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Davis Journal of Legal Studies Editorial Staff

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Letter from the Editor-in-Chief

Dear Reader,

It is with great enthusiasm that I present to you Volume I of Davis Journal of Legal Studies, an undergraduate academic journal that publishes legal research, analysis, and commentary.

Davis Journal of Legal Studies (DJLS) was founded in June 2020 at the University of California, Davis. Modeled after a law review, we are a student-run organization that publishes an annual volume containing undergraduate legal research. Davis Journal of Legal Studies is committed to contributing to public legal scholarship, creating a community of undergraduate legal scholars, and providing valuable opportunities in publication to undergraduate students. I hope that Volume 1 represents our commitments and furthers undergraduate research in the legal field.

I greatly appreciate the generous support Davis Journal of Legal Studies received from the University of California National Center for Free Speech and Civic Engagement and the UC Davis Undergraduate Research Center. I would also like to acknowledge my advisors, Dr. Lisa-Jane Klotz and Ms. Kate Andrup Stephensen. Thank you for your guidance, patience, and encouragement throughout this project. Finally, I must thank the Davis Journal of Legal Studies editorial staff for their work. In these turbulent and chaotic times, it has been a pleasure and privilege to work with this team. I am proud of every member of the editorial staff, and I am proud to present our first volume to you.

Education is an enriching, powerful tool; it is the foundation for public good, social progress, and interpersonal leadership. Undergraduate students must have access to educational experiences that provide them the freedom to learn about, explore, and pursue their interests, and we are committed to championing this philosophy. Through publication, collaboration, and the exploration of past, present, and evolving legal research, my hope is that Davis Journal of Legal Studies will serve as an educational resource that furthers the advancement of public discourse and legal studies scholarship.

Good reading,
Emma Tolliver
Founder & Editor-in-Chief
Davis Journal of Legal Studies, Volume I: Spring 2021

Waters of the United States Controversy

By Cayley Chan

Cayley Chan is a student at the University of California, Davis. She is studying Environmental Policy Analysis and Planning and Political Science - Public Service. She is an Involvement Mentor at the Center for Student Involvement and President of Prytanean Women's Honor Society. Cayley aspires to become an environmental lawyer.

The purview of the Clean Water Act has and continues to be a widely contentious topic with regard to the varied interpretations of the vague language used within the Act and the vacillating extensions of the Act that occur with the changes in presidential administrations. This paper intends to analyze the lawsuit against the Trump administration's attempt to roll back long-standing water quality legislation through the Recodification Rule. The main issues that arise in this litigation are the legality of the Rule under the Administrative Procedures Act and the statutory applicability of the Rule under the Clean Water Act. Finally, the analysis completed in this paper suggests that the likely outcome of the case will be in favor of the plaintiffs or considered moot under the recent change in presidential administrations.

Introduction

The Clean Water Act (CWA) was established in 1972 by the United States Congress with the purpose of ensuring the protection of bodies of water in the United States by establishing a framework through which water pollution can be regulated.[1] However, after this framework was put into practice, some of the terms and phrases employed within the body of the Act were found to be ambiguous and have been cause for debate about the extent of the Act's jurisdictional authority. In one of the most contentious issues, the phrase "waters of the United States" is

[1] Clean Water Act 33 U.S.C § 1251-1387.

frequently used to define which bodies of water are subject to the jurisdiction of the CWA. To resolve this issue, in 2015, the *Clean Water Rule: Definition of "Waters of the United States"* was published by the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers to clarify the extent that the phrase can be applied to U.S. bodies of water.[2] This rule sets forth a clear definition of the phrase by factoring in information from the CWA statute, science, three Supreme Court Decisions, and the EPA's and Army Corps of Engineers' experience and technical expertise.[3]

However, in 2019, this rule was repealed by the passage of the Recodification Rule, which reverted the regulatory text to its original form before the 2015 rule was put in place.[4] The Recodification Rule attempts both to repeal the Clean Water Rule and revert regulatory implementation to the standards that were in place before the 2015 rule was implemented. As a result of this roll back of the Clean Water Rule, twelve states, two commonwealths, and two cities joined together in a coalition and filed a complaint against the EPA and the U.S. Army Corps of Engineers to deem the Recodification Rule as unlawful, which would restore the implementation of the Clean Water Rule.[5] This issue is especially important because it can finally settle one of the most long-standing and highly debated parts of the CWA. The ruling will set forth a decision regarding which waters will be protected from pollution by the CWA. If the court rules in favor of the plaintiffs, many polluters will be forced to comply with the necessary

[2] National Conference of State Legislatures, "Legal & Regulatory Timeline of 'Waters of the United States,'" *WOTUS Timeline*, 2020 .
[3] Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" Federal Register, last modified June 29, 2015.
[4] Environmental Protection Agency, "Definition of 'Waters of the United States'-Recodification of Pre-Existing Rules," Federal Register, Last modified October 22, 2019.
[5] Complaint, State of California by and through Attorney General Xavier Becerra et al. v. Andrew R. Wheeler et al. and States of New York et al. v. Andrew R. Wheeler et al. hereby referred to as "Plaintiffs' Complaints".

requirements in order to acquire a permit. Otherwise, these entities will have a decreased ability to release pollutants into waterways. If the court rules in favor of the defendants, the plaintiffs will incur harmful effects to their economic, environmental, and proprietary interests as each of the plaintiffs are geographically located along the shores of major bodies of water.

