THE
GEORGE WASHINGTON
UNDERGRADUATE
LAW REVIEW
THE GEORGE WASHINGTON UNDERGRADUATE LAW REVIEW

Foreword  Corey Schroer
Introduction  Adam Schilt

ARTICLES

Talking Money: The Constitutionality of Limits to Campaign Contributions In Light of McCutcheon v. Federal Election Commission  1  Justin Peroff
The Constitutionality of the Death Penalty After Botched Executions  17  Zoe Goldstein
Discerning a Universal Right to Freedom of Expression in an Increasingly Multicultural World  33  Aaron G. Esparza
On the Costs and Consequences of the Patient Protection And Affordable Care Act of 2010  49  Haley Meyers
The First Amendment Implications of Campaign Finance: Why Campaign Finance Must Be Regulated  67  Arian Rubio
Troubled Waters: Turkey & the Republic of Cyprus’ Maritime Disputes in the Eastern Mediterranean Sea  79  Nicole Grajewski
Executive Orders: A Beneficial Tool or Danger to Democracy?  93  Fatima K. Jamal
The Cyber Battlefield: Extensions of Just War  107  Nikhil R. Venkatasubramanian
The Future of International Climate Change Law  123  Caroline J. Gimello

THINK PIECE

Dual Loyalties: On the Topic of Professional Medical Accountability and Human Rights Violations in Prisons  143  Eunice Gwon

© Copyright 2015. The GWU Pre-Law Student Association. All rights reserved.
THE
GEORGE WASHINGTON
PRE-LAW STUDENT
ASSOCIATION

BOARD OF EXECUTIVES

Corey Schroer
President

Adam L. Schilt
Law Review Director

Arjang Asadi
Law Review Editor-in-Chief

Rowland Zhang
Financial Director

Sara Merken
Blog Director

Abigail Shriver
Vice President

Aman Y. Thakker
Law Review Editor-in-Chief

Zoe Goldstein
Public Relations Director

Eunice Gwon
Events Director
BOARD OF ADVISORS

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

James Bonneau, JD
Keith Diener, JD, LLM, DLS
Michael Gabriel, JD
Ioana Luca, BCL/LLB, LLM
Rikin S. Mehta, PharmD, JD, LLM
George E. Petel, JD
Cary Silverman, JD, MPA
Andrew Stewart, JD
Zachary Wolfe, JD

ASSOCIATE EDITORS

The articles of the George Washington Undergraduate Law Review would not be published without the hard work of the student editors.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

Alyssa Asquith
Carly Bellerive
Andrew Costello
Zoe Goldstein
Angelina Grochowski
J. Douglas Harrison, Jr.
Susan Huang
Victoria Muth
How to Beat the LSAT and Get into Law School

Cannot recommend **Strategy Prep** enough.

I started with an initial diagnostic score of 163. My goal was a 170 by the end of the 100-hour course. **I scored a 172.**

Strategy makes breaking down the LSAT an understandable science, synthesizing it to its basics and providing the student with the tools and techniques needed to conquer this learn-able test.

Best of all, the company is **small**, the instructor is **friendly**, and there are always opportunities for extra instruction and assistance. If you are in the DC/M/V area, it would be illogical of you not to study with Strategy Prep.

— Mickey DiBattista
Foreword

The George Washington Pre-Law Student Association is a prominent student organization on campus for all students interested in pursuing a law degree and a career in the legal field. The organization aims to enhance the foundation of legal scholarship on campus, while providing members with the opportunity to network and develop legal writing skills. Additionally, the organization equips students with the tools most necessary for a future in law, including information regarding law school admissions.

The George Washington Undergraduate Law Review is a student-managed and published legal journal that analyzes current legal issues across a variety of specialties, including environmental, criminal, immigration, civil, and international law. The Undergraduate Law Review offers students the opportunity to explore legal research, enrich their writing and critical thinking skills, and make a valuable contribution to legal discussion during their undergraduate studies.

The writings published in the Undergraduate Law Review conform to the 19th Edition of The Bluebook legal citation system, while adhering to the academic integrity of The George Washington University. The Pre-Law Student Association is proud of the work of these student authors and editors and their efforts in producing this journal.

Sincerely,

Corey Schroer
President
Introduction

When the Pre-Law Student Association holds its General Body meeting at the beginning of the school year, the Undergraduate Law Review (ULR) generates a great amount of interest. Freshmen through seniors applied to join this prestigious publication. The students want to be a part of one of less than twenty undergraduate law journals in the nation, become published as an undergraduate, and push themselves to excel in a challenging, yearlong academic endeavor. It is certainly a challenge for those selected at the beginning of the year to make it to this point. This journal is a testament to their hard work and dedication throughout the rigorous process.

Dating back to April 2014, the ULR Leadership Team came together to lay the foundations for the fifth edition of the law review. I can safely say that this publication would not have gotten off the ground without the two outstanding editors-in-chief, Aman Thakker and Arjang Asadi. They have gone above and beyond expectations to ensure that the writers and editors of this journal had superior guidance throughout this yearlong process. I am truly indebted for their time and dedication.

Aman, Arjang, and I would not have had a publication to organize if it were not for the writers and editors. I am extremely proud of the ten writers, who thrived under the writing process, and were able to attain their goal of being published. Additionally, the student editors deserve all the credit in the world for their work. They helped all the articles get to their high level of quality that you see in this journal. Though their name may only appear in the opening pages, their dedication runs throughout the publication. We also are sincerely indebted to the professional editors that offered their time and expertise to the ULR. This journal is lucky to have a team of practicing attorneys and law school professors help to guide the writers to publishing. Their insight is unparalleled and adds a level of integrity that could not have been possible without them.

The people truly make this publication of the finest undergraduate law reviews in the nation. As the Director of the ULR, I had the immense pleasure of working with them through the whole process. From the very start of the year, everyone was dedicated to producing the highest quality journal in our organization’s history. I can proudly say that we achieved our collective ambition and have raised expectations of the ULR for years to come.

Sincerely,

Adam L. Schilt
Law Review Director
Talking Money: The Constitutionality of Limits to Campaign Contributions In Light of McCutcheon v. Federal Election Commission

Justin Peroff

“It could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.” – James Madison

Introduction

On February 19, 2013, the United States Supreme Court agreed to hear the campaign contribution case brought by Alabama businessman and political activist Shaun McCutcheon. McCutcheon, a fervent supporter of the Republican National Committee and many individual politicians during the 2011-2012 election cycle, was not satisfied with adhering to the restricted aggregate limits – wanting to donate to a number of other candidates in addition to the sixteen he had already supported.1 The aggregate limits, along with the distinct, but equally notable, base limits, were products of the Bipartisan Campaign Reform Act (BCRA) – a federal law passed in 2002.2 As outlined by the BCRA, individuals are limited to the amount they could give to a single candidate in an election cycle ($5200 in 2013), known as the base limit.3 However, McCutcheon, and accordingly the Justices ruling on McCutcheon v. FEC, were chiefly concerned with the aggregate limits, which constrained an individual contributor to a limit of $123,200 in donations to all federal candidates, PACs and parties in an election cycle.4

Fundamentally, the issue of campaign contribution limits lay with the First Amendment’s protection of political speech.5 While proponents of contribution regulation posit there is a compelling government interest to ensure the integrity of the

3 Id.
5 Id.
democratic process is not undermined, advocates for contribution deregulation assert that money is speech, and is thus protected by the First Amendment as a form of political speech. It is at this juncture where the core legal issue arises. Is the compelling government interest of preventing corruption, or the appearance of corruption, in the electoral process substantial enough to outweigh the tremendous burden necessary to restrict political speech protected by the First Amendment?

Upon a more comprehensive examination of the multiple facets of McCutcheon, however, the sources of the clash in ideologies become clearly identifiable. Indeed, the disparities in how central terms were defined – most importantly those of ‘corruption’ and ‘political speech’ – and discrepancies in opinions on pivotal issues – notably, whether big money truly does lead to widespread deterioration of the political system – leave one expecting nothing but a narrow decision on McCutcheon. And, on April 2, 2014, the Supreme Court struck down aggregate limits on campaign contributions in a narrow 5-4 ruling for McCutcheon. In order to fully grasp the intricate matter of campaign finance reform, as well as the equally complex McCutcheon decision, it is imperative to first explore the precedent and history of campaign finance, beginning with Buckley v. Valeo (1976). In particular, the Supreme Court’s remarkable shift from a strict application of stare decisis in campaign contribution cases, to what can be characterized simply as a considerable disregard for precedent and continuity. Next, this paper will consider those aforementioned disparities and discrepancies in fundamental concepts and definitions in the cases leading up to, and certainly noticeable in, McCutcheon. This section will also include an analysis of the McCutcheon decision. Finally, it will be argued that financial contributions to political candidates and parties should be, without reserve, uninhibited by Congress and F.E.C. restrictions due to said contributions being protected speech under the First Amendment. Consequently, although the plurality’s decision in McCutcheon v. FEC to remove aggregate limits was a step in the right direction, the base limits continue to be grossly unconstitutional.

I. A Shift Away From Stare Decisis

Shortly after the Watergate scandal in 1972, with the thought of political corruption fresh in the minds of the American people, many in politics and government believed it necessary to implement more stringent campaign finance laws. As a result, Congress created the Federal Election Commission, and amended the Federal Election Campaign Act (FECA) in 1974. And although there was undoubtedly support for the increased regulation, there was also a prominent “coalition of conservative and liberal adversaries who viewed the law as trampling core First Amendment rights by

---

6 McCutcheon, 572 U.S. at 47.
8 McCutcheon, 572 U.S. at 46.
Thus, it did not take long for the controversial amendments to be challenged in court. In 1974, Senator James Buckley accepted the challenge and filed suit against the U.S. government—arguing that the amendments violated First Amendment rights to freedom of expression.10 The case, *Buckley v. Valeo*, ultimately reached the Supreme Court, and, in a landmark decision the Court upheld nearly all contribution limitations—that is, base and aggregate ceilings—while striking down most candidate spending limits and expenditure limitations—the latter essentially being independent spending restrictions.11 However, arguably the most impactful outcome of the Court’s decision was Justice Stewart’s declaration that “money is speech, and speech is money.”12 Indeed, this swiftly became a naïve summation of the *Buckley* decision, that money is speech. For if one has put up flyers, he or she had to pay to print them; and if one advertises on television or in the newspaper, he or she had to purchase the ad space. Indeed, as the jurists posited, “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”13 Where the divide over campaign contribution first became apparent, however, was in the opinions of Justices Powell, Burger, Rehnquist and Stewart compared to Justices White, Marshall and Blackmun—the former considering the amendments to be “the most drastic abridgment of political speech since the Alien and Seditions Acts,” while the latter wanting to uphold more of the limits.14 Indeed, it was *Buckley* that appeared to have sparked the paradigm shift towards a rift in the views on campaign finance reform—epitomized by the twenty-three Supreme Court cases that would be heard over the 38 years following the *Buckley* ruling. However, despite the truly remarkable number of cases heard by the Supreme Court since 1976, it is imperative to underscore the general trend that appears when studying the rulings altogether: until 2006, the Court employed a strict application of *stare decisis*, after which its stance drastically shifted in a manner that appeared to have complete disregard for precedent. An analysis of this transition is essential in order to truly recognize the views of the *McCutcheon* Court and its ruling.

In a post-*Buckley* era, the Court only tightened their regulation of campaign contributions. The pinnacle of this legal crusade by the Supreme Court was *Austin v. Michigan Chamber of Commerce* (1990). In a 6-3 decision, the Court ruled there was a compelling government interest in combatting not just the original, narrow, view of corruption—*quid pro quo* corruption—but also a “different kind of corruption.”15 The Court held there was a significant threat stemming from “the corrosive and distorting

---

9 COLLINS & SKOVER, supra note 1, at 68.
10 Id.
12 Id.
13 Id.
14 Id.
effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”

The consequences of this shift away from what was once simply characterized as an exchange of gifts or money for political favors thus became this all-encompassing understanding of corruption that included the possibility of big money to influence and undercut the democratic system. As Collins and Skover put it, this “capacious definition of corruption effectively granted lawmakers more leeway to regulate campaign finance.” The *Austin* decision only served to further catalyze the rift between the Supreme Court Justices. Indeed, this polarizing divide would persist throughout each and every campaign finance case that followed in the Supreme Court, even through to *McCutcheon*.

By 2003, the Supreme Court had consistently and steadfastly applied *stare decisis* to all campaign contribution cases they agreed to hear, while simultaneously broadening the definition of corruption. In its ruling on *McConnell v. Federal Election Commission* (2003), the Court considered corruption to be “any conduct that wins goodwill from or influences a Member of Congress.” But when it appeared as though the Court had permanently solidified its stance on campaign finance reform, to a point where nearly any modestly significant contribution was corrupting, the most sudden of vicissitudes occurred. With the death of Chief Justice Rehnquist in 2005, and the retirement of Justice Sandra Day O’Connor in 2006, came the appointments of new Chief Justice Roberts and Justice Samuel Alito, respectively. And although it was President George W. Bush who appointed both justices to the court, neither Justice’s position on campaign finance reform was evident. The impact of their appointment, however, would immediately and drastically alter the law on campaign finance regulations. It was at this point, by 2006, that the Court would no longer exactly apply *stare decisis*.

In the 2006 ruling on *Randall v. Sorrell*, the Court struck down a Vermont law that placed a strikingly strict cap on campaign contributions to a candidate, in one election cycle. Of note was Justice Breyer’s plurality opinion, joined in concurrence by some of the more right leaning justices such as Justice Scalia and Justice Thomas, marking one of the only times he sided with the more right leaning justices on an issue of campaign finance regulation. Undoubtedly a sign of rulings to come, *Randall* was the first case in which the Court deemed a contribution ceiling unconstitutional. A year later, the Court ruled yet another campaign finance law unconstitutional in *F.E.C. v. Wisconsin Right to Life* (2007), declaring the political advertising barrier before elections

---

16 Id.
17 COLLINS & SKOVER, supra note 1, at 68.
18 Id.
20 COLLINS & SKOVER, supra note 1, at 70.
21 Id.
23 Id.
24 Id.
overbroad. However, undeniably the most symbolic ruling that deviated from the strong political continuity that was present just half a decade before, was the Court’s decision to strike down the infamous Millionaire’s Amendment in *Davis v. F.E.C.* (2008). The Millionaire’s Amendment was a provision in that in effect penalized a wealthy candidate for self-financing himself, by increasing the legal contribution limits for the opponent. Indeed, three jurisprudential propositions can be drawn from Justice Alito’s opinion of the court that effectively summarizes the Court’s transition from a one decisively supporting campaign finance regulation to one starkly and harshly opposing it. These propositions can be condensed as follows:

- **Level of scrutiny:** Campaign finance laws such as the Millionaire’s Amendment “impose a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech.” Consequently, the Court must apply the standard of “strict scrutiny” rather than the “closely drawn” standard of *McConnell*.
- **Definition of corruption:** Directly referencing Justice Thomas’s narrower definition of corruption from *Nixon v. Shrink Missouri Government PAC*, Justice Alito and the plurality posited that the prevention of *quid pro quo* corruption is “the only legitimate and compelling governmental interest thus far identified for restricting campaign finances.”
- **The Court’s role:** Unlike the rulings prior to *McConnell*, which identified a compelling government interest in regulating campaign contributions, the *Davis* decision unequivocally revoked that precedent. As Justice Alito wrote: “The argument that a candidate’s speech may be restricted in order to ‘level electoral opportunities’ has ominous implications” because it allows for “Congress to use the election laws to influence the voters’ choices.”

With the decision, the Supreme Court demonstrated to the lower courts, Congress, and the American people just how divisive the issue of campaign finance regulation is – and that *stare decisis* is far from ironclad.

The stage was thus set for business tycoon and political activist Shaun McCutcheon to bring suit – along with the Republican National Convention – against the Federal Election Commission. McCutcheon, the plaintiff, argued the BCRA’s aggregate limits to political contributions were unconstitutional as they restricted his First Amendment rights. In 2012, the District Court of the District of Columbia rejected the plaintiff’s

---

27 Id.
28 Id.
29 COLLINS & SKOVER, supra note 1, at 92–93.
30 Id.
31 Id.
32 Id. at 103.
argument and granted the defense’s motion to dismiss, citing *Buckley* as precedent for the constitutionality of aggregate contribution limits. However, once the Supreme Court agreed to hear the case a year later, everything was in place for a ruling that would even further the campaign finance limit.

II. *McCutcheon v. The Federal Election Commission*

The three cases following *McConnell* demonstrated that the Court was now, as Jeffrey Toobin put it, “engaging in a long-term project to deregulate campaigns. [And] a blessing on unlimited aggregate contributions is the next logical step for them to take – and they have five votes.” Indeed, these prophetic words would soon prove truthful, as on April 2\(^{nd}\), 2014, the Supreme Court delivered its 5-4 decision on *McCutcheon*. In its 139-page opinion, the Court struck down the $25,000 aggregate limit that had been in place since *Buckley*. Granted, this decision was made considerably easier by Congress’s efforts to close a major loophole – the absence of a limit on individual contributions to political parties – which made the aggregate limits ineffective to say the least. The plurality held the aggregate limits, which had been enforced since 1976, were unconstitutional because the government interest did not match the First Amendment infringement. Chief Justice Roberts outlined the reasoning behind the decision in his opinion:

“*Buckley* upheld aggregate limits only on the ground that they prevented channeling money to candidates beyond the base limits. The absence of such a prospect today belies the Government’s asserted objective of preventing corruption. [Instead, the aggregate limits today] simply limit the amount of money in political campaigns.”

Thus, even though the Government had, and indeed still has, a compelling interest to combat corruption – an interest that will be explored in great detail further on in this article – the plurality found the indiscriminate aggregate limits to be “disproportionate” (in other words, poorly tailored) to the Government’s interest. In particular, there was no evidence the aggregate limits succeeded in preventing circumvention of the constitutional base limits. This was a central question the justices considered, specifically the issue of “whether experience under the present law confirms a serious threat of abuse.” The answer from the plurality, as underscored in Chief Justice Roberts’ opinion, was a

---

36 *McCutcheon*, 572 U.S. at 35-36.
37 *Id.*
resounding “no.”38 Therefore, it was not so much that the aggregate limits did not satisfy the objective of inhibiting corruption, but rather that those limits overreached on the issue to the point where the basic First Amendment right to free speech was being infringed upon. In fact when the justices examined the application and success of the aggregate limits, experience suggested that “the vast majority” of contributions made above the aggregate limits were usually retained and used by the recipients, as opposed to being sent along to candidates.39

Finally, the Justices of the plurality were quick to note the complete arbitrariness of the current aggregate limits. Fundamentally, the plurality failed to relate to the dissent’s assessment that a contribution of $5,200 to nine candidates is permissible—falling within the aggregate limits—while classifying a contribution of the same amount to a tenth candidate “corruption.”40 While the limit appeared arbitrary, the dissent posited the reasoning stemmed from their broader interpretation of the “public’s interest in collective speech.”41 This interest, as articulated by Justice Breyer in his dissenting opinion, fosters “a government where laws reflect the very thoughts, views, ideas, and sentiments, the expression of which the First Amendment protects.”42 Yet this generalized conception of the public good presented by the dissent was wholly refuted by the plurality in a series of arguments outlined by Chief Justice Roberts. Most notably, however, was the Chief Justice’s argument that the degree to which speech is protected does not hinge on whether the courts or Congress view that specific speech to be valuable to the democratic process.43 In fact, legal precedent clearly demonstrated that the First Amendment does not allow for any form of “ad hoc valancing of relative social costs and benefits.”44 With that, the Court proceeded with the accepted analysis of weighing the compelling government interest to any form of infringement or restriction on individual free speech.

A further issue underscored by the plurality in their opinion was the existence of alternative options other than aggregate limits for combatting corruption and the appearance of corruption. Chief Justice Roberts emphasized the “significant First Amendment costs for individual citizens” when imposing a limit to an established form of political speech.45 Evidently, however, it is imperative to underscore that this implies complete First Amendment protection— the current base limits serving as a chief example. Rather, the issue raised by the plurality concerned how well tailored the aggregate limits were to preventing the circumvention of the base limits, which in turn serves the government’s compelling interest of mitigating corruption. In that, the plurality

38 Id.
39 Id.
40 Id.
42 Id.
43 Id. at 23 (majority opinion).
45 McCutcheon, 572 U.S. at 24.
found that “there are numerous alternative approaches [to aggregate limits] available to Congress to prevent circumvention of the base limits.” Among these alternatives – which will be explored in detail further on – varied from various earmarking and antiproliferation rules, to the FEC’s ability to initiate enforcement proceedings against contributors with suspicious patterns of PAC donations. This consequently served as yet another component to the plurality’s position that the aggregate limits were not narrowly tailored enough to outweigh the burden on individual free speech. “When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions,” and with regards to aggregate limits, the Court found the Government did not meet its burden. Indeed, this notion will be referenced frequently throughout this article.

Finally, although the opinion of the Court’s plurality has been touched on, it is crucial to explore the dissent’s arguments as outlined in Justice Breyer’s opinion. The dissent’s opinion is of particular note in *McCutcheon* because of how narrow the decision was. Justice Breyer – along with Justice Ginsburg, Justice Sotomayor, and Justice Kagan – concluded “the majority of the Court […] is wrong to [overrule the aggregate limits]” because “its conclusion rests upon its own, not a record-based, view of the facts.” In its 30-page dissenting opinion, Justice Breyer boldly stressed that the plurality’s decision to strike down aggregate limits “creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate’s campaign.” Although the dissent never truly provides concrete evidence to support their striking claim, they do directly address portions of the plurality’s opinion and attempt to provide counter evidence to further their argument. In doing so, Justice Breyer outlined three distinct, yet all “fatally flawed,” claims the plurality made that, as the Justice claimed, resulted in their misguided decision in *McCutcheon*. First, Justice Breyer highlighted that the plurality deemed the aggregate limits did not further any important government objective. Second, he argued that the majority falsely assessed the aggregate limits to not fulfill their intended objective outlined in *Buckley* – that is the safeguarding of the base limits. Third, Justice Breyer underscored that the plurality erred in understanding the aggregate limits to not be a “reasonable” policy tool based off of alternative regulations. Although each of these three points were contested at length in the Justice’s opinion, it becomes evident that at the core lies the disparity in the plurality’s and the dissent’s definitions of “corruption.” Indeed, it is from this pivotal difference that nearly

---

46 Id.
47 Id.
50 Id.
51 Id.
52 Id. at 54.
53 Id.
54 Id. at 64.
every other disagreement stemmed from – and is thus the reason the definition requires a detailed examination.

III. Defining Corruption

Almost certainly the single most pivotal component to the McCutcheon decision was the definition of corruption. It has previously been made clear that in coming to a decision, the Court weighed the burden on free speech against the Government’s compelling interest. Yet it is vital to emphasize that in McCutcheon, “the court identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.”55 This singular important government interest, most often defined as quid pro quo corruption (or the “narrow” view of corruption by its critics), is characterized by limiting Congress to solely rein in “large contributions that are given to secure a political quid pro quo from current and potential office holders,”56 in addition to limiting the “appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” to a particular candidate.57 This so called quid pro quo corruption has been clearly articulated and widely recognized since Buckley, wherein it was stated “quid pro quo corruption occurs when elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns.”58 Proponents of this definition – evidently including the five Justices in the McCutcheon majority – posit that any broader view of corruption results in a dangerous and slippery slope of First Amendment infringements in order to protect “collective speech” and even the playing field. Indeed, the McCutcheon plurality made it abundantly clear that “the First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”59 However, the point of contention is fostered from the fact that precedent on the issue is far from unwavering. As Justice Stevens wrote in Citizens United v. F.E.C, the Supreme Court “has not always spoken about corruption in a clear or consistent voice.”60

Thus, the ensuing contrast is exemplified by a central paragraph of Justice Breyer’s dissenting opinion in McCutcheon. In it, Justice Breyer summarizes what has been labeled the “broad view” of corruption. In his opinion, the Justice asserts the sole reason the plurality’s decision is plausible is because it “defines corruption too narrowly.”61 It is the dissent’s belief that corruption should include, yet not be limited to, “efforts to garner influence over or access to elected officials or political parties” – a concept first articulated

56 Id. at 25.
57 Id.
58 Id. at 43.
59 Id. at 26.
in *Citizens United*. In fact, when examining how the Court defined corruption in *Buckley*, *Austin*, *Nixon*, *Davis*, *McConnell*, and *Citizens United*, it is apparent that there is no consistently applied definition of corruption – for each employed a distinct interpretation of the term. Nevertheless, the dissent staunchly defended its broader definition of corruption, emphasizing the fundamental and paramount interest to ensure “a few large donations not drown out the voices of the many” and ensure the link between political thought and political action not be severed. Yet, as encouraging as Justice Breyer’s ideals may sound, Justice Scalia’s words from his opinion in *Austin* (where the Court upheld a broader definition of corruption, similar, but not identical, to the one outlined by the dissent in *McCutcheon*) serve as a resounding contrast:

“The Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.”

Indeed, although the four dissenting Justices attempted to appeal to the preservation of the political “chain of communication” between politicians and the public, the Justices of the plurality feared a slippery slope of infringement on political free speech in trying to “even the playing field.”

**IV. The Issue of Scrutiny**

After touching on the difficulties that arise when attempting to define corruption – the government’s single important or compelling interest – it is imperative to then understand the importance of campaign contributions as political speech. Since the 1974 *Buckley* ruling, it has been well articulated that money is speech. This classification results in a subsequent burden, or protection, in favor of the least restrictive limits to campaign contributions as possible. For, anytime “the government restricts speech, the government bears the burden of proving the constitutionality of its actions.” In *Buckley*, the Court ruled campaign contributions have “substantial expressive significance” and

---

62 Id. at 55.
63 Id.
64 COLLINS & SKOVER, *supra* note 1, at 92-93.
67 Id.
68 Id.
Talking Money: The Constitutionality of Limits to Campaign Contributions

consequently merit a “heightened level of judicial review” to legislate its regulation.\footnote{Buckley, 424 U.S. 1.} However, the implementation of strict scrutiny has since been highly contested by advocates of increased campaign regulations. As the Justices of the McCutcheon dissent argued, by holding campaign contribution limits to strict scrutiny “[the plurality] understates the importance of protecting the political integrity of our governmental institutions.”\footnote{McCutcheon v. Fed. Election Comm’n, 572 U.S. 1, 53 (2014) (Breyer, J., dissenting).} 

Michael T. Morley, the counsel of record for the plaintiff Shaun McCutcheon, provided a merit brief that spent a considerable portion exploring the reasoning behind the need for strict scrutiny to protect basic freedom of speech.\footnote{Brief for Appellant Shaun McCutcheon, McCutcheon v. Fed. Election Comm’n, 572 U.S. ___ (2014) (No. 12-536).} First, Morley underscored that contribution limits significantly burden First Amendment rights – thus warranting rigorous review.\footnote{Id. at 21.} Second, that aggregate limits do not further any constitutionally permissible government interest because whether a donor contributes within the base limits to one, nine or ten candidates, the risk and appearance of corruption is unchanging.\footnote{Id. at 34.} Finally, Morley contended the aggregate limits were not tailored narrowly enough to be a constitutionally permissible constraint on First Amendment rights.\footnote{Id. at 55.} Each of these three arguments attested to a specific requirement for the application of strict scrutiny. Indeed, perhaps the most critical component to the argument for the imposition of strict, rather than standard, scrutiny is the substantial burden or penalty on an individual who wishes to “robustly exercise First Amendment rights.”\footnote{Id.} If this stricter test were to be applied, argued James Bopp in a brief written on behalf of the RNC, the government would have to demonstrate a “large-conduit-contribution risk and may not meet its burden with broad-brush theories of corruption instead.”\footnote{Brief Opposing Motion to Dismiss, McCutcheon, McCutcheon v. Fed. Election Comm’n., 572 U.S. (2014) (No. 12-536).}

Clearly the arguments presented by Morley and Bopp, among others representing the plaintiffs, were successful – at least in part. As the Court sided with the appellants, the plurality were seemingly convinced protection of the First Amendment and political speech outweighed the benefits, if any, garnered by the aggregate limits. However, the reason for the appellants’ claims only being partially successful is due to the fact that the majority truly did not need much swaying. In fact, the only pivotal portion of the plaintiff’s briefs was Morley’s third and final argument that the aggregate limits were not sufficiently tailored to infringe on protected political speech. Chief Justice Roberts even ventured to say, “[the Court] need not parse the differences between the two standards in this case […] because we find a substantial mismatch between the Government’s stated

\begin{footnotes}
\footnote{Buckley, 424 U.S. 1.}
\footnote{McCutcheon v. Fed. Election Comm’n, 572 U.S. 1, 53 (2014) (Breyer, J., dissenting).}
\footnote{Brief for Appellant Shaun McCutcheon, McCutcheon v. Fed. Election Comm’n., 572 U.S. ___ (2014) (No. 12-536).}
\footnote{Id. at 21.}
\footnote{Id. at 34.}
\footnote{Id. at 55.}
\footnote{Id.}
\footnote{Brief Opposing Motion to Dismiss, McCutcheon, McCutcheon v. Fed. Election Comm’n., 572 U.S. (2014) (No. 12-536).}
\end{footnotes}
objective and the means selected to achieve it, the aggregate limits fail even under the “closely drawn” test.”\textsuperscript{79}

\textbf{V. Corruption and The Democratic Process}

Perhaps the most fundamental and overlooked feature of \textit{McCutcheon} in need of consideration is not an argument made by the plaintiff or Government, but rather what both sides did \textit{not} include in their arguments before the courts. For, mentioned in a single, brief footnote, Chief Justice Roberts noted:

\begin{quote}
“\text{T}he parties have treated the question as a purely legal one \[as opposed to developing an evidentiary record], and the Government has insisted that the aggregate limits can be upheld under the existing record alone.”\textsuperscript{80}
\end{quote}

Thus, despite the protests by the dissent to remand in order to expand the lower court’s record to include significant empirical data, both the Government and the plaintiffs chose to not include such evidence in the District Court – and the Supreme Court must “take the case as it comes to [them].”\textsuperscript{81} However, it is critical to examine this aspect of the issue, for even though the courts hearing \textit{McCutcheon} could not take such objective evidence into consideration, a proper, detailed, analysis of external research provides us with a unique perspective on the \textit{McCutcheon} ruling.

First, it must be stressed that it is indisputable that with each new election cycle, the cost to run for a political position continues to rise. In fact, since 1974 – the year of the \textit{Buckley} decision – the average amount it takes to run for reelection to the House went from $56,000 to over $1.3 million in 2008.\textsuperscript{82} It is, therefore, fairly evident that campaign contributions play a vital role in the political process. However, the question, as always, becomes whether too much money from an individual contributor to too many candidates leads to corruption, or the appearance of corruption, which severely undermines democracy. And although the legal field remains as divisive as ever, the general consensus among academics and statisticians appears far more unequivocally unanimous.

“The evidence is pretty overwhelming \[that\] money does not play much of a role in what goes on in terms of legislative behavior.”\textsuperscript{83} These words, expressed by the notoriously fervent opponent of campaign finance regulation\textsuperscript{84} and former F.E.C. Chairman Bradley Smith, echo the fundamental findings of many scholars in the field. Indeed, although it must be conceded that some – such as Harvard’s Lawrence Lessig, or

\textsuperscript{79} \textit{McCutcheon} v. Fed. Election Comm’n, 572 U.S. 1, 16 (2014).
\textsuperscript{80} \textit{Id.} at 20.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Collins & Skover, supra note} 1.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Bradley A. Smith, The Folly of Campaign Finance Reform} 12-13 (2001).
John Nichols and Robert McChesney in *Dollarocracy* – assert there are factors such as dollar dependency\(^85\) or the influence of mass media that undermine the political process, there is a considerable portion that propose large contributions have little negative impact on democracy.\(^86\) Where there is even greater agreement, however, is among those who maintain aggregate limits do not catalyze, nor even mitigate, corruption or the appearance of corruption. Epitomizing this group is Paul Sherman, senior attorney at the Institute of Justice, who ventures to argue that no real world evidence has ever been presented to demonstrate campaign finance restrictions have done anything to reduce corruption or its appearance throughout their forty year existence.\(^87\) In a recent debate, Sherman emphasized:

"One thing that not a lot of people know is that the overwhelming majority of American states do not have aggregate contribution limits like the federal aggregate limit. [...] There is not a shred of evidence that was presented in *McCutcheon*, or even that was not presented in the case, finding that those states are either more corrupt or less well governed than states that do have such limits."\(^88\)

And Sherman’s words neither stand alone, nor are they unfounded. Indeed, he is supported by a host of academic papers and scholars from the economic, political and legal arenas. In 1994, MIT professor Steven Levitt published a study finding “campaign spending has an extremely small impact on election outcomes, regardless of who does the spending.”\(^89\) More recently, economist Jeff Milyo concluded “current data suggests that increments to spending have negligible effects on vote shares,”\(^90\) while a later publication by Adriana Cordis and Milyo found “no strong or convincing evidence that state campaign finance reforms reduce public corruption.”\(^91\)

Other notable journals have actually demonstrated the regulation of campaign contributions deteriorate the very process it is intended to safeguard – although such a group is certainly far from the preponderance. A comprehensive study in the American Political Science Review by a Yale University professor outlines how limits such as those struck down in *McCutcheon* “significantly increase incumbent defeat rates [and] may

---

\(^85\) **JOHN NICHOL & ROBERT MCCCHESNEY, DOLLAROCRACY: HOW THE MONEY AND MEDIA ELECTION COMPLEX IS DESTROYING AMERICA** (2013).

\(^86\) **LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS**, (2011).


\(^88\) *Id.*


improve the chances of challengers.” In contrast, Ilya Shapiro of the Cato Institute approached the issue from a unique perspective in his amicus brief in support of the plaintiffs. In the brief, Shapiro cited that “spending increases public knowledge of the candidates, across essentially all groups in the population. […] Getting more money into campaign should, on the whole, be beneficial to American democracy.” However, perhaps most striking were the findings of a University of Pennsylvania law professor who specifically addressed the issue of campaign regulations and the perception of corruption. In the publication – which examined forty years of survey data – Nathaniel Persily argues, “trends in public perception of corruption have little to do with the campaign finance system” – thus directly attacking a major component of the government’s singular compelling interest outlined in the McCutcheon decision. In context, the words of former Senator and D.C. Circuit Court Judge James Buckley that “severely limiting the size of individual contributions [make] the search for money a candidate’s central preoccupation” foster a serious concern over whether campaign contribution limits result in more harm than good.

VI. Two Sides to the Same First Amendment Coin

“[T]his Court’s decision in Buckley v. Valeo denigrates core First Amendment speech and should be overruled.” This first line of Justice Clarence Thomas’ opinion in McCutcheon is quite possibly the most controversial and discounted aspect of the entire ruling. Yet, it is in turn undoubtedly the most considerate of political speech and the substantial protection such speech warrants. In his succinct 5–page opinion concurring in judgment, Justice Thomas considerably shifted away from the pigeonholed lens through which the other Justices examined the constitutionality of the limits before them. Justice Thomas instead focused much more broadly on the legality of the limits first upheld in Buckley, as well as the very logic that was used to foster them. Utilizing the McCutcheon ruling and the plurality’s own opinion, Justice Thomas attempts to undermine the entirety of Buckley and thus campaign limits as a whole by arguing that from the plurality’s logic follows a conclusion that limiting the amount of money a person may give to a candidate imposes a direct and unconstitutional restraint on that person’s right to political speech. Thus, Justice Thomas adopted the position that the very core of campaign regulations – the distinction between expenditures and contributions – is no longer impregnable.

---

95 *Collins & Skover, supra* note 1, 62.
97 *Id.* at 51.
Indeed, the Justice’s opinion radiates the traditional belief in the free and open marketplace of ideas the Founding Fathers envisioned.

Justice Thomas’ position does not come without evidence, either. Although the distinction between expenditures and contributions has been widely accepted, recent precedent, including but even before McCutcheon, can be seen as pointing to otherwise. As the Justice wrote in his opinion:

“I am wholly in agreement with the plurality's conclusion on [aggregate limits] [...] I regret only that the plurality does not acknowledge that today’s decision, although purporting not to overrule Buckley, continues to chip away at its footings.”

It is truly far from unreasonable to argue that political giving and political spending are alike, despite what has been held since 1974. Further, it is equally as sound to reason that, just as aggregate limits have been found unconstitutional because they limit an individual attempting to robustly exercise his First Amendment rights, so, too, do base limits impose an arbitrary limit on American voices. Indeed, “what remains of Buckley is a rule without a rationale.” Just as aggregate limits were not narrowly tailored enough to match the substantial burden on political speech, so should base limits not meet this test. For, despite the Court’s contention that such limits impose only a “marginal” restriction on speech because a contribution “does not communicate the underlying basis for the support,” the law does not require a speaker to justify the basis or motive for his or her views to merit total First Amendment protection. Fundamentally, there is no just distinction that lies between a writer with a pen, a protestor with a megaphone, a donor to a charity, or a contributor to a candidate. Each desires to exercise his right to voice his support for specific values, ideologies, goals, or otherwise. Therefore, if campaign contributions were to be held to the same standard of protection as the other previously mentioned forms of speech, the base limits would fail to pass the test of strict scrutiny and, just as the aggregate limits, the Court would face little choice but to rule them unconstitutional.

