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NOTE FROM THE PUBLISHER:

This edition has undergone reformatting and editing to adhere to the formatting guidelines of the newly reorganized Juris Mentem Law Review. Upon its initial release, this edition was not formatted for print; thus, non-content-based edits have been made to enhance readability. The unedited version can be accessed on our website.

This edition was written before our editorial review and development process was implemented. This edition should not be cited as independent research, and Juris Mentem does not endorse the factual accuracy of these articles.

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LETTER FROM THE EDITORS:

The Juris Mentem Executive Board is pleased to present the second edition of American University's Undergraduate Law Journal. Especially considering the difficulties of this semester amidst the COVID-19 pandemic, we were thoroughly impressed with the level of enthusiasm and quality of work that our staff writers exhibited. This journal presents the culmination of months of hard work from our dedicated staff writers, column editors, and executive board members.

Volume I, Issue 2, contained in this journal, is only the second edition of Juris Mentem to ever be published. We are proud of the development of the journal over the 2020-2021 academic year, and we see great potential for expansion and improvement in the future.

In this publication you will find in-depth analyses of complex legal issues ranging in topics from business law to legal theory. Our objective was to present nuanced student perspectives on a diverse range of subjects that may not be covered as thoroughly in a classroom setting. Juris Mentem provides undergraduate students the opportunity to build on the intellectual curiosity that they hold for the legal field by producing original analytical work that may serve as the basis for their future legal education.

We would like to thank our advisor, Professor Michelle Engert, for her dedication to giving undergraduate students the opportunity to present their original work in the field of law and politics. Secondly, we must express our gratitude towards the Design Editors and Column Editors who ensure that our journal exemplifies high standards of visual design and writing quality. Lastly, this journal would not be possible without the wonderful staff writers that spent hours researching and writing thoughtful articles on complex subject matters. We are grateful for the collaborative work of all those involved in Juris Mentem, and we hope to bring the opportunities that Juris Mentem provides to an even larger set of American University students in the coming years.

Thank you,

Harsha Mudaliar & Graham Payne-Reichert
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*Section 230 and the
Future of the Internet*

JACOB LEVINE
Staff Writer



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SECTION 230 AND THE FUTURE OF THE INTERNET

BY JACOB LEVINE

Technical evolution is followed by expansion in technology policy. This has been true throughout human history, but today we face a new challenge—the Internet, a beast of its own kind. Just 600 years ago, the printing press was invented and changed the landscape of public policy, communication, and knowledge production forever (Gregersen, n.d.). With the ability to mass-produce literature and discourse for the first time, liability rules and early content ownership rights began to emerge (Deazley, 2006). Just within the past hundred years, writable CDs, TVs and computers were thrust into our world, beginning the transformation of our world from print to digital. Accordingly, this transformation brought along the need for a new set of governing laws. The last few decades alone have seen groundbreaking developments such as smartphones, Bluetooth integration into smart-homes and smart-cities and, above all else, the expansion of the modern Internet. However, this progress works as a double-edged sword, as technology has begun to evolve so rapidly that new concepts and abilities challenge the boundaries of the law.

While it has become commonplace to reexamine the words that our founding fathers wrote in the 18th century, legislation governing our use of the internet was written only 25 years ago and is already being challenged based on modern capabilities. Just a few short months ago the American people

were unfamiliar with Section 230 of the Communication Decency Act of 1996; yet, this piece of bipartisan legislation, or “the twenty-six words that created the internet”, is the foundation upon which the digital world of today rests (Kossoff, 2019).

Section 230: an Overview

Section 230 itself can be described with a simple legal protection: computer interactive services cannot be treated as the publisher or speaker of third-party content (Office of Compliance, 1996). This effectively means that companies serving as web hosts or platforms cannot be held liable for the content that is posted on them by another group or individual. When Section 230 was originally written by Senator Ron Wyden, a Democrat from Oregon, and Representative Chris Cox, a Republican from California, they intended to create a law that would allow the internet to continuously grow. What most do not realize, however, is that they also intended to encourage some form of content moderation by extending liability protections to online platforms that still have editorial control (Gardner, 2020). This was unusual for its time, especially when compared to paper publications which are responsible for their content because their editorial control effectively identifies them as co-publishers of the content. Just a year later, the Fourth Circuit Court of Appeals heard *Zeran v. America Online Inc.*, resulting in a decision that caused the law to be interpreted much more broadly. The regulation was framed as a blanket intermediary immunity, absolving hosting platforms of almost all cases of liability (*Zeran v. America Online*, 1997). Ironically, it was this decision that kicked the growth of the internet into high gear.

By shielding online services from the civil liability that would otherwise apply for content moderation responsibilities, the Fourth Circuit ensured that the internet would continue to grow. In the early days of Section 230, after the *Zeran* decision,

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the lowered barrier to entry for new companies allowed those with limited initial resources to offer online services without risking the debilitating cost of a lawsuit for any illegal third-party content. For the same reasons, Zeran also enabled social media platforms to thrive and encouraged online hosts to allow the public to have free reign over the materials they access and interact with. This broad application of Section 230's protections resulted in a competitive advantage for American technology giants such as Google, Facebook, Reddit, Twitter, Bing and many others, helping them to prosper in relation to their foreign counterparts that weren't free from these liability risks (Johnson and Castro, 2021). Now, after a quarter century, they dominate the global industry as some of the biggest companies in the world.

Without Section 230, important websites and digital hosting companies could be sued out of existence or be forced to moderate their content to an unaffordable extent, shrinking the internet in the process and eliminating the ability for information, opinions, media and other content to be freely shared. In essence, social media companies and all other web platforms would be liable for all content posted onto them. This would force the companies to gatekeeper every post which is an almost impossible task with the sheer volume and size of today's internet, resulting in risks for debilitating lawsuits or costs associated with self-policing billions of daily interactions. Search engines and media sharing companies would have to take on similar risks and face similar dilemmas. At the same time, Section 230 is not always looked at favorably because the very same liability protections that allowed the internet to grow in the first place have been taken advantage of. So, while the Zeran doctrine has been applied without reevaluation so far, the law is more nuanced than the single paragraph suggests and has recently been shrouded in controversy.

Political Underpinnings

Without Section 230, important websites and digital hosting companies could be sued out of existence or be forced to moderate their content to an unaffordable extent, shrinking the internet in the process and eliminating the ability for information, opinions, media and other content to be freely shared. In essence, social media companies and all other web platforms would be liable for all content posted onto them. This would force the companies to gatekeeper every post which is an almost impossible task with the sheer volume and size of today's internet, resulting in risks for debilitating lawsuits or costs associated with self-policing billions of daily interactions. Search engines and media sharing companies would have to take on similar risks and face similar dilemmas. At the same time, Section 230 is not always looked at favorably because the very same liability protections that allowed the internet to grow in the first place have been taken advantage of. So, while the Zeran doctrine has been applied without reevaluation so far, the law is more nuanced than the single paragraph suggests and has recently been shrouded in controversy.

Since this hearing, former President Trump, President Biden, and other politicians on both sides of the aisle have been calling for a repeal of Section 230, while some have refused to consider the conversation around the law in the first place (Newton, 2020). This is an alarming situation for everyone—including Big Tech, small businesses, private individuals and academic institutions. Although Section 230 is vital to the survival of the modern internet, there are still legitimate concerns to be addressed with blanket immunity, including many problematic cases of misinformation, doxing, and sharing of inappropriate imagery and content (Kelly, 2020). However, the bickering of legislators and political leaders hasn't seemed to be productive in arriving at a plausible solution that adjusts Section 230 to fit its original purpose. Instead, this

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political tug-of-war, between completely repealing Section 230 and leaving it untouched, has presented an all-or-nothing, lose-lose situation.

The congressional hearings with Big Tech moguls exemplified this dilemma, overshadowing the real problem with political banter and slowing any actual progress (Dwoskin and Lerman, 2021). Furthermore, instead of independently discussing a possible compromise or amendment to Section 230, Congress has repeatedly called Zuckerberg and the other social media executives back to speak, be questioned, and offer their own solutions. This has presented a perfect opportunity for party leaders to berate the moguls with their own concerns in a strong showing to the electorate—while counterproductively enabling the Big Tech companies themselves to promote their own business interests.

Big Tech and Section 230

With this opportunity to be in the spotlight, Facebook has undertaken an ad campaign, attempting to regain the trust of the general public and government after its blemished track record with privacy, information sharing and Section 230 issues (Lima, 2021). Zuckerberg even wrote a special memo to Congress, encouraging them to change Section 230 to a conditional immunity. His proposal is based on the expectation that web hosts and platforms should be required to have adequate systems in place to identify and remove illegal content to the best of their ability (but still be granted immunity in case of mistakes or oversights) (Brandom, 2021). Though this seems like a step in the right direction, many believe that Big Tech companies are simply attempting to save their own reputations and market dominance with this talk of reform and new regulation (Hendrickson and Galston, 2019). In fact, Zuckerberg's proposal may only serve to amplify Facebook's monopoly power even more.

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With Congress looking to push these moguls into a corner, proposals such as Zuckerberg's may seem like a victory all around. This is a startling misunderstanding of the true implications of his strategy. By forcing web hosts to maintain a minimum level of best practices and content moderation that is uniform across the board, larger companies such as Facebook will have more resources, time, money and manpower at their disposal to meet these guidelines and police the billions of posts that go online every day. By contrast, smaller online servers, hosts and companies would have a much harder time building the moderation infrastructure which would force competitors to Big Tech out of the market, or at least make things difficult (Teachout 2021). The effects of Zuckerberg and other mogul's "compromise" solutions could actually be just as destructive as repealing Section 230 altogether to startups and medium size online businesses (Nabil, 2021). Alternatives, such as holding larger platforms to stricter liability expectations through a scaling system, may prove to be more effective and fairer in creating a safer and freer internet. That said, other approaches to internet policy such as this haven't been considered by Congress because recent hearings and debates have centered the leaders of Big Tech companies in the discussion on optimizing internet policy. Historically, Congress hasn't dealt much with the examination of Section 230 and, at least for now, it doesn't seem that relying on meaningful and nuanced legislation to amend Section 230 will yield results.

As of now, political banter is resulting in radical moves to either repeal Section 230, or leave it completely untouched, without much regard to applications and technical capabilities of changing such a monumental law—and it seems that Big Tech won't back down without having a say in the matter. The Supreme Court and other Federal Courts seem to have the unique ability to reexamine Section 230 and solve existing issues by setting a narrower case precedent, but no real progress has

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been made yet besides lower-level rulings on individual cases. The question for our government becomes where to draw the line in the sand, especially now that the internet is still evolving beyond what we could have imagined just decades ago.

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Gamestop v. Wall Street

PRANJAL CHANDRA
Staff Writer



GAMESTOP V. WALL STREET

BY PJ CHANDRA

Big banks vs the little guy. Hedge Fund vs Reddit stars. Wall Street vs Main Street. These are just some of the ways to describe what has been happening these past few months with GameStop's volatile stock price. So, what exactly happened here and why is the world going crazy over an electronic retail company that seemed to have lost its relevance over the last 5-10 years?

In layman's terms, a "shorting" took place, meaning that there were investors who bet against the stock; and in this case, there were two different large hedge funds who felt they should bet against GameStop. Essentially, when one shorts a stock, they are borrowing an amount of shares from a broker and then selling them while promising the return of shares at a later date. So what was behind the rise in the stock of Gamestop? The investors took their cue from a blog on the social media platform Reddit called Wall.StreetBets. This blog encouraged its followers to do battle with the hedge funds by placing bets in favor of GameStop.

The bets placed for and against GameStop are called "short selling" or "shorting a stock" in industry vernacular. As the New York Times describes it, "These bets involve contracts that give them the option to buy a stock at a certain price in the future" (Phillips, 2021). Following this, if the price of the stock

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rises, the trader buys the stock at a bargain and sells it for a profit. Again, as the Times points out, “In practice, lots of traders just sell the options contract itself for a profit or loss instead of actually buying the shares, but this description suffices for our purposes' ' (Phil.lips, 2021). What the people from WallStreetBets did was legal, but certainly not ideal from a monetary and financial perspective (Chung, 2021).

Professor Harris shared his perspective on what exactly occurs, what can be done to prevent this in the future, and how he views the division between Main Street vs Wall Street. First, Professor Harris thought it was important to understand why GameStop was targeted by WallStreetBets. Jaime Rogozinski, Wall.StreetBets’ founder, has been orchestrating the blog for over eight years now. Recently, however, he “pushed a ‘Wall Street Bet Championship’” event, where he may have had a stake in the company’s sponsorship and success (Fitzgerald, 2021). Mr. Harris felt that if hedge funds such as Melvin Capital gained a large enough market share, there would be fundamental issues within the market.

When asked about how this can be prevented again in the future, Professor Harris mentioned that there are several key points worth noting. The first is that WallStreetBets and similar groups get traction by mobilizing against hedge funds, which often results in huge losses for the hedge funds. He believes this model can and will be replicated by small investors who like the idea of shorting stocks to counteract big Wall Street money and revitalize some older companies like GameStop. The model will be tough to follow for sure though, and that is also where policy and politics come into play. Professor Harris opined that the anti-hedge fund sentiment highlighted during the GameStop fiasco was probably one of the most unifying moments in our country in recent years. Progressives like Congresswoman Alexandria Ocasio-Cortez and conservatives like Senator Ted Cruz alike felt the free market should prevail and large

companies should not be allowed to collude against the smaller one. Senator Elizabeth Warren has called for a Securities and Exchanges Commission (SEC) review of how the whole situation was handled internally. Professor Harris said that generally, politicians will stand up for their constituents rather than the hedge funds. He noted that politicians universally supported the small investors throughout the entire week where the GameStop stock had a nearly 800% run that they will continue to represent them in the best light moving forward as well. Additionally, the courts would likely have a difficult time deciding a convoluted case such as this. The specific challenge would be more so along the lines that the hedge funds did not really break any rules, they just manipulated the system to their advantage.

Professor Harris also mentioned that hedge funds may need to worry that they might lose their efficacy because small investors could make a practice of teaming up against them. We talked about the pump and dump scheme, which is “a scheme that attempts to boost the price of a stock through recommendations based on false, misleading, or greatly exaggerated statements (Dhir 2021)”. Since stock prices naturally have peaks and valleys, it is possible to manipulate investors into following a false narrative, though it can be difficult to select the right timing to pursue such a tactic. Such frauds may be easier to perpetrate on small, relatively unsophisticated investors who may not have the wherewithal or time to do thorough due diligence before making investment decisions.

In terms of some legal precedent, in 2008 the SEC banned what is known as naked shorting the illegal practice of short selling shares that have not been affirmatively determined to exist. Additionally, the Supreme Court case *Merrill Lynch vs Manning* focused on Merrill Lynch and the other financial institutions consistently violated Regulation SHO, the federal law that regulates naked short selling of common stock. There were some similar comparisons to how a trading company like

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Robinhood stopped the selling of GameStop and lessons can still be learned a decade later.

Professor Harris ultimately offered two pieces of advice to those looking to learn more about stocks and how hedge funds are run. He first mentioned the value of young people investing in index funds, which he believes is underappreciated. Finally, even if you believe you can manipulate and work a stock like GameStop's in your favor, you will always lose in the end to Wall Street. Tough Business.

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*An Overview of State
Anti-LGBTQ+
Curriculum Laws*

ZACHARY SWANSON
Staff Writer



AN OVERVIEW OF STATE ANTI-LGBTQ+ CURRICULUM LAWS

BY ZACHARY SWANSON

Most media attention on the intersection of LGBTQ+ rights and the legal system has been about Supreme Court decisions. For example, in 2003, the Court struck down state anti-sodomy laws in *Lawrence v. Texas*. In 2015, the Court legalized gay marriage nationwide in *Obergefell v. Hodges*. In 2020, the Court clarified Title VII, declaring that the statute protected LGBTQ+ people in employment decisions (*Bostock v. Clayton County*).

An issue that has seemed to slip through the cracks is anti-LGBTQ+ curriculum laws. These laws, sometimes referred to as “no promo homo” or “don’t say gay” laws (“‘No Promo Homo’ and ‘Don’t Say Gay’ Laws”), prohibit discussion of homosexuality in the classroom, typically about sex education. The recent success of the LGBTQ+ rights movement in the legal system has brought their constitutionality into question.

To date, three cases have challenged these laws: *Equality Utah v. Utah State Board of Education*, *Equality Arizona v. Hoffman*, and *Gender and Sexuality Alliance v. Spearman* (“University of Utah law professor challenges”). A review of these cases reveals that the rest of the states with this type of law are on shaky ground. While these suits did not establish binding precedent, each case was successful in getting the state to admit that the law would not survive a challenge. As of March 2021,

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there are still five states that have anti-LGBTQ+ curriculum laws: Alabama, Louisiana, Mississippi, Oklahoma, and Texas (Knox).

GSA v. Spearman On February 26, 2020, South Carolina's Superintendent of Education, Molly Spearman, was sued in her official capacity. The lawsuit alleged that the state was violating students' rights under the Equal Protection Clause by enforcing § 59-32-30(A)(5) of South Carolina's Comprehensive Health Education Act, which prescribed that "[t]he program of instruction provided for in this section may not include a discussion of alternative sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases." By singling out homosexual relationships, particularly only allowing their mention in conjunction with the discussion of venereal disease, the complaint alleged that the state was unlawfully discriminating against LGBTQ+ students ("*Gender and Sexuality Alliance v. Spearman*").

Spearman requested legal advice from South Carolina's Attorney General, Alan Wilson. Wilson's office instructed her not to fight the lawsuit, arguing that the law was unconstitutional based on current precedent and would not withstand a challenge (Cook). On March 11, 2020, the plaintiffs and Spearman entered into a consent decree, essentially an in-court settlement. Both parties agreed that the law was unconstitutional, and Spearman agreed not to enforce it. Additionally, she was required to issue a memorandum instructing State Board of Education members and public school superintendents that the law was not to be enforced (Gross).

This case was unique in that it was the first time an anti-LGBTQ+ curriculum had struck down in court. In Arizona and Utah, the lawsuits succeeded in another way: convincing the state legislatures to repeal the laws. Both states had been sued by

LGBTQ+ advocacy groups, and acknowledging that the laws as they stood likely would not survive a legal challenge, they decided to take them off the books.

Analysis

All three states in which a lawsuit has challenged an anti-LGBTQ+ curriculum law have conceded that said laws are unconstitutional, and they have either repealed their law or agreed not to enforce it.

These outcomes are a double-edged sword for potential plaintiffs looking to challenge the remaining anti-LGBTQ+ curriculum laws. On the one hand, there is now an abundance of evidence that these laws are widely considered unconstitutional. On the other hand, there is no binding precedent that would prevent the remaining states with these laws from enforcing them. For example, if Utah had decided to fight their case up to the Tenth Circuit, and if they lost, Oklahoma would also likely be enjoined from enforcing their anti-LGBTQ+ curriculum law.

Additionally, though South Carolina's law was brought to an end in court, the judgment was a consent decree. It was not technically a decision made by the court. Though no other jurisdiction would be bound by a decision at the district court level, such district court decisions can serve as a persuasive precedent for judges deciding future cases. The consent decree, though it does demonstrate that the state was unwilling to fight the constitutional claim, may not be considered as persuasive as a standard court ruling. That said, it may demonstrate to other states that fighting these lawsuits is a losing battle.

“Anti-Gay Curriculum Laws”

An interesting throughline in all of these cases is the influence of the article “Anti-Gay Curriculum Laws”, published in the Columbia Law Review in 2017. Written by University of

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Utah College of Law Professor Clifford Rosky, the research in the article developed “a framework for a national campaign to invalidate anti-gay curriculum laws—statutes that prohibit or restrict the discussion of homosexuality in public schools” (Rosky).

Alan Wilson’s advisory opinion to Molly Spearman cites the article multiple times (Cook), and Rosky himself was involved in each of the aforementioned lawsuits. In Equality Utah, he served as an expert who assisted the plaintiffs (“Rosky’s research provides foundation”). In Equality Arizona and Gender and Sexuality Alliance, he was one of the lawyers who filed the lawsuit (“Rosky files lawsuit against the State of Arizona ”; “Rosky files lawsuit challenging South Carolina's' ”).

Rosky’s analysis of the Equal Protection Clause laid the groundwork for each of these cases. He demonstrated that if courts were to comply with the Supreme Court’s precedent in prior LGBTQ+ rights cases, they would have to strike down anti-LGBTQ+ curriculum laws. Each case challenging this law has been based around the Equal Protection Clause in no small part because of Rosky’s research.

