

Volume VII - April 2024



The Capstone Journal
of LAW *and* PUBLIC POLICY

The Capstone Journal of Law and Public Policy aims to provide undergraduates in the Southeast region and beyond with the opportunity to publish exceptional work, contributing to the discussion of relevant legal issues, their nuances, and their implications.



The Capstone Journal
of LAW *and* PUBLIC POLICY

The views represented in Volume VII of The Capstone Journal of Law and Public Policy are solely those of the author. They do not represent the opinions or views of the Editorial Board, The Capstone Journal of Law and Public Policy, or The University of Alabama.

Copyright © 2024 The Capstone Journal of Law and Public Policy. All rights reserved.

No part of this publication may be reproduced, distributed, or transmitted in any form or by any means, including photocopying, recording, or other electronic or mechanical methods, without the prior written permission of the publisher, except in the case of brief quotations embodied in critical reviews and certain other noncommercial uses permitted by copyright law.

MASTHEAD

Volume VII

April 2024

Number 1

David Ware
Editor in Chief

Michael Regnier
Managing Editor

Executive Editors

Jackson Alsup **Brina Harden**
Maria Derisavi **Angela Henle**

Director of Campus Outreach and Recruitment
Kate Herndon

Associate Editors

Danielle Chbeir **Amanda Moulton**
Jack Gibby **Liam Phillips-McGraw**
Alyssa Heitz **Katelyn Rials**
Kate Herndon **John Richardson**
Jack Hurst **Nicholas Tolbert**
Tara Jones **Saniya Virani**
Reese Langdon **Brendan Yee**

Dr. Lawrence Cappello
Faculty Advisor

Proudly published by the
LEGAL RESEARCH CLUB

TABLE OF CONTENTS

INTRODUCTORY MATERIALS

- Letter from the President
- Letter from the Editor

ARTICLES

- Examining Tension Between Originalism and Stare
Decisis: Suggestions for Future Directions 1
Carson Goodier

- Integrating Native Voices into Federal Land
Management: Bear Lodge and NPS Implementation of
Native American Federal Legislation 23
Victoria Myers

- One Foot In the Grave: Lawful Permanent Residence as
Legislative Immigration Reform for Dreamers’
Precarious Status 56
Alaina Ruffin

- Why the Current Juror Selection Process is Unfit to
Combat Implicit Biases 78
Karim Panjawani

- Population Pressure: The Domino Effect of Population
Policy 99
Olivia Key

An Analysis of School Vouchers in the U.S. Education System: How vouchers worsen its plight and suggestions for reform of the school funding apparatus..... 129

Matthew Merino

Assessing Water Disparities in the Global Community: Case Studies 155

Vivian Coleman

Letter from the President

On behalf of the editorial staff, the authors, and the Legal Research Club, I am proud to present the Seventh Volume of *The Capstone Journal of Law and Public Policy*. This journal and the LRC have worked in tandem to honor our mission by equipping undergraduates with the legal research skills necessary to navigate the legal field. With alumni at Harvard, Yale, University of Pennsylvania, and Georgetown Law Schools, I believe we are doing so successfully.

Since our founding, the Legal Research Club has thrived in creating an environment of legal education for anyone interested in the field. From originalism and voir dire to water disparities and immigration reform, this edition of the journal explores a wide variety of legal topics. Additionally, this year saw the LRC's highest ever attendance rates at meetings. At our core, we are rooted in the Legal History concentration of the History Department. Our advisor, Dr. Lawrence Cappello, has been tirelessly dedicated to the LRC, advising pre-law students, and recruiting for the organization. When I entered the graduate program in history this year, it went without saying that he would continue to advise me in my graduate work. He has created an environment in which students interested in the law can thrive. I am personally grateful to have him as a mentor.

My thanks also go to David Ware and Michael Regnier, whose hard work has brought the journal to another level. I am also thankful to the LRC's Executive Board, composed of Addie Grace Pyron, Angie Henle, and Audrey Kilgore. They have provided endless support in organizing and promoting events, managing administrative work, and handling the finances. Each of these people has excelled in their role and I consider myself fortunate to have been able to work with them.

Lastly, I am thankful to anyone who takes the time to support and read the Journal. This is a unique research opportunity for undergraduates, and I am endlessly grateful to those who support this goal. And so, to you, I present the Seventh Volume of *The Capstone Journal of Law and Public Policy*.

My best,

Kara Hutchinson
President, Legal Research Club
2023-24

Letter from the Editor

Dear Reader,

On behalf of the 2023-2024 Editorial Board, I am proud to present the Seventh Volume of *The Capstone Journal of Law and Public Policy*.

These seven authors, hailing from various universities across the southeast and beyond, explored novel legal questions from water scarcity to immigration reform. This edition was our most diverse both in terms of topic and institution, and I credit this to the efforts of my predecessor, Katie Kroft, and the truly outstanding outreach done by the journal's Managing Editor, Michael Regnier, and the Director of Campus Outreach and Recruitment, Kate Herndon.

Over the past four years, first serving as an associate editor and then the Editor-in-Chief, I have seen this publication and organization live up to its mission of providing undergraduates in the Southeast region and beyond with the opportunity to publish exceptional work. Since its founding in 2017 as the State of Alabama's first ungraduated law review, the journal has grown from a small club to an essential part of The University of Alabama's pre-law community. My experience here at The Capstone would not have been the same without this organization and those part of it. I will be forever grateful and look forward to seeing the future of this publication and its staff.

I would like to thank some specific individuals who made the publication of *The Capstone Journal of Law and Public Policy* possible: again, Michael Regnier, for his tireless and unwavering dedication to serving as the journal's Managing Editor and promoting our mission; Kara Hutchinson, for her service as LRC President, providing administrative

oversight and assistance; Dr. Lawrence Cappello, for his continued support and guidance as our faculty advisor; and last, but certainly not least, our staff that worked tirelessly to evaluate, edit, and polish every last piece being published.

And finally, to you, the reader, I cannot say thank you enough. Without your continued support of undergraduate legal research, both here at The Capstone and beyond, our publication would not be possible. I am proud to present to you the Seventh Volume of *The Capstone Journal of Public Policy*.

Sincerely,
David Ware
Editor in Chief, *The Capstone Journal of Law and Public Policy*
2023-2024

**EXAMINING TENSION BETWEEN
ORIGINALISM AND STARE DECISIS:
SUGGESTIONS FOR FUTURE
DIRECTIONS**

*Carson Goodier**

INTRODUCTION

- I. A BRIEF HISTORY OF ORIGINALISM
 - II. EXISTING TENSIONS BETWEEN ORIGINALISM AND STARE DECISIS
 - III. THE CASE FOR ORIGINALISM
 - IV. ARGUMENTS FOR STARE DECISIS
 - V. THE INDEPENDENT ROLE OF STARE DECISIS: DEMONSTRABLY ERRONEOUS PRECEDENT
 - VI. CONSTITUTIONAL VS. STATUTORY PRECEDENT
- CONCLUSION

INTRODUCTION

In recent years, the jurisprudential philosophy of originalism has rapidly risen to prominence, elevated to the national spotlight predominantly by the legal writings of the late Justice Antonin Scalia. Originalism, sometimes called legal textualism or literalism, is the theory of statutory interpretation in which judges consider the specific textual phrasing of a law or statute as well as the historical context in which it was written in order to “conform to the intentions

* Carson Goodier is a Senior studying psychology at Clemson University. Goodier plans to attend law school beginning in Fall 2025.

of the lawmaker.”¹ This theory of legal interpretation starkly contrasts the formerly popular idea of a “living Constitution,” which held that the document’s meaning was “susceptible to evolution over time.”² In fact, one of Justice Scalia’s most vocal ideological opponents, Supreme Court Justice Elena Kagan, has claimed that upper court justices “are all textualists now” thanks to Justice Scalia’s widespread influence.³ However, despite originalist philosophy’s newly regenerated popularity among legal communities, significant tension exists between the fundamental ideas of constitutional and statutory originalism and adherence to stare decisis. Here, I argue that a strong theory of stare decisis is favorable in statutory cases in which consistency is critical, while a weaker one is preferable in constitutional claims concerning fundamental rights.

Stare decisis, meaning literally “to stand by things decided,” is a legal concept referring to the authority of existing precedent over forthcoming legal cases. Horizontal stare decisis, which has persuasive but not binding authority, is applied when provably similar cases arise in the same court. For example, a case that appears in the Fourth Circuit Court of Appeals that deals with the same statute and similar circumstances as a prior case should be decided in the same manner as the original instance. Previous rulings in provably similar cases from different circuits should be considered in

¹ For a more in-depth discussion of this topic, see Stephen Markman, *Originalism and Stare Decisis*, 34 HARV. J.L. & PUB. POL’Y 111, 111-120 (2011).

² Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1921-1944 (2017).

³ For a fuller analysis of Justice Kagan’s discussion of the late Justice Scalia, see Diarmuid F. O’Scainnlain, “*We Are All Textualists Now: The Legacy of Justice Antonin Scalia.*,” 91 ST. JOHN’S L. REV. 303, 303-313 (2017).

the deciding of new Circuit Court of Appeals cases, but the precedents set are not required to stand.⁴ In vertical stare decisis, however, authority is binding, and precedent must be followed. Vertical stare decisis applies when a higher level court makes a ruling that applies to all lower level courts.⁵ For instance, a ruling made by the Supreme Court must be followed without exception by all lower courts throughout the United States.

Tensions arise between originalist jurisprudence and the concept of stare decisis when a previously decided case arguably or demonstrably contradicts the original and/or textual content of the rule of law. These cases can arise in constitutional or statutory cases, and can cause conflict and debate among originalist justices and legal scholars. In this discussion, I will examine the issues that are presented when demonstrably non-originalist precedent arises, the options and intellectual deliberations of the justices that encounter them, and some of the accepted legal interpretations and philosophies surrounding this tension, as well as suggesting a potential solution.

I. A BRIEF HISTORY OF ORIGINALISM

While originalist philosophy was skyrocketed to prominence by outspoken proponents like Justice Scalia, the underlying motivation for its rapid ascent into the mainstream dates back to the sociopolitical climate of the mid-twentieth century. Conservative Justice Clint Bolick of the Arizona Supreme Court argues that the famously liberal and judicially activist Warren Court of the 1950s and 1960s applied “an elastic interpretation of constitutional

⁴ *Stare Decisis*, LEGAL INFO. INST. (Sept. 7, 2022), https://www.law.cornell.edu/wex/stare_decisis.

⁵ *Id.*

provisions” and regularly “assumed legislative and judicial powers.”⁶ From 1953 to 1969, Chief Justice Warren presided over a Supreme Court notorious for overruling a number of criminal procedural precedents in a series of cases “that ‘incorporated’ the Bill of Rights through the 14th Amendment.”⁷ Due to some of its momentous civil rights decisions, including the desegregation of schools through the outright overruling of *Cumming v. Richmond County Board of Education (1899)*,⁸ *Gong Lum v. Rice (1927)*,⁹ and *Plessy v. Ferguson (1896)*¹⁰ in the prominent *Brown v. Board of Education (1954)*¹¹ case, the Warren Court elicited extraordinary backlash from those who considered it a platform for judicial activism and progressive agenda-pushing.

According to Justice Powell, the Warren Court overruled an existing precedent sixty-three times over sixteen years. The Burger Court, upon which Justice Powell served, had a tenure of seventeen years from 1969-1986, and overturned sixty-one cases.¹² Altogether, the Court has overturned an average of fewer than four cases per term, a number which has remained fairly consistent over time. Justice Powell argues that, considering the totality of cases that the Court considers each term, *stare decisis* “remains a

⁶ Clint Bolick, *Fidelity to the Constitution*, 3 HOOVER DIGEST 36, 36-42 (2018).

⁷ Lewis F. Powell Jr., *Stare Decisis And Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 281-290 (1990).

⁸ *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).

⁹ *Gong Lum v. Rice*, 275 U.S. 78 (1927).

¹⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹¹ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

¹² Powell Jr., *supra* note 7. It should be noted that these estimates may differ based on method of counting. In this case, numbers are garnered from explicit overturnings.

fundamental component” of the justice system.¹³

Bolick claims that the vehement response to the Warren Court’s sweeping judicial decisions brought forth a textualist reaction, which has maintained its distinction for the past several decades. The 1988 term of the Supreme Court marked a significant shift in the Court’s judicial direction. Justice Powell writes that the term itself presented a variety of uniquely difficult cases that forced justices to reexamine precedents and areas of the legal sphere formerly thought to be decided.¹⁴ The unusual difficulty of these cases resulted in multiple rulings that were 5-4, some without majority opinions at all. For instance, Justices Scalia and Kennedy declined to follow the precedent set by *Roe v. Wade*¹⁵ in the case of *Webster v. Reproductive Health Services*.¹⁶ Justice Scalia advocated for the outright overruling of *Roe*, while Justice Kennedy joined two other justices in limiting it instead. According to Justice Powell, the result was a “fractured Court with five separate opinions” and a muddled conclusion.¹⁷

The textualist majority on the Supreme Court has led to a revitalization of “private property rights, federalism, Second Amendment rights, constraints on national government power, and freedom of speech.”¹⁸ It is moderately surprising that, since the inception of the Roberts Court, the overturning of past Supreme Court decisions has become more frequent. Justice Powell affirms that overrulings as a general concept are not rare, but considered

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁶ *Webster v. Reproductive Health Svcs.*, 492 U.S. 490 (1989).

¹⁷ Powell Jr., *supra* note 7.

¹⁸ Bolick, *supra* note 6.

in the totality of the business of the Court, they are somewhat uncommon.¹⁹ Justice Stevens asserts that “two or three overrulings each Term are, indeed, significant,”²⁰ but the court as a whole, including certiorari jurisdiction, considers thousands of cases each year. Justice Powell claims that a significant majority of these cases involve nothing more than the application of previously declared precedent. “This,” he claims “is stare decisis.”²¹ He argues for a view of stare decisis as a “rule of stability, but not inflexibility,” quasi-similar to Justice Scalia’s “faint-hearted originalism.” This pragmatic approach to originalist application allows for greater elasticity when a long-standing precedent does not conform to textualist philosophy.

Krishnakumar writes that this trend is notable because originalists “tend to prioritize the predictability and stability of legal rules” while their purposivist counterparts “tolerate inconsistency and case-by-case adjudication.”²² However, it is notable that the prominent originalists on the Roberts Court have advocated to overturn statutory precedents nearly thirty times, while purposivists on the Court have done so only once in the same chronological period.

For example, in 2015, Justices Alito, Thomas, and Roberts advocated in a dissenting opinion to overturn a precedent regarding the 1964 Patent Act by arguing that the Court’s initial ruling was based on a now-debunked economic theory.²³ Likewise, Justices Thomas, Alito, and

¹⁹ Powell Jr., *supra* note 7.

²⁰ John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1- (1983).

²¹ Powell Jr., *supra* note 7.

²² Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 157-233 (2018).

²³ *Kimble v. Marvel Entm’t, LLC*, 135 U.S. 2401, 2415 (2015) (Alito,

Scalia argued in a 2014 concurrence with the majority opinion that a precedent regarding a 1988 securities law should be overturned because it was “based upon a since-disproved theory of efficient markets.”²⁴ In multiple other cases, including *Preston v. Ferrer* (2008) and *Kimbrough v. United States* (2007), Justice Thomas issued lone dissents that advocated for the overruling of statutory precedent, regardless of stare decisis.²⁵

While originalism tends to be the dominating form of legal thought represented in superior courts today, a number of legal scholars still make the case that originalism is not, in fact, the proper method of legal interpretation. George Washington University School of Law professors Colby and Smith argue that originalism is not, as widely claimed, a single, unified theory of interpretation, but rather a disparate grouping of distinct constitutional interpretations that create a living constitutionalism equivalent to that which it purports to ardently avoid.²⁶ In fact, they claim that the tenets of originalist philosophy are equally as flawed as the competing purposivist jurisprudence philosophies they purport to supersede.

Colby and Smith compare the philosophy of originalism to the Chicago O’Hare airport, arguing that it is a “point of departure,” but only because “there are so many flights on so many airlines to so many different places, you

J., dissenting).

²⁴ *Halliburton Co. v. Erica P. John Fund*, 134 S. Ct. 2398, 2417-27 (2014) (Thomas, J., concurring in the judgement).

²⁵ *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); *Kimbrough v. United States*, 552 U.S. 85, 114-16 (2007) (Thomas, J., dissenting).

²⁶ Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 239-307 (2009).

can use it to get virtually anywhere you want to go.”²⁷ This may be true in part, as different originalist judges may reflect different levels of commitment to the doctrine in their rulings. However, this is true of all philosophies of jurisprudence. Just as some originalist judges are more textualist than others, some purposivist judges are more liberal or conservative in their readings of the statutes and provisions in question. For the purposes of this discussion, I will examine *stare decisis* through the lens of originalist and textualist interpretive philosophy in order to further investigate the balance between the two.

II. EXISTING TENSIONS BETWEEN ORIGINALISM AND STARE DECISIS

Originalism and textualism, while (as Bolick notes) not identical philosophies, experience significant overlap.²⁸ Both assert that the meaning of a statute can be found within its textual content. *Stare decisis*, however, has little to do with the text of a law or statute. Indeed, it is possible that a precedent has been created and sustained for decades without any significant grounding in the rule of law. Thus, both of these concepts are critical to the United States legal system. Merrill claims that “neither one is going to vanquish the other, at least not any time soon.”²⁹ A successful legal system appears to depend on a delicate balancing act between the two theories, which can oppose or even outright contradict each other. Because of this tension, Justice Antonin Scalia famously referred to himself as a “faint-hearted originalist,” who would “abandon historical meaning when following it

²⁷ *Id.*

²⁸ Bolick, *supra* note 6.

²⁹ Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 271-288 (2005).

was intolerable.”³⁰ Justices Barrett and Scalia both argue for stare decisis as a pragmatic exception to originalism rather than an outright contradiction of the philosophy.

Applications of this ideology can be seen in the decisions of the current Court, upon which Justice Barrett sits. The Supreme Court has recently taken on a number of cases dealing with issues of stare decisis, most notably overturning a fifty-year-old precedent set in *Roe v. Wade* in *Dobbs v. Jackson Women’s Health Organization*.³¹ In the majority opinion in *Dobbs*, Justice Alito wrote at length about the judicial errors made in *Roe*, specifically addressing the nature of the Court’s error and the quality of the Court’s reasoning, which he called “egregiously wrong and deeply damaging.” *Dobbs* also overturned a similar case to that of *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³² in which the Court took the opposite approach in dealing with the tension between originalism and stare decisis. As opposed to taking on the “error” made in *Roe* identified by the later Court, *Casey* found that by “the principles of institutional integrity and the rule of stare decisis,” the proper course of action was to reaffirm *Roe*. This initial decision and eventual overruling by a later Court clearly demonstrate the difficulty in resolving the tension between these two legal theories.

III. THE CASE FOR ORIGINALISM

Justice Barrett claims that originalism is supported by two fundamental claims. The first of these is that “the meaning of constitutional text is fixed at the time of its ratification,” meaning that the originalist judge must take

³⁰ Barrett, *supra* note 2.

³¹ *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

³² *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833,864 (1992).

into account the context of a statute upon interpretation. The second basic claim of originalist jurisprudence is that judges will defer to the original meaning of a text because “it and it alone,”— meaning the text of a statute— is law.³³ Staunch proponents of originalism advocate for the overturning of precedent that does not strictly comply with the constitutional or statutory text in question. Justice Barrett cites several notable originalists, including Justice William Douglas, who wrote that the text of the Constitution is what Justices have sworn to defend, “not the gloss which his predecessors may have put on it.”³⁴ Gary Lawson, a lawyer and former law clerk for Justice Scalia, meanwhile, makes the argument that any interpretation that departs from an originalist perspective cannot be legitimate. Lawson uses the arguments presented in *Marbury v. Madison* to justify judicial review to support his assertion that, since the Constitution is the highest source of law, any statute or interpretation that contradicts the document is void. Therefore, he claims, “if the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution.”³⁵

Likewise, McGinnis and Rappaport propose that the original public meaning of a legal text should control its interpretation not simply because it is the written and expressed law, but because following that interpretational method would yield the best consequences for society as a whole.³⁶ Markman asserts that one of the undervalued

³³ Powell Jr., *supra* note 7.

³⁴ William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

³⁵ Gary S. Lawson, *The Constitutional Case Against Precedent*, 17 HARV J.L & PUB. POL’Y 23, 27-28 (1994).

³⁶ JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *Originalism and the Good Constitution* (2013).

advantages of an originalist philosophy of jurisprudence is that it “sets forth a clear decision making standard” before a case even arises, and therefore promotes equal treatment under the law.³⁷ Likewise, Justices on the Supreme Court of Michigan wrote in clear support of originalist philosophy, resolving in *Robinson v. City of Detroit*, that citizens use the words of a statute itself to govern behavior by virtue of “know[ing] in advance what the rules of society are.”³⁸

However, most legal scholars argue for a balance between past and present: an inherent respect for the decisions of previous judges, but a presence of mind to make the strongest interpretations in forthcoming legal cases according to textualist philosophy. Bolick, for instance, writes that “our job is not to conform the Constitution to our precedents, it is to conform our precedents to the Constitution.”³⁹ Additionally, Kurt Lash wrote that a “popular sovereignty-based originalist” can follow some demonstrably incorrect precedents without compromising their overall commitment to popular sovereignty as a construct.⁴⁰

Justices on the modern Supreme Court seem to corroborate this pragmatic approach to originalist jurisprudence. For instance, Josh Blackman discusses a possible framework for contemplating cases in which a decidedly nonoriginalist precedent is addressed.⁴¹ Blackman

³⁷ Markman, *supra* note 1, at 116.

³⁸ *Robinson v. City of Detroit*, 613 N.W.2d 307, 319–20 (2000).

³⁹ Bolick, *supra* note 6.

⁴⁰ Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1438-71 (2007).

⁴¹ Josh Blackman, *Originalism and Stare Decisis In the Lower Courts*, 13 NYU J.L. & LIBERTY 44, 46 (2019), referring to the dissenting opinions of Justices Gorsuch and Thomas in *Garza v. Idaho*, 586 U.S. ____ (2019)).

details the case of *Garza v. Idaho*, a case dealing with the Sixth Amendment right to effective counsel, and mentions the commentary of Justices Thomas and Gorsuch, which suggests that, in cases where there is a distinctly nonoriginalist precedent, a court should “tread carefully before extending” the scope of said precedent.⁴² In *Garza*, the Court heard the case of Gilberto Garza, who waived his right to appeal when accepting a plea bargain in a criminal case. Later, he requested that his attorneys file an appeal, which they declined. Garza then filed a motion claiming ineffective assistance of counsel because his attorneys refused to file an appeal after he waived his right in a plea agreement. The Court determined that Garza did, in fact, receive ineffective counsel, because his attorneys did not choose to file an appeal on his behalf.

Justices Thomas and Gorsuch dissented, finding no right to “effective counsel”⁴³ in the Constitution. They claimed that not only did the decision depart from established precedent, it “move[d] the Court another step further from the original meaning of the Sixth Amendment.”⁴⁴ While Blackman acknowledges the extremely limited power of lower-court judges to challenge existing precedent, the dissents of Justices Gorsuch and Thomas suggest that originalist lower court judges should follow established precedent, but not extend the range or scope of that specific precedent in order to remain as close to original meaning as possible.

He gives the example of any potential litigation, describing the tendency of the Plaintiff to argue that their position is entirely grounded in long-standing precedent,

⁴² *Id.*

⁴³ *Garza v. Idaho*, 586 U.S. ____ (2019).

⁴⁴ *Id.*

while the Defendant will argue that the Plaintiff's assertion is totally unsubstantiated by stare decisis. If the judge concludes that the Plaintiff is correct, or that the proper application of a statute is unknown, then they must follow precedent, whether it is originalist or not. However, if the judge resolves that the Defendant is absolutely correct in their claim that the Plaintiff's plea departs radically from existing precedent, Justices Thomas and Gorsuch suggest that it is not only possible, but necessary to refrain from expanding the non-originalist precedent further.⁴⁵ While the logic behind this theory is sound, it falls short in proposing an exhaustive solution to the existing tension between these two fundamental tenets of law. "Faint-hearted originalists" such as Justice Scalia recognized that the significance of some nonoriginalist precedent is too great to depart from.⁴⁶ I propose that both are integral to the system and necessary to its success in distinct cases.

IV. ARGUMENTS FOR STARE DECISIS

Conversely, another sector of legal scholars contends that a strong theory of stare decisis is the solution for many of the tensions surrounding originalist jurisprudence and adherence to precedent. Some argue that the benefits of adherence to precedent include the value of judicial restraint, rather than the activist philosophy that has controlled the court at certain points throughout its two-hundred-year history. Merrill claims that some "80 percent of the justificatory arguments in Supreme Court constitutional law opinions are grounded in precedent" rather than originalist philosophy.⁴⁷

⁴⁵ Blackman, *supra* note 41.

⁴⁶ Powell Jr., *supra* note 7.

⁴⁷ Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of*

Another case for the strengthening of stare decisis is made via what I will refer to here as the “sociopolitical chaos theory.” Many legal scholars assert that stare decisis is uniquely critical to the United States legal system because of its singular ability to maintain consistency in the rule of law. In many cases, precedent has been determined to be without constitutional or statutory foundation, but is allowed to stand because overturning it would cause social, political, and legal anarchy. Markman, for instance, writes that “a responsible court must not unnecessarily unsettle the law, or wreak chaos upon that law.”⁴⁸ This theory was demonstrated specifically after the ruling in *Dobbs*, which overturned a five-decade old precedential right to an abortion up to the point of fetal viability. After the *Dobbs* ruling, social and political chaos erupted. In returning the question of abortion access to the states, the decision eliminated the clear standards of legality that had been upheld for fifty years. It was replaced instead with “ambiguous, irresolute language.”⁴⁹ While this does not qualify the inherent correctness or fallacy of the *Dobbs* decision, it is important to note that overturning a longstanding precedent such as *Roe* is not without significant consequences both socially and politically.

Markman argues that it is so difficult to overturn existing precedent because the burden of proof rests on “the party seeking to overturn” since precedent reflects the contemporary rule of law. Justice Barrett supports this claim, writing that “if a precedent is so deeply embedded that its overruling would cause chaos, no Justice will want to subject

Judicial Restraint, 22 CONST. COMMENT. 271, 271-88 (2005).

⁴⁸ Markman, *supra* note 1.

⁴⁹ Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, THE NEW YORKER, <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients>.

the precedent to scrutiny.”⁵⁰ Her argument, different from that of Markman, is that there is no requirement for a judge to overturn a precedent that would upset the stability of the legal system. Instead, justices should focus their attention on “the contested question in front of them,” and determine the best course of action given the facts presented.⁵¹

In concordance with this theory, Justice Scalia refers to government as “to some extent... a practical exercise,” claiming that some precedents are “so woven in the fabric of law” that he would not seek to correct them despite his originalist inclinations.⁵² Likewise, Markman affirms that a court must determine whether or not a precedent is “so embedded... to everyone’s legal expectations” that to overrule it would cause “practical real-world dislocations.”⁵³ Therefore, he continues, it is the responsibility of the court to ascertain whether the consistency of and confidence in the legal system will be protected and expanded more by the overruling of existing precedent, or its maintenance. Mitchell summarizes this perspective well, concluding that in order for the doctrine of stare decisis to earn broad approval and acknowledgement, it must rely on principles that can satisfy both textualists and pragmatists alike.⁵⁴

V. THE INDEPENDENT ROLE OF STARE DECISIS: DEMONSTRABLY ERRONEOUS PRECEDENT

⁵⁰ Barrett, *supra* note 2.

⁵¹ *Id.*

⁵² Barrett, *supra* note 2, at 1928, referring to Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

⁵³ Markman, *supra* note 1, referring to *Robinson v. City of Detroit*, 613 N.W.2d 307, 319–20 (2000); Colby, *supra* note 26, quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627–28 (1974) (Powell, J., dissenting).

⁵⁴ Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 1-68 (2011).

Now, I will turn to the only truly independent function of stare decisis, which occurs when there is a case of demonstrably erroneous precedent. If a prior case has been decided correctly and a provably similar case arises, the current case should be decided with the same veracity and outcome, not because a precedent demands it, but because that conclusion is a provably correct one. Therefore, stare decisis only comes into play when there is disagreement as to the correctness of a previous interpretation.

Nelson discusses the delicate issue of determining erroneous precedent, writing that conventional wisdom dictates that “a purported demonstration of error is not enough to justify overruling a past decision.”⁵⁵ Regarding statutory decisions, the Court has asserted that it will adhere to precedent, whether or not they believe it is inherently correct, unless that precedent has been proven “unworkable” or has been superseded by “the growth of judicial doctrine or further action taken by Congress.”⁵⁶ This was clearly demonstrated in *Brown v. Board of Education*, which overturned *Plessy v. Ferguson* on the basis that *Plessy*’s “separate but equal” decision was “in denial of the equal protection of the laws”⁵⁷ and could not stand. In other constitutional cases, the Court has written that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”⁵⁸ Nelson argues that because of this, judges may be able to refine the doctrine of stare decisis “to take advantage of the consistency

⁵⁵ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1-84 (2001).

⁵⁶ *Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989).

⁵⁷ *Brown*, 347 U.S.

⁵⁸ *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833,864 (1992).

that would tend to exist even in its absence.”⁵⁹

Nelson furthers his argument by describing the process of judicial decision-making, specifically in cases regarding a precedent that a judge feels has been wrongly decided. He describes that judges can disagree on a matter of stare decisis on originalist grounds in one of two distinct ways. First, he describes that a judge could merely disagree with a previous court's decision on discretionary grounds. He writes that, in this case, a prior court will have “used its discretion to pick Rule *A* when the current judges would have picked Rule *B*.”⁶⁰ On the other hand, a court could argue that the previous court deciding the case went beyond their discretionary jurisdiction. In this circumstance, Nelson gives the example that “the relevant provision could permissibly be construed to establish Rule *A*, *B*, or *C*, but the prior court read it to establish Rule *D*.”⁶¹ He writes that, in the first case, the doctrine of stare decisis is sensible, responsible, and necessary. Nelson claims that there should be a “‘special justification’ (such as the proven unworkability of the prior judges’ chosen rules)” in order to prevent each new court from revising and transforming the precedent set by prior courts based on their own discretionary arguments.⁶² Without such measures, it is possible that there would be constant overruling of established precedent based solely on the discretionary opinions of whichever judges happen to preside over a court at that time.

However, Nelson argues that the second circumstance presents a much more realistic need for overruling a particular precedent. If a prior court exceeded its

⁵⁹ Nelson, *supra* note 55.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

own authority in setting a precedent, then it did not merely make a discretionary choice, but a “demonstrably erroneous decision.”⁶³ Nelson disputes that allowing future courts to overrule such conclusively unsound precedent would not result in a perpetual series of reversals as long as the overruling court “adopts a rule within the range of indeterminacy.”⁶⁴ Nelson continues, arguing that the doctrine of stare decisis could account for the difference between these two occurrences without necessarily being mutually exclusive. Thus, one can accept the argument that a court should not overturn decisions that are not verifiably flawed in their manner of determination, while supporting the conclusion that a court may responsibly overrule an existing precedent where there is found to be a demonstrable error in the method by which it was decided. Additionally, he argues, if one believes in the soundness of this purported concept of demonstrable error, this theory would not present any measurable threat to the rule of law.

Nelson addresses a competing point of view by discussing Justice Powell’s perspective on the doctrine of stare decisis. He writes that Justice Powell’s argument assumes that there would be little to no check on judicial authority without the persuasive influence of stare decisis, and judges could come to whatever discretionary conclusions they so choose. The opposite assumption is that the underlying principles of judicial decision-making exist with or without the doctrine of stare decisis, and those decisions determine what conclusion must be reached by a competent, non-subversive judge— the “correct” decision.

Presenting his competing perspective, Nelson argues that neither of these interpretations is entirely correct in their

⁶³ *Id.*

⁶⁴ *Id.*

assumptions. He writes that both statutory and constitutional mechanisms provide constraints for judges who might seek to establish whatever policy they might prefer. He argues that, even without the doctrine of stare decisis providing binding constraints on judges, the provisions established by statutory and constitutional law are sound enough that they could not be interpreted feasibly to suit a judge's every whim. However, Nelson argues that while these mechanisms are constraints for judges, they "do not entirely eliminate" judicial discretion, allowing judges "some freedom to pick among permissible interpretations."⁶⁵

VI. CONSTITUTIONAL VS. STATUTORY PRECEDENT

While the Constitution guarantees the rights and freedoms of all citizens of the United States, statutory cases are those which are most commonly heard within the legal system. Because of the inherent differences in their purpose and the prevalence of statutory cases over constitutional ones within the justice system, some legal scholars argue for different methods of interpretation for statutory and constitutional cases. It can be argued that, because constitutional cases deal with the most fundamental rights of citizens, they should be overruled when an existing precedent is provably erroneous. In these cases, the stakes are arguably too high for a court to sustain a flawed precedent. However, in statutory cases, which make up the vast majority of heard cases, consistency in ruling can be argued to be most important in order to maintain certainty and predictability of the rule of law.

Justice Powell addresses this argument and discusses some of the most prominent statutory and constitutional

⁶⁵ *Id.*

cases to demonstrate these claims. He discusses the statutory case of *Patterson v. McLean Credit Union*, which reconsidered the ruling handed down in *Runyon v. McCrary*. *Runyon* and *Patterson* both dealt with the application of 42 U.S.C. § 1981 to private contracts. In *Patterson*, the majority opinion did not believe that *Runyon* was correctly ruled. However, the court unanimously concluded that the case should be upheld, regardless of *Runyon*'s correct or incorrect interpretation, on the grounds of stare decisis. In his court opinion, Justice Kennedy claimed that "the doctrine of *stare decisis* is of fundamental importance to the rule of law."⁶⁶

Next, Justice Powell discusses a constitutional case regarding the impact and extent of stare decisis. He discusses the case of *South Carolina v. Gathers*, which reconsidered the decision reached in *Booth v. Maryland*. Justice Powell, who delivered the opinion of the court in *Booth*, discusses both cases at length. In *Booth*, the court held that the Eighth Amendment to the Constitution "limits comment in capital sentencing proceedings on attributes of a murder victim and his family that were unrelated to the commission of a crime."⁶⁷ In *Gathers*, the four dissenters called for an outright overturning of *Booth*. In this case, Justice Scalia, in a dissenting opinion, discussed stare decisis, acknowledging "some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible," but holding that a Justice must be able to vote to overturn decisions that they conclude are not supported by the Constitution.⁶⁸

⁶⁶ Powell Jr., *supra* note 7, referring to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), (Kennedy, J., concurring in part and dissenting in part).