Conclusion

The Supreme Court’s decision to eliminate the arbitrary and overbroad aggregate limits on campaign contributions was a seemingly logical decision and an appropriate application of precedent. The plurality was certainly justified in their analysis and reasoning, as aggregate limits do not do enough to further the sole objective of preventing
corruption and the appearance of corruption. Chief Justice Roberts outlined several less intrusive means to mitigate the government’s compelling interest, each of which simply promoted a more comprehensive and open system for monitoring campaign contributions, without imposing unnecessary burdens on individuals trying to exercise their constitutional rights. One that was explored, but that should be further pursued, is that of more effective earmarking and contribution disclosures. Ideally, any member of the public would then be able to review the source of substantial contributions to a particular candidate. This method entrusts citizens with the ability to review and reason any potential meaning behind a major donor and how those values may reflect on the candidate, or vice versa. Such a system effectively combats the issue of corruption, as well as its appearance, without unduly infringing on those wanting to voice their strong beliefs in whatever values or ideas a candidate embodies through financial contributions.

It also becomes clear that aggregate limits were ineffective from an evidentiary standpoint. Based on multiple publications and scholars, the limits appeared to be either futile in preventing corruption or actually detrimental to the democratic process. This stems from the fact that leveling the proverbial playing field is not, despite what many may perceive at first glance, an appropriate goal legally or politically. Rather, the ultimate goal is that of an unfettered exchange of values, ideas, and beliefs – to the greatest extent such an ideal can be realistically achieved. With this, the next appropriate step for the Supreme Court would be to overrule Buckley in its entirety rather than continuing to chip away at what is left of it. With more targeted anti-circumvention measures than ever before, the subjective base limits on contributions are superfluous to say the least, and undemocratic at most.
The Constitutionality of the Death Penalty After Botched Executions

Zoe Goldstein

The history of the capital punishment debate in the United States is one of virtually uninterrupted contention. The uniqueness of the death penalty issue, which has contributed to its longevity, lies in its repercussions in the matter of moral justice. Since its birth, the United States has been a pioneer in the promotion of civil liberties, yet it is still plagued by the ethical struggle inherent in the use of capital punishment. Lawmakers and criminologists have attempted to develop the most humane ways possible to execute convicts, including hangings, the electric chair, and lethal injection. However, from a legal and moral standpoint, it is highly debated whether or not there is really a humane way to kill someone, without violating his or her civil liberties. The constitutionality of capital punishment remains contested.

The constitutionality of the death penalty is once again called into question in light of four separate botched executions in 2014 that inflicted severe pain and unnecessary suffering on their victims. According to New Republic magazine, 2014 was “the worst year in the 37-year history of lethal injection. While previous years have seen several executions where states struggled to establish IV access, all of this year’s problematic executions have had issues after the drugs began to flow.”¹ In modern context, it is doubtful that the death penalty remains constitutional, especially with regards to the Fifth, Eighth, and Fourteenth Amendments. Considering the aftermath of these mishandled executions in 2014, the experimental nature of capital punishment proves that a certain, albeit small, inconsistency exists on a case-by-case basis. Furthermore, it is worth investigating whether or not the death penalty actually serves its retributive purpose in deterring crime, for it would be excessive if it did not do so. Legally, its discriminatory implementation and inconsistency with democratic values makes the death penalty both cruel and unusual.² Therefore, capital punishment should be illegal in the United States. It violates both the United States Constitution and

² CASE AGAINST THE DEATH PENALTY, AMERICAN CIVIL LIBERTIES UNION (Dec. 11, 2012).
international humanitarian law and it is ineffective as a deterrent for future crimes. This article discusses the background of the controversy surrounding the death penalty, analyzes its modern relevance in both a national and international context, and concludes by recommending that the United States ban capital punishment on the grounds of constitutional violations.

I. Background

“The Worst Year in Lethal Injection History”

On January 9, 2014, the state of Oklahoma executed thirty-eight-year-old Michael Lee Wilson for the murder of his coworker at a convenience store in 1995. His last words were, “I feel my whole body burning,” though there were no physical signs of distress. Due to a shortage of the most commonly used drug in lethal injections, sodium thiopental, the state decided to use the more controversial pentobarbital, manufactured in Denmark. The Danish government explicitly stated it would not allow use of pentobarbital for executions because Denmark prohibits capital punishment and because the drug can be contaminated, causing excruciating pain prior to death. Despite this knowledge, Oklahoma carried out the execution. A firestorm erupted over the state’s lack of precaution in using the drug. Tanya Greene, advocacy and policy counsel on criminal justice issues for the American Civil Liberties Union (ACLU), claimed that Wilson’s execution violated the Eighth Amendment because the use of drugs in executions is “basically an experiment on human beings; the risk of extended, painful death is very high.” The experimental nature of Wilson’s execution therefore violated his right to be free of cruel and unusual punishment.

A week later, the state of Ohio executed Dennis McGuire at the Southern Ohio Correctional Facility. A jury found McGuire guilty of raping and killing a pregnant 22-year-old woman named Joy Stewart in 1989. His lethal injection consisted of a never-before-used cocktail of a sedative called midazolam and a painkiller called hydromorphone. Due to the experimental nature of the drugs, McGuire’s attorney attempted to block the use of the injection, arguing that it would cause “undue agony and

---

3 Crair, supra note 1.
5 Id.
7 Id.
8 Id.
10 Crair, supra note 1.
The Constitutionality of the Death Penalty After Botched Executions

terror and violate McGuire’s constitutional protection from cruel and unusual punishment.” 11 The execution took twenty-five minutes – the longest execution in Ohio since it resumed use of the death penalty in 1999. 12 McGuire made “loud snorting noises” and “appeared to gasp several times” for about ten minutes straight. 13 The context of the botched execution is alarming considering a similar issue had happened just a week before, prompting a number of states to second guess their views on capital punishment. 14 McGuire’s attorney was accused of counseling him to make a show of his death, and coaching him to fake symptoms of suffocation. However, multiple witnesses confirmed that McGuire was indeed unconscious at the time he began struggling to breathe. 15 Jennifer Moreno of the Death Penalty Clinic at the University of California School of Law commented shortly after the incident, “Two botched executions in the past two weeks certainly raise lots of concerns about whether they were carried out in a humane way.” 16 Her doubts highlight the concerns of many Americans that state governments may be overstepping their boundaries in inflicting capital punishment.

To complicate the matter, in April, Oklahoma once again fell under scrutiny in the execution of convicted murderer Clayton Lockett. Executioners pushed the IV catheter into Lockett’s groin, causing the drugs to fill his tissue and not in the intended destination of his bloodstream. 17 Lockett’s attorney, Dean Sanderford, claimed his client’s body “started to twitch,” and then "the convulsing got worse. It looked like his whole upper body was trying to lift off the gurney. For a minute, there was chaos." 18 Doctors determined a vein in his groin had exploded and called off the execution; however, Lockett died shortly after of a heart attack. 19 According to CNN, Lockett’s execution has been labeled as what may have been the worst lethal injection in United States history, prompting Steven W. Hawkins, the Executive Director of Amnesty International USA, to issue the statement: "Last night, the state of Oklahoma proved that justice can never be carried out from a death chamber," by lethal injection or otherwise. 20

11 Strauss, supra note 9.
12 Id.
13 Id.
14 Id.
16 Strauss, supra note 9.
19 Robinson, supra note 17.
20 Levs, supra note 18.
The final botched execution case of 2014 occurred in July, when the state of Arizona executed Joseph Rudolph Wood III with the same combination of drugs as Ohio used in the lethal injection given to Dennis McGuire. In light of the three highly publicized botched executions before his, Wood understood that his civil liberties were in danger. He argued before his death that he had a First Amendment right to details about the state’s method for lethal injections, the qualifications of the executioner, and the company that manufactured the drugs. The state did not grant him these details before his death, which was one of the longest executions in United States history. After gasping over 660 times, Wood finally died one hour and fifty-seven minutes after the executioner administered the injection. According to defense attorney Dale Baich, the execution “should have taken ten minutes.” Wood’s case, along with the three others that went horribly wrong in 2014, has called into question the constitutionality of the death penalty in a country that deems cruel and unusual punishment illegal.

**Legal Precedent and Controversy**

Public response to these executions has brought the issue of capital punishment to the forefront of American legal policy once again. Three Amendments to the United States Constitution have been historically used to challenge the constitutionality of the death penalty. The most vocal dissenters cite the Eighth Amendment as clear evidence of the death penalty’s unconstitutionality. The Eighth Amendment prohibits excessive fines and bail, and also forbids the use of “cruel and unusual punishment.” James Wilson, a prominent American politician from Pennsylvania, wrote during the drafting of the Constitution: “A nation [that tolerates] cruel punishments becomes dastardly and contemptible. For in nations, as well as individuals, cruelty is always attended by cowardice.” As such, the Eighth Amendment does not only afford protection for an individual convicted of a crime, but it also stems from an important belief in moral justice.

The Fifth and Fourteenth Amendments are also cited in cases relating to capital punishment. The Fifth Amendment states that a person cannot be deprived of “life, liberty, and property without the due process of law.” In a similar manner, the Fourteenth Amendment applies the Due Process Clause to states, adding that the state cannot “deny to any person within its jurisdiction the equal protection of the laws.” The constitutionality of the death penalty is called into question in cases where due process

22 Id.
23 *Id.*
24 *Id.*
25 U.S. Const. art. VIII.
27 U.S. Const. amend. V.
28 U.S. Const. amend. XIV, § 1
and equal protection may not have been observed. Due process concerns are raised when
evidence arises of those on death row being wrongly convicted, due to issues such as
procedural errors or inadequate representation. Equal protection issues also stem from
the problem of inadequate representation. According to the ACLU, a prominent advocate
against capital punishment, “Inadequate representation is almost always the result of
poverty. Poor defendants are assigned counsel, who may be inexperienced and are almost
always over-worked. Unequal protection is a violation of the 14th Amendment.” The
drafters of the Constitution knew that many of those who escaped to America “had stood,
helpless to defend themselves, before biased legislators and judges” in the old world, and
had suffered immense and undeserved consequences because of it. The possibility that
a person could be wrongly convicted and sentenced to death poses serious constitutional
violations.

Two landmark Supreme Court cases encompass the issue of the Eighth and
Fourteenth Amendments and their applicability to capital punishment. In Furman v.
Georgia (1972), a 5-4 majority held that the imposition and implementation of the death
penalty in Furman’s case violated the Eighth Amendment’s prohibition of cruel and
unusual punishment. Only Justices Brennan and Marshall found the death penalty
unconstitutional in all circumstances. However, many of the concurring justices
focused on the “arbitrary nature with which death sentences have been imposed, often
indicating a racial bias against black defendants.” The Court reversed Furman just four
years later in Gregg v. Georgia. There, it issued a 7-2 majority opinion finding that “a
punishment of death did not violate the Eighth and Fourteenth Amendments under all
circumstances. In extreme criminal cases, such as when a defendant has been convicted
of deliberately killing another, the careful and judicious use of the death penalty may be
appropriate if carefully employed.” Although Furman was ultimately reversed, the
Court still placed constraints on the extent of the Amendments’ applicability, reserving
use of the death penalty for “extreme criminal cases.” States that still practiced the
death penalty were forced to rework their methods to fit with the Court’s new guidelines
of what crimes warrant the use of capital punishment and what methods states can use.

Controversy surrounding the death penalty has presented many different
arguments, most leaning towards opposition. Much of the issue originates in the
discriminatory nature of capital punishment, considering that an overwhelming majority

30 Id.
31 WILLIAM COHEN, DAVID J. DANELSKI, & DAVID A. YALOF, CONSTITUTIONAL LAW: CIVIL LIBERTY
AND HUMAN RIGHTS 1 (Foundation Press, 6th ed. 2007).
33 Id. at 258.
34 Id. at 242.
35 Id. at 405.
36 Id.
of those on death row currently are nonwhite males. According to Professor William O. Hochkammer of Northwestern University, “If capital punishment is not uniformly applied, some say it should be abolished.” Furthermore, states that allow the death penalty do not disclose the sources of their lethal drugs, nor do they always grant death row inmates details about how they will be killed. Fordham University Law professor Deborah Denno summarizes the issue: “Until death penalty states are willing to focus more on solutions than secrecy… execution is mired in an endless cycle of difficulty and disorder.” Since this principle was illustrated four times in the past year, the constitutionality of the death penalty is now dubious.

II. The Issue of Capital Punishment and its Modern Relevance

United States Context

In a country that values the word of the people in policy decisions, at least in theory, public opinion matters a great deal. American views on the death penalty have fluctuated over recent decades, typically based on emotional responses to media coverage of homicides, rapes, and deadly kidnappings. Dennis McGuire’s fatal stabbing of Joy Stewart, a twenty-two-year-old pregnant newlywed, justifiably angered Americans beyond resolve. However, an emotional response to heinous crimes does not inherently justify the use of capital punishment as both retribution and as a method for deterring future crime. Capital punishment is an especially difficult issue concerning civil liberties because of the emotional and moral ambiguity involved in deciding its constitutionality. Once emotional reactions are set aside; however, it is evident that the Constitution does protect United States citizens from cruel and unusual punishment in the form of the death penalty, no matter how reprehensible the crime may have been.

Research suggests that Americans continue to favor capital punishment in the abstract for the purpose of retribution, but most people make this assumption before understanding the underlying consequences and implications. Yale Law School Professor Stephen Bright, in a debate on the modern view of capital punishment at Georgetown University, claimed, “There’s no question that 70% or more of people in the United States in the abstract support the death penalty - the question remains though,

38 Id. at 361.
39 Deborah Denno, Lethal Injection Secrecy Post-Baze, 102 THE GEORGETOWN LAW JOURNAL 1, 1 (2014).
40 Id. at 54.
would they support it if they saw the actual people."  

If the general public took the time to look at both sides of each case, emotional responses aside, Bright argues, ambiguities arise. He implores: “When it comes to strapping [a mentally ill, schizophrenic, brain damaged man] down in the electric chair and putting 2,000 volts of electricity through his body… how do you feel about the death penalty there?”

As Justice Marshall asserted in *Furman v. Georgia*, public opinion is important, but only if it is informed public opinion. He wrote, “It is not possible to determine whether capital punishment as it actually functions offends a person’s sense of decency if that person is ignorant or misinformed about capital punishment.”

He believed that many people would be subject to change their mind after witnessing the physical and psychological realities of executions. The unconstitutionality of such a punishment not only depends on its cruel and unusual nature, but it also depends on the social, economic, and political barriers to justice that an inmate on death row may face.

Since the late 1990s, the American Bar Association (ABA) has taken an increasingly firmer stance against capital punishment. Its main complaints with the death penalty are not exclusively about cruel and unusual punishment, but also about equal protection – specifically racial bias, poor quality of counsel, and high execution rates of mentally ill and disabled people.

In *Furman v. Georgia*, Justice Douglas claimed that death penalty statutes were “pregnant with the possibility of discrimination.”

In the same case, Justice Marshall said: “Under the Cruel and Unusual Punishment Clause that the death penalty was unusual because of the race discrimination.”

Statistics show that eighty percent of people receiving the death sentence across the United States committed crimes against white people, partly because “our criminal justice system has been the part of our society that’s been least affected by the civil rights movement.”

In 2014 alone, three of the four aforementioned death row inmates who suffered from botched executions were African-American. Many Americans refuse to recognize this alarming statistic about Death Row, attributing race as the cause of capital crimes rather than the reality, which is that race often determines whether or not a person is convicted of a capital offense.

Another issue the ABA mentions regarding capital punishment is the lack of quality counsel for those of poor socioeconomic backgrounds, raising equal protection and due process concerns under the Fifth Amendment.

Professor Bright summarizes

---

43 *Id.* at 1356.
44 *Id.*
46 Kozinski & Bright, *supra* note 42 at 1356.
47 *Id.* at 1358.
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.* at 1356.
this argument: “People are sentenced to death not for committing the worst crime, but because they have the misfortune to be assigned the worst court-appointed lawyer by the judge who is presiding over the case.” He cites a case in which a woman named Judy Haney, currently on death row, was sentenced to death at a trial to which her lawyer showed up drunk. The ABA has conducted a series of Death Penalty Assessments in randomly chosen states. In many of the ABA’s reports, including one from the Texas Capital Punishment Assessment Team in 2013, researchers highlight the ineffectiveness of state-appointed defense counsel. The report concluded, “The criteria developed by the Texas legislature for qualification of defense counsel in capital cases fall short of ensuring high-quality legal representation, emphasizing experiential requirements which may do very little to improve the quality of representation.” In essence, whether or not the death penalty is administered may not always depend on the crime committed - it may often depend on the quality of counsel appointed to the defendant.

Lastly, the ABA criticizes the United States capital punishment system’s high execution rates of mentally disabled people. The ABA’s Death Penalty Assessments cited overwhelming evidence in multiple states of poor legal assistance given to the mentally ill and inaccurate information given to juries about convicting people with disabilities. For example, the Virginia Death Penalty Assessment Team found that “Virginia’s rules and laws do not afford adequate protection of individuals with several mental disorders or illnesses in death penalty cases... Furthermore, Virginia does not forbid execution of the severely mentally ill under any standard.” In Texas, courts gave jurors inaccurate instructions when deciding cases involving the mentally disabled. State law does not require jurors to be instructed that a “mental disorder or disability is a mitigating, not an aggravating, factor and that evidence of mental disability should not be relied upon to conclude the defendant represents a future danger to society.” The totality of the ABA’s Death Penalty Assessments have revealed constitutional violations regarding capital punishment under the rights of due process and equal protection.

Essentially, recent investigations into American death penalty methods prove that capital punishment is a parochial solution favoring retribution and substituting for current

---

52 Id. at 1356.
53 Id. at 1354.
57 Texas Report, supra note 54.
inefficient law enforcement methods. Columbia Law Professor James S. Liebman, in his article entitled “Minority Practice, Majority’s Burden: The Death Penalty Today,” claims, “It turns out that the imposition of death sentences, particularly for felony murder, provides parochial and libertarian communities with a quick and cheap alternative to effective law enforcement.”58 The death penalty in the United States is a minority institution, mostly used by small, provincial towns that often target specific races or classes, incurring major costs for the majority of society as a whole. Professor Bright claims, “At one time there was a necessary argument. There weren’t any prisons, there wasn’t any place to put people, and therefore in a frontier society, the death penalty… was appropriate. That necessity is not there anymore today.”59 As the United States continues to modernize in a global era, supposedly as a pioneer of civil liberties, the international community sees a perplexing dichotomy in a forward-facing nation that still chooses the “eye-for-an-eye” approach to justice.

International Context

While the United States opinion on the death penalty is mired in controversy, the international view is less contested. Over two-thirds of the world has eradicated capital punishment, and about three countries per year eliminate it either in law or in practice.60 International trends in use of the death penalty are therefore moving “unmistakably towards abolition,” according to Amnesty International.61 UN Secretary General Ban-Ki Moon declared in July 2014, “The death penalty has no place in the twenty-first century,” citing it as a “cruel and inhumane practice” due to wrongful convictions, deterrence and public opinion, and discrimination.62

In fact, since the mid-1980s, the United Nations and other international organizations have taken a firm stance against capital punishment. In 1984, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment drafted a series of resolutions that afforded remediation to those who suffered from cruel and unusual punishment.63 This convention laid the groundwork for the United Nations’ stance against the death penalty. The United States signed the resolutions in 1988, but then later objected to them in 2011, despite an overwhelming number of signatures from its Western counterparts.64 UN Secretary General Ban-Ki

59 Kozinski & Bright, supra note 42 at 1355.
60 Death Penalty Facts, AMNESTY USA, 1, 3 (2012).
64 Id.
Moon has now called on states to “support the resolution on the moratorium on the use of the death penalty; and take concrete steps towards abolishing or no longer practicing this form of punishment.”\(^\text{65}\) Furthermore, in response to Clayton Lockett’s death in 2014, a spokesman for the United Nations Office of the High Commissioner for Human Rights (OHCHR) claimed the execution amounted to “cruel, inhuman, and degrading treatment.”\(^\text{66}\) The international community is responding, and the future does not look promising for acceptance of capital punishment in the United States.

International opinion on the death penalty is significant for multiple reasons. It is in the United States’ best interests to be seen as a positive player in international humanitarian law, and not be seen as hypocrites. Since the United States keeps the death penalty legal, its stance on international human rights is paradoxical. Professor Bright explains, “For the United States it’s very hard to lecture China or any other country on human rights violations when we lead the world in the execution of juveniles.”\(^\text{67}\) In order for United States foreign policy to be taken seriously, it cannot expect to hold other countries to higher standards in human rights while failing to accurately evaluate its own practices. International views on the United States are increasingly important in a globalized world, and the provincial nature of the death penalty in the United States raises doubts in the country’s ability to keep up with modern criminal justice.

However, a perplexing question still remains: Why is there still support for the death penalty in the United States despite such negative views worldwide? In the mid-1990s, American support for the death penalty reached a record high, with almost seventy-five percent favoring capital punishment in 1995.\(^\text{68}\) Many Americans, including prominent lawyers and politicians, justify the death penalty in terms of proportionality to the severity of the crime.\(^\text{69}\) If the punishment is roughly proportional to the severity of the crime committed, most Americans are satisfied if use of the death penalty is deemed necessary. However, this often leads to ambiguity and inconsistency in sentencing, creating unequal protection and due process concerns.

Furthermore, Professor Liebavit warns, “Although supported in principle by two-thirds of the public and even more of the States, capital punishment in the United States is a minority practice when the actual death-sentencing practice of the nation’s 3000-plus counties and their populations are considered.”\(^\text{70}\) In the abstract, capital punishment is supported by a majority, but is actually practiced by a very small minority. So, although

\(^{65}\) No Place in 21st Century, supra note 62.  
\(^{67}\) Kozinski & Bright, Modern View of Capital Punishment, supra note 42 at 1357.  
\(^{70}\) Liebman & Clarke, supra note 58, at 255.
the American majority supports capital punishment conceptually, “research over the last twenty years has tended to confirm the hypothesis that most people’s death penalty attitudes are based on emotion rather than information or rational argument. People feel strongly about the death penalty, know little about it, and feel no need to know more.” The nature of the 2014 botched executions highlight a multitude of legal problems surrounding the use of capital punishment in the United States, putting its constitutionality into question.

III. Solution

Unconstitutionality

Despite decades of debate in the United States, a viable solution has not yet surfaced for the constitutional problems that capital punishment poses. In the past, courts have circumvented ruling on the issue at large by deciding whether the methods used to execute prisoners are legal under the Eighth Amendment, instead of finding whether or not the death penalty itself is legal. In Furman v. Georgia, Justice Brennan stated, “The cruel and unusual punishments clause, like the other great clauses of the Constitution, is not susceptible of precise definition.” Historically, the cornerstone of determining whether a punishment is cruel or unusual has rested on proportionality – whether or not the crime committed is justifiably equal to the punishment incurred. In the case of Coker v. Georgia (1977), the Court held that the Eight Amendment “normally bars punishments that are barbaric, but also those that are excessive in relation to the crime committed.” The proportionality theory has satisfied most Americans and has thus far failed to address constitutional issues. However, the botched executions that occurred in 2014 highlight the possibility that the experimental nature of the death penalty may put proportionality out of the question.

In order to make capital punishment more humane, the United States has arguably rejected more “barbaric” forms of execution. The firing squads, guillotines, and electric chairs of earlier years have been replaced with a cocktail of various experimental drugs called a lethal injection. The typical lethal injection consists of a mixture of three drugs – an anesthetic to reduce pain (such as sodium thiopental), a paralytic agent called pancuronium bromide, and potassium chloride, which stops the heart and causes death. Such an approach appears humane because the victim can feel no pain, cannot move, and is unconscious before death. However, further examination of the drugs reveals startling problems. For example, numerous complaints with the three-drug procedure cite that the barbiturate may not work, “leading the inmate to suffer excruciating pain upon the...
injection of the potassium chloride: the chemical ‘inflames the potassium ions in the sensory nerve fibers, literally burning up the veins as it travels to the heart.’”76 For this reason, the American Veterinary Medical Association even prohibits use of potassium chloride on animals.77

Compounding the issue, since 2009, drug shortages have forced states to experiment with different methods, some of which include a single-drug method of a lethal dose of anesthetics, or a two-drug protocol using midazolam (which was used in Lockett and McGuire’s executions).78 These new methods of lethal injection raise concerns regarding the death penalty as cruel and unusual punishment. The methods have even been likened to torture, citing the practice as barbaric and ineffectively regulated.79 The Harvard Law Review Association notes, “A federal judge in California has cited inconsistent and unreliable screening of execution team members, a lack of meaningful training, inconsistent and unreliable recordkeeping, improper preparation of chemicals, and inadequate lighting in California executions.”80 Therefore, despite the idea that lethal injection is considered the most humane form of capital punishment, numerous flaws in state lethal injection procedures have caused it to be inconsistent and unregulated. The United States has been experimenting with creating a more “humane” form of capital punishment since the country’s birth, but it seems unlikely that will ever be found without jeopardizing the Eighth Amendment. Even if a method were developed to instantaneously kill someone, researchers would need to test this method, making it experimental, and potentially cruel or unusual, by nature. Because of this, the death penalty is not constitutional.

Capital punishment also inherently and irrevocably violates a citizen’s right to due process of law and equal protection, as outlined in the Fifth and Fourteenth Amendments. As discussed in Section II, sometimes the death penalty is administered because the defendants are given incompetent attorneys, they are unequally protected in terms of race, geographical location, income, and other issues, or they are falsely convicted. In Furman v. Georgia in 1972, Justice Stewart claimed, “Being sentenced to death is like being struck by lightning. Whether you get the death penalty doesn’t depend on the crime you commit, it depends on what lawyer is appointed to defend you.”81 In other words, the United States has sacrificed due process and fairness for reasons of expediency and efficiency, rather than dealing with Constitutional violations.

The United States Court of Appeals for the Second Circuit decided United States v. Quinones in 2002, in which defendants Alan Quinones and Diego Rodriguez attempted to overturn their death sentences on the grounds that the Death Penalty Act of 1994 was

---

76 A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections, 120 HARVARD LAW REVIEW 1301, 1302 (2007).
77 Id. at 1303.
78 Lethal Injection, supra note 75.
79 Executed Man Faked Symptoms of Suffocation, supra note 15.
80 Eighth Amendment Challenges, supra note 76, at 1303.
81 Kozinski & Bright, supra note 42, at 1358.
The Constitutionality of the Death Penalty After Botched Executions

unconstitutional under the Fifth Amendment’s Due Process Clause. Although the Second Circuit rejected this argument, important information came to light, “arguing that the documented risk of execution of the innocent presented substantial due process concerns.” The defendants’ attorneys argued that “the unacceptably high rate at which innocent persons are convicted of capital crimes… compels the conclusion that execution under the Federal Death Penalty Act… denies due process and, indeed, is tantamount to foreseeable, state-sponsored murder of innocent human beings.” Due process and equal protection issues, coupled with the inevitability of cruel and unusual punishment, present a viable legal justification for the abolition of capital punishment in the United States.

Deterrence

For those who loosely interpret the Constitution, capital punishment still may seem justifiable if it keeps the public safe – an exchange of liberty in favor of security. Though support for the death penalty steadily waned at the beginning of the twentieth century, as violent crime rates began to skyrocket in the 1960s and 1970s, capital punishment became popular once again. Deterrence theory is a doctrine of saving lives: “the killing of convicted offenders is justified as a means of preserving the lives of future victims of potential or actual offenders,” regardless of constitutional qualms. However, as far back as the 1830s, studies have shown that capital punishment fails to act as a deterrent to future crimes. During this time period, Massachusetts state legislator Robert Rantoul, Jr. examined long-term death penalty trends and found that “nations with a low proportion of executions to convictions had declining homicide rates, precisely the reverse of what deterrence theory would predict.” Almost a century and a half later, analysts such as Brier and Feinberg used sophisticated econometric models to test for a deterrence effect, and they still found none. These statistical studies conducted by multiple professionals find that there is “no correlation between the murder rate and the presence or absence of the capital sanction.” This evidence indicates that capital punishment’s inability to serve as a deterrent makes it is cruel and unusual, thus violating the Eighth Amendment.

---

86 Id. at 992.
87 Id. at 998.
Therefore, the deterrence argument has little merit and, in itself, exposes constitutional problems. Professor Thomas Long argues in his article, *Capital Punishment – Cruel and Unusual*, that “capital punishment is unconstitutional because the pain and suffering it involves cannot be shown to be justified by its effectiveness as a deterrent.”\(^9^0\) Since it is not seen as an effective way to prevent future crimes, then less severe punishments should suffice.

The solution to the death penalty controversy in the United States is to abolish it by legislation. Legal arguments that justify its existence, as seen in *Gregg v. Georgia* and *US v. Quinones*, only allow judges to circumvent constitutional issues in favor of judicial efficiency. Not only does capital punishment violate the Fifth, Eighth, and Fourteenth Amendments, but it also fails to deter the possibility of future crimes. This cruel and unusual punishment has no place in modern society, and the United States needs to abolish executions carried out on the basis of the theory of retribution.

**Conclusion**

Capital punishment should be abolished in the United States because it violates both the United States Constitution and international humanitarian law, and it is ineffective as a deterrent for future crimes. The four botched executions in 2014 again bring the death penalty to the forefront of American legal and political debate, raising questions over constitutional concerns. However, the discriminatory and unreliable nature of capital punishment procedures, whether by hanging, electric chair, lethal injection, or any other method, makes it both cruel and unusual. The inconsistency of sentencing and the lack of competent counsel also violate the fundamental constitutional right to due process of law. The disproportionate number of minorities executed and use of the death penalty on those with mental disabilities raise equal protection concerns.

The four executed men in 2014 that suffered from prolonged, painful deaths did not receive the constitutional protection they deserved as citizens of the United States. Furthermore, decades of statistical studies indicate that their deaths will not prevent future crimes. Despite the nature of these men’s respective offenses, their punishment will not serve its intended purpose, causing it to be disproportionate and excessive. SUNY Cortland Professor Herb Haines warns of the effects that botched executions can have on public opinion: “Flawed executions appear to have become potentially powerful threats to otherwise supportive public attitudes toward capital punishment.”\(^9^1\) The year 2014 proves no exception, and public opinion matters because its change over time has led to necessary reforms and reinterpretations of the Constitution. Now seems to be one of those times with regard to the death penalty. In light of these four botched executions,

---


both constitutional and public support for capital punishment have diminished, and the law must subsequently follow.
Discerning a Universal Right to Freedom of Expression in an Increasingly Multicultural World

Aaron G. Esparza

Introduction

While holding 193 of the world’s roughly 196 countries under its purview, Article 19 of the Declaration of Human Rights asserts, “everyone has the right to freedom of opinion and expression.”1 Yet, according to Freedom House’s most recent assessment, only 45 percent of the global population can freely exercise this supposed human right.2 The United Nations has attempted to alleviate this problem by further passing a resolution reaffirming the protection of free expression to Internet users at the height of the Arab Spring movement in the Middle East.3 However, such steps ignore the root of the problem: there remains no widely accepted definition of free expression for the U.N. to protect.

A brief consideration of current events demonstrates this continued debate over what material might be excluded from the protections afforded in Article 19. In 2011, a YouTube video titled “Innocence of Muslims” sparked protests from Muslim communities in over 20 countries.4 Egyptian President Muhammad Morsi argued that President Obama had a legal obligation to intervene and stop the video from being broadcast, calling it, “a crime against humanity”.5 In contrast, President Obama defended the video, arguing that the American legal tradition believes that the “strongest weapon against hateful speech is not repression; it is more

---

speech.”6 A similar debate occurred during the production of The Interview, a film which portrayed a plot orchestrated by the American government to assassinate the current leader of North Korea, which deeply offended the North Korean state.7 In response to the ongoing production of the film, the North Korean ambassador to the U.N. wrote to the U.N. Secretary-General urging, "the United States authorities [to] take immediate and appropriate actions to ban the production and distribution of the aforementioned film; otherwise, it will be fully responsible for encouraging and sponsoring terrorism."8 Just as in the previous international uproar, President Obama argued against taking action, as it would create a precedent contrary to the American understanding of free expression.9 Since each party in these conflicts justified their position with legitimately accepted legal support, then the human right to free expression remains subjective and, therefore, unenforceable in the eyes of many states.

The international community faces two problems: that the right to free expression is not equally protected, and that the definition of free expression varies regionally. In these respects, this article argues that by recognizing that the current language of the right to free expression is flawed and needs revision, both problems can be solved. Section 1 of this article will begin by introducing international documents and precedents that form the international legal basis of the right to free expression. Section 2 will further demonstrate the inadequacies of the status quo’s treatment of free expression, show that the proliferation of technology is exacerbating these preexisting problems, and explain why solving this issue is crucial to the wellbeing of the international community. Section 3 contends that the best plan of action is to compartmentalize expression into political and non-political expression, with different restrictions afforded to each sphere. Following this proposal, a brief consideration of likely criticisms will be presented and explained. Within this article, international political speech will be synonymous with the American precedent of “core political speech,” defined in Meyer v. Grant as “interactive communication concerning political change.”10

I. The Current Framework of Free Expression

It is essential to first provide background on the issue by presenting the documents and the subsequent legal precedents that have formed the present understanding of the right to free expression in international law.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights


8 Id.


The Universal Declaration of Human Rights (UDHR), and its legally binding partner, The International Covenant on Civil and Political Rights (ICCPR), have become influential in the development of a consistent, international code of free expression. The Declaration’s treatment of free expression can be found in Article 19, with restrictions found in Article 29. Article 19 states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 7 and Article 29, Clause 2, limit the breadth of free expression defined in Article 19. Article 7 does so by preventing “incitement to […] discrimination.” Article 29, Clause 2, further limits liberties by authorizing restrictions “for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” This approach to explicitly define the rights and restrictions was a controversial topic during the drafting process of the UDHR. Members from nations with a common law legal system, such as the United Kingdom and the United States, took issue with Article 7 and felt that such restrictions limited local discretion. Ultimately, Article 7 passed the Third Session of the draft process with eight delegates in support, seven delegates opposed, with one abstention. This close passage reflects fundamental resentment among many countries towards the UDHR’s potentially restrictive approach to the right of free expression.

Legal precedents established by the UDHR and the ICCPR

Despite the general direction towards a system of universal free expression in the international community, the legal interpretations of free expression founded in the UDHR and the ICCPR vary regionally. By comparing hate speech treatment in America, using Brandenburg v. Ohio, and hate speech treatment in France, using the Gayssot law, it becomes clear that the unified system of free expression has resulted in dramatically different forms. Though the U.S. has signed and ratified both the UDHR and the ICCPR, many of the international obligations have had “little domestic effect”. Upon ratification, one of the U.S. Senate’s four reservations to the treaty confirmed that the American approach to free expression

---

11 ENCYCLOPEDIA OF JOURNALISM 759 (Christopher H. Sterling ed., 2009).
13 Declaration, supra note 1.
14 Id.
15 Id.
17 Id. at 72.
would not be compromised. Therefore, despite a superficial appearance of adhering to international law, American free expression is determined by local judicial decision such as the 1969 Brandenburg v. Ohio case. In the case, a parade of Ku Klux Klan members waved guns, made racist and anti-Semitic statements, and threatened to march on Congress. Under a local Ohio criminal syndicalism law, the leader of the group was arrested and sentenced. Though the U.S. had not yet signed onto the legally binding ICCPR, this arrest would clearly have been acceptable according to the limitations recommended in the UDHR “against any incitement to [...] discrimination.” However, the Supreme Court unanimously ruled that the Ohio law was a violation of the first and the fourteenth amendments, setting a precedent for protecting hate speech that clearly violates the UDHR.

Contrary to the degree of free speech protected in the United States, the decisions in France to uphold the French Gayssot law confirms that international documents legally provide local governments the ability to restrict free speech. According to Mark Weber, the director of the Institute for Historical Review, “France’s Fabius-Gayssot law of July 13, 1990, makes it a crime to ‘contest’ the ‘crimes against humanity’ as defined by the Nuremberg International Military Tribunal of 1945-46.” The law’s interpretation has been found to be so broad that minimalizing language such as “speaking of ‘alleged’ gas chambers, the ‘presumed holocaust,’ or ‘the rumour’ about Auschwitz” is considered illegal. In Robert Faurisson v. France, the United Nations' Human Rights Committee reexamined the conviction of Mr. Faurisson for Holocaust denial and upheld the decision deeming “the restriction of Mr. Faurisson's freedom of expression [to be] necessary within the meaning of Article 19, Paragraph 3, of the Covenant.” These two incidents illustrate that though the majority of the members of the international community have signed agreements to protect free expression, domestic interpretations of the agreements vary.

