THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

VOLUME 2    NUMBER 1       APRIL 2012

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Foreword

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The Pre-Law Student Association is a collection of students seeking to increase their foundation of legal scholarship. As an organization, we transcend the boundaries set for undergraduate education to pursue a common goal. Our goal as an organization is to shape current legal, political, ethical, philosophical, and sociological issues through legal writing. Many of our student editors and writers have experience working on Capitol Hill, various esteemed law firms, and federal agencies placing us on the vanguard of the issues we write about and the ideas that we put forth.

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The Effectiveness of the Law of the Sea in Protecting the Environment

Paige Munger

The oceans face a number of serious threats, including overfishing, acidification and pollution from both land-based and maritime sources. The oceans face increasing pressure each year as human population growth and technological advances increase competition for depleted fish stocks and resources found on or beneath the sea floor. These problems have been exacerbated by the freedom of the seas doctrine that ruled for centuries, until the United Nations Law of the Sea Convention (UNCLOS) entered into force in 1994.¹ The Convention now governs all aspects of the oceans, including navigational rights, territorial sea limits, scientific marine research, economic and commercial activities, transfer of technology, the protection of the marine environment and dispute settlement.² This paper will examine whether UNCLOS has been an effective tool for resolving international environmental disputes.

For the purposes of this paper, one main benchmark is used in order to objectively analyze the Convention's effectiveness in resolving environmental disputes: court decisions issued in environmental cases arbitrated or litigated pursuant to the Convention’s framework for dispute settlement. The analysis of the implementation of court decisions in these cases demonstrates UNCLOS' immense potential as an effective tool for the protection of the environment. However, UNCLOS could better reach this potential through the implementation of a number of reforms modeled after the World Trade Organization’s dispute settlement mechanism.

The United Nations Law of the Sea Convention

UNCLOS was opened for signature at the end of 1982, and it entered into force twelve years later in 1994. The Convention is now globally recognized as the framework and authority governing all legal matters regarding the oceans. Before the Convention was implemented in 1994, the oceans were considered free, with the exception of a nation’s jurisdiction over a narrow stretch of sea around its coastline. However, over time the tension created by spreading pollution and competition for limited fish stocks and offshore resources made it clear that a level of order was necessary in order to manage the growing number of disputes over matters related to the sea. The freedom of the seas doctrine was outdated in the face of the world’s burgeoning population and technological advances. These worldwide developments allowed for the

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previously unforeseen exploitation of the ocean’s resources.\(^4\) UNCLOS was created in response to the growing pressure. UNCLOS contains key provisions governing navigation, exclusive economic zones, the continental shelf, deep seabed mining, technological prospects, marine scientific research, and the protection of the marine environment and the settlement of disputes. The Convention draws attention to the interconnectedness of all matters regarding the sea and places particular emphasis on the need to protect the marine environment.

Part XII of the Convention establishes the specific legal framework for the “Protection and Preservation of the Marine Environment.”\(^5\) The first article in this section, Article 192, prescribes the general obligation of states to protect and preserve the environment. Article 194 of the Convention requires states to implement measures, both independently and in cooperation with other states, to “prevent, reduce and control the pollution of the marine environment.”\(^6\) Specifically, states must implement measures to minimize pollution from vessels, the atmosphere, land-based sources, dumping, seabed mining installations, and any other devices operating in the oceans. The Convention also requires states to take measures against the introduction of alien species into

marine environments, and provides for the special protection of highly migratory species like albacore tuna.7

In implementing these measures, states are required to consider regional and global needs. First, as prescribed by Section Two of Part XII of the Convention, states must cooperate on a regional and global level. They must notify other states of imminent environmental damage, allow for the flow of information and technology between states regarding the preservation of the environment, and work together to establish and adhere to measures to control pollution based on scientific criteria. Second, Section Three requires that states provide assistance to developing countries. Specifically, states must permit them preferential treatment, help to train their scientific forces and then enhance their capabilities to make essential marine protection equipment. Third, states are required to adhere to their obligations under other international and regional conventions in accordance with UNCLOS’ objective of protecting and preserving the marine environment.8

Part V of the Convention, “Exclusive Economic Zone,” also contains a number of requirements that are vital to the preservation of the environment, namely, the conservation of fishing stocks. Article 56 gives coastal states the right to the protection and preservation of the marine environment in their Exclusive Economic Zone (EEZ). An EEZ is an area beyond and adjacent to the territorial sea that can extend up to 200 nautical miles from shore.9 States are

required to implement measures to conserve the living resources in their EEZ, to “maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield and to allow and provide for the exchange of data relevant to fish stocks regionally and internationally.” Article 63 requires states whose EEZs share fishing stocks to cooperate and agree upon measures to conserve those stocks. Finally, Article 64 requires states whose EEZs contain highly migratory species, and any state harvesting these species, to cooperate with appropriate international organizations to conserve the species.

UNCLOS is supplemented by a number of subsidiary agreements. In many cases, the obligations established by the Convention are in fact implemented through these subsidiary agreements. For example, the subsequent UN Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks furthers the UNCLOS provision requiring states to cooperate to conserve fish species. The Convention obligates states to use existing regional organizations or agreements in the management and conservation of fish stocks. Where such an organization or agreement does not exist, the Convention calls upon states to create one. For example Canada, a signatory to UNCLOS and the UN Fish Stocks Agreement, uses the Northwest Atlantic

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Fishing Organization to meet its obligations. The International Maritime Organization (IMO) created the Convention for the Prevention of Pollution from Ships (MARPOL) in 1973. This convention establishes the framework for dealing with all pollution from ships except dumping. It is through MARPOL that many member states partially implement Article 194 of UNCLOS, which specifically requires them to prevent and control pollution from vessels, among other things.

The Convention also establishes the legal framework for dispute settlement. First, Article 297 provides that states are required to settle disputes through peaceful means. This provision is relatively unique to UNCLOS; many treaties do not require binding dispute settlement. The convention outlines a two-part procedure for settlement that accords respect to the parties’ sovereignty. First, the disputing parties may engage in direct negotiation with one another. If this fails, the disputing parties must submit their issue to one of four alternatives for binding third-party arbitration: the International Tribunal for the Law of the Sea (ITLS), the International Court of Justice (ICJ), an arbitral panel of UN legal experts (Annex VII) or a special arbitration tribunal that specializes

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in a specific dispute (Annex VIII). The Convention also gives the International Tribunal for the Law of the Sea exclusive jurisdiction over seabed disputes. An eleven-member Seabed Disputes Chamber within the ITLS must resolve seabed activity disputes.

Case Studies: Cases Arbitrated or Litigated Under UNCLOS

A total of 30 cases have been arbitrated or litigated under UNCLOS. Nineteen of these cases were submitted to the International Tribunal for the Law of the Sea. Three of these were in relation to the UNCLOS provisions concerning the conservation and preservation of the environment.

The first of these cases is the Southern Bluefin Tuna Case of 1999, *New Zealand v. Japan and Australia v. Japan*. Australia and New Zealand first initiated arbitration proceedings under Annex VII of UNCLOS (an arbitral panel of UN legal experts). They then filed a request for provisional measures by the Tribunal. The case considered whether Japan's initiation of an experimental research program for Southern bluefin tuna, a highly migratory species, amounted to a failure to conserve and to cooperate in the conservation of the Southern bluefin tuna stock. New Zealand and Australia brought the case to the Tribunal after failing to resolve the dispute through negotiation with Japan. The Tribunal found that

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21 International Tribunal for the Law of the Sea. *Dispute Concerning Southern BlueFin Tuna Australia and New Zealand Versus Japan.*
Japan’s experimental fishing program for Southern bluefin tuna did constitute a failure to conserve the species and ordered its discontinuation.\textsuperscript{22} The Tribunal also prescribed five other provisional measures. These measures required Japan, New Zealand and Australia to prevent aggravation of the dispute, prevent prejudice to the decision, abide the annual catch levels to which they last agreed, resume negotiations regarding the conservation of the Southern bluefin tuna stock, and seek agreements with all other states fishing the species.\textsuperscript{23}

In 2000, the Tribunal commenced hearings on the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, or Chile \textit{v. European Union}. The three issues in the case were, “whether the European Community has complied with its obligations under UNCLOS to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its Member States in the high seas adjacent to Chile’s exclusive economic zone, whether the Chilean Decree which purports to apply Chile’s conservation measures relating to swordfish on the high seas is in breach of the United Nations Convention, and whether the “Galapagos Agreement” of 2000 was negotiated in keeping with the provisions of the UN


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Convention." The case was discontinued in 2009 after the parties successfully resolved the issue through negotiations. The parties stated that they were committed to the creation of a treaty that would better regulate both parties' fishing of swordfish stocks.25

In 2001, the Tribunal heard the MOX Plant Case, Ireland v. United Kingdom. Ireland applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures after it began the dispute mechanism process under Annex VII of the Convention. The issue in the case was whether the United Kingdom’s opening of a mixed oxide fuel plant in Cumbria would pollute the Irish Sea.26 Ireland expressed special concern over the transport of radioactive material to and from the plant and requested provisional measures from the Tribunal.27 The panel ruled that the UK could proceed with the MOX plant, and that Ireland and the UK must cooperate to

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monitor the risks and effects of the plant and implement measures to prevent pollution from the MOX plant.28

The ITLOS and Annex VII are the only two dispute mechanisms that have been used to resolve disputes pertaining to the environment under UNCLOS. In both instances that dispute settlement under Annex VII of UNCLOS was initiated, it was in conjunction with an application to the ITLOS for the prescription of provisional measures.

**The Implementation of Court Decisions**

In the Southern bluefin tuna case, ITLOS prescribed provisional measures pending the Tribunal’s final decision.29 Once the tribunal was formed, it concluded that it did not have jurisdiction. The tribunal cited Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) as its rationale.30 Article 16 of the CCSBT required that in order for a dispute to be settled through a binding third-party decision, all parties involved in the dispute must agree to the initiation of the dispute settlement mechanism. Japan had not agreed. The tribunal found that because UNCLOS was a broad agreement that established only the framework for dispute mechanism, Article 16 of the Convention for the Conservation of Southern Bluefin Tuna would be applied in

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favor of compulsory dispute settlement. On August 4th, 2000 the arbitral tribunal held that absent jurisdiction, the provisional measures the ITLOS had prescribed were invalid.

Japan adhered to the provisional measures prescribed by the ITLOS pending the arbitral tribunal’s decision. However once these provisional measures were revoked, Japan initiated negotiation with Australia and New Zealand to increase its allowed catch under CCSBT to compensate for the experimental catches lost during its adherence to ITLOS provisional measures. Japan was granted an additional 335 tons of catches per year. Their total catch allocation increased to 6,430 tons per year. Then in 2006, the CCSBT began an investigation into whether Japan was catching more Southern bluefin tuna than it reported. The CCSBT found that Japan had been overfishing for over 20 years. Japan’s Southern bluefin tuna annual catch quota was halved, and remains so at just under 3,000 tons.

37 Halláis, Yuichi. "Japan's Annual Southern Bluefin Tuna Catch Halved." USDA Foreign Agricultural Service GAIN Report. USDA
On the surface, this outcome appears to represent an indirect success of UNCLOS in the protection of the environment (UNCLOS requires the cooperation with regional agreements like CCSBT), and, in some ways, it is. Japan adhered to the provisional measures prescribed by the ITLOS, peacefully negotiated a new catch quota and, at least attempts to appear to abide with CCSBT requirements. However, Japan successfully undermined the CCSBT for 20 years by catching more than its quota when it was allowed twice what it is today. There is no evidence to suggest that Japan will stop misreporting its catches now that its official quota has been halved. In addition, the questionable intentions of the experimental research program, whose catches were sold into the market, were never addressed.

Chile v. European Union, was discontinued in 2009. After Chile and the European Union initially submitted the case in 2000, the ITLOS granted the parties successive time-limit extensions that expanded over a nine-year period on the basis that they were working on negotiating an agreement. The parties were granted their request for the discontinuance of the case after informing the Tribunal that they were committed to the “signature, ratification, approval and implementation of and compliance with the new Understanding agreed between negotiators.” The details of the Understanding were also submitted with their request.


The Understanding negotiated between the European Union and Chile was in fact implemented. It now provides the framework for the conservation of swordfish stocks in the South Eastern Pacific Ocean.\textsuperscript{40} While the dispute was not settled under a binding third-party decision, it was still settled by a dispute mechanism under UNCLOS: the engagement of direct negotiation.\textsuperscript{41} In addition, the need to file requests for time-limit extensions with the Tribunal and to provide a compelling argument for the discontinuation of the case to the Tribunal after they submitted their dispute in 2000, likely acted as an incentive for Chile and the European Union to reach a solid negotiation as quickly as possible. The overall effect is the better management of the conservation of swordfish stocks in the South Eastern Pacific Ocean. In this case, the Law of the Sea acted as an effective tool in the protection of the environment.

The provisional measures ordered by the ITLOS in the MOX Plant Case required Ireland and the United Kingdom to immediately negotiate terms for management of the plant’s pollution.\textsuperscript{42} In 2007,


Ireland and the United Kingdom were granted their request to suspend the requirement to submit periodic reports of their negotiations to the arbitration panel. In 2008, Ireland formally withdrew their claim against the United Kingdom. The MOX plant functioned without interruption until 2011 when The United Kingdom closed the plant in response to the Fukushima incident in Japan. The Fukushima Plant was hit by fire and multiple explosions due to damage caused by the earthquake and tsunami that hit Japan in March 2011. As a result of those natural disasters, much of the nuclear industry in Japan has closed down. Before the tsunami, Japan was the MOX plant’s biggest customer.

However, the closing of the plant cannot be attributed to UNCLOS. The MOX plant was allowed to continue normal functioning under the provisional measures prescribed by the

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The decision to close the plant was made purely on commercial grounds and was not influenced by any UNCLOS provisions pertaining to the prevention and reduction of pollution to the seas. Furthermore, the United Kingdom is considering converting the current plant into a new one that would convert plutonium into fuel to be burned in a new set of British nuclear reactors. The Irish Sea is currently the most radioactively contaminated in the world. A second nuclear plant in Sellafield will only exacerbate this, as will the existing plant in the months it will take to close it down. In this case, the Law of the Sea proved to be an ineffective tool in protecting the environment.

Analysis of the Effectiveness of UNCLOS in Protecting the Environment

The three cases arbitrated or litigated represent mixed results for the environment under UNCLOS. However, the results are slightly tilted in favor of the assertion that the Law of the Sea is an effective tool in the protection of the environment.

This assertion is strengthened when the general strengths of UNCLOS in the protection of the environment are examined. One of the main themes of the Convention is the preservation of the oceans

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and the resources found within them.\textsuperscript{50} This theme can be traced through nearly every section of the Convention, continually reinforcing its importance and practically demanding that member states acknowledge its significance.\textsuperscript{51} The preamble of UNCLOS demonstrates this. The preamble states that parties to UNCLOS have agreed to its provisions in recognition of “the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”\textsuperscript{52} Three of the five main goals of the Convention pertain to the protection of the oceans and its resources. It is clear that this is a fundamental component of the treaty. Furthermore, the interconnectedness of the environment with economic and security goals presented in the Convention gives the preservation of the oceans a more relevant and fundamental position in worldwide politics. Through this linkage, the protection of the marine environment is made a priority, even for those states that might otherwise make it a low political priority.

In addition, the specific requirements pertaining to the environment are extensive. However, the breadth of the


requirements allow for a significant amount of flexibility in implementation. For example, Article 194 of the Convention requires states to implement measures, both on their own and in cooperation with other states, to “prevent, reduce and control the pollution of the marine environment.” It does not specify what measures each state must take. The Convention establishes the framework for these policies without infringing upon the sovereign rights of states.

This balance between respect for sovereignty and binding international law is also reflected in the Convention’s section on dispute settlement. The fact that UNCLOS requires disputes to be settled peacefully significantly increases the chances that parties to the Convention will reach an agreement on their disputes in accordance with the Law of the Sea. In addition, the Convention only requires a binding third-party decision if the disputing parties are unable to reach an agreement through their own individual negotiation. The disputing states are then able to choose from four different third parties. This respect for sovereignty, the very principle of international law, likely generates a general willingness to comply with the Convention’s provisions. This allows for the Convention’s relatively more extensive requirements for dispute settlement.

In practice, the dispute settlement mechanism laid out in UNCLOS yields mixed results that are tilted slightly in favor of the

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assertion that UNCLOS is an effective tool for achieving the extensive environmental protection that it states is one of its fundamental principles. In the MOX Plant case, the dispute settlement mechanism was an inadequate tool in protecting the environment. The ITLOS permitted the plant’s operation. The nuclear plant in Sellafield further polluted the Irish Sea, which is now the most radioactive in the world. While the plant is being shut down this year for economic reasons, it will have a residual negative impact on the environment and may be replaced by another nuclear plant in the next ten years.\(^56\)

In the instance of the Southern Bluefin Tuna Case, the dispute settlement mechanism under UNCLOS yielded more success. The case was brought to international attention when it was submitted to the ITLOS. As a result, even when the arbitral court ruled that it did not have jurisdiction over the case, international pressure remained to negotiate a fair agreement that would protect fish stocks. Japan’s Southern bluefin tuna catches were suddenly subject to worldwide public scrutiny. This likely contributed to the eventual investigation of Japan’s catches, and the halving of its quota by the CCSBT.\(^57\) While Japan may continue to misreport its annual catches of Southern bluefin tuna, the continual pressure from the international community has made it much more difficult to do so,

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and Japan likely cannot achieve its historically high rates of unreported catches.

The Swordfish Stock Case is UNCLOS’s one total success in protecting the marine environment. Chile and the European Union settled their dispute over the conservation of swordfish stocks in the South-Eastern Pacific Ocean entirely in accordance with UNCLOS dispute mechanisms. They first attempted negotiation, and then submitted their case to a third-party for a binding decision before finally reaching an understanding through direct negotiation.\(^{58}\) The agreement they reached is in effect today.

Unfortunately, there are only three cases available to analyze the effectiveness of UNCLOS in protecting the environment. However, it is possible that the fact there are so few environmental cases that have required dispute settlement under UNCLOS is testament to the Convention’s effectiveness in deterring violations of its environmental protection provisions.

**Conclusions**

In general, UNCLOS demonstrates immense potential as a tool for the effective protection of the environment. The Convention itself maintains an extraordinarily high level of legitimacy through its successful balance of the need to respect the sovereign rights of individual states, and to establish compelling, fair and strong legal international legal standards. The protection of the environment is both heralded as necessary to the interests of humanity as a whole, and presented as inseparable from states’ individual economic and

security interests. The analysis of the implementation of the court decisions on the three cases brought to arbitration and litigation in accordance with the dispute settlement mechanisms laid out under UNCLOS offers further reason to remain optimistic about the effectiveness of the Law of the Sea in protecting the environment. Overall, the three cases demonstrate that dispute settlement mechanisms under UNCLOS both indirectly and directly work to encourage the protection of the marine environment.