⁶⁷ *Id.*, referring to *Booth v. Maryland*, 482 U.S. 496 (1987).

⁶⁸ *Id.*, (Scalia, J., dissenting).

CONCLUSION

While the debate over fundamentally “correct” philosophies of legal interpretation remains heated, tensions between originalist jurisprudence and the concept of stare decisis linger among the legal community. In this article, I have discussed the tenets of originalist legal philosophy and its methodological implications and examined the conceptual framework and practical application of stare decisis within the United States legal system. Upon exploration of the tension that often arises between the two legal concepts, I propose that more weight should be given to stare decisis in statutory adjudication, while originalist interpretation should have greater influence in constitutional cases.

While some advocate for staunch originalism and the overturning of demonstrably non-originalist precedent, others stand by a strong theory of stare decisis and argue that adherence to precedent is one of the greatest strengths of the United States’ legal system. These scholars argue that adherence to stare decisis promotes judicial restraint rather than the negatively perceived judicial activism and prevents sociopolitical chaos from erupting due to the overturning of long-standing and widely accepted precedents.

While I lack the legal expertise and distinction of the scholars above, I agree with Justice Scalia’s pragmatic view of both originalism and stare decisis. It follows logically that certain precedents, although constitutionally unfounded, cannot be overturned without significant upset to society as a whole. Additionally, like Justice Powell, I support a stronger theory of stare decisis for statutory precedents and a weaker one for constitutional cases. As the Constitution and its included amendments are meant to protect the basic rights and liberties of American citizens, it follows that it is critical

for related cases to be decided “correctly” rather than merely consistently. However, in statutory cases, consistency of rulings and equal protection within the legal system should take precedence over a necessarily “right” decision.

**INTEGRATING NATIVE VOICES INTO
FEDERAL LAND MANAGEMENT: BEAR
LODGE AND NPS IMPLEMENTATION OF
NATIVE AMERICAN FEDERAL LEGISLATION**

*Victoria Myers**

INTRODUCTION

I. LEGISLATIVE AND CULTURAL BACKGROUND

II. UNIT ANALYSIS

A. *Bear Lodge History*

B. *Legislative Integration at Bear Lodge*

C. *NAGPRA Compliance*

D. *NHPA Compliance*

III. LEGISLATIVE IMPACT

CONCLUSION AND ARGUMENT

ABBREVIATION GUIDE

INTRODUCTION

National Park Units throughout the United States are recreational sites highlighting American beauty and cultural significance. Under the 1916 Organic Act, Congress created the National Park Service (NPS) to complete a “dual mission, both to conserve park resources and provide for their use and enjoyment in such a manner and by such means, as will leave

* Victoria Myers is a senior at The University of Alabama studying American Studies through the Accelerated Master’s Program. Myers plans to attend the University of Utah S.J. Quinney College of Law beginning in Fall 2024.

them unimpaired for future generations.”¹ While doing so encouraged tourists worldwide to flock to these natural beauties, creating these parks did not come without exploitation and compromise of Indigenous communities. This paper explores the tensions among these different groups and their various reasons for park usage.

Creating these parks was impossible without passing legislation that drove Native communities off the land. To garner public support for these laws, narrative tropes such as the Ecological and Vanishing Indians developed to dismiss Indigenous concerns. The Ecological Indian and Vanishing Indian tropes are narratives created with the original intention to stereotype Indigenous people in ways that may not be readily apparent and harmful. The Ecological Indian, a derivative of the noble savage trope, emerged as the idea of an Indigenous people as “natural conservationists who were attuned to the earth’s rhythms.”² The Vanishing Indian emerged as the idea that “the less advanced societies should disappear in the presence of those more advanced.”³ Frontiersmen in the late 19th century used the Vanishing Indian narrative to socially justify removing tribal communities to preserve America’s most precious sites. Today, the caricaturing of tribal communities in these ways allows the US government and society to ignore their issues and concerns over self-governance and land management in

¹ NPS Organic Act, THE UNITED STATES DEPARTMENT OF JUSTICE (2015), <https://www.justice.gov/enrd/nps-organic-act#:~:text=16%20U.S.C.,while%20protecting%20them%20from%20impairment.>

² GREGORY D. SMITHERS, *Beyond the Ecological Indian: Environmental Politics and Traditional Ecological Knowledge in Modern North America*, 20 ENVIRONMENTAL HISTORY 83,83-111 (2015).

³ PHILIP J. DELORIA, *PLAYING INDIAN* 65 (Yale University Press, 1998).

light of other federal governance and land usage suggestions. If Native Americans were seen as innately connected to the land, their concerns over land management could come across as irrelevant as their outlooks on land management would be seen as “primitive” to the present-day American land needs.

As time progressed and Indigenous communities began engaging in civil rights talks throughout the country in the 1960s, urban and reservation-based communities took it upon themselves to advocate for the protection of their treaty rights with the United States government. They sought self-determination over their government, education, religion, and other culturally essential provisions and pushed back against the stereotypical narratives assigned to them. This era never ended, as tribes continued to push for new methods of self-governance over their land, as shown throughout recent legislation. Coalescing primarily in the 1990s, the US government enacted policies of self-governance and respect for tribes, such as the Native American Graves and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA) of 1966 with its 1992 amendments, and the American Indian Religious Freedom Act (AIRFA) of 1994. These policies improved government-to-government relations between tribes and the US government in some areas. During these decades, the Department of the Interior (DOI) also issued various memorandums to discuss bettering the relationship between tribes to better co-manage the country’s public lands.

To examine the effectiveness of these late self-determination-era policies, an analysis of a case study of Bear Lodge, also known as Devils Tower, in Wyoming, will reveal how these legislation pieces affect Indigenous communities in the contemporary era. Acknowledging how

the communities surrounding the monument were impacted and manipulated to create these sites is essential when assessing the park units' present-day impact on Indigenous groups. Indigenous communities in the United States experienced exploitation and abuse from the U.S. government from the beginning of colonization. Bear Lodge serves as an excellent example of how NPS units may best integrate Native voices and concerns while simultaneously tending to the needs of park-goers. My primary focus begins in the 20th century with the creation of park units and continues into the 21st century. Specifically, the analysis will examine how federal land co-management has developed and changed on public lands over the past few decades and shed some light on the role of Indigenous narratives in developing and managing DOI units. The analytical framework factors are the language used in drafting the legislation and unit paperwork, contemporary uses of the park unit, how Indigenous points of view are integrated into park management, and how the stereotypes of the Vanishing and Ecological Indian affect public perception.

I. LEGISLATIVE AND CULTURAL BACKGROUND

To best understand how the DOI integrates Indigenous voices in land co-management in the contemporary era, three Acts will serve as the primary legislation for the analysis: the NAGPRA of 1990, the NHPA of 1966 with its 1992 amendments, and the AIRFA of 1994. I will use other NPS commissioned reports and assessments from the 1990s to show how they effectively implemented these policies in Bear Lodge and integrated Native considerations at the monument.

It is relevant to look into one of the first pieces of legislation made for American "archaeology, conservation,

and historic preservation.”⁴ The Antiquities Act “authorizes the President to proclaim national monuments on federal lands that contain historic landmarks, historic and prehistoric structures, or other objects of historic or scientific interest.”⁵ The conservation movement that created public support for the Act started around 1879 when Congress created the Bureau of Ethnology to better understand the Indigenous populations. Over the next couple of decades, the US saw an increase in the awareness of the need for the conservation and preservation of sites of natural beauty and wonder and federal protection of sites rich in historical and scientific value that could benefit future generations.

Interest in these sites began with published books and illustrations of Indigenous sites throughout the Southwest region of the US.⁶ Pivotal sites include the Casa Ruins and Chaco Canyon in Arizona and New Mexico. This intense fascination was rooted in the fear that the country would continue to lose traditional Indigenous imagery. However, the American public was more interested in preserving the “primitiveness” within the sites. Federal land management agencies were not trying to imply that Indigenous heritage should be fully incorporated into land management. Instead, they stated that the sites captured this idea of a “savagery” encompassing a part of the American national identity that was worth preserving. The preservation of Indigenous sites was not altruistic. The way Indigenous land and sites were treated through the Antiquities Act exemplifies this claim, as

⁴ DAVID HARMON ET AL., EDS., *The Antiquities Act: A Century of American Archaeology, Historic Preservation, and Nature Conservation*, (University of Arizona Press, 2006).

⁵ *American Antiquities Act of 1906*, NATIONAL PARK SERVICE (2023), <https://www.nps.gov/articles/lee-story-appa.htm>.

⁶ HARMON ET. AL, *supra* note 4, at 5.

tribes were often left out of conversations over land usage and sometimes even barred from accessing sites once they were deemed significant archaeological sites. The Antiquities Act and its many failures to the Indigenous population throughout the country led to the need for new legislation to better include their voices and concerns.

Associations such as the Advancement of Science and the General Land Office pushed for the passage of the Act both due to the increased vandalism and looting in Indigenous sites and for their political agenda. Proponents gathered enough support despite ulterior motives, and the Act passed “virtually unchanged.”⁷ It was signed by President Theodore Roosevelt twenty-five years after the initial interest in conserving American antiquities.⁸ The Act includes provisions for antiquities “situated on any lands owned or controlled by the government of the United States,” meaning Indigenous land would fall under this review since “the federal government holds title to the land in trust on behalf of the tribe.”⁹ The bill that created the Act also introduced “the term ‘national monument.’”¹⁰ These two provisions are the most relevant to analyzing how the Act impeded Indigenous self-governance.

The Antiquities Act was just the beginning of legislation that would go on to control Indigenous land without Indigenous insight. Each tribal relationship with the government is unique, as they are classified as domestic-dependent nations. The term “domestic dependent nation” comes from John Marshall’s opinion in *Cherokee Nation v.*

⁷ *Id.*

⁸ *Id.* at 31.

⁹ *Frequently Asked Questions*, BUREAU OF INDIAN AFFAIRS (2022), <https://www.bia.gov/frequently-asked-questions>.

¹⁰ HARMON ET. AL, *supra* note 4, at 32.

Georgia (1831), meaning that tribes are recognized as having a unique relationship that is still domestic and within the country. Nevertheless, they are still considered independent political communities.

Coming out of the self-determination movement, the 1960s brought new legislation favoring Indigenous rights, such as the NHPA and the AIRFA of 1978.¹¹ Passed in 1966, the NHPA “established a national preservation program and a system of procedural protections, which encouraged both the identification and protection of historic resources, including archeological resources, at the federal level and indirectly at the state and local level.”¹² Specifically, Section 106 of the Act deals with the protection of Native American sites and their involvement as it “requires tribal consultation in all steps of the process when a federal agency project or effort may affect historic properties that are either located on tribal lands or when any Native American tribe or Native Hawaiian organization attaches religious or cultural significance to the historic property, regardless of the property’s location.”¹³ The original drafting and passage of the Act did not include any considerations for Native American cultural sites on federal land, which “reflects the historic state of affairs between the United States and Native Nations:” a continual state of disregard and disrespect to these sites.¹⁴

¹¹ Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 AMERICAN INDIAN QUARTERLY 35, 42 (1997).

¹² National Historic Preservation Act of 1966, 16 U.S.C. § § 470 (1966).

¹³ *Id.* at 11.

¹⁴ Amanda M. Marincic, *The National Historic Preservation Act: An Inadequate Attempt to Protect the Cultural and Religious Sites of Native Nations*, 103 IOWA L. REV. 1777, 1783 (2018)

As will be shown with other pieces of legislation, merely stating what government agencies should do regarding Native American cultural sites is not enough of an enforcement tactic, as it creates a need for amendments and further directed guidance. In 1992, the NHPA added amendments that created a structure to the original Act and guidance that made it “more difficult for agencies to ignore their responsibilities.”¹⁵ This act enforced the use of specific language governing the preservation of Traditional Cultural Properties, allowing historic Native American properties to be preserved alongside new historical discoveries. Principles were also added to the amendments to encourage better consultation, involvement, and religious respect with Native American communities and their leaders and confidentiality over specific sites they deemed culturally sensitive. This aspect will be fundamental when considering NHPA implementation in NPS units.

While not directly linked to the NHPA, the AIRFA and its amendments were created under the same political environment with similar fundamentals of Indigenous sovereignty. The AIRFA directly connects to NPS units and their jurisdiction. Therefore, the NPS needed to reevaluate their policies and how they deal with Indigenous sites with religious implications. Initially, the AIRFA sought to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian including but not limited to access to sites, use, and possession of sacred objects, and the freedom to worship through ceremonials and traditional

(discussing the importance of the NHPA).

¹⁵ Alan L. Stanfill, *Native American Participation in Federal Programs Under the National Historic Preservation Act*, 170 *PLAINS ANTHROPOLOGIST* 65, 70 (1999).

rites.”¹⁶ The Act came as an extension of the First Amendment’s guarantee of the freedom of religion, though Native American rights were often overlooked and unconstitutionally revoked before the passage of the Act. After its passage, the 1978 policy was not enforced, causing a need for improvement and amendments in the following years.

In 1987, the NPS issued a policy statement in their National Register Bulletin to “minimize the likelihood of such misinterpretation” by giving “special attention to properties of traditional cultural significance to Native American groups” regarding recent legislation such as the NHPA and AIRFA.¹⁷ The National Register is “the official list of the Nation’s historic places worthy of preservation,” established by the NHPA with the authority to document and account for appearances that pertain to elevating “America’s prehistory and history.”¹⁸ According to a proponent of the Act, it would allow Native Americans to congregate on public lands so long as there was not “some overriding reason why they should not.”¹⁹ The vague language and guidance led to little accountability for the federal government.

¹⁶ American Indian Religious Freedom Act of 1994, Pub. L. No. 103-334, 108 Stat. 3125.

¹⁷ *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NATIONAL PARK SERVICE, (1987), <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Compleweb.pdf>.

¹⁸ *National Register of Historic Places*, NATIONAL PARK SERVICE, (2022), <https://www.nps.gov/subjects/nationalregister/index.htm>.

¹⁹ Jody Neal-Post, *Sacred Sites and Federal Land Management: An Analysis of the Proposed Native American Free Exercise of Religion Act of 1993*, 34 NATURAL RESOURCES JOURNAL, 445 (1994), <https://www.jstor.org/stable/24884765>.

Furthermore, the National Register's statement did not improve the management of religious sites. Instead, it states that religious considerations "must be within the bounds of existing legislation as well as NPS rules and policies," placing these considerations in the pre-existing framework without any new guidance.²⁰ Other government departments and the Supreme Court dealt with individual issues concerning the AIRFA, all with differing opinions, further emphasizing the act's failure.

The Native American Cultural Protection and Free Exercise of Religion Act of 1994, an amendment meant to address the failures of the AIRFA, sought to "recontextualize Native American religions" by looking into religious practices that so profoundly define Native American culture.²¹ The Act examines several religious legal protections, including peyote use, cultural practices in prison settings, and, especially, Native American rights to cultural and religious sites. The difficulty of exercising these protections is primarily due to the boundaries they cross. Cultural sites are often on public land, making for difficult conversations and disagreements regarding proper land co-management.

Encompassing decades of Indigenous struggles to protect ancestors and cultural artifacts in burials, the Native American Graves Protection and Repatriation Act became law when President Bush signed the bill on November 23, 1990. NAGPRA requires federal agencies and institutions that receive such funding to "repatriate or transfer Native American human remains and other cultural items to the

²⁰ IRWIN, *supra* note 10, at 44.

²¹ Susan Staiger Gooding, *At the Boundaries of Religious Identity: Native American Religions and American Legal Culture*, 43 NUMEN, (1996), <http://www.jstor.org/stable/3270345>.

appropriate parties” through a guided process laid out in the legislation.²² Regarding the DOI, the agencies must “return human remains and associated funerary objects upon request of a lineal descendent, Indian tribe, or Native Hawaiian organization.” However, returning these items largely depends on the item’s found location and the item’s owner.²³ Human rights are at the heart of the Act, as it was made to pay respect and encourage open dialogue between federal agencies and Native peoples across the country. The Act goes into further detail, guiding agencies on handling remains and collaborating with tribes respectfully and appropriately. The guideline’s effectiveness will be analyzed further down, but it is relevant to note that NAGPRA has not been amended since its passage, marking an upward change in management. However, the DOI implemented several additional rules concerning technicalities within NAGPRA over its inception.

Additionally, the Act serves as an essential societal indicator of the changes in legislation over Indigenous graves and protections. As mentioned, the Antiquities Act considered Indigenous remains on public land as “federal property.”²⁴ The most common phrase used in past legislation to describe Native American remains is “archaeological resource,” permitting museums and scientists to extract and study remains without consideration of ancestors or cultural importance. With NAGPRA, collaboration and

²² *Getting Started - Native American Graves Protection and Repatriation Act*, NATIONAL PARK SERVICE, (2023), <https://www.nps.gov/subjects/nagpra/getting-started.htm>.

²³ DEVON A. MIHESUAH, *Repatriation Reader: Who Owns American Indian Remains?*, 141, (Lincoln: University of Nebraska Press, 2000), <http://library.ua.edu/vwebv/holdingsInfo?bibId=1079595>.

²⁴ *Id.* at 127.

conversations are heavily encouraged between the parties, placing cultural significance at the head of the table when discussing remains and their future. Additionally, for a tribe or Indigenous person to claim the remains, there are various options without “scientific certainty” as they would have needed in the past.²⁵ Past legislation regarding Indigenous remains and claims required several documents to prove ownership. Ownership over belongings and certain forms of documentation are rooted in non-Indigenous culture and history. Community ownership over items and oral traditions often replace non-Indigenous practices of ownership and record keeping, so having legislation as fluid as NAGPRA over ownership is a step in the right direction.

There is not one defined turning point in American culture in the late 20th century that created such change for these policies to be adopted and well received, but rather, a cumulation of changes occurred. While the civil rights era in the United States motivated Native leaders to advocate for change, other cultural changes and events in the country played a significant role in the creation of these policies: the Native American Renaissance, the Christopher Columbus Quincentenary Jubilee Commission, the bicentennial of the first treaty under the US constitution, and the widespread culture wars in the United States.

In 1991, the NPS released a collection of articles as a part of their Cultural Resources Management guide, and the collection outlines the “renaissance” that was occurring for Native Americans throughout the 1970s and possibly into the late 1990s.²⁶ The collection details the emergence of several

²⁵ *Id.* at 142.

²⁶ *America's Tribal Cultures—A Renaissance in the 1990s*, NATIONAL PARKS SERVICE, (1991), <https://www.nps.gov/crps/CRMJournal/CRM/v14n5.pdf>.

cultural endeavors in this period and how they allowed tribes to engage in preservation efforts on NPS land. These endeavors worked in tandem with the policies, meaning the passage of acts like the NHPA and NAGPRA further allowed the integration of native voices into land management, which led to further legislation.

This renaissance also encompasses the publication of several books by Native authors and their focus on the Native experience in the country. The publication of these books came in two waves: the first was before the self-determination era that dealt with Reconciling Identity, and the second was after the beginning of the era dealing with Ambivalent Enfranchisement.²⁷ The second wave was far more politically charged, as authors like Vine Deloria and Sherman Alexie began writing about their discontentment with Native American treatment in the United States. Their styles differed, though, as Deloria's writing had a far less narrative approach to addressing the discontent, while Alexie preferred short story formats. Regardless of their approach, these authors began overdue discussions of Native American treatment in the country, forcing policymakers and the American public to become more aware of Native American issues and beliefs.

One of the most pressing moments in American culture that led to the passage of these policies was the Jubilee Commission and the ongoing culture wars.²⁸

²⁷ Tara AnnCarter, *First and Second Wave Native American Literature*, YALE NATIONAL INITIATIVE, (2023), https://teachers.yale.edu/curriculum/viewer/initiative_16.01.03_u

²⁸ Culture Wars in America are an expansive topic that will not be covered in this paper, as other cultural moments in this era were more pressing to the passage of the policies being discussed. See Robert Daniel McClure's *Winter in America: A*

Established on August 7, 1984, the Jubilee Commission sought to “plan, encourage, coordinate, and conduct the commemoration of the voyages of Christopher Columbus and to set forth general provisions and policies governing the process of recognition and support of the Quincentenary projects.”²⁹ The Commission was to form a celebration for the 500th anniversary of Columbus’ arrival in America. However, this did not come without pushback, as Columbus’ arrival is not universally celebrated, especially in Indigenous communities. In response to the Jubilee and general disagreement with the creation of Columbus Day, Berkeley, California, celebrated “Indigenous Peoples’ Day in 1992 as a protest to the 500th anniversary of Columbus’ arrival,” though the idea for Indigenous Peoples’ Day arose initially in a United Nations Conference in 1977.³⁰ The protest against the Jubilee exemplified the tension between the American public and Native communities, a tension that would go on to shape media representation and public perception, as described later.

II. UNIT ANALYSIS

A. *Bear Lodge History*

In 1916, President Woodrow Wilson signed the

Cultural History of Neoliberalism, from the Sixties to the Reagan Revolution, for a more expansive look at the American Culture Wars.

²⁹ *Christopher Columbus Quincentenary Jubilee Commission*, FEDERAL REGISTER, (1994),

<https://www.federalregister.gov/agencies/christopher-columbus-quincentenary-jubilee-commission>.

³⁰ Harmmeet Kaur, *How Indigenous Peoples’ Day Came About and Why It Matters Today*, CNN, (October 9, 2023),

<https://www.cnn.com/us/indigenous-peoples-day-native-americans-ccc/index.html>.

Organic Act, which created the National Park Service as a bureau within the Department of the Interior.³¹ However, when the Organic Act went into law, many national monuments were still under the jurisdiction of other federal bureaus, such as the War Department and Forestry Service. Executive Order 6166, enacted on August 10, 1933, reorganized presently known NPS units from other departments; “the Service’s holdings were greatly expanded, and there was now a single, national system of parklands. With the 1933 reorganization and new responsibilities for historical areas, historic preservation became a primary mission of the National Park Service.”³² Federal ownership and the agencies’ varied missions create conflicts among Native Americans, the agencies, and other stakeholders,” creating a need for reorganization and complication even after assigning monuments and parks to NPS.³³

On September 24th, 1906, under the authority of the Antiquities Act, President Theodore Roosevelt proclaimed Bear Lodge as the country’s first National Monument. Rather than making the tower a monument to preserve its cultural value for the over twenty tribes that claim affiliation with it,

³¹ *National Park System*, NATIONAL PARK SERVICE, (2023), <https://www.nps.gov/aboutus/national-park-system.htm>.

³² *National Park Service History: National Park System Timeline*, NATIONAL PARK SERVICE, (2023), https://www.nps.gov/parkhistory/hisnps/npshistory/timeline_annotated.htm.

³³ Eric Freedman, *Protecting Sacred Sites on Public Land: Religion and Alliances in the Mato Tipila-Devils Tower Litigation*, THE AMERICAN INDIAN QUARTERLY, 3, 14 (January, 2007), https://www.researchgate.net/publication/236702274_Protecting_Sacred_Sites_on_Public_Land_Religion_and_Alliances_in_the_Mato_Tipila-Devils_Tower_Litigation.

the monument sought to conserve the scientific value within the geological wonders of the tower.³⁴

The monument's name listed on NPS media and paperwork is Devil's Tower, though many Native tribes in the region refer to the monument as Bear Lodge. Bear Lodge originates from an Indigenous story about young girls who left their camp and were chased by bears. The bears were close to catching the girls when they ran up onto a short rock, and one of the girls began to pray for the rock "to take pity on them." The heavens heard the girl's prayers, and the rock "began to grow skyward, pushing the girls out of reach of the bears. The bears jumped and scratched the rock."³⁵

On the other hand, the European-based account for the monument's origin has scientific roots, as the formation is believed to be the result of "great Earth stresses," which caused a deformity in the crust. As a result, the Rocky Mountains uplifted along the Great Plains region, allowing magma to well into gaps and fissures, creating Devil's Tower. These are two very different accounts for the monument's creation. However, there is much to be said about why the latter was chosen as the monument's name, causing the Indigenous story and name to disappear for the sake of the Euro-American account. Additionally, many recreators come to Bear Lodge hoping to successfully climb it, making for some complicated legal issues that will be further explored. However, a detailed analysis of the implications resulting from the name choice will not be thoroughly done in this

³⁴ The Antiquities Act of 1906, 54 U.S.C. §§320301-32.

³⁵ Lloyd Burton & David Rupert, *Bear Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8, CORNELL J.L.P.P. 201, 201 (1999) (Discussing legends surrounding the creation of Bear Lodge).

piece.³⁶

Tribes, including the Lakota, Arapahoe, Cheyenne, Crow, and Kiowa have varying religious and cultural ties to the monument. Since Bear Lodge is a national monument, it attracts tourists to the site, often in ways that result in the degradation of the environment and tribes' cultural sovereignty and rights. To better understand how the legislation is working either for or against these tribes, it is crucial to understand their affiliation to the monument, as it places into perspective the cultural significance being sacrificed as Bear Lodge continues to be a recreational site. Many tribes perform cultural and religious rituals and ceremonies at the lodge, such as the Sun Dance, sweat lodge rites, vision quests, and prayer offerings. Currently, the Sun Dance is the only public ceremony.³⁷ The Sun Dance, annually held in June at Bear Lodge, is a multi-tribe religious ceremony, but the Lakota are primarily involved. The ceremony is "a prayer and a sacrifice. One does not take part in it voluntarily but as the result of a dream or a vision," demonstrating that though the ceremony is public, it is still a sacred event that "involves, suffering, pain, and sacrifice and was never meant to be 'comfortable' or 'easy.'"³⁸ Other lodge religious activities include prayer, fasting, and associated offerings in private ceremonies. Many religious events call for silence, as prayer and pipe ceremonies are spaces for intentional, solemn reflection. The specific needs for the

³⁶ See *id.* 204.

³⁷ *Indian Religious Freedom at Devil's Tower National Monument*, INDIAN LAW RESOURCE CENTER (2000), https://indianlaw.org/projects/past_projects/cheyenne_river.

³⁸ Wambli S. Win, *The Ultimate Expression of Faith, the Lakota Sun Dance*, NATIVE AMERICAN TIMES, (Jul. 3, 2011), <https://nativetimes.com/life/commentary/5657-the-ultimate-expression-of-faith-the-lakota-sun-dance>.

ceremonies will be relevant when analyzing past legal issues at the lodge concerning religious needs.

B. Legislative Integration at Bear Lodge

While various Indigenous rights were disregarded in the decades immediately following the monument's creation, I will only be considering the past few decades in my analysis of the efficacy of the chosen legislation as it applies to Bear Lodge. In the 1990s, legislation such as the NAGPRA, AIRFA, NHPA, and the First Amendment's free exercise of religion clause came into play at Bear Lodge. Bear Lodge attracts "as many as five thousand to six thousand climbers and their innumerable spectators among the monument's five hundred thousand annual visitors," bringing intolerable damage to the lodge and disrupting tribes performing religious ceremonies.³⁹ After consulting tribal leaders and finding a solution preferable to both tribes and the NPS, the NPS created a Final Climbing Management Plan (FCMP) to best keep the tribal interests at the forefront of managing the monument.

Environmental groups, tribes affiliated with the lodge, and various climbing organizations worked together on this plan. Its creation is an excellent example of the NPS following AIRFA guidelines to best accommodate Indigenous religious practices on public lands. Similarly, the plan follows the Religious Freedom Restoration Act of 1993, which shares sentiments with the AIRFA 1994 amendments. It calls for the government to "not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability."⁴⁰ The FCMP directly

³⁹FREEMAN, *supra* note 32, at 2.

⁴⁰ Religious Freedom Restoration Act, 42 U.S.C. §§2000vv (1993).

references the AIRFA statute calling for “access to sites, use, and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites,” considering how to fulfill this obligation while satisfying all parties involved.⁴¹ Additionally, the FCMP examined how climbers’ actions adversely affected the monument through the scope of the NHPA. First, the National Register authorized Bear Lodge as a traditional cultural property, protecting it through complying with the NHPA standards and regulations. With this in mind, the FCMP notes that bolting, a climbing practice that requires drilling a hole into the rock to place an anchor for support, violates the NHPA, so new bolts are not allowed on the monument. Climbers are allowed to climb on existing bolts. The FCMP also noted that it would complete proper archeological consultation as required by the NHPA.

However, issues arose as climbers wanted to respect only some parts of the management plan, especially during the involuntary winter closures and voluntary closure in June. The June voluntary closure was out of “respect for the reverence many American Indians hold for Devil’s Tower as a sacred site.”⁴² As the name implies, the ban does not disallow tourists from entering the monument and enjoying the available sites. Instead, it suggests climbers should avoid climbing during June out of religious respect for the ceremony, which often requires peace and quiet. Some climbers thought a month-long ban was inappropriate, seeing as the ceremony does not last thirty days, but the NPS explains in their FCMP that “the 30 days of June are a compromise in the modern world. A regular voluntary

⁴¹ NATIONAL PARK SERVICE, DEPT. OF INTERIOR, FINAL CLIMBING MANAGEMENT PLAN/ FINDING OF NO SIGNIFICANT IMPACT, 3, 1995.

⁴² *Id.* at 2.

closure fixed on a modern calendar month has a better chance to be understood and successful than a shifting closure based on a lunar calendar.”⁴³ Climbers viewed the voluntary closure as the NPS, and by association the US government, becoming entangled in established religion, which would violate the First Amendment’s Establishment Clause. The Establishment Clause “prohibits the government from making any law ‘respecting an establishment of religion.’”⁴⁴ Although, in *Bear Lodge Multiple Use Ass’n v. Babbitt* in 1998, the courts ruled the voluntary ban did not violate the Establishment Clause. It was affirmed in 1999 by the Tenth Circuit Court of Appeals.

The FCMP’s most unique feature is its inclusion of public comments on the proposed plan and the NPS’s responses. Thirty-three pages of the plan are devoted to answering public concerns regarding a multitude of topics: scope and area of closure, climbing specifics, environmental impact, cultural sources, legal contingencies and fulfillment, and educational programs. No singular opinion is voiced in these comments, as climber, Indigenous, and environmentalist concerns are included. In many of the NPS responses, the narratives of the Ecological and Vanishing Indians are rejected to make way for more appropriate conversations about contemporary Indigenous concerns and cultural practices. For instance, Section E, *Cultural Resources*, includes many culturally inappropriate questions, countered by considerate responses by the NPS:

⁴³ *Id.* at 63.

⁴⁴ *Devil’s Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, MN. JOURNAL OF LAW AND INEQUITY 157, 159-160 (2002) (Discussing the claim failed against the FCMP by climbers stating it violated the establishment clause of the first amendment)

Public Comment: The NPS should give Indians someplace else to worship.

NPS Response: The NPS does not determine what is sacred to American Indians. There is a clearly documented cultural affiliation between several northern plains tribes and Devils Tower. Because of the natural and cultural significance of the tower, the NPS feels fortunate to manage this important part of America's heritage and interpret it to the public.⁴⁵

This public comment, along with several others within the FCMP, reveals public sentiments about Native American culture, and their ignorance of religious ceremonies and traditions. Some Americans' understandings of Native Americans and their culture are based on those aforementioned stereotypes. They are often unaware of the vastness that is Native America, as modern entertainment portrays inaccurate visages of Indigenous peoples to the public. The 1990s film scene was overwhelmingly saturated with colonial history movies featuring Native Americans in stereotypical ways. Films such as *Dances with Wolves* (1990), *Last of the Mohicans* (1992), and *Pocahontas* (1995) displayed Native Americans in these ways with excellent box office success.⁴⁶ These films marked a shift in Indigenous film representation from "savage opponent to being portrayed as the wronged victim or generous host."⁴⁷ The

⁴⁵ NATIONAL PARK SERVICE, DEPT. OF INTERIOR, *supra* note 40, at 62.

⁴⁶ *Dances with Wolves* went on to win seven Academy Awards.

⁴⁷ However, it was not without harm. There lies a double-edged sword when dealing with Indigenous representation. On the one hand, representation somewhat deconstructs the Vanishing Indian narrative, as it shows the existence of Native peoples today. The

films developed out of the same cultural background that allowed for the passage of these policies, as the American public regained fascination with this time period, partially due to the aforementioned Columbus anniversary.

Through the FCMP, the NPS is working to break down those misconceptions by collaborating with tribes and even noting the faults of the US government in comments such as the following:

Public Comment: Rock climber use is older than Indian ceremonial use at the tower.

NPS Response: Our ethnographic investigations indicate that several tribes have held

traditional ceremonies at the sacred butte for hundreds of years before the stake ladder was built in 1893. Aspects of American Indian religion were actively suppressed by the federal government until the American Indian Religious Freedom Act (AIRFA) was passed in 1978. Before then, these activities were held quietly away from public and government view. This may be why many non-Indians consider the resurgence of traditional cultural activities at Devils Tower as a recent phenomenon.⁴⁸

problem lies with misrepresentation, overshadowing genuine expressions of Indigenous culture, beliefs, and history. In the three listed films, white saviors are the films' stars, forcing the Natives into secondary roles that need "saving" by their white counterparts. Additionally, the films showcase centuries-old histories, which keeps Native peoples in the past rather than bringing them into the present day.

⁴⁸ NATIONAL PARK SERVICE, DEPT. OF INTERIOR, *supra* note 40, at 60.

By doing this, the NPS is taking accountability for their wrongful actions towards tribes in the past. The response also considers the perceived cultural “resurgence” by the public, when in actuality, tribes have a long history of the listed cultural and religious practices at the monument. Misrepresentation, or rather lack of modern representation of Native communities, in films such as the popular ones made in the 1990s may have contributed to this ignorant perception of tribal use of the monument. However, it is difficult for the NPS to appease all stakeholders of the monument. Tourists surely bring in substantial amounts of revenue to the park, causing their standing to historically be at the top of agenda, as shown with the Antiquities Act and previous land management legislation. Indigenous people and their concerns should become paramount in these discussions. They were the first “landowners,” and their interests surpass those of frivolous recreational needs.