The European Convention on Human Rights

Though The European Convention on Human Rights (ECHR) is not an international agreement, it is nonetheless an important document to consider due to its multinational nature and generally accepted success among the public, which has led some scholars to consider it as a viable model for future agreements. Similar to the UDHR and the ICCPR, the ECHR grants

---

20 Id.
22 Declaration, supra note 1.
23 Brandenburg, 395 U.S at 395.
“Everyone […] the right to freedom of expression.”²⁸ However, unlike the aforementioned documents’ ambiguously outlined exceptions on restricting free expression, the ECHR specifically defines when governments may censor free expression. The ECHR states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.²⁹

Legal precedents founded on the European Convention on Human Rights

Despite the document’s appearance as a list of ready-made restrictions on free expression, in practice the ECHR has been widely recognized as a success due to its powerful degree of discretion afforded to judges to vary their decisions depending on location and individual circumstances, otherwise known as the “margin of appreciation.”³⁰ The “margin of appreciation,” commonly used in European Court of Human Right (ECtHR) decisions is defined as the “room for manoeuvre the Strasbourg institutions are prepared to accord national authorities in fulfilling their obligations under the [ECHR].”³¹ In Jersild v. Denmark, the ECtHR was confronted with a case of a journalist convicted in a Danish court of aiding and abetting a bigoted group by broadcasting an interview in which members made xenophobic and ethnic statements.³² A strict interpretation of the ECHR arguably would have upheld the conviction, but the court took into consideration the journalist’s “conduct during the interviews [which] clearly dissociated him from the persons interviewed” in their decision to overturn the Danish conviction.³³ An additional case that shaped the understanding of the ECHR was The Observer and The Guardian v. The United Kingdom. In the case, a former spy in the British Security Service decided to publish a tell-all book about his experience, leading the British government to impose an injunction against further publication.³⁴ According to the London based human rights

²⁹ Id. at 11.
³⁰ Internet Treaty, supra note 26, at 208.
³³ Id. at 34.
organization, Article 19, the ECtHR ruled “The injunctions constituted an interference with the applicant’s right to freedom of expression.”\textsuperscript{35} Therefore, this decision had the significance of giving “notice to the Government that [the ECtHR] would not automatically accept its say-so on what constituted a risk to national security.”\textsuperscript{36} Therefore, the ECtHR can be characterized as a dynamic authority that in some cases strictly interprets the ECHR, but in some cases it allows unique circumstances to change its decisions.

**II. Issues within the Current Framework of Free Expression**

The existing status quo treatment of free expression in international law is inadequate, the growth of technology will exacerbate these flaws, and addressing this issue must be made a priority in international law.

The inadequate, misguided, and ill-equipped enforcement of free expression in international law

The international community currently fails to adequately address issues of free expression. It is too lenient towards political censorship, it is misguided in its protection of expression, and it lacks the ability to properly judge what is defined as a violation of human rights to local communities.

One problem with the international legal system’s approach to free expression is the ambiguous language permitting political censorship. The ECHR serves as a case study of a common flaw in international documents to excuse political censorship. According to Professor Weaver of the University of Louisville, “The broad language of the ECHR would seem to allow repressive regimes…to readily suppress objectionable speech and to do so entirely consistent with the proposed international treaty…All the regime need do is point to public safety or to health and morals.”\textsuperscript{37} This problem is no longer a theoretical criticism. In Dr. Agnes Callamard’s report to The Office of the United Nations High Commissioner for Human Rights, she stated “In many countries, overbroad rules are abused by the powerful to limit nontraditional, dissenting, critical, or minority voices, or discussion about challenging social issues.”\textsuperscript{38} Therefore, the permissive treatment in international law towards political censorship has led to the legitimization of government censorship.

An additional problem is the international community’s counterproductive application of these rules. According to Article 19, a London-based human rights organization, “International law permits or even requires, states to prohibit hate speech, including hate speech directed against followers of a religion.”\textsuperscript{39} However, this delegation of power to local governments is

\begin{footnotes}
\item[37] Internet Treaty, supra note 26, at 210.
\end{footnotes}
Discerning a Universal Right to Freedom of Expression

extremely worrisome. For example, the 2012 Rabat Plan of Action stated that, “At the national level, blasphemy laws are counter-productive, since they may result in the de facto censure of all inter-religious/belief and intra-religious/belief dialogue, debate, and also criticism, most of which could be constructive, healthy and needed.” Essentially, the tactics used by the international community to protect free expression create more problems than they solve.

Furthermore, the existing treatment of free speech by international law is unable to judge, from an international perspective, violations against individual rights. Already, the U.N. actively supports individuals who claim that their rights have been violated. For example, a character in the Dutch tradition named Zwarte Piet “sparked an investigation by a United Nations advisory panel” due to complaints against the character’s use of blackface makeup. Human rights violations may have occurred, but the international community is ill-equipped to judge because racism varies nationally. For instance, blackface is offensive in the U.S. because of its historical use in perpetuating racial stereotypes. However, the Dutch use of blackface predates colonialism and slavery. Racism is not the only limit on free expression that varies regionally. As professor Ardyth Sohn points out, child pornography remains the closest area of international agreement. Otherwise “nations have different ideas about the kinds of content and materials that are inappropriate or even illegal.” Therefore, the international community’s interest in viewing non-political expression through an international perspective dismisses relevant background of local regions.

The Internet’s role as a source for friction

The expansion and accessibility of the Internet, from limited access twenty years ago to nearly half the global population by 2018, has sparked a reevaluation of the right to free expression. Flashpoints of this change include: LICRA v. France, the “Innocence of Muslims” video, and the recent cyber attack on Sony.

The first notable case that demonstrated the inadequacy of the existing international approach to free expression in the Internet era was the case of LICRA v. France and the subsequent reaction to the decision by an American court. According to Giampiero Giacomello’s summary of the case, “In 2000, French Jewish and anti-racist groups sued the California-based Yahoo! over items such as SS daggers, swastikas, propaganda films, and photos of death camp victims being sold on its auction pages in the United States.” Upon deliberation, the French

41 Black Pete Is 'Negative Stereotype' – Court, BBC NEWS, July 3, 2014.
45 Id.
judge found that Yahoo! unintentionally wronged French Internet users because the “exhibition of Nazi objects for purposes of sale,” violated French law Article R.645-2 of the criminal code.\(^\text{48}\) Furthermore, though Yahoo! was a foreign company, the French court also believed that this case fell under the jurisdiction of the Superior Court of Paris where it then ordered Yahoo! to restrict access to French users.\(^\text{49}\) As the judge predicted, though “Yahoo! was not bound by the French ruling (a California judge heard the case nonetheless), the Internet company decided to comply autonomously and blocked access from France to those pages.”\(^\text{50}\) In the end, this incident sparked a global outcry. One legal analyst from the Economist newspaper stated that this decision created an “uncomfortable precedent for the way in which national governments might try to impose their own laws in an online world.”\(^\text{51}\)

Similarly, in 2012, a YouTube video titled “Innocence of Muslims” was released, inflaming Muslims worldwide because it insulted the Prophet Muhammad. On one side of the controversy, leaders of comparatively conservative Muslim countries such as Egyptian President Mohammad Morsi and Pakistani President Asif Ali Zardari condemned the video and urged the United States and the international community to take legal action against the film.\(^\text{52}\) U.N. leaders, such as Secretary-General Ban Ki-moon and then-President of the General Assembly, Nassir Abdulaziz Al-Nasser likewise argued that this type of free expression violated the U.N. Charter and cannot be protected.\(^\text{53}\) Responding to international pressure, President Obama equally condemned the film’s content, but explained his refusal to block the video as a violation of the American Constitution.\(^\text{54}\) Furthermore, he argued that “In this modern world with modern technologies, for [the United States to censor] hateful speech empowers any individual who engages in such speech to create chaos around the world.”\(^\text{55}\) As exemplified in this case, the world is currently divided on which forms of non-political speech are acceptable on the internet.

More recently, the international controversy between North Korea and Sony Picture’s movie “The Interview” demonstrates that political expression has vastly different interpretations internationally. The comedy’s depiction of an assassination attempt against the Supreme Leader Kim Jong-un provoked outrage from North Korean officials. In a letter sent to Secretary-General Ban Ki-moon, North Korea's U.N. Ambassador Ja Song Nam said:

To allow the production and distribution of such a film on the assassination of an incumbent head of a sovereign state should be regarded as the most undisguised


\(^{50}\) Giacomello, *supra* note 45, at 70.


\(^{54}\) Obama, *supra* note 6.

\(^{55}\) Obama, *supra* note 6.
Discerning a Universal Right to Freedom of Expression

sponsoring of terrorism as well as an act of war. The United States authorities should take immediate and appropriate actions to ban the production and distribution of the aforementioned film; otherwise, it will be fully responsible for encouraging and sponsoring terrorism.56

In response, President Obama stated: “We cannot have a society in which some dictator some place can start imposing censorship here in the United States. If somebody is able to intimidate folks out of releasing a satirical movie, imagine what they start doing when they see a documentary that they don’t like…” 57 This exchange confirms that political expression protections are not universally agreed upon.

The significance of the right to free expression

The international community has consistently reaffirmed that all human rights provided are “indivisible” from one another, effectively dismissing a hierarchy of rights.58 Current standards of free expression protection fail to address evidence that when citizens exercise their right to free expression, they advance numerous other goals of the international community. A recent study by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) found a striking correlation between “environments conducive to media freedom and independence and the indicators of human development.”59 According to the study’s findings, media freedom is related to decreased poverty and violence. There are further correlations with increased access to basic supplies, health, education, and environments favorable to business interests and good governance.60 All of which led the authors of the study to claim, “A free press always has a positive influence.”61 According to Dr. Ibrahim S. Alharbi, the opposite is also true by noting that “Violations of freedom of expression often go hand-in-hand with other violations.”62 Additionally, the U.N. acknowledges the significance of free speech in the 1946 General Assembly resolution 59(I), stating that the mutually dependent freedom of expression is “the touchstone of all the freedoms to which the United Nations is consecrated.”63 In short, protecting the right to free expression is a vital tool towards achieving the international community’s agenda, yet it has only been treated as one right among many.

56 Ben Beaumont-Thomas, North Korea Complains to UN about Seth Rogen Comedy, The Interview, THE GUARDIAN, July 10, 2014.
57 Viser, supra note 8.
59 MARINA GUSEVA ET AL., PRESS FREEDOM AND DEVELOPMENT: AN ANALYSIS OF CORRELATIONS BETWEEN FREEDOM OF THE PRESS AND THE DIFFERENT DIMENSIONS OF DEVELOPMENT, POVERTY, GOVERNANCE AND PEACE,3 (Unesco 2008)
60 Id. at 4.
61 Id. at 5.
62 IBRAHIM S. ALHARBI, DEMOCRACY IN ISLAMIC AND INTERNATIONAL LAW 111 (AuthorHouse 2011).
63 Id. at 111.
III. A Proposal to Divide Free Expression into Political and Non-Political

The international community’s flawed approach towards protecting the right to free expression should be divided into political and non-political forms of expression that will each be treated distinctly. Advantages of this solution are that it will prevent local governments from censoring political expression as easily, it is based upon traditional legal precedents, it takes advantage that violations of political expression are easily observed and universally opposed, and it will improve cultural coexistence.

This proposal prevents local governments from abusing their authority to censor

According to John Palfrey, the Executive Director of the Berkman Center for Internet and Society at Harvard Law School, “Online censorship is growing in scale, scope, and sophistication around the world.”

According to a study by Freedom House, the period from May 2013 to May 2014 marked the “fourth consecutive year” of an overall decline in Internet freedoms globally. This trend is in part due to civilian support for morally objectionable non-political censorship and the ambiguous legal language in international law that easily allows governments to infringe on political expression.

The general sentiment in the West that the Internet and censorship are incompatible simply is not globally supported. Instead, many regions actively support the censorship of non-political speech. For example, a 2012 poll by the independent Levada Center found that in Russia, “63 percent of respondents say censorship is necessary due to the ‘numerous dangerous sites and materials’ online.” According to a poll funded by the New York based Markle Foundation, 84 percent of Chinese respondents agreed that “the internet should be controlled or managed”, with an additional 85 percent believing that the government should be responsible for this censorship. In the report, Guo Ling, the director of the poll, explained this response as evidence of the “historical sense in which the state is assumed to be broadly responsible for social management and public values.” Similarly, in many Muslim countries, it has become expected, “to adopt a special regime for protecting the sanctity of religious values, expressions, and symbols.” As demonstrated by these international cases, much of the world supports non-political internet censorship for the protection of tradition and morality.

---


68 DEBORAH FALLOWS, MOST CHINESE SAY THEY APPROVE OF GOVERNMENT INTERNET CONTROL (March 27, 2008).

69 Id.

However, some scholars have observed that these popularly supported means of social censorship often lead to unpopular political censorship. According to Professor Ardyth Broadrick Sohn, “In many nations, governments have the power to shut down web sites which advocate intolerance or racism, but often the same powers can be used to muzzle dissent.”\textsuperscript{71} Recognizing this issue, the U.N.’s Rabat Plan of Action noted that a common form of censorship, anti-incitement laws, often leads to the “persecution of minorities” because the laws are “excessively narrow or vague,” “scarce and ad hoc.”\textsuperscript{72} Essentially, citizens encourage their governments to censor non-political expression, and gradually they extend this censorship towards political expression.

This creep from non-political censorship to political censorship is not entirely a natural phenomenon, but instead a result of international law’s clumsy approach towards protecting free expression. Article 29 of the UDHR states that all rights may be limited if they jeopardize “morality [or] public order.”\textsuperscript{73} This phrasing is problematic because it equates morality as of equal importance to public order. A literal interpretation of the language would indicate: it is legally excusable for repressive dictators to continue this practice of enforcing both non-political and political censorship to maintain their regime’s stability. Therefore, by dividing speech into non-political and political speech, each with different values and punishments for violators, the international community can effectively address inappropriate abuses of censorship by local governments.

\textit{This proposal conforms with preexisting legal traditions}

A common practice found in many traditional legal systems is to consider political issues separately from other issues of tradition or religion. In the traditional Islamic legal system, laws are divided into \textit{uq\textsuperscript{o}q All\textsuperscript{u}h} and \textit{zul kabad}. \textit{uq\textsuperscript{o}q All\textsuperscript{u}h} are the traditionally mandated religious “rights of Allah which cannot be waived.”\textsuperscript{74} \textit{Zul kabad} “are variable human rights” determined by political decisions.\textsuperscript{75} Traditional Hindu law also contains a sharp distinction between traditional and political laws. The divinely inspired Vedic texts are considered distinct from \textit{tma-tu\textsuperscript{i}}, the rules which are decided by mortal “individuals of great virtue.”\textsuperscript{76} In the traditional American legal system, Cass Sunstein argues that the treatment of expression depends on whether the speech is political or non-political.\textsuperscript{77} Non-political speech, is of low-value with limited legal protections, unlike high-value areas such as core political speech in which speakers seek to “[effect] popular control of government affairs.”\textsuperscript{78} Clearly there is a global precedent for compartmentalizing issues into political and non-political categories. Yet, the existing approach

\begin{itemize}
  \item \textsuperscript{71} Sohn, supra note 43, at 208.
  \item \textsuperscript{72} Rabat Plan of Action, supra note 39.
  \item \textsuperscript{73} Declaration, supra note 1.
  \item \textsuperscript{74} Oba, supra note 66, at 224.
  \item \textsuperscript{75} Id. at 224.
  \item \textsuperscript{76} \textit{ROBERT LINGAT, THE CLASSICAL LAW OF INDIA} 6 (J. Dincan M. Derrett trans., 1973).
  \item \textsuperscript{78} Id. at 603.
\end{itemize}
from international legal bodies to treat threats to “morality [and] public order” equally is incongruous with traditional legal practices.

This proposal capitalizes on the unambiguous nature of political expression and the global support to protect it

Dividing free expression into non-political and political spheres is advantageous because violations of political expression rights are universally identifiable, and political free expression is universally supported. On a practical level, this proposal capitalizes on the unambiguous nature of political expression. When governments censor a speaker for offending local religious traditions, determining if human rights were violated carries with it a degree of uncertainty. However, when journalists are imprisoned, protesters are harassed, or forced disappearances are reported on dissidents, the international community does not need to understand local customs or traditions; human rights have certainly been violated.

Furthermore, the right to free political expression is universally supported. In the Wisconsin International Law Journal, Professor Ali Khan demonstrates this tendency in his suggestion that the globe is headed towards “Universal Democracy.” According to Khan, world history demonstrates that there is a constant march towards a “right to party platform and the right to recall.” Today this universal right can be seen by North Korea’s declaration that it is a Democratic People’s Republic. Additionally, North Korea carries out superficial elections every five years. Though The Economist ranks North Korea as the least democratic of all nations, the government must acknowledge Khan’s theory of “universal democracy” through its deceptive name and periodic elections. Therefore, this inclination towards democracy implies that the right to political expression provided in Article 20 of the UDHR is, in fact, a universal aspiration.

This proposal improves cultural coexistence

Samuel Huntington’s controversial characterization of the current world as a “clash of civilizations” epitomizes the community of scholars and individuals who believe that modern conflicts arise from embedded cultural differences. One of the front lines of cross-cultural antagonism is in international law. One scholar, Abdulmumuni Oba, has argued: “While the West is asking the rest of the world to conform to its version of human rights, there [has been] virtually no instance in which the West has conceded the superiority of any norm or values from non-Western peoples.” This “[implication] that Western norms are superior to Islamic norms” has led Oba to declare the current system of human rights as an example of Western “cultural

80 Id. at 67-68.
82 The Economist Intelligence Unit, Democracy Index 2013, THE ECONOMIST, 2014.
84 Oba, supra note 66, at 239
Discerning a Universal Right to Freedom of Expression

imperialism." Before the proliferation of the internet creates more situations that endanger cross-cultural relations, as already seen in LICRA v. France, it is imperative that the international community recognize that dividing expression offers a meaningful compromise to ease cultural tensions.

Western nations would benefit from this proposal because they would not have to violate international laws or engage in legal maneuvering to avoid international scrutiny for their liberal free expression laws. Currently, many Western countries fulfill the obligations of the international agreements; except in the domain of non-political speech. According to Professor Jack Goldsmith, in the U.S., “the ICCPR’s prohibitions on ‘[a]ny propaganda for war’ and on ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’ are probably inconsistent with First Amendment free speech rights.” The U.S. and other Western countries in similar circumstances such as Denmark and Iceland have enacted reservations on the ICCPR that ensure domestic free expression laws will not be violated. Furthermore, the U.S. included, during ratification, a declaration that the entire ICCPR would not be self-executing. This device prevents citizens from suing the U.S. government when it violates human rights, leaving the power of the ICCPR severely weakened. If expression were divided into non-political and political speech, with a substantial delegation of domestic authority over morally subversive non-political speech, then Western nations would be able to retain their own liberal standards of free expression without engaging in legalisms that damage the documents’ protections of political rights.

Retaining a universal standard of political speech while providing local countries the legal right to censor morally inflammatory non-political speech is valuable because it offers conservative countries the ability to judge non-political issues for themselves. As seen in the backlash to the “Innocence of Muslims” video, the Arab region remains a stronghold of non-political censorship. According to one poll of the Arab population conducted in 2012, 81% believe that nudity should be censored and 71% believe that offensive language should be censored. Opponents may argue that majority rule is not a sufficient legal reason to allow non-political censorship in conservative regions. Yet the West is also guilty of popularly supporting the suppression of non-political expression. In Europe, laws against Holocaust denial, which are comfortably supported by the population, could easily be considered a form of non-political censorship. Therefore providing local jurisdictions the right to censor morally subversive

85 Id. at 226.
86 Id. at 239.
89 Id.
91 Giampiero, supra note 45, 131
speech acknowledges that every region is guilty of non-political censorship and eases the tensions created when the international community decides a global standard of morality.

IV. Potential Criticisms

Differentiating international free expression laws carries with it major consequences that must be anticipated. This proposal assumes politically subversive speech is universally recognized and it may unfairly dismiss the importance of protecting individual non-political rights.

Political suppression is not always universal

Political expression may tend to be universal, but some critics may consider what the treatment of political organizations that endanger other rights will be. For example, the Muslim Brotherhood treads a fine line in international law. Historically, “the group has used or supported violence and has been repeatedly banned in Egypt for attempting to overthrow Cairo’s secular government.”92 However, “[since the 1970s] the Egyptian Brotherhood has disavowed violence and sought to participate in Egyptian politics.”93 Though the Brotherhood continues to display instances of anti-Semitism, there is no denying that it is an important voice in Egyptian politics.94

This case demonstrates that dividing speech into non-political and political categories will not be a simple task. However, assessing a political organization like the Brotherhood is an issue that the international community is capable of performing. Unlike the Dutch case of Zwarte Piet, which requires a subjective decision based on local history, the Brotherhood can be measured and assessed using universal indicators such as the number of violent events caused by the organization.

Protecting non-political expression should be of equal importance

Opponents of this proposal likely will view this proposal as contrary to recent trends in international law. During the Cold War, the globe was divided into two factions. The West believed in the supremacy of political and civil rights, and the socialist states believed in the supremacy of economic, social, and cultural rights.95 However, since the end of the Cold War, the international community has largely dismissed both perspectives and instead argued that human rights are interdependent of each other. An example of this nature is the correlation

---

92 Mary Crane, Does the Muslim Brotherhood Have Ties to Terrorism?, COUNCIL ON FOREIGN RELATIONS (Apr. 05, 2005), http://www.cfr.org/egypt/does-muslim-brotherhood-have-ties-terrorism/p9248.
93 Id.
95 HOPE LEWIS, BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN AMERICA 116-117 (Cynthia Soohoo, Catherine Albisa, and Martha F. Davis eds., 2007).
between literacy and political expression.\textsuperscript{96} When political expression increases, so does literacy and vice versa. Therefore, it may be anticipated that critics will wonder whether dividing the legal treatment of free speech into political and non-political speech ignores their mutually dependent relationship.

Within the area of free expression, it is clear that political speech has the capability of improving numerous human rights violations while non-political expression has a limited impact elsewhere. Free political expression leads to improvements in standard of living because individuals can petition the government for assistance. According to Judge Posner, political speech is essential to inform the government “what the people are thinking.”\textsuperscript{97} The government can then use this information to improve its decision-making and as a result, improve the standard of living for citizens. In short, this suggestion may appear a rejection of the importance of moral rights. However, it is, in fact, a realistic utilitarian assessment that recognizes that the preservation of a universal standard of political speech is likely to contribute towards much greater human rights advancements than the current system.

\textbf{Conclusion}

The spread of the Internet to billions of users has tested the limits of the human right to free expression and proven that it must be redefined into a truly universal provision. This development has proven that the international status quo towards free speech is unsustainable. To alleviate these problems, the international community would be better served by dividing free expression into political and non-political expression because of their fundamental differences.

This conclusion not only offers a valuable insight into the field of free expression, but possibly even demonstrates that many other human rights are not as universal as once thought. Scholarly claims that human rights are a “Western construct” may have sounded exaggerated before, but with billions of Internet users exchanging ideas and testing their human rights, the universality of these rights may also be called into question.\textsuperscript{98} Already, relatively recent developments such as the 1990 Cairo Declaration on Human Rights in Islam\textsuperscript{99} and the 1993 Bangkok Declaration may be the first incidents of a global trend towards rejecting the universality of human rights.\textsuperscript{100} Both of the documents shared a belief that the current list of human rights were imperfect and that they did not correspond with the regional peculiarities of Islam or “Asian values.” Therefore, it is likely that free expression is simply the first of many rights to be scrutinized in the future by a more internationally cognizant global community.

\begin{footnotes}
\footnote{\textsuperscript{96} OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS, ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS FUNDAMENTALLY DIFFERENT FROM CIVIL AND POLITICAL RIGHTS?, http://www.ohchr.org/EN/Issues/ESCR/Pages/AreESCRfundamentallydifferentfromcivilandpoliticalrights.aspx.}
\footnote{\textsuperscript{97} RICHARD A. POSNER, FREE SPEECH IN AN ECONOMIC PERSPECTIVE, 20 SUFFOLK U. L. REV., 1, 9 (Spring 1986).}
\footnote{\textsuperscript{98} Oba, supra note 66, at 219.}
\footnote{\textsuperscript{99} CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM, UN Doc. A/CONF.157/PC/62/Add.18 (August 5, 1990).}
\footnote{\textsuperscript{100} BANGKOK DECLARATION ON HUMAN RIGHTS, UN Doc A/CONF.157/PC/83 (April 19, 1993).}
\end{footnotes}
On the Costs and Consequences of the Patient Protection and Affordable Care Act of 2010

Haley Meyers

According to the nonpartisan Congressional Budget Office (CBO), the Patient Protection and Affordable Care Act of 2010 (ACA)\(^1\) is expected to cost over $1.35 trillion, or $50,000 per newly insured person, from 2016 to 2025.\(^2\) At the same time, the ACA demands $675 billion in “new or increased taxes from 2013 to 2022”\(^3\) with the vast scope of the ACA predicted to extend to more than one sixth of the U.S. economy.\(^4\) This data presents only a few of the ACA’s many economic impacts that are permitted by the unprecedented ruling of *National Federation of Independent Business v. Sebelius* (2012), which authorizes the Supreme Court to, in effect, create taxation legislation and Congress to tax inactivity. Recent rulings, including the aforementioned case, ultimately suggest that the ACA is changing the face of U.S. health care both economically and constitutionally, and will continue to do so.

The ACA set out to address the rising costs of health care in the United States and the 50.7 million uninsured people estimated by the U.S. Census Bureau in 2009, or approximately 16.7 percent of the U.S. population.\(^5\) In its implementation, several elements of the ACA, specifically the individual mandate, seriously challenge individual constitutional rights, setting an unprecedented amount of control in the federal government's hands while taking that power away from the citizenry, state, and local governments. A balance in the role of the federal government was central to many


\(^3\) Michael Tanner, *The Patient Protection and Affordable Care Act: A Dissenting Opinion*, 34 J FAM ECON ISS 3, 6 (2013).


Founding Fathers’ constitutional ideologies\(^6\), including Founding Father and former Chief Justice John Marshall, known for his emphasis on limiting federal power to “ensure protection of our fundamental liberties” and “reduce the risk of tyranny and abuse,” and remind American citizens that “those limits may not be mistaken, or forgotten.”\(^7\)

This article will explore the constitutional and economic implications of the ACA and determine that it far infringes on the Founding Fathers’ and the Constitution’s limits on federal power, sets dangerous precedents for federal overreach, and presents too high of an economic burden. Section I will introduce the ACA’s legislative and judicial context. Section II will discuss constitutional challenges to the ACA, including analyses of the Origination Clause, the Commerce Clause, and the Taxation Clause. Section III will discuss the consequences and economic costs of the ACA with an analysis of its impact on individuals, the labor market, the medical market, and the United States as a whole. These analyses will lead to the conclusion that the ACA is unconstitutional and wrongfully extends federal power, jeopardizing individual rights. Furthermore, the costs of the ACA suggest that this legislation does not fulfill its goal to provide universally higher quality and more affordable health care.

I. Legislative and Judicial Context

Within its nearly 11,000 pages of regulations,\(^8\) the ACA’s two major provisions are the employer mandate, which requires businesses with over fifty employees to provide insurance coverage to employees,\(^9\) and the individual mandate, which requires Americans to obtain a minimum amount of health care or to pay a penalty to the government.\(^10\) These mandates were implemented as an effort to decrease health care costs, increase accessibility, and improve the quality of care.\(^11\) Reducing the uncompensated costs associated with patients who are unable to pay for their emergency room care, created by the Emergency Medical Treatment and Active Labor Act (EMTALA) of 1986,\(^12\) was considered a major step in decreasing health care costs and increasing care accessibility.\(^13\) The EMTALA\(^14\) requires participating hospitals to treat patients who need emergency treatment regardless of their ability to pay.\(^15\) According to a 2014 study by the American Hospital Association, it was estimated that hospitals’

---

\(^{6}\) William Marbury v. James Madison, Secretary of State of the United States, 5 U.S. 137 1 Cranch 137, 2 L. Ed. 60, (1803).

\(^{7}\) Id.

\(^{8}\) Jayne O’Donnell & Fola Akinnibi, How Many pages of Regulations are in the Affordable Care Act?, USA TODAY, Oct. 25, 2013.


\(^{10}\) 26 U.S.C. § 5000A (2010).

\(^{11}\) WHITE HOUSE DEPARTMENT OF HEALTH AND HUMAN SERVICES, KEY FEATURES OF THE AFFORDABLE CARE ACT BY YEAR (2010).


\(^{13}\) Jonathan Cohn, Common Sense, NEW REPUBLIC, Apr. 9, 2010.

\(^{14}\) See Id. § 1395dd.

\(^{15}\) Frequently Asked Questions about the Emergency Medical Treatment and Active Labor Act (EMTALA), EMTALA (Oct. 10, 2009), http://www.emtala.com/faq.htm
uncompensated care costs rose by 11.7 percent to $45.9 billion in 2012 due to the EMTALA requirement to treat an influx of uninsured patients. In accordance with EMTALA, these payments shift onto both the federal and state governments, creating a considerable cost to provide care for the many uninsured who are left to utilize hospital services. Considering these goals, the logic of this legislation is as follows: if all Americans are insured, then hospitals and the government will be free of uncompensated health care costs, and more people will gain access to care since every person is eligible regardless of pre-existing conditions.

President Barack Obama focused much of his 2008 presidential campaign platform on passing health care reform that fulfills these aforementioned goals. In March of 2009, President Obama announced his commitment to draft and pass a bipartisan reform bill originating in Congress by the end of 2009. Yet the House, with its Service Members House Ownership Tax Act of 2009, and the Senate, with its Patient Protection and Affordable Care Act of 2010 (ACA), failed to compromise enough to combine their individually drafted health care bills into one. President Obama responded to this failure by drafting his own proposal. House Democrats only agreed to pass the Senate bill if it could be amended by the Health Care and Education Reconciliation Act of 2010 (HCERA) through the reconciliation process, which meant that it had considerable non-budgetary regulation, and was limited to only minor budget changes. According to the Congressional Research Service, budget reconciliation is divided into two steps: “first, Congress includes reconciliation instructions in a budget resolution directing one or more committees to recommend changes in statute to achieve the levels of direct spending, revenues, and the debt limit agreed to in the budget resolution. Second, the legislative language recommended by committees is packaged ‘without any substantive revision’ into one or more reconciliation bills, as set forth in the budget resolution, by the House and Senate Budget Committees.” Additionally, the

---

17 Id.
20 The White House, Address to Joint Session of Congress (Feb. 24, 2009).
23 Sheryl Stolberg et al., Health Vote Caps a Journey Back From the Brink, N.Y. TIMES, Mar. 2010.
Congressional Budget Act of 1974 made reconciliation of HCERA filibuster-proof and thus politically easier to pass. This move seemed risky considering that although reconciliation was ideal to quicken the adoption of budget and tax legislation and “requires only [a simple majority of] 51 votes for passage in the Senate,” it inherently “entails procedural and political risks.” House Democrats argued that reconciliation was appropriate since many of the changes to this bill were budgetary, including “higher subsidy levels, [and] different kinds of taxes to pay for them.” On March 2, 2010, HCERA was passed by the House and later by the Senate in reconciliation, on March 25. President Obama finally signed HCERA on March 30. On March 21, 2010, the House passed the Senate’s ACA bill and President Obama officially signed the ACA into law on March 23, 2010.

Once the ACA was signed into law, the Obama Administration announced that “all Americans will have access to affordable health insurance options” and that Medicaid would be expanded to cover more low-income individuals by 2014. The Obama administration published the overall objectives for the law on their website, with goals such as, “improving quality and lowering health care costs; free preventative care; RX discounts for Seniors; protect against health care fraud; small business credits; health insurance marketplace expands access; and new consumer protections in pre-existing conditions and consumer assistance.” The Obama Administration also established a penalty timeline for those who choose not to purchase insurance. The flat dollar amount for each uninsured adult is set to rise from $95 in 2014 to $695 in 2015 (the penalty for children is half of the adult amount). The CBO and the Joint Committee on Taxation estimate that such payments will yield a total of $46 billion for the fiscal years 2015-2024, expropriating this $46 billion from consumers and the market.

In its implementation, the ACA has faced and continues to face numerous judicial challenges. A significant case that led to such numerous challenges is *State of Florida v. United States Department of Health and Human Services* (2010), a suit filed in the Northern District of Florida’s U.S. District Court. In this suit, Florida and twelve other

34 *Id.*
35 *UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, KEY FEATURES OF THE AFFORDABLE CARE ACT BY YEAR* (2010).
36 *Id.*
38 Brian Duignan, *Affordable Care Act cases*, ENCYCLOPEDIA BRITANNICA (2014).
states (fourteen additional states, the National Federation of Independent Business [NFIB], and two individuals later joined the suit) argued that the individual mandate regulated inactivity in the market, overstepping Congress’s power under the Commerce Clause\textsuperscript{40} to regulate interstate commerce.\textsuperscript{41} Additionally, the plaintiffs argued that the Medicaid expansion of the ACA\textsuperscript{42} violated the U.S. Constitution,\textsuperscript{43} which prevents Congress from offering financial rewards to the states that are “so coercive as to pass the point at which pressure turns into compulsion, as established in \textit{South Dakota v. Dole} (1987).”\textsuperscript{44} The states argued that the costs to expand their Medicaid programs to cooperate with the ACA creates an immense financial burden, and they felt coerced into accepting this burden in order to continue receiving federal funds to support their current Medicaid recipients.\textsuperscript{45} On January 2011, Judge Roger Vinson found the individual mandate unconstitutional under the Commerce Clause,\textsuperscript{46} and not severable from the remaining parts of the ACA, thus declaring the entirety of the law unconstitutional.\textsuperscript{47} Additionally, Vinson ruled that the states’ coercion argument was not supported by current case law.\textsuperscript{48} To complicate this ruling, a three-judge panel in the 11th Circuit Court of Appeals agreed with Vinson’s individual mandate and Medicaid ruling, yet reversed Vinson’s decision on severability in a 2-1 ruling.\textsuperscript{49}

In November of 2011, the Supreme Court split the ACA challenges into the following: \textit{Florida v. Department of Health and Human Services} (2012)\textsuperscript{50} to debate the ACA’s Medicaid expansion, \textit{National Federation of Independent Business et al. v. Kathleen Sebelius, Secretary of Health and Human Services} (2012)\textsuperscript{51} to discuss severability, and \textit{Department of Health and Human Services v. Florida} (2012)\textsuperscript{52} to discuss the Anti-Injunction Act and the individual mandate provision.\textsuperscript{53} For the first time since 1970, the Court scheduled six hours of oral argument for this decision, instead of the usual limit of one hour per decision, showing the Supreme Court recognized the complexity and difficulty this case presented.\textsuperscript{54}

\begin{itemize}
  \item \textsuperscript{40} U.S. CONST. art. I, § 8, cl. 3.
  \item \textsuperscript{41} Id. at 40.
  \item \textsuperscript{42} Patient Protection and Affordable Care Act, 26 U. S. C. §1396c.
  \item \textsuperscript{43} U.S. CONST. art. I, § 8, cl. 1.
  \item \textsuperscript{44} South Dakota v. Dole, 483 U.S. 203, 211–212 (1987).
  \item \textsuperscript{45} See Id. at 40.
  \item \textsuperscript{46} U.S. CONST. art. I, § 8, cl. 3.
  \item \textsuperscript{47} Florida ex rel. Bondi v. US Dept. of Health and Human Services, 780F.Supp.2d 1258 (N.D. Fla. 2011).
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} Brian Duignan, 648 F.3d 1235 (11th Cir. 2011); Affordable Care Act cases, ENCYCLOPEDIA BRITANNICA.
  \item \textsuperscript{50} National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, (2012).
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Brian Duignan, Affordable Care Act cases, ENCYCLOPEDIA BRITANNICA.
\end{itemize}
In a 5-4 ruling, the Supreme Court held that under the Anti-Injunction Act the Court has the authority to hear constitutional challenges of the ACA’s individual mandate provision, despite the fact that the mandate had not yet gone into effect at the time of the case.\(^55\) The Court also held that the Medicaid expansion provision is unconstitutional.\(^56\) States cannot be mandated to extend their Medicaid programs, considering that the penalty withholds all federal funding for existing Medicaid beneficiaries, making this provision coercive, due to the significant amount of funding that the non-participating states would lose.\(^57\) The Court additionally held that although the ACA’s individual mandate provision is unconstitutional under the Commerce Clause,\(^58\) the individual mandate is constitutionally valid according to Congress’s authority under the Taxing Clause.\(^59\)\(^60\)

II. Testing the Taxation Clause, Challenging the Constitution, and Breaking the Balance of Power

The individual mandate is arguably the most debated part of the ACA, especially since lawmakers, the Obama Administration, and judicial authorities have gone back and forth on the definition of the individual mandate as either a tax or a penalty. In discussing the constitutionality of this law, the definition is critical when considering the vastly different legal ramifications each would have. In *United States v. La Franca* (1931), the Court clearly defines both as mutually exclusive, “[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction by statute as punishment. If an exaction be clearly a penalty, it cannot be converted into a tax by calling it such.”\(^61\) Taxes and penalties are inherently defined by their purposes and effects.\(^62\) Since Congress aimed for all Americans to be eligible to purchase insurance and avoid the penalty, the main purpose of the ACA is to provide universally available health care, suggesting that the ACA has no explicit revenue-raising purpose. In addition to this purported purpose, both the Executive Branch and the Legislative Branch initiated the ACA, including the individual mandate, without the intention of exercising the General Welfare Clause, by establishing the ACA as non-taxation legislation. From the bill’s beginning stages, the Obama Administration has been inconsistent with its definitions of the individual mandate; initially declaring it was not a tax.\(^63\) Yet later on, President Obama supported this legislation as a tax, realizing that labeling the law as such was the


\(^{56}\) *Id.* at 6.

