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The Legal Research Club is proud to present the

CAPSTONE JOURNAL
OF LAW AND PUBLIC POLICY

The mission of the Legal Research Club is to continue the tradition of excellence at The University of Alabama by Equipping undergraduates with the skills necessary to succeed in research, Expanding perspectives of legal issues in both Alabama and the nation, and Excelling in the publication of the Capstone Journal of Law and Public Policy.
On behalf of the Legal Research Club, we would like to express our most sincere gratitude to the faculty, staff, and students who made this publication possible.

First, we would like to thank Tyler Roberts and the University of Alabama pre-law community, who have given us generous support and guidance since our club’s founding in 2017. We also extend our deepest gratitude to our club’s incredible advisor, Dr. Allen Linken, who has helped us turn the LRC’s mission, vision, and goals into reality.

We would also like to thank the University of Alabama College of Arts and Sciences’ administration, especially Associate Dean Lisa Dorr and Assistant Dean and Director of Student Affairs John Wingard for their help in securing the funding necessary for this first print edition of the Capstone Journal of Law and Public Policy. We are lucky to collaborate with such an innovative and supportive administration, and we thank you all for working with us to ensure our club’s continued success and legacy on campus.

We also extend our gratitude to the pre-law advisors around the southeast who shared our club’s mission and work with their students. We are proud to publish a journal that highlights quality undergraduate research from distinguished institutions around the region. With their help, we look forward to expanding the Capstone Journal’s presence beyond our campus and establishing the Capstone Journal as the premier undergraduate law review in the southeast.

To our executive team, our editorial staff, and our contributors: words cannot express how thankful and inspired we are by your dedication, hard work, patience, and resilience throughout this year. We are so fortunate to work with some of the most brilliant, driven,
and creative minds on campus who will achieve academic success and leave a lasting legal legacy.

We hope you find this publication informative and inspiring. We have thoroughly enjoyed putting it together. It has been an honor to serve as LRC President, and I cannot wait to witness how this Club continues to redefine what it means to be an undergraduate pre-law student at the University of Alabama.

With gratitude,

Sophia Warner
President, Legal Research Club, 2019
Dear Reader,

On behalf of the 2019 Editorial Board and the Legal Research Club, I am proud to introduce this second edition of the Capstone Journal of Law and Public Policy.

This club and its journal were founded two years ago. Since then we have published an online journal, started a legal blog, grown to be one of the University’s largest pre-law clubs, hired and trained two classes of editors, and given the Alabama pre-law community many valuable opportunities to engage with legal research before law school. All of this is possible because of our dedicated team.

From the start, the LRC and the CJLPP have been by students and for students. Our primary goal is to give pre-law students opportunities to gain experience in legal research and writing before law school. While we strive to publish the best undergraduate legal research available, our focus is always on our members.

The students that make the publication of the Journal possible are among the most impressive at the University. They regularly earn high honors for their academic achievements, many are members of the University’s most prestigious organizations, and some will be attending top law schools next year. We are proud and grateful that they choose to invest their time in our club.

We are humbled to publish articles from our own University of Alabama, but also from Samford University, Vanderbilt University, and the University of Florida. The students whose work is featured here have already demonstrated their outstanding academic ability and we are proud to publish their work. We would like to extend our deepest gratitude to the pre-law communities throughout the region who have chosen to take part in this project.
The editorial staff invested deeply in each of these articles. After being selected from a large and competitive applicant pool at the beginning of last semester, each editor attended multiple trainings and dedicated a significant amount of time to learning and editing. Each editor has gained skills that will make them excellent law students and we are proud to have had a chance to work with them.

The executive board of the LRC also gave hours of hard work to this Journal by soliciting articles, talking with programs at other schools and our own, securing funding, and many other things. This Journal could not have been published without their support.

Now, here’s what you can expect in this edition of the Journal.

Nick Gillan opens our volume with an exploration of the laws which currently govern space and highlights some ways in which they fall short in his article Issues in Space Law: Proposing a New Treaty. He uses this survey and perceptive arguments to propose some features that a new space treaty should have.

In Narrowly Tailored, Jessica Pearce discusses Grutter v. Bollinger, highlighting the background and context of the case and diving into how and why the judges made their decisions. This piece explores the past, present, and future of affirmative action jurisprudence and offers a fresh look at a landmark decision.

Lynsey Smith examines the impacts of reversal rates on court decisions in her article Is Reaching New Heights a New Low? Judges consider a variety of factors when deciding cases, but do the politics of the reviewing court affect their decisions? Smith dives into this question and provides an enlightening look at the court system and some of the most prominent Justices along the way.

Modern Debtors’ Prisons by Lauren Engle reveals how the modern justice system perpetuates class differences by jailing some people simply for an inability to pay. Engle’s unique perspective culminates in a practical plan for reform.
Britton Williams makes the case for immediate action to protect against climate change in *An Imperative to Act*. This synthesis of climate change information strengthens his call for action through the innovative and practical solutions he proposes.

Do a state’s views on abortion affect its willingness to pass surrogacy laws? Olivia Brick seeks to answer this question through a new analysis of data in her article *State Surrogacy Laws in Light of Abortion Views*.

In *The Necessity of Childcare Reform*, Xaviera Webb argues that we need to implement better child care programs at a federal level. This will help protect the country’s most vulnerable populations and help ensure a brighter future for every child.

Kate Weaver explores legal issues regarding the detainment of suspected undocumented immigrants in her piece *Unreasonable Suspicion, Unreasonable Seizures*. This timely article argues for a new process for investigating citizenship cases.

Carolyn Adams rounds out our journal with her article *The Modern Syrian Refugee Crisis*. Offering sensible solutions that extend compassion to refugees while respecting citizens’ rights, Adams explores immigration law and policy in a perceptive way.

I hope that you enjoy reading these articles and consider becoming involved with the Legal Research Club or the Capstone Journal in the future. We are always looking for talented undergraduates to submit papers, become editors, or join our executive board.

Best regards,

Spencer Pennington
Editor in Chief, Capstone Journal, 2019
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Submissions for the next edition of the journal will open soon! Send an email to capstonejournal@gmail.com to inquire about our submissions process. Submissions are open to all.

The Capstone Commentary is always accepting blog posts for the state’s foremost undergraduate legal blog. Please send inquiries or pieces for publication to LRCatUA@gmail.com.

If you are a University of Alabama pre-law student, consider joining the Legal Research Club. We offer a variety of opportunities to engage with legal research and writing before law school, including research workshops, writing clinics, and a writing competition. Members of the LRC are also eligible to apply for positions with the LRC, Capstone Journal, or Capstone Commentary.

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We are excited to work with you!
ISSUES IN SPACE LAW: PROPOSING A NEW TREATY

Nick Gillan

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INTRODUCTION

The sun, our nearest star and one of an estimated one hundred billion in the Milky Way,¹ is around 93 million miles from Earth.² The Milky Way itself is only one in roughly ten billion galaxies.³

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² How Big is Our Universe?, NASA (July 15, 2004), https://www.nasa.gov/audience/foreducators/5-8/features/F_How_Big_is_Our_Universe.html.
These are only estimates of the observable universe. The actual universe is believed to be many times larger.\(^4\)

The vastness and usefulness of outer space make its exploration a necessary part of humanity’s future. For millennia, humanity’s natural curiosity was fed with terrestrial observation. However, this came to an end in 1957 with the successful orbit of the first artificial satellite, Sputnik I, by the Soviet Union.\(^5\) Since then, Earth’s nations—and more recently, private companies—have launched countless spacefaring vessels and have landed spacecrafts on numerous celestial bodies. In 2018, the National Aeronautics and Space Administration (NASA) was budgeted nearly twenty-one billion dollars, an increase of more than seven billion dollars from twenty years earlier.\(^6\) It is clear that human beings have a deep desire to explore the cosmos. What is unclear is what rules persons, both individual and corporate, will be expected to follow in outer space. With the future of space travel quickly approaching, it will soon be necessary to define these rules. This paper will explore the uncertainty and propose a framework for the creation of a new treaty to govern outer space.

Part I will discuss both the present importance of outer space through the use of satellites and its future potential, with a focus on natural resources. This part will focus on issues that have already arisen and controversies we should expect in the near future. Part II will analyze the relevant law that currently exists in outer space as

\(^4\) Id.


well as the gaps and limitations of this body of law. This discussion will span both space law and other sources of law that could be applied to outer space. Lastly, Part III will propose a new set of terms that should be included in a new treaty that will modernize outer space law.

I. THE IMPORTANCE AND VALUE OF OUTER SPACE

A. Satellite Technology

Today, satellite technology makes communication across continents possible.\(^7\) It also allows us to study the solar system and our own climate.\(^8\) Satellites provide some cell phone coverage and provide the backbone for the Global Positioning System.\(^9\) In addition, high-ranking United States military officials have recently called for more satellites equipped with weapons and protection for these satellites.\(^10\) With satellites playing both routine and protective roles in the everyday life of the modern person, we must protect the cooperative use of satellites and create a framework for punishing their misuse.

The prominent and varied uses of satellites bring risks of hacking, signal jamming, and other kinds of interference. Some minor instances of interference have occurred with two United States satellites being interfered with at least four times in 2007 and


\(^8\) Id.

\(^9\) Id.

The cyber-attack was traced to a Norwegian control station run by Kongsberg Satellite Services, according to U.S. officials. However, the station denies any interfering activities and General Robert Keller, commander of the U.S. Strategic Command, has admitted that the military does not have sufficient evidence to determine who was behind the attack. According to the Pentagon, the Chinese military supports the use of satellite-disabling techniques and poses a threat to U.S. satellites. Even if satellite cyber-attacks are not yet common, the fact of the capability for such attacks makes it worthwhile to consider current space law and ways to improve it.

B. Natural Resources

Currently, there are around a half million known asteroids in Earth’s solar system alone. Some of these asteroids contain significant amounts of ice. The discovery of water on celestial bodies is important for the future of manned spaceflight, as

11 John Leyden, Inside the Mysterious US Satellite Hacking Case, The Register (Nov. 21, 2011),

12 Id.

13 Id.

14 Id.


asteroids could function as roadside stops for thirsty astronauts on long journeys.\textsuperscript{17}

These bits of space rock also contain other natural resources. According to one report, even a single small asteroid could contain twice the amount of rare platinum-group metals that have been harvested on Earth.\textsuperscript{18} In addition, iron, nickel, gold, and other metals are likely to be found on the surface and subsurface of near-Earth asteroids.\textsuperscript{19} With this enormous financial potential, the first successful space miners will become wealthy virtually overnight while simultaneously wreaking havoc on the current mineral markets on Earth.

In pursuit of such promising riches, many private companies have entered the field to become the first to extract natural resources from space, each with a unique approach. One Japanese company, ispace, has placed its bets on the moon to become the first celestial body to be mined and has made creating lightweight rovers its priority.\textsuperscript{20} On the other side of the globe, Planetary Resources has tapped deep pockets, with investors who include Google executive Larry Page and Virgin Group founder Richard Branson.\textsuperscript{21} The company launched a satellite in January 2018 designed to detect

\textsuperscript{17} Id.
\textsuperscript{18} Shane D. Ross, \textit{Near-Earth Asteroid Mining} \textbf{6} (2006).
\textsuperscript{19} Id.
\textsuperscript{21} Id.
While the executives of companies developing space mining technology almost universally admit that it will likely take at least a decade for it to become profitable, it is clear that the industry is becoming increasingly attractive to both engineers and venture capitalists.

II. CURRENT OUTER SPACE LAW AND ITS LIMITATIONS

A. The Declaration of Legal Principles

The first resolution adopted by the United Nations General Assembly that pertained to outer space was the unanimously adopted Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, hereinafter referred to as the “Outer Space Declaration.”\(^{23}\) Agreed to in 1963, six years after the launch of Sputnik I, the resolution outlined the principles that the General Assembly believed should be followed in future exploration of outer space. The following are principles that are within the scope of this paper: outer space activity should be conducted “for the benefit and in the interests of all mankind” (Principle 1);\(^{24}\) outer space and its bodies are “not subject to national appropriation by means of sovereignty, by means of use or occupation, or by any other means” (Principle 3);\(^{25}\) “states bear international responsibility for national activities” (Principle 5);\(^{26}\)


\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.
and launching states are “internationally liable for damage to a foreign State” or its persons (Principle 9).\textsuperscript{27}

It is important to note that, according to a memorandum issued by the United Nations Office of Legal Affairs in 1962, a “declaration’ is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.” However, a declaration is not binding on Member States of the General Assembly in the way that States Parties are bound to U.N. treaties and conventions.\textsuperscript{28} In effect, a declaration issued by the United Nations acts as a mere international recommendation, leaving the multilateral organization without a way to enforce the principles behind it.

\textbf{B. The Outer Space Treaty}

The 1963 Outer Space Declaration was followed up with the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, hereinafter referred to as the “Outer Space Treaty,” in 1967. With eighty-four States Parties,\textsuperscript{29} the treaty has been ratified by every country with a major space program.\textsuperscript{30} The treaty uses much of the same language as the Outer Space Declaration did four years prior. Similar to Principle 1 of the

\textsuperscript{27} Id.

\textsuperscript{28} E/CN.4/t.610, Use of the Terms “Declaration” and “Recommendation”, Memorandum by the Office of Legal Affairs, (April 2, 1962)


declaration, Article I of the Outer Space Treaty requires that the exploration of outer space be “carried out for the benefit and in the interests of all countries.” Article II prohibits the national appropriation of outer space and Article VI assigns international responsibility for each ratifying country’s space activities, regardless of whether the activities are “carried on by governmental agencies or by non-governmental entities.” As with the declaration, Article VII of the treaty establishes liability internationally for any State Party that launches an object into space. According to the article, the state that “launches or procures the launching of an object into outer space” is liable for damage to another State Party or to “its natural or juridical persons...on Earth, in air space or in outer space.”

While the Outer Space Treaty does feature egalitarian-sounding language such as the affirmation that outer space is the “province of all mankind” (Article I), precise language is not one of the treaty’s strong points. The requirement that space exploration be carried out “for the benefit and in the interests of all countries” (Article I) leaves room for competing interpretations. Hypothetically, if a single mined asteroid could double the market supply of platinum on Earth, the mining of such an asteroid would send the price of platinum into rapid decline. While this price decrease may please the producers of catalytic converters and jewelry, as well as the consumers of these items, this phenomenon would not benefit every country equally and would clearly harm some countries more than others. Almost seventy percent of the world’s platinum is produced

by South Africa, so it faces substantial harm from space mining and may claim it violates the Outer Space Treaty. However, other State Parties to the treaty may counter that preventing Earth from running dry of any non-renewable resource through space mining would be in the best interest of the world as a whole and should be allowed even though specific instances of mining activities may hurt certain countries.

Another debate on the wording of the Outer Space Treaty has arisen from the Article II requirement that outer space is “not subject to national appropriation.” The treaty itself does not define the term “national appropriation.” It is clear that governments on Earth cannot claim territory on the moon or other celestial bodies, but whether private, non-governmental resources are allowed to appropriate outer space is not specified. This creates another instance of differing interpretations. One is that the United Nations or a similar multilateral entity would need to facilitate any appropriation in outer space. Another view is that non-government individuals or corporations could appropriate resources in outer space as long as they are not affiliated with any government on Earth. One note to be made about the treaty that could support the first interpretation is that Article VI binds non-governmental entities to their home governments by requiring “authorization and continuing supervision” from the government on Earth. Still, whether this connection makes non-governmental entities agents of their governments remains disputed.

32 Id.
34 Id.
The article also prohibits claims of sovereignty in outer space. Without the protection of a sovereign power, some believe that any claim of private property in space is unenforceable. In response, some legal analysts have supported the creation of an independent committee under the umbrella of the United Nations or another multilateral organization with the authority to distribute space resources. Others have supported private property claims for asteroids, which could be treated as chattel property, but not large celestial bodies, which would constitute real property.

While the Outer Space Treaty was the first treaty concerned with outer space and, to this day, is largely viewed as the most influential document in the field, it is full of potential points of disagreement and is not equipped to deal with issues that we may face in the very near future. While it made sense in 1967 to avoid language that was too specific, as space travel was still in its infancy, the world is now much more aware of where space travel is headed and the issues that are likely to emerge from it.

C. The Liability Convention

Although the Outer Space Treaty was both the first and last sweeping international space treaty that gained widespread ratification, there were three other treaties with a narrower scope

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36 Id.
37 Id.
39 Id.
that were widely adopted between 1968 and 1976. Among them was the Convention on International Liability for Damage Caused by Space Objects of 1972, hereinafter referred to as the “Liability Convention.” This treaty expanded on the concept of international liability for damage of space objects that was the focus of Article VII of the Outer Space Treaty. According to Article II of the Liability Convention, a state that “launches or procures the launch of a space object” is absolutely liable for damage done to the surface of the Earth or aircraft. Article III of the Liability Convention creates liability for damage done by one space object to another in space, but only “if the damage is due to its fault or the fault of persons for whom it is responsible.” However, the concept of “fault” is not defined in any article of the Liability Convention.

**D. The Moon Agreement**

The most recent attempt at a major space treaty was in 1979 with the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, hereinafter referred to as the “Moon Agreement.” The only United Nations space treaty to fail to gain broad acceptance, the agreement only has sixteen parties to date. The failure of the Moon Agreement could potentially be traced to Article 11, which outlines restrictions on property and the exploitation of natural resources. The article establishes the natural resources of outer space as the “common heritage of mankind” and requires the States Parties to the treaty “to establish an international

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40 Convention on International Liability for Damage Caused by Space Objects art. I, Mar. 29, 1972,
41 Id. at art. II
42 Id. at art. III
43 Viets, supra note 7.
regime…to govern the exploitation of the natural resources” of celestial bodies.\textsuperscript{44} The article requires that the international regime enforce “an equitable sharing by all States Parties [of] the benefits derived from those resources” found in outer space.\textsuperscript{45} It is likely that the strict requirement of an equal sharing of resources in the Moon Agreement dissuaded countries with promising futures in space exploration from ratifying the treaty.

\textbf{E. The Space Resource Exploration and Utilization Act of 2015}

The United States Commercial Space Launch Competitiveness Act was signed into law on November 25, 2015.\textsuperscript{46} Title IV of this law, known as the Space Resource Exploration and Utilization Act, hereinafter referred to as the “SREU Act,”\textsuperscript{47} offered the United States government’s interpretation of the current body of space law. Chapter 513 of the law specifically allows any United States citizen to “possess, own, transport, use, and sell” any asteroid resource or space resource obtained through commercial enterprise.\textsuperscript{48} The signing of this bill into law has proven to be somewhat controversial, with some arguing that the United States does not have the power to assert legislation in an area beyond its borders while others believe the wording of the law falls under the

\textsuperscript{44} Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979.

\textsuperscript{45} Id.


\textsuperscript{47} Id.

\textsuperscript{48} Id.
ambiguities of the Outer Space Treaty.\textsuperscript{49} The SREU Act is simply one of the first in what is sure to be many legislative attempts to address the gaps in the current outer space law.

III. A New Treaty

I have shown that the international community is in need of a new outer space treaty. While countries have been able to keep relative peace in outer space thus far in history, this is unlikely to continue forever with the present scarce and ambiguous legal framework. In this section, I propose four new principles that would improve and bring clarity to current space law.

\begin{itemize}
  \item[A.] Punitive Damages for Intentional or Reckless Tortious Acts
\end{itemize}

The Liability Convention rightfully created a strict liability standard for any damage done by a space object to the Earth’s surface or an aircraft mid-flight. It also assigned liability based on fault for damage done by one space object to another. However, the convention failed to address the possibility of intentional damage or recklessness in outer space. If an activity, such as satellite hacking, is intentionally damaging to a spacecraft, the country of residence of the hacker should be held liable and subject to punitive damages. This principle is in line with Article VI of the Outer Space Treaty, which requires States Parties to “bear international responsibility for national activities in outer space.” By holding each country liable for hacking done by its residents, there is an incentive to deter, police, and prosecute this kind of behavior.

This is important both because of the reliance of the modern world on satellites and because of the large cost of putting satellites into space. Even though it is not necessarily the government’s fault that one of their residents is committing an international tort, it should be their responsibility, not the international community’s, to apprehend those within their jurisdiction. Under this rule, governments would be incentivized to track down hackers in order to recover the damages they were forced to pay.

In addition to punitive damages for intentional space torts, the payment of punitive damages should also be required in the case of recklessness. The standard of what constitutes recklessness should be flexible, based on reasonableness and foreseeability. Only true experts in aerospace engineering and spaceflight should be given control of spacefaring vessels. This rule would ensure that national governments fulfill their duty of “authorization and continuing supervision” of non-governmental entities in outer space, which is required by Article VI of the Outer Space Treaty. The governments of the world, if faced with the threat of punitive damages, would be incentivized to create strong requirements for those working in the space industry.

B. Criminalization of Seizure or Intentional Destruction

In a similar spirit to the requirement of punitive damages outlined above, countries should also be required to outlaw, under threat of serious criminal penalties, any intentional destruction of spacecraft, whether in person or through cyberspace. This proposal is grounded in the 1970 U.N. Convention for the Suppression of Unlawful Seizure of Aircraft, which requires severe penalties for hijacking and requires that the country where the hijacker is found
prosecute said hijacker if they are not extradited.\textsuperscript{50} This convention, which has been adopted in 182 countries, should be expanded to outer space. Among other benefits, a rule criminalizing “spacejacking” would all but guarantee that the hacking of outer space vessels does not become a tool of new age warfare.

\textbf{C. A Required Contribution to Exploration}

The next proposed term for a new outer space treaty would be a required contribution to space exploration. This minimum contribution would be a specified percentage of gross domestic product and would ideally increase every year to adjust for both inflation and the increasing importance of outer space exploration. This proposed contribution could be made in a variety of different ways. It could be spent on a government-funded space agency such as the National Aeronautics and Space Administration in the United States or the China National Space Administration. Otherwise, the contribution could also be spent to subsidize private space companies or to create joint ventures with other countries. One requirement attached to this contribution is that it must be earmarked for non-military use. As with the Outer Space Treaty, any new treaty should also prioritize peace and cooperation between countries. With the United States currently far ahead of every other country in terms of money spent on space, the inclusion of this requirement in the treaty would hopefully foster closer diplomatic relationships between countries while quickly increasing the amount that is spent worldwide on space exploration. In addition, this requirement should be written to prevent burdening struggling countries. One option is to use a ranking system such as the Fragile

\textsuperscript{50} Convention for the Suppression of Unlawful Seizure of Aircraft art. 7, Dec. 16, 1970.
States Index to determine which states should not be required to pay for any given year.51

D. The Distribution of Resources

Lastly, a new space treaty should include the general framework for a resource distribution system. This system would include the creation of a multilateral organization to supervise resource extraction and distribution. While the organization would not directly be mining, it would keep track of where each country’s space contribution is being spent and how much mining each country is doing. After a certain amount of resources mined, all additional resources would enter a common pool and would be distributed by the percentage of funding per capita that each state is contributing to space exploration. This would incentivize countries to invest more than their minimum required contribution while allowing countries without established space mining companies to reap benefits, given they are contributing their fair share. Allowing each country to keep a maximum amount without handing it over to the multilateral organization would give the countries that risked early investment in space mining a well-deserved payoff while preventing inequality between nations to run unchecked.

NARROWLY TAILORED: 
GRUTTER V. BOLLINGER AND AFFIRMATIVE ACTION IN EDUCATION 

Jessica Pearce 

INTRODUCTION 

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INTRODUCTION 

The case of Grutter v. Bollinger began with Professor Carl Cohen. As a faculty member at the University of Michigan Ann Arbor and a long-time American Civil Liberties Union activist, Professor Cohen took a special interest in race issues and discrimination.¹ His interest prompted him to investigate the consideration of race in college admissions programs, particularly at the University of Michigan.² Under the state of Michigan’s Freedom of Information Act, he requested admissions documents from the 

University of Michigan Law School (hereinafter referred to as “Law School”) and the Undergraduate College of Literature, Science, and the Arts (LSA).\(^3\) He found the admissions documents shocking because they contained proof that minorities, such as blacks and Hispanics, had high rates of admission into both the Law School and LSA despite having low grades and test scores.\(^4\) His discovery was more shocking when compared with the rates of admission for whites and Asians. In fact, a significant amount of white and Asian applicants with better credentials than accepted minority applicants were denied admission.\(^5\) The issues uncovered by Professor Cohen in the documents become further apparent when closely analyzing the Law School’s race-conscious admission process.

