report regularly on emissions
and implementation of efforts, and to meet every five years to reassess collective
programs. Also in this agreement, the signatories addressed environmental displacement
and delegated to the Executive Committee of the Warsaw International Mechanism on
Loss and Damage, the establishment of a task force to determine recommendations to
“divert, minimize and address displacement related to the adverse impacts of climate
change.”

Newly established summits and conventions allow for discussion on climate
change to be transformed into action. With larger powers such as the United States and
China joining the conversation, more can be done to effectively mitigate climate change.
These countries are the most responsible for the damage to the Earth as they have the
largest ecological footprints. Furthermore, these countries have the resources to regulate
developing countries and promote a more sustainable future.

44 Id.
45 Id.
46 G.A. Res. 42277, Kyoto Protocol to the UN Framework Convention on Climate Change (Sep. 25,
2003).
48 Id.
49 Id.
50 Id.
D. International Refugee Law

The UN High Commissioner of Refugees (UNHCR) was established after the 1951 United Nations Convention Relating to the Status of Refugees in reaction to World War II. The UNHCR replaced the 1950 International Refugee Organization to better provide protection for refugees and seek permanent solutions to their problems. These problems were to be solved through the assistance of governments to facilitate voluntary repatriation and assimilation programs into new countries. The UNHCR sets the international standard by defining a refugee as “someone who has been forced to flee his or her country because of persecution, war, or violence.” In 1967, signatories reconvened to remove the geographical and time limitations on the definition and make it more universal. The UNHCR places refugees in new countries and provides legal support to obtain legal status. Additionally, the UNHCR supports refugees financially and promises to provide protection for them and their families.

In more recent years, the UNHCR has acknowledged the existence of environmentally displaced populations. However, the UNHCR regards these people with the same status as internally displaced persons, whom under international law are not protected. Furthermore, the UNHCR has failed to produce solutions to the predictions of population displacements.

E. Legal Precedent

Several parties have appealed to the high courts of major Pacific actors to overturn the rulings of immigration officers. In the case of Teitiota v. Chief Executive Ministry of Business, Innovation and Employment, a man from Kiribati illegally remained in New Zealand following the expiration of his visa in October of 2010. To avoid deportation, Teitiota applied for refugee status under Part 5 of the New Zealand Immigration Act of 2009 that

52 Id.
53 Id.
54 Id.
55 Id.
implemented the 1951 Convention Relating to the Status of Refugees into domestic law. Teitiota was denied status by both a refugee and protection office of Immigration New Zealand, and then appealed to the Immigration and Protection Tribunal (IPT). The court dismissed the appeal in 2013 and stated that the appellant’s arguments were unconvincing. The appellant then appealed to the High Court, which upheld prior rulings, and later appealed to the Court of Appeals and the Supreme Court. Each court upheld prior rulings and stated that the court did not have authority to apply the Refugee Convention to this case. The decision stated that Teitiota did not face “serious harm” and that “there is no evidence that the Government of Kiribati is failing to take steps to protect its citizens from the effects of environmental degradation to the extent that it can.”

The decision of the IPT referenced eight other refugee appeal cases brought before the New Zealand Refugee Status Appeals Authority, the predecessor of the IPT. The cases were appealed on the grounds of personal insecurity based on inundation, coastal erosion, and salinization of the water table – the conditions of their home state, Tuvalu. The IPT ruled in the cases of Refugee Appeal numbers 72,185 to 86, 72,189 to 195, 72,179 to 181, and 72,313 to 16 that the events “raise no nexus to a Convention ground.” The case appeals did not pertain to the Refugee Convention and therefore did not warrant a decision in favor of the appellants.

In an appeal to the Refugee Review Tribunal of Australia, cases 0907346 [2009] RRTA 1168 (10 December 2009) and 1004726 [2010] RRTA 854 (30 September 2010), the Tribunal upheld the decisions made by the Minister for Immigration and Citizenship that refused to grant the applications protection visas under Section 6.5 of the Migration Act of 1958, legislation that adopted the 1951 Refugee Convention mandate. The appellants applied for refugee status on the grounds of personal danger if they returned to their home
countries of Kiribati and Tonga, respectively. The applicants argued that environmental degradation in their home countries threatens their personal safety.

In the case of Mohammed Motahir Ali v. Minister for Immigration, Local Government and Ethnic Affairs, a citizen of Bangladesh challenged the decision of an immigration officer regarding the complainant’s status as a refugee in a federal court of Australia. The appellant referenced sections of the 1958 Migration Act that supported refugee status and appealed on the basis of environmental degradation in Bangladesh. The application was dismissed because of the Migration Legislation Amendment Act of 1986 that applied the 1951 Refugee Convention, protecting political refugees only.

In accordance with previous decisions, the New Zealand IPT dismissed an appeal case in 2014 for refugee status on the basis of environmental displacement. However, in AD (Tuvalu), the IPT declared as an exception that the parties could remain in New Zealand because of personal connections made after several years staying in the country. The court granted members of the family, two sons, a mother and a father, protection visas. The exception of the IPT is evidence that the 1951 Refugee Convention cannot ignore the situations of environmental displacements, especially in Pacific-Island nations.

II. Issues of current law

Despite scientific predictions for mass migrations and instances of environmental displacement, the international community is reluctant to recognize the need for multilateral action to create mechanisms that address relocation. A publication by the UNFCCC, entitled “Climate Change: Impacts, Vulnerabilities, and Adaptation in Developing Countries,” acknowledged environmental pressures caused by climate change but stated that international relocation is not possible. The publication failed to provide alternative solutions that may effectively confront climate change migration. Other international governmental organizations focus on national plans to mitigate displacements and immigration; however, such plans as promoted by the World Bank and UN.

---

66 Id. at 1169.
67 Id. at 1170.
69 AD (Tuvalu) [2014] NZIPT 501370-371, at 371.
70 Id. at 372.
Development Program are insufficient. The absence of a functional international mechanism to address environmental refugees violates global commitments to human rights, risks international security, and fails to provide financial assistance to states to cope with these migrations.

A. Human Rights

The UNHCR maintains authority over international refugee law, as set forth by the 1951 Convention. However, the UNHCR only provides protection and support for political refugees and equates environmentally displaced populations as internally displaced persons (IDPs). Environmental refugees are excluded from international protection as a result of that distinction and by the UNHCR’s definition of a refugee. The exclusion of these populations produces a massive “rights gap” or, “the lack of a right in existing law to remain permanently in another country due to environmental conditions in the home country.” The gap, therefore, infringes upon international commitments to protect human rights.

Political refugees are exclusively guaranteed the issuance of legal travel documents, the unity of their family, legal and welfare services, co-operation in their asylum and resettlement, and the extension of treatment if necessary. Such benefits are denied from IDPs and environmental refugees. In principle, the exclusion of IDPs is unjust because of geopolitical circumstances of many populations. Additionally, in the case of environmental refugees, internal displacement is often the most humane, efficient, and economically conscious solution. The resettlement of populations, within the same country, to less vulnerable regions requires less funding and time, as well as protects cultural integrity.

The United Nations Universal Declaration to Human Rights (UNUDHR) signifies an international commitment to the protection of a state’s own inhabitants by the government. The commitment to the declaration also promises international assistance to nations, capacity building of developing governments, and timely and decisive responses to violations. A parallel can be drawn between human rights violations and the

73 Id. at 133.
74 Id. at 134.
76 Id.
consequences of climate change. Such violations are detrimental to the health and well-being of populations, just as the consequences of climate change are expected to be. Governments that fail to mitigate climate change also fail to protect their citizens by worsening environmental degradation. Moreover, Article 3 of the declaration guarantees global citizens the right to life, liberty and security of person; Article 22 of the declaration promises the right to social security; and Article 25 promises the right to a standard of living. Under conditions of environmental degradation, populations are not experiencing security or a proper standard of living. Members of the international community have upheld the international assistance and capacity building commitments through the recognition of climate change and partnerships to confront it. However, global actors have failed to respond in a timely manner and decisively to the effects of climate change on populations. Furthermore, the international community is obligated through its commitment to human rights to defend and protect environmental refugees.

In accordance with human rights protections, the United Nations International Covenant for Civil and Political Rights (ICCPR) and the International Covenant for Economic and Social Rights (ICESR) impose binding obligations on signatories to protect several rights of populations. The ICCPR guarantees a person the right to human life and free utilization of natural wealth and resources; the protection of this right is the responsibility of the state. However, environmental degradation limits the availability of resources and therefore lowers living standards. The ICESR promises a person the right to health and enjoyment of full natural resources. Conditions in certain regions do not fulfill the promise to health and full natural resources due to the exacerbation of horrible conditions posed by climate change.

B. International Obligations

Obligations to environmental refugees by the international community are currently exemplified in several multilateral institutions and norms. Within the UNFCCC, developed countries are required to assist developing countries that are parties to the

---

79 Id. at 1110.
convention and that are particularly vulnerable to the adverse effects of climate change. Developed countries are compelled to meet the costs of adaptation in instances of said adverse effects, as stated in the convention. The conditions of the convention further bind developed countries to aid developing countries with the relocation of displaced populations, as these displacements are direct effects of climate change. Likewise, developed countries must provide financial assistance to developing countries to facilitate these relocations and to mitigate further environmental degradation through infrastructure projects and sustainable resource production and consumption.

In order to uphold the Charter of the United Nations, member states must act to establish relocation mechanisms to ensure international peace and security. The migration of environmental refugees should be legal and controlled because such displacements can rarely occur without conflict. As evidenced by the debate between the UK and the UN Security Council, environmental displacements are threats to international stability and security if not properly regulated. Therefore, the UN and member states are obligated to act to prevent displacement in order to uphold the Charter that ensures international peace and security. The UN is obligated to take effective collective measures for the prevention and removal of threats, like unregulated migrations, to such peace.

C. The Funding Gap

International institutions have failed to provide adequate funding to mitigate and facilitate environmental displacements. Insufficient funding programs produce a “funding gap,” or the “lack of a dedicated source of international funding to help offset the costs that developing countries may incur in dealing with climate change migration.” As a consequence, developing countries—which are most susceptible to climate change consequences—are not funded well enough to prevent mass destruction of lands or cope with mass migrations.

Developing countries lack proper mechanisms to address climate change and protect vulnerable populations from its adverse effects. Infrastructure, such as seawalls and

---

81 Id.
82 U.N. Charter art. 1, 1.
84 Id. at 22.
drainage systems, lessen the effects of natural disasters, however these nations do not have enough financial resources to fund projects. In the wake of disasters, developing countries struggle to provide aid to affected areas.\textsuperscript{85} Populations in such areas are unable to rebuild or migrate to safer locations because governments cannot provide financial assistance or organize groups to aid in recovery.\textsuperscript{86} The insecurity of affected populations severely hinders their ability to rebound and rebuild. Similarly, these populations are incapable of sustaining the economy in the area and further hinder the countries’ economic development.\textsuperscript{87}

The funding gap affects the capabilities of developed countries to accommodate refugee migrations. Although programs exist to help these countries, not nearly enough money is available to offset initial costs of large-scale immigration.\textsuperscript{88} Developed countries are responsible for the financial well-being of refugees by providing stable jobs and housing. Additionally, developed countries are responsible for providing adequate social programs such as education and healthcare to refugees. These programs are guaranteed to refugees for an extended period of time in order to assimilate.\textsuperscript{89} Financial assistance programs are established within the international system, however they fund projects in regions to improve the environment.\textsuperscript{90} The Global Environment Facility contributes to the protection and improvement of the environment.\textsuperscript{91} The international system lacks an operational funding program to address environmental refugee costs.

III. Solutions

A. Redefining a Refugee

In order to accommodate environmental refugees in existing policies, the UNHCR must change the definition of refugee. Under international law, the stipulations for refugees are outdated and insufficient, as they have remained unchanged since 1951.\textsuperscript{92} The UNHCR must account for unprecedented changes in the environment and take

\textsuperscript{85} Stefano Pagiola, Gunars Platais, \textit{Payments for Environmental Services}, WBG 1 (2002).
\textsuperscript{86} Id. at 2.
\textsuperscript{87} Id. at 2.
\textsuperscript{88} Charlotte Streck, \textit{The Global Environment Facility—a Role Model for International Governance?}, Global Environmental Politics 71, 90 (May 2001).
\textsuperscript{89} Id. at 90.
\textsuperscript{90} Id. at 92.
preventative actions to lessen the impact of mass migrations. Furthermore, the definition must be modified because existing programs can then most effectively relocate environmental refugee populations.

Changes to the definition must account for those predicted to be most affected by climate change. Natural disasters and other consequences of climate change will force large-scale emigration from low-lying and vulnerable areas, such as Sub-Saharan Africa and the Bangladesh Delta. All things considered, the definition should include internally displaced persons because internal migration is the most efficient and economical solution for affected nations. The UNHCR can most efficiently displace these populations with these amendments to the definition:

Someone who has been forced to flee his or her region because of environmental hazards caused by climate change. Refugees include those who are seeking displacement inside or outside of their home country and have a well-founded fear that their personal safety, livelihood, and standard of living are at risk.

The amendments should be adopted on the basis of human rights, as the absence of these changes will put populations at risk. The new definition accounts for the fears of returning home to unsafe and unlivable conditions that are found amongst environmental refugees and IDPs. The new definition will provide environmental refugees with the same protection and opportunities as political refugees as the mechanisms in place will then be applicable to environmental refugees. Refugees in immediate danger will be guaranteed legal protection, financial aid, and help in the displacement process. Additionally, responsibilities of signatory countries will then be applicable to environmentally displaced populations. The definition also places responsibility for the health and welfare of these refugees in environmental circumstances in the hands of developed countries.

The UNHCR, as per the new definition, will be required to provide environmental refugees financial and legal support throughout the process of displacement. The displacement program of the UNHCR will allocate funding to intake countries in accordance with the number of refugees accepted. The UNHCR will pay for travel services and provide employment services for immigrants. Through the funding provided

---

93 Id. at 557.
by the UNHCR, intake countries will also ensure stable healthcare for immigrants and public education for their children.

Members of the international community are hesitant to modify the definition of the refugee. The majority of states believe that the inclusion of environmental refugees will swamp national governments with protection costs and resettlement needs, which is referred to as the “floodgates concern.” Furthermore, these nations reference statistics that state potentially twice as many refugees as accommodated now may enter the international system and will overburden refugee mechanisms. However, the modified refugee regime will account for this concern by establishing a cap for the number of refugees admitted into a country. The cap will avoid a system breakdown, as the cap will account for the individual physical and financial capabilities of intake countries.

Other international actors do not advocate for the expansion of the refugee definition because of the belief that countries are unwilling to take initiative to change the definition. Under this belief, the expansion of protection by the UNHCR would require governments to modify a definition that has been unchanged since 1951. The concern for refugee safety remains relevant in the international system, but the exclusion of environmental refugees is outdated. Increasing recognition of climate change by the international community, through agreements such as the Paris Agreement and Kyoto Protocol, illustrates the willingness of signatories to accommodate environmental refugees.

B. A Modified UN High Commissioner for Refugees

Signatories to the UNHCR must convene to reform the make-up of the program, in order to accommodate the specific needs of environmental refugees under a new convention. The UNHCR is most qualified to handle relocated populations because of the program’s part in the international refugee regime. The UNHCR, with the new convention, will then adopt a subsidiary organization to address environmental refugees specifically.

The established mechanisms of and support by the international community for the UNHCR make it the ideal program to accommodate environmental refugees. The adoption of the new definition is the optimal solution to this matter because major international powers already support the program. Current obligations to the international refugee regime, combined with increased adherence to norms regarding climate change...
mitigation, would entice signatories to adopt the new policies. Likewise, signatories would provide programs and opportunities to environmental refugees as they are currently obligated by the UNHCR.

Signatories, and all members of the UN, would convene at the United Nations Conference of Environmental Refugees once. This conference would later adopt the United Nations Environmental Refugee Convention (UNERC), which would outline the modifications to and establish a subsidiary group for the UNHCR. The UNERC would govern all environmental refugee affairs and be delegated the same powers and mechanisms as the UNHCR political refugee programs. Signatories would also sign into non-refoulement, by which they cannot return refugees unless it is the consensus of the majority of signatories. Therefore, refugee allocations would also account for the physical capacities of countries, as to not overextend the abilities of receiving countries.

The signatories to the convention would reconvene every five years, the same timeframe coordinated by the signatories to the Paris Agreement, to discuss the future of the environmental refugee regime.\textsuperscript{96} The convention would maintain fair representation with each region contributing two representatives to discuss a global plan for displacement mitigation. One delegate must represent a developing country and the other a developed country. Together, these delegates would present regional plans that best represent the environmental issues of that area. In order to accommodate the needs and specific environmental issues of regions, the UNERC must also establish departments specific to geographical regions. All regions have issues and concerns specific to their area. For instance, drought in Africa is not an issue in the Amazon Rainforest in South America. Additionally, the inclusion of special needs and cultures of regions will ease the transition for refugees and make displacement migrations more feasible. More displaced migrants can continue to live in the same regions, instead of moving across the globe. In addition, the delegates would establish a global benchmark system, with which they will reconvene to address after five years. The benchmark system would include approaches to climate change mitigation, national improvements of infrastructure, and displacement mechanisms.

The UNERC, the subsidiary group, would further define their work through the differentiation of temporary and permanent refugees. Temporary environmental refugees would receive full civil rights within the new country, such as healthcare and education,

\textsuperscript{96} UNFCCC, \textit{supra} note 47, at 51.
however would not be given political rights, like voting powers. Permanent environmental refugees would be given citizenship of the receiving country as well as full political and civil rights of non-refugee citizens. This differentiation will allow displaced populations to return to their home countries, provided that conditions are conducive to a safe and prosperous future. Similarly, permanent refugees would better assimilate into the receiving country.

The actions taken by the subsidiary group would also follow the rules, regulations, and guidelines of several environmental institutions. The leading institutions in environmental law and development are the UNFCCC, the UNEP, and the Intergovernmental Panel on Climate Change. The subsidiary must abide by and adopt the projects and provisions put forward by these groups, as it will better coordinate efforts to mitigate climate change and prevent future displacements. Similarly, signatories to the convention would be legally bound to adopt mitigation policies that prevent the exacerbation of climate change. The signatories must implement procedures to establish safer and more sustainable development within their country. For instance, signatories would implement prevention policies for environmental degradation, efficient pollution controls, adequate disaster response procedures, and quality infrastructure.

C. The Global Fund for Environmental Displacement

The UNERC will establish the Global Fund for Environmental Displacement (GFED) that will fund displacement programs and support affected and intake countries. The Fund will provide financial assistance to countries and regions as a way to combat the funding gap that hinders the work of the international community. The GFED will allow larger populations to be successfully relocated inside or outside of home states. The GFED will also fund future programs of UNERC to successfully adjust to the oncoming consequences of climate change.