However, there is a lot of room for improvement in the Convention’s effectiveness in protecting the environment. The Convention should be amended to include a provision requiring periodic reports from all member states detailing their adherence to UNCLOS obligations. This would dramatically increase the accountability of each member state. It would also provide valuable insight into the effectiveness of UNCLOS in deterring violations of the environmental protection provisions by member states, insight that cases brought to arbitration and litigation alone cannot provide. The data made available by these reports would allow UNCLOS to identify its weakness and loopholes, making it possible for the Convention to be efficiently improved. Over time, this process of data collection and relevant subsequent amendment of the Convention would allow UNCLOS to reach its full potential in protecting the marine environment.

This system would not be perfect. States would be relied upon to file their own reports, leaving room for misrepresentation. However, it is important to remember that sovereignty is the fundamental principle of international law. States must be willing to be party to a convention in order to be subject to its obligations, and states will not ratify a treaty that infringes too much on their
sovereign rights. Thus while this system would not be perfect, it would be the best system possible.

The World Trade Organization (WTO) acts as a testament to this. The WTO’s dispute settlement mechanism is heralded as the gold standard for dispute settlement in the international community. It requires periodic reports detailing a state’s adherence to its obligations under the WTO. UNCLOS should strive to achieve the WTO’s level of effectiveness and legitimacy. The first step in this direction is the requirement of periodic reports from party states. Over time, UNCLOS could also develop a system of economic penalties and consequences for states that violate the Convention’s provisions for the protection of the environment.
The Second Amendment: Extinct? An Analysis of the Historic and Recent Supreme Court Rulings and Their Effect on Gun Regulations

David Showalter

Since the passage of the Fourteenth Amendment, many of the Bill of Rights of the United States Constitution have been incorporated at the state level, by virtue of the Amendment’s due process clause. Incorporation is the process by which United States courts have applied portions of the Bill of Rights to the states. However, a limited number of the first ten Amendments have not been incorporated at the state level. Until recently, one of the unincorporated rights was the Second Amendment, adopted to ensure that “the right of the people to keep and bear arms shall not be infringed.” The decisions of District of Columbia v. Heller and McDonald v. Chicago resulted in the incorporation of the Second Amendment to Washington, D.C. as well as to the state and local level. The precedents established in these Supreme Court decisions suggest that states will now be forced to radically change their gun laws to conform to the new interpretation of the Second Amendment. This paper will begin with an examination of the history of the Second Amendment in the Supreme Court, followed by an analysis of the decisions rendered and the key questions posed in their wake. In addition, I will show that incorporation of the Second Amendment will be limited in scope to the right to gun ownership for self-defense in the home. Furthermore, this new interpretation
of the Second Amendment will stand despite its radical departure from previous Court rulings and the Court’s division over this issue, illustrated by the 5-4 vote in *Heller*.

The Second Amendment to the United States Constitution reads, “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹ The adoption of this and the other nine articles of the Bill of Rights formed a barrier to prevent any attempt of the new Federal government to intrude upon the rights of the people of the United States. It was not until the Reconstruction Era following the Civil War that a protection against both federal and state intrusions upon individual rights came in the form of the Fourteenth Amendment to the Constitution. The amendment specified that no state could deny life, liberty or property to its citizens without due process of law, nor could it deny privileges or immunities guaranteed by the Constitution. This trend began the era of “incorporation,” the act of applying the Bill of Rights to the state level, one amendment at a time. While the first official Second Amendment case was not heard until 1939, there were several well-known cases prior to this time that indirectly addressed the Second Amendment’s application to the states.

**Historical Jurisprudence**

The 1876 case of *United States v. Cruikshank*² dealt with multiple rights that the first ten amendments protect. The accusers argued that two individuals conspired to deny fundamental liberties

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to certain individuals of color in the state of Louisiana. One of the charges brought against the defendants was denying the “the right to keep and bear arms for a lawful purpose.” Before assessing the charges made against the defendants, the Court proceeded to outline the relationship between the federal and state governments. The Court stated that the people of the United States are subject to two levels of government, state and national, which exist without conflict. “The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions.”3 Using this idea, the Court took a strict constructionist view on the Constitution, arguing that the Bill of Rights limits only the encroachments of the federal government, while the states are responsible for enforcement.4 The Court said that the Fourteenth Amendment “does not add anything to the rights which one citizen has under the Constitution against another.”5 Upon considering the Second Amendment charge, the court flatly rejected the interpretation that the right to bear arms for a lawful purpose is a guaranteed right. Instead, the Second Amendment “means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government.”6 In carrying out this ruling of the Second Amendment, the Court relegated enforcement to the state and municipal level.

3 Id at 126.
4 The Court ruled that because the issue dealt with individuals denying fundamental rights of other individuals, rather than the state denying the rights of individuals, the Fourteenth Amendment protections did not apply. Future decisions rendered the Cruikshank decision obsolete.
5 Id at 129.
6 Kruschke, 127.
While *Cruikshank* was the first case to address the Second Amendment, *Presser v. Illinois*\(^7\) (1886) was the first to address a city ordinance regulating the right to bear arms. The case was heard because an unauthorized militia paraded through the city of Chicago bearing arms. At the time, the law mandated proper licensing from the state in order for the group to legally associate itself as a militia.\(^8\) The appellant, Presser, alleged that the Illinois law violated the Second Amendment right of the people to keep and bear arms. The Court again took the view of *United States v. Cruikshank*, saying that the Second Amendment “...is a limitation only upon the power of Congress and the National government and not upon that of the states"\(^9\). The Court did not see *Presser* as a Second Amendment case because it never separates the right to bear arms from the right of the states to maintain a militia. Because of this “limitation,” the Court does not consider *Cruikshank* to be a Second Amendment case *per se*. Nevertheless, the decision helped to lay the foundation for the so-called “Collective View” of the Second Amendment. The Collective View asserts that the Second Amendment intends to bar Congress from hindering the establishment and maintenance of state militias, which must keep and bear arms to serve as an effective defense. The Collective View came to dominate the opinion of the Court towards the Second Amendment for the rest of the twentieth century, and was only overturned in recent years.

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\(^8\) Id at 130.

\(^9\) Id at 134.
Miller v. Texas\textsuperscript{10} (1894) reaffirmed Cruikshank and Presser because it associated the right to keep and bear arms with a state militia only. It is clear from Miller v. Texas that the Court did not see the Second Amendment as applicable to the states, even under the Fourteenth Amendment, since the Court insisted that the amendment operates “only upon the Federal power, and [has] no reference to proceedings in state courts.”\textsuperscript{11}

United States v. Miller\textsuperscript{12} became the hallmark Second Amendment case when the Court decided that the Second Amendment did not protect the possession and transportation of a firearm without meeting proper defense specifications. The weapon in question, which was not properly registered under the National Firearms Act of 1934, was a double barrel 12-gauge Stevens shotgun equipped with a barrel less than 18 inches long. In the ruling, the Court explains, “Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.” The Court again held to the Collective View; however, it clearly defined its terms. It grouped the Second Amendment with the Article I Section 8 provision for the calling for the militia by Congress. “With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied


\textsuperscript{11} Id at 138.

with that end in view." The opinion then explains the historical importance of militias in order to account for their inclusion in the Constitution. As professor of political science Wilbur Edel has stated, “except for wartime emergencies involving the mother country, each colony relied for its protection on local laws that required every able-bodied male to arm himself and stand ready to assist in the colony’s defense when called upon to do so.” In previous centuries, the militia was comprised of all able-bodied men in the community. The fact that “most if not all of the states have adopted provisions touching the right to keep and bear arms” added support to the Collective View established by Presser.

After United States v. Miller, federal jurisprudence continued to judge Second Amendment cases by the Collective View, rather than considering the right to keep and bear arms as a fundamental right for every citizen regardless of his participation in the militia. In 1942 the Third Circuit reaffirmed that an individual right to keep and bear arms is “not conferred upon the people by the federal Constitution.” In addition, in 1971 the Eighth Circuit Court of Appeals ruled that the right to keep and bear arms refers only to the militia, not to the individual. Finally, in Quilici v. Morton Grove (1982) the Seventh Circuit grounded the Second Amendment in the Collective View. The town of Morton Grove, Illinois, placed a ban on the possession of virtually all portable arms. The decision affirmed

13 Id. at 139.
15 United States v. Tot, 131 F.2d 261 (3rd Cir. 1942).
16 United States v. Decker, 446 F.2d 164 (8th Cir. 1971).
the police powers of the state of Illinois to regulate the right to keep and bear arms. That Court decided that that ban on portable arms did not violate the Second Amendment because the amendment only applied to the actions of the Federal government with respect to encroaching upon the state’s right to arm its militia.

**Modern Interpretation: Heller**

Prior to *District of Columbia v. Heller*, the Supreme Court clearly favored a Collective View of the Second Amendment. These decisions also notably favored state and local jurisdiction regarding gun-related crime in urban areas. For many years, the high crime rate in large cities fueled the desire for stringent gun laws, and the Supreme Court assented to these laws by the Collective View of incorporation.

The shift in focus came in *District of Columbia v. Heller*. This case brought to court the District’s blanket ban on handgun ownership. In 2008, the Supreme Court addressed whether the individual right to keep and bear arms for self-defense was protected under the Second Amendment, and if so, whether the DC law violated this right. The decision of the Court involved several re-evaluations of historic cases. First, it concluded that neither *Cruikshank* nor *Presser* refuted an individual rights interpretation, because neither of them deals specifically with whether the right to keep and bear arms in purely collective. In addition, the Court argued that *Miller* only applied to the type of weapons of those in the state militia, the very people subject to the amendment in the first place. There is therefore a dual protection ensured through the

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Second Amendment: the protection of state militias, and the protection of the right of the individual to keep and bear arms. “The District’s law does prevent a resident from keeping a loaded handgun in his home. In addition, it makes it more difficult for the householder to use the handgun for self-defense in the home against intruders, such as burglars. As the Court of Appeals noted, statistics suggest that handguns are the most popular weapon for self-defense.” Over the objections of Justice Stevens, Justice Scalia highlights the historical precedent of this decision:

Irrespective of what the Framers could have thought, we know what they did think. Samuel Adams, who lived in Boston, advocated a constitutional amendment that would have precluded the Constitution from ever being “construed” to “prevent the people of the United States, who are peaceable citizens, from keeping their own arms.”

The court found that, historically, the right to keep and bear arms was viewed as a fundamental right for everyone. Since the founders considered militias preferable to standing armies, it was important that individuals possessed arms – to quickly respond for the call of defense. The Supreme Court ultimately ruled that the DC law violated the individual right to keep and bear arms. The Court was quick to add that this decision did not in any way overturn the laws prohibiting convicted criminals or the mentally-ill from acquiring guns, or the laws barring guns from being within proximity to sensitive areas such as schools. It was the scope of these laws that needed to be re-evaluated; yet, because the District of Columbia is a federal enclave, the decision did not extend to the state and local

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level. An additional case was needed for this incorporation to take place.

**State-level Incorporation: McDonald**

In 2010, a case that provided an opportunity to expand *Heller* to all states came in the form of *McDonald v. Chicago*. In accord with its findings in *Heller*, the Court found that Chicago's blanket ban on gun ownership violated an individual right to keep and bear arms for self-defense. The Fourteenth Amendment Due Process clause applies this provision to the states, making it a right protected from unlawful infringement by state and federal governments. Like the Heller case, the Court again reaffirmed that the decision did not overturn prohibitions on gun ownership for criminals and the mentally ill as well as near sensitive areas. Justice Alito, writing for the majority, related the previous decisions of *Cruikshank* and *Presser* to the outdated narrow interpretation of the Fourteenth Amendment’s Privileges or Immunities Clause fostered by the *Slaughterhouse Cases* (1873) in which the Court decided that the Privileges or Immunities Clause of the Fourteenth Amendment did not compel state enforcement of the Bill of Rights. While the court decided that it would not overturn *Slaughterhouse*, Justice Alito assures that “this Court’s decisions in *Cruikshank*, *Presser*, and *Miller* do not preclude us from considering whether the Due Process Clause of the Fourteenth Amendment makes the Second Amendment right binding on the States.” Accordingly, Justice Alito ties the interpretation of the Fourteenth Amendment to *Palko v. Connecticut*, the case that introduced selective incorporation of the Bill of Rights. In addition, the Court examined the historical

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meaning argument presented in the amicus briefs, and found that the right to keep and bear arms has always been considered a fundamental right of the people. The Second Amendment was considered a protection of this fundamental right, and “the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.”

**Investigating the Scope of the Rulings**

In the wake of the *McDonald* case, the scope of the decision remains unresolved. As the Johns Hopkins Center for Gun Policy and Research has noted, “Although Justice Scalia listed certain presumptively valid gun laws, some of them -- such as "laws imposing conditions and qualifications on the commercial sale of arms" -- were described in very general terms. Does this mean that any such conditions on gun purchases are valid?” Some believe that the Court will begin applying strict scrutiny to gun control legislation, a scrutiny first established in *United States v. Carolene Products Co.* of 1938. Footnote Four of this decision outlines the opinion the Court takes on legislation that possibly violates rights protected under the Bill of Rights. It reads, “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments…”

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23 Johns Hopkins Center for Gun Policy and Research. “Changing the Constitutional Landscape for Firearms: The US Supreme Court's Recent Second Amendment Decisions.”

Because the Court has now decided that the right to keep and bear arms is an individual right protected by the Second Amendment, it may begin to apply strict scrutiny to state gun control legislation should litigants file more lawsuits.

The decision to regulate the state gun control more thoroughly came over the written dissents of Justice Stevens and Justice Breyer. Justice Stevens’s objection came at the scope of Fourteenth Amendment application, claiming he would “ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments.”

The Second Amendment, Stevens argues, should not apply as forcefully to the states as compared to the federal level of government. “Inclusion in the Bill of Rights is neither necessary nor sufficient for an interest to be judicially enforceable under the Fourteenth Amendment.” To use Stevens’s method would be to undo the many years of precedents. In addition, it would not be sound to assume that there are different principles being used to incorporate the Bill of Rights on the state versus the federal level. “It is far too late to exhume what Justice Brennan, writing for the Court 46 years ago, derided as “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.” It is true that Justice Stevens’ view, while providing room for incorporation after Palko, has more connection to the Slaughterhouse sentiment of limited incorporation. Moreover, the Court’s deposition in Footnote Four of Carolene Products makes the freedoms contained within the Bill of

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26 Id at 1.
27 Malloy, supra, at 10–11 (internal quotation marks omitted).
Rights of much concern to the Supreme Court. The majority counted the minority view by reminding of the direction the Court took for the past century toward selective incorporation.

In addition, the objections of Justice Breyer alleged that if the Court were to incorporate the Second Amendment under the Fourteenth Amendment, the states would lose freedom to legislate in the area of gun control under its police powers. In response, the majority points out that this is the case with all incorporations, and that it is a necessary step to ensure the preservation of rights considered fundamental in the American experience. In addition, the Court separates incorporation from an obligatory power in which it makes judgments on what constitutes wise policy for the states in matters that they have little previous experience. Justice Alito, on the other hand, argues that incorporation means the opposite, asserting, “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.”

Future legislation will certainly be proposed, and local governments will adopt the approach Justice Breyer desired for the Court, that of weighing the benefits and risks and coming to a reconciling regulation. As the Johns Hopkins Center notes,

"Probably the safest form of immediate post-\textit{Heller} and post-\textit{McDonald} prediction is for some uncertainty about which gun laws (other than handgun bans) will be upheld and which judged unconstitutional. In such a climate, there may be a chilling effect for policymakers contemplating new laws"

\footnote{Justice Samuel Alito, Opinion, \textit{McDonald v. Chicago}, 561 U.S. 3025, 130 S.Ct. 3020 (2010).}

\footnote{\textit{Heller}, supra, at ____ (slip op., at 62–63).}
intended to reduce firearm violence. Legislators may remember *Heller’s* assertion that many different types of gun laws remain presumptively valid.30

As of yet, the Supreme Court has not developed a standard for determining the constitutionality of any case relating to the Second Amendment. Though the Court has ruled that any state can create legislation to prevent convicted criminals from possessing firearms as well as outlaw the possession of firearms within a certain distance near sensitive areas, state governments will now likely begin to frame new laws critical to determining the constitutionality of cases involving the Second Amendment. Given this paucity of guidelines, state government will have to conduct fresh studies to weigh the risks of gun ownership in order to arrive at a standard that satisfies both the Supreme Court and the states’ needs. The Johns Hopkins Center further writes:

> Researchers can also anticipate the kinds of gun laws most likely to face constitutional challenges and conduct new research to inform decision makers. Many gun laws have never been carefully evaluated. But relevant research need not be limited to direct evaluations of the public health impact of gun laws. Unbiased studies that consider possible risk and protective factors for violence may also be useful for courts and policymakers.31

The importance of the recent rulings given for Second Amendment cases, particularly *McDonald*, is undeniable. The


31 Id at 14.
Supreme Court has incorporated the Second Amendment, overturning precedent and setting the stage for a future reshaping of gun control legislation, but, whether the decision will endure is still in question. Historically, 5-4 decisions have invited further litigation to challenge and change the opinions of the relatively narrow majority. New justices with different attitudes towards the issue could overturn *Heller* and *McDonald* and still fit perfectly within the American legal tradition. Nevertheless, the Supreme Court has not overturned an incorporation case before, despite a 5-4 ruling. Therefore, it is not likely that the slim majority vote will shorten the life of this decision.

**Potential Problems**

Although the Court has incorporated the Second Amendment, there are additional steps it should take in future cases if it is to reinforce the necessity of incorporation. One of these steps involves a more thorough investigation into the history of the “right to keep and bear arms for self-defense.” The dissenting opinions of Justices Stevens and Breyer delivered searing criticisms of the Court’s historical analysis. Justice Breyer bemoaned, “The Court based its conclusions almost exclusively upon its reading of history. However, the relevant history in *Heller* was far from clear: Four dissenting Justices disagreed with the majority’s historical analysis. And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history.”

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disagree with the Court’s understanding of the right to keep and bear arms for self-defense as fundamental and deeply rooted in the American experience.

Looking more critically at the disagreement over the Court’s recent interpretation of the Second Amendment reveals a debate regarding the correlation between the “Militia” clause and the “right of the people to keep and bear arms” clause. Many argue that the nature of the state militia in the present era differs from that of the eighteenth century, which necessitates a different understanding of to whom the phrase “bearing arms” applies. As the opinions of the Court have noted, colonial Americans viewed the militia to be every able-bodied man in a township. Ownership of personal firearms qualified an individual to partake in the militia; however, modern state militias are well-trained and well-organized forces under the purview of local governments. They possess armories to equip their forces, so one need not own a firearm in the home to participate in the militia. It is therefore imperative to the survival of the recent interpretation of the Second Amendment that future courts thoroughly investigate the history of the right to keep and bear arms in order to discern how the right to bear arms clause justifies the possession of firearms in the home absent the intent to participate in the militia.