To conduct a statistical analysis of the Law School’s admissions program, Professor Cohen obtained admissions charts that separated applicants by race.\(^6\) Within these charts, different cells showed what percentage of applicants were admitted at each level of LSAT score and undergraduate GPA.\(^7\) In certain cells, the admission rate for white applicants was around two to three percent while the admission rate for black applicants was as high as one hundred percent.\(^8\)

Professor Cohen’s research attracted attention from many, including a nonprofit public interest law firm known as the Center for Individual Rights.\(^9\) The firm reached out to white applicants rejected by the Law School and LSA in order to pursue lawsuits, which would be grounded in the claim that they had been

\(^{3}\) Shea, \textit{supra} note 1, at 46
\(^{4}\) \textit{Id.}
\(^{5}\) \textit{Id.}
\(^{6}\) Cohen, \textit{supra} note 2, at 32.
\(^{7}\) \textit{Id.}
\(^{8}\) \textit{Id.}
\(^{9}\) Shea, \textit{supra} note 1, at 46.
unlawfully discriminated against on the basis of their race. Among the horde of rejected white applicants recruited by the Center were Jennifer Gratz, Patrick Hamacher, and Barbara Grutter. Gratz and Hamacher, who were rejected from LSA, would become plaintiffs in *Gratz v. Bollinger*. Grutter, who was denied admission to the Law School, would become a plaintiff in a separate case, *Grutter v. Bollinger*.

From its origin in Professor Cohen’s office in Ann Arbor, Michigan, *Grutter* would find its way to the highest court of the United States. The nine Justices of the Supreme Court would look to both the country’s long history of race-related cases and the United States Constitution in forming their ruling. The divisive five to four decision issued by the Court would do little to settle the issue of affirmative action. Rather, it renewed judicial and legislative debate about achieving diversity in education by sparking new laws and cases regarding race-based admissions.

Part I of this Article will track Grutter’s case through the federal legal system, from its start in the U.S. District Court for the Eastern District of Michigan to the Supreme Court of the United States. Part II will discuss the ruling made by the U.S. Supreme Court, with an analysis of the precedent and rationale the court relied on in its decision. Part III will explore the legacy of *Grutter*, emphasizing its influence on subsequent affirmative action cases and the nation’s response to the ruling.

I. THROUGH THE APPEALS CHAIN

*Grutter v. Bollinger* began in December of 1997 when Barbara Grutter filed suit in the Eastern District of Michigan. Section A of this part will summarize the case’s path through the district court
and the Sixth Circuit Court of Appeals. Section B will cover the outside parties that either submitted *amicus* briefs or otherwise tried to influence the case once it was taken up by the Supreme Court. Section C will outline the arguments made by the attorneys before the Supreme Court.

### A. The Lower Courts

In 1996, Grutter applied for admission to the Law School and was initially placed on a waitlist before her application was rejected in June 1997.\(^\text{12}\) Prompted by Professor Cohen’s discovery of unlawful discrimination taking place at the Law School, Grutter filed suit in the U.S. District Court for the Eastern District of Michigan on December 3, 1997.\(^\text{13}\) Counsel for Grutter argued that the Law School’s admissions process amounted to discrimination on the basis of race. They claimed that this discrimination would violate both the Fourteenth Amendment’s Equal Protection Clause, which affords all individuals equal protection under the law, and Title VI of the 1964 Civil Rights Act, which prohibits federally funded institutions from discrimination on the basis of race.\(^\text{14}\)

The plaintiff’s claims were countered by the defendants: former Law School dean Lee Bollinger, current Law School dean Jeffrey Lehman, Law School admissions director Dennis Shields, the regents of the University, and the Law School itself. The defendants admitted that the Law School noted an applicant’s race in its admissions decisions; however, they claimed race was not used as a “trump card” and was merely one factor considered out of many.\(^\text{15}\)

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\(^{14}\) Shea, *supra* note 1, at 46.

\(^{15}\) Id. at 836.
However, the defendants also contended that the Law School would be devastated if it could not consider race in admitting applicants.\textsuperscript{16} Professor Cohen was unimpressed by this argument because it contained an apparent contradiction: if the Law School would be devastated by the elimination of racial preferences in admissions, then race appeared to be a major factor, not a minor one.\textsuperscript{17} Moreover, the defendants justified the Law School’s consideration of race by arguing that the state had a compelling interest in creating a diverse student body.\textsuperscript{18} The defendants hoped to prove that using race as an admissions factor was an acceptable method to attain the educational benefits associated with diversity.

Noting the arguments of the plaintiff and the defendants, the District Court ruled in favor of Grutter and found that the Law School’s use of race as a factor in admissions was unconstitutional in light of the Equal Protection Clause and violated Title VI of the 1964 Civil Rights Act.\textsuperscript{19} Judge Bernard Friedman remarked in his findings of fact that the Law School’s admission policy was “practically indistinguishable from a quota.”\textsuperscript{20}

The defendants in \textit{Grutter} appealed to the U.S. Sixth Circuit Court of Appeals. \textit{Grutter}’s sister case, \textit{Gratz}, was appealed to the same court. The Sixth Circuit Court would be reviewing two similar cases with two different decisions made by the lower courts. In \textit{Gratz}, the District Court had concluded that the University of Michigan’s admissions policy for admitting applicants to LSA was constitutional, opposite of the ruling on \textit{Grutter}.\textsuperscript{21}

\textsuperscript{16} Cohen, \textit{supra} note 2, at 33.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} \textit{Grutter}, \textit{supra} note 12, at 872.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} Cohen, \textit{supra} note 2, at 33.
\textsuperscript{21} \textit{Affirmative Action Fast Facts}, \textit{supra} note 13.
Though the differences in the conclusions of *Gratz* and *Grutter* are particularly important, other differences between the two cases are worth noting as well. The College of Literature, Science, and the Arts received around five times as many applications each year as the Law School. They also considered a wider variety of factors in an applicant’s file such as personal essays, interests, and achievements, whereas the Law School primarily based decisions on LSAT scores and GPA. Lastly, the scale and the complexity of the LSA admissions process dictated the use of a point system, which was not utilized by the Law School. More specifically, LSA determined admissions through a 150-point selection index, which allowed the University to rank applicants by awarding them points for having different elements in their application. In contrast, the Law School only sought to attain a critical mass of minority students of ten to twelve percent, as it disclosed during the district court trial. These fundamental differences between the two cases may have led to the lower courts drawing opposite conclusions.

Despite some differences, the cases were largely similar. The main similarity was that the level of academic credentials of black and Hispanic applicants to LSA and the Law School were much lower than those of white and Asian applicants. Keeping in mind the similarities and differences between *Gratz* and *Grutter*, the Sixth Circuit Court moved forward with both cases.

The arguments in *Grutter* were made in December 2001 with the Law School and its officials acting as the appellant while

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23 *Id.*
24 *Id.*
25 *Id.*
26 Cohen, *supra* note 2, at 33.
Grutter became the appellee.\textsuperscript{28} The Law School maintained that its admissions policy was narrowly tailored to serve a compelling state interest.\textsuperscript{29} To bolster the Law School’s argument, several groups and individuals intervened in the case on behalf of the Law School. The forty-one individuals and three groups joining \textit{Grutter} argued that the Law School had another compelling interest in considering race as a part of the admissions process: remedying past discrimination.\textsuperscript{30} The Law School relied primarily on the diversity argument, but some of the groups intervening in the case cited the remedial argument in attempts to make the Law School’s claim stronger.

Although Grutter stuck to the same argument her side presented in the District Court, she did not win the case this time. The Sixth Circuit Court reversed and vacated the decision of the District Court, ruling in favor of the Law School.\textsuperscript{31} The court held that the Law School’s admission program was permissible.\textsuperscript{32} Chief Judge Boyce F. Martin, Jr., wrote the opinion in which he critiqued the District Court for not disputing the merits of diversity and concluded that striving to achieve student diversity was a compelling interest.\textsuperscript{33} Judge Danny J. Boggs, in a dissenting opinion, rejected the precedent cited by the Chief Judge and attacked the idea that diversity could justify racial selectivity.\textsuperscript{34} He then went so far as to accuse the Chief Judge of judicial malfeasance for rigging the decision to benefit the Law School.\textsuperscript{35}

\textsuperscript{28} \textit{Affirmative Action Fast Facts, supra} note 13.
\textsuperscript{29} \textit{Grutter v. Bollinger}, 288 F.3d 732, 735 (6\textsuperscript{th} Cir. 2002).
\textsuperscript{30} \textit{Id}.
\textsuperscript{31} \textit{Id.} at 752.
\textsuperscript{32} A. Lee Parks, Jr., \textit{Racial Diversity’s Effect on Education is a Myth}, \textit{CHRON. OF HIGHER EDUC.}, Mar. 23, 2003, at B11.
\textsuperscript{33} \textit{Grutter, supra} note 29, at 739.
\textsuperscript{34} \textit{Id}.
\textsuperscript{35} \textit{Id}.
The disagreement between the Sixth Circuit judges on the *Grutter* case was evident and showed how controversial the issue at hand was.

**B. Outside Influence**

Before the judges of the Sixth Circuit could debate over the same issue in *Gratz* and return a verdict for it, both *Grutter* and *Gratz* were brought to the U.S. Supreme Court.\(^{36}\)

When the other branches of government and the public realized *Grutter* and *Gratz* had reached the highest Court in the land, they began to get even more involved in the case. In January 2003, the executive branch became entangled in the controversy; President George W. Bush filed an *amicus* brief in the Court.\(^{37}\) The brief argued that LSA and the Law School could have achieved diversity with race-neutral policies.\(^{38}\) Two days prior to filing the brief, President Bush had spoken at the White House about the Michigan admissions policies and affirmative action programs.\(^{39}\) In his speech, the President remarked that the admissions policies were “divisive, unfair, and impossible to square with the Constitution.”\(^{40}\) He sided with Grutter and opted to strike down the admissions programs. The executive branch of government had become absorbed in the controversy.

The public was also eager to debate diversity and race considerations in the educational system. Some viewed the Law School’s application of race in admissions as plainly unconstitutional.\(^{41}\) Others simply wanted the issue of race-conscious

\(^{36}\) Parks, Jr., *supra* note 32, at B11.


\(^{39}\) \textit{Id.}

\(^{40}\) \textit{Id.}

\(^{41}\) Parks, Jr., *supra* note 32, at B11.
admissions and affirmative action to disappear. Peter Schuck, a professor at Yale Law, summarized this perspective:

There is a deep yearning in the public…that this issue sort of go away, so we don’t have to face the terrible trade-offs between the desire for proportional representation…and the vastly unequal levels of preparation and credentialing among different racial groups.\textsuperscript{42}

Groups like the Independent Women’s Forum, the Center for Equal Opportunity, and the American Civil Rights Institute joined forces to compel the Supreme Court to reverse the Sixth Circuit Court’s decision on behalf of Grutter.\textsuperscript{43} The brief filed by these groups stated, among other things, “If the door to discrimination is left ajar, universities will drive a truck through it.”\textsuperscript{44} They believed that if the Court were to side with the Law School and affirm the decision of the Sixth Circuit Court, universities would take advantage of the decision to excuse discriminatory admissions programs.

The reasoning of groups supporting Grutter was fundamentally wrong in the eyes of affirmative action advocates, who cited the educational benefits associated with diversity. Some referenced evidence and research showing the positive effects of diversity on students. Citing psychologists, they argued, “When people interact in unfamiliar environments, with unfamiliar people, they more fully engage their cognitive faculties; people learn differently when they leave their comfort zones.”\textsuperscript{45} Affirmative action supporters latched

\begin{itemize}
\item \textsuperscript{42} Grutter v. Bollinger, \textit{supra} note 38, at 2.
\item \textsuperscript{44} \textit{Id.}
\end{itemize}
on to this research and advocated for the Law School from afar.\textsuperscript{46} Not all supporters of the Law School kept their distance, though. The Coalition to Defend Affirmative Action & Integration and Fight for Equality By Any Means Necessary (BAMN), United for Equality and Affirmative Action, Law Students for Affirmative Action, and other organizations held press conferences on the courthouse steps to respond to the Court’s decision to hear \textit{Grutter}.\textsuperscript{47} They saw affirmative action programs as a means to integrate society: “Affirmative action plans are desegregation plans for higher education.”\textsuperscript{48} These groups filed \textit{amicus} briefs as well.

One group, BAMN, proved particularly helpful by intervening in \textit{Grutter}. This organization’s defense got to the core of Grutter’s claim that she was entitled to admission to the Law School.\textsuperscript{49} In the view of BAMN, Grutter believed that she was an entitled white woman. They also noted that the petitioner did not address discrimination against minorities and ignored the racial, class, and gender biases that universities often reinforce in admissions processes.\textsuperscript{50} Though BAMN largely supported the Law School, the group was not pleased with the Law School’s argument either. They were critical of the Law School for relying on LSAT scores in admissions because such reliance kept minorities from getting in even with special affirmative action programs.\textsuperscript{51} Nevertheless, for the most part, BAMN endorsed the Law School for considering race in admissions.

\textsuperscript{46} \textit{Id.} at 762.


\textsuperscript{48} \textit{Id.}


\textsuperscript{50} \textit{Id.} at 797.

\textsuperscript{51} \textit{Id.}
Another *amicus* brief on the side of the Law School is worth nothing. Walter Dellinger filed a brief for the Law School Admissions Council (LSAC). Dellinger was the former Solicitor General under President Clinton.\(^52\) In his brief, Dellinger stated that an abysmal amount of black students have good enough LSAT scores and GPAs to even rank among white and Asian applicants.\(^53\) Without considering race as a factor in admissions, the Law School would have “virtually no black students.”\(^54\) Dellinger’s argument echoed the concerns expressed by BAMN: that affirmative action was needed to counterbalance the fact that minorities, due to socioeconomic factors, had trouble achieving high credentials, which the Law School relied heavily on. These briefs were just two out of many briefs filed in *Gratz* and *Grutter*. By the time both cases were ready for oral argument before the Court, around two-thirds of the 81 *amicus* briefs filed supported the Law School and LSA.\(^55\) The large amount of *amicus* briefs shows the public was truly invested in the cases.

### C. The Arguments

On April 1, 2003, the U.S. Supreme Court heard oral arguments for *Gratz* and *Grutter*.\(^56\) Arguments for *Grutter* proceeded first. Attorney Kirk Kolbo, representing Grutter, started his oral argument by stressing that the Law School had violated Grutter’s rights by racially discriminating against her.\(^57\) At one point during Kolbo’s statements, Justice Sandra Day O’Connor asked whether he

\(^{52}\) Sander & Taylor, Jr., *supra* note 22, at ch. 13.

\(^{53}\) *Id.*

\(^{54}\) *Id.*


\(^{56}\) *Affirmative Action Fast Facts, supra* note 14.

believed that race could not be used at all as a factor in admissions.\textsuperscript{58} When Kolbo responded that race should not be a factor, he received backlash from Justice O’Connor, who stated, “You’re speaking in absolutes, and it’s not quite like that. I think we have given recognition to the use of race in a variety of settings.”\textsuperscript{59} The other justices joined in the questioning of Kolbo. Justice Anthony Kennedy asked whether universities should be concerned about minority enrollment levels, especially after years of underrepresentation.\textsuperscript{60} Kolbo responded in the negative, but added that it would become a problem if underrepresented races were not “participating fully in the fruits of our society… [but] racial preferences don’t address those problems.”\textsuperscript{61} In sum, Kolbo argued that Grutter was wrongly discriminated against by the Law School because race should not be considered as a factor in admissions.

Solicitor General Theodore Olson gave a few statements as well, backing up Kolbo as he argued the cause for the United States. Though the United States was not a party to the litigation, it was involved as an \textit{amicus curia} from the brief filed by President Bush. Solicitor General Olson called the Law School’s policies “a thinly disguised quota.”\textsuperscript{62} Justice Stephen Breyer interrupted, stating that the Law School’s goal was to break down stereotypes with diversity.\textsuperscript{63} The Solicitor General disagreed completely. He argued that the Law School was actually “using stereotypes… to break down stereotypes” and “using race as a surrogate for experience.”\textsuperscript{64} He went on to say that the U.S. disagreed with the approach that

\begin{footnotesize}
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\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id. at 3.}
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.}
\end{itemize}
\end{footnotesize}
race could be considered as a positive factor in the admissions process.\textsuperscript{65} The Solicitor General’s argument was similar if not the same as Kolbo’s argument. However, the Solicitor General presented the case from the perspective of the United States’ interests rather than Grutter’s.

Next, attorney Maureen Mahoney rose to argue on behalf of the Law School and its officials. Among the Law School’s officials was former dean Lee Bollinger. Mahoney’s argument would coincide with Bollinger’s opinion on the race issue:

Without a diverse study body and faculty, a university simply will be unable to achieve the highest levels of excellence in teaching, research and intellectual discovery.\textsuperscript{66}

Then argument for the Law School began. Mahoney, after receiving a question from Justice Kennedy about whether the admissions program was a quota, responded, “The law school’s program is nothing of the kind... It’s been a very flexible program.”\textsuperscript{67} Mahoney insisted that the Law School only strove for a critical mass of students and did not implement a quota system.\textsuperscript{68} Justice Antonin Scalia attacked the idea of having a critical mass. He said, “Once you use the term ‘critical mass,’ you’re into quota-land.”\textsuperscript{69} Prompted by Justice O’Connor, Mahoney remarked that the Law School’s policy was not permanent and would be removed when race “didn’t matter so much.”\textsuperscript{70} Overall, Mahoney’s argument avoided answering how a critical mass differed from a quota or points system. Her admission that the Law School’s affirmative

\textsuperscript{65} \textit{Id.}  
\textsuperscript{67} Jost, \textit{supra} note 55, at 3.  
\textsuperscript{68} Id.  
\textsuperscript{69} Id.  
\textsuperscript{70} Id.
action policy would not be in place forever did seem to improve her argument.

Once oral arguments ended, it was time for the Court to deliberate over *Grutter*. The main issue of the case was the constitutionality of the Law School’s consideration of race. The admissions process required admissions officers consider applicants’ academic ability, talents, experiences, and ability to improve campus diversity.\(^\text{71}\) For the Law School to be able to consider race in its admissions process, it had to pass strict scrutiny, the highest form of judicial review. Under strict scrutiny, the Law School’s admission policy should further a compelling state interest and be narrowly tailored to achieve that interest.\(^\text{72}\)

There were two possible arguments for the Law School to choose. The first involves remedying the past effects of racial discrimination. The remedial argument proposes that affirmative action programs ought to provide “a remedy to persons who themselves had been the victims of government racism in the past.”\(^\text{73}\) Since minorities had been so adversely discriminated in the past, the government and other public bodies, including universities, should compensate minorities for that past discrimination by giving them a leg up. Thus, universities would give slight preference to minority applicants to adjust for how they were discriminated in past years. This argument was the “only exceptional justification that the Court had clearly recognized” before *Grutter*.\(^\text{74}\) Yet, this argument was not foolproof.

Though the Court had given some leverage to this argument, it also “made clear that such permissible race-based remedial

\(^{71}\) *Grutter* v. *Bollinger*, *supra* note 38, at 3.

\(^{72}\) *Strict Scrutiny*, BLACK’S LAW DICTIONARY (7th ed. 1999).


\(^{74}\) *Id.*
programs are rare and very hard to structure.” 75 Race-based remedial programs were allowed but only if properly implemented and justified. Universities had to demonstrate specific past discrimination and narrowly craft a remedial plan to “perfectly fit the scope of that past discrimination” in order to use this argument effectively. 76 This strategy proved too difficult in most cases, so universities, including the Law School in Grutter, stayed away from the race-based remedial argument.

Rather than trying to satisfy strict scrutiny by declaring an interest in remedying past discrimination, universities could attempt to prove the state’s interest as striving for the benefits associated with diversity. Under the diversity argument, universities opted to defend race-conscious admissions programs “in terms of… creating a diverse learning environment that will benefit students in the present and the future.” 77 The Law School decided to use this argument to explain its interest in having a race-conscious admissions program.

But this argument has flaws. By declining “to justify affirmative action programs as remedies for discrimination,” the Law School allowed the opposing side to “claim a moral high ground.” 78 The diversity argument could give the petitioners a chance to present affirmative action as “an unfair racial spoils system in which minorities are rewarded despite academic deficiencies.” 79 The Law School took its chances with the diversity argument.

Grutter, argued that race should not be considered as a factor in admissions. Specifically, she alleged that the Law School’s admissions policy “involved the use of race as a potential admission

75 Id.
76 Id.
77 Id. at 12.
78 Brown-Nagin, supra note 49, at 795.
79 Id.
criterion and... allowed African-American, Latino and Native-American students to be admitted ahead of similarly or better qualified non-minority students.”

Her claims were rooted in the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Grutter’s argument, as Justice O’Connor voiced during oral arguments, was absolute and did not explicitly acknowledge whether an interest in furthering diversity allowed for the consideration of race in admissions. This is an apparent weakness in her argument. However, her argument had some merit. Individuals are ensured equal protection under the law, and the Law School’s deference to race might violate that right. It would be up to the Court to decide how weak or strong her argument was in light of the constitution.

On June 23, 2003, the Court returned its verdict on the Grutter case as well as Gratz. With a five to four vote, the Grutter Court wrote:

[we] approved the University of Michigan’s use of race to ensure that its law school enrolled a ‘critical mass’ of African Americans, Hispanics, and Native Americans because each applicant was reviewed individually, and the law school did not set explicit quotas for the number of minorities to be admitted.

Because the Law School sought a critical mass instead of using a points system or quota, the consideration of race as a factor was

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81 Id.
82 Jost, supra note 55, at 2.
84 Grutter v. Bollinger, supra note 38, at 1.
constitutional. Gratz, although nearly identical to Grutter, came out with a different ruling.

Since LSA utilized a points system for its admissions process, it was unlawfully considering race as a factor. Instead of ruling the same way in two similar cases, the Court upheld one and struck down the other. Some saw the Court’s decisions as a compromise, allowing one form of affirmative action to persist and the other to come to an end. It would seem that supporters of the Law School and affirmative action would be disappointed with such a compromise, yet many were pleased with the decision. To them, the Court had allowed universities to use “individualized race-conscious admissions procedures to promote the compelling government interest in diversity.” While universities could not have point systems, they could be race-conscious by having a targeted critical mass. The benefits associated with diversity were a compelling enough interest for a narrowly-tailored critical mass method to be used.

II. THE COURT’S RULING

The landmark decision in Grutter spawned six different opinions by the justices, each viewing the case in different ways. The majority opinion, written by Justice O’Connor, held that the admissions program violated neither the Fourteenth Amendment of the U.S. Constitution nor the 1964 Civil Rights Act. Section A will compare and contrast the unique opinions issued by the Court. Section B will analyze the seminal cases that offered precedent for the decision of the Court. Section C will define the relevant law cited in the Court’s opinion.

85 Jost, supra note 55, at 4.
86 Id.
87 Id.
A. Differing Opinions

The Court’s majority opinion, which ruled in favor of the Law School, was penned by Justice O’Connor, who was joined by four other justices: Justice Stevens, Justice Souter, Justice Breyer, and Justice Ginsburg. One dissenting opinion was filed by Chief Justice William Rehnquist and joined by Justice Scalia, Justice Kennedy, and Justice Thomas. In addition to those two opinions, four other opinions were filed. Justice Ginsburg filed a concurring opinion; Justices Thomas and Scalia filed opinions dissenting in part and concurring in part; and Justice Kennedy wrote an additional dissent.

Justice O’Connor proved crucial to the Grutter ruling and not simply because she wrote the Court’s opinion. She cast the fifth and final vote to uphold the Law School’s admissions process. Some may have found it shocking that Justice O’Connor sided with four liberal justices despite being traditionally viewed as conservative. However, “her decision to join the traditionally more liberal justices... should not be altogether shocking.” This holds true for a couple of reasons. First, the diversity argument relied upon by the respondents “tends to be integrationist in character.” While Justice O’Connor may have taken issue with the remedial justification for considering race in admissions, she was supportive of the Law School’s main argument that diversity is beneficial in education. Justice O’Connor supported the idea that diversity increases integration, especially in the Law School environment, so she sided with the respondents.

Secondly, Justice O’Connor recognized that “educational diversity has implications not just for economic equality, but

88 Evan Thomas & Stuart Taylor, Jr., Center Court, NEWSWEEK, July 7, 2003, at 46.
89 Amar, supra note 73, at 12.
90 Id.
political equality as well.”91 To her, an individual’s ability to access a law school education meant having political power.92 She characterized education as political rather than economical, and subsequently “tapped into a deep vein of [the] Supreme Court.”93 Though these two reasons are not the only explanations for why Justice O’Connor voted the way she did, they do provide some possibilities. Regardless of how or why she voted a certain way, it is clear she played a decisive role in the result of the case.