C. NAGPRA Compliance

In 1994, the NPS Applied Ethnography Program commissioned a report overviewing NAGPRA compliance and implementation on specific units, including Bear Lodge. The report found that though the NAGPRA laid out a basic framework for repatriating objects, a significant gap existed between identifying objects and funding these efforts.⁴⁹ While in 1994 the budget for NAGPRA efforts was a mere 2.5 million, “the Association of American Museums estimated that the cost of repatriation for museums will be

⁴⁹ Michael J. Evans, et al., *NAGPRA Consultation and the National Park Service*, 3, UNIVERSITY OF ARIZONA (September 3, 2024), https://repository.arizona.edu/bitstream/handle/10150/296658/az_u_stoffle_nagpra_nps_report_w.pdf?sequence=1&isAllowed=y.

\$30-\$50 million over five years.” The report found strengths within the NAGPRA legislation regarding federal and museum possession of objects. Before NAGPRA, with overlapping federal and Indigenous land, federal agencies could claim the right to possess legal title. Having the “right of possession” over an item is not enough to prevent the federal government from going through NAGPRA review for those objects and contacting tribes with connections to the item.

The report’s main objective was to document NPS unit collections and determine the objects’ original location and cultural significance to the various tribes near the unit. For Bear Lodge, the report found that all objects in the collection did not originate from the park, which required extensive collaboration with over thirty tribes to narrow down the specific affiliation for each object.⁵⁰ Before listing the object analysis for Bear Lodge, the report made note of the cultural affiliation several tribes have to the monument. Instead of conglomerating all tribal history of the monument into one section, the report thoughtfully details the individual histories of the Cheyenne, Kiowa, and Dakota tribes. Additionally, the report identifies several Native connections to the objects and details the cultural significance of each object type and its associated use by a specific tribe. The report completes this process with each object for ten different tribal considerations. By individualizing the histories and cultural affiliations, the report breaks the tradition of fusing disparate tribal histories into one singular narrative.

⁵⁰ NATIONAL PARK SERVICE, DEPT. OF INTERIOR, *supra* note 40, at 40.

Throughout the research, the report found numerous objects within the park with questionable origins. The items are listed in the image below.⁵¹

Table 2: Servicewide Summary Items for Devils Tower

A) 11 pipes with stems	G) one turtle charm
B) a stone hammer or club	H) two eagle feather fans
C) a ceremonial stone	I) one lizard charm
D) a model shield	J) two Indian dolls
E) a pendant	K) one beaded bag
F) one flute	

The traditional uses of these objects were determined through interviews and discussions with some “expert American Indian peoples.”⁵² However, the report recommends additional consultation in the future as they did not feel their findings were thorough enough. The objects are thought to come from a private donation in 1937, but the circumstances by which these objects were obtained are unknown. Because of the many unknowns associated with the objects’ origins, the NPS needs to complete a thorough NAGPRA analysis of the objects. Commissioning a report for the objects, such as the one listed, is a part of the NPS fulfilling their NAGPRA responsibilities.

D. NHPA Compliance

In the 1990s, the NPS commissioned an Ethnographic Overview and Assessment of Devils Tower National Monument (EOADTNM). The EOADTNM’s mission was to “further help direct the Monument’s effort to incorporate American Indian perspectives in its public education program. Most importantly, the study is one factor that has led to a productive working relationship between a number

⁵¹ EVANS ET AL., *supra* note 48, at 3.

⁵² NATIONAL PARK SERVICE, DEPT. OF INTERIOR, *supra* note 40, at 79.

of tribal governments and the Monument.”⁵³ Though not completed until 1997, the assessment aided in constructing the FCMP and further NPS efforts of Indigenous incorporation in park management. Ethnohistory and ethnography were the primary analytical frameworks used for the assessment. Ethnohistory “implies the critical examination of historical documents to solve anthropological problems,” while ethnography “is the collection of cultural data from contemporary peoples and involves the use of participants in collecting interviews.”⁵⁴ The addition of an ethnographic approach for a perspective that contradicts biased historical records that engage with the Ecological and Vanishing Indian narratives in mind rather than genuine Indigenous perspectives. The team even participated in the 1990 Sun Dance at Devils Tower, showing their commitment to better understanding Indigenous religious practices and how it is connected to the monument.

One of the main findings of the assessment points to a fault in the American legislative process’ solution to land co-management. Many policies, such as NAGPRA and NHPA, require Native Americans to disclose the location of cultural sites to the federal government for preservation to occur. For instance, the 1993 National Museum of the American Indian sponsored the NAGPRA convention and invited Native leaders to discuss the Act. Although it seems like a step in the right direction, many leaders stated that “divulging religious information is a violation of strongly

⁵³ JEFFERY R. HANSON & SALLY CHIRINOS, *Ethnographic Overview and Assessment of Devils Tower National Monument, Wyoming*, (National Park Service, 1997), <http://npshistory.com/series/archeology/rmr/9/report.pdf>.

⁵⁴ *Id.*

held cultural and religious beliefs.”⁵⁵ This led to a conundrum where agencies need to know what location to protect, but many Native American religions do not condone this type of disclosure. Tribes risk being culturally insensitive and acting counter to what their religion asks of them. Other findings and suggestions from the assessment include banning climbing on the tower, registering the Sun Dance compound to the National Register, better educating the general public so as not to remove religious offerings from the tower, and changing the monument's name to Bear Lodge. Instead of forcing tribes into compromising positions, the federal government should instead investigate ways both cultures can be respected while working on these changes.

III. LEGISLATIVE IMPACT

What impact did these findings and suggestions have in the decades after the assessment's completion? The voluntary ban on June climbing is still in place, but climbing is allowed on the tower during other months. The dance compound is not listed on the National Register's website, meaning it was never approved or submitted as a historic site. As for the suggestion to better educate tourists and not move religious offerings, there has been some noticeable progress on the NPS webpage. On the official “Devils Tower: NPS” webpage, web users must go through multiple links to get to the “Sacred Place” section. Users must click “NPS.gov-Park Home-Learn About the Park-History & Culture-People-American Indians-A Sacred Place,” or six separate links, to get to a page that states in bold, “Please do not touch, disturb or remove prayer cloths or other religious artifacts in the park.”⁵⁶ While the statement nods towards religious respect,

⁵⁵ EVANS ET AL., *supra* note 48, at 12.

⁵⁶ *Place of Reverence for Native Americans – Devils Tower*

there is not much accountability for those who disturb these religious objects, and the suggestion is buried very deep on the park's site, not making it very accessible to visitors.

Additionally, and perhaps the most telling, the monument's name was never officially changed to Bear Lodge. In November of 2014, a Lakota spiritual leader petitioned for the United States Board on Geographic Names (BGN) to change the monument's name out of respect for the over twenty tribes who find the current name culturally insensitive.⁵⁷ The NPS has no authority to change an NPS unit name, so the petition was made to the BGN. Initially, the BGN did not respond to this request, and in February 2023, Senator Cynthia Lummis (R-WY) introduced S. 267 in the Senate. S. 267 is essentially the same as Senator Lummis's 2021 bill, S.22., which "declares that the mountain at the Devils Tower National Monument in Wyoming shall be known and designated as Devils Tower."⁵⁸ Due to BGN name change policies, even if Senator Lummis's bill does not pass, the monument cannot undergo a name change until ninety days after the beginning of the next Congressional session in 2025. The push for legislation like Lummis's bill comes from a desire to maintain Devils Tower's "name and legacy" as the first national monument.⁵⁹ Changing the monument to Bear

National Monument, NATIONAL PARK SERVICE (May 31, 2023),
<https://www.nps.gov/deto/learn/historyculture/reverence.htm>.

⁵⁷ *Proposals to Change the Name*, NATIONAL PARK SERVICE,
<https://www.nps.gov/deto/learn/historyculture/devils-tower-proposals-to-change-the-name.htm>.

⁵⁸ *To Designate the Mountain at the Devils Tower National Monument, Wyoming, as Devils Tower, and for Other Purposes*, S.22, 117th Cong. (2021).

⁵⁹ Brendan LaChance, *Lummis, Barrasso Work to 'Protect' Devils Tower, Block Tribal Requests to Change Name to 'Bear Lodge*, OIL CITY NEWS (February 18, 2021),
<https://oilcity.news/wyoming/2021/02/18/lummis-barrasso-work->

Lodge does not disrupt the monument's legacy. The "legacy" American politicians are trying to uphold is based on Indigenous culture and religion long before 19th-century conservationists declared the monument a site worth preserving, a note that even the NPS added in their official FCMP.

Currently, the NPS continues fulfilling its responsibilities in the three pieces of legislation. In 2019, the NPS released a Cultural Resource Stewardship Assessment for Bear Lodge. The assessment's scope covered ten areas, though the ones relevant for this analysis are Cultural Anthropology, Compliance, and the Native American Graves Protection and Repatriation Act (NAGPRA).⁶⁰

For cultural anthropology, the report states that the management staff for the monument has ongoing relationships with "26 associated Tribes and consults regularly, including at least one in-person meeting per year," showing an improvement in collaboration between tribal and park entities.⁶¹ Under the section on the next steps for cultural anthropology, the report placed a reminder and recommendation for tribes wanting to host religious ceremonies on the tower and integrate oral histories into the park document database.⁶² In 2016, park leaders met with tribal leaders to create new interpretive signage for religious ceremonial information to better inform the public of the history of ceremonies such as the Sun Dance. By actively

[to-protect-devils-tower-block-tribal-requests-to-change-name-to-bear-lodge/](#).

⁶⁰ *Cultural Resource Stewardship Assessment: Devils Tower National Monument*, U.S. DEPARTMENT OF THE INTERIOR NATIONAL PARK SERVICE CULTURAL RESOURCE DIVISION, <http://npshistory.com/publications/deto/crsa-2019.pdf>.

⁶¹ EVANS ET AL., *supra* note 48, at 6.

⁶² *Id.* at 12.

teaching the public about these ceremonies, the NPS is breaking the Ecological Indian trope. As previously stated, Indigenous concerns over land usage are often thought to be associated with their “innate connection” to nature rather than their cultural and religious affiliations with the land. By giving Indigenous voices a place within the park to explain their religious connection with the monument, the NPS facilitates better understanding amongst park-goers. Additionally, including oral histories as a form of historical documents is a step toward the inclusion of Indigenous practices rather than the previous practice of forcing Native communities to alter their traditions to fit Euro-American preferences.

For the compliance section of the report, the NPS staff states there is a lack of tribal consultation for all historic sites at the monument, as required and defined by the NHPA.⁶³ This lack of consultation primarily results from understaffing in the park, so the report suggests hiring additional staff with experience in NHPA compliance and tribal consultation. Finding staff with these qualifications, though, may be difficult as that knowledge is usually within the GS-09 range of the federal pay grade but requires a master’s degree and sometimes a Juris Doctorate for low-scale pay. The report also suggests developing a better consultation process when working with tribes. However, it does not detail what this process should look like and what steps to take when developing this relationship. The report mentions numerous times lack of staff and funding for cultural resources, yet suggests building a better relationship and framework without the resources to do so. This lack of guidelines and resources emulates the structure of policies

⁶³ *Id.* at 4.

such as the AIRFA of 1978, as they are seemingly for pro-Indigenous rights but do not provide avenues to make meaningful, lasting change. However, there have been positive improvements in NAGPRA compliance and execution in recent years at Bear Lodge. In 2005, “the monument repatriated all known NAGPRA items,” and there are suggestions to make streamlined processes in repatriating found objects in the future as they are discovered.⁶⁴

CONCLUSION AND ARGUMENT

The various compliance documentation and NPS responses to Indigenous concerns prove the changes the NPS is continuously making to integrate Indigenous voices in land management. As the first landowners, Indigenous people hold certain rights that deserve to be paramount to those of recreational concerns. Of course, the NPS has to comply with other interests, such as land use regulations, but Indigenous viewpoints have long been overshadowed by said interests. Even today, as shown through Senator Lummis’ 2021 bill, individuals are attempting to keep Native people’s culture and insights out of land management in their own ancestral homes. Pushback against said politicians who openly disrespect Indigenous heritage is one of the many ways we as non-Native people can help advocate for better land co-management in our nation’s public lands. The NPS is certainly on the upward slope of integrating these Indigenous concerns, but larger change will not come from solely one federal department’s change in policies. Rather, a larger societal change must take place in which we view and respect Native culture, land, and opinions when considering these issues.

⁶⁴ *Id.* at 13.

Bear Lodge is just one of over four hundred park units in the US that face difficult questions related to Indigenous inclusion in land co-management. As shown through this analysis, the creation of the AIRFA, NHPA, and NAGPRA all assisted in including Indigenous voices in Bear Lodge management. Including these voices helped break down some stereotypes and misconceptions about Native Americans and better show the affiliations tribes have with federal lands. While recreating at your favorite National Park, it is easy to forget the land on which you stand and the less than desirable history that lets you stand there. The DOI Secretary, Deb Haaland, a member of the Pueblo of Laguna, is consistently implementing new management strategies in these units to facilitate Indigenous cultural and religious understanding amongst the American public, some of which include extensive consultation with tribes in the US and Canada.⁶⁵ Appointing and voting for Indigenous leaders in agencies such as the DOI will create better inclusion of Indigenous voices in land management. Properly allocating funds and staff to allow these improvements is one of the first steps in addressing these problems. NPS units throughout the country have room for improvement by addressing these concerns and implementing Native leadership.

ABBREVIATION GUIDE

AIRFA: American Indian Religious Freedom Act

BGN: United States Board on Geographic Names

DOI: Department of Interior

⁶⁵ Press Release, U.S. Department of the Interior, Secretary Haaland Takes Action to Remove Derogatory Names from Federal Lands (Apr. 10, 2023), <https://www.doi.gov/pressreleases/secretary-haaland-takes-action-remove-derogatory-names-federal-lands>.

EOADTNM: Ethnographic Overview and Assessment of Devils Tower National Monument

FCMP: Final Climbing Management Plan

NAGPRA: Native American Graves Protection Repatriation Act

NHPA: National Historic Preservation Act

NPS: National Park Service

ONE FOOT IN THE GRAVE: LAWFUL PERMANENT RESIDENCE AS LEGISLATIVE IMMIGRATION REFORM FOR DREAMERS' PRECARIOUS STATUS

*Alaina Ruffin**

INTRODUCTION

- I. THE ORIGINS OF DACA AND CURRENT STATE OF THE UNITED STATES IMMIGRATION SYSTEM
 - A. *Creation of DACA and Related Legislation*
 - B. *Current Structure and Logistics of DACA*
 - C. *Contemporary Challenges and Contentions with DACA's Legality*
 - D. *Stakeholders*
- II. THE FEASIBILITY OF REFORMATION
 - A. *Current Policy Proposals*
 - B. *Possibilities of Implementation*
 - C. *Arguing the Counterarguments: Opposition to Lawful Permanent Residence*
- III. POLICY RECOMMENDATIONS: CREATING OPPORTUNITIES OVER PENALTIES

CONCLUSION

INTRODUCTION

Western society has held a long and macabre fixation with

* Alaina Ruffin is a recent graduate of George Mason University, earning an honors Bachelor's degree in English Writing & Rhetoric with dual minors in Legal Studies and U.S. History. Upon concluding her current internship with the Congressional Black Caucus Foundation, Ruffin plans to further her education by completing her paralegal certification and applying to graduate school.

the undead: something that occupies an ambiguous space between the concrete existences of life and death. For thousands of undocumented young people under the current state of the Deferred Action for Childhood Arrivals (DACA) program, also known as “Dreamers,” their citizenship status lies in a similar, blurry state of uncertainty.

As one of the most salient examples of immigration reform policies in the contemporary world, DACA has garnered considerable public and political attention in recent years. From its initial introduction under the Obama administration to its eventual suspension under the Trump administration, and now to having increased protections as part of the Biden administration, DACA has undergone myriad changes.

However, since its inception, the legality of DACA as a program has been contested. In 2022, two court cases related to ending DACA due to legal uncertainty arose in New York and Texas. Although new legislation was introduced to Congress in February 2023, the status of new applicants remains in limbo. In addition to the inability of new, eligible migrants to apply for DACA, existing recipients continue to question their actual citizenship status, as the program’s current stagnancy reveals its position as a matter of prosecutorial discretion rather than a formalized category or status.

To address the Dreamers’ precarious immigration status under the current state of DACA, Congress must implement an opportunity for potential recipients to apply for lawful permanent residence within the U.S. This policy proposition would mean reforming DACA to include a concrete pathway for lawful permanent residency, especially to allow current and eligible undocumented youth the potential of eventually obtaining legal citizenship status.

This essay examines the uncertain status of Dreamers under DACA as it exists today. Beginning with the origins of DACA as a policy, the opening section of this essay will describe the purpose and significance of DACA, including the stances of stakeholding entities and early challenges to DACA. Following this introduction is a discussion of the current leading policy positions on how to address DACA's uncertainty, accompanied by examinations of their feasibility if they were to be implemented. Based on these proposals, recommendations for implementing lawful permanent residence as a solution to DACA's stagnancy will be presented. This essay concludes by reinforcing the significance of DACA to Dreamers and American society as a whole.

I. THE ORIGINS OF DACA AND CURRENT STATE OF THE UNITED STATES IMMIGRATION SYSTEM

A. Creation of DACA and Related Legislation

Preceding the DACA program, the Development, Relief, and Education for Alien Minors (DREAM) Act was first introduced in 2001 as federal legislation. The DREAM Act was designed to allow undocumented immigrant youth who were brought to the United States as children to obtain conditional, lawful, and permanent resident status if they remain in high school, receive a diploma (or GED), and go on to college or join the military.¹ Under the Obama administration, DACA was formally introduced in June 2012 as a way of mitigating deportation rates for unauthorized minors. Its overall goal was to defer deportation for a demographic of undocumented migrants brought into the

¹ William A. Schwab, *Dreams Derailed: Undocumented Youth in the Trump Era* 49 (2019).

U.S. as children, who are therefore unable to change or otherwise prohibit the circumstances of being present in the country. Through offering eligible children and young adults an opportunity to access more economic and professional stability— namely, by providing temporary employment authorization, social security, and even driver’s licenses in certain states, as well as granting a pathway to pursue higher education and better-paying jobs²— DACA ultimately allowed young people the chance to pursue opportunities in the U.S. and contribute to American society at large. Upon fulfilling the policy’s conditions, deportation proceedings would be deferred for two years, with the opportunity for renewal.

Some legal scholars and professionals have argued that DACA’s foundation was established on uncertain grounds, as it was never a formal citizenship program. Tom Wong, a senior fellow for Immigration Policy at the Center for American Progress, states that “as an exercise in administrative discretion— unlike a legislative effort— DACA does not give undocumented youth lawful permanent resident status such as a green card or provide a path to permanent residency and citizenship. Rather, it gives temporary relief from deportation.”³ With its lack of formal structure for obtaining citizenship, some advocates and legal experts voiced concerns that DACA was created as an overreach of administrative power.

² Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CENTER FOR AMERICAN PROGRESS (Nov. 24, 2021), <https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/>.

³ Tom K. Wong et al., *Undocumented No More: A Nationwide Analysis of Deferred Action for Childhood Arrivals, or DACA* (2013).

B. Current Structure and Logistics of DACA

As of 2022, approximately 600,000 DACA recipients, including parents of U.S. citizens, reside within the country; additionally, “more than 75 percent of DACA recipients in the workforce—nearly 350,000—were employed in jobs deemed essential to getting us through the COVID-19 pandemic, including approximately 34,000 health care workers.”⁴ In addition to comprising a significant number of the country’s population of workers, Dreamers have also become active social and economic participants in everyday life. Specifically, employers may hire undocumented migrants, or businesses may have migrants comprise a large proportion of their consumer base.

The current structure of the policy is rigid, even more so after the Department of Homeland Security (DHS) created more punitive policies against undocumented migrants remaining in the U.S. Such stipulations include DACA recipients only being permitted to travel outside of the country for educational purposes, as opposed to personal reasons, and having to apply for advance parole to do so. Marc Rosenblum, Executive Director of the Office of Homeland Security Statistics, notes that “the policy focus since 1986 has been on boosting the capacity of the enforcement system to identify and deport unauthorized immigrants.”⁵ This is particularly evident in the DHS targeting Dreamers via criminalizing trivial issues, like fining or detaining undocumented migrants over employment authorization documents or driver’s licenses

⁴ Geri Mannion & Marielena Hincapié, *Ten Years of DACA: What’s Next?*, CARNEGIE CORP. OF N.Y., (Sep. 13 2022).

⁵ Marc R. Rosenblum, *A New Era in US Immigration Enforcement: Implications for the Policy Debate*, 16, *Georgetown J. of Int’l Affairs*, 122, 127 (2015) (discussing the implications of immigration enforcement policies).

and registrations.

Despite being proposed before Congress several times, the DREAM Act never passed, though it was introduced again by Senators Lindsey Graham and Richard Durbin in February 2023 as a pathway for conditional citizenship status for up to eight years. Though the bill has yet to move through the Senate or House, receiving no action other than being referred to the Senate Judiciary Committee, the 2023 version of the DREAM Act would “automatically grant conditional permanent resident status to Deferred Action for Childhood Arrivals (DACA) recipients who still meet the requirements needed to obtain DACA,”⁶ which would change into lawful permanent residence if the recipient were to fulfill further conditions.

C. Contemporary Challenges and Contentions with DACA’s Legality

As previously discussed, two cases that actively debated DACA’s legality arose in New York and Texas. For the *Texas v. United States* lawsuit beginning in December 2014, a little over two years after DACA’s introduction, “Texas and 25 other states [asked] a federal court in Texas to block implementation of DAPA and the expansion of DACA.”⁷ In June 2016, the Supreme Court announced a 4-4 deadlock in *Texas v. United States*. Five years later, in June 2021, DACA was declared unlawful by a federal judge in Texas. Although *Batalla Vidal v. Mayorkas* resulted in the DHS denying any comprehensive expansion of the program,

⁶ National Immigration Forum, *Bill Summary: Dream Act of 2023* (2023), (last visited December 6, 2023).

⁷ Mexican American Legal Defense and Educational Fund, *A History of Efforts to Challenge DACA in Federal Court* (2019) (last visited December 6, 2023).

Texas v. United States determined in October 2022 that while DACA is unlawful, current recipients would still be able to retain their protections and file for renewals. During this time, the DHS could not approve or process new applications from first-time applicants.⁸ More recently, the Biden administration appealed the court's decision and asserted in August 2022 that the previous guidelines established in 2012 codified DACA for existing recipients who sought to renew their requests, as opposed to new applications.⁹ Regardless of the Biden administration's proposed regulations and the persistent legal debate behind DACA's standing, current and prospective DACA recipients are still suspended in uncertainty; current DACA recipients have no concrete pathway to becoming citizens, while new applicants are unable to pursue DACA as a means to stability whatsoever. Additionally, as raised by Cornell Law Professor Jaclyn Kelley-Widmer, "young people who were brought to the United States as children but have never received DACA protections will continue to be here precariously."¹⁰

The case out of New York, *Batalla Vidal v. Wolf* (2020), was "the first lawsuit in the country in which DACA-holder plaintiffs challenged the Trump administration's efforts to end DACA in 2017."¹¹ The Wolf Memorandum,

⁸ *Texas v. United States*, No. 21-40680 (D. Mass. filed Oct. 05, 2022).

⁹ Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152 (Aug. 30, 2022) (to be codified on Oct. 31 2022).

¹⁰ Jaclyn Kelley-Widmer, After the 5th Circuit's ruling, does DACA have a future?, Washington Post (Oct. 6, 2022), <https://www.washingtonpost.com/politics/2022/10/06/texas-daca-undocumented-dreamers/>.

¹¹ Jess Hanson, *What Is Going on With DACA in the Courts?*, NAT. IMM. L. CEN (Jun. 29 2022), <https://www.nilc.org/2022/06/29/what-is-going-on-with-daca-in-the-courts-torch/>.

issued by Acting DHS Secretary Chad Wolf in July 2020, rescinded two previous memoranda from 2017 Acting DHS Secretary Elaine Duke and 2018 Acting DHS Secretary Kirstjen Nielsen. The memorandum would have required that the DHS deny first-time DACA requests, cut renewal periods for DACA recipients in half, and limit the availability of advance parole, among other goals.¹² The district court's final ruling in December 2020 mandated that the federal government accept first-time, renewal, and advance parole requests for DACA recipients based on the original policy's terms.¹³ Furthermore, as part of the August 2022 decision in *Batalla Vidal v. Mayorkas (2022)*, the District Court for the Eastern District of New York denied the plaintiffs' motion for limited relief, after the plaintiffs requested the court modify its previous order to process first-time and renewal requests for DACA.¹⁴ For the nearly 100,000 individuals attempting to renew their lapsed DACA statuses or apply for DACA for the first time,¹⁵ the court's refusal to extend any relief casts their statuses further into limbo.

Former U.S. Attorney General Jeff Sessions announced on September 5th, 2017 that the Trump administration was suspending DACA because "it did not feel that such a large program could be created without Congress enacting legislation and that it did not believe that the executive action of inherent prosecutorial discretion and

¹² Memorandum from Deputy Director Joseph Edlow on behalf of the U.S. Cit. and Imm. Serv. to Associate Directors and Program Office Chiefs (Aug. 21, 2020) (on file with author).

¹³ *Batalla Vidal v. Wolf*, 501 F.Supp.3d 117 (E.D.N.Y. 2020).

¹⁴ *Batalla Vidal v. Mayorkas*, 618 F.Supp.3d 119 (E.D.N.Y. 2022).

¹⁵ Am. Immigr. Law. Association, Practice Alert: Current State of the DACA Program, <https://www.aila.org/library/aila-practice-alert-filing-daca-renewal> (last visited December 6, 2023).

authority existed.”¹⁶ A series of court challenges emerged in response to the Trump administration’s rescission of the program, in which such legal oscillation contributed to DACA’s stagnancy. Upon DACA’s reversal in 2017, various parties filed lawsuits against DHS affiliates in California, Maryland, New York, and Washington, D.C. to argue that the rescission was illegal.¹⁷

However, some have argued that DACA’s suspension was constitutional, as “the Constitution does not explicitly designate decision-making authority regarding immigration to any one branch of government; this allows both Congress and the executive branch to make decisions regarding immigration, especially when precedent has enabled Congress to delegate decision-making power regarding immigration to the executive, as it has with DACA.”¹⁸ This argument is partially due to the aforementioned belief that DACA’s inception was based on rudimentary terms.

In addition to Congress, another conspicuous stakeholder of DACA is the National Immigration Law Center (NILC), a pro-immigration organization established in 1979 and dedicated to migrants’ rights advocacy, including litigation and fieldwork. Another is the American Civil Liberties Union (ACLU), a national civil rights

¹⁶ MICHAEL A. OLIVAS, *PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT AND DACA* 109 (2020).

¹⁷ Charles Fendrych, *DHS v. Regents of the University of California: Administrative Law Concerns in Repealing DACA*, 15, *Duke J. of Const. L. and P.P.*, 99, 102 (2020) (discussing the procedural history of DACA’s rescission background).

¹⁸ Kelly Bogart, *Keeping the Dream Alive: Deferred Action for Childhood Arrivals and the Necessary Next Step*, 56, *Fam. Court R.*, 651, 653 (2018) (discussing the constitutionality of DACA’s implementation and successive rescission).

organization that in 2020, filed a lawsuit about deceptive practices from immigration law enforcement as a violation of the Fourth Amendment.¹⁹ Overall, supporters of DACA lean toward citing the rights of undocumented youth when asserting the program's legal status, although they often neglect to account for DACA's stagnancy, casting Dreamers' status into uncertainty.

D. Stakeholders

As expected of such a prominent political issue, stakeholders in opposition to the policy have also emerged. One example is the Center for Immigration Studies, a think tank that became one of the leading organizations to call for DACA's cancellation²⁰ in the wake of its 2017 suspension.²¹ Others include the Immigration Reform Law Institute (IRLI), a nonprofit that filed an amicus curiae brief in February 2023 for *Texas v. United States*, claiming that DACA violates the Constitution's Take Care clause under Article II, Section 3 (i.e., the President taking care to execute the law).²² In general, opposing stakeholders tend to emphasize canceling DACA because of its alleged unconstitutionality, though fail to consider the Dreamers whose statuses, and even entire

¹⁹ Leila Rafei, This Deceptive ICE Tactic Violates the Fourth Amendment, ACLU NEWS & COMMENTARY (Apr. 12, 2023), <https://www.aclu.org/news/immigrants-rights/this-deceptive-ice-tactic-violates-the-fourth-amendment>.

²⁰ Mark Krikorian, On the 5th Anniversary of DACA, Pull the Plug, CENTER FOR IMMIGRATION STUDIES: BLOG (Aug. 15, 2017), <https://cis.org/Krikorian/5th-Anniversary-DACA-Pull-Plug>.

²¹ Steven A. Camarota, Time to End DACA, CENTER FOR IMMIGRATION STUDIES: BLOG (Aug. 3, 2017), <https://cis.org/Oped/Time-End-DACA>.

²² Memorandum from Christopher J. Hajec and Mat A. Crapo on behalf of Imm. Ref. L. Inst. to the U.S. District Court for the Southern District of Texas Brownsville Division (Feb. 20, 2023) (on file with author).

lives, essentially depend on the program's existence.

Interestingly, however, stakeholders have emerged whose political platforms and backgrounds might not otherwise indicate their views on DACA. Namely, Senator Lindsey Graham, a staunch Republican, was one of the legislators to introduce the 2023 version of DACA to Congress. Despite his track record of supporting restrictive immigration policies for border enforcement, Senator Graham has been an outspoken proponent of preserving DACA and tried to convince President Trump to serve as a bipartisan determinant in fixing and maintaining the program.²³

II. THE FEASIBILITY OF REFORMATION

A. *Current Policy Proposals*

The leading policy proposals to address the issue of Dreamers' status include fortifying the program and the rights extended to recipients, reforming DACA in an attempt to address their statuses and other issues regarding the program and immigration as a whole, and canceling DACA altogether as a way to restrict further immigration into the country.

The Biden Administration has been especially concerned with fortifying DACA. Upon taking office in January 2021, President Biden attempted to reverse restrictive Trump-era immigration policies and address the murky state of the immigration system. After the initial *Texas v. United States* ruling, President Biden moved to "modify

²³ Jonathan Blitzer, Lindsey Graham Spent a Year Courting Trump, But on Immigration He's Being Shut Out, *THE NEW YORKER* (Jan. 17, 2018), <https://www.newyorker.com/news/news-desk/lindsey-graham-spent-a-year-courting-trump-but-on-immigration-hes-being-shut-out>.

DACA ... in an effort to “preserve and fortify” it against future legal challenges, mainly coming from conservative states who call it amnesty for illegal migrants.”²⁴ In April 2023, President Biden announced a proposal to amend Medicaid and the Affordable Care Act to include Dreamers in their definitions, thus allowing thousands of undocumented youth to apply for healthcare coverage.²⁵

An alternative proposal aims to establish DACA as a permanent program. Since DACA currently exists as a temporary, limited policy under persistent legal and political threat, pro-immigration advocates have called for creating a permanent solution. The policy would be restructured to include a clear pathway for citizenship. Advocates from the National Immigration Forum,²⁶ the National Immigrant Justice Center,²⁷ and even several political representatives²⁸ have consistently called for a permanent version of DACA to create a way for new and current Dreamers to apply for citizenship.

Conversely, conservative opponents have called for DACA to be permanently suspended, especially after its

²⁴ Julia Ainsley, Biden Administration Moving to Protect Dreamers After Texas Court Ruling, NBC NEWS (Sep. 27, 2021), <https://www.nbcnews.com/politics/politics-news/biden-admin-moving-protect-dreamers-after-texas-court-ruling-n1280166>.

²⁵ Press Release, The White House, Fact Sheet: President Biden Announces Plan to Expand Health Coverage to DACA Recipients (Apr. 13, 2023) (on file with author).

²⁶ Press Release, National Immigration Forum, Proposed DACA Rule Is a Positive Step, But Not a Permanent Fix (Sep. 27, 2021) (on file with author).

²⁷ Press Release, National Immigrant Justice Center, Congress Must Act To Secure Permanent Protections For DACA Recipients Following 5th Circuit Ruling (Oct. 6, 2022) (on file with author).

²⁸ Press Release, Alex Padilla for Senate, Padilla Joins DACA Recipients to Urge Action on Permanent Solution for Dreamers (Nov. 16, 2022) (on file with author).

rescission in 2017. The Federation for American Immigration Reform (FAIR) wrote one month after DACA's suspension that "the unlawful DACA program was unilaterally created by President Obama in 2012 to defer deportation and grant work permits to illegal aliens,"²⁹ noting that proposed legislation would provide amnesty to "illegal aliens."³⁰ Another reason held by opponents for suspending DACA is the belief that migrants are a bane to the American economy. This idea stems from the notion that migrants will drain resources from the federal government— such as housing or education— by becoming a public charge.

B. Possibilities of Implementation

Based on DACA's current political, legal, and advocacy landscape, solidifying it into permanence does not seem entirely feasible, at least not in the near future while its legality is debated. Hunter Hallman, an Immigration Project Associate at the Bipartisan Policy Center, examines that, while the feasibility of DACA's permanence would not result in immediate solutions for the Dreamers, Congress would have to consider whether "expired holders of DACA status, since deported, [are] eligible to apply for reinstatement" as well as "what fees should be charged to cover administrative costs."³¹ Careful consideration should also be given to the classification of Dreamers under a new version of the policy, and what the objective of said version would ultimately be: either giving undocumented migrants a clear path to

²⁹ Federation for American Immigration Reform, Legislative Options to Replace DACA (2017).

³⁰ *Id.*

³¹ Hunter Hallman, Fact Sheet: Building a Permanent DACA Program, BIPARTISAN POLICY CENTER: ALL BLOG POSTS (Dec. 7, 2017), <https://bipartisanpolicy.org/blog/fact-sheet-building-a-permanent-daca-program/?gad=1>.

obtaining citizenship, or creating another policy to prompt Congress to take some sort of action on immigration reform.

Additionally, due to the thousands of Dreamers currently part of the policy, suspending DACA entirely is not feasible either. Not only would terminating DACA create devastating economic impacts for recipients and their families, but employers and businesses who regularly engage with Dreamers would also experience financial burdens as a consequence. As the Center for American Progress stated in 2017, Dreamers bring billions of dollars to the federal government and provide thousands of workers to the nation's economy.³² Canceling DACA would mean losing billions in federal tax income and revenue, thus striking a blow to the economy.