Conclusion

It is unclear what the five states with anti-LGBTQ+ curriculum laws will do in light of the Utah, Arizona, and South Carolina actions. They could repeal their laws, enter into a consent decree, or fight to continue their enforcement.

With a lack of binding precedent to guide how judges should approach these laws, it may seem that decisions could go either way. However, with the success of recent LGBTQ+ rights lawsuits in general, along with the fact that states thus far have not deemed it a fight worth having, it seems to be only a matter

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of time before all of these laws are either repealed, rendered unenforceable, or perhaps even struck down in a court of law.

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JURIS MENTEM

*B.L. v. Mahanoy Area
School District: An
Evolving Look At Free
Speech In Schools*

SHERYA MURTHY
Staff Writer



B.L. v. MAHANAY AREA SCHOOL DISTRICT: AN EVOLVING LOOK AT FREE SPEECH IN SCHOOLS

BY SHREYA MURTHY

Abstract

In 2017, a student and junior varsity (JV) cheerleader at Mahanoy Area High School was suspended from cheerleading for the next school year. The reason the school gave the suspension was that the student, Brandi Levy (who is referred to in the court case by her initials B.L. as she was a minor at the time), posted messages on a social media platform regarding cheerleading tryouts that were “negative,” “disrespectful,” and “demeaning,” (ACLU). In response, the American Civil Liberties Union of Pennsylvania filed suit on behalf of B.L., stating that her suspension from cheerleading violated her First Amendment rights, as she posted those messages off-campus. The issue at contention is whether the First Amendment prohibits public school officials from regulating off-campus student speech or not. The case is on the docket to be heard by the Supreme Court of the United States.

Background

During the 2016-2017 school year, B.L. was a JV cheerleader at Mahanoy Area High School. As a cheerleader, she was required to sign a code of conduct that included, among other statements to “have respect for [her] school, coaches, teachers, and other cheerleaders and teams,” and that there would be “no toleration of any negative information regarding

cheerleading, cheerleaders, or coaches placed on the internet,” (B.L. v. Mahanoy Area School District). At the end of the 2016-2017 school year, B.L. tried out for the varsity cheerleading team but did not make it. That weekend, she decided to express her frustrations on Snapchat, a social media platform where messages may only be viewed temporarily before they “vanish” after twenty-four hours. B.L. posted a photo of her and a friend in which their middle fingers were raised, with the caption, “f*** school f*** softball f*** cheer f*** everything” (B.L. v. Mahanoy Area School District). She proceeded to post a follow-up Snap with the words “Love how me and [my friend] get told we need a year of JV before we make varsity but that[] doesn’t matter to anyone else?” (B.L. v. Mahanoy Area School District). These messages were viewed by 250 friends, many of whom were students at Mahanoy Area High School, and some were fellow cheerleaders. Some cheerleaders reported these messages to B.L.’s coach, and B.L. was suspended from the cheerleading team for the next school year. B.L.’s parents attempted to appeal this decision to the school board, which did not take any action. From here, B.L., decided to file a lawsuit with the United States District Court for the Middle District of Pennsylvania.

Lower Courts’ Rulings

The ACLU-PA filed a lawsuit on B.L.’s behalf, and in addition to the complaint, they also filed a motion for a temporary restraining order and preliminary injunction. The United States District Court for the Middle District of Pennsylvania granted both the preliminary injunction ordering the school to reinstate B.L. to the cheerleading squad while the litigation proceeded. The order was granted on the basis that B.L. was likely to succeed in her lawsuit (ACLU). The ACLU-PA then proceeded to file a motion for summary judgment, which the Court also granted.

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Judge A. Richard Caputo ruled in favor of B.L., stating that he held B.L.'s words are constitutional and protected by the First Amendment. He firstly cited the precedent from *Tinker v. Des Moines Independent Community School District*, which established that “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The *Tinker* test essentially states that schools cannot restrict speech unless the speech in question “materially and substantially disrupts the work and discipline of the school,” (*B.L. v. Mahanoy Area School District*). From here, Judge Caputo went through exceptions to *Tinker* as established by other court cases: *Bethel School District No. 403 v. Fraser* established that lewd or offensive speech can be policed by the school, however, this applies to on-campus speech only. *Hazelwood School District v. Kuhlmeier* established that schools are entitled to exercise greater control over school-sponsored activities, however, this only applies to activities the school endorses. Finally, *Morse v. Frederick* stated that schools could “categorically prohibit speech that can reasonably be regarded as encouraging illegal drug use,” (*B.L. v. Mahanoy Area School District*). Based on the facts of this case, none of these exceptions applied to B.L.'s speech. Therefore, Judge Caputo stated that he looked at the case purely through the lens of *Tinker* and found that there was no substantial disruption caused by B.L.'s speech. Ultimately, Judge Caputo decided in favor of B.L. on the basis that *Tinker* did not apply to off-campus speech, and therefore the school could not regulate it.

The school decided to appeal this ruling, however, the United States Court of Appeals for the Third Circuit took the same position as the district court and ruled in favor of B.L. They applied similar tests, precedents, and standards, and also took note of the modern technological aspect of this particular case. Judge Cheryl Ann Krause stated that the way *Tinker* defines “disruption” only makes sense when “a student stands in the school [context], amid the “captive audience” of his peers,” (*B.L.*

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v. Mahanoy Area School District). In this case, because the speech was done off-campus and through social media, there is no “captive audience”. Indeed, Judge Krause affirms that “recent technological changes reinforce, not weaken, this conclusion,” (B.L. v. Mahanoy Area School District). She acknowledges that it may be difficult to use a test where the likelihood of the speech’s “reach” into the school environment is measured, especially in the digital age.

Looking Forward

B.L. v. Mahanoy Area School District will be heard by the Supreme Court of the United States in 2021. While the outcome is uncertain, the questions it raises have the potential to be impactful. Old precedents such as Tinker and Fraser are being viewed through the lens of the digital era. To me, the ultimate question, in this case, is where is the line between on and off-campus speech in the modern world? Now, because speech can spread so quickly online through social media, speech made physically outside of the school setting can have a large impact on what goes on within the school, and it has the potential to be disruptive during school hours. The Court’s decision will greatly shape free speech and the monitoring of social media for the foreseeable future.

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JURIS MENTEM

*Do We Need A Revision
of The Civil Rights Act?*

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DO WE NEED A REVISION OF THE CIVIL RIGHTS ACT?

BY ALICIA RIDGLEY

The Civil Rights Act is a key piece of historical legislation that has changed life for many minorities in America. When the first Civil Rights Act passed in 1964, people of color became an integral part of society and received more rights. Though it was in the heat of the civil rights movement, it provided more legal protections for people of color, especially black people. In light of recent events in our country, there has been a lot of talk and discussion around a new revision of the Civil Rights Act. It would modernize the law and provide more coverage and protection for modern-day minorities and people of color. Since the George Floyd murder and the recent reactivation of the Black Lives Matter movement, there have been discussions around the revision of the law.

Historical Evolution of the Civil Rights Act

As mentioned previously above, the Civil Rights Act of 1964 was published into law by President Lyndon B Johnson. President John F. Kennedy Jr. worked on the bill with Congress before his assassination, and his successor Lyndon B Johnson was able to put the bill into national law. In legal terms, “The Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex or national origin.” (Legal Highlight: The Civil Rights Act of 1964). Eventually, provisions were put into place and the silver rights act included protections against voting rights and workplace discrimination. The Civil Rights Act of 1964 was a key turning point in the civil rights movement of the 1960s and helped to provide key legislation for the future of

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segregation and discrimination in America. There are other civil rights acts, like the Civil Rights Act of 1968 (also known as the Fair Housing Act), and those provided smaller, yet it's still just as significant, pieces of legislation that prevented discrimination against people of color. Dr. Martin Luther King Jr. 's work before his death in 1968 helped to improve civil rights for people of color (black people in particular) and contributed to the passing of the Civil Rights Act of 1968.

Not only did the Civil Rights Act of 1964 pave the way for more civil rights laws in our government, but it also upheld some previous Supreme Court rulings from the past. (Civil Rights Act of 1964). The most prominent of them all is *Plessy v. Ferguson* (1896). The case was a man who refused to sit in the black car on a train and decided to argue against segregation in public spaces as a result. The landmark case came to the decision that "...the protections of 14th Amendment applied only to political and civil rights (like voting and jury service), not "social rights" (sitting in the railroad car of your choice)." (*Plessy v. Ferguson*). In simpler terms, the Supreme Court decided that the term "separate but equal" when it comes to segregation is constitutional and legal. The case was the turning point for segregation and discrimination in America and eventually led to the civil rights movement.

Another landmark case upheld by the Civil Rights Act of 1964 is *Brown v. The Board of Education* (1954). This case discussed racial segregation within public schools and whether this form of segregation was constitutional under federal law. "Displaying considerable political skill and determination, the new chief justice succeeded in engineering a unanimous verdict against school segregation the following year." (*Brown v. Board of Education*). Even though *Plessy v. Ferguson* (1896) had a different outcome, *Brown v. The Board of Education* (1954) had a ruling that "separate but equal" in public education was unconstitutional and therefore must be changed across the

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country. The case was just ten years before the Civil Rights Act of 1964, so it was a good segway into the civil rights era.

Civil Rights Act in the Future

In the current and future outlook of the Civil Rights Act, citizens of America have called for a new revision of the Civil Rights Act. After the previous president's administration, Americans are looking to take steps forward toward a better and, of course, more civil country. A Boston Globe article said, “By not only strengthening the existing laws but also championing sweeping and aggressive reforms under a new Civil Rights Act — one that would create new antiracist housing policies, reform policing practices, and explicitly protect people against discrimination based on sexual orientation or gender identity — Biden would send a signal that an antiracist agenda will be the cornerstone on which the nation will rebuild itself.” (Biden must champion a new Civil Rights Act). In the political stance of this argument, some Americans believe that the past president was taking steps backward from civil rights and equality so they’re calling on President Biden to take steps forward and revise the Civil Rights Act. This would support the recent work and peaceful protests of the Black Lives Matter movement and support the growing minority groups that live in this country. Just like the rest of the laws in this country, as things and people modernize, the government must adapt to them. A revision of the Civil Rights Act would do just that and support many of America’s rich cultures.

Conclusion

After reviewing and taking a look at the civil rights legislation of America, a revision of the Civil Rights Act of 1964 could both hurt and help the current civil rights laws in place. By creating a new revision of the act, America could come together to create a more equal and inclusive society for all citizens of this

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country. It would modernize our government to stay current with our changing lifestyles, technologies, and ways of growing as a society. “The civil rights movement made lasting contributions to the nation. Above all, it helped eliminate the legal apartheid that had dogged the United States since its earliest days. It also created a national expectation that individuals and groups had the right to petition their government to right legal wrongs affecting them.” (Ladner). If we were to leave the Civil Rights Act as it is, it would keep the current, yet still federally significant, the law in place. Although it would not modernize to the present legal climate, it would still protect the rights of all minorities and people of color. The Civil Rights Act of 1964 still plays a significant role in American law and a revision could be a beneficial addition to the future of the American government.

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JURIS MENTEM

*When Does Free Speech
Go Too Far?*

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WHEN DOES FREE SPEECH GO TOO FAR?

BY GRACE WEINBERG

In the original draft of the Declaration of Independence, Thomas Jefferson accuses King George III of having “incited domestic terrorism” among the American colonies (US 1776). On January 6, 2021, these words took on a new meaning as white supremacists stormed the US Capitol and violently protested what then-incumbent President Trump called a stolen election. A grievance that contributed to an international war in 1776 acquitted in 2021. The relationship between rhetoric and crime is a long and complicated one that illuminates a gray area of our legal system. Freedom of speech was integral to our founding as a nation and is a key facet of our democracy. But what happens when free speech is weaponized? How and to what extent can our government regulate the free speech it promises in the Constitution? Ultimately, the acquittal of Former President Trump illuminates the United States’ continual enlargement of what can be allowed in the name of free speech, as hateful rhetoric becomes more and more legally protected even as it produces deadly consequences.

The Riot and Trial

On January 6, 2021, then-President Donald Trump gave a speech in Washington, DC as the Senate electoral committee confirmed the results of the 2020 presidential election, which Trump lost to current President Joe Biden. In his speech, he encouraged supporters to “stop the stealing” of the election, as he believed the votes were inaccurately reported to favor Biden. Even on December 19, Trump hinted at a protest on January 6th

and encouraged supporters to “be there” and “be wild” (Twitter, 2020). Earlier on the day of the riot, Trump’s son Don Jr said “we’re coming for you” to the people who he and his father thought were rigging the election (New York Times).

At around 11:00 AM, several rallies had converged on the National Mall to hear President Trump speak, as he had encouraged supporters to do so in tweets and rhetoric. (Leatherby, et. al). It is also worth noting that the majority of these people were maskless and not socially distancing, at a time when almost 4,000 people were dying of Covid-19 every day (New York Times, 2021). By 1:00 PM, supporters had migrated to the Capitol and began harassing guards and officers there. They used rocks to break glass windows and infiltrate the Capitol, breaching several barriers and running towards the floor where Congress was convening. In total, five people lost their lives and over 130 more were injured.

The US House of Representatives voted to impeach Trump for the second time during his four years in office, this time on charges of inciting an insurrection to the Capitol. The impeachment trial was held in the Senate, which ultimately voted to acquit Trump on a vote of 57-43 (NPR). The riot is not the first time in our history that freedom of speech was not protected even when it bears violent consequences. The United States has a long-standing history of protecting radical and offensive free speech.

Brandenburg v. Ohio

A landmark case on free speech is *Brandenburg v. Ohio*, which took place in 1969 (395 U.S. 444). The appellant contacted media outlets to show a Ku Klux Klan rally on television. The footage included the rally and a speech by Brandenburg in which he used derogatory language to refer to African Americans and Jewish people. He was convicted under Ohio’s Criminal

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Syndicalism statute for participating in the rally and for the speech he made. The Ohio courts dismissed Brandenburg's arguments that the speech was protected by his First and Fourteenth Amendment rights. The U.S Supreme Court reversed this ruling. They argued in favor of Brandenburg, arguing that freedom of speech cannot be restricted or punished by the government unless the speech is "inciting or producing imminent lawless action and is likely to incite or produce such action" (U.S Supreme Court 444). The case effectively struck down Ohio's Criminal Syndicalism statute, as the court decided that it restricted free speech in a way that violated the First and Fourteenth Amendments.

The ruling of *Brandenburg v. Ohio* set an extremely important new precedent for the restriction of free speech and the relationship between rhetoric and crime. Previously, the court used what was called a "tendency test" of if speech incited "clear and present danger" (Stone 411). In 1919, Justice Holmes delivered a unanimous opinion in *Schenck v. United States* that established the "clear and present danger" standard (249 U.S. 47). If an act of free speech presented a clear and present danger to the common welfare, that free speech could be restricted. Relatively speaking, this was a broad restriction on freedom of speech that could be enacted by the government. *Brandenburg v. Ohio* replaced this with the "imminent lawless action" standard. Rather than simply proving the "tendency" of speech to result in criminal acts, the speech itself had to have been shown to incite imminent lawless action. In a *per curiam* decision, the Court wrote that free speech that includes "advocacy of the use of force" or illegal activity is protected by the First Amendment, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action" (395 U.S. 444). The amendment placed a larger burden on the government to prove a definitive cause of lawlessness and intent to do so, making it harder to justify government restriction of

free speech. The protection of free speech effectively expands the imminent lawless action standard and the current standard by which courts judge if the government is allowed to restrict free speech.

Nwanguma v. Trump

The precedent set by *Brandenburg v. Ohio* became a key factor in the court's ruling in 2018 in the case *Nwanguma v. Trump* (17-6290 6th Circuit). During a presidential campaign rally, plaintiffs Nwanguma, Shah, and Brosseau attended a peaceful protest. On multiple occasions, Trump said to "get 'em out of here'" referring to those who had shown up to the peaceful protest. The plaintiffs were then assaulted by rally attendees and sued the assaulters for battery and Trump for inciting the violence against them. The plaintiffs argued for a negligent speech theory of incitement, alleging that Trump incited a riot with his repeated directions to "get 'em out of here." The District Court of Appeals ultimately ruled in Trump's favor, writing that his words "do not make out a plausible claim for incitement to engage in tumultuous and violent conduct creating grave danger of personal injury or property damage" (US 17-6290 6th Circuit). The court relied on the imminent lawless action standard set by *Brandenburg* to find Trump not guilty of having incited a riot. The *Brandenburg* test of determining if free speech can be restricted or condemned for having incited violence has three parts. All of these parts must be satisfied for the court to be able to restrict free speech. The majority decision of *Bible Believers v. Wayne Cty., Mich.*, another 2015 case that used the *Brandenburg* precedent, writes that these three stipulations are set out by the *Brandenburg* test:

"(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3)

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the imminent use of violence or lawless action is the likely result of his speech” (805 F.3d 228, 246 (6th Cir. 2015)).

In *Nwanguma v. Trump*, these conditions were not met. During Trump’s Impeachment trial, this case became a point of defense for President Trump. Democrats in the House and Senate argued that the fact that this was an impeachment trial was different because “statements that may be legally defensible when uttered by a private individual can nonetheless be grounds for impeachment” (Liptak). So, let’s dive into what Trump has said and held his words up against the Brandenburg test.

Trump’s Rhetoric and the Brandenburg Test

The court precedent set by *Brandenburg* and upheld by *Nwanguma* requires more than offensive speech to convict someone on incitement of violence. The imminent lawless action standard requires 1) explicit or implicit encouragement of violence or lawlessness, 2) intent that the speech will result in said violence or lawless action, and 3) said violence or lawlessness being the imminent and probable result of the speech (*Brandenburg v. Ohio*, 395 U.S. 444). Trump certainly intended for his supporters to go down to the Capitol. At the end of his speech on January 6th, 2021, then-incumbent President Trump told supporters “And after this, we’re going to walk down and I’ll be there with you. We’re going to walk down ... to the Capitol” (Slate). This statement itself merely discusses going to the Capitol itself rather than committing illegal acts. On its own, it does not satisfy the imminent lawless action standard established in *Brandenburg*, and would not be enough to convict President Trump for having incited domestic terrorism. House managers encouraged the Senate to not consider the speech in isolation, but rather to view it as one step in a pattern of inflammatory rhetoric. Given the impeachment trial, House managers argued that it is imperative to look to the culmination of four years of words and actions to determine whether or not President Trump

incited the riot (Liptak). There is certainly more than enough evidence to look at when reviewing the history of Trump's hateful words. At the beginning of the Covid-19 pandemic, he referred to the virus as the "Kung Flu" (BBC). In 2005, he spoke derogatorily about women, saying men should "grab them by the p****" (Glasser). This comment is monumentally important because Trump is explicitly advocating for the use of illegal acts, in this case, assault. If one were to accept the House managers' plea to look into not only the speech on the 6th but the larger pattern, this quote satisfies first of the three stipulations of the Brandenburg test.

The second and third elements of the Brandenburg test are much more difficult to prove. It cannot be determined from his speech what the intent of his words were, nor the extent that his speech affected the mob in the first place; it may have been their initial intention to invade the Capitol. The immense difficulty of proving all three parts of the Brandenburg test and the political atmosphere at the time both contributed to Trump's ultimate acquittal. The imminent lawlessness established by Brandenburg is an intentional safeguard against the restriction of free speech.

Conclusion

Free speech is an integral part of our country and democracy. The court has repeatedly shown that it will go to massive lengths to protect that speech, arguably at the expense of other civil liberties at times. The First Amendment of our Constitution promises all Americans that Congress shall "make no law abridging the freedom of speech" (Constitution of the United States). *Brandenburg v. Ohio* replaced the method by which courts assessed free speech. In 2018, *Nwanguma v. Trump* ruled that the Brandenburg test protected a previous instance of alleged incitement of violence. In 2021, the Senate acquitted Trump of his charge of inciting an insurrection. These events

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and precedents indicate that the case to restrict freedom of speech is immensely difficult and will continue to be so due to the courts' dedication to protecting this constitutional right.

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JURIS MENTEM

*Are Companies Doing
What They Can To
Prevent Workplace
Discrimination?*

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ARE COMPANIES DOING WHAT THEY CAN TO PREVENT WORKPLACE DISCRIMINATION?