\(^{57}\) *Id.* at 3.

\(^{58}\) U.S. CONST. art. I, § 8, cl. 3.

\(^{59}\) U.S. CONST. art. I, § 8, cl. 1.

\(^{60}\) Kate Pickert, *Supreme Court Upholds Health Reform Law in Landmark Decision*, TIME, June 28, 2012.

\(^{61}\) United States v. La Franca, 282 U.S. 568, 572 (1931).

\(^{62}\) *Id.*

necessary “linchpin” to ensure the mandate’s constitutional viability.\textsuperscript{64} Congress showed similar initial intentions when the U.S. Senate passed the bill as a Reconciliation Act, a move that is commonly used for minor budgetary amendments. The dissenting opinion of \textit{NFIB v. Sebelius} also concedes that Congress intended for the ACA to be non-taxation legislation by noting the ACA’s codified location, “the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found—in Title IX, containing the Act’s “Revenue Provisions.”\textsuperscript{65} In his Opinion from \textit{Commonwealth of Virginia v. Kathleen Sebelius} (2010), U.S. District Court Judge Henry Hudson similarly recognizes Congress’s intent to utilize the Commerce Clause, rather than their power to tax, arguing that “[i]n drafting this provision, Congress specifically referred to the exaction as a penalty” for not buying coverage.\textsuperscript{66} In evaluating all of this evidence in the ACA’s legislative process, Congress’s intent to pass the ACA as a regulatory penalty becomes clear. However, regardless of whether or not Congress intended to or had the power to pass the ACA as a tax, the real outcome remains that Congress in the end did not pass the ACA as a tax.\textsuperscript{67} This would suggest that the Supreme Court judicially rewrote the ACA as a tax in \textit{NFIB v. Sebelius (2012)},\textsuperscript{68} a move that is constitutionally questionable in and of itself.

Rewriting the ACA as taxation legislation undermines the U.S. Constitution’s Origination Clause, which states that “[a]ll Bills for raising Revenue shall originate in the House of Representatives,”\textsuperscript{69} since the ACA was reinterpreted as taxation legislation in the Supreme Court despite being born as a mandate paired with a penalty in Congress. The dissenting opinion in \textit{NFIB v. Sebelius (2012)} recognizes this violation, arguing that “imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.”\textsuperscript{70} Allowing the Supreme Court to rewrite the ACA as taxation legislation consequently transcends the Constitution, disrupting the intended balance of powers and demeaning the power of the people.

This extension of judicial power also created an unprecedented tax that regulates inactivity.\textsuperscript{71} There are two kinds of taxes enforced in the United States today, direct and indirect.\textsuperscript{72} Direct taxation is the power of the federal government to impose such payments on individuals.\textsuperscript{73} Yet Chief Justice Roberts clarifies that the ACA does not fall


\textsuperscript{65} \textit{Id.} at 150 (Scalia, Kennedy, Thomas, Alito, J.J., dissenting).

\textsuperscript{66} \textit{Id.} at 33 (Judge Henry E. Hudson, Memorandum Opinion).

\textsuperscript{67} \textit{Id.} at 68.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} U.S. CONST. art. I, § 7, cl. 1.


\textsuperscript{71} \textit{Id.} at 192 (Thomas, dissenting).

\textsuperscript{72} Springer v. United States, 102 U.S. 598 (1880).

\textsuperscript{73} Fritz Neumark, \textit{Taxation}, \textit{ENCYCLOPEDIA BRITANNICA}, July 1, 2014.
under the direct taxation category, affirming that "a tax on going without health insurance does not fall within any recognized category of direct tax."74 The ACA is not a direct tax since it is not a capitation that would require payment from every citizen without regard to any circumstances.75 The Court argues that this legislation falls under indirect taxes.76 Indirect taxes are duties, imposts and excises, or taxes on activities and products.77 It can be argued that the ACA tax is similar to the indirect tax on cigarettes in its efforts to influence public behaviors,78 specifically by imposing a monetary incentive to encourage individuals to stop smoking. In *NFIB v. Sebelius* (2012), Chief Justice Roberts similarly argues that "taxes that seek to influence conduct are nothing new."79 He cites the cases, *United States v. Sanchez* (1950)80 and *Sonzinsky v. United States* (1937)81 to draw the parallel between encouraging people to stop smoking and requiring a payment to the IRS for refusing to purchase insurance.82 However, the major disconnect between these aforementioned cases and the ACA is the difference between taxation to regulate activity versus taxation to regulate inactivity. In the previously discussed case, taxes on cigarettes can be avoided by choosing not to purchase such products.83 However, the only way citizens above the specified income bracket can avoid such taxation is by purchasing health insurance.84 Thus, the U.S. Supreme Court has created an indirect tax that cannot be avoided without complying to purchase a mandated product. Although the Chief Justice continues to argue that “tax incentives already promote, for example, purchasing homes and professional educations,” no such previous regulation has enforced a non-compliance tax penalty for failing to purchase homes or professional educations.85 For example, if an individual chooses to not borrow money when he or she invests in higher education, then the individual does not receive that particular tax deduction, but the individual is not taxed with a penalty for the inactivity of not borrowing funds.86

Although the Court limited Congress’s ability to directly regulate individuals’ behavior under the Commerce Clause, it expanded Congress’s ability to indirectly regulate individuals under the Taxation Clause.87 This expansion now provides a constitutional precedent for both the Supreme Court to rewrite law, specifically allowing for the judicial creation of taxation legislation, and for the federal government to regulate

75 Id.
76 Id. at 44.
77 Neumark, supra note 73.
78 JANE MCGREW, HISTORY OF TOBACCO REGULATION (Schaffer Library of Drug Policy).
83 See notes 83–84.
87 Wendy K. Mariner, et al., Reframing Federalism — The Affordable Care Act (and Broccoli) in the Supreme Court, 367 N ENGL. J. MED. 12 (2012).
people who “do nothing.” The Chief Justice himself warned that this type of federal expansion of power would “fundamentally chang[e] the relation between the citizen and the Federal Government.” Considering the many things that “people do not do” this ruling significantly strengthens and broadens the federal government’s taxing and regulation authority, giving it the power to influence both activity and inactivity and raise revenue from such regulation. This precedent places the power to participate in the hands of Congress, meaning that Congress can now decide to mandate people to purchase anything that they feel will promote greater welfare for the public.

The separation of powers not only exists to balance the three branches of government, but more importantly to prevent this kind of overreaching federal influence on the people. Justice Kennedy affirms this argument for federalism and the balance of the three branches to “protect individual liberty” in Bond v. United States (2011). This case warns that mandating individuals to participate in commerce consequently costs them their liberty. Challenging individuals’ liberty may even constitute a substantive due process argument rather than a Commerce Clause or an enumerated powers argument, as attempted in the D.C. District Court Case, Seven-Sky v. Holder (2011). These concerns for the conservation of liberty show the consequences of the expansive federal power exercised to uphold the ACA. They warn against a great fear that the U.S. Constitution was designed to protect, the fear to forego liberty. Not only do these arguments challenge the constitutionality of the ACA, but they also predict the consequential constitutional destruction that comes as a cost to exercising the expansion of federal power.

Federal power only continues to extend within the recent implementation of the ACA. On March 4, 2015, the Supreme Court heard oral arguments for King v. Burwell (2015), a suit that challenges the IRS final rule which interprets the ACA’s premium tax credit provision as the authority to grant tax credits to individuals who purchase insurance through both the state-run exchanges and the federal exchange run by the Department of Health and Human Services (HHS). A ruling is expected around June 2015. This issue arose when thirty-four states exercised their right to refrain from

---

88 Id.
90 Id.
92 131 S. Ct. 2355 (2011).
94 See Seven-Sky v. Holder, 661 F.3d at 19 (D.C. Cir. 2011).
95 Clement, supra note 93.
97 26 C.F.R. § 1.36B-2(a)(1).
99 Amy Howe, Will Concern For States’ Rights Win Out In Subsidies Battle?: Today’s Argument in Plain English, SCOTUSBLOG, Mar. 4, 2015.
setting up an exchange, and in response, the federal government granted subsidies to individuals who reside in those thirty-four states and purchased insurance through the federal exchange. However, the statute’s text expressly allows federal subsidies for only those “enrolled in” a qualified health plan offered “through an Exchange established by the State under section 1311.” This is the central argument for the plaintiffs in both the Fourth Circuit Court of Appeals case *King v. Burwell* (2014) and the D.C. Court of Appeals case *Halbig v. Burwell* (2014), that the statute only allows subsidies for those enrolled in a state-run exchange. In fact, the statement, “established by the State [under 1311]” is written in the ACA in nine different locations to emphasize the explicit restriction to allow subsidies for only those who enroll in an exchange “established by the State.” These aforementioned cases reveal how the federal government’s interpretation of the ACA attempts to allow it to act outside of the law, continuing to extend its federal authority. If the Supreme Court rules in favor of the petitioners, eight to ten million people would “likely lose their coverage.” This suggests that without such subsidies, the ACA will not be able to fulfill the promise of affordable health care for individuals in those remaining thirty-four states. Even if Congress intended for subsidies to be extended to those enrolled in the federal exchange, these outcomes ultimately portray the ACA as poorly written legislation that fails to achieve its goals. Justice Kennedy argued the importance of “very clear” and precise language, especially when such language dictates the terms of “billions of dollars” in tax deductions. In the Supreme Court oral argument, Justice Scalia reminded the Court that the question “is not what Congress intended; the question is what it actually wrote in the statute.” Justice Scalia suggests that regardless of the reasoning, the letter of the law stands, and furthermore, the federal government is acting outside of what is written, showing a continued expansion of unsubstantiated federal authority.

III. Enrollment and Economic Costs

Despite the constitutionally questionable means at which the federal government has interpreted and implemented the ACA and its individual mandate, many Americans have abided by the law. Recent polling has shown that the ACA’s mandate has made

---

102 § 36B(c)(2)
107 Denniston, supra note 100.
108 Howe, supra note 99.
109 Id.
some progress in decreasing the number of uninsured Americans.\textsuperscript{110} As of November 2014, Gallup-Healthways Well-Being Index produced a thorough survey that showed a 4.6 percent decrease in the uninsured rate to reach an overall 13.4 percent rate of uninsured since the 2013 open enrollment period.\textsuperscript{111} This rate has stayed around 13.4 percent since the survey was conducted.\textsuperscript{112} However, despite these gains, further analysis suggests that the ACA creates greater economic uncertainty for individual Americans, the labor market, and the U.S. as a whole.

A significant part of this uncertainty is due to the remaining uninsured individuals who decided to pay the penalty although they were projected to participate. Enroll America, a non-partisan non-profit, estimated that two-thirds of the uninsured chose to not look for coverage in previous enrollment periods.\textsuperscript{113} Perhaps these failed projections are due to the failed attempts to educate Americans on the basic steps of enrollment. The Kaiser Family Foundation tracking poll found that eighty-nine percent of potentially eligible yet uninsured adults were unaware that there was an additional open enrollment session in November 2014. Enroll America also found that thirty-eight percent of enrollees were unsure of what plan they chose.\textsuperscript{114} This feedback suggests that the federal government has been struggling to effectively educate the public on the enrollment process.

An even greater obstacle preventing the ACA from securing significant participation is the affordability factor. Although minimum insurance plans will be mandated, this does not guarantee that coverage premiums will be affordable and that individuals will be able to enroll.\textsuperscript{115} Affordability is the number one reason that the uninsured chose to not participate (which has been the consensus among a majority of enrollment surveys).\textsuperscript{116} When asked, “Why didn’t you sign up for health insurance?” most uninsured answered that the “costs weren’t worth it.”\textsuperscript{117} This emphasizes the ACA’s major fault in its application: increasing deductibles and co-pays. Many individuals may have a deductible as high as $6,000 and will be required to pay a forty percent treatment co-pay.\textsuperscript{118} Although these figures will vary for different individuals depending on their selected coverage and amount of subsidies awarded, many families will face similar unexpectedly high health insurance costs.\textsuperscript{119} Unfortunately, even the low-income families who qualify for the largest subsidies can still face up to $4,500 “in total out-of-pocket

\textsuperscript{110} Jenna Levy, \textit{In U.S., Uninsured Rate Holds at 13.4 %}, GALLUP, Oct. 8, 2014.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} PerryUndem Research & Communication and Enroll America, \textit{Voices from the Newly Enrolled and Still Uninsured: A Survey about the Affordable Care Act’s First Open Enrollment Period} (July 2014).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} Jeffrey Dorfman, \textit{Get Ready for the Real Obamacare Disasters as People Start to Use It}, FORBES, Apr. 5, 2014.
\textsuperscript{119} \textit{Id.}
spending, which is about 11.84% of their annual income." If these low-income families could not afford insurance before, it is difficult to fathom that they could afford these high deductibles and co-pays. These health care cost increases completely undermine the ACA’s purpose to provide more affordable and accessible coverage. As the implementation of the ACA continues, Americans have begun to feel the frustration of this law’s broken promise for affordability and it threatens the ACA’s greatest need for near-universal participation.

Affordability is an especially pertinent question when it comes to the young adult population. The ACA is dependent on this age group to pay higher annual minimums and to help compensate for the older and less healthy individuals who plan to participate in the health care market. Gallup’s enrollment data shows little hope for the youth to outnumber the elder group of enrollees. Despite the approximate 4.6 percent drop in the uninsured rate for young adults ages 26-34, and the overall coverage gain for individuals ages 18-34 over the past year, young adults ages 18-35 still fall five to 10.3 percent below the threshold of age groups 35-64 years old. If the older generation persists to have higher enrollment rates than the young adult generation, the youth is unlikely to compensate for the more costly, older generation. The older generation typically incurs more costs because many individuals have put off treatment, which typically worsens their conditions and increases their health care needs. The California Association of Health Plans found that, in general, “someone in his 60s uses $6 in health care services for every $1 tallied by someone in his 20s.” To keep costs affordable for all generations under the ACA, the federal government needs to increase the number of young adult enrollees and help compensate for the more costly care for adults and seniors. This suggests that the deficit of enrollees, especially young enrollees, has created an implementation problem that threatens the foundations of the ACA.

In addition to the costs presented by under-participating young adult enrollees, the new taxes and mandated payments imposed on individuals and employers in the ACA

---

122 Dorfman, supra note 118.
124 Id.
125 Levy, supra note 110.
126 Id.
127 Michael Blood, Young People Aren’t Signing up for Obamacare and that’s a Problem, THE HUFFINGTON POST, Nov. 15, 2013.
128 Id.
129 Id.
130 Courtney Subramanian, Obamacare Needs Two Young People for Every Three Older Sign-Ups, TIME MAGAZINE, Nov. 16, 2013.
create additional economic uncertainties and especially hurt the labor market. Americans and their businesses will face more than $675 billion in “new or increased taxes from 2013 to 2022” to fund health care reform under the ACA. According to the National Bureau of Economic Research, a nonpartisan research organization, the ACA’s explicit and implicit taxes will decrease aggregate output by approximately two percent and reduce total factor productivity by approximately one percent. This decrease in aggregate output implies an economic shortage where the demand for the total amount of goods and services in the U.S. will exceed the supply, which typically leads to higher prices. Additionally, this lower level of factor productivity suggests a decrease in technological growth and efficiency.

Additionally, the increased taxes and mandated payments create greater unemployment for Americans. Not only will the general labor force diminish in the face of the ACA, but for incomes between 100 to 133 percent above the poverty level, tax rates increase by two percent, yet individuals between 133 percent and 400 percent of the poverty level will pay significantly more taxes towards the ACA, or approximately 9.5 to eighteen percent. The ACA’s increasing taxes with increased income are predicted to reduce the total hours worked by 1.5 to two percent from 2017-2024. As companies are forced to spend more to comply with the employer mandate, they are also faced with the harmful incentive to hire fewer full-time employees who would require employer-provided insurance and increase company costs. This especially applies to businesses that are not small enough to fit into the small business category, which is defined as employing less than 50 individuals, yet they are small enough to not afford insuring all of their employees. Many individuals earning close to the minimum wage will not be worth hiring if the employer is required to offer them health insurance coverage. To achieve efficiency, employers will be forced to hire fewer employees to reduce the cost of penalties. To compensate for a smaller workforce, the “skill-intensity” will have to

---

139 Mulligan, supra note 133.
140 Ubel, supra note 137.
increase for many employers to keep up with the profitable level of productivity.\textsuperscript{141} The CBO predicts that general unemployment will likely increase by a minimum of 700,000,\textsuperscript{142} or 0.5 percent of the current labor in the economy. Yet the National Bureau of Economic Research argues an even higher reduction in total labor.\textsuperscript{143} They suggest total labor will decrease by approximately three percent and low-skill labor by approximately nine percent.\textsuperscript{144} The National Bureau of Economic Research found that “a third of uninsured workers earn within $3 of the minimum wage and therefore have a higher risk of losing their jobs because of an employer mandate.”\textsuperscript{145} This suggests that the employees with the highest risk of losing their jobs will be a majority of low-income workers, including high school dropouts, and minorities, including females, racially-ethnic groups.\textsuperscript{146} If minorities lose their job stability, and experience a decrease in their standard of living, these consequences propose that although the ACA’s taxes and mandated payments attempt to make health care more affordable, it instead creates a greater net cost for individuals and the U.S. economy, especially in terms of employment.

Additionally, the medical industry is taking and will continue to take an immense hit to its labor market, as Former Chief Labor Department Economist Diana Furchtgott-Roth predicts that the additional taxes will cost 45,661 jobs specifically across the medical industry.\textsuperscript{147} As the enrollees transition to actual usage of the new insurance under the ACA, they have experienced significant setbacks.\textsuperscript{148} Four major complaints about the usage of the new insurance policies include: the lack of affordability due to high out-of-pockets costs, diminishing quality of care, lack of access to doctors, and failures in the ACA’s technological back-end to verify new coverage.\textsuperscript{149} Nationwide, there is increasing evidence that emergency rooms are experiencing an influx of patients due to the ACA’s new regulations and Medicaid expansion provisions. The University of Chicago recently published an article about its growing wait times and the subsequent obstacles patients and medical staff face.\textsuperscript{150} The increasing demand in ER’s across the country suggest that despite the ACA’s efforts and distribution of Medicaid cards, Americans are still not getting adequate access to care.\textsuperscript{151} Distributing over 500,000 Medicaid cards without providing any additional means for patient care simply set the medical market up for

\begin{thebibliography}{99}
\bibitem{141}Mulligan, \textit{supra} note 133.
\bibitem{142}Elmendorf, \textit{supra} note 134.
\bibitem{143}Mulligan, \textit{supra} note 133.
\bibitem{144}Id.
\bibitem{146}Id.
\bibitem{147}Goodman, \textit{supra} note 131.
\bibitem{148}Dorfman, \textit{supra} note 118.
\bibitem{149}Id.
\bibitem{150}Naomi Bauman, \textit{Long ER Waits at University of Chicago Not Surprising In the Wake of ACA}, ILLINOIS POLICY, Dec. 29, 2014.
\bibitem{151}Dorfman, \textit{supra} note 118.
\end{thebibliography}
failure. A major motivator to expanding health care coverage among Americans was to limit the millions of uninsured Americans’ uncompensated ER costs allowed under the EMTALA. Yet, under the ACA’s new regulations, many emergency rooms face more overcrowded rooms and other regulatory burdens that jeopardize quality of care. Thus far, the medical market faces 11,000 pages that include the 109 regulations added by the ACA. Such onerous regulations serve only to add to the already overburdened emergency room staff. To comply with the increased regulations, it is estimated that the business and health care industries will spend about 190 million extra hours of paperwork per year. This takes significant time and resources away from direct patient care, likely reducing the quality of care. The expanded Medicaid program may have increased the use of the system, yet the increased regulation failed to fulfill the promise to lessen emergency room visits, instead further burdening hospitals and doing “little to improve health outcomes.”

Prior assertions that individuals could keep their previous doctors were blatantly disregarded in the implementation of the ACA. To comply with the mandate, insurers only selected doctors and hospitals that agreed to lower reimbursement rates in their exchange plans. So many of the plans patients sign up for will have more limited lists of doctors and hospitals, sometimes excluding patients’ previous medical professionals. In addition to possibly losing their previous doctors, ACA enrollees will likely have a greater difficulty finding new doctors who will accept their new insurance. Many doctors have also complained that it is not clear to insurance companies who they are now insuring. Similar to the ACA’s website setbacks when individuals attempted to enroll, the technological back-end of this system has continued to be inconsistent in showing updated and clear information on who is enrolled, meaning insurers cannot relay reliable information back to doctor offices, creating communication conflicts. These unintended, yet serious, setbacks suggest that just because an individual has insurance, it does not guarantee they will receive good quality, or any care under the ACA. These

152 Id.
153 Id.
156 Id.
158 Timothy Wingo, Concierge Medicine For All: Direct Primary Care is the Solution for our Health, FORBES, Sept. 19, 2014.
159 Id.
160 Id.
161 Id.
162 Id.
163 Id.
factors, when combined with the decreased quality of care foreshadow an increasingly destabilized health care industry.164

Conclusion

The ambitious ACA set out to address America’s monster of a problem with its health care system. Prior to its implementation, the inefficiencies inherent in the American health care system deprived many individuals from accessing adequate health care, and many who did gain access could not afford the increasing costs.165 Forbes contributor Avik Roy reports that health care costs account for half of all US bankruptcies.166 So many Americans were forced to face the choice to go bankrupt or suffer serious health complications.167 Additionally, Medicare persists as a $38+ trillion “unfunded liability”, growing at twenty percent per year.168 This article agrees with the many Americans and experts who recognize the U.S. health care shortcomings, but argue that the ACA is not the right solution. In fact, many Americans are unhappy with the ACA.169 Gallup’s recent November 2014 poll reflected the American public’s third consecutive year opposing government-run health care. Fifty-two percent agreed that, “it is not the federal government's responsibility to ensure that all Americans have health care coverage.”170 This is especially telling, considering that people polled in favor of government-run health care in Obama’s early stages of presidency in 2009. Gallup’s findings suggest that numerous Americans are not willing to accept the constitutional and economic costs that shadow the good intentions of expanding health care coverage.171

Though the ACA is founded on these good intentions, it harbors overly burdensome constitutional and economic costs to achieve its goals. Under the ACA, federal power is extensively expanded, individual liberties are being lost, the U.S. economy as a whole will likely face continued hardship, and health care costs will continue to increase for many Americans. Thus it is pertinent that Americans be cognizant of the individual rights, as well as the cost and quality of care that is jeopardized in the ACA’s continued implementation. Such costs are too high for the American people, especially lawmakers and leaders, to sit idly by and allow such circumstances to persist. As Congresswoman Nancy Pelosi, Speaker of the House at the time of the ACA’s passage, surmised during a press conference, “We have to pass the bill so that you can find out what is in it.”172 But as Founding Father James Madison would

164 Id.
165 Id.
166 Id.
167 Id.
169 Frank Newport, Majority Say Not Gov’t Duty to Provide health care for All, GALLUP, Nov. 20, 2014.
170 Id.
171 Id.
172 Nancy Pelosi, Congresswoman, Fmr. Speaker of the House, Remarks at the 2010 Legislative Conference of the Nat’l Ass. Of Counties (Mar. 9, 2010).
probably retort, “It will be of little avail to the people…if the laws be so voluminous that
they cannot be read, or so incoherent that they cannot be understood.”

Now that the American people can see the overarching effects of the roughly 1,000 page long ACA bill and its 33,000 pages of implementation regulations, a comprehensive reexamination of the utility of the ACA is merited, its repeal mandated, and its history marred.

---

173 THE FEDERALIST NO. 62 (James Madison).
The First Amendment Implications of Campaign Finance: Why Campaign Finance Must Be Regulated

Arian Rubio

Introduction

American citizens are guaranteed the right to their freedom of speech, emanating from the First Amendment to the United States Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.” ¹ While the First Amendment makes no statement in relation to money or the freedom to spend therein, in the ruling of McCutcheon v. FEC (2014) and other related campaign finance cases, the U.S. Supreme Court asserts that it does.² These rulings effectively struck down legislative campaign finance regulations that protect one a principal foundations of the American republic: the voice of the American people in their political process. The implications of the McCutcheon and other related rulings on the future of American politics and governance are widespread and possibly severe. Campaign finance regulations are inherent to the preservation of the First Amendment, particularly with respect to the equalizing effect of these regulations for speech in electoral processes. There are many potential solutions to the implications of the McCutcheon case and its kin, but a comprehensive examination reveals that the basic tenants of McCutcheon misinterpret the First Amendment and go against the spirit of the law. From there, this article’s primary prescription will be for the Supreme Court to abandon the doctrine of treating money as speech.

This article analyzes the broader implications of recent high-profile cases regarding campaign finance legislation and explores how limiting campaign finance would protect, rather than deter, free expression and speech. The first part of this article will undertake a comprehensive analysis of the foundation of the Supreme Court’s doctrine on campaign finance. The second will discuss flaws in the Court’s prior

¹ U.S. CONST. amend. I.
reasoning and how the United States can move towards a more sustainable approach toward campaign finance.

I. Legal and Judicial Context

In order to understand the McCutcheon ruling, one must first understand the doctrinal origins of First Amendment limits on campaign finance regulation: Buckley v. Valeo (1976)\(^3\). The opinion that campaign finance regulations are essential can be seen in Justice Byron White’s opinion, concurring in part and dissenting in part, that argued in favor of upholding key aspects of campaign finance regulations that were enacted in 1974 in their entirety, as opposed to the weakening of such regulations that the Court imposed.\(^4\) After considering this foundation, one must consider solutions to the problem moving forward. In his book, Six Amendments: How and Why We Should Change the Constitution\(^5\), Justice John Paul Stevens analyzes Justice White’s opinion, providing the context in which Justice White made his arguments and how those arguments applied to his own dissent in the landmark campaign finance case Citizens United v. FEC (2010)\(^6\). The principles of Citizens United can be found in the McCutcheon ruling and, in looking at the reasoning behind Justice Stevens’ dissent, can provide insight to the flaws of McCutcheon. By examining how the Supreme Court has dealt with campaign finance regulations, Justice Stevens then provides a suggestion to better deal with such issues in future: an amendment to the United States Constitution.\(^7\)

Importance of Regulation

This raises the question of exactly how important regulation is. Such regulation is essential not only to the philosophical aspects of campaign finance, but to its application, how it affects the political landscape, as well. Money in politics at a high degree allows political interests to get their message across more easily to voters, swaying the outcome of federal races. A 2007 study published by Bowdoin College concluded that there is considerable evidence that advertising persuades voter choice and influences attitudes towards candidates and policies, especially among independents and weak partisans in smaller races where candidates are not as well known to the electorate.\(^8\) With growing levels of the population no longer affiliating with major parties and levels of voter apathy increasing, political marketing is becoming increasingly powerful. This, then, increases the power of more affluent interests, especially if there are weak or non-existent measures

\(^3\) See Buckley v. Valeo, 424 U.S. 1 (1976).
\(^4\) Id.
\(^5\) JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014).
\(^7\) Stevens, supra note 5.
\(^8\) Franz, Michael, Paul Freedman, Ken Goldstein, & Travis Ridout, Understanding the Effect of Political Advertising on Voter Turnout: A Response to Krasno and Green, 1 THE JOURNAL OF POLITICS 70 (Feb. 2008).
in place to prevent that influence from overpowering the speech of other members of the electorate. This gives more affluent interests the opportunity to promote their own views in the market of ideas and attack those of persons with less money, essentially giving such interests a greater medium to utilize speech. This also affects voter involvement leading to disillusionment and a low voter turnout, as those who are not particularly passionate about politics or select political issues do not necessarily get a full picture of what it means to be politically involved. Seeing the results of the 2007 Bowdoin College study, it is clear that an increase in money in politics harms the foundations of our political system by weakening the cornerstones of democracy.

Campaign finance is often a tricky issue as restrictions on the source, amount, and use of campaign funds may be in conflict with the First Amendment protections of free speech and association and yet is required to build organization and construct and display one’s message. Many questions must be asked in order to determine whether campaign finance contributions can be legally considered a constitutionally protected form of expression, such as whether money is speech; whether corporations and unions can be given the same constitutional and legal protections as living human beings; what the implications of the varying interpretations on our political processes are; and what to do if the courts have erred in the past. Luckily, there are many legal interpretations and solutions that can be used to discuss the issue at hand.

*Justice White’s Separate Opinion in Buckley Would Have Struck A Better Balance*

Justice Byron White’s opinion, concurring in part and dissenting in part, in the landmark 1976 U.S. Supreme Court decision *Buckley v. Valeo* provides significant insight into the implications of campaign finance regulations. In *Buckley*, the Court upheld the legislative regulations on campaign finance contributions in the 1974 Amendments to the Federal Election Campaign Act and provisions of the Internal Revenue Code, but ruled that the act of spending money to influence the outcome of political elections is constitutionally protected as free speech. The Court stated that, “In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.” The Court upheld contribution caps, differential treatment of contributions and expenditures, and public financing of elections, while striking down expenditure caps. Justice White, however, would have upheld contribution caps, expenditure caps, and public financing, while striking down differential treatment of contributions and expenditures. Justice White justifies this position by articulating that

---

9 *Id.*


11 *Id.*

12 *Id.*
campaign finance regulations can curb the effects of corruption in the political process in his opinion:

In the first place, expenditure ceilings reinforce the contribution limits and help eradicate the hazard of corruption. The Court upholds the over-all limit of $25,000 on an individual's political contributions in a single election year on the ground that it helps reinforce the limits on gifts to a single candidate. By the same token, the expenditure limit imposed on candidates plays its own role in lessening the chance that the contribution ceiling will be violated. Without limits on total expenditures, campaign costs will inevitably and endlessly escalate. Pressure to raise funds will constantly build, and, with it, the temptation to resort in "emergencies" to those sources of large sums, who, history shows, are sufficiently confident of not being caught to risk flouting contribution limits. Congress would save the candidate from this predicament by establishing a reasonable ceiling on all candidates. This is a major consideration in favor of the limitation. It should be added that many successful candidates will also be saved from large, overhanging campaign debts which must be paid off with money raised while holding public office and at a time when they are already preparing or thinking about the next campaign. The danger to the public interest in such situations is self-evident.\textsuperscript{13}

This opinion defends federal regulation of election finance in order to protect speech, rather than deter its application as is often criticized, by preventing candidates from being overly swayed by affluent influences. Justice White argues that the speech of the masses is more important than that of only the very wealthy. Campaign finance limits would then prevent the possibility of a slippery slope between the relationship of money and power by implementing laws that ease the temptation of corruption in public elections.

The Supreme Court, however, took a different direction than Justice White’s position. The Court held that restrictions on individual contributions to political campaigns is legally protected, as money in this case would be a medium for those individuals to support political campaigns, and that individuals could finance their own political campaigns without limitations. This case, being the first landmark U.S. Supreme Court case regarding campaign finance, would set precedent that would go on to impact the next several decades of electioneering.

This is evident in cases such as \textit{McConnell v. Federal Election Commission} (2003)\textsuperscript{14}, \textit{Citizens United v. Federal Election Commission} (2010)\textsuperscript{15}, and \textit{McCutcheon v.}

\textsuperscript{13} Id. at 6.
\textsuperscript{15} See \textit{Citizens United}, supra at note 5.
The First Amendment Implications of Campaign Finance

Federal Election Commission (2014)\textsuperscript{16}, which all shaped the political landscape in terms of election funding. Analysis regarding these cases can be found through Justice John Paul Stevens, who joined the U.S. Supreme Court prior to the ruling in \textit{Buckley v. Valeo} but after the case was argued, and so did not participate in its proceedings. Justice John Paul Stevens’s analysis regarding the principles of campaign finance regulations can be concisely found in his 2014 book \textit{Six Amendments: How and Why We Should Change the Constitution}, where he argues that campaign finance regulations make logical sense. He articulates this legal viewpoint by arguing that:

There are, however, situations in which rules limiting the quantity of speech are justified by the interest in giving adversaries an equal opportunity to persuade a decision maker to reach one conclusion rather than another… It would have been manifestly unfair for the moderator of one of [the 2012 Republican presidential debates] to allow Mitt Romney more time because he had more money than any of his rivals.\textsuperscript{17}

Justice Stevens echoes the position of Justice White’s special concurrence in \textit{Buckley} by reasoning that disproportionate applications of wealth in politics dilute the public conversation regarding elections, policies, and campaigns, by placing a significant focus on the views of the wealthy. Justice Stevens uses the example of the 2012 presidential election primaries and former Massachusetts Governor Mitt Romney. The example of the moderator deciding that Romney be granted more time to express his speech than the other candidates due to his wealth emulates the political landscape when wealth can determine the scope and reach of one’s speech. Justice Stevens goes on to propose a solution in which the Constitution is amended to fix the problems of disproportionate speech due to funding, stating: “Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters, may spend in election campaigns.”\textsuperscript{18} This would allow Congress and state legislatures to determine reasonable campaign funding limitations on elections within their jurisdictions without fear that such legislation is repugnant to the principles of speech as applied in recent Supreme Court cases. While the First Amendment should not be read to incorporate money as speech, the Court has repeatedly done so. In ratifying such an amendment, clarity would be added to the text of the Constitution, preventing such misinterpretation from being perpetuated.

\textsuperscript{16} See \textit{McCutcheon}, supra at note 2.
\textsuperscript{17} See Stevens, \textit{supra} at note 4.
\textsuperscript{18} Id.
In addition to his proposals in his writing after leaving the Court, Justice Stevens has provided thoughts regarding campaign finance regulation within his legal opinions, in cases such as *McConnell* and *Citizens United*. *McConnell v. Federal Election Commission* (2003) had a mixed Court opinion, in which Justices Stevens and Sandra Day O’Connor wrote parts of the binding legal opinion. In the joint opinion with Justice O’Connor, Justice Stevens articulated that the *Buckley* decision concluded that further legislation was “necessary to regulate the role that corporations, unions, and wealthy contributors play in the electoral process.” This was due to the idea that there is a significant difference between actual and theoretical results, stating that: “As a result of [a strict reading of FECA], the use or omission of ‘magic words’ such as ‘Elect John Smith’ or ‘Vote Against Jane Doe’ marked a bright statutory line separating ‘express advocacy’ from ‘issue advocacy’. “\(^{19}\)

Thus, campaign finance regulations protect First Amendment rights, rather than infringe upon them. The opinion goes on to argue that:

> Our treatment of contribution restrictions reflects more than the limited burdens they impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits – interests in preventing ‘both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.’\(^{20}\)

Here, Justice Stevens sought to articulate that money will always find its way into the political process, but in order to protect the right to free speech as a whole, how the money gets in is important to note and to regulate: "Money, like water, will always find an outlet."\(^{21}\)

*Rights Belong To People, Not Corporations: Money is Not Speech*

As a member of the Court during many landmark campaign finance disputes, Justice Stevens remains an outspoken authority on the topic. The sentiments of Justice Stevens’ position returned in 2010 with the high-profile U.S. Supreme Court case of *Citizens United v. FEC*\(^ {22}\), in which Justice Stevens wrote a dissenting opinion. The case surrounded the Bipartisan Campaign Reform Act of 2002, which prohibited corporations and unions from using funds to make independent expenditures for electioneering.


\(^{20}\) See *McConnell*, supra at note 15.

\(^{21}\) See *Citizens United*, supra at note 5.

\(^{22}\) *Id.*
communication, using non-campaign funds for campaigns. The dissenting opinion articulated that speech rights cannot be applied to corporations or unions, and is therefore inappropriately applied in the Court’s opinion, by stating, “In the context of election to public office, the distinction between corporate and human speakers is significant… They cannot vote or run for office.”23 Given this distinction, it is unreasonable to grant non-humans the same political rights in terms of electioneering as humans, especially as the voice of a corporation can often be vague. This is articulated in the dissent, which stated:

It is an interesting question ‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters… It is entirely possible that the corporation’s electoral message will conflict with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one’s autonomy, dignity, or political equality has been impinged upon in the least.24

Through the regulation of speech of a corporation, there are no basic, personal rights infringed. The formulation of a political message of a corporation is not necessarily the collective view of every member of the corporation; rather than the corporation having political views, it should be the views of the individuals within the corporation who have their political opinions voiced in the public sphere. Otherwise, the message becomes diluted with heavy funding from corporate influences that may or may not reflect the broader views of those who contribute to its funds. Therefore, regulation serves to protect rather than hurt free speech, as the dissenting opinion implies:

Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.25

The dissent in this case goes further to point out the idea that the Court rejected the principle of stare decisis in order to promote a political agenda, rather than the principles of the law:

Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907… In the
end, the Court’s rejection of... McConnell comes down to nothing more than disagreement with their results... The only relevant thing that has changed since [McConnell] is the composition of this Court.26

Justice Stephen Breyer, who was present on the Court for the McConnell, Citizens United, and McCutcheon cases, has both spoken and written of a formula for interpreting statutes.27 This formula consists of six factors that Breyer uses to decide cases: text, history, tradition, precedent, purpose of a statute, and the consequences of conflicting interpretations.28 The ruling in the Citizens United case failed to satisfy all six of these criteria. The First Amendment prevents government abridgment of speech, not the limitations on which one can spend money on campaigns. Money is not interpreted as direct speech, yet the Court operated under the assumption that it is. The purpose of this statute was to prevent the abridgment of the voices of millions of Americans at the expense of those who have money to buy political power. Now individuals and corporations, whether in law or in actuality, have the power to spend as much money as they want in elections. Maybe they cannot spend all of that money on one candidate, but they can essentially put an extraordinary amount of money into a political agenda that can be used to purchase political power. The federal government did have a legitimate interest, as a ruling would affect the way the federal government is comprised through elections.