However, restructuring DACA seems possible and even likely, given the Biden Administration's recent moves to enhance the rights of recipients. Specifically, in addition to announcing the expansion of healthcare coverage to DACA recipients last month, President Biden previously ordered his administration's Cabinet to preserve DACA by granting recipients a permanent pathway to citizenship.³³ If passed, the 2023 version of DACA would "establish a process for Dreamers to apply for conditional legal status and ultimately become citizens"³⁴ by granting Dreamers a

³² Angie Bautista-Chavez, Tom Jawetz & Nicole Prchal Svajlenka, A New Threat to DACA Could Cost States Billions of Dollars, CENTER FOR AMERICAN PROGRESS: ALSO FROM CAP (Jul, 21, 2017), <https://www.americanprogress.org/article/new-threat-daca-cost-states-billions-dollars/>.

³³ Associated Press, Biden Orders Cabinet to Preserve DACA, LOS ANGELES TIMES (Jan. 20, 2021), <https://www.latimes.com/politics/story/2021-01-20/biden-orders-cabinet-to-preserve-daca>.

³⁴ Dream Act of 2023 Priority Bill Spotlight, FWD.US: DREAMERS (Mar. 7, 2023), <https://www.fwd.us/news/dream-act->

renewable eight-year conditional permanent resident status upon applicant approval. Though the Biden administration has attempted to fortify the program by enhancing its current protections, these recent executive moves have yet to address the core issue of DACA lacking a structured path to citizenship.

While it is unlikely the program will be made permanent, public opinion regarding DACA has generally been positive. A 2020 poll from the Pew Research Center reveals that “74% of Americans favor a law that would provide permanent legal status to immigrants who came to the U.S. illegally as children, while 24% are opposed.”³⁵ Additionally, University of Washington professors Geoffrey Wallace and Sophia Jordán Wallace observe that “both conservative and liberal US media and political elites increasingly adopted rhetoric emphasizing Dreamers’ Americanness and limited culpability ... despite frequent and different positions on immigration policies between Democrats and Republicans, there appeared to be bipartisan support for Dreamers.”³⁶ Often, because of their youth and prospects for education and employment, undocumented youth are narratively framed as tenacious underdogs striving to prove their “Americanness” to justify their calls for migrants’ rights. However, the large percentage of support

[of-2023-priority-bill-spotlight/#posts](#).

³⁵ Jens Manuel Krogstad, Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children, PEW RESEARCH CENTER: SHORT READS (Jun. 17, 2020), <https://www.pewresearch.org/short-reads/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/>.

³⁶ Geoffrey P. R. Wallace & Sophia Jordán Wallace, *Who Gets to Have a DREAM? Examining Public Support for Immigration Reform*, 54, IMR, 527, 532 (2020) (discussing the public bipartisan characterization of DACA recipients).

for permanent residence for Dreamers not only indicates the extent to which bipartisan agreement surrounds DACA, but also gestures to the possibility of lawful permanent residence becoming a tangible solution for the Dreamers.

*C. Arguing the Counterarguments:
Opposition to Lawful Permanent
Residence*

Some arguments against the possibility of allowing DACA recipients to become legal permanent residents include the assertion that such a change would promote illegal immigration into the U.S., as well as increase the country's overall crime rate. Notably, due to DACA being aimed toward migrants born or brought over into the country as young children, opponents have asserted that alongside the program being created illegally in the first place, DACA serves as a covert way of smuggling older migrants into the country. For instance, FAIR has historically been a leading voice to oppose DACA, arguing that "most DACA recipients are not shining valedictorians or medal-of-honor recipients like open border proponents and the mainstream media commonly suggest ... instead, they are mostly adults in their 20s and 30s, many of whom did not even meet the basic qualifications for the program but were offered DACA status anyways."³⁷

Although immigration has indelibly become a pressing political, social, and economic issue within the last decade, DACA's existence as a program to mitigate the circumstances of immigration and offer a semblance of stability to young migrants ultimately exhibits its relevance and impact on thousands of young people nationwide. Rather

³⁷ Federation for American Immigration Reform, *The DACA Myth, What Americans Need to Know* (2017).

than embodying opponents' characterizations of migrants as violent and deceptive, smuggling themselves into the country as adults, DACA recipients have grown up into successful contributors to the workforce and their own families. Despite continuing to live in uncertainty within the U.S., migrants who received DACA protections as children have now graduated from high school and gained some form of higher education, contributed billions of dollars to the nation's economy, and gone on to marry and have their own children.³⁸ Though DACA was meant only to be a temporary policy, the program now serves as a precarious, decades-long reality for the thousands of young people protected under its guidelines.

One such example of the impact of DACA on recipients today, particularly for those forced to reapply to the program every two years and lengthen their blurry citizenship status, is Carlo Barrera, a teacher living in New York.³⁹ Barrera came to the U.S. on a tourist visa as a 6-year-old in 1993 and became a DACA recipient upon the program's creation in 2012. Despite living in New York for seven years, graduating from college, and formerly teaching at the Speyer School in New York, Barrera cannot return to teaching until his temporary status under DACA is renewed.⁴⁰ With the program's biannual renewal, many DACA recipients endure a similar inability to form long-term professional plans or deepen potential connections in their

³⁸ Phillip Connor, *DACA 11 Years Later: From Students to Careers and Families*, FWD.US: DREAMERS (Jun. 12, 2023), <https://www.fwd.us/news/daca-anniversary/>.

³⁹ Amy Yensi, Ten years after the enactment of DACA, hundreds of thousands of 'Dreamers' still in limbo, Spectrum News (Jun, 15, 2022), <https://ny1.com/nyc/all-boroughs/politics/2022/06/15/daca-recipients-have-to-reapply-every-two-years>.

⁴⁰ *Id.*

communities. In light of the courts' back-and-forth decisions, even in their efforts to continue with their lives, recipients live with an acute awareness of the program's shaky ground. Should DACA be terminated outright, for two years, approximately 22,000 jobs would be lost monthly, with an additional 1,000 family members seeing a loved one at risk of deportation daily.⁴¹

Ultimately, despite the claim that the program provides an avenue for illegal immigration, restructuring DACA to offer a concrete pathway for recipients to pursue lawful permanent residence could offer a sense of finality for recipients whose citizenship status remains in uncertainty—and for the ongoing immigration debates circulating today's legal and political realms. It is also important to note that DACA recipients were brought to the country as children, often without their consent or knowledge of their situation or surroundings, and have since established deep-seated roots within their communities. While it would indeed be a sweeping generalization to characterize every DACA recipient as a model American, it is also a gross disservice to the thousands of current recipients, and the thousands of others denied the chance to ever apply for the first time, to label every migrant—particularly those with no control over growing up in a country they were brought into as children—as a threat to our nation's sanctity and security.

III. POLICY RECOMMENDATIONS: CREATING OPPORTUNITIES OVER PENALTIES

Based on the current proposals circulating in discussions, some of the best options to address the issue of Dreamers

⁴¹ Phillip Connor, *What happens if DACA ends?*, FWD.US: DREAMERS (Aug. 22, 2022), <https://www.fwd.us/news/what-if-daca-ends/>.

holding unclear citizenship status include building an opportunity for lawful permanent residence into the current policy. As defined by the DHS, lawful permanent residents are “non-citizens who are lawfully authorized to live permanently within the United States.”⁴² Though not legally considered U.S. citizens, these individuals are entitled to similar rights as naturalized citizens, such as owning property, being protected under the law, and having increased employment opportunities.

Another benefit of lawful permanent residence as a solution would be ameliorating some of the rigidity established by the DHS for the current version of DACA. Unlike conditional permanent residence, where a recipient would receive valid residence for only two years based on the fulfillment of certain conditions, lawful permanent residence presents the same requirements for a longer term of residence and with the opportunity for renewal. Currently, DACA recipients must renew deferred action every two years, despite remaining in the country since childhood. Through lawful permanent residence, Dreamers would experience the same benefits as entailed under DACA—employment authorization, for instance— and have both a clearer path to citizenship and less financial and emotional strain on their well-being.

Some challenges with implementing lawful permanent residence as a solution to address the precarious status of Dreamers include the question of whether reforming the existing program would only worsen its stagnation, as DACA would still ultimately exist. Additionally, the current bill proposing conditional permanent residence under a

⁴² Dep. of Home. Sec., Lawful Permanent Residents (2023), <https://www.dhs.gov/ohss/topics/immigration/lawful-permanent-residents>.

revised DREAM Act is still being debated in Congress, with minimal updates since February 2023. Considering these challenges, the feasibility of implementing lawful permanent status as a solution to DACA's stagnancy in the immediate or even near future is slim.

Despite these obstacles, this solution would offer Dreamers a more concrete, formalized status and the potential to gain the full extent of U.S. citizenship someday, and implementing lawful permanent residence into DACA could resonate across the political spectrum by appeasing conservative hesitation to extend further opportunities for citizenship and liberal calls for providing undocumented migrants the same rights granted to naturalized citizens. Furthermore, due to the 2023 bill on DACA introducing conditional permanent residence as an option, the possibility remains that this solution will be adopted into the current policy. While the bill did eventually lose traction and die before reaching a vote, and when considering the current fractured, hot-button nature of immigration in Congress, the early bipartisan support behind the bill— and, historically, behind DACA as a whole— reveals how bipartisan reform support is not only feasible, but ultimately necessary to achieve significant, comprehensive policy change.

CONCLUSION

Despite significant challenges, there is still a chance of lawful permanent residence being implemented as a way to fix the state of DACA. With the historic bipartisan support surrounding DACA and ongoing advocacy and legislation on bolstering its rights, there is certainly evidence of a desire to aid the Dreamers whose status has been uncertain. However, with the solution to fix the program stuck on the Congress floor, help has yet to arrive for undocumented migrants stuck

in waiting or seeking to apply for DACA for the first time. The stagnation of DACA impacts thousands of people across the country, leaving the Dreamers to question their status and does nothing to address the issue, instead prolonging and even worsening it.

As exhibited by *Texas v. United States*, the need for policy reform when it comes to protecting and bolstering the DACA program is made all the more urgent when considering the sheer amount of people stuck in citizenship status limbo. By blocking potential recipients from accessing the program and lacking a clear pathway for citizenship for existing Dreamers, DACA has essentially been forced by the DHS and the courts into a legal gridlock. Thus, only Congress can provide stability and relief in the form of clear, comprehensive citizenship pathways to those whose lives have been defined by status uncertainty. With thousands of Dreamers still stuck in legal limbo, Congress must recall its once broad, bipartisan support of the program and offer young people a way forward.

For some, moving abroad and leaving the country altogether serves as a better option than continuing to wait in doubt and further endure the absurdity of uncertainty. Some Dreamers, who are no longer the hopeful children and teenagers the public has come to associate with DACA, have chosen to “self-deport.” With the COVID-19 pandemic shutting down the world and forcing an already stationary system to a halt, “a small but growing number of DACA recipients, disheartened after years of instability, [began] voluntarily moving to countries where they can acquire permanent legal status.”⁴³ Rather than wait another decade in

⁴³ Andrea Castillo, “I can’t keep fighting the system”: DACA Recipients Are Leaving the U.S., Disheartened By Years of Instability, LOS ANGELES TIMES (Nov. 12, 2022),

hopes of gaining answers for their status, Dreamers have chosen to leave the U.S. on their own terms, deciding that the same hopes of employment, education, and community could be found elsewhere.⁴⁴ No longer would they live in the shadows of legalistic doubt or succumb to the crushing psychological, social, and financial tolls of living undocumented in the U.S.

Despite the ambiguous current state of DACA, permanently laying it to rest would only exacerbate the issue of Dreamers lacking clear status. Without it, thousands will continue to exist in limbo, only straining the limited legal resources available for immigration. However, by introducing lawful permanent residence into a new version of DACA, the Dreamers could finally secure a more certain path to obtain citizenship, rather than hoping for a solution to rise from DACA's shallow grave.

<https://www.latimes.com/politics/story/2022-11-12/daca-recipients-disheartened-by-instability-are-leaving-the-u-s>.

⁴⁴ Devin Dwyer et al., *DACA Recipients Leaving US, Disheartened By Legal Limbo*, ABC NEWS (Mar. 7, 2023), <https://abcnews.go.com/Politics/daca-recipients-leaving-us-disheartened-legal-limbo/story?id=97300896>.

WHY THE CURRENT JUROR SELECTION PROCESS IS UNFIT TO COMBAT IMPLICIT BIASES

*Karim Panjawani**

INTRODUCTION

I. VOIR DIRE BACKGROUND

II. ATTORNEYS

- A. Gender Bias Study Summary*
- B. Racial Bias Study Summary*
- C. Considering Gender and Racial Bias*
- D. Response to Potential Counterclaims*

III. JURORS

- A. Voir Dire Questioning Summary*
- B. Voir Dire Questioning Considerations*
- C. Jurors' Assessments*

IV. REAL-WORLD IMPLICATIONS

CONCLUSION

REFERENCES

INTRODUCTION

While it is commonly understood that many individuals possess outward or explicit biases, an underlying bias that is often unaddressed is implicit bias. Serving as the unconscious attitudes that drive individuals' everyday actions, implicit biases can manifest in a multitude of ways and in various settings. One instance of implicit bias that this

* Karim Panjawani is a Junior studying Psychology and Property Development (Interdisciplinary) with minors in Linguistics and Liberal Arts at The University of Alabama. Panjawani plans to attend law school beginning in Fall of 2025.

paper aims to explore is bias within the judicial system, specifically regarding juries and the jury selection process. Through an analysis of various scientific studies, the thesis of this paper is to demonstrate that the current jury selection process in the United States of America needs to be reworked, as it is unfit to combat various implicit biases, disallowing defendants from having a trial by a fair and impartial jury, as is their right per the Sixth Amendment.

To effectively explore this topic, the body of this paper will consist of three major portions that dissect the categories of attorney, juror, and real-world implications on the problem of implicit bias in legal settings. The three major sections will be preceded by a short explanation of the voir dire process. The reason for such division within this paper is not only to better organize the large amount of information discussed, but also to showcase that the existence of implicit biases within the U.S. judicial system is multi-layered. As such, working through the different layers allows for better synthesis of the larger goal of this paper.

The first section of this paper outlines how attorneys contribute to the complications that arise concerning implicit bias regarding juries and the juror selection process. The attorney section consists of the following subsections: gender bias, racial bias, considerations of both gender and racial bias, response to potential counterclaims, and general comments and limitations. The juror section concerns how jurors might be fallible to certain kinds of questioning that expose their biases, or how their self-assessment of their bias is inaccurate. It consists of the following subsections: voir dire questioning summary and considerations, jurors' assessment of the judicial system, jurors' self-assessment, considerations of assessment and self-assessment, and general comments. The real-world implication section

references judicial practices contributing to the complications that arise through attorneys and jurors, and the conclusion section includes additional commentary alongside some solutions that could remedy the impact of implicit biases.

I. VOIR DIRE BACKGROUND

An important concept to note about the jury selection system within the United States is voir dire. Voir dire, literally meaning “to speak the truth” in French, is a process that consists of either a judge or attorney asking questions to potential jurors to determine if they are suitable to serve on the jury.¹ Additionally, attorneys also have two types of challenges they can raise to remove jurors from serving: challenges for cause and peremptory challenges. While challenges for cause allow attorneys to strike or remove jurors from service upon citation of a specific, non-discriminatory reason,² peremptory challenges, though variable in number depending on jurisdiction, essentially allow lawyers to exclude potential jurors from service without stating any reason or explanation.³ Hence, the scope of this paper will deal with discussing the various layers in the voir dire system as a whole while focusing on an attorney approach to the juror striking process, along with an evaluation of juror biases that come into play.

¹ *Voir Dire*, LII / LEGAL INFORMATION INSTITUTE (2019), voir dire | Wex | US Law | LII / Legal Information Institute (cornell.edu).

² *Challenge for Cause*, LII / LEGAL INFORMATION INSTITUTE (October 2022), challenge for cause | Wex | US Law | LII / Legal Information Institute (cornell.edu).

³ *Peremptory Challenge*, LII / LEGAL INFORMATION INSTITUTE (June 2015), peremptory challenge | Wex | US Law | LII / Legal Information Institute (cornell.edu).

II. ATTORNEYS

A. Gender Bias Study Summary

Considering the way that attorneys contribute to the jury selection process, it is important to grasp that they are given control within a courtroom to exclude any jurors through strikes. Norton et al. (2007) worked to explore this very concept through two studies to gauge the unconscious gender biases that might modify attorneys' attitudes when it comes to selecting potential jurors. Norton et al. (2007) gave their participants instructions to assume the role of prosecuting attorneys in a criminal case of a thirty-two-year-old white female defendant facing charges of first-degree murder. Specifically, the participants were informed that the defendant faced charges for shooting her husband who was reportedly physically and emotionally abusive towards her and her children. The participants received instructions to remove/strike certain jurors if they felt that the jurors could be partial or sympathetic to the defendant. Norton et al. (2007) also included two additional juror profiles from which the participants could only strike one and had to provide justification. The two profiles of prospective jurors included that of a thirty-nine-year-old married parent juror with previous jury experience and that of a thirty-four-year-old single domestic abuse counselor juror without previous jury experience. Additional details about each juror were provided to the participants to round out their juror profiles. The experimental manipulation in this study was that for half of the participants, the parent juror was a man, and the counselor was a woman, whereas it was flipped for the other half.

After the study was administered through a three-page questionnaire, the results indicated that 71% of all

participants eliminated whichever juror was female.⁴ Whenever the parent juror was female, 67% of participants chose to exclude her and retain the male counselor. When the parent juror was male, 76% excluded the female counselor. These results indicate that jurors who had almost identical profiles were eliminated simply based on their gender. Additionally, Norton et al. (2007) sought to examine the reasoning for such strikes and discovered that the justification used by participants focused on the juror qualifications rather than their gender, even though results indicated that gender biases drove participants' selections. The use of such external reasoning perhaps indicates efforts to cover the underlying biases through which participants might have made their decisions. Such results become clear from this study as participants' ratings for the female juror, compared to those of the male juror, indicated a belief that the female jurors were less likely to vote guilty than the male jurors— below is a chart that further simplifies these results.⁵

Table 1. Peremptory challenge use and justification of challenges (Study 1)

	Challenging Parent Juror (%)	Citing parental status (%)	Challenging Counselor Juror (%)	Citing counseling job (%)
<i>Parent Juror is female/Counselor Juror is male</i>	67	61	33	39
<i>Parent Juror is male/Counselor Juror is female</i>	24	19	76	81

Note: Because one prospective juror was always depicted as female and the other as male, the first and third columns sum to 100%, as do the second and fourth columns.

In their second study, Norton et al. (2007) ran the same experiment but included a warning against the use of implicit gender bias or gender-based reasoning to exclude

⁴ Michael I. Norton, Samuel R. Sommers, & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20, JOURNAL OF BEHAVIORAL DECISION MAKING, 467, 479 (2007)

⁵ *Id.* at 472.

jurors. This study yielded similar results to the first and showcased that even though encouragement against implicit bias-based reasoning was included, many participants still chose to remove the female juror. One of the only differences here was that fewer participants explicitly cited gender as their reasoning for juror exclusion (about 9% compared to 10% in study 1).⁶ It is important to note that even though experimenters clarified that participants were prohibited to use any gender-based reasoning, individuals still explicitly cited such as their motive for exclusion. These results also merit an argument for other participants continued use of gender-based reasoning as they may have merely noted another reason as their motive for exclusion.

B. Racial Bias Study Summary

Using an almost identical experimental methodology in a different study, Sommers and Norton (2007) gauged the impact of implicit racial biases. In this study, the trial scenario consisted of a twenty-four-year-old Black male defendant who allegedly beat a male homeowner after a confrontation during a burglary. An identical procedure was followed as the abovementioned study in Sommers and Norton (2007) but included an experimental condition of two jurors whose race they switched between Black and white. Characteristics for juror #1 were the following: forty-three-year-old male journalist writing about police misconduct with no previous jury experience. Characteristics for juror #2 were: forty-year-old divorced male skeptical statistical executive, with experience of serving on two prior juries. In condition one, the journalist was white, and the executive was Black. In condition two, the races were flipped.

⁶ *Id.* at 472.

Participants also had to include their reasoning for exclusion just like the previous study.

Similar to the results regarding gender biases, 63% of participants in this study also chose to exclude the prospective Black juror more than they did the prospective white juror.⁷ Additionally, both conditions individually saw greater rates of challenges occur for the Black juror over the white juror – a table is included below for reference.⁸

Table 1 Peremptory challenge use by prospective juror race across three participant samples

	Juror #1		Juror #2	
	When Black (%)	When White (%)	When Black (%)	When White (%)
College students (<i>n</i> = 90)	80	59	41	20
Law students (<i>n</i> = 81)	73	51	49	27
Attorneys (<i>n</i> = 28)	79	43	57	21

Note. Values represent the percentage of participants who chose to excuse the prospective juror. One prospective juror was always depicted as Black and the other as White, thus the first and last column represent the two prospective jurors presented to participants in one experimental condition (and sum to 100%) and the second and third column represent the two prospective jurors presented to participants in the other condition.

The study found that just under 10% of each participant category cited race as influential in their exclusion despite race being a prohibited factor in exclusion determinations.⁹ It was also found that whenever the excluded juror was Black, their occupation or some related qualification was more often cited as a reason for their exclusion instead of their race; however, such citation of qualification significantly decreases when that same juror is white in the alternative condition. ANOVA in this study also indicated that participants rated believing that the Black

⁷ Samuel R. Sommers & Michael I. Norton, *Race-based Judgements, Race-neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW AND HUMAN BEHAVIOR, 261-273 (2007).

⁸ *Id.* at 267.

⁹ *Id.* at 267.

prospective jurors would be less likely to vote guilty than the white jurors.¹⁰

C. Considering Gender and Racial Bias

Within both studies, the first layer of bias exposed in jury selection is the underlying implicit attitudes of attorneys. Before any biases of jurors themselves can be calculated into the equation, the biases with which attorneys include or exclude certain jurors determine the makeup of the panel that is responsible for delivering a verdict. In these studies, both Norton et al. (2007) and Sommers and Norton (2007) showcased how gender and race bias play a significant role in determining prospective jurors.

Racial biases connect to the thesis of this paper as they demonstrate that qualified, capable individuals are eliminated from consideration due to internal attitudes that a racial difference might affect a juror's perception of defendants. This way of thinking serves to be incredibly shallow, as it reduces individuals of diverse backgrounds and experiences to a single quality that is thought to magically predict the way jurors might rule. Similarly, gender biases highlight the same issue. Individuals are again reduced to one aspect of their being that can supposedly predict how they might perceive a certain scenario. Such considerations fail to consider the importance that evidence, witnesses, testimony, deliberations, etc. can all have on jurors' perceptions. Not only is the action of reducing jurors to a single aspect of their gender or race shallow, but it also assumes that jurors themselves are shallow enough to base their decisions off such qualities.

Additionally, though Norton et al.'s (2007) and

¹⁰ *Id.* at 268.

Sommers and Norton's (2007) studies outline that attorneys might consider race or gender biases during juror selection, the question remains as to what remedies exist to expose such biases during juror exclusion. As demonstrated in both studies, attorneys may cite reasons not related to gender or race for exclusion; however, such citations may be in vain as attorneys could still be acting with implicit biases. For such reasons, the jury selection process is demonstrated to have issues with implicit bias in the first layer of jury selection involving attorney input.

D. Response to Potential Counterclaims

The Supreme Court of the United States' ruling in the case of *Batson v. Kentucky* (1986) outlined that the use of peremptory challenges to remove a prospective juror solely based on their race violates the Equal Protection Clause of the Fourteenth Amendment.¹¹ Additionally, in *J.E.B. v. Alabama* (1994), the Court outlined that the Equal Protection Clause of the Fourteenth Amendment prohibits attorneys from striking (excluding) jurors not only on the basis of race or ethnicity but also gender.¹²

Though it may be argued that such rulings entirely prohibit the involvement of implicit gender and racial biases in juror selection, the implication is that citations of race, ethnicity, or gender cannot be *explicitly* expressed or cited. There exists the possibility of citing an acceptable reason for exclusion that is still yet motivated by underlying implicit biases.

A real-world example that highlights such implicit biases is Ray Ojeda's 2015 trial.¹³ In this trial, Ojeda's

¹¹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹² *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994)

¹³ Micheal Karlik, *State Supreme Court reverses man's*

prosecutor failed to offer non-race based reasons when questioned about his peremptory exclusion of a Hispanic man from the jury pool – something clearly against previously established judicial precedent as per *Baston* and *JEB*. However, instead of disallowing such an exclusion, Colorado District Court Judge Kenneth M. Laff offered his own explanations for the exclusion and allowed it. Further, the prosecutor in *Ojeda*'s case even attempted to mask his racial bias with a switch to a challenge for cause exclusion of the Hispanic man, citing vaguely that he had a “bias against the criminal justice system.”¹⁴

What makes such an occurrence most appalling is that it took place over two decades after the rulings of the Supreme Court on race, ethnicity, and gender-based discrimination prohibition, highlighting that judicial precedent is not enough to prevent biased exclusions. As such, the abovementioned studies readily outline that attorneys, just like participants, can act in accordance with such biases and get away with it, showcasing that attorneys' implicit biases can and do still play a significant role in jury selection and that immediate change is required. While the previous subsections clarify how implicit biases can be and still are rampant within the jury selection process as it relates to attorneys, the studies summarized do have certain limitations relating to their sample sizes and sample makeup. However, though such considerations can be clarified, the larger contours of contention that the implicit racial, gender, and ethnic biases of attorneys are a problem within the jury

convictions for handling of race-based juror dismissal, COLORADO POLITICS (February 14, 2022), [State Supreme Court reverses man's convictions for handling of race-based juror dismissal](https://coloradopolitics.com/courts/state-supreme-court-reverses-man-s-convictions-for-handling-of-race-based-juror-dismissal/) | Courts | coloradopolitics.com.

¹⁴ *Id.*

system are still valid.

III. JURORS

A. Voir Dire Questioning Summary

Working to develop a standardized measure that could assist in voir dire processes, Cox and Tanford (1989) created the Qualification by Example Selection Technique (QUEST), a questionnaire containing scenarios/descriptions of crimes in order to better understand jurors' willingness to consider capital punishment. In their first study, Cox and Tanford (1989) found that individuals that initially opposed the imposition of the death penalty had their attitudes "rehabilitated" (supported the imposition of capital punishment) after taking QUEST. In their second study (which tested for bias produced by their crime questionnaire), they found that their crime questionnaire further biased prospective jurors to impose the death penalty over life imprisonment. It is important to note that the questionnaire included specific, personally worded scenarios that would prompt prospective jurors to imagine how they would act given someone they knew (friend or relative) was the victim of a crime. The results of this study highlight the potency that certain kinds of questions can have to bring about various underlying juror attitudes.

Adding to the literature on the use of specific questioning to gauge juror attitudes, Salerno et al. (2021) ran three experiments to test the impact of minimal vs. extended voir dire and the impact of judicial rehabilitation (instructed by the judge to forego certain biases) on juror attitudes. In their study, Salerno et al. (2021) utilized three experiments under the premise of civil litigation to issue voir dire conditions of (1) no voir dire, (2) minimal voir dire, or (3) extended voir dire. Additionally, some participants were

judicially rehabilitated while others were not. Using an exploratory factorial analysis, it was revealed that neither extensive demographic information of the jurors (meaning the no voir dire condition), nor the minimal voir dire process accurately predicted the possible verdicts of jurors. On the contrary, extended voir dire questioning was determined to serve as a useful tool to identify underlying attitudes of jurors. Additionally, judicial rehabilitation was shown to have no effect in reducing juror bias. Though jurors received guidance to avoid certain biases they might hold, Salerno et al. (2021) found that it was not useful in any kind of prevention.

Greathouse et al.'s (2011) work adds to the conversation surrounding voir dire usage to gauge juror's underlying biases with exploration of the direct impact of specific, extended voir dire. Dealing with juvenile offenders, this study consisted of three sub-studies which included participants viewing a standard voir dire procedure in comparison with a voir dire designed to reveal juvenile qualifying jurors. The first study specifically gauged whether such voir dire would impact juror bias prior to hearing trial evidence. While the second study involved gauging the impact of voir dire bias in relation to trial evidence, the third study attempted to gauge whether manipulation of pre-trial assessments could have any impact. Though a follow-up univariate analysis in Greathouse et al.'s (2011) first study found that participants that viewed the juvenile qualifying voir dire would be more likely to find the juvenile defendant guilty of their crimes, their second study negated these findings as it found that after inclusion of trial evidence, the impact of the differing voir dire is no longer present. Essentially, the first two studies outlined that though voir dire can cause juror bias as it relates to pre-trial, any such bias is

readily eliminated upon hearing trial evidence. The third study, in effect, confirmed the findings of the first two that while pre-trial bias is increased through specific voir dire, the evidence presented in trial overrides juror opinion in their case.

B. Voir Dire Questioning Considerations

Understanding these studies detailing the impact of voir dire questioning opens up an interesting discussion. While these studies may not explicitly reveal the implicit biases that jurors might possess, they showcase how specific questioning can be used to prime juror attitudes. For example, QUEST's inclusion of personal scenarios seemingly tugs at the personal heartstrings of its subjects, moving them to use their underlying attitudes to find a verdict with which they better identify. Cox and Tanford's (1989) second study to gauge the bias brought out by QUEST illustrates this principle as they themselves found that their questionnaire had the power to skew juror attitudes towards finding individuals guilty and imposing the death penalty.

Specifically concerning voir dire, though extended voir dire employed by Salerno et al. (2021) was used to understand juror attitudes rather than shape them, the inclusion of Greathouse et al.'s (2011) findings do indicate that such questioning highlights the ability to greatly influence jurors' implicit attitudes. It is important to note the limitations that trial evidence had in Greathouse et al.'s (2011) study, but the presence of swaying and priming juror attitudes is still not negated as pretrial attitudes were still affected by voir dire questioning. Hence, the use of such questioning methods to assess juror bias can seemingly serve as a tool to manipulate or enhance any kinds of views that jurors might hold.

C. Jurors' Assessments

Shifting from assessment of juror attitudes, McGuffee et al. (2007) provides context concerning jurors' views of the judicial system and any underlying biases that they might believe the system to embody. McGuffee et al. (2007) sent out a survey to Tennessee jury-qualified individuals, attempting to measure the following variables through questions based on a Likert scale: desire for a racially representative jury, the belief that the jury system is racially neutral, and the idea that the criminal justice and jury systems are fair. Using bivariate analyses, the study found that a desire for racially representative juries was more common with younger respondents. It was also found that those who had previously been called on to serve as jurors thought the criminal justice and jury systems were fair. This finding of fairness along with the belief that the jury system was race neutral was overall affirmed by all respondents. However, 52% of respondents did indicate that for African American defendants to have a fair trial they need other African Americans on the jury, and 26% believed that African American jurors were more likely to be biased against and dismissed from jury duty over white people.¹⁵ Additionally, around 93% of all respondents disagreed with the notion that white people are fairer than minorities in jury decisions.¹⁶ It is not clear whether this percentage also applies contrapositively in that individuals think white people would be less fair or more harsh; however, such results make it clear that though respondents are overall

¹⁵ Karen McGuffee & Tammy S. Garland, *Is Jury Selection Fair? Perceptions of Race and the Jury Selection Process*, 20 CRIMINAL JUSTICE STUDIES, 445-468 (2007).

¹⁶ *Id.* at 445.

categorized as believing that race has nothing to do with jury verdicts, they clearly hold influential implicit attitudes concerning the implication of race in the legal system.

Carrying forth this idea of race within the legal system, Schuller et al. (2015) shifts the focus from juror perception of the legal system to how jurors themselves might feel about their ability to remain impartial while serving on a jury. To effectively evaluate juror attitudes, Schuller et al. (2015) obtained data from prospective jurors through naturalistic observation in criminal trials involving non-white defendants. Data from this study largely indicated that jurors feel they would be able to remain impartial in a case, regardless of the defendant's race. However, some interesting findings arose when jurors are questioned in a multiple-choice format regarding their impartiality. In the *R v. Joseph Parris*¹⁷ trial, the use of the multiple-choice format yielded a much higher rate of uncertainty from jurors regarding their ability to remain impartial, with over 25% of the jurors expressing that they would not, might not, or did not know if they could be impartial.¹⁸ Additionally, many jurors were found less likely to be able to remain impartial regarding race when a case involved a violent crime.

Taking into account the work of McGuffee et al. (2007), the results of that study do not entirely make sense. Though jurors seem to have full faith in the fairness and racial neutrality of the jury and criminal justice system, their response that race serves as an important factor in the decision-making process for black and white defendants

¹⁷ Regina A. Schuller & Caroline Erenzten, *Challenge for Cause: Bias Screening Procedures and Their Application in a Canadian Courtroom*, 21 PSYCHOLOGY PUBLIC, POLICY, AND LAW, 407-419 (2015).

¹⁸ *Id.*

renders their answers contradictory. This showcases how jurors might possess positive explicit racial attitudes regarding the criminal justice and jury systems while still indicating an idea that jurors themselves are inclined to have underlying racial biases when serving on a jury – outlining self-acceptance of the presence of implicit racial biases within the judicial system and its processes.

Adding to the discussion of racial bias, Schuller et al. (2015) presents like-minded findings in a report of many jurors who indicate that they can remain impartial regarding race, which conveys a similar belief that the system is fair and race neutral. However, the implication of the multiple-choice questions and violent crime scenarios reveals that jurors possess implicit biases but explicitly act as if they are without them. It is important to note that though this study by Schuller et al. (2015) is conducted in Canada under the premise of a Canadian legal governance system, the findings regarding self-assessment of bias through focused questioning call for intriguing application and possible improvement in the US judicial system.