It does not appear that mandatory incorporation will go any further than preventing the abolition of handguns for self-defense in the home. While there is notable disagreement over the historical analysis of gun control, the right of the people to keep and bear arms possesses historic examples. For instance, the interpretation of the Second Amendment as a protection for individuals to keep and bear arms follows a few ideas included in the English Bill of Rights of
which had a significant role in framing the United States Constitution. It was true at the time of the English Bill of Rights that the English version of the Second Amendment did not apply only to those in the militia forces, but to any who felt the need for self-defense against unlawful activity. In the modern era of standing armies, heavily regulated state militias and dedicated police forces, the militia aspect of the Amendment has already been incorporated. It is the individual right of the people to keep and bear arms for self-defense that has remained unprotected at the state level until the present. This right is clearly rooted in the English Bill of Rights of 1688, and in both the colonial and state bill of rights created before and after the American Revolution respectively. It therefore follows, that the right of the individual to keep and bear arms qualifies as a privilege or immunity, all of which should be incorporated to the states under the Fourteenth Amendment.

There are states that have enacted less-stringent firearm regulations, even going so far as to allow gun owners to carry their weapons unconcealed in the public. In these states, the incorporation of the Second Amendment as the right to keep and bear arms for self-defense is clearly less controversial; but, in places that have historically maintained stringent regulation, particularly in large cities, local governments must make a special effort to enforce the Court’s finding. Given the more stringent gun regulations of urban areas, it is likely that the incorporation of the Second Amendment will go no further in the near future than for

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purposes of self-defense in the home. The fact that the Supreme Court recognizes how serious gun-related crime is in urban areas reveals a concern for the possible implications of the decision. Urban regions cannot liberalize their gun laws to match those of rural areas without risking a spike in gun-related lawlessness.35 Those who fear that the decision could lead to tumultuous reshaping of urban gun laws are likely overestimating the situation, since the Court’s finding did not expand beyond the original charge of preventing handgun ownership for self-defense in the home.

Conclusion

After looking into the various aspects of the debate and examining the findings of the Court, it is likely that the precedent set forth in *Heller* will stand. Although the decision was five-to-four and proved a dramatic departure from previous Supreme Court trends on the Second Amendment, the decision has marked the foundation for future cases on this issue. The nature of the finding relates similarly to many other incorporation cases, which, as Justice Alito noted, alter the federal-state relationship in some way. In addition, incorporation cases have historically lacked a consistent voting pattern, making it doubtful that the vote count will hamper the longevity of the decision.

The Supreme Court acknowledged a historical value to the right to keep and bear arms, while also narrowing the scope of the Amendment. Regarding the right to keep and bear arms, the majority accepted this right as a provision rooted in the experience of the United States and applicable to every law-abiding citizen.

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regardless of an affiliation with the state militia. On the other hand, the Supreme Court carefully limited the ruling to self-defense in the home. This narrow decision seems to be rooted in the defensive nature of the state militia, as well as the majority-expressed concern for urban area efforts to curb gun-related violence.

Finally, regarding future gun regulations, the court has given the states a model from which to build. All laws that prevent criminals and the mentally ill from owning firearms and the possession of firearms near sensitive areas are still valid; however, the states must create their own legislation to conform to the Court’s finding. The diversity of the opinions of this issue will inevitably lead to many new lawsuits, and the courts may then decide whether fresh regulations comply with the precedent established by the court. The majority of the Supreme Court desires this case-specific attitude and believes it will be the most judicious way to apply Second Amendment incorporation on the state and local level.

In the wake of *Heller* and *McDonald* decisions, much uncertainty remains. Nevertheless, in the words of Justice Scalia, there is one settled fact: “it is not the role of this Court to pronounce the Second Amendment extinct.”

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A Solution to Sex Trafficking in the United States

Rosalba Gleijeses

Introduction

A 12-year-old girl from Georgia was supposed to be under the care of a 39-year old man, Marcelo Alejo Desautu. Instead of providing the care and supervision promised to the young girl, Desautu forced her to have sex with older men for money. He used the profits to fund his own alcohol and drug habits. He drugged the victim, gave her alcohol, engaged in sex acts with her, and forced her to continue to prostitute herself.1 Exploited and violated, the trauma endured by this young girl has irreparably damaged her life forever. More terrifying still is the fact that she is only one of many children in the United States to be forced into sex slavery.

Sex trafficking is a growing, multibillion dollar industry that plagues the United States with a prevalence and ferocity unbeknownst to most citizens. Every year, thousands of women and children across the United States are sold into the commercial sex industry. It is a modern form of slavery: the ultimate violation of the most basic human right to freedom. The Victims of Trafficking and Violence Protection Act of 2000 defines “severe forms of trafficking persons” as follows:

(A) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, on in which the

person induced to perform such an act has not attained 18 years of age; or
(B) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.  

This article will focus on a solution to the first category. The statute elaborates on its definition of trafficking persons, describing sex trafficking as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.”

The Victims of Trafficking and Violence Protection Act of 2000 also found human trafficking to be the largest source of income for organized criminal enterprises in the world. The Justice Department’s Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons shows disconcertingly low numbers of convictions. However, the report has indicated progress over the past decade. In 2001, only four sex trafficking cases were reported from which 26 defendants were charged. Of these defendants, 15 were convicted. A mere 57.7% of the people charged of sex trafficking were sentenced. Unfortunately, due to underreporting, it

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3 Id.

6 Id.
is reasonable to assume that more than 26 people in the United States committed this atrocious crime that year. The numbers appear more promising in 2010, but still unsatisfactory nonetheless, as more cases are being reported than are convicted. In 2010, the Department of Justice reported 71 cases from which 113 defendants were charged, resulting in 85 convictions. Hence, over the span of nine fiscal years, the conviction rate increased 17.5% to 75.2%. Over that time span, 431 defendants have been convicted of sex trafficking in the United States.

However, it is difficult to calculate exact statistics in this field. Sex trafficking is an intrinsically surreptitious industry. Victims are closely guarded by their captors. Many victims go unfound due to lack immigration documentation. Much information is obtained from the victims themselves. Often, victims are reluctant to share their stories due to shame for what they have endured, fear that they will be punished, threats from the traffickers, or general distrust and/or unfamiliarity with the legal system. Additionally, data obtained from victim services is often non-comparable and contains duplicate reports. Often, different organizations report data for the same victim, resulting in duplicate court cases.

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7 Id.
8 Id.
An important question to pose is: How many victims are there? Certainly there are more victims than defendants. Who are these victims? According to a report published by the Bureau of Justice, there were 2,515 suspected incidents of human trafficking opened by federally funded task forces between January 2008 and June 2010 alone. From these, 87% of confirmed victims of sex trafficking were under the age of 25. Out of all of the victims of these sex trafficking incidents, 83% were confirmed US citizens. In addition, these are just the incidents that appear on the government’s radar. There are more victims than the government has been able to identify due to underreporting as a result of the victims’ reluctance to share their stories, as discussed in section I of this article.

These statistics paint a clear problem in America. What can be done to halt the atrocities of human trafficking? My proposed solution has three main components: prevention, prosecution, and victim assistance, though the order of these stages is arguably interchangeable and some of these stages may run concurrently. Prosecution can take place at the same time victims are being assisted, while preventative efforts can continually take place. The cornerstone of prevention is education. If people are made aware of the signs of human trafficking, they are better equipped to identify and put an end to it. Programs must be established to educate students as well as staffs of businesses that are pertinently susceptible to sex trafficking, such as hotels. Additionally, such programs should be required for law enforcement officers.

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The prosecution stage is critical. It calls for stricter and more specific sex trafficking legislation. This stage is directly related to prevention; it is important not only to punish those guilty of sex trafficking, but also to deter future criminals of that nature. Finally, victim assistance must be dramatically improved. Improvements in healthcare, shelters, and reintegration for victims are necessary, as well as a shift in deportation policy for victims who are illegal immigrants. Human trafficking cannot continue to plague the United States. A specified plan of prevention, prosecution, and victim assistance can help end this deplorable epidemic.

**Current Federal Legislation**

The Federal government and many state governments continue to pass more human trafficking legislation. A federal law commonly referred to as the White-Slave Traffic Act, set the stage for future sex trafficking legislation. It outlaws the transportation of women and girls as interstate commerce for the purpose of engaging in prostitution or other sexual activity. The law states:

That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce… any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to

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debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto... shall be deemed guilty.  

Sections 2, 3, and 4 of the law enumerate punishments of varying severity. In all cases, such conduct is deemed a felony. However, the punishment never exceeds a prison term of ten years and/or a fine of $10,000. Until this law was passed (and arguably for some time after), the scope of the Commerce Clause was interpreted broadly. In the Mann Act, Congress claims that women and children could not be traded or sold within or across states, or internationally.

While the constitutionality of the Mann Act has been challenged, the Supreme Court has consistently found it to be constitutional, in such cases as United States v. Bitty (1919) and five years later in Hoke v. United States. The law was amended by Congress in 1978 to include a definition of “transportation.” Additionally, this amendment replaced the phrases “debauchery” and "any other immoral purpose" with "any sexual activity for which any person can be charged with a criminal offense."

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Over twenty years passed before another powerful, federal statute was introduced to prevent human trafficking. The Victims of Trafficking and Violence Protection Act of 2000 (TVPA) is perhaps the most influential piece of legislation addressing the issue of sex trafficking. Its purposes are:

[T]o combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominately women and children, to ensure just and effective punishment to traffickers, and to protect their victims. 20

The legislation required stricter punishment for traffickers and increased protection of victims. It also required the president to create an Interagency Task Force to Combat Trafficking (TVPA). Congress wanted this Task Force to gather human trafficking data, monitor the United States’ progress in the prosecution and prevention of such crimes, work in conjunction with the Secretary of State to make annual reports, and engage in advocacy.

TVPA made additional progress in protecting victims. It stated that victims of severe forms of trafficking, who were in custody, were to receive adequate medical care and were not to be detained in environments unsuitable to their status. It prohibited the public disclosure of the names of victims and required that they (and their families) be protected from immediate threats or danger. Such aspects of the legislation are well intentioned, but ultimately too vague to be effective, as indicated by the inconsistency of sentencing’s for human trafficking cases. TVPA also enumerates more severe and specific sentences for traffickers than did the Mann Act previously. For instance, unlike that Mann Act, TVPA states that

if the victim is under 14 years of age, the defendant may be sentenced to life in prison. 21

In 2002, T-visas, mentioned in TVPA, were made legal by the Attorney general. T-visas allowed immigrant victims of severe forms of trafficking to stay in the US for three years, if their homes in their native countries were deemed too dangerous for return. After the three years, they are allowed to apply for permanent residency in the United States. Additionally, some victims were allowed to apply their children, spouse, or parents for non-immigration status.

Since the enactment of TVPA, several other laws have been passed to stop human trafficking. The Trafficking Victims Prevention Reauthorization Act of 200322 enabled victims to sue their traffickers in US Courts. It also amended the Special Watch List, which heavily monitored countries that have shown minimal efforts in preventing trafficking and/or have a high number of trafficking victims. The Trafficking Victims Prevention Reauthorization Act of 2005 developed a program that granted $50,000,000 to state and local governments to investigate and prosecute traffickers.23 Additionally, it required the Federal Bureau of Investigation to investigate all severe forms of human trafficking of both domestic and foreign persons. Furthermore, it created a Pilot Program to rehabilitate victims. Such programs’ goals are to:

(A) Provide benefits and services to victims of trafficking, including shelter, psychological counseling, and assistance in developing independent living skills;

(B) Assess the benefits of providing residential treatment

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facilities for victims of trafficking, as well as the most efficient and cost-effective means of providing such facilities; [and]
(C) Assess the need for and feasibility of establishing additional residential treatment facilities for victims of trafficking.24

This is the first act to establish residential treatment for victims and more acts targeted at helping victims have followed.

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 200825 made further efforts to protect and rehabilitate victims in addition to lowering the government’s burden of proof in prosecuting trafficking cases. The Mann Act made human trafficking illegal. TVPA provided a concrete foundation for addressing human trafficking. Other statues have amended and added to TVPA, but ultimately the aforementioned statistics in section 1 of this article indicate that human trafficking remains a colossal problem in the United States, proving that this legislation alone is not sufficient in ending sex trafficking.

Precedent Cases

As established in Section I of this article, more sex trafficking cases are being tried every year. The sentences have become progressively more severe, in correspondence with the stricter, more specified legislation.26 While this argument is not to suggest such offenses should be punishable by death, the wrong message is sent out if there is not a more uniform sentence extended to

24 Id.
traffickers. Only in the past 12 years have sentences included the possibility of life imprisonment. Despite its newfound legality, such a severe sentence for these cases is rare.27

In 2004, the defendants in United States v. Jimenez-Calderon28 pled guilty to one count of conspiracy and one count of sex trafficking. The men ran a brothel in New Jersey, occupied by girls as young as fourteen years old, who were persuaded by the defendants to leave their homes in Mexico for a better life in the United States. The young girls were beaten and forced to engage in habitual sex acts. The defendants pled guilty and each received 17.5 years in prison, and $135,240 in restitution was split between four of the victims. While the victims presumably welcomed compensation, a longer sentence would be more effective in keeping the victims safe.

In 2011, the defendants in United States v. Alexander29 pled guilty to one count of enticement to engage in prostitution. Alexander and his accomplice met a 16 year-old girl in Minneapolis and brought her back to St. Louis, where they trained her to work as a prostitute and advertised her online for sex. Alexander was sentenced to only 6 years in prison. While there are other cases that offer promising outcomes, there is still a pertinent issue of lenient judgment in trials regarding human trafficking. Some traffickers are given the maximum sentence of life imprisonment. However, many traffickers receive more lenient sentences by pleading guilty.

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29 US v. Alexander (10th Cir. 2011).
Prevention

The first step in preventing sex trafficking is the development of a strong understanding of it. Educational programs are paramount in the fight against human trafficking. Programs for schools, law enforcement, public service employees, and government agencies teach people the signs of human trafficking, so they are then able to report and ultimately stop these acts. Additionally, media campaigns can be a powerful tool in raising awareness and funds for the cause. Currently, there are no major school programs that educate students of the perils of human trafficking. Many parents would protest the prospect of their young children being told of such horrific and vulgar crimes. Such programs would not be targeted at elementary school kids. It would be more prudent and appropriate to introduce these programs to children in the range of 14-16 years of age. There are many such cases in which children in that age range—or even younger—are victims of human trafficking. If they are aware of the indicators of such behavior, they can avoid coming in contact with it and learn to report it when they do. Such programs would engage students in conversations that they presumably are unaccustomed to having in hopes that it will prompt a child to report an act—targeted at them or someone they know—that they may have otherwise been to uncomfortable or embarrassed to tell. Programs tailored to employees of the school—teachers, janitors, bus drivers, etc.—would have an equally profound and effective impact.

In addition, more Internet safety seminars should take place. With social media networks becoming unprecedentedly popular, there is more personal information on the Internet than ever before. Many young teens—though they are not the only ones—reveal
inordinate amounts of personal data to anyone with Internet access. People often update their social networking sites with their location at any given moment. Some people post provocative pictures and publically disclose their contact information. Many have weak privacy settings, allowing open contact and access to their information. Such careless gestures can make one more vulnerable to becoming a victim of human trafficking. Many victims are lured into the industry with false advertising for modeling, acting, or dancing opportunities. Others are lured under the impression that they have a romantic relationship with their trafficker.\textsuperscript{30} In conjunction with the aforementioned programs for students and school employees, lessons in Internet safety would reveal the prevalent danger of sex trafficking, and expose how social media perpetuates it, thus imploring students to be prudent about what they post online.

Training programs targeted at businesses vulnerable to human trafficking, such as hotels and motels, must be implemented. These programs would also focus on identifying the signs of sex trafficking and the appropriate course of action. Sex trafficking occurs commonly in private residences, but is also very prevalent in hotels.\textsuperscript{31} Pimps often require their victims to meet clients at such locations. Everyone associated with the hotel would engage in such a training program: receptionists, waiters, valets, maids, etc. If every employee in a given venue was thoroughly informed of the indicators of human trafficking, they could report and ultimately


\textsuperscript{31} Id.
help end them. Such programs do exist, but are uncommon. Many hotels in St. Louis, MO became involved in training programs of this sort after the aforementioned case, *US v. Alexander*\(^{32}\).

Similar programs should be implemented for law enforcement and other government agencies. If these people were informed of the subtle cues of sex trafficking, they would be more equipped to end it. For instance, police officers may be more inclined to detect well-hidden human trafficking schemes when investigating potential defendants for other crimes. Programs that educate judges, attorneys, victim witness coordinators, etc. could substantially improve the government’s ability to prosecute traffickers.\(^{33}\)

In Missouri, the St. Louis Anti-Trafficking Outreach Program (STOP) was recently developed to address the issue by targeting certain ethnic communities that are particularly vulnerable to becoming victims of human trafficking, including Hispanics, Asians, Eastern Europeans, and African Americans.\(^{34}\) There are over 150,000 immigrants living in St. Louis, among which there are roughly 25,000 Hispanics, 30,000 Bosnians, and a growing, undocumented number of Eastern Europeans and Africans. STOP collaborates the efforts of three agencies that work with specific ethnic groups: the International Institute, which works with Asian and Eastern European communities, the Catholic Family Service, *US v. Alexander* (10th Cir. 2011).


\(^{33}\) US Attorney’s Office of the Eastern District of Missouri, Abstract on St. Louis Anti-Trafficking Outreach Program
which conducts outreach for Vietnamese and Hispanic communities, and the Urban League of Metropolitan St. Louis, which provides outreach for African Americans. All three of the organizations have identified severe forms of sex trafficking within their respective communities in St. Louis.\textsuperscript{35}

The program has a four-pronged approach. It seeks to conduct informational sessions with law enforcement, ethnic leaders, and social services targeted at helping these communities. Additionally, the program seeks to implement lost-cost media campaigns through ethnic radio stations and newspapers targeted at the aforementioned communities. STOP also intends to expand existing professional services in victim assistance. Finally, the program strives to develop outreach programs for potential victims.

The outcomes of STOP indicate incipient success. Thus far, 200 individuals from 30 agencies have been educated on human trafficking legislation and the rights of victims. Media campaigns have introduced the issue to over 3,000 ethnic community members. Additionally, 25 individuals from 10 different agencies have been trained in identifying potential victims and referring them to investigative agencies and victim service. Ten lawyers will provide pro bono services for potential victims. From these approaches, 30 victims have since been identified and 5 cases have been referred for investigation.\textsuperscript{36}

While many people devote their lives to volunteering for such a cause, these programs need funding. The lack of educational training programs can, in part, be linked to the lack of funding. Either the government has to allocate more money to these

\textsuperscript{35} Id.
\textsuperscript{36} Id.
programs or more awareness must be raised to induce the public to donate. A positive feedback loop would inevitably ensue: more awareness leads to more funds, which leads to more programs, which in turn lead to more awareness, and so forth.