BY SOPHIE BIONELLI

Racial inequality in the workplace has been a prevalent and persistent problem in America for a very long time. Recently, more light has been shed on the issue of racial discrimination and inequality regarding employment. Racial disparities are still present across the United States, and the recent global uproar over racial injustice has allowed people to recognize racial inequality in the workplace. Companies have started working on ways to prevent racism and injustice, but they may not be enough. Anti-racism must be instilled into the values of companies to stop racial discrimination from happening.

The U.S. government attempted to take steps in the right direction by forming a federal agency to enforce civil rights laws, although it did not solve the problem. The Civil Rights Act of 1964 established the U.S. Equal Employment Opportunity Commission to manage and implement civil rights laws against workplace and employment discrimination. Their job is to enforce Title VII's prohibition of race and color discrimination in the workplace. The EEOC has filed many cases since 1964 and has resolved and adjudicated them. The E-RACE Initiative allows the Commission to focus on the elimination of race and color discrimination in the workplace and reconstruct its administration efforts to approach modern forms of bias.

Recent EEOC Cases Regarding Racial Inequality in the Workplace

The EEOC works hard to hold companies accountable for their racism and brings forth lawsuits that protect minorities against discrimination in America. They recently sued Prewitt Enterprises and DeSoto Marine for race discrimination at work. The EEOC v. Prewitt Enterprises case (2020) involved Prewitt and Desoto supervisors and managers harassing and humiliating black employees. They called their employees of color derogatory and racially offensive names and assigned them to more dangerous job duties. This race harassment case brought by the EEOC caused Prewitt Enterprises to have to pay \$250,000 and supply other relief (“EEOC Sues Prewitt Enterprises and Desoto Marine for Race Discrimination”). They revised their anti-racial harassment policies to train employees and conduct exit interviews of employees who decided to leave the company. They also provided a number for employees to call and voice complaints about harassment and discrimination. These steps were taken to ensure that less discrimination would occur but did not prevent it.

Another recent case involving racial discrimination in the workplace was EEOC v. Bass Pro Outdoor World LLC (2017). While never admitting to it, they agreed to pay \$10.5 million to Black and Hispanic workers who were discriminated against (“Bass Pro to Pay \$10.5 Million To Settle EEOC Hiring Discrimination and Retaliation Suit”). They were not hired because of their race and/or national origin, which violates Title VII. This is not rare in America and is a problem that is constantly occurring. An agreement was made between the EEOC and Bass Pro Outdoor World LLC that was based on Bass Pro’s diversity efforts. The efforts included appointing a director of diversity and inclusion and organizing outreach efforts to increase diversity in the company. These outreach efforts involved reaching out to minority colleges and technical schools

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as well as posting job openings in popular publications among the Hispanic and Black communities. Employee training programs were put in place, and Bass Pro was instructed to report its store-to-store hiring rates to the EEOC (“Bass Pro to Pay \$10.5 Million To Settle EEOC Hiring Discrimination and Retaliation Suit”). The EEOC attempted to hold Bass Pro accountable and establish a non-discriminatory workplace.

A recent case where people may be familiar with the defendant is EEOC v. BMW Manufacturing Co. (2015). The EEOC case brought forth a lawsuit at a South Carolina plant. The company’s criminal background check policy disproportionately affected black logistics workers. The claimants were employees of UTi Integrated Logistics, Inc. This corporation provided BMW with logistics services, including transportation services, manufacturing support, and warehouse and distribution assistance (Mora and Fliegel 2015). After learning of the results of these background checks, BMW banned access to the plant to 88 logistics employees. Out of the 88 employees, 70 were black employees (“Significant EEOC Race/Color Cases”). EEOC assisted 56 black employees discharged from the plant who were employed at BMW for several years under logistics providers (“BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit”). BMW paid a total of \$1.6 million split among the 56 claimants. They also offered employment opportunities to discharged workers and 90 other black applicants who BMW had previously refused to hire based on former criminal records guidelines. In addition to this, BMW also supplied training on criminal history screening in accordance with Title VII (“BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit”). Training is essential to prevent racial discrimination in the workplace, but more actions need to be taken to combat this consistent issue.

How Companies Can Be Anti-Racist

Racial bias training is an important step in making a workplace more inclusive, and it is also the best way for companies to be anti-racist. Anti-racist means accepting and learning from a racist act, which companies involved in the EEOC cases did not. Denying their racism is being racist, so companies first must hold themselves accountable and admit to past mistakes. Companies should then take a stand against racism, but it cannot be an empty claim. They must take action instead of saying they will. Companies must be committed to making progress and announce actions they will take to stand against racism, like workshops teaching about anti-racism or the complete stopping of support for racist people and organizations. Taking action instead of just talking about steps can be a very significant way to prevent racial discrimination in the workplace.

Corporate brutality is systemic. This means that policy reform is the essential way to achieve solutions. According to Ibram X. Kendi, an author, professor, and anti-racist activist, focusing on policy is the best way to solve racist problems (Kazi and Ceseña 2020). While this is more of a long-term goal that involves government action, companies can still take steps to combat anti-racism right away. An important step that Kendi recommends is creating safe spaces for people. Employee Resource Groups (ERGs) help people feel more comfortable in their workplace. ERGs are voluntary, employee-led groups. Their goal is to make the workplace more inclusive and are usually run by employees who share a certain characteristic, either ethnicity, religious affiliation, gender, or interest (Hastwell 2020). They are a significant part of preventing racial discrimination in the workplace and fostering a sense of comfort for employees. As seen by the recent EEOC cases, companies are still not grasping the idea of anti-racism in the workplace, and it is important for them to take steps in the right direction through taking

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accountability, creating ERGs, or taking other actions like creating training programs and workshops.

Conclusion

Racial discrimination in the workplace is no new problem in America, but it needs to be addressed immediately. No one should feel uncomfortable in a workplace, and companies must create a sense of unity and community. Taking meaningful actions to combat racism and practicing anti-racism are the only ways companies can tackle this problem. Forming Employee Resource Groups allows for conversations about how people are feeling and is an important way to make everyone feel safe and comfortable in their workplace. Training programs and workshops revolving around anti-racism are also helpful, but companies must take accountability and own up to past mistakes for their motives to be pure. The EEOC has played a significant role in fighting back against racism in the workplace, and its work will continue to address the persistent problem of racism in America. Even though corporate racism is systemic and must be addressed by policy changes, there are steps companies can take to stop racial discrimination from happening in their place of employment and make these spaces safe and equal.

JURIS MENTEM

*The Lemon Test and
The Establishment
Clause*

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THE LEMON TEST AND THE ESTABLISHMENT CLAUSE

BY EDWARD GROOME

There are few constitutionally protected freedoms more cherished than the freedom of religion. The ability to worship freely is so intimately intertwined with the country's history that many students learn of the United States' origin as a haven for free worship. However, what most Americans are likely unaware of is the Constitution's first command relating to religion, that "Congress shall make no law respecting the establishment of religion" (US Const. Amend. I Clause I). Indeed, though a majority of the country's population for much of its history has been some denomination of Protestant Christian, the United States remains one of few nations in world history that was founded as purely secular. The Constitution does not, however, specify a precise definition for establishment, nor does it prohibit lawmakers from crafting policy based on deeply held religious beliefs. This contradiction has resulted in countless lawsuits seeking to define the bounds of the Establishment Clause, and the Supreme Court has attempted to provide clarity as to this clause's true meaning in several notable decisions.

School Prayer and Religious Schools

The most common debate that concerns the Establishment Clause has historically been the issue of prayer in schools (370 U.S. 421. 1962). Often, religious families and lawmakers have argued that prayer in school does not violate the Establishment Clause because such policies do not force non religious students to violate their own beliefs, but merely allow religious students to express their own. Though the subject of

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prayer in schools has remained a contentious political topic, the question of whether schools themselves can read non-denominational prayers has long been resolved. In *Engel v. Vitale*, the Court held that even a voluntary prayer led by school officials was a violation of the Establishment Clause, due to its breach of the “wall of separation” between church and state (370 U.S. 421. 1962). Critics of this decision, and advocates of religious practices in public institutions more generally, have argued that only an explicit establishment of a state supported religion would constitute a true violation of the First Amendment, but this view has never been widely adopted by the Court in any of its opinions.

More controversial than even *Engel* was the Court’s decision in *Lemon v. Kurtzman*, which created what is known as the “Lemon Test.” At issue in *Lemon* was a pair of statutes from Pennsylvania and Rhode Island that directed public funds to non-public religious schools, both to supplement teachers’ salaries and purchase textbooks and other educational materials for secular subjects. The Court held in an 8-1 decision that the statutes violated the Establishment Clause (403 U.S. 602. 1971), and created a three pronged test for determining whether such a violation had occurred.

The first prong of the *Lemon* Test is whether or not the law at issue has a secular legislative purpose. Given the fact that both statutes at issue were intended to bolster secular educational practices, both Pennsylvania and Rhode Island satisfied this requirement. The second prong is whether the statute at issue either advances or inhibits religion—showing preferential treatment to one religious community over another would be constitutionally impermissible. The Court did not determine whether either state had violated this prong of the test in *Lemon*, but instead that both had excessively entangled government and religion, which constitutes the third prong (whether the statute results in an excessive entanglement of government and religion)

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(403 US 602. 1971). As a result, the Court held that neither statute was constitutional.

As with many court decisions touching upon religious matters, *Lemon* has been considered controversial since its inception. Critics have blasted the test it established as entirely too vague or easy to subvert on all three of its prongs. Determining a statute's purpose is virtually impossible if its framers are no longer alive or capable of speaking to its intent. It is also true that the Court has never specifically defined what an "excessive entanglement" is with respect to religious activities or institutions. The most famous criticism of *Lemon* was offered by Justice Scalia in his concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*, where he wrote that the *Lemon* Test was reminiscent of a "ghoul in a late night horror movie...being repeatedly killed and buried" (508 U.S. 384. 1993).

Scalia's opinion perfectly highlights the issues present with applying the *Lemon* Test, as the Court is frequently inconsistent in its applications. This is certainly true, as only a year earlier the Court had used the *Lemon* Test to invalidate religious speeches at public-school graduations. Notable of Justice Kennedy's opinion in *Lee v. Weisman* was his observation that the formalized nature of a religious speech during a graduation ceremony amounted to "peer pressure" sanctioned by the state, and was therefore "coercive" (505 US 577. 1992). This case marked one of many examples of the Court applying both the *Lemon* Test and also new reasoning to explain why an entanglement of religion and state action must be unconstitutional.

It is no surprise that the question of whether *Lemon* remains good law is so often raised by legal scholars, particularly when the precedent is outright ignored in cases where it is clearly applicable. One such example of this is the capital case of

Dunn v. Ray, where inmate Dominique Ray was granted a temporary stay of execution by the Eleventh Circuit on the grounds that Alabama had run afoul of the Establishment Clause by offering Ray the services of a Christian chaplain for his last rites, rather than a Muslim imam. The state of Alabama offered no other defense for this policy other than to state that allowing Ray's rites to be performed by an imam posed "security concerns" that the state did not explain at length during argument in the lower courts (586 US __ . 2019). What is notable about this case is that while the Eleventh Circuit granted Ray a stay of execution based on Establishment Clause concerns with Alabama's policy, Lemon was not invoked, despite the policy clearly violating its second prong. The Court's reasoning for denying Ray his stay of execution was the time he waited to seek a remedy, when he had only been informed of the policy the week prior to the Court's decision (586 US __ . 2019). Also notable is that the majority in this case seemingly experienced a change of heart in the case of Murphy v. Collier, where a similar policy in Texas was challenged by a condemned inmate seeking access to his Buddhist spiritual adviser. While Murphy did not challenge the policy on the grounds that it violated the Establishment Clause, the same issues with Ray's case were present (597 U.S. . ____ . 2019). Again, neither party in this case chose to invoke Lemon, despite the state policies at issue constituting a clear violation of the second prong. The Court's approach to executions illustrates its utter lack of interest in applying Lemon, despite clear First Amendment concerns. Coupled with being outright ignored in many instances, the Court has also undermined Lemon in some of its more recent holdings on Establishment Clause cases.

Recent Developments

Despite numerous Supreme Court Justices offering criticism of the Lemon Test, the precedent still has yet to be definitively overturned. Even when the Court has accepted

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policies argued to be religious entanglements, the justices have continued relying on reasoning consistent with *Lemon* rather than declare the case to no longer hold precedential value. The most prescient example of this is the 2019 case of *American Legion v. American Humanist Association* where the funding of upkeep for a World War I era memorial in the shape of a Latin cross was challenged on the grounds that it violates the *Lemon* Test, and thus the Establishment Clause. The Court held that the memorial's presence did not violate the Constitution (588 U.S. _____. 2019).

Justice Alito's opinion, delivered for the Court, held that the historical context of the memorial, as well as the fact that determining whether the intent of the original committee that first erected the cross is virtually impossible, distinguishes it from a contemporary display of religious imagery funded by taxpayers. Alito argued that the passage of time obscuring the original intent of the cross's creators creates "a presumption of constitutionality." The Court relied upon the memorial's value as a historical object to uphold its upkeep costs as a constitutionally valid policy (588 U.S. _____. 2019). While the holding in this case is certainly a blow to the long-term applicability of the *Lemon* Test, it is undeniable that the decision has left the test intact, if not still controlling. That Justice Alito's analysis centered so heavily around the memorial's value as a historical object, and its secular purpose of honoring the sacrifice of American soldiers, suggests a reliance upon the *Lemon* Test's first prong. This is notable because not only had advocates for the American Legion asked that the *Lemon* Test be replaced, but amicus briefs had suggested multiple replacements to the doctrine as well.

One such proposal was to replace *Lemon* with a test based on coercion, as Justice Kennedy had explored in *Lee v. Weisman*. However, this approach has thus far not been adopted due to the difficulty that comes with determining when a policy is "coercive." Additionally, it may not account for simple

preferential treatment, and thus permit governments to fund religious organizations to the exclusion of others. A single-minded approach to coercion as a violation of the Establishment Clause is no less vague than the Lemon Test.

Another proposal for reform proposes a new definition of “establishment of religion,” consistent with the generally accepted meaning of that phrase at the time of the founding. Some of the factors included within this more historical definition include government control over religious doctrine, compel observance, or grant civil authority to the church. As professor Michael McConnell of Stanford Law School has noted, this new approach to the Establishment Clause would add clarity to the Court’s muddled jurisprudence on the subject of religious entanglement (Brief for the Becket Fund as Amicus Curiae, Pg. 17). The problem with this approach, however, as with most approaches concerning originalist thought, is that by adopting a definition of establishment near to the one most widely accepted in 1789, justices invite the argument that Justice Thomas did in his concurring opinion, that the command of the Establishment Clause, which specifically names “Congress,” ought not be applied to the states (588 U.S. ____ 2019). Inviting litigation on these grounds would likely compel the Court to revisit precedents concerning the Establishment Clause. In the interest of judicial restraint, Chief Justice Roberts’ generally preferred course of action, the best course of action for the Court moving forward is likely not a complete departure from Lemon, but a more incremental approach where the third prong, by far its most vague, is set aside in favor of new tests. Meanwhile, the requirement that laws have a clear secular purpose will remain intact, as Justice Alito relies heavily upon this portion of the Lemon Test, if not explicitly, in his opinion.

Regardless of the ultimate fate of the Lemon Test, whether it will continue to be revived only to be killed again, what is certain is that the Court today has a more favorable view

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of government sanctioned displays of religion, and of broader definitions of religious freedom. Despite the unique disdain for Lemon held by judicial conservatives, the test remains valuable for establishing general parameters for interpreting the Establishment Clause. While the test is unlikely to survive in its entirety, its second prong's prohibition against religious favoritism is particularly valuable moving forward. As this nation becomes increasingly diverse, government policies that advance the interests of one religious community to the exclusion of others cannot be seen to be consistent with the First Amendment. Despite the vehement disdain which the justices seem to hold for Lemon, the time is fast approaching when this country will have to reckon with the question of when religious liberty must give way to secular governance.

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JURIS MENTEM

*Free Exercise in the Age
of COVID-19*

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FREE EXERCISE IN THE AGE OF COVID-19

BY JAMES PHELAN

COVID-19 restrictions on religious worship have been the subject of great controversy, and some churches sued their respective state governments to enjoin them as unconstitutional under the First Amendment (Snouwaert). The responses of state courts have varied, and the Supreme Court has failed to elucidate a clear definition of what it means for a law to be “generally applicable.” The Court should clarify and endorse a final approach to resolve the inconsistency and confusion that have posed obstacles to the judiciary during this pandemic.

COVID-19 has transformed lives, displaced persons, and altered the relationships that people have with their government, state and federal. When the coronavirus-induced pandemic was declared in spring 2020, it was not yet clear just how big of an impact it would have on the United States. By March 19, however, California became the first state to issue a stay-at-home order (Katella). Other states soon followed suit, and in the process one common target for restrictions was religious worship services. State action restricting religious worship came as no surprise: church gatherings have been cited as common examples of “super-spreader” events—gatherings which spread the virus far from one single source of infection (Musumeci). Still, churches have not been the sole target of these restrictions, as concerts and other secular forms of gathering fall under their umbrella, too. At the end of the day, approaches have varied, so much that some states, like Florida, have been open (relative to closed ones) since the summer and fall (Calvan).

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That there is considerable tension between COVID-19 restrictions and the desire to religiously worship is to be expected given the competing concerns at play—religious freedom versus public health—and government health officials in the course of justifying restrictions have impressed that church worship embraces a variety of behavior that is harmful from the perspective of reducing cases.

Churches themselves often are poorly ventilated, and worship activities include singing, handshaking, and other forms of physical contact (Kong 1595). But the coronavirus, in leading to the deaths of over 500,000 people in the United States alone, has also led to an increased level of and desire for spirituality and religiosity (“How COVID-19 Has Strengthened Religious Faith”). It’s a catch-22: the circumstances of the pandemic inculcates a desire to engage in religious worship, but they also make doing that very thing a legitimate concern in the context of containing the virus’s spread. In sum, the “pandemic’s increased death toll, for many, has produced a greater need for religious traditions, yet social distancing and appropriate health measures continue to prevent the customary exercise of such traditions” (Kong 1595).

This tension strikes at the heart of the First Amendment and one of its guarantees: the right to exercise one’s religion as one sees fit. The First Amendment provides in part that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” (U.S. Const. amend. I) (emphasis added). The Amendment’s Free Exercise Clause “means, first and foremost, the right to believe and profess whatever religious doctrine one desires” (Employment Division v. Smith 877). When religious exercise is burdened, therefore, those affected sometimes seek judicial redress, something which should not surprise. In general, claims implicating the Free Exercise Clause tend to involve laws which are facially neutral but end up applying to religious institutions or worship (Kelly 929, 930). In 1993, the Supreme Court’s

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Employment Division v. Smith's decision laid down what still governs today's free-exercise jurisprudence. But the long road to Smith started with two prior cases, Reynolds v. United States (1878) and Cantwell v. Connecticut (1940) (Kong 1597).

In Reynolds, the question involved whether a federal ban on polygamy was religiously motivated and thus unconstitutional (Reynolds 161–162). The Court declined to strike down the ban and reverse the petitioner's arrest. Although it remarked that Congress “cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion” (162), in the end it reasoned that practices which extend from religious belief may be punished; but the underlying beliefs cannot be targeted (166). Ending with an opposite result decades later, the Court struck down a state-level law against a Jehovah's Witness during the 1940 Cantwell case (Kong 1597). Additionally, the guarantees of the Free Exercise Clause were incorporated into the states.

Still without an established framework for religious-discrimination claims, the Court approached its next seminal case dealing with the Free Exercise Clause in 1963, Sherbert v. Verner (1963). After the petitioner was fired for refusing to work on Saturdays due to her faith, South Carolina “denied Sherbert unemployment benefits, concluding that she had failed to accept suitable employment when offered, despite its conflict with her religious beliefs' ” (Kong 1598). The Court first asked whether the denial of unemployment benefits imposed a significant burden on the free exercise of Sherbert's religion (Sherbert 403). After concluding that it did, it then asked whether there was a compelling interest on the state's part to justify such a burden (Sherbert 406). In overturning the state's decision, the Sherbert test was created: laws which infringe upon religion must further a compelling interest and be narrowly tailored to achieve it (Kong 1599). This test remained in force and was

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extended in four other contexts until the 1980s, at which point it came under increasing scrutiny” (Kong 1600).