IV. REAL-WORLD IMPLICATIONS

Though events and individuals within the courtroom demonstrate their bias during legal proceedings, another aspect that also affects implicit biases is that of pre-trial activities. Evaluating the impact of pre-trial juror bias, trial evidence, and jury deliberations, De La Fuente et al. (2003) presented a questionnaire including the Juror Bias Scale (JBS) and separated their participants into several juries which favored either prosecution or defense in a Spanish case. The separate conditions which participants were split into also consisted of varying case samples that either had evidence favoring one side in the trial or evidence that was

ambiguous in nature. The use of Weight Least Square (WLS) methodology was employed in this study to analyze the categorical nature of the collected data, and the findings revealed that the Juror Bias Scale (a method to measure bias of jurors through a method similar to that of a Likert scale) successfully predicted juror attitudes in cases with ambiguous evidence.¹⁹

While the above-mentioned study looks at how juror bias impacts the perception and weight of evidence, Ruva et al. (2022) does something similar but instead gauges the impact that negative-victim (NV) and negative-defendant (ND) pre-trial publicity (PTP) can have on juror biases and evidence interpretations. Using a trial stimulus of video footage of modified criminal trial, Ruva et al. (2022) split jurors across six jury groups that consisted of the following mixes of pre-trial publicity: pure NV, pure ND, mix ND/NV, mix ND/no PTP, and mix NV/no PTP. Using a multitude of different analytical methods, the findings of the study reported results that varying PTP impacted the deliberation content and verdict of juries. ND and ND/no PTP juries were found most likely to render a guilty verdict, and NV and NV/no PTP were found as least likely to render a guilty verdict. The pure ND category was found to most frequently discuss PTP than any other category despite receiving instructions against discussion of PTP.

The works of both De La Fuente et al. (2003) and Ruva et al. (2022) help to tie in the other sections of this article as they elaborate on how exactly the issues of implicit

¹⁹ Leticia De La Fuente, E. Inmaculada De La Fuente, & Juan García, *Effects of Pretrial Juror Bias, Strength of Evidence and Deliberation Process on Juror Decisions: New Validity Evidence of the Juror Bias Scale Scores*, 9 PSYCHOLOGY, CRIME & LAW, 197-209 (2003).

biases occur within the legal system and the jury selection process externally. As evidenced through the previous discussion section in this paper, attorneys might use specific kinds of questioning to prime jurors to react a certain way. This kind of priming can then be exacerbated through questionnaires like the juror bias scale mentioned above, which can be used by attorneys to stack juries in accordance with any specific perspectives they might desire.

Additionally, despite the occurrence of De La Fuente et al.'s (2003) study in Spain, both studies provide further general context and emphasize a lack of proper self-assessment on the jurors' end. Though they might feel that they are not explicitly biased towards any gender, race, age, etc., their implicit biases reveal themselves through such questionnaires and potential pre-trial publicity.²⁰

Not only do the studies dealing with external implication further elaborate on the rest of the body of this paper, but they also highlight how, without direct manipulation, jurors are extremely susceptible to having their underlying attitudes manipulated as Ruva et al. (2022) outlined that targeted PTP could sway jurors' interpretations, opinions, deliberations, and the overall verdict.

CONCLUSION

While a potential critique might surface as to the relevance of De La Fuente et al.'s (2003) or Schuller et al.'s (2015) studies in this paper due to their international status, it is important to note that the general trends analyzed in

²⁰ Christine L. Ruva, Stephanie E. Diaz Ortega, & Kathleen A. O'Grady, *What Drives a Jury's Deliberation? The Influence of Pretrial Publicity and Jury Composition on Deliberation Slant and Content*, 28, JOURNAL OF PSYCHOLOGY, PUBLIC POLICY, AND LAW, 32, 52 (2022).

terms of juror behavior are nonetheless applicable as forms of self-assessment, and questionnaire-based procedures do commonly exist within the U.S. legal system. Additionally, the international stature of these studies not only is applicable to the American legal system, but it also emphasizes the widespread nature of implicit bias and its contribution to legal matters. As such, they are both increasingly relevant in establishing that individuals are not readily provided fair and impartial juries and that there needs to be immediate change on a large scale to remedy this issue.

Combining the various sections of this paper together, it is evident that implicit biases within the courtroom can result in biased trials for defendants due to multiple contributing factors. The initial layer of biases established in the first section of this paper showcase exactly how attorneys during the juror selection process tend to stereotype jurors because of their underlying gender or racial biases. The works of Norton et al. (2007) and Sommers and Norton (2007) highlight the continual preference that attorneys make in cases depending on the gender or race of the defendant, despite prospective jurors meeting all external qualifications to serve on a jury panel. Additionally, it is important to highlight that these studies also showcase the masking of such implicit attitudes through the use of acceptable external reasoning that focused on the “issues” presented within the qualifications of prospective jurors.

Carrying this one step forward, attorneys are then also showcased to further exercise their underlying attitudes within the system as the second section of the article examines the priming effects of voir dire. The implications of Cox and Tanford’s (1989) QUEST with personal inclusion in the questions and the impact of particular voir dire questioning on juror attitudes explored through Greathouse

et al.'s (2011) and Salerno et al.'s (2021) studies compound the notion that attorneys not only manipulate juror attitudes, but also that they do so on a regular basis.

In addition to these external biasing impacts, jurors are also balancing any effects of pre-trial questionnaires and pre-trial publicity as highlighted by De La Fuente et al. (2003) and Ruva et al. (2022). If jurors are already vulnerable to such external manipulations, it is quite logical that they are not able to properly self-assess their biases as showcased in the latter portion of the juror section of this article. The works of McGuffee et al. (2007) and Schuller et al. (2015) solidify this notion, as jurors convey confusing and almost contradictory attitudes about their impartiality and their beliefs in a race neutral jury and criminal justice system. While there seem to be a mountain of issues related to implicit biases, a possible solution is suggested by Sommers (2006) in which either homogeneous or heterogeneous jury groups were created to evaluate the impact of racial diversity on a jury's decision-making process. While the findings of this study did not match expectations that heterogenous jury groups would exceed bias inducing limitations, the results indicated that a heterogenous jury group is more likely to both discuss a larger variety of facts and spend a larger amount of time in deliberation. Such a makeup of jury groups suggests that perhaps this could be something of a solution in which certain jury groups are required to be constructed in a heterogeneous manner. This could potentially take place through the consideration of diversified presence of socioeconomic status, gender, age, race, etc.

Another solution that could be considered is the use of the Implicit Association Test or other specific questionnaires that could gauge the kinds of biases with which attorneys might be acting when they are working in

the jury selection process. While such tests aren't perfect measurements of implicit bias by any means, their inclusion can at least serve to improve the current lack of control over the power that underlying biases can exercise.

Though there are possible solutions that could be implemented to address such implicit biases within the jury and judicial system within the United States, the studies covered within this paper concretely establish the notion that the current system needs to be reworked and that existence of such biases creates an environment in which not everyone is allotted a fair and unbiased trial.

POPULATION PRESSURE: THE DOMINO EFFECT OF POPULATION POLICY

*Olivia Key**

INTRODUCTION

- I. CHINA'S HISTORY
- II. ITALY'S HISTORY
- III. NIGERIA'S HISTORY
- IV. CHINA'S HEALTHCARE APPROACH
- V. ITALY'S HEALTHCARE APPROACH
- VI. NIGERIA'S HEALTHCARE APPROACH
- VII. HEALTHCARE OVERLAPS
- VIII. CHINA'S ECONOMIC APPROACH
- IX. ITALY'S ECONOMIC APPROACH
- X. NIGERIA'S ECONOMIC APPROACH
- XI. ECONOMIC OVERLAP

CONCLUSION

INTRODUCTION

Extreme population trends serve as a ticking time bomb for many states. The inevitable future ramifications of population instability can be dire, regardless of whether the population is growing, declining, or poorly dispersed. The most evident areas of concern are within the economic and

* Olivia Key earned her Bachelor of Arts in International Relations and Global Studies from The University of Texas at Austin in December 2023. Key plans to attend SMU Dedman School of Law beginning in Fall 2024.

healthcare fields, because population trends heavily dictate workforce employment and healthcare capacities. Therefore, a state's population influences vital elements of human security on an individual, local, and global scale. While some states believe that this can be remedied by taking direct control of reproduction through population policy, this is often a futile tactic.

Once population instability begins, it is extremely difficult to regulate population and demographic trends without overshooting or undershooting the numbers of where a healthy population size should lie. Reliance on population policy often results in states coping with different, yet just as costly, forms of population insecurity than before. This creates cyclic population fluctuations. It is worthwhile to focus on mitigating the consequences of population instability, rather than attempt to solve population insecurity itself. This approach would replace the reliance on population policy with adjustments to both healthcare and economic policies, structures, and norms.

The consequence of this policy shift would prevent the creation of future population trend extremes while enabling states to operate efficiently under current circumstances. As case studies, China, Italy, and Nigeria exemplify three states in differing population circumstances. Each country has the potential to implement changes to healthcare and economic factors to simultaneously protect human and state security on both a broad and individual scale. They depict how social and economic influences can have a better long-term impact on security than population policy.

I. CHINA'S HISTORY

China's population instability was initially incited by

consequences of the Great Leap Forward. Mao Zedong implemented this plan to transition China from a primarily agrarian society to an industrialized society. The communal system was twofold— industrialization in cities and collectivization in the countryside.¹ These structural changes created a greater emphasis on labor and a subsequent tightening of resources away from agriculture. This resource diversion, along with poor food distribution policies, resulted in a massive famine killing between an estimated twenty-three to fifty-five million people, thus beaconing the end of the Great Leap Forward.²

Following the famine, reproduction rates began to rise again as couples had children that they had postponed.³ These children made up the tail end of the baby boomer generation. As they neared adulthood, renewed fears of food sustainability resurfaced. There were concerns that the already large baby boomer generation nearing childbearing age would exponentially grow the population, thereby threatening to outpace food supply.

The Chinese government addressed these projections by announcing the one-child policy in 1979. However, its enforcement varied over time and across locations. The height of family planning pressure occurred around 1984 with nationwide standardization of population policy. At the initial point of implementation, the Chinese government's goal was to prevent a population exceeding 1.2 billion by the year 2000.⁴

¹ Clayton D. Brown, *China's Great Leap Forward*, 17 EDUC. ABOUT ASIA 29 (2012).

² *Id.*

³ Lori L. Heise, *China's Baby Boomers*, 1 WORLD WATCH 10 (1988).

⁴ Judith Banister et al., *Population Aging and Economic Growth in China*, in THE CHINESE ECONOMY (Masahiko Aoki & Jinglian Wu eds., 2012).

The Chinese population slightly exceeded the government's goal in 2000, and today, the population sits at around 1.4 billion. Projections predict that China has reached its peak population numbers and will now face a continuously declining population for the remainder of this century.⁵ In the process of this decrease, China will see the aging of the baby boomer generation, which is the demographic making up the largest portion of its population.⁶

II. ITALY'S HISTORY

Throughout Italy's history, its population has experienced fluctuations similar to trends seen in neighboring European countries. Various factors, from plagues to wars, have played a part in Italy's population stability over the past few centuries. Since Italy's unification in the 1860's, there has been a steady upward trend in Italy's population.⁷ Since World War II, Italy has seen both declining fertility rates and mortality rates.⁸ As birth and death rates are maintaining a similar pace, a major dictating factor of population stability is migration on all levels.

Internal migration rates were very low throughout Italy's fascist era due to the requirement of permits for internal movement. In the years following the end of World War II and the downfall of Italian fascism, Italy began to see economic growth. In this period, population mobility was

⁵ Michael E. O'Hanlon, *China's Shrinking Population and Constraints on Its Future Power*, BROOKINGS (Apr. 24, 2023), <https://www.brookings.edu/articles/chinas-shrinking-population-and-constraints-on-its-future-power/>.

⁶ Heise, *supra* 3.

⁷ John A. Marino et al., *Italy*, BRITANNICA, <https://www.britannica.com/place/Italy/Demographic-trends> (Mar. 8, 2024).

⁸ *Id.*

spurred along by industrial centers in many of Italy's urban areas.⁹ This pull towards economic epicenters continues to drive migration, creating an uneven population distribution.

Emigration increased in Italy following World War II. Many males moved to nearby European countries in search of employment. This trend of working for stints of time outside of Italy was discouraged by a period of recession and unemployment in 1973, marking the return of many Italians to Italy. Italy simultaneously saw an increase in immigration as people arrived from outside of Europe. This influx of immigrants and returning emigrants contributed to the first net increase in people entering the country.¹⁰

The present-day approach to Italy's population issues presents an ongoing difficulty for population stability. Italian Prime Minister Giorgia Meloni has proposed a plan to support the aging population while encouraging childbearing incentives. However, she opposes immigration in favor of "maintaining Italian culture."¹¹ This further contributes to the foundation of the population crisis, which is worsened by low female employment, few young families, and a high life expectancy.¹²

III. NIGERIA'S HISTORY

Since 1960, Nigeria has experienced a marked increase in its population growth rate that sets it apart from most neighboring African countries. As of 1991, Nigeria had the largest population in sub-Saharan Africa, and it is now projected to break into the top five populous countries in the

⁹ *Id.*

¹⁰ *Id.*

¹¹ Jason Horowitz, *The Double Whammy Making Italy the West's Fastest-Shrinking Nation*, N.Y. TIMES (Jan. 30, 2023),

<https://www.nytimes.com/2023/01/30/world/europe/italy-birthrate.html>.

¹² *Id.*

world within the decade. The progression is expected to continue, with Nigeria passing the United States by 2050 and replacing China as the second most populated country by 2100.¹³

Nigeria experienced an oil boom in the late 1960's, which brought improvement to healthcare and a consequent drop in mortality rates. Simultaneously, cultural and social influences enabled norms that encouraged high birth rates. Large families are considered vital to providing labor for farming and economic stability within a household. This contributes to the narrative that high fertility rates are rewarding and necessary. These norms ingrain cultural norms of large families, early marriage, early childbearing, and lessened emphasis on contraceptives.¹⁴

A low mortality rate and high fertility rate allowed Nigeria to maintain a long-term heightened growth in population. However, the population is unevenly distributed, with high density in urban areas. As the young adult demographic makes up the majority of its population, there are concerns for Nigeria's capacity to accommodate them with necessary infrastructure and economic security.¹⁵

In the past, various approaches have been proposed to mitigate the rate of population growth; however, none of them have been formally adopted and implemented. The main tactic involves encouraging a lower fertility rate by implementing the following institutions and rhetoric. These would include better access to higher education for women

¹³ Doris Dokua Sasu, *Population forecast in Nigeria in selected years between 2025 and 2050*, STATISTA, (Sept. 6., 2023), [Nigeria: population forecast 2025-2050 | Statista](#).

¹⁴ Israel O. Orubuloye, *The Demographic Situation in Nigeria and Prospects for Fertility Transition*, 7 J. INT'L DEV. 135 (1995).

¹⁵ Oramah I. Theodore, *The Effects of Population Growth in Nigeria*, 6 J. APPLIED SCI. 1332 (2023).

to offset the age and frequency of childbirth. Sex education and family planning would also need to be widely practiced, especially within rural communities. Mass media could also play a role in promoting the advantages of small families. This potential population policy does not enforce population limits, but instead creates an incentivizing narrative.¹⁶

IV. CHINA'S HEALTHCARE APPROACH

Healthcare institutions and population rates directly influence one another, making healthcare one of the most important factors related to population policy. The quality of healthcare plays a vital role in the birth and death rates of a country, which are prime determinants of net changes in population. Conversely, population instability can generate dependency and consequent strain on healthcare institutions, thereby threatening human security. Thus, avoiding population instability requires a finely-tuned balance between the healthcare capacities and a population's medical needs; however, this balance can be affected by the consequences of an unstable population size.

China exemplifies a nation with a healthcare system in high demand that faces population-induced issues. As of 2020, around 17.8% of China's population was over the age of 60; this number is expected to skyrocket over the next few decades.¹⁷ The geriatric population is expected to peak near the year 2080, when it is estimated to make up 48.26% of China's total population.¹⁸ With a spike in the

¹⁶ Amon Okpala, *Nigerian Population Growth and Its Implications for Economic Development*, 9 SCANDINAVIAN J. DEV. ALT. 63 (1990).

¹⁷ C. Textor, *Share of Population Aged 60 and Older in China 1950-2100*, STATISTA (Dec. 11, 2023), <https://www.statista.com/statistics/251529/share-of-persons-aged-60-and-older-in-the-chinese-population/>.

¹⁸ *Id.*

elderly population comes a need for long-term healthcare support. Despite Chinese life expectancy currently sitting at around 77.4 years, a large portion of the elderly develop debilitating diseases and health issues late in life. This leads to an almost nine-year discrepancy between life expectancy and healthy life expectancy, which currently sits at around 68.5 years.¹⁹

The onset of chronic disease in the elderly spurs a heightened need for long term and hospice care that challenges the capacities of China's healthcare infrastructure and budgetary allocations. The gap between healthcare supply and demand first appears among rural areas where doctors, resources, and infrastructure are less equipped to address health concerns. Doctors in rural areas lack the formal training that doctors in urban areas have obtained. Only around 11.4% of rural based doctors have received a bachelor's degree, compared to the 65.7% of urban doctors with a bachelor's degree.²⁰

China has implemented changes to medical education institutions to offer opportunities and incentives to enter the healthcare profession, particularly within rural areas. China's National Health Commission has introduced guidelines to standardize the necessary medical experience for doctors, which requires eight years of training. There are pathway opportunities to assist students from poor backgrounds in financing a medical degree that are contingent upon completing a stint working solely in rural areas. In the past decade, hospital visits increased by about 100% as medical

¹⁹ WORLD HEALTH ORG., *China*, WHO DATA (2024), <https://data.who.int/countries/156>.

²⁰ LEYTON NELSON, CHINA'S HEALTHCARE SYSTEM: ADDRESSING CAPACITY SHORTFALLS BEFORE AND AFTER COVID-19 (2021).

school attendees increased by only 68%.²¹ The goal of these incentive programs is to maintain an upward trend in the number of doctors that matches the uptick in inpatient hospital visits.

Healthcare coverage also varies significantly from rural to urban areas due to a non-uniform reimbursement system and a lack of accountability for the allocation of funds. China utilizes a government provided healthcare insurance system divided into tiers of coverage for working urban residents, non-working urban residents, and rural residents. Each tier decreases sequentially in contribution of funds and reimbursement ratio. This system serves around 96% of the population, and in some cases the wealthy pair it with private insurance plans.²²

Medical insurance funding is largely contingent on economic development by region, leading to a distinct concentration of medical resources in larger cities. The integrity system also lacks a supervising mechanism to dissuade corruption and dishonesty. There are common issues related to falsified documents, unneeded hospitalizations, and corrupt medical institutions being leveraged to apply for benefits.²³ This is worsened by China's varied insurance information system, which makes it difficult for genuinely ill people to obtain funds, yet simultaneously distributes funds to fraudulent applicants.

These issues have been met with multiple government policy proposals. A strong insurance supervision platform would allow for a more stable insurance structure

²¹ *Id.*

²² *Id.*

²³ Qingwen Chen et al., *Investigating the Influence of Age-Friendly Community Infrastructure Facilities on the Health of the Elderly in China*, 13 BUILDINGS 341 (2023).

by preventing the unnecessary loss of funds. Operations tasked with dismantling corrupt medical institutions would further protect funds. A uniform insurance information system would not only optimize the distribution of insurance policies, but also provide a level of accountability. These issues boil down to organizational errors resulting in financial problems and illegal activity that reduce the efficiency of the healthcare system. Policymakers turn to strategies to encourage healthy aging as an operative means to delay the long-term reliance on healthcare services. This emphasizes the analysis of environmental factors, infrastructure accessibility, and health-related habits.

Environmental issues arose in China as pollution became a byproduct of widespread economic development following the Great Leap Forward. Exposure to toxic chemicals and unnaturally occurring substances caused an increased occurrence of cancer among populations not predisposed to these issues.²⁴ The presence of smog in predominantly urban areas will have a widespread impact on mortality related illnesses.

In relation to healthy habits, many Chinese residents exhibit practices that correlate with declining biomarker data in old age. Low physical activity and regular smoking are making obesity and inflammation more common among adults. These factors are not only detrimental to mobility but also to cognitive ability, as these conditions tend to worsen as people reach advanced ages. Many of the most common causes of mortality can be traced back to these habitual

²⁴ David Stanway, *China Lung Cancer on Rise, Smog Suspected* – *China Daily*, REUTERS (Aug. 10, 2017, 11:01 PM), <https://www.reuters.com/article/uk-china-health-pollution/china-lung-cancer-on-rise-smog-suspected-china-daily-idUKKBN1AR09U/>.

practices.²⁵

The Chinese government has claimed to address these issues by implementing initiatives that encourage healthy habits from a young age as an investment in future health. The launch of physical education programs and development of recreational activity centers has become a notable movement since the COVID-19 pandemic.²⁶ The global health crisis served as direct evidence that fit, health-conscious individuals fare better against disease, observing fewer hospitalizations and long-term symptoms. There has also been a roll-out of policies to discourage certain behaviors. As smoking is one of the most preventable causes of disease, the government has leveraged taxes, smoke-free laws, and anti-smoking advertising to dissuade the population from partaking in the practice.²⁷

To the extent that these provisional policies can no longer delay health issues, the government turns to communal support systems and infrastructure for elderly accommodations. China anticipates a shift toward community and home-based care systems rather than large scale institutions. This strategy capitalizes on the traditional value of “filial piety” whereby the elderly do not have to be

²⁵ POPULATION REFERENCE BUREAU, *Aging and Health in China: What Can We Learn from the World’s Largest Population of Older People?*, PRB (Jan. 2020), <https://www.prb.org/resources/china-aging-worlds-largest-population-older-people/>.

²⁶ Huang Haiyan, *A Sports Power and Physically Fit Nation*, CHINA DAILY (Oct. 22, 2022, 8:59 AM), <https://global.chinadaily.com.cn/a/202210/22/WS63534086a310fd2b29e7de72.html>. ***[*The Capstone Journal of Law and Public Policy* recognizes that this citation is from China Daily, a newspaper managed by the Chinese Communist Party]

²⁷ Geoffrey T. Fong et al., *Achieving the Goals of Healthy China 2030 Depends on Increasing Smoking Cessation in China: Comparative Findings from the ITC Project in China, Japan, and the Republic of Korea*, 3 *China CDC Wkly.* 463 (2021).

completely removed from their familiar environment to find care.²⁸ Communal responsibility for the elderly removes some strain on healthcare by making state sponsored institutional care more supplementary. Community values also involve making living environments more accessible to limited-mobility individuals, which allows them to provide for themselves for an extended time before joining communal care. This could appear as alterations to the physical infrastructure to enable elderly capability.

China's rapidly aging population has led to intentional policy and institutional changes in an effort to mitigate the ill effects of an off-kilter population pyramid. Healthcare stability is one of the most prominent areas of impact that threatens human security of the population as a whole if there are not preventative actions taken. The Chinese government wields healthcare as an instrument to encourage trust in the central government, because public goods dissuade political challenges and resistance.²⁹ A reliance on government provisions, especially in relation to a service as vital as healthcare, legitimizes and strengthens political power. Instability in an individual area has the ability to fester into all areas of government, which makes stabilizing the healthcare system a necessary process to ensure power on both a domestic and global scale.

V. ITALY'S HEALTHCARE APPROACH

Around a quarter of Italy's population is made up of people over the age of 65 and the overall life expectancy is

²⁸ Marion F. Krings et al., *China's Elder Care Policies 1994-2020: A Narrative Document Analysis*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 6141 (2022).

²⁹ Jane Duckett & Neil Munro, *Authoritarian Regime Legitimacy and Health Care Provision: Survey Evidence from Contemporary China*, 47 J. HEALTH POL., POL'Y, & L. 375 (2022).

slightly longer in comparison to other aging countries, as it currently sits around 83 years.³⁰ The COVID-19 pandemic forced Italy to make drastic and swift changes to healthcare systems, particularly within elderly care due to their higher susceptibility to life-threatening symptoms. This healthcare revolution resulted in the implementation of key intermediate services and technology to create a more personalized approach to medicine. The Italian healthcare system puts more emphasis on the quality of life of their geriatric patients as a metric for the stability of their nation's elderly health. This represents a sharp contrast to China's focus on data driven adjustments that survey the healthcare system as a whole.

A unique aspect of Italy's elderly demographic is that they make up about half of the population living alone.³¹ This translates to a large portion of elderly Italians lacking caregivers within direct, daily contact. Given this independent lifestyle, the implementation of intermediate services proved to be a valuable layer of healthcare infrastructure. The intermediate health sector is made up of a range of services, ranging from nursing facilities and rehabilitation centers to more flexible options of home care services. This open functionality allows for resources to introduce preventative treatment and address more serious health issues. Their assistance in daily activities has made an independent lifestyle more accessible.³²

³⁰ WORLD HEALTH ORG., *Italy*, WHO DATA (2024), <https://data.who.int/countries/380>.

³¹ Maria G. Melchiorre et al., *Frail Older People Ageing in Place in Italy: Use of Health Services and Relationship with General Practitioner*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 9063 (2022).

³² Virginia Boccardi and Patrizia Mecocci, *Intermediate Care in Italy: Addressing the Challenges and Opportunities for Person-Tailored Care*, 8 GERIATRICS 59, (2023).

The rehabilitation centers, also known as “transition care,” represent a vital approach to the intermediate system. The goal of the centers is to assist the patients with regaining optimized ability and returning home on an efficient timeline. This approach prevents unnecessarily lengthy hospitalizations, which prevents hospital capacities from becoming overwhelmed while simultaneously prioritizing the comfort of the injured or ill. To maintain the efficiency of these intermediate operations, they must bolster accessibility, affordability, and sustainability. These components require a coordinated, widespread approach which can be challenged by workforce shortages, making rural and remote delivery more difficult.³³

Technology serves as a short-term remedy for regional discrepancies in healthcare accessibility by enabling remote monitoring and care delivery on a broader scale. Northern regions of Italy have more developed resources related to healthcare quality and accessibility. Conversely, southern regions lack many of the advantageous healthcare resources due to economic discrepancies, infrastructure inconsistencies, and workforce shortages. Telemedicine can potentially bridge the gap between the regions’ healthcare quality by making medical expertise available through distanced communication and data monitoring. The Italian National Recovery and Resilience Plan also created a network of “community houses” to provide isolated regions with access to healthcare professionals.³⁴

Following their adjustments to improve the efficiency and effectiveness of the system, the Italian outlook on healthcare is more stable and well equipped to handle

³³ *Id.*

³⁴ *Id.*

issues of the geriatric community.³⁵ The careful balance between under-treatment and over-treatment allows for the expansion of medical capabilities to populations separated by greater distances. Italy emphasizes quality of life by implementing functional treatment to maximize citizens' healthy life expectancy, thereby preventing high rates of healthcare dependency. While there are still issues regarding the distribution of healthcare services, many of the provisional solutions have drastically improved accessibility.

Italy and China reflect two similar case studies, as each country faces an aging population and population shrinkage. The burden that the geriatric demographic weighs on the healthcare system warrants healthcare reform in order to allocate funding and resources to support its capabilities. However, China exemplifies a much more comprehensive approach to healthcare reform, whereas Italy has implemented reforms in response to values-based preferences. This exemplifies the difference between China's emphasis on hard data compared to Italy's partial reliance on soft data. Overall, each country is attempting to ensure the health security of their people against the strains of population insecurity.

VI. NIGERIA'S HEALTHCARE APPROACH

Nigeria's increasing population serves as a byproduct of a high fertility rate, sitting at slightly over five children per woman.³⁶ A rapidly growing population requires

³⁵ *Id.*

³⁶ Akanni I. Akinyemi, *Nigeria's Growing Population Can Be an Advantage, with Better Data and a Policy Focus on Young People*, THE CONVERSATION (July 11, 2023, 11:03 AM), <https://theconversation.com/nigerias-growing-population-can-be-an-advantage-with-better-data-and-a-policy-focus-on-young-people->

simultaneous healthcare growth to continue to support the population efficiently. This needs to include adjustments and solutions to address both current and prospective downfalls in healthcare that align with population projections. This puts a great reliance on accurate census data, including location, age, gender, and occupation demographics, in order to strategically plan on the type of healthcare needed in various areas of Nigeria. Nigeria has economic and infrastructure disparities, meaning healthcare reforms need to address these differences by analyzing census data.

As the population continues to grow, there are healthcare reforms that are necessary to prevent healthcare unavailability. Nigeria's poor healthcare distribution results from fragmented healthcare infrastructure in the form of resources, financing, and personnel. Nigeria's rural population makes up about half of the total population; however, they only have readily available access to about 12% of physicians and 19% of nurses.³⁷ This is more concerning when paired with the rural fertility rate outpacing urban fertility rates.³⁸ Given the fact that a major contributor to the growing population is a high birth rate among agricultural and rural communities, it is imperative to expand healthcare access to these areas.

One approach to remedy these healthcare disparities is to address the insufficient healthcare financing. Healthcare budgets must be prioritized on both a national and state level of government. This draws in a political element to the financing issue, because the political leadership of Nigeria

[209530](#).

³⁷ Ogonna N. O. Nwankwo et al., *A Qualitative Inquiry of Rural-Urban Inequalities in the Distribution and Retention of Healthcare Workers in Southern Nigeria*, 17 PLOS ONE e0266159 (2022).

³⁸ T. O. Lawoyin & M. O. Onadoko, *Fertility and Childbearing Practices in Rural African Community*, 16 W. AFR. J. MED. 204 (1997).

largely determines the portion of the budget that goes toward healthcare development. Most notably, the implementation of the Structural Adjustment Program in 1986 spurred a reduction in health expenditures, creating a reliance on out-of-pocket payments.³⁹ This created a cost-barrier that prevents access to modern healthcare services and medication, thereby forcing many Nigerians to turn to traditional medicinal practices that tend to be more affordable and accessible. This trend continues today as many hospitals and medical facilities rely on user fees. Meanwhile, 60% of Nigerians have only “minimal disposable income.”⁴⁰

Improvements to healthcare financing must take different approaches within both public and private sectors. The public sector needs to capitalize on government funds while simultaneously addressing taxation corruption to maximize their operational abilities. This requires hefty healthcare reform to increase government funding, provision of monetary oversight structures, and provision of universal insurance. To make space in the budget, Nigeria could improve tax collection, diversify revenue beyond oil, and charge health taxes.⁴¹ Meanwhile, the private sector should be developed to fill in the gaps of the public sector utilizing funding from non-governmental organizations or private donors.⁴² This expansion would allow both sectors to work in a collaborative partnership. This would involve

³⁹ Ibrahim Abubakar, et al, 399, *The Lancet Nigeria Commission*, THE LANCET. 1155-1200, (2022).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Bolaji S. Aregbeshola & Morenike O. Folayan, *Nigeria's Financing of Health Care during the COVID-19 Pandemic: Challenges and Recommendations*, 14, WORLD MEDICAL AND HEALTH POLICY. 195-204, (2022).

communication pertaining to policy, planning, and information sharing between the sectors to better coordinate a more comprehensive healthcare system.

Nigeria struggles with high rates of medical tourism, as citizens seek surgeries and medical treatment outside of the country. Various factors, such as cost and quality of care,, drive Nigerians to partake in medical procedures in countries throughout Asia and Europe rather than in their home country.⁴³ This practice reflects both a lack of access and a sense of distrust that many Nigerians feel towards Nigerian medical institutions. Medical tourism introduces typical risks associated with traveling while in unstable health conditions and is often expensive. One proposed solution to discourage medical tourism involves investing in training medical professionals to restore a sense of trust in Nigeria's quality of care.⁴⁴

Nigeria could also benefit from integrating an e-learning approach that would allow students to gain more clinical engagement to close the gap in professional experience. The added exposure to a wider variety of cases would allow medical students to specialize in more niche, distinct areas of medicine that Nigeria lacks. Virtual medical training also allows more accessible education for students living in rural areas at considerable distances from medical schools. Many of these practices were first utilized due to the COVID-19 pandemic, so there are some concerns about how this method of learning could limit a grasp of appropriate

⁴³ Olusean Ayodeji Makinde, *Physicians as Medical Tourism Facilitators in Nigeria: Ethical Issues of the Practice*, 57, CROATIAN MEDICAL JOURNAL. 601, (2016).

⁴⁴ Adeponle Olayode Adeoye, *Assessing the associated medical, legal, and social issues in medical tourism and its implications for Nigeria*, 45, PAMJ, 145, (2023).

bedside manner.⁴⁵ Therefore, it would be valuable to consider a hybridized approach made up of predominantly virtual lectures combined with in-person laboratory immersion experiences.

An emphasis on general health education would help not only aspiring medical professionals, but also average citizens of Nigeria. There is a severe lack of family planning resources and basic knowledge of sex education in Nigeria. A study indicated there is a combined trend of early engagement of sexual activity paired with low exposure to sex education relating to sexually transmitted infections and contraceptive use.⁴⁶ This data depicts the educational disparities between rural and urban areas as the average age of childbirth is over three years lower in rural areas.⁴⁷

The National Council on Education has formally approved and integrated aspects of family life and HIV education into schools over the past decade. However, educational implementation is much less consistent in rural areas, meaning that some of the areas with the highest birthrates in the country are not being reached by these programs. This is further complicated by diseases borne from faulty water and sanitation systems that keep children out of schools.⁴⁸ Efforts to distribute these resources more

⁴⁵ Aishat Temitope Oladipo, et al, *Challenges with Medical Education in Nigeria in the COVID-19 Era*, 47, THE PAN AFRICAN MED JOURNAL, 223, (2020).

⁴⁶ Uyi E. Osadolor, et al., *Exposure to Sex Education and Its Effects on Adolescent Sexual Behavior in Nigeria*, 2022, 54, JOURNAL OF ENVIRONMENTAL AND PUBLIC HEALTH, (2022).

⁴⁷ Doris Dokua Sasu, *Median age of women at first birth in Nigeria as of 2018*, STATISTA, (2022).

⁴⁸ WORLD BANK, NIGERIA: ENSURING WATER, SANITATION AND HYGIENE FOR ALL, <https://www.worldbank.org/en/news/feature/2021/05/26/nigeria-ensuring-water-sanitation-and-hygiene-for-all> (last visited March 20, 2024).

evenly beyond schools would better preserve overall rural quality of life, especially for women.

Access to prenatal care, postnatal care, and contraceptives would allow women to better plan and prepare for motherhood, thereby contributing to the value of human security at all levels. In efforts of creating a more stabilized healthcare system, Nigeria has shown a greater reliance on both prevention and care tactics to mitigate the prospect of an overwhelmed or insufficient healthcare system.