The imperative legal issues that need to be solved in this case include the role of the Administrative Procedures Act in determining if the proceedings that culminated in the Recodification Rule are lawful. Additionally, it is important to resolve the legal issue of deciding what course of action will result in the achievement of the CWA's goals and purpose. Finally, the decisions from the U.S. Supreme Court cases *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) and *Rapanos v. The United States* (2006) must be evaluated before the case as a whole can be resolved.

Parties and Issues

Parties

Plaintiffs: The States of New York, California, Connecticut, Illinois, Maine, Maryland, Michigan, New Jersey, Oregon, Rhode Island, Vermont, and Washington; Commonwealths of Massachusetts and Virginia; District of Columbia; and City of New York. This paper will primarily focus on the twelve states and hereby refer to them as "The States."

"The States"

The States are acting as sovereign states of the United States and are represented by their attorneys general. The States filed this complaint as *parens patriae*[6] and representing the best interest of their residents and citizens. These states filed the suit because they believe that the

[6] *Id.*

Recodification Rule harms the "environmental, economic, and proprietary interests of the States."[7] The States also have an interest in the outcome of this case because they are geographically situated near bodies of water that will be negatively affected by the revocation of the Clean Water Rule. The plaintiffs seek injunctive relief through the declaration that the Recodification Rule is unlawful, as well as for reasonable fees incurred through the litigation process and other relief that the court deems as necessary.[8]

Defendants: Andrew R. Wheeler, as Administrator of the United States Environmental Protection Agency; United States Environmental Protection Agency; R. D. James, as Assistant Secretary of the Army for Civil Works; and United States Army Corps of Engineers.

Environmental Protection Agency

The Environmental Protection Agency (EPA) is an executive agency directed by an administrator appointed by the president. At the time of this case, the administrator of the EPA was Andrew R. Wheeler. The role of the EPA is to protect human health and the environment[9] through interpreting statutes passed by Congress and devising rules and regulations to provide more detail on the implementation of the statutes. Because the agency's course of action is defined, to some extent, by the will of the president, the direction of the EPA shifts to match the ideals of the presiding President. In regard to this case, the EPA issued the Clean Water Rule and subsequently issued the Recodification Rule, which repealed the aforementioned Clean Water Rule.

[7] *Id.*
[8] *Id.*
[9] Environmental Protection Agency, "Our Mission and What We Do," accessed September 23, 2020.

United States Army Corps of Engineers

The United States Army Corps of Engineers is an agency of engineers that delivers infrastructure projects and engineering services with the guiding principle of environmental sustainability. The Army Corps has regulatory authority over the permitting program for dredge and fill permits under Section 404 of the CWA.

Issue

The CWA came into being after a series of amendments to the 1948 Federal Water Pollution Control Act.[10] Throughout the body of the Act, the phrase "waters of the United States" is used to describe which bodies of water are subject to regulations under the CWA and require a permit for pollution activities. This phrase is employed to define other terms used in the Act; however, the phrase itself is never clearly defined. The lack of a clear definition has caused debate and controversy about which bodies of water in the United States should be considered "waters of the United States" and therefore must comply with the jurisdiction of the CWA.

Clearly defining the scope of the phrase is essential to achieving the intended implementation effects of the CWA. For example, Section 311 of the CWA states, "The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States."[11] If it was decided that the phrase should have an expansive meaning and include many bodies of water, those who release pollutants into bodies of water that are considered "waters of the United States" will be negatively impacted and will be required to obtain a permit before polluting.

[10] Environmental Protection Agency, "Summary of the Clean Water Act," *EPA*, Environmental Protection Agency, 9 Sept. 2020, www.epa.gov/laws-regulations/summary-clean-water-act.
[11] Congressional declaration of goals and policy, U.S. Code 33 § 1251 et seq.

Conversely, if the phrase is assigned a narrow definition, then the environment would incur negative effects from increased water pollution.

In an attempt to resolve this issue, the EPA issued regulations aimed at providing a regulatory definition of the phrase. These regulations were later affirmed by the Army Corps of Engineers in 1986, making no changes to the regulatory definition.[12] Yet, after the decisions from the Supreme Court cases *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) and *Rapanos v. The United States* (2006) were made, the 1986 definitions had to be reevaluated with the rulings from the Supreme Court factored into the decisions.[13] The definition remained in use until the implementation of the Obama Era Clean Water Rule in 2015, which integrated the significant nexus standard from the Rapanos case into the CWA. However, in 2019, the EPA under the Trump administration issued the Recodification Rule to revert the phrase definition back to the 1986 definition.[14]

Relevant and Applicable Laws

The Administrative Procedure Act

The Administrative Procedure Act (APA) guides the processes of federal agencies to ensure a fair, transparent, and consistent process to make and issue regulations.[15] It includes guidelines and requirements that agencies must follow during the rulemaking process. These requirements include informing the public of proposed and final rulemaking and providing the public with opportunities to comment and offer suggestions on the proposed regulation. The