By 1990, the Court decided *Employment Division v. Smith*, replacing the *Sherbert* test in the process. In *Smith*, the question presented was whether the denial of unemployment benefits to the respondents after their use of peyote “for sacramental purposes” (Smith 874) violated the Free Exercise Clause. The Court decided to abandon the compelling-interest inquiry and declared that laws of general applicability do not implicate the Free Exercise Clause (Kelly 930). In an opinion authored by Justice Scalia, the Court reasoned that, contrary to prior precedent, generally applicable laws do apply to religiously motivated actions (Kelly 955). Previous cases were also distinguished on the basis of the argument that they “involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and the press” (Smith 881). Additionally, unlike in *Sherbert* and the cases that followed it, the legal consequences for peyote use in *Smith* stemmed from an “across-the-board criminal prohibition on a particular form of conduct”—not a “system of individual exemptions” like those at the center of unemployment-compensation disputes (Smith 884). To drive home his point, Justice Scalia remarked that *Sherbert*’s application would have “court[ed] anarchy” and opened up “the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind” (Smith 888).

In turning the page on *Sherbert*, the *Smith* decision provided a new line of inquiry for cases that involve the Free Exercise Clause and concern a “valid and neutral law of general applicability” (Smith 879): “if prohibiting the exercise of religion...is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended” (Smith 878). Since the decision was handed down, this holding has been construed to

mean that a law will pass muster “so long as the law [is] neutral and generally applicable” (Kong 1602). Even so, by 1993, the exact contours of neutrality and general applicability in the free-exercise context still needed to be defined, which “culminated in the Supreme Court’s decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*” (Kong 1604).

In *Lukumi*, the Court elaborated on *Smith* in overturning a city’s prohibition of religious animal slaughtering, essentially holding that “any law affecting religion must use the proper means (general applicability) to achieve a proper end (neutrality) (Kong 1606, citing *Lukimi* 208–209). Under this framework, a law which burdens religious exercise but not the same activity in the secular context is not generally applicable (*Lukimi* 208–209). Thus today, years later, *Smith* remains good law, and the *Sherbert* test—along with the strict scrutiny that accompanies it—is only triggered where a law is “found not neutral or not generally applicable” (Kong 1609).

Under the backdrop of *Smith* and *Lukami*, gathering restrictions in the era of COVID-19 have increasingly called upon courts to understand and apply this jurisprudence. Additionally, as more states have now opened up and businesses have begun to reopen, there are even more free-exercise disputes, in which “numerous churches clai[m] that secular gatherings that posed similar or greater danger to the states’ public health interests were subjected to more lenient restrictions” than other similarly situated venues (Kong 1612). Meanwhile, *Smith* has not provided helpful guidance on how to define “general applicability” in the context of restrictions that were no longer across the board but applied on a state-by-state, establishment-by-establishment basis’ (Kong 1612). As of now, therefore, the prevailing first step by the Court in evaluating general applicability is to compare restrictions on churches to restrictions on secular establishments that engage in similar activity.

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The Court's *South Bay United Pentecostal Church v. Newsom* (2020) (South Bay I) opinion in May 2020 signaled conflicting approaches to carrying out this crucial first step. In South Bay I, California's governor, Gavin Newsom, released an executive order which placed "temporary numerical restrictions on public gatherings": it limited churches to an attendance of 25% building capacity, or a maximum of 100 attendees (1, opinion of Roberts). In his concurrence, Chief Justice Roberts compared California's restrictions on churches to those placed on "lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time" (2). Meanwhile, he construed grocery stores, banks, and laundromats—areas which enjoyed fewer restrictions—as dissimilar on the basis that the groups which form there are not as large and do not remain for as long. Moreover, Roberts endorsed a deferential approach towards scientists and "politically accountable officials," given the public-health crisis at hand (2).

On the other hand, Justice Kavanaugh, with whom Justices Thomas and Gorsuch joined, dissented in South Bay I. Unlike the Chief Justice, Justice Kavanaugh chose his points of comparison for worship services to include "factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries" (1). Following guidance from Smith and Lukumi, Kavanaugh proceeded to engage in a strict-scrutiny analysis of the Governor's executive order, consequently finding it to be unconstitutional (3).

After South Bay I, lower courts reached a variety of decisions. Some followed Chief Justice Roberts's analysis, while others went with Kavanaugh's. Some, despite following the Chief Justice's approach, still ruled in favor of religious establishments (*Kong* 1617–1620). When *Calvary Chapel Dayton Valley v. Sisolak* came along next, the Court seemed to signal a clearer stance in

favor of public-health restrictions. Concerning measures in Nevada which limited church services to 50 persons or less while only capping secular establishments at 50% capacity (Calvary Chapel 2, opinion of Alito)—which, in practice, could attract far more than 50 persons, e.g., at a casino or a movie theater—and without an opinion (only dissents), the Court denied relief to the petitioners, muddying the water for lower courts and throwing into doubt their justifications for having upheld state measures in the past (Kong 1622).

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, however, the Court shifted course against a presumption in favor of public-health measures. Reflecting its changed makeup, specifically Justice Amy Coney Barrett replacing Justice Ginsburg, “the Court adopted [a] more religious organization-friendly approach to...COVID-related restriction claims’ ’ (Davis). Challenging business-capacity requirements by Governor Cuomo in New York, petitioners were able to demonstrate that the orders violated “the minimum requirement of neutrality” set forth by *Lukumi* (533). Accordingly, the order’s measures were evaluated under strict scrutiny and deemed unconstitutional (*Roman Catholic Diocese* 4–5, per curiam opinion). The dissenters—Justices Breyer, Kagan, and Sotomayor—observed that similar restrictions had been upheld in *South Bay I* and *Calvary Chapel* and would have upheld them in this instance, too (Davis).

Since the *Roman Catholic Diocese*, there has been one more case in the line of COVID-related free-exercise decisions: a return to *South Bay*. As part of Governor Newsom’s reopening plan, it was determined that churches with a “Tier 1” designation could not admit any in-person worshippers (*South Bay II* 1, opinion of Gorsuch). In an order without an opinion, the Court granted injunctive relief as to the Tier-1 prohibitions on church worship. Concurring and dissenting opinions again reaffirmed

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the positions of both sides laid out in previous COVID-era decisions.

In the end, the pertinent question remains what types of comparison are to be made by courts in evaluating general applicability and neutrality under *Smith* and *Lukumi*. Until Justice Barrett joined the Court's roster in October 2020, it seemed that decisions would continue to tilt towards public-health choices, but now with a new makeup and two cases deciding in favor of worship services, "it is quite possible that this religious organization-friendly approach to COVID-19 related regulations will become even more commonplace across the federal courts" (Davis). Nonetheless, a clearer answer is needed to provide guidance, especially as claims continue accruing.

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JURIS MENTEM

*One Size Can Fit All:
Harmelin v. Michigan
and the
Constitutionality of
Mandatory Minimums*

CASSIDY STONEBACK
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ONE SIZE CAN FIT ALL:
HARMELIN v. MICHIGAN AND
THE CONSTITUTIONALITY OF
MANDATORY MINIMUMS

BY CASSIDY STONEBACK

Recently, as calls for criminal justice reform have grown stronger, the controversy surrounding mandatory minimum sentences has increased. Mandatory minimum sentencing laws set a minimum prison sentence that a judge can hand down for a specific crime, most often a drug crime. While judges can give a defendant a stricter punishment if they believe one is necessary, they cannot hand down a sentence for less prison time than the mandatory minimum prescribes, except in very specific cases. These laws have faced constant criticism for as long as they have been in use, most often because they tend to disproportionately harm people of color and low-income people. There is also debate as to whether these laws are constitutional, because until 1991 when the Supreme Court ruled on *Harmelin v. Michigan*, it was generally accepted that judges should have the power to determine what punishment best fits a given crime. The Court's decision in *Harmelin* overrules this precedent, holding that the Eighth Amendment does not guarantee the right to a punishment proportional to the crime, establishing that mandatory minimums are constitutional.

The History of Mandatory Minimums

Mandatory minimum sentencing laws have existed in some way since the founding of the United States, but it was not

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until much more recently, 1914, that the first mandatory minimum for drug crimes was put into place (2011 Report to Congress). In 1971, Richard Nixon officially declared the War on Drugs, a decades-long attempt by the federal government to tackle the drug problem in America (Timeline: America's War on Drugs). One of the tools used throughout the War on Drugs was mandatory minimums. The Anti-Drug Abuse Act of 1986, which was signed by Ronald Reagan, created mandatory minimums for drug offenses based on factors like the type of drug, the weight of the drug, if the crime was violent, and prior convictions of the defendant (Criminal Justice Policy Foundation).

Although these laws were originally intended to promote uniform sentencing across the country, so that a defendant's judge would not influence their sentence, they instead promoted inequality (Bennett). These laws were designed to prevent judges from using their own judgment to decide a person's punishment; instead they "effectively took power away from judges and gave it to prosecutors, who could threaten to charge defendants with crimes that would 'trigger' a mandatory minimum" (Cullen). Without mandatory minimums, judges could take into account the details of different situations when determining punishments, but under these laws, they cannot often, which has led to what many would consider punishments that do not fit the crime.

It is further important to highlight the impacts of mandatory minimums on mass incarceration. There is no doubt that the mandatory minimums have greatly increased the prison population, as they often force judges to hand down longer sentences than they would without these laws. They have also frightened defendants into confessing to crimes, sometimes ones they did not commit, in order to avoid the mandatory minimum sentences (Cullen). Mandatory minimums also promote inequality within the criminal-justice system, even though their intent is to create a more just one. The American Civil Liberties Union highlights the fact that Black and Latino offenders are

more likely to be charged with crimes than their White counterparts and often face longer sentences (Written Submission of the American Civil Liberties Union). These laws also target low-level offenders, primarily low-income people, further increasing the population of low-income people who are incarcerated (United States Sentencing Commission). Despite this evidence of discrimination, some argue that mandatory minimums are not designed to discriminate, and if they were enforced more rigidly and to their fullest extent, any inequalities would be eliminated as this would ensure that all those charged with a given crime would receive the same sentence (Otis). While these facts do not necessarily present a constitutional challenge to the use of mandatory minimums, though some have challenged them under the Equal Protection Clause, it is important to be aware of these issues since they have helped to bring the debate around mandatory minimums back into the spotlight in recent years.

The Winding Path to *Harmelin v. Michigan*

Leading up to the Supreme Court's decision in *Harmelin v. Michigan*, 501 US 957 (1991), the Court's rulings on mandatory minimums were unclear and often seemed contradictory. But the *Harlem* decision made it incredibly clear that "criminal sentencing and punishment are the tasks of the legislature, not the courts'" (Paschke). In 1980, in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court upheld the application of a Texas mandatory minimum that sentenced a man to life in prison after he was convicted of three felonies in the span of fifteen years (Supreme Court of the US 1980). In this case, and in *Hutto v. Davis* (Supreme Court of the US 1982), the Court emphasized that 1) the principle of proportionality should be applied differently in capital punishment cases and non-capital punishment cases; 2) criminal sentencing is primarily the legislatures' responsibility; and 3) courts cannot be objective when determining sentences. These two rulings seemed to make the Court's opinion on this

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matter obvious: mandatory minimums are not only constitutional, but a necessary aspect of the criminal-justice system to ensure equality in sentencing.

Despite the Court's opinions in *Rummel* and *Hutto*, in 1983 they seemed to completely change course and rule against mandatory minimums with *Solem v. Helm* (United States Supreme Court 1983). In *Solem* the Court overruled *Helm's* sentence to life imprisonment without parole under a state statute, deciding that in this case the punishment did not fit the crime. In the decision, written by Justice Powell, the Court found that the Eighth Amendment protects against punishments disproportionate to the crime committed, and the Court laid out how courts should hand-down sentences, stating that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions" (Powell, 292). While this case did not make mandatory minimums unconstitutional by any means, it did establish two important precedents: the Eighth Amendment applies to the proportionality of punishments, not just the mode of punishment, and while legislatures can set guidelines for sentencing, judges should have the final say (Keir).

A Change of Heart: *Harmelin v. Michigan*

The opinion in *Solem* might have been a shocking change in precedent, but it remained the accepted interpretation of the Eighth Amendment until 1991. The *Solem* decision had overruled what was the most commonly accepted interpretation of the Eighth Amendment—that it prohibited modes of punishments, not disproportionate punishments, and it had only done so with a one-vote majority on the Court. So it was not much of a surprise when *Harmelin v. Michigan* (United States

Supreme Court 1991) overturned *Solem*. Justice Scalia, who wrote one of the opinions for *Harmelin*, came to the conclusion that, in *Solem*, the Court had misinterpreted the Eighth Amendment when it ruled in favor of *Helm*. Justice Scalia engaged in an in-depth analysis of the history of the Eighth Amendment and determined that the framers of the Constitution did not intend for the Amendment to protect against disproportionate punishments, only specific modes of punishment (United States Supreme Court 1991).

This case was also a 5-4 decision and there were two opinions, one written by Scalia and one written by Kennedy, revealing that the Court was rather divided on how to rule on this case. In his dissent, Justice White argued that those who signed on to either opinion completely disregarded the precedent set in *Solem* and that the Court's analysis of the Eighth Amendment was flawed (United States Supreme Court 1991). Despite these clear disagreements within the Court and the inconsistencies between the opinions in *Solem* and *Harmelin*, this decision has stood for 30 years without being overturned.

The Future of Mandatory Minimums

Recently, there have been cases that limited the ability of legislatures to pass sentencing laws (Harvard Law Review). In the first case, *Blakely v. Washington* (United States Supreme Court 2004), the Court ruled that any fact that would increase a sentence must be submitted to a jury for review, despite a Washington state law that allowed judges to make that decision. Later, in *United States v. Booker* (United States Supreme Court 2005) the Supreme Court determined that while not unconstitutional, the U.S. Sentencing Guidelines are only advisory and are not mandatory. It is important to note that mandatory minimums are not the same as the U.S. Sentencing Guidelines, and that while this case did not explicitly refer to

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mandatory minimums at all, it did shift power away from legislatures and to judges when it comes to sentencing.

Almost every case that involved sentencing laws has come down to a 5-4 vote, and many of the opinions seem to contradict each other. The future of mandatory minimums, at least in the Supreme Court, is therefore unclear. As already mentioned, mandatory minimums are being brought back into the spotlight because people realize that these laws increased mass incarceration and inequality in the criminal-justice system (Snyder). As the debate continues, it is likely that there will be more court challenges, with different arguments ranging from the equal protection clause to separation of powers (Mandatory Minimum Sentencing). The Supreme Court has been given many opportunities to declare mandatory minimums unconstitutional and the long-lasting precedent of *Harmelin v. Michigan* suggests that the mandatory minimums will not be thrown out any time soon, at least by the Court.

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JURIS MENTEM

*The 2nd Amendment's
Constitutional
Standing*

OLIVIA HARWOOD
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THE 2ND AMENDMENT'S CONSTITUTIONAL STANDING

BY OLIVIA HARWOOD

The foundation of the United States started with the Constitution and the Bill of Rights in the late 18th century. Many civil liberties are guaranteed by the documents written from that time, including key liberties that support democracy such as the right to free speech and the right to assembly. However, these civil liberties have developed overtime through reinterpretations that have led to their expansion and protection. Still, one key liberty guaranteed by the Bill of Rights remains controversial and unique to American society. This is the 2nd Amendment, which protects the right to bear arms. Opinions on this liberty vary greatly throughout the country and depending on political affiliation. People's lifestyle, gender, and age also influence their views on the 2nd Amendment. This article will analyze the Supreme Court's current interpretation of the 2nd Amendment and the evolution of rulings on the amendment's application.

The 2nd Amendment states the following: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" (U.S. Const., amend. 2). This right has been a part of the American tradition since the founding. The concept of a "national militia" was first established in late 16th century England under Queen Elizabeth I ("Second Amendment - Origins and Historical Antecedents"). Therefore, when the framers of the Constitution were deliberating on what to include, adding local militias fell in the natural line of thought. However, the additional concept of "the right of the people to keep and

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bear arms” was included in the wording, distinguishing this right from its previous wording in English law (“Second Amendment - Origins and Historical Antecedents”). Altogether, the right was intended to be a defense against any form of tyranny. The Framers believed that giving this right to the people supported a delicate balance of power between them and the government.

Setting the Stage

Despite the improvement and expansion of firearms since the late 18th century, the 2nd Amendment has remained relatively unchanged. While those who were armed back in the late 1700s and early 1800s primarily had a large musket, a person in the 21st century has a wider range of firearm options, from handguns to so-called “assault rifles.” Citizens can now choose to arm themselves with various forms of firearms with relative ease.

It was not until the mid-20th century that the conversation about American gun ownership truly began, spurred by America’s first “mass shooting.” Howard Unruh is often credited with being the first to commit this crime in the United States, killing 13 people using a pistol purchased from a sporting goods store (Sauer). Mass shootings now have an explicit definition: an event in which “there are several injuries or deaths from firearm-related violence” (Statista). Following Unruh’s horrific actions, mass shootings developed into one of the darkest aspects of American society. Between 1966 and 2012, the United States “was home to nearly one third of the world’s mass shooters” (Sauer). As mass shootings have become a reoccurring horror in the United States, there has been an increased push for change, focusing on limiting the 2nd Amendment’s interpretation and application.

Varying Viewpoints

While it is just one sentence, the 2nd Amendment has remained one of the most divisive constitutional amendments in American politics. Despite this, there have been only a handful of Supreme Court decisions on the issue (Acosta). The right to bear arms can be broken down into two general theories towards which people lean. The first is the individual-right theory, to which the concept of individualism is applied (“Second Amendment”). As applied to the 2nd Amendment, the individual-right theory holds that the Constitution explicitly protects the individual right to keep a firearm, meaning that, generally, legislation or efforts to restrict or prohibit firearm possession or use are unconstitutional. The second theory is the collective-rights theory, which suggests that individual citizens do not have an explicit individual right to possess firearms (“Second Amendment”). Collectivists believe that both the federal and state governments possess the authority to place regulations surrounding the purchasing, possession, and use of firearms. The difference in interpretation between individualists and collectivists has, over time, fed the formation of the 2nd Amendment as an increasingly politically controversial issue.

Building Precedent

As previously mentioned, there have only been a handful of Supreme Court rulings on the 2nd Amendment. One of the earliest rulings came in *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). The Supreme Court ruled that, in terms of restricting the right to bear arms, the restriction is placed on Congress with the goal to give power to the people and the states. The Court ruled that “this is one of the amendments that has no other effect than to restrict the power of the national government” but not state and local governments (*United States v. Cruikshank*, 1875). This ruling ultimately left it up to the local governments to implement and regulate firearm use. This decision was reaffirmed

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in *Presser v. Illinois*, 116 U.S. 252, 265 (1886). For a time, therefore, the 2nd Amendment remained under this ruling in which the responsibility was placed on local authorities. Then, in 1939, *United States v. Miller*, 307 U.S. 174 (1939) was decided. In this case, two people were indicted for transporting an unregistered sawed-off shotgun across state lines in violation of the National Firearms Act of 1934” (Acosta). Miller argued that the National Firearms Act violated the 2nd Amendment because it interfered with his right to transport arms between states. When the case reached the Supreme Court, the Court ruled that “in the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than 18 inches in length has some reasonable relationship to the preservation or efficiency of a well regulated militia, the Second Amendment does not guarantee the right to keep and bear such an instrument” (Acosta). By establishing this specification, the Court reversed the decision by explaining that “the right to keep and transport the shotgun” that Miller was in possession of was “not part of any ordinary militia equipment and [that] its use could not contribute to the common defense” (Acosta). However, the Court did also find that the section of the National Firearms Act under which Miller was originally indicted was unconstitutional. *United States v. Miller* was the first case to place new parameters on the 2nd Amendment while also reaffirming the State’s right to maintain militias.