VII. HEALTHCARE OVERLAPS

While China, Italy, and Nigeria face varying population issues, there is an undeniable need for the healthcare system to adjust to their respective population needs. There is a lot of overlap between the proposed improvements that could assuage each country's issues of population insecurity. This is partially due to the limited points of entry predominantly targeting healthcare financing, accessibility, infrastructure, and education. However, it is evident that each approach will vary slightly to balance cultural values and lifestyles with a well equipped system. Regardless of specific population projections and age data, it is imperative that any form of population instability is met with a multifaceted approach to tailor the healthcare system to the greatest area of need. Stabilizing the healthcare system plays a major part in achieving a stable population by preventing fluctuations caused by preventable deaths, accidental pregnancies, or chronic disease.

In each country's case, the most viable solution involves improvements to funding and training. Specifically, these states would benefit from implementing accountability safeguards in relation to healthcare funding. In the case of each country's rural regions, healthcare funding is easily

susceptible to fraud due to a lack of accountability structures following the flow of funds. Additionally, China, Italy, and Nigeria struggle with evenly distributing trained medical professionals to their rural regions, where salaries tend to be lower. While these two problems appear quite distinct, they could be remedied with a common solution. The use of streamlined, standardized computer programs would allow both accessible medical training and the tracking of healthcare funds to all urban and rural regions.

VIII. CHINA'S ECONOMIC APPROACH

As China's population continues to age, their workforce will continue to decline. A lower rate of efficiency in the workforce will inevitably lead to a declining economic growth rate.⁴⁹ Manufacturing, services, and agriculture make up the largest sectors of China's economy—responsible for the largest contributions to overall employment and gross domestic product.⁵⁰ Given the fact that China's economic prosperity is built on the availability of low-cost labor, the workforce decline may force China to look at their economy through a new lens.

In addition to a rapidly aging population, social factors, such as lifestyle choices and occupational preferences, are also contributing to the labor shortage. The Chinese youth have displayed a sense of disdain for the factory jobs that previous generations had embraced. Many millennials view their parent's factory work as a "lifeline"

⁴⁹ Yi Wu, China's Demographic Shift: Impact of Population Decline, CHINA BRIEFING NEWS, February 17, 2023, <https://www.china-briefing.com/news/chinas-demographic-shift-how-population-decline-will-impact-doing-business-in-the-country/>.

⁵⁰ Sean Ross, *The 3 Industries Driving China's Economy*, INVESTOPEDIA, Aug. 20, 2022.

out of rural poverty, yet those lacking economic insecurity do not feel driven to accept the physically arduous careers.⁵¹ The combination of a declining population, a considerable percentage of which are unwilling to fill manufacturing roles, forces China to consider incentive programs to fill empty positions.

The reevaluation of internal migration restrictions serves as a potential solution to fill deserted positions within the manufacturing industry. In the past, China's "Hukou" system upheld strict restrictions that made it very difficult to obtain the proper registration to live and work in a new province of China.⁵² China has begun to relax residency rules, making it more accessible for rural residents to migrate to smaller urbanized areas, thereby drawing migrant workers and college students to urban hubs.⁵³ The goal of this policy shift is to increase urban consumption and fill manual labor positions in order to spur China's economic standing on both a local and global scale.

Migration on a larger scale is also a point of entry to mitigate economic drop off. China could benefit from encouraging immigration and discouraging emigration to maintain a net increase in migration. China's commitment to the value of "racial purity" is a major factor posing an obstacle for immigration.⁵⁴ However, a more laissez-faire

⁵¹ David Kirton, *Insight: Younger Chinese Are Spurning Factory Jobs That Power the Economy*, REUTERS, Nov. 21, 2022, <https://www.reuters.com/world/china/younger-chinese-are-spurning-factory-jobs-that-power-economy-2022-11-21/>.

⁵² Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China's Hukou System*, 139, THE CHINA QUARTERLY, 644–668, (1994).

⁵³ Lusha Zhang & Ryan Woo, *China to Ease Internal Migration Curbs This Year to Lift Virus-Hit Economy*, REUTERS, April 10, 2020, <https://www.reuters.com/article/idUSKCN21S0IR/>.

⁵⁴ Dudley L. Poston Jr., *China Needs Immigrants*, THE CONVERSATION, July 18, 2023, <http://theconversation.com/china-needs-immigrants->

immigration policy would allow China to integrate families and younger couples into the country to balance their aging population pyramid. It would also allow China to attract talented and skilled individuals that could contribute to the advancement of various industries, especially technology-reliant industries, that will become increasingly relevant to the nation's economy as its population ages.

The transition to an automated manufacturing sector is crucial for China as they continue to lose labor as a result of shifting desires and age-related factors. In 2022, the Chinese government announced a five-year plan for China to become a global leader in industry automation.⁵⁵ The capabilities of robotic machinery target manufacturing roles that involve routine tasks typically seen in a factory setting. However, it is already a concern that this technology will devalue the work of skilled laborers as well as potentially impacting wages and employment stability.

China currently predicts that supplementing productivity levels with automation will result in higher wages for the youth demographic, allowing for greater contributions to pension funds to support elderly retirees.⁵⁶ The integration of innovative automation could relieve some stress on manufacturing productivity, but there is a fine line between fulfilling labor needs and eliminating employment opportunities. China's industry adjustments need to be fluid and adaptable to the needs of their population as it changes throughout the future.

IX. ITALY'S ECONOMIC APPROACH

[208911](#).

⁵⁵ Sam Meacham, *Beijing Welcomes Its New Robot Coworkers: China's Aging Crisis and Automation*, HARV. INTERNATIONAL REV., (March 31, 2023).

⁵⁶ *Id.*

Italy's economic makeup has a sharp divide between the industrial north and the agricultural south. Its mixed economy relies on a combination of manufacturing, tourism, and agriculture. As its workforce rapidly ages, Italy faces an economic imbalance. More elderly residents are claiming pension and state benefits, while a disproportionately low portion of its youth population are paying taxes that fund those benefits.⁵⁷ This issue requires Italy to find new ways to create a strong, capable workforce to maintain economic productivity.

Italy has been making an increased effort to invest in the skills of their workforce, which translates to increased job security and overall employability. Notably, in the face of artificial intelligence advancements, Italy has allocated almost thirty-million euros to maintain the skills and capabilities of workers whose jobs are most at risk. In many sectors, this skill development is related to digital and technological comprehension. The Italian workforce lacks proficiency in these areas when compared to neighboring European Union countries. A strong grasp on the ever-advancing technological innovations that are ingrained in northern industries fosters a more efficient workforce, making Italy more competitive within the EU's economy.

Italy's urban centers could benefit greatly from implementing incentives to draw young, working professionals. A feasible option would involve integrating a tax incentive to attract human capital in the form of recent graduates, students, and specialized workers. Throughout the past, Italy has seen greater rates of emigration, with many of

⁵⁷ Giles Gibson, *Italy's Aging Population a Growing Problem as the Piazzas Fall Silent*, CGTN, March 12, 2023, <https://newseu.cgtn.com/news/2023-03-12/Italy-s-aging-population-a-growing-problem-as-the-piazzas-fall-silent-1i4o9WQ15gk/index.html>.

the emigrants being skilled and educated laborers in search of better economic opportunities.⁵⁸ Introducing some form of fiscal incentive could also help retain Italian-born citizens. Maintaining Italian workers and immigrant workers would help to balance the workforce as the elderly retire.

A possible solution to boost workforce participation would involve making the workforce more accessible for women. This would involve advocating for workplace culture to better accommodate women, especially mothers, through equal salaries and childcare accessibility. In Italy, the birth rate and employment rate for women are near the lowest in the European Union.⁵⁹ Each of these statistics are important to achieve population and economic stabilization. Therefore, it is vital that Italy balances familial support systems with workplace equity to eliminate the sentiment that women must choose between their careers and children. The addition of more women in the workplace would bring additional skills and balance to a declining workforce. Yet these efforts are futile in the grand scheme of population stability if they prevent women from bearing children, because they would only further contribute to the cycle of consequences that comes from a fluctuating population.

X. NIGERIA'S ECONOMIC APPROACH

Before 1960, Nigeria relied on agriculture as their main form of economic revenue. However, as the oil sector

⁵⁸ Bianca Giacobone, *Ciao, Italia: Why Italy's Youth Are Leaving in Droves*, NATIONAL PUBLIC RADIO, February 18, 2020, <https://www.npr.org/sections/money/2020/02/18/807025154/ciao-italia-why-italys-youth-are-leaving-in-droves>.

⁵⁹ Valentina Za, et al., *Job or Baby? Italian Women's Struggle to Have Both Holds Back Growth*, REUTERS, October 16, 2023, <https://www.reuters.com/world/europe/job-or-baby-italian-womens-struggle-have-both-holds-back-growth-2023-10-13/>.

developed in the 1960's, and further into the 1970's, oil overtook agriculture.⁶⁰ This resulted in a distinct gap in Nigeria's economic makeup split between rural and urban areas. The rural regions represent a subsistence economy, whereas the urban areas operate within a more developed economy. The rural regions, characterized by traditional agriculture and a trading economy, have lower levels of socioeconomic development. This is a sharp contrast to the urban areas of Nigeria, which offer far more economic opportunity.⁶¹

Nigeria's youth can be seen as an asset benefiting the economic production of urban areas. As economic disparities have propelled an increase in migration from rural to urban areas, there is a sense of untapped potential. However, in order for Nigeria to transform a straining population into an economic benefit, Nigeria must integrate strategies to harness human capital. There have been concerns regarding the high rate of young people living in poor socioeconomic conditions and facing unemployment. Therefore, a solution may require investment to improve their Human Development Index (HDI) by committing resources to improving education, health, and infrastructure across all regions.

More comprehensive STEM education could serve as a vital component of integrating the youth into the workplace. This specific area of education could spur innovation and involvement in sectors of the economy that contribute to productivity, particularly when it comes to

⁶⁰ *About Economy*, THE NIGERIA HIGH COMMISSION LONDON, 2022, <https://www.nigeriahc.org.uk/economy/>.

⁶¹ Wilson Erumebor, *Nigeria in 2023: Bridging the Productivity Gap and Building Economic Resilience*, BROOKINGS, February 6, 2023, <https://www.brookings.edu/articles/nigeria-in-2023-bridging-the-productivity-gap-and-building-economic-resilience/>.

tradable services.⁶² To most effectively diffuse access to components of STEM education, national skill programs could be implemented in schools at a primary and secondary level. However, in order to make these efforts worthwhile, the public school system would have to commit to consistent investment in curriculum change across the country.

Digital fluency would give more young people the opportunity for profitable, productive careers. From a human security standpoint, this would not only improve quality of life, but also contribute to a more efficient economy.

The manufacturing industry currently accounts for less than ten percent of Nigeria's gross domestic product, therefore offering limited employable labor.⁶³ Given the combination of Nigeria's rising population, mineral resources, and the presence of a single-market Africa due to the African Continental Free Trade Area, there is potential for the development of a strong manufacturing sector.⁶⁴ However, in order to leverage these conditions, there must be significant investment into manufacturing infrastructure.

This investment would have to address the infrastructure deficit by introducing new, efficient technology to improve aging infrastructure from the 1970's and 1980's.⁶⁵ These updates would need to simultaneously

⁶² Mma Amara Ekeruche, et al, *Nigeria's Industries without Smokestacks Are Delivering Better Economic Opportunities than Traditional Sectors*, BROOKINGS, June 13, 2023, <https://www.brookings.edu/articles/nigerias-industries-without-smokestacks-are-delivering-better-economic-opportunities-than-traditional-sectors/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Nigeria's Infrastructure Deficit Demands \$2.3trn Investment*, LEADERSHIP NEWS AND AGENCY REPORT, December 4, 2023, <https://leadership.ng/nigerias-infrastructure-deficit-demands-2-3trn-investment-fashola/>

improve the energy sector, which is currently producing a power supply that is inadequate to support an expanding manufacturing sector. The Electricity Act, signed by President Tinubu in 2023, will assist in this area by encouraging renewable energy and consolidating energy legislation. These forms of investment will increase the capabilities of the manufacturing industry, thereby opening up employment opportunities for various skill levels.

Nigeria's efforts to adjust their infrastructure and educational institutions will greatly help in preparing the large youth population to take on a stable role in the economy. These adjustments will have a positive impact on economic productivity at a national and individual level. Nigeria's degree of human security is reliant on ensuring a more evenly distributed access to both basic human resources and economic opportunities. This investment will have a beneficial impact on Nigerians' quality of life by creating a pathway to a stable income, employment opportunities, and transferable skills.

XI. ECONOMIC OVERLAP

Despite their different population fluctuations and struggles, China, Italy, and Nigeria have all experienced the effects that population instability can have on an economy. The common themes of migration, technology, and workforce education reflect the various approaches that countries must take to secure their economy on a local and global scale. In each case, the implementation of policies to assuage economic consequences must be adaptable to future population changes. The current status or makeup of a population will inevitably evolve over time, so making irreversible changes to a country's major industries is not always the wisest decision. The major sectors of an economy

must be able to respond to unforeseen population trends that have implications on the workplace, pension systems, and overall economic productivity. Potential solutions can have far reaching consequences on the global economy. As countries shift production output and industry habits, their role in the global economy will undoubtedly shift as well, requiring countries to reassess who they rely on for certain imports and exports.

China, Italy, and Nigeria face economic shifts that require similar adaptable approach principles that will appear differently from country to country. In China's case, the population is becoming insufficient for their manufacturing to operate at full capacity. Conversely, Nigeria's population is outgrowing their current industry capabilities. Italy's case parallels Nigeria's, as they lack the employment opportunities to accommodate their youth population. Each of these issues can be approached with individualized tactics. For instance, China and Nigeria may both target their manufacturing sector infrastructure, perhaps in different approaches. China should be more inclined to implement automation, whereas Nigeria should rely on physical labor. Italy's efforts for job creation somewhat mirror Nigeria's approach to job expansion by leveraging tax incentives. Each of these individualized economic coping mechanisms represent the ways that industries can retract, expand, or adjust to accommodate the size of the workforce and economic security.

CONCLUSION

Issues of population instability can range from general population size struggles to specific demographic incongruencies, such as uneven population distributions, aging populations, or rapidly growing populations.

Regardless of the specific issue, population shifts pose serious problems to the political and economic capabilities of a state. Efforts to adjust to these issues can significantly impact states' role on a global and local scale by forcing them to reallocate resources, redefine economic reliances, restructure social programs, or reestablish norms.

Population instability typically operates within a cyclical trend of population phenomena that affect multiple generations, so the way that leaders and policy-makers approach solutions to stabilize both institutions and human security must adopt a long-term view. Most solutions based in population policy are incapable of completely restabilizing population trends, therefore it is most beneficial to focus on mitigating the impact of these trends. Given the fragile, ever-evolving nature of population demographics, it is necessary to maintain a sense of flexibility in the way that social and economic policies and structures respond to these issues.

Since population trends are rarely stagnant, this idea of a flexible approach is meant to allow the state to respond to population issues at the pace at which they occur. This includes leveraging healthcare and economic makeup to prioritize various components of human security on a global, state, and individual scale. This envelops a multilateral approach giving considerations to quality of life, relative state power, and economic strength to preserve security at all levels. Population instability can put states in a precarious situation; however, prioritizing adaptable policy reform that targets aspects of human security can allow a state to continue functioning efficiently on a global and local scale. Healthcare and economic adjustments have the potential to create a better long-term, stabilizing effect on security than direct population policy.

**AN ANALYSIS OF SCHOOL
VOUCHERS IN THE U.S. EDUCATION
SYSTEM: HOW VOUCHERS WORSEN
ITS PLIGHT AND SUGGESTIONS FOR
REFORM OF THE SCHOOL FUNDING
APPARATUS**

*Matthew Merino**

INTRODUCTION

- A. What are School Vouchers?*
- I. AN ANALYSIS OF THE EFFECTS OF FUNDING ON EDUCATIONAL QUALITY
- II. HOW VOUCHERS TAKE SCHOOL FUNDING
 - A. Texas Case*
 - B. Vermont Case*
- III. WHY SCHOOL VOUCHERS ARE NOT THE ANSWER
 - A. Why private is not always better*
 - B. How competition does not always improve services*
 - C. Solutions?*

CONCLUSION

INTRODUCTION

Americans often take their public education system for granted. However, in recent years, and following the Covid-19 pandemic, issues of education are finding themselves in the spotlight of political debate. In 2021,

* Matthew Merino is a Junior studying Political Science and International Studies with a minor in Spanish at the University of Alabama. Merino plans on attending law school following graduation.

according to a Pew Research poll, although 61% of all Americans said that k-12 public schools are having a positive effect on the US, only 42% of Republicans or those who lean Republican said the same.¹ This is in contrast to 77% of Democrats or those who lean Democratic who said that public schools have a positive effect.² Conversely, 57% of Republicans or those who lean Republican said that K-12 public schools were harming the United States.³ This sentiment has appeared to coincide with an increase in state school voucher legislation, also commonly called “school choice.” The claimed goal of this legislation is to allow parents to more easily decide whether they send their children to a public or a private school.

School vouchers are nothing new. They have been both implemented and debated over the past few decades and were argued for by economist Milton Friedman as early as the 1950s. Although support for school vouchers is certainly at an all-time high in the wake of COVID-19 and debates over school curriculums, it would be a mistake to characterize the new push for school choice legislation in many Republican-controlled states and on a national level as merely an impulsive reaction to a hysterical public. Conversely, school vouchers should be analyzed as a serious policy proposal that has had the support of not only many prominent thinkers and politicians of the past, but also of many prominent politicians today. This does not mean,

¹ John Gramlich, *Republicans’ Confidence in K-12 Principals Has Fallen Sharply During the Pandemic*, PEW RESEARCH CENTER (Feb. 24, 2022), <https://www.pewresearch.org/short-reads/2022/02/24/republicans-confidence-in-k-12-principals-has-fallen-sharply-during-the-pandemic/>.

² *Id.* at 1.

³ *Id.* at 1.

however, that school vouchers have a positive effect on American education. This article will take the position that school vouchers not only fail to solve the problems of the American education system but that they may also have many negative effects. In addition, it will answer questions on the impact of funding on education in the United States, explain recent school voucher proposals in several states, explain the multiple problems with school vouchers in achieving the goal of quality education for all, and conclude by explaining alternative ways to achieve better public education in the US.

A. What are School Vouchers?

Before an effective analysis is made, it is important to accurately define what school vouchers are and to explain some history behind them. School vouchers can be defined as money or tax credits given to parents by the government to pay for their child's tuition at a private institution instead of paying for a public school. As previously mentioned, it was first promoted by Milton Friedman, who made the case for school vouchers in his 1962 work *Capitalism and Freedom*.⁴ In relation to market theory in economics, Friedman reasoned that because competition drove innovation at the peril of failure, there was no way that public schools would be incentivized to provide quality education to their students under a government-run monopoly.⁵ Therefore, according to Friedman, the school system should instead be composed of multiple different schools competing against each other so that the schools that did not deliver the

⁴ TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC*, BROOKINGS INSTITUTION PRESS (2001).

⁵ *Id.*

best services for their clients would not survive.⁶ However, Friedman also believed in education as a public good and thus argued in favor of government subsidies in the form of school vouchers that could keep the costs of education low and promote investment for well-performing school districts.⁷ Friedman also considered an argument that many today would find familiar: that under a public monopoly, the government would make decisions on what values would be taught, whereas school vouchers would allow parents to decide which values they would want to teach to their children.⁸

For the next few decades after Milton published his work, the idea of school vouchers would remain relegated to academia. By the late 1970s, school vouchers were still a fringe proposal and were not given any serious political attention.⁹ However, in the 1980s, global political opinions would begin to shift towards the adoption of free market economics.¹⁰ In the United States, market economic theory and supply-side economics were spearheaded by President Ronald Reagan. The Reagan administration futilely attempted to pass school voucher programs through Congress in the form of tax credits.¹¹ Even though Reagan's programs failed, it did represent the beginning of school vouchers as a legitimate public policy program.¹² Furthermore, following the publication of the now infamous report *A Nation at Risk* in 1983, which warned of inadequacy in American public schools, many people, including

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

prominent experts in education as well as conservative and religious groups, began to support school vouchers to reorganize a fundamentally broken system.¹³ Since then, presidents George H.W. Bush and George W. Bush have proposed various voucher systems, with the latter promoting vouchers for students in Louisiana following Hurricane Katrina in 2005.¹⁴

Today, there has not been much serious discussion nationally about school vouchers since Hurricane Katrina, although there has been a push to implement and expand school vouchers on the state level.¹⁵ By 2023, thirteen states and the District of Columbia had implemented voucher systems, including Colorado, Arizona, Maine, Florida, Georgia, Louisiana, Indiana, Ohio, Utah, Vermont, Oklahoma, and Wisconsin.¹⁶ In October 2023, North Carolina also adopted school vouchers.¹⁷ Most recently in 2024, Alabama Governor Kay Ivey signed the CHOOSE Act into law, making Alabama the latest state to adopt a school voucher program.¹⁸ It is important to note that there is not one single type of voucher program. For example, programs in Milwaukee, Wisconsin, Ohio, and the District of

¹³ *Id.*

¹⁴ Susan Ludwig, *School Vouchers*, SALEM PRESS ENCYCLOPEDIA (2023).

¹⁵ *Id.* at 14.

¹⁶ *Id.* at 14.

¹⁷ Nelson, Joshua Q., and Fox News. “North Carolina Becomes 9th State to Pass Universal School Choice, the First to Do so without GOP Trifecta.” *Fox News*, FOX News Network, 28 Sept. 2023, www.foxnews.com/media/north-carolina-become-9th-state-pass-universal-school-choice-first-without-gop-trifecta.

¹⁸ Nelson, Joshua Q., and Fox News. “Alabama Becomes Latest State to Pass Universal School Choice Following a Wave of Red States.” *Fox News*, FOX News Network, 10 Mar. 2024, www.foxnews.com/media/alabama-becomes-latest-state-pass-universal-school-choice-following-wave-red-states-making-move.

Columbia are only available for students who are low-income or are in failing schools. Additionally, in Vermont and Maine, religious schools were prohibited from receiving state funding.¹⁹ However, the Supreme Court ruled in *Carson v. Makin* (2022) that Maine and Vermont could not prohibit public funds to go to religious schools due to it violating the free exercise clause of the US Constitution.²⁰

In Alabama and many other states, such as Florida, Arizona, and Arkansas, school vouchers are universal. This means that most families are eligible for vouchers without many restrictions or regulations on who receives the money, and in some cases, even where that money is spent. Vouchers then can be used to pursue private education, homeschool, or even other public options. At least ten states currently have universal school choice options, beginning with Arizona in 2022. Furthermore, Tennessee, Texas, North Dakota, Mississippi, and Louisiana are pushing to adopt universal school vouchers as Republicans nationwide lead the charge to bring school vouchers to the forefront of an education revolution.²¹ School vouchers can take different forms, but they all share one thing: they shift the burden of education from the public sector to the private sector.

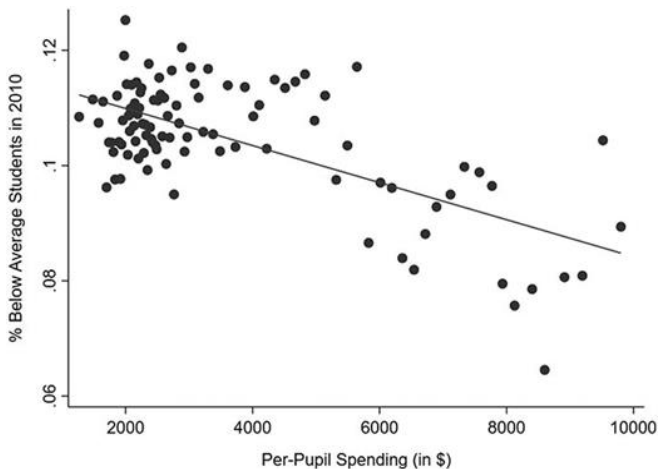
I. AN ANALYSIS OF THE EFFECTS OF FUNDING ON EDUCATIONAL QUALITY

¹⁹ *Id.* at 14.

²⁰ *Carson v. Makin*, 596 U.S. (2022).

²¹ Nelson, Joshua Q., and Fox News. "These States Plan an Aggressive Universal School Choice Push in 2024: 'Teachers Unions Overplayed Their Hand.'" FOX NEWS, www.foxnews.com/media/these-states-plan-aggressive-universal-school-choice-push-2024-teachers-unions-overplayed-their-hand. Accessed 17 Mar. 2024.

Before addressing some of the more contemporary policies related to school vouchers, it is important to confront one of the most integral portions of the education system in the United States: finance. Schools, like anything, need money to effectively administer their services. Resources vital to students' educational experiences such as hiring quality teachers, access to schoolbooks and other academic materials, better facilities, and smaller classroom sizes can only be acquired by the correct appropriation of funds. Not only does increased funding lead to better schools, but there is also evidence to suggest stronger economic results. A study by the Massachusetts Institute of Technology (MIT) on school funding in South Korea found that when schools are given additional funds targeted at student achievement, there was a direct correlation between performance and the amount spent.²²



The researchers discovered that after a 20% increase

²² Sohn, Hosung, et al. "The Effect of Extra School Funding on Students' Academic Achievements under a Centralized School Financing System." *MIT Press*, MIT Press, 1 Jan. 2023, direct.mit.edu/edfp/article/18/1/1/109966/The-Effect-of-Extra-School-Funding-on-Students#.

in funding, there was a decrease in the number of students considered below average in every one of the four major academic fields, except for reading, by considerable percentages.²³ Although this study was conducted in South Korea, a country with an education system that is much more centralized and regulated than the United States,' the study still proves that a correlation exists between funding and educational quality. In addition, the researchers noted that additional financing would be beneficial if the funds were "given directly to those targeted schools and used solely to provide new programs and resources for student academic improvement."²⁴

Furthermore, spending matches quality in general terms as well. In 2021, New York, the District of Columbia, Vermont, Connecticut, and New Jersey spent the most on education per pupil.²⁵ The northeastern region spent the most on education per pupil in 2021, with seven out of ten of the top ten states for K-12 education being from the northeast, the largest spender being New York.²⁶ While this does not always translate perfectly to better quality schools (New York was ranked 8th in the country for Pre-K-12 schools by the U.S. World News and Report, despite spending the most on education),²⁷ Northeastern states topped the rankings, with New Jersey, Massachusetts, Connecticut, and Vermont

²³ *Id.*

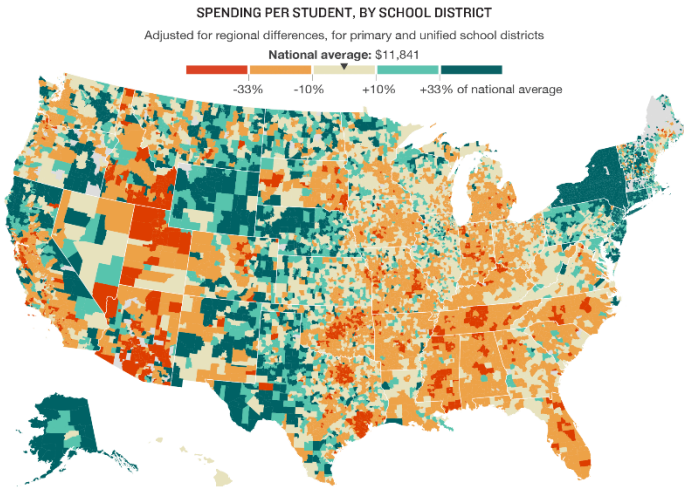
²⁴ *Id.*

²⁵ Bureau, U.S. Census. "Public School Spending per Pupil Experiences Largest Year-to-Year Increase in More than a Decade." *Census.Gov*, 18 May 2023, www.census.gov/newsroom/press-releases/2023/public-school-spending.html.

²⁶ *Id.*

²⁷ *Rankings: Pre-K-12 - Best States for Childhood Education - U.S. News ...*, U.S. NEWS, www.usnews.com/news/best-states/rankings/education/prek-12. Accessed 5 Jan. 2024.

being ranked first, second, third, and fourth, respectively.²⁸ In contrast, Oklahoma, Arizona, New Mexico, Alabama, Mississippi, Texas, Tennessee, and Nevada were among the states that spent the least.²⁹ They fell between 34th and 50th according to the U.S. News.³⁰ Notable outliers among the low spenders were Utah, Colorado, Florida, and Idaho, which ranked 9th, 12th, 14th, and 15th, respectively.^{31 32}



These statistics demonstrate that access to high quality education in the United States is not always equal. Not only does educational quality differ among states, but it also differs within states. Because the U.S. education system is funded by property taxes, the funds of a school district often depend on the amount of wealth of the area the district serves. Some low-income school districts have suffered from

²⁸ *Id.*

²⁹ *Id.* at 29.

³⁰ *Id.* at 29.

³¹ *Id.* at 29.

³² *Week 1: Why America's Schools Have a Money Problem*, NPR, www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem.

leaking roofs and teacher shortages, while other districts, sometimes as close as an hour away as is the case in Illinois, boast small class sizes and high-quality facilities.³³ These disparities ensure lower-income students receive a worse education than their more financially stable counterparts and contribute to keeping deprived areas poor. Furthermore, in the Supreme Court case *San Antonio Independent School District vs. Rodriguez*, which was heard in 1973, Rodriguez argued that the property tax funding scheme was unconstitutional on the grounds that it systematically discriminated against the poor and deprived them of a quality education.³⁴ In a 5-4 decision, Chief Justice Powell argued that schools funded by property taxes were constitutional and that the Court had no right to overturn the system, due to the fact that there exists no right to an education in the U.S. Constitution, and because the system did not intentionally discriminate nor did it discriminate against all poor people.³⁵ This case effectively cemented property-tax-funded school districts and their resulting economic and academic disparities into law.

However, various state supreme courts have ruled that unequal property tax funding does violate their state constitutions. For example, in *Robinson v. Cahill (1973)*, the New Jersey Supreme Court found that property-tax-funded public schools violated the New Jersey Constitution, which guaranteed access to a public education system.³⁶ In addition,

³³ *Why America's Schools Have A Money Problem*, NPR (Apr. 18, 2016), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem>.

³⁴ *San Antonio Public School District v. Rodriguez*, 411 U.S. 1 (1973).

³⁵ *Id.*

³⁶ "Landmark U.S. Cases Related to Equality of Opportunity in K-12 Education." *Equality of Opportunity and Education*, edeq.stanford.edu/sections/section-4-lawsuits/landmark-us-cases-

Ohio's property-tax-funded school system was ruled unconstitutional by the Ohio Supreme Court on the grounds of disparities between poor and wealthy school districts in *DeRolph v. State* (1997).³⁷ New York's property-tax-funded public school system was also found unconstitutional by the New York Supreme Court in *Campaign for Fiscal Equity v. State of New York* (2006), and the court ordered the state to ensure equal funding and equal education for all students in the state.³⁸ The supreme courts of California and Kentucky also found their property-tax-funded systems violated their state constitutions in *Serrano v. Priest* (1971), and *Rose v. Council for Better Education* (1989), respectively.³⁹ It should also be noted that many of the states that have had their state supreme courts rule that property-tax-funded school systems violated their state constitutions and have undergone school finance reform rank highly when it comes to K-12 public schools. For example, New Jersey currently ranks first in the nation in the category.⁴⁰

related-equality-opportunity-k-12-education. Accessed 17 Mar. 2024.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 29.

Study natural experiment	Short-run impacts: Test scores, graduation	Long-run impacts: Attainment and adult outcomes
School finance reforms		
National	Positive	Card and Payne 2002; Jackson et al. 2016; Lafortune et al. 2018; Candelaria and Shores 2019; Brunner et al. 2020.
		Positive: Wages, attainment, poverty Positive: Upward mobility
		Jackson et al. 2016; Rothstein and Schanzenbach 2022 Biasi, forthcoming
Single state	Positive	Guryan 2001 (MA); Papke 2008 (MI); Roy 2011 (MI); Hyman 2017 (MI); Johnson and Tanner 2018 (CA); Lafortune 2021 (CA)
	Null	Clark 2003 (KY)
		Positive: Attainment Positive: Reduced crime
		Hyman 2017 (MI) Baron et al. 2022 (MI)
Close school bond/tax elections		
Operational spending	Positive	Baron 2022; Abott et al. 2020; Lee and Polachek 2008
Capital spending	Positive	Rauscher 2020
	Null	Cellini et al. 2010; Martorell et al. 2016; Baron 2022
		Positive: Reduced crime
		Baron et al. 2022 (MI)
Housing market dynamics		
	Positive	Miller 2018
	Null	Davis and Ferreira 2022
Funding formula "quirks"	Positive	Gigliotti and Sorenson, 2018 (New York); Knesman and Steinberg 2019 (Texas)
Spending cuts	Negative (from cuts)	Shores and Steinberg 2019; Jackson et al. 2021

41

Additionally, according to the Public Policy Institute of California, a collection of studies done on the results of state finance reforms that resulted in higher funding for schools found increases in the rate of high school graduation, higher wages, and increases in economic mobility.⁴² As illustrated in Figure C, a collection of national studies found positive results in areas such as students’ wages, upward economic mobility, educational attainment, and lower rates of poverty. Studies done in Michigan found positive impacts

⁴¹ Person, and Julien Lafortune. “Understanding the Effects of School Funding.” PUBLIC POLICY INSTITUTE OF CALIFORNIA, 30 Nov. 2023, www.ppic.org/publication/understanding-the-effects-of-school-funding/.

⁴² Person & Julien Lafortune, “Understanding the Effects of School Funding.” *Public Policy Institute of California*, Public Policy Institute of California, 30 Nov. 2023, www.ppic.org/publication/understanding-the-effects-of-school-funding/.

in regard to attainment and reduced levels of crime.⁴³ These encouraging results specifically pertained to school finance reform or efforts to separate how much funding districts receive from the wealth of the surrounding community.⁴⁴

This is essential to understand before discussing the topic of school vouchers. Like any other policy, school vouchers are designed to solve a problem. The underlying issue behind the advocacy for school vouchers and the backlash against the proposed solution is school funding. Even if one were to argue that recent pushes towards school vouchers are based on cultural arguments of parental rights and disagreements on what is taught in schools, it is undeniable that these qualitative assertions are underwritten by, or at the very least influence, quantitative results. As such, school vouchers aim to shift the burden of education from the state to the private sector. It is necessary to note the economic and financial realities of the current system before considering this. In fact, some may even argue for school vouchers as a solution to the problems laid out above. Regardless of debates on accuracy and effectiveness, information on recent school voucher proposals and alternative solutions to the underlying issues that cause the gap in education accessibility will be laid out in the upcoming sections.