**Prosecution**

As statistics mentioned earlier have shown, the rate of traffickers indicted and subsequently sentenced has gradually improved in the past decade. Many sentences for crimes of this nature include a period of incarceration, as well as a fine intended as restitution for the victim(s). Oftentimes, defendants are given little jail time but are required to pay restitution to the victim. These fines, less so than the incarceration, act as deterrents for other potential defendants, and attempt to compensate for the trauma endured by the victims. Ultimately, monetary compensation cannot erase the victim’s experiences. What would be more beneficial to victims would be longer periods of incarceration for traffickers. If the traffickers were in prison for longer, their ability to perpetuate their criminal endeavors would be incapacitated—or at least severely hindered. Hence, the victims would be safer, as would all other potential victims. Longer terms of incarceration for traffickers would mean less time that they are free to commit the same crimes, targeting past and new victims.

**Victim Assistance**

While focusing on prevention of human trafficking is important, it is also vital to remember the victims of past cases and do everything possible to assist them. Victims of trafficking are traumatized and often feel at a loss of control. It is important that
necessary step be taken to help trafficking victims regain stability in their lives. As stated earlier, many victims are illegal immigrants and are often deported when their case goes to court.

Immediate deportation is not an ideal solution. Alternatively, Immigration and Naturalization Services (INS) may take deferred action. This allows victims to remain in the United States and enables them to work until INS revokes their deferred action. The prospect of being allowed to remain and work in the United States is promising, but the threat of relocation always looms overhead. This threat may deter victims from approaching police about their sex trafficking experience. Hence, there should be clear, legally bound criteria explaining what grounds enable the INS to revoke deferred action. Additionally, victims who are not U.S. citizens should be permitted to remain in the country on parole, which permits aliens to remain in the US for “urgent humanitarian reasons”. Victims remaining in the country on parole would also be eligible for employment opportunities. From this eligibility arises the concern that illegal immigrants would pretend to be victims of human trafficking in order to get a job that enables them to stay in the United States. Stringent repercussions for those who falsely report crimes could act as marginal deterrents. Fear of deportation and additional punishment will render people unlikely to report a false crime.

The United States currently has no reintegration program for victims of human trafficking. For the occasions when victims do return to their home country, the government should have a program in place that assures the safe reintegration of victims. Such a program would work closely to monitor the safety of these victims.
There are Non-governmental Organizations (NGOs)\textsuperscript{37} that address such matters, such as one funded by the International Organization for Migration, which caters to victims from Thailand, Cambodia, Vietnam, and Laos\textsuperscript{38}. If the government cannot fund reintegration problems on its own, it should at least work closely and cooperate with NGO’s and the private sector in managing such program.

If victims who are not citizens are permitted to remain in the country based on the aforementioned solutions—or any others—they will need a place of residence. Currently, there is only one government program funding shelters for victims of human trafficking; The Department of Justice’s Office for Victims of Crime is funding language specific shelters in Los Angeles for Asian victims of sex trafficking. While this is a worthy start, such programs need to be greatly expanded across the country. While some would argue that cultural and language specific shelters could exacerbate racial tension, such programs would be considerably more helpful than harmful. If victims were to be surrounded by professionals and other victims that speak their language and understand their culture, channels of communication would be open, thus allowing said professionals to better help the victims. Tensions will also be absolved if victims were to be surrounded by other who understood and respected their culture, which would make for a more comfortable environment and reintegration into society.

In addition to shelters, the government needs to directly fund counseling programs for victims. Currently, there is no such direct funding. Different states have different criteria regarding eligibility for medical assistance for emotional and psychological problems,

\textsuperscript{37} Id.

\textsuperscript{38} Id.
but there is still not a national policy. Healthcare and counseling programs directed by the Federal government would help to better address the issue by providing universal standards for assisting victims in this field.  

Conclusion

The issue of sex trafficking has recently been addressed more vigorously than it has been in the past and yet the sex trafficking industry continues to blossom. This expansion—and the enterprise of human trafficking all together—must be stopped. Overwhelmingly, government funding could help address this issue. Such funds need to be allocated to victim assistance programs, as well as prevention programs. In terms of aiding victims, the government needs to focus such funds on programs for shelter, medical assistance, counseling, and reintegration. Regarding prevention, government funds should be used to develop informative training programs targeted at an array of different groups including: businesses, schools, law enforcement, and government workers. Internet safety programs should also be helpful to both students and faculty at schools. The government must also fund media campaigns to raise awareness, entice donations (to fund any of the other programs mentioned), and deter criminals by advertising the potential legal [and social] repercussions. Additionally, there needs to be a stark shift in the judicial ideologies in sentencing these cases. The focus should be on longer periods of incarceration with stricter conditions, rather than fines, which the defendant is more than likely unable to pay. 

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timely matter, or at all. Further developing the manner in which US approaches the prevention, prosecution, and victim assistance of sex trafficking crimes can ultimately lead to the end of this horrific epidemic.
Flawed Retribution: The Hypocrisy of the “Non-Citizen”

Gregory Arnold

Introduction

While the international community has made strong stands against legal discrimination in countries around the world, some cases continue to exist. Often these acts of discrimination occur outright against minorities that the state deems as dangerous. It is within this category of discrimination that the policy of the “non-citizen” functions in Latvia. “Non-citizens,” or nepilsoņi in Latvian, is the official status of former citizens of the USSR in Latvia, as defined in Section 23.1 of the Law on Entry into and Residence in the Republic of Latvia of Aliens and Stateless Persons:

1. ...on 1 July 1992 they were registered in the territory of Latvia regardless of the status of the living space indicated in the registration of residence, or up to 1 July 1992 their last registered place of residence was in the Republic of Latvia, or it has been determined by a court judgment that they have resided in the territory of Latvia for 10 consecutive years until the referred to date;

2. They are not citizens of Latvia; and

3. They are not and have not been citizens of another state.¹

While there is nothing in the Latvian Constitution about the idea of the “non-citizen”, the realities following the Cold War created a government and society that looked on non-Latvian members of

society as aliens. The institution of the “non-citizen” was also created as a solution to resolve the issue of stateless individuals following the dissolution of the USSR, and the large number of individuals of non-Latvian descent that arrived in Latvia after 1940. The government of Latvia has subsequently referred the institute of the “non-citizen” as a unique entity that has never before existed.²

The government of Latvia has sustained the idea of a “non-citizen” over two decades following the end of the Cold War. Despite the continuing existence of the institution, the European Court of Human Rights (ECHR) continues to view the concept of the “non-citizen” as a violation of the fundamental human rights of the European Union, and the European Convention on Human Rights (Convention). Several NGOs, including Amnesty International, have likewise accused the “non-citizen” policy of fostering statelessness.³

Despite allowing “non-citizen” status to continue in Latvia, the court decisions of the ECHR, along with the actions of the Council of Europe and the international community, show that the institution of “non-citizen” is at its best ineffective and at its worse discriminatory. The “non-citizen” policy does not only affect the country of Latvia. Other post-Soviet governments may see the Latvian policy and its continued existence as an acceptable institution in the eyes of the international community, and therefore feel justified to implement similar discriminatory laws. It is the job of the European Union, of which Latvia is a member, to work with


the Latvian government to find a way to facilitate the restoration of full rights to all citizens.

**History of Modern Latvia**

The Republic of Latvia (*Latvijas Republika*) is a country situated in northern Europe along the Baltic Sea and bordered by Estonia to the north, Lithuania to the south, and the Russian Federation to the east. Latvia’s modern history begins when the country gained independence following the armistice ending World War I. The early years of Latvian independence were filled with this new state’s conflict to ensure its liberation from the recently formed Soviet Union. In 1922, Latvia created its first constitution.4

Latvia’s independence persisted until 1939. In that year, the secret territorial provisions of the Molotov-Ribbentrop Pact between Nazi Germany and Soviet Union saw Eastern Europe divided between them, with Latvia to be re-annexed into the USSR.5 By June 17, 1940, the USSR had formally occupied and dissolved the Republic of Latvia, creating the Latvian Soviet Socialist Republic. Latvia’s fate at the end of World War II, like that of its neighbors Lithuania and Estonia, was complex. Despite the defeat of the Germany and the rest of the Axis Powers, the Soviet Union refused to relinquish control of the territories annexed as per the Molotov-Ribbentrop Pact.

It was in the years following Soviet control that issues regarding ethnicity emerged in Latvian society. Much like the rest of

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the Soviet Union's territories, Latvia was subject to a program of “Sovietification”, which set into motion the annihilation of the Latvian landed class, as well as the suppression of Latvian as a language in favor of Russian. As a result of the pre-existing infrastructure in Latvia, the Soviet Union invested heavily in the region, making it a center of heavy industry, and soon thousands of Russians were migrating to Latvia for work.\(^6\) However, the government of the United States continued to recognize the pre-war governments of all of the Baltic nations throughout the Cold War.\(^7\)

After several decades of illegal occupation, the Baltic nations, including Latvia, moved for their independence. Starting in 1987, opposition forces fused to create the Popular Front of Latvia, the organization that would propel Latvia to seek greater autonomy from the Soviet Union. In 1990, the Supreme Soviet, the legislative body of the entire USSR, issued a resolution regarding the occupation of Latvia, Lithuania, and Estonia, whereby the USSR officially deemed the occupation of all these states was officially deemed illegal by the USSR, and set the events in motion for the independence of these states and the collapse of the USSR.

**Origins of the “Non-Citizen” Institution**

The institution of the “non-citizen” is a particularly interesting one. Like most sovereign states, the Republic of Latvia has a clause in its constitution that establishes an official language. In Chapter I, Article 4 of the Latvian Constitution of 1922, “The state

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language within the Republic of Latvia is the Latvian language..."\(^8\)
However, the Latvian constitution did not openly discriminate against minorities. In Chapter VIII, Article 114, “Persons who belong to minority nationalities have the right to maintain and develop their own language and ethnic and cultural originality.”\(^9\) That section of the Constitution was authored because, after centuries of inclusion within the Russian Empire, Latvia had sizable minorities of Russian, Polish, Belarusian, and Lithuanian ethnicities.\(^10\) Later on, the Sovietification of Latvia would greatly shift the demographics of the country. In 1897, the Imperial Russian census showed Latvia’s Russian population was around 12 percent. By 1989, that number was 34 percent.\(^11\) This influx of Russian immigrants had likewise coincided with the systemic attempt by the Soviet authorities to promote Russian over Latvian as a national language.

Naturally, when Latvia gained independence, there was a backlash against the Sovietization policies. The new Popular Front restored the 1922 Constitution, and implemented an additional “State Language Law” in 1999, which made the official language Latvian. This language law stated in its purpose that it related to “[Article 1, Section 4] the integration of national minorities into Latvian society while respecting their right to use their mother tongue or any other language.”\(^12\) Latvia also created a citizenship exam, whereby all applicants were required to have competency in

\(^8\) Ibid. § 1, cl. 4.
\(^9\) Ibid. § 8, cl. 114.
\(^11\) Ibid.
the Latvian language and, more controversially, acknowledge elements of Latvian history including the Soviet occupation. These conditions for citizenship led to many ethnic minorities, particularly for the Russian community, actively choosing not to apply for citizenship, which required them to subvert to the overtly nationalist state definition of “citizenship”. What then followed was the creation a large population that was neither an active part of Latvian society, nor a part of any other state.

**Legality of the “Non-Citizen”**

The institution of the “non-citizen” is especially disputed. Typically, the argument focuses on whether it violates any pre-existing laws, or if the Latvian government is doing nothing more than other governments have already done regarding occupying forces. In the latter, examples such as Alsace-Lorraine, a region of France that was annexed and settled heavily by ethnic Germans until its re-annexation into France almost fifty years later show that, despite the occupation and settling of an area by another power, it does not mean that these occupiers can or will be permanently granted citizenship. However, as opposed to the Alsace-Lorraine case, where German citizens found themselves in a continually existing country (i.e. France), it should be noted that the individuals who are “non-citizens” held citizenship in a country that no longer exists (the USSR), and as such are technically “stateless” by the definition of the word.

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14 Peter Van Elsuwege, *From Soviet republics to EU member states: a legal and political assessment of the Baltic states' accession to the EU*, 75 (2008)
The idea of the “non-citizen” is a unique one, because those who wear the title have rights within the borders of Latvia, and to a greater extent, the European Union. “Non-citizens” are granted the right to live in Latvia and are represented by the Latvian government when they travel throughout the EU. On the other hand, “non-citizens” are politically restricted by their status, unable to vote and hold certain offices in the government, and suffer from restriction of pension rights. Furthermore, Latvia has worked to negate elements of Council of Europe treaties regarding the rights of minorities, in particular, minority languages. For instance, in 2005, Latvia ratified the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM). Despite this, the Latvian parliament (or Saeima) stated reservations in regards to Articles 10 and 11 of the Convention. These articles are listed below:

**Article 10**

1. The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.

2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to

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the Parties shall endeavor to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

3. The Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter.

**Article 11**

1. The Parties undertake to recognise that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system.

2. The Parties undertake to recognise that every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public.

3. In areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavour, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority
language when there is a sufficient demand for such indications.\textsuperscript{18}

The ill-intent of Latvia’s rejection of these clauses is furthered complicated by the fact that Latvia has not signed the European Charter for Regional or Minority Languages, a document which promotes the protection of regional languages and the peoples that speak them.\textsuperscript{19} These attempts to reduce traces of minority languages show that the Latvian government continues to reinforce the unchallenged supremacy of the Latvian language within its borders.

To these ends, there have been several cases brought before the ECHR to challenge actions undertaken under the direction of the “non-citizen” clause. Of these, the cases of \textit{Podkolzina v. Latvia} and \textit{Slivenko v. Latvia} are of particular significance.

1) \textit{Podkolzina v. Latvia}

The case of \textit{Podkolzina v. Latvia} was one of the largest cases against the “non-citizen” policy and the restrictions it places on “non-citizens”. Ingrida Podkolzina was an ethnic Russian born in Latvia in 1964, at a time when Latvia was part of the USSR. In 1998, Ms. Podkolzina ran for the Latvian \textit{Saeima} under the National Harmony Party (TSP). While the TSP did file that Ms. Podkolzina spoke Latvian, a subsequent examination by the State Language Inspectorate found that the candidate did not possess a “third level” (the highest) command of the Latvian language, and was ultimately removed from the list of candidates. It should be noted that the TSP did assert that Ms. Podkolzina had competency in the Latvian

\begin{footnotesize}
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    \item \textsuperscript{18} Framework Convention for the Protection of National Minorities, § 10-11 (1998)
    \item \textsuperscript{19} \textit{Ibid.}, available at http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/LVA-CbC-III-2008-2-ENG.pdf
\end{itemize}
\end{footnotesize}
language, and claimed that she stated that extenuating circumstances caused a poor performance on the exam. Regardless, the courts of Latvia withheld the decision to remove her candidacy because of existing laws.

The law in question was an addition to the Constitution of 1922, which stated that individuals who “do not have a command of the official language at the third (upper) level of knowledge,” and where “the candidate is not a citizen in possession of full civic rights [in reference to age and command of the Latvian language] would be disqualified from running as a candidate in a Latvian election.” Similarly, Podkolzina’s complaint was that these additions to the Constitution violated her right to run as a candidate, as in Article 3 of Protocol No. 1 of the European Convention on Human Rights, which states: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” Ms. Podkolzina also argued that the Latvian government violated Articles 13 (effective remedy) and 14 (discrimination). Podkolzina’s argument was that, as an ethnic Russian candidate, representing the 40 percent of society who were not Latvian, her knowledge of Latvian was irrelevant to her candidacy.

Ultimately, the Court unanimously decided to side with Ms. Podkolzina, stating that the State Language Centre, which had originally opposed the TSP placing her on the candidacy list, had

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21 Ibid

22 Ibid

23 European Convention on Human Rights, Pro. 1, § 3 (1952)

24 Ibid
taken unnecessary and extraordinary measures to disqualify Ms. Podkolzina as a candidate. It should be noted that, because a violation was found in regards to Article 3, the court did not make any decisions concerning the violations of Articles 13 and 14. Ultimately, the laws regarding language requirements for candidates would not be removed because of this case.

2) Slivenko v. Latvia

The case of Slivenko v. Latvia refers to a Mrs. Tatjana Slivenko and Ms Karina Slivenko, both ethnic Russians who lived in Latvia and, due to family circumstances, left for Russia but were barred from re-entering Latvia. This case differs from Podkolzina v. Latvia because it deals with the rights of individuals who were more directly affected by the USSR and its breakup. Tatjana Slivenko was born in Estonia in 1959, but her family moved to Latvia only a month later, where she married a Soviet officer, N. Slivenko, who was stationed in Latvia in 1980. The following year, the couple had their daughter Karina. Things would remain tranquil until 1993, when K. and T. Slivenko registered as “non-citizens.” In 1994, N. Slivenko was ordered to leave Latvia, as part of the “Agreement between the Republic of Latvia and the Russian Federation on Terms, Time Limits, Procedure of a Complete Withdrawal of the Armed Forces of the Russian Federation and the Legal Status thereof during Withdrawal from the Territory of Latvia” in 1994. Shortly thereafter, both T. and K. Slivenko were also ordered to leave, despite being permanent residents of Latvia. In addition to

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protesting their deportation, T. and K. Slivenko were unable to return to Latvia in order to see the parents of T. Slivenko.27

The Latvian justification for the aforementioned actions was the Russian-Latvian Treaty of 1994, which stated in Article 2: “The Russian Federation’s military troops shall leave the territory of the Republic of Latvia by August 31, 1994. The withdrawal of Russian Federation military troops shall concern all members of the armed forces of the Russian Federation, members of their families and their movable property.”28 The Latvian case argued that, since T. and K. Slivenko were related to N. Slivenko, in this case a former Soviet soldier, they too were included in the clause regarding family. The Latvian government went on further to state that the eviction of the Slivenkos was in the interests of “national security”, and therefore acceptable according to Article 8 of the Convention.29

The applicants’ counterargument pointed out that the Latvian government had violated Article 8 of the Convention, which states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.30

28 Ibid
29 Ibid
30 ECHR § 8.
As the applications stated, they were forcibly evicted from Latvia, despite being permanent residents of Latvia, with K. Slivenko having been born there and T. Slivenko having lived there since shortly after her birth. The claim observed that the Latvian authorities had misinterpreted the treaty, and that the Slivenkos had done nothing to warrant their expulsion from Latvia. Furthermore, the applicants also charged the government of Latvia had violated Article 14 of the Convention. 31

The Court ultimately ruled against Latvia, stating that the government had indeed violated Article 8 of the Convention; yet like in the case of Podkolzina v. Latvia, the ECHR did not rule on a violation of Article 14, as it viewed that action was unnecessary. 32

Conclusion: Recommendations on the “Non-Citizen” Institution

The institution of the “non-citizen” is a difficult one to undermine. It is born out of necessity, as the fall of the USSR and the resulting geopolitical shifts left thousands of people stateless. On the other hand, the Latvian government in the process of upholding the institution has broken several of the articles of the European Convention on Human Rights. 33, 34 Likewise, as the numbers show, there has not been a sizeable decrease of “non-citizens” since independence.