[12] Stephen P. Mulligan, "Evolution of the Meaning of 'Waters of the United States ...", Evolution of the Meaning of "Waters of the United States" in the Clean Water Act, 2019.
[13] Brad Plumer and Umair Irfan, "Why Trump Wants to Repeal an Obama-Era Clean Water Rule," *Vox*, Vox, 28 Feb. 2017.
[14] National Conference of State Legislatures, "Legal & Regulatory Timeline of 'Waters of the United States,'" *WOTUS Timeline*, 2020.
[15] Administrative Procedures Act 5 U.S.C. ch. 5, subch. I § 500 et seq.

plaintiffs claim that the EPA "failed to comply with notice and comment requirements for the rulemaking"[16] before they implemented the rule. Furthermore, the APA gives the court the authority to "hold unlawful and set aside" agency regulations, processes, and conclusions as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17] The plaintiffs call for the court to utilize this power to find that the Recodification Rule is arbitrary and capricious.

The Clean Water Act

The CWA employs the phrase "waters of the United States" primarily in sections 311 to 313. At its conception, the phrase was never assigned a specific definition; however, it is employed on multiple occasions to describe the term "navigable waters." The term "navigable waters" is then used to define bodies of water that are protected in the CWA from polluting activities. For instance, the CWA states, "The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States."[18] While the EPA and various court cases have attempted to interpret and clarify the definition, the EPA has vacillated between regulatory definitions as a final, concurring decision has yet to be reached. This case is another attempt to rectify the definition. As a result of the impactful effects that arise from assigning a definition to the phrase, the plaintiffs claim that the repeal of the 2015 Clean Water Rule without countermeasures to make up for the resultant lack of definition could potentially lead to detrimental effects for their states.[19]

[16] Plaintiffs' Complaints.
[17] Scope of Review, U.S. Code 5 (1966) § 706.
[18] Congressional declaration of goals and policy § 1251.
[19] Plaintiffs' Complaints.

One major case that has arisen from the CWA is *Rapanos v. United States* (2006). In this Supreme Court case, Justice Kennedy offered a concurring opinion that introduced the "significant nexus" standard to help determine if a non-traditional navigable body of water should be protected as "waters of the United States." This opinion protects bodies of water that have a significant effect on the "chemical, physical, or biological" integrity of traditionally navigable waters.[20] In relation to the Recodification Rule controversy complaint, the plaintiffs argue that the Clean Water Rule should not be repealed through the passage of the Recodification Rule for two reasons. The first reason is that the 1986 definition was created before the ruling of the *Rapanos* case.[21] Therefore, the 1986 definition failed to include the "significant nexus" standard within the definition's body. The second reason is that the Clean Water Rule is more comprehensive and inclusive of recent Supreme Court rulings because the Clean Water Rule defines which categories of water are regulated under the CWA by employing the latest scientific research and knowledge about whether categorizing non-navigable waters would result in a significant impact on the integrity of navigable waters.[22]

The Clean Water Rule

The Clean Water Rule: Definition of "Waters of the United States" was published and enacted in 2015 by the EPA and U.S. Army Corps of Engineers to "define the scope of the waters that are protected under the Clean Water Act." [23] The rule's purpose was to delineate which waters are subject to the CWA and lessen the amount of time that permitting authorities and agencies needed to make case-specific jurisdictional decisions about whether a body of

[20] Rapanos v. United States, 547 U.S. 715 (2006).
[21] Plaintiffs' Complaints.
[22] *Id.*
[23] Environmental Protection Agency, "Clean Water Rule: Definition of 'Waters of the United States,'" Federal Register, last modified June 29, 2015.

water is or is not required to secure a permit under the CWA.[24] To accomplish this goal, the Clean Water Rule employed scientific review to include the "significant nexus" standard from the *Rapanos v. United States* case. Furthermore, by applying the "significant nexus" standard, the Clean Water Rule was also able to provide precise definitions for which tributaries and adjacent waters are protected by the CWA and which are not.[25] Finally, the Clean Water Rule developed defined categories of waters that are and are not under the jurisdiction of the CWA, which reduced the need for jurisdictional determinations on a case-by-case basis. The defendants claimed that, because the Clean Water Rule included all of these factors and the Recodification Rule does not, the Clean Water Rule should not be repealed by implementing the Recodification Rule.

When the Clean Water Rule was about to be implemented, the governments of Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming sued the EPA and U.S. Army Corps of Engineers for a preliminary injunction to block the Clean Water Rule.[26] Federal Judge Ralph Erikson ruled in favor of the plaintiffs because he believed that the aforementioned states would be forced to surrender their sovereignty over intrastate bodies of water that would be subject to the jurisdiction of the CWA. This decision only exempts the thirteen states that filed the injunction. This decision was an impetus for garnering more support against the Clean Water Rule and had a significant influence in the movement to repeal the 2015 rule.

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[24] *Id.*
[25] Environmental Protection Agency. "Clean Water Rule: Definition of 'Waters of the United States,'" Federal Register.
[26] MacPherson, James, "Judge: Injunction against Water Rule Limited to 13 States," AP NEWS, Associated Press, 5 Sept. 2015.