Justice O’Connor started the Court’s opinion by analyzing the Law School’s admissions policy. Under the policy, admissions officials must consider an applicant’s GPA and LSAT score.94 The policy also “requires admissions officials to look beyond grades and test scores to other criteria that are important in the Law School’s educational objectives.”95 One criterion within the “other” category is diversity. Supposedly, the Law School does not restrict a particular type of diversity, but it does commit itself to “one particular type of diversity” which can be described as:

Racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body.96

In order to fulfill its commitment to diversity, the Law School sought to enroll a critical mass of underrepresented minority

91 Id. at 13.
92 Id.
93 Id.
94 Lucius Barker et al., CIVIL LIBERTIES AND THE CONSTITUTION 549 (Charlycee Jones Owen et al. eds., 9th ed. 2011).
95 Id. at 550.
96 Id.
students.\textsuperscript{97} The concept of critical mass was vague and hard to define, so Justice O’Connor cited a testimony from the District Court that defined critical mass as “meaningful numbers” or “meaningful representation.”\textsuperscript{98} Yet this definition also failed to place a specific numerical value on critical mass. The same testimony revealed the Law School had “no number, percentage, or range of numbers or percentages that constitute a critical mass.”\textsuperscript{99} Hence, the Court’s opinion reflected that there was no numerical value attached to critical mass. Through researching the Law School’s method of attaining a critical mass, Professor Cohen found that critical mass consisted of a percentage of about ten to twelve percent.\textsuperscript{100} Professor Cohen’s research made critical mass less vague. More importantly, it made critical mass resemble a quota system, which the Court struck down in \textit{Gratz}. Nevertheless, his research was not evident in the Court’s opinion, so the majority determined critical mass to be what the Law School defined it as: meaningful representation.

Another aspect of Justice O’Connor’s opinion demands emphasis. Justice O’Connor wrote: “The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”\textsuperscript{101} She was hinting that \textit{Grutter} allowed for a sort of judicial deference to the diversity argument. Her statement was considered a controversial one, especially in the eyes of the other justices. In particular, Justice Kennedy believed this idea proposed by Justice O’Connor “marked a sharp departure from the rigors of strict scrutiny and that the Court’s ‘review’ of these

\begin{thebibliography}{10}
\bibitem{97} Id.
\bibitem{98} Id. at 551.
\bibitem{99} Id.
\bibitem{100} Cohen, \textit{supra} note 2, at 33
\end{thebibliography}
matters was ‘nothing short of perfunctory’.”

Justice O’Connor’s statement seemed to endorse rational basis review over strict scrutiny. Rational basis review is a form of review that is significantly lower than strict scrutiny and requires a law or policy to be “reasonably [related] to the attainment of some legitimate governmental objective.” In essence, Justice Kennedy found that Justice O’Connor was lowering the standard of review for race-based governmental actions.

Justices Scalia and Thomas believed Justice Kennedy misinterpreted Justice O’Connor’s statement. In their opinions, they noted that Justice O’Connor was not declaring “diversity itself is a compelling educational interest… to ‘which we defer.’” Instead, Justice O’Connor was deferring to the Law School’s “choice of mission.” She was simply acknowledging “the University of Michigan had chosen to embrace student body diversity as part of its institutional identity.” This may be the case, and if so, it is an important distinction. However, a “choice of mission” seems hardly different from Justice Kennedy’s interpretation. In fact, the Law School’s mission was to further diversity. Distinguishing between a deference to a mission and a deference to diversity proved to be a major disagreement between the justices.

The opinion of Justice Thomas included a few key points that are worth mentioning. Justice Thomas began his opinion by quoting Frederick Douglass: “What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice.” Like Douglass,

\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Rational-Basis Test, BLACK’S LAW DICTIONARY (7th ed. 1999).}\]
\[\text{Killenbeck, supra note 101 at 32.}\]
\[\text{Id.}\]
\[\text{Id.}\]
Justice Thomas believed that blacks could “achieve in every avenue of American life without the meddling of university administrators.” But he also believed that students of all colors should succeed, and the Law School was trying to ensure that they would. In other words, he respected that the Law School strove to help students succeed in life. However, the Law School took it too far.

When the Law School began to use racial discrimination (Justice Thomas consistently used the term “racial discrimination” instead of “affirmative action”) to help some students succeed, then it was acting unlawfully. Justice Thomas was critical of the Law School. He wrote, “I believe the Law School’s current use of race violates the Equal Protection Clause and that the Constitution means the same thing today as it will in 300 months.” In this statement, Justice Thomas criticized the opinion of Justice O’Connor, who had stated in her majority opinion that affirmative action programs in higher education will no longer be needed in 25 years. Though Justice Thomas did agree that affirmative action would be illegal in 25 years, he also thought it was just as illegal today.

Many affirmative action supporters have critiqued Justice Thomas for his long-time opposition to race-conscious admissions policies. Justice Thomas’ embrace of the “originalist” interpretation of the constitution has led him to fundamentally disagree with the use of affirmative action as a solution to systematic racial inequality. But as evident in his opinion in Grutter, Justice

\begin{itemize}
  \item[109] Id. at 350.
  \item[110] Id.
  \item[111] Id.
  \item[112] Id. at 351.
  \item[113] Barker et al., supra note 94, at 560.
  \item[114] Id.
\end{itemize}
Thomas does not “lack genuine concern about racial equality.” In fact, he is very concerned with racial equality. He believed that the Constitution “abhors classifications based on race” and that “every time the government...makes race relevant to the provision of burdens or benefits, it demeans us all.” Regardless of whether Justice Thomas’ opinion is worthy of critique, it is notable for showing the merits of both parties’ arguments. Justice Thomas gave some merit to the Law School for supporting students and the principle of equality, but he did not think such support should be implemented in an unconstitutional, racially discriminatory way.

Justice Ginsburg’s concurring opinion in *Grutter* contrasts Justice Thomas’ opinion. Justice Ginsburg largely agreed with the majority opinion, adding that affirmative action was necessary to ensure minorities have equal educational opportunities. She also agreed with Justice O’Connor’s point that affirmative action would eventually be put to an end:

> From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.

Justice Ginsburg took a stance opposite of Justice Thomas and chose to support the Law School’s admissions policy. Perhaps the two justices’ differing opinions are slightly obvious, given Justice Ginsburg traditionally leans liberal and Justice Thomas leans conservative. Although their opinions on *Grutter* differed, they both stressed a type of diversity that would reflect changes in institutions.

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115 *Id.* at 790.
117 *Id.* at 346 (2003).
118 *Id.*
and attitudes instead of giving the mere appearance of diversity.\textsuperscript{119} Justices Thomas and Ginsburg sought “functional diversity:” full and complete diversity that considered the past, present, and future.\textsuperscript{120} While they may have disagreed on how to achieve functional diversity, they both recognized the need for institutional and societal change. It is hard to determine whether the Law School’s admission process was a façade or a real attempt to achieve functional diversity. Regardless, the Law School did not frame its policy in terms of past discrimination, which Justice Thomas and Justice Ginsburg took account of in their opinions. The functional diversity introduced by both justices emphasized the consideration of the past, especially seminal cases.

\textbf{B. Precedential Cases}

Before affirmative action was a prevalent issue brought to the Court, issues of desegregation and civil rights were center stage. Two precedential cases, \textit{Sweatt v. Painter} and \textit{Brown v. Board of Education} paved the way for future discrimination and affirmative action cases. \textit{Sweatt v. Painter} was cited in the Court’s majority opinion. Justice O’Connor recited the Court’s conclusion in \textit{Sweatt}: “Law schools cannot be effective in isolation from the individuals and institutions with which the law interacts.”\textsuperscript{121} Her statement makes more sense when contemplating the facts of \textit{Sweatt} in which the Court was confronted with the question of whether the University of Texas could have a separate program of legal education specifically for blacks.\textsuperscript{122} The Law School at the

\textsuperscript{120} Id.
\textsuperscript{121} Barker et al., \textit{supra} note 94, at 557.
\textsuperscript{122} Killenbeck, \textit{supra} note 101, at 13.
University of Texas would not admit Heman Sweatt “solely because he is a Negro.” The University wanted to admit Sweatt to a different institution, the Texas State University for Negroes, where he would supposedly gain the same opportunities. The Court rejected the idea that a separate law school for blacks ensured equal opportunity and ruled that the University’s all-white Law School must admit Sweatt “rather than force him to attend an inferior all-black school.” Sweatt thus began the desegregation efforts in higher education. Sweatt’s claims are similar to Grutter’s, though of course their circumstances are different. Sweatt was denied admission to the Texas Law School for being black, while Grutter alleged she was denied admission to the Michigan Law School for being white.

Sweatt emphasized the value and importance of diversity. The Sweatt Court saw the benefits of diversity in higher education. Specifically, the Court noted, “the interactive nature of legal education and the vital role that access to a variety of perspectives played in the learning process.” The Court was acknowledging that diversity has certain benefits, such as encountering different perspectives and backgrounds, that are vital to a legal education. The Michigan Law School’s argument reflected what the Court noted in Sweatt. The Law School wished to use affirmative action as a means to ensure diversity and the benefits associated with it.

The case of Brown v. Board of Education explicitly deals with discrimination. Sweatt, decided four years prior, “paved the way” for Brown. Where Sweatt dealt specifically with higher education,

123 Id.
124 Id.
125 Jost, supra note 55, at 1.
126 Killenbeck, supra note 101, at 13.
Brown broadly tackled the public education system. In the majority opinion for Grutter, Justice O’Connor recognized Brown for establishing that “education is the very foundation of good citizenship.” Justice Ginsburg also referenced Brown to illustrate that the beginnings of desegregation had only begun a short time ago, so racial discrimination was not gone and thus affirmative action was necessary. Though Brown, like Sweatt, does not explicitly deal with affirmative action, it has been cited by many to promote the argument of remedying past discrimination.

Lee Bollinger, former Dean of Michigan Law School, a respondent in Grutter, put it this way: “The remedy… is to advocate for a broader, historically informed jurisprudence that harks back to the values and goals of Brown v. Board of Education, even while we persist on preserving the holistic consideration of race in admissions.” Bollinger, like other affirmative action supporters, emphasize that the goal of race consideration in admissions is to carry on the legacy of Brown. A spokesperson for BAMN, one of the groups that filed an amicus brief on behalf of the Michigan Law School, remarked that Grutter would determine “whether Brown v. Board of Education is real or is a dead letter.” Supporters of affirmative action saw it as a means to ensure people of color would have equal opportunity and rights, which started with Brown.

Brown was one of the first cases where the Court recognized that discrimination on the basis of race is unconstitutional. Professor Alexander Bickel once described Brown as determining: “Discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic

128 Barker et al., supra note 94, at 556.
130 Bollinger, supra note 66, at NA(L)
131 Civil Rights Organizations Call for March, supra note 47, at 1.
society.” This statement reflects the basic premise of *Brown* and “accurately captured… the assumption that, in the normal course of events, an individual’s race should not be taken into account when [the] government acts.” This assumption is one that critics of affirmative action use to back up their argument. If *Brown* reflected that race should not be considered, then affirmative action, which does exactly that, violates the precedent set forth in *Brown*. Interestingly, *Brown* is cited by both sides to the affirmative action debate but for different reasons. Critics of affirmative action believe *Brown* prohibits the consideration of race, while supporters find that affirmative action is necessary to remedy the past effects of discrimination as kick-started by *Brown*.

The Court’s opinion in *Grutter* cited numerous other seminal cases besides *Sweatt* and *Brown*. One of the most significant is the case of *Regents of the University of California v. Bakke*. This case was countlessly cited and referenced in *Grutter* due to its inherent relevance and importance. As noted by Justice O’Connor, *Bakke* involved the review of a “racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups.” The University of California at Davis Medical School reserved 16 seats for minority students, leaving only 84 seats open for white applicants. When Allan Bakke, a white man, applied twice to the Medical School, he was denied both times. The 16 reserved seats were of particular concern in the Medical School’s admissions process; after all, it gave the impression that the Medical School was engaging in a quota system. In addition to

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132 Killenbeck, supra note 101, at 11.
133 *Id.*
134 Barker et al., supra note 94, at 552.
136 *Id.*
this concern, Bakke noted that the minorities admitted by the Medical School had lower GPAs and MCAT scores than he did. He claimed the Medical School had subjected him to “reverse discrimination” by preferring to admit applicants of a minority. He had raised a controversial and unsettled issue, and the Court had to determine its constitutionality.

*Bakke* did not reach a conclusion by a majority; the Court released a fractured decision with six separate opinions. Ultimately, the only holding that came out of *Bakke* was: “[The] State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race.” Universities could consider race under a correctly implemented admissions policy.

The Court “did not outline the specifics of a narrowly-tailored admissions program that considers race.” For clarification on what the *Bakke* Court’s fundamental ruling was, the opinion of Justice Lewis Franklin Powell, Jr., has become the “touchstone for constitutional analysis of race-conscious admissions policies.” Because of this, Justice O’Connor spent time in her opinion to explain Justice Powell’s opinion in *Bakke*.

In general, Justice Powell upheld affirmative action programs. To him, affirmative action programs were beneficial for diversity purposes. He saw “the attainment of a diverse student body” as a compelling reason for the medical school to use race as a factor in

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137 Id.
138 Barker et al., *supra* note 94, at 552.
139 Id.
140 Id. at 553.
142 Barker et al., *supra* note 94, at 553.
its admissions process.\textsuperscript{144} But Justice Powell did not endorse all forms of affirmative action. In fact, the way the medical school went about achieving diversity—through a quota system—was unconstitutional in his view. Quota systems gave too much consideration to race. Justice Powell merely thought race should be “only one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body.”\textsuperscript{145} Hence, Justice Powell found that race could be one factor considered out of many other factors. His opinion can also be summarized as deciding that race can be viewed as a “plus” in an applicant’s file so long as it does not “insulate the individual from comparison with all other candidates for the available seats.”\textsuperscript{146} Using race as a predominant factor, which Justice Powell saw as inherent of quota systems, was not permitted under the Constitution. Nevertheless, race could be a “plus” factor.

In \textit{Grutter} the Law School stressed the relevance of \textit{Bakke}, arguing that it had designed its admission program to comply with \textit{Bakke}.\textsuperscript{147} The admissions policy of the Law School does seem compliant with Justice Powell’s line of reasoning. The policy, according to the Law School, “uses race as a factor in admissions, as part of a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”\textsuperscript{148} These intentions of the policy seem nearly identical to Justice Powell’s finding that race can be considered as a plus factor. Indeed, the majority in \textit{Grutter} thought the same. Justice O’Connor wrote in her opinion:

\begin{footnotesize}
\begin{enumerate}
\item[Barker et al., supra note 94, at 553.]
\item[Id.]
\item[Killenbeck, supra note 101, at 16.]
\item[Farrell, supra note 141, at 300.]
\item[Id.]
\end{enumerate}
\end{footnotesize}
The Law School’s current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other education values, not to mention every other kind of diversity.\textsuperscript{149}

This statement reflects what Justice Powell had in mind as a permissible form of affirmative action: a program that simply considers race as one of many factors in an applicant’s file. This type of program was present at the Law School.

Lastly, the case of \textit{Hopwood v. Texas} was instrumental in the \textit{Grutter} decision. Perhaps the most intriguing fact about \textit{Hopwood} is that it is not a U.S. Supreme Court case. In July 1996, the U.S. Supreme Court refused to review \textit{Hopwood},\textsuperscript{150} so the case never made it to the highest Court in the land. Yet, this fact does not prevent \textit{Hopwood} from being extremely influential on \textit{Grutter}. Generally, \textit{Hopwood} held that diversity is not a compelling state interest.\textsuperscript{151} The U.S. Fifth Circuit Court of Appeals that ruled on \textit{Hopwood} did not believe the diversity argument was compelling enough to set affirmative action programs in place. The Fifth Circuit Court invalidated the University of Texas Law School’s race-based admissions process.\textsuperscript{152} The Fifth Circuit Court’s decision was in direct contradiction with \textit{Bakke}, decided almost two decades beforehand. \textit{Hopwood} addressed Justice Powell’s opinion in \textit{Bakke} but seemed to view the decision as a suggestion instead of established law. The Fifth Circuit cited the fragmented, weak holding of \textit{Bakke} to excuse itself from following that precedent; it also noted that the Court’s rulings after \textit{Bakke} had raised doubts

\textsuperscript{149} Barker et al., \textit{supra} note 94, at 559.
\textsuperscript{150} Sander & Taylor, Jr., \textit{supra} note 22, at ch. 13.
\textsuperscript{151} Barker et al., \textit{supra} note 94, at 552.
\textsuperscript{152} Parks, Jr., \textit{supra} note 32, at B11.
about its validity. The Fifth Circuit decided to rule against what was established in *Bakke* and strike down affirmative action programs under its jurisdiction. When the U.S. Supreme Court did not review the Fifth Circuit’s decision, it “prompted widespread speculation that a majority of the [U.S. Supreme Court] justices were comfortable with the result” of *Hopwood*. This speculation would be proved wrong with the decision in *Grutter*, in which diversity was ruled a compelling state interest.

### C. The Court’s Rationale

The Court’s opinion in *Grutter* did not only depend on important Supreme Court cases but also on the Fourteenth Amendment’s Equal Protection Clause and Title VI of the Civil Rights Act of 1964. As Justice O’Connor expresses in the majority opinion: “The Equal Protection Clause provides that no State shall ‘deny any person within its jurisdiction the equal protection of the laws.’” The Equal Protection Clause guarantees that all individuals are treated equally in the eyes of the law. This basic promise ties directly into Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in public schools. The promise of equal protection is applied to education by Title VI because federal-funded universities cannot discriminate against individuals on the basis of race or subject them to inequality. Simply put, Title VI ensures equal protection to individuals involved with a federally-funded university.

Like Grutter, Bakke relied on the Equal Protection Clause and Title VI in his case against the University of California, Davis. In

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154 Sander & Taylor, Jr., *supra* note 22, at ch. 13.
155 Barker et al., *supra* note 94, at 554.
156 Caldwell, *supra* note 80, at 198.
157 *Id.*
Bakke, Chief Justice Rehnquist, Justice Burger, and Justice Stewart “voted to strike down quota systems as an impermissible racial classification under Title VI.”\textsuperscript{158} To them, whether the school’s admissions policy was constitutional or not, it still violated Title VI and thus should be revised.\textsuperscript{159} In \textit{Grutter}, the Court ruled that the Law School’s critical mass method did not violate Title VI.\textsuperscript{160} The \textit{Grutter} Court also determined that

the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling state interest in obtaining the educational benefits that flow from a diverse student body.\textsuperscript{161}

According to the Court, the Law School did not violate Title VI of the 1964 Civil Rights Act or the Equal Protection Clause of the Fourteenth Amendment. Though the Court considered both laws, it did give more weight to precedent, especially Bakke.

III. LASTING SIGNIFICANCE

The holding in \textit{Grutter v. Bollinger} had a ripple effect across the nation, with vastly different reactions among the populace. Section A will summarize the public’s response to the case. Section B will specify the reaction of the state government of Michigan. Section C will introduce subsequent court cases which the ruling in \textit{Grutter} provided inspiration and influence.

A. Public Response

Affirmative action and the debate about the role of race in the educational sphere did not end with \textit{Grutter}. At the time of \textit{Grutter}, it had been twenty-five years since the Court addressed the use of

\begin{itemize}
\item \textsuperscript{158} O’Brien, \textit{supra} note 135, at 299.
\item \textsuperscript{159} \textit{Id}.
\item \textsuperscript{160} Barker et al., \textit{supra} note 94, at 560.
\item \textsuperscript{161} \textit{Id}.
\end{itemize}
race in public higher education.\textsuperscript{162} Naturally, once the Court finally released a decision on that issue, the rest of the nation reacted. Some believe the \textit{Grutter} decision “was a tragedy for all Americans.”\textsuperscript{163} And others, like University of Michigan president Mary Coleman, thought that \textit{Grutter} gave public universities “the green light to pursue diversity.”\textsuperscript{164} Though public opinion about the \textit{Grutter} ruling was highly polarized, both sides could agree that the case would have lasting significance and enduring impact on the United States. Subsequent legislation and court cases proved how influential \textit{Grutter} was.

\textbf{B. State Response}

In 2006, three years after \textit{Grutter}, the state of Michigan passed Proposal 2, which prohibited the state government from “discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin.”\textsuperscript{165} The proposal was a direct response to \textit{Grutter}. Enactors of the proposal noted, “Nothing in the Court’s ruling suggested that because racial preferences are permitted by the Constitution that the states can’t ban them.”\textsuperscript{166} Because Proposal 2 prevented preferential treatment, affirmative action in the state of Michigan was also eliminated.\textsuperscript{167} This ban affected the University of Michigan, which used affirmative action programs as allowed by the \textit{Grutter} Court. In fact, minority enrollment at the University

\textsuperscript{162} Jost, \textit{supra} note 55, at 1.
\textsuperscript{163} \textit{Id.} at 5.
\textsuperscript{164} \textit{Id.} at 5.
\textsuperscript{165} Shikha Dalmia, \textit{Allow States to Decide on Affirmative Action}, \textit{USA Today}, Oct. 14, 2013, at 9A.
\textsuperscript{166} \textit{Id.}
dropped significantly due to Proposal 2.\footnote{Id.} It seemed that, without a race-conscious admissions program, the University of Michigan could not achieve a diverse study body.

The decline of minority students at the University suggests that the Law School in \textit{Grutter} had a decent reason to pursue diversity. Had the Law School not pursued diversity through affirmative action, minority enrollment could have decreased, as illustrated when Proposal 2 was implemented. In addition, Proposal 2 demonstrated how controversial the \textit{Grutter} decision was and how it prompted backlash as much as it did praise. Even the state of Michigan, which seemed on the side of affirmative action in \textit{Grutter}, consisted of several residents who disagreed with affirmative action and thus voted in Proposal 2. Indeed, the majority of Michigan voters (58\%) upheld the ban.\footnote{Dalmia, \textit{supra} note 165, at 9A.}

Further, Proposal 2 disregarded the Court’s decision in \textit{Grutter}. The proposal essentially found a loophole to find a way around what the Court had recently established. Perhaps this shows that some did not take \textit{Grutter} seriously, whether because they disagreed with it or because the decision was so fractured. Yet another possibility is that \textit{Grutter} was taken seriously, hence the intense backlash and support it received. Either way, \textit{Grutter} clearly had an effect on legislation such as Proposal 2.

\textbf{C. Judicial Response}

\textit{Grutter} influenced future legal cases as well. \textit{Parents Involved in Community Schools v. Seattle School District No. 1} presented the issue of whether students can be assigned to K-12 public schools on the basis of race.\footnote{Daniel Fisher, \textit{SCOTUS Upholds Affirmative Action, In Theory At Least}, FORBES, June 2013, at 2.} In Seattle, a group of parents claimed that their
children were being “denied assignment to their chosen high school in the district because of their race.” Indeed, the high schools in that district “considered an applicant’s race as well as the impact on racial balance of a school’s racial demographics in student assignments.” The parents claimed that the school district was acting unconstitutionally.

They alleged that their children’s right to equal protection under the Fourteenth Amendment was compromised by the school assignments. Parents Involved, in essence, raised the question of whether race could be considered in K-12 school assignments. Because this question was similar to that in Grutter, Parents Involved cited it as precedent worth consideration by the Court. Consequently, when the U.S. Supreme Court reviewed Parents Involved, it had to address its past decision in Grutter while making a new ruling. In Parents Involved, the Court held that the Seattle School District had violated the Equal Protection Clause of the Fourteenth Amendment. The Court also ruled that the district had not narrowly tailored its assignment method to serve a compelling state interest. The Court encroached into Grutter territory. It had decided that the school district’s claimed interest, diversity, was not compelling enough to allow consideration of race in school assignments. In Grutter, diversity was a compelling interest. The

172 Id.
173 Id.
175 Id. at 978.
176 Id. at 979.
177 Id.
Court had to determine why diversity was compelling in *Grutter* but not in *Parents Involved*. Ultimately, the Court clarified that student body diversity is only compelling “in the context of higher education.” ¹⁷⁸ This meant that *Grutter* did not govern *Parents Involved*, at least in the opinion of the majority. ¹⁷⁹ The reason *Parents Involved* gave the victory to the parents was because the issue took place in high schools rather than a university or professional school.

In a way, *Parents Involved* influenced *Grutter* as much as *Grutter* influenced it. *Parents Involved* limited diversity interests to higher education. Those in support of affirmative action and the diversity argument were displeased with *Parents Involved*. Some claimed *Parents Involved* erased the legacy of *Brown*, which had been respected in *Grutter*. ¹⁸⁰ They called *Parents Involved* “enormously harmful” and a few went so far as to accuse the Roberts Court of harboring a “deep hostility” toward remedying past and present racial discrimination. ¹⁸¹ Critics of affirmative action recited Chief Justice John Roberts’ remark in *Parents Involved* to explain their side: “The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.” ¹⁸² These reactions to *Parents Involved* reflect societal interests and concerns about racial issues, particularly affirmative action. *Parents Involved* carried on the impact of *Grutter* by maintaining public and national interest.