The international community has had various comments about the “non-citizen” policy, and its effects on the democratic

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32 Ibid  
process of Latvia. The Organization for Security and Cooperation in Europe (OSCE) stated during the 2006 Latvian elections that:

Approximately 400,000 people in Latvia, some 18 per cent of the total population, had not obtained Latvian or any other citizenship and therefore still had the status of "non-citizens." In the vast majority, those were persons who migrated to Latvia from within the former Soviet Union, and their descendants. Non-citizens do not have the right to vote in any Latvian elections, although they can join political parties. To obtain citizenship, these persons must go through a naturalization process, which over 50,000 persons have done since the 2002 Saeima election. The OSCE claimed that the fact that a significant percentage of the adult population did not hold voting rights represented a continuing democratic deficit.35

Indeed, the problem is not that Latvian citizenship is difficult to attain, but that there is an absence of an alternative for “non-citizens”. The “non-citizens” lack other countries to which they may emigrate, and in many cases, cannot escape Latvia in the first place because they are as integrated into Latvian society as full citizens. There have also been a number of recommendations given in order to make the “non-citizen” institution more favorable in the eyes of the international community. They include:

1. Granting non-citizens voting rights
2. Encouraging the process of gaining citizenship

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3. Revising questions in citizenship that may be culturally and historically contentious\textsuperscript{36}

Ultimately, the question arises as to who will champion the effort to encourage reforms in Latvia. It should be noted that in the aftermath of the \textit{Podkolzina v. Latvia} case, the recommendation of ECHR did nothing substantial, but the push from NATO (of which Latvia was set to become a member) to ease the restrictions placed on “non-citizens” actually resulted in the removal of the language requirement for candidates.\textsuperscript{37} Nowadays, Latvia is a member of the EU, and taking into account the disastrous effects of the recent recession on its economy, Latvia will inevitably depend more on the EU than ever before. Given the previous track record of the ECHR with regards to the “non-citizen” cases, it would not be implausible to assume that if the policy was charged with violation either Article 13 or 14 of the Convention, the ECHR could directly challenge the legality of the institution. Allowing the “non-citizen” policy to stand unchanged will cause tensions between Latvia and the neighboring Russian Federation to rise. Russia has cited the issue overall, and the differences between citizens and “non-citizens” to highlight the discrimination of the ethnic Russian minority.\textsuperscript{38}

\textsuperscript{36} PACE resolution No. 1527 (2006)-Section 17.8-17.11.2: \textit{available at} http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/RES1527.htm


While the issue of the “non-citizen” is a divisive one, it is also one that needs to be corrected, or at the least amended to conform to acceptable Western democratic norms. The inability of “non-citizens” to vote, among other things, is a direct form of discrimination, and completely unacceptable to have in a member of the European Union. As such, the European Union must be willing to intervene and put its foot down in order to modify the policies that challenge greater EU law itself.
Rebuilding the American Education System

Chelsea Brewer

Introduction

In 2002, under the Bush Administration, the No Child Left Behind Act of 2001 (NCLB) was enacted in high hopes of finally eliminating the achievement gap in the country’s public schools.\(^1\) However, those who drop out of school continue to be disproportionately of a minority group.\(^2\) While the education reform bill’s hard emphasis on raising standards for America’s schools was admirable, NCLB has not repaired education, and in many ways, the law has caused further damage for schools in the US. Unfortunately, every year, “approximately 1.2 million students fail to graduate from high school, more than half who are from minority groups.”\(^3\) In addition, the majority of the country’s high school dropouts are the result of only about 12 percent of America’s high schools.\(^4\) In an effort to address the issue of education reform as well as the problems brought about by NCLB, the Obama Administration is

\(^3\) Ibid.
\(^4\) Ibid.
currently seeking to make major provisions in the law. The President additionally authorized the Race to the Top in an attempt to raise standards and further localize the American education system. Although President Obama’s education reform ideas are a step in the right direction for the country’s large student population, I advocate that education policies be further localized to the district level to ensure that specific needs of the diverse nation are attended to. In addition, a more comprehensive evaluation method would allow the government to gain more accurate data to assess America’s public schools.

Background

When George W. Bush was first elected to office, he vigorously sought to make education reform a top priority for his duration in office. The No Child Left Behind Act of 2001, passed on January 8, 2002 by Congress, represented the most large-scale reform of the Elementary and Secondary Education Act (ESEA) since the law was authorized in 1965. The amendment’s purpose states that it is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement

standards." NCLB advocates for greater control of the federal government to regulate the education system in the US. Under the provisions of NCLB, annual standardized tests are administered in public schools from grades three through eight in order to assess and track yearly progress of reading and math skills. The data collected will label as “failing” schools whose scores do not meet the standards the federal government has issued. NCLB strives to increase school accountability of student performance by requiring schools to meet Adequate Yearly Progress standards. The benchmarks aim to ensure that all children are proficient in math and reading by 2014. If the standards are not met, schools may face consequences such as firing of staff and closure. Despite the promising layout of the education law, major improvements have not been seen since NCLB was implemented, and the law has not been revised since its enactment in 2002.

Unreasonable Expectations

In an attempt to give greater power to local school districts, an elimination of NCLB would be necessary. Although admirable at the time, the strict requirements and penalties to schools that do not meet yearly standards have caused American students more harm than benefit. The unrealistic goal of complete proficiency by 2014 has placed unfair strain on schools, teachers, and, mostly, students. Some have even argued that 100% proficiency by 2014 is

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unattainable or would take another 100 years.\textsuperscript{12} According to the “Programme for International Student Assessment (PISA), no country has achieved a 100\% pass rate at any reasonable level of achievement.”\textsuperscript{13} In addition, the 2003 PISA test revealed that “not one country—even the highest performing countries of Finland, Korea, and Canada—had all of its students pass the lowest standards in either math or reading.”\textsuperscript{14}

\textbf{Severity of Penalty}

NCLB looks to standardized test scores that place a narrow emphasis on reading and math, disregarding other important subjects such as history, science, the arts, and physical education. The quality of education necessary for a child’s success in the future has been undermined when teachers are forced to teach to the test in order for students to attain proper scores on standardized tests. The demand for complete proficiency by 2014 also disregards the possibility for simple human error. On a test day, at least one student may come in sick or tired, and a single student’s error can cause a school to face the consequences outlined by NCLB. Therefore, “in 2014, a single student failure is sufficient for the school to fail as a whole.”\textsuperscript{15} Placing such a large amount of pressure on young students is unfair, for there exist many other factors that may affect a child’s academic success, such as parenting, teachers, and socioeconomic status. In President Obama’s 2012 State of the Union Address, he praised former President Bush for the

\begin{itemize}
  \item \textsuperscript{13} Ibid.
  \item \textsuperscript{14} Ibid.
  \item \textsuperscript{15} Ibid.
\end{itemize}
significance he placed on raising standards, yet he recognized that NCLB’s provisions have contributed in harming the country’s children and their education. Additionally, he stated, “In order to avoid having their schools labeled as failures, some states, perversely, have actually had to lower their standards.”

Race to the Top

In an effort to address the state of the American education system and increase influence of the states, the Obama administration authorized the Race to the Top Assessment Program under the American Recovery and Reinvestment Act of 2009. Race to the Top is a competitive grants program that “provides funding to consortia of States to develop assessments that are valid, support and inform instruction, provide accurate information about what students know and can do, and measure student achievement against standards designed to ensure that all students gain the knowledge and skills needed to succeed in college and the workplace.” Because the US no longer represents the leading power in education, the President aims to reclaim the title by 2020. In doing so, Race to the Top’s assessments seek to greatly influence the future of education, and the program aims to provide

schools, educators, students, and parents with the information collected in order to improve education in the US to meet President Obama’s goal for 2020. Like NCLB, Race to the Top is a voluntary program for states to participate in, and the majority of states entered the competition for the same reason as NCLB—states in dismal economic situations have been left with no other options. States may be eligible for up to $700 million, or as low as $20 million, in award money from the program. However, states may have to pay much more to conform to the standards placed upon states to meet the requirements. Critiques and politicians have spoken out against the President’s education program due to the belief that it, like NCLB, relies too heavily on narrow testing techniques and imposes too much federal bureaucracy control over school standards and education funding for each state. Texas, praised for its emphasis on ensuring that children are prepared for college and careers, was one of the states that chose not to participate in Race to the Top. Governor Rick Perry spoke in opposition of the idea of states surrendering their power to the federal government in exchange for short-term, immediate funding. In his address, he stated that the state of Texas would be “irresponsible to place [its] children’s future in the hands of unelected bureaucrats and special interest groups thousands of miles away in Washington, virtually eliminating parents’

20 Ibid.
23 Ibid.
participation in their children’s education.”24 States such as Texas have succeeded in forming their own unique education policies tailored to the specific population of students without the overbearing control of the federal government’s perception of the needs for all children. Texas’ “Early College High Schools,” a result of the Texas High School Project, “have achieved dramatic results by blending high school and college-level works into a single academic program.”25 While earning high school diploma requirements, students additionally gain college credit needed for an associate’s or baccalaureate degree.26 The students, many who came from backgrounds where the aspiration of a college degree seemed impossible, “gain access to the college experience [and] also begin believing that a postsecondary degree is a reality within their grasp.”27 The Texas model of education has also gained attention from other states seeking to implement a similar program.28 Each population of children is unique due to the surroundings they were raised in, so increasing and encouraging local innovation of education standards would greatly benefit the generations of students to come.

**Local Control**

Local school districts should have the power to set goals for their own schools, for they have the most knowledge of and

24 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
interaction with the population of the specific area. In states as large as California, with 6,217,002 enrolled students and about 268,495 full-time teachers in 9,895 public schools, managed by 1,050 school districts, the federal and state government cannot possibly know the solution for students in a particular district.\textsuperscript{29} The large federal control of education under NCLB greatly undermines the influence of state and especially local governments. Although states can technically opt out of the law altogether, the current economic climate leaves states with no other choice but to participate in order to gain education funding from the government.

If given greater power in outlining programs, school districts could seek grants directly from the federal government rather than through the state, to prevent the state from taking a cut of the funds before they reach local school districts. When states outline their own plan that they feel would conform to the desires of the federal government, the specific needs of children in each diverse and unique district are overlooked. Bringing education to the district level would call for more focused, targeted funding aimed to improve specific failing aspects of a school to ensure that funds are being used in the most efficient manner. While NCLB’s and Race to the Top’s goals for improving accountability are steps in the right direction, efforts must strive to cater closer to the school district level, so that children are receiving the most personalized education as possible. In large and diverse states like California, the critical needs in each district vary dramatically. NCLB appeals to the masses

with its rhetoric demanding that ‘excellence’ occur by a certain time. Critiques suggest, “Genuine excellence on the part of either teachers or students must be carefully and thoughtfully nurtured. It cannot simply be imposed, mandated, or legislated.” 30 Those with closer contact with the constituents and schools, such as the local school board, should have greater discretion when deciding where to place allocated funds and when outlining the most appropriate and realistic, yet ambitious standards for schools in the district.

**Student Assessment**

One of the largest issues with NCLB’s emphasis on accountability is its approach to student assessment. Adequate Yearly Progress standards place far too much focus on standardized testing techniques rather than additional factors, such as high school graduation rates, college attendance rates, and college graduation rates, which can provide far more accurate conclusions regarding the quality of education students receive in the classroom. Specifically, data regarding graduation rates should additionally display specific rates of racial, ethnic, and gender groups, as well as English as a Second Language students and intellectually disabled students for the purpose of ensuring that children of all backgrounds are able to graduate. Graduation and retention rates have embodied a large indicator for the college-level assessment, and a similar system can be beneficial to assess high school success. When an emphasis on high graduation rates is implemented, schools gain a greater incentive to place a larger focus on ensuring students

In addition, if a student demonstrates signs that he or she may not graduate, the government’s focus on graduation may push schools to provide support to those who are struggling academically. In the current economic climate, it has become more crucial than ever that children not only graduate from high school, but also attend and graduate college. School districts could keep records of student admission, attendance, and graduation from college, which will help schools assess whether or not the education students received at particular schools actually aided in success in higher education. The government should pay closer attention to graduation rates of schools in order to identify the ‘dropout factories’ that are failing students before they even enroll in the school. Surprisingly, it is a small amount of chronically failing schools that are contributing to the nation’s poor graduation rates. Data suggests that “approximately two thousand high schools (about 12 percent of American high schools) produce more than half of the nation’s dropouts. In these ‘dropout factories,’ the number of seniors enrolled is routinely 60 percent or less than the number of freshmen three years earlier. These are the low-performing schools that need to have the largest attention called upon. Because individual schools can have such a dramatic impact on the nation’s educational success as a whole, district-unique programs are necessary in order to ensure than ‘dropout factories’ cease to exist. Combating poor education practices in these failing schools cannot be achieved through federally prescribed standards. Education will

32 Ibid.
improve when the government recognizes the student’s need for a system that gives greater attention to detail regarding programs that will benefit schools in local districts. Standardized testing in order to assess basic skills is necessary; however, the assessment method should be viewed in equality to graduation rates. Because the current system of standardized testing only evaluates a narrow set of reading and math skills, the resulting data that the government has been receiving has failed to properly gauge the academic level of thousands of students across the nation.

The dynamic of standardized testing must be reformed so that it better judges the abilities of students while decreasing the ability and need for teachers to ‘teach to the test.’ Increasing the spectrum of questions asked on the exam would lessen teacher’s capability to only teach the basic application of a problem. For example, if a math question is asked in multiple applications, the test will more efficiently gather information of whether or not the students truly understand the math concept being asked. The more diverse test will force teachers to educate their students about more practical and challenging concepts regarding a specific topic. The goal is to ensure that students are receiving the most enriched education experience as possible.

An unfortunate outcome of the pressures placed on teachers to make certain their students pass the standardized testing exams is the tendency for some teachers to cheat. The most noteworthy cheating scandal took place in Atlanta, Georgia, where teachers confessed to erasing wrong answers to fill in the correct answer, allowing students to look up the correct answers, as well as placing higher-performing students next to struggling students to
encourage cheating. After thorough investigation, it was revealed that about half of Atlanta’s schools allowed cheating, which began at the implementation of NCLB, to continue. The punishment or firing of teachers whose students did not meet standards created a “culture of ‘fear, intimidation, and retaliation,’” which was claimed to be the cause of presumably good teachers resorting to cheating tactics to ensure job security. Education lawmakers hold onto the perception that “poor teaching is the primary cause of unsatisfactory student performance, [so] schools can be best improved by threats and sanctions.” While teachers are pressured by administrators to guarantee that all students pass the standardized tests, students may be moving into the next grade levels not at all prepared for the upcoming learning material. The incentives placed on teachers to promote students to the next grade pass along the child’s unsolved problem areas to the next teacher. A destructive cycle is initiated when teachers begin “watering down the material and passing students” when the child’s academic struggles are not attended to. When issue areas are not promptly discovered, critical measures to improve the education of a student may not happen until it is too late.

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35 Ibid.
36 Ibid.
39 Ibid.
IV. Conclusion

In order for the US to return as the educational super power it once was, the entire mentality of the government regarding education must change. Most of all, the focus of education needs to be brought back to the success of the country’s children. Young students do not have an official voting voice in government, so adults often overlook the essential needs of the changing generations. The positive outlook on teachers must also be brought back to the spotlight rather than making overbearing threats of job loss, pressuring teachers into cheating. Educators need to work in a positive environment where the top priority is to deliver the best quality education rather than simply passing standardized exams. Local control over the education system will bring back the necessary emphasis on personal attention and excellent education.

Despite its many flaws, No Child Left Behind has greatly opened up the discussion of the much needed education reform, and it has placed the spotlight on the nation’s children, who make up the country’s future. In the current economic climate, more people have come to realize the importance of educating the younger generations, and the issue has surprisingly taken greater importance for most of the population over topics such as national security and healthcare. According to a recent Huffington Post article, “a recent poll states that Americans place education ahead of health care costs, the wars in Iraq and Afghanistan, and Medicare and Social Security on the list of issues that Congress should focus on.”

More and more, current policy makers and voters are coming

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to realize the necessity of quality education. From preventing childhood delinquency to ensuring employment opportunities for the next generations, education often serves as the root to a number of issues countries across the globe face on a daily basis. Schools in the United States are failing young students every day, and the country’s fate relies on the success of the youth.
E-Verify and DREAM: Two Distinct Policies and Visions for the Direction of Federal Immigration Reform

Max Lesser

Introduction

The broad consensus in the U.S. is that our immigration system is fundamentally broken. This is opinion on both sides of the political aisle, and is primarily rooted in the fact that—according to the Department of Homeland Security—there are about 10.8 million unauthorized aliens living in the U.S.\textsuperscript{1}, which is roughly 4\% of the population. There is much less unanimity when it comes to deciding precisely where the blame lies for these exceptionally high numbers. Some cite “inadequacies in the legal immigration system”, others, “the failures of immigration control policies and practices”\textsuperscript{2}, as well as a plethora of other reasons. Despite these differences, policymakers are in agreement that the extent of our immigration problems requires bold, sweeping action. It has been twenty years since comprehensive immigration legislation was passed, the last being The Immigration Reform and Control Act in 1986.\textsuperscript{3} This extended absence of any significant federal laws has prompted some states to simply take matters into their own hands. For example, Arizona and Alabama have received considerable publicity for instituting highly controversial immigration laws, which have fed national debate over the discrimination of illegal aliens and the

\textsuperscript{1} Ruth E. Wasem, \textit{Overview of Immigration Issues in the 112\textsuperscript{th} Congress}, Congressional Research Service (2011).
\textsuperscript{2} Wasem, 1.
\textsuperscript{3} Immigration Reform and Control Act, Pub.L. 99-603, 100 Stat. 3359
constitutionality of state actions on immigration policy. Though not the focus of this article, these states’ decision to implement such radical legislation certainly comments on the desperate need for federal immigration reform.

Two legislative proposals for addressing immigration reform have steadily grown in popularity over the past ten years: E-Verify and the DREAM Act. Neither of these proposals provides truly comprehensive immigration reform, but function as important “stepping-stones” towards the two major policy approaches on immigration. These are “legalization” and “departure”, which are almost diametrically opposed in their larger philosophies and proposed reforms. It follows that enacting one of these legislative proposals over the other would establish a distinct direction for immigration reform, and have major implications not only for illegal aliens, but also for our country’s society and economy as a whole. Thus, the purpose of this argument is the analysis of E-Verify and the DREAM Act, and a final determination of which policy and larger approach provides a superior method for addressing illegal immigration in the U.S.