The Recodification Rule

The Recodification Rule was published and implemented in 2019 by the EPA and U.S. Army Corps of Engineers with the purpose of repealing the 2015 Clean Water Rule. The Recodification Rule aims to repeal the Clean Water Rule because the agencies believe that the Clean Water Rule did not include the legal limits that Congress intended to impose on the jurisdictional reach of the CWA within the 2015 rule. The agencies state that in regard to the definition of the "waters of the United States," they will interpret it to include the waters covered by regulations in line with precedent and long-standing implementation practices that are informed by agency guidance documents, training, and experience. The plaintiffs assert that this claim is vague and does not clearly define what resources will be used to advise redefining the "waters of the United States" phrase.

Evaluation

Based upon the evidence presented in this paper, the likely outcome will be that the court will rule in favor of the plaintiffs; however, the defendants may offer an alternative relief to the plaintiffs to settle the issue. This alternative relief could include a temporary injunction or call for the agencies to conduct additional rulemaking procedures before the Recodification Rule could be reimplemented. Additionally, no matter the outcome of the district court, this case will most likely be appealed by the losing party and eventually make it into the Supreme Court. However, with the Biden administration now in office, the case is likely to be moot as President Biden will presumably rescind the Trump administration's Recodification Rule.

When applying the Administrative Procedures Act (APA) to the Recodification Rule controversy, the outcome will likely be in favor of the plaintiffs because the defendants did not follow all APA guidelines during the rulemaking process. For instance, the defendants did not seek public comment on the impact the Recodification Rule would have on the nation's waters. Furthermore, the defendants claimed that, because they were simply reverting back to a rule that was already implemented, they did not need to accept public comments.[27] This issue could potentially be litigated as its own issue; however, in the context of the Recodification Rule issue, it adds to the merit of the arguments made by the plaintiffs that the defendants did not follow the guidelines of the APA. Overall, the court will probably rule in favor of the plaintiffs on this issue to receive the injunctive relief they seek.

When applying the Clean Water Act to the Recodification Rule controversy, the court will probably rule in favor of the plaintiffs, but only by a slight margin. This issue is highly contentious and has a significant amount of support on either side. The court will likely rule in favor of the plaintiffs because of the vagueness, lack of reasoning, and lack of alternative measures in the Recodification Rule. For example, in regard to the purpose of the CWA to protect waters from pollution, the repeal of the Clean Water Rule will leave many bodies of water vulnerable to pollution because of the vagueness of the regulation around categories of water that are protected under the CWA. Furthermore, the EPA and Army Corps of Engineers indicate that they will interpret the "waters of the United States" phrase in accordance with the 1986 definition along with Supreme Court rulings and agency experience, but never explicitly state how these factors will culminate in a clear definition of the phrase. Therefore, an injunction

[27] Environmental Protection Agency, "Definition of 'Waters of the United States'-Recodification of Pre-Existing Rules," Federal Register.

may only be temporary until the defendants can devise a clearer definition. On the other hand, because the defendants have stated that the Recodification Rule is merely an interim rule that is put in as a placeholder for more comprehensive regulations, the court may somewhat lean toward the defendants' side, as an interim rule does not need to have the aspects of a final rule.

Conclusion

Though the phrase "waters of the United States" utilized in the Clean Water Act may seem to be simple and straightforward, when applied in a Congressional Act, the phrase may not be as easily interpreted by agencies or to the entities to which the Act applies. In a complaint filed against the allowance of the Recodification Rule, which repeals the Clean Water Rule, this long standing controversy around the "waters of the United States" can be easily seen. The Clean Water Act and the Administrative Procedures Act are the main laws in this controversy. This case will probably find that the Recodification Rule should be halted or even completely thrown out, resulting in a ruling in favor of the plaintiffs of the States of California, Connecticut, District of Columbia, Illinois, Maine, Maryland, Michigan, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, Commonwealths of Massachusetts and Virginia and the City of New York. Ultimately, this contentious issue of defining the "waters of the United States" has had controversy surrounding it for decades and will likely have more issues in the future; however, this case could move it one step closer to finally being resolved.

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Title IX and Sexual Assault at Academic Institutions

By Elizabeth Cho

Elizabeth Cho is a student at the University of California, Davis. She is studying Philosophy and International Relations. Elizabeth is Cofounder and Vice President of Davis Pre-Law Society (DPLS).

The creators of Title IX of the Education Amendments of 1972 intended to prohibit sex discrimination in all education programs and activities that received federal funds. However, the act has now become synonymous with the expansion of female sports.[1] This article provides an introduction to the law and deeply explores its legalities and history. The paper also focuses on federally funded academic institutions, a group Title IX mainly targets. Furthermore, it references a relevant court case and details the situation surrounding Title IX today. It also addresses Title IX in relation to sexual assault and reports current sexual assault statistics at academic institutions. Finally, the text provides recommendations to the law and maintains the position that the law is flawed in its ineffectiveness to protect students from sexual assault.