*Grutter* also lived on in *Fisher v. Texas*. Abigail Fisher, a white woman, claimed she was denied admission to the University of

¹⁷⁸ *Id.*
¹⁷⁹ *Id.*
¹⁸¹ *Id.*
Texas because of her race. Fisher further alleged that the University’s admissions process resulted in the admittance of less qualified minority applicants. The University’s admission process utilized an Academic Index and a Personal Achievement Index to determine which applicants to admit. The Personal Achievement Index consisted of several factors like race, as well as community service and extracurricular activities. According to Fisher, the Personal Achievement Index unlawfully considered race and thus violated her guarantee to equal protection under the Fourteenth Amendment.

The University of Texas countered Fisher’s argument by stating that the point of its admissions process was “not to favor applicants with any particular background” but to promote diversity. Like the Law School in Grutter, the University presented the diversity argument before the Court in Fisher. As in Grutter, that argument won. More specifically, the Fisher Court ruled in favor of the University of Texas’ race-based admissions program. The Court noted that the University’s interest in diversity was compelling and narrowly tailored to achieve that interest. This conclusion was a similar if not the same conclusion that the Court had drawn in Grutter. Even the justices noticed as much. Justice Kennedy thought

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186 Id.
188 Mack, supra note 184, at 1181.
189 Id.
Fisher would benefit from additional fact-finding.\textsuperscript{190} He then added that without more facts, Fisher meant “we’re just arguing the same case [as Grutter] … It’s as if nothing had happened.”\textsuperscript{191} Although Fisher was so similar to Grutter it seemed redundant, it was helpful to reaffirm Grutter and the Court’s stance on affirmative action. Fisher gave the Court the opportunity to strengthen its position on affirmative action after a severely split and divisive ruling in Grutter.

Because the Court was able to reaffirm Grutter in Fisher, universities felt comfortable pursuing diversity goals in admissions.\textsuperscript{192} But as in Grutter and Parents Involved, Fisher was brought public response. Critics of the decision felt that the University’s policy was a quota system, which was established as unconstitutional in Bakke.\textsuperscript{193} The Court was chastised for again supporting affirmative action. To some, affirmative action emphasized “equality of result instead of equality of opportunity and… the color of individuals’ skin over the content of their character.”\textsuperscript{194} Groups and individuals on the other side of the debate were happy with Fisher. Sherrilyn Ifill, president of the NAACP Legal Defense and Education Fund, stated,”We’re gratified that the Court has essentially upheld that [Grutter’s] framework.”\textsuperscript{195} Fisher also commanded a large amount of amicus briefs, especially on the side of the University. In total, seventy-three amicus briefs were

\textsuperscript{190} Daniel Fisher, \textit{Supreme Court May Punt Affirmative-Action Case Back For Another Look}, \textit{FORBES}, Dec. 2015, at 34.

\textsuperscript{191} Id.


\textsuperscript{193} Editorial, \textit{Narrowly Tailored to Make the Grade}, \textit{WASH. POST}, Dec. 9, 2015, attA16.


filed on behalf of the University. This shows the public’s continued engagement with Court affirmative action cases.

Last but not least, affirmative action litigation is happening in the present. Harvard College is facing charges of racial discrimination; it “stands accused of illegal discrimination against Asian Americans—an overrepresented minority.” Students for Fair Admissions, the group that brought the suit, claimed that Harvard uses a quota system in its admissions process to “achieve essentially the same racial balance year over year.” They also contend that Harvard assigns a lower “personal rating” to Asian applicants, who usually outperform other applicants in academics and extracurricular. This new case is strikingly similar to Grutter and Fisher but is rooted in the discrimination of a different racial group: Asian Americans. Though the verdict on the case is uncertain and the U.S. Supreme Court may or may not hear the case in the future, it is the prime example of how relevant affirmative action still is in the U.S. Cases like this one, as well as Parents Involved and Fisher, illustrate that the issues in Grutter will continue to be debated by the courts, as well as the public. Presently, affirmative action remains a pressing civil liberties concern, and what the Court ruled in Grutter will be remembered as this concern continues to develop in the U.S. legal system.

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199 Id.
IS REACHING NEW HEIGHTS A NEW LOW?
A STUDY ON SUPREME COURT JUSTICES AND LOWER COURT REVERSAL RATES

Lynsey Smith

INTRODUCTION

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INTRODUCTION

On October 6, 2018, America awaited the confirmation or the rejection of a controversial new Supreme Court Justice. The process began on July 9, 2018, when President Donald J. Trump announced he was nominating Judge Brett Kavanaugh to fill the vacancy left behind by retired Justice Anthony Kennedy. Politics aside, Kavanaugh was an interesting pick for the Court. Justice Kennedy,
who was nominated by Republican President Ronald Reagan, “was seen as a swing vote who sometimes sided with Democratic appointees to the court,” whereas Kavanaugh is expected to be anything but a swing vote.¹ The confirmation of Justice Kavanaugh on October 6 lead to a shift in Supreme Court ideology: The Court now sits further right with five conservative Justices. This calls into question how this new appointment will impact the court system, particularly in regard to reversal rates. I argue that an appointment of a new justice to the Supreme Court does influence the Court, but this influence is indirect and dependent on partisan politics.

I will examine the impact of newly appointed Supreme Court justices on the reversal rates of lower courts, namely the Seventh and the Ninth Appellate Circuit Courts, as well as the role of partisan politics in an allegedly nonpartisan Supreme Court by considering how higher courts use reversals as a way of ensuring uniformity of justice and how that uniformity is either positive or negative. Justices Clarence Thomas, Ruth Bader Ginsburg and Sonia Sotomayor will be examined as case studies to help us better understand this. I will also comment on how reversals could be just another element of the checks and balances system of the American government and might not be positive or negative to the court system.

I. CONTEXTUAL INFORMATION

A. Theories of Reversal

This section will offer a brief examination of the existing literature which centers around the implications of reversal rates.

Joseph Smith in his *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court* explains how reversals are “critical for maintaining coherence and consistency in a judicial system” and are necessary to ensure new legal policies are put into place.\(^2\) However, Smith also discusses the ways in which reversals can impact a judge. Operating under the assumption that a judge does not want their ruling reversed at a higher court, Smith argues a reversal serves as an indicator that the lower court judge interpreted the law incorrectly, or that a reversal will often cause a judge to feel as if he or she has “lost some of the respect of the legal community.”\(^3\)

However, Stephen Choi, Mitu Gulati, and Eric Posner in their article *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* argue that while reversal is still unfavorable to district court judges, it is unfavorable because it requires them “sometimes to conduct new trials and usually hear new motions.”\(^4\) That is, reversals are not bad because of possible embarrassment or insult, they simply add more to a judge’s docket. Lastly, David Klein and Robert Hume theorize that a high reversal rate of a district court “might reduce opportunities for professional


\(^{3}\) Id. at 30.

recognition and advancement” to positions in the appellate court for
the district court judges.⁵

Rachael Hinkle, Andrew Martin, Jonathan David Shaub, and
Emerson Tiller, however, have a different view on reversals. Their
Choice in District Court Opinions*, focuses on how federal district
court judges try to evade opinion reversals using hedging language
that makes opinions harder to attack, and intensifying language that
makes statements easier to falsify.⁶ While this article was not
focused on reversals being inherently good or bad, it did remark on
how judges sometimes change how opinions are dictated in order to
not be reversed on appeal. I plan on studying how this modified
behavior impacts the court system as a whole.

While these are well conducted studies on district courts, Smith
focuses solely on the District Court of Washington, D.C., where the
number of judges in this study account for less than two percent of
the total amount of district judges.⁷ The District Court of
Washington, D.C., is not a fair measure of other district courts
because it is so fundamentally different. While the work of Hinkle
et al. focused on modified judicial behavior to avoid reversals, the
work failed to remark on how this modified behavior impacts the
court system as a whole.

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⁵ Robert J. Hume & David E. Klein, *Fear of Reversal in Lower Court

⁶ Rachel K. Hinkle et al., *A Positive Theory and Empirical Analysis of Strategic
Word Choice in District Court Opinions*, 4 J. OF LEGAL ANALYSIS 1 (2012).

⁷ Smith, *supra* note 2, at 29.
B. Reversals by the Numbers

Frank Cross in his article *Decision Making in the U.S. Circuit Court of Appeals* conducted an empirical study with data collected from the Appeals Court Database concerning court opinions issued from 1928-1992 and found that there is no evidence that fear of Supreme Court reversal impacts appellate decision-making.\(^8\) However, regardless of whether or not reversals impact decision making, reversal rates are often used as a way of ranking appellate circuit courts. In *Supreme Court Reversal Rates: Evaluating the Federal Court of Appeals*, Roy Hofer goes on to give the Seventh Circuit an ‘A’ for having the lowest reversal rate at fifty-five percent and gives the Ninth Circuit a ‘C-’ for having a reversal rate of eighty percent.\(^9\) Hofer indicates that because eighty percent of the cases the Supreme Court chooses to hear from the Ninth Circuit end up being reversed, the Ninth Circuit is an inferior court.

Stephen J. Wermiel would disagree with Hofer. In his article, *Supreme Court Reversals: Exploring the Seventh Circuit*, Wermiel argues that “criticism of a circuit for its reversal rate by the Supreme Court is misplaced” and that “far too much significance is attached to reversal rates as a measure of the caliber of a circuit performance or abilities.”\(^10\) Kevin Scott supports Wermiel’s research. In his paper, *Reversals of the Seventh Circuit*, Scott attempts to explain why the Ninth Circuit has such a high reversal rate. One of his

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Theories includes ideological disagreements between the Ninth Circuit and the Supreme Court. Scott theorizes that the “persistent Ninth Circuit liberalism in the presence of increasing Supreme Court conservatism” is the reason for the high reversal rates, not the Ninth Circuit’s inability to properly apply the law.

The common assumptions present in the literature are that the Supreme Court will only hear cases that are likely to be reversed, that reversals are indicative of a failing court system, and that judges do not want their opinion to be reversed by a higher court. As a result, judges will tailor their opinions to how they think appellate courts will rule. Another alarming assumption is that opinion reversals are inherently bad because of how a reversal adversely impacts a judge. When evaluating the court, the ideal impact of a reversal on the presiding judge would not be held in high consideration, as the evaluation should focus on how the reversal impacts the court as a whole. Focusing on the judges when evaluating a court system neglects how the court serves the people and most of the literature evaluates courts based on how reversals impact judges.

II. RESEARCH METHODS

To study the implication of reversal rates, I will conduct a cross-sectional analysis, utilizing data from the American Bar Association and the U.S. Court System to understand why court reversals happen, why certain circuits are reversed more than others, and whether these reversals are a result of sloppy jurisprudence. I will

12 *Id.* at 345.
be analyzing data from the Seventh and Ninth Circuit Courts of Appeals since the first is overturned on appeal the least and the second is overturned more frequently than any other circuit court. I analyze reversal rates to determine if they increase or decrease shortly after a new justice has assumed the bench, or if the reversal rates appear to be unaffected by the new justice.

To study how a new Supreme Court justice could impact reversal rates in the federal appellate circuits courts, I will conduct three case studies on Supreme Court justices. These case studies will follow the appointment process, significant opinions, issues faced, legal theories, and how these justices acted on the bench. I will also cross reference the data mentioned above surrounding the Ninth and Seventh Circuit Courts to determine if this justice impacted reversal rates of the federal appellate circuit courts.

The research mentioned above along with a study on the evolution of the nomination process will help detect a partisan shift. I will compare the directions outlined in the U.S. Constitution regarding Supreme Court appointments with the processes that have been implemented up to the present day. By tracking the evolution of the nomination process, I hope to detect when and how partisan politics crept into the judicial branch.

III. CASE STUDIES

The three judges described below were chosen because they represent different ideologies and were confirmed to the court by different margins. This section will serve to introduce relevant parts of their biographies in order to better understand how particular justices might impact reversal rates.
A.  Clarence Thomas

Justice Thomas was appointed by George H.W. Bush from his position on the United States Court of Appeals for the District of Columbia Circuit following the resignation of Justice Brennan in July 1990. He had a contentious appointment process, ending with a confirmation in a close vote of 52 to 48 in the Senate. Justice Thomas is one of the most conservative justices to ever sit on the bench, and because of these values he faced staunch opposition from various organizations during his confirmation.

The National Association for the Repeal of Abortion Laws, for example, was the largest group against Thomas’ confirmation, spending over $100,000 on pro-choice television ads that portrayed him as a new threat to abortion rights. Thomas also had difficulty gaining the support of African American groups. The national chapter of the National Association for the Advancement of Colored People publicly denounced the nomination and the Urban League decided to not take a stance. However, the Southern Christian Leadership Conference decided to make the “pragmatic” decision to support Thomas’ appointment. These examples, along with sexual assault allegations, serve to explain, in part, Thomas’s narrow margin of confirmation.

B.  Ruth Bader Ginsburg

Justice Ginsburg was appointed by President Clinton and assumed office in August 1993. During her confirmation hearing, Ginsburg addressed controversial issues and answered questions

14 Id. at 357
directly – a strategy a potential justice typically shies away from. She was nonetheless confirmed by a vote of 93-3. When Justice Ginsburg began her legal career, the country had few women law professors, and when she left academia, her colleagues expressed concern about her ability to serve as a federal judge based on her gender.\(^5\)

Typically, justices do not share personal opinions on controversial social issues, but Justice Ginsburg has not followed that precedent. She is known for maintaining liberal opinions on abortion and women’s rights. I will examine whether her outspoken nature influenced how lower courts decide their cases.

C. Sonia Sotomayor

Justice Sonia Sotomayor was appointed by President Obama and assumed office in August 2009. She was confirmed to the Senate with support from the Democrats and mild reluctance from the Republicans with a vote of 68-31. Prior to the Supreme Court, Justice Sotomayor served as a District Judge for the Southern District of New York and as a Judge on the United States Court of Appeals for the Second Circuit. Additionally, Justice Sotomayor has asserted the importance of the Appellate Court and has remarked that the Appellate Court is where policy is often tested and established. Justice Sotomayor also believes it is impossible to make judicial decisions without influence from personal values. Due to her beliefs, empathy is an important element of her opinions. Additionally, Justice Sotomayor emphasizes diversity in her legal theory, remarking that:

as a government attorney you represent a very fractured society—and not fractured because that’s the nature of government today, but fractured because we are a community, as is every community in the world, with competing interests . . . what law is trying to do, and what government is trying to do, is to harmonize those interests along lines that we can live with.\footnote{Transcript: A Conversation with Justice Sonia Sotomayor, Albany Law School Dean Alexander Moot Courtroom Monday, April 3, 2017, 81 ALB. L. REV. 725, 729 (2017/2018).}

She supports the rights of the accused and has largely changed the legal scholarship surrounding police brutality, capital punishment, and abuse in prison and tends to vote liberally.

\textbf{D. Ninth Circuit Court of Appeals}


This court is the most reversed in the United States Court System. From 1999 to 2008, during which time Justice Thomas and Justice Ginsburg were both on the bench, of the Ninth Circuit decisions reviewed by the Supreme Court, one in five were affirmed, the same amount were vacated, and the remaining three
fifths of cases were reversed.¹⁸ Moreover, from 2010 to 2015, the Supreme Court reversed nearly eighty percent of the cases from the Ninth Circuit while the reversal rate for all federal circuits was around seventy percent.¹⁹

E. Seventh Circuit Court of Appeals

The Seventh Circuit Court of Appeals includes the Central District of Illinois, Northern District of Illinois, Southern District of Illinois, Northern District of Indiana, Southern District of Indiana, Eastern District of Wisconsin, and Western District of Wisconsin. The eleven-judge Seventh Circuit, with headquarters in Chicago, was established in 1891. The American Bar Association has given the Seventh Circuit a grade of “A”, and is the only Circuit Court to receive this mark, because the court has the lowest reversal rates of the other Federal Appellate Courts at about fifty-five percent, the median reversal rate being close to seventy percent.²⁰ The Seventh Circuit is largely without controversy and rarely receives national attention; the most recent notice of the Seventh Circuit arose because the newly appointed Justice, Brett Kavanaugh, used to preside over this court.

¹⁸ Hofer, supra note 9, at 1.
IV. Analysis

A. Justices Thomas, Ginsburg, and Sotomayor

We can gain insight into the impacts of a justice during their first year on the bench by studying the controversies of the appointment processes of Justices Thomas, Ginsburg, and Sotomayor. Justice Thomas was confirmed by the smallest margin, Justice Ginsburg was confirmed by the highest margin, and Justice Sotomayor did not have a particularly high or low margin. Their relative impact can be determined in part by considering how often they were in the Court’s majority during their first term.

Dr. Adam Feldman’s work examines the frequency with which a justice was in the majority opinion during their first term. Justice Ginsburg was in the majority ninety-six percent of the time, which correlates with her margin of confirmation. Justice Sotomayor was in the majority of eighty-four percent of opinions, while Justice Thomas was in the majority of eighty-six percent of the opinions.21 This variance in majority percentages between the three Justices could be explained by the margins by which the Justice was appointed; however, Justice Thomas’s results conflict with the proposition that the ease of confirmation predicts the frequency of being in the majority opinion during their first term.

In regard to appointments, the Constitution provides very little instruction. The Appointment Clause can be found in Article 2 and states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the

Supreme Court.”\textsuperscript{22} While elements of the appointment process have changed, the relationship between the President and the Senate in the process has remained the same—in order to become a Supreme Court Justice, one must be nominated by the President and confirmed by the Senate. Typically, this is an uncontroversial process. In the history of the court from the first appointments in 1789 to the consideration of Neil Gorsuch in 2017, the Senate confirmed 118 nominations out of 162 received.\textsuperscript{23}

Until 1981, this appointment and confirmation process for a Justice was typically quick. For instance, President Ford’s nomination of Justice Stevens had a stretch of nineteen days between nomination to the Senate’s final vote, and President Reagan’s nomination of Justice O’Connor had a period of thirty-three days between the nomination and the Senate’s final vote.\textsuperscript{24} However, the process has become longer and more drawn out, with months intervening between nomination and final voting. This longer period has allowed for more speculation about whether a judge leans to the left or right.\textsuperscript{25} The addition of this political speculation has undoubtedly influenced the justices’ legitimacy on the bench and has played a role in case selection.

B. Seventh and Ninth Circuit Court of Appeals

The Supreme Court has heard about 260 more cases from the Ninth Circuit than from the next most reviewed court in the past

\textsuperscript{22} U.S. Const. art. 2, § 2, cl. 2.
\textsuperscript{23} Barry J. McMillion, Supreme Court Appointment Process: Senate Debate and Confirmation Vote, 2 (2018).
\textsuperscript{24} Id. at 12.
\textsuperscript{25} Neil A. Lewis, Balanced Jurist at Home in the Middle, N.Y. Times, June 27, 1993, at 20.
twenty-two years.\textsuperscript{26} The Ninth Circuit has averaged 10.78 reversals per term.\textsuperscript{27} Moreover, despite the Supreme Court’s decreasing caseload since the 1980s, the reversals of the Ninth Circuit have steadily increased.\textsuperscript{28} The incidence of the increased number of reversals in the Ninth Circuit court correlates to the point at which Supreme Court nominations and appointments became more partisan. The Seventh Circuit, for example, is consistently reversed less than the Ninth Circuit, and often by large margins.\textsuperscript{29}

\textit{C. Reversal Rates}

The Supreme Court has been reversing courts at a higher rate than any point in the past forty years, coinciding with a rise in partisanship throughout the appointment process.\textsuperscript{30} From October Term 2001 to October Term 2006 reversal rates ranged from seventy percent to seventy-six percent annually. While the Supreme Court has not commented on the high rates of reversals, the change should not be ignored when examining the impact of a more partisan appointment process.

When examining the historically liberal Ninth Circuit Court, its ideology could explain its high reversal rate. While the Supreme Court is intended to be free of political bias, the legalist theory that Justice Sotomayor observes addresses the concern that one cannot make judicial discussions free from one’s own dispositions and biases. Following this logic, it is reasonable to conclude that the more conservative leaning Supreme Court would rule against the

\begin{footnotesize}
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\item \textsuperscript{26} Wermiel, \textit{supra} note 10, at 646.
\item \textsuperscript{27} Scott, \textit{supra} note 11, at 341.
\item \textsuperscript{28} Wermiel, \textit{supra} note 10, at 656.
\item \textsuperscript{29} \textit{Id.} at 656.
\item \textsuperscript{30} \textit{Id.} at 644.
\end{enumerate}
\end{footnotesize}
politically liberal Ninth Circuit Court. Moreover, this logic explains the pattern of low reversal rates of the more politically conservative Seventh Circuit.

High reversal rates alone are not entirely indicative of a failing court. It is important to consider the margin of decision. In the instance of a 5-4 decision it is difficult to condemn the reversed circuit since four Supreme Court Justices agreed with the initial decision. Additionally, it is important to consider the types of cases that are being reversed. When the Supreme Court reverses the decision by one circuit court, but other circuits share their view, the reversed circuit should not be criticized.\textsuperscript{31} Thus, solely comparing reversal rates among the circuit courts is misleading and not an accurate method of determining the failure of a court.\textsuperscript{32}

\textit{D. Reversal Rates and Newly Appointed Justices}

After completing this study, I have concluded that newly appointed justices do not directly impact lower court reversal rates. However, because of the consistently above average reversal rates for the past forty years and the correlation between the court becoming more partisan, a newly appointed justice would not directly impact reversal rates immediately, but rather impacts the politics of the court and indirectly impacts reversal rates.

In addition to the increase of reversals, there has been a decrease in the amount of cases being heard. The partisan nature of the bench has contributed to this decrease. As the Supreme Court hears fewer cases, justices often seek out cases which are likely to need correction.\textsuperscript{33} This also aligns with the trends presented in the court –

\textsuperscript{31} \textit{Id.} at 647.
\textsuperscript{32} \textit{Id.} at 647.
\textsuperscript{33} \textit{Id.} at 645.
the more conservative court has been hearing more cases from ‘liberal’ circuits and reversing them, whereas the court has not been hearing as many cases from ‘conservative’ circuits and affirming them. The research presented here suggests a newly appointed justice does impact the court and reversal rates but in a more nuanced way through the growing partisan nature of the court.

VI. CONCLUSION

The addition of Justice Kavanaugh, an anticipated conservative, leaves the conservative-leaning bench in a 5-4 split. Thus, it is likely that more cases from ‘liberal’ circuits will be reversed than those of the more ‘conservative’ circuits. The Supreme Court began their October Term for 2018-2019, and with this being Kavanaugh’s first term on the bench, questions regarding his short-term impact on the court will be answered shortly. Considering the research above regarding a Judge’s legitimacy and confirmation votes, it should be anticipated that Justice Kavanaugh will not stray away from the conservative partisanship that carried him through the appointment process.

The results of this study show that a new Supreme Court appointment will impact lower circuit courts reversal rates through the shifting of a partisan balance on the bench. Further, the results show that reversal rates should not be used to determine if a circuit court is failing in its judicial duty. A newly appointed justice does impact reversal rates through the now present partisan politics on the bench. This is significant and contributes to the literature surrounding the Supreme Court as my conclusions address a presence of partisanship in an allegedly non-partisan branch of government.
MODERN DAY DEBTORS’ PRISONS AND THE ENDURING RELEVANCE OF CLASS

Lauren Engle

INTRODUCTION

I. CONTEXTUAL INFORMATION
   A. Debtors’ Prisons in Ferguson, Missouri
   B. Systems Protecting Creditors

II. CAUSES OF THE PERSISTENCE OF DEBTORS’ PRISONS

III. IMPLICATIONS AND SUGGESTED REFORM

CONCLUSION

INTRODUCTION

Debt bondage is one of the oldest and most enduring forms of punishment in human history. This punitive measure has never disappeared completely, but simply changes shape according to the political and economic climate of the day. For example, as Enlightenment ideals of egalitarianism eventually led to the outlawing of explicit bondage as a form of punishment for defaulting debtors, incarceration was introduced as an alternative. Later, when the public eye focused on the predicament of incarcerated debtors, these prisons were also banned. Nonetheless, while imprisonment for debt has been illegal in the United States since the early nineteenth century, debtors’ prisons were never completely eradicated and have only grown in power over the last few decades. Not only do debtors’ prisons still exist today, but when viewed through a Marxist perspective, they are clearly used as instruments for the perpetuation of hierarchical race and class discrimination.

This essay will first examine the institution of debt bondage in recent United States history through the example of their
implementation in Ferguson, Missouri. It will then discuss the several social and economic conditions that allowed for the viability of such an institution. Having established the claim that debt bondage is still practiced in the United States, the essay will seek to elucidate the implications of this practice, contextualizing the issues within the theoretical framework of Marxism. Finally, this essay will conclude by offering judicial and governmental reform measures that could eradicate the institution.