The GFED will aid development in developing countries to improve the strength of government capacity and elasticity. This aid will go to economic development, social welfare, and climate change prevention measures such as infrastructure. Developing countries that are most vulnerable to climate change cannot afford to build preventative infrastructure to mitigate climate change. These countries must be able to build seawalls

97 Moberg, supra note 69, at 1113.
and drainage systems, as well as other infrastructure, to prevent massive damage on coasts and other areas. More importantly, the funding will aid sustainable economic growth to take these countries out of poverty and adjust to the economic complications that follow climate change. As discussed earlier, the most vulnerable countries promote industries such as agriculture and forestry that are most susceptible to climate change.\(^98\) Also, the funding will allow developing countries to establish well-funding social programs to aid poorer populations and help their adjustments to climate change. In their current state, developing countries’ governments cannot fund internal displacements. Internal displacements are the most efficient means of relocating environmentally displaced populations.

The GFED will aid placement programs in developed countries that take in migrants. Developed countries will receive aid to fund already existing welfare systems, healthcare, and social programs specifically for migrants. Developed countries are hesitant to accept large refugee populations because of high initial costs in social programs, given that this financial burden likely falls upon taxpayers.\(^99\) The weight of this financial burden is evidenced by the growth of conservative movements in developing countries such as Germany and the United States.\(^100\) The assistance from the GFED, however, will be put towards public education, welfare systems, job and housing placement, and healthcare. This financial assistance would better the social programs currently in place for both non-refugee and refugee citizens.

The GFED will require start up funds that will be obtained from developed countries as per their global economic standing and ecological footprint. The largest contributors to climate change are those with massive populations and that are highly industrialized.\(^101\) Such countries must be responsible for their unsustainable actions. The GFED would follow the “polluters-pay principle,” with which developed countries are unjustly enriched. In consequence, developed countries will put funds towards the GFED in accordance with their ecological footprint and size of the economy. Countries such as the United States and China, for example, will place major contributions towards the GFED because of their large ecological footprint and massive economies. As per national gross domestic product statistics of 2015, the United States produced $18,036,648 and

\(^{98}\) Mendelsohn, supra note 15, at 11.


\(^{100}\) Id.

\(^{101}\) Mendelsohn, supra note 15, at 12.
China produced $11,007,721.\textsuperscript{102} The ecological footprint of the United States ranks of the worst among global powers. With these statistics in mind, the signatories to the UNERC and major powers would be compelled to allocate funding toward the GFED.

IV. Conclusion

Given scientific predictions for increased intensity of climate change threats and current displacements, reform of international law is necessary for continued global sustainability. Recent changes in climate change law are not sufficient enough to prevent massive migrations. Therefore, international law must account for the mass migrations with heavy changes to make way for the presence of environmental refugees.

The absence of legal precedent and the disillusionment of developed countries delays preventative actions that combat unregulated mass migrations. Despite increased global recognition, the international community has failed to take initiative to accommodate such populations. In its current state, the international refugee regime fails to provide financial aid to environmentally displaced populations. Without proper funding, the predicted migrations will deplete the welfare systems of intake countries. Similarly, established immigration plans are dependent on geopolitics within regions. This approach deeply divides areas and will promote regional conflict.\textsuperscript{103} In the same manner, developed countries with well-established immigration systems fail to cooperate with developing countries to address displacement plans, government stability, and in-state infrastructure. Together, these challenges strain the cooperation of regional actors.

The inaction of the members of the UN General Assembly disrupts the stability of a safe global future. Developed countries consistently approve policies that directly impact developing countries without their input. The 2009 Copenhagen Climate Change Conference negotiated the Copenhagen Accord with select members of the UNFCCC, such as the United States, China, and India.\textsuperscript{104} Developing nations most affected by the structure of this agreement, such as Bangladesh, were excluded from the negotiations.\textsuperscript{105} In order to promote a sustainable environment for the international community, developed nations must include developing nations in environmental negotiations.

\textsuperscript{102} Gross domestic product 2015, WBG. World Development Indicators database, Feb. 1, 2017.
\textsuperscript{103} Raleigh, supra note 19, at 29.
\textsuperscript{104} Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat during the Month of August 2009, 2009 U.N. Statement T. & Int'l A. [i], 72 (2009).
\textsuperscript{105} Id.
The absence of a plan to accommodate mass migrations will only create issues for the international community in the near future. Indigenous cultures will be lost as a result of inaction, because many small cultural communities live in the most vulnerable locations on the earth. According to the Prime Minister of Tuvalu, Maatia Toafa, “Identity is very important. You have your people, the same land and your culture. Once we are to relocate, meaning we will lose our land, which is a very important component of anyone's identity.”

Moreover, Toafa has emphasized the drastic effects relocation has on the development of children.

Intrastate and interstate conflicts will emerge without proper relocation mechanisms. As emphasized by the UK and its debate with the UN Security Council, the consequences of climate change will create mass resource competitions as well as massive influxes of illegal immigrants. These issues will agitate populations within countries and increase tensions between countries, resulting in more instances of warfare.

As a result of the unsustainable practices of past generations, the welfare of future generations is at risk. Environmental changes, while slow, are drastically changing the geography of the globe. The political, economic, and environmental stability enjoyed by the populous will be noticeably disrupted by 2050. In both developed and developing countries, land mass will be both lost to sea level rise and damaged by increased storm frequency. Before the full potential of climate change is realized, it is imperative that the international community formulates a plan to address and mitigate the consequences of mass migrations.

---

Victims’ Rights within the Framework of Theoretical American Justice

Kaarish K. Maniar

Introduction

The nomination and appointment of Senator Jeff Sessions as attorney general has excited those who support expanding the rights of crime victims. Sessions, a former prosecutor, has also been an advocate for amending the Constitution to include victims’ rights. Sessions builds on the Victims’ Rights Movement (VRM), a movement that first was born in response to Linda R.S. v. Richard. The initiatives advanced by the VRM offer surviving victims of violent crimes, or their families, a part in the prosecution of the individual being charged. Since the 1970s, the VRM has managed to secure rights for victims with legislation, occasional support from courts, and the work of thirty-three state legislatures that passed amendments to their state constitutions. Furthermore, supporters of the movement see their cause as a return to a private prosecutorial legal model in which the victim is given significantly more importance and influence.

After nearly half a century of growth, the VRM today is an amalgam of victims’ rights organizations, grassroots supporters, and dedicated legislators from both parties. The movement does not possess a definitive hierarchy, organization, or designated spokesperson, but with the cooperation of numerous advocacy groups and individuals, it has become a powerful force. The most influential VRM group today is the group pushing for states, and indeed the nation, to adopt an amendment they call “Marsy’s Law.” The organization rallies around the murder of Dr. Henry T. Nicholas’s daughter, Marsalee.

The movement stems from the pain and suffering that Marsy’s family endured after her boyfriend murdered her. The parents cite as their impetus an incident in which

---

2 Paul Cassel and Steven Twist, Why Jeff Sessions, a conservative attorney general, would be best for crime victims, FOX NEWS, Dec. 14, 2016.
they encountered the suspected murderer after he had been released on bail, without the victim’s family having been informed.\(^5\) The organization, “Marsy’s Law for All,” now fights to convince state legislatures to adopt amendments securing victims’ rights, thereby obligating prosecutors to keep victims’ families informed. Thus far they take credit for the passage of victims’ rights legislation in California, Illinois, North Dakota, South Dakota, and Montana.\(^6\)

Conservatives originally founded the VRM during the Reagan presidency and liberal veterans of the civil rights movement. In terms of governmental advocacy, the VRM’s two primary supporters are the Congressional Victims’ Rights Caucus and the Office for Victims of Crime within the U.S. Department of Justice. The caucus, founded and co-chaired by Congressmen Ted Poe and Jim Costa, is a “bipartisan congressional caucus that [provides] a louder voice for all the advocacy groups who advocate on behalf of victims of crime.”\(^7\) In a rare occurrence, both sides of the aisle have consistently united behind the VRM to perpetuate the popular ‘tough on crime’ image that still dominates public opinion.\(^8\) For instance, the VRM-supported Crime Victims’ Rights Act of 2004 received almost unanimous support in the Senate, passing the body with a 96-1 vote.\(^9\) Today, legislative and bureaucratic support for the VRM remains bipartisan.\(^10\)

Nonetheless, in the framework of our justice system’s intentions and processes, the VRM poses a threat to the objective determination of guilt. While it is inarguably crucial to treat victims with respect and guarantee justice and transparency for them, the Fifth and Sixth Amendments clearly lay out the rights of the defendant: rights that cannot be threatened by introducing emotion into legal proceedings.\(^11\) The VRM advocates for a noble cause and justly ensures that victims’ needs are addressed; however, the furthering of victims’ rights, beyond what is already provided for today, will undoubtedly undermine those of the defendant. Furthermore, due to our common law system of public prosecution, crime is an issue between the people and the criminal, not two individuals. The criminal justice process is seen as a matter of creating precedent based on individual

\(^5\) Id.
\(^6\) Id.
\(^11\) U.S. CONST. amend. V.; U.S. CONST. amend. VI.
decisions that are supposed to be objectively just. The involvement of the victim, however, makes crime a private matter, undermining the justice system’s objective function as a lawmaking entity. While it is imperative that victims are informed, respected, and protected, their inevitably subjective involvement in proceedings tramples over the objective search for justice.

**Part I: American Justice in Theory**

Although the American judicial system lacks structured definition as a result of ever-changing common law, it consistently strives to achieve efficiency, fairness, and accuracy. Nonetheless, while certain debates persist over time, numerous scholars have attempted to concretely define several aspects of the U.S. legal system. In the following section, the U.S. legal system will be broken down into key philosophical strains that impact the VRM; this includes standard American beliefs regarding who can prosecute, how prosecution should be conducted, and what punishment should look like.

**A. The Public vs. Private Issue**

For centuries, societies have used various criteria to determine who is allowed to pursue justice. Historically, victims have had significant influence over criminal proceedings because private justice was typically most efficient, especially during the medieval period.12 After the fall of the Roman Empire, victims in Europe sought justice through personal vengeance; they established a private justice system that relied on the victim, families, and communities to both judge and punish.13 However, in feudal England, the justice system soon evolved into a mix of public and private procedures due to the standardization of power dynamics between the law, lords, and kings.14 Thus, the VRM finds its roots in early English law, which translated into American law. In early America, it remained common for victims and families to have massive influence over criminal proceedings.15 Predicated on personal vengeance, the private justice system has since been

---


13 Id.


supplanted in America, but its values are still partially preserved through policies reintroduced by the VRM.

Some scholars argue that private prosecution was the norm well into the American Revolution and drafting of the Constitution. Others assert that public prosecution appeared quickly in colonial America due to the view that prosecution was a public duty and because of the largely more egalitarian society. Either way, it remains true that America practiced a mix of public and private prosecution until the rise of the public prosecutor in the nineteenth century. For instance, Philadelphia allowed individuals to bring criminal charges against other private citizens in cases concerning seduction, assault, battery, adultery, and desertion until the late 19th century. Likewise, in Michigan and Wisconsin, private prosecution did not become illegal until 1875 and 1888, respectively.

The current U.S. system is mostly based on public prosecution; however, some states allow victims and their prosecutor to appoint a private attorney to assist or to act as prosecutor. Other states allow private citizens to initiate prosecution; specifically, New Hampshire, Pennsylvania, and Virginia permit limited or entirely private prosecutions overseen by the victim. Despite the few remnants of a private prosecutorial system, public prosecution has overwhelmingly become the norm because private prosecutors often cannot function on behalf of both the people and the victim. In order to represent the people, the people must regulate a prosecutor, however, in private prosecution this is incredibly difficult to accomplish. In 1985, the Virginia Supreme Court articulated this notion in Cantrell v. Commonwealth, a case in which a private prosecutor was hired to act as a “special prosecutor” in a murder trial. Justice Russell argued that private prosecutors are hired with private money to pursue private vengeance, thereby compromising the objectivity of a courtroom and simultaneously making the case a private matter.

---

18 Id.
19 Id., at 371.
21 234 PA. CODE Rule 506; State v. Rollins, 533 A.2d 331, 331 (N.H. 1987); VA. STAT. § 19.2-72.
23 Id.
24 Id.
25 Id.
highlighted that American criminal proceedings do not attempt to resolve conflict between two individuals, but to bring justice on behalf of all citizens, thereby making it a public matter. 

B. The Due Process and Crime-Control Models

Despite historical fluctuations in practice regarding public and private prosecution, the American judicial system is unique in that it can function for several purposes. Professor Herbert Packer attempts to delineate these aims into two models: the crime-control model and the due process model. The crime-control model is proactive. It holds that the repression of criminal conduct is the primary purpose of the legal system, for without strict law enforcement, public order is corroded and crime increases. However, in order for the crime-control model to function, it must produce a large number of convictions in order to repress and deter crime. In order to do this, a pure crime-control based system maintains informal and uniform practices, unlike those of a court trial, in order to ensure efficiency. Packer defines efficiency as “the system’s capacity to apprehend, try, convict, and dispose of...criminal offenders” in a timely manner. He calls this process “a conveyor belt,” or a series of routine practices, that helps divide suspects into “probably innocent” and “probably guilty” categories. Packer goes on to say that a crime-control model functions on what he coins a “presumption of guilt.” He clarifies that this theory is not the opposite of the presumption of innocence. Whereas the presumption of innocence explicitly guides officials throughout the judicial process, Packer explains that the presumption of guilt is a mood or attitude which expresses confidence in the state’s preliminary investigations and fact-finding. Without superfluous ritual and ceremony, the crime-control model aims to reduce crime through efficiency and speed, it can do so at the expense of accuracy and fairness.

28. Id. at 9-10.
29. Id. at 9-10.
30. Id. at 10.
31. Id. at 10.
32. Id. at 11.
33. Id. at 11.
34. Id. at 12.
35. Id. at 18.
While the crime control model represents a conveyor belt, the due process model resembles an obstacle course.\textsuperscript{36} Whereas the crime-control model places confidence in the fact-finding processes of officials, the due process model seeks to eliminate every doubt by scrutinizing and remaining skeptical of those officials.\textsuperscript{37} Because the confiscation of an individual’s life or liberty is the most severe punishment a government can impose, it is that government’s duty to ensure that only those who have undoubtedly earned that punishment actually receive it.\textsuperscript{38} For this reason, even if an individual is factually guilty, he or she cannot be punished unless that guilt was determined in a procedurally sound manner.\textsuperscript{39} The due process model thus places more value in reliability than efficiency, or the speedy execution of the justice process. Moreover, it seeks to foster equality within the system by assuming a defendant is innocent until the state can prove its case against them in an unbiased venue. Due to its stress on accuracy and fairness, the due process model holds “that it is better that ten guilty persons escape, than that one innocent suffer.”\textsuperscript{40}

Whereas the crime-control model says that the ends justify the means, the due process model dictates that the means must determine the ends.\textsuperscript{41} This value is a trademark principle of American law because few other systems have procedural minutia that hold such sway over the entire process.\textsuperscript{42} For instance, it is rare for courts in other countries to make illegally obtained evidence inadmissible.\textsuperscript{43} In \textit{Weeks v. United States}, the Supreme Court held that such evidence directly violates the defendant’s Fourth Amendment rights and thus cannot be used in American courts.\textsuperscript{44} This decision was applied to state courts in \textit{Mapp v. Ohio}.\textsuperscript{45} The very existence of such principles and controls show an investment in preventing the government’s confiscation of an individual’s liberty, and thereby a theoretical dedication to the due process model.

Nonetheless, Packer argues that despite an overwhelming predilection to due process in the system’s written governance, in practice it largely resembles the crime-

\begin{thebibliography}{9}
\item \textsuperscript{36} \textit{Id.} at 13.
\item \textsuperscript{37} \textit{Id.} at 20.
\item \textsuperscript{38} \textit{Id.} at 16.
\item \textsuperscript{39} \textit{Id.} at 17.
\item \textsuperscript{41} Packer, \textit{supra note} 27 at 25.
\item \textsuperscript{42} Christopher Osakwe, \textit{The Defendant’s Rights Today}, 52 TUL. L. REV. 211, 213 (1977) (discussing American due process).
\item \textsuperscript{44} \textit{Weeks v. United States}, 232 U.S. 383 (1914).
\item \textsuperscript{45} \textit{Mapp v. Ohio}, 367 U.S. 643, 398 (1961).
\end{thebibliography}
control model. However, he adds that the system is returning to a focus on due process.\footnote{Packer, supra note 27, at 61.} This change is important to the American legal system because the due process model is fundamental to American values. Whereas the crime-control model is born of a need for efficiency in daily matters, the due process model actually has roots in the Fifth Amendment.\footnote{U.S. CONST. amend. V.} Aside from the due process clause of the amendment acting as a namesake for the model, the rights protected in the amendment suggest an attitude of skepticism and thorough review of evidence in order to ensure fairness and accuracy, not necessarily efficiency. The U.S. Constitution explicitly protects the rights of the defendant, but says nothing about the general control of crime; therefore, ensuring that the party to be punished is actually guilty is of the utmost importance. Nonetheless, while the Constitution has clearly sided with the due process model, it remains the courts’ responsibility to oversee its practical application.

What we must note, however, is that regardless of which model we follow in any selected historical period, both of Packer’s models clearly side with a public prosecutorial model. Private prosecution explicitly undermines due process because, as established in \textit{Cantrell v. Commonwealth}, a private prosecutor’s conflicts of interest encroach on the defendant’s due process rights. In regards to the crime-control model, a private prosecutor’s personal investment in the case allows him to pursue it with more vigor, thus increasing the potential for a larger number of convictions. While this supports a crime-control model, private prosecution also diverges from the uniformity and efficiency offered by the public prosecutor’s office, therefore still undermining Packer’s framework.

Those who support private prosecution and the involvement of the victim typically support a crime-control model because they favor increased incarcerations. Ironically, however, in the late 1800s and early 1900s, supporters of a crime-control model advocated for public prosecution because of its uniformity and efficiency.\footnote{Carolyn B. Ramsey, \textit{The Discretionary Power of “Public” Prosecutors in Historical Perspective}, 39 AM. CRIM. L. REV. 1309, 1309-1393 (2002).} In fact, when studying the prosecutions under a public prosecutor and comparing those with the desires of public opinion, the two generally seem to align. In this way, public prosecution has
proven to control crime and adequately punish offenders while preserving the rights of the defendant.\textsuperscript{50}

That said, the label of “victim” inherently introduces bias into the process by implying that the defendant committed a wrong upon them, when the purpose of being in court is to determine whether or not the defendant is actually guilty of having made the victim a victim. For instance, the Marsy’s Law advocacy group platform states, “No rapist should have more rights than the victim. No murderer should be afforded more rights than the victim’s family.”\textsuperscript{51} These statements subvert a defendant’s Sixth Amendment rights to an impartial trial.\textsuperscript{52} By implying that the defendant is already a “rapist” or “murderer,” before having been lawfully found to be one, this platform clearly sabotages the presumption of innocence. The label of “victim” will always be used in court, but it must be noted that at a fundamental level, by calling the affected individual a victim, and by claiming that the defendant is anything more than a defendant, the VRM threatens defendants’ rights.