Title IX and Its Legal Functions

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[2] The act applies to all federally funded or assisted educational programs at both the state and local levels in all fifty states, the District of Columbia, and territories and possessions of the United States.[3] Title IX entitles all recipients equal treatment through recruitment, admissions and counseling, financial assistance, athletics, sex-based harassment, treatment of pregnant and parenting students,

[1] Karen Blumenthal, *Let Me Play: The Story of Title IX, the Law that Changed the Future of Girls in America* (Atheneum Books for Young Readers, 2005).
[2] "Title IX and Sex Discrimination," U.S. Department of Education, Office for Civil Rights, revised April 2015, https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.
[3] *Id.*

discipline, single-sex education, and employment.[4] Title IX defines gender discrimination as discrimination or harassment based upon one's gender, including sexism, sexist attitudes, and sex stereotyping.[5] The act also requires that all athletic programs or activities be offered to all genders.[6] Title IX lastly applies to the institution itself and its students, faculty, administrative staff, and any entity involved with the institution.[7] Each institution maintains the responsibility of investigating any case of gender discrimination per the Office of Civil Rights' requirements.[8]

History

The creators originally enacted Title IX to combat gender discrimination in education. Prior to the act, many top universities refused to accept female students; graduate schools even utilized tactics to limit female enrollment.[9] In 1972, then-President Richard Nixon signed Title IX into law. However, three other notable people created and implemented Title IX.[10] Representative Patsy T. Mink of Hawaii, the first woman of color and Asian American elected to the House, authored and sponsored Title IX.[11] Along with Oregon Representative Edith Louise Starrett Green and former Indiana Senator Birch Bayh, Mink introduced the bill regarding gender equity in education, leading to the passage of Title IX.[12] Although most of Congress considered the law relatively noncontroversial, others opposed the act's creation and passing. One key concern regarded the "other" side: men's sports. Many individuals worried that funding for

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[4] *Id.*
[5] "Gender Discrimination," Ventura College, Definitions and Examples of Title IX Violations, https://www.venturacollege.edu/college-information/about-ventura-college/title-ix/definitions.
[6] *Id.*
[7] "What are Title IX Penalties?" Duffy Law, https://www.duffylawct.com/title-ix/what-are-title-ix-penalties/.
[8] "[RESCINDED] Dear Colleague: From Assistant Secretary," U.S. Department of Education, last modified April 4, 2011, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[9] Christina Hoff Sommers, "Title IX: How a Good Law Went Terribly Wrong," *Time*, last modified June 23, 2014, https://time.com/2912420/titleix-anniversary/.
[10] "Title IX - The Nine," ACLU, https://www.aclu.org/other/title-ix-nine.
[11] "MINK, Patsy Takemoto," History, Art & Archives, United States of Representatives, https://history.house.gov/People/detail/18329.
[12] "GREEN, Edith Starrett," History, Art & Archives, United States House of Representatives, https://history.house.gov/People/Detail/14080.

men's sports would be cut in order to provide for women's sports. In response, political opponents of Title IX filed for an amendment to exempt all school athletics from the umbrella of the act. This amended Title IX passed in the House but not the Senate, resulting in another House vote. After a series of complications, Congress eventually passed the act *without* the amendment regarding school athletics.[13] After Representative Mink's passing, Congress officially renamed the act in her memory: the Patsy T. Mink Equal Opportunity in Education Act.[14] Additionally, former President Barack Obama awarded Mink the Presidential Medal of Freedom posthumously, according her legacy the nation's highest civilian honor.[15]

Alexander v. Yale **(1980)**

Title IX has been challenged multiple times in court, but the most notable case regarding sexual assault was the case of *Alexander v. Yale* (1980). In this first sexual harassment case under Title IX, Yale students Ronnie Alexander, Margery Reifler, Pamela Price, Lisa E. Stone, and Ann Olivarius filed a suit against Yale University.[16] The plaintiffs alleged they had faced sexual harassment as students at Yale and the school administration failed to protect them.[17] The sexual harassment took the form of male professors coercing female students for sexual intercourse in exchange for better grades.[18] The plaintiffs argued that Yale's failure to take action resulted in

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[13] *Congressional Record*, House, 94th Cong., 1st sess. (18 July 1975): 23504–23506; *Congressional Record*, House, 107th Cong., 2nd sess. (17 July 2002): 13370–13371; "Gwendolyn Mink Oral History Interview," Office of the Historian, U.S. House of Representatives, last modified March 14, 2016.

[14] Kerri Lee Alexander, "Patsy Mink," National Women's History Museum (NWHM), https://www.womenshistory.org/education-resources/biographies/patsy-mink.

[15] Kate Stringer, "No One Would Hire Her. So She Wrote Title IX and Changed History for Millions of Women. Meet Education Trailblazer Patsy Mink," *The 74*, last modified March 1, 2018, https://www.the74million.org/article/no-one-would-hire-her-so-she-wrote-title-ix-and-changed-history-for-millions-of-women-meet-education-trailblazer-patsy-mink/.

[16] "Case Profile: Alexander v. Yale," Civil Rights Litigation Clearinghouse, University of Michigan Law School, https://www.clearinghouse.net/detail.php?id=12614.