II. HOW SCHOOL VOUCHERS HURT FUNDING

Recently, the concept of school vouchers has become quite popular, particularly among many Republicans and conservatives. Since the COVID-19 pandemic, there seems to be an ever-growing debate on the right over the content taught in schools. Racial and LGBTQ+ issues have

⁴³ *Id.* at 21.

⁴⁴ *Id.* at 21.

especially caught the ire of conservative parents and sparked a backlash that has led to legislative action in multiple states. One example is the Florida Parental Rights in Education Act, dubbed the “Don’t Say Gay” bill by its opponents, which, among other things, restricted classroom discussion on topics related to “sexual orientation and gender identity” in “certain grade levels.”⁴⁵ The act originally only applied up to third grade but was recently expanded to include through the twelfth grade.⁴⁶

Although universal school voucher programs are fairly new, the studies, analysis, and data that currently exist on recently administered school voucher programs in states such as Florida and Arizona point to the conclusion that school vouchers might negatively affect the capacity of such states to fund their public schools, which would ultimately hurt education as a whole in these states. For example, a report from the Florida Policy Institute estimated that 1.3 billion dollars, or 10% of Florida's public education funding, would be spent on vouchers.⁴⁷ In 2023, a year after the 2022 report was released, Florida, under Governor Ron Desantis, expanded its school voucher program to include most state residents.⁴⁸ Meanwhile, Arizona’s previously limited school

⁴⁵ *Referred Committees and Committee Actions, CS/CS/HB 1557 (2022)*
- PARENTAL RIGHTS IN EDUCATION | FLORIDA HOUSE OF REPRESENTATIVES,

www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=76545.

⁴⁶ *Florida Education Board Approves Expanding Parental Rights Law through 12th Grade*, FOX 13 Tampa Bay, Apr. 20 2023, www.fox13news.com/news/florida-education-board-to-discuss-parental-rights-law-expansion-through-12th-grade.

⁴⁷ Kate Payne, *New Report Estimates Vouchers Will Divert \$1.3 Billion in Public Money to Private Schools This Year*, WLRN, Sept. 21 2022, www.wlrn.org/education/2022-09-21/new-report-estimates-vouchers-will-divert-1-3-billion-in-public-money-to-private-schools-this-year.

⁴⁸ *Florida’s Expanded School Voucher System Explained: What’s Changed and Who’s Eligible*, NBC 6 SOUTH FLORIDA, Sept. 3 2023,

voucher program, which started with only 150 students, now has 60,000 students after universally expanding its program.⁴⁹ This program enlargement is expected to cost the state approximately 1 billion dollars.⁵⁰ Additionally, a recent audit by the state of Arizona found that \$700,000 of fraudulent purchases were made by parents on the school voucher program, meaning much of Arizona's voucher money failed to be used for education, but rather went to various consumer goods bought by parents.⁵¹ Such large sums of money, although not direct evidence of public school underfunding, do run the risk of putting significant strain on states' educational budgets, which could, in turn, harm the amount of money invested into public schools.

Also, most residents using the school voucher program in Arizona are not using the funds to switch to private schools from public schools. According to the Arizona Department of Education, 75% of students on the state's school voucher program were either in home school, enrolled in private school before going on the program, or were just entering the school system.⁵² An independent think tank, The Grand Canyon Institute, found that 45% of students receiving school vouchers in Arizona were among the top

www.nbcmiami.com/news/local/floridas-expanded-school-voucher-system-explained-whats-changed-and-whos-eligible/3104356/.

⁴⁹ Brian Lopez, *Texas' Main Voucher Bill Seeks to Avoid Other States' Mistakes but Keeps Ideas That Attracted Criticism*, THE TEXAS TRIBUNE.

⁵⁰ *Id.* at 41.

⁵¹ Yvonne Wingett Sanchez & Rob O'Dell, *Parents Spent \$700K in School Voucher Money on Beauty Supplies, Apparel; Attempted Cash Withdrawals*, THE ARIZONA REPUBLIC, Oct. 31 2018,

www.azcentral.com/story/news/politics/arizona/2018/10/29/misspent-school-voucher-funds-exceed-700-k-little-recovered/1780495002/?fbclid=IwAR0zQ0NztHUWe6ZI_cju6xrn8deBYkiB-Ahc74ed5-CLRso5KhmhYCM38zk.

⁵² *Id.* at 41.

percentile of earners.⁵³ Arizona is not an outlier. 69% of Florida students were enrolled in private schools or entering the school system for the first time prior to receiving school vouchers.⁵⁴ In Arkansas, that number is 95%, with 75% of students receiving school vouchers coming from the most populated parts of the state.⁵⁵

The main concern illustrated by these statistics is that states may be paying out around 1 billion dollars in school choice funding which could strain state budgets causing public schools to become underfunded. Furthermore, these programs might even negate any of the theoretical benefits that school choice might have. According to one study from the Journal of Public Economics, school vouchers allow for large amounts of public money to be pocketed by private schools.⁵⁶ Furthermore, the study found that although there was an increase in enrollment in private schools under limited school voucher programs with little to no increase in tuition, universal voucher programs not only saw little to no increases in enrollment but also incentives for private schools to raise tuition rates for students already enrolled in them.⁵⁷ Reports out of Iowa have affirmed that many private schools in the state are raising tuition rates after Iowa adopted a universal school voucher program.⁵⁸

⁵³ *Id.* at 41.

⁵⁴ *GOP States Are Embracing Vouchers. Wealthy Parents Are Benefitting.*, www.politico.com/news/2023/11/22/inside-school-voucher-debate-00128377.

⁵⁵ *Id.* at 46.

⁵⁶ Daniel M. Hungerman, *Where Does Voucher Funding Go?: How Large-Scale Subsidy Programs Affect Private-School Revenue, Enrollment, and Prices*, JOURNAL OF PUBLIC ECONOMICS, Mar. 18 2016, www.sciencedirect.com/science/article/abs/pii/S0047272716000426.

⁵⁷ *Id.*

⁵⁸ Ty Rushing, *Kim Reynolds' Private School Voucher Plan Led to*

The evidence outlined, therefore, points to the conclusion of perpetuating educational and economic stratification due to declines in funding for public schools and increases in funding for private schools with no real transfer of students from public to private or vice versa. This creates even greater burdens for families with students in private school, therefore undermining the entire point of having “school choice.”

A. Texas Case

The Republican-controlled state of Texas is ranked number thirty-seven in the country for its K-12 education system, just ahead of California and just behind North Dakota.⁵⁹ In the past Texas legislative session, the Republican Governor Greg Abbott fiercely contended to get a school voucher bill through the legislature, declaring it a top priority and promising to veto any public school funding bill that did not include vouchers.⁶⁰ Abbott did everything he could to get vouchers passed in Texas, including threatening to primary Republican opponents and veto bills he deemed unnecessary “until after education freedom is passed”.⁶¹ However, twenty-one Republicans in the Texas House of Representatives ultimately voted in favor of an amendment to the school funding bill to which the vouchers were linked, killing Abbott’s plan.⁶²

Tuition Hikes, IOWA STARTING LINE, May 12 2023, iowastartingline.com/2023/05/12/kim-reynolds-private-school-voucher-plan-led-to-tuition-hikes/.

⁵⁹ *Id.* at 2.

⁶⁰ Zach Despart, et al, “How Gov. Greg Abbott Lost a Yearlong Fight to Create School Vouchers.” THE TEXAS TRIBUNE, 22 Dec. 2023, www.texastribune.org/2023/12/22/texas-school-vouchers-greg-abbott/.

⁶¹ *Id.*

⁶² *Id.*

As a result, the Texas legislature ended its session without any additional funding for state public schools and gave Governor Abbott a vendetta against the twenty-nine Republicans who voted against him. Without sufficient funding, many Texas school districts are being forced to reduce their budgets, with one school district in the Dallas-Fort Worth metroplex warning parents about the reduced budget taking effect.⁶³ Furthermore, Abbott was recently able to unseat nine of the twenty-one Republicans who voted against his voucher plan in the March 2024 primaries, with more being sent to runoff.⁶⁴ Interestingly enough, most of Abbott's attacks leading to his primary victories had little to do with school choice and more to do with attacking the rebellious rural Republicans as being weak on gun rights, the border, colluding with Democrats, or even supporting Sharia law in a 4.4 million dollar endeavor.⁶⁵

While this is the result of a political fight, even if the funding bill had passed, it still would have negative effects on school funding in Texas. Abbott's voucher plan would have allotted \$10,500 per recipient, part of a 7-billion-dollar price tag for his proposal.⁶⁶ The inflated cost of the bill alone did not spark bipartisan opposition in the Texas state legislature. However, because school districts receive state funding in Texas depending on how many students are

⁶³ *Texas Public Schools Prepare for No Increase in Funding as Voucher Stalemate Continues*, FOX 4 NEWS DALLAS-FORT WORTH (last visited Dec. 26, 2023),

www.fox4news.com/news/texas-school-vouchers-debate-impact.

⁶⁴ Karen Brooks Harper, "School Voucher Supporters Bask in Primary Wins, Say Goals Are within Reach," THE TEXAS TRIBUNE, 6 Mar. 2024, www.texastribune.org/2024/03/06/texas-primaries-vouchers-school-choice/.

⁶⁵ *Id.* at 52.

⁶⁶ *Id.* at 46.

enrolled, rural districts, which have low populations and few private schools, would suffer the most. One analysis predicts that if the New Boston State House district northeast of Dallas lost just 1% of its students, then all the public schools in the area could lose 3.5 million in funding.⁶⁷ Additionally, the funding losses could increase to 17.5 million if 5% of the students in the area took vouchers.⁶⁸ Despite that gains could total 49 million dollars allocated to the district due to funding increases under the bill, the economics of these issues have led to such fierce contentions of rural Republicans against Abbott, and why vouchers have, for the time being, failed in Texas.

B. Vermont Case

Vermont and Texas are two vastly different states. Considering how school choice is primarily a Republican policy, one would expect that the home state of Bernie Sanders would not have such a program. However, Vermont surprisingly does have a school choice program, even though Texas has yet to adopt one.

The two states still do not share much when it comes to education, or how they have decided to implement, or potentially implement, a school choice program. For example, Vermont is ranked 4th in the nation for their K-12 public schools, while Texas is ranked 34th.⁶⁹ Furthermore, although rural Texas Republicans stood against school vouchers on the grounds that they would harm the local public schools in their districts, Vermont's program exists to

⁶⁷ Brian Lopez & Patrick Svitek, *Our Public School System Is Our Town: Why This Rural Republican is Voting Against School Vouchers*, THE TEXAS TRIBUNE, <https://www.texastribune.org/2023/11/17/texas-school-vouchers-rural-republicans-gary-vandeaver/>.

⁶⁸ *Id.*

⁶⁹ *Id.* at 24.

actively help rural communities. Vermont's program is a limited one that allocates money to be given to families in rural towns that do not have public high schools or elementary schools.⁷⁰ The money can be utilized to send students to public schools, private schools, or even schools outside of Vermont. In addition, Vermont has a program where students can attend any public high school in the state, regardless of where they live.⁷¹

Although there is still room for criticism of the Vermont school choice model, there are key differences between Texas and Vermont which make Vermont's program an interesting comparison with universal school choice programs. Firstly, while Texas' proposal would be universal, Vermont's is only targeted at rural communities with a lack of public education. Also, Vermont already spends large sums of money on its public schools, while Texas, along with many other states that either have universal school choice programs or are thinking of adopting them, spends among the least. Additionally, many of the newer pushes towards school choice in Texas, Alabama, Florida, and other states are due to cultural reasons, not just pragmatic ones. These differences are important to understanding the nature of recent pushes for school choice, due to the differences in how these programs can be implemented.

III. WHY SCHOOL VOUCHERS ARE NOT THE ANSWER

A. *Why private is not always better*

Funding and whether school vouchers are limited or

⁷⁰ Ballotpedia, "School Choice in Vermont," ballotpedia.org/School_choice_in_Vermont. (last visited Mar. 14 2024).

⁷¹ "Public High School Choice," AGENCY OF EDUCATION, education.vermont.gov/vermont-schools/school-operations/public-schools/public-high-school-choice, (last visited Mar. 14 2024).

universal are not the only considerations when analyzing school vouchers as policy. One must also look at its effects on academic achievement. For this, the results are mixed. Some studies find positive results, some negative, and some are not conclusive. For example, one study from the Journal of Policy Analysis and Management on the District of Columbia's Opportunity Scholarship Program, which gives vouchers to some low-income families to use towards private school tuition, found that there was a significant positive increase in high school graduation rates and reading comprehension, with no significant improvements in math proficiency.⁷² However, another study found no significant increase in college enrollment from those who received the scholarship.⁷³ Furthermore, another study on the same District of Columbia program found that student achievement in areas such as mathematics decreased following their enrollment in a private school program.⁷⁴

However, a recent article from the Brookings Institute found that voucher programs diminished student achievement by -0.4 of the standard deviation in Louisiana,

⁷² Wiley Online Library | Scientific Research Articles, Journals, ..., onlinelibrary.wiley.com/doi/abs/10.1002/ece3.9373. Accessed 17 Mar. 2024.

⁷³ Matthew M. Chingos & Brian Kisida, *School Vouchers and College Enrollment: Experimental Evidence From Washington, DC*, EDUCATIONAL EVALUATION & POLICY ANALYSIS (last accessed Sept. 2023), <https://doi-org.libdata.lib.ua.edu/10.3102/01623737221131549>.

⁷⁴ Mark Dynarski, et al., *Evaluation of the DC Opportunity Scholarship Program: Impacts after One Year*. NCEE 2017-4022, NATIONAL CENTER FOR EDUCATIONAL EVALUATION AND REGIONAL ASSISTANCE (Jan. 2017), search.ebscohost.com/login.aspx?direct=true&db=eric&AN=ED573822&site=eds-live&scope=site.

and -0.15 of the standard deviation in Indiana.⁷⁵ In addition, a study from Milwaukee reported in the Brookings Institute's article found that those on the voucher program were leaving the program at rates of 20% a year and found that students improved academically when they returned to public schools, with comparable results found in Florida and Indiana.⁷⁶ This shows that vouchers have minimal increases or even decreases in academic achievement. Nevertheless, this data refers to limited school voucher programs specifically. Universal school voucher programs are an entirely different consideration. As previously mentioned, while limited voucher programs target those who are low-income, universal voucher programs have no such restrictions and have been shown to favor those already in private school and who already come from well-off families. As such, it is unknown what the student outcome will be for universal school choice programs, but the facts show very mixed results for limited programs.

In addition, another problem with school vouchers, especially universal school vouchers, is deregulation. Going back to the study on school funding by MIT in South Korea, the researchers found that increased school funding only was beneficial when directed at programs specifically designed for student academic improvement.⁷⁷ Therefore, it stands to reason that even if private schools were well-funded, their efficacy would still be harmed without their resources being allotted to the right places. Thus, regulation is necessary for any school voucher program to have any chance at success,

⁷⁵ Deven Carlson, et al, "Research on School Vouchers Suggests Concerns Ahead for Education Savings Accounts." BROOKINGS, Aug. 15, 2023, www.brookings.edu/articles/research-on-school-vouchers-suggests-concerns-ahead-for-education-savings-accounts/.

⁷⁶ *Id.*, at 68.

⁷⁷ *Id.* at 24.

even if there was an inherent benefit in certain circumstances. Additionally, one report from the Brookings Institute found that there are simply not enough effective private schools for every student to attend, and that student performances actually increased when private schools taking voucher money were required to use the same testing requirements as public schools.⁷⁸ However, even if there were regulations implemented by the state onto private schools that receive state funding, another study published in the Journal of School Choice found that the more regulations imposed, the less likely private schools would be willing to participate in a voucher program.⁷⁹

B. Why competition does not always improve services

Even if private schools are not inherently more efficient than public schools, surely competition would improve the quality of public schools? The answer would be yes. It is a rough consensus among economists and market theorists that competition does improve the quality of a service. If public schools were at risk and had to compete with private options, there is some evidence that competition does improve the quality of nearby public schools, taken from *School Voucher, A Survey of Economics Literature*.⁸⁰

⁷⁸ *Id.* at 68.

⁷⁹ DeAngelis, Corey A., et al., *When Being Regulated Is a Choice: The Impact of Government Policies on Private School Participation in Voucher Programs*, JOURNAL OF SCHOOL CHOICE (July 2021), <https://doi-org.libdata.lib.ua.edu/10.1080/15582159.2020.1783476>.

⁸⁰ Dennis Epple, et al., *School Voucher, A Survey of the Economics Literature*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2015), search.ebscohost.com/login.aspx?direct=true&db=cab00456a&AN=ua.4363200&site=eds-live&scope=site.

While this may be true for the short term, there has also been evidence from the Education Policy Analysis Archives ⁸¹[\[COP\]](#). In addition, another study from the *Education Finance and Policy* journal.⁸² While the results of competition in public schools are not particularly negative, the factual results are still quite different from the idealized version of competition hypothesized by Friedman. Competition in education does not provide the necessary benefits to public schools.

Schools are not businesses. Competition may have positive effects in other economic sectors, but schools are fundamentally a public good. Not only that, but they are a driver of economic growth, and a necessary pillar to a stable democracy. It has already been established how funding for schools is hurt due to vouchers, and this could be a reason competition yields mixed results. If public schools receive less funding because of state investments, and if resources such as money are crucial to providing an effective education, then it does make sense that many of the real beneficial effects of competition may be mitigated.

CONCLUSION

All that has been discussed thus far has led to one conclusion: school vouchers cannot solve the problems of the education system in this country. The only meaningful way

⁸¹ Yusuf Cabolat, *The Long-Term Effect of Competition on Public School Achievement: Evidence from the Indiana Choice Scholarship Program*, EDUCATION POLICY ANALYSIS ARCHIVES / ARCHIVOS ANALÍTICOS DE POLÍTICAS EDUCATIVAS / ARQUIVOS ANALÍTICOS DE POLÍTICAS EDUCATIVAS (July 2021), <https://doi-org.libdata.lib.ua.edu/10.14507/epaa.29.6311>.

⁸² Egalite, Anna J., and Jonathan N. Mills. *Competitive Impacts of Means-Tested Vouchers on Public School Performance: Evidence from Louisiana*, EDUCATION FINANCE AND POLICY, vol. 16, no. 1, Jan. 2021, pp. 66–91. EBSCOhost, https://doi-org.libdata.lib.ua.edu/10.1162/edfp_a_00286.

that some of these problems could be solved is if education is considered not only a necessary economic public good, but a political one as well. A governmental system that operates by allowing its people to have a say in the government must have an educated populace to make reasonable and well-informed decisions. It is essential, then, that education be considered an institution sacred and imperative for the continuance of a democratic republic. Furthermore, education can also have many economic effects. As previously discussed, those who receive better educational experiences are more likely to pursue college and achieve higher paying jobs. This could yield economic benefits, and, if the education is distributed equally, it can go a long way in allowing for equality of opportunity for all people.

Therefore, the most logical and obvious solution would be to pay more money to public schools, and to use that money explicitly for programs that improve student achievement and learning. A collection of studies from the American Economic Association found that increases in spending on public schools resulted in significant increases in academic achievement.⁸³ Moreover, as previously established, it is not enough to fund school districts, but how the money is allocated. Also, school districts must be funded equally in a state to have a truly robust education system. Funding schools using property taxes only leads to inequality and contributes to cyclical poverty. Schools must be funded equally, generously, and effectively.

The reality of the situation is that the recent school voucher pushes, powered by moral panic, are well-funded

⁸³ C. Kirabo Jackson & Claire L. Mackevicius. "What Impacts Can We Expect from School Spending Policy? Evidence from Evaluations in the United States." *AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS*, www.aeaweb.org/articles?id=10.1257%2FApp.20220279&&from=f.

and organized. For example, groups such as the American Federation for Children have spent 9 million on pro-universal school voucher candidates in the 2022 midterms, winning 277 out of 368 races, and plan on spending 10 million dollars on supporting school choice candidates in 2024.⁸⁴ Additionally, many more states, such as Texas and Tennessee, could adopt school voucher legislation in 2024 and 2025, making this the largest push for school vouchers and, ultimately, for the privatization of education in U.S. history. The system that we have is not perfect and needs improvement, but school vouchers are not the answer.

⁸⁴ GOP States Are Embracing Vouchers: Wealthy Parents Are Benefitting, POLITICO www.politico.com/news/2023/11/22/inside-school-voucher-debate-00128377.

ASSESSING WATER DISPARITIES WITHIN THE GLOBAL COMMUNITY

*Vivian Coleman**

GENERAL PROBLEM STATEMENT

- I. JACKSON, MISSISSIPPI, UNITED STATES
 - A. *Problem Statement*
 - B. *Background*
 - C. *Legal Actions & Implications*
- II. CLUJ NAPOCA, ROMANIA
 - A. *Problem Statement*
 - B. *Background*
 - C. *Legal Actions & Implications*
- III. PAMPLONA ALTA, LIMA, PERU
 - A. *Problem Statement*
 - B. *Background*
 - C. *Legal Actions & Implications*
- IV. GAZA CITY, GAZA
 - A. *Problem Statement*
 - B. *Background*
 - C. *Legal Actions & Implications*
 - D. *Acknowledgement of Discrepancy*

WHY A HUMAN RIGHTS FRAMEWORK

GENERAL PROBLEM STATEMENT

During the 29th session of the United Nations' (UN) Committee on Economic, Social, and Cultural Rights in 2003, General Comment 15 played a crucial role in the interpretation of the 1966 International Covenant on

* Vivian Coleman is a graduating senior studying international relations and global studies with a focus in international security, and french studies at the University of Texas at Austin. Coleman has been accepted into policy programs at the University of Michigan and the University of Texas for Fall 2025.

Economic, Social, and Cultural Rights (ICESCR). General Comment 15 is pivotal in defining and establishing water as a human right. Within this document, water is explicitly recognized as a fundamental right; it acknowledges that every individual should have physical and affordable access to sufficient, safe, and physically accessible water for personal and domestic use. General Comment 15 goes beyond mere acknowledgment; it outlines the obligations of states to respect, protect, and fulfill this right. It emphasizes the need for non-discrimination, ensuring that water is accessible to all, including marginalized and vulnerable populations. The document provides a comprehensive framework for understanding and implementing the right to water, making it a cornerstone in the global effort to ensure equitable and sustainable access to this vital resource.

Additionally, General Comment 15 offers valuable guidelines for the interpretation of the ICESCR's Articles 11 and 12, which address the right to an adequate standard of living and the right to the highest attainable standard of health,¹ respectively. However, only thirty-nine countries have incorporated this right into their legislation and constitutions.² Notably, the United States and the United Kingdom abstained from voting, showcasing their distaste for an international standard.

The United Kingdom Parliament stated there is no sufficient legal basis under international law to "declare" or "recognize" water and sanitation as independent human

¹ U.N. G.A. Res. 64/292 (Jul. 28, 2010).

² Mia DiFelice & Mary Grant, *We Have a Right to Water. The U.S. Has Not Delivered*, FOOD & WATERWATCH, (March 16, 2023), <https://www.foodandwaterwatch.org/2022/09/15/we-have-a-right-to-water-the-u-s-has-not-delivered/#:~:text=The%20United%20States%20has%20failed%20to%20follow%20suit.,made%20water%20a%20human%20right>.

rights.³ The government noted that no consensus exists on the right to water in any UN human rights treaty, nor do these rights appear in customary international law. The responsibility for fulfilling the human right to water lies with individual states, allowing them to determine necessary measures.

Similar to rights mentioned in the ICESCR, the U.K. parliament notes that the right to an adequate standard of living is the responsibility of the individual state within its available resources. The right to water is not an isolated, customary, international right, nor is it derived from other rights, such as the right to life.⁴

The United States approaches the debate similarly, noting that these issues require understanding the U.S. federal system, where state and local authorities primarily promote and have jurisdiction over access to safe drinking water and sanitation.⁵ Despite these legal arguments which contest notions of state sovereignty, a stark reality persists; over 1 billion individuals lack access to a water supply, and billions more lack adequate sanitation, leading to water contamination and associated diseases, exacerbating poverty, and undermining human rights and dignity.⁶

In a society dominated by Western hegemonic powers that often reject the international institutionalization

³ U.K. Foreign & Commw. Off., National Explanation of Vote on UN Human Rights Resolution 64/292, (Jul., 2010).

⁴ *Id.*

⁵ Views of the United States of America on Human Rights and Access to Water, Addressed to the Off. of the High Comm'r of Hum.Rts, (Jun., 2007).

⁶ *OHCHR and the Rights to Water and Sanitation*, OHCHR, (Feb. 23, 2023), <https://www.ohchr.org/en/water-and-sanitation>.

of water and sanitation as fundamental human rights and standards, the struggles faced by marginalized communities worldwide underscore the pressing need for comprehensive and equitable water governance. Across diverse geographical and political landscapes, from Cluj Napoca, Romania, to Pamplona Alta, Peru, and even to Jackson, Mississippi, common themes of water insecurity and human rights violations emerge.

The stories of these communities reveal the profound impact of water-related challenges on vulnerable populations, transcending borders and emphasizing the urgency of establishing international standards to codify access to water and sanitation as an essential human right. Through an in-depth analysis of each case study, this research seeks to shed light on the systemic injustices perpetuated by the lack of a universal recognition of water as a necessity in international laws and standards, and advocates for a paradigm shift towards inclusive and equitable water governance frameworks.

I. JACKSON, MISSISSIPPI, UNITED STATES

A. Problem Statement

On August 29, 2022, torrential rain inundated the Pearl River, which flows through Jackson, MS, causing the water to reach a crest of thirty-five feet. The flooding, in conjunction with the frail infrastructure of a deteriorating water system, overwhelmed the O. B. Curtis Water Plant, resulting in a system-wide failure. Approximately 200,000 residents were left without access to clean water, while spillage contaminated the surrounding waterways with "tens of millions of gallons" of untreated wastewater.⁷ The

⁷ Amanda Klasing, *Mississippi Water Crisis a Failure Decades in the Making*, HUMAN RIGHTS WATCH, (Apr. 25, 2023),

unsanitary water conditions not only led to the closure of schools and businesses within the city but also exacerbated health-related challenges for residents.

On August 30, 2022, President Joe Biden issued an Emergency Declaration, granting federal agencies the authority to intervene and provide temporary relief measures to Jackson's residents. However, despite the federal infrastructure bill signed by President Biden, which allocated seventy-five million dollars to Mississippi, the distribution of these funds remains under state authority. In September 2022, the National Association for the Advancement of Colored People (NAACP) filed a complaint under Title VI of the Civil Rights Act of 1964, urging the US Environmental Protection Agency (EPA) to investigate the impacts of state discrimination on the health and well-being of Jacksonians.⁸ Nonetheless, Human Rights Watch notes that the U.S. does not acknowledge water as a fundamental human right.⁹

As a result, historical patterns of racial disinvestment by the state legislature in underserved, low-income communities persist into 2023, despite citizens' efforts to raise donations and provide funding for predominantly Black districts. Discriminatory structural practices, such as federal funding programs, restrict and diminish access to the resources that local governments require to begin addressing the damage. Despite protests from residents in other states facing discriminatory funding, Jacksonians appear

<https://hrw.org/news/2022/09/02/mississippi-water-crisis-failure-decades-making>.

⁸ JANETTE MCCARTHY WALLACE, ET AL, COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000D, AND 40 C.F.R PART 7 REGARDING DISCRIMINATION BY THE STATE OF MISSISSIPPI GRAVELY AND ADVERSELY IMPACTING THE DRINKING WATER SYSTEM FOR THE CITY AND THE HEALTH AND WELL BEING OF THE PEOPLE OF JACKSON, MISSISSIPPI, 11 (NAACP, 2022).

⁹ Klasing, *supra* note 7.

desensitized to the decades-long struggle for human rights, which endures due to racist ideology and the failure to ensure equity within Mississippi.

B. Background

Before Jackson's latest water crisis, numerous service disruption notices highlighted the faulty water quality and pressure within the city. The residents received water advisory warnings indicating possible contamination of the public water supply with lead and E. coli bacteria. While the current crisis resulted from inadequate funding for essential infrastructure upgrades and tensions between leaders of the predominantly Black, Democratic-led city and white, Republican legislators, Mukesh Kumar, Jackson's Director of Planning and Development from 2017 to 2019, states that the "white flight" phenomenon of the 1960s contributed to Mississippi's water crisis.¹⁰

After the courts mandated the integration of the Jackson school districts, white residents left en masse, causing an "exodus of wealthy whites."¹¹ This exodus reduced the city's population, thereby decreasing the tax revenue needed to upgrade the century-old water system. State investment in the capital city could have assisted Black communities which had been denied access to clean water. However, Republican officials frequently rejected funding for these improvement initiatives.

Instead, they exacerbated conditions in Jackson by blocking local efforts to raise money and implementing sales

¹⁰ Emmanuel Felton & Bryan Pietsch, *Jackson's water crisis comes after years of neglect: 'We've been going it alone'*, THE WASHINGTON POST, (Apr. 25, 2023).

<https://www.washingtonpost.com/nation/2022/08/30/jackson-mississippi-water-crisis-update/>.

¹¹ Wallace, *supra* note 8.

tax revenue, further depriving the local government of the capital needed to revamp the system. Now, census data from 1990 to 2020 indicates that Jackson lost nearly 25% of its population, amplifying the racial divide as more white residents left the city. Recent demographics show that Jackson is now 83% Black and 25% impoverished.¹²

The testimony of Frank Figgers, provided by the NAACP in its complaint to the EPA, confirms the effects of white flight on this marginalized community. Figgers attested that Jackson's infrastructure crisis is a long-standing issue. Having lived in Jackson for more than seventy years, he recalled that water problems persisted for more than half a century before the population shifted to being a majority Black community. Back then, Figgers noted that the local and state governments actively funded the upkeep of the water system when the city was predominantly white. However, "[a]s Jackson's Black population grew, the water problems seemed to worsen."¹³ This gradual deterioration of water infrastructure has given rise to an industry that profits from the community's reliance on plastic water bottles for basic survival tasks such as bathing and cooking. However, due to water bottle shortages and financial constraints, residents have resorted to collecting and boiling rainwater to support their families.

Therefore, the water crisis in August and September of 2022, which persists today despite promises of change, is just one disaster in a series of environmental catastrophes directly affecting those in the city. For example, storms in 2010, 2014, and 2018 caused similar water outages for Jackson residents. The winter storm of February 2021 left tens of thousands of Jacksonians without access to safe,

¹² *Id.* at 22.

¹³ *Id.* at 7.

readily available running water.¹⁴ In 2016, state officials received an alert about elevated lead levels in the public drinking water, exacerbated by their disinvestment.

However, the legislature's priorities remained more focused on collecting consistent payments for a failing system. In 2020, state legislatures received multiple citations from the EPA for failing to use federal funds to maintain the city's primary water treatment plant. These citations also noted that between 2018 and 2020, the city issued about 300 boil water notices (BWNs), confirming an estimated 750 BWNs since 2016.¹⁵ The EPA also stated that the state government was responsible for discharging millions of gallons of raw sewage into the source water. Jackson's Mayor, Chokwe Antar Lumumba, estimated that reversing the neglect and fixing infrastructure would cost about 2 billion dollars.¹⁶

Yet securing funds at the local level proves difficult due to inherent racial bias in the state legislature, which diverts federal funds to white neighborhoods with less need. For example, using federal funds provided by the EPA, state agencies created the Drinking Water State Revolving Loan Fund (DWSRF) to improve existing infrastructure and alleviate existing debt burdens in communities with immediate needs. Instead of using the DSWRF as intended, the state redirected funds to white areas in Mississippi with less demand, awarding Jackson federal funds only three times in the twenty-five years of the program's existence.¹⁷

¹⁴ Wallace, *supra* note 8.

¹⁵ Carol L. Kember, *Emergency Administrative Order, Addressed to City of Jackson Public Water System*, Env't. Protection Agency Doc. SDWA-04-2020-2300 (Mar. 27, 2020).

¹⁶ Klasing, *supra* note 7.

¹⁷ Wallace, *supra* note 8.

C. Legal Actions & Implications

Historically, Mississippi's refusal to allocate adequate federal funds to improve its aging water infrastructure was deeply rooted in racial discrimination. The water supplied to predominantly Black residents violates national drinking water standards, disregarding individuals' rights to safety and health.¹⁸ In fact, the severity of the water crisis triggered emergency declarations at the local, state, and federal levels, prompting the involvement of various agencies such as the Federal Emergency Management Agency (FEMA) and the U.S. Army Corps of Engineers. This crisis also invoked the enforcement authority granted by §§ 1414 and 1431 of the Safe Drinking Water Act (SDWA), empowering the EPA to ensure compliance with drinking water regulations, address violations, and respond to emergencies endangering public health and safety.

In response to these violations, the United States Department of Justice (DOJ) initiated legal proceedings against the city, seeking a range of remedies due to its non-compliance with SWDA. This act, which establishes standards and federal requirements for public water systems across the nation, was allegedly violated by the city. While the complaint primarily focused on the city's inadequate water infrastructure, it also highlighted concerns regarding water quality and safety within Jackson's water system. Following further investigation by the EPA, the complaint revealed that Jackson had exceeded the maximum contaminant level for haloacetic acids, a group of chemicals known to pose significant health risks such as cancer.¹⁹

Thus, corrective measures were implemented to safeguard public health, adherence to regulatory standards,

¹⁸ *Id.*

¹⁹ *Id.*

and enforcement of EPA orders. § 1414 of the SDWA grants the EPA the authority to issue administrative orders and pursue civil actions to rectify such violations. Meanwhile, section § 1431 provides the EPA with the authority to respond in situations involving imminent and significant risks to public health or the environment. Enforcement actions under both sections involve mandating corrective measures, imposing civil penalties, and seeking injunctive relief to ensure compliance.

In correspondence, the EPA notified the city that the identified violations met the criteria for the assessment of civil penalties under 42 U.S.C. § 300g-3(b)(4)(A) of the SDWA. Furthermore, the EPA indicated its intention to pursue appropriate injunctive relief and civil penalties for these violations, including those pertaining to the city's breaches of its National Pollution Discharge Elimination System (NPDES) permit. Despite these notifications and enforcement actions, the city has yet to fulfill the obligations outlined in the Corrective Action Plan (CAP) or achieve compliance with the SDWA and its implementation regulations, warranting the apathy of skeptical Jacksonians who doubt the feasibility of justice and change.²⁰

Mississippi's continued disregard for federal policy carries significant implications not only for public health and safety, but also for the broader relationship between state and federal governments. By persisting in non-compliance with federal mandates such as the Safe Water Drinking Act (SWDA), Mississippi risks exacerbating tensions and undermining the cooperative framework upon which state-federal relations are built. First and foremost, the failure to adhere to federal policy jeopardizes the well-being of

²⁰ *Id.*

Mississippi residents. Ignoring regulations designed to safeguard public health, such as those outlined in the SWDA, exposes communities to various health risks associated with contaminated water. This not only undermines trust in local authorities but also erodes confidence in the ability of the state government to fulfill its duty to protect its citizens.