I. CONTEXTUAL INFORMATION

Although there have been many court cases and decades of statutory law outlawing debtors’ prisons, the institution continues to thrive. While the Equal Protection and Due Process clauses in the Constitution were intended to ensure fair and equal treatment for all people, they have historically only protected a select few. It was not until the 1970s and 1980s that a series of Supreme Court cases interpreted these clauses to protect the rights of poor criminal debtors.\(^1\) Following Supreme Court rulings in *Williams v. Illinois*, *Tate v. Short*, and *Bearden v. Georgia*, the government is not permitted to incarcerate criminal defendants who are unable to pay their criminal justice debts without a clear “determination that no alternative method would accommodate the government’s interest in assessing the debt.”\(^2\) Nonetheless, beginning in the 1990s and especially following the Great Recession, many municipalities have used the criminal justice system as an untapped monetary supplement for their reduced budgets.\(^3\) Sometimes known as legal

\(^2\) *Id.*
\(^3\) *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129, Harv. L. Rev. 1024, 1024, (2016). [Hereinafter referred to as *State Bans.*]
financial obligations, this criminal justice debt includes a mix of interest, fees, court costs, and fines.\textsuperscript{4} In practice, this translates into the aggressive use of fines for offenses as minimal as traffic and parking violations.\textsuperscript{5}

\textit{A. Debtors' Prisons in Ferguson, Missouri}

The Ferguson Police Department is an example of a municipality aggressively using these fines to offset revenue. After an investigation, the Department of Justice reported that the city, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process, beginning with how fines and fine enforcement processes are established.\textsuperscript{6}

The local governments in Ferguson and other small municipalities disproportionately target poor minorities with these fines, as they are less likely to hire lawyers or have powerful connections in the community; therefore, the injustice is largely undisputed and unnoticed.\textsuperscript{7} Additionally, the threat of imprisonment can cause debtors to pull money from welfare and disability checks or borrow from family or friends which places a financial strain on the whole community.\textsuperscript{8} As a result, the entire lower class is placed under undue financial strain that lasts for generations. A Marxist might note the generational and communal impact of these

\textsuperscript{4} Hampson, \textit{supra} note 1, at 9.
\textsuperscript{6} \textit{Id.} at 499.
\textsuperscript{8} \textit{State Bans, supra} note 3, at 1025.
aggressive fines as evidence of a competitive capitalist market hidden under the label of justice.

B. Systems Protecting Creditors

New forms of market and social discipline have encouraged the growth of modern debtors’ prisons and have targeted low income individuals. Starting in the 1990s, power over incarceration has gradually shifted from states to municipalities and private entities with the introduction of neoliberal economic ideals, which emphasize a laissez-faire approach to regulation. This shift in power commodified punishment and created an industry out of debt collection. Borrowing was extended to working class populations as a partial solution to the insecurities they faced under neoliberal market structures. As borrowing became more of a compulsory reality for the working class, it also became increasingly difficult for debtors to repay their debt as wages plateaued, social provisions decreased, and poverty began to be addressed in a more punitive sense than ever before.

These trends, along with the institution of the war on drugs and law-and-order policing, have effectively rendered poverty a form of criminality. Along with the recent shift to a pro-creditor market, there is increased national and community pressure to pay off debt, even though much debt for which creditors hound the poor has been

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11 Id. at 42.

12 Sobol, supra note 5, at 495.
absolved through publicly funded bailouts. These wealthy creditors not only have their debts forgiven but are also given every available means, including the legal system, to collect. As Marx warned, justice unequivocally favors the wealthy under capitalism.

II. CAUSES OF THE PERSISTENCE OF DEBTORS’ PRISONS

The restructuring of bankruptcy policy advantages wealthy creditors and floods American prisons with a disproportionate number of poor minority debtors. Increasingly pro-creditor reforms were added to bankruptcy legislation throughout the 1980s and 1990s, but this trend peaked in 2005 with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act, which further strengthened the power of creditors against borrowers. Following this legislation and the economic downturn of 2008, which plunged many into massive debt, the number of arrests for debt has increased exponentially. Since 2008, bankruptcy reforms have restructured legislation so that it is “more difficult for insolvent debtors to discharge their debts and has created a competitive environment for creditors.” Further, this growing debt-collection industry has pushed legislation that would prevent debtors from declaring bankruptcy, as doing so would wipe many of their debts clean. When combined, these reforms disproportionately target poor and easily bankrupted debtors and remove the option of declaring bankruptcy.

Long-term debt repayment plans were introduced as a solution to this inequality, but these plans also frequently lead debtors to

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13 LeBaron & Roberts, supra note 10, at 42.
14 Roberts, supra note 9, at 678.
15 LeBaron & Roberts, supra note 10, at 41.
16 Roberts, supra note 9, at 678.
17 Id. at 678.
“agree to pay more than would be required in bankruptcy proceedings.”\(^{18}\) As a result, creditors fight amongst themselves to collect first, prioritizing speed, not accuracy, in legal proceedings against debtors. Incarceration is a very easy and available option for creditors to impose on debtors to hurry repayment; therefore, many of the reforms allow for this sanction.\(^{19}\) This style of bankruptcy reform benefits creditors over debtors in every class, but is especially detrimental to the lower classes, who have few possessions to sell and as such are more likely to be incarcerated for debt. The rift between the haves and the have-nots becomes a difference worthy of imprisonment as a result of these reforms.

The privatization and commodification of debt also disproportionately targets lower class debtors. Over the last few decades, “the growing power of debt buying firms has been supported by states and has coincided with the growing profitability of consumer lending.”\(^ {20}\) This new market emerged with the Federal Deposit Insurance Corporation’s move to shake off floundering banks in the 1980s and Bank of America’s subsequent move to sell off a large portion of its credit card debt.\(^ {21}\) These two actions triggered the creation of the debt collection industry, which is now one of the fastest-growing industries nationwide.\(^ {22}\)

Following the broader shift towards punitive treatment of poverty, these debt collection agencies have used their new power to manipulate the legal process of the state to obtain the money owed to them by borrowers.\(^ {23}\) These companies have been found engaging

\(^{18}\) Id. at 678.

\(^{19}\) State Bans, supra note 3, at 1025.

\(^{20}\) Roberts, supra note 9, at 679.

\(^{21}\) LeBaron & Roberts, supra note 10, at 41.

\(^{22}\) Id. at 42.

\(^{23}\) Id. at 43.
in immoral and often illegal practices, as when PRA, Unifund CCR Partners, and Debt Equities LLC were found to be “responsible for 15 percent of all debt-related arrest warrants issued in [Minnesota] since 2005.” Judges have been known to issue arrest warrants for debtors owing amounts as little as $85, a sum less than half the price of lodging an inmate overnight. Some debtors have even received sentences of “indefinite incarceration” until they pay the amount owed. The issue here is the incredible coercive power that the banking and collection agency can exert over poor and working-class borrowers, many of whom require credit to meet daily needs. By making a competitive industry out of debt collection, the poor and powerless are even more likely to fall prey to debt than ever before.

Additionally, the costs associated with the justice process disadvantage the poorest citizens, who are often unable to pay. This debt includes and goes beyond the myriad of fines, fees, court costs, and interest placed on individuals. Criminal justice debt also includes costs concerned with probation, parole, and incarceration itself through “pay-to-stay” programs forced on inmates. This type of debt arose as a result of state privatization that shifts costs to users of the courts system while casting them as irresponsible. This characterization of working-class debtors as freeloaders or lazy people encourages maltreatment of the poor in the justice system.

24 Roberts, supra note 9, at 679.
25 LeBaron & Roberts, supra note 10, at 43.
26 Id. at 43.
27 Roberts, supra note 9, at 680.
28 Hampson, supra note 1, at 10.
29 Roberts, supra note 9, at 680.
30 Id. at 678.
Very little has been documented about how the poor have been forced to assume criminal justice debt, as this practice largely occurs in municipal courts.\(^\text{31}\) Although the United States Constitution “requires courts to hold a special hearing prior to imprisoning a defendant for inability to pay their criminal justice debts” very few actually do—and if they do, most last less than five minutes.\(^\text{32}\) Equally disturbing is the fact that debtors almost never have a lawyer during these hearings.\(^\text{33}\) As Sobol and his colleagues have noted, black defendants are five times as likely as their white counterparts to use appointed counsel, making them especially vulnerable to collecting more criminal justice debt in public defender fees.\(^\text{34}\)

The entire premise of the *Gideon v. Wainwright* ruling was to root out class injustice in the court system by providing defense for those who cannot afford it. Fines for court appointed defenders are imposed on impoverished defendants, which is counterintuitive and reveals the continuing relevance of class exploitation in America today. This lack of attention to the poor criminal’s plight is made even more clear as the amount these debtors owe can fluctuate wildly and many are never made aware of the total amount they owe throughout the penal process.\(^\text{35}\) The poor criminal debtor, then, is not considered an individual with rights, but a problem that requires punishment, not counsel or assistance.

Several targeted methods for criminalizing the poor that exhibit this punitive mindset are used throughout the justice process. These strategies include “poverty penalties,” which are comprised of a

\(^{31}\) State Bans, *supra* note 3, at 1027.
\(^{32}\) Hampson, *supra* note 1, at 10.
\(^{33}\) Id. at 10.
\(^{34}\) Sobol, *supra* note 5, at 517.
\(^{35}\) State Bans, *supra* note 3, at 1027.
combination of “late fees, payment plan fees and interest charged to those who are too poor to pay their debts all at once.”36 A few examples of such unjust debt loading in practice are: in North Carolina, mandatory charges are imposed on defendants who use public defenders; in California, debtors who default on fines are charged another fee of $300; in Pennsylvania, inmates cannot leave prison until they pay a sixty dollar parole fee; in Washington and Louisiana, courts uphold “auto-jail” policies that prompt automatic jail time for debtors.37 Furthermore, the majority of these defendants often have no hope of posting bail, as “the median bond amount in this country represents eight months of income for the typical detained defendant.”38

As a result, many defendants lose their jobs and can’t provide for their already-struggling families while awaiting trial. According to the law, it is illegal to detain people for the simple reality of their poverty, but, unfortunately, this practice is very common in our society today.39 In the end, these fees punish people for the simple fact of their poverty and often, for their race, as poor blacks and Latinos are overrepresented among the criminalized population and the ‘client base’ of courts at all levels.40 Clearly, there is a two-track system of fairness in our court system, where the expense of pre-trial freedom is much more damaging for the poor than for the wealthy.

36 Roberts, supra note 9, at 681.
37 Id. at 681.
38 Rabuy & Kopf, supra note 7, at i.
39 Id. at 3.
40 Roberts, supra note 9, at 682.
III. IMPLICATIONS AND SUGGESTED REFORM

The style and power plays of modern debtors’ prisons place them squarely in line with Marxist theories of power, social control and capitalism. Although debtors’ prisons were outlawed in the 19th century, the social stratification of debt they created were institutionalized gradually through laws and policies that were not as explicitly political. This phenomenon is understandable within a Marxist framework which says that the law is directly related to economics, and thus even national values of freedom and equality for all are used as instruments for the continuation of class rule. This institutionalized value set has generated a “commodity form of the law” because similar to the way disparate products can give the perception of equality, the law under capitalism “becomes the universal political equivalent by means of which each individual is rendered equal to every other individual, so that any one individual can represent any other.”

Theoretically this is ideal, but as Marx foresaw, those of the dominant class are the only ones really heard or recognized as true “individuals,” and as such the only class receiving equal treatment under this form of law. In making everything “equal,” the law fails to take into account the fundamentally different levels of financial stability of the individual, and as such frequently assigns disproportionately harsh fines to some of the most disadvantaged members of society. A study focusing on municipal courts in Missouri found they “arely examined the defendants’ ability to pay,

[41] Sobol, supra note 5, at 489.

which is a failure to abide by Missouri law requiring courts to “proportion the fine to the burden that payment will impose in view of the financial resources of an individual.”43 Defendants who hire lawyers have better chances of having their finances examined and penalty scaled accordingly, but only wealthy defendants can typically pay for lawyers. As a result, debt has continued to be a class characteristic, allowing for the continued “imprisonment and coercive treatment of the poor and working-class people.”44 The class character of debt, or any coercive measure falls along the lines of Marxist analysis and reveals the stark inequality in the American dream.

In light of the terrible reality of debtors’ prisons today, major changes in court policy should be considered and enacted. Firstly, governments should cut out all pay-to-stay programs. Currently, prisons and jails in forty-one states charge incarcerated individuals, and at ridiculous prices, such as in Riverside County, California, where prisoners pay $142 per day for room and board.45 Unsurprisingly, Riverside County was unable to collect even 1% of what it hoped to make through these programs in 2013.46 States and municipalities like Riverside County who insist on these programs risk spending more on the administrative costs than such fee programs can generate in potential returns.47 In the end, these programs only saddle already destitute prisoners with greater monetary burdens, and considering the social bias against them, these prisoners are likely to return to crime to pay it off. Another option for policy makers would be increasing funding for indigent

43 Sobol, supra note 5, at 494.
44 Roberts, supra note 5, at 683.
45 Rabuy & Kopf, supra note 7, at 6.
46 Id. at 6.
47 Id. at 6.
criminal defense, which is critical to ensuring incarceration is only used when necessary. It also ensures that the sentence matches the level of the offense. Overloaded public defenders cannot keep pace with the number of cases they are given, so it is vital for the continuation of justice that they are better funded. Higher pay to public defense would encourage more lawyers to consider this desperately understaffed field of public service.

CONCLUSION

In conclusion, debtors’ prisons are not a social artifact of the past, but a living menace present in our society today. Disproportionately, poor minorities in America are labeled criminal, denied justice, and targeted by institutions and individuals as sources of revenue. As one Supreme Court justice famously said, “Justice, if it can be measured, it must be measured by the experience the average citizen has with the police and the lower courts.” Policy makers and citizens at every level of society must rise up against this horrific practice, and work to ensure a more equitable form of debt collection and enforcement is put into practice.

48 Sobol, supra note 5, at 521.
AN IMPERATIVE TO ACT

Britton Williams

“Earth’s climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities. The assumption that current and future climate conditions will resemble the recent past is no longer valid.”

INTRODUCTION

I. BACKGROUND

II. THE COSTS OF ACTION AND INACTION

III. LEGAL BACKGROUND

A. Massachusetts v. EPA

B. The Learned Hand Formula

IV. POSSIBLE SOLUTIONS

CONCLUSION

INTRODUCTION

Over 300 authors, working across thirteen different federal agencies, released the 2018 National Climate Assessment. This report identifies anthropogenic climate change as a significant threat to the welfare and national security of the United States, as well as

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the world. We have had good reason to take action to address climate change. Now, we have an imperative to do so.

A summer of record heat waves saw 2018 on track to be the fourth-hottest year on record, surpassed only by 2015, 2016, and 2017. Forest fires threatened thousands of homes in locations all over the world. South Africa experienced its worst drought in nearly a century. Temperatures in Canada, Japan, and Europe rose to dangerous highs led to many deaths. Also, as noted in the National Climate Assessment, humans are the primary drivers. While it is difficult to calculate the economic and physical risks precisely, scientists of various backgrounds are convinced that a failure to take action to mitigate climate change will have severe consequences for humans and other species across the globe. The costs of taking action now are far smaller than the risks of inaction; failing to do so would be an act of negligence. In the same way that consumers buy health insurance to hedge against future risk, governments worldwide must hedge against the risks inherent to a warming planet. The cost of action now is manageable, and lower than the cost of inaction.

This paper explores the scientific background and causes of anthropogenic climate change before moving on to take stock of two recent reports: The Intergovernmental Panel on Climate Change’s (IPCC) report and the National Climate Assessment (NCA). The probabilities of risk and the costs of action are serious enough to warrant attention and a commitment to action.

We will first examine the economic argument for action, then look at how action can be justified legally. We will then look at a few policy proposals that may limit climate change. These policies

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include, but are not limited to, a carbon tax and tradable pollution permits.

I. BACKGROUND

The greenhouse effect is a well-understood phenomenon responsible for trapping heat on earth in the atmosphere; however, its effects are exacerbated when humans burn carbon-based fuels which significantly add large amounts of greenhouse gases (GHG) to the atmosphere.\textsuperscript{4} Greenhouse gases remain in the atmosphere for hundreds of years as they accumulate in the atmosphere and oceans. This leads to many problems including intense heatwaves and ocean acidification, which is responsible for the death of marine life, including significant portions of the Great Barrier Reef.\textsuperscript{5}

Policymakers and climate scientists often stress the importance of limiting temperature increases to two degrees Celsius higher than pre-industrial levels. This is the upper bound to be able to manage the effects of climate change established in the 2015 Paris Climate Agreement. Some climate experts and leaders from low-lying island nations argue that the two-degree Celsius limit is too high and this much increase in temperature poses a significant threat to individuals and nations around the globe.\textsuperscript{6}

Although President Trump chose to withdraw from the 2015 Paris Agreement, both domestic and international organizations

\textsuperscript{4} A Blanket Around the Earth. NASA GLOBAL CLIMATE CHANGE. Updated March 21, 2019. https://climate.nasa.gov/causes/

\textsuperscript{5} Helen Yap. Faculty of 1000 Evaluation for Anthropogenic Ocean Acidification over the Twenty-First Century and Its Impact on Calcifying Organisms, F1000 - POST-PUBLICATION PEER REVIEW OF THE BIOMEDICAL LITERATURE, 2005.

have continued to warn that climate change is a serious threat. The NCA and the IPCC have shown that the world is already experiencing losses from climate change and that losses will only increase over the coming years and decades. The NCA is a result of decades of work compiled into a report endorsed by over a dozen federal agencies which shows that, over the past few decades, the number of high temperature records has dramatically increased while the number of low temperature records has decreased. They warn that the average annual temperature over the continental United States will increase by approximately 2.2 degrees Fahrenheit (1.2 degrees Celsius) and that record-setting heat waves will become more common.4 The NCA cites the California wildfires as evidence of climate change’s impact on the United States. These wildfires are responsible for hundreds of lives and billions of dollars. The costs of climate change are already being felt and will only continue to increase.

II. THE COSTS OF ACTION AND INACTION

The IPCC released a special report on global warming in Fall 2018. It concluded that human activity has already led to an increase of one degree Celsius in global temperatures above pre-industrial levels, and that a further increase to 1.5 degrees Celsius is likely between 2030 and 2052.7 The report goes on to discuss increasing temperatures over land, especially in the Arctic. The authors explain they are highly confident that some parts of the earth will experience higher mean temperatures and that extremely hot temperatures will become more common in various locations around the world. Researchers conclude by estimating the monetary

cost of climate change: Fifty-four trillion dollars if warming is limited to 1.5 degrees Celsius or sixty-nine trillion dollars if warming is allowed to reach two degrees Celsius.⁸

Working Group III of the IPCC estimated that limiting warming to two degrees Celsius with sixty-six percent certainty would require reducing global consumption by up to four percent by 2030, six percent by 2050, and eleven percent by 2100.⁹ These estimates from the IPCC should be a cause for alarm and an incentive to act.

Another detailed analysis by the Rhodium Group, a private consulting firm, concludes that the United States could face losses of up to three percent of GDP annually by the end of the century. Their estimate is conservative because it does not consider potential losses from decreased agricultural productivity, the spread of disease, or scenarios where temperature thresholds are crossed that lead to truly catastrophic damage. Efforts to estimate the cost of taking action to mitigate the effects of climate change are likewise difficult. One estimate conducted by Energy & Environmental Economics (E3), Lawrence Berkeley National Laboratory and the Pacific Northwest National Laboratory found that an eighty percent reduction in greenhouse emissions from 1990 levels by 2050 would require spending about 0.8% of GDP annually, or about $135 billion, rising to $400 billion annually by midcentury.¹⁰

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This amount is significant but can be raised. As Jerry Taylor, president of the Niskanen Center points out, the second Bush administration spent upwards of four trillion dollars on conflicts in Iraq and Afghanistan to preempt the threat posed by Al-Qaeda. Surely, climate change poses as significant of a threat as international terrorism, considering that it has the capability to cause greater and longer-lasting damage. Taylor then argues that the U.S. government has a responsibility to take precautionary measures against climate change, even if the threat is less than certain. The Constitution charges the federal government with protecting America and its people, so the government should be risk-averse in how it approaches potentially catastrophic threats like climate change. Much as the Department of Defense invests heavily in equipment to defend the country, the Environmental Protection Agency or another government actor should invest in precautionary measures to ensure that climate change does not irrevocably damage the security and wellbeing of the United States.\(^\text{11}\)

Some experts believe that the transition away from dependence on fossil fuels could be a net economic benefit to the United States and to the world. A report published by the International Energy Agency (IEA) in 2014 estimated the costs of switching to low-carbon energy at forty-four trillion dollars. The report went on to say that reduced expenditures on fuel consumption as well as anticipated increases in energy efficiency would lead to net savings by 2050.\(^\text{12}\) However, they also stress the importance of acting now rather than later. Additionally, a study cited by the London School of Economics concluded that if the world begins to take action,

\(^{11}\) Id.

health benefits from reduced exposure to pollution could amount to as much as five percent of global GDP by 2030.\textsuperscript{13} As countries and world leaders procrastinate, the costs of mitigation increase dramatically. It is far less costly to take precautions now than it will be by the middle of the century.

III. LEGAL BACKGROUND

Some argue that the federal government has no legal authority to regulate greenhouse gases in a way that would make meaningful progress in the global efforts to prevent catastrophic damage. However, Supreme Court rulings have shown that the necessary legal framework exists to enable and obligate the U.S. government to take immediate action.

A. Massachusetts v. EPA

In 1999, Massachusetts and eleven other states petitioned the EPA to request that the agency regulate carbon dioxide emissions from vehicles. Massachusetts argued that greenhouse gases emitted by vehicles were a significant contributor to climate change and that its status as a coastal state exposed it to significant risk in the event of a dramatic rise in sea levels.\textsuperscript{14}

The EPA decided in 2003 to deny the states’ request to regulate carbon dioxide, arguing that the Clean Air Act (CAA) did not give the agency the authority to regulate greenhouse gases. The EPA went on to state that even if legislation did allow for the regulation of greenhouse gases, they still would not regulate carbon dioxide emissions because they believed that more research on its effects on the climate was needed. In 2005, Massachusetts appealed the EPA’s decision to the U.S. Court of Appeals for the D.C. Circuit.

\textsuperscript{13} Supra at 6.

\textsuperscript{14} Massachusetts v. EPA. THE UNITED STATES DEPARTMENT OF JUSTICE. Last updated on May 14, 2015. https://www.justice.gov/enrd/massachusetts-v-epa
However, the court upheld the EPA’s decision to reject the request. In 2006, the plaintiffs appealed the case to the U.S. Supreme Court, which heard arguments in November 2006 and issued its ruling in April 2007.

The Supreme Court ruled in favor of Massachusetts and the other eleven states. In a five to four vote, it reversed the D.C. Appellate Court’s decisions and ruled that the EPA was required to regulate greenhouse gas emissions if they were found to be a clear threat to public health or welfare. The majority wrote that the CAA did authorize the EPA to regulate emissions because the terms of the act were “capricious” and were intended to evolve over time. Chief Justice Roberts and Justice Scalia wrote the dissenting opinions. Roberts argued that Massachusetts lacked standing because the potential injuries caused by climate change were not tangible or personalized. Meanwhile, Justice Scalia wrote that the Clean Air Act did not give the EPA the authority to regulate greenhouse gas emissions because it was designed to combat air pollution, not climate change.15

B. The Learned Hand Formula

Apart from the Supreme Court’s ruling in 2007, another basic legal principle reinforces the idea that the government has a duty to take preemptive action against the effects of climate change: The Learned Hand formula. The formula was established by Judge Billings Learned Hand in a 1947 negligence case, United States v. Carroll Towing.16 The case involved the unmooring and subsequent sinking of a barge that was carrying flour owned by the U.S. government.17 In deciding whether to hold the barge owner liable

15 Id.
16 United States v. Carroll Towing Co., 159 F.2d 169, 173
17 Id. at 170.
for the loss of the cargo, Judge Learned Hand stated that the owner’s duty was a function of three variables: the burden of precaution (B), the probability of loss (P), and the magnitude of the loss (L). Judge Learned Hand stated that if $B < P \times L$, the owner has a duty to take preventative actions and is negligent if the precautions are not taken.

Through his opinion, Judge Learned Hand simplified the cost-benefit analysis used in negligence cases into algebraic terms. Though most commonly used in tort and insurance cases, the Learned Hand formula is a useful tool when making the legal argument that the state has a duty to take preemptive action to counter the effects of climate change. Applying the Learned Hand formula shows that the risks are significant.