[17] *Id.*

[18] Tyler Kingkade, "How A Title IX Harassment Case At Yale In 1980 Set The Stage For Today's Sexual Assault Activism," *HuffPost*, updated June 10, 2014, https://www.huffpost.com/entry/title-ix-yale-catherine-mackinnon_n_5462140?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAIAAJnSq2Q-ytcQp0Pd1OZJr97eULLVhPSU7__768-P767ai6U2CHTDu2wP9NiWXM0m-4nab4dfS593OSPmUiCq4e2m81_YifG_T.

discrimination against female students. While the plaintiffs did not seek compensation, they wanted Yale to adopt a detailed and organized procedure to respond to and combat sexual harassment on-campus.[19] Ultimately, the district court ruled the plaintiffs could not bring the suit because they had already graduated.[20] Although the case never went through to the Supreme Court, Yale University adopted a grievance board system for victims, inspiring hundreds of other colleges to follow.[21] While the plaintiffs in *Alexander v. Yale* may not have won their case, the district court agreed with them on one critical point: sexual harassment is a form of sex discrimination.

Prior to the start of *Alexander v. Yale*, lawyer Catherine MacKinnon advised the plaintiffs and eventually became co-counsel. When MacKinnon attended law school, she devised the argument that sexual harassment in the workplace is sex discrimination.[22] During the *Alexander* case, MacKinnon pushed for this key argument and, as stated above, set a precedent for future sexual harassment cases as cases of sex discrimination. In 1976, MacKinnon published her legal theory in her book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, which became pivotal for future sexual harassment cases. Today, MacKinnon is known as a law professor, writer, lawyer, and activist for gender equality.[23]

Title IX Today

In 2017, former President Donald Trump nominated Betsy DeVos as the eleventh United States Secretary of Education. Advocates for public school funding, transgender students,

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[19] *Id.*
[20] *Id.*
[21] "Appeals Court Dismisses Yale Sex Harassment Suit," *The Harvard Crimson*, last modified October 2, 1980, https://www.thecrimson.com/article/1980/10/2/appeals-court-dismisses-yale-sex-harassment/.
[22] The Editors of Encyclopaedia Britannica, "Catharine A. MacKinnon: American feminist and law professor," *Britannica*, https://www.britannica.com/biography/Catharine-A-MacKinnon.
[23] "Catherine A. MacKinnon," Faculty Profiles, Harvard Law School, https://hls.harvard.edu/faculty/directory/10540/MacKinnon.

teachers, and sexual assault and harassment victims have all intensely criticized DeVos.[24] Before DeVos' time in office, the Office of Civil Rights under the Obama administration sent out a document to all federally funded colleges and universities that became known as the "Dear Colleague Letter."[25] The letter contained instructions on how to increase protections for student victims of sexual assault and how to address sexual assault and harassment allegations. Most notably, the "Dear Colleague Letter" stated: "If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."[26] The letter aimed to protect students from instances of sexual harassment or assault on campus, as the *Alexander* case established that sexual harassment fell under the category of sex discrimination.

DeVos rescinded the letter in 2017.[27] After doing so, DeVos proposed a new rewrite of the rule in 2018. In short, DeVos appeased opponents to the Obama-era rule by expanding the rights of the accused. Among these rights for the accused is the right to a live hearing and the right to cross-examine their accusers—a highly controversial addition.[28] Moreover, DeVos' redefinition of sexual harassment under Title IX was stricter than before, more so than even the Equal

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[24] Tyler Kingkade, "Biden wants to scrap Betsy DeVos' rules on sexual assault in schools. It won't be easy," *MSNBCNews*, last modified November 12, 2020. https://www.nbcnews.com/politics/2020-election/biden-wants-scrap-betsy-devos-rules-sexual-assault-schools-it-n1247472.

[25] Max Larkin, "The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?" *WBUP: Boston's NPR News Station*, updated November 25, 2016, https://www.wbur.org/edify/2016/11/25/title-ix-obama-trump.

[26] "[RESCINDED] Dear Colleague: From Assistant Secretary," U.S. Department of Education, 2011.

[27] Greta Anderson, "U.S. Publishes New Regulations on Campus Sexual Assault," *Inside Higher Ed*, last modified May 7, 2020, https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

[28] Valerie Strauss, "Betsy DeVos's controversial new rule on campus sexual assault goes into effect," *The Washington Post*, last modified August 14, 2020, https://www.washingtonpost.com/education/2020/08/14/betsy-devoss-controversial-new-rule-campus-sexual-assault-goes-into-effect/.

Employment Opportunity definition of harassment, which protects adult workers.[29] The new definition states that sexual harassment must be "severe and pervasive."[30] In other words, student victims must suffer multiple and repeated sexual harassment encounters before they can file a complaint with Title IX. President of the National Education Association Lily Eskelsen García highlighted the main issue with this redefinition, stating, "A 6-year-old now must endure more extreme levels of harassment before she has a visible complaint under Title IX than a grown woman would have to tolerate to have a similar claim for workplace harassment."[31] Many groups and organizations opposed DeVos's new provisions, including Congressional Democrats, the National Women's Law Center, Know Your Title IX, and Stop Sexual Assault in Schools.[32] On the flip side, a multitude of groups highly supported DeVos in her efforts to change Title IX—including Congressional Republicans and the Foundation for Individual Rights in Education.[33]

The 2021 Biden administration announced a desire to strike down these new rules during its 2020 presidential campaign.[34] However, DeVos claimed that any new Secretary of Education would face many difficulties attempting to reverse or change her policies.[35] If the Biden administration decides to follow through on their campaign claims, the process to dismantle or