E-Verify—an Internet database run by the federal government that matches an employees I-9 form with data from U.S. records4—is an integral part of a larger “departure” strategy on illegal immigration. Under this approach, emphasis is placed on removing unauthorized populations through increased deportation and “attrition through enforcement.” E-Verify plays an important role in the second component of this approach, which is based around creating an inhospitable environment for illegal immigrants

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in the U.S. through strengthening enforcement of immigration laws, restricting benefits, and increasing the difficulty of illegal aliens finding employment. The end game of this strategy is the departure of the roughly eleven million illegal immigrants in the U.S, who are perceived as threatening our country’s “social order, national security, and economic prosperity”.5

The Development, Relief, and Education for Alien Minors Act (DREAM) is part of an opposing approach towards illegal immigration that reduces the “unauthorized population through the grant of legal [or quasi legal] status to unauthorized aliens.”6 The DREAM Act, which has been introduced in every Congress since the 107th, enables unauthorized students to adjust to Legal Permanent Resident (LPR) status through a series of requirements that focus on educational achievement and/or military service. For example, an alien under the DREAM legislation would have to demonstrate that he or she had been physically present in the U.S. for at least five years, had not reached age sixteen at the time of entry, and had been admitted to an institution of higher learning and gained a high school diploma.7 After these initial steps, unauthorized students would have to complete at least two years in a bachelor’s or higher degree program or serve two years in the uniformed services in order to gain LPR status.8

Broadly defined as “legalization,” the policy approach behind DREAM makes a fundamentally different characterization from

8 Bruno, 16.
“departure;” instead of identifying illegal immigrants as burdensome law-breakers, these persons are considered valuable contributors towards the American economy and society.\(^9\) The fundamental concept in legalization is the idea that illegal aliens should be able to earn legal status through contributions towards our country. This is done through a combination of “work (education or military service), payments of fines and income taxes, and learning English and participating in civic classes.”\(^10\) Proponents of legalization find that taking responsible steps towards integrating illegal aliens into American society provides an increased tax base, improves future educational and economic prospects for these persons, and eliminates the government spending and cruelty associated with deportation and attrition through enforcement.

**E-Verify**

E-Verify started as a way of strengthening the employment verification process, as a part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996\(^11\) (IIRIRA). The pilot program has grown steadily from this point, as there are currently 244,135 employers enrolled in E-Verify.\(^12\) E-Verify is a primarily voluntary program, with exceptions including government contracts and employers that have repeatedly broken U.S. legal hiring laws. The program operates by “employers participating in E-Verify being required to submit information from the I-9 form about the new hires (name, date of birth, Social Security number,

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\(^9\) Bruno, 13.


\(^12\) Andorra Bruno, *Electronic Employment Eligibility Verification*, 1.
immigration/citizenship status) via the Internet for confirmation”. The employer’s submitted information is matched with the Social Security Administration’s Numerical Identification File (Numident), and if the information matches up the employer is notified that that the employee’s work authorization is verified. If it does not match, however, the employer is notified that the employee has received a United States Citizenship and Immigration Services (USCIS) tentative non-confirmation finding (TNC). This then results in the case either being referred to the SSA or the USCIS if the employee chooses to contest the finding, or the system issuing a final non-confirmation if he or she does not. E-Verify receives significant federal funding, and its proponents believe it provides an efficient system for ensuring that America’s workforce is composed strictly of legal citizens. There have been a number of bills introduced in Congress that would institute E-Verify as mandatory system nationwide for all American employers. For example, The Legal Workforce Act is a bill currently pending in the 112th Congress that would implement this sweeping reform.

There are some major problems with instituting a government database for the processing of every application for employment in the U.S. A study by Westat and Temple University’s Institute for Survey Research evaluated whether E-Verify actually meets its policy goals and reduces unauthorized employment, and the results were very mixed. Although the study found that most people who received final non-confirmations were indeed ineligible

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13 Bruno, 2.
14 Bruno, 3.
15 Andorra Bruno, Electronic Employment Eligibility Verification, 3.
16 Bruno, 4.
17 Bruno, 7.
to work, it also showed that E-Verify has major issues with detecting document and identity fraud. In fact, “almost half of the unauthorized aliens checked through the system were erroneously determined to have work authorization.” The reason for this egregious inefficiency is that employees present counterfeit documents, fraudulently obtained “valid” documents, and engage in identity fraud (in which they present valid documents issued to other individuals), all of which E-Verify has major trouble in detecting. In fact, the study goes on to argue that aliens “increasingly obtaining counterfeit, borrowed, or stolen documents” in order to dupe the system could indirectly produce a dangerous illicit trade in social security numbers and identification documents.

Another major problem with E-Verify is the fact that there are “discrepancies in approximately 17.8 million (4.1 percent) of the 435 million Numident records,” which could result in significant incorrect feedback when submitted through E-Verify. In addition, one of USCIS’s own studies showed that, “E-Verify’s issuing of a TNC is erroneous 18 percent of the time,” which means legitimate job-applicants are initially rejected by the system almost one sixth of the time. These gaping holes in the government’s databases and E-Verify’s questionable ability to detect fraud should be major concerns for any lawmaker seriously considering E-Verify on a nationwide scale.

18 Bruno, 7.
19 Bruno, 7.
21 Bruno, 8.
22 Bruno, 12.
Businesses and employers have some of the most profound concerns about the mandated use of E-Verify. Their objections towards the system often stems from the basic idea that it should be the government that bears the burden of immigration enforcement, and not American businesses. This opinion was articulated by policy expert Michael Wildes: “It is unfair to force employers to bear the cost of protection by creating laws that handcuff cash-strapped businesses behind bureaucratic red tape.”

Opponents in the business community claim that the hiring delays, paper-work, and overall time commitment required by E-Verify would be a significant burden, especially given the weakened state of our economy. This is supported by a 2009 Westat evaluation, which found that 24% of employers enrolled in E-Verify had stopped using it because it was “too burdensome to use.” These issues of the E-Verify’s feasibility also present a compelling problem, which is that “businesses would seek to circumvent the laws and insulate themselves against its externalities by discriminating against Hispanics at the interview, or protecting themselves by preemptively firing or cutting the wages of one who receives a tentative non-confirmation from the system.” In this way, E-Verify could inadvertently increase job discrimination, or contribute towards employers ignoring its regulations and hiring workers “under the table.” These factors combined increase the risk of

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24 Bruno, 13.
worker exploitation and decreases tax revenues for our government.\textsuperscript{28}

**The DREAM Act**

The DREAM Act was first introduced in Congress in 2001,\textsuperscript{29} and on a premise that has become increasingly popular in the past decade. It is based on the idea that the children of illegal aliens are here through no fault of their own, and therefore those showing exemplary ability in their academics should be able eligible for federal aid for college and be able to “earn” their citizenship through two years in an education of higher institution or military service. Yet these students face a predicament. In the American education system, “unauthorized aliens in the U.S. are able to receive free public education through high school, but may experience significant difficulty in obtaining higher education.”\textsuperscript{30} A major part of the challenge for such individuals successfully gaining college admission is a 1996 provision that prohibits states from granting, “unauthorized aliens certain post-secondary educational benefits on the basis of state residency,”\textsuperscript{31} which means they cannot qualify for in-state tuition. This fact, coupled with such students not qualifying for any federal student financial aid and the extremely high price of a college education, make higher education nearly impossible for the children of illegal aliens. This scenario severely restricts the future educational and professional opportunities for these children.

\textsuperscript{28} Bruno, 8.
\textsuperscript{29} Student Adjustment Act of 2001, H.R. 1918, 107\textsuperscript{th} Cong. (2001).
\textsuperscript{31} Bruno, 1.
The DREAM Act is a two-stage program that provides a rigorous set of standards for qualifying students, who are able to achieve legal permanent residence status if they complete the program. As mentioned earlier, the requirements for the first stage are residence of at least five years in the U.S, a high school diploma or admission to an institution of higher learning in the U.S. The completion of the second stage requires the acquisition of a degree, completion of at least two years in a bachelor's or higher degree program, or a minimum of two years in the armed services. The Center for Immigration Studies (CIS) estimates that there are roughly 2.1 million potential beneficiaries for the DREAM Act. When considering the stringency of the legislation, however, the CIS estimates that only around 825,000 would achieve legal permanent residence status through the process of “cancellation of removal” in the U.S.

During the first six years of their enrollment students would be granted “conditional” status and would be able to apply for federal student loans and work-study programs, which would help them pay for their education. Some states have passed their own measures to make these students eligible for in-state tuition as well, a component of earlier versions of the DREAM Act which has since been dropped. Experts have posited that the DREAM Act could have a significant effect on drop-out rates for illegal aliens by providing incentives for sustained education. Furthermore, studies have shown that persons attaining a college degree through the DREAM Act would end up paying roughly “$5,300 more in taxes and cost $3,900 less in criminal justice and welfare expenses each year than

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32 Bruno, 2.
33 Bruno, 1.
if they had dropped out of high school."\textsuperscript{34} The essential rationale behind the DREAM Act is that it is “both fair and in the national interest to enable unauthorized alien students who graduate from high school to continue their education.”\textsuperscript{35}

Analyzing the problems with implementing the DREAM Act is more difficult than doing so for E-Verify because the legislation has never been passed into law or enforced by the federal government. Although some states have passed legislation similar to the DREAM Act by offering in-state tuition and other benefits, these states obviously lack any legalization abilities. In turn, most arguments against the DREAM act are more conceptual than factual. For example, many legislators and voters feel granting in-state tuition to illegal aliens is unfair towards legal American citizens from other states, and are opposed to the more general idea of subsidizing the education of people who are here illegally through taxpayer money.\textsuperscript{36} In addition, there is a feeling that granting these “law-breakers” any kinds of federal benefits undermines the U.S. immigration system, and can work as “magnet” that encourages additional illegal immigration.\textsuperscript{37} All of these positions stem from the core conceptual precept of the “departure approach,” which holds illegal aliens simply have no right to be here, and that the only policy that should be entertained is their immediate removal.\textsuperscript{38} Any legislation that works towards legalizing illegal aliens, even those

\textsuperscript{34} The Economic Benefits of the DREAM Act and the Student Adjustment Act, The National Immigration Law Center, 2005.

\textsuperscript{35} Andorra Bruno, Unauthorized Alien Students: Issues and “DREAM Act Legislation, 7.

\textsuperscript{36} Bruno, 8.


\textsuperscript{38} Bruno, 8.
who have achieved academic success or served in the military, is perceived as violating this fundamental principle, and is—thus—inadmissible.

**Determination of the Superior Policy Option**

E-Verify’s logistical problems, enormous expansion of federal authority, and negative effects on American businesses make it a deeply flawed piece of legislation for addressing immigration reform. As described earlier, a number of studies have shown that E-Verify has major issues with detecting identity and document fraud. This is most disturbingly evidenced by the fact that almost half of the illegal aliens checked through the system were wrongly given work authorization,\(^{39}\) which brings into question the program’s basic utility. Moreover, the effect of the discrepancies in E-Verify’s Social Security Administration databases would be amplified exponentially if applied to the nation as a whole, which would have a negative effect on our economic recovery. This is also supported by the fact that there are widespread complaints from the business community that mandatory use of E-Verify would be a significant burden for them. The program’s possible role in pushing more employees to “work under the table” and producing job discrimination should also be seriously considered.

The E-Verify system is appropriate in its current usage for government contracts and as a voluntary program, but adopting E-Verify as a national policy would have severe consequences, and place an undue burden on American businesses in the enforcement of our immigration laws. Furthermore, instead of focusing Immigration and Customs Enforcement’s resources on more

dangerous illegal immigrants (such as drug smugglers, criminals, and terrorists), E-Verify and other attrition through enforcement measures target the entire illegal immigrant population. A full-on implementation of the mass deportation and attrition through enforcement of this “departure” strategy would require a huge expansion of federal authority and massive increase in government spending. In fact, experts have estimated that deportation costs roughly $12,500 dollars per illegal immigrant, and the “total costs of mass deportation and continuing border interdiction and interior enforcement efforts would be $285 billion dollars over five years.”

The fact that “seventy-three percent of the children of undocumented immigrant parents are U.S. citizens by birth” also presents the disturbing reality that mass deportation would take away the parents of these nearly 4 million citizen children—an action certain to produce “unacceptable and incalculable social consequences.” These statistics illustrate the terrible financial and human costs of implementing the “departure” strategy behind the E-Verify program, which is the direction this “stepping stone” policy would provide.

In many ways, the philosophy of “departure” is even more troubling than the distinguishable effects E-Verify could have on a national scale. The belief behind this approach is that the solution to all immigration problems is as simple as “getting rid” of illegal aliens. In this view, unauthorized workers are law-breakers dragging down the U.S. economy, and the only just course of action

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43 Fitz & Martinez, 19.
is a combination of mass deportation and laws that make the U.S. an extremely inhospitable environment for immigrants. As described earlier, this is not only an incredibly impractical approach, but also one with strong undertones of nativism and racial prejudice. It entirely ignores that the majority of illegal immigrants has lived in our country for a long time, and are intimately integrated in their local communities.\textsuperscript{44} It disregards people who work exceptionally hard in many of our country’s most unpleasant and difficult jobs, and often for exceedingly long hours and the very lowest of wages. It overlooks how these men and women are willing to risk life and limb just to enter this country, all so they can tap into our superior resources, opportunities, and way of life. And \textit{most} of all, this strategy fails to recognize the unequivocally important role of immigration in our country’s history.

Immigration has been the backbone of America’s sustained development and powerful role on the world stage, and—with the exception of Native Americans—all American citizens are descended from immigrants. The fact is that the vast majority of today’s illegal aliens are not so different from previous generations of immigrants; they are in the same essential pursuit of the “American Dream.” These are people that simply want to provide themselves and their children with a better life, and they see the U.S.A. as the best place for achieving this goal. That we would not want to tap into such a distinctly “American” ambition and work ethic, but also forcibly drive these people out through costly strategies of legal persecution and discrimination reminiscent of Jim Crow is ludicrous.

The DREAM Act’s rigorous path towards citizenship for exemplary students and soldiers—on the other hand—makes it an

\textsuperscript{44} Fitz & Martinez, \textit{The Costs of Mass Deportation}, 19.
excellent piece of legislation for initiating immigration reform in the U.S. The two-step process the DREAM Act provides for potential beneficiaries is a strong set of guidelines that ensures only the most committed individuals receives citizenship. This is exemplified by the fact that most estimates have only 33% of the nearly 2.1 million eligible beneficiaries actually completing the entire program. The DREAM Act also successfully addresses one of the fundamental quagmires facing unauthorized alien students, which is their ineligibility for federal loans and in-state tuition—both of which are critical for them having a realistic chance of attaining a college education. In addition, DREAM has the potential to be a huge source of savings in the long run, as beneficiaries who have completed the program have higher taxable incomes and far lower costs from the welfare and justice systems. The DREAM Act gives the children of illegal aliens a fighting chance for educational success and financial stability, and the potential benefits of this program vastly outweigh the vague, conceptual issues with its implementation. And compared with the inefficiency and questionable end-goals of E-Verify, DREAM is an immensely superior policy option. By reflecting our country’s historical role as a place of hope and opportunity for immigrants, the DREAM Act would provide the best direction for future immigration legislation.

We simply cannot afford to postpone immigration reform any longer. In the words of Michael Wildes, immigration attorney and noted policy expert: “Our current system of immigration is not only outdated and inadequate, it perpetuates the cycle of illegal immigration through its rigid and arbitrary rules. The system makes

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it impossible for hard working, taxpaying immigrants to achieve legal status, even though they may have a strong desire to do so.”

The government’s lack of action has also contributed towards states implementing drastic legislation, which often creates a social order reminiscent of Jim Crow. In Alabama, for instance, laws have criminalized “working and renting a home, nullified any contracts where one party is an undocumented immigrant, and required the police to check the papers of people they suspect to be here illegally.”

The politicians of states such as Alabama often justify their extreme measures by citing the “fact” that illegal immigrants are dragging down the local economy by holding jobs sorely needed by unemployed Americans. The effects of these laws prove, however, that this legislation has only exacerbated the problems of a state with an already struggling economy. For example, farmers and poultry plant operators in Alabama have “complained of severe labor shortages” since the implementation of this legislation, and there is “no evidence that Alabamians in any significant number are rushing to fill the gap left by missing farm laborers and other low-wage immigrant workers.” Facts such as these have policy-makers such as Slade Blackwell, a Republican state senator in Alabama, admitting, “The longer the bill has been out, the more unintended

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49 Campbell Robertson, In Alabama, Calls for Revamping Immigration Law, 1.
consequences we have found."\textsuperscript{50} Members of Congress proposing similarly discriminatory and extreme legislation at the federal level should heed this admission.

Instead of relying on policies based in attrition through enforcement, racial-profiling and discrimination, our country needs a way to “integrate the many undocumented immigrants to allow them to be productive citizens, thus benefiting the U.S. as a whole.”\textsuperscript{51} We are a nation founded and built by immigrants, and adopting intelligent, progressive reforms such the DREAM Act will allow our country to harness the energy and capabilities of undocumented workers rather than oppress them.

\textsuperscript{50} Campbell Robertson, \textit{In Alabama, Calls for Revamping Immigration Law}, 1.
\textsuperscript{51} Michael Wildes, \textit{Alabama’s History With Jim Crow Revisited}, 2.
Introduction

There are few Americans who would argue that public education in their country is perfect. The nation’s citizens routinely rank education as one of their highest priorities for the government to address\(^1\) – and there is valid reason for the concern. Non-partisan reports from non-governmental organizations such as Educational Testing Service (ETS), the non-profit organization that develops and administers standardized tests such as the SAT, GRE, and AP examinations, reveal that nationwide high school completion rates are falling. ETS released a report in 2005 that showed that high school completion rates peaked at 77.1 percent in 1969 and have fallen to 69.9 percent in 2000.\(^2\) Even the government’s own numbers, as reported by the National Center for Education Statistics, exhibit a dismal statistic: one in four public school students did not graduate high school in 2008.\(^3\) The Center for Education Policy also released a report demonstrating that the number of schools that failed to meet the standards set in the No Child Left Behind Act of

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2001 has been increasing steadily in the past decade. These reports indicate an evident problem with public education. And, Pennsylvania, along with many other states, is trying new measures to find the solution.

**Background**

School reform has been constantly revisited throughout the past couple decades and has been the platform of more than a few politicians. One of the more influential movements is the push for school voucher systems. A school voucher is a monetary scholarship granted by the state to low-income families with children living within the attendance boundaries of a poorly performing public school. The state determines school performance by judging student achievement in tested subjects and growth of student achievement over time, among other measures. The parents who receive vouchers may then spend the scholarship money on tuition at any private or parochial school, or they have the option of sending both their student and the money to another, better-performing public school in the area.