With regard to climate change, it is almost impossible to assign exact numerical values to the variables in the Learned Hand formula, although it is possible to use the best estimates available, or even multiple estimates, to help determine whether or not a failure to take action to temper the effects of climate change is negligent. For illustration, the following example uses the figures cited by Jerry Taylor of the Niskanen Center. Supposing that the costs of prevention are equal to 0.8 percent of GDP annually and the magnitude of loss sits at about two percent of GDP annually, with a conservative probability of loss of 0.6 percent of GDP annually, the Learned Hand formula would be: $0.8 < (0.6) \times (2)$.

\[^{18}\text{Id. at 173.}\]
\[^{19}\text{Negligence, LEGAL INFORMATION INSTITUTE. https://www.law.cornell.edu/wex/negligence}\]
\[^{20}\text{W. Page Keeton et al., PROSSER & KEETON ON THE LAW OF TORTS § 56, p. 170t(5thed.t1984).}\]
\[^{21}\text{Taylor, supra note 10.}\]
In this case, the preventative action to limit the effect of climate change should be taken. Although this is an overly-simplistic example, it demonstrates that it would be wise to invest now, even if the costs of climate change and the probability of loss are not exactly certain. To do nothing would be negligent and a dereliction of duty on the part of the federal government.

IV. POSSIBLE SOLUTIONS

Environmental degradation is commonly cited as a market failure, meaning that goods and services are distributed inefficiently when the free market is left to its own devices. Specifically, market prices normally fail to adequately consider the environmental cost of producing and distributing an item. Critics of aggressive environmental action are concerned that efforts to reduce the effects of climate change are incompatible with the market-based economic system of the United States. Moreover, they worry that real action necessitates command-and-control approaches to economic planning and that a shift away from carbon would reduce American competitiveness abroad and well-being at home.

This dichotomy between carbon-fueled prosperity and green poverty is unnecessary and false. Aggressive action on climate change is compatible with the market economy, and economists have suggested and elaborated on a number of market-based solutions, like carbon taxes and tradable pollution permits, that could significantly reduce carbon dioxide emissions. At the core of these proposals is a price on carbon whereby the social cost of carbon is included in the price of goods and services, like fuel and transportation.

The social cost of carbon refers to the process in which policymakers put a price on carbon’s harm to society. The Obama administration first computed this cost as part of its Clean Power Plan when the social cost of carbon was set as high as forty-five
dollars per ton. The Trump administration prices it as low as one dollar per ton.\textsuperscript{22} If market prices included the full environmental costs, society would be incentivized to find cleaner and more innovative ways of meeting the needs currently supplied by polluting alternatives. Economists, environmental activists, and politicians have backed various proposals to price carbon, including a carbon tax or a cap-and-trade system, as currently exists in New England.

A carbon tax, also known as a carbon fee or a pollution levy, uses the social cost of carbon to set a tax on each ton of carbon dioxide emitted. The tax provides price certainty, but it cannot necessarily control the exact amount of emissions.\textsuperscript{23} This can be remedied by clauses that raise or lower the tax rate depending on whether specific targets have been met.\textsuperscript{24}

For example, a tax previously set at forty-five dollars per ton might rise to fifty-five dollars per ton if emissions goals are not met. On the other hand, the tax might lower to forty dollars per ton if the goals were exceeded. The Stanford Energy Modeling Forum estimates that the United States would need a tax of sixty five dollars per ton in 2020, rising to $296 per ton by 2050 in order to “decarbonize” the American economy.\textsuperscript{25} Carbon taxes are currently used in the Canadian provinces of British Columbia, Alberta, and Quebec, and, when set high enough, are highly effective at reducing emissions. One way of ensuring civic buy-in and popularity is to return the revenue collected by the tax as a citizen’s dividend to help offset the increased costs of goods and energy.

\textsuperscript{22} Irfan, \textit{supra} note 8.
\textsuperscript{23} Alex Rice Kerr, \textit{Why We Need a Carbon Tax}, 34 \textit{Environ: Envtl. L \& Pol’y J.} 69, 89 (2010).
\textsuperscript{24} \textit{Id.} at 93 (discussing the ease of adjusting a carbon tax for regulators in response to carbon prices and environmental conditions).
\textsuperscript{25} Taylor, \textit{supra} note 10.
 Tradable pollution permits, also known as cap-and-trade, are similar in scope to a carbon tax. Instead of setting an exact price on each ton of carbon dioxide, the government sets a cap on the total amount of carbon dioxide that can be emitted. The government then distributes or auctions off tradable permits entitling the holder to emit a fixed quantity of carbon dioxide. Cap-and-trade, unlike carbon taxes, allows regulators to precisely limit the total amount of emissions, though it does not necessarily guarantee the price.  

Some governments that have experimented with cap-and-trade found that the prices in the secondary market for permits were not high enough to significantly reduce emissions. Cap-and-trade systems are currently used in California, New England, and the European Union, and are being rolled out in China over the coming years. They tend to be the preferred solution of environmentalists, who appreciate the certainty that the cap on emissions offers. Oil companies and free-market economists tend to prefer a carbon tax, which they claim is easier to implement and supervise. Both systems can be tweaked to behave similarly, though cap-and-trade has had more political success in the United States.

Carbon taxes have been consistently voted down when they appear on state ballots, while a comprehensive cap-and-trade bill failed in the Senate in 2009. While proponents of both systems posit that they would take a meaningful first step in staving off environmental catastrophe, opponents on the left contend that they rely too much on market mechanisms and that they allow the wealthy, the well-connected, and large businesses to avoid responsibility. Meanwhile, opponents cast carbon taxes and tradable pollution permits as clear signs of federal overreach, while others worry that low-income individuals would shoulder a

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26 Keeton, supra note 23 at 89.
27 Supra note 23 at 2.
disproportionate amount of the costs associated with a price on carbon.

Climate activists have proposed a set of policies and goals known as the Green New Deal. Made up of disparate organizations and independent supporters, the movement has found a vocal supporter and unofficial leader in Representative Alexandria Ocasio-Cortez, who, along with Senator Ed Markey, released a proposal in February of 2019. The resolution calls for trillions of dollars of public investment in transportation, electricity generation, construction, and infrastructure. Ocasio-Cortez’s proposal calls for a wholesale transformation of the American economy, along the lines of the mobilization for World War II following the attack on Pearl Harbor. Though controversial, Ocasio-Cortez’s plan highlights the increasing desire for aggressive action to combat the effects of anthropogenic climate change. Representative Ocasio-Cortez and her colleagues in Congress and statehouses around the country have decided that the time to wait has passed.

CONCLUSION

Human activity is contributing to the rapid warming of the planet and the associated uptick in severe weather, drought, and disease. Calculating the financial and physical risks is difficult, but not impossible. The costs of not taking action far outweigh the costs of prevention, costs which might actually benefit to the United States. As established by the Learned Hand formula and Massachusetts v. EPA, the federal government has both a right and a duty to regulate greenhouse gas emissions. But, Contrary to the opposition’s fear to action, efforts to temper the effects of climate change.

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28 H.R. Res. 109, 116th Cong.
change need not conflict with America’s commitment to a market economy. These efforts, including a carbon tax or cap-and-trade system, are proven to be feasible. The time for delay has passed. There is an imperative to act now.
STATE SURROGACY LAWS IN LIGHT OF ABORTION VIEWS

Olivia Brick

INTRODUCTION

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INTRODUCTION

The first modern surrogacy was arranged in the United States in 1976.¹ Today, around 1,000 surrogate mothers give birth in our country every year.² However, no federal legislation regarding surrogacy has ever been passed, and laws regulating surrogacy vary between states. State laws range from full acceptance of surrogacy and enforcement of contracts to complete rejection and criminal penalties.³ Many states have no laws regarding the validity of

³ Magdalina Gugucheva, Surrogacy in America, COUNCIL FOR RESPONSIBLE GENETICS (2010), http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf.
surrogacy contracts. Even in states with prohibitive regulations on surrogacy contracts, some people practice surrogacy anyway. The lack of consistency across states also encourages individuals to forum shop and cross state lines to take advantage of friendlier surrogacy laws. Consequently, prohibitive surrogacy laws are largely ineffective in regulating the practice. The controversy and uncertainty surrounding surrogacy results in disagreement over potential regulation.

There is no federal mandate on standardized reporting of surrogacy agreements, so statistics do not accurately reflect the prevalence and impact of surrogacy in the United States. There has not been sufficient study of the effects of surrogacy on American families and individuals, especially regarding the ethical questions raised by surrogacy. Some argue that upholding surrogacy agreements, especially for financial compensation, commoditizes and exploits women. Others point out that prohibiting surrogacy robs some couples of one available option to have children. The major case law surrounding surrogacy provides little consistent, concrete precedent in navigating these difficult issues. Even with inconsistency and confusion surrounding stances on surrogacy,

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5 Id.
7 Armour, supra note 2.
8 Guzman, supra note 6.
9 Id.
some states have laws enforcing surrogacy contracts. This phenomenon is documented in some academic literature.

I. LITERATURE REVIEW

Surrogacy is a contractual agreement in which a woman acts as a gestational carrier for another person.\(^1\) The woman giving birth is referred to as the surrogate and the individuals who intend to become the legal parents of the resulting child are referred to as the intended parents.\(^2\) The biological relation of surrogates and intended parents to the resulting child depends on what type of surrogacy is utilized. There are two main types of surrogacy: traditional and gestational.

Traditional surrogacy is when a woman is artificially inseminated, typically with the sperm of the intended father or a sperm donor, but uses her own egg.\(^3\) In traditional surrogacy, the surrogate is the “biological, genetic, and gestational mother” of the child.\(^4\) Such an arrangement means that the surrogate would lawfully be recognized as the natural mother, but part of the traditional surrogacy arrangement involves the surrogate contractually abandoning her parental rights.\(^5\) Some states also allow pre-birth orders which transfer full parental rights to the intended parents before the child is born.\(^6\) However, as technology advanced, another surrogacy option became available.

Gestational surrogacy is made possible by \textit{in vitro} fertilization (IVF): an \textit{in vitro} fertilized embryo may be implanted into a woman’s uterus, and she agrees to relinquish all parental rights

\(^{11}\) Gugucheva, \textit{supra} note 3.
\(^{12}\) Id.
\(^{13}\) Id.
\(^{14}\) Id.
\(^{15}\) The Supreme Court of New Jersey, \textit{In Re Baby M.} 3 Feb. 1988.
\(^{16}\) Gestational Surrogacy, \textit{supra} note 4.
upon the child’s birth. The embryo can consist of one, both, or neither of the intended parents’ genetic material. In any case, the surrogate has no genetic relation to the resulting child and is solely the gestational mother. This advancement helped popularize surrogacy as women were more willing to serve as surrogates if they had no genetic relation to the resulting child. Court precedent favors gestational surrogacy over traditional surrogacy.

Courts have established significantly different precedents between traditional and gestational surrogacy. Two early cases that took very different approaches to surrogacy contract disputes: In re Baby M from New Jersey in 1988 and Johnson v. Calvert from California in 1993. The different case outcomes hinge on the fact that one case dealt with traditional surrogacy and the other case dealt with gestational surrogacy.

A. In re Baby M

In re Baby M involved a traditional surrogacy contract in which the gestational and biological mother refused to follow the terms of the agreement and relinquish the child to its intended parents. The court ruled that the surrogacy contract between the surrogate mother and intended parents was invalid because state policy held that no one can contractually abandon one’s parental rights. Further, the payment of money to the surrogate was illegal under a law that prohibited financial compensation for private adoption. This court decision exemplified the view that surrogacy was just another form

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17 Gugucheva, supra note 3.
19 Arshagouni, supra note 10.
21 Id.
22 Id.
of adoption and that surrogacy contracts were invalid because of the surrogate’s parental rights.

B. Johnson v. Calvert

In Johnson v. Calvert, a woman entered into an agreement with a couple to gestate a zygote conceived of their genetic material.23 She later threatened not to surrender the child, prompting the couple to sue “for a declaration they were the legal parents of the unborn child.”24 The court ruled that the surrogacy contract was valid and enforceable. It established that when genetic relation and the act of giving birth do not coincide in one woman, then the woman intending “to procreate the child and raise as her own” is the natural mother.25 Notably, the case also recognizes the importance of the child’s well-being in making any decision regarding breached surrogacy contracts.26 This precedent is still utilized today, namely in Wisconsin, which enforces surrogacy contracts “unless contrary to the child’s best interest.”27 Overall, the precedent of Johnson v. Calvert recognized the validity of surrogacy, its distinction from adoption, and its need to be regulated by specific laws and precedent.

C. Surrogacy in State Laws

The distinction between gestational and traditional surrogacy is prevalent in state laws today. For example, both Maine and Massachusetts allow gestational surrogacy but require traditional surrogates to carry out an adoption process.28 In New Jersey,

24 Id.
25 Id.
26 Id.
27 Gestational Surrogacy, supra note 4.
28 Id.
gestational surrogacy contracts are now enforced. However, *In re Baby M* has not been superseded, so intended parents in traditional surrogacy situations must wait until after the birth to adopt their child.\(^{29}\) The traditional and gestational dichotomy is not the only important distinction made in surrogacy laws.

The other factor in surrogacy agreements is compensation. Surrogacy may be called altruistic and commercial. Altruistic surrogacy refers to an agreement that does not promise payment to the surrogate beyond reimbursement for medical costs.\(^{30}\) In commercial surrogacy, however, the surrogate is paid for her service as a surrogate.\(^{31}\) This practice is ethically controversial; some view it as a commodification of women, and others view it as rightful compensation for the task of giving birth.\(^{32}\) In examining laws, the issue of compensation is as prominent as that of motherhood.

Compensating surrogates creates a sticky legal situation. Globally, the majority of countries that legally recognize surrogacy agreements prohibit commercial surrogacy.\(^{33}\) In the United States, state laws tend to add stipulations against commercial surrogacy that have negative side effects. In Virginia, gestational surrogacy is permitted, but subject to restrictions: intended parents must be a married couple, the surrogate cannot give her consent until three days post-birth, and compensation is limited to medical and ancillary expenses.\(^{34}\) These strict stipulations prohibit commercial surrogacy while also limiting the types of individuals who qualify to

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\(^{29}\) *Id.*

\(^{30}\) Guzman, *supra* note 6.

\(^{31}\) *Id.*

\(^{32}\) *Id.*


\(^{34}\) *Gestational Surrogacy, supra* note 4.
be intended parents and adding a layer of uncertainty to the surrogacy process. After pregnancy, intended parents cannot resolutely ensure their parental rights until filing a request with the state birth registrar at least three days after birth. Other states impose even stricter penalties for individuals entering into compensated agreements.

Surrogacy laws in the state of New York disadvantage both intended parents and surrogates in their intent to stop commercial surrogacy. Individuals in New York may prepare surrogacy contracts as a statement of intent, but they are not legally binding, which means they are unenforceable. In addition, surrogates may not take any enforceable steps to relinquish parental rights until after birth. Once again, these restrictions cause uncertainty in both parties about whether their agreement will be fulfilled. These strict stipulations are necessary for gestational surrogacy contracts, but the contracts themselves are only legal in the event that they are carefully structured to qualify as uncompensated. Surrogates can only receive medical, hospital, and living expenses for sixty days before and thirty days after placement, the same reimbursements allowed in New York adoptions. These rules seem to follow the In re Baby M precedent of lumping surrogacy under an umbrella of adoption, even if the surrogate has no genetic connection to the child. Finally, if the surrogacy agreement infringes on the guidelines for compensation, it is deemed illegal and its participants are subject to fines. Punishment is even more severe in other states.

Michigan has one of the most restrictive surrogacy policies of any state, where all surrogacy contracts, agreements, or

35 Id.
36 Id.
37 Id.
38 Id.
arrangements are void and unenforceable as contrary to public policy.\textsuperscript{39} Even more extreme, surrogacy contracts for compensation are subject to criminal penalties.\textsuperscript{40} Strict laws like this are outliers, but surrogates who change their minds and want to evade existing surrogacy contracts could do so by relocating to Michigan or states with similar laws. Therefore, inconsistency is the main problem with surrogacy laws from state to state.

Multiple states enforce and regulate surrogacy contracts, but several prohibit them. The largest group of states have no laws about surrogacy.\textsuperscript{41} This inconsistency makes the laws that are in place ineffective. In Nebraska, compensated surrogacy contracts are unenforceable, and the biological parent in such a contract receives all the rights and obligations to the child.\textsuperscript{42} This law simplifies the matter of parental rights instead of functionally stopping surrogacy. The result of this law is that surrogacy is practiced in Nebraska.\textsuperscript{43} Other equally as ineffective laws specify that the state takes no specific stance on surrogacy.

Tennessee has a statute that simply defines surrogacy and states that contracts are neither allowed nor disallowed.\textsuperscript{44} Case law from the state shows that the courts approach cases from the child’s interest in having a named legal mother; if the surrogate is carrying an embryo with an egg from an anonymous donor, the surrogate must be named on the birth certificate, and the intended mother completes an adoption proceeding.\textsuperscript{45} This law has led to convoluted court precedent that is out-of-sync with other states.

\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Arshagouni, \textit{supra} note 10.
\textsuperscript{42} \textit{Gestational Surrogacy, supra} note 4.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
Aside from laws that are difficult to enforce, the inconsistency from state to state allows individuals to find loopholes. It is not uncommon for intended parents to merely forum shop and cross state lines to take advantage of friendlier laws.\textsuperscript{46} These issues with inconsistent laws have been addressed through the proposed Uniform Parentage Act.

\textbf{D. The Uniform Parentage Act}

The Uniform Parentage Act of 2002 proposed consistent surrogacy laws across all fifty states. The act would require intended parents to receive a court order stating that they are the legal parents of the child for agreements to be enforceable.\textsuperscript{47} It would also address compensation and forum shopping: it would allow compensating surrogates and require parties to the contract to have been present in the state for ninety days. The main purpose of this act is to create a consistent standard for surrogacy across the country to make the surrogacy process more accessible and understandable to involved parties. As it stands today, only a handful of states have adopted versions of this approach.\textsuperscript{48} Identifying the rationale for enforcing surrogacy contracts could provide an argument for states to adopt consistent laws.

\section*{II. Why Some States Are Pro-Surrogacy}

\textbf{A. The Risks of Anti-Surrogacy Laws and the Case of BabyeS}

To answer the question of why some states are pro-surrogacy, one must first look at the academic arguments for consistent legalization of surrogacy. First, laws prohibiting surrogacy are

\begin{footnotesize}
\begin{enumerate}
\item Guzman, \textit{supra} note 6.
\item \textit{Id.}
\item \textit{Id.}
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largely ineffective. Few individuals with the means to hire surrogates are prevented from traveling across state lines to do so.\textsuperscript{49} Even so, prohibitive laws add a layer of risk to those who inevitably decide to arrange surrogacy contracts.

The lack of consistency in surrogacy laws artificially limits the supply of surrogacy services, raising costs for intended parents.\textsuperscript{50} In addition, it adds a level of uncertainty to the arrangements. Intended parents cannot be confident that their contracts will be enforced to receive custody of their child.\textsuperscript{51} They even face the uncertainty that traveling to different states might invalidate their custody.\textsuperscript{52} Their parent-child relationships are not secure, and they face the possibility that a court could decide their fates. This jeopardizes the well-being of children resulting from surrogacy contracts. Aside from affecting intended parents and resulting children, the inconsistent laws also do not adequately protect women who choose to become surrogates. Currently, without regulation, “no mental health evaluations are required, leading to a higher risk of exploitation of poor, vulnerable women.”\textsuperscript{53} This concern for both child and surrogate well-being is illustrated by the recent case of Baby S.

In Connecticut in 2011, a woman named Kelley entered into a gestational surrogacy agreement with the stipulation that the child be aborted if a severe defect should be detected. When an ultrasound at twenty-one weeks showed that the child would be born with heart defects, the intended parents requested that she abort the baby as the most humane options. However, she refused, even after the parents offered her ten thousand dollars. The parents thus

\textsuperscript{49} Arshagouni,\textit{ supra} note 10.
\textsuperscript{50} Id.
\textsuperscript{51} Conklin,\textit{ supra} note 33.
\textsuperscript{52} Arshagouni,\textit{ supra} note 10.
\textsuperscript{53} Conklin,\textit{ supra} note 33.
changed their minds, deciding they would take custody of their child at birth and then surrender her to the state of Connecticut, all of which was legal under state law.\textsuperscript{54}

In response, Kelley relocated with her family hundreds of miles away to Michigan where the baby would legally belong to her; yet while she adamantly wanted to give birth, she could not realistically raise the child. She eventually found a couple willing to adopt the child, and Baby S. was born with serious medical issues, including a fifty percent chance she would not be able to walk, talk, or use her hands normally.\textsuperscript{55} The inconsistent surrogacy laws among states made it possible for Kelley to relocate to evade her contract, making a serious decision for a child that was not genetically or legally hers. This case exemplifies the uncertainty and flippant nature of surrogacy contracts under inconsistent regulation.

Consistent legalization of surrogacy would both respect citizens’ right to procreate and help the government protect its citizens. This argument is similar to the pro-choice rationale of legalizing abortion. Both abortion and surrogacy are controversial forms of family planning, but since \textit{Roe v. Wade}, abortion has been federally mandated as legal. Supporters of abortion access point to the unenforceability of laws against abortion, and the fact that those laws drive the demand of abortion services to dangerous and illicit sources.\textsuperscript{56} Proponents of legal abortion and proponents of legalizing surrogacy thus operate using the same theory of regulation, rather than illegalization, to protect the health and safety of citizens. Some states pass laws permitting surrogacy because they utilize a similar


\textsuperscript{55} \textit{Id.}

rationale that aligns with their support for legal abortion. So, we expect that pro-choice states are also pro-surrogacy.

B. Research Design

To test this hypothesis, we will examine data on whether states are pro-choice or pro-life and pro-surrogacy or anti-surrogacy. The Pew Research Center conducted a study in 2014 which polled a sample of adult citizens in each state about their attitudes toward abortion. The data compiles what percentage of citizens believe abortion should be illegal in all or most cases, what percentage believe abortion should be legal in all or most cases, and what percentage do not know what they believe. These data can be used to classify states as pro-choice or pro-life: if half or more of the citizens of a state think abortion should be legal, we will label it pro-choice, and pro-life otherwise. This can then be compared with each state’s surrogacy laws.

The website for Creative Family Connections, an organization which offers surrogacy services and legal counsel, includes a comprehensive state by state list of surrogacy laws. While the states have widely varying laws, I classified each of them into one of three categories.

States with no existing legislation or court cases pertaining to surrogacy were classified as having no law. Also under this umbrella are Tennessee, Wyoming, and New Mexico, which have laws specifically designed to state that surrogacy is neither expressly permitted or prohibited in the state.\(^{57}\) Since states in the no law category do not regulate surrogacy, surrogacy is still practiced.\(^{58}\) States in this category could be viewed as neutral on the issue of surrogacy.

\(^{57}\) Gestational Surrogacy, supra note 4.

\(^{58}\) Id.
States with laws that do not endorse the practice of surrogacy were classified as prohibiting. In these states, surrogacy contracts are deemed void and unenforceable in court. Two states, Louisiana and Michigan, go as far as to carry criminal charges for entering into surrogacy agreements.²⁹ States in this category could be viewed as anti-surrogacy.

The final category includes states that have laws which legitimize surrogacy contracts. Most of these states also have regulatory stipulations on what kinds of surrogacy contracts are valid but are included in this category if they enforce contracts for altruistic gestational surrogacy.³⁰ These states are pro-surrogacy.

An analysis of this data may reveal correlation between a state’s abortion stance and its surrogacy stance by comparing the percentages of pro-choice states classified as no law, prohibiting, and permitting to the percentages of pro-life states with the same classifications.

C. Data and Analysis

According to the Pew Research Center study from 2014, there are twenty-one pro-life states and twenty-nine pro-choice states. Based on the surrogacy laws compiled by Creative Family Connections, twenty-one states fall under the classification of no law. Twenty-three states are permitting, and six states are prohibiting. Out of the twenty-nine states that are pro-choice, ten states have no law, three states have laws that are prohibiting, and sixteen states have laws that are permitting.

These data do not support the hypothesis that pro-choice states are also pro-surrogacy, but still give interesting insights. More than half of pro-choice states have laws that are pro-surrogacy. Though

²⁹ Id.
³⁰ Id.
this supports the hypothesis, it is not significant support. Looking at the states without pro-surrogacy laws, about a third have no law, and about one tenth have laws that are prohibiting. However, if you compare these numbers to the states that are pro-life, there are key differences.

Of the twenty-one states that are pro-life, eleven have no law, three states have anti-surrogacy laws, and seven have pro-surrogacy laws. Pro-choice states are statistically less likely to be classified as having no law—half of the pro-life states have no law compared to only a third of pro-choice states. Further, pro-choice states are more likely to have permitting laws. Only a third of pro-life states have permitting laws compared to more than half of pro-choice states. These findings align with the theory behind my hypothesis but were in some ways surprising.