As far as the purpose of the First Amendment is concerned, it must be determined whether campaign finance regulations protect or deteriorate freedom in elections, and whether the government has a compelling interest to enforce such regulations. It is important to note that not all liberty is the same. This ruling is a distortion of free speech because it assumes all liberty is the same. This case looks at the "freedom to do something", but not the "freedom from something." Not all liberty is the same, and it should not be treated as such, in that there are positive and negative liberties. In other words, while people have a right to perform an action, they equally have the right from certain actions being done onto them. People have freedom of speech, and that freedom of speech implicitly comes with a freedom to be heard. Campaign finance laws allow people to be heard in the political process. Too much money will drown out those without money, which infringes on their freedom of speech because it implicitly takes away their freedom to be heard. This seems to pervert the statement "We the People" into "We the People with Money." Money, then, is not symbolic speech -- it is no form of speech. It is not expression. A person cannot express himself or herself monetarily, as that money is being used with a clearly defined purpose that goes beyond the expression that is protected under the First Amendment. Money is simply a means to an end in regards to

26 Id.
27 Id.
28 Id.
having a message heard, and the access to more means leads to more ends. In other words, having more money grants certain people more ability to transmit speech, effectively giving them more speech than others. A person without money could easily go outside of their home and shout in support of a candidate or issue, but it would not have the same effect as a wealthy person spending money on well-crafted and poll-tested advertisements that are broadcasted at peak viewing times. The time, place, and manner in which the speech is transmitted is essential, and having more money effectively strengthens one’s ability to participate in the democratic process. If one donates a generous amount to a political campaign, one does not see that money as one expressing one’s support or speech. One sees it as a way of advancing a political campaign for public office. At regulated amounts, this is good. It helps people to have their voice in the process and helps candidates share their message with the public. Most people are not directly affected by many of the campaign finance laws in place. This ruling does not affect the campaign expenditures of the majority of people who participate in our democratic process. Those who still want to contribute can. Most people don’t have thousands of dollars to spend on the promotion of political candidates, but those who can often do. The donation of thousands of dollars to a multitude of campaigns, each seeking positions of power and influence in the government, which is intended to reflect the interests of all citizens, can’t be compared to wearing a ribbon for ideological support. Increased funding from a corporate source at the time of an election can be essential for a candidate, meaning that when a candidate knows that they will eventually be up for re-election, they would want to enact policies that keep them in good standing with that corporate entity. The Court, in both the McCutcheon decision and the Citizens United decision, is beginning to allow seats in Congress to be bought and sold by a small minority of people.\footnote{McCutcheon v. Fed. Election Comm’n, 527 U.S. ___ (2014).} \footnote{See Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010)}

This opens the floodgates to corruption. For example, the National Rifle Association has extensive amounts of political influence, not necessarily because of the number of its members, but rather because of the amount of money that it can generate to be put toward campaigns. It uses this money for outreach and can derail a candidate as a result. We need accept the fact that the electorate is poorly informed because we poorly inform them. It is possible that negative ads can spur political involvement, but it will only spur that involvement for those who are already involved. For everyone else, it leads a feedback loop of disillusionment. Money in politics is causing this loop that only distorts our political process even further. The First Amendment argument, thus, does not hold in terms of striking down campaign finance laws.
II. Prior Stances and Moving Forward

In order to determine solutions to the issues of campaign finance, it is essential to understand why campaign finance regulation matters in the first place. More money in politics means more money to spend on political advertising and messaging, essentially serving as a medium for candidates and policymakers to connect with the electorate. The ability to spend more money allows candidates and supporters to portray their message, and can therefore impact what voters think about certain candidates and policies.

Brand familiarity and brand choice are highly correlated, and therefore brand familiarity is the most rudimentary form of consumer knowledge. Brand familiarity is often ingrained in consumers through marketing and advertising. This concept can be applied to political candidates, policies, and voters. Political advertising and marketing, to which a large percentage of campaign funds are dedicated, persuade voters. A 2007 study published by Bowdoin College concluded that there is considerable evidence that advertising persuades voter choice and influences attitudes towards candidates and policies, especially among independents and weak partisans in smaller races where candidates are not as well known.31 With growing levels of the population no longer affiliating with major parties and levels of voter apathy increasing, political marketing is becoming increasingly powerful.32 This, then, increases the power of more affluent interests, especially if there are weak or non-existent measures in place to prevent that influence from overpowering the speech of other members of the electorate.

Potential Solutions

There are many possible solutions to the problems regarding campaign finance regulation. Perhaps the most effective solution would be that the Court revisit the principles of the McConnell case, with emphasis on Justice White’s opinion, in a new Supreme Court case in order to have fair elections and protect the rights of the people to free speech by allowing Congress to pass legislation that curbs the amount of money in political races. Since the Citizens United ruling, money in politics has soared and has disillusioned voters. This is not free expression; it is quite the opposite. By allowing the democratically elected legislators to impose reasonable limits, the voice of the general populous will be restored and faith in the political process can begin to heal. In reversing the Citizens United case, it could be argued that more power would be placed back into the hands of the American people, rather than in those of wealthy interests. It could then be argued that if American voters were less disillusioned with the process that defines governance, more involvement in day-to-day issues would become more important in the daily lives of Americans. The best solution for this issue would be for the Court to abandon the misguided doctrine of allowing money to be treated as speech.

31 See Franz, supra note 6.
32 Id.
Another solution would be that Congress and the states adopt Justice Stevens’ suggested amendment to the Constitution regarding congressional power to regulate speech. This will clarify that Congress does have the power to regulate campaign finance, effectively ending the First Amendment debate about money and campaign speech. The ratification of such an amendment would be an effective conclusion to the arguments of whether money is speech and allow the conversation to move forward to how we should regulate political funding, rather than if we should do so at all. Unfortunately, the political climate does not allow for such an amendment to be ratified. Due to the controversial and impactful nature of the Supreme Court’s current doctrine on campaign finance, many legislators at the state and federal levels would be inclined to dismiss any legislation that would reign in corporate influence because the corporate influence exists among those legislators and voting for such a proposal could be politically risky. While such an amendment would satisfy many of the concerns listed in this article, it is more important and more feasible for the Court to take up this issue.

In the contemporary political conversation, campaign finance is often a tricky and complex issue to discuss. The legal interpretations of Justices White, Stevens, and Breyer can all be used to determine the ramifications of regulation, as these interpretations all promote the idea of democracy supporting the voices of all individuals as opposed to only oligarchical regimes which support the voices of the wealthy few. The idea of limiting campaign finance in order to promote democracy not only defends the principles of liberty and equality under the Constitution, but goes on to provide solutions for reigniting faith in the political system of the United States.

33 Stevens, supra note 5.
34 Id.
Troubled Waters: Turkey & the Republic of Cyprus’ Maritime Disputes in the Eastern Mediterranean Sea

Nicole Grajewski

Introduction

In early October 2014, Turkish warships and surveillance vessels entered Cyprus’ Exclusive Economic Zones (EEZ), thereby challenging Cypriot efforts to expedite its search for offshore natural gas.¹ Turkish aggression occurred against the backdrop of Italian oil giant ENI’s initial exploration drilling off the coast of Cyprus and the burgeoning regional conflict over energy. Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), all coastal states exercise the right to explore and exploit their resources within their EEZ and continental shelf of up to 200 nautical miles off the coast.² Claims between Cyprus and Turkey center on the maritime delimitation of the continental shelf and EEZ in the Eastern Mediterranean Sea, an area believed to contain approximately 122 trillion cubic feet of recoverable gas and 1.7 billion barrels of recoverable oil.³ The UNCLOS, customary international law, and international jurisprudence offer a framework to mediate Turkey and Cyprus’ competing claims over state sovereignty and jurisdiction of these maritime delimitations.

Contrasting views of rights for exploration and maritime delimitation of the continental shelf and EEZ in the Eastern Mediterranean Sea perpetuate the debate between Turkey and Cyprus. The continental shelf and EEZ are codified in the UNCLOS, yet both were accepted as customary international law prior to the convention. Turkey has yet to ratify the UNCLOS, which requires the interplay of international law and state practice. Dispute resolution methods, customary international law, and

¹ Resolution On The Situation In The Exclusive Economic Zone Of The Republic Of Cyprus, Eur. Parl. Doc. (2014/2921(RSP)).
² United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [Hereinafter UNCLOS]; Article 55 of UNCLOS defines EEZ as “an area beyond and adjacent to the territorial sea … under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.”
³ See ASSESSMENT OF UNDISCOVERED OIL AND GAS RESOURCES OF THE LEVANT BASIN PROVINCE, EASTERN MEDITERRANEAN, FACT SHEET 010-3014, UNITED STATES GEOLOGICAL SURVEY (March 2010) [Hereinafter United States Geological Survey] (the Aphrodite Field is located 1,700 meters below sea level with initial estimates of recoverable volumes in the 5–8 tcf range).
resolution methods deriving from both the UNCLOS and international jurisprudence such as the International Court of Justice (ICJ) present the means to reach a solution and the International Tribunal for the Law of the Sea (ITLOS).4

Part I describes the historic and present geopolitical context, specifically the dimensions of the dispute both in material and political objectives to explain the heightened tension and distrust between Cyprus and Turkey. As a non-signatory of the Convention, Turkey declines to recognize Cyprus’ existing EEZ agreements that overlap with their continental shelf. Likewise, Cyprus claims Turkey’s agreement with the Turkish Republic of Northern Cyprus (TRNC) violates their sovereignty.

By examining the primary sources of maritime law, Part II elaborates on the UNCLOS and the nature of maritime boundary delimitation. Maritime delimitation establishes lines to separate the zones where coastal states exercise sovereignty and jurisdiction, both of which Turkey and Cyprus contest.5 Within the UNCLOS, especially the provisions for the continental shelf and EEZ codify the process for maritime delimitation.

Decisions by the ICJ and ITLOS demonstrate the crystallization of the UNCLOS’ principles into customary international law, including the continental shelf and EEZ. Part IV places Cyprus and Turkey’s competing arguments in the context of previous cases and customary international.6 Even though Turkey is a non-signatory of the UNCLOS, the continental shelf and EEZ represent state practice and tout near universal acceptance. When seeking a resolution, customary international law and international jurisprudence are inextricably linked. Finally, Part V concludes by recommending a solution to the conflict.

I. Geopolitical Context Of Turkey & The Republic Of Cyprus

Disputes over the delimitation of maritime boundaries between Turkey and the Republic of Cyprus relate to opposing desires to develop the abundant energy reserves in the Aphrodite Gas Field off the island’s coast. In 2011, an American oil and gas company, Nobel Energy, discovered major reserves in Block 12 of Cyprus’ EEZ, the Aphrodite gas field.7 Developing these hydrocarbons into liquefied natural gas (LNG) could yield an estimated fifteen million tons of gas and profit up to ten billion euros.8 The

---

4 Statute of the International Court of Justice art. 38, 59 Stat. 1055 (June 26, 1945) [Hereinafter ICJ].
5 Maritime delimitation defines the maritime space between adjacent or overlapping coasts, concerning the territorial sea, the continental shelf, and EEZs. For the purpose of this paper it should be noted that the significant issues taken into account include: ratios between maritime space of each state and length of coastline, presence of islands and geographical features, presence of third states, economic factors and natural resources, historical rights, and security interests.
6 Turkey argues that a delimitation line based on equitable should determine the EEZs, whereas Cyprus seeks to use the median line principle based on equidistance.
7 United States Geological Survey, supra note 3.
government of Cyprus believes it holds up to sixty trillion cubic feet of natural gas in its entire twelve blocks, which, if proven, would make Cyprus the European Union’s second largest energy source after Norway. 9 While the discovery of these unearthed hydrocarbons has the potential for tremendous economic improvement, the political issues between Cyprus and Turkey could thwart the possibility of reaping any benefit for either party.

The roots of the Cyprus conflict date back to the 1923 Treaty of Lausanne, which terminated Ottoman rule and instilled an imperialist British government. As result of Britain’s divide-and-rule policies and inter-communal violence between the two dominant ethnic groups, two main factions, namely the Turkish and the Greek Cypriots, emerged in the 1950s. The development of these factions gave rise to polarizing ethno-nationalist ideology. When the island gained independence from the British in 1960, the Greek Cypriots monopolized power and drove the Turkish Cypriots out of government. A clear divide surfaced between the two ethnic groups, as the Greek Cypriots enjoyed wealth and power, while the Turkish Cypriots lived in enclaves following their forced migration. The July 1974 coup, organized by the junta in Athens to unite the island with Greece, was reversed five days later by a Turkish invasion. In 1974, a de facto partition separated the internationally recognized Republic of Cyprus in the southern part of the island from Turkey’s self-proclaimed TRNC in the north. Since then, there has been little diplomatic improvement, and Turkish military troops continue to occupy the northern half of the island. The protracted political conflict, as well as oil and gas aspirations, not only deepens the maritime disagreements over the continental shelf and EEZ, but also creates a sense of urgency to find a solution.

Overlapping entitlements to maritime jurisdictions of Cyprus and Turkey reflect the technical and legal difficulties in a geographically complex region like the Eastern Mediterranean Sea.10 Turkey and the Cyprus fundamentally disagree on territorial sovereignty and the process of drawing maritime boundaries, with the former preferring the principle of equity and the latter preferring the median line.11 Moreover, territorial disputes, in the absence of an agreement of sovereignty, underline the dual nature of the conflict. Therefore, a solution must consider both issues relating to recognition of sovereignty and coastal jurisdiction of both states.

Turkey

---

10 Id.
Contrary to EEZ and the continental shelf provisions in the UNCLOS, Turkey holds that Cyprus does not possess the sovereign right to pursue explorative drilling off its coast. Unilateral attempts by Nicosia to secure offshore drilling jeopardize the “equal and inherent” rights of the Turkish Cypriots. Both Turkey and the TRNC interpret Cyprus’ bilateral agreements with neighboring countries with apprehension, fearing that the government will withhold gas profits from the Turkish Cypriots. Turkey has dispatched its own exploratory vessel, escorted by a pair of Turkish warships, to shadow the drilling operations. Despite international outrage, the Turkish National Security Council insisted in late-October 2014 that it would continue shadowing energy operations in Cypriot waters to “protect the interests” of the Turkish population in Cyprus. The arguments regarding sovereignty are supplemented by the delamination of maritime boundaries.

Turkey neither recognizes Cyprus’ sovereignty nor its right for explorative drilling off its coast. Furthermore, Turkish Government challenges the legitimacy of Cyprus’ EEZ agreements with Egypt, Lebanon, and Israel. Consequently, in 2011, Turkey established its continental shelf agreement with the TRNC in an area that also overlaps with Egypt and Cyprus’ EEZ. According to Turkey, Cyprus should be given limited maritime zones due to its relative size and the continental shelf should be drawn consistent with equity. As such, due to its size and island status, Cyprus’s maritime zones should only extend up to twelve nautical miles territorial waters to the west of the island. Maritime delamination, according to Turkey, must consider the relevant circumstances when drawing boundaries, opposed to the median line principle found in the UNCLOS.

Cyprus

Likewise, Cyprus’ arguments focus on sovereignty and jurisdiction pursuant to the UNCLOS. A statement by Cyprus to the UN General Assembly argues, “The sovereign rights and jurisdiction” over Cyprus’ exclusive economic zones and continental shelf, “emanate from the United Nations Convention on the Law of the Sea, which enjoys near-universal participation and reflects the relevant customary international law. Turkey’s claim … has no basis whatsoever in the Convention or customary international

---

12 Press Release Regarding Drilling Activity of the Greek Cypriots, No: 311, Turkish Foreign Ministry, (Oct. 4, 2014). “Turkey follows with concern the Greek Cypriot Administration’s continuing unilateral research activities of hydrocarbon resources in its so called Exclusive Economic Zone without taking into account the Turkish Cypriots’ detailed and concrete cooperation proposals for a fair sharing.”


14 Turkey’s National Sec. Announcement. “Turkey has scheduled major naval exercises to coincide with drilling by Greek Cypriot contractors and has sent its own exploration vessels to disputed waters, threatening to drill on behalf of Turkish Cypriots in the Aphrodite field.”

law.” Based on the UNCLOS proclamation of EEZ and the continental shelf, Cyprus asserts its exclusive sovereign rights and authority beyond and adjacent to its territorial sea for the purposes set out in Article 56 of the UNCLOS which reflects customary interactional law.17

The 2011 Turkey and the TRNC continental shelf agreement assigns exploration licenses for seven blocks, six of which are offshore in Greek Cypriot areas, and one which is onshore in Famagusta in the north. The government of Cyprus argues that this agreement violates Cypriot sovereignty and maritime jurisdiction. It has allowed Turkey’s state oil company, TPAO, to explore hydrocarbons “in areas overlapping Cypriot Blocks 1, 2, 3, 8, 9, 12, 13.”18 According to Cyprus, the granting of hydrocarbon exploration to the TPAO by the TRNC illustrates the “unreasonable claims by Turkey with respect to its maritime boundaries” and violates the rights of Cyprus.19 In addition, the international community largely supports the Cypriot government. Cypriot officials quickly denounced the move as a violation of their maritime domain, hailing it as almost akin to an invasion and broke off talks to resolve the decades-old impasse regarding the island’s unification.20

Greek Cypriot officials insist that the practices of establishing EEZs and continental shelves based on the median line have received such worldwide acceptance that they have become part of international customary law and are therefore binding on non-signatory states like Turkey. They claim that Turkey has repeatedly rejected the view that certain norms have crystallized in customary international law. The Republic of Cyprus ratified the continental shelf doctrines in 1958 Geneva Convention and the UNCLOS, while Turkey has signed neither. An official statement from the Republic of Cyprus to the UN Security Council argues that Turkey has no standing to challenge Cyprus “in areas that are neither opposite nor adjacent to Turkish coasts.”21 Rather, Cyprus asserts its sovereignty “over the maritime areas surrounding the island and the

17 Letter dated 15 June 2012 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General, Permanent Rep. of the Republic of Cyprus, U.N. Doc. A/66/851 (June 2012), “Republic of Cyprus has, as a matter of international law, inherent and exclusive sovereign rights over continental shelf covering the same area, which it exercises in conformity with Article 77 of the. In relation to hydrocarbon resources, the Republic of Cyprus has exclusive sovereign rights, inter alia, for the purpose of exploration and exploitation in its proclaimed EEZ and over its continental shelf.” Emphasis added.
18 Id.
19 Id.
20 Joint Communiqué of the Ministers of Foreign Affairs of Greece, Egypt and the Republic of Cyprus (Oct. 10, 2014); Diplomatic sources interpret the statement as a rebuke to the trilateral cooperation between Greece, Cyprus, and Egypt on the issue of drilling rights and EEZs in the region, and a joint communiqué from all three states condemns “the recent illegal actions perpetrated within Cyprus’s EEZ, as well as the unauthorized seismic operations being conducted therein.”
21 Id.
natural resources therein and rejects any claim.” 22 Cyprus’s EEZ are based on the UNCLOS’ median line principle, measured by equidistance between the coasts.23

II. Sources Of Maritime Governance

*United Nations Convention On The Law Of The Sea*

The governing principles of the oceans and seas culminated through the UNCLOS, which built upon both existing treaties and customary international law.24 The UNCLOS represents the evolution of international norms “extending back, philosophically and historically, to the sixteenth century and far beyond…in history of international diplomacy, there has been nothing to equal the 1982 Convention in scope, sophistication, and universality.”25 At the advent of the 21st century, the use of seas multiplied and intensified as a result of developments in technology and increasing demand for resources. This phenomenon led to the 1930 Hague Conference, the first multilateral conference to address the question of the territorial sea’s relationship to national law and state responsibility.26 Under the auspices of the League of Nations, the Conference attempted to codify the customary law of maritime delimitation yet failed to reach an agreement on the question of the breadth of territorial waters and the problems of contiguous zones.27

*Exclusive Economic Zones*

The concept of the continental shelf materialized in the 1945 Truman Proclamation, which asserted states’ rights to exploration and exploitation of “the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.”28 The Geneva Conventions furthered the Truman Proclamation and enshrined a coastal state’s sovereign right to exploit the living resources within its continental shelf. The UNCLOS expands the continental shelf provisions in Geneva Conventions by granting economic rights of both living and non-living resources in their continental shelf, including hydrocarbons.

---

22 Id.
23 ICJ, supra note 4, at 10.
24 See Julia Lisztwan, *Stability of Maritime Boundary Agreements*, 37 YALE J. INT’L L. 153, 156 (2012); “UNCLOS is a formidable attempt to provide a comprehensive regime for management of the oceans” that “interacts with the larger body of international law, including the Vienna Convention on the Law of Treaties”, See also SHAW, supra note 15, at 226.
26 The Conference was unable to reach an agreement on the question of the breadth of territorial waters and the problems of contiguous zones.
28 Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Procl. No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945)
States are inherently entitled a 200 nautical mile continental shelf measured from the baselines, regardless of the nature of their seabed, where not restricted by neighboring territories.\textsuperscript{29} The continental shelf is both a legal doctrine as well as a geological phenomenon and is described as “the natural prolongation of the continental land mass” taking account of the marine geological concept of features being either “oceanic” or continental.\textsuperscript{30}

Under Article 77, the coastal state enjoys sovereign rights over the natural resources. The UNCLOS grants the coastal state exclusive control over its resources and prohibits interference of its unexplored natural resources.\textsuperscript{31} Although a state could have a continental shelf without an EEZ, there cannot be an EEZ without a corresponding continental shelf. A continental shelf is exclusive to the coastal state and prohibits any other state from exercising any rights over unexplored natural resources or undertakes any activities relating to them without the expressed consent of the coastal state.

Prior to the ratification of the UNCLOS, EEZs acquired the status of customary international law through state practice.\textsuperscript{32} A coastal state, pursuant to Part V of the UNCLOS, enjoys “sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living.”\textsuperscript{33} Unlike the continental shelf, EEZ requires states to receive consent from neighboring and adjacent states to claim 200 miles of sea. An EEZ must be exercised in accordance to the continental shelf’s subsoil and seabed.\textsuperscript{34}

By requiring state to reach “an agreement in good faith” for pending areas of delimitation, EEZ emphasises cooperation between states.\textsuperscript{35} In additions, states are expected to exercise their rights, jurisdiction, and freedoms “in a manner which would not constitute an abuse of right.”\textsuperscript{36} The Eastern Mediterranean Sea’s confined and complex geography renders exercising jurisdiction over the full 200 nautical miles EEZ nearly impossible.\textsuperscript{37}

\textsuperscript{29} UNCLOS, \textit{supra} note 2, art. 76 on the Continental Shelf; “the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout. the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

\textsuperscript{30} Convention on the Territorial Sea and the Contiguous Zone \textit{supra} note 26

\textsuperscript{31} UNCLOS, \textit{supra} note 2, art. 77.


\textsuperscript{33} \textit{Id.} at 162.

\textsuperscript{34} UNCLOS, \textit{supra} note 2, art. 74; “rights related to the seabed and subsoil in the EEZ must be exercised in accordance with the Part of the Convention dealing with the continental shelf.”

\textsuperscript{35} \textit{Id.} at 83; \textit{See also} International Crisis Group, \textit{supra} note 8.

\textsuperscript{36} \textit{Id.} art. 300

\textsuperscript{37} \textit{Id.}
Maritime Delimitation of the Continental Shelf and Exclusive Economic Zones

The UNCLOS subjected vast maritime areas once part of the high seas to treaties coastal state jurisdiction. This has also required new maritime boundary delimitations because of overlapping maritime zones between states. Yet, the ambiguity of the language contained in these provisions and consequent interpretation of have prompted states to resort to third party dispute settlement procedures. This renders it impossible to accurately predict the results when applied to a particular dispute. The interpretation of UNCLOS provisions in ICJ and arbitration cases, however, has greatly enriched their application, thereby contributing to the development of customary international law and providing clearer guidance on this issue.

Before a state can do exploration or exploitation up to 200 nautical miles off its coast, it has to delimit its EEZ and continental shelf with states with opposite or adjacent coasts. States are also required under Articles 74 and 83 to seek “an agreement in good faith” for exploitation of natural resources in disputed areas pending delimitation, and to refrain from exploitation prior to such an agreement. This emphasises cooperation between states, for example, through the obligation under Article 283 to exchange views by negotiation or other peaceful means when a dispute arises. Similarly, Article 300 requires states to exercise their rights, jurisdiction and freedoms “in a manner which would not constitute an abuse of right.” In a crowded sea like the Eastern Mediterranean, no state can exercise jurisdiction over the full 200 nautical miles EEZ. Cooperation is essential. In practice, the majority of bilateral agreements on delimitation use the equidistance or median line method. Even so, the median line is generally taken as a starting point. Modifying the median line often produces inequitable results.

International courts and tribunals often look at the length and configuration of the relevant coasts and coastlines, proportionality, and the presence of islands, and tend to ignore or attach only limited weight to other arguments based on, for example, population, socioeconomic, and security considerations. Areas of overlapping territorial sea are to be divided by the median or equidistance line method, unless otherwise required by historic title or special circumstances. Overlapping EEZs requires a state to delimit its zone into one consistent with the UNCLOS’ median line principle, which calculates equal distance from the nearest points on the respective coasts. Drawing boundaries based off of a median line has caused issues for states who call for equity.

---

38 See Leanza, Umberto, *The Delimitation of the Continental Shelf of the Mediterranean Sea*, 8 INT’L J. MARINE & COASTAL L. 373 (1993); See also CHURCHILL, supra note 32, at 170.
39 UNCLOS, supra note, 2 art. 74, art. 83; See also International Crisis Group, supra note 8, at 10.
40 Id. at art. 283
41 Id.
42 UNCLOS, supra note 2, art. 300.
43 Id.
While the UNCLOS provides a process of maritime delimitation, it draws upon customary international law, treaties, and judicial decisions.

The legal nature or status of a maritime zone that is the object of overlapping claims pending delimitation is particularly relevant for the process of negotiating and establishing a maritime boundary. However, the ambiguity of the language contained in these provisions and consequent interpretation of these provisions have prompted states to resort to third-party dispute settlement procedures.

III. International Arbitration & Customary International Law

State Practice

Customary international law results from consistent state practice coupled with a sense of legal obligation, *opinio juris*. State practice can be legitimized through official physical or verbal acts, submission to norms of international organizations, and negotiations. As the second pillar of customary international law, *opinio juris* requires “international custom, as evidence of a general practice accepted as law”. In order for a law to satisfy *opinio juris*, “not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it…The States concerned must feel that they are conforming to what amounts to a legal obligation.”

Customary international law assumes a status akin to treaty law and often trumps statutes or laws that precedes an emerging custom.

Historically, the international community accepts customary international law as a norm and a universal mandate. However, the absence of legitimate enforcement methods paves way for state negligence. In addition, the basic of tenants of customary international law lack clarity regarding conditions and content of rules. The requirements for what constitutes evidence of state practice have led to uneven implementation. Although Turkey refused to ratify the UNCLOS, both the EEZ and continental shelf provisions reflect customary international law, which should apply to Turkey. While customary international law provides precedents applicable to the Cypriot-Turkish dispute, the problem of non-compliance without any consequence supports international jurisprudence as the path to a solution.

*International Jurisprudence*

International jurisprudence has evolved considerably, especially against the backdrop of the entry into force of UNCLOS and its near universal acceptance, as well as the crystallization and acceptance of many of its provisions as reflecting customary

---

45 Article 15, Article 74, paragraph 1; Article 83, paragraph 1 constitute the primary legal reference in maritime delimitation.
46 ICJ, *supra* note 4, art. 38.
international law. When an agreement over maritime boundaries cannot be reached through bilateral or multilateral negotiations, dispute settlement procedures become the subsequent form of resolution. Maritime delimitation disputes heard in front of the ICJ have applied customary international law to examine the relevant circumstances of claims over areas of jurisdiction such as cases over the adjustment of the median line in favor of the principle of equity.

In the 1969 North Sea Continental Shelf case, Denmark and the Netherlands argued Germany’s delimitation of boundaries should be based on median line. The ICJ determined “equitable principles” such as the general configuration of the coasts, the physical structure, and the natural resources the length of coastline and general direction of the coast should be taken into account. This denied the median line provision in the UNCLOS. The North Sea Continental Shelf case establishes the principle of delimitation of maritime boundaries in areas of overlapping claims should be done by “agreement in

---

Id. at 973.
49 CHURCHILL, supra note 32, at 65-66.
50 ICJ, supra note 4, art. 38, para. 1 states “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations...[and] judicial decisions and the teachings of the most highly qualified publicists of the various nations...”
51 International Crisis Group, supra note 8.
52 UNCLO, supra note 2, art. 59.
53 ICJ, supra note 4, para. 101; The general configuration of the coasts, as well as the presence of any special or unusual features; the physical and geological structure, and natural resources, of the relevant continental shelf areas; and proportionality between the extent of the continental shelf of the coastal state and the length of its sea-frontage.
accordance with equitable principles, and taking into account all the relevant circumstances.”54 The case established that rules of customary international law apply to the disputes over maritime delimitation.

In Libya v. Malta, the ICJ determined whether maritime delimitation should consider the lengths of coasts, and if a proportional difference warrants an adjustment of the median line.55 The difference of Libya and Malta’s coastline lines is a ratio of eight to one, respectively. The ICJ declared that the disparity between the two coastlines was “so great as to justify the adjustment of the median line.” Turkish officials particularly refer to the ICJ’s 3 July 1985 ruling between Malta and Libya, which adjusted the median line 18 nautical miles northward to give the latter a larger continental shelf.

Given more than twenty times difference in coastal lengths between Cyprus and Turkey, it would be an act of negligence to allow the “equidistance” line to govern EEZ delimitation and to overlook equitable rights. Maritime delimitation between Cyprus, Egypt, Israel, and Lebanon should also be adjusted to establish a proportionate distribution of EEZ areas and to prevent loss of sea area to Cyprus.

Non-signatories to the UNCLOS have submitted to international arbitration. Nicaragua v. Colombia concerned the delimitation of EEZ and the continental shelf, yet Colombia had yet to ratify the Convention. The case necessitated the application of the relevant principles of customary international law to reach a settlement. Both Colombia and Nicaragua claimed sovereignty over islands encompassed within Colombia’s maritime boundaries. Nicaragua appealed to the ICJ regarding Colombia’s delimitation of the EEZ and the continental shelf, rejecting the Colombia’s sovereign right to the islands. The Court finally decided that Colombia would have total sovereignty rights over the islands in question on the basis Colombia’s entitlement to a continental shelf and EEZ. Nicaragua v. Colombia accepted the continental shelf and EEZ as customary international law.56

Both customary international law and the UNCLOS determined the outcome. The ICJ stated, “any claim of continental shelf rights beyond 200 miles (by a State party to) must have been in accordance with Article 76…on the Limits of the Continental Shelf. [T]he fact that Colombia is not a party thereto did not relieve Nicaragua of its obligations under Article 76.”57 The continental shelf and EEZ were still applicable Colombia even as non-signatory.58 ICJ judgments have asserted that components of the UNCLOS reflect customary international law.

55 Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29-34 (June 3) (explaining that "some of its [UNCLOS] provisions constitute...the expression of customary law].
56 Territorial Dispute and Maritime Delimitation (Nicaragua v. Colombia), Summary of Judgment, ICJ, Nov. 19, 2012, at 5. [Hereinafter (Nicaragua v. Colombia)].
57 Id.
58 Id.; See also, Petros Siousiouras & Georgios Chrysochou, The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation, 1(3) LAWS 12-49, (2014).
Nicaragua v. Colombia sheds light on significant aspects of the Cyprus-Turkey conflict. Firstly, Colombia’s non-party status parallels that of Turkey. Secondly, the nature of the disagreement, regarding disputes over sovereignty, pertains to Turkey’s challenge to the legitimacy Cyprus’s of bilateral agreements. The fusion between aspects of customary international law found in and the ICJ’s charter serve as a starting point for an effective dispute resolution between Cyprus and Turkey.

In 2009, the ICJ adjudicated the maritime boundaries between Romania and Ukraine, which concerned the boundaries of the continental shelf and EEZ in the Black Sea. Ukraine’s Serpent Island is situated in closer to Romania’s coastal than the coast of the Ukraine. Delimiting maritime boundaries based on the median line would begrudge Romania of an equitable solution. The ICJ created a three-prong process for the delimitation of overlapping maritime boundaries.

The ICJ’s delimitation method enumerated followed a methodology, where courts would establish the provisional delimitation line equidistant between the states, consider any relevant circumstances that may require the adjustment of that provisional equidistance line, and finally, verify that the line does not lead to an inequitable result. The Black Sea Case provides a framework to delimit boundaries to the west and southwest of the Cyprus, namely in areas of overlapping with Turkey’s continental shelf and EEZ.

The first requirement of the paradigm presented by the Black Sea case, which draws an equidistant line from the baselines of Cyprus and Turkey would not be consistent with principles of equity due to their relative size. The second prong identifies the relevant circumstances such as history, natural resources, geopolitics, and geographical composition to modify the equidistant line. Given Turkey’s 1542 kilometer coastline, the largest in the Eastern Mediterranean, an ICJ judgment would likely award Turkey a larger share of continental shelf. Precedents established by previous cases heard before the ICJ, Libya v. Malta, Black Sea, and the North Sea Continental Shelf refute the Cypriot EEZ assertions based on the equidistance principle, which implies that international law could eventually benefit Turkey. Yet the ICJ decisions also consider international recognition of a state. The status of the TRNC could work towards the benefit of Cyprus who the international community accepts as the legitimate government on the island. Applying a disproportionality test to the modified equidistance line would be equally as difficult and could result in Cyprus receiving only 12 nautical miles of territorial sea.

In the Eastern Mediterranean, the lack of diplomatic relations between Cyprus and Turkey, the pervasive economic and political instability, and the potential value of the undeveloped energy resources demand a solution to its maritime disputes. International

59 Nicaragua v. Colombia, supra note 55.
61 International Crisis Group, supra note 8, at 14.
Troubled Waters: Turkey and Cyprus’ Maritime Disputes

Jurisprudence applied to customary international law is the best ways for states to pursue its legitimate rights and to resolve disagreements on maritime affairs in the region.

Conclusion

The escalating dispute between Turkey and Cyprus over maritime jurisdiction and access to offshore gas resources indicates the challenge will not be in extracting and exporting the gas, but rather in mediating the claims by both parties. Settling the salient disagreements over maritime boundaries and the resources off the coast of Cyprus with the combination aspects of customary international law found in the UNCLOS and international jurisprudence provides the best chances for success. Resolving differences over maritime boundaries and satisfying Turkey, Cyprus, and TRNC’s political and economic concerns would benefit all parties.

Neither customary international law nor the UNCLOS can provide a solution alone. However, both offer a framework for international jurisprudence especially since Turkey has yet to ratify the UNCLOS. Concepts found in the UNCLOS have crystalized as principles of international customary law, chiefly the continental shelf and EEZs regimes. These provisions reflect customary international law even though certain provisions of the treaty do not. In regards to EEZs and the continental shelf, Turkey and Cyprus have both adopted state practice and opinio juris. In addition, the ICJ’s judgment on the continental shelf case between Libya and Malta, stated, “it is in the Court’s view incontestable that…the institution of the exclusive economic zone…is shown by the practice of States to have become a part of customary law.”62

Turkey and Cyprus should agree to take their claims over the continental shelf and EEZ in the Eastern Mediterranean to the ICJ, the ITLOS, or an arbitral tribunal. An agreement for joint exploitation could alleviate the conflicts between the states. International mediation could distribute the revenues from natural resources equitably between Turkish and Greek Cypriots, including the geographic rights of the parities, and the exploratory rights off of Cyprus’ coasts. There is no fixed terminology to refer to legal arrangements under which states agree to develop and exploit resources jointly in maritime areas subject to overlapping claims of sovereignty. Considering the benefits of a resolution, international mediation will increase chances of success.

Situated in the Eastern Mediterranean at the crossroads of Eastern and Western civilizations, the island of Cyprus has been a strategic aspiration to nearly every great empire since the Bronze Age. With valuable trade routes to linking Europe with the Far East, Cyprus traditionally has been viewed as a geographic asset. Discovery of oil off of its coast has preempted the island’s role of harboring trade with a desire to develop its abundant resources. However, geopolitics, in the absence of international arbitrations, hampers any progress.

---

62 ICJ 1985: para. 34.
Executive Orders: A Beneficial Tool or Danger to Democracy?

Fatima K. Jamal

Introduction

Close to 14,000 executive orders have been released and recorded by the Office of the President with the Office of the Federal Register.¹ Delicately designed, the American Republic and its system of governance is a structure of checks and balances intended to keep one faction from gaining too much power; each of the three branches of government – the executive, the legislature, and the judiciary – has the power to implement and impede the actions of another branch in some way, shape, or form. Congress, the United States legislature, is the branch responsible for passing a bill into law while the president may veto the bill using his or her executive power. Embodying democratic ideals and the separation of powers, Congress may override the veto with a two-thirds majority and the Supreme Court, the judiciary branch, may deem the bill unconstitutional and overturn it, if brought to the Court.