It is important to note that the money for the vouchers is subtracted from the funding of the public schools the students would have otherwise attended. Proponents argue that vouchers are the answer to failing public education, yet the voucher concept is fundamentally flawed. By the very nature of a voucher program, not every student can be helped. Due to capacity restrictions, only a select number of students can receive a voucher. Thus, a voucher system deserts the many students who must remain in failing

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schools that are then forced to operate with reduced funding. School voucher systems do not truly address the issue of education reform, as these systems only benefit those who receive a voucher. While vouchers may serve as short-term, temporary solutions for some students, they do so at the expense of every other student who is left in the public school system, as a result of funding cuts. True school reform prioritizes the strengthening of public schools, not the transferring of state funds to private schools.

**Flaws with Pennsylvania’s Bill**

Pennsylvania’s new governor, Tom Corbett, elected into office in 2010 on the school choice platform, has been a driving force behind the state’s school voucher legislation. The first item introduced in the state senate was a voucher bill: the Opportunity Scholarship Act.\(^5\) This exceptionally flawed bill lacks any measures that would hold the private schools either fiscally or academically accountable. Public schools are required to make their budgets public, while private schools may keep those records confidential. All public education spending information is readily accessible to anyone. Private schools, on the other hand, have complete discretion with regard to spending and are not required to disclose their budgets to the public, even after accepting taxpayer-funded vouchers. Also, local school boards govern public schools. If the community takes issue with a school in its district, parents have the opportunity to voice their opinion directly to the democratically elected school board. Those who manage voucher-funded private

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\(^5\) P.A. Senate. Session of 2011. "S.B. 1, Opportunity Scholarship and Educational Improvement Tax Credit Act".
schools would not be held to any comparable standards of accountability to the taxpayers funding the vouchers. While public schools are required to adhere to state standardized tests, private schools are exempt. Private schools are not measured by the same standards that are used to measure public schools, which means that a private school might provide an inferior education yet still receive the public school's funds.

Although many of the voucher-ready private schools are religiously affiliated, Pennsylvania’s voucher bill excludes any measures that protect the separation of church and state. The Pennsylvania Constitution states, “No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.” Such clear wording makes evident the unconstitutionality of vouchers for religiously affiliated schools. The Pennsylvania Supreme Court has been rigid in upholding the wall between church and state, outlawing state payments to religiously affiliated hospitals. With such inflexibility on the issue, the state Supreme Court would undoubtedly uphold its precedent on the separation of church and state and also outlaw state payments to religiously affiliated schools.

The bill also offers vouchers to students who are already meeting academic standards, as opposed to giving vouchers only to failing students who are at risk. Even in struggling schools, many students excel academically, so the state does not need to focus its limited resources on these students. Pennsylvania’s bill does not focus on granting aid to those who are truly in need.

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6 P.A. Const. art. III, § 1.
7 Collins v. Martin, 139 A. 122 (Pa. 1927)
8 Collins v. Kephart, 117 A. 440 (Pa. 1921)
Private schools cannot accept every student who is voucher-eligible. Most voucher programs include a lottery-style admissions process, in order to determine which students are chosen to receive the limited number of tuition scholarships. Pennsylvania’s bill, however, does not use any such lottery system, which eliminates the guarantee for fairness in admissions. Private schools are able to “cherry pick” which students they accept, picking and choosing only the best and brightest, leaving the students who perform at the lowest academic levels and require the most need to the schools with reduced funds.

In addition to violating Pennsylvania’s constitution, the bill would violate a number of federal anti-discrimination laws. Given the admissions policies outlined by the bill, private schools would not be required to admit or accommodate students with special needs, such as students with disabilities or English-learning students. The Equal Education Opportunities Act of 1974 prohibits states from denying equal educational opportunity by “the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” The Americans with Disabilities Act of 1990 states that no individual by reason of a disability may be denied the benefits, programs, or activities of a public entity. In addition, the Rehabilitation Act of 1973 reads, “A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, 

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9 Equal Education Opportunities Act, 20 U.S.C. § 1701
regardless of the nature or severity of the person’s handicap.”11
These federal anti-discrimination laws outlaw the very system that Pennsylvania’s voucher bill has designed. Schools receiving voucher funds would not be required to provide equal access and benefits to accommodate the needs of disabled students and English language learners. Even worse, the schools are able to refuse admission to these students on the basis of their disability or language skills.

After the third year of the bill’s passing, the scope of schools targeted by the voucher program would expand from only struggling schools to any public school in the state. Any low-income student living in Pennsylvania would be eligible for a voucher, regardless of his or her school’s performance status. A student could be attending the highest performing public school in the state and still be able to take the voucher (if he wanted the prestige of a private school), thus cutting a high-performing school’s funding. In addition, low-income students who are already attending private schools would also be eligible for a voucher. In fact, after evaluating the bill’s expected impact, the Pennsylvania Senate Appropriations Committee estimated that only 9% of eligible low-income students attending failing public schools would receive a voucher and move on to private schools. However, 100% of eligible low-income students who are already enrolled in private and parochial schools would receive voucher funding. Under the bill, in the 2013-14 school year a total of $50 million of taxpayer money is planned to fund tuition for students already enrolled in private and parochial schools, compared with just $25 million assigned for the students currently enrolled in public schools who would move on to private schools.

schools. The students currently enrolled in the private schools do not embody those whom voucher proponents desire to assist, and yet they encompass the students who would receive the most aid.

Legal History of Vouchers

A voucher program has already been challenged in the Supreme Court. In *Zelman v. Simmons-Harris* (2002), the Court upheld an Ohio voucher plan by a 5-4 vote. The Pilot Project Scholarship Program in the Cleveland City School District granted tuition aid, in the form of vouchers, to students to attend participating public or private schools of the parents’ choosing. A vast majority of the private schools had religious affiliations. The question presented to the Court was whether Ohio’s school voucher program violated the Establishment Clause of the First Amendment. The Court reasoned that there was no violation of the First Amendment because the taxpayer dollars did not go directly to religious schools, but instead went to the parents of voucher students, who then chose to spend the tuition money on a religiously affiliated school, despite the presence of non-religious options.

In *Zelman*, the Court developed a test, known as the Private Choice Test, that all future voucher programs must pass in order to be declared constitutional. One of the requirements of the test is that a “broad class of beneficiaries must be covered.”

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14 *Id.*

15 *Id.*

16 *Id.*
Pennsylvania’s bill does not pass this part of the test: by an overwhelming majority, the students who would receive voucher aid are already enrolled in private, voucher-ready schools. Therefore, the class of beneficiaries is shockingly narrow.

**Vouchers and School Reform Efficacy**

Voucher proponents make the assumption that a private school education is always superior to a public school education. A study by the National Bureau of Economic Research (NBER) evaluated the effectiveness of one of the most extensive school choice programs in the country: Chicago Public Schools’ tuition voucher system. The voucher program made use of randomized lotteries, which created a natural experiment, allowing the authors of the study to compare the results of students who went on to private schools against the results of students who stayed in the public education system. The NBER discovered no observable difference in terms of test scores or school attendance between lottery winners who went on to private schools and those who remained who stayed in their public schools.¹⁷ The pro-voucher argument hinges on the notion that private schools are more effective than public schools, and once that belief is disproven, the basis for the argument evaporates.

The voucher system fails to provide long-term solutions to fundamental issues that negatively affect a child’s education, such as instability in the home. Over decades, research has proven time and again that parental involvement is extremely important in

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education. School reform endeavors are blind to issues that take place outside school walls, so politicians endorse ill-conceived new movements every few years. Those who engineer voucher plans base their reforms on principles drawn from the corporate sector, without consideration for whether the same rules apply when it comes to education; so although it may be sound economics, rewarding high-achieving schools with more funding while cutting the funding to low-performing schools does an injustice to the students. Competition may breed innovation, but with competition there are winners and losers, and when there are losers in education, the students suffer.

Solutions

There is, however, hope for the seemingly dismal state of public education. The government needs to invest in innovation. The research on the effectiveness of school choice is mixed at best. Instead of gambling on vouchers, the state needs to focus on what has been proven to work. Programs such as Teach for America must be expanded in order to provide enthusiastic young teachers who can inspire students that veteran teachers and public education have failed. Various independent studies show that Teach for America teachers often have a greater impact on achievement than conventional teachers do. While the NBER found there to be

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little achievement growth in private schools, it found enormous success in vocational-technical programs.\textsuperscript{21} Vocational programs train students in career-related fields, such as medical billing, car maintenance, paralegal studies, and many more. Given the high levels of success found at these schools, it seems only logical for the state to expand such programs.\textsuperscript{22} Also, while standardized testing is important for measuring progress, when a poorly performing school’s funding is cut based on the results of the test, the students suffer as well, continuing the cycle of low-achievement. The state has many options available to improve public education, but it must first abandon its misguided reform attempts.

**Conclusion**

Voucher programs, such as Pennsylvania’s Opportunity Scholarship Act, do not have a history of excellent success, and the bill contains measures that would completely undermine public education in the state. The desire for sweeping school reform is necessary, and graduation rates and test scores prove the need for a change in the policies of the American public school system. The lack of accountability for private schools, the absence of accommodations for students with disabilities or who are English language learners, and no safeguards for the separation of church combine to create a bill that is ineffective, unconstitutional and impassable. The state needs to refocus its efforts on drafting and passing education reforms that can actually benefit the students.


This bill may be well intentioned, but ultimately, it is the job of the state to provide a quality education for all students, and the Opportunity Scholarship Act fails to do just that.
In the Wake of *Concepcion* and *Dukes*, Consumer Class Action Lawyers Must Soldier Forward By Leveraging Their Rich History and Taking Some Clues from the Whistleblower Bar

*Steven N. Berk*

**Introduction**

As an attorney who has specialized over the last several years in prosecuting nationwide consumer class action cases, I, like many of my colleagues, fear the Supreme Court’s recent decisions in *AT&T vs. Concepcion* and *Dukes v. Walmart* represent a tipping point that will fundamentally limit and perhaps ultimately eliminate the viability of the consumer class action practice. If that occurs (still in doubt at this writing) what alternatives are available to me (and my colleagues)? Being a former federal prosecutor and having worked on both sides of whistleblower cases over the years, the Qui Tam bar seemed a viable alternative. To study that option in more depth, I attended the 11th Annual Conference of Taxpayers Against Fraud, a prominent stop for lawyers specializing in prosecuting claims on behalf of a growing number of different kinds of whistleblowers.

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Starting with the False Claims Act (the great granddaddy of them all) and more recently followed by a panoply of statutes containing some whistleblower provisions, the bar representing whistleblowers is dynamic and robust.

The Conference was timely and substantively rich. However, at times my mind wandered toward the bigger picture, or so I rationalized. I couldn't get the strong parallels between the two practices—Qui Tam and class action—out of my head. Although many of my colleagues in the class action bar are in a deep malaise that has engulfed the practice since Concepcion and Dukes, looking to how and why the parallel Qui Tam bar has flourished may allow us to successfully navigate a legal landscape driven by a powerful political agenda that, simply put, is dead set on destroying the class action mechanism despite its 700-year-old history in both British and American jurisprudence.

Although important distinctions exist, there seem to be three core concepts that help illustrate the parallel nature of these two practices. First, both are deeply embedded into American jurisprudence. The whistleblower's important role dates back to at least the Civil War, when Congress enacted legislation to punish fraud on the Federal Government. In those days, fraud mainly consisted of selling defective munitions and sick mules or horses to the Union Army. Class actions or actions on behalf of non-present members are part of the first codification of the Federal Rules of Civil Procedure (1928); the general concept of mass actions and suits on behalf of non-present class members dates back to British

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Common Law and at least the fourteenth century. Second, both practices work in conjunction with, or on a parallel track with, state and federal prosecutors. In the case of a Qui Tam action, private members of the bar initiate the proceeding, but by its decision to intervene or decline, the government plays a pivotal role in the direction and outcome of the case. On the class action side, many cases (securities and antitrust in particular) are generated from an ongoing or completed government investigation and prosecution. Third, both practices share the moniker of being “a protector of the individual” against overreaching by corporate interests. In today’s vernacular, they are in the same “space.” Despite this, Qui Tam lawyers, with their ability to direct billions back to government, enjoy a relatively high place in the public’s perception while class action lawyers are dismissed with the back of the hand and the stereotype that they take all the money and leave class members with pennies.

**Qui Tam Lawyers Have Statutory Authority**

Beginning with the Federal False Claims Act\(^3\) and now spanning a range of statutes, the whistleblower and his attorney have codified an important and, under some statutes, necessary

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\(^3\) The False Claims Act, 31 U.S.C. §§ 3729-3722
role. They are part of the process. They are engrained in the fabric of the statutory scheme. From that comes much of the legitimacy enjoyed by the Qui Tam bar. It could be said that the whistleblower’s statutory rights and protections are akin to a consumer class action attorney being able to plead a private right of action on behalf of a class. But in many ways, the Qui Tam lawyer has more than just a private right of action. They not only generate the case by filing under seal, they then enjoy various rights to participate in the litigation even when the government decides to intervene.

Additionally, the Qui Tam lawyers have largely avoided nationwide efforts at tort reform and a growing resentment of “trial attorneys.” They are not seen as part of the problem. To the contrary, they continue to expand their portfolio by successfully lobbying for the inclusion of whistleblower protections in a range of legislative schemes. Notably, a new whistleblower provision in the controversial Dodd-Frank legislation has survived despite a strong, well-funded opposition led by corporate interests and spearheaded by the U.S. Chamber of Commerce. While the provision is not all that was hoped for, it does provide a mechanism for whistleblowers to participate and receive monetary awards in cases selected and prosecuted by the Securities and Exchange Commission.

In comparison, the efforts of the class action bar have had less impressive results. Not only do critical pieces of federal legislation, such as the Federal Trade Commission Act, lack a private right of action; state consumer protection statutes—the bulwark of a consumer class action attorney’s authority—are being narrowed by judicial interpretations disallowing class treatment in favor of only individual cases.5 Similarly, reliance requirements are being read into other statutes, making class treatment a virtual impossibility.6

Simply put, class action attorneys are not—like their brethren in the Qui Tam bar—returning billions of dollars to the U.S. Treasury. But efforts to carve out footholds wherever possible must be pursued with intelligence and vigor. Is it likely that Congress will

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5 See, e.g., T. C. A. § 47-18-109; Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301 (Tenn. 2008) (barring class actions for consumer protection claims in Tennessee);
pass a private right of action for Section 5 of the Federal Trade
Commission Act? No, but legislative efforts should be redoubled on
both state and federal levels to advocate for a private right of action
and statutory protections for class actions on every piece of
consumer protection and regulatory statute.

Ironically, now is an excellent time to redouble efforts and
seek statutory legitimacy. Both federal and state prosecutors are
strapped for resources and in many places face government freezes
and cutbacks. The private bar has sufficient capacity. It can be an
efficient, competent and fully motivated flexible enforcement
division that can be deployed to enforce the legislative intent of a
host of regulatory imperatives.

Lawyers Representing Whistleblowers Have Powerful Friends

With statutory authority comes powerful friends. As a
lawyer who has attended a few consumer class action seminars over
the past several years, I was struck by the strong presence of
government attorneys at the TAF conference in comparison to
similar conferences in other fields of law. Several state and federal
prosecutors made presentations. They not only told a few war
stories; they cajoled, preened and otherwise tried to impress the
group. They were hunting for cases.

“File your case in Nashville, we have great food, music and we will
vigorously consider your claims.” “No you must come to DC.” “No,
New York, we have this innovative ‘public-private partnership’ where
everyone benefits.” “Forget those places; Baton Rouge is the place you
want to be. We have better food and great football.”
What a refreshing change of pace for a maligned consumer class action lawyer who often felt I needed to apologize for what I did for a living. Here was the mighty federal government and the New York Attorney General’s office asking to play.

The government lawyers were not lower level line prosecutors who drew the short straw and were forced by some midlevel manager to make a token appearance. Nope, the speakers at the TAF conference were the bosses. The crowd included U.S. Attorneys from at least three jurisdictions and senior government attorneys from civil fraud and other areas of the Department of Justice. Their presence alone was telling. But they were also articulate, sincere and straightforward about the need to work together to forge private-public partnerships to fight for taxpayers and against government waste and abuse. The issue is limited resources. The Department of Justice, through the various U.S. Attorneys Offices, simply does not have enough resources to go it alone. There seems to be genuine mutual respect and fellowship as one panel after another included a government lawyer (sometimes two) teaming up with a private attorney to present a topic or lead a discussion.

They had a common goal: Fighting fraud and maximizing the dollars returned to the government. Surely issues may exist beneath the surface, and it may not be all smiles, but the incentives of both the government and private bar were in sync. Not a bad place to start. Topping it off was a keynote lunch speech by no less than Royce Lamberth, the Chief Judge of the United States District Court for the District of Columbia. He emphasized the importance of the false claim cases, the importance of working together and finally some level of frustration with the failure of the government to move
cases fast enough. Yes, the government, not the private bar, was to blame.

Class action attorneys need to work more closely with state and federal prosecutors and program administrators. As just one example, class action attorneys should push to attend the National Association of States Attorneys General National Conference. Their value proposition to these often beleaguered, overcommitted state prosecutors is, “We have the resources, know-how and willingness to pursue cases that can make you look good. Tell us your priorities and we will deliver.” Similarly, the same effort at outreach should include federal officials. And not just at the Department of Justice, but also directly at the operation level (FTC, SEC, Treasury Department). Consumer attorneys should take every opportunity to work with federal officials. Fostering a collaborative environment is a necessary first step toward building the type of trust that comes with joint prosecutions in accordance with a statutory grant similar to the False Claims Act.

Whistleblowers and Their Attorneys Have More Support Among the Public and Private Officials

We’ve heard it time and again, class action lawyers take millions, while their clients receive pennies. It has become a label
we can't shed.\textsuperscript{7} Class action lawyers are no longer thought to protect individuals from the big bad corporations, as seen in the movie \textit{Erin Brockovich}, but have now acquired a reputation to pursue frivolous claims that benefit the representation more than the class members. Class action lawsuits with low settlements are known as “coupon settlements” because at times they take the form of “coupons” that can be redeemed for future purchases with the defendant company. This type of settlement now dominates perceptions of the class action lawsuit. You don’t hear that about whistleblowers. Yes, there is shock at huge awards, like the $96 million that Cheryl Eckard earned blowing the whistle on Glaxo-SmithKline’s improper drug manufacturing, processing, and labeling practices. But still, whistleblowers are the stuff of Hollywood movies. (Think Russell Crowe as the jittery, risk-it-all whistleblower, alone and gambling with his life to take on the tobacco industry in \textit{The Insider}.) In comparison, the class representative willing to stand up to an exorbitant early termination fee by a telecom company hardly generates the same level of support.