Relevant Precedent

A landmark case that sets the stage for a legal discussion of the 2nd Amendment is *District of Columbia v. Heller*, No. 07–290. *District of Columbia v. Heller* on writ of certiorari from the U.S. The Court of Appeals held that “the Second Amendment protects an individual’s right to possess firearms’ ” (*District of Columbia v. Heller*, 2008, pg. 1). The case was heard in the Supreme Court in 2008 where the appellate decision was affirmed. The Court ruled that “The Second Amendment

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protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home” (District of Columbia v. Heller, 2008, pg. 1). This case in particular found its place in the spotlight because of the specifications it addressed regarding gun ownership. The Court cited the specific definition of “arms” included in the 2nd amendment, explaining that “arms” is defined “as anything that a man wears for his defense, or takes into his hands, or [use] in wrath to cast at or strike another” (District of Columbia v. Heller, 2008, pg. 7). The Court went on to explain that “all instruments that constitute bearable arms” including those not invented in the late 18th century are included in the term “arms” . Additionally, the phrase “to keep and bear” is defined as the ability to “retain in one’s power or possession” (District of Columbia v. Heller, 2008, pg. 7). This, according to the opinion of the Court, includes the ability to carry, based on *Muscarello v. United States*, 524 U. S. 125 (1998). The explanation of these phrases from the 2nd Amendment defines the constitutional parameters of restricting one’s right to bear arms. However, the case also addressed the unique complexity of the 2nd Amendment, found in its peculiar wording.

According to *District of Columbia v. Heller*, the 2nd Amendment can be divided into a prefatory clause and an operative clause; the prefatory clause neither restricts nor enables but rather complements the operative clause (*District of Columbia v. Heller*, 2008). In fact, the Court explained that the two clauses fit “perfectly” together once one understands the history of the Amendment. It was explained that “the Amendment’s prefatory clause announces a purpose, but does not limit or expand the scope of the second part” while the “operative clause’s text and history demonstrate that it connotes an individual right to keep and bear arms” (*District of Columbia v. Heller*, 2008, pg. 1-2). The 2nd Amendment then could be

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rephrased to say “because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed” (District of Columbia v. Heller, 2008, pg. 1). When considering all the intricacies of the 2nd Amendment addressed in District of Columbia v. Heller, it is evident that the right to bear arms has a strong constitutional foundation. The deliberate wording was intended to allow both the government and the people to understand its fixed place among American liberties (District of Columbia v. Heller, 2008). However, despite the clear cut explanation, discussion continues surrounding the new forms of “arms” that exist in American society today. For example, a federal ban on bump stocks for automatic weapons was instituted in 2019 hopes to increase American public safety. Many of these conversations stem from the consistent occurrence of mass shooting across the nation as well as the overall rate of gun violence. Yet the 2nd Amendment remains strong in its constitutional standing in the Bill of Rights.

In 2010, McDonald v. City of Chicago, No. 08–1521., challenged the standing of the 2nd Amendment in application to the states. In this case, suits were filed that challenged the gun ban from District of Columbia v. Heller. Constitutionally, the plaintiffs were challenging the application of the 2nd Amendment according to the 14th Amendment. The Supreme Court ruled that the 2nd Amendment does apply to the states under “the Fourteenth Amendment incorporates the Second Amendment right, recognized in Heller, to keep and bear arms for the purpose of self defense” (McDonald v. City of Chicago, 2010, pg. 2). McDonald v. The City of Chicago ultimately established that the right to bear arms “is fundamental to the Nation’s scheme of ordered liberty” (McDonald v. City of Chicago, 2010, pg. 2). This decision by the Supreme Court affirmed the placement of the 2nd Amendment in both federal and state law which reaffirmed the liberty of self defense.

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In 2016, *Caetano v. Massachusetts*, 577 U. S. (2016), presented a new question to be considered under the *Heller* decision. In this case, the Court was challenged with what kind of weapons are included within the 2nd Amendment. The Court ruled that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding” (*Caetano v. Massachusetts*, 2016, pg. 1). This decision was based on the *Heller* decision and was applied by the 14th Amendment by the *McDonald v. Chicago* decision. This was a landmark case for the 2nd Amendment because it requires the interpretation and application of *Heller*. The Court had to evaluate the extension of the 2nd Amendment to modern day and how to appropriately apply it. By using the *Heller* decision, the Court found that restricting weapons such as stun guns would be limiting. Additionally, *McDonald v. City of Chicago* in 2010 clarified the equal application of the 2nd Amendment into both federal and state law.

Conclusion

Questions still arise in how to regulate certain accessories and firearms in American society. Automatic weapons are not considered firearms which citizens may possess. However, semi-automatic weapons are still considered legal firearms for the public. The discussion of gun control has increasingly become a partisan issue which has inhibited the development and implementation of legislation. Additionally, there continue to be few cases that reach the Supreme Court that would give the Court the opportunity to reinterpret gun rights. Based on the 14th Amendment, any Supreme Court decision on the 2nd Amendment, whether looking to limit or expand gun rights, would apply to all state governments as well as the federal government. Because of this, gun rights have powerful fighters on both ends of the arguments looking to push their respective legislation through. Additionally, despite the current precedent,

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the issue of modern weaponry under the 2nd Amendment continues to be a frontline issue. While there are groups looking to limit the 2nd Amendment, there is no doubt that it is part of the legal and, to a certain extent, cultural foundation of this country. American liberty is deeply rooted in the idea of self defense and it protects the 2nd Amendment's standing as one of the original rights of the people.

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*Home is where the
Habitual Residence is:
Family Separation and
Childrens' Rights Under
the Law*

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HOME IS WHERE THE HABITUAL RESIDENCE IS: FAMILY SEPARATION AND CHILDRENS' RIGHTS UNDER THE LAW

BY LAUREN WINKLEBLACK

The U.S. Supreme Court's ruling in *Monasky v. Taglieri* held that the habitual residence of a child, as defined by the Hague Convention on the Civil Aspects of International Child Abduction, is determined through examination of the "totality of circumstances" specific to the case, rather than categorical requirements such as an informal agreement reached between the parents of the child (Scotus Blog, n.p.). The court's opinion was unanimous, affirming the judgment of the 6th Circuit Court of Appeals and holding that a concrete agreement between the legal guardians regarding where the child is to be raised is not necessary in order to establish the habitual residence of the child (Scotus Blog, n.p.). The court also set a precedent for district courts, encouraging them to employ a clear-error review in order to establish a child's habitual residence as defined by the Hague Convention (Scotus Blog, n.p.). Justice Ginsburg delivered the opinion of the court, writing that the determination of a child's habitual residence does not reject the existence of an actual agreement. Justice Ginsburg noted in the court's conclusion that there are no distinct categorical requirements for determining a child's habitual residence (Scotus Blog, n.p.). The opinion also stated that *Monasky's* proposed actual-agreement requirement is not supported by the Hague Convention and is inconsistent with the international harmony demanded by the Convention which would thwart its purpose (Scotus Blog, n.p.).

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Justice Thomas filed a concurring opinion, agreeing with the Court's conclusion that the determination of habitual residence is intensely fact-driven and based on each case's unique circumstances, but that he would have decided this case solely on the plain meaning of the text within the Hague Convention (Scotus Blog, n.p.). Justice Alito also filed a concurring opinion, agreeing with the Court that the determination of habitual residence should be based on a range of factors, specifically those unique to the individual case (Scotus Blog, n.p.). He also agreed with Justice Thomas that courts must independently define the meaning of 'habitual residence' (Scotus Blog, n.p.).

This piece will examine how the decision reached in *Monasky v. Taglieri* will be applied to the hundreds of return petitions filed each year and used to handle such cases uniformly; this process will illustrate how courts should determine the habitual residence of an infant and clarify the correct standard of review for the determinations on appeal (Scotus Blog, n.p.).

Discussion of Prior Law

Following the oral arguments of *Monasky v. Taglieri*, the court noted that certiorari was granted in order to resolve differences in opinions between circuits regarding how to define a child's habitual residence (Garbolino, n.p.) The court relied on the approach employed by the Seventh Circuit Court of Appeals in *Redmond v. Redmond*, which was to reject rigid and structured rules, formulas or presumptions to determine a child's habitual residence (Garbolino, n.p.). Based on the opinion of *Redmond*, the Court noted the importance of recognizing the unique circumstances of each individual case and allowing common sense to guide their decisions, understanding that no single factor can determine the outcome

(Garbolino, n.p.). For example, *Redmond v. Redmond* established that the ages of the children may influence the decision regarding their location of habitual residence (Garbolino, n.p.). Older children, for example, tend to be keener on acclimation to the environment and culture of a new country (Garbolino, n.p.). Cases involving young children, on the other hand, often prioritize the circumstances of the parents or caregivers because such young children will not yet be forced to acclimate independently (Garbolino, n.p.).

The court also followed precedents that arose under the 1980 Convention by considering its text, as well as the history of its drafting and the negotiations that took place (Garbolino, n.p.).

The Supreme Court also reviewed the Pérez-Vera Report which accompanies the Convention, in which the Hague Conference defined habitual residence as being a question of pure fact, differing from domicile (Garbolino, n.p.). The specific interpretation created by the Hague Conference provides courts maximum flexibility when determining the habitual residence of a child to best assess the unique circumstances of each case (Garbolino, n.p.). Each circuit court has its own definition of habitual residence, though they, as well as the U.S. Supreme Court, all agree that the place where a child is deemed to be at home at the time of removal is their habitual residence (Garbolino, n.p.).

Facts

In 2011, Michelle Monasky, the American petitioner, and Domeico Taglieri, the Italian respondent, married in Illinois (Cornell Legal Information Institute, n.p.). After two years, the couple relocated to Milan, Italy to pursue their careers (Cornell

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Legal Information Institute, n.p.). Beginning in March of 2014, Taglieri became physically abusive and hit Monasky in the face and continued to hit her and force her to have sex with him (Cornell Legal Information Institute, n.p.). Monasky became pregnant with the child, referenced as A.M.T. in court documents, in May of 2014; Taglieri moved three hours away from Milan to Lugo in June of the same year (Cornell Legal Information Institute, n.p.). Their marriage became strained under the weight of the pregnancy and the separation, and Monasky sought an American divorce attorney, as well as healthcare and childcare options for herself and A.M.T. in the United States; throughout this time, the couple was concurrently planning for the arrival of the baby and exploring Italian childcare options (Cornell Legal Information Institute, n.p.). In February of 2015, Monasky considered moving back to the US and informed Taglieri about pursuing divorce, giving birth to A.M.T. two days later (Cornell Legal Information Institute, n.p.). Following the birth, Monasky, A.M.T. and Monasky's mother remained in Milan while Taglieri traveled back to Lugo. The next month, Monasky again informed Taglieri of her desire to get a divorce and relocate to the U.S. but went to stay with him in Lugo a few days later (Cornell Legal Information Institute, n.p.). While in Lugo, Taglieri claims there was a reconciliation, which Monasky denied. While visiting Lugo, Taglieri and Monasky jointly applied for both Italian and U.S. passports for A.M.T. (Cornell Legal Information Institute, n.p.). But following an argument, Monasky took A.M.T. with her to the police, seeking shelter and informing the officers that Taglieri was abusive (Cornell Legal Information Institute, n.p.). In light of this, Taglieri requested to rescind his permission for A.M.T. 's American passport, though Monasky took A.M.T. with her to the United States two weeks later (Cornell Legal Information Institute, n.p.). Taglieri successfully filed to rescind Monasky's parental rights and filed a petition under the Hague Convention for A.M.T. 's return to Italy (Cornell Legal Information Institute,

n.p.). The District Court ruled in favor of Taglieri, holding that A.M.T. 's habitual residence is in Italy based on the decision between Monasky and Taglieri to raise the child in Italy and not the United States (Cornell Legal Information Institute, n.p.). Though Monasky appealed to the Sixth Circuit, A.M.T. was returned to Italy after her motion was denied for a stay pending the appeal District Court's decision was affirmed by the Sixth Circuit. The Sixth Circuit determined that

A.M.T. 's habitual residence was a question of fact and reviewed the prior decision under the clear-error standard, requiring the court to be deferential to the findings of the lower court (Cornell Legal Information Institute, n.p.). The Sixth Circuit employed precedent from a prior case, *Ahmed v. Ahmed*, to find that the District Court's method of evaluating the shared intents of the parents was the correct one because A.M.T. is too young to consider whether he has acclimated to Italy enough to deem it his habitual residence (Cornell Legal Information Institute, n.p.).

Holding

The Court held that under the Hague Convention, the habitual residence of a child is determined by the totality of factors unique to the class as opposed to categorical requirements such as informal agreements reached between parents (*Oyez*, n.p.). Justice Ginsburg delivered the unanimous opinion, with Justices Thomas and Alito joining in part and concurring in the Court's judgment (*Oyez*, n.p.). The actual text of the Convention does not define "habitual residence" but does state that children habitually reside where they are considered to be at home (*Oyez*, n.p.). Though Monasky took A.M.T. to America and she herself is an American citizen, A.M.T. was intended to be raised in Italy, which is why he also had a joint Italian and American passport and why his American passport had been rescinded by Taglieri. The court held that there is not a singular fact that can

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determine habitual residence, rather courts must conduct a fact-driven analysis that considers unique factors of the case, one of which is using common sense to determine where a child will feel most at home (Oyez, n.p.). Monasky attempted to argue that she and Tagleri did not have a formal agreement stating where A.M.T. was to be raised and she was being abused; thus, she was justified in leaving for America and taking A.M.T. with her to provide him with citizenship (Oyez, n.p.). But the treaty is not interpreted that way and does not view the creation or lack of formal agreements between parents to be the deciding factor in the child's habitual residence (Oyez, n.p.). Furthermore, the court found that the determination of habitual residence is a complex question of law that is heavily fact-driven; thus, a determination made by a trial court should be entitled to a differential clear-error review (Oyez, n.p.).

Reasoning and Analysis

Monasky argued that the appeals court should have reviewed the findings of the trial court under a less deferential, de novo, standard of review, which is supported by Congress' dressing of the importance of uniformly interpreting the Hague Convention (Slattery, n.p.). Monasky noted that the majority of appeals courts employ the de novo standard when determining a child's habitual residence and argued (Slattery, n.p.). She also argued that the appeals court was wrong in simply considering habitual determination a question of pure fact when it clearly reflects a legal judgment regarding the settings in which the Hague Convention was intended to present a return remedy (Slattery, n.p.).

Monasky also argues that the lower court was wrong to rule that she and Taglieri had established shared parental intent for A.M.T.'s habitual residence to be in Italy, noting that they were not actually in agreement (Slattery, n.p.). Requiring a formal agreement between a child's parents leads to a timely

review of return positions, deterring parents from stripping their infants of stable family life and social environment (Slattery, n.p.). She argued that courts should determine habitual residence simply by its plain meaning, which requires the environment to be one with a degree of settled purpose and continuity (Slattery, n.p.). Monasky also argued that the lower court turned a blind eye to the abuse she suffered at the hands of Taglieri and his multiple charges of domestic abuse (Slattery, n.p.). She stated that their ruling incentivizes parents to forum-shop for a more favorable venue, a practice which ultimately hurts children who have an abusive parent (Slattery, n.p.). Thus, Monasky concluded that her abusive husband's crimes should have been taken into consideration, and argued that A.M.T. was not habitually residing in Italy since she fled the country to escape Taglieri's abuse (Slattery, n.p.).

Taglieri, however, argued that a formal agreement is unnecessary when determining the habitual residence of a child (Slattery, n.p.). He proposed that the parents' intentions are certainly relevant, but are one of many factors courts could consider, and that employing Monasky's standard would leave his children with no habitual residence (Slattery, n.p.). Taglieri argued that the plain meaning of habitual residence is the country in which the child usually lived before being abducted by the other parent (Slattery, n.p.). Congress has proposed a uniform interpretation as part of the Convention's framework; thus, Taglieri noted a 2018 Supreme Court of Canada case that held that a child's habitual residence is the focal point of their life and the family environment in which they have developed before they were abducted (Slattery, n.p.). He also argued that a habitual residence determination should be reviewed for clear error, rather than *de novo*, which would undermine the Conventions's desire for quick return of the child and promote more appeals in these emotional disputes, considering the chances of reversal are elevated (Slattery, n.p.).

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This case is highly significant and has emotional implications for separated parents. Monasky cites a deep sense of hurt and separation from her daughter and believes it will be detrimental to her future development (Slattery, n.p.). Without a return order, she will lack meaningful recourse in both the U.S. and Italy, leaving her daughter to grow up without the love and support of her mother. Cases involving the Hague Convention display parents at their worst and most vulnerable as they grapple with the possibility of being separated from their child (Slattery, n.p.). With hundreds of return petitions filed every year, the Supreme Court will utilize *Monasky v. Taglieri* to ensure U.S. cases are handled uniformly based on clear guidelines for determining an infant's habitual residence (Slattery, n.p.).

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JURIS MENTEM

*Prosecutorial
Discretion: Are Plea
Bargains Contrary to
Justice Under the Law?*

LAUREN GREENBERG
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PROSECUTORIAL DISCRETION: ARE PLEA BARGAINS CONTRARY TO JUSTICE UNDER THE LAW?

BY LAUREN GREENBERG

Americans are familiar with court proceedings on television and in films; the lengthy trial, the judge's oversight, and the jury's finding. Yet the television image of the judicial process is divorced from reality. Approximately 95% of guilty verdicts in this country are a product of plea bargains; this means no trial, no jury deliberation, and no jury or judge finding (ACLU). Why do nine out of ten defendants waive their constitutional right to trial?

Prosecutors have both discretion in overseeing pleas, and the leverage to negotiate away what would otherwise be Constitutional rights. As a starting point, mandatory minimum sentences too often make trials high-risk propositions for defendants, many of whom choose to avoid the risk of a harsh sentence by entering into plea bargains where the guilty plea and the sentence are negotiated. Though legal scholars have expressed their concerns about the process, the daily press and regular news media have focused more on police misconduct, subpar prison conditions, and the death penalty. Meanwhile, the matter of whether countless Americans are forfeiting their Constitutional rights has remained off the radar screen for effective public oversight.

Historical Opinions: Plea Bargains as a Deprivation of Justice

Advocates of the plea bargain process have long argued pleas lessen the judicial caseload in an already overburdened

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court system. While this may be the current rationale, the truth is that plea bargains have existed since the late 17th century but only gained popularity shortly after the civil war.

As crime rates rose to unmanageable levels, pleas “became a release valve for mounting caseloads” (Walsh). But in the late 19th century even as pleas came to prominence, there was strong opposition among appellate courts which condemned the procedure as “shocking and terrible” (Walsh). Courts also protested pleas in various opinions citing excessive secrecy and coercion of the innocent (Walsh). In the 1877 case *Wight v. Rindshopf*, the Wisconsin Supreme Court declared that pleas are “hardly, if at all, distinguishable in principle from a direct sale of justice” (*Wight v. Rindskopf* 1877).

Notwithstanding the opinion in *Wight*, no court of law took note of the negative sentiment; plea bargains continued with courts relying on this procedure to keep the system running smoothly. Still, prominent jurists, including Chief Justice Warren Burger, remained opposed to the process throughout the late 20th century. In the 1971 Supreme Court case *Mayer v. City of Chicago*, Burger’s concurring opinion announced “an affluent society ought not be miserly in support of justice, for economy is not an objective of the system” (*Mayer v. City of Chicago* 1971). More specifically, Burger was inferring that the court’s first duty is to discern the innocent from the guilty, not to lazily accelerate the transmission of criminal defendants (Walsh).

These sentiments were echoed by a number of courts, spanning across centuries, all supporting the consistent theme that pleas impede justice. Appellate courts were, first, shocked at how terrible the procedure was for justice, citing the secrecy of backroom deals and the coercive stronghold which prosecutors have (Walsh). The Wisconsin Supreme Court then conceded that pleas inherently mean disposing of the very concept of justice (*Wight v. Rindskopf* 1877). Finally, the highest court in the nation

proclaimed we must not make the mistake of putting efficiency before justice (*Mayer v. City of Chicago* 1971). The concerns driving these proclamations endure among plea reform advocates to this day (Savitsky). Plea bargains were and still are irreconcilable with the notion of justice. So why does the practice persist?

Translating Historical Opinions to Contemporary Plea

Plea bargains are still backroom deals with a great degree of secrecy; prosecutors continue to have a strong coercive influence and court systems have carried on placing greater importance on efficiency rather than accomplishing true justice for every defendant. Generally, the system of pleas has remained the same, depriving the most vulnerable citizens of their right to justice under the law. This is chiefly because prosecutors dominate the justice system. As Attorney General Robert Jackson popularly and accurately proclaimed, “the prosecutor has more control over life, liberty, and reputation than any other person in America” (Bellin). In other words, the prosecutor holds the leverage point through the entire process, conquering any disagreements with their exercise and holding ultimately unrestrained discretion (Bellin). The Honorable Nancy Gertner, former judge and lifelong advocate, affirmed a similar sentiment during a virtual visit to an American University SPA course. As for plea bargains, she asserted “it’s a scandal...the defendant has virtually no bargaining power, so people plead guilty to things they are innocent for, and it is tremendously distorting of the system” (Gertner).