\textit{C. Proportional Punishment}

While the Eighth Amendment is most commonly discussed in the context of the death penalty, it also impacts other forms of punishment used in the United States. The Eighth Amendment’s use of the word “cruel and unusual,” in conjunction with the Fifth Amendment’s due process clause, suggests a fair process devoid of emotional influence that could render an unjust sentence.\textsuperscript{53} Thus, the emotion-centric policies for which the VRM advocates can result in unusually harsh punishments.

The idea of proportional punishment was brought to the forefront in 1983 when the Supreme Court delivered a decision in \textit{Solem v. Helm}.\textsuperscript{54} For uttering a $100 “no account” check and for six previous non-violent felonies, South Dakota sentenced the defendant as a recidivist to a life-sentence without parole. The Supreme Court’s opinion, delivered by Justice Powell, found that the Eighth Amendment prohibits both barbaric punishment and sentences disproportionate to the offense. Therefore, considering the

\textsuperscript{50} Id.
\textsuperscript{51} About Marsey’s Law, \textit{supra} note 4.
\textsuperscript{52} U.S. CONST. amend. VI.
\textsuperscript{53} U.S. CONST. amend. VIII; U.S. CONST. amend. V.
severity of his crimes, Helm’s punishment was found unconstitutional.\textsuperscript{55} Furthermore, in order to determine the proportionality of a sentence going forward, the court proposed a test in which three factors are analyzed:

1. The gravity of the defendant’s crime
2. Whether more serious crimes in the same jurisdiction are subject to the same or less-harsh penalties
3. Sentences for the same crime in other jurisdictions\textsuperscript{56}

The court instructs that the factors be considered on a relative scale by evaluating the “harm caused or threatened to the victim or to society, and the culpability of the offender.”\textsuperscript{57} While the court allows for the impact on the victim to be considered, the use of the word “society” suggests a consequentialist view in which crime is punished based on its ramifications on the public.\textsuperscript{58}

Justice Burger, in saying that \textit{Solem v. Helm} overturns the 1980 decision in \textit{Rummel v. Estelle}, wrote a dissenting opinion in favor of \textit{stare decisis}.\textsuperscript{59} Burger argues that Helm’s previous felonies were more severe than those of Rummel, therefore, if the court found Rummel’s sentence to be sound, Helm’s life imprisonment must also be just. Burger also contends that \textit{Solem v. Helm} infringes on the authority of states because if multiple states hold that a sentence the court deems disproportionate is in fact proportionate, the court has no right to intervene.\textsuperscript{60}

Nonetheless, the Solem Test seems to be a more accurate representation of the Eighth Amendment than is the decision in \textit{Rummel}. The Solem Test does not define what is and is not a proportionate sentence, but simply sets guidelines to determine proportionality. By instructing states to consider the actual ramifications of a defendant’s crime, the court makes cruel punishment less likely. The second and third factors directly address the unusual nature of a punishment by instructing states to punish similar crimes in a similar manner, regardless of whether an individual court finds that punishment to be too harsh or light. Thus, the court does not encroach upon a state’s right to decide what is proportionate; it simply ensures that states come to a somewhat uniform decision that

\textsuperscript{55} \textit{Id. at 279.}
\textsuperscript{56} \textit{Id. at 292.}
\textsuperscript{57} \textit{Id. at 292.}
\textsuperscript{58} \textsc{Antony Duff}, \textit{Legal Punishment} (Edward N. Zalta ed., 2016).
\textsuperscript{60} \textit{Solem}, 463 U.S. at 304.
abides by the constitution. For this reason, the Solem Test protects due process by safeguarding the defendant’s rights, but also promotes a more realistic crime-control model by making punishment across jurisdictions more uniform to one another.

However, in 1991, the Court overruled the Solem Test with its opinion in Harmelin v. Michigan.61 Writing for the majority, Justice Antonin Scalia acknowledged that the “cruel and unusual punishment” clause of the Eighth Amendment is derived from the 1689 English Declaration of Rights, but he contested the notion that the Declaration of Rights and American Bill of Rights are derived from the Magna Carta or the ideas enshrined within it.62 Justice Scalia said that the opinion in Solem assumed that the framers of the Constitution intended the Eighth Amendment to prohibit disproportionate punishment, based in the right to punishment proportionate to the offense as provided in the Magna Carta.63 He argued that the Eighth Amendment was historically more concerned with the illegality of punishment rather than its disproportionality. Moreover, Justice Scalia claimed that while disproportionate punishment may always be cruel, it is not always unusual, therefore Harmelin’s punishment is not prohibited by the Eighth Amendment.64

Justice Anthony Kennedy wrote a concurring opinion saying that while the court held a narrow proportionality rule in numerous past cases, the Eighth Amendment did not require that a crime and sentence be proportionate, but it did forbid “grossly disproportionate” punishment.65 Nonetheless, Justice Kennedy acknowledged Michigan’s attempt to control wholesale drugs through a crime-control model. While he said that there is no guarantee that their heavy sentencing will act as a deterrent, he agreed that their punishment of Harmelin did not violate the Eighth Amendment.66

Justices Byron White, Harry Blackmun, and Thurgood Marshall upheld proportionality in arguing that the use of the word “excessive” within the Eighth Amendment suggests a need for proportional punishment.67 Justice White rebutted Scalia’s argument that if the Founding Fathers wanted a proportionality guarantee, they would have included one, by countering that most amendments to the Bill of Rights are vague and ambiguous. Therefore, it was by no means unreasonable to recognize a proportionality

62 Id. at 961.
63 Id. at 966.
64 Id. at 966.
65 Id. at 866.
66 Id. at 1008.
67 Id. at 1009.
factor within the Eighth Amendment. Furthermore, Justice White wrote that because such a vast number of past cases construed the Eighth Amendment to possess a proportionality component, the decision in Harmelin must also do so to preserve the integrity of said past decisions.68

All in all, the Harmelin dissent is most persuasive in agreeing that proportionality is in fact inherent within the Eighth Amendment. While Justice White does address most of Justice Scalia’s argument, it must be added that the Solem Test itself addresses his concerns about the unusualness of a punishment.69 In comparing punishment to the same jurisdiction and others, the second and third factors of the Solem Test are directly aimed at ensuring that a punishment is not unusual, even if it is disproportionate. For this reason, contrary to Justice Scalia’s belief, the Solem Test does not make the assumption that all disproportionate punishments are unusual, simply that they are cruel.

If victims’ emotional and potentially revenge-seeking involvement makes testimony in court more prejudicial, then the likelihood of disproportionate punishment would significantly increase.70 This is true for every instance in which the victim offers any evidence or testimony other than objective, unbiased facts. Thus, if the Eighth Amendment does prescribe proportional punishment, or at least forbids disproportionate punishment (as Justice Kennedy and the majority of Supreme Court decisions suggest), then a victim’s prejudicial involvement would be unconstitutional. If, as is our current consensus, the Eighth Amendment does not prescribe proportional punishment, then a victim’s involvement is not unconstitutional, but still undermines the fundamental guarantees of the U.S. legal system.

The U.S. justice system is already known for its inconsistency in sentencing, especially in capital cases, despite attempting to be consistent.71 Hence, the victim’s influence exacerbates a pattern of inconsistency that already exists at some levels of our system. The major procedural reforms advocated for by the VRM make verdicts even more inconsistent because they custom-tailor each case to the individual people involved

68 Id. at 1009.
69 Solem, 463 U.S. at 292.
rather than focusing on the facts of the case. While this clearly can violate defendants’ right to due process, the lack of uniformity is also unbecoming of a crime-control model. Moreover, if victim influence does in fact lead to disproportionate punishment, then over time American punishment will exponentially become more severe and unfair because with common law, courts will inevitably use precedent in deciding individual cases.

Despite having a complex legal system, we function on commonly accepted principles that should not be compromised for what has become a popular cause. In fighting for victims, it is important to maintain a prosecution on behalf of the public, to ensure that defendants are guaranteed due process, and to limit abnormal and unfair punishments. Part II of this article will specifically look at the VRM and analyze its impact on these judicial basics.

Part II: The VRM’s Growth in the Context of Legal Theories

Having established a broad understanding of legal fundamentals, this article now proceeds to discuss the VRM’s growth. While the movement began by fighting for the victim’s protection, its goals shifted to advocating for compensation and support, and ultimately to obtaining participation rights for the victim. The VRM’s specific achievements can be contrasted with the theories of American justice in order to identify if and where there are potential threats to our system and values.

A. Linda R.S. v. Robert D.

Without opposition to the Supreme Court’s opinion in Linda R.S. v. Richard D. that victims have no standing to sue in court, public prosecution may very well have gone into the 21st century completely unchallenged. Nonetheless, Linda R.S., the mother of an illegitimate child, forced the courts to consider a victim’s standing in court when she sued both the state of Texas for discriminatory application of the law and the child’s biological father for refusing to provide for the child. She claimed that because Texas typically only held parents of legitimate children accountable for violating Texas Penal Code Article 602, which prohibits the desertion, neglect, or refusal to provide for one’s child, the state violated the Equal Protection Clause of the Fourteenth Amendment. However, the

72 Linda R.S., 410 U.S. at 614.
74 Id.; U.S. CONST., art. XIV.
District Court found that the plaintiff did not have standing to challenge Article 602 because the statute did not impose on her any undue burden that the parent of a legitimate child would not encounter.\footnote{Id. at 805} Thus, those who opposed the court’s opinion banded together and construed the decision as a violation of a victim’s rights.

The Supreme Court affirmed the decision of the District Court, stating, “A private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.”\footnote{Linda R.S., 410 U.S. at 619.} This decision denied that Linda R.S. had the right to prosecute as a victim because she was unable to manifest a nexus showing that the suggested application of Article 602 would actually result in support for the child, rather than solely the jailing of the illegitimate father.\footnote{Id. at 614} Justice Thurgood Marshall wrote that in the absence of statutes creating standing, such a nexus was required as a matter of due process.\footnote{Linda R.S. 410 U.S. at 618.}

In this instance, the Court agreed that Linda R.S.’s issue with the district attorney was a public matter, while her issue with Robert D. was private. Justices Marshall and White suggested two different solutions. Justice Marshall’s opinion focused greatly on due process – he refused to incarcerate a man without proving that the consequences of his actions were significantly harmful and that his punishment would guarantee remedy for the plaintiff’s alleged injury. As a consequentialist, Justice Marshall was unable to justify the defendant’s incarceration unless it somehow guaranteed support for the child. More broadly, however, Justice Marshall’s opinion speaks to a fundamental issue with the VRM: victims’ involvement in criminal proceedings rarely gives them the opportunity to regain what they lost as a result of the crime. For that reason, while Justice Marshall was right in saying that legislation is required to give a private prosecutor standing without showing a nexus, such legislation would not change the fact that a victim’s involvement is no more likely to tangibly repay them for what they lost. Such provisions for monetary compensation were later introduced under the 1984 Victims of Crime Act.\footnote{Crime Victims Fund, 42 U.S.C. § 10601 (1984).}

Conversely, Justice White focused on the issue of legislation rather than due process. He said that Linda R.S.’s failure to clearly define a complaint and the possibility for it to be misconstrued does “not affect her right to bring this class action.”\footnote{Linda R.S., 410 U.S. at 619.} He not
only validated the merits of the private issue, but his opinion argued that Article 602 was not clearly defined and that the court should not set precedent allowing a class of people to be excluded. Justice White puts more value in the end than in the means, but he sees the private matter as an opportunity to correct a public wrong.

Such decisions have made justice a historically public issue, but the VRM formed in opposition to the opinion that Linda R.S. did not have standing as a victim. Marshall advised, “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” This means that either Congress can create statutes to define standing in court or they could more clearly define their laws so as to make a violation of the law more explicit. In Linda R.S., if Article 602 was more clearly defined, it would be more obvious as to whether the government or Robert D. was in violation of the law; a clear infraction on either’s part would have given Linda R.S. standing in court to pursue a civil case. The VRM, latched onto the first option and pushed to give victims more rights in court so as to reduce the bar of standing that is required. From this decision came validation for statutes protecting victims’ rights because the court’s support for state prosecution led those who disagreed to join together in opposition. In reality, however, Linda R.S. showed that laws must be more clearly defined and explained; this would eliminate the need for private citizens to prosecute.

B. Legislation Under Reagan

Nine years later, with the creation of the President’s Task Force on Victims of Crimes, the movement found a champion in President Ronald Reagan. As a result of the strides made during Reagan’s presidency, thirty-three states have since amended their constitutions to incorporate extended rights for victims of crimes. These rights range from the right to be respected throughout the court proceedings to the right to consult with the prosecution and the right to speak in court. President Reagan’s task force found a “lack of compensation and services for crime victims and a large imbalance between a defendant’s rights and those of the victim.” Due to this perceived disparity in defendants’ and victims’ rights, the task force made a series of proposals, including the suggestion of a
constitutional amendment. However, little progress was made on the amendment because that same year Congress passed the Victim and Witness Protection Act of 1982.

One year into Reagan’s presidency, the VRM achieved major victories in guaranteeing victims and witnesses’ physical protection, the right to be notified and informed about such protection and the proceedings of the trial, separate waiting areas in court, and return of property.85 The Victim and Witness Protection Act of 1982 was the VRM’s first tangible accomplishment in response to *Linda R.S. v Richard D.* While the majority of these rights seem logical, fair, and do not threaten the legal process, Section 6(5) states, “The victim of a serious crime...should be consulted by the attorney for the Government in order to obtain [their] views...about the disposition of any Federal criminal case brought as a result of such crime.”86 Whereas the other rights provided by the act do not interfere with the actual prosecution of the defendant, this section of the act allows for the victim to have an active say in how the prosecutor approaches a case.

Section 6(5) is the most critical clause because it allows inevitably prejudiced victims leverage over what is supposed to be an objective prosecutorial procedure. In order to allow victims to participate in the process without biasing the proceedings, they must only receive objectively agreeable rights similar to the others for which the 1982 Act provides. Consultation with the prosecutor is essentially a reversion back to early English private prosecution. If a prosecutor approaches a case with the interests of the victim in mind, he is not fairly doing his job to seek the truth. Instead of acting on behalf of the people or the state, the prosecutor is held accountable by an emotionally invested private citizen. In addition to undermining objective due process, consultation makes the system less efficient because prosecutors are pressured to pursue a case in which the victim is involved, even if the case does not need to be pursued to such an extent.

Despite being overworked, prosecutors are professionals in law, and victims usually are not; therefore, prosecutors must only be held accountable to the state and must be able to use his or her own discretion in pursuing cases. In this way, consultation with the prosecutor undermines absolute prosecutorial discretion because the victim is allowed undue input, which is neither customary nor guaranteed to the defendant. This inconsistency threatens the systematic function of the state in controlling crime without

---

86 *Id.*
tainting the legal process. Furthermore, prosecutors who consult with the victim are more likely to bring emotion into a supposedly objective courtroom, in the same way that private prosecutors have the potential to taint legal proceedings. Because private prosecutors (and prosecutors who have consulted with the victim) have “so much power, it is crucial that [the prosecutor] not be encumbered by interests that could impede the detached, impartial exercise of his duties.” Disinterested parties seldom provide private prosecutors, thus, private influence makes it highly probable that the prosecutor will abandon his duty to ensure the defendant’s rights. In cases where the prosecutor either is a private prosecutor, or is influenced by a private party, the victim has significant influence over the proceedings of the trial and can likely sway the trial in a direction it would not have taken without the victim’s involvement. This in turn threatens the defendant’s right to due process and objectivity as well as the need for uniformity in the courtroom.

Yet, the Victim and Witness Protection Act of 1982 was just the beginning for the VRM. In 1984, President Reagan supported the Victims of Crime Act, which established the Crime Victims’ Fund. This reserve collects money from the fines of federal offenders as well as independent gifts in order to compensate victims. Because the funds come directly from criminals and go to the victims, the act treats crime as a private affair. In a public model, the funds would come from taxpayers and go to the victim; however, this would likely enrage taxpayers and is therefore somewhat impractical.

Nevertheless, despite bolstering a private model, the act has little bearing on the procedure, reliability, or efficiency of the legal system itself. It advocates for the respect, dignity, and indemnity of victims and is completely removed from the judicial process; therefore, it has little potential for collaterally jeopardizing a fair trial. Like the rights in the Victim and Witness Protection Act, excluding Section 6(5), the 1984 Victims of Crime Act appropriately furthers the VRM’s cause without negatively impacting the fair prosecution of the defendant. Aside from the 1984 Act’s support for a private outlook on crime, the provisions and protections provided to victims under the act reflect the types of

---

87 Ramsey supra note 49.
89 Id. at 305
90 Id. at 305
91 Id. at 305
93 Crime Victims’ Rights Act, supra note 9.
Victims' Rights Within the Framework of Theoretical American Justice

compromised rights that can be offered to victims without endangering the defendant’s right to objectivity.

C. Payne v. Tennessee

Arguably the crowning achievement for the VRM was the Supreme Court decision in Payne v. Tennessee. In deciding to overturn Booth v. Maryland and South Carolina v. Gathers, the court set precedent that allowed victim impact statements into court as admissible evidence during criminal trials and during the sentencing phase of capital trials. A victim impact statement allows the victim or the victim’s family to testify verbally or in writing during the proceedings of a trial. Booth held that victim impact statements are inadmissible under the Eighth Amendment because they increase the likelihood for the death penalty to be arbitrarily administered. Similarly, in Gathers, the Court found that a prosecutor cannot share his personal opinion about the victim because it is not relevant. In Payne, however, the Court decided that if defendants are able to bring in evidence regarding their character and family, the state has the right to present evidence discussing the impact of the crime on the victim and family.

Evidence expressing the impact of the crime on the victim has the potential to be substantially more prejudicial than it is probative to the jury. In this way, Payne makes it easier to admit irrelevant evidence in violation of Rule 403 of the Federal Rules of Evidence. In other words, if our legal system intends to be objective and seek the truth, emotionally charged statements from victims cannot make the fact at issue, the defendant’s innocence or culpability, more or less likely. Additionally, prejudicial evidence directly undermines a defendant’s right to an impartial trial under the Sixth Amendment. Instead, such statements can increase the likelihood for a harsher or more disproportionate verdict.