The power to issue executive orders is generally considered to be a president's most powerful tool due to the orders broad range of uses and implications.² The issuing of executive orders is important and beneficial to high-quality presidential administrations; executive orders allow the executive to implement his or her democratically elected agenda as well as to effectively respond to national, and in some cases international, issues within an appropriate period of time. The misuse of the executive order occurs when a president issues an executive order that goes against the constitution, law, and in some situations, the law-making process in Congress; the overuse of the executive order, though similar to misuse, occurs when a president issues one or more executive orders that promotes stagnation or a lack of coordination with the legislature due to the circumstance it is released in. Together, the misuse and overuse of executive orders, for instance when the order goes against the Constitution and promotes a lack of coordination with Congress, threaten to undermine the delicate system of checks and balances that the U.S. federal government put in place by the American constitution.

I. Definitions and Usage Throughout American History

Executive orders can be defined as an order issued by the President of the United States to the executive branch that has the full force of the law; this is not to be confused with presidential proclamations that do not have the full force of the law and are generally considered to be more symbolic. Presidents have rooted the justification for their executive orders in Article II, Section III, Clause V of the United States Constitution, which states that the president, as the executive, has the power to "take Care that the Laws be faithfully executed," or else he or she may face impeachment. The theory behind this is that presidents have the duty to ensure that laws are closely and authentically implemented in the federal government; if the "laws", loosely understood, are not implemented, the president has the power to use executive orders to execute them through the executive branch.

Executive orders are intended to help members of the executive branch manage the internal affairs of the government. However, executive orders have been used in a variety of ways throughout history: presidents have issued executive orders for expediency when it would take too long for Congress to pass a bill regarding a time sensitive issue, in cases where action is required by the government as soon as possible. President George W. Bush's executive order in the aftermath of 9/11 and in preparation for the 2003 Invasion of Iraq exemplified this power in pressing concerns. Another example was President Clinton’s executive orders that implemented sanctions against Iran and banned trade between Iran and the United States. Presidents have issued executive orders as tools for general policy stances, such as President Obama's order that raised the minimum wage for federal workers and contractors. This executive order also illustrated how it can be issued to address internal government and administrative issues, and can be used to build up support for their Presidential agenda and for a bill in Congress. President Obama, like much of the Democratic Party and its constituents, wishes to raise the national minimum wage; thus by issuing this order, President Obama was able to implement his agenda and build up support for future Congressional bills by calling more attention to a larger issue.

---

4 U.S. CONST., art. II, § III.
The number of orders issued by presidents has varied significantly as demonstrated by figure one. It is important to note that the use of executive orders is not a partisan issue - Republican presidents have issued only slightly more than Democratic presidents. The number of executive orders issued is indicative of the level of cohesion between Congress and the executive, as well as of the state of affairs in the country at the time. For example, President Franklin Delano Roosevelt issued 3,522 executive orders during his time in office, which are the most orders issued by a President in American history. Comparatively, President Wilson issued the second-most executive orders with 1,803. Both presidents served their terms under extreme social circumstances: President Wilson leading the U.S. through World War I and increasing the nations influence abroad and President Roosevelt leading the United States through the Great Depression and World War II. Both presidents, however, saw a strong executive as essential to the strength of the overall government. It is also important to note that President Roosevelt served an unprecedented three full terms in office and was elected to a fourth term which effected the number of executive orders issued as well.

Most significantly, President Roosevelt expanded the power of the executive branch with regards to domestic issues; as a result, the President provided future presidents with the precedent to issue orders that pertain to social life and welfare, consequences of which are still felt today. An example of presidents issuing executive

---

8 BROOKINGS, A HISTORY OF EXECUTIVE ORDERS (Jan. 2014).
10 Executive Orders, supra note 1.
11 Id.
orders after President Roosevelt revolutionized the reach of executive orders included President Truman's desegregation of the armed forces. President Johnson issued an executive order on affirmative action. More recently, President Obama illustrated the increased reach of executive powers through his order regarding gender equality protection in the workplace.

Executive orders have further been used as a threat in a divided government and as a negotiating tool between Congress and the executive. Recently however, the threat of executive orders has become a polarizing topic, especially regarding domestic issues like immigration, and for issues abroad, like terrorism in the Middle East. An example of this can be seen in President Obama's 2014 State of the Union in which the President declared:

But what I offer tonight is a set of concrete, practical proposals to speed up growth, strengthen the middle class, and build new ladders of opportunity into the middle class. Some require Congressional action, and I’m eager to work with all of you. But America does not stand still – and neither will I. So wherever and whenever I can take steps without legislation to expand opportunity for more American families, that’s what I’m going to do.

In a divided government and under increasing pressure to take action, President Obama has since taken a "with or without Congress" approach to governing hoping that this will force Congress to cooperate with the executive due to fear of executive action. Substantiating his threat, the President raised the minimum federal wage to $10.10, along with dozens of others executive orders that dealt with contentious topics.

Like all other decisions of the federal government, executive orders can be subject to judicial review and deemed unconstitutional and not within the parameters of presidential power. As will be discussed, it is important to note that the Supreme Court has very rarely addressed executive orders. Additionally, Congress may overturn an executive order/presidential veto with a two-thirds majority. This system is reflective of the system of checks and balances discussed previously, but it also creates constitutional issues to be discussed in the next section.

16 Id.
17 Id.
18 Id.
19 U.S. CONST., art. I, § VII, cl. 3.
II. The Dangers of an Overuse of Executive Orders

Incentives, Coordination Issues, and Constitutional Ambiguity

Though executive orders are a crucial part of maintaining a cohesive and responsive system of governance, an overuse of this executive power can cause destructive fractions in the aforementioned system.\(^{20}\) Theoretically, Presidents may single-handedly legislate through executive orders; however, an overuse of the power goes against the basic principle of separation of powers. Arguably, the biggest issue associated with the overuse of executive orders is the coordination problem; this occurs in a situation where involved parties benefit from cooperating but struggle to coordinate and cooperate due to individual cost. Executive orders stand to undermine the main prerogative of Congress: legislation. Especially in a divided government, executive orders create coordination issues between the legislative and executive branch in the way that it creates an incentive to usurp Congress and pass laws without cooperation with Congress.

In addition to logistical challenges, another danger inherent in executive orders is the constitutional ambiguity by which they are defined. Scholars and academics continue to disagree on the true basis for executive orders, which has spurred additional disagreements in the political realm.\(^{21}\) Without clear parameters on executive orders, coordination issues have continued to occur as different branches of the government and political parties continue to disagree on what is lawful and what is not. Recently, Republican Speaker of the House, John Boehner, gained authorization from Congress to sue President Obama.\(^{22}\) This is in response to claims that President Obama has overused his executive powers – by issuing what Republicans see as too many executive orders – and overrode democratic frameworks. Rather than focusing on cooperation, an atmosphere of hostility continues to grow as the President continues to rely on executive orders only to be faced with the option of being overturned or underfunded in Congress, or overturned by the succeeding President. Although issues of cohesion between Congress and the executive is not unusual, the situation with President Obama is particularly troubling as policy and law making – on both sides of the debate – has come to standstill, with both branches being referred to as "the do-nothing Congress" and "the do-nothing President." In a system where each branch of the government is meant to cooperate with the others in order to keep one branch from being more powerful than the other, executive orders – when misused – represent a coordination failure in the American system.

---


\(^{21}\) Id.

\(^{22}\) Michael R. Crittenden et al., House Votes to Authorize Boehner to Sue Obama, The Wall Street J., July 30, 2014.
Signing Statements

Bearing in mind the aforementioned challenges, an additional executive power shrouded in extreme constitutional gray area is signing statements. Defined as a written pronouncement made by the President upon signing a bill into law, this executive tool has recently become especially controversial.23 Dating back to President James Monroe's administration, signing statements have been considered to be useful since the statements generally illustrate how the President interprets the bill, shortcomings they see, and direction to executive branch officials regarding the bill's administration.24 However, signing statements have recently been noted for their negative effects, such as during the George W. Bush administration that have continued through the Obama administration as both Presidents have used signing statements to challenge the constitutionality of a bill or to cherry pick parts of the bill that they approved or did not approve.25

With basis in the "Take Care" Clause of Article II, Section III of the United States Constitution, signing statements are neither permitted nor prohibited.26 The "Presentment" Clause in Article II, Section VII, however stated that once a bill has passed through both houses of Congress and has been delivered to the President, the President may chose to sign it, veto it, or do nothing.27 As such, there is no actual legal value to signing statements nor are they explicitly required or prohibited. Assistant Attorney-General Walter Dellinger of the Clinton administration categorized signing statements into three types: constitutional, political, and rhetorical.28 Constitutional signing statements assert that a law is constitutionally defective and guide federal agencies to limit its interpretation.29 Political signing statements define ambiguous terms in a law to guide federal agencies in interpretation and implementing the law.30 Rhetorical signing statements are used to mobilize various political constituents.31

The biggest danger lies in constitutional signing statements; as ruled in Marbury v. Madison, the legislature is the only branch that may officially make law which means that the president does not have the right to craft his or her own law, without approval from Congress.32 Complicating matter more, the landmark decision also ruled the Supreme Court is the only branch that may rule on the constitutionality of the law which means that the president may not rule on the constitutionality of a law passed by

26 U.S. CONST., art. II, § III.
27 U.S. CONST., art. II, § VII.
29 Id.
30 Id.
31 Id.
32 5 U.S. 137 (1803).
Congress, as is done in constitutional signing statements. In *Hamdan v. Rumsfeld*, the Supreme Court gave no weight to the signing statement on the Detainee Treatment Act of 2005.

Even though the Supreme Court has given no weight to signing statements, signing statements have been widely criticized as a danger to the separation of powers and the rule of law. In the legislature, Senator Arlen Specter led Congressional efforts against signing statements with the President Signing Statements Act of 2006 and 2007, both of which failed in the Senate Judiciary Committee. Conversely, proponents of signing statements claim that they are a logical Presidential power that encourages Congress to address weaknesses in a law and to aid federal officials in the implementation of the law. However, signing statements continue to undermine the separation of powers as Presidents curve into the responsibilities of other branches by legislating without the power to legislate and reviewing a law judicially without the power of judicial review. Although they lack concrete legal value, in addition to cutting into the responsibilities of other branches, signing statements still stand to offset the system of checks and balances.

**Presidential Lawmaking and Difficulties Checking Executive Orders**

Critics of the overuse of executive orders have often called the tool a mechanism for "presidential lawmaking." Instead of working with Congress to encourage the writing and passing of laws, Presidents have been accused of unilaterally acting and violating their constitutional constraints. Underscoring the potential danger associated with excessive and misuse of executive orders, William J. Olson, a political scientist, claimed:

I would say that concerns about presidential lawmaking must not be written off as attacks on the policies underlying the executive orders. This is not partisan politics masquerading as separation of powers issues. It is true that it finds fault with President Clinton, but it also finds fault with Presidents Reagan, Bush, and others. As a review of the above-mentioned CRS report will demonstrate, presidential directives were used to legislate to accomplish political objectives which could be viewed as “liberal” and political objectives which could be viewed as “conservative.” No constitutional power should be misused, irrespective of the benefit

33 *Id.*
perceived for a political objective. If constitutional processes are violated, in the end, we all lose.40

Stated during Congressional testimony, Olson also claimed that Courts have been ineffective at checking presidential power.41 Olson claimed that the there were only two cases in which the Court ruled that executive power overreached. One of these cases is Youngston Sheet & Tube v. Sawyer. 42 In April 1952, President Truman issued an executive order that allowed Secretary of Commerce Sawyer to seize and national steel mills in anticipation of a steelworkers strike during the Korean War. The Court held that President Truman did not have the authority to seize private without congressional statute and also held that the President does not have the power to interfere in labor disputes. The other is the Chamber of Commerce of the U.S. v. Reich.43 In The Conservative Caucus v. Reagan, the U.S District Court for the District of Columbia dismissed the case for lack of standing.44 The plaintiff sued President Reagan for "usurping the Senate's power to ratify treaties before they become effective,"45 when President Reagan unilaterally implemented the Strategic Arms and Limitations Talks (SALT) II. Olson also argued that Congress has also been ineffective at combating excessive executive power by only attempting to implement superficial solutions, such as Resolution 30 by Representative Metcalf, which stated that executive action that "infringed on Congress's duties" would not have the full force of the law.46 These claims emphasize the lack of adequate mechanisms by which executive power and orders can be checked; this only increases the danger that misused executive orders pose as the system lacks a significant check to a potentially unchecked power.

Although Congress may overturn a veto with a two-thirds majority, a Congressional research study has suggested that Congress has modified less than four percent of executive orders. The votes need to overturn a veto are more difficult to achieve in modern political times though Congress does have the power to refuse to fund programs and initiatives ordered through executive orders; this has occurred several times, particularly during the Obama administration, which has brought Congress and the executive to a deeper standstill.

Importance

Surrounded by constitutional ambiguity and scholarly disagreement, executive orders continue to be a source of disagreement in American politics: are executive orders an important tool for Presidents to achieve their goals or a detriment to the delicate
Executive Orders: A Beneficial Tool or Danger to Democracy?  101
democratic process or both? The answer lies somewhere in between these two extremes, as executive orders have produced fragments in the American political system, but also some of its most positive changes. An executive order is considered successful when the order engenders a necessary social change, such as President Kennedy's executive order on equal opportunity in housing agreements.47 Another success includes President Truman's desegregation of the armed forces via executive order. With that being said, these two executive orders were successful mainly due to the fact that they had substantial support by the American public. Executive orders are beneficial to the American government and society when they deal with general policy initiatives or are necessary due to time constraints and security issues. Although general policy initiatives are generally considered to be the responsibility of Congress, in certain cases, like the desegregation of the armed forces, the executive is more effective in directing new laws because the president has the power to do so unilaterally while members of Congress face various opportunity costs for a variety of constituents that may make a favorable vote difficult to achieve. An example of an executive order that was successful in situation constrained by time is President Carter's freezing of Iranian assets during the 1979 - 1981 Iranian Hostage Crisis.48

On the contrary, when executive orders dictate significant policy changes that lack support of Congress, they threaten to divide the government even more. The question of quantity vs. quality becomes important as more substantial executive orders pose greater danger to the system than several smaller orders. In the case of President Obama, his executive orders involving cyber security have not caused much controversy in comparison to his orders on immigration.49 Announced in 2014 after several years of calls for immigration reform amidst a reluctant Congress, President Obama issued several executive orders that constituted one of the largest immigration reforms in American history. The orders are estimated to protect over five million undocumented immigrants, the majority of which are parents to children who were brought to the United States when they were under sixteen years of age. Since announced, members of the GOP have said they would work to defund the program, thereby undoing the executive order.50 Although executive powers are considered to be an important tool in negotiations, their use without Congressional support for the underlying policy usurps legislative power and the federal system as a whole.

III. Solutions and Implications for the Future

The misuse of executive orders by a president creates important implications for the future. Rather than focusing on repairing the system, any viable solution to an overuse of executive orders must deal with the motivation and cause behind its issuance. Research

has shown that presidents use executive orders to circumvent Congress when it is unlikely that their executive orders will be overturned and the issuing of substantive executive orders often stem from an uncooperative/divided Congress.\textsuperscript{51} Given this, the incentive to issue executive orders could be significantly diminished by restructuring the Congressional voting system to encourage action from Congress. Mandating a time period in which a bill must be brought to the floor and voted could encourage debate, legislation, and action, restructuring the Congressional system. This would prevent gridlock as it would encourage cooperation and communication between members of Congress, since they would not have a time frame to adhere. However, further research is needed to conclude if executive orders are effective in prompting Congressional action.

One method is to use the existing checks and balance system already intertwined into the government by having the Supreme Court address the issue of executive orders. The Court would dictate what is acceptable and what is not within a clear definition of the limits of executive orders for future cases. However, as mentioned in the previous section, the Supreme Court has proven to be ineffective in addressing the overuse of executive orders.\textsuperscript{52} One reason for the Court’s lack of action is due to the limited resources and time available to it – there are too many executive orders issued and not enough time to allow the Court to analyze and come to a consensus. This proposed solution, however, would be more viable if the Supreme Court defined what executive orders are able to constitutionally do and then expanded access to a newly created enforcement body that would impose the definition and parameters.

Another more viable solution to the overuse of executive orders is the creation of regulatory bodies to counteract previously discussed coordination problems between Congress and the executive. These regulatory bodies can be composed in a number of ways, for instance the independent regulatory agency or committee within Congress. A Congressional committee could create specific bodies to oversee areas where the Executive Office and legislature face problems and make recommendations on how to combat such issues. Although these recommendations may suffer from partisan bias, the benefit of these Congressional committees would stem from the awareness and research into current coordination issues. Both Congress and the executive could, then, use this to foster future cooperation, with an understanding of what coordination issues the two branches face. A regulatory agency, conversely, could work in conjunction with the executive and Congress to coordinate policy and ensure that the actions of both branches do not contradict or work against each other. However, a regulatory agency may cause issues of bureaucratic drift.

Furthermore, much of the danger of executive orders stems from constitutional ambiguity, as mentioned in the previous section. The Constitution does not explicitly


\textsuperscript{52} Olson, supra note 39.
prohibit or allow executive orders, signing statements, or place complete responsibility on one branch of the government for addressing a specific issue. Because of this, Congress and the executive often experience a collective action problem because responsibility does not fall on one group, but rather a number of groups; consequently, the issue goes unaddressed due to a lack of cooperation. Even though legislative power falls to Congress, the president is still expected to maintain responsibility and respond to issues of national importance, which is where cooperation issues come into effect.

The cooperation failure is most clearly demonstrated in the aftermath of Hurricane Katrina in 2005. One of the five deadliest hurricanes in American history, Hurricane Katrina caused over $108 billion in damage and took over 1,800 lives during the storm and its aftermath.\textsuperscript{53} The response of the federal government was heavily criticized especially in regards to New Orleans where approximately 90% of the infrastructure was destroyed or damaged amidst the collapse of federal-state communication and coordination.\textsuperscript{54} Olson has called the response of the federal government to the situation in New Orleans the biggest collective action failure in American history due to a complete breakdown of federal emergency response and aid and coordination between federal agencies involved. Olson argued that because no branch of the government bears the entire legal responsibility, the burden falls to none; each branch is expected to cooperate with each other. However, it follows that the individual cost to act may be considered too high as individual actors defer taking action to other actors.

Connecting this situation to motivating factors of executive orders, branches of the federal government did not want to bear the individual cost of responding to a crisis when other branches were expected to respond as well. Similar to the situation between Congress and the executive, when both are expected by the American public to respond to a crisis, situations arise where neither branch responds due to personal political cost. Communication channels completely broke down since there was no incentive to cooperate. The situation in New Orleans is similar to that of an atmosphere where executive orders threaten the balance of the system in that responsibility to respond to national and international issues is shared between the President and Congress. Because of shared responsibility, a successful end product becomes even more difficult to achieve as different branches of government, who may differ in terms of ideology and goals, must cooperate with one another. If not, the issue threatens to go unaddressed as it did in New Orleans. Conversely, this type of situation where responsibility is shared by all but not explicitly by one, the executive may have the incentive to misuse an executive order in an effort to provide an answer to this situation. The creation of regulatory bodies, however, would monitor cooperation between Congress and the executive, and the

\textsuperscript{54} Sneed, \textit{supra} note 50.
The issuance of executive orders, would work to ensure that important issues such as national disaster emergency response, immigration, and healthcare do not go unaddressed. When unanswered, presidents resort to executive orders, as seen with the Affordable Care Act and President Obama's recent actions concerning immigration.\(^{55}\)

If there is a large degree of cohesion and coordination between the executive and legislature, there will be less of a need for executive orders, as the President's incentive to act unilaterally will be mitigated by a cooperative Congress. This coordination will ideally ensure that these branches of government can come to an agreement on important national issues. The issues of content and possible the contention of major executive action that lacks support in Congress would also be addressed with greater cohesion and communication. In juxtaposition to a solution in which the Supreme Court is the responsible regulatory body that was suggested earlier, the creation of these bodies would prevent limited resources being spent on one topic. A solution such as this would then allow for the bodies to keep up with contemporary coordination problems between the other two branches of government and then enable constructive responses to problems. Keeping pace with current executive orders and national issues is essential to any future solution as executive orders are often used to bypass Congress and legislative boundaries set in place by the Constitution in an effort actualize governmental action. Regulatory bodies working with both Congress and the executive would diminish much of the incentive for "presidential lawmaking" by fostering communication and cooperation.

**Conclusion**

Executive orders have been a part of every American Presidency, though the extent at which this executive power has been used differs from President to President.\(^ {56}\) Presidents have used executive orders to dictate administrative changes and policies, in conjunction with legislation, and to respond to national issues within time constraints. However, executive orders have also been used in a divided government, where compromise and legislative action is often difficult to achieve. The United States of America is built on a culture of democracy achieved through a balanced system of cooperation and compromise – not unilateral executive action. As such, the issuance of executive orders, without substantial national and political support and when in conflict with the Constitution, is a dangerous misuse of a strategic tool meant to encourage a responsive, cooperative, and effective government. Although more research is needed to determine if executive orders are effective in encouraging Congressional action, a misuse and overuse of executive orders continues to threaten and undermine the American system of government as whole. This has become considerably more urgent recently as Congress and the executive have come into more conflict on what most of Congress sees


\(^{56}\) BROOKINGS, supra note 8.
as "Presidential lawmaking." Solu tions must be implemented before the situation threatens to become increasingly dangerous. This paper has proposed restructuring of the Congressional voting system, involvement of the Supreme Court and a body to enforce their ruling on executive orders, and other regulatory bodies that would promote cooperation between Congress and the president to ensure policies do not contradict each other and issues do not go unaddressed. Without a substantial change, "we all lose."  

57 Olson, supra note 39.  
58 Id.
The Cyber Battlefield: Extensions of Just War

Nikhil R. Venkatasubramanian

“Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation” – William Gibson, Neuromancer

First used in 1984 by author William Gibson in his triple-crown winning science fiction book, Neuromancer, the term “cyberspace” began to play an increasingly meaningful part in the life of every individual in modern society.\(^1\) Neuromancer follows a simple plotline—a washed-up hacker is hired by a mysterious employer to carry out the ultimate hack.\(^2\) Mr. Gibson seems to have not only coined a golden buzzword, but has also foreshadowed one of the greatest threats to ever face society – cyber crime. The emergence of technology and the Internet as viable tools of interaction has also created a massive security threat to billions.

The Department of Homeland security reported in 2007 that in the year past, almost 80 thousand cyber-attacks were made on United States military computer systems.\(^3\) In the following year, the Department of Defense reported to the House Intelligence Committee that these same computer systems were attacked or scanned by foreign sources almost 300 million times per day.\(^4\) However, the attacks are not only limited to governmental computer systems. As the world continues to further integrate with technology, the viability of terrorism rooted in computing has witnessed a meteoric rise. It is for this very reason that the United States, and the world, need to engage in significantly more discourse about the problem of cyber-attacks and finally, must establish an exhaustive treaty setting the bounds for combating cyber-attacks.

I. Key Terms and Definitions

Before delving into a deep analysis of cyber-attacks and their solutions, it is important to understand what cyber-attacks actually are. To understand the scope of

---

\(^1\) *Defending the Digital Frontier*, THE ECONOMIST, June 12, 2014.
\(^2\) WILLIAM GIBSON, NEUROMANCER (Ace, 1st ed. 1984).
\(^3\) Shane Harris, *China’s Cyber Militia*, NATIONAL JOURNAL, May 31, 2008.
\(^4\) Eric Rosenbach & Tamara Klajn, *China’s Cyber Warriors*, BALTIMORE SUN, June 18, 2008.
cyber-attacks, one has to define its bounds, its plane of action—cyberspace. In *Neuromancer*, Mr. Gibson defines it as “a consensual hallucination experienced daily by billions of legitimate operators” and as a “graphic representation of data abstracted from the banks of every computer in the human system.”5 Although this definition is pretty close to what it should be—we strive for a more legitimate account in the modern age. The Economist offers a surprisingly simple definition that captures the expanse of this plane—describing it as “the computing devices, networks, fiber optic cables, wireless links and other infrastructure that bring the internet to billions of people around the world.”6 The area of operation for cyber activities is only one hurdle in the task of understanding the true nature of cyber operations; within cyber operations itself, exist multiple international definitions for what a cyber-attack may constitute.

Definitions play a large role in policy recommendations, especially in policy areas in the nascent stages of exploration. The United States and the world suffered the same problem with defining traditional terrorism in the post–9/11 security boom.7 However, many governments have not agreed upon a precise, consistent, and expansive definition of cyber-crime, cyber-terror, or cyber-warfare; in fact, many governments have not even agreed upon what to call it. The United States’ definition of “cyber warfare,” provided by a Congressional Research Service report, is “defending information and computer networks, deterring information attacks, as well as denying an adversary’s ability to do the same. It can include offensive information operations mounted against an adversary, or even dominating information on the battlefield.”8 However, Cyber Security policy, like many other policy discussions, is not unipolar. The Shanghai Cooperation Organization, a security group consisting of “China, Russia, and most of the former Soviet Central Asian republics, as well as observers including Iran, India, and Pakistan,” provides a more “means-based approach” to defining cyber warfare.9 This other prominent definition of cyber-warfare, or rather “information warfare” (what the Shanghai Cooperation Organization calls it) is defined as the “psychological brainwashing to destabilize society and state, as well as to force the state to take decisions in the interest of an opposing party.”10 It is not difficult to see that these two official definitions differ widely in scope and subject. Thus, we converge on a much more topic-specific, exhaustive definition of what cyber-crime or cyber-warfare might include. Duncan Hollis, professor of law at Temple Law School with a specialization in treaties and cyber security, provides such a definition in his article for the Lewis and Clark University Law Review as “Information Operations” which involves the use of “information technology, such as computer network attacks or psychological operations, to influence, disrupt, corrupt, usurp, or

5 *Gibson*, supra note 2.
6 *Economist*, supra note 1
7 *How the USA PATRIOT act redefines ‘Domestic Terrorism’*, ACLU (2002)
10 Id. at 9.
defend information systems and the infrastructure they support.” Note that this definition includes cyber capabilities used for defense—this is critical in that some cyber actions by governments might be preemptive in nature and categorized as an attack. Mr. Hollis’s definition, for the purpose of this article, is unique apolitical and all encompassing in nature. In the crafting or suggestion of an international treaty, these two characteristics are extremely important.

It is also important to distinguish between the different terminologies that this article will employ in describing cyber-attacks. Mike Reagan, Chief Executive of LogRythym, a leading security intelligence firm, explains that a cybercrime could be used to “execute a criminal act for any number of reasons” but cyberwar or cyber-attacks are uniquely also political in nature. Mr. Reagan seems to mirror the consensus of the security industry of the United States in these distinctions between cyber attack, crime, and war. While this article does not suggest multiple unique methodologies in mitigating the effects of these three cyber activities, it does suggest an all-inclusive framework that all of these cyber-activities ought to operate within, especially those with political motivations in their instantiation.

II. Brief History of Cyber Warfare

Now that this article has established the key terms in the broader discussion of cyber security in international and domestic policy discussions, it can move on to describing the progression of cyber warfare into the modern age—and rather than focusing on what it might be, move on to describing what it actually is today and has been in the past. It is important to note that the following descriptions of historical and ongoing examples of cyber warfare are only brief and by no means exhaustive in nature. To describe all forms of Information Operations (IO) would be an extremely difficult task—highlighting the difficulty of an international treaty governing the topic. Any explanation of recent cyber warfare must begin with an analysis of the many actors involved in these interactions. This is, however, the simplest hierarchy we can begin with to discuss cyber-warfare—a more complex framework will follow.

The first area of analysis in the cyber-actor hierarchy must focus on the actions of non-state actors, which are non-governmental entities that engage in IO (Information Operations). This actor-group can include individual hackers or groups of hackers—nearly any non-governmental entity. Some of the most dangerous attacks in the history of cyber-crime came from this group of actors. Gregory Rattray and Jason Healey, Vice President of Security at BITS and Director of the Cyber Statecraft initiative at the Atlantic Council, provide an interesting selection of cyber-attacks in their book

America’s Cyber Future: Security and Prosperity in the Information Age. They discuss early examples of cyber-crimes ranging from Russian hacker Vladimir Lenin stealing 10 million dollars from Citibank in 1994 to a disgruntled Australian employee hacking into the control system from a former occupation and releasing 800,000 liters of raw sewage.

As Rattray and Healey have explained, these early examples display more of “curiosity” or “hooliganism” than attempts at instigating warfare. However, recent examples show a shift in the intent and scope of non-state actors to a more malicious, politically catalyzed realm. Many individuals have formed groups in countries to react to governmental actions. Take, for example, Chinese hackers reacting to military complications between the U.S. and China in 2001, WikiLeaks, or any other cyber interaction in the middle of a politically charged state (Pakistan and India; Israel and Palestine, etc.). Governmental backlash, however, is not the only reason behind the occurrence of cyber-crimes. Non-state cyber-crime has also become increasingly economically focused. Online cyber-crime, as indexed in the United Kingdom Cyber Security Strategy Report of 2007, cost the world 52 billion pounds in 2007. This number is sure to have increased meteorically in the past half-decade as access to cyber space has increased for hundreds of millions of people. The prospect of non-state cyber-crime is an extremely important area of analysis in any discussion of international law mitigating the effects of cyber-crime; it has the ability to destroy global economic systems and possibly even the lives of millions. International treaties, through the increased success of attribution (discussed later in this article), may help to deter state actors from contracting to non-state actors, or deter non-state actors from waging cyber-attacks themselves.

The second, much more mysterious subject in the actor-hierarchy of cyber-warfare is state-based cyber-crime. Actions within this state-based actor-group can happen on two different levels. The first is direct governmental actions. This occurs when branches of states, including militaries, cyber command units, and similar forces, wage the actions indicating cyber warfare themselves. One of the most popular, modern examples of this type of attack under the direct involvement of an actor-subgroup is the famous Stuxnet virus—a “damaging cyber-attack against Iran’s nuclear program.” Although the United States has not taken official responsibility for the attack, many current officials in the United States government claim that it was covertly conceived by the George W. Bush administration, continually governed by President Obama and developed further by the Israeli government and the National Security Agency, aimed to

---

13 ROBERT E. KAHN ET AL., CENTER FOR NEW AMERICAN SECURITY, AMERICA’S CYBER FUTURE (May 31, 2011).
14 Id.
15 Id. at 69
slow the development of the Iranian nuclear program. The attack itself destroyed nearly 1,000 of Iran’s 6,000 centrifuges used for enriching uranium—a crucial step in developing nuclear weapons. Another popular example of state-based cyber-crime is, ironically, nothing of the sort. In 1998, the United States Department of Defense main frame was under attack for several days, which was thought to be the work of the People’s Liberation Army of China. On the verge of all-out cyber warfare—the United States cyber command found that the attack originated from two bored teenagers in Cupertino, California. Regardless, State-Based cyber operations have the potential for massive destruction. The second subgroup of state-based cyber-crime is contracts by the state. That is, governments contract out to third-party individuals or hacker groups to hack other state or non-state systems. This second sub-group is much harder to investigate since states often do not take responsibility for these actions, highlighting an innate characteristic of contracting third parties in the first place. State-based cyber warfare is mysterious, and often difficult to discern, yet has the ability to create massive amounts of harm. It is thus just as important to deter and regulate state-based actors in cyber warfare with an exhaustive international treaty on the matter.

The focus above has been on the history of cyber-attacks. However, in the creation of an international treaty, prediction is paramount. In other words, what could cyber-attacks look like in the future? Scott Borg, director and chief economist of the US Cyber Consequences Unit, attempts to answer the question. He explains critical Infrastructure (electrical grids, stock exchanges, bridges, dams, etc.) is the answer and the target. Both state and non-state actors have not, but could attempt and succeed in targeting critical infrastructure in their cyber-attacks. Any attacks aimed at the computer systems of these subjects could devastate the target with massive economic costs and even human lives. An attack on the United States Stock exchange could devastate the international economy. An attack on an electrical grid could leave hospitals without power—potentially leaving millions without access to proper care. An attack on the regulation systems of a dam could destroy cities and leave millions without a home or in the worst-case scenario, cost them their lives. Cyber-attacks are no second-line international agenda item. They are one of the greatest threats to domestic and global stability.

III. Just War Theory: an Ethical Map for Cyber Warfare

In June of 2012, The Atlantic Journal captured the essence of this new class of warfare in a single question in the form of an article title: “Is It Possible to Wage a Just

18 Id.
20 Id.
22 Id. at 94.
Cyber War?"\(^23\) In this part, we attempt to suggest a functioning legal framework to bound cybercrime and its after-effects. The same article highlights the multitude of cyber-attacks that have plagued the nuclear systems of Iran, as discussed above, or even the United States Military and Industrial computer systems.\(^24\) This part of the article will elaborate on two sections of the Laws of War: Jus ad Bellum and Jus in Bello. That is, this part will explain the applications of the laws of war before a cyber-war is engaged in as well as during the duration of the war. It will also become clear that a direct, exact application of the Laws of War becomes difficult with this digital revolution. Instead, this analysis will follow a general, broad level application instead of a case-by-case basis.

Any explanation on the Laws of War and their application to warfare today, regardless of cyber warfare, requires a note on the origin of the Law of War to truly understand its scope and progress. Many of the first examples of the Law of War appear in the Geneva Convention or for example, The Hague Peace Conference of 1899.\(^25\) This particular conference revised “the laws and customs of war” elaborated by an even earlier conference.\(^26\) Regardless of the Laws’ origins, it is certain that its contributors did not experience expansive crime over millions of computers and networks across the globe in the early 1500s. When moving on to discussions of punishment for cyber-crimes, applications of just war theory become even more difficult. How heavily should one be punished? How should the severity of a cybercrime be evaluated? Before these questions can even come close to consideration, it is important to explore a legal framework first. Thus, the seemingly archaic nature of Jus ad Bellum and Jus in Bello, while still applicable to many wartime actions today, is extremely difficult to apply to cybercrimes.

**Jus Ad Bellum and Cyber Warfare’s Legality**

It would make the most logical sense to discuss Jus Ad Bellum, or the legal questions guiding and bounding action before war is engaged. Karma Nabulsi, Professor of International Relations at Oxford University, simplifies this topic in the Crimes of War Journal when she posits that it is “the reasons you fight” versus Jus In Bello or “how you fight.”\(^27\) This Section will highlight the seven different principles to Jus Ad Bellum and how they may broadly apply to cybercrime.

**Just Cause**

---


\(^24\) Id.


\(^26\) Id.

\(^27\) Karma Nabulsi, *JUS AD BELLUM/ JUS IN BELLO*, CRIMES OF WAR J.
One of the most widely discussed and possibly most important principles of Jus Ad Bellum is the first of the six, Just Cause.\textsuperscript{28} As per the customs of legitimate war, there has been only one reason to aggress upon other states or individuals—in self-defense of prior threat or use of force.\textsuperscript{29} This has been further codified in Article 51 of the UN Charter, which denies the impairment of any action a country takes in self-defense.\textsuperscript{30} This Article will draw upon the conclusion reached by an Article in the California Law Review discussing a test for the fulfillment of the Just Cause principle.\textsuperscript{31} The aforementioned California Law Review Article provides the most comprehensive reasoning of kinetic barriers and cyber warfare, and their comparability to conventional warfare.\textsuperscript{32} Such “kinetic effects” (when certain cyber operations lead to physical manifestations of harm) are not just science fiction.\textsuperscript{33} Note this article’s explanation of the physical destruction of Iran’s nuclear centrifuges by the Stuxnet virus. A “Cyber Pearl-Harbor” and attacks on critical infrastructure could destroy millions of lives.\textsuperscript{34} Breaking the kinetic barrier is certainly possible as it has been in the past and will be in the future of Cyber operations.

The other popular governing legal principle from the UN arises in Article 2 of the UN Charter.\textsuperscript{35} The clause reads, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”\textsuperscript{36} While many may argue that this definition may broaden the sense of self-defense to include attacks on political or economic welfare, similar to the uses of contemporary cyber operations, many scholars still agree that the definition only encompasses conflict that leads to physical harm.\textsuperscript{37}

Many may cry foul at the requirements of Just Cause and the application of certain line items present in the above-mentioned UN articles.\textsuperscript{38} For example, strict adherence to UN Article 51 demands that any state acting in self-defense must report its action to the Security Council.\textsuperscript{39} In the world of cyber warfare, this would be semi-problematic; the United States and China play the largest role. Any cyber action

\textsuperscript{28} Michelle Maise, \textit{Jus Ad Bellum}, BEYOND INTRACTABILITY (June 2003), http://www.beyondintractability.org/essay/jus-ad-bellum.

\textsuperscript{29} Id.

\textsuperscript{30} U.N. Charter art. 51.

\textsuperscript{31} Hathaway et al., supra note 9.

\textsuperscript{32} Id.

\textsuperscript{33} Id.

\textsuperscript{34} Oliver Rochford, \textit{Cyberwar: Breaching the Kinetic Barrier}, SECURITY WEEK, Jan. 22, 2013.