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[29] Mary Ellen Flannery, "With Title IX changes, Betsy DeVos puts more students at risk of violence," *Education News*, National Education Association, last modified May 12, 2020, https://educationvotes.nea.org/2020/05/12/with-title-ix-changes-betsy-devos-puts-more-students-at-risk-of-violence.
[30] *Id.*
[31] *Id.*
[32] Annie Grayer and Veronica Stracqualursi, "DeVos finalizes regulations that give more rights to those accused of sexual assault on college campuses," *CNN*, last modified May 6, 2020, https://www.cnn.com/2020/05/06/politics/education-secretary-betsy-devos-title-ix-regulations/index.html; Greta Anderson, "Lawsuit Against DeVos, Title IX Rules Is Dismissed," *Inside Higher Ed*, last modified October 22, 2020, https://www.insidehighered.com/quicktakes/2020/10/22/lawsuit-against-devos-title-ix-rules-dismissed.
[33] Tyler Kingkade, "Biden wants to scrap Betsy DeVos' rules."
[34] *Id.*
[35] Kayla Rubble, "Betsy DeVos at Hillsdale suggests her policy changes will be difficult to undo," *The Detroit News*, last modified October 20, 2020, https://www.detroitnews.com/story/news/politics/2020/10/19/betsy-devos-hillsdale-college-education-roundtable/3706409001/.

revise DeVos' rewrite of the rule could take up to two years.[36] There have been several other attempts to reverse the new additions through lawsuits. However, none have succeeded as of yet; cases have either been dismissed or are still pending.[37]

Title IX and Sexual Assault

Before Secretary DeVos's revisions to Title IX, the act had very specific guidelines as to how sexual assault at universities should be addressed. First and foremost, the act required an assurance that victims would receive support from their college, whether through adjustments in housing arrangements or no-contact orders issued to the accused perpetrators. Title IX enforced these guidelines to ensure the victim's protection, including if the accused retaliated. The academic institution was ordered to entirely provide these resources, no matter the cost.[38] Title IX also required colleges to have clear, established, and formal procedures to respond to sexual assault and harassment claims.[39] Due to the new revisions to the act, the guidelines for addressing sexual assault allegations have changed. In addition to allowing the accused to cross-examine their accusers, academic institutions can now determine the standard of evidence, which could set a higher burden of proof for victims.[40]

Despite many victims' advocates attempting to reverse DeVos's revisions, some say certain additions will help rather than hurt victims—the most prominent addition being the inclusion of dating and relationship violence under the definition of sexual harassment.[41] However, DeVos ultimately narrowed the definition of sexual harassment in an attempt to

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[36] Tyler Kingkade, "Biden wants to scrap Betsy DeVos' rules."
[37] Greta Anderson, "Lawsuit Against DeVos, Title IX Rules Is Dismissed"; Evie Blad, "Judge Won't Stop DeVos Title IX Rule From Taking Effect," *EducationWeek*, last modified August 10, 2020, https://www.edweek.org/policy-politics/judge-wont-stop-devos-title-ix-rule-from-taking-effect/2020/08.
[38] "Title IX," RAINN, https://www.rainn.org/articles/title-ix.
[39] *Id.*
[40] Greta Anderson, "U.S. Publishes New Regulations on Campus Sexual Assault."
[41] "Summary of Major Provisions of the Department of Education's Title IX Final Rule," US Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf.

balance Title IX and First Amendment concerns. Critics of the "Dear Colleague Letter" argued that, due to its wording, the right to free speech of members of academic institutions became limited. DeVos's revisions reflected this criticism, stating, "Students, teachers, faculty, and others should enjoy free speech and academic freedom protections, even when speech or expression is offensive."[42]

In addition, some felt concerned that the Obama administration had adjusted Title IX to pressure universities to assume that those accused of sexual misconduct were already guilty before viewing evidence.[43] This assumption creates an unfair bias against the accused. To counteract that bias, the Trump administration forced academic institutions to follow one of America's most sacred principles: innocent until proven guilty. When dealing with a sexual harassment or assault allegation, academic institutions must treat the accused as innocent, regardless of the potential danger they pose to other students, faculty, etc.

As repeated from above, DeVos also included the right for the accused to cross-examine their accusers. DeVos added this in an attempt to prevent false rape reports, where an individual accuses another of sexual assault, but "an investigation factually proves [the allegation] never occurred."[44] However, only 2 to 10 percent of rapes are false reports.[45] This statistic also includes recants, or when a sexual assault victim decides to take back their report for any particular reason.

Before and after DeVos's revisions to Title IX, however highly contested they may be, the act was and is not effective in preventing sexual assault. Rather, certain groups have turned Title

[42] *Id.*
[43] Greta Anderson, "U.S. Publishes New Regulations on Campus Sexual Assault."
[44] "False Reporting: An Overview," National Sexual Violence Resource Center, 2012, https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf.
[45] "Statistics," Know Your Title IX, https://www.knowyourix.org/issues/statistics/.

IX into a political tool with which to gain favor from others. This article recommends that Title IX should be adjusted to prevent sexual assault, instead of just creating procedures to address it.