The logical inverse of the hypothesis is the assumption that pro-life states are also anti-surrogacy. However, the data do not support this assumption. Out of only six states with prohibitive laws, the same number are pro-choice as are pro-life. Although fourteen percent of pro-life states have prohibitive laws compared to only ten percent of pro-choice states, that is not a significant enough difference to make a strong statement that being anti-surrogacy is correlated to being pro-life. Also, out of only two states, Louisiana and Michigan, that subject unlawful surrogacy contracts to criminal penalties, Louisiana is pro-life while Michigan is pro-choice, further confusing the issue. This shows that state laws that prohibit or criminalize surrogacy contracts have low correlation to the state’s stance on abortion.

**Conclusion**

Modern advances make it possible for a wider range of individuals to procreate on their own terms, but prohibitive surrogacy laws inhibit this progress. Our country’s varying
surrogacy laws are informed by conflicting sources. Court precedent views traditional surrogacy as similar to adoption and gestational surrogacy as valid if regulated in the child’s best interest. Other ethical debates bemoan the commodification of women that results from commercial surrogacy as opposed to altruistic surrogacy. While state laws vary in reflection of these differing litigations and ideological debates, no federal laws have been passed on the subject. This lack of consistency makes it difficult to enforce regulations in the interest of protecting the health and safety of citizens.

Research disproves that states that are pro-choice are also pro-surrogacy. While pro-choice states are more likely to be pro-surrogacy than pro-life states, states that are anti-surrogacy are equally as likely to be pro-choice as pro-life. Therefore, rationales distinct from abortion views are present in regulating surrogacy, specifically in the justifications for anti-surrogacy laws. However, the pro-choice argument that prohibiting abortion is unenforceable and fails to protect the health and safety of citizens is transferable to inconsistent surrogacy laws and may prove effective in promoting the legalization of surrogacy.
THE NECESSITY OF CHILD CARE REFORM IN THE UNITED STATES

Xaviera Webb

INTRODUCTION

I. CHILD CARE VS. BABYSITTING
II. THE COST OF CHILD CARE
III. THE QUALITY AND AVAILABILITY OF CHILD CARE

CONCLUSION

INTRODUCTION

Finding quality child care is among the top priorities of parents in the United States. Many studies link quality child care with better preparedness for elementary school. The correlation is seen across the board, regardless of income, gender, or race—children who go to good child care programs tend to do better in elementary school than children who do not.¹ The quality of care that a child receives can impact the rest of their life, especially when the link between child care and juvenile delinquency is examined.² Scholars suggest that “early intervention programs help reduce risk factors that contribute to delinquent behavior and later adult offending,” which indicates that child care programs can help people long after they have aged out of its direct services.³


³Id.
Providing quality child care could help the United States produce more productive and engaged citizens. It would give parents the peace of mind that their children are safe and cared for, while the children gain the cognitive and social benefits of early education. Federal child care reform is necessary so families may benefit from quality child care regardless of their state of residence. This is especially important in lower income neighborhoods which have fewer options for child care than more affluent communities.

I. CHILD CARE VS. BABYSITTING

Child care can take place at a designated facility or in someone’s private home with a permit. The most notable option for child care is center-based, which entails bringing children to a facility and leaving them with instructors. An advantage of a center-based approach is that it allows parents to leave their children with a caretaker during their work hours. Center-based child care also helps children’s social skills and often includes a curriculum of reading, writing, and math. However, one disadvantage is the lack of federal regulation on the certification of daycare instructors, who are often underpaid and overworked.\(^4\) This leads to a high turnover rate in the industry.\(^5\) There is no requirement that centers provide a curriculum, and since they are businesses motivated by profit, affluent or urban communities often have more daycare options. This gives parents in these communities the ability to find the environment that best fits their expectations and price range, while parents in rural or low-income areas have fewer choices as there is little economic incentive to start centers in their communities.


\(^5\) Id.
Due to a lack of availability or affordability, many parents turn to babysitters, relatives, or family friends to care for their children. These situations are often precarious and do not provide any educational curriculum during a child’s most impressionable years. These arrangements are at risk of being shut down if they begin to look too much like daycares. For example, in South Carolina, a license is required when taking care of unrelated children for a considerable amount of time each week.\textsuperscript{6} Being shut down for violating these regulations would have harmful effects on the families who rely on unlicensed arrangements because they cannot afford center-based child care.

Other forms of child care exist, but high-quality center-based care has been shown to result in the greatest educational outcomes, particularly for low-income children.\textsuperscript{7} It is also the option that is the most easily regulated and expanded, so accrediting agencies can ensure that all participants are meeting at least basic standards like staff ratios, living wages, and quality curricula.

\textbf{II. THE COST OF CHILD CARE}

Child care is unaffordable for about twenty-seven percent of families who pay for it.\textsuperscript{8} The Department of Health and Human Services considers child care to be affordable if it constitutes ten percent of a family’s income. They have proposed reducing that number to seven percent. Nationwide, child care consumes almost


\textsuperscript{7} Margaret Burchinal et al., \textit{Threshold Analysis of Association Between Child Care Quality and Child Outcomes for Low-Income Children in Pre-Kindergarten Programs}, 25 EARLY CHILDHOOD RES. Q. 166–176 (2010).

nine percent of family income. When broken down into economic categories, a more complete story emerges. The Federal Poverty Threshold (FPT) for a family of four is $24,036. Of those below the FPT, about fifty-two percent of families with young children are paying more than ten percent of income on child care, which means they are financially burdened by child care costs. Of those making more than the FPT, between thirteen and forty percent of families are burdened. These numbers do not include the many families with no child care costs, nor do they reflect quality or availability, both of which are lacking in numerous cities and are topics of concern for child care reform supporters.

The Economic Policy Institute reported the following child care costs in April 2016. The average cost of a four-year-old’s child care was $4,871 a year in the state of Alabama, which was equivalent to more than half of the cost of in-state tuition for a four-year university. In the case of infant care, the numbers were even more bleak. In Alabama, infant care was $5,637, which was two-thirds of the cost of in-state tuition for a four-year university. The typical Alabama family made around $51,206 a year, making a four-year-old’s child care ten percent of their total income and an infant’s eleven percent of their total income. This is a considerable expense for the typical Alabama family, particularly households with more than one child. The typical Alabama family with a four-year-old and an infant would spend $10,508 for a year of child care or over one fifth of their income.

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10 Id.
11 Id.
12 Id.
13 Id.
desperate for the average minimum wage worker who would have to spend more than a third of their $15,080 yearly income to take care of one infant.\textsuperscript{14} This means that formal child care is unattainable for most minimum wage workers. However, child care was more affordable in Alabama than in other states, where not even half of families were able to attain infant care.\textsuperscript{15}

According to the same report, child care in the District of Columbia was among the most expensive in the entire nation. The cost of infant care was $22,631 per year, with four-year old care costing slightly less at $17,842 per year.\textsuperscript{16} Both of these figures were greater than tuition at a four-year public college. The median income for a family with children in D.C. was $63,587 meaning that infant care would be more than a third of income and four-year-old care would be more than a quarter of income.\textsuperscript{17} For a minimum wage worker who made $21,840 per year, four-year old care would be eighty percent of income, and infant care would be unaffordable outright,\textsuperscript{18} making child care unattainable for a vast majority of D.C. families. Fewer than one in ten D.C. families would have been able to afford infant care.\textsuperscript{19}

These two case studies were on opposite ends of the spectrum, with child care in Alabama among the most affordable and child care in D.C. among the most expensive. However, both show that child care in the United States is often a huge burden for families regardless of financial status. According to Jordan Weissmann from \textit{Slate}, only thirty percent of families are paying for child care at all.

\textsuperscript{14} \textit{Id.}  
\textsuperscript{15} \textit{Id.}  
\textsuperscript{16} \textit{Id.}  
\textsuperscript{17} \textit{Id.}  
\textsuperscript{18} \textit{Id.}  
\textsuperscript{19} \textit{Id.}
today, while forty percent of families were doing so in the late
1990s.\textsuperscript{20} Despite child care workers’ low wages, payroll is still one
of the highest costs of running a child care facility and contributes
to the overall unaffordability.\textsuperscript{21} States regulate the child-to-
employee ratio in centers, so they must hire additional workers,
reducing their revenue. Some have suggested relaxing regulations to
drive down prices, but this has a limited effect.\textsuperscript{22} Implementing
wage cuts for child care workers is not feasible since their median
income is currently only $17,990 and $24,990 in Alabama and D.C.
respectively.\textsuperscript{23} One viable way to reduce costs would be government
subsidies, either as a tax credit or by increasing direct payment to
facilities.

Another measure to reduce the burden of child care costs is to
increase the availability of paid family leave. In 2016, nearly nine in
ten workers had access to unpaid family leave but only thirteen
percent had access to paid family leave.\textsuperscript{24} The introduction of a
national family leave policy would give parents the ability to stay
home with their children without risking their livelihoods. This
would reduce the need for infant care, which was more expensive
than four-year public university tuition in thirty-three states and has

\footnotesize{\textsuperscript{20} Jordan Weissmann, \textit{Why Does Obama Want to Help Families Pay for Child
Care? Because It's Insanely Expensive.}, SLATE MAGAZINE, Jan. 21 2015,
www.slate.com/blogs/moneybox/2015/01/21/state_of_the_union_2015_exploring
_the_insane_cost_of_childcare.html.}

\footnotesize{\textsuperscript{21} Porter, \textit{supra} note 4.}

\footnotesize{\textsuperscript{22} Id.}

\footnotesize{\textsuperscript{23} ECONOMIC POLICY INSTITUTE, \textit{supra} note 9.}

\footnotesize{\textsuperscript{24} Elise Gould et al., \textit{What does good child care reform look like?}, ECONOMIC
POLICY INSTITUTE (March 29, 2017), http://www.epi.org/publication/what-does-
good-child-care-reform-look-like/.}
lower availability compared to care for older children.\textsuperscript{25} Paid family leave also increases female workplace participation and economic activity.\textsuperscript{26}

Cash assistance for all families with children could also offset the costs of child care. These child benefits would not have the same requirements that programs like Temporary Assistance for Needy Families (TANF) or Women, Infants, and Children (WIC) currently have, but instead all families with children would be eligible to receive federal assistance. This would help middle class families who do not qualify for TANF, but still struggle to pay for child care. Making TANF more available could be beneficial since less than a quarter of eligible low-income families currently receive these cash benefits due to work requirements and discouragement from applying.\textsuperscript{27} Cash assistance will help reduce the burden of child care costs and give parents more freedom to choose between child care options.

III. THE QUALITY AND AVAILABILITY OF CHILD CARE

With only one third of families paying for professional child care, many rely on relatives or friends to provide it. Around two thirds of children under the age of six have both parents in the workforce, leaving about thirty-five percent of children with parents at home able to take care of their children without professional child


care services. However, many families have working parents who do not pay for professional child care. Many of those who do not utilize professional services rely on friends or family make use of home daycares, which can be dangerous even when meeting state regulations. While these arrangements often do not provide quality child care, many families cannot afford other options.

Child care reform aims to increase the overall quality of child care in the United States. As it stands, many child care centers provide nothing more than a place for parents to leave their children while they work. They do not foster an environment that prepares children to enter the formal education system. The lack of quality child care disproportionately affects low-income families, as high-income families can pay for better services. It is difficult to get a national picture of the quality of child care because individual states vary regarding their licensing requirements and quality assessments, while the federal government mainly regulates quality for programs that receive subsidies. The Care Report measures quality from state to state by percentage of centers that are accredited by the National Association for the Education of Young Children or the National Association for Family Child Care. They have found that only around one in ten centers are accredited. The District of


29 Angela M. Greene et al., UNDERSTANDING UNLICENSED CARE HOMES: FINAL REPORT (2015).


31 Schulte and Durana, supra note 25.
Columbia has the highest rate of accredited centers at fifty-six percent, which could be a plausible cause of the extremely high child care costs in the area. By comparison, only one in ten centers are accredited in Alabama.

Children are impressionable in the early years of their lives as they are introduced to the world around them. Quality child care can capitalize on this time of rapid learning by teaching valuable skills. The Care Index refers to two pillars of quality for child care centers: structural quality and process quality. Structural quality is more easily regulated because it looks at factors such as child-to-provider ratios, staff education and experience, and staff compensation. Process quality is more difficult to measure as it looks at the relationships and interactions between children and their instructors. Better methods of evaluating process quality need to be established because it is the most responsible for the positive outcomes attributed to good child care, while structural quality simply addresses organizational efficiency. Additionally, the Care Report focuses on child care centers specifically because centers are often of higher quality than informal locations.

To combat the lack of good child care, the government will need to increase investment in structural factors like teacher pay and education and the regulation of process factors.

The availability of child care is also a point of concern. The Care Report measures availability of child care as the proportion of child care professionals to the number of children under 5 in each

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33 Greene, *supra* note 29.
state. For comparison, D.C. is third in the country for availability while Alabama is still below the national average. However, they also discuss the limitations of their methodology and the need to focus on three dimensions of availability: geography, time, and age-appropriateness. Geography refers to proximity to child care, and time refers to whether child care is offered when families need it. Age-appropriateness refers to whether a specific child care service will accept children of a particular age.

The third goal of child care reform supporters is to increase the availability of child care because the cost and the quality of child care are irrelevant to families who are unable to access it. Low-income families who rely on jobs without set hours have a difficult time finding flexible providers. This pushes more low-income families to rely on the informal care market as they struggle to balance the demands of their jobs with their responsibilities as parents. The 9-to-5 model of day care centers no longer reflects family needs in the modern day.

Increasing access to the current subsidies and public programs would give more children the opportunity to attend child care. The Child Care Development Fund (CCDF) is a federal block grant given to each state to make child care more affordable for low-income families. However, the flexibility that states have in the use of this block grant has made some families ineligible for assistance. For example, eligibility requirements in several states are


set below the federal cap of eighty-five percent of the state’s median income, even though child care is unaffordable for many people making the median. Yet, even among families that are eligible, only eleven percent accessed these funds in 2016, likely due to a lack of awareness and an inability to meet the copayment. Similarly, the Head Start program, a federally funded program offering comprehensive child care services to low-income families with pregnant women or children under 3, only serves around 5% of eligible participants. This is due to either a lack of availability, awareness, or both. State governments need to do more to educate their constituents about child care subsidy programs so more families can take advantage of them.

The creation of publicly funded universal preschool would have a major impact on families across the nation. A universal preschool program could build off of the Head Start model. Relieving the burden of finding affordable preschool for all income levels will lead to an increase in overall participation, especially as more preschool centers open across the nation. The advantages of universal preschool, as discussed by the Care Report, include preparing children to go to kindergarten, a lower special education placement rate, an increase in high school graduation rate, and a decrease in future crime rates. All families, but especially low-income families, would reap benefits from the implementation of such a program. Having a federally-regulated program would make it easier to standardize preschool quality because in the current system, quality varies widely across the country. Preschool teachers could get paid a living wage, which would create more stability in

37 Id.
38 Id.
39 Schulte and Durana, supra note 25.
the field. Publicly funded universal preschool would give every child the opportunity to start school off on the right foot and propel the United States towards a better-educated future.

CONCLUSION

Ideally, child care will be high-quality, affordable, and available to every child in the United States. There are a variety of measures that could push the country closer to that goal, including national paid family leave policies, cash assistance programs for families in need of child care, an expansion of current subsidy programs, and the introduction of universal preschool. These solutions require a financial commitment from the American people and the United States government to aid families in this daunting process.

Child care reform is long overdue in the United States. The American Dream relies on the assumption that mobility is possible and that the circumstances of one’s birth do not necessarily determine one’s future. Providing high-quality early education to the youngest citizens can serve as the first step to making that dream a reality for more people. Finding quality child care is a foremost concern to parents, and they should be secure in the knowledge that their child is in a safe environment. The government has a responsibility to promote legislation that helps its people achieve their goals, but with the current child care system, fewer and fewer children are being given the necessary foundation to do so. As the discussion surrounding child care reform progresses, it will only be a matter of time before equal opportunity becomes more than just a phrase.
UNREASONABLE SUSPICION, UNREASONABLE SEIZURES: UNDOCUMENTED LATINO IMMIGRANTS AND THEIR RELATIONSHIP TO THE FOURTH AMENDMENT

Kate Weaver

INTRODUCTION

I. THE BORDER ZONE AND PERSONAL VEHICLES
II. PUBLIC TRANSIT AND THE MENDENHALL TEST
III. SEIZURES IN WORKPLACES: INS v. DELGADO
IV. SANCTUARY CITY LAWS AND ICE DETAINERS

CONCLUSION

INTRODUCTION

In 2018, state Representative Jay Reedy introduced Bill 2315 to the Tennessee House of Representatives through which he sought to prohibit sanctuary city policies throughout the state.¹ Sanctuary policies allow local law enforcement to provide immunity to undocumented immigrants by not requiring police to work on behalf of immigration and Customs Enforcement (ICE). The House members present had a variety of questions in response to Representative Reedy’s testimony. One representative from East Tennessee was opposed to the bill because it would remove highway funds from sanctuary cities, which are applied jointly between the city and county. She was worried that the county might

be punished if a city broke this law. Reedy’s response was simple: “Don’t do it and we don’t have to worry about that.”

Though none of the members of the committee personally defended immigrants or chastised Reedy, one representative introduced two members of the Tennessee Immigrant and Refugee Rights Coalition to testify on the matter. The TIRRC representatives articulated a variety of concerns: First, the loose definition of “sanctuary cities” in the bill might deter immigrants from coming forward to make complaints. Second, and most importantly, the bill could expose the state of Tennessee to lawsuits under the Fourth Amendment.

The Fourth Amendment not only protects people against having their possessions unreasonably searched or seized, but also protects their person from being seized. The prevalence of racial profiling in immigration law enforcement—specifically of Latinos—results in the systematic violation of Fourth Amendment rights of both undocumented immigrants and people who are thought to be undocument. The Fourth Amendment states,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

That is, all people legally residing in the U.S. are guaranteed security in their persons and possessions unless an officer of the law

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2 Jay Reedy, remarks from debate on HB 2315, Cordell Hull State Office Building, April 11, 2018.
3 Id.
4 U.S. CONST. amend. IV.
can satisfy the constitutional requirements for a warrant for search or seizure.\(^5\)

The determination of probable cause to search or seize someone or their belongings is usually made by a neutral magistrate who must sign a warrant granting law enforcement permission to investigate.\(^6\) Some exceptions to this principle allow the police to act without a warrant. For example, the police may conduct a traffic stop based only on a “reasonable suspicion” that someone is engaged in illegal conduct.\(^7\) Police officers are generally expected to base searches and seizures on specific evidence of legal violations, not on assumptions. In the immigration context, the police frequently infringe on immigrants’ constitutional rights through unjustified seizures of their persons, sometimes in situations in which there is not verifiable reasonable suspicion or probable cause.

This article discusses four different examples of Fourth Amendment violations towards undocumented immigrants, citizens, and legal residents. The first section examines instances of Latino immigrants being stopped in their personal vehicles at higher rates than other groups. The second section looks at stops on public transit, which perpetuate the unreasonable suspicion of Latinos, restrict their liberties, and subject them to unconstitutional seizures. Section three looks at cases outside of the border zone where the police use sweeping searches, sometimes based upon no suspicion besides appearance, to intimidate immigrants at their places of


work. The last section examines sweeping raids and in other contexts where immigrants are taken into custody under ICE detainers. Officials of ICE, however, sign these civil, administrative warrants, as opposed to neutral adjudicators signing criminal warrants. Some of these ICE arrests are so egregious that some immigration scholars have begun asking not “whether immigration arrests violate the Fourth Amendment, but rather why these arrests have been shielded from constitutional scrutiny for so long.”

I. THE BORDER ZONE & PERSONAL VEHICLES

Two-thirds of the U.S. population live in parts of the U.S. where Customs and Border Protection (CBP) Officers are legally permitted to “board and search” vehicles. If someone lives within 100 miles of the border, border patrol agents can pull them over in the name of preventing illegal immigration. However, the police are not allowed to stop a vehicle unless they have a reasonable suspicion that the occupants are involved in criminal activity. The difficulty is that some people believe that they have a clear picture of what an undocumented immigrant looks like.

The concern is that when the police encounter people that appear to be Latino, they will be inclined to use these individuals’ appearance as a basis for concluding that there is a reasonable suspicion regarding their immigration status. In border towns like El Paso where eighty percent of the population is Latino, the fact that


9 8 U.S.C § 1357(a)(3).


someone is Latino should not serve as a “reasonable suspicion” for believing that someone is an undocumented immigrant.

The principles in 8 U.S.C § 1357(a)(3), which established a 100-mile border patrol zone, give CBP officers latitude to engage in racial profiling. In many instances, these searches and seizures seem to involve nothing more than the skin color of drivers and passenger. Class action lawsuits have revealed that sheriffs have racially profiled Latinos in traffic stops. On the other hand, those of European descent are assumed to be citizens, while Latinos are stopped and questioned about their status. As the CATO Institute points out, laws like these have the potential to turn people’s faces into their “papers.”

II. PUBLIC TRANSIT AND THE MENDENHALL TEST

The situation is aggravated by the fact that immigration officials also stop people and ask for papers on public transit routes within the one-hundred-mile border zone. Last year, ICE boarded Greyhound buses to search for undocumented immigrants, then detained a customer due to the appearance of his shoes—they suspected the shoes had been worn in a recent border crossing.

In the case of Florida v. Bostick, officers conducted a search on a bus in a similar manner, but they were searching for drugs instead of undocumented immigrants. The issue was whether the police violated the Fourth Amendment by entering the bus. Although the

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13 See note 8.
Court ruled that Bostick was not “seized,” Justice Marshall argued that

officers who conduct suspicion-less, dragnet-style sweeps put passengers to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. It is exactly because this ‘choice’ is no ‘choice’ at all that police engage this technique.\(^{15}\)

Justice Marshall’s position is compelling given that an individual has only a limited choice when forced to choose between being interrogated on a bus and leaving the bus, possibly in the middle of nowhere. This type of intimidating situation should be treated as illegal when it is based upon nothing more than the fact that a suspect is wearing run-down shoes.

Similarly, in *U.S. v. Mendenhall*, the Court made clear that a seizure occurs when a “reasonable person” would not feel free to leave and continue going about his or her business after a show of authority from an officer.\(^{16}\) In the Court’s opinion in *California v. Hodari*, Justice Scalia wrote that the *Mendenhall* test establishes that a show of authority is objective and based on “whether the officer’s words and actions would have conveyed [that a citizen is being told to remain in place] to a reasonable person.”\(^{17}\) The fact that the officers approached individuals who were confined on a bus—giving them the sole alternative of departing the bus and being stranded in the middle of nowhere—constitutes a show of authority that would have intimidated a “reasonable person.” In other words, ICE officials should be regarded as having seized an entire Greyhound bus, without probable cause or a specific reasonable


\(^{16}\) *United States v. Mendenhall*, 446 U.S. 544, 446 (1980)

suspicion, solely on the assumption that those aboard could be undocumented immigrants.

An inherent problem in the “reasonable person” standard as applied in the *Mendenhall* test is that it caters to those who know their rights. For those who were raised in other countries, their interactions with police and the concept of “rights” can be different than the average native-born American’s. People come to the U.S. illegally for a variety of reasons. Though some come for economic reasons, many people are forced to flee their home countries because of persecution. This creates difficulties with the application of the “reasonable person” standard. Although the standard defines when a seizure occurs, it is based on what a reasonable U.S. born citizen would think. The perception of what is “reasonable” may be completely different for non-citizens or naturalized citizens, who have had different experiences. The “reasonable person” standard needs to be applied differently for undocumented immigrants.

III. SEIZURES IN WORKPLACES: *INS v. Delgado*

Another practice related to the *Mendenhall* test which could be considered unconstitutional occurred much farther from the border in Tennessee. Last year, ICE conducted a raid at a meatpacking plant in Bean Station, Tennessee, which was the “largest single workplace raid in a decade.”\(^\text{18}\) This Tennessee raid was similar to the one conducted in *Immigration and Naturalization Service (INS) v. Delgado*, in which INS agents performed a search at a plant

looking for undocumented immigrants.\footnote{\textit{INS v. Delgado}, 466 U.S. 210 (1984).} The Delgado case asked the question of whether workers can be reasonably seized in their workplace since it is a confined setting.