Moreover, Mississippi's defiance of federal policy strains the relationship between the state and federal governments. Federal laws like the SWDA are enacted to establish uniform standards and ensure consistent protections across the nation. When states fail to comply, it creates friction and challenges the authority of the federal government to enforce its regulations. This can lead to legal battles, as evidenced by the initiation of legal proceedings against the city of Jackson by the DOJ. Additionally, continued non-compliance may result in federal intervention, further complicating the state-federal dynamic. Federal agencies, such as the EPA, may escalate enforcement actions and impose sanctions on the state, potentially exacerbating tensions between state and federal authorities.

In the broader context, Mississippi's resistance to federal policy can set a precedent for other states, creating a ripple effect that undermines the effectiveness of federal regulations nationwide. This precedent challenges the notion of a unified approach to governance and weakens the foundation of cooperative federalism, wherein states and the federal government work together to address common challenges. To mitigate these tensions and address the underlying issues, it is imperative for Mississippi to prioritize compliance with federal regulations and work collaboratively with federal authorities to ensure the well-being of its residents.

While domestic policies are essential in addressing racial discrimination, as seen in *United States v. City of Jackson (1963)*, domestic policies often fall short in eliminating these racial inequities and holding governments accountable for these biases. In these instances, it is imperative that the global community bands together and recognizes the significant role that international actors can play in addressing these systemic issues. Most international treaties, like the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), are non-binding in nature, meaning that legally, signatories like the United States are not obligated to adhere to its provisions. However, the principle of the ICERD provides a framework for dialogue amongst states, international organizations, and civil society actors which can exert public pressure and indirectly enact meaningful reforms. By monitoring state compliance and engaging in dialogue with policymakers, organizations like the NAACP will be able to leverage the “moral authority” of the ICERD to push for legislative and policy changes at the national level.

II. CLUJ NAPOCA, ROMANIA

A. Problem Statement

On December 15, 2010, the Cluj-Napoca municipal authorities mandated Coastei Street Roma residents to submit social housing forms by the next day, coercing fifty-six families into signing lease agreements without allowing them to review the terms or view alternative accommodations. On December 16, 2010, as these families prepared to relocate, the local municipal authorities, accompanied by several hundred law enforcement officers, arrived with bulldozers and trucks. They promptly demolished the homes of 270 individuals, including 106

minors, at the Coastei Street Centre in Cluj Napoca, Romania, leaving them displaced.²¹

Linda Greta Zsiga recollects a frigid December morning marked by the unwelcome presence of police, city officials, and bulldozers at her family's doorstep. Zsiga emphasizes that the Roma community on Coastei Street had established a well-integrated presence for over two decades, spanning multiple generations. They consistently fulfilled financial obligations, including rent and utilities for their publicly owned residences, while their children actively participated in local educational institutions.

Nevertheless, an abrupt displacement transpired, relegating them to what Zsiga metaphorically characterizes as the city's "trash heap."²² "They considered us garbage, not humans," said Zsiga, "and they thought we deserve[d] to live there."²³ The Coastei community was not provided with a reason for their forced eviction from these "places of high economic value." But Zsiga has no doubt why they were moved. "They wanted to 'clean' Cluj of Roma," she said. "Now very few Roma still live in the city".²⁴

As of 2021, over a decade has elapsed since the eviction of Roma families from Coastei Street in Cluj-Napoca, and their subsequent relocation near the city's waste dump in Pata Rât. The children who experienced displacement in 2010 have now matured into adults with families of their own, yet they still face the looming threat of eviction at the behest of the Cluj-Napoca City Hall, under the

²¹ *TAKEN FROM THE CITY: ROMANIAN ROMA EVICTED TO A RUBBISH DUMP*, (European Roma Rights Centre, 2012).

²² Vlad Odobescu, *Roma fight environmental racism*. DEUTSCHE WELLE, <https://www.dw.com/en/living-in-a-sea-of-trash-roma-fight-environmental-racism-in-romania/a-58827229>.

²³ *Id.*

²⁴ *Id.*

administration of Mayor Emil Boc. Despite their efforts to secure social housing within the municipality, they find themselves unable to continue residing with their parents in the homes, which lack basic access to water and sanitation. City authorities have ordered these parents to remove their adult children from their leases, unfairly stigmatizing them as abusive or unauthorized occupants, and demanding compensation.²⁵

The documents sent by the mayor's office to the families, executors, and the court bear the signatures of several officials, including an inspector responsible for the area, Iulia Ardeuş from the Patrimony and Property Records Department, Raluca Ferezan from the Space and Land Administration Service, and Mayor Emil Boc. Currently, four families find themselves in this situation.

This issue stems from the relocation of families from Coastei Street to Pata Rât, which was deemed discriminatory by the National Council for Combating Discrimination (CNCD) in decision no. 441 dated November 15th, 2011.²⁶ CNCD determined that the evacuation, relocation, and isolation of the Roma ethnic community near the landfill and chemical waste station of the city constituted direct discrimination. As a result, Cluj City Hall was fined 8000 lei.²⁷ Additionally, the CNCD recommended that measures be taken to ensure living standards for the Roma community in the Pata Rât area.

²⁵ *Appeal to the Romanian State Authorities and International Organizations: Increased Risk of Eviction in Pata Rât of Cluj-Napoca!*, HOUSING AND LAND RIGHTS NETWORK, <https://www.hlrn.org/activitydetails.php?id=p2lqZQ==>.

²⁶ SANDU D. GERGELY, ET. AL, DISCRIMINAREA IN ACCESUL LA SERVICIILE PUBLICE (Intervin, 2016).

²⁷ *Appeal to the Romanian State Authorities, supra*, note 25.

Ultimately, the struggle for water justice in Pata Rât is a microcosm of broader issues of social inequality and environmental degradation. By upholding water as a fundamental human right and addressing the root causes of marginalization, progress can be made towards a future in which all communities, irrespective of ethnicity or socio-economic status, enjoy access to clean water, secure housing, and dignified living conditions.

B. Background

Pata Rât, situated in Cluj County, Romania, is the country's largest landfill and has long been home to various Romani communities. Cluj-Napoca, the city near which Pata Rât is located, hosts four significant Roma communities, with Pata Rât itself accommodating approximately 2,000 people. Roma residents began settling in Pata Rât in the late 1960s and early 1970s, initially driven by poverty to work as waste pickers. Subsequent waves of evictions, particularly during the real estate boom in the 2000s, saw an influx of Roma residents. The negative perceptions of Romani communities in Cluj-Napoca stem primarily from their residence on the site of the city's rubbish dump, a factor contributing to their marginalization.

The landfill, operational since 1973, serves as the sole waste disposal site for the city. Despite its closure, two temporary storage landfills, established in 2015, continue to expand, indicating unresolved waste management challenges. In fact, in 2010, municipal authorities allocated accommodations to forty families in substandard modular shelters measuring eighteen square meters each. However, the remaining sixteen families were not afforded housing, exacerbating overcrowding within the area. These housing units consisted of four individual living spaces conjoined by

a singular shared bathroom for communal use by seventeen residents. Heating inside the shelter was solely provided through wood burning stoves, and eleven of the properties were without electricity. Notably, each block of four modular homes shared one water connection, which provided only cold water.

Widespread negative attitudes toward the Roma persist in Romania, with seven out of ten Romanians expressing distrust toward this ethnic minority. Between 20% and 30% of respondents believe that Roma individuals have excessive rights, endorse state-sanctioned violence against them, or advocate that discrimination and hate speech targeting the Roma should go unpunished. Such sentiments mirror broader patterns of discrimination across Europe, where Roma communities face denial of basic civil rights, exclusion from employment and public services, and spatial marginalization to areas lacking adequate infrastructure, including water, sanitation, and waste management.

Research underscores the disproportionate exposure of Roma communities to environmental degradation, pollution, and health risks arising from waste dumps and landfills. A study by the European Environmental Bureau (EEB) on environmental racism against Roma communities in Central and Eastern Europe highlighted this disparity.²⁸ Furthermore, a 2012 report by the UN Development Program revealed that 22% of adults in Pata Rât suffered from chronic diseases or disabilities, indicating serious health challenges in the community.²⁹

C. Legal Actions & Implications

²⁸ Odobescu, *supra* note 22.

²⁹ *Id.*

The living conditions of Roma communities in Pata Rât raise serious concerns regarding the enforcement of legal norms pertaining to hygiene, public health, and human rights. Despite the Romanian Minister of Health's insistence, as outlined in Article II of Ordin nr. 119/2014, that hygiene and public health norms are obligatory for all public and private entities and the population as a whole, there persists a significant disparity between legal requirements and their practical enforcement, resulting in precarious conditions for marginalized communities. Additionally, Article II reaffirms that the locations of residential buildings must be livable areas that ensure safety and healthy land.

Subsection 4 of Article II stipulates that regions deemed susceptible to "natural or anthropogenic risks" shall be subject to prohibitions on the construction of residential or socio-cultural structures until such risks are mitigated.³⁰ An environmental assessment conducted in the vicinity of Pata Rât highlights the presence of surface water laden with substantial pollutant concentrations, categorizing the environmental impact as a "degraded environment, improper for life."³¹ Additionally, this investigation revealed that pharmaceutical companies headquartered in Cluj-Napoca persist in disposing waste at the site, notwithstanding the European Union's official closure of the dump in 2019 due to its failure to adhere to EU waste management obligations.³²

³⁰ Sorina Pinte, *Ordinul Nr. 994/2018 pentru Modificarea și completarea normelor de igienă și sănătate publică privind mediul de Viață al populației, aprobate Prin Ordinul Ministrului Sănătății Nr. 119/2014*, LEGE5, <https://lege5.ro/gratuit/gi4tcmbqgaza/ordinul-nr-994-2018-pentru-modificarea-si-completarea-normelor-de-igiena-si-sanatate-publica-privind-mediul-de-viata-al-populatiei-aprobate-prin-ordinul-ministrului-sanatatii-nr-119-2014>.

³¹ TAKEN FROM THE CITY, *supra* note 21.

³² Odobescu, *supra* note 22.

Furthermore, Article 8 within this same ordinance states that the arrangement of areas intended for rest must ensure drinking water supply installations as well as public toilets and places for water collection.

Legal recourse, including petitions, appeals, and court actions have been pursued by advocacy groups and affected communities. For example, the European Roma Rights Centre (ERRC) actively supports individuals presently residing in Pata Rât through numerous domestic legal proceedings against the municipality. Concurrently, the ERRC is pursuing legal avenues, seeking damages and relocation, and has initiated proceedings to obtain public information and documents pertaining to the eviction and construction of modular houses. Non-governmental organizations, including the Desire Foundation and the Coastei Roma Community Association, have formally lodged a complaint with the Anti-Discrimination Council, alleging enduring discrimination by the Cluj-Napoca Municipality.

Zsiga and fellow advocates from the Coastei camp have established an association collaborating with other NGOs to advocate for housing solutions in Pata Rât. Simultaneously, they are pursuing legal action against the authorities regarding the eviction.³³ However, the legal recourse available to these families, including appeals for social housing and challenges to eviction orders, has been met with limited success.

“Ordinea de zi a ședinței Camerei Deputaților de luni, 5 decembrie 2011,” which translates to the Agenda for the session of the Chamber of Deputies on Monday, December 5th, 2011, shows the extent of these agencies’ success in

³³ *Id.*

regard to legislation. Legislative proposal 26, which called for the stimulation and support for house construction as per PI - x 423/2011 of ordinary law was rejected by the Romanian senate.³⁴ So, while CNCD decisions have highlighted the discriminatory practices of local authorities, implementation and enforcement mechanisms remain insufficient to effectively protect the rights of Roma communities.

III. PAMPLONA ALTA, LIMA, PERU

A. Problem Statement

In Lima, Peru, the water crisis is evident in the stark contrast between privileged districts, characterized by flourishing pools and gardens, and marginalized pueblos, where more than 1.5 million people lack access to water and sanitation.³⁵ The government's attempt to privatize water services through Supreme Decree no. 214-2019-EF has ignited protests, as citizens fear increased tariffs and diminished accessibility, particularly in impoverished regions called "pueblos juvenes" or "asentamientos humanos."³⁶

On September 26th, 2019, thousands of concerned workers and citizens peacefully protested against the decree establishing that "all shares of state owned companies can be sold, which include SEDAPAL."³⁷ SEDAPAL, also known

³⁴ Pinteá, *supra*, note 28.

³⁵ Siobahn Wagner and Sebastian Castaneda Vita, *Lima's Poorest Residents Are Buying Drinking Water from a Truck*, BLOOMBERG <https://www.bloomberg.com/news/features/2021-02-05/lima-s-poorest-residents-are-buying-drinking-water-from-a-truck>.

³⁶ Jake Kincaid, *Off the Grid: Barriers to Water Access in Lima's Slums*, MEDLIFE, <https://www.medlifemovement.org/medlife-stories/global-topics/538-water-access-in-lima/>.

³⁷ *Peruvians Protest Against Water Privatization*, PEOPLE'S DISPATCH, <https://peoplesdispatch.org/2019/09/28/peruvians-protest-against-water->

as the “Servicio de Agua Potable y Alcantarillado de Lima” is a Peruvian state-owned water utility that provides water and sewage services to the people of Lima and Callao. The non-profit organization, Single Union of Workers of Drinking Water and Sewage Service of Lima (SUTESAL), consistently collaborates with diverse Congressional groups to safeguard the constitutional human right to water.

Luisa Eyzaguirre, general secretary of SUTESAL remarked, “Unfortunately we still have more than 700,000 people who do not have access to water in Lima and Callao. And almost 10 million people nationwide who don’t have this resource. A private company will never operate in areas that are not profitable for it and it is precisely these areas that could not afford a higher price service.”³⁸

In Lima, over half a million people rely on private water vendors that can charge up to 12 times the public utility rate.³⁹ Water trucks mainly serve accessible areas, forcing residents in other communities to undertake challenging journeys to obtain water. The economic burden is significant, with public utility users paying 1.3 sols (\$0.40) per cubic meter, while trucked-in water costs around 20 sols (\$6), disproportionately affecting the impoverished.⁴⁰ The quality of trucked-in water is often compromised, sourced from polluted streams, and stored unsafely, leading to health issues, particularly among children. Communities lacking land titles face a heightened water access challenge,

[privatization/](#).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Kayla Ritter, *Water Access in Lima Complicated by Inequality and Climate Uncertainty*, CIRCLE OF BLUE,

<https://www.circleofblue.org/2018/south-america/water-access-in-lima-complicated-by-inequality-and-climate-uncertainty/>.1

remaining unconnected to Lima's public water utility due to inadequate infrastructure.

Informal settlements, a consequence of mass rural-to-urban migration, compound the issue. These settlements lack formal public water networks, leading to water mismanagement and unequal distribution. The city's water trucks, a lifeline for many, often fail to reach remote areas, forcing residents to endure long journeys for water, which they carry home. The consequences are dire, with untreated water sometimes sourced from polluted streams.

B. Background

Peru faces substantial challenges in providing safe drinking water, as it ranks among countries with the lowest percentage of their population accessing safe water in the Latin American region. A study spanning from 2008 to 2018 revealed a nationwide increase in access, from 47% to 52%, but significant disparities persist, especially concerning city size and socioeconomic status.⁴¹ While Peru possesses abundant freshwater resources, disparities in access are evident. The percentage of the population with access to chlorinated water stands at 87%, lower than the South American regional average of 95%. Urban-rural divides further exacerbate discrepancies, with 85% in urban areas compared to a mere 9% in rural areas.⁴²

Lima, the second-largest desert city globally, grapples with severe water scarcity, leading to almost 1.5 million residents lacking running water. Water truck

⁴¹ Akram Hernández-Vasquez, et al, *Inequalities in Access to Safe Drinking Water in Peruvian Households according to City Size: An Analysis from 2008 to 2018*, 20 INT'L J. EQUITY IN HEALTH AM. Q., (2021).

⁴² *Id.*

deliveries, often expensive, become the primary source of access.⁴³ Environmental concerns arise from contamination in waterways due to mining activities, affecting regions like the Mantaro Basin, Lake Titicaca, and Lake Junín. In the arid Ica Valley, water scarcity results from agricultural demands, with farming conglomerates extracting over 90% of groundwater for crops, leaving residents with limited water access.

The impact of these challenges is often undocumented, compounded by a lack of data on water availability and expenses, hindering efforts to address the status quo. The absence of transparency poses a challenge in holding both the state and water companies accountable. Fenna Hoefsloot, a Ph.D. candidate specializing in urban infrastructure, emphasizes the critical role of transparency, stating, “If you don’t have an at-home connection and no water meter, you won’t be represented in the data collected by the water company. A lack of transparency makes it difficult to hold the company accountable.”⁴⁴

In her research, she uncovered a dusty, non-digitized master plan from 1960, laying the foundation for today’s water distribution system. Hoefsloot contends that this ingrained mindset in Peru’s government and companies embodies racism, discrimination, classism, and machismo, urging a necessary shift in perspective. She asserts, “It’s ingrained in our institutional system’s DNA, and it’s time for a mindset change.”⁴⁵

⁴³ Ben Miller & Emilie Sweigart, *How Countries Manage Water: Peru*, AM. Q., (2019).

⁴⁴ *Fighting Food Waste, Economic Insecurity, and Climate Change through Virtual Cold Chain Application*, DATA.ORG, <https://data.org/stories/virtual-cold-chain/>.

⁴⁵ *Id.*

In Lima, water distribution exhibits stark inequality, mirroring the broader trend in Latin America, where nineteen of the world's thirty most unequal cities are located.⁴⁶ The privatization of water, proposed as a solution to governmental failures, has sparked international debates regarding its effectiveness and ethics. Despite improvements in water and sanitation access, Lima's rapid growth, particularly in informal settlements, poses challenges. A literature review conducted from August to December 2019 calls for faster formalization of the water system, improved water organization, increased political will, and innovative water conversion methods to address the complex issues surrounding water access in Lima.⁴⁷ While water availability is considered a human right, the disparities persist despite Peru ranking 20th globally in water availability. With 70% of the population residing on the desert coast, accessing only 2% of the country's total water availability, Lima's unique geographical and climate challenges contribute to the ongoing water crisis.⁴⁸

C. Legal Actions & Implications

Lima, Peru, grapples with a complex web of challenges in the realm of water governance and access. A critical turning point occurred in 2011 when the Peruvian National Congress conducted a thorough investigation into the "Agua Para Todos" initiative, unearthing significant mismanagement and resulting in allegations of fraud. This inquiry revealed a stark contrast between the ambitious goals

⁴⁶ Ritter, *supra* note 40.

⁴⁷ Natalie Burg, et al., *Access to Water for Human Consumption in Lima, Peru: An Analysis of Challenges and Solutions*, (UNESCO, 2nd Int'l Conf. on Water, Megacities and Global Change), <https://en.unesco.org/sites/default/files/burg.pdf>.

⁴⁸ *Id.*

of the initiative and the stark realities of its implementation. The findings underscored the inherent challenges in ensuring equitable and efficient water services, laying bare the vulnerabilities within the existing governance structures.

The government's recent move to privatize water services, as evidenced by Supreme Decree no. 214-2019-EF, reflects a significant shift in policy. This decision has been met with widespread protests, as citizens fear the potential consequences, including increased tariffs and reduced accessibility, particularly in marginalized areas.⁴⁹ This privatization effort raises questions about the government's commitment to the principles of the UN, given that access to clean water is recognized as a fundamental human right by the organization. The government's actions underscore the pressing need for effective governance and the importance of upholding human rights standards in the pursuit of water privatization.

The Peruvian water resources law of 2009, known as Ley de Recursos Hídricos 29338, adds another layer to this legal recourse for water rights. While the law aimed for integrated water resources management, it carried implications for the marketization of water rights.⁵⁰ This shift necessitates a closer examination of the public-private alliances that govern water resources in Peru. The tension between viewing water as a national common good, as stated in the law, and the potential marketization of water rights poses challenges that demand scrutiny. This duality reflects a broader global trend where the commodification of water

⁴⁹ Kincaid, *supra* note 36.

⁵⁰ Astrid Oberborbeck Anderson, *Assembling Commons and Commodities: The Peruvian Water Law between Ideology and Materialisation*, 12, WATER ALTERNATIVES J. 470 (2019) (marketization of Peruvian water rights).

services intersects with the preservation of water as a shared resource.

Law No. 30588 (2017) represents a recognition of the right to progressive and universal access to drinking water, enshrined in the Peruvian Constitution through the incorporation of Article 7-A.⁵¹ Despite this legal recognition, the persistent constraints in state infrastructure, financial resources, and political environment will present ongoing challenges to effective water provision. The struggles faced by entities like SEDAPAL, the major utility managing water infrastructure, highlight the difficulty of guaranteeing access to all citizens. The paradox of Peru, as a founding member of the UN, grappling with internal hurdles in ensuring a fundamental human right, underscores the complexity of the institutional landscape surrounding water governance in Lima.

IV. GAZA CITY, GAZA

A. Problem Statement

On October 7th, 2023, Hamas, the Islamic Resistance organization that has held dominion over the Gaza Strip since 2007, perpetrated a grave attack in Southern Israel, resulting in the abduction of over 240 individuals. In response, the Israeli government implemented a cessation of water supply to Gaza. Even prior to the outbreak of this conflict in 2023, the Palestinians living in Gaza were already facing a profound water scarcity issue, exacerbated by its geographical location and geopolitical complexities.⁵²

⁵¹ Burg, *supra* note 47.

⁵² Wilson et al., *Gaza's Limited Water Access, Mapped*, CNN, <https://www.cnn.com/2023/10/18/middleeast/gaza-water-access-supply-mapped-dg/index.html>.

Situated in a region known for its hot and arid weather and water scarcity, the Occupied Palestinian Territory has experienced an “increase in average temperature over the past fifty years.” Half of the Palestinian wells in the West Bank have dried up over the last few years, and the occupation has increased land scarcity, territorial fragmentation, and urbanization; “urban populations in the Occupied Palestinian Territories have nearly tripled in the past 25 years, contributing to the reduction of local groundwater recharge.”⁵³ Coupled with the undue strain on local groundwater reservoirs, Israeli actions have also imposed restrictions on access and control over natural resources, including water. An estimated 1.2 million out of Gaza's 2.2 million residents faced acute food insecurity, with over 80% reliant on humanitarian aid. Moreover, as highlighted by the 2021 UN High Commissioner, 97% of Gaza's populace depended on informal and unregulated sources such as private water tankers and small-scale desalination plants for potable water, indicative of a dire situation.⁵⁴

Since gaining control of crucial aquifers in 1967, Israel has wielded significant influence over water management, notably in the West Bank and Gaza Strip. This control, coupled with the expansion of Israeli settlements, has increased tensions and obstructed progress toward equitable water distribution. Israel maintains comprehensive authority over Gaza, governing the movement of people and goods, territorial waters, airspace, infrastructure, and population registry. Consequently, Gazan Palestinians,

⁵³ Rep. of the U.N. High Comm’r. For Hum. Rts., *Allocation of Water Resources in the Occupied Palestinian Territory, including Jerusalem*, U.N. Doc. A/HRC/48/43 (Oct. 15, 2021).

⁵⁴ *Id.*

subjected to an unlawful closure for 16 years, are heavily reliant on Israel for essential resources including fuel, electricity, medicine, food, and water.

According to the Palestinian Water Authority, approximately 90% of Gaza's water was sourced from groundwater wells in 2021, with the remainder procured from desalination plants or purchased from Israel's national water company, Mekorot. UN findings from the Multiple Indicator Cluster Survey 2019-2020 (PMICS6) reveal that while 99.8% of households in Palestine utilized improved drinking water sources, only 39.5% have access to safely managed water resources, defined as ones without *E. coli*.⁵⁵

Disparities of sanitary water access are stark within the territory, with figures notably higher in the West Bank (66.2%) compared to the Gaza Strip (4.3%).⁵⁶ Alarming, nearly one in five Palestinian households utilize water sources contaminated with *E. coli*. To ensure that Israel upholds its responsibilities as an occupier of the Palestinian Territories and acknowledges Palestinian right to water, addressing these discrepancies necessitates delinking water from its security concerns and mitigating the profound humanitarian toll of inadequate water access and sanitation.

B. Background

Since 1967, the dynamics of Israeli-Palestinian relations have been deeply influenced by both conflict and

⁵⁵ *Vulnerable children and communities in the State of Palestine access water, sanitation and hygiene services thanks to UNICEF's Multi-Sectoral Work and System Strengthening*, UNICEF, <https://www.unicef.org/sop/stories/vulnerable-children-and-communities-state-palestine-access>.

⁵⁶ *The Palestinian Central Bureau of Statistics (PCBS), and the Palestinian Water Authority (PWA) Issue a joint Press Release on the Occasion of World Water Day; on March 22th, 2021*, PCBS, <https://www.pcbs.gov.ps/post.aspx?lang=en&ItemID=3944>.

collaboration over shared water resources. With the occupation in 1967, Israel exerted complete military control over all water resources in the Occupied Palestinian Territory, as stipulated by Military Order No. 92 of 1967.⁵⁷ This control extended to the prohibition of Palestinians from constructing new water installations or maintaining existing ones without obtaining a military permit—a restriction not imposed on Israeli settlers governed by Israeli law. Furthermore, Israel's assertion of control over the Eastern recharge zone of the western Mountain aquifer and the southern Coastal aquifer, following the occupation of the West Bank and Gaza Strip, facilitated Mekorot in assuming ownership of West Bank water supply systems by 1982.

The 1993 Declaration of Principles on Interim Self-Government Arrangements (Oslo I) and the 1995 Interim Agreement on the West Bank and Gaza Strip (Oslo II) presented an opportunity to transition from conflict to cooperation over water resources. Codified in the Oslo Accords, water sharing was recognized as crucial for human security, economic development, and regional cooperation. However, while some water governance powers were devolved to the Palestinian Authority, Israel retained primary control over West Bank waters. Under the Oslo II accords, approximately 80% of aquifer waters were allocated for Israeli use, leaving only 20% for Palestinian use. Additionally, the Oslo Accords called for the creation of a Joint Water Committee (JWC) during an interim period before the final status negotiations, composed of an equal number of members from Israel and the Palestinian Authority. The JWC's functions included the coordinated

⁵⁷ Uzi Narkiss, M.O. 92, ISRAEL LAW RESOURCE CENTER
<https://web.archive.org/web/20140112172151/http://www.israellawresourcecenter.org/israelmilitaryorders/fulltext/mo0092.htm>.

management of water resources and water and sewage systems in the West Bank.

However, despite being labeled as cooperation, this arrangement was often viewed through a dominating lens, with Palestinians effectively “consenting to their own colonization”.⁵⁸ Thus, the approval process for new projects in the West Bank, subject to Israeli authorities, hindered true cooperation. Jan Selby, an academic at Sussex University, noted that “Israel made approval of improvements to Palestinian water supplies conditional upon [the] Palestinian Authority[’s] (PA) approval of new water facilities for settlements.”⁵⁹ Thus, these illegal settlements under international law, further complicated the situation, impeding Palestinian statehood. Selby supports this argument noting that “the PA’s role as ‘subcontractor’ — practiced most visibly for internal security [...] ‘effected a disarticulation of power and responsibility — enshrining Israeli power over decision making and key resources, whilst delegating to the PA responsibility for local water supplies and lesser value resources.’”⁶⁰ Now, most of Gaza’s water comes from the Coastal Aquifer, which suffers from over-extraction, saltwater intrusion, and sewage infiltration, and is on the brink of collapse.

C. Legal Actions & Implication

The Oslo II Agreement, signed in 1995, delineated key provisions regarding water rights in the West Bank. Annex 3 within the subsections of Appendix 1 and Article 40

⁵⁸ Ian Black, *Water under the Bridge: How the Oslo Agreement Robbed the Palestinians*, THE GUARDIAN, <https://www.theguardian.com/world/on-the-middle-east/2013/feb/04/israel-palestinians-water-arafat-abbas>.

⁵⁹ *Id.*

⁶⁰ *Id.*

notes that the “Water Agreement” recognized the significance of safeguarding Palestinian water rights in the West Bank and emphasized the necessity of developing additional water resources to meet the population's needs.⁶¹ The first principle of Article 40 reads, “Israel recognizes the Palestinian water rights in the West Bank. These will be negotiated in the permanent status negotiations and settled in the Permanent Status Agreement relating to the various water resources.”⁶² However, the expected final status negotiation as well as the status of water rights within the region has stalled since 2000.⁶³ Although Oslo II actively acknowledges Palestinian water rights, this stalemate in policy and negotiations has negatively impacted Palestinian access to water resources, allowing water to be utilized as a tool to ensure Israeli national security at the expense of the Palestinian people.

In contrast, while the Oslo Accords recognize the humanity of the Palestinian people, Military Order No. 92, issued by the Israeli military shortly after the Six-Day War in 1967, asserted comprehensive control over water resources in the Occupied Palestinian Territory. This order granted the Israeli military authority to regulate and manage water sources, installations, and infrastructure within the occupied territories, effectively placing water resources under Israeli military jurisdiction. Notably, Military Order No. 92 imposed stringent regulations on Palestinian access to water, necessitating permits for water-related activities and thereby

⁶¹ *Water in Israel: Overview of Israel-Palestinian Water Issue*, JEWISH VIRTUAL LIBRARY, [https://www.jewishvirtuallibrary.org/overview-of-israel-palestinian-water-issue#:~:text=The%20Palestinian%20Authority%20consumes%20approximately,Water%20Agreement%20\(31%20MCM\).](https://www.jewishvirtuallibrary.org/overview-of-israel-palestinian-water-issue#:~:text=The%20Palestinian%20Authority%20consumes%20approximately,Water%20Agreement%20(31%20MCM).)

⁶² *Id.*

⁶³ Black, *supra* note 58.

limiting Palestinian autonomy over water resources. Although the issuance of the Order received wide scrutiny and was criticized by human rights organizations and international legal experts, it remains permissible within the context of the Israeli government.

Not only are the implications of these legal actions profound, but they also juxtapose the other, both acknowledging and denying Palestinian human rights based on the Israeli national agenda. Despite the recognition of Palestinian water rights in agreements that were facilitated by the global community, such as Oslo II, the continued enforcement of military orders like No. 92 has hindered Palestinians' ability to meet their basic water needs. Furthermore, the lack of substantive response from Israeli authorities to address concerns raised by international human rights bodies exacerbates the situation, perpetuating inequalities in access to water resources.

D. Acknowledgement of Discrepancy

It is essential to acknowledge that the inclusion of Gaza City as a case study in this research does not equate the Israeli-Palestinian conflict to the situations in Cluj Napoca, Pamplona Alta, and Jackson. Instead, Gaza was selected as a case study due to its shared theme of water insecurity, the violation of human rights, and institutional neglect related to water access.

All four case studies demonstrate a shared experience of water scarcity, albeit stemming from different underlying causes. In Cluj Napoca and Pamplona Alta, inadequate infrastructure and resource mismanagement contribute to water scarcity, disproportionately affecting marginalized communities. Similarly, Gaza City and Jackson face water insecurity exacerbated by conflict, geopolitical complexities,

and systemic neglect. Despite the contextual differences, marginalized populations in each case study bear the brunt of water scarcity, highlighting the pervasive nature of social inequality and discrimination in accessing essential resources.

While the circumstances in Gaza City are distinct from those in Cluj Napoca, Pamplona Alta, and Jackson, the commonalities lie in the profound impact of water-related challenges on vulnerable populations. Like the other case studies, Gaza City highlights the consequences of water scarcity and restrictions on access, emphasizing the urgent need for international standards to codify water as a necessity in international laws and standards.

WHY A HUMAN RIGHTS FRAMEWORK

The case studies of Cluj Napoca, Romania, Pamplona Alta in Lima, Peru, Gaza City in Gaza, and Jackson in Mississippi collectively underscore the urgent need for international standards that codify water as a fundamental human right within international laws and standards. These cases present distinct yet interconnected challenges regarding water scarcity and human rights violations. While the context of each case exhibits unique geopolitical dynamics and causes of water insecurity, commonalities emerge in the marginalized status of affected communities and their inherent access to water. Understanding these similarities and differences is essential for formulating effective interventions and advocating for universal access.

Each case vividly illustrates the dire consequences faced by marginalized communities when access to clean water is compromised or denied due to various socio-political factors. From forced evictions and discriminatory practices in Cluj Napoca, Romania, to privatization threats

and disparities in Lima, Peru, deliberate withholding of water as a punitive measure in Gaza City, and systemic neglect leading to compromised infrastructure in Jackson, Mississippi, these instances illuminate the pervasive violations of basic human rights linked to water access. In response to these challenges, the establishment of international standards is imperative to safeguard the rights of vulnerable populations and ensure equitable access to clean water, irrespective of geographical location, socioeconomic status, or political circumstances. Although international human rights standards are often met with skepticism and resistance, particularly within Western hegemonic powers, the call for codifying water and sanitation as fundamental human rights in international laws and standards becomes increasingly urgent.

As scholars like Gay McDougall assert, international human rights standards offer a powerful framework for addressing the limitations of domestic legal systems and advocating for transformative change. By reframing water access as a human right, communities can leverage litigation and international advocacy to hold governments and institutions accountable for ensuring universal access to clean water and sanitation. This strategic approach transcends the confines of domestic legal frameworks, providing a platform for collective action and systemic change. These case studies demonstrate that existing legal and political frameworks are insufficient in safeguarding the universal right to water, necessitating a holistic approach that integrates legal structures, grassroots movements, and international cooperation.

The global community must recognize water as a fundamental human right and take collective action to codify this right within international laws and standards. By

embracing a human rights approach to water governance, humanity can transcend geographical and political boundaries to ensure equitable access to clean water and sanitation for all, despite circumstance and conflict. Through sustained advocacy and collective mobilization, we can build a more just and inclusive world where the right to water is universally recognized and upheld.