Additionally, since there is little oversight, prosecutors’ powers are only further reinforced. There are no federal guidelines that judges be required to oversee pleas, and no written documentation is required (Walsh). Furthermore, pleas “follow no standards of evidence or proof” which normally guide justice in a trial setting (Walsh). These unsupervised,

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undocumented, and unstandardized practices result in secret backroom deals that are only a piece of the puzzle as to why prosecutors hold much discretion.

As Angela J. Davis notes in her book, *Arbitrary Justice*, plea bargain proceedings can lead to duress because prosecutors have an intense motivation to offer a plea that will likely “encourage [defendants] to give up their right to trial” (Davis). And, defendants gain something from pleas as well, especially when there is great evidence of guilt, but “the prosecutor always has the upper hand because of... [their] control over the process” (Davis). This control chiefly results in coercion, with prosecutors relying on a few key factors to persuade defendants to plead guilty.

Coercion: Punitive Tools in the Prosecutor’s Arsenal

Not only is there sparse oversight of the entire plea procedure but legislation has been tailored to prosecutors' needs, putting punitive tools in their hands which pressure defendants to take inadequate deals (Trivedi). Pretrial detention first isolates defendants from their community, family members, and jobs (Trivedi). This tool feeds into a defendant’s fears of missing out on family affairs or failing to pay bills because of lost income. The prosecutor determines just how isolated the defendant may feel, usually setting a higher bail to convince low-income defendants they should plead guilty so they can go home more promptly (ACLU).

The enhancement of sentences and mandatory minimums is an additional tool which the prosecutor holds over a defendant, making the risk of going to trial too much to bear, evoking a “trial penalty” of sorts (Trivedi). Additionally, prosecutors have control over how much evidence they disclose they are aware of during negotiations allowing them to conceal anything that may be beneficial to the defendant (Trivedi). These

loose, relaxed discovery rules convince defendants that the prosecution's case is stronger than it might realistically be. Likewise, there are few requirements for transparency which subsequently robs defendants and their lawyers of the potential to analyze how the deals are being executed (Trivedi). Lastly, precedent from the Supreme Court "allows judges to rubber-stamp the deals" without even inquiring about the prosecutor's use of their punitive tools (Trivedi). Instead, when accepting a plea, the judge typically questions whether the defendant felt coerced in the process which is somewhat like asking a hostage if their captor acted righteously "while the hostage still has a gun to their head" (Trivedi).

Of course, these defendants chose to take a guilty plea, but if prosecutors are coercive is it much of a choice? Is this not a predetermined outcome instead? Much free will is stripped from defendants if they are falsely convinced by prosecutors that the evidence is stacked against them and that they will receive a harsher sentence if they risk going to trial. Since judges and prosecutors rely on plea deals to keep the system moving it makes sense why they might wish to persuade even the innocent to plead guilty.

Conclusion: How Does this Fare for Justice?

Lack of oversight and an uneven power dynamic between the prosecution and defense does not fare well for justice. Through coercion and virtually closed-off proceedings, defendants are locked out of justice under the law. Although 'access to public trial' and 'trial by jury' are encoded in the Sixth Amendment, taking a plea deal eliminates these prospects. With prosecutors offering defendants substantially differing sentences to those who plead guilty versus those who go to trial, the system becomes detached from any reasonable rationales for public safety or justice. This not only has no logical basis, but it also penalizes Americans for exercising their constitutional right to a

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public trial by jury, removing any air of justice or equity from the system. Considering the excessive use of plea bargaining today, the framers would be appalled at the blatant constitutional violations to which defendants are subjected. The authors of the Constitution did not intend for the majority of legal outcomes to be decided behind closed doors, but rather in front of a jury of peers with a judge to oversee.

The entire affair disparately impacts the most vulnerable Americans, making the practice of pleas even more concerning and unjust. According to ACLU attorney Somil Trivedi, minority defendants receive “disproportionately worse [plea] offers' ', suffering from greater coercion than white folks receive. It is important to note that plea bargains are not inherently evil: if sorted out fairly with an equal balance of power between the prosecution and defense they can be helpful to both sides. But, to accomplish this, there must be some sort of sensible guidelines in place (Trivedi). Some regulation, some semblance of transparency and fairness, and oversight of prosecutorial discretion might help advance justice. The motivation and value of court efficiency must be accompanied, if not overpowered, by the value of justice.

Constitutional rights under the Sixth Amendment have turned into a fallacy for 95% of Americans (ACLU). The citizens who suffer the most from this harmful practice are predominantly Black and brown, low-income, unable to afford an expensive private defense attorney, or all of the above. We must do better for Americans- especially those who are most often manipulated by the cruelty of the justice system.

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JURIS MENTEM

*The Abbott School
Rulings and the Fight
for an Equal Right to
Education*

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THE ABBOTT SCHOOL RULINGS AND THE FIGHT FOR AN EQUAL RIGHT TO EDUCATION

BY JACK BAUM

Since COVID-19 has drastically changed the way that schools work across the country, issues of school funding have moved to the forefront of policy debates. While the entire nation saw a shift to online education, not all school districts were able to make the transition as easily. There are massive disparities across the United States in regard to school funding, largely because schools are primarily funded through property taxes. While states try to reduce these inequalities, they do not always succeed (Darling-Hammond). These inequalities are nothing new; in New Jersey, they were the norm up until the 1980s. In New Jersey particularly, there were massive disparities, most notably between poor urban schools and wealthy suburban schools. This discrepancy angered many, and led to the Education Law Center filing a lawsuit on behalf of twenty children that attended schools in poorer and less-funded districts (Education Law Center). This lawsuit inevitably led to the Abbott decisions, the results of a series of New Jersey Supreme Court Cases which had a massive impact on the state's system for funding its public schools.

The Court Cases

The New Jersey Supreme Court first cast a decision on unequal funding of public schools in the case known as *Abbott v. Burke* in 1985. The Abbott case would become one of the most litigious cases within the state, leading to nearly twenty different

court decisions regarding school funding spanning from 1985 to 2016 (Education Law Center). While there are nearly twenty decisions based on the initial Abbott case in total, many focus on reforms to the education system that the New Jersey legislature proposed, and had a lesser impact on the entire school system. The most decisive victory for poorer urban schools came about from the initial decisions in the first two Abbott cases, commonly known as Abbott I and Abbott II.

Abbott I

The original Abbott case actually had very little implication in reforming New Jersey's education funding system. The case was centered around a 1975 New Jersey law known as the Public School Education Act of 1975 which complainants argued widened the disparity between urban and suburban schools (*Abbott v. Burke*, 1985). This case came before the court as a violation of the New Jersey state Constitution, which promises that "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years" (New Jersey Constitution). This provision has been the basis for prior challenges to New Jersey school funding laws, but never amounted to anything at the level of Abbott. The plaintiffs within the case make a consistent effort to showcase that those within poorer districts were denied a thorough and efficient education and therefore denied equal protection under the New Jersey Constitution. On the other end, defendants noted that while there were disparities, the 1975 law was not the main issue. Rather, they suggested these disparities came about as a result of local school boards' inability to properly manage their school systems (*Abbott v. Burke*, 1985). While the court heard both arguments, they never brought forth a decision. A look into New Jersey legal history shows us that in court cases focused on school and education laws, the court often prefers to utilize a

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more procedural course to determine cases. This is possible because New Jersey has a law in place that allows the Commissioner of Education to hear all cases that arise regarding education laws in the state. The New Jersey Commissioner of Education then transferred the case to be heard by the New Jersey Office of Administrative Law (OAL), which is composed of administrative law judges to be impartial and deal with matters of administrative law (*Abbott v. Burke*, 1985). The court's decision to transfer the case to the Commissioner of Education (who eventually transferred it to the OAL) stalled any and all progress that was being made in making the New Jersey educational system more equal, as the court did not render any verdict, and awaited to hear the OAL's decision before finalizing their own.

Abbott II

Five years later, the New Jersey Supreme Court made their final decision in regards to the OAL's ruling. The court upheld the ruling that the state's current school funding law was unconstitutional, concluding that the current system led to one simple principle, "the poorer the district and the greater its need, the less the money available, and the worse the education" (*Abbott v. Burke*, 1990). The court ruled that the act must be amended to ensure that poorer urban districts receive per-pupil funding that is "substantially equivalent" to school districts found in more affluent districts. The court specifically noted a list of twenty-eight school districts that lacked the resources and funding to provide a quality education. These districts would henceforth be known as "Abbott Districts" which the court determined would need far greater funding for New Jersey to properly abide by its own constitutional requirements. (*Abbott v. Burke*, 1990). This case became a cornerstone of New Jersey education law, and became the basis for countless court cases in the coming years. As the New Jersey legislature made changes to accommodate the Abbott II decision, these new education laws

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would find themselves before the NJ Supreme Court once again to determine whether or not these new funding processes adequately met New Jersey's constitutional obligations to its citizens.

After Abbott II

This case had a drastic impact on public school funding, as the legislature worked for the next 20 years to provide a school funding formula that didn't violate Abbott II. Each new change to public education funding inevitably came before the court. Time and time again the court found provisions of the new funding laws that failed to adequately address the New Jersey Constitution's requirement that students in each district be provided a thorough and efficient educational opportunity (Education Law Center). All of these subsequent cases fall under the Abbott title and are the reason Abbott is such a well-known word within New Jersey.

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JURIS MENTEM

*Governance In the
Klamath River Basin*

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GOVERNANCE IN THE KLAMATH RIVER BASIN

BY CLAIRE MILLS

The Klamath River Basin, a region located in Northern California and Southern Oregon fed by the winding Klamath River, is divided by not just the geography of the Upper and Lower Basins, but also the tensions of decades of slow conflict between farmers and fishers, settlers and indigenous peoples, and production and conservation. The Lower Klamath Basin is home to the Klamath Tribes, the Yurok Tribe, and the Hoopa Tribe, who historically have made a living as fishermen. The Upper Klamath Basin is populated by predominantly white Americans who are commercial farmers, growing food crops which are shipped nationwide. Both of these groups rely heavily on the Klamath River water source, and conflicts over water management have persisted for generations. To complicate matters further, the federal government is heavily involved in the region, both in land management, agricultural production support, and the enforcement of environmental laws.

Klamath River Basin History

The Klamath Tribes, Yurok Tribe, and Hoopa Tribe have resided in the region for time immemorial and maintain an active presence in the region. Prior to white settlement, these tribes controlled half a million acres of land in the Basin, lived off the land, and engaged in subsistence farming and fishing of salmon in the Klamath River. Further, these tribes believe the stewardship and protection of the Klamath River and its salmon is their true purpose and destiny. According to a Yurok legend, if the salmon leave the Klamath River, the Yurok tribe will no

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longer be needed on Earth. Environmental protection and water and land rights are therefore critically important to the Indigenous Tribes of the Basin.

In 1906, the recently congressionally established Bureau of Reclamation started the Klamath Irrigation Project (KIP) to improve the agricultural productivity of the Basin for white settlers who had established farms within the region throughout the 1800s. Over the next 60 years, KIP built a series of dams along the Klamath River, culminating with the 1956 building of 4 hydroelectric dams, which needed to be relicensed in 50 years, in compliance with the Federal Energy Regulatory Commission (FERC). During this time period, water rights in the region strongly favored the interests of the farmers. This trend was cemented with the 1957 Congressional approval of the Klamath Basin Compact which protected water rights for irrigators and gave increased control of the region to KIP, denying water rights to Indigenous Tribes.

Water dynamics in the region began to shift in the 1990s, due to increased environmental legislation. Although the Indigenous Tribes in the region had been actively pursuing federal court cases to gain senior water rights, due to their presence in the Basin before any other stakeholders, these efforts had yet to shift regional water dynamics. Instead, it was the federal government's addition of three species of fish in the Klamath River to the list of endangered species under the Endangered Species Act (ESA) which was a major turning point. In 2001, the U.S. Fish and Wildlife Service (USFWS) determined that no water could be diverted for irrigation due to a severe drought in the region, to protect species covered by the ESA. Organized protests broke out in defiance of the shutoff order. More than 18,000 protestors gathered in Klamath Falls, Oregon and farmers stole water for irrigation purposes in a "bucket brigade." Farmers also mobilized their grievances against the ESA through legal battles that seek to reduce the impact of

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federal policy. However, in response to the backlash, the US Interior Secretary shifted the application of the ESA to favor irrigators the following year, resulting in a fish kill devastating to Indigenous Tribes. The 1990s and early 2000s thus represented a period of increased conflict between the stakeholders, due to increased involvement by the federal government to enforce environmental legislation which failed to consider local dynamics or historical water rights.

However, in more recent years the local parties have come together in efforts to manage resources and solve the rising tensions. In 2006, the 4 dams, now owned by PacifiCorp, were up for FERC relicensing and PacifiCorp spearheaded stakeholder discussions to devise a plan for dam removal. These resulted in the 2010 Klamath Basin Restoration Agreement and the Klamath Hydropower Settlement Agreement, which were signed by local stakeholders but not approved for funding by Congress. Following the failure of the 2010 Agreements (and their 2016 resubmitted versions), the Klamath River Renewal Corporation (KRRC) was created by local stakeholders to organize dam removal. In 2013, a federal court determined the Klamath Tribes hold senior water rights in the region. In 2020, a Memorandum of Agreement was signed by local stakeholders which transfers dam ownership from PacifiCorp to the KRRC, adds the states of California and Oregon as co-licensees, and submits the KRRC's plan for dam removal to FERC for approval.

Still, legal battles over water and land management continue and concerns for the future of farming in the region are growing. A 2017 management plan of the USFWS allows land within the Klamath Basin National Wildlife Refuge Complex to be leased for private agriculture, with limitations. Environmental groups have challenged this decision for infringing on the refuge, while the Tulelake Irrigation District (with support from the California Farm Bureau and local county farm bureaus) has sued claiming the limitations on leasing are in violation of the 1964

Kuchel Act which created the Refuge and guaranteed the leasing of land within it to allow farms to coexist. Additionally, this year, the Oregon government has declared a drought emergency due to low mountain snowpack and has prevented farmers from diverting water. As conditions in the Basin change due to the impacts of climate change, these tensions may outgrow the past cooperation in the region.

Federal Oversight Failures

Federal institutions have failed to address the situation in the Basin in a satisfactory manner and have contributed to increased hostility in the region. As described above, the federal government is involved in the conflict due to (1) the operation of the Bureau of Reclamation and KIP, (2) management of federal lands in the Basin, and (3) the implementation of environmental laws including the ESA. The mismanagement of water resources by KIP throughout the 20th century contributed to steadily worsening conditions in the Lower Basin for Indigenous Peoples and environmental damage to the region's ecosystem. KIP stated it planned to "reclaim the sunbaked prairies and worthless swamps" of the Klamath region by redistributing Native owned land into 1,400 privately owned farms given to white settlers to cultivate mass crops such as wheat. During the second world war, land in the region was also used by the US War Relocation Authority for Japanese internment camps. To support this development, a total of seven dams were placed along the Klamath River, damaging downstream water flow and leading to the extinction of certain species of salmon and the severe endangering of others.

However, even as the government turned away from agricultural development and to environmental protection with the enforcement of the ESA in the late 1900s, the sudden application of the legislation failed to consider local dynamics. The ESA's purpose is to "provide a means whereby the

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ecosystems upon which endangered species and threatened species depend may be conserved” and empowers the Secretaries of Interior, Commerce, and Agriculture to classify species as endangered. It was enacted in 1973 and is considered one of the most influential environmental protection legislation in the United States. But the application of the ESA has often sparked local controversy, including in the case of the Klamath River. To make matters worse, the USEFWS’ sudden ban on irrigation access showed limited awareness of local dynamics and the Department of Interior’s contradictory actions in 2001 and 2002 resulted not only in political unrest and environmental damage, but also increased litigation which made local stakeholder discussions more difficult.

Another key failure of the federal government is the continued inaction by Congress on approving either of the 2010 Agreements or their 2016 renewals. By not approving funding for dam removal, Congress ignored on-the-ground reconciliation efforts and undid the work of local institutions. The most recent Memorandum of Agreement attempts to avoid this pitfall by not requiring federal funding and only needs approval from FERC, rather than Congress, which is reason to be hopeful for the future of the conflict.

Local Governance

Despite missteps in federal involvement in the region, local institutions have repeatedly sought local governance efforts to resolve the water management conflict. Beginning in 2006, PacifiCorp, the owner of the hydroelectric dams, was a key institution that brought together stakeholders in local discussions. These discussions have served as successful organizational tools to channel grievances and have created the 2010 Agreements and their 2016 renewal. Most recently, these stakeholder discussions have been formalized into the KRRC

which has proven capable of synthesizing interests in the region into the currently active Memorandum of Agreement (MOA).

The MOA is a legal agreement, signed by all major parties, which transfers the ownership of key hydroelectric dams from PacifiCorps to the Klamath River Renewal Corporation (KRRC) and states of Oregon and California. It also specifies that KRRC will serve as the “Dam Removal Entity” and that funds for dam removal will come from local organizations and state governments, rather than the federal government, hopefully avoiding the pitfalls of previous agreements. The legal transfer of dam ownership is currently underway, and dam removal is projected to begin in the coming year. The MOA is therefore an example of local governance that is better able to navigate the competing interests of stakeholders than the federal government’s management, although the results are yet to be seen.

Conclusion

The Klamath River Basin is not remarkable because of its long history of government failure, denial of indigenous water and land rights, or increasing environmental degradation. Rather, it is the cooperation by local actors on water and land management plans despite continued federal failures which is both impressive and critical to our understanding of other land management issues. Over fifty percent of land in the western United States is owned by the federal government and much of this land, like the Klamath River Basin, is embroiled in long standing water and land rights conflicts between Indigenous Peoples, local American residents, environmental conservation groups, agricultural and fishing industries, and state and local governments. The Klamath River Basin thus serves as an example for both what is possible when local actors come together to build solutions, and what can go wrong when these efforts fail. Therefore, as climate change contributes to

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increasing unpredictability in the region and potentially exacerbates local tensions, it is critical to learn from past successes and failures to ensure future cooperation and expansion of rights, rather than conflict or continued slow violence.

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JURIS MENTEM

*SCOTUS Protects
Dreamers Now But The
Future Of DACA
Remains Uncertain*

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SCOTUS PROTECTS DREAMERS NOW BUT THE FUTURE OF DACA REMAINS UNCERTAIN

BY EMMA MILOGLAV

Department of Homeland Security v Regents of the University of California, decided on June 18, 2020, states that the government's attempt to rescind Deferred Action for Childhood Arrivals (DACA) was arbitrary and capricious in accordance with the Administrative Procedures Act (APA). In a 5 to 4 decision led by Justice John Roberts, the Court established that the government failed to act in a few key ways required by the APA, and therefore the rescission was arbitrary and capricious. By breaking down the case, this article will examine the major facts and arguments from both sides to gain an understanding of what led the Court to its decision. The article also assesses the future of DACA and what the decision means for possible future attacks.

Background

Deferred Action for Childhood Arrivals was established in 2012 by the Department of Homeland Security (DHS) as a two year program to defer deportation to individuals who arrived in the US as children without legal status (Robertson). If DHS determines that an undocumented immigrant did arrive before the age of 16, is enrolled in school, has been continuously living in the US, and does not pose a threat to the country, then they are granted DACA status. "Those granted such relief become eligible for work authorization and various federal benefits" and most importantly are not at risk for deportation (591 US _ 2020).

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DACA has granted over 700,000 undocumented immigrants the opportunity to acquire lawful status while in the United States.

In 2014 DHS decided to create a similar program called Deferred Action for Parents of Americans and Lawful Permanent Residents, or DAPA, which would give many of the same benefits as DACA to parents. However, Texas and 25 other states put forth a “preliminary injunction barring implementation” of the program (591 US _ 2020). The Fifth Circuit upheld the injunction stating that the programs violated the Immigration and Nationality Act (INA). The INA has reorganized the structure of immigration law and contains many of the most important provisions of immigration law.