\textsuperscript{35} U.N. Charter art. 2.

\textsuperscript{36} U.N. Charter art. 2, para. 4.


\textsuperscript{38} Randall E. Dipert, \textit{The Ethics of Cyber Warfare}, 384 JOURNAL OF MILITARY ETHICS 384-410 (2010), (discussing the inapplicability of Just War doctrine to cyber operations).

\textsuperscript{39} U.N. Charter, art. 51.
committed in the U.S. in self-defense would have to be reported to the Security Council, involving China. Such knowledge of an attack could significantly reduce the efficacy of a counter-attack from the United States. While scholars may suggest that many military actions are not reported to the Security Council, since they are not actions waging war, this article suggests that it would still function as a deterrent to cyber operations from states; states would have to consider the consequences of forgoing the security council. It is for such reasons that this article suggests only a broad adherence to the Just Cause principle and the Laws of War.

We derive two conclusions from the application of the Just Cause principle to cyber crime. First, cyber operations as part of cyber warfare do not meet the Just Cause principle. Thus, they would only be just if they are in self-defense to a particular physical destruction or kinetic action. Secondly, states may not respond with force to cyber acts unless those cyber acts have overcome the kinetic barrier and have caused physical destruction. It is clear that any international treaty or discussion on the legality and bounds of cyber crime must involve a requirement to fulfill the Just Cause principle.

Proper Authority

The next logical step in applying Jus ad Bellum to cyber crime is to analyze the actors involved in the situation. The Stanford Encyclopedia of Philosophy explains proper authority and public declaration to ensure that war actions are not just unless they waged by a legitimate authority and made public to its citizens and to the enemy state.40 Parts of this definition are seemingly contradictory to the nature of cyber warfare, and in some cases they are expressly contradictory.

This clause of Jus ad Bellum is recognized by most scholars to suggest that those that wage war or actions using force must be legitimate, sovereign countries with lawful authority.41 In the case of cyber crime, such recognition is essential in the increasing occurrence of rouge cyber terrorism or cyber operations by illegitimate states such as North Korea. Such a prospect is certainly a grave danger. President Obama recently classified cyber crime and cyber terrorism as the United States’ largest security threat and recent governmental actions have matched the tone. He has instructed all parts of the US military to contribute “cyber warriors” to cyber command in light of “The Mask”, one of the most sophisticated cyber threats ever seen to attack oil and natural gas companies in the United States.42

But what does this Cyber Terrorism usually look like? This is an easier question to answer. States usually work with proxies and contact other groups or individual hackers to carry out the cyber-attacks. In the application of the Proper Authority

41 Lawfully declared by lawful authority, BBC, available at: http://www.bbc.co.uk/ethics/war/just/lawful.shtml
principle—this would disappear, or in a more likely case, become more attributable. Such a clause in an international treaty on cybercrime would incentivize countries to take responsibility for their cyber actions and help countries crack down on rogue hacktivist groups from stealing billions from banks or putting millions of individuals in harm’s way.

Last Resort and Proportionality

The last major clauses of Jus Ad Bellum with regards to cyber warfare that need fulfillment if the hurdles of proper authority and just cause are crossed, are the Last Resort and Proportionality principles. The Last Resort principle necessitates that all diplomatic negotiations are considered and executed before following with a use of force. Along the same lines, if all diplomatic solutions were tried and failed, the proportionality clause explains that a state may not respond with overly aggressive force for an original aggravation or threat.

In terms of Cyber Warfare, the last resort clause seems intuitive. A state must only resort to using forceful actions like cyber-attacks if all other peaceful diplomatic attempts at achieving the state’s political goals have been attempted and have failed. While this may be difficult to analyze in a concrete way, such a clause is essential to an international treaty. It forces states to attempt other methods of diplomacy before engaging in harmful cyber-attacks.

The proportionality clause, while clearly defined, becomes more subjective when applied to international relations, especially cyber warfare. The proportionality clause would force an evaluation of damage done to computer networks or information operations if the cyber-attack does not break the kinetic barrier. The proportionality clause also forces a certain level of specification and adjudication within cyber operations that some scholars say is too difficult, a relatively intuitive argument. When the proportionality clause dictates that retaliation ought be equal to the extent of the provocation, a certain level of scale is required in determining the harm associated with a cyber-attack. While this article will not suggest a scale that should be used, it will suggest that the proportionality clause should be a paramount point of discussion in the ongoing international conversation about cyber security.

Right Intention, Probability of Success, Public Declaration

While many of the main tenants of Jus ad Bellum apply to well cyber warfare, there are some outliers that do not concretely advance the goals of curbing cyber crime.

43 Orend, supra note 40.
44 Id.
45 Id.
46 Hathaway, supra note 9.
47 Id.
Right Intention is the clause of Just War that forces states to have a Just Cause to take a forceful action, whether that be the original cyber-attack or a response to one.\(^{48}\) However, Right Intention forces states to only respond or act forcefully for the reason of the Just Cause, rather than using it to go to war for an economic gain or another reason.\(^{49}\) As it may already be apparent, Right Intention is extremely difficult to judge and even harder to implement in international relations; the reasons that a state may act forcefully are nearly impossible to concretely determine. It is also for this reason that Right Intention, as a Just War clause has not been codified into international treaties guiding state actions. Although it may not be able to be strictly enforced as a part of international cyber law, Right Intention is an interesting area of exploration within cyber crime. While this principle of Just War is difficult to investigate in conventional warfare, it becomes easier to analyze within cyber space. Conventional Warfare’s limited targets tell the international sphere very little about the intention of attacking. A state may choose to attack a certain military compound, or civilian center, but cyberspace offers hundreds of different targets. This increased scope may tell us significantly more about the intentions behind the attack’s origin.

Similarly, Probability of Success is also subjective in nature. This clause forces states to only engage in war when the probability of success of the attack or strike is high.\(^{50}\) While the ethics behind the clause make sense, they are difficult to enforce, for the full information about the probability of success is usually only apparent to the state taking the action, and would usually not be disclosed to other states. While this may be a facet of a state’s decision making process in responding to the threat of a cyber-attack or engaging in one itself, it does not make sense to codify it into an international treaty concerning the subject. Although it may not be codified into international cyber law, probability of success, similar to the Right Intention principle, provides an interesting point of exploration within the scope of cyber operations. The consideration of the probability of success may deter states from delving into complex attacks that break the kinetic barrier, when the difficulty of the attack becomes much more significant, and even slight details may alter the kinetic effects of an attack.

While Public Declaration is less subjective in nature, it is the only principle that stands semi-contradictory to the nature of cyber-attacks. Although in a perfect world, public declaration of a cyber-attack would be the best-case scenario, this article suggests that it not be included in an international treaty for political efficacy.

Conclusively, it is apparent in the analysis of Jus ad Bellum and its application to cyber warfare that certain subsets of the Law of War can be difficult to apply to constantly evolving methods of warfare. However, Jus in Bello becomes much easier to apply and will be elaborated upon in the following section.

\(^{48}\) Orend, supra note 40.  
\(^{49}\) Id.  
\(^{50}\) Id.
IV. Jus in Bello and Cyber Warfare's Legality

While Jus Ad Bellum guides a state’s actions before responding to or taking an action in war, Jus in Bello guides a state’s actions within the war. In the realm of cyber warfare, setting these bounds is crucial. The effects of cyber-attacks and kinetic effects are essentially limitless and require a legal boundary to deter states from engaging in potentially devastating attacks.

**Distinction**

Perhaps the most important clause within Jus in Bello regarding any form of warfare, but especially cyber warfare, is the concept of distinction. The Center for Strategic and International Studies explains that the principle of distinction “requires attacks to be limited to legitimate military objectives and that civilian objects shall not be the object of attack.” Following this principle, cyber objectives that target critical infrastructure or civilian economic structures would be strictly unjust, as they would be targeting civilians. The same report explains that collateral damage may affect civilians but only when there is a comparatively larger military advantage to the action. In essence, any cyber-attack that is unable to distinguish between civilian and military objectives would be outlawed according to the Distinction clause of Jus In Bello.

**Proportionality**

The In Bello proportionality clause follows a similar description to the Distinction clause. This clause dictates that any military act ought to be proportionately crafted to the original threat. Additionally, it demands that any damage to civilians or loss of life of civilians above and beyond the benefit accredited to a military advantage are strictly banned.

In Cyber Warfare, this may be more difficult to enforce. A strict scale of evaluation for non-kinetic cyber-attacks does not exist and would be somewhat subjective. Regardless, this principle is an absolute requirement in any international agreement on the bounds of cyber warfare. The general principle of Proportionality when using military actions, cyber or not, is just as essential in the cyber battleground. Interestingly, however, the concept of proportionality can be applied to a recent example of a state based cyber-attack. When the United States and Israel launched the mysterious ‘Stuxnet’ virus against Iranian nuclear systems, the virus “distributed itself across tens of thousands of computer control systems without regard” for whether the systems were

---

51 Id.
53 Id.
54 Id.
55 Id.
originally targeted in the attack. The result was damage far beyond what was intended by the attacker, and originally caused by Iran.

No Means Mala In Se

The International Humanitarian Regime strictly prohibits any means of war that is intrinsically evil. In traditional war, “mass rape campaigns; genocide or ethnic cleansing; using poison or treachery” are all methods of attack that are inherently evil. More generally in international humanitarian law, No Means Mala In Se, Latin for intrinsic evil, is most popular for its sub-clause prohibiting deception or perfidy. For example, in war, discreeting troops as medical personnel or other groups not involved in the war is strictly outlawed. On the other hand, sending misinformation is a common legal practice, as long as it is not perfidy. In the nature of viruses and computer operations, it seems that very few cyber-attacks would reach the level of perfidy to be considered prohibited under No Means Mala In Se. It is important to explore this further, however. Sean Watts, Professor at the Creighton University School of Law, posits that attacks in the cyber realm only reach the level of perfidy when deception leads to human death or injury. An analysis of Additional Protocol I, Article 37 to the Geneva Conventions supports Watts’s claim. The first tenet of AP I dictates that only the “kill[ing], injur[ing], or capture” of an adversary through perfidy is strictly outlawed; such actions are only capable when cyber operations break the kinetic barrier.

IV: Counter Arguments to Applications of Just War

While Just War Theory has been codified into international law and has guided analysis of new and emerging technologies on the battlefield for centuries, many scholars find it to bear false hope for the advent of cyber warfare. The most common concern is that many of the clauses of both Jus ad Bellum and Jus in Bello simply do not apply to cyber warfare because of its lack of control and complete differentiation from traditional warfare. Many of these problems have been addressed in the individual clause sections above. However, it is important to address this argument on a broad level. While many may point to traditional Just War Theory as being too old to accommodate the evolution of war, namely cyber warfare, the general principles of both

---

56 John Richardson, Stuxnet as Cyber Warfare: Applying the Laws of War to the Virtual Battlefield, 1 J. OF COMPUTER AND INFORMATION LAW (2011).
57 Orend, supra note 40.
58 Id.
62 Id.
63 Dipert, supra note 38.
Jus ad Bellum and Jus in Bello still apply. Regardless of Just War’s ‘all or nothing tone, core principles of the theory can still guide countries in taking the correct actions regarding CNA (Computer Network Attacks).

More importantly, Just War Theory provides for an ethical and legal approach to the intersection of traditional warfare as well as cyber warfare, a characteristic that is immensely understated in the appreciation of the Just War approach to bounding CNA. Cyber Warfare and its study does not only include CNA but also how countries may respond to CNA with traditional military force or vice versa. Just War Theory provides a reasonable framework for assessing ethical actions in light of this interaction. It may not be perfect, but the Laws of War as the international cyber standard would establish an excellent basis for the ethical guidelines for cyber warfare.

V. An International Convention/Treaty on Cyber Warfare

Now that we have established an ethical road map and its general application to the advent of Cyber Warfare, this article will move on to a concrete policy proposal on how the world should move forward on CNA. In light of the proliferation of nuclear weapons or the use of biological or chemical weapons, it is important to negotiate a treaty before the threat evolves. Post-facto adjudication or arbitration of a cyber-attack is too costly; by this point, billions of dollars and hundreds of lives may have been lost.64 This Part will answer three simple questions. First, what major aspects should this treaty contain? Second, who will be able to facilitate this treaty and judge its violators? And third, what will the effects of this treaty be?

Cyber warfare has many aspects in common with negotiations regarding nuclear proliferations and biological weapons. Both nuclear and biological weapons presented the world with a truly global challenge: weapons that could inflict damage across the globe almost instantaneously without any need for troop transport. Cyber Warfare has only intensified the convenience of instantaneous, international attacks. It is for this reason that only an international approach that incorporates the fundamental tenets of Just War theory can solve the problem.

Definitions

Perhaps the largest challenge and the most important aspect to include in an international treaty on cyber warfare is definitions of many of the terms that cross legal boundaries. As briefly discussed earlier in this Article, an international treaty ought to adopt a definition for cyber warfare, as well as a definition and “clarification” for a cyber attack.65 Without definitions of what a cyber-attack may constitute, as well as its difference from political espionage and corporate competitiveness, any progress on the international norms on cyber warfare is impossible. Defining cyber attacks in a concrete

64 Caplan, supra note 21.
The George Washington Undergraduate Law Review

way is one of the first steps to controlling their proliferation. The international community would be able to make a significant step forward in the progress of bounding cyber crime if they agreed on the terms and differences between the existing definitions of cyber operations, addressed earlier in this paper.

Investigative Cooperation

One of the strongest counterarguments against an international treaty that governs the actions of information operations is the difficulty of attribution. Many scholars point to the difficulty in pinpointing the source of an attack as a complete roadblock in an international treaty for cyber warfare. Their concerns are certainly valid; if an attack’s origins cannot be found, how will an international treaty enforce certain norms and standards? The answer lies in an international treaty and convention. The Internet is a massive playing field, and no country can hope to defend its system by itself. Investigative cooperation would only assist in overcoming this hurdle, not strengthen it. Information-sharing between developed and countries in the cyber periphery could help foster a strong network of cyber security, to help identify cyber-attacks before they strike. Collective security, especially against such a mysterious threat, provides massive incentives for countries to share information. Additionally, the mirage of absolute anonymity in cyber space and its assistance in launching untraceable cyber-attacks must be addressed. It was once believed that anonymity was unbreakable on TOR, a deep-web (black-market internet) browser that is a breeding ground for illegal activities like weapon and drug black markets. The NSA and FBI, working together, have been able to breach the anonymity barrier multiple times in recent years to expose criminals. In the case of cyber, as the technology evolves, so will the ability to trace attacks. Working together with regimes across the world instead of fostering a world of fear and hostility in cyber will only assist in breaking the attribution-barrier that treaty critics point to. An international treaty or convention on cyber warfare that obligates information sharing and cooperative investigation among member states is paramount to the establishment of international norms on CNA. Some may argue that states lack incentive to sign such a treaty, or further, lack the ability to track cyber threats within their boundaries. While such concerns are legitimate when considering conventional warfare, they are not as valid amidst CNA. Barriers for entry are essentially lower for cyber operations, since it technically requires only the know-how and base-level technology. On the other hand, conventional warfare requires massive political capital assisted by a similar level of capital. Even with such assets, many countries need to buy materials from developed countries with active military complexes. When barriers to entry are low and the potential gains of collective security against cyber warfare are high, the benefits of signing a treaty
governing cyber warfare with the clauses that this Article suggests far outweigh the harms, on balance.66

**Appropriate State Actions and Responses**

While this Article establishes an ethical roadmap using just war theory in Part II, this is only just the beginning. An international convention on cyber warfare, after establishing internationally agreed upon definitions of key terms within this discussion, must also specify and define the bounds of responsible and accepted actions and responses. For example, certain actions falling under Perfidy would be strictly banned so that any actions aimed at harming civilians by attacking critical infrastructure would be categorized as war crimes.

**Facilitators of an International Treaty**

Many organizations may be able to facilitate the aspects of an international treaty that are discussed in this article. This article will not confine the emergence of an international treaty to only one of these organizations, but rather will suggest a few that would serve the ends of the treaty most efficiently.

The United Nations, amongst any other international regime, is considered to have made the most progress. Additionally, the UN Security Council consists of those countries that are considered to be the most involved in the realm of cyber space.

With the prospects of the establishment of an international treaty governing cyber crime, unbiased judgment and enforcement mechanisms are a must. Even without a treaty, many call for an international tribunal court to judge acts spanning international cyberspace. Although such mechanisms exist for some parts of the world (see the European Convention on Cyber Crime),67 one of the main problems with them is their lack of global recognition. Global recognition and ratification of these courts, along with observation of a larger number of crimes, is paramount in the adjudication and enforcement of international norms and treaties on CNA. One of the best enforcement mechanisms to date would be to expand the ICTC and include many more developed and developing nations, and to stop being too euro-centric as its critics have suggested. Such a euro-centric focus on cyber crime also inhibits the progress on an international treaty. While it may be effective for a group of countries to take a lead on cyber crime, early leadership may cause large collective action problems when trying to arbitrate between certain clauses or definitions of the treaty.

---

The Necessity of a Treaty

Many in the international human rights regime have labeled cyber operations as the first major leap from traditional warfare. They posit that Just War theory is too old, or inapplicable to cyber warfare. And in addition, that a treaty system would be too slow to address the rapidly progressing nature and bounds of cyber operations. This article has already dealt with the individual problems of JWT’s applicability, and will suggest the same for the fundamental treaty problem. While nuclear warfare and chemical weapons have served as excellent examples for the norms and treaties against use of certain attacks, they may not apply to cyber warfare. Nonetheless, this article suggests that there is no cost in preemption of the evolving threat of cyber crime. A treaty on cyber warfare will help guide the actions of future cyber operations, even if they are not clearly listed in the treaty. Although continuous efforts will be required to edit and amend such a treaty, the costs of inaction are far worse.

Conclusion

Although there are immense grey areas in which the law is concerned in cyber warfare, the recent scholarship on the intersection of international humanitarian law and CNA shows that it is a manageable challenge to the world. Cyber War will not be a weapon for only developed countries, but one for all. This massive sociological transition in the nature of war prompts immediate action from the world’s leaders and those on the geopolitical periphery. While this article has suggested an ethical framework and a possible enforcement mechanism to govern cyber activities, there is still much to be discussed.
The Future of International Climate Change Law

Caroline J. Gimello

Introduction

At no point in history has there been a more urgent need to take legal action to protect the environment. While global temperatures rise and extreme weather events (such as heat waves and hurricanes) plague societies, addressing climate change is more important than ever. 2014 was the hottest year on record since global temperature began to be measured in 1891. The top ten hottest years have all occurred since 1998, indicating that the problem is both current and worsening. Since the effects of climate change can no longer be entirely avoided, new international environment law must be implemented in order to address the problem through both, the expansion of currently existing preventative mechanisms that reduce greenhouse gas emissions, and through the implementation of new adaptive measures. This article will first explain the issue of climate change and its impacts on the global community as well as the legal framework behind international environmental law. It will then evaluate major pieces of environmental law with respect to their ability to both limit greenhouse gas emissions and to allow the global population to adapt to climate change. In light of this analysis, this article will propose legal solutions to address a myriad of issues surrounding international climate change law.

I. Background

Introduction to Climate Change

Climate change is defined as global change in climate patterns, mainly due to amplification of the greenhouse effect as a result of human activities. The greenhouse effect is a naturally occurring phenomenon that maintains the Earth's temperature as atmospheric gases trap the sun's heat. As the concentration of these gases increases, the effect becomes stronger. There have been major periods of warming and cooling throughout the Earth's history, with the greatest

---

3. Id.
fluctuations occurring during ice age cycles that take place approximately every 100,000 years. These cycles are primarily dictated by minor alterations in the Earth's orbit around the sun, which change the distribution of solar radiation around the Earth's surface. The last ice age ended a mere 18,000 years ago. Over the past 7,000 years, global temperatures have increased by about 7 to 9 degrees Fahrenheit. In the past 200 years alone (approximately marking the beginning of the industrial revolution), global temperatures have risen by 1.4 degrees Fahrenheit; an alarmingly quick temperature rise associated with a 40% rise in atmospheric carbon dioxide levels over the same time period.

The greenhouse effect is fueled by greenhouse gases (GHGs); primarily water vapor, carbon dioxide, methane, and nitrous oxide. Carbon dioxide is the GHG most frequently produced by human activities, and accounted for 82% of all U.S. GHG emissions in 2012. Over half of the massive increase in atmospheric carbon dioxide following the industrial revolution occurred after 1970. The last time carbon dioxide naturally reached the levels seen today was 3 to 5 million years ago.

The industrial revolution was a tipping point for the climate due to exponential population growth and humans beginning to burn fossil fuels on a massive scale. Before the industrial revolution, world population growth grew at a slow rate of about .1% per year. Between 1827 (again, approximately the start of the industrial revolution) and 1927, the world population grew by 100% to 2 billion people. In the 20th century, the world population grew to 6 billion people: a 400% increase. Population growth inevitably leads to increased human consumption of natural resources. This is particularly alarming because the industrial revolution shifted energy use from muscle and biomass to fossil fuels. Coal in particular was burned to power factories, steam engines, and other new technologies. Since 1870, humans have released

---

5 Id.
6 Id.
7 Id.
9 Id.
10 NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, supra note 2.
12 THE ROYAL SOCIETY and the U.S. NATIONAL ACADEMY OF SCIENCES, supra note 4, at 2.
13 Id. at 10.
15 Id.
16 Id.
17 Id.
The Future of International Climate Change Law

over 2,015 billion tons of carbon dioxide into the atmosphere. While some of this carbon dissipates and reenters the carbon cycle, most of it is absorbed by oceans (leading to ocean acidification), landmasses, or remains in the atmosphere. The accumulation of atmospheric carbon leads to an intensification of the greenhouse effect as the higher concentration of carbon molecules absorbs more of the sun's heat. It is clear that this extreme and abrupt increase in atmospheric carbon dioxide coincides with the rapid increase in temperatures that are symptomatic of global climate change.

Global temperature rise is not the only indicator that the planet is getting warmer. Other factors; such as rises in ocean surface temperature, glacial retreat and sea level rise; are frequently cited as indicators that the global climate is indeed changing. The increased incidence of GHGs in the atmosphere contributes to both rising global temperatures and the myriad of negative impacts on ecosystems and human life.

Climate change affects many different aspects of human life on Earth: health, agriculture, water resources, coastal resources, ecosystems, and even national security. Human health is threatened as tropical illnesses expand in both their reach and seasonality. The increased incidence of extreme weather due to changes in atmospheric circulation further threatens individuals' security as weather events damage both people and property. Major cities will become increasingly more susceptible to blackouts due to more frequent and intense hurricanes. In addition to hurricanes, heat waves, droughts, and other extreme weather events damage agricultural lands that are already troubled by rapid changes in growing season durations. Freshwater availability for both agricultural use and human consumption decreases, particularly in coastal areas, when rising sea levels lead to increased saltwater intrusion into freshwater

---

21 NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, supra note 2.
Aquifers. Coastal communities produce an increasing number of climate refuges due to their lack of adequate freshwater resources (i.e., due to saltwater intrusion) and are at risk for total evacuation as a result of rising sea levels. According to the United Nations High Commissioner for Refugees, in 2009 alone 36 million people became climate refugees as a result of natural disasters. It is predicted that by 2050, 50 million people will become climate refugees per year, however some scientists predict that the figure could be as high as 200 million people per year.

The combined issues of an increase in extreme weather events, decreased availability of freshwater, and alterations in season duration have all contributed to the destabilization of ecosystems. Countless species fail to adapt to climate change at the same rate at which these problems increase, and thus a “substantial loss” in species diversity is expected to occur. The “poster child” for climate change related population drops is the polar bear, as its hunting is critically reliant on access to stable Arctic sea ice. Sea ice is now accessible for shorter periods of time, and is often so fragile that swims to shore become longer, sometimes resulting in polar bears drowning. A recent study by the US Geological Survey found that polar bear populations in the southern Beaufort Sea declined by 40% in the 2000s. The U.S. Geological Survey predicts that the continued shrinking of Arctic sea ice could result in two-thirds of the world's polar bears disappearing within the next 50 years.

Less widely documented than evident ecological concerns is climate change's threat to national security. The U.S. Department of Defense stated in its 2014 climate change adaptation report that the effects of climate change (mass migration, spread of disease, impaired access to food and water, etc.) could undermine already fragile governments. Additionally, countries vying for limited resources could face increased competition and tension between various actors (e.g., state governments versus small extremist groups). The resulting gaps in governance have

---

28 Ian Burton, et al., supra note 24, at 7.
31 Id.
33 Ian Burton et al., supra note 24, at 7.
35 Id.
the ability to create avenues for extremist ideologies and conditions that foster the emergence of terrorism. The conflict related to the Islamic State in Syria has been cited as an example where climate change has had an exacerbating effect on tensions in the region. An extreme drought, along with poor resource management, led to severe water scarcity and the displacement of over 1.5 million people. This example illustrates the threat that intense resource competition leads to, as cautioned by the U.S. Department of Defense. Climate change effectively acts as a threat multiplier. What could become a stable regime can be pushed into chaos as groups compete over increasingly scarce freshwater supplies or heat-sensitive food sources. Similarly, climate refugees have the potential to strain states in the same way as refugees of war do, as they too put social and economic strains on supportive regions. Norwegian Refugee Council head, Jan Egeland, stated that, “Natural disasters displace three to 10 times more people than all conflicts and war in the world combined.” Refugees compete for resources with the citizens of host countries, require additional infrastructure, and challenge government abilities to handle the sudden and massive demand for aid. In essence, what was once a precarious situation in a state may be pushed passed the tipping point due to the local consequences of global climate change.

What is perhaps most concerning about the present state of the changing climate is that global surface temperature is still projected to rise even if GHG emissions were to stabilize. If emissions were to suddenly stop altogether, it would still take thousands of years for the Earth to return to pre-industrial atmospheric carbon dioxide levels because carbon dioxide takes an extremely long time to dissipate. The future rate of warming will rely almost entirely on the amount of GHGs that humans will emit. This problem is global in nature, as global temperature rise and related extreme weather events affect the entire human population. Therefore, a global solution is needed. All actors have some responsibility to act on the issue because they will all benefit from activities that protect the population from climate change. Thus far, international law has primarily targeted reducing the production of greenhouse gases without necessarily addressing climate adaptation concerns.

---

40 Id.
41 2014 Climate Change Adaptation Roadmap, supra note 38.
45 THE ROYAL SOCIETY and the U.S. NATIONAL ACADEMY OF SCIENCES, supra note 4, at 22.
Basic Legal Framework

International environmental law is typically derived from treaties and other agreements voluntarily adopted by states.\(^{46}\) The origin of international climate change law stems from the 1972 UN Conference on the Human Environment in Stockholm.\(^{47}\) The conference covered the basics surrounding the relationship between human development and the environment, such as climate science and related technology, responsibility of states to respond to climate change, and the necessity of international cooperation to address the issue.\(^{48}\) The principles established at the conference were important for both synthesizing international environmental law to that point and creating a framework that would guide the future of the field.\(^{49}\) The Stockholm Declaration was adopted by the General Assembly after receiving 112 votes in favor and none dissenting.\(^{50}\) The world charter for nature, adopted by the UN General Assembly in 1982, which specified environmental obligations for different members of the international community, followed the 1972 conference.\(^{51}\) The charter was adopted after receiving 111 votes in favor of it and one against it; that one vote belonged to the United States.\(^{52}\) Outside of major environmental conferences, the United Nations has multiple bodies that continually monitor the state of the global environment so that future policy recommendations can be effectively made.\(^{53}\) The most significant of these bodies are the UN Environmental Programme (UNEP) and the World Commission on Environment and Development (WCED) due to their significant impact on United Nations policy.\(^{54}\)

Created by the 1972 Conference on the Human Environment, the UNEP serves to execute global environmental policy and recommend policy to other bodies of the United Nations.\(^{55}\) The organization's mission is primarily to assess environmental trends and assist United Nations institutions in creating instruments that pragmatically manage the environment.\(^{56}\) The UNEP is attempting to combat climate change by focusing on adaptation, mitigation, reducing emissions


\(^{48}\) Id.

\(^{49}\) Id. at 432.


\(^{51}\) Kubasek & Silverman, *supra* note 47, at 432.


\(^{53}\) Id. at 434.

\(^{54}\) Kubasek & Silverman, *supra* note 47, at 434-436.

\(^{55}\) Id. at 434.

from deforestation, and raising awareness of the impacts of climate change. These goals are mainly pursued through the creation of state-specific assessments and support plans. The UNEP, however, has many problems. Less than one third of United Nations members are on its Governing Council, which is currently missing many key nations, including the United States, China, Canada, Germany, and Brazil, since their terms on the council expired in 2013. With few members and the absence of many powerful actors, the UNEP often lacks strong international backing. Furthermore, its funding is volatile as it is comprised entirely of voluntary contributions. Perhaps most significantly, it is a subsidiary of the General Assembly rather than an independent agency, and therefore lacks any type of decision-making authority.

While the UNEP primarily assesses and responds to the state of the current environment, the WCED was formed to create long-term sustainability strategies. The organization had the specific goal of creating recommendations surrounding sustainable development, and had a small team of 21 members (both developed and developing) working on its reports. In October 1984, the WCED adopted a mandate to re-examine issues surrounding human development and the environment. The purpose of this mandate was to develop action proposals for governments, smaller organizations, and individuals. With the 1987 Brundtland Report, the WCED (also known as the Brundtland Commission) made a multitude of recommendations to combat the effects of climate change through a variety of international solutions. The essential aspects of the resolution were to strengthen UNEP, make environmental assessment and protection a global priority, and emphasize international cooperation. Critics argue, however, that the WCED failed to account for the needs of developing countries and did not thoroughly account for power relations between actors. Growing economic inequality made realizing environmental goals difficult, and states have not been as freely cooperative as originally envisioned, thus contributing to a faulty framework for international sustainable development. The WCED

---

59 Andrew Steer, Time to Get Serious About the Future of UNEP, WORLD RESOURCES INSTITUTE (Feb. 27, 2013), http://www.wri.org/blog/2013/02/time-get-serious-about-future-unep.
60 Id.
61 Kubasek & Silverman, supra note 47, at 436.
62 Id.
63 Id.
64 Id.
66 Id.
dissolved after releasing the Brundtland Report because it had fulfilled its goal of creating the recommendations that would become the framework for the 1992 UN Conference on Environment and Development.\textsuperscript{68}

The largest source of international climate change law is the UN Framework Convention on Climate Change (UNFCCC) created by the UN Conference on Environment and Development (UNCED) in 1992.\textsuperscript{69} All United Nations members are party to the convention, and thus its outcomes tend to represent the interests of both developed and developing nations.\textsuperscript{70} The basic objective of the UNFCCC is to stabilize emissions rather than reverse them altogether.\textsuperscript{71} The convention outlined a broad strategy for countries to cooperatively address climate change through the long-term goal of stabilizing greenhouse gas concentrations.\textsuperscript{72} This stabilization would focus on drastically reducing the burning of fossil fuels. The UNFCCC established the idea of different states sharing a common goal while carrying out different responsibilities.\textsuperscript{73} In other words, while all states were urged to act on climate change, industrialized nations in particular hold key responsibilities in reducing GHG emissions. While evidence surrounding climate change grew, the UNFCCC parties negotiated the 1997 Kyoto Protocol as a substantive response.\textsuperscript{74} Though contentious, the Kyoto Protocol (as will be detailed on later) was a landmark piece of environmental law that established both critical legal advances in international environmental law and definitive evidence that addressing climate change is indeed an international priority.

Under UNFCCC article 4.1b, parties are required to “cooperate in preparing for adaptation to the impacts of climate change.”\textsuperscript{75} Within the rules of the convention itself there is a legal necessity to create adaptive agreements. Little has been accomplished in this sphere, and new agreements are necessary to accomplish this core goal, as will be discussed later. The UNFCCC has been criticized “for not being flexible enough” to accommodate states-specific needs, which has significantly inhibited progress.\textsuperscript{76} Such instances of these problems will be discussed in the section on the Kyoto Protocol.

\textsuperscript{68} H. KENT BAKER & PETER CHINLOY, PRIVATE REAL ESTATE MARKETS AND INVESTMENTS 235 (1st ed., 2014).
\textsuperscript{72} Norman J. Vig & Michael E. Kraft, supra note 69, at 283.
\textsuperscript{73} Id. at 295.
\textsuperscript{74} Id. at 283.
\textsuperscript{76} Norman J. Vig & Michael E. Kraft, supra note 69, at 295.
The organization often suggests solutions that are more expensive for some states than others, which has caused some difficulties. In general, the UNEP supports the “polluter pays principle,” which says that whoever causes damage to the environment bears full responsibility for all costs associated with such damage.\(^7\) For many developing nations, however, such a principle is not economically feasible. It is therefore often necessary to create specific funds or exceptions in UNFCCC agreements, which provide more flexible options for developing nations to make reasonable pledges. The World Bank, for example, works with institutions like the Global Environment Facility to help finance developing nations' compliance with treaties like the Kyoto Protocol.\(^8\)

II: Current Law

The key problem with international climate change law is that current agreements do not provide for climate change adaptation. The legal framework established by the Berlin Mandate, Kyoto Protocol, Montreal Protocol, and the Copenhagen Accord, while an excellent base, contains significant flaws and fails to comprehensively address the problem.

**Berlin Mandate**

In 1995, the first UNFCCC Conference of the Parties (COP1) resulted in the creation of the Berlin Mandate.\(^7\) The agreement created legally binding GHG reduction commitments for industrialized countries, exempting developing countries from any binding obligations.\(^8\) The agreement was recognized for establishing the framework that would lead to the creation of the Kyoto Protocol.\(^9\) In particular, it solidified the notion of joint implementation, in which a member may work toward its own emissions goals by aiding emissions reductions in another.\(^10\) The purpose behind establishing the principle of joint implementation was primarily to draw attention to the implications of states' offshore activities.\(^11\) The original mandate did not envision states claiming credit against emissions reduction goals through joint implementation investments yet future agreements utilized the principle as such.\(^12\)

**Kyoto Protocol**

---

10. Id.
14. Id.
Although controversial, the Kyoto Protocol was a significant step toward global action on climate change. Even though ratification of the protocol was entirely voluntary, the United States, Andorra, Canada, and South Sudan are the only UN members who are not party to the agreement. This failure was not so much a political statement as it was an economic one; for some countries the protocol would have been very expensive to implement with relatively few gains. Kyoto regulates six key greenhouse gases: carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and, sulfur hexafluoride (SF₆). Three strategies were emphasized to limit GHG production: joint implementation, the Clean Development Mechanism (CDM), and Assigned Amount trading. These particular strategies were chosen because they were seen as the most cost-effective solutions that would stimulate green investment.

Article 4(2)(b) allows developed countries to act either individually or jointly, as roughly established by the Berlin Mandate. Joint implementation incentivizes developed nations to invest in projects in other developed nations by providing them with emissions credits.

Article 12 created the CDM, which allows parties to finance projects in states without commitments under the agreement (i.e., developing nations). This allows states to benefit from sharing technologies with industrialized nations while achieving the larger goals of the protocol. Emphasis is therefore placed on net sustainable development rather than on individual responsibilities that may strain developing economies. There have been significant administrative difficulties with the CDM, however. They are likely due to the highly politicized nature of the UNFCCC. Countries often vie for recognition of implementing more CDM projects rather than creating projects of higher quality. Therefore the most cost-effective projects are often favored over more comprehensive projects.

---

88 David Freestone, supra note 71, at 9-12.
89 Kyoto Protocol, supra note 87.
90 David Freestone, supra note 71, at 10.
91 Id.
92 Id.
93 Id.
94 Robert O. Keohane & David G. Victor, supra note 78, at 17.
95 Id.
96 Id.
Article 17 establishes Assigned Amount trading, in which Annex I parties (developed nations) may trade parts of their Assigned Amount Units (AAUs) among themselves. More commonly known as “cap and trade” or “emission trading,” this strategy places limits on total emissions, as countries buy the right to pollute or sell extra credits they do not need while abstaining from polluting. Any state may participate in this program regardless of whether they are a party to the agreement. The UNFCCC failed to make the program comprehensively flexible, however, as states struggle to reach Annex I status. Kazakhstan, for example, has tried and failed to join Annex I for over ten years.

Emission targets are monitored by registry systems that track parties' projects and parties' regularly self-reported emissions. The Kyoto Protocol’s Compliance Committee monitors compliance with commitments. Should the committee find that a country is not in compliance, it will require a specific plan to be implemented. For example, if a country exceeds its allowed emissions budget for the year, it may have to make up the difference in emissions the next year in addition to another 30% reduction. Further, its eligibility to participate in the protocol's mechanisms will be withdrawn, should the country fail to implement the plan.