The concept of victim testimony is a manifestation of the VRM’s contention that the defendant and victim’s rights should be balanced, but the truth is, the victim is not on trial. During a criminal trial, only the defendant has something to lose further, thereby

---

97 South Carolina, 490 U.S. at 811.
98 Payne, 501 U.S. at 817.
99 FED. R. EVID. 403.
100 Id.
101 Id. at 401.
102 U.S. CONST. amend. VI
making his or her rights, and due process, a priority. For this reason, even though \textit{Payne} declares that victim statements highlight the victim’s uniqueness, such evidence is completely irrelevant to the facts at issue.\textsuperscript{103} The very notion that it is relevant undermines due process because such testimony does not work toward seeking a more truthful determination of the defendant’s guilt or innocence. As Trey Hill suggests in the \textit{Law and Psychology Review}, “Only evidence that can be directly linked to culpable acts over which a defendant has control should be considered for an enhanced sentence.”\textsuperscript{104} The potential prejudicial effect of the impact statement can inflame the passions of the jury and subsequently render an unfair verdict.

Additionally, the very idea of introducing “uniqueness” challenges the notion of maintaining uniformity and procedure, thereby violating the crime-control model as well. If a prosecutor requires emotionally inflammatory evidence to make his argument, the system is not functioning on Packer’s “presumption of guilt” because the prosecutor is not confident in the state’s preliminary investigation. Furthermore, although the crime-control model makes efficiency and crime prevention a priority, it does not advocate doing so at the expense of justice. Thus, the crime-control model would not condone testimony to the uniqueness of an irrelevant party because, even though it may increase incarcerations, it strips the court of both its efficiency and objectivity. While impact statements may be relevant in civil cases to determine reimbursement, they can be detrimental to criminal cases.

Furthermore, even if victim statements are presented solely in the sentencing phase of a trial, they still undermine objectivity and proportionality.\textsuperscript{105} Impact statements bring in the possibility for juries to determine punishment based on a defendant’s character rather than their actions. This in turn leads to an emotional judgement based on the damages incurred by the victim rather than the crime itself. In this way, victim statements seem to bolster consequentialist punishment in determining the effects faced by the victim. However, consequentialists are typically more concerned with the effects on a societal scale. They see punishment as broader than just the individual who is hurt by the action.

Similarly, one could argue that victim impact statements represent a more restorative justice system, or one in which the two parties aim to reconcile and punishment

\textsuperscript{103} Payne, 501 U.S. at 823.
\textsuperscript{104} Hill, supra note 96 at 221.
\textsuperscript{105} Id. at 216.
allows the criminal to redeem themselves.\textsuperscript{106} While it is true that, like restorative justice, victim statements make crime a private matter, in criminal trials these statements actually undermine restorative justice because neither death nor life-imprisonment helps the two parties reconcile. Rather, it only allows the victim’s party to have their revenge. While restorative justice may justify victim statements in the sentencing phase of minor offenses or civil cases, it remains detrimental to cases in which the defendant’s life or liberty is at stake.

Victim impact statements may help victims in achieving a sense of closure and expressing to the jury the negative effects they have had to confront due to the injustice committed upon them. However, victim impact statements in capital trials have the potential to influence the decision between a sentence of life imprisonment or execution. Testimony so irrelevant to the defendant’s actual culpability,\textsuperscript{107} or even the consequences put upon society, should not play such a vital role in deciding whether someone lives or dies.\textsuperscript{108} One potential solution is that “an objective standard be developed that describes the type of information that may be used in a victim impact statement.”\textsuperscript{109} Easier yet, allow victims to witness trials, but prohibit them from testifying at all unless they can offer objective facts.

\textit{D. Legislation in the 1990s and 2000s}

In 1994, the VRM saw another victory with the passage of VAWA.\textsuperscript{110} The Act funded the prosecution of crimes against women, guaranteed restitution by those convicted, and provided redress to cases that were not prosecuted, none of which, like the 1984 Act, actually impacted the proceedings of a fair trial.\textsuperscript{111} However, the act, under 42 U.S.C.S. § 13981, granted women the right to privately sue their attackers in federal court.\textsuperscript{112} In stating that individuals who commit crimes of violence motivated by gender “shall be liable to the party injured,” the act made gender-motivated crimes a private issue.

\textsuperscript{107} FED. R. EVID. 403.
\textsuperscript{109} Hill, supra note 96 at 221.
\textsuperscript{110} 42 U.S.C. § 13925 to § 14045d.
\textsuperscript{111} Id.
\textsuperscript{112} 42 U.S.C. § 13981.
rather than a public one. In reality, a crime against one woman should be considered a crime against all women, and transitively against all Americans. While VAWA as a broad body of legislation made admirable progress toward combatting gender-motivated crime, § 13981 was primarily beneficial to the VRM in its aim to re-introduce private prosecution. Nonetheless, § 13981 was tried in United States v. Morrison, in which the court decided that neither the Commerce Clause nor Article Five of the Fourteenth Amendment gives Congress the authority to enact § 13981. VAWA had the potential to allow private prosecutions to once again prevail, however with the court’s striking of § 13981 in Morrison, the VRM was slightly stunted.

Although emotionally comforting to those vehemently opposed to crime against women, § 13981 did not work within the framework of the American justice system. While the court justified striking § 13981 using the Fourteenth Amendment, the provision simply was not necessary in the first place. As Congress and the courts had already established the use of victim impact statements, consultation with the prosecutor, and other less controversial rights, § 13981 did not add anything substantially more helpful to the victim. On the contrary, it threatened both due process and crime control because without evidentiary basis, a woman’s testimony in her own trial is immaterial. Hence, it violated the due process concept of benefit of the doubt and added unnecessary nuances rather than informal uniformity. The right to privately prosecute in our justice system is wholly superfluous because even without it there are a multitude of opportunities to find closure.

The most recent progress that the VRM has made was the Crime Victims’ Rights Act of 2004 (CVRA). This act grants eight specific rights to victims reminiscent of those granted in the Victim and Witness Protection Act of 1982. Primarily, CVRA extends victims’ rights in the cases of misdemeanors and felonies, expands victims’ participatory rights, and allows victims the right to appeal to a federal court regarding the violation of their rights and be heard within seventy-two hours. Although the CVRA alone is not significantly detrimental to the legal process, with increasing legislation and court cases putting the VRM in the spotlight, further expansion of victim rights and participation can lead to severely damaged defendant rights.

\[113\text{ Id.}\]
\[114\text{ United States v. Morrison, 529 U.S. 598 (2000).}\]
\[115\text{ Crime Victims’ Rights Act, 18 U.S.C. § 3771.}\]
Although the VRM has yet to severely damage our system, it has certainly shown its potential. With every decade, supporters of the VRM grow in number, and their achievements in weight. After *Linda R.*., the VRM started with trying to protect victims’ rights. With legitimacy from President Reagan, they moved on to create new rights for victims, allowing them to consult with the prosecutor and impact trial proceedings. Before long, VRM-backed initiatives had come close to reintroducing private prosecution. The victim’s involvement in trials taints the objectivity of proceedings, thereby violating the defendant’s right to an unbiased venue and a presumption of innocence, making legal precedent based on individual people rather than the public, and increasing the likelihood for disproportionate punishment.

**Part III: Victims’ Rights Today in the U.S. and Abroad**

In addition to the extensive legislation protecting victims’ rights, the VRM has long pursued amendments to the U.S. Constitution and state constitutions. Part III will discuss the impact and necessity of current amendments in addition to proposals for expansion. This section will also compare the American judicial system to the opinions of the American people, as well as international victims’ rights models, to determine how the United States should move forward with victims’ rights.

**A. Victims’ Rights in States**

Despite progress that the VRM has made in passing legislation, disunity and fragmentation is pervasive. With each state enacting different constitutional amendments, national discrepancies in victims’ rights and private prosecution laws have been produced.

The first state to pass a victims’ rights amendment was Florida in 1988.\(^{116}\) Since then, especially in the 1990s and early 2000s, the trend to introduce state victims’ rights amendments became popular. While Montana, North Dakota, and South Dakota passed such amendments as late as 2016, for the most part, fewer states have ratified such amendments after California did so in 2008.\(^{117}\) Most states’ amendments stick to a standard format that decrees the victim be treated with dignity, fairness, and respect, be informed and notified, allowed to confer with the prosecution, present at trial, physically protected, and be heard when legally appropriate. However other states go farther in mandating that

---

\(^{116}\) *Fla. Const.* art. I, § 16.

criminal administration be based on the victim’s rights or in barring the defendant from making objections about the victim’s involvement. Contrarily, several other states value the protection of the defendant’s rights and have explicitly included clauses in their amendments to do so. Among those states are Alabama, California, Florida, and Mississippi. Several other states have not provided such protections at all while others have specifically not provided the right to consult with the prosecutor or the right to be heard in trial.

These discrepancies can be resolved by advocating state victims’ rights amendments that compromise between the victim and the defendant. Amendments like those of Hawaii, New Jersey, and Oklahoma provide for transparency, protection, restitution, and closure for victims. These amendments give the victim his or her deserved rights, without providing for unnecessary and prejudicial practices like conferring with the prosecution, making trial suggestions, or being heard in trial. Furthermore, some states, like California, do provide for rights that have the potential to be prejudicial, such as conferring with the prosecution, but vividly explain how and when this right can be exercised, thereby limiting its prejudicial potential. Lastly, a model that is fair to both parties should explicitly state that prosecution is a public matter, as do the amendments of Alaska and California. This extra provision reinforces that while victims should be treated appropriately, the procedure of prosecution is not between two individuals, but between the defendant and the people of the state.

Similar to the disunity in amendments, although not quite to the same degree, policies regarding who can prosecute differ from state to state. Georgia, Idaho, North Carolina, Maryland, Ohio and South Carolina allow for a private citizen to initiate public prosecution against a suspect, but not to actually privately prosecute. Virginia, on the other hand, permits completely private prosecution. New Hampshire and Pennsylvania also permit private prosecution, but the former only does so for crimes without the

---

118 ALASKA CONST. art. I, § 12; N.M. CONST. § 24, cl. B.
119 ALA. CONST. amend. DLVII; CAL. CONST. art. I, § 28; FLA. CONST. art. I, § 16; MISS. CONST. § 26A.
120 Basic Bill of Rights for Victims and Witnesses, HRS § 801D-4 (2013); N.J. CONST. art. I, § 22.
OKLA. CONST. art. II, § 34.
122 GA. CODE § 17-4-40; State v. Murphy, 584 P.2d 1236 (1978); IDAHO STAT. 19-50; N.C. G.S. § 15A-304; MD. STAT. § 2-607(c)(6); OHIO CODE § 2935.09; S.C. CODE § 22-5-110.
123 VA. STAT. § 19.2-72.
possibility of incarceration and the latter requires the permission of the state prosecutor. Meanwhile, Colorado and New York completely ban private prosecution as an explicit violation of defendants’ rights.

It is no doubt important that victims be treated with respect, given access to the legal proceedings of the defendant’s trial, and be protected; however, we must do so consistently and without violating the defendant’s rights. Thus, we must find a solution that protects both victims and defendants. Michael Ira Oberlander, in the *Vanderbilt Law Review*, writes:

> The proper response is to adopt laws and procedures that will assist victims in rebuilding their lives, coming to terms with the crime, and healing emotionally. Hawaii has adopted a basic bill of rights for victims that addresses the concerns of the victim while protecting the constitutional rights of defendants. Hawaii informs the victim of the major developments of the case, notifies her of delays, notifies her when the defendant is released from custody, and consults and advises her concerning plea bargaining by the state prosecutor. A victim counselor also informs the victim about financial assistance and other social services that are available. Further, the state provides victims with secure waiting areas, away from the defendant, the defendant's family, and the defendant's friends, and the state expeditiously returns any property that the victim lost.

Many of these rights are universally guaranteed in legislation like the Victim and Witness Protection Act of 1982, 1984 Victims of Crime Act, and VAWA. However, these federal acts sometimes went a step too far in allowing for consultation and private prosecution. States should emulate Hawaii’s amendment, where constitutional protections are allotted to victims while simultaneously protecting those of the defendant.

### B. The National Victims’ Rights Amendment

As recently as 2013, legislators have proposed various drafts of an amendment to the Constitution to recognize the rights of victims. Their primary argument is that since defendants are guaranteed rights under the Fifth Amendment, the same victims’ rights

---


should also be universally guaranteed with an amendment to the Constitution. Mario T. Gaboury, Director of a Crime Victim Center at the University of New Haven, argues:

If the victim tries to assert his or her rights to attend court proceedings and to participate in the system, the defendant says, that would unduly influence the jury and create a prejudicial attitude against me, and my rights are superior because they are constitutionally based. So the problem is one of equity. The only way to put victims on equal footing is to put them into state and Federal constitutions. The constitutional amendment first puts victims on par with defendants. Around 21 states have passed such amendments.127

Although Gaboury is correct in arguing that victims do not have equal rights, a flaw in his argument must be addressed. The Constitution explicitly protects a defendant’s rights because when he or she is on trial, he or she has everything to lose, unlike the victim who has already experienced loss. This is especially true if the state’s prohibition of liberty, including the imposition of death, is in fact the harshest punishment possible. Thus, it is with good reason that both the Sixth Amendment and Gideon v. Wainwright deny the victim the right to prosecute.128

Additionally, it would be imprudent to guarantee victims rights under the Constitution when defendants’ rights are not consistently maintained and observed. For instance, the Supreme Court overturned a trial court’s decision in Johnson v. Zerbst because the defendant was not offered the proper assistance of a defense counsel.129 While today most defendants are provided counsel, there still is no guarantee that the defendant’s counsel is as competent as a prosecutor, especially if that prosecutor is private or is influenced by private affairs. While victims need to be given a path to closure, their liberty is not at stake and the trial is not centered on them. Therefore, there is little justification for providing them with equal rights.

Nonetheless, the House of Representatives held a hearing in 2013 regarding the passing of a Victims’ Rights Amendment (VRA). During this hearing, Professor Robert P. Mosteller, of the University of North Carolina School of Law, proposed three theoretical reasons for an amendment and debunked each of them. The first was the provision of

---

participatory rights for the victim, the second was support for the victim, and the third was the intent to damage defendants’ rights.\textsuperscript{130}

Mosteller argues that the issue behind the first theory, participatory rights, is not that people do not want victims to be informed and involved, but that courts are unable to accommodate.\textsuperscript{131} Ensuring these rights is simply a matter of legislating better resources and organizing courts to be able to accommodate victims.\textsuperscript{132} Thus, because the amendment does not allocate resources or reorganize the court system, it does not guarantee that the issue of participatory rights will be solved.

Secondly, Mosteller argues that under the Victim and Witness Protection Act of 1982 and Crime Victims’ Fund, legislation for the physical protection and monetary compensation of the victim has already been passed.\textsuperscript{133} Since the victim is already supported, an amendment is unnecessary.

The last theoretical reason, damaging defendants’ rights, would in fact need a constitutional amendment.\textsuperscript{134} Although CVRA implicitly curtails victims’ rights and the VRM’s rhetoric often includes ideas of “balancing the scales,” an explicit attempt to diminish defendants’ rights would clearly be unconstitutional as the Constitution now stands.\textsuperscript{135} Thus, the third prong, although justifying the need for an amendment, would blatantly fly in the face of the Constitution.

Others in support of the VRA argue that a constitutional amendment is needed for national consistency. When judges are faced with the dilemma of allowing the victim to participate, thereby potentially introducing prejudice, they first look to previous rulings, which are inconsistent and ultimately look at the state and U.S. constitutions. William G. Montgomery, a prosecuting attorney from Maricopa County, Arizona, said in a statement to Congress concerning the VRA that without having the victims’ rights guaranteed in the constitution, judges cannot guarantee their rights in the courts.\textsuperscript{136} Furthermore, he contends that the VRA would not jeopardize the rights of the defendant or the

\textsuperscript{131}Id. at 34.
\textsuperscript{132}Id. at 32.
\textsuperscript{133}Id. at 32.
\textsuperscript{134}Id. at 35.
\textsuperscript{135}Id. at 35.
\textsuperscript{136}Id. at 11-25.
presumption of innocence. Instead, Montgomery says that victim testimony in court is not only a worthy right, but it helps attorneys to gain insight into the happenings of the case.

While there have been varying amounts of support for various drafts of the VRA, much of the reason a draft has yet to be ratified is that it not only needs the support of two-thirds of Congress, but also that of three-fourths of the states. Furthermore, in addition to the question of its necessity, a fundamental point of contention is whether the rights outlined in the amendment would apply solely to victims of federal crimes or if states would also be forced to recognize those rights in their courts. The high burden of support, a lack of necessity, and unclear implementation have contributed to the VRM’s inability to see a constitutional amendment to fruition.

Nonetheless, the VRM has certainly morphed and expanded since its early days in the sixties and seventies. Whereas it initially advocated for the physical protection of victims, it surpassed that goal by securing for victims a say in the legal process and by coming close to altering our constitution. Victims of crime have no doubt walked an unimaginable and inarguably unjust road; they must be guaranteed respect, dignity, and the right to confront the defendant. However, the question remains whether victims’ participation is valuable to obtaining truth. The U.S. must consider how a victim’s involvement affects due process and the proportionality of punishments, and if there is a point at which a victim’s involvement becomes dangerous or unfair to the defendant or themselves.

C. Public Opinion

Although the public prosecution system works for both defendants and victims, for decades, the public simultaneously had little confidence in the criminal justice system and demanded tougher crime-control tactics.137 This led to a push towards curtailing defendants’ rights because the public perceived this as the best way to ensure their personal safety. For instance, a 2011 Gallup poll found that only twenty-eight percent of Americans had a great deal or quite a lot of confidence in the criminal justice system, whereas seventy-one percent only had some, very little, or none.138 Nonetheless, this has significantly changed over the years. As of 2016, although support for victims persists, only forty-five percent of people thought that our justice system was not tough enough, down from sixty-

137 Ramsey, supra note 49.
five percent in 2003.\textsuperscript{139} Furthermore, the idea of rehabilitative punishment is becoming more popular as well. As a result of these fluctuating opinions, law makers face the dilemma of fighting victims’ rights and looking unsympathetic, or furthering the movement and contradicting public opinion’s support for defendants.