In 2017 Acting Secretary of Homeland Security, Elaine C. Duke, decided to terminate the DACA program, arguing that the flaws of DAPA applied to DACA as well. This decision led several plaintiffs to bring cases against the decision to terminate DACA. District Courts in California, New York, and the District of Columbia ruled in favor of the plaintiffs. The government then appealed the case to the Second, Ninth, and D.C. Circuits.

Some definitions that are important in understanding the case are first, the Administrative Procedures Act (APA). 5 U.S. Code § 551 outlines the purpose of the Administrative Procedures Act which governs the process of how government agencies create, develop, and issue regulation (5 U.S. Code § 551). Agencies have to meet certain requirements and follow certain processes in order for policy implementation to be valid. Second, is the meaning of arbitrary and capricious. The arbitrary or capricious test is a legal standard of review used by judges to assess the actions of administrative agencies (Anderson). Actions are considered arbitrary and capricious if the Court decides they are random, unreasonable, unsupported, or unpredictable, among other things.

Claims

In order to understand the decision of the Court, one must look at the claims from the plaintiff and the respondent. The plaintiffs argued that the decision to terminate DACA violated the Administrative Procedures Act (APA). Specifically, they noted that it was arbitrary and capricious and infringed upon the “equal protection guarantees of the Fifth Amendment's Due Process Clause” (591 US _ 2020). The respondents refuted these claims by stating that DAPA and DACA “violated the APA’s notice and comment requirement, the Immigration and Nationality Act (INA), and the Executive’s duty under the Take Care Clause of the Constitution” (591 US _ 2020). Considering both arguments the Court ruled that Acting Secretary Duke’s decision violated the APA but did not infringe on equal protection guarantees and that the rescission must be annulled. In making their decision the Court evaluated three questions: 1) are the APA claims reviewable? 2) Is the revision arbitrary and capricious in violation of the APA? 3) have the plaintiffs stated an equal protection claim?

Whether APA Claims are Reviewable

The Court has the power of judicial review over agency actions under *Abbott Laboratories v. Gardner* (1967) unless it’s shown that the agency has discretion by law as explained in 5 U. S. C. §701(a)(2). In another case, *Heckler v. Chaney* (1985), the Court held that this narrow exception includes an agency's decision not to institute an enforcement action” (470 U. S. 821, 831–832). Respondents argued that DACA falls under this category and was equivalent to the decision in *Chaney*. The Court disagreed with this classification and ultimately ruled that the rescission of DACA was an action that allowed for judicial review. Respondents brought forth two jurisdictional provisions to bar review, however the Court ruled that neither apply. The Court has full authority to rule on APA claims.

Whether Claims are Arbitrary and Capricious

This Court decided that the government's decision to terminate DACA met the criteria of the arbitrary and capricious test for two reasons.

First, DACA consists of two key proponents: the benefits that an alien receives and the forbearance of removal, meaning while DHS legally has the right to deport an undocumented immigrant, they act with forbearance and allow the undocumented immigrant to stay under certain circumstances. While Secretary Neilsen considered the legality of the benefits offered to DACA recipients in depth, she did not address the forbearance policy "at the heart of DACA" (591 US _ 2020). Without explanation or reasoning from Duke, the Court was forced to rely on a previous memo explaining the reasoning to terminate DACA. The Court found that this memo was also insufficient and unclear when addressing the forbearance issue.

Second, Secretary Duke did not offer reasoning for whether there was a legitimate reliance interest on the DACA program. The respondent must consider that the termination of long standing policies "en.gender serious reliance interests that must be taken into account" (Encino Motorcars, LLC v. Navarro). In this case, Duke needed to consider any negative effects on the population which relies on the DACA program. Respondents argued that they did not need to consider this aspect because DACA recipients did not have a reliance interest on the program due to the benefits being allocated in only two year increments. It is clear that DACA recipients do rely heavily on the program having "enrolled in degree programs, embarked on careers, started businesses, purchased homes, and even married and had children, all in reliance" on the DACA program (591 US _ 2020). The Court ruled that by overlooking these two aspects the government's actions were arbitrary and capricious in their decision to terminate the program.

Whether It Violated the Equal Protection Clause

While the previous questions dealt with largely legal and procedural issues, this question of whether or not the decision to terminate DACA violated the equal protection guarantees of the Fifth Amendment relies on political ideology and morality. When examining this question the justices concluded that it did not violate the clause. This has much to do with where the justices fall on the political spectrum and whether they were willing to concede a civil rights violation to a minority population; the majority of the justices were not.

In order to claim that there was a Fifth Amendment violation, respondents had to show that there was an invidious discriminatory purpose. This is defined as “treating a class of persons unequally in a manner that is malicious, hostile, or damaging” (Cornell Law School). To show that this exists respondents must fulfill three elements: 1) evidence of a disparate impact on a particular group, 2) departures from the normal procedure, and 3) contemporary statements by members of the decision making body.

Respondents replied to these requirements by stating that the rescission would leave a disparate impact on the Latino population from Mexico who make up 78% of DACA recipients. DACA is granted on a two year basis and as different individuals’ benefits expire they would be forced to leave the country on a rolling timeline. Researchers believe that in a six month span over 232,000 individuals’ DACA status are set to expire, the large majority of whom would be deported to Mexico (Gamboia). The Court, however, did not believe that even though the Latino population was the majority, they were the ones most affected.

Respondents tackled the second element by pointing to the usual history and decision making process behind the rescission to qualify it as a departure from normal procedure.

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However, the Court did not find the procedure unusual. This decision seemed counterintuitive considering they did rule that the rescission violated the APA which focuses mainly on proper and regular procedure.

Finally, respondents used the statements of President Trump pre and post election as evidence of contemporary statements of the decision making body: the body responsible for rescinding DACA. Statements such as “when Mexico sends its people, they’re not sending their best. They’re bringing drugs, they’re bringing crime, they’re rapists,” and “you wouldn’t believe how bad these people are. These aren’t people. These are animals” were used in court to demonstrate hostility towards Mexican immigrants by President Trump (Lee). The Court overlooked these statements, claiming that President Trump was not a member of the decision making body; only statements from members of the DHS would qualify and neither Duke nor Neilsen said anything of this nature.

While the plurality agreed with Justice Roberts that a Fifth Amendment violation did not occur, Justice Sotomayor issued a separate dissenting opinion claiming that the equal protection guarantee of the Fifth Amendment was infringed upon in the decision to terminate DACA. She stated that the respondents only needed to suggest a reasonable inference of invidious discrimination and that they should be allowed to further develop their claims as proceedings continue. She went further in saying that the Court overlooked and dismissed important arguments by the respondents starting with the racist statements made by former President Trump. She stated, “They bear on unlawful migration from Mexico—a key.stone of President Trump’s campaign and a policy priority of his administration—and, according to respondents, were an animating force behind the rescission of DACA” (591 US _ 2020).

These statements directly relate to the disproportionate impact on Latino DACA recipients. Justice Sotomayor points to the correlation between Trump's statements and the population affected by the recession. Clearly, the group that Trump made his comments about is the same group disproportionately affected by this order. This correlation was clear to Justice Sotomayor because of her political stance, left leaning, and connection to the subject, being a Latina woman.

Finally, she stated that "DHS terminated DACA without, as the plurality acknowledges, considering important aspects of the termination," and that this quick decision suggests that something more was at play when making the decision to terminate DACA other than its legality (591 US _ 2020). Decision making factors may have included racial motivators or the immigration policy of the Trump administration. These factors would be enough to show a departure from normal procedure.

The Future

The future of DACA stands uncertain. For now, this Supreme Court decision was a win for DACA recipients and for existing United States immigration policies. However, Justice Roberts made it clear that the government is free to attempt another rescission as long as they follow the requirements of the APA. Roberts stated, "We do not decide whether DACA or its rescission are sound policies," implying that the court neither agrees or disagrees with the policy of the DACA rescission; only providing an opinion on "whether the agency complied with the procedural requirement[s]" (591 US _ 2020).

Roberts posed two questions to the respondents. First, had DHS and the Trump administration considered if every part of DACA needed to be withdrawn? Or if it is necessary to deport people post termination? Second, had DHS and the Trump administration considered the reliance on immigrant lives?

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Respondents are free to answer these questions and proceed with the rescission once again. This part of the opinion offers less hope for the future of DACA. However, with the new change of administrations it is unlikely that DACA's status will be brought to court again in the near future.

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JURIS MENTEM

*The Chinese Detention
System Under The Eyes
of International Law*

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THE CHINESE DETENTION SYSTEM UNDER THE EYES OF INTERNATIONAL LAW

BY ALYSSA BASCH

China's negligence of international and humanitarian rights has been a source of international debate for years. As the definition of national sovereignty and the prioritization of safety is diminished, the question remains as to whether China has violated international law to a point that requires intervention. With China's adoption of the Exit and Entry Administration Law, individuals can be "barred from exit if they are part of an ongoing civil or criminal matter, or if their departure would impact national security." While the law serves to address national security concerns, it includes an elusive catchall provision that allows authorities to impose exit bans on individuals in "other circumstances in which exit from China is not allowed in accordance with laws or administrative regulations." Reasons vary widely from tangled divorce proceedings, faulty business deals, or simply displeasing influential members of Chinese society (The State Council of the PRC). By creating the sweeping provision under its Exit and Entry Administration Law, China may be committing heinous human rights crimes through the unlawful detention of innocent individuals. Furthermore, the legality of such detentions may be called into question, as Chinese authorities utilize severe punishment tactics in order to gather information.

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Recent Cases

In 2017, Chinese officials sanctioned exit bans against US citizen Daniel Hsu and his wife, Jodie Chen, despite their lack of criminal records. Hsu was then placed in solitary confinement for six months under strict surveillance and conditions that could qualify as torture under international conventions. While Hsu remained innocent, Chinese officials used the Exit and Entry Administration Law as a coercive tactic to force the return of Hsu's father, Xu Weiming, who was accused of embezzling 447,874 yuan (\$63,000 today) from the Shanghai Anhui Yuan Industrial Corporation in the 1990s (Kinetz). Despite Hsu certifying that he was studying at the University of San Francisco during the time of his father's tenure, Hsu was deemed a co-conspirator in the case and was detained for nearly six months.

Likewise, American siblings, Victor and Cynthia Liu, and their mother, Sandra Han, entered China in 2018 to visit their ailing grandfather only to become trapped by the government. Within several days of entry, police officers detained Sandra and escorted her to a detention center commonly referred to as a black jail. Despite being told that they were not under investigation or charged with a crime, the children were barred from leaving China for months. By keeping the family hostage, Chinese officials hoped to lure the siblings' father, Liu Changming, to return to China and face criminal charges. As a former executive at a state-owned bank, Changming was accused of aiding and abetting in a \$1.4 billion fraud case. Aware that the authorities were closing in, Liu fled China in 2007. Although the children claimed that their father severed ties with the family in 2012, Chinese authorities continued to hold them hostage under the Exit and Entry Administration Law (Kellogg).

Examining China's Exit Bans

Under the reign of President Xi Jinping, exit bans are used to cleanse the Communist Party of corrupt officials and suppress criticism against authorities. The lack of proper safeguards and procedures make it easier to impose exit bans against activists and human rights lawyers, usually on undefined and baseless national security grounds. A study conducted by Foreign Policy found that of the cases collected relating to barred exit from China, 69 consisted of authorities citing the “[jeopardization of] national security” as justification, despite providing no evidence to support such a claim (Kellogg and Sile). The same study found that in 62 cases, the government failed to give any reason whatsoever as to why an exit ban had been imposed, leaving the individuals to guess at what they might have done to warrant such a significant limitation on their basic freedoms (Kellogg and Sile).

Furthermore, China's manipulation of the Exit and Entry Administration Law may pose a direct violation to international law based on an individual's right to travel, as justified with the case of Victor and Cynthia Liu. Both the Universal Declaration of Human Rights (UDHR) and Article 12 of the International Covenant on Civil and Political Rights (IC.CPR) claim that all persons have the right to liberty of movement and the freedom to choose their residence (Kellogg and Sile). Article 12 also provides the exception that the right to leave can be subject to restrictions if the limitations are “provided by law, are necessary to protect national security, public order... or the rights and freedoms of others' (Kellogg and Sile). While China often classifies its exit bans under the protection of national security, the UN Human Rights Committee states that any restrictions on an individual's Article 12 rights must be both necessary and proportional to achieve the state's goals, and must be based on “clear legal grounds” (Kellogg and Sile). The ban against Victor and Cynthia holds no legal basis, as both children were young during their

father's tenure at the banking center, and demonstrated that they held no knowledge of their father's dealings or current whereabouts. Without any clear evidence to detain Victor and Cynthia, China's use of the Exit and Entry Administration Law proves illegitimate and unwarranted under the eyes of international law.

Legality of Chinese Detention Centers

Complementary to China's Exit and Entry Administration Law, discreet and inhumane jailing systems known as black jails are employed to force confessions out of detainees. Black jails have been a product of Chinese society since 2003, in which large numbers of citizens are held for up to several months in secret (Human Rights Watch). Government officials and their agents routinely abduct people off the streets of Beijing and other Chinese cities, strip them of their possessions, and imprison them—depriving innocent people of their liberties and rights (Human Rights Watch). The Human Rights Watch discovered that petitioners seeking redress for government abuses such as police torture to illegal land grabs are more likely to become thrown in black jails (Human Rights Watch). Despite the legality of the Chinese petitioning system, local authorities take discrete actions to prevent petitions out of fear of losing their status. When local officials fail to take decisive action upon prompting of petitioners, penalties are levied against the officials. According to one legal expert in Beijing, "Petitioners are bad for [local] government officials [because] officials' positions, career prospects and salaries are all linked to the number of petitioners coming to Beijing, so they want to control them" (Human Rights Watch).

To prevent their reputations from becoming harmed, local officials often employ plainclothes thugs known as retrievers, or *jiefang renyuan*, to locate and abduct petitioners in Beijing and other cities (Human Rights Watch). Experienced

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retrievers are paid up to US \$250 per petitioner retrieved. Petitioners are then taken to highly guarded facilities, usually hidden in plain sight such as hostels or medical centers (Human Rights Watch). Officials will then hire guards and pay the facility for use of the establishment. A part of the facility will consist of holding cells, equipped with iron bars and doors, and will sometimes have a fenced-in outdoor area. Also located in the facility are offices for guards and retrievers, and occasionally an area where newly-arrived inmates will be stripped of their ID cards, cell phones, etc. (Human Rights Watch).

Black jails are not only used for illegal purposes but often entail excessive force and inhumane torture. A former black jail detainee during a Human Rights Interview recalls, “I asked why they were detaining me, and as a group [the guards] came in and punched and kicked me and said they wanted to kill me. I loudly cried for help and they stopped, but from then on, I didn’t dare [risk another beating]” (Human Rights Watch).

Daniel Hsu, as previously mentioned, faced prolonged solitary confinement within a black jail and 24-hour surveillance designed to cause psychological suffering (Kinetz). Even after being told in December 2017 that his father had made a sworn statement declaring Hsu innocent, Hsu was denied release after his mother sent word that his father’s health was poor and he would have to postpone his return to China (Kinetz). It wasn’t until February 11, 2018--around the end of Hsu’s six month detention--that he was finally released from Chinese custody.

These forms of torture directly contradict Article 5 from the Universal Declaration of Human Rights which states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (United Nations). The detainees were deprived of their basic human rights and subjected to cruel and unusual punishment despite abiding by the legality of petitioning.

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China also served as a signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which defines torture as “intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person...” (United Nations). Daniel Hsu, like other foreigners prohibited from exiting China, was used as leverage to convince his father to return to China and face the penalty. Yet, as defined by the Convention, coercion serves as a direct form of torture which China has explicitly opposed.

Concluding Remarks

Despite calls for intervention, little has been done to change the trajectory of China’s coercive politics. As defined by international lawyers, intervention is the “unsolicited interference by one state in the affairs of another; nonintervention is the avoidance of such interference” (American Foreign Relations). Interventionist policies include military, economic, or political pressures which force states to act in a manner deemed sufficient by the intervening state under the jurisdiction of the United Nations (American Foreign Relations).

Intervening in China remains a gray area. On one hand, China is notorious for its numerous human rights abuses, most notably being the Uighur crisis. After WWII, the law of intervention and protection of sovereignty became much more prominent. Article 2 of the United Nations Charter required all members to refrain “...in their international relations from the threat or use of force against the territorial integrity or political independence of any State” (Picard). In 1970 the General Assembly adopted the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among

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States in Accordance with the Charter of the United Nations, which stated:

“No State or group of states has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state....

...Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another state, or interfere in civil strife in another state” (Picard).

China’s actions may pose a direct violation against human rights, however its grievances towards petitioners may not be serious enough to the international community to incite intervention. As an economic powerhouse, China also plays a key role in uplifting many economies and providing necessities even to the United States. If states were to intervene, they may lose a very powerful trading partner essential to their economic development. The United Nations has already urged China to halt its detention practices, claiming they “may amount to incommunicado detention in secret places, putting detainees at a high risk of torture or ill-treatment” (Associated Press). However, only time will tell if the international community views China’s illegal actions as a means to intervene and prevent further human rights abuses.

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JURIS MENTEM

*Corporate Obligations
In The 21st Century*

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CORPORATE OBLIGATIONS IN THE 21ST CENTURY

BY RUSSELL SULLIVAN

Who a company has obligations to from a legal perspective can greatly impact how corporate enterprises are viewed and are operated. For the purpose of this paper, stakeholders refer to all parties that are affected by a business's actions. This includes but is not necessarily limited to a company's employees, community, and customers whereas a company's shareholders are the people who stand to directly benefit through profit as a result of the company's success. While American and European legal traditions that benefit shareholders may foster innovation and competition, legal theories forcing corporations to act on behalf of stakeholders may be necessary to implement on a national level as the United States faces growing challenges surrounding labor practices, climate change, and income inequality.

Background

During the era of industrialization in the 19th century, companies exercised very little interest for any entity outside their shareholders. Western powerhouses reached economic heights never seen before by revolutionizing the way they produce and sell goods. New technologies led to more innovative practices, while the creation of the division of labor meant goods could be mass-produced quickly and cheaply. European empires stretched into Asia, Africa, and the Americas in order to gain access to the goods and resources that would fuel this boom. Never before had a culture been driven so thoroughly by consumerism, and never before had corporations been able to

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compete on such a large regional, national, or at times even global level. The 19th century brought into existence the age of capitalism, with countries rushing to create profit at all costs, and is the beginning of a movement that lasts to this day.

However, this age of capitalism and imperialism proved to be an unhealthy one. Expansion of empires and trade influence was carried out with little regard to the indigenous people who already lived there. Europe systematically cut down and altered their once plentiful forests in favor of industrialization and profit. Factories polluted the environment with smoke and pollutants that deteriorated the air quality. In these same factories, labor conditions were atrocious.

Slowly, these conditions began to get better, but only because companies were prevented from continuing to carry out policies that solely benefit the shareholders. Decolonization and independence movements began to weaken the ties of imperialism that allow one country and their businesses to dominate another. The United Kingdom's Clean Air Act of 1956 finally addressed pollution in the cities. Minimum wage laws began in 1898 in Australia and New Zealand and later adopted by Great Britain in 1909 began to address labor exploitation concerns. All of these improvements came about not by the willingness of corporations, but because the framework of the legal system changed. While ethical businesses exist to some degree, as a whole, corporations are insufficiently checked on their own. Government laws and regulations have helped curb companies from being able to achieve their desire for maximum profit and instead ensure fair treatment of their workers and community while minimizing exploitation. Many of these issues could have been avoided in the first place if corporations considered the consequences for their employees, customers, and community to be of equal or greater importance as their bottom line.

Philosophical Basis

Opponents of my position would point to laissez-faire economics. They would argue that the market will regulate itself through consumer pressure and the “invisible hand of the market.” If labor conditions or environmental standards matter in the production of a product, the company’s consumer base will pressure it to do so, and thus these changes are primarily to the benefit of the shareholders for the sake of profit and ultimately benefit the stakeholder because of the extent that it maximizes profit.