This public approval (or at worst, indifferent acceptance) of the function of the whistleblower translates to a favorable

\textsuperscript{7} See, \textit{e.g.}, Brian T. Fitzpatrick, \textit{Do Class Action Lawyers Make Too Little?}, 158 U. Pa. L. Rev. 2043, 2043 (2010) (“Class action lawyers are some of the most frequently derided players in our system of civil litigation.”); Martin H. Redish, \textit{Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals}, 2003 U. Chi. Legal F. 71 (2003) (“Public attitudes about plaintiffs' class action lawyers have often been strongly negative [in recent years].”).
environment on Capitol Hill and in state legislatures throughout the United States. In fact, 21 separate federal statutes contain whistleblower protection provisions and entire offices are dedicated to ensuring that the programs run smoothly and whistleblowers’ rights are secure. By any measure, the role of the whistleblower and the profile of their counsel has grown over the past decade. Importantly, that stature has support on both sides of the aisle. Indeed, a leading proponent of whistleblower provisions is conservative republican Senator Charles Grassley, who is currently targeting pharmaceutical companies for defrauding federal health care programs.

In comparison, the class action attorney does not have a comparative champion. While the Class Action Reform Act of 2005 has not turned out to be the death knell to class actions that some of its supporters hoped for, it does represent a successful limitation on

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9See, e.g., Dennis J. Ventry Jr, Whistleblowers and Qui Tam for Tax, 61 Tax Lawyer, (2008) (“These individuals [federal whistleblowers], Grassley said, “often risk their careers to expose fraud, waste, and abuse in an effort to protect not only the health and safety of the American people, but the federal treasury and taxpayer dollars.” But he likely was thinking in particular of tax whistleblowers, given that he had championed legislation in 2006 for the expansion of an IRS Whistleblower Office and that his staff wrote the provision in the Tax Relief and Health Care Act of 2006 that authorized such an office, greatly enhancing the IRS whistleblower program.”)
class actions. On the other side of the coin, talk of a “legislative” fix to Concepcion has likely reached its final destination: the House Subcommittee on Courts, Commercial, and Administrative Law. Not only will the Republican-led house reject that fix, but I suspect several Democrats would be unsympathetic to doing anything that could be construed as benefiting class action attorneys. Indeed, based on his record as a senator I would not be surprised if even President Obama refused to stick out his neck for the class action bar in an election year.

**Class Action Lawyers Can Change the Paradigm**

To be sure, whistleblower attorneys have a distinct advantage over class action attorneys. Their work results directly in the government receiving money—billions. In these days of huge budget deficits that is profoundly significant. Moreover, the very structure of the False Claims Act and other whistleblower statutes requiring that the private bar work with the government creates a symbiotic. Simply put, the private bar must allow the government the opportunity to intervene and proceed with the prosecution.

No such analog exists on the class action side. Moreover, monies received by class action attorneys typically do not go into the coffers of a federal or state treasury. In grand terms class action attorneys effectuate a transfer of wealth back from corporations to

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consumers. That transfer is not automatically seen as a positive development; simply ask the U.S. Chamber of Commerce. Despite this mixed perception, class action attorneys can begin to change the paradigm. They can start quantifying these results in money and value obtained for consumers. It is that simple. Consumers lose billions every year in deception, defective products and sharp corporate practices. Like their friends in the Qui Tam bar, they must illustrate those concrete results. That will surely go a long way toward developing trust, legitimacy and a road toward sustainability even in the face of an indifferent legislature and a hostile judiciary.

**Class Action Law’s Rich History**

Class action suits have been serving the public interest for centuries. The jurisprudential history of class actions shows that, far from a modern creation of convenience, the class action has a rich history in efficiently and fairly administering justice for those who might otherwise go unrepresented.

The tradition of class actions dates back nearly a millennium to 1125 and the reign of Henry III. The most commonly cited case that synthesizes the rules of a modern class action is *Brown v. Vermuden (1676)*, 1 Ch. Cas. 272, 22 Eng. Rep. 796. That’s right, 1676. The dispute involved a defendant class of miners failing to pay their full tithes to a local parish. The court held in favor of the parish and, more importantly, held that the judgment bound all

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13 Id.
members of the defendant class—even those who were not directly involved in the litigation.\textsuperscript{14}

More recent, but still centuries old, the case of Discart v. Otes, 30 Seld. Society 137 (No. 158, P.C. 1309), offers a clear example of a class action prosecuted by a representative plaintiff.\textsuperscript{15} In Discart, the citizens of the Channel Islands, a group of islands in English possession off the Northwest coast of France, brought suit against Sir Otes Grandison, to whom King Edward I had granted the islands.\textsuperscript{16} The islanders complained that Otes’ demand for all rents to be paid in French currency as opposed to the debased local currency had effectively tripled the rents owed to Otes.\textsuperscript{17} The local Island Court deferred the case to the King’s Council, ordering “that Discart and all that are in like case with [him] are bidden to appear ... before that same Council, either in person or by someone representing them all, to hear its opinion and to receive such judgment as shall there be delivered.”\textsuperscript{18} The island inhabitants were therefore afforded the right to pursue their grievances, which might otherwise have been impracticable, through a binding class action. Unfortunately, as you might expect, English Nobility won out against the island inhabitants.\textsuperscript{19}

The modern American rules for class action litigation owe their heritage to Equity Rule 38, which existed until the adoption of the modern Federal Rules of Civil Procedure following the Rules

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} Id.
Enabling Act of 1938.\textsuperscript{20} According to the Advisory committee notes, Rule 23 adopted the old equity test of allowing class actions where the question is “one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court.”\textsuperscript{21} Developments in the 1966, 2003, and 2007 amendments have given us the class action under Rule 23 that we know today. Still, despite recent clarifications of the rule, our mission remains the same as those barristers of centuries past: to represent the interests of aggrieved class members who are too numerous, or whose individual losses are too small, so as to render individual representation unfeasible.

Just as the Qui Tam bar traces its history to the Civil War, we too must emphasize the rich history of class actions. Class actions are evidence of judicial evolution from the days of individual writs (remember your first year doctrinal courses?) to the modern view that even where all of the members of the class may not be able to represent themselves, they deserve justice nonetheless. Class action attorneys should be mindful of the important role we play in the historical evolution in the administration of justice. Were the public more aware of the significant tradition of class action and representative litigation, it might look upon the practice with a more favorable light.

\textbf{Conclusion}

After \textit{Concepcion} and \textit{Dukes}, class action attorneys are no doubt feeling beleaguered. But these decisions cannot wipe out

\textsuperscript{21} Fed. R. Civ. P. 23
1,000 years of jurisprudence and a record of substantial victories for consumers. Instead of retreating, the class action bar must redouble its efforts to pursue justice. Like our brethren in the Qui Tam bar, we must demonstrate that class action attorneys add value and represent the rights of individuals and groups that need and deserve our expertise and representation. We must not be defined by our opponents and instead rise above political rancor to focus on protecting the rights of our clients.
Roe v. Wade and its Interpretations

Hannah Grill

The Supreme Court decision in Roe v. Wade cited the violation of a constitutional right to privacy said to be prescribed by “penumbras” created by the 9th Amendment and the due process clause of the 14th Amendment. Significant debate still surrounds this decision because the Constitution does not explicitly define a right to privacy, and privacy, as an argument for legalized abortion, does not necessarily invoke rapid agreement. For this reason, many legal scholars and philosophers claim that the decision in Roe is invalid, and myriad others posit alternative arguments for the Roe decision. In this paper, I argue that Ronald Dworkin’s argument for the decision in Roe, which depicts criminalized abortion as a violation of the first amendment right to freedom of religion, most effectively and convincingly defends the Court’s decision.

Roe v. Wade

A Texas resident, Roe, brought a class action that challenged the constitutionality of the Texas criminalized abortion law. The Texas law in question outlawed the procurement or attempt of abortion except when the life of the mother was in danger, as decided by a medical professional. The Supreme Court held that the law in Texas and those like it violated the right to privacy, protected by the 14th amendment and supported by the 9th amendment. The main facet of the appellant’s attack on the Texas statute was that it

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2 Id.
invaded a right supposedly possessed by the pregnant woman, to choose to terminate her pregnancy. The Court argued that this right does indeed exist, upheld by the concept of personal liberty embodied in the Fourteenth Amendment’s Due Process Clause; and by the personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights and its penumbras. These amendments were deemed broad enough to protect the woman’s right to privacy and the subsequent right to terminate her pregnancy. The court held that nowhere is a fetus held as a “person” as used in by the Fourteenth Amendment. Therefore State interest in protecting the fetus cannot outweigh that of protecting the woman’s right to privacy, at least up to viability of the fetus. The three provisions of the Court’s decision were as follows: a) the period from conception to the end of the first trimester shall be left completely to the discretion of the pregnant woman’s attending physician whether to terminate the pregnancy or not, b) during the stage subsequent to the first trimester, the State may, if it chooses, regulate the abortion procedure in ways related to maternal health, and c) in the stage beginning with viability, the State may regulate or even prohibit abortion except where necessary, as deemed by the medical professional, in relation to the life of the mother. The Court ruled 7-2 in favor of Roe.

**Freedom of Religion**

As a result of the extensive contention over the *Roe* holding by scholars and the public, many alternative defenses of the Roe

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3 *Griswold v. Connecticut*, 381 U.S. 479 (1965)
6 *Id.*
holding were published. Robert Dworkin posited that freedom of religion is the ultimate argument for legalized abortion. He argues that the argument over the right to abortion is “detached,” meaning that it is inextricably linked to the debate over whether human life has an innate, intrinsic value from conception. In order to support this argument, Dworkin explains that statistics show that the majority of Americans represented in the survey thought that abortion should be legal in most or some circumstances, but polls also state that the majority of Americans, as represented by the poll, think abortion is morally wrong. Thus, Dworkin explains, moral value judgments are inseparable from the argument over abortion since people both believe abortion should be legal, but also believe it to be morally wrong. And in America, the federal government is not constitutionally permitted to make ethical or spiritual decisions for the people. Dworkin explains that the argument over abortion, then, must be religious:

“If the great battles over abortion and euthanasia are really about the intrinsic, cosmic value of a human life, as I claim they are, then those battles have at least a quasi-religious nature, and it is hardly surprising that many people believe both that abortion and euthanasia are profoundly wrong and that it is no part of the proper business of government to try to stamp them out with the jackboots of the criminal law.”

Dworkin’s connection of religion to abortion is sound. It is easily argued that the beginnings and ends of human life are ultimately tied to people’s beliefs, and their subsequent religions. Even atheists

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and agnostics can be argued to have their own collective view of when life starts, what happens after it ends, and who should decide when either occurs. Furthermore, some believe, in due diligence to their religion, that sinful behavior causes pregnancy while people of other religions may believe the opposite. The question of the legality of abortion, an aspect of life inextricably linked to one’s beliefs, is religious in nature. And, the First Amendment explicitly states that, “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.” The government should therefore protect the freedom of spiritual beliefs of a pregnant woman surrounding a fetus. When deciding on the constitutionality of criminalized abortion laws, I argue that Dworkin's proposed argument for freedom of religion as the correct tenet of the Constitution to be used offers the most widely applicable and constitutional opinion.

**Critics of Dworkin and Alternative Solutions**

According to Robert Bork, a strong opponent to Dworkin and the Roe decision, the court must avoid becoming a “naked power organ” and remain neutral. In order to do so, he argues that all decisions of the court must cite an explicit tenet of the constitution and interpret it as the average American would have at the time of its framing. Moreover, all aspects of legislation that are not explicitly stated in the Constitution must be left to the majority. Remaining neutral, according to Bork, is the only way for the Court to retain its legitimacy in a democratic system. Therefore, Bork would argue that the constitution’s provision of freedom of religion within the

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8 U.S. Const. amend. I.

first amendment could not encompass abortion, since abortion itself is not explicitly enumerated. Furthermore, the Supreme Court has no legitimate power to rule either for anti-abortion laws, or against them, no matter the related provision utilized. Bork argues that the Court made a value choice in favor of a pro-choice opinion. Bork would likely argue, like he did for Griswold, that for the anti-abortion laws, the “only course for a principled Court is to let the majority have its way.”¹⁰ This, according to Bork, would be the only course of action that would allow the judiciary to remain legitimate: to simply not take cases that do not allow the court to make a “fair and impartial manner.”¹¹

Bork’s harsh take on the role of the Supreme Court, however, is not itself impartial. By restricting the Court’s responsibilities, Bork is making a value judgment in favor of small central government and strong state autonomy. He seems to do this under the assumption that all state legislatures are dictated by majority vote. But the purpose of the Court is to protect the minority’s rights, especially those that could be taken by the majority. I argue that the Court must take opinions on more than what is explicitly stated in the Constitution in order to protect unenumerated rights. Stephen Macedo agrees in his critique of Bork, stating that following only explicit provisions and disregarding general statements of the Constitution is a political viewpoint, a choice of the interpretive approach. Further, he argues that Bork’s argument for originalism would essentially constrain judges “far more than the text of the Constitution, the ideas of the framers, or the political morality

¹⁰ Id.

warrant.” Macedo argues that the framers, and arguably the average educated people at the time of the framing, did not intend for the Constitution to be read as literally as Bork suggests. Macedo explains that Bork's argument for “curtailing” action on moral judgments is mostly based on Bork's illiberal political program. Furthermore, shifting value choices are allowed for in the constitution, contrary to Bork's beliefs.

Gerard Bradley posits another opposition to Dworkin’s arguments. He explains that the constitution is not entirely clear in its description of personhood, and the Court has utilized the term under multiple definitions, including whole corporations. Additionally, examination of congressional discussion surrounding the 14th Amendment depicts only basic and broad defining features of “personhood,” such as “all natural persons” or all “human beings.” Though this description does not explicitly state that a fetus is a “person,” it certainly does not discount that possibility. Bradley argues further that the use of Griswold as a precedent for the Roe decision was wrongly interpreted. He claims that the Griswold case only established marital privacy in intimate situations; it did not establish the right to the use of contraception in general, since one could oppose contraception and still agree with the decision in order to protect marital privacy. Based on his stance, it certainly did not set a precedent for women’s privacy in all child-bearing decisions. Bradley also explains that the Court has been involved in making value judgments throughout much of its history.

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14 Id.
using Justice Harlan’s opinion in the Poe v. Ullman decision as a supporting argument:

“The very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical wellbeing of the community, but has traditionally concerned itself with the moral soundness of its people as well...The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis.”

Therefore, Bradley concludes that the ill-defined concept of “personhood,” nonexistence of true precedent, and history of value-laden Court decisions lend to a necessary conclusion that Dworkin’s religious argument for the Roe decision is unfounded and perhaps blatantly wrong.

However, Bradley’s argument, though convincing, does not necessitate a reversal of the Roe decision, nor completely negate Dworkin’s argument. Bradley claims that personhood is ambiguous in the constitution and could easily be construed as including fetuses, therefore leading to the assumption that abortion could be construed as murder. However, this is exactly Dworkin’s argument:

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that the decision whether a fetus is a human is an intrinsically “detached” argument, meaning it is linked to certain values and innate moral reasoning. Therefore, under protection from the Constitution, freedom of religion bans the choice of one religious argument over another and allows the Court to make a value choice to protect the rights of those practicing many different religions, not just one opinion. Additionally, Bradley’s claim that Griswold was misunderstood by Dworkin, and only sets a precedent for marital privacy, can be just as easily argued for the direction of Roe. Simply stating that the decision was not implicitly granting women the privacy to make decisions regarding child bearing, does not implicate that the opposite is true. It is just as easily argued that the specificity of the right to privacy in the Griswold decision intrinsically lends itself to the understanding that a woman, single or married, can make her own choice about whether to bear a child or not. Last, though the Court can be argued to make value judgments often in its decisions, this does not allow for violation of religious freedom. The Constitution protects the right to religious freedom, and though the decision of what value choices are intrinsically religious is contentious, the Court’s choice best upheld the right to religious choice.

Donald Regan depicts an alternative to Dworkin’s argument for the Roe decision in his article, “Rewriting Roe v. Wade.” Regan claims that requiring a woman to carry a pregnancy to term is imposing a burden on women for the sake of another life, which could be construed as a form of Bad Samaritan law, one that criminalizes the omission of aid to someone in need.\footnote{Regan, Donald H. “Rewriting Roe v. Wade.” \textit{Michigan Law Review}. 1979 (1570)}
Samaritan law in regard to pregnancy would only be imposed on women (since men do not have to endure bodily harm in order to save another life under any laws thus enforced), which would in turn violate the Equal Protection Clause within the 14th Amendment. He explains that within the U.S., there has never been a strong inclination toward Bad Samaritan laws and often a strong trend against bodily harm or invasion under the law. Imposing such a requirement on women to have to endure pregnancy for the sake of another human being’s life is both contrary to this trend and inherently unequal. Pregnancy is ultimately invasive and potentially dangerous, as well as uncomfortable and stigmatized. The unborn fetus cannot live without the mother, leaving its existence reliant solely on the mother. To require women to endure this in order to save another’s life in this way, without requiring the same of men, is a violation of the Equal Protection Clause. This, according to Regan is a more valid, and perhaps more constitutional, explanation for Roe.

Regan’s creative and well-constructed Equal Protection argument for legalized abortion poses an interesting contrast to Dworkin’s. However, one could argue that pregnancy is too special a case to be construed as Bad Samaritan law. Furthermore, one could also argue that if such an infliction of pain could be given to men, then it would, in which case inequality is not actually occurring, purely by the inexistence of such an option. Even if we suppose Regan’s argument stands, abortion could still be deemed illegal by the courts, if Bad Samaritan laws are simply be put into place, mandating that one may not cease vital support to another living

17 *Id.* at (1572)
18 *Id.* at (1585)
being (supposing it was decided that a fetus counts). In theory, this could be universally applied and avoid violation of the Equal Protection clause.

**Conclusion**

Dworkin’s argument for the Roe decision arguably utilizes one of the most important and well-known aspects of the constitution: freedom of religion. He artfully crafts an argument that describes the duty of the Court to allow for multiple religious faiths by legalizing abortion. His argument stands up to the tests of his critics and provides a more relatable and infallible argument than his competitors. The Roe decision, with all of the surrounding debate, presents itself as imperative to the rights of women and the wants of the majority (as depicted by surveys quoted by Dworkin). I believe this argument can best uphold *Roe*, and is better than the argument presented by the Court. Rather than assuming the intangible right to privacy upheld by the Supreme Court in Roe – that lends itself to myriad interpretations and presents potentially harmful precedential proceedings, Dworkin presents an argument that relies on a clear aspect of the Constitution and its evident relation to the abortion debate.

In current debates over healthcare coverage and the inclusion of contraception and abortion in health plans, decisions such as Roe and Griswold are imperative precedents to the protection of women’s health and choice in federal legislation. The Constitution was created in order to protect the rights of the minority. Even in progressive times, women are often underrepresented, making them the minority. The right to choose to terminate one’s pregnancy, as well as to choose to use contraception
is an important right for a minority that needs to be upheld. Dworkin best utilizes the Constitution in order to do so.