Much of the justification for the VRM came from the American public’s overestimation of crime rates. A Pew Research Poll found that fifty-seven percent of American voters believe crime rates have increased since 2008; however, FBI data shows that between 2008 and 2015, property crime rates dropped by twenty-three percent and violent crime rates dropped by nineteen percent.\textsuperscript{140} Similarly, the Bureau of Justice Statistics found that property and violent crimes dropped by 22\% and 26\%, respectively.\textsuperscript{141} Likewise, in 2016, forty-one percent of people believed the death penalty was not used often enough, overlooking that between 2008 and 2016, 1,446 people were executed, and in 2012 alone, 159,520 people in American prisons were serving life imprisonment.\textsuperscript{142} These discrepancies evidence that, although Americans have grown tired of the “tough on crime” approach, they continue to underestimate our justice system.\textsuperscript{143}

While it cannot be denied that victims of crimes endured experiences that no citizen should ever have to, the unfortunate reality is that defendants are fighting to retain their rights in a system intended to protect them. Rights in the justice process are a zero-sum game. If victims are granted more access, e.g. participatory rights, the right of the defendant to due process is inherently decreased with the introduction of immaterial testimony likely to incur an unsubstantiated harsher penalty.

Now is the time to bolster the due process of our system to seek the truth rather than lower crime rates with potentially unjust legal processes. With seventy-five percent of

\begin{itemize}
\item \textsuperscript{139} Justin McCarthy, \textit{Americans’ Views Shift on Toughness of Justice System}, Gallup (October 20, 2016) http://www.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx.
\item \textsuperscript{140} John Gramlich, \textit{Voters’ perceptions of crime continue to conflict with reality}, P\textsc{ew} R\textsc{e}search C\textsc{enter} (November 16, 2016) http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/; Id.
\item \textsuperscript{141} Id.
\item \textsuperscript{143} Matt Ferner, \textit{Americans are Sick of the ‘Tough on Crime’ Era}, The Huffington Post (February 12, 2016) http://www.huffingtonpost.com/entry/federal-justice-reform-poll_us_56be1a95e4b08ffac124f71c.
people not trusting preliminary investigation, and with the majority of people satisfied with
the system’s toughness, it is the perfect time to bolster due process in the nation.¹⁴⁴

D. American vs. International Victims’ Rights

In the past, numerous Supreme Court Justices have suggested we use international
models to analyze the system we have in the United States. In particular, Justice Stephen
Breyer has been an avid supporter of this approach, saying that the court “must
increasingly consider foreign and domestic law together.”¹⁴⁵ Therefore, viewing the VRM
through the scope of international precedent is necessary for a holistic understanding of its
application.

U.S. courts employ the adversarial model of justice as opposed to the inquisitorial
model.¹⁴⁶ It assumes that when two highly biased parties clash, with an objective moderator
refereeing, the truth will likely surface and guide the jury’s decision.¹⁴⁷ The adversarial
model was designed to limit state power and protect individual rights and liberties while an
inquisitorial model incorporates investigation conducted by the court itself in order to find
the truth. In the inquisitorial model, the unbiased third party is best able to conduct
investigation to discover and determine all the facts in the case; however, that objective
third party is the judge and state.¹⁴⁸

Although the adversarial system seems to favor a more emotional and private view
of justice, it actually makes it more imperative to uphold objectivity because individual
cases can determine law for generations. The American common law system uses statutes
and precedent, not just the civil law code, to govern court decisions.¹⁴⁹ Even though
France and Germany completely involve the victim in the process, the U.S. cannot do so
due to its common law system in which each decision in a court trial can become law.

The issue then arises as to where the line is drawn for letting victims get involved.
France and Germany’s judicial systems are practical, but also extreme in their involvement

¹⁴⁴ Jeffrey M. Jones, In U.S., Confidence in Police Lowest in 22 Years, Gallup, June 19, 2015
¹⁴⁵ Albert R. Hunt, Breyer Sees Value in U.S. Supreme Court's Looking to Foreign Law, N.Y. Times, Nov.
looking-to-foreign-law.html?_r=0.
¹⁴⁶ The Common and Civil Law Traditions, U.Cal. Berkeley, The Robbins Collection,
¹⁴⁷ Id. at ¶ 3.
¹⁴⁸ Id. at ¶ 3.
¹⁴⁹ Id. at ¶ 4.
of the victim. In France, a “victim’s civil claims against a defendant [can] concurrently [be] considered during the criminal trial.”\textsuperscript{150} While this allows the prosecutor to represent the people, this system would nonetheless infringe on the defendant’s rights to due process because he now faces two trials, brought by two separate parties at once. Similarly,

In Germany, the victim’s right to have an attorney in court to speak to all the victim’s interests effectively made the victim a ‘third party’ in the case, with independent rights to question witnesses, call one’s own witnesses, and even appeal rulings and decisions, including sentences, in critical cases.\textsuperscript{151}

Some have called for a three-party system in the United States as well; however, in America, this set-up would clearly violate the Fifth Amendment because the prejudicial effect of the victim’s involvement substantially outweighs its probative value.\textsuperscript{152} Furthermore, in a three-party system, the adversarial system is completely swapped for an inquisitorial system that further empowers the state, thereby contradicting the sentiment of limitation enshrined within the Bill of Rights and Constitution.

Even so, in 1985, the United Nations adopted the\textit{Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power}.\textsuperscript{153} The report holds offenders responsible for providing fair restitution to their victim, recognizes that victims should be guaranteed fair treatment and access to the justice system, and increases awareness for victims’ rights in the judicial process. Additionally, sixty-seven nations have ratified the\textit{International Covenant on Civil and Political Rights} (ICCPR).\textsuperscript{154} Because this treaty guarantees individual rights and freedoms for all individuals, many misconstrue it to apply specifically to victims. However, ICCPR simply guarantees physical protection and the rights to equality before the law, to freedom from discrimination, to access justice, and to due process. In the United States, these provisions are already guaranteed to all individuals. Thus, ICCPR does not bind us to provide rights like equality before the law in situations where an individual, or the victim, is not being tried by the law.

\textsuperscript{150}Marlene Young and John Stein, \textit{The History of the Crime Victims’ Movement in the United States}, Office for Victims of Crime, 1-13, 11 (December 2004).

\textsuperscript{151}\textit{Id.} at 9


\textsuperscript{153}G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985).

In 2008, Human Rights Watch published a report titled, "Mixed Results: U.S. Policy and International Standards on the Rights and Interests of Crime." The report suggested that while progress has been made in providing for victims, the U.S. needs to universalize its legal definition and treatment of victims, and expand victim services, compensation, and information. Because neither of these suggestions would directly impact the reliability of the U.S. legal system, it is in the country’s best interest to expand these opportunities for victims, so long as they do not interfere with the defendants’ right to objectivity and the state’s right to prosecute on behalf of the people.

Although victims’ rights are a necessary aspect of human rights, it cannot be overlooked that a defendant’s right to a fair and unbiased trial is also a fundamental human right. Furthermore, while subjectivity may be appropriate in international justice models, the United States’ adversarial and common law-based justice system makes it an inappropriate venue for any non-factual evidence.

Conclusion

The VRM, specifically Gabouri, argues that victims should have equal rights to defendants. However, a victim’s involvement in court proceedings undermines the defendant’s right to due process and decreases the uniformity of the trial process. Furthermore, since crime is a public matter in the United States, the victim’s participation narrows the issue to one between two individuals: making it a private one. This issue is exacerbated specifically by implicit and explicit private-prosecution policies, consultation between the victim and prosecution, and victim impact statements. While it would be impractical to try removing these prejudicial practices without a sweeping Supreme Court case, individual states can do their part by implementing strict limits on the victims’ rights or minimizing their further expansion in new constitutional amendments. Without such limits on the victims’ influence in trial, the probability for disproportionate punishment can rise dramatically.

Public prosecution, as it is practiced right now, is efficient, just, and relatively accurate. This is bolstered by the fact that public prosecutors have historically reflected the prosecutorial desires of the public, have been effective in reducing crime rates, and, for the

156 Id.
most part, have been truthful. Moving forward, victims must be guaranteed protection, opportunity for recuperation, and transparency. These are rights that are provided for under existing federal legislation, but can fairly and easily be incorporated into state law without violating existing law. However, portions of existing amendments, and some federal acts allowing for consultation, victim impact statements, and private prosecution, violate the Fifth Amendment right to due process. We must work to prevent further incorporation of such practices, if not repeal their existing use. This is because, unlike international models, American legal proceedings demand comparatively intense objectivity, skepticism, and protection of defendants.

We must turn our attention to bolstering due process in our judicial system. At a time when incarcerations are unnecessarily high, there is no doubt that every expansion of victims’ rights implicitly threatens those of the defendant. The VRM has noble intentions for seeking to protect and empower victims; but going forward, we must be careful to continue giving priority to defendants’ rights. Victims’ undue influence over the judicial system has the potential to make our justice system spiral into a state of illiberality. In such a system, the presumption of innocence ceases to exist, the defendant is both tried and convicted before going to trial, and objectivity is entirely disposed of. Emotion rules the court in such a system, and basic American principles are abandoned. The only way to avoid this model is to resist the urge to expand victims’ participatory rights. Objectivity and fairness must reign supreme in the courtroom; we can ensure this by giving victims respect, transparency, and protection, but not influence over legal proceedings.
The Injustice of Profit: A Legal Review of the Private Prison Industry

Margaret Meiman

Introduction

The purpose of incarceration in the United States has long been two-fold: to rehabilitate criminals as well as punish them for breaking the law. As U.S. Attorney General Eric Holder explained in his 2013 speech to the American Bar Association, “We need to ensure that incarceration is used to punish, deter, and rehabilitate—not merely to warehouse and forget.” Upon their inception in the 1980s, privatized prisons were hailed as the perfect solution for an overextended criminal justice system that incarcerates more individuals than any other in the world. Faced with rising costs and rising prison populations, legislators believed that passing the burden to the private sector would alleviate budgets and provide quality care. They hoped that free market competition would lead to a quality product, but did not realize that the few giants who dominate the industry would greatly reduce the competitiveness of the market. While these institutions were never without controversy, they were seen to be a reasonable, cost saving measure

3 PRESIDENTS COMMISSION ON PRIVATIZATION, PRIVATIZATION TOWARD MORE EFFECTIVE GOVERNMENT (March 1988).
that would protect society. However, this ideal was never realized in the United States, and the private prison industry quickly became profit-centric, allowing and even encouraging human rights abuses so long as profits continued to increase.

Although contracting out the government’s incarceration burden was originally intended to punish wrongdoing in the most efficient manner, the rise of the private prison industry has warped these intentions by introducing an unchecked profit motive. Given the history of human rights abuses as well as legal violations, for-profit prisons should be phased out as their contracts expire. In the meantime, legal action should be taken to make them accountable and humane. While it appeared that progress had been made towards this goal given the Justice Department’s decision to refrain from renewing contacts with these federal institutions under former Deputy Attorney General Sally Yates, Attorney General Jeff Sessions has reversed this trend, electing to preserve privatized prisons by rescinding Yates’s memo.

I. Background

The United States has a long history of contracting out various forms of incarceration, beginning with predominantly minimum-security facilities. As early as 1983, almost two-thirds of the juvenile detention facilities in the country were privately run, as well as a majority of Community Treatment Centers. The Immigration and Naturalization Service was one of the first government agencies to contract out to private prisons, holding contracts with two different companies by 1984. Four years later, President Reagan advocated for the increased and preferred use of privatized facilities after the findings of the 1988 report by the

---

7 President’s Commission, supra note 3, at 149.
8 Herival & Wright, supra note 6, at [need a page number here].
10 President’s Commission, supra note 3, at 147.
President’s Commission on Privatization. This report ultimately recommended that “contracting should be regarded as an effective and appropriate form for the administration of prisons and jails at the federal, state, and local levels.”

This recommendation paved the way for the massive shift from government run institutions to private institutions, which dominate the field today. In 2010, 128,195 prisoners were housed in privately run facilities, approximately eight percent of the total 1.6 million incarcerated population. The privately housed population experienced an 80% increase over the between 1999 and 2010, drastically outpacing the growth of the prison population as a whole.

Two companies, the Corrections Corporation of America and the GEO Group, dominate the industry today. Together, they are responsible for 131 domestic facilities that include approximately 160,717 beds ready to house both state and federal prisoners. These companies benefited greatly from both toughened sentencing laws that were created as part of the war on drugs and the government's inability to meet its self-created demand increase.

The prisoner population has also expanded as a result the criminalization of illegal immigration and the status quo increase of immigrant detention. Since becoming one of the first government agencies to utilize private facilities, the INS has continued to use them aggressively, with half of all immigrant detainees currently being held in privately run facilities. According to a report by the ACLU in 2009, “More people entered federal prison for immigration offenses than for violent, weapons, and property offenses combined—and the number has continued to rise each year since.” After prosecution, most undocumented immigrants are

---

12 President’s Commission, supra note 3, at 147.
13 CODY MASON, TOO GOOD TO BE TRUE PRIVATE PRISONS IN AMERICA 1 (2012).
14 Formerly referred to as Wackenhut.
sent to one of thirteen privately run Criminal Alien Requirement Prisons, which are segregated facilities specifically for non-citizens that often experience even worse conditions than comparable facilities for citizens. 18 Non-citizen detention is not the only area in which private corporations have expanded their dominance, as their presence can be felt in the areas of halfway houses, juvenile facilities, and within the public sector itself. 19 Clearly, the power of the private prison industry has expanded unchecked for the last few decades, overpowering the administration of punishment in several areas traditionally under the jurisdiction of the Federal Bureau of Prisons (BOP) and state authorities.

The Eighth Amendment to the Constitution of the United States of America states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” 20 This amendment protects against abuses of those accused of a crime in two ways: by protecting them from unfairly high fees and payments and from unfair punishments in light of the crime they have committed or are suspected of committing. The spirit and wording of this law are drawn from its English predecessor, the 1689 Bill of Rights. 21 Ultimately, the latter half of this amendment is most relevant to the issue of private prisons. In Furman v. Georgia, Justice Brennan outlined a definition for what constitutes “cruel and unusual” punishment. 22 His opinion states:

There are, then, four principles by which we may determine whether a particular punishment is "cruel and unusual." The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. Yet "it is unlikely that any State at this moment in history," would pass a law providing for the infliction of such a punishment. Indeed, no such

---

18 Id. at 3.
20 U.S. CONST. amend. VIII.
21 The Bill of Rights (1688 or 1689), 1 Will. & Mary, sess.2, c.2.
punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is patently unnecessary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so.\(^23\)

This definition sets the stage for future interpretations of what constitutes cruel and unusual punishment. Essentially, in order to be labeled a constitutional violation, a punishment must be degrading to human dignity, torturous, arbitrary, or unnecessary, either in terms of sentence length or conditions suffered. This definition will be utilized throughout the article when examining the conditions that exist in private facilities.

Terrible conditions run rampant throughout all manner of privatized facilities, often contributing to Eighth Amendment violations and flagrant human rights abuses. When the state of Ohio performed a surprise inspection of a facility recently brought under the control of the Corrections Corporation of America, they discovered grave and “outrageous violations like prisoners being forced to use plastic bags for defecation and cups for urination because they had no running water for toilets.”\(^24\) The conditions throughout the prison were described as “heinous” in the same report, due to the standing water, mold, and improperly stored food that was found throughout the facility. During this inspection, the Lake Erie Correctional Facility achieved only a 66.7 compliance rate with Ohio state prison standards, with twenty Ohio standards judged to be in noncompliance.\(^25\) Upon later inspection of the same facilities, basic issues such as mold and standing

\(^{23}\) Id. at 281, citing Robinson v. California, 370 U.S., at 666

\(^{24}\) Mike Brickner, States Should Run Screaming From the CCA to Avoid Dangerous and Disgusting Prisons, ACLU of Ohio Blog (Feb. 4, 2013 at 12:11 PM), https://www.aclu.org/blog/states-should-run-screaming-cca-avoid-dangerous-and-disgusting-prisons

water had been fixed, but more troubling issues such as overuse of solitary confinement, poor officer response to conflict, illegal drug use were not addressed. These terrible conditions and lack of resolution are not unique to a single prison in Ohio, but are rather indicative of larger issues within the system as a whole.

Other examples of rampant prisoner abuse in privatized prisons are described as follows. A class action lawsuit against the East Mississippi Correctional Facility, a facility that treats severely mentally ill prisoners, revealed several disturbing features, including a lack of functioning toilets, locking seriously mentally ill patients in solitary confinement cells for years at a time, and prisoners being left naked and wet in dirty shower stalls for hours on end. The rat infestation has reached the point where rats had become a commodity, and “some prisoners capture rats, put them on improvised leashes, and sell them as pets to the seriously mentally ill.” These horrific conditions have led to a large number of attempted suicides, as well as increases in self-mutilation. In the Idaho Correctional Center, run by the Corrections Corporation of America, violence was so rampant that it was known as a “gladiator school.” A lack of proper supervision or control by guards allowed the situation to get drastically out of hand, with the complaint citing eleven reasons relating to the staff that caused such drastic levels of violence and calling them “deliberately indifferent.” However, the Department of Justice declined to press charges against the CCA. A surprise inspection of Texas’s Coke County Juvenile Justice Center, which is run by the GEO group, discovered severe health and safety violations. The youth were not provided with a sanitary

---

28 Stephen L. Pevar, Plaintiff’s Amended Complaint for Damages, and for Classwide Declaratory and Injunctive Relief 2 (Mar. 11, 2010).
29 Id. at 6,10.
environment by any means and lived among improperly stored chemicals and unfixed water leaks. Youth in the facility described only being allowed to shower once every three days, and sometimes were prohibited from brushing their teeth for days. Most importantly, the Warden was aware of these conditions, and did nothing to remediate them. The complete lack of governmental oversight in these facilities allows for terrible conditions like these to develop. The government's compliance with and trust of these corporations, without any verification or monitoring system, is allowing over 130,000 prisoners to be placed in life threatening situations.

The contentious nature of the private prison industry comes with a complicated legal history. Beginning in 1997 with Richardson v. McKnight, the Supreme Court held that private prison guards do not enjoy the same immunity from prosecution as their federally employed counterparts. It was determined that just because an actor performs a function usually reserved for the government, especially without government supervision, does not grant immunity to any private citizen. The Court recognized that the profit incentive causes private firms and employees to act differently than their public counterparts, and thus creates a need for oversight and liability. This case was decided in a 5-4 split. The narrow margin that carried this case indicates that the opinions explained in Justice Antonin Scalia’s dissenting opinion were not unique. He argued that “function rather than status governs the immunity determination,” meaning that because private prisons guards acted in the same capacity as their state-employed counterparts, who were granted immunity in Procunier v. Navarette, they should benefit in the same manner.