This theory originated with philosopher and economist Adam Smith in his *Wealth of Nations* in 1776. Smith supports free-market capitalism and believes that the market will regulate itself and individuals should be allowed to act purely out of their own self-interest. Thus, companies should likewise prioritize their profit as it is within their own self-interest. However, Evan Smith recognizes the necessity of regulation. Specifically looking at the example of taxation, Smith argues both that taxes are a necessity to support the good of society and that the burden of taxation should fall onto the richest class in order to support the poor. Smith additionally recognizes that while he sees self-interest alone as sufficient enough regulation in theory, in practicality the wealthiest people will collude with each other to maximize profit and disadvantage the poor, as evident with the poor labor practices at the time. This leads Smith to accept and recognize both the need of companies to act in the interest of their stakeholders, but also the need for the government to take a lead in making sure these interests are upheld. The nature of large corporations to act in their self-interest, which while is beneficial to the economy as a whole, must be checked to ensure the fair treatment of workers, the environment, and other stakeholders in the company.

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To illustrate this point, James Madison in Federalist 51 says that “if men were angels, no government would be necessary” (Madison 43). Madison understands man is motivated by self-interest and craves power, and therefore he emphasizes the need for government power to be checked both by the people and other branches of government. This same concept should apply to business. If men were angels, business would be able to regulate itself. However, instead business will try to amass power over the market, even at the expense of cutting corners or taking advantage of their stakeholders. Therefore, unregulated business is bad for the same reasons that unregulated government is bad. Businesses can't be trusted to act in the best interest of their stakeholders, no more than the government can be trusted to act in the best interests of its citizens. Both need checks and regulations to ensure that they take into account a multitude of interests beyond their own. Implementing the stakeholder theory into the legal system would constitute such a check as it would make corporations have more of a legal responsibility to their community and employees before their shareholders that stand to profit from the exploitation of these stakeholders.

Legal Applicability in the United States

In the US, however, the legal system has historically supported, even mandated, the shareholder model of business. In 1919, Henry Ford wanted to lower the price of the Model T and increase the pay for his workers, a move that would have hurt shareholders, but ultimately greatly benefit stakeholders. In a Michigan Supreme Court Case, *Dodge v Ford Motor Co* (1919), the court ruled, however, that Ford must operate in the interests of their shareholders as opposed to their stakeholders, denying Ford's ability to decrease the company's bottom line. Ford acted in good conscience for the general good of society by taking his stakeholders into account, and yet this wish was denied. In this case, the government not only failed to encourage companies to

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benefit their stakeholders but outright prevented it from being a company's goal.

Still, subsequent cases in other state courts rejected the Dodge v Ford standard. For example, in the Illinois Supreme Court case *Shlensky vs Wrigley* (1968), the court ruled that the Chicago Cubs didn't have to put up lights even though it would increase their revenue under the rationale that the owner believed baseball is a "daytime sport" and the lights would negatively disrupt the fan experience and the neighborhood surrounding it. However, this doesn't discount the legal supremacy of shareholder theory in the United States legal system because in the decision part of the court's rationale was that the Cubs' owner has a basis to believe that putting up lights in the stadium wouldn't increase the profitability of the team and could potentially even harm property values.

Courts have shied away from Dodge v Ford since the ruling, but whether shareholder theory is mandated isn't so much the problem as it's incentivized, especially in the United States. Twenty-seven states have the right to work laws that limit the power of unions, and since 1980 there has been an increasing gap between corporate lobbying and labor lobbying money spent in congress. Combined with the *Citizens United* ruling in 2010, corporations have been given free rein to spend money to influence the legal system however they please in order to ensure that their boards only have to take into account those who stand to profit directly into consideration.

Alternative Options

One immediate path that can be taken to move away from shareholder primacy is introducing mandates that stakeholders be placed on company boards and have full voting rights. For example, the company board could appoint a representative from a community where it does the majority of

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its business or a representative from a labor union. These representatives would then have the power to influence and shape a corporation's direction alongside the shareholders who are traditionally given a voice. This would ultimately help preserve some of the principles of competition that advocates of shareholder theory argue for, while also ensuring that the greater needs of the people the corporation impacts are given better representation in company decision making. Additionally, union membership should be further encouraged or even required. Despite union membership being in decline for decades, union members on average make up to 19% more than non-union employees, and strong unions provide additional means for workers and stakeholders to negotiate and pressure corporations into providing safer and higher-paying conditions that will ultimately benefit stakeholders as a whole. While this is not a dramatic overhaul or abolishment of the current system, these are reforms that can be taken immediately and would have immediate impact on the wellbeing of workers, customers, and members of the community at-large.

Conclusion

Corporations in the United States legal system have been given free-range to virtually disregard stakeholders in their decision-making profit. Whether the obligation is de facto through their enormous lobbying power or de jure through case law, the prevailing theory of shareholder supremacy is the hurting workers and communities they serve. Proponents of shareholder theory argue that it fosters competition and thus innovation, but with ongoing issues surrounding workers' rights, the environment, and increasing wealth disparity, profit maximization in the name of innovation can't be the only or even primary institutionalized obligation corporations have.

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JURIS MENTEM

*An Analysis of the
Future Of Digital
Information Privacy
and Data Security*

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AN ANALYSIS OF THE FUTURE OF DIGITAL INFORMATION PRIVACY AND DATA SECURITY LAW IN A POST-COVID UNITED STATES

BY MADELEINE LIBERO

Background

From the early 1980s, the digital revolution created a world where personal information could be shared and stored across the internet. With a constitution unequipped to handle the modern complexities that users faced when trying to protect their personal information and data across the internet, a series of laws at both the state and federal level came into effect to address the fast-growing concerns over protecting private information and data while using the internet. The federal framework surrounding digital information and data privacy, are lacking, as the existence of a comprehensive single law is instead comprised of various laws including: the US Privacy Act of 1974, the Health Insurance Portability and Accountability Act (HIPAA), the Child Online Privacy Protection Act (COPPA), and the Gramm-Leach Bliley Act (GLBA). These federal laws put broad guidelines on digital information and data privacy which outline the legality of the use, distribution, and collection of personal healthcare information, the information of minors, as well as financial information. The broadness of these federal laws leave much up to the states discretion. However, while the existence of strong digital privacy and personal data security laws are lacking in many states, California is the state with the strongest legal framework surrounding digital privacy. The

Californian Consumer Privacy Act (CCPA) grants internet users the right to know what personal information is being collected about them, whether their personal information is being disclosed or sold and to whom, the right to deny the sale of personal information, the right to access their personal information, and the right to equal service, even if exercising privacy rights (California Consumer Privacy Act, 1798.100 - 1798.199.100).

Introduction

The Covid-19 pandemic that plagued not only the United States, but the entire world starting in early 2020 posed new challenges to information privacy. The pandemic brought forth many new policies, such as contact-tracing, that while necessary, if not handled correctly would pose significant risk to the information privacy rights of individuals in the United States. Government data collection of citizens became increasingly essential to health officials; however, the United States previously existing federal and state information privacy laws specifically surrounding user's data security were not set up to handle a situation such as this. The pandemic in addition has created an increasingly digital environment where receiving an education, going to work, or going to a doctor's appointment has gone digital. This new digital environment is expected to continue outside of the pandemic as businesses are learning how to optimize their benefits by going virtual. The now unavoidable virtual environment has more and more users entering their sensitive, identifying information online, calling for an evolution of standard federal and state information privacy and data security laws. The Covid-19 pandemic presents a similar dilemma as to what was seen post-9/11: how do you protect the privacy of individuals during a public safety crisis, and what will this mean for the future of digital privacy law?

Digital Privacy During the Pandemic

Undoubtedly, the pandemic created an environment where now more than ever, people were using the internet, thus leaving behind their digital breadcrumbs. Not only had healthcare providers and educators gone digital, but even the most basic day to day tasks moved online to accommodate fears of going into public spaces to avoid the virus. Grocery shopping as well as catching up with friends and family who became separated from each other, moved online via internet based applications. With more people online, heightened data collection naturally followed, sparking a new and more wide-spread concern for how personal information and data was being handled and safeguarded on the internet. The public proved to be reluctant to subject their personal data to contact-tracing apps, which proved to be an issue. While app-based contact tracing could be more effective at stopping the spread than manual contact-tracing, the reluctance to use these apps stemmed from widespread distrust that United States digital privacy laws were sufficient enough to safeguard their data. Policy makers were confronted with a situation where data collection and use was necessary in light of a growing public health and safety crisis but retaining the privacy of individuals was important as well.

In May 2020, proposed bills from both the Republican and Democratic parties made an attempt to address the digital privacy and data security laws in a pandemic-stricken United States. From the republican side was the COVID-19 Consumer Data Protection Act. The intention of this bill was to protect sensitive, identifying user information from being collected or transferred by businesses regulated by the FTC, without explicit consent, and for the purpose of contact-tracing (Larose, 2020). This bill included that FTC regulated business must fully inform how the data will be handled as well as how long it will be retained for. In addition, if users consent to having their data

handled, collected, or transferred, after the pandemic, the data must be de-identified. This bill aimed at filling the gaps in the weak existing information privacy laws. As of now, there is no federal law in the United States requiring consumer consent before collecting data and it is important to note that this bill, while aiming at closing that gap in regards to contact tracing data, did not apply to circumstances outside the specificity of contact-tracing. This bill ultimately died. On the Democratic side, the Public Health Emergency Privacy Act (PHEPA) was proposed. The proposed bill aimed at creating regulation that would address the widespread mistrust for the handling of identifiable user data which had manifested into the reluctance to use internet-based methods of contact-tracing. Similar to the COVID-19 Consumer Data Protection Act, the PHEPA requires explicit consent and full disclosure of how, and for how long data will be used and stored (S.3749). However, PHEPA would cover a broader area of what type of data could be collected including: genetic data, biological samples and biometrics, as well as behavioral information (S.3749). PHEPA also differs from the COVID-19 Consumer Data Protection Act as it would cover government entities as well as private businesses. This bill ultimately died as well, leaving the United States to navigate a public health crisis without pandemic-specific laws put in place, which would not only protect users, but raise their confidence in knowing their sensitive information would be safeguarded, even while using internet-based contact-tracing services. The pandemic has definitely exposed how the flaws in the United States digital information and data privacy laws have created a mass distrust in the security of their data, something that would come to haunt the United States once citizens were hesitant and reluctant to use internet-based softwares that could stop the spread of a deadly disease.

The Future of Digital Information Privacy

The pandemic ultimately exposed the flaws and inherent weaknesses in the United State's current set of digital information privacy and data security laws. The proposed bills came too little too late, regulations surrounding highly sensitive identifying information should have already been federally established. Because of this, the American people did not show widespread support for using internet-based contact-tracing applications which had the potential to slow the spread of the virus significantly. However, with the American people more online than ever, and both parties acknowledging the gaps in the legal framework for digital privacy, traction has been gained which can give digital privacy law more of a platform than ever. However, it is hard to see a post-covid federal law surrounding information and data privacy coming into place for one main reason; in the United States, technology companies are essential for the economy and therefore have substantial influence on policy outcomes. It is in the best interest for many of the tech giants to have weaker priva.cy laws, rather than a strong federal privacy law, as their companies rely heavily on the collection and selling of user information. However, a more likely outcome could be the widespread adoption of state laws that follow the framework of the CCPA. With digital information and data security now more than ever being such an important and relevant topic, it is likely that states will learn from the pandemic and adopt the framework of the CCPA for their own state. As the saying goes, "as California goes, so goes the nation".

Conclusion

Undoubtedly, the United States existing framework surrounding digital information privacy is weak, and considerably behind other nations who have stronger, centralized digital privacy laws. The patchwork of federal and state laws leave gaps which have contributed to large scale user data

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scandals. With some states having strong data privacy and security policies, and some having almost none at all, the American peoples' confidence in the security of their sensitive information has diminished. The Covid-19 pandemic only illuminated this distrust. When attempting to handle a public health and safety crisis while balancing the sensitive information of millions of Americans, the flaws in the digital privacy laws became truly apparent. The existing laws lacked the specificity and the comprehensivity to make the American people feel as if their data was in good hands. This resulted in the reluctance of many Americans towards using internet-based contact tracing, something which had the potential to slow the virus considerably. On a brighter side, with the amount of Americans online and increasingly concerned about their data, as well as the issue gaining platform in both the democratic and republican parties, digital information privacy may have gained the traction it needed in order for the current laws to begin to change. While a single all-encompassing, strong federal law is unlikely due to the influence of tech giants on policy-making, it is plausible to expect to see more states begin to adopt legal frameworks consistent with the CCPA.

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*Law In A Post-COVID
United States: The Roots
Of Modern Originalism
In Legal Positivism*

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THE ROOTS OF MODERN ORIGINALISM IN LEGAL POSITIVISM

BY PAUL RELYEA

In mainstream commentary on jurisprudence, particularly pertaining to the Supreme Court, the two most prominent and competing philosophies are “Originalism,” and “Living Constitutionalism.” Both are born out of an extensive legal history and tradition dating back to the drafting of the Constitution. On the Supreme Court, recent and self-described “originalists” include Justice Amy Coney Barrett, Justice Neil Gorsuch, Justice Clarence Thomas, Justice Antonin Scalia, and Justice Samuel Alito, who brands himself a “practical originalist.” Despite its prominence in mainstream political conversations about the Supreme Court, Originalism’s origins are seldom explored.

The stage for Originalism as we know it today was set during the Warren Court of the 1960s. Following the decision *Brown vs. Board of Education* (1954), advocates of the process-restraint approach, which urges judges and justices to limit their restraint, called out the increasing disparity between the understood meaning of the text of the Constitution and what the Court claimed it said. The Warren Court was, in essence, exercising a level of judicial authority that concerned those who prefer a deference to positivist, or written sources of law. So, Originalism as we know it today, was the response to this perception of the Court embracing new activism that aided liberals politically and parted ways with its previous process-restraint school of thought.

The schism between Originalism and Living Constitutionalism is clear. The former relies heavily on positivist ideas and formulations, as well as the contextual understanding of the document in the founding era. The latter believes that Originalism is far from all encompassing and at times inadequate, favoring a document that changes meaning with society. Positivism, the reliance on textual sources of law, and a key component of Originalism, centers around several key principles. These are the source thesis, traceability thesis, social thesis, and separation thesis. The first thesis asserts that the law stems back to an “identifiable and authoritative source” (Purcell, 1460). The second asserts that for any rule or law to be sound, it must trace to an “authoritative legal ‘source’” (Purcell, 1460). The third asserts that the law is only truly so if the community at large accepts it and obeys it (Purcell, 1460). The fourth creates a bifurcation between what is legal and what is moral, not suggesting that they are unrelated but that they are distinct from one another (Purcell, 1460).

While Originalism relies on most, if not all these principles, they were not always present in positivism in American law. In the beginning, the aim of the colonial settlers was “clear and written legal rules” (Purcell, 1462). Tension arose as to whether to respect a more common law tradition or stick to what was textually present.

Legal Positivism’s Foundations at the Nation’s Inception

In the founding era, and through the late nineteenth century, the “‘intent’ and ‘purpose’ of the framers, the ratifiers, and the Constitution” were often referenced (O’Neill, 15). These arguments additionally made appearances in the Federalist papers. Federalist 78 describes the Constitution as a statute and asserts that understanding and applying its original intent were technically standard (O’Neill, 16). Though members of the founding generation disagreed about the role of politics and the

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meaning of the document, they never strayed from believing that the goal was to assert its original intent. In *Marbury vs. Madison*, the court used the argument from *Federalist 78*, limiting the legislature from infringing on a coequal branch (O'Neill, 18).

The balance of natural law beliefs and concepts with what was written came to a head when the issue of slavery. The Civil War ultimately forced a positivist remedy and realignment to adequately resolve the issue (Purcell, 1461). Following the passage of the 14th Amendment, a whole new sphere of conflict between positive sources of law and moral ones was created (Purcell, 1463). Over the period between the founding and the passage of the fourteenth amendment, the Court's level of authority had been consistently challenged, but it rose in prominence throughout this period (Purcell, 14654).

Changes in Scenery

Notably, the court began dealing more frequently with questions regarding the separation of powers, and the relationships between the branches. During this time, the concept of a malleable Constitution came about. Woodrow Wilson wrote in the mid-1880s that “the growth of the nation and the consequent development of the governmental system would snap under a constitution which could not adapt itself to the new conditions of an advancing society” (Purcell, 1465). This is the inception, in the progressive era, of the “living constitution.”

A few years prior, two previous works of John Austin's were republished, providing a view of legal positivism (Purcell, 1466). These ideas failed to gain prominence prior to the Civil War, but that was far from the case after the war (Purcell, 1466). However, political developments of this time, tied to democratic growth and expansion, lead to somewhat of a rejection of positivism (Purcell, 1468). As legal problems developed leading

up to the turn of the century and the Great Depression, the Langdellian and Holmesian strains of legal thought emerged from Austin's. The former became associated with values of liberty and a free-market economy, while the latter became associated with progressivism and subsequently the New Deal (Purcell, 1475). The Langdellian view was very methodologically based, whereas Holmesian jurisprudence was very much a sociological and realist approach (Purcell, 1475). Again, political, and progressive developments of the day led to a depiction of the more mechanical view as less than and out-of-touch. Despite that depiction though, Progressive jurists deployed tenets of legal positivism to counteract the infusion of extra constitutional ideas into "conservative" decision-making. This was a careful invocation though, as progressives now had to mold positivist theses to fit the idea of a changing and adapting Constitution (Purcell, 1478). These changes in course were evident in the thinking of the New Deal Court, which revered the legislator as the ultimate maker of laws and encouraged the judicial branch to stay in its own lane (Purcell, 1478). The justices appointed by Roosevelt then, respected several of the core principles of positivism.

However, World War II and the Cold War vastly altered the ideas and attitudes surrounding positivist ideas (Purcell, 1479). It eventually was thought to be undemocratic in some ways and democratic in others. In sum, the connection between positivism and democracy was severed by this period, leading some to believe its separative nature was blatantly a threat (Purcell, 1480).

In the 1950s, the Thayer-Holmes doctrine of self-restraint emerged, sweeping across the law school scene (O'Neill, 44). This school of thought was very much about emphasizing process and the rule of law. However, deference to these concepts did not indicate a consideration of original intent, that is a development that re-emerges later, with modern Originalism.

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This culminated in the publication of *The Concept of Law* in 1961. In this work, by Hart, legal philosophy was considered as separate from public view and political circumstances (Purcell, 1485). However, Ronald Dworkin was a notable critic of such a severance and revered the political values of the New Deal and discerning law by “knowable” moral standards.

A Positivist Response to the Warren Court: Modern Originalism

As a result of this tidal wave of cases, positivism re-emerged in the 1970s and 1980s. It is during this period where Originalism, as we understand it today, finds its bearings, embracing values of separation of powers, republican government, and the supremacy of the law (O’Neill, 68). This was partially a result of Raoul Berger’s early conception of originalism focused on historical intent (O’Neill, 117). Much of his thought had to do with the separation of powers and respecting federalism. His jurisprudential argument for originalism came in *Government by the Judiciary*, which solidified the trend of conservative politics favoring a positivist and originalist view (O’Neill, 117). The largest jurisprudential critiques of the Warren Court were that the court had been substituting what was the law for their personal values or those changing with society. This, to them, was illegitimate (Purcell, 1487). As a result, alternatives began to emerge in prominent political circles.

President Reagan’s attorney general announced a sharp departure on his part from those decisions declaring it would be the policy of the administration to press for a “Jurisprudence of Original Intention” (Purcell, 1489). The cementation of the idea furthered its widespread dissemination by individuals such as Edwin Meese and Yale Law Professor Robert Bork (Purcell, 1489). It was a full-throat condemnation of a jurisprudential left that had allegedly left the Constitution far behind. During the

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Reagan Presidency, political liberals mounted a massive attack on Rehnquist prior to his appointment and confirmation, and it felt in many ways as Originalism itself was put on trial when the Senate rejected Richard Bourke's nomination (O'Neill, 170). The confirmation of Antonin Scalia, now revered as a pioneer of Originalism on the Supreme Court, made it through the Senate in cooler political tides, following attacks on a popular President's former nominee, and probably provided his confirmation would have little sway on the overall makeup of the court itself (O'Neill, 170). Bork, of course, never made it through the Senate to the Supreme Court as the political left lambasted him as anti-liberal and willing to roll back Civil Rights (O'Neill, 171). Despite their best efforts though, the confirmation of Antonin Scalia to the highest court in the land cemented the presence of a jurisprudential philosophy still present today. From the drafting of the Constitution forward, positivist interpretations of the law have occupied both the right and the left, but in the contemporary era, the bulk of their influence is on the legal right, which has introduced with Originalism a key contextual framework, the drafting itself.

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