The Court held that they had not been seized in the \textit{Delgado} case. But, in his dissent, Justice Brennan addressed the \textit{Mendenhall} test and questioned whether or not a reasonable person would feel free to leave this environment. He wrote:

It is fantastic to conclude that a reasonable person could ignore all that was occurring throughout the factory and ... believe that he was at liberty to refuse [INS] questions and walk away. Respondents’ testimony paints a frightening picture of people subjected to wholesale interrogation under conditions designed not to respect personal security and privacy, but rather to elicit prompt answers from completely intimidated workers. These tactics amounted to seizures of respondents under the Fourth Amendment.\footnote{\textit{Id.}}

The fear that the INS generated in this raid did not create an environment in which the workers would have felt comfortable leaving and/or avoiding questions. Therefore, this should be regarded as a workplace seizure. The Court’s ruling in favor of the INS diminishes the Fourth Amendment rights of immigrants — particularly immigrants of Latino descent, who seem to be the main focus of \textit{ICE} raids at these plants.

In the Bean Station case, it is evident that the police show of force was even greater than that in \textit{Delgado}. As the \textit{Washington Post} reported, there was “a surprise blitz of the factory and streets blocked by state and local authorities.”\footnote{Sacchetti, supra note 18.} There is no way that individuals working at the factory would have felt free to go about
their daily business when ICE had barricaded the entire street surrounding their workplace. The blockade that the officers set up in Bean Station involved a show of force that would make a reasonable person feel confined in their actions, as Justice Brennan argued in Delgado.

This confined raid should be treated as a violation of the right to be protected from unreasonable seizures. The officers arrested eighty-six immigrants in the raid because they suspected that they were in the country illegally, but thirty-two of these immigrants were released within a few days when ICE found evidence that they were in the country legally. This type of action, where immigration officers arbitrarily detain people without individually determining their status beforehand, could be viewed as a violation of their liberties.

The Supreme Court emphasized in Delgado that reliance upon a person’s apparent ancestry provided an insufficient basis for detaining that person. The Fourth Amendment specifically requires that warrants describe what is intended to be seized. Though the Fourth Amendment does not require that the names of each suspected immigrant be separately listed, a justifiable reason should be explicitly stated in the warrant for questioning particular people at the plant. Officers did not demonstrate probable cause for seizing so many immigrants at Bean Station.

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22 Sacchetti, supra note 18.
IV. SANCTUARY CITY LAWS AND ICE DETAINERS

Congressman Reedy’s argument for sanctuary cities before the Tennessee House centered around the idea that undocumented immigrants only come into contact with law enforcement when they have committed crimes, so they should not be protected under sanctuary city policies. Reedy ignores that police officers sometimes look for undocumented immigrants in factories, on buses, or in their personal vehicles. These sweeping searches can bring undocumented immigrants into contact with law enforcement more often.

Immigrant searches do not solely take place in confined buildings or public transport; they can also encompass entire immigrant neighborhoods. Matt Taibbi states that police in some Latino neighborhoods place checkpoints to catch residents moving between their neighborhood and the white part of town. Taibbi’s account is corroborated by a Newsweek report from last year that reported that ICE’s attempt to crackdown on immigrants with known criminal charges has disproportionately centered on immigrants who have only committed traffic violations. So despite Reedy’s claim, there are a variety of scenarios where undocumented immigrants come into contact with law enforcement when they are simply going about their daily lives, attempting to do what non-Latino citizens are allowed to do without question.

Representative Reedy also asserted that sanctuary cities are intended to interfere with cooperation between local law

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26 Chantal Da Silva. Most Charges in ICE Criminal Crackdown Related to Traffic Offenses. NEWSWEEK. (February 14, 2018).
https://www.newsweek.com/ice-arrested-more-immigrants-over-traffic-offenses-including-duis-any-other-806467
enforcement and federal officials. However, local law enforcement officials are simply being prohibited from violating immigrants’ Fourth Amendment rights. The Massachusetts Supreme Court agrees. In the first state supreme court ruling regarding compliance with ICE detainers,\textsuperscript{27} the court ruled that “state law enforcement lacked authority to detain individuals subject to ICE detainers under state law.”\textsuperscript{28} In other words, if a government enacts an anti-sanctuary city law that requires local law enforcement to work with ICE, they would be in danger of violating the Fourth Amendment. Sanctuary cities give immigrants peace of mind and represent the government’s commitment to uphold the Constitution.

There are multiple situations in which local law enforcement working alongside ICE should be regarded as violating the Fourth Amendment. These violations are a result of a confusion between administrative warrants and judicial ones. An administrative warrant is one that authorizes ICE to detain a suspected undocumented immigrant while they check the individual’s immigration status or begin the detention process.\textsuperscript{29} These warrants are frequently known as detainers which indicate that ICE has started an investigation into whether someone is subject to removal from the United States.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{27} \textit{Lunn v. Commonwealth.} 477 Mass. 517 (2017)
\item \textsuperscript{29} Chantal Da Silva. \textit{Police who help detain immigrants for ICE could be “violating Fourth Amendment,” experts say.} NEWSWEEK. (February 20, 2018b). https://www.newsweek.com/what-people-fearing-deportation-need-know-about-ices-administrative-warrants-808205
\end{itemize}
These warrants are not based on probable cause, making them unjust. Because the Immigration and Nationality Act does not require the involvement of a neutral adjudicator, the warrant is signed by an ICE official rather than by a judge.\(^\text{31}\) Since the signer is not subject to the same constitutional requirements as a judge, they have significantly less motivation to adhere to the Fourth Amendment. Instead, there is a risk that they will value ICE’s objectives over constitutional values. When immigrants are unconstitutionally detained by ICE, “it could take several days, or even weeks, for a court to address the error” because these ICE warrants are not supported by a probable cause finding by a judge.\(^\text{32}\) This was the case for the thirty two immigrants arrested in the Bean Station plant who were detained and later released.

Part of the reason for this lack of protections is that immigration cases are treated as civil cases and not as criminal cases, which is also why immigrants are not given the right to an attorney in such proceedings. Given the potential repercussions of ICE cases, including the threat of jail time or deportation, immigration cases are not typical civil trials. Under the current system, immigrants endure the repercussions associated with criminal proceedings. However, they are not accorded any of the benefits associated with criminal proceedings, such as the right to an attorney or habeas corpus. The fact that immigration cases are labeled as civil should be regarded as a denial of immigrants’ constitutional rights.

One solution is to handle immigrant cases in criminal courts. Thus, arrest warrants would require the signature of a neutral

\(^{31}\) Kagan, supra note 7.

\(^{32}\) Roque Planas. Here’s A Good Reason for The Fourth Amendment To Apply To Immigration Courts. Huffington Post. (May 17, 2016), https://www.huffingtonpost.com/entry/immigrant-detention-fourth-amendment_us_573102ae4b016f37896be7e
adjudicator and would be subject to strict Fourth Amendment standards. The imposition of criminal process would also presumably allow immigrants to be granted an attorney to ensure that they are informed of their rights and prohibit officials from asking them to sign stipulated orders of removal in which they forfeit their protections.33

Because ICE detainer warrants are currently not judicial—and therefore can be issued under a lower standard of proof—they place immigrants at a disadvantage. Consider, for example, the case of Wilson Rodriguez Macarreno. He called emergency services when a trespasser tried to break into his home but was ultimately taken away in handcuffs himself. When the police responded to his call, they uncovered an ICE detainer on his record. Unable to recognize the difference between a judicial warrant within their jurisdiction and an administrative one issued by ICE, local police arrested him. He was sent to jail to await deportation to Honduras.34

Although the consequences of the administrative warrant are the same, if not greater, than warrants issued in criminal cases, Macarreno was not afforded the same rights as a criminal. Violent criminals are accorded the right to due process—including an appointed lawyer and a fair and speedy trial—which are denied to immigrants who have only committed the civil offense of residing here illegally. Just for trying to protect his family from an intruder, Macarreno is now being extradited from the U.S.

Macarreno is certainly not the only individual who has been affected by ICE detainers. Since such detainers can be issued without the involvement of a neutral magistrate, there is a greater likelihood of mistakes, which creates the possibility that even U.S.

33 Taibbi, supra note 25.
34 Da Silva, supra note 29.
citizens and legal residents may be detained by ICE. In 2012, ICE arrested Jhon Erick Ocampo—a naturalized citizen—at his house. After driving Ocampo to a detention center and imprisoning him for a week, ICE released him when they realized that he was a citizen. Although, they had driven him to a detention center 200 miles away from home, they refused to drive him back.\(^{35}\) As long as ICE detainers are being used in the same way as criminal arrest warrants, stories like Macarreno’s or Ocampo’s will continue to occur.

**CONCLUSION**

Fourth Amendment violations occur in the workplace, in personal vehicles, on public transit, and even in people’s own homes under the guise of preventing illegal immigration. Undocumented immigrants, documented immigrants, and citizens alike are targeted due to their appearance which in turn creates suspicion of their status. In a country where people have misconceptions of what an undocumented immigrant looks like, unfair assumptions easily arise. Have we, as a nation, come to a point where stopping illegal immigration is more important than ensuring the rights of all people to be free from unreasonable suspicion and, more importantly, unreasonable searches and seizures?

\(^{35}\) Planas, *supra* note 32.
THE MODERN SYRIAN REFUGEE CRISIS:
PRACTICALITY VS. HUMANITY

Carolyn Adams

“Life’s most persistent and urgent question is, ‘What are you doing for others?’” –Martin Luther King, Jr.

INTRODUCTION

I. CATALYSTS AND HISTORY OF THE SYRIAN CIVIL WAR
   A. Resources and the Environment
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INTRODUCTION

One of today’s most pressing humanitarian emergencies is the international refugee crisis, affecting nearly seventy million people worldwide.¹ The number of globally displaced people is nearly equivalent to the population of France. About twenty-five million of these people have legal refugee status while the other forty-five million are either internally displaced or seeking some sort of asylum.² Most refugees originate from Syria, the Central African Republic, South Sudan, and Myanmar, and most are fleeing political or religious tension and persecution.³

The consequences of these crises have left scholars and humanitarians alike wondering what can be done for the sake of the afflicted people as government leaders and ordinary citizens ponder

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² Id.
the effects that open borders or implemented relief programs might have on their own country. We must find and analyze information to formulate a plan to assist those in distress. This article seeks to find the balance between assisting refugees and protecting the citizens of asylum-granting countries. Syria is the country of origin for the largest number of refugees in the world and can serve as a case study to better understand how to find this balance.

I. CATALYSTS AND HISTORY OF THE SYRIAN CIVIL WAR

The primary source of the Syrian refugee problem is the country’s civil war, which is a result of the 2011 Arab Spring, a series of pro-democracy protests in the Middle East and Northern Africa. Since the initial protests, civil unrest in the region has grown, especially in Syria. After the violent suppression of initial demonstrations promoting the removal of President Bashar al-Assad, a militant Syrian group began its battle against the oppressive and corrupt Assad administration. Sectarian conflict has also been on the rise since the onset of the war, allowing groups like ISIS to wreak havoc on Syrian communities. The result has been an ongoing eight-year civil war, displacing an alarming twelve million from their homes. These people are left to consider where they can go, how they will travel there, and how they can adapt upon their arrival. Available host countries also have much to contemplate regarding the refugee situation.

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A. Resources and the Environment

One of the issues potential host countries must consider is the strain on national resources and their environment. Refugee camps and holding areas are typically large plots of isolated land that are already environmentally sensitive.\(^7\) The environmental stress of hundreds of thousands of people staying on this land for extended periods of time leads to localized environmental crises such as water pollution and scarcity.\(^8\) For example, water supply problems have been a primary environmental concern for the Turkish government, which accepts a large number of refugees. According to the Ministry of Foreign Affairs, Turkey has “only about one fifth of the water available per capita in [...] regions such as North America and Western Europe.”\(^9\)

Recent data indicate that a population surge combined with Turkey’s already meager water supply is leading to extreme water shortages in the region.\(^10\) Now, it is expected to aid in supply to more than three million Syrian refugees on top of its own eighty million citizens. Water supply and access are persistent problems that need to be addressed for energy and agricultural reasons.

Two massive transboundary rivers, the Tigris and Euphrates, flow through the southeastern portion of the country into

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neighboring Syria and Iraq. Due to their size, they account for almost a third of Turkish water supply and, as such, Turkish law dictates that they be “used in an equitable, reasonable and optimum manner.”\textsuperscript{11} However, as refugees flood into Turkey from this area, water is heavily used, creating shortages. Moreover, the rivers are often used for hygienic purposes, contaminating the water and making it unfit for drinking. For example, by consuming this water and staying in close quarters it is easy for diseases like cholera to spread and infect large percentages of the refugee population.\textsuperscript{12}

Incoming refugees are also tasked with felling wood for makeshift shelters and burning it in an effort to cook food or stay warm. In turn, entire habitats are lost, and famine becomes widespread as arable land degrades. When adding together the estimated value of water usage, destruction of land, and the spread of disease, the cost might outweigh the benefits of hosting refugees. The UNHCR, the developed world’s primary organization for sending aid to refugees, puts this idea into perspective, stating:

"On a global scale, the impacts of refugees on the environment is not significant ... [but] for most countries, the loss of any forest cover may be a major issue because of habitat degradation, the loss of ecosystem functioning and, often, reduced levels of income or a lower quality of life. Reversing the loss or environmental damage in such a case is a costly and not always practical solution."\textsuperscript{13}

Host countries are then left to decide between the relative wellbeing of their nation, both geographically and economically, and that of millions of human beings.

\textsuperscript{11} \textit{Id.} at 9.
\textsuperscript{12} \textit{Id.} at 7.
\textsuperscript{13} \textit{Id.}
It seems that the only solution might be to close borders in a preventative effort, but I propose a different solution which will be of more benefit to all parties involved. Combining the resource infrastructures of the Kakuma refugee camps in Kenya and the formal structure of German refugee camps could prove to be a compromise that ensures safety for refugees and security for the state and its environment. The Kakuma camps contain both formal and informal infrastructures for water and energy for refugees. Wells are dug and water provided by the UNHCR and an acting Norwegian committee, who also place elected people in charge of water sanitation and distribution. Energy resources are provided for a fee by the larger surrounding community of Turkana, which allows money to flow into the surrounding community as the refugees receive electricity in return. These systems allow refugees to have access to necessary amenities without placing heavy burdens on the natural resources of the state itself. For housing, official German camps provide living spaces within buildings for a large portion of registered refugees. The quality of life in these camps is exponentially higher than that of informal camps and, as an added benefit, cause no more strain on environmental resources than any other apartment style building.

B. Economic Effects

The most pressing concern surrounding refugee housing for a majority of states is the effect on the economy. Cost-benefit analyses, resource expenditures, and welfare costs are a small

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15 From the documentary *Human Flow*, dir. Ai Weiwei
number of important decisions nations must make when granting asylum. The real problem lies more in the realm of economic efficiency. Efficiency is the net value of an action or input and, in academic approaches to humanitarian work, is achieved when “no more changes can benefit someone without making someone else ‘worse off’”\(^\text{16}\). For example, as Syrian refugees have flooded into Turkey, they have brought entrepreneurial skills and business as well as a greater household base for markets to sell products to. This is true in a large portion of the communities refugees inhabit because “refugees are more likely to be entrepreneurial and enjoy higher rates of successful business ventures compared to natives ... [and] at the local level, refugees provide increased demand for goods and services through their new purchasing power.”\(^\text{17}\) Conversely, refugees have become a large portion of the Turkish population and are subject to welfare programs that amount to a full percent of the Turkish GDP, totaling nearly 8.5 billion dollars.\(^\text{18}\) According to various economic studies, housing refugee populations in camps is worse for the economy than integrating them into the community. Even then, refugee camps with large populations typically begin to create their own economies through trade and entrepreneurial endeavors.\(^\text{19}\)

The general population of most states is often willing to pay more in exchange for personal value. The question, then, of whether or not the cost outweighs the benefit is almost entirely subjective as

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\(^\text{16}\) Module 5: Economic Evaluation. UNITE FOR SIGHT. https://www.uniteforsight.org/health-economics/module5


\(^\text{19}\) Id. at 15.
efficiency relates specific input data to the output of perceived net value. National host governments must also determine the relative equity of their policies, at which point personal opinion comes into play. Some believe that, as citizens of their respective nations, they should be the primary beneficiaries of their national aid and welfare programs. Others believe that non-citizens should be able to partake in the benefits that the rest of the nation receives. The true balance, then, between equity and efficiency, as well as between the two conflicting views surrounding national aid, lies in whichever policies assist the most people for the lowest cost.

Developed countries could accept as many refugees as they can hold. Some of these states, like Greece and Turkey, have done just that but with negative impacts on their environment, economy, and social stability. According to studies by multiple organizations, this action might seem to be the most humanitarian-minded, but it is actually the least practical use of funds. The Center for Immigration Studies asserted as much in a 2015 study, saying that

For what it costs to resettle one Middle Eastern refugee in the United States for five years, about 12 refugees can be helped in the Middle East for five years, or 61 refugees can be helped for one year. ... [Furthermore,] The five-year cost of resettling about 39,000 Syrian refugees in the United States is enough to erase the current UNHCR funding gap [for resettling four million refugees].

Since accepting as many refugees as possible is not helpful, developed countries are left with two choices: help a relatively small number of refugees or devote their available resources to aid within the refugees’ region of origin. With these facts in mind, it would be imprudent to resettle Syrian refugees in any country

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outside of the Middle East or Northern Africa. By doing so, host countries would be spending money needlessly while assisting far fewer people. Furthermore, instead of giving unconditional financial aid, governments would benefit from creating sustainable occupations and economic opportunities through social integration.\(^{21}\)

II. HOW DO SOCIOPOLITICS COME INTO PLAY?

To most ordinary citizens, the biggest issue with granting asylum to refugees is one of social adaptation. As refugees maneuver their way into local communities, conflict can arise due to cultural and ethnic differences, language barriers, and religious tensions. Even between the Turkish and Syrian peoples, who have closely related cultures and religions, there is tension. Initially, Turkish compassion towards refugees seemed to be steady and enduring. Now, according to multiple polls, the larger part of Turkish citizens resent Syrians “for deteriorating public services, [causing] price increases, and [prompting] rising unemployment.”\(^{22}\) Whether or not Syrian refugees have actually contributed to these burdens, the Turkish population feels it to be true and proposes either more complete integration or deportation. These tensions are, in part, economic as Turkey allocates funds “among municipalities according to the number of Turkish citizens, without considering the refugee population, which means resources are [...] stretched in


communities with large numbers of Syrians.” Understandably, the Turkish residents in these communities feel that the amount of money spent on integration programs combined with the stretched funds for their cities is far too extreme. Furthermore, most Syrian refugees enter into the informal economy as unskilled workers without permits, allowing them to work for less money and subsequently creating job competition for the low-income Turkish population.

These economic and cultural clashes have caused a rise in crime. An anonymous group has reported an astonishing 181 cases of refugee-related criminal incidents in 2017 alone, during which there were twenty-four Syrian deaths. According to multiple surveys and polls within the general Turkish public, “75 percent of Turkish citizens did not believe they could live together peacefully with Syrians […] in Istanbul […] 72 percent felt uncomfortable encountering Syrians and 76 percent had no sympathy for the refugees.” Turkish citizens are hardening to the influx of Syrians into their nation, raising the question of how much more Turkish citizens will tolerate before the conflict becomes a full-scale urban ethnic war. Violence is not the standard for countries hosting refugees. However, the effects of cultural tension should be considered by any country looking to host refugees.

Countries can help refugee populations transition into their new culture by emulating German methods with funds allocated to them by humanitarian organizations. In recent years, the German state has accepted upwards of 700,000 Syrian refugees and has, subsequently, implemented vast social programs to improve

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23 Id. at 21.
24 Id.
25 Id.
26 Id.
integration. These include vocational training programs for a variety of jobs and social integration schools to help migrants learn German language, history, government and economic systems, and other cultural norms. Syrian children also have access to German schooling, meaning they can continue their educations unlike in most informal camps. It has yet to be determined if the benefits of these programs will outweigh the initial costs, but scholars are hopeful that the refugees will become productive members of the German economy. If other states follow Germany’s model, there is a strong possibility for reducing, and perhaps altogether eradicating, intercultural conflict and isolation between their natural-born citizens and incoming refugees. Thus, international organizations should require that every host country provide integration programs, as long as those programs do not require government subsidies or increased taxes.

III. INTERNATIONAL LAW MANDATES… OR DOES IT?

Sovereignty is a fundamental characteristic of statehood, but its implications are widely misunderstood. Sovereignty is the possession or exercise of supreme authority within a limited sphere, with the boundaries of the sphere being drawn by the highest authority of government. The idea seems simple enough on a domestic scale, but a problem arises when one tries to clarify the line between human rights and sovereignty. In Syria, for example, Assad’s use of chemical weapons against his citizens is a human rights violation, but foreign interference infringes upon Syria’s

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27 Lily Hindy. *Germany’s Syrian Refugee Integration Experiment*, THE CENTURY FOUNDATION. https://tcf.org/content/report/germanys-syrian-refugee-integration-experiment/?session=1

28 *Id.* at 27.

29 Merriam-Webster.
sovereignty as a state. This dilemma illustrates the shortcomings of international law.

In 1948, the member states of the United Nations signed the Universal Declaration of Human Rights, which details the freedoms afforded to every citizen of the nations under its authority. The document has been the foundation for most international humanitarian law, but violations of the rules that lie therein rarely have consequence due to the fact it is not legally binding. The Assad administration, along with other regimes in various states, is currently violating multiple provisions of the document such as Articles 5 and 9 which state, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and “No one shall be subjected to arbitrary arrest, detention or exile” respectively.

Although they are not technically breaking laws, in doing so, they assert their disagreement with the values of the United Nations as a whole and should be subject to removal from the organization. However, any intervention by the United Nations has been blocked. Two key members on the UN Security Council, Russia and China, issued an extremely rare double-veto on taking action in Syria. Under UN guidelines, one veto on the Security Council is enough to prohibit action by any other member state, making outside involvement in Syria impossible and illegal. Subsequently, though the world often looks to the United Nations as the defender of the human and refugee rights, a globalized economy and cultural points of controversy make decisions by this kind of institution much more

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30 Universal Declaration of Human Rights, United Nations.
31 Id.
ambiguous. International human rights law is often ineffective due to a lack of binding mandates.

Any state is technically within its rights to reject an asylum-seeker if they have already been granted protection by another state. While host-countries are internationally required to allow refugees to seek asylum, “granting would be a discretionary act of the State (in accordance with their domestic legislation) rather than a right of the individual to receive it (in accordance with international law).”\(^{33}\) Furthermore, according to the Refugee Convention, non-refoulement—the prohibition of returning an asylum-seeker to a place where they might receive illegal treatment—is not the sole requirement for a host-state.\(^{34}\) They must include “access to social assistance, healthcare, work, and education” in their provisions for the refugee population. Turkish foreign policy states that the government maintains a strict non-refoulement policy, but the other hosting obligations outlined by the Refugee Conventions only reach to “250 thousand Syrians living in temporary protection centers” and a non-specified number of Syrians outside official camps.\(^{35}\) If the Turkish government aids another 250,000 refugees outside of camps, that still leaves 86 percent of Syrian refugees in Turkey receiving little or no aid. Without a definitive and enforced system in place to maintain the standard of refugee assistance, we cannot ensure asylum-seekers are truly much better off in their host country than in their homelands. This necessitates legislation that will enforce fair and equal treatment for all registered refugees funded by humanitarian and social welfare donations.


\(^{34}\) Id.

\(^{35}\) Humanitarian Assistance By Turkey, Republic of Turkey Ministry of Foreign Affairs.
CONCLUSION

As previously demonstrated, an influx of refugees typically causes environmental, economic, and social issues for host countries. Yet, as human beings, we are often obligated and emotionally compelled to help others, expecting, in our times of need, others to do the same. Most true acts of justice are the direct result of our innate drive to stop inequity from having free reign among us. However atrocious the living conditions of the refugees in these camps may be, their willingness to run towards the hardships that await them there is telling of just how vast the state of crisis is in their home countries. Then again, some circles argue that they have no issue with women and children fleeing as refugees to other countries, but able-bodied men should remain and fight for their cause. Particular member nations of the United Nations, especially the United States, spend millions of dollars and send thousands of troops to assist in Syria, so why are the country’s own men not staying back to fight for their cause? Again, this issue is extremely complex as man’s inherent fear of death can drive even the most patriotic citizen from his home or a committed soldier to desertion.

All things considered, there is no “perfect” solution to any refugee crisis because we occupy a vastly imperfect world. There will always be men hungry for power and thirsty for vengeance; greedy people who prioritize the value of the dollar above the value of a life. Even if developed nations send funds to relocate Syrian refugees to other states within the Middle East, the countries that would be accepting and accommodating some twelve million people, even with full funding, would be subjected to most of the sociopolitical and environmental consequences inherent to immigration. When humankind is faced with a humanitarian crisis of this magnitude, tension will forever lie between this sense of
practicality and empathy, but a compromise must be found to ensure the solution that benefits the most people, the needy and their rescuers alike. And even though finding the balance between head and heart is arguably life’s most difficult struggle, it remains one of its most gloriously noble pursuits.