---

33 Richardson v. McKnight, 521 U.S. 399, 400 (1997).
34 Id. at 412.
35 Id. at 417.
While the outcome of Richardson resulted in decreased autonomy for private prison employees, that precedent was essentially reversed with the 2001 decision in Correctional Service Corporation v. Malesko. The Supreme Court held that corporations under contract with the federal government were not liable for constitutional violations in Correctional Service, and that such liability could only be applied to individuals. This case involved a privately run halfway house and a defendant who suffered a fatal heart attack after being made to engage in physical activity for which he had a medical exemption. The purpose of this case was to determine if the decision made in Bivens v. Six Unknown Fed. Narcotics Agents was applicable in this situation. The Bivens decision allowed private citizens to sue the federal government for redress for constitutional violations, even though there was no precedent to do so because the Fourth Amendment prohibits certain actions that state law might permit, making a federal remedy acceptable. However, later rulings limited the ability of defendants to sue the federal government, leaving this option open only when other methods of redress, such as state torts and civil cases, were unavailable.

It should also be noted that the Bivens decision was meant to deter future wrongdoing by holding individuals responsible, while Malesko was concerned with suing a corporation as a whole. In Malesko the court held that Bivens' limited holding may not be extended to confer a right of action for damages against private entities acting under color of federal law,” meaning that additional method of redress established in Bivens would not be available when a corporation committed the violation, rather than an individual employed by a federal agency. This decision effectively protected federal private prison companies from prosecution.

38 Malesko, 534 U.S. at 64.
40 Malesko, 534 U.S. at 63.
41 Bivens, 403 U.S. at 397.
43 Minneci, 565 U.S. at 132.
44 Malesko, 534 U.S. at 63.
judging that their prosecution would do little to deter further actions of this kind. Notably, Justice Scalia, who dissented on the Richardson decision, concurred in the opinion of the court in Malesko.\footnote{Id.}

In 2012, the legal situation regarding private prisons was once again muddied with the Supreme Court decision in Minneci v. Pollard. Pollard, a prisoner in a Wackenhut facility, suffered greatly after breaking his arm and was denied adequate medical care or accommodations, constituting and Eighth Amendment violation. The court held,

\begin{quote}
[V]iolation of [the Fourth Amendment] by a federal agent . . . gives rise to a cause of action for damages against a Federal Government employee). Because we believe that in the circumstances present here state tort law authorizes adequate alternative damages actions--actions that provide both significant deterrence and compensation--we cannot do so.\footnote{Minneci, 565 U.S. at 120.}
\end{quote}

Thus, no Bivens remedy was applied in this case. Pollard’s Eighth Amendment claim fell under state jurisdiction rather than federal jurisdiction, and thus suing employees of private prison employees, and through them the federal government, was deemed an inappropriate method for redress. In this case, state tort law was seen as a more appropriate remedy, especially considering that Pollard’s claim arose in California, a state that has successfully prosecuted prison personnel for negligence previously.\footnote{Id. at 128.} In this 8-1 decision, with Justice Ginsburg as the lone dissenting vote, the Supreme Court further restricted the grounds on which inmates can seek to ameliorate damages because of the federal prison system.\footnote{Id. at 131.}

In August 2016, then-Deputy Attorney General Sally Yates dictated to the Director of the Federal Bureau of Prisons that federal private prisons should begin to be phased out, a big step towards decreasing the pervasive nature of the system. Yates wrote:

Private prisons served an important role during a difficult period, but time has shown that they compare poorly to our own Bureau
facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office inspector General, they do not maintain the same level of safety and security.\footnote{Yates, supra note 9.}

As contracts for these facilities expire, the Bureau of Prisons would have declined to renew them, or significantly decreased them in scope. While this decision did not apply to state or local facilities, it was viewed as being possibly indicative of a new trend in the federal government’s relationship with privatized corporations. However, this trend was reversed by the current Attorney General Jeff Sessions’ February memo, which rescinded Yates’ previous directive in its entirety, claiming that it “impaired” the Bureau’s ability to effectively incarcerate prisoners.\footnote{Sessions, supra note 9.}

II. Motivations for Punishment

The type of punishment that occurs in private institutions is not in line with the proper form of punishment, and simply ought not occur. Proper punishment can be defined as punishment that does not violate the Eighth Amendment, and is neither cruel nor unusual.\footnote{U.S. CONST. amend. VIII.} Forward-looking punishment is, in theory, consequentialist and likely utilitarian.\footnote{Hugo Adam Bedau & Erin Kelly, Punishment, STAN. ENCYCLOPEDIA OF PHIL. (Fall 2015), https://plato.stanford.edu/entries/punishment/.} According to this idea the point of the practice of punishment is to increase overall net social welfare by reducing crime and causing a positive effect on society. Thus, punishment in and of itself can be considered a good thing, because it benefits society rather than just focusing on inflicting harm on the criminal. This justifies its use. Perversions of punishment are the problem, not punishment itself. The justification for punishment can be found in the decrease in recidivism that is provided by specific deterrence\footnote{DOUGLAS SMITH & PATRICK GARTIN, SPECIFYING SPECIFIC DETERRENCE: THE INFLUENCE OF ARREST ON FUTURE CRIMINAL ACTIVITY 102 (1989).}. However, the applications of punishment are not always in line with this ideal. Furthermore:
The concept of punishment—its definition—and its practical application and justification during the past half-century have shown a marked drift away from efforts to reform and rehabilitate offenders in favor of retribution and incarceration. Punishment in its very conception is now acknowledged to be an inherently retributive practice.\textsuperscript{54}

This is problematic because the goal of incarceration should be to rehabilitate and reform so that the incarcerated can rejoin society as a productive member. Even though the practice of punishment is justified, individual acts of punishment may not be justified. This concept applies to the gross injustices and Eighth Amendment violations that occur within private facilities, as detailed above.

When private institutions engage in punishment, they corrupt the motives of punishment in two ways. First, economic profit motives are not the ones that the law would deem an appropriate purpose of deprivation of rights. Thus, any extent to which people's freedom is restricted for this purpose is greater than necessary.\textsuperscript{55} Second, as articulated by Max Weber, the state possesses sole authority over the legitimate use of coercive force for punishment purposes because its sovereignty,\textsuperscript{56} which is based on the premise of the supremacy of the rule of law, has been violated by the criminal act. When private institutions take on the role of punisher, they warp this relationship. As established by the Supreme Court ruling in \textit{Richardson v. McKnight}, although private institutions perform functions for the federal government, they are not afforded the same protections or powers as the government.\textsuperscript{57}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{57} \textit{Richardson}, 521 U. S. at 400 (1997).
\end{itemize}
\end{footnotesize}
III. The Modern Relationship between the Federal Government and Private Prison Corporations

The federal government gives privatized prison corporations a fairly large degree of autonomy and minimal oversight, allowing them to conduct daily operations as they choose. This condition is created due to the influence that the private prison industry has in politics. Through a combination of lobbying and campaign contributions, these corporations manage to ensure their long-term existence and increase their profits. Now, these companies are attempting to expand into other areas as the need for prisons decreases.

As they exist today, privately run facilities are not subject to the Freedom of Information Act (FOIA). FOIA functions by requiring government entities to release information about these activities upon citizen request as a means of creating oversight and accountability. Seeking to remedy this deficiency, a bill known as the Private Prison Information Act was introduced to Congress in 2011. The bill aimed

To require non-Federal prisons and correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to make available.

This bill did not pass but in 2013 a coalition of thirty-four interest groups encouraged Representative Sheila Jackson Lee to reintroduce the bill. Considering that these corporations attain forty percent of their revenue from the federal government, and that the market for incarceration would not exist without the laws of the federal government, they are perfect candidates for oversight. Their argument is as follows:

---

59 Id.
61 Id.
The Injustice of Profit

The private prison industry operates in secrecy while being funded almost entirely with public taxpayer money,” noted Human Rights Defense Center associate director Alex Friedmann, who testified in support of the PPIA before the U.S. House Subcommittee on Crime, Terrorism and Homeland Security in June 2008. “The public has a right to know how its money is being spent, and transparency and accountability demand that private prison corporations answer to the public by being subject to FOIA requests to the same extent as federal agencies. If they have nothing to hide from the public, they should not object – but they do, which speaks volumes.63

The fact that the bill failed to pass was no surprise, given that privatized corporations lobby heavily to advance their own interests. The interest groups noted in their letter to Rep. Jackson that CCA and the GEO Group lobbied heavily against the Private Prison Information Act when it was first proposed.64 The two largest for-profit prison companies in the United States – GEO and Corrections Corporation of America – and their associates have funneled more than $10 million to candidates since 1989 and have spent nearly $25 million on lobbying efforts.65 Senator Marco Rubio alone has received almost $40,000 in campaign contributions from the GEO Group after approving a $110 million contract for them in his home state of Florida.66 Additionally, The Republican Party of Florida PAC has received nearly $2.5 million from GEO and CCA since 1989.67 Since 2000, the three largest private prison companies—CCA, GEO and Cornell Companies I—have contributed $835,514 to federal candidates, including senators and members of the House of Representatives.68 Giving to state level politicians during the last five election cycles was even higher: $6,092,331.69 Since 2003, CCA has spent

63 Id.
64 Id.
65 Michael Cohen, How for-profit prisons have become the biggest lobby no one is talking about, WASHINGTON POST (April 28, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm_term=.33e0ca6f4883.
66 Id.
67 Id.
69 PAUL ASHTON & AMANDA PETERUIT, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 16 (June 2011).
upwards of $900,000 annually on federal lobbying.\textsuperscript{70} Clearly, lobbying and influencing political campaigns is big business for big prison companies.

Private prison corporations naturally lobby for legislation that will increase their profits. While in theory the Corrections Corporation of America claims not to lobby for or against policy that would change the terms or duration of an incarceration,\textsuperscript{71} this appears not to be true in practice.\textsuperscript{72} For profits to increase, the number of individuals incarcerated must also increase, because private companies are paid on the basis of how many individuals they are responsible for.\textsuperscript{73} In their 2010 annual report, the CCA wrote,

\begin{quote}

The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them.\textsuperscript{74}
\end{quote}

In order to increase prison populations, CCA and other companies like it lobby for harsher drug policies and increasingly stringent immigration laws, both of which result in more people in federal prison.\textsuperscript{75} Corrections Corporation of America spent $956,135.86 in 2012, $1,110,846.79 in 2014, and $781,800 in 2015 on lobbying.\textsuperscript{76} Although they may present themselves as simply meeting the demand for prison beds, in reality they lobby heavily, contribute to campaigns either

\textsuperscript{70} Id. at 22.
\textsuperscript{72} Cohen, supra note 65.
\textsuperscript{73} IN THE PUBLIC INTEREST, HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS GUARANTEE PROFITS 3 (2013).
\textsuperscript{74} Corrections Corporation of America, 2010 Annual Report on Form 10-K 19 (2010).
\textsuperscript{75} Ashton & Petteruit, supra note 69, at 14.
\textsuperscript{76} CORRECTIONS CORPORATION OF AMERICA, POLITICAL ACTIVITY AND LOBBYING REPORT 2014 3 (2014).
primarily or secondarily, and try to form a network of associations and relationships to further their goals.\textsuperscript{77}

In response to decreasing incarceration in traditional prisons, private prison corporations have elected to look elsewhere for increasing profits. Privatization is increasing in the residential re-entry sector, colloquially known as halfway houses, and the CCA has received several contracts in recent years. One such contract that the CCA has recently received in California needs to be renewed every three years. This represents CCA’s twenty-fifth halfway house in the last three years alone.\textsuperscript{78}

The CCA’s entry into this sector has been incredibly rapid, which is concerning because of how fast the program may be growing. As private prisons begin to be phased out, these corporations are finding a new avenue to maintain their foothold and profits.

Many state and federally run prisons have also begun contracting out certain services, such as medical care to privately run companies. The reason for this is, of course, to cut costs associated with the rising price tag of incarceration. Prison healthcare companies usually receive a flat fee per prisoner, rather than a per service fee. Weiss finds:

\begin{quote}
This incentivizes them to provide as few services as possible to maximize their profits. While these contracts encourage cost-reduction, they simultaneously discourage proper oversight; their indemnification clauses render local governments largely immune from financial consequences when contractors deny emergency care to inmates in crisis.\textsuperscript{79}
\end{quote}

The result of this is poor healthcare for prisoners, occasionally even reaching the level of cruel and unusual punishment. In addition, healthcare is not the only service within the prison industry that has been privatized. Food, laundry, and education are also privatized, although these types of privatization have less dire

\textsuperscript{77} Ashton & Petteruit, supra note 69, at 3.
consequences for prisoners.® Clearly, a spectrum of privatization exists even within publicly run facilities, simultaneously serving to complicate this issue while increasing the strength of private companies. The existence of this spectrum makes it clear that private companies have a much greater reach than previously assumed, and makes them significantly more difficult to dismantle. This manner of structuring prisons is problematic for many reasons, as detailed above, but for no reason more than the fact that “even as local governments contract away their core functions, they cannot contract away their ultimate legal responsibility for violations of their citizens' constitutional rights.”® Regardless of who perpetrates the action that results in a violation of an inmate’s constitutional rights, the government must still assume some degree of liability for the violations that occur. In the status quo, it is impossible to enforce this type of liability, but this article will now examine several ways by which to remedy this issue.

IV. Potential Solutions

A. Forcing compliance with the Freedom of Information Act

First and foremost, the government ought to require private prison facilities to comply with FOIA and disclose their activities when a request is made by a member of the public.® By its terms, the FOIA originally only applied to federal agencies and this piece of legislation did not define the term “agency.” Therefore, the government defaults to the traditional definition wherein private institutions are not included. This is a mere technicality. While the letter of the law does not include private facilities acting in the same capacity as the government, the spirit of the law certainly allows for a significant amount of insight into government's actions.® Upon signing the law, President Lyndon B. Johnson expressed exactly this sentiment:

® Weiss, supra note 79, at 732.
® Corrections Corp. of America, supra note 56.
This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.\textsuperscript{84}

President Clinton updated the Act in 1996 to include a definition of “agency,” but it still remained limited to government entities, and still did not include private corporations.\textsuperscript{85} Some state facilities have been required to be more transparent and comply with freedom of information laws if they receive any state funding. However, this is not yet a federal requirement.\textsuperscript{86} As previously discussed, given that private prison companies receive the largest portion of their funding from federal or state governments, they ought to have to provide information about their activities. This makes them a unique candidate for increased oversight, because this private industry requires the government funds to exist. This approach should extend beyond just an extension of the FOIA, mandatory reporting, broad discovery rules, and limits on protective orders. Making these institutions more accountable is the first step towards making them more humane and preventing future violations of prisoner’s rights. While forcing oversight may seem impossible in light of the substantial political power that these corporations have, they do have a potential incentive to be accountable: a healthy and well-treated prison population will eventually increase profits. A large population of healthy prisoners is exactly what allows these companies to exist and profit in the first place. Were these institutions to be considered to be legally and morally acceptable in the future, they would continue in the long term. Market discipline could easily prove to be just as powerful if not more powerful than administrative control. Of course, reform would need to occur before this was possible.

\textsuperscript{84} Lyndon B. Johnson, President, U.S., Statement by the President Upon Signing the "Freedom of Information Act (July 4, 1966).
\textsuperscript{85} Freedom of Information Act, supra note 58.
B. Continue and Accelerate the Phasing Out of Private Facilities

Given their long legacy of mistreatment and law breaking, the most obvious solution to the private prison problem is to remove these facilities from the U.S. criminal justice system. While this system could not be implemented overnight, it is feasible as a long-term plan. As Deputy Attorney General Sally Yates wrote in a Memorandum for the Acting Director Federal Bureau of Prisons in 2016,

They [privatized prisons] compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource— and these services are essential to reducing recidivism and improving public safety.87

This memo also states that as private facilities’ contracts expire, the bureau will either decline to renew the contract or substantially decrease the scope of said contract.88 While this is certainly a step in the right direction, this memo only applies to federal prisons, and not the many privately run state facilities. In 2014, 40,017 prisoners were held in federal private prisons, while 90,224 prisoners were held in state private prisons, indicating that this directive only applies to approximately thirty percent of the private prison population.89

These facilities were initially put into place in order to reduce costs in an overburdened prison system. However, a meta-analysis of evaluation research studies found that any savings are primarily a result of economies of scale,90 because most private facilities nearly always remain at eighty to one hundred percent capacity.91 In many cases, this requirement is a part of contracts with the

87 Yates, supra note 9.
88 Id.
89 Carson, supra note 32, at 2.
90 Pratt & Maahs, supra note 5, at 3, 367.
91 POLICY MATTERS OHIO, SELECTIVE CELLLING: INMATE POPULATION IN OHIO’S PRIVATE PRISONS 2 (May 2001).
government. These savings are so modest that they are unlikely to lessen the burden on state budgets, making private facilities simply not worth it. Thus, states ought to follow the example of the federal government and refuse to renew contracts with groups such as the Corrections Corporation of America or the GEO Group, or significantly reduce the scope of private prison facilities as part of a plan to phase such facilities out.

The need for such facilities will likely continue to decrease in the future as the result of changing mandatory minimum laws, which result in the incarceration of fewer people. The Bureau of Prisons experienced a one percent reduction in prisoner population from 2013 to 2014, amounting to 15,400 less prisoners. This represents the lowest rate of imprisonment in over a decade, and continues the pattern of decreases that began in 2007 and 2008. These decreases are a result of declining admissions, rather than an increase in releases, which indicates that the pattern is likely to continue and prison populations should decline in the long term.

Despite this positive step towards decreasing prisoner populations and the consequent decreased need for private facilities, care must be taken to prevent private prison corporations from simply expanding into other areas in order to preserve their profits. Prisons are not the only area that needs to be addressed because the CCA, GEO Group and others are active in various other industries, such as immigrant detention and halfway houses. This particularly concerns halfway houses because private corporations are already actively expanding into this arena. In addition, the aforementioned memo from Deputy Attorney General Yates specifies that this decision specifically does not apply to halfway houses and similar facilities.

---

93 Praat & Maahs, supra note 91, at 3, 368.
94 Carson, supra note 32, at 2.
95 Id. at 7.
96 Id. at 9.
97 Yates, supra note 9.
Second, in light of the current political climate, it is likely that there may be an increased use of Immigration Detention centers, due primarily to increasing deportations and the end of catch and release policies.\textsuperscript{98} In an alternative world, the passing of more liberal legislation would naturally decrease the number incarcerated in Immigration Detention Facilities, because less people would be deemed “illegal” and thus slated for incarceration. Both of these avenues present as viable alternatives for private prison corporations, and their future activities should be closely watched so that they may be prevented from harming individuals in the way that they have in their other facilities.