The methods of emissions reductions introduced by the Kyoto Protocol were significant as starting points in spurring global action on climate change. States value the flexibility offered by the protocol through market-based mechanisms such as emissions trading. Kyoto has been criticized, however, for both its goals and its delegation of responsibilities. The main flaw with the protocol's goals is that it focuses only on short-term emissions reductions with no long-term targets. While methods to cut emissions were made available, they served more to slow the rate of climate change rather than to stop it in its tracks. The delegation of responsibilities has
been even more controversial. Developing nations, including such major polluters as China, have no mandatory obligations, even though they are party to the treaty.\textsuperscript{108} Although there is certainly economic logic behind this absence of responsibility, this is concerning because China is currently the largest emitter of carbon dioxide in the world (23% of global emissions).\textsuperscript{109} Energy-related carbon dioxide emissions from developing countries are predicted to be 127% greater than in developed countries by 2040.\textsuperscript{110} Furthermore, Kyoto lacks any effective compliance or participation mechanisms, rendering all emission-reducing activity completely voluntary, and noncompliance nearly inconsequential.\textsuperscript{111}

**Montreal Protocol on Substances that Deplete the Ozone Layer**

Like the Kyoto Protocol, the Montreal Protocol was a response to the urgent need to reduce GHG emissions. Unlike Kyoto, its focus was limited to reducing the use and consumption of HFCs,\textsuperscript{112} and is widely acknowledged as being incredibly successful.\textsuperscript{113} HFCs were chemicals frequently used in refrigerators, air-conditioners, and foam manufacturing.\textsuperscript{114} The protocol was a comprehensive response to a singular urgent problem; rather than targeting every aspect of climate change, its focus on one particularly dangerous GHG allowed for a finely tuned solution. HFCs have been nearly universally phased-out as a result of the Montreal Protocol.\textsuperscript{115}

Understanding why the Montreal Protocol was so much more effective than the Kyoto Protocol is necessary in order to create successful environmental agreements in the future. In short, it was successful because there was shown to be a lot to gain.\textsuperscript{116} Scientific data stated that “immediate action” on HFC production was desired, as HFCs are very damaging to the ozone layer.\textsuperscript{117} Preserving the ozone can prevent skin cancer deaths and cataract cases among other sun exposure-related ailments.\textsuperscript{118} Additionally, industry was already making changes as replacements for CFCs came into existence.\textsuperscript{119} This made the already relatively low cost of adopting the

\textsuperscript{108} Cass R. Sunstein, \textit{supra} note 86, at 10567.
\textsuperscript{111} Scott Barrett & Robert Stavins, \textit{supra} note 105.
\textsuperscript{112} Cass R. Sunstein, \textit{supra} note 86, at 10566.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} Cass R. Sunstein, \textit{supra} note 86, at 10568.
\textsuperscript{116} \textit{Id.} at 10567.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 10568.
\textsuperscript{119} \textit{Id.}
The Future of International Climate Change Law

protocol even more enticing since it would be even cheaper than anticipated. The financial benefits clearly outweighed the costs, and it was therefore economically sound and environmentally responsible for states to adopt the Montreal Protocol. As an additional incentive to ratify, the treaty contained a financial mechanism to support developing countries' implementation. The Multilateral Fund for the Implementation of the Montreal Protocol has funded the costs of compliance since 1991, and has been essential in ensuring developing countries' ratification and continued support as the protocol is legally binding for all those countries that have ratified it.

Copenhagen Accord

The Copenhagen Accord is a prime example of an international agreement that attempted to create lofty international goals, but ultimately produced little more than tenuous pledges. It represents some progress since it sets the limit of global temperature rise at 35.6 degrees Fahrenheit, creates a global system of global emission monitoring, and creates the Copenhagen Green Climate Fund to aid developing nations in reducing emissions. Among its numerous problems, most states' pledges were incredibly unambitious. The United States, for example, pledged to cut emissions to only 3% below 1990 levels. The European Union pledged 20-30% in cuts. If emissions cuts were indeed made at only 20%, there would be smaller annual reductions accomplished than have been accomplished on the average per year over the past three decades. These pledges are further weakened by the fact that the agreement is non-binding, so states will likely reach only the lower ends of their pledges. Even the Green Climate Fund fails to produce any significant results due to its lack of reliable funding and...
uncertainty over how exactly the fund would be financed.\textsuperscript{130} This insecurity neglects developing countries in their efforts to reduce emissions, as there is no guarantee that funds will be available for related projects.

Furthermore, the agreement fails to provide any long-term goals that would secure the 35.6 degree Fahrenheit global temperature rise limit.\textsuperscript{131} Even if states completely met their pledges, developed countries would reduce their emissions by only 15.6\% from 1990 levels.\textsuperscript{132} It has therefore been predicted that if states stuck to their Copenhagen Accord pledges, it is almost certain that the 35.6 degree Fahrenheit rise will be exceeded over the course of this century.\textsuperscript{133} In sum, the Copenhagen Accord appears to be little more than an agreement made for the sake of making an agreement. As pledges are weak and unenforceable, no mechanisms allow for adaptation, and little can ultimately be achieved through this agreement.

\section*{III: Solutions}

International climate change law currently focuses on gradual emissions reductions without establishing any long-term goals. It is therefore necessary for future law to develop long-term goals that will continue to reduce emissions. This alone, however, is not sufficient. As the climate continues to change, there is an increasingly pressing need for the law to provide for adaptation to a changing Earth.

\textbf{Emission Control}

In order to create successful future international agreements, it is essential to utilize strategies that have worked in the past. The Montreal Protocol was successful largely because its benefits clearly outweighed its costs. No matter how noble the intent of an agreement, it is highly unlikely to succeed if it is expensive. It will therefore be essential for agreements to demonstrate their economic value relative to their associated costs. For instance, the UNFCCC should take into account the efforts businesses are already investing in, and strengthen the incentives to further those efforts. For example, clean coal technologies, such as carbon capture\textsuperscript{134} and sulfur dioxide scrubbers\textsuperscript{135} can be supported in regions that are heavily reliant on coal and that would struggle to switch over to renewable resources. The UNFCCC could credit states with helping companies develop or implement such technologies.

\begin{thebibliography}{9}  
\bibitem{wu2013}
\bibitem{rogej2013}
Joeri Rogelj et al., supra note 126, at 1128.
\bibitem{rogej2013b}
\textit{Id}.
\bibitem{carboncapture2015}
\bibitem{sulfurdioxide2015}
\end{thebibliography}
The success of the Kyoto Protocol must not be forgotten altogether. Its creation of flexible implementation mechanisms that encouraged innovative and cooperative solutions can certainly continue to be utilized in future agreements. In particular, the idea of allowing states to partner to organize projects or “trade” their rights to emit may be the kind of solution that could work. As previously mentioned, the inflexibility of the UNFCCC in implementing the CDM and setting appropriate standards for trading AAUs hindered the Kyoto Protocol's success. The logical solution would be to revise the CDM to promote the implementation of more expensive programs by recognizing relative strength of projects rather than just the fact that a project exists at all, and to allow any country to trade AAUs. Projects should be evaluated for effectiveness and given weighted credits in relation to the true reduction in emissions they are predicted to achieve. This would incentivize more comprehensive emissions reductions programs in developing states, and would allow more states to take initiative in capping their annual emissions.

The UN Intergovernmental Panel on Climate Change (IPCC) made many notable recommendations on the preventative side of its Fifth Assessment Report. While several of these recommendations include those already mentioned, perhaps most notable is the report's support for cap and trade as a cost-effective solution that may continue to be used. However, cap and trade's ultimate effectiveness is largely dependent upon state-specific circumstances in addition to policy design.\textsuperscript{136} Revisions to the system may be necessary in order to further encourage limitations on net emissions.

A potential way to replicate the success of cap and trade may be to apply it at the domestic level. Instead of just trading carbon credits between states, credits may be traded between entities within a state. This potential scheme would limit statewide emissions to a specific amount. Within this amount, like in the interstate scheme, non-state entities could buy and sell the right to pollute. This would allow entities that rely on polluting to produce a profit (e.g. oil companies) to function as usual, yet still be penalized for harming the shared resource of that is the environment. Likewise, entities that control their emissions can reap the benefits of environmentally responsible behavior by selling their unneeded emissions allowances. Under the cap and trade scheme of the Kyoto protocol, states voluntarily participate. For a domestic scheme to be effective, however, it must take into account the complexity of a much larger number of potential actors. Participation would have to be mandatory to ensure that some companies that are sure to pollute more cannot get away with not paying a penalty for polluting more while other companies try to reduce their emissions to sell off credits. To make the system both effective and fair, all qualifying entities (however they may be ultimately defined) must participate in the scheme. The incorporation of a domestic emissions trading scheme would further reinforce cap and trade's goal of limiting net emissions, which would aid the state as a whole in meeting emissions reductions targets.

\textsuperscript{136} U.N. Intergovernmental Panel on Climate Change, \textit{supra} note 44, at 20.
The IPCC report also found that fuel taxes have had results similar to those of carbon taxes, although they were not necessarily implemented for environmental purposes.\textsuperscript{137} Due to the complexity of the global oil market, this article does not necessarily recommend the utilization of fuel taxes for the purpose of reducing emissions. However, it is noteworthy as a creative solution. Should future research demonstrate the effectiveness of fuel taxes without severely threatening the economy or fragile political situations, this could potentially be a method of decreasing the burning of fossil fuels.

Adaptation

The most significant developments in international environmental law will be those that allow the world to adapt to a changing climate. As temperatures rise and more communities are endangered by extreme weather and altered seasonal cycles, legal solutions will be necessary to ensure the continued survival of our species. The law must have special support for vulnerable communities, careful land use planning rules, and mechanisms that effectively measure and respond to progress. It is essential to note that climate change is not entirely predictable, and any adaptive measures must incorporate mechanisms that routinely monitor progress and allow for changes to be made quickly and as-needed.\textsuperscript{138}

Vulnerable communities tend to be agriculturally dependent communities and those that are in low-lying, coastal regions. One of the most certain aspects of climate change is sea level rise, and flooding will force either coastal engineering or complete evacuation. Even if property is not significantly damaged, saltwater intrusion will threaten coastal freshwater availability when seawater encroaches on aquifers. Water will also play a role in the sustainability of agriculturally dependent communities because major precipitation events (e.g. hurricanes and droughts) will become more frequent. Rising temperatures will also put heat-sensitive crops at risk. Further planning will be needed as these factors are considered alongside new seasonal variations.

To prevent climate-induced disaster, land use will need to be carefully regulated to minimize risk. Effective land use planning will be the most effective measure for many to protect against flooding, saltwater intrusion, erosion, and many other risks.\textsuperscript{139} In addition to limiting or outright prohibiting development in at-risk areas, developers may be required to prove that their proposed construction will meet certain performance standards, or at the very least inform potential buyers of the environmental risks associated with the property.\textsuperscript{140} If fewer people and properties are placed in at-risk coastal areas, the probability of a need to evacuate will decrease, preventing both property damage and the displacement of people. Land will need to be evaluated

\textsuperscript{137} Id.
\textsuperscript{138} Jan McDonald, \textit{The Role of Law in Adapting to Climate Change}, 2 \textsc{Wiley Interdisciplinary Reviews: Climate Change} 283, 289 (2011).
\textsuperscript{139} Id. at 285.
\textsuperscript{140} Id.
for its potential need for evacuation even in areas already inhabited so that the potential for climate refugees to emerge can properly be predicted. If it is likely that people will become climate refugees, plans to move in a controlled manner can be created before disaster forces change that may not be executed as efficiently as possible. These changes will likely be made at the domestic level, however the UNFCCC may set basic legal standards.

Such adaptive measures may be most easily undertaken through the creation of new rules under the UNFCCC.\footnote{Ian Burton, et al., supra note 24, at 15.} It is reasonable to add on rules to a strong framework rather than undertake the task of creating an entirely new body. The UNFCCC would be required to formulate a plan to support vulnerable communities through regional or national adaptation strategies, provide funding for high-risk developing nations that may struggle to implement new adaptive measures, and create a body to review the effectiveness of strategies and top priorities for aid so that changes may be made on an as-needed basis.\footnote{Id. at 16.} As the law does not tend to be particularly swift in responding to the best available science, monitoring systems will likely need to incorporate critical thresholds or other built-in triggers in order to ensure that the necessary changes can be made quickly and prevent further damage.\footnote{Jan McDonald, supra note 138, at 289.} For example, should global temperatures rise to a particularly dangerous height (say, the 35.6 degrees Fahrenheit limit of the Copenhagen Accord), annual emissions allowances must automatically become stricter. The threat of a new and severe expense may incentivize states to gradually make cost-effective changes that work in their regions rather than having to scramble to make cuts in light of an imminent global threat. Failure to incorporate an automatic trigger could jeopardize communities that are likeliest to face the effects of climate change if natural disaster outpaces bureaucratic action.

A major challenge in creating new rules is the high degree of uncertainty surrounding climate change. The degree to which different communities will be affected, the frequency of extreme weather events, and the amount of funding needed to respond to climate change are among the many uncertainties that may lead to “regulatory paralysis.”\footnote{Id. at 14.} Laws that both measure adaptation objectives and rapidly respond to new science will reduce the problems of uncertainty. International bodies will need to be created to regularly check for better solutions and respond to new information in such a way that sluggish bureaucracy does not jeopardize the planet.

It is also critical to note that climate change is special in that the concept of irreversibility must be taken into consideration when making decisions.\footnote{Id.} Although it may appear to be expensive or risky to implement certain measures, there is no going back should states fail to act.

\begin{thebibliography}{9}
\bibitem{141} Ian Burton, et al., \textit{supra} note 24, at 15.
\bibitem{142} \textit{Id.} at 16.
\bibitem{143} Jan McDonald, \textit{supra} note 138, at 289.
\bibitem{144} \textit{Id.}
\bibitem{145} \textit{Id.}
\end{thebibliography}
Species cannot be brought back from extinction and communities forcefully evacuated due to extreme weather or rising sea levels will never return to their original state. The problem climate change presents with regard to irreversibility is the scale and unpredictability surrounding it, with no historical basis to make decisions.146 The importance of adaptation must be stressed in the law, as every potential problem surrounding climate change cannot be addressed. Because knowledge and resources are limited, steps must be taken to prioritize projects that will have the most significant impacts on human life by either preventing further damage to the climate or protecting communities from risks associated with the changing climate. Lawmakers will be required to take preventative action in the most at-risk areas while not placing undue financial burdens or entirely neglecting resource-poor communities.

Conclusion

The greatest challenge facing the creation of adaptive climate change law will be formulating agreements that are satisfactory to the many countries signing them. Hard commitments and the fear of noncompliance consequences may deter states from ratifying agreements.147 They may be complex to formulate, expensive, or favorable to certain states over others. To prevent gridlock and create viable policy options, agreements must be economically reasonable (with support for developing countries), and provide flexible solutions for agreement compliance (as favored in the Kyoto Protocol).

New climate change agreements do not necessarily fail because states are uninterested in entering them. Climate change is a global problem of significant social and economic consequence, and is in dire need of a global solution. Plans that clearly demonstrate the costs incurred and amounts saved will be among the strongest driving factors in new international agreements. A common misconception about climate change law is that it is too expensive. However, this is simply not the case. The Montreal Protocol, for example, was largely successful because it was economically prudent to implement. Climate change creates a multitude of expenses, including the costs of relocating communities, recovering from more frequent natural disasters, and coping with agricultural losses. Adaptive measures that prevent and efficiently respond to disaster have the potential to save enormous amounts of economic resources along with countless human lives. The challenge will be to find the cheapest solutions that produce the greatest benefits.

As GHGs continue to be emitted at alarming rates by all states, the best possible outcome one can hope for is the mitigation of climate change. Through the strategy of dually implementing more preventative and adaptive legal mechanisms, there may still be hope for

146 Id.
future generations to live in an inhabitable climate. Without the creation of new laws, however, the damage caused by environmental irresponsibility will be both devastating and irreversible.
Dual Loyalties: On the Topic of Professional Medical Accountability and Human Rights Violations in Prisons

Eunice Gwon

“The health of my patient shall be my first consideration.” – World Medical Association (WMA) Declaration of Geneva

Introduction
The dual loyalties dilemma, also known as ‘divided loyalties’ or ‘double agency,’ is an ethical conflict of interest. The conflict is formally defined by the Physicians of Human Rights as the “clinical role conflict between the clinician’s professional duties to a patient and expressed or implied obligations to the interests of a third party such as an employer, insurer, or state”. This phenomenon presents itself in a variety of settings involving custodial circumstances, including refugees/military prisoners, military, developing countries, and most specifically, the prison context. Within a prison setting, dual loyalties poses particular challenges with respect to medical ethics due to the relative lack of knowledge regarding violations, inadequate training, dominance of prison bureaucracy, and current legal language in place which makes it difficult for prisoner plaintiffs to exercise medical indifference cases, in which medical care can be claimed as misappropriated, neglected, or refused. This comes to be a problem when health professionals, doctors, or medical staff are subjected to demands by governments or other third party agents to subordinate their patients’ human rights to third party interests. Health care professionals working in prisons are in a particularly vulnerable position to the dual loyalty

1 General Assembly of World Medical Association at Geneva Switzerland, Declaration of Geneva, (Sept. 1948) [hereinafter World Medical Association].
3 Id. at 15.
conflict, and may face pressures to serve in a medical capacity other than patient care including interrogations, forensic searches, or court ordered requirements to name a few. Health professionals working in prison environments are also subject to subordinating employment arrangements or financial constraints, which compromise their ability to exercise unbiased judgments.

Scholarship on dual loyalties attributes this exacerbation to the legal framework of international doctrines, technically categorized as “soft law”. International law at most times is considered as “soft law” due to its legal differences in enforcement from domestic law. Although soft law can be accountable in failing to provide or properly hold the necessary jurisdictional oversight, it is not the sole proprietor to blame. The climate for dual loyalty conflicts stem from the culture of prison business administrations, composed of cost containment, resource allocation, and measures taken in the name of national security. In conjunction with this culture of business administration, medical staff are frequently, systemically or legally pressured to perform tasks that are outside of their typical medical duties, including interrogations, forensic assessments, assisting in body searches, or disclosing a prisoner’s medical data, are either not aware of ethical violations or systemically protected under carefully constructed legal language. It is the unfortunate absence of legal enforcement and regulation of medical ethics, coupled with the extraordinary circumstances health care professionals face working in prisons that exacerbates the dual loyalties conflict.

Often times the relative weakness of jurisdictional abilities and enforcement of soft law has been pointed as culprit of dual loyalty conflicts. However, upon examination, a more careful look at the platform on which violations occur seems to be systemic, and sometimes even accidental, due to the nature of prison culture itself. As the institution holds custody of prisoners, they are responsible for healthcare services as prisoners are unable to seek their medical care elsewhere, as free persons may do. As such, appropriating healthcare and health services are an important task to which proper time, effort, and expense must be devoted. Frequently, incarcerated persons have severe health problems, due to alcohol or drug abuse, among other factors. The ideology behind cost containment, resource allocation, national security measures, and legal attitudes, unique to penitentiary contexts naturally breeds an environment for dual loyalty conflicts. This manifestation and continuation of conflicts stem from bureaucratic and legal circumstances, such as unique, prison-specific employment relationships and legal structures. Fundamentally, the removal of ethical accountability in the doctor-patient relationship due to the assumption of legal consequences by the prison results in human rights violations and ultimately jeopardizes a physician’s fiduciary duty to incarcerated patients.

---

6 Doctors working in prisons: human rights and ethical dilemmas, WORLD MEDICAL ASSOCIATION (2009).
7 Id. at 480.
8 Id. at 481.
9 Id.
I. Understanding the Dual Loyalty Structure:

According to the Declaration of Geneva (1948), a Physician’s Oath is one that promises and adheres to the application of a physician’s knowledge to the best interest of his or her patient and to the greater good of human life. International doctrines such as the Declaration of Geneva serve as ethical guidelines and modes of professional conduct. The doctrine also falls under international common law, or soft law governance, by which individual countries should adopt into its own doctrines to be legally enforced. Although not readily enforced, it is important to note the arena in which the provision of healthcare is served in order to understand the complexities of the ethical conflicts. Essentially, dual loyalty conflicts are deviations from ethical rules and modes of conduct outlined in international tribunals and doctrines including, but not limited to the United Nations, the Council of Europe, the World Medical Association, the International Council of Nurses, Physicians of Human Rights, Penal Reform International, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT). Thus it begs the question, what is to be done legally when violations do occur? If medical ethics are not readily enforced by a singular governing body, then who is responsible for enforcing them? The answer lies within the complicated jurisdiction and nature of international law, usually within the realm of human rights.

By comparison, the sole task of the prison doctor and subsequent health care professionals is maintaining the health and well being of inmates through the seven essential principles outlined by the CPT: free access to a doctor for every prisoner, equivalence of prison health care and community care, patient consent and confidentiality, preventative health care, humanitarian assistance, and complete professional independence and competence. Professionally, doctors swear on the Hippocratic Oath to “do no harm” with their medical knowledge in the face of receiving their It is the duty of the prison doctor to advise the prison director of penitentiary health affairs while strictly adhering to the seven principles. These codes are bound by moral professionalism; however, the regulation of role violations, either by fault of the physician themselves or by the institution, is blurry.

At a recent public forum, sponsored by the Division of Medical Ethics at Harvard Medical School, Leonard Rubenstein, the executive director of the Physicians for Human Rights, described four kinds of behaviors that violate an individual’s human rights that medical professionals find themselves. The four behaviors include: compromising one’s medical judgment, (examining detainees and leaving out records of medical evidence of torture); imposing medical procedures to serve state interests (lethal injections of prisoners on death row); lowering the quality of care (taking the form of a lack of referral for treatment); or remaining

---

10 World Medical Association, supra note 1.
11 Pont, supra note 4.
12 Id.
silent (medical personnel prohibited by law to speak of certain instances such as torture).\textsuperscript{14} Prisoners who cannot choose their care provider are fully dependent on the health care provided to them. As a vulnerable population, the prison population suffers from a lack of choice creating the ultimate lack of accountability.

Health professionals working in these environments often find it difficult to provide the best possible care for their patients when they feel pressure to participate in institutional security and cost cutting to help meet institutional objectives. Additionally, there is often times deliberate ambiguity, about the health professional’s role in a closed institution, as in a prison due to its emphasis on security and control.\textsuperscript{15} Prisons are the most susceptible to breeding dual loyalty conflicts, because security concerns tend to run high while transparency and monitoring mechanisms of prisoner care are generally lacking or altogether absent.\textsuperscript{16} When guidelines or proper procedures to care are lacking or insufficient, loyalty conflicts can unfortunately be expressed or implied by higher administration, or perceived by professionals who are unaware. Regardless of the form this pressure takes, it has the potential to distract a doctor in providing the best possible care to his or her patient. Situations such as these draw health professionals into moral and ethical difficulties delineating their primary duty of giving patients the best possible care as they are grossly pressured to either serve the need of their employer or their patient. It is also a legal obligation in the United States not to violate a “standard of care” outlined historically from the Supreme Court. The conflicting demands of a penitentiary context more often than not includes a lack of resources, overcrowding, pathogenicity, adherence to security, and lack of public support.

Current legal standing and precedents, for example liability issues, defend physicians towards dual loyalty violations and a continued prevalence of conflicts arise for a variety of different reasons. First, health care professionals receive little to no training in medical ethics specific to prisons simply because of the lack of written procedures and appropriate training.\textsuperscript{17} In that degree, professional ethics should be the highest priority in training. As of now this attention in training has been seen in only English and Welsh prisons.\textsuperscript{18} Untrained prison health care professionals, who are not equipped with the knowledge to understand difficult breaches in medical ethics, would account for the further violations. Legally, health care professionals working in prison contexts are integrated into uniform executive bodies following a military-like chain of command, posing the greatest challenge to their professional independence and undivided loyalty to their patients.\textsuperscript{19} The structure of prison employment relationships subordinates physicians as civil servants to prison authority and subject civil service rules that

\textsuperscript{14} Solomon MZ et al., Address at Harvard Medical School: Medical Professionalism, Dual loyalty and Human rights (Mar. 1, 2005).
\textsuperscript{15} Id.
\textsuperscript{16} The Federal Bureau Of Prison’s Efforts To Manage Inmate Health Care, Audit Report Number 08-08, Office of the Inspector General (2008).
\textsuperscript{17} Aaron Gray & Mark Pearce, The training needs of doctors working in English and Welsh Prisons: A survey of doctors, 121-130 INT’L J PRISON HEALTH 2, 3 (2006).
\textsuperscript{18} Pont, supra note 4.
\textsuperscript{19} Id.
encounter dual loyalties and limitations of medical independence and confidentiality. When there is enough systemic abuse, leeway, or absence of checks, normative rules such as doctor-patient confidentiality may be breached. Under civil service rules, the current system of legal cannon protects prisons from liability issues of inadequate health care through a protection from accountability.\textsuperscript{20}

In the case of nonmedical superiors, executive wardens may use their responsibilities to manipulate medical issues.\textsuperscript{21} Part-time or private health care may run into dismissal threats, in contrast, full time health care professionals are more likely to succumb to institutional cultures that subordinate patient interests to prison agendas because prison authorities take on the legal responsibilities of these medical tasks, in which they deem for security purposes. By taking on a legal responsibility, it relieves the doctor of accountability; coupled with the access of lawyers and legal services at the disposal of prison directors and prison representatives, the lack of accountability that could arise from ethical dilemmas is shielded under safety, security, or forensic purposes.\textsuperscript{22}

II. A Case in Using Soft Law to Improve Dual Loyalties

International declarations regarding prison health care belong to a body of law called soft law, which can be defined as pronouncements of tribunals of international organizations that provide a nonbinding gloss on binding legal rules.\textsuperscript{23} Broadly, soft law can be defined as those nonbinding rules or instruments that interpret or inform our understood as legally enforced rules as it represents promises towards future conduct.\textsuperscript{24} As such, if not actively incorporated into national law where it can be legally enforced, deviations from medical principles are sanctioned by national professional boards that generally do not have a strong agenda or urgency in prison health care.\textsuperscript{25}

The corpus of United Nations soft law includes the Basic Principles for the Treatment of Prisoners as well as the Principles of Medical Ethics relevant to the Role of Health Personnel.\textsuperscript{26} Europe's attitude towards enforcing human rights further protects prisoners' right to health care because it views “the treatment of persons deprived of their liberty with a view to strengthening.”\textsuperscript{27} Uniquely, CPT delegations hold the right to unlimited access to detention facilitations to preform interview prisoners in private and communicate freely with necessary peoples. Policy or health recommendations thus made by the CPT are formulated on the basis of facts found during the visit, are included in a confidential report that is sent to the state

\begin{thebibliography}{9}
\bibitem{20} 9 AELE Mo. L. J. 301 (2007).
\bibitem{21} 9 AELE Mo. L. J. 301 (2007).
\bibitem{22} 9 AELE Mo. L. J. 301 (2007).
\bibitem{23} Id.
\bibitem{25} Pont, \textit{supra} note 4.
\bibitem{26} United Nations. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975).
\bibitem{27} See C.P.T., Art. 1.
\end{thebibliography}
or country concerned.28 If the state or country fails to cooperate with suggestions or refuses to improve cited situations, the CPT may decide to make a public statement that could affect undesired global consequences for the particular state or country. For further legal protection, the European Court of Human Rights (ECHR) directly cites recommendations from the CPT.29 As a result, the ECHR’s activity influenced the Council of Europe’s recommendations, which now constitute soft law.30 The Council of Europe upholds the principle of equivalence of care in its recommendations ethically as its own governing, legal force.31

As an example, the canton of Geneva, Switzerland pioneered prison health care by completely transferring health responsibility to the Geneva University Hospitals and integrated a community health care system grounded in public health policy. It provided for the seamless integration of professional staff, medical information systems, and disease treatment and prevention between a large jail facility and a network of community centers.32 Geneva is known as a successful model of pacifying dual loyalty conflicts, because it had integrated the soft law into its local context thus turning its own doctrines into hard law.33

Examples of international dual loyalty violations that are systemic include countries such as Austria, Azerbaijan, Germany who hold penal systems and include penitentiary laws and regulations in which health care professionals are involved in the approval of punishments and in medical supervision of punitive and security measures (interrogations), which directly violates statutes laid out by the United Nations Resolution of the Principle of Medical Ethics.34 This principle strictly calls for the separation of the role of health care providers with those who dictate medical activities not in the patient’s interest – including body searches, forensic evaluations, and providing medical expertise for the application of disciplinary measures, and assisting in capital punishment/force feeding, or torture.35 These activities, which are clearly out of the scope of medical care, should not fall under prison physicians. Depending on political relationship and the state of the international community, it could be politically feasible to garner support to intervene on behalf of foreign prisoners. However, with an already low attention towards prisoners’ rights, such intervention will most likely not occur without of international attention or pressure. On the other hand, in lessening dual loyalty several countries including Georgia, Scotland, and Spain are considering moves implemented in prison health care brought forth by Geneva.36

30 Id.
31 Id; See CPT Art. 19; AP I, Art. 13(1); AP II, Art. 11(2).
33 Id. at 190.
34 Pont, supra note 4.
35 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).
36 Bernice, supra note 32.
III: Why is Soft Law not the Issue? Examining the Civil Liability and Human Rights Legal Approach

The scope of Geneva is an interesting one as its own legal context follows the soft law corpus outlined in UN and other international doctrines. Heath professionals have made considerable influences on legal frameworks in protecting prisoners’ rights and realizing key public health objectives by adopting a human-rights framework of providing health care seen in Geneva. Thus, soft law is not the issue when the country includes it into their legal body. The theory of soft law states that countries will adopt the rules of soft law corpus as a morally inherent binder of the institutions of law. Therefore, the current impediments to lessening dual loyalties are not grounded in soft law corpus, but it can be found within the bureaucratic or legal environment on which including the current attitudes of health care occur.

When healthcare is seen as a human rights issue, it follows the ethical spirit of international medical codes as the Declaration of Geneva. As an example, opposite of Europe and Geneva, United States prisons regard misappropriation of health as civil liabilities issues rather than human rights violations. The practical difficulties and clinical realities of prison care amalgamate a propensity for dual loyalty conflicts to occur, not from the jurisdictional inabilities of international soft law. Specifically in Geneva, the strength of the legal basis behind prison health care rests on the principle of equivalent healthcare to prisoners.

This not only provides a platform for equal healthcare, but it begins to form the legal framework as one of human rights law rather than civil liabilities, as it has been evidenced in the United States. A legal environment grounded in human rights law requires a constant awareness and defense of detainees’ rights by health authorities and health care workers. Solutions outside the dual loyalty structure can include preventative measures, free and informed consent, and physicians and their medical constituents aiding in lessening the forthcoming of institutional pressures by constantly defending confidentiality. As prison health care workers change frequently, they must be continually educated in their obligations to patients. The current ideology of rationing and cost containment is a glaring weakness ultimately delegitimizing Geneva’s human rights based legal cannon.

In a 2008 audit report of the Federal Bureau of Prisons (BOP), the US Department of Justice Office of the Inspector General outlines the effects of the BOP’s initiatives on inmate health care costs. Beginning from the 1990s, the BOP has implemented necessary steps in health care cost containment. Inevitably, through this platform, a dedication to human rights can be

37 Bernice, supra note 32, at 35.
38 Id.
39 Id. at 30.
40 Id. at 34.
41 9 AELE Mo. L. J. 301 (2007).
42 Id.
43 Pont, supra note 4.
difficult to keep. Since 2000, the BOP has implemented or developed at least twenty initiatives designed to improve the delivery of health care to inmates, to clarify administrative management of health care, and to reduce or contain rising health care costs by restructuring medical staff to match care levels, automated electronic records, and pairing inmates with appropriate medical program/interventions.\textsuperscript{45} 

However, for post-implementation analyses, the BOP had stated that it did not conduct or maintain cost-related data that is necessary in analyzing the cost effectiveness in health care initiatives.\textsuperscript{46} Herein lies the first problem in the system. Without data to confirm effectiveness, there is a deficit of answers to questions of problems or proper protocol when dilemmas arise. To note, the only tool the BOP uses to measure the effectiveness of cost containment is the decrease of the budget itself after each year.\textsuperscript{47} In combination, without yearly reports, dual loyalties can occur without detection. The 2008 report determined that each of the BOP institutions tested had not always provided recommended preventive health care to inmates. The audit also found that for almost half of the preventive health services that have been tested, more than ten percent of the sampled inmates did not receive the medical service.\textsuperscript{48} As a result, these inactions breed dual loyalties and in response, legal language and court validated these policies.

In federal court, prisoners can sue an institution if proper care had not been met, or broadly, inadequate medical treatment has been given as a medical indifference claim.\textsuperscript{49} However, the legal strength on which prisoner plaintiffs would have to face in a civil liabilities case is overwhelming. The United States Supreme Court has stated detention and correctional facilities must hold the legal obligation of providing adequate medical care to detainees and prisoners.\textsuperscript{50} The root of this doctrine stems from the Eighth Amendment of the US Constitution, as it bars “deliberate indifference to serious medical needs of prisoners,” and on its prohibition on “cruel and unusual punishment.”\textsuperscript{51} Deliberate indifference requires that the employee or official is aware of the risk of harm that he or she is enhancing by either failing, delaying, or inadequately providing medical treatment.\textsuperscript{52} 

It is not sufficient in the federal civil rights lawsuit of inadequate medical care for the plaintiff prisoner to point to mere negligence by a doctor. They must prove that the care provided was not absolutely the best possible, that medical personnel inadvertently failed to pursue some possible avenue of diagnosis or treatment, or that they “should have” known that their symptoms indicated a particular medical condition.\textsuperscript{53} Furthermore, if another doctor had disagreed with the particular treatment avenue or if a prisoner would have preferred another treatment avenue, is not enough to claim the defendant’s actions as deliberate indifference. In \textit{Shell v. Brzezniak}, a

\textsuperscript{45} Id.  
\textsuperscript{46} Id. at 53.  
\textsuperscript{47} Id. at 47.  
\textsuperscript{48} Id. at 51.  
\textsuperscript{49} 9 AELE MO. L. J. 301 (2007).  
\textsuperscript{50} Id.  
\textsuperscript{51} U.S. CONST. amend. VIII, 2.  
\textsuperscript{52} Bell v. Wolfish, 441 U.S. 520 (1979).  
\textsuperscript{53} 9 AELE MO. L. J. 301 (2007).
complaint about medical care that amounted only to a disagreement about the manner of treatment received was found insufficient to state a constitutional claim for deliberate indifference against a prison doctor.\textsuperscript{54} To prove deliberate indifference requires some form of knowledge of the problem. Prison personnel with no awareness at all of a prisoner’s medical problem will not be held liable for alleged inadequate care. In \textit{Mayo v. Snyder}, prison administrators were not shown to have known of a prisoner's requests for medical treatment for back pain prior to his initial doctor's appointment, so they could not be said to have acted with deliberate indifference to a serious medical need.\textsuperscript{55} The relative argument of indifference and what constitutes medical indifference is at times hard to distinguish. The verdict of these cases show that a case grounded in civil liabilities aims to prove fault. On this platform, dual loyalty conflicts can be exacerbated in the sense that prisons could argue against medical indifference. Instead, when health care is established and legally protected under a platform of human rights, it shifts the attention from arguing whether inadequate medical care was committed to applying care and attention towards affected groups.

\textbf{Conclusion}

The solution thus may rest outside the dual loyalty structure if it is perceived and believed as an inevitable, systemic one. Implementing stronger legal approaches, or at least examining the issue of upholding and delivering medical care through a lens of human rights rather than civil liabilities, can strongly restrict ethical conflicts from occurring.\textsuperscript{56} Even with the consideration of international law’s influence over global conduct, it is not enough to uphold the basic right to adequate health care.

A lack of ethical accountability creates a legal vacuum wherein dual loyalty violations can occur. Due to bureaucracy, prisons will assume the legal responsibility of a physician’s actions. In some cases however, in the name of security or safety, prisons will mandate a legal responsibility onto the physician.\textsuperscript{57} The illusion of choices in instances of care on the part of the doctor creates a lack of ethical accountability. Ultimately, the structure of dual loyalties is one that involves an input of a lack of accountability, which creates an output that materializes as human rights violations. Those who blame soft law as the cause of dual loyalties refer to the lack of de jure jurisdiction of international law regarding medical care.\textsuperscript{58} Although true, blaming soft law as the problem implies that amending it would be the solution. However, it is the ambiguity of law that pressures doctors to balance ethical obligations and legal standards of protection.

Health professionals’ practice, typically governed by ethical codes, may benefit from human rights guidelines, particularly in situations of dual loyalty where the rights of the clients or of the communities are threatened. The powerful normative role of human rights in

\textsuperscript{55} Mayo v. Snyder, No. 05-1775, 166 Fed. Appx. 845 (7th Cir. 2006).
\textsuperscript{57} Pont, supra note 4.
\textsuperscript{58} Id.
establishing accountability for protections and freedoms can curb the professional accountability violations. Moreover, institutional accountability for protecting human rights is essential to avoid shifting responsibility solely onto the health professional, which may result in medical indifference claims.\textsuperscript{59} Human rights approaches can include holding states and other parties accountable, developing policies and programs consistent with human rights, and facilitating support for victims of violations of the right to health.\textsuperscript{60} The essential elements of this approach include principles of non-discrimination and equality, coupled with entitlements to availability, accessibility, acceptability, and quality of health care\textsuperscript{61}. The obligations to respect, protect, and fulfill can be promoted through participation and enforcement by accountability, providing a powerful means of addressing the plight of health care professionals and patients.

\textsuperscript{59} Footer, \textit{supra} note 56.
\textsuperscript{60} \textit{Id}.
\textsuperscript{61} \textit{Id}.