C. \textit{Allow the incarcerated their Bivens rights and pass legislation to address the problems created by the Supreme Court’s decisions in Minneci and Malesko}

The Supreme Court has been notably reluctant to extend the \textit{Bivens} remedy since its original inception. They have only extended it in two instances: in \textit{Davis v. Passman}\textsuperscript{99} and in \textit{Carlson v. Green}.\textsuperscript{100} As noted in the \textit{Malesko} decision by Chief Justice William Rehnquist:

\begin{quote}
In 30 years of \textit{Bivens} jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend \textit{Bivens}.\textsuperscript{101}
\end{quote}

The Supreme Court decided in \textit{Minneci} that as long as alternative methods of redress exist, such as through state tort law, that a \textit{Bivens} remedy should not apply.\textsuperscript{102} However, the Court also noted that the alternative remedy does not need to be congruent in scope to the federal \textit{Bivens} remedy, given that the remediation

\begin{footnotes}
\item Davis v. Passman, 442 U.S. 228, 229 (1979).
\item Carlson v. Green, 446 U.S. 14, 16 (1980).
\item Malesko, 534 U.S. at 70.
\item Minneci, 565 U.S. at 127.
\end{footnotes}
afforded by state tort law is usually significantly smaller.\textsuperscript{103} This is problematic because preventing a \textit{Bivens} remedy effectively decreases the scope of the solution following an eighth amendment violation.\textsuperscript{104} This is not the only way in which redress has been limited. In \textit{Minneci}, the Supreme Court further narrowed \textit{Bivens}, holding that employees of private prisons who are found guilty of constitutional violations are not subject to damage claims under the Eighth Amendment.\textsuperscript{105}

\textit{Bivens} should deter individual federal officers from committing constitutional violations.\textsuperscript{106} Allowing the federal \textit{Bivens} remedy would allow the guilty party to experience the full punishment for their actions and likely act as a stronger deterrent because of its increased scope. Simply put, this deterrent would deter more individuals should the \textit{Bivens} remedy be extended in more cases. Justice Ruth Bader Ginsburg dissented from the \textit{Minneci} decision, noting that Pollard would have had access to federal methods of redress had he been housed in a public facility, and that it was thus unfair to deny him this simply because he was unlucky enough to have been housed in a private prison.\textsuperscript{107} Justices Stevens, Souter, Breyer, and Ginsberg dissented with the \textit{Malesko} decision. They wrote that although the decision in \textit{FDIC v. Meyer} made it clear that federal agencies could not be sued under \textit{Bivens}, that decision did not apply to private companies, thus making the \textit{Minneci} case unique.\textsuperscript{108}

I argue that the \textit{Bivens} remedy ought to be extended more than it has been in the past. Clearly, this issue has been the subject of debate, both in terms of arguments in front of the Justices but also between the Justices themselves. The heart of the question of whether or not to extend the \textit{Bivens} remedy in the case of private prisons is of whether or not private prison corporations can be considered federal agents. While clearly this method of redress is not appropriate in every

\begin{itemize}
\item \textsuperscript{103} Id. at 129.
\item \textsuperscript{105} \textit{Minneci}, 565 U.S. 120.
\item \textsuperscript{106} \textit{Malesko}, 534 U.S. at 70.
\item \textsuperscript{107} \textit{Minneci}, 565 U.S. at 132.
\item \textsuperscript{108} Federal Deposit Insurance Corporation vs. Meyer, 510 U.S. 471, 473 (1994); \textit{Malesko}, 534 U.S. at 74.
\end{itemize}
situation, or for every type of amendment violation. Thus, private prison corporations must be considered as federal agents, a position that they are uniquely suited for due to their absolute reliance on federal funding. Prisoners should not have different access to redress as a result of whether or not they are forced to serve out their sentence in a public or private facility. Such a method of determining punishment is notably asymmetrical and inequitable, and thus should be considered unacceptable in a criminal justice system supposedly based upon democracy and justice.

**Conclusion: The Necessity of Action**

After careful consideration of the evidence, I conclude that incarceration and rehabilitation should simply not be a for-profit endeavor. Private Prisons and the Corporations that run them have ultimately failed at their primary objective: to house prisoners at a lesser cost to the federal government in a way that maintains each prisoner’s constitutional rights. Rather, these institutions have a history of human rights violations and inhumane conditions, which has been allowed to persist because of the political clout that private prison corporations like Corrections Corporation of America and the GEO Group possess. Past progress, now interrupted, must be accelerated and continued, with regard to both judicial decisions but also by increasing the efficacy of government oversight. While a total phase out of private prisons is the ideal objective, accomplishing it will take significant time and resources, as it will likely require a restructuring of the entire prison system to accommodate the change and redistribute prisoner populations. Ideally, incarceration should return to being a totally public endeavor, because privatization of essential services goes above lowers the governmental threshold.

In the meantime, intermediary steps ought to be taken to bring these institutions in line with the proper warrants and methods of punishment. Actions such as increased oversight and the extension of *Bivens* rights are necessary steps in the right direction, regardless of whether state governments decide to follow the policy laid out by Yates and refrain from renewing contracts. Due to the likely
increase in immigrant detention that will occur under the current administration, the need for these private institutions may increase again in a manner not previously anticipated, and the private prison lobby may gain even more power. Despite this negative possibility, the law and the Constitution should ultimately provide for a triumph of individual rights and freedoms, proving that profit in incarceration truly is unjust.
THINK PIECE
The Pollen Problem: The Marginalization of the Organic Farmer in the Biotechnology Liability Debate

Swetha Ramesh

“When tillage begins, other arts follow. The farmers, therefore, are the founders of human civilization.”

– Daniel Webster (January 13, 1840)

Introduction

Agriculture has long been a key building block in the construction of the United States. From the days of American independence, agriculture has been a medium for economic mobility and expression of social ideals, bringing to the forefront of American culture the ideas of an agrarian utopia and the bootstrapping American. When the founding fathers began to craft the Constitution, they envisioned a country in which farming would remain a large sector of the economy, shaping the country and the rights of the people in it. However, agriculture in America has evolved substantially since the days when Thomas Jefferson first conceptualized the country as a nation of small farmers. Today, agriculture has become increasingly influenced by technology, with large corporations and modern scientific advancements affecting farming in ways the Founding Fathers could not have ever imagined.

Genetically modified organisms, in particular, have dramatically changed the landscape of agriculture, allowing farmers to cultivate crops that are more resistant to unforgiving weather conditions, pesticides, and fluctuations in soil pH. Since their first introduction in 1996, genetically modified organisms have been allowing farmers to make a higher profit due to their uniquely customizable DNA that is easily adaptable to farmers’
The U.S. Food and Drug Administration (FDA) defines genetically modified organisms (GMOs) as plants or animals that have been created through genetic engineering. In other words, GMOs have had their genome manipulated and do not occur in nature on their own. This definition does not include any plants or animals that occur as a result of selective breeding or that have had their appearance significantly altered by hormones or antibiotics.

So far, scientists have focused their genetic modification efforts on creating new species of plants that help increase crop yields or provide greater nutrient value, though they have not yet created genetically modified meat available for consumption. However, many meat producers do use animal feed that is genetically modified to provide their livestock with essential vitamins and minerals. This process of genome modification involves four basic steps: 1) identifying a desired trait, 2) isolating the desired trait, 3) inserting the desired trait into the chosen organism, and 4) developing and replicating the modified organism. The methods by which the desired trait is inserted into the genome vary depending on the company that produces the doctored seeds, but the end result is always an organism that has been significantly altered to display a desired trait.

Currently, five continents and more than twenty countries use genetically modified seeds, occupying a total land area of around 175.2 million hectares in 2013 alone – a number that has steadily continued to increase in the past few years at a growth rate of 3%. So far, there are no laws or federal legislation that regulate the production of GMOs; rather, existing regulations tend to focus on the nature of the product after production. GMOs have continued to emerge as a market and establish their presence in modern agriculture. In 2013, the United States led the world in the amount of total land devoted to GMO production, averaging around 70.1 million hectares. In response to this emerging trend, four large biotechnology corporations developed, and it is their presence that has truly impacted the worlds of patent and agricultural law.

---

3 Id.
4 Id.
5 Endres & Schlessinger, supra note 1, at 818.
7 Id.
soybean market, eighty percent of the U.S. corn market, and over fifty percent of the world’s overall seed supply is controlled by one of the “Big Four” seed companies: Monsanto, DuPont/Pioneer, Syngenta, and Dow AgroSciences.\(^8\)

In recent years, conflicts between organic farmers and large biotech companies have erupted over the issue of pollen cross-contamination. Today’s organic farmers must constantly be on the watch for pollen from GMOs that can cross-contaminate organic crops. Cross-contamination occurs due to pollen-drift, or the natural process by which pollen is carried on wind that has little regard for man-made property lines.\(^9\) Even when a farmer takes extensive precautions pollen-drift can still happen as a result of neighboring farms or others.\(^10\) On average, a single stalk of corn is capable of releasing twenty-five million grains of pollen.\(^11\) Cross-contamination of organic crops leads to distortion of the crop’s appearance, and the unintentional change in growing conditions leads to violation of the FDA’s requirements for organic produce, rendering the crops unfit for sale.\(^12\)

However, when farmers turn to courts to receive damages, they often face lawsuits from GMO corporations that accuse them of copyright infringement for unintentionally growing, and sometimes selling, the GMOs. For this reason, many organic farmers do not come forward with cross-contamination cases and simply focus on preventing further economic losses. Aside from the costs of a lawsuit some additional effects of cross-contamination for organic farmers include 1) expenses related to taking proper precautionary measures to avoid cross-contamination, 2) the annoyance of having to report a cross-contamination incident, 3) costs involved in testing organic plants before and after the contamination, 4) economic losses incurred from being unable to sell contaminated crops, and 5) possible loss of organic certification altogether.\(^13\) However, even when all of these consequences have the potential to severely impact the livelihood of organic farmers, U.S. courts have continued to side with the large biotechnology companies, almost always ignoring or dismissing the complaints of organic farmers that do not have the same

\(^8\) Sabrina Wilson, Induced Nuisance: Holding Patent-Owners Liable for GMO Cross-Contamination, 64 EMORY LJ. 170 (2014).
\(^10\) Id.
\(^11\) Endres & Schlessinger, supra note 1, at 820.
\(^12\) Endres & Schlessinger, supra note 1, at 820.
financial resources to devote to a court case as one of the “Big Four” biotechnology companies.

Of the “Big Four” biotech companies, this article will focus specifically on the biotech company Monsanto and how its legacy of pollen cross-contamination lawsuits against organic farmers has shaped the modern biotechnology liability debate. This article seeks to present a possible solution to the pollen cross-contamination liability debate in the form of a federal law supporting the protection of organic farmers from copyright infringement suits. Part I will include an exploration of why pollen cross-contamination poses a problem for organic farmers, a brief discussion of organic farming regulations, the arguments for and against holding organic farmers liable for cross-contamination, and a short summary of the landmark case *OSGATA et. al. v. Monsanto*. Part II will include a history of the evolution of GMO law and important cases in GMO law. Part III will include an analysis of existing legal routes organic farmers can take to receive compensation in cross-contamination cases, discuss state solutions to cross-contamination, and present a case for an amendment to the USDA’s current organic regulations to protect organic farmers.

I. Pollen Drift, Organic Regulations, and Consequences

For years, pollen cross-contamination has occurred in the natural world with little consequence. However, the introduction of GMOs into agricultural practice by large biotechnology companies has transformed cross-contamination from an interesting natural phenomenon to a significant legal issue. The FDA’s organic guidelines stress that organic farmers must rely upon methods that use natural substances and traditional farming methods as much as possible.14 It is the prohibition of genetically modified organisms in organic growing practices that creates problems for organic farmers when they are contaminated by nearby GMO crops and unintentionally involve GMO pollen in their growing practices.

These standards for organic produce were introduced in response to Congress passing the Organic Foods Production Act in 1990, which created the United States Department of Agriculture’s (USDA) National Organic Program.15 By 2002, the National

---

15 Environmental and Natural Resources Law Center, *supra* note 13, at 3.
Organic Program was up and running, regulating organic produce and awarding organic certifications. In order to be awarded an organic certification, the National Organic Program mandates that farmers must comply with the guidelines for production in the Organic Foods Production Act and must “respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.” In addition to prohibiting the use of all non-natural substances during the production of organic plants and animals, the National Organic Program also prohibits the use of these substances on the land on which organic organisms are produced for a period of three years before it is used for producing organic organisms. If organic farmers violate these terms put forth by the National Organic Program, they may not be issued an organic certification or may have their existing certification revoked, rendering them unable to sell or produce any more organic produce.

While the USDA has made it clear that organic producers are prohibited from using GMOs in their production methods, some companies that sell corn to organic dairy and animal farmers have stated that contamination is inevitable. These farmers states that most organic corn contains 0.5% to 2% GMOs, and that this contamination has been an ongoing problem more than a decade ago when GMOs first came into widespread use in the agricultural world. If this level of contamination is as prevalent in other organic produce as it is in corn this poses a serious problem as in these conditions most organic food does not comply with the National Organic Program guidelines. The USDA’s zero-tolerance policy on GMOs in organic foods does not account for the prevalence of contamination. The current agricultural climate is one in which much of organic farmers’ produce is almost always contaminate, does not meet the guidelines for organic certification, and cannot be sold as organic produce.

In the past few years, as GMOs have continued to grow in use and capture the attention of mainstream media, the demand for organic food has steadily increased. As consumers have begun to become aware of the near omnipresence of GMOs in their food,
concern over potential adverse health effects related to GMOs has driven consumers toward organic or GMO-free produce. In response to consumer requests for greater food diversity and GMO-free options, the popular Mexican fast-food chain Chipotle declared in 2015 that they would be serving food that was “GMO-free,” citing concerns over the long-term health effects of routinely consuming GMOs.\(^{21}\) Prior to this announcement, GMO corn was found in Chipotle’s corn and flour tortillas, and GMO soy was found in their flour tortillas and cooking oil.\(^{22}\) Chipotle also announced that other ingredients, like the corn used in their salsa and the tofu used in their “sofritas” entrée, would be GMO-free.\(^{23}\)

In order to become truly GMO-free, Chipotle replaced their GMO ingredients with alternatives that included rice bran oil and sunflower oil.\(^{24}\) The company’s switch to GMO-free ingredients was an important decision in both the GMO farming and organic farming communities. For many, Chipotle’s decision seemed to confirm a public suspicion of GMO foods and bolster the spirits of organic farmers.\(^{25}\)

While the GMO market has grown steadily over time and GMOs have made their way into more than eighty percent of processed foods consumed in the U.S., the lack of research on the long-term effects of GMO consumption (mainly due to the fact that GMOs have only been recently introduced to agriculture) has allowed the organic food market to thrive.\(^{26}\) The lack of information about GMOs heavily plays into the general public’s fear of genetically modified food, prompting consumers to purchase more familiar organic foods. A demand for greater diversity in food options available for consumers has allowed seven percent of U.S. corn acres to be devoted to organic production and a significant chunk of all U.S. agriculture to continue to be made up of organic produce.\(^{27}\)

While organic farmers generally produce less crop yields than GMO producers, the consumer demand for food that has not been laced with additives, pesticides, or has been altered allows them to charge a premium on their food.\(^{28}\) Since the organic label is the only avenue by which consumers can find food that does not contain GMOs, this creates new

\(^{21}\) Chipotle, G-M-Over It, CHIPOTLE (2017), https://chipotle.com/gmo.\(^{22}\) Id.\(^{23}\) Id.\(^{24}\) Id.\(^{25}\) Cristina Alesci, Chipotle is Now GMO-Free, CNN MONEY (Apr. 27, 2015), http://money.cnn.com/2015/04/26/investing/chipotle-gmo-free/.\(^{26}\) Chipotle, supra note 21.\(^{27}\) Endres & Schlessinger, supra note 1, at 822.\(^{28}\) Environmental and Natural Resources Law Center, supra note 13, at 2.
marketing opportunities for organic farmers and helps them carve out a niche in the competitive world of agricultural production. While organic farmers suffer serious consequences when their crops are contaminated by GMO pollen, large biotechnology companies involved in agricultural law and patent infringement still argue that organic farmers should bear the burden of pollen cross-contamination. These groups argue that organic farmers should not expect to receive compensation from biotechnology companies for cross-contamination, and that biotechnology companies are justified in charging organic farmers with patent-infringement in these cases. Proponents of holding organic farmers liable for pollen cross-contamination often argue that because organic crops are less economically efficient, they contribute less to overall social welfare and therefore their inefficiency merits the economic burden of cross-contamination. However, organic farmers’ ability to charge a premium for their crops despite lower yields indicate that there is a social demand for organic produce and that their presence in the agricultural world does contribute significantly to social welfare. In one study it was shown that sixty-four percent of the respondents had purchased organic food and that those who did purchase organic food were willing to pay up to 20% more than they would for non-organic food.

Additionally, those who argue in favor of holding organic farmers liable for pollen cross-contamination often argue that because GMO farmers do not intentionally spread the GMO pollen and cross-contaminate organic plants, they should not have to shoulder the burden of liability. However, it is also argued that these GMO biotechnology companies are the ones that plant and produce the crops with GMO pollen, and are in the best position to control the spread of the pollen. Therefore, many agricultural law scholars argue that those who are most able to control the spread of this GMO pollen should be held accountable.

While U.S. courts have a record of ruling in favor of the “Big Four” biotechnology companies when cross-contamination issues arise, there are still many researchers in the

\[\text{29} \quad \text{Hamilton, supra note 9, at 84.}\]
\[\text{30} \quad \text{Adam Cohen, Is It a Crime to Plant a Seed? TIME (Feb. 18, 2013), http://ideas.time.com/2013/02/18/is-it-a-crime-to-plant-a-seed/}.\]
\[\text{31} \quad \text{Endres & Schlessinger, supra note 1, at 830.}\]
\[\text{32} \quad \text{Id.}\]
The agricultural community that believe that these large corporations should be liable in pollen drift cases. An argument that this group makes is that the damages that the organic farmer faces are far greater than the threat of patent infringement that the GMO companies face. Not only does the farmer incur economic damages for the supply of produce that has been contaminated, but she also faces additional expenses involved in decontamination efforts if she is ever to use that land again to grow organic crops.\textsuperscript{34} Given this situation, it only seems appropriate that the GMO companies be held liable for the damage that occurs directly as a result of their products.

Another argument that can be made in favor of holding GMO biotechnology companies accountable is that GMO company operations directly affect the rate at which GMO pollen is spread, and the more land that is used for GMO production, the higher the likelihood of contaminating organic farmers’ crops. In a study that looked at three alfalfa-growing states (California, Idaho, and Washington), researchers found that among the 400 inspected sub-areas, over a quarter of the alfalfa plants examined contained Monsanto’s Round-up Ready resistant gene (a gene genetically modified to resist the pesticide Round-Up), evidence that GMO pollen had spread rapidly even among plants that were not GMO organisms.\textsuperscript{35} The expansion of Monsanto and other biotechnology companies’ increases the risks that nearby organic plants may become contaminated. As this contamination is directly related to the industry’s expansion, the GMO companies should be held liable for pollen cross-contamination.

An additional legal defense that many agriculture scholars use to defend organic farmers is the defense of \textit{volenti non fit injuria}, which loosely translates to, “Those who incur damage through their own fault have no one but themselves to blame.”\textsuperscript{36} When applied to pollen cross-contamination cases, this can be interpreted to mean that because GMO companies allow patented genetic material to float in the wind, knowing full well that pollen drift may allow for cross-contamination, they have no right to complain about patent infringement as the infringement occurred as a result of their own actions. As the GMO companies knowingly placed GMO pollen in areas where the wind can carry it and it can contaminate organic crops, the GMO farmers also have no right to complain about

\textsuperscript{34}Wilson, supra note 8, at 175.
\textsuperscript{36}Heald and Smith, supra note 33, at 3.
having to compensate organic farmers for the economic damages that occur from cross-contamination.

These defenses and many others have been used in the legal arena to argue both for and against holding organic farmers liable for pollen cross-contamination. One pivotal case biotechnology liability case was *Organic Seed Growers and Trade Association (OSGATA) et al. v. Monsanto* (2012). In 2011, the Organic Seed Growers and Trade Association (OSGATA), as well over sixty other agricultural organizations, filed a suit against the biotechnology giant Monsanto. OSGATA, made up of farmers, seed-growers associations, agricultural organizations, and public advocacy groups, sought to invalidate some of Monsanto’s seed patents, claiming they were “not safe for societal use.” In the 2012 landmark federal lawsuit, the New York Federal District Court issued a ruling that stated Monsanto would not have to be held liable for pollen-drift.

The verdict in *OSGATA et al. v Monsanto* is detrimental to organic and small business farms as it creates a lack of accountability for genetic engineering companies like Monsanto in pollen contamination cases. While this case specifically addressed Monsanto’s ability to file copyright infringement cases against small farmers, it left unanswered the question of what to do when small farms are targeted by these lawsuits by other genetic engineering corporations. This question has yet to be answered as the U.S. Supreme Court denied OSGATA certiorari. Starting with their first lawsuit in the mid-1990s, Monsanto has sued over 700 additional farmers who have chosen to settle outside of court. In fact, many experts in biotechnology claim that Monsanto has only been able to maintain its monopolistic position because of its extreme vigilance with regards to patent infringement, using forceful investigations and prosecutions against suspected patent-infringers. Mark A. Kastel, Senior Farm Policy Analyst at the Cornucopia Institute spoke on OSGATA’s recent challenging of Monsanto saying, “The purpose of our lawsuit is to preemptively challenge its reign of intimidation over organic farmers.” Given Monsanto’s history of

---

38 Id.
39 Id.
41 Heald and Smith, supra note 33, at 4.
42 The Cornucopia Institute, supra note 40.
lawsuits against organic farmers, it is important to find a legislative solution that allows organic farmers to thrive in the global marketplace.

II. The Evolution of GMO Law

Laws surrounding genetically modified organisms and pollen drift have gone through significant evolution. Three specific cases in GMO law have altered the landscapes of agricultural and patent law, and it is worth exploring them in order to understand how they significantly affect pollen-drift issues. These cases have specifically impacted the verdict in *OSGATA et al. v. Monsanto*, which has directly hurt small farmers and lead to detrimental effects on the American economy. A discussion of pesticide drift law is also worth considering, as much of the same standards that have been applied to pesticide-drift issues are applied to pollen-drift issues.

In the year 1980, professor at the University of Illinois at Chicago, Ananda Chakrabarty made a groundbreaking discovery. After working for years in the development of genetically engineered bacteria, Chakrabarty was able to create bacteria that could break down crude oil. After this discovery Chakrabarty sought to patent discoveries like his that were man-made, live organisms. Chakrabarty believed in protecting the “manufacture” an “composition of matter” and applied for a patent for his discovery. This patent application inevitably caused serious buzz in the international scientific community, raising questions such as “do living organisms fall under the requirements of patent law?” and “even if an organism is live, does the fact that it was created by a human make it eligible for a patent?” Previous to Chakrabarty’s unusual request, the only living organism to ever have been granted protection under U.S. Patent Law was Louis Pasteur’s purified yeast, for which a utility patent was awarded. Controversy in the scientific community only increased when knowledge that the Patent Office had denied Chakrabarty’s patent request. In denying the request the office cited a subsection of Patent Law called the product-of-nature doctrine, which argued that because Chakrabarty’s creation involved a living organism it could not be patented. After the verdict Chakrabarty appealed and eventually the case was granted certiorari by the Supreme Court.

In their decision the Supreme Court Justices ruled in a 5 to 4 decision in *Diamond v. Chakrabarty* (1980) that Chakrabarty was eligible to receive a patent for his bacteria. The verdict in this case was that a “live, human-made organism” is patentable, as the bacteria
are not naturally found in nature. Due to the fact that the bacteria could only occur as a result of Chakrabarty’s actions, the Supreme Court found that the product-of-nature doctrine did not apply in this case. This landmark decision opened the doors for the manufacture of genetically modified organisms. Today, only a few decades after this case, the world of agriculture has found itself undoubtedly changed by the mass production of these genetically modified organisms. This case opened new doors in agriculture, complicating the debate over ownership of crops and combining patent law with agricultural law. The issue of pollen cross contamination would not even have been raised if not for this Supreme Court case. Specifically in *OSGATA et al. v. Monsanto* as *Diamond v. Chakrabarty* establishes that it is legal to patent GMOs, providing the legal foundation for GMO seed patent owners to sue small, organic farmers in cases of pollen cross-contamination.

Another case that set the legal foundations for *OSGATA et al. v. Monsanto* was *Alliance for Bio-Integrity v. Shalala* (2000). In May 1992, the FDA released a Statement of Policy that stated that they would not require the labeling of GMOs. The statement defined genetically modified crops as “foods produced through the rDNA process” and declared them to be “generally recognized as safe.” The Alliance for Bio-Integrity reacted negatively to this statement, arguing that the FDA’s decision not to require labeling for GMOs was “arbitrary and capricious.” The case made its way to the District of Columbia District Court, where the justices decided that public curiosity does not necessitate GMO labeling, and therefore labeling should not be required. Not requiring GMO producers to label their crops may put GMO producers in close proximity to organic crops. Additionally, organic farmers may not even know about the danger of cross-contamination from this close proximity until the damage has already been done.

While the previous cases had ramifications on pollen-drift controversies they did not directly address the issue of pollen-drift from genetically modified organisms. In 2010, *Monsanto Co. v. Geertson Seed Farm* brought questions of biotechnology liability and pollen-drift to the forefront of the agricultural community. The primary questions asked in this case were “Was the Ninth Circuit wrong in ruling that the plaintiffs do not need to show a

---

44 Id. at 170.
45 Id.
46 Id.
'likelihood of irreparable harm' to obtain an injunction?” and “Was the district court allowed to enter an injunction without conducting an evidentiary hearing?” The Court decided the Ninth Circuit did not err in holding that Geertson Seed Farms was exempt from showing “likelihood of irreparable harm” before obtaining an injunction. However, they did err in issuing an injunction against Monsanto without conducting an evidentiary hearing. The justices also decided that there was not enough evidence for Geerston Seed Farms to issue an injunction. This relates to OSGATA, serving as an example in which Monsanto won and the concerns of small farmers were dismissed by a majority vote of 7-1. The verdict in this case helped set a legal precedent in which small farmers can be disenfranchised despite economic harm done to them by large GMO corporations. This trend is further continued in OSGATA et al. v. Monsanto.

An important part to Monsanto Co. v Geertson Seed Farms was Justice John Paul Stevens’ dissent. Justice John Paul Stevens’ dissent argues that the facts of the case supported the imposition of an injunction. He primarily cited the fact that 1) GMO alfalfa can contaminate other plants, 2) contamination can occur even in settings that are controlled, due to wind and natural conditions, 3) regulators have limited ability to control how crops are planted, and 4) GMO contamination can severely damage farmers’ livelihoods. While existing cases surrounding GMO law have only complicated the discussion surrounding pollen-drift cases, one area of existing agricultural law provides the agricultural community with some solutions. Many experts have looked toward pesticide-drift laws as a means to solving cross-contamination involving GMOs, arguing that the same standards that apply to pesticides apply to pollen as well. Drake University Professor Neil Hamilton argues, “Under traditional pesticide drift law, if the judge views the product as a pesticide then the person using it will be responsible and strictly liable for its movement off the property. If it is seen as a natural product then the fact the crop expressed itself all over the neighbor’s field may not result in liability.” As there is no one viable federal legal solution to pollen drift, farmers often turn toward pesticide drift law and tort law to receive compensation.
III. Addressing Harms Resulting from Pollen Drift

There are a few methods by which organic farmers can attempt to recompense the damage caused by GMO pollen cross-contamination. The most common methods that organic farmers try include applying pesticide drift law for pollen drift cases or seeking compensation through common tort law. These methods, however, often prove to be inadequate as they fail to take into account the unique nature of pollen drift and the resulting implications it has for patent law.

Many pesticide laws can and often do apply in pollen drift cases. However, even in cases where pesticide laws are applied to pollen-drift cases, they still often leave farmers without a way to adequately redress harms that result from pollen cross-contamination. Any attempts at federal legislation do not adequately address cross-contamination issues and sufficiently protect farmers. According to the Environmental and Natural Resources Law Center, “Those laws exacerbate the problem by failing to limit, and effectively encouraging, the use of pesticides and GMOs, ensuring that drift will be an inevitable consequence of the U.S. agriculture industry.” Because existing legislation fails to address the grievances of farmers and offer them appropriate protection an amendment to the USDA’s organic regulations that offers better protection is necessary.

Another route that many farmers take in attempting to recover compensation for damages that result from cross-contamination is through tort law. These organic farmers seek to use common law torts such as private and public nuisance, trespassing, and negligence to end debates over contamination when they arise. Trespassing can be defined as the “voluntary and intentional or negligent act of unauthorized entry upon/physical contact with another’s land,” in which the damage done to the land is direct and immediate. While farmers often use the argument that the GMO pollen cross-contamination is a violation of the trespassing tort, trespass laws do not address all the issues involved in cross-contamination. This tort requires that the invasion be direct, however, as the wind is acts as a carrier for the pollen, the entry of the pollen into organic crop fields is said to be indirect. Additionally, the tort requires that the entry of the pollen cause immediate damage, and in cross-contamination cases the damage only occurs over a

---

52 Environmental and Natural Resources Law Center, supra note 13, at 3.
53 Id.
54 Endres & Schlessinger, supra note 1, at 823.
55 Endres & Schlessinger, supra note 1, at 823.
56 Endres & Schlessinger, supra note 1, at 823.
long period of time when the crops reach the time of harvest and undergo organic
testing.\footnote{Endres & Schlessinger, supra note 1, at 823.} Many legal scholars have argued for a strict liability doctrine to apply to cross-
contamination cases, in which GMO farmers would be held accountable for pollen cross-
contamination without showing negligence or proof of intent.\footnote{D. Strauss, We Reap What We Sow: The Legal Liability Risks of Genetically Modified Food, 16 J. OF LEGAL STUDIES IN BUSINESS 149-177 (2010).} These scholars argue that this would provide the best possible protection for organic farmers.

Another tort that is commonly used in cross-contamination cases is nuisance. A public nuisance can “a) significantly interfere with public health, safety, and comfort, b) can be illegal, or c) can continue with a significant, long-lasting effect on the public.”\footnote{Id. at 149.} Many organic farmers often argue that GMO pollen cross-contamination is a public nuisance as continual contamination of organic crops has the potential to significantly interfere with public health given the long-term effects of GMOs have yet to be studied in depth. However, when organic farmers try and use the public nuisance tort to try and obtain compensation they often are not successful as the harm done does not affect the public at large but rather is just confined to the farmer whose crops were harmed.\footnote{Id. at 149.}

In the event that a public nuisance tort does not work out for the organic farmers, they often try the private nuisance tort. A private nuisance can be defined as a nuisance that is a civil wrong that deals with the “creation of unreasonable physical harm to the plaintiff’s property” or “an unreasonable interference with a plaintiff’s use of her land.”\footnote{Endres & Schlessinger, supra note 1, at 849.} Organic farmers are often most successful using the private nuisance tort in cross-contamination cases however, issues arise in locating who exactly caused the unreasonable physical harm in the event that multiple GMO farms are located near an organic farmer’s plot.\footnote{Endres & Schlessinger, supra note 1, at 835.}

The last tort that organic farmers use in the event of pollen cross-contamination is negligence. Many organic farmers try and prove that GMO farmers were negligent in letting their pollen carry over and cross-contaminate organic crops.\footnote{Endres & Schlessinger, supra note 1, at 835.} However, GMO farmers can counter these claims by stating that pollen drift is an inevitable consequence
and a naturally occurring phenomenon, absolving them of responsibility. Additionally, there may be issues for organic farmers in pinpointing the exact source of the GMO pollen. Given the rapid spread of GMOs, organic farmers may often come across situations where multiple GMO farms surround their organic plot and it may not be possible to identify which of the GMO farmers is responsible for the cross-contamination. Often the defendants in a tort action can be a number of people including all GMO farmers in the area, seed producers and distributors, those in charge of farming equipment, or those who administered permits that made GMO farming possible. Using common law torts to remedy this problem often breeds controversy and leads to varied legal outcomes, adding to the confusion over who is actually liable in pollen-drift cases.

Many states have attempted to remedy the issue of cross-contamination by passing their own legislation. Frequently, states deal with this issue by banning GMO farming altogether. Marin and Mendocino counties in California, Hawaii County and Kauai County in Hawaii, and Jackson County in Oregon have all banned the cultivation of GMO crops. In response to Jackson County’s banning of GMO crops, many GMO alfalfa farmers in Oregon have challenged this ordinance, stating that it violates the state’s “right to farm” legislation. In *Schultz Family Farms, LLC v. Jackson County*, Jackson County argued that the ordinance did not violate the state’s “right to farm” laws as it protected “traditional farmers” and gave them greater protection from pollen cross-contamination. In 2014 counties in Hawaii introduced amendments to their state’s Right to Farm Act, which would allow them to prevent GMO farmers from growing crops. Hawaii introduced these amendments in response to a controversy over papaya in the state. For years Hawaiian papaya had been considered a delicacy, making papaya one of Hawaii’s main exports,

---

64 Endres & Schlessinger, *supra* note 1, at 835.
66 Endres & Schlessinger, *supra* note 1, at 831.
70 Randall, *supra* note 68.
especially in Japan where it was considered a delicacy.\textsuperscript{71} However in the mid-90s the state’s papaya industry was hit with the ringspot virus, decimating the number of papaya on the island.\textsuperscript{72} In response, Cornell-educated plant pathologist Dennis Gonsalves developed the genetically engineered Rainbow Papaya that was resistant to the ringspot virus. While this Rainbow Papaya allowed papayas to be grown on the island again, their new GMO status lost the papaya industry business as countries wary of GMOs began boycotting Hawaiian papayas.\textsuperscript{73} Dismayed by the loss of business farmers responded by banning the use of GMOs in the two Hawaiian counties Hawaii and Kauai.\textsuperscript{74} Hawaii’s anti-GMO stance is informed by the Precautionary Principle, a concept borrowed from the United Nation’s Protocol on Biosafety which states that before adopting any new biotechnology the state must have proof that it is benign.\textsuperscript{75} Given that there is little research on the long-term effects of GMO consumption, many farmers in Hawaii argued that the Rainbow Papaya had the potential to be harmful.

While anti-GMO legislation is one way to protect organic farmers from cross-contamination, it is simply unrealistic in the face of such rapid expansion in the GMO industry. GMOs are occupying more land than ever before in today’s agricultural landscape and banning GMOs simply avoids the problem than addresses it. Today’s organic farmers have limited routes available to them for protection and compensation in the event of pollen cross-contamination, exposing them to economic harm. If the problem of pollen cross-contamination is not addressed in the next few years the organic farming industry faces the threat of being wiped out entirely. The solution to this issue is an amendment to the USDA’s organic regulations that protects organic farmers from GMO lawsuits. An amendment would allow for adequate protection for organic farmers and would help prevent the small farmers from becoming the prey of large biotechnology companies.

\textbf{Conclusion}

In its current state, the USDA regulations have a zero-tolerance policy, disqualifying any produce that is even slightly contaminated with GMO pollen. However, 


\textsuperscript{72} Id.

\textsuperscript{73} Id.

\textsuperscript{74} Id.

\textsuperscript{75} Id.
given the arbitrary nature of pollen drift, it is impossible to guarantee that any produce can
be completely GMO free. In fact, U.S. public policy analysts often argue that the USDA
organic regulations, because they adopt a zero-tolerance policy toward GMOs, mislead
Americans into thinking that foods free from GMOs are somehow safer, more nutritious,
and higher in quality. Amending the USDA’s organic regulations to allow for a “threshold
for contamination” would allow organic produce that has been slightly contaminated to
still be labeled as organic. For example, the European Union has 0.9 percent GMO
contamination threshold, accounting for any unintentional GMO pollen drift. This
option would provide a way for the USDA to accommodate both organic and GMO
farmers, allowing both of them a place in the global marketplace. If the United States were
to amend the USDA’s regulations, it would make sense for the United States to adopt a
slightly higher contamination threshold, given the sheer quantity of GMOs produced in the
United States. Though the contamination threshold would adequately protect organic
farmers, a particular flaw with this solution is that it does not protect GMO companies
from patent infringement. However, as statistics have shown that large biotechnology
companies like Monsanto tend to excessively utilize lawsuits against small organic farmers,
this amendment would still allow farmers to escape harm to some degree. While
researchers are still attempting to find biological solutions to pollen drift, an overhaul of
the USDA’s produce labeling system is required in order to provide a long-term fix to
cross-contamination. An amendment to the USDA organic regulations is necessary to
ensure the future of organic farming around the world.

---

76 Henry I. Miller, The USDA ‘Organic’ Label Misleads And Rips Off Consumers, FORBES, March 7, 2015,
https://www.forbes.com/sites/henrymiller/2016/03/07/the-usda-organic-label-misleads-and-rips-off-
consumers/#11b08cf591a19.
77 Randall, supra note 68.
79 The Cornucopia Institute, supra note 40.