Sexual Assault Statistics

Sexual assault has been commonly referred to as an "epidemic," as numbers of sexual assault incidents continually rise.[46] On college campuses, the numbers are striking. Among graduate and professional students, 9.7 percent of females and 2.5 percent of males experience rape or sexual assault through physical force, violence, or incapacitation.[47] Among undergraduate students, 26.4 percent of females and 6.8 percent of males experience the same.[48] One in four college undergraduate women in the U.S. are sexually assaulted.[49]

College-age women are the most at risk. From ages eighteen to twenty-four, female college students have a three times higher chance of being sexually assaulted in comparison to all women.[50] While attending college, female students have around a 19 percent likelihood of getting sexually assaulted.[51] Compared to other crimes with high numbers at college campuses, college women are twice as likely to be sexually assaulted than, for example, robbed.[52]

But, while the number of sexual assaults on campus is high, the reporting numbers are low.[53] Nationally, rape is already the most underreported crime, where over 63 percent of sexual assaults are not reported.[54] Out of all sexual assault student survivors, only 12 percent report their

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[46] Jennifer Rubin, "The sexual assault epidemic is real," *The Washington Post*, last modified December 7, 2017,
[47] "Campus Sexual Violence: Statistics," RAINN, https://www.rainn.org/statistics/campus-sexual-violence.
[48] *Id.*
[49] Mary P. Koss, Christine A. Gidycz, and Nadine Wisniewski, "The scope of rape: Incidence and prevalence of sexual aggression and victimization in a national sample of higher education students," *Journal of Consulting and Clinical Psychology* 55, no. 2 (April 1987), 162–170. https://pubmed.ncbi.nlm.nih.gov/3494755/.
[50] *Id.*
[51] Christopher P. Krebs, Ph.D., Christine H. Lindquist, Ph.D., Tara D. Warner, Ph.D., Bonnie S. Fisher, Ph.D., and Sandra L. Martin, Ph.D., "The Campus Sexual Assault (CSA) Study," National Criminal Justice Reference Service (NCJRS) (December 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.
[52] *Id.*
[53] "Campus Sexual Violence: Statistics," RAINN.
[54] "Statistics About Sexual Violence," National Sexual Violence Resource Center, 2015, https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

assault to the police.[55] Female survivors cited a myriad of reasons for not wanting to report their sexual assault.[56] Note: these are not listed in any particular order, nor are they the only reasons.

1. Not wanting others to know about their sexual assault.
2. Did not know how to report their sexual assault.
3. Fear of being badly treated by the criminal justice system.
4. Did not think their sexual assault was "serious" enough.

In addition to the assault itself, many survivors face emotional and physical repercussions after their sexual assault. After the incident, 34 percent of college student survivors report experiencing Post Traumatic Stress Disorder.[57] 33 percent experience depression and 40 percent use drugs or alcohol to self-medicate.[58]

These statistics are, unfortunately, only a few of the many in regard to sexual harassment and assault. These numbers are still too high, and for students protected under Title IX, they should be lower.

Recommendations

This article maintains that, before and after the 2020 revisions to Title IX, the act did not and currently does not effectively or appropriately prevent sexual assault, which ultimately hurts students. This article recommends making an addition to Title IX that would prevent sexual assault in schools to begin with—prevention is better than response. This addition would require Title IX to use a section of federal funds to implement a more comprehensive sexual health education in all federally funded academic institutions, particularly in high schools.[59] Most importantly, this addition would include, but not be limited to, education for high school students

[55] Dean G. Kilpatrick, Ph.D., Heidi S. Resnick, Ph.D., Kenneth J. Ruggiero, Ph.D., Lauren M. Conoscenti, M.A., and Jenna McCauley, M.S., "Drug-facilitated, Incapacitated, and Forcible Rape: A National Study," National Criminal Justice Reference Service (NCJRS) (July 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] "America's Sex Education: How We Are Failing Our Students," USC Department of Nursing, https://nursing.usc.edu/blog/americas-sex-education/.

on what is and is not sexual consent; education on what sexual assault, sexual violence, and sexual harassment are; and the different actions these can take form in.

Currently the U.S. mandates high school sex education in only thirty states and the District of Columbia. Only twenty-two of those states require that their sex education be medically accurate when taught.[60] The definition of medical accuracy differs by each state, but can mean anything from support from scientific and published peer-review journals to what medical professionals "generally rely upon."[61] The debate surrounding parents' rights concerning their children's education caused this inconsistency in sex education between states. Parents may have a myriad of different reasons for opposing sexual health education in schools: religious values, personal family values, etc. However, for as many reasons as there are against having a more comprehensive sexual health education in schools, there exists an equal number for improving the education.

The benefits of sexual health education to students are vast. Most strikingly, students who learn from a well-designed and comprehensive sexual health education program on average are less likely to be victims or perpetrators of sexual assault in their lifetime.[62] When schools teach comprehensive sexual health education, students learn to avoid a whole host of dangerous situations and factors that many parents try to teach their children. This article understands the controversy of teaching sexual health in schools; however, it maintains the belief that its recommendations are helpful, rather than harmful.

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[60] "State Policies on Sex Education in Schools," National Conference of State Legislatures, last modified October 1, 2020, https://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx.
[61] John S. Santelli, "Medical Accuracy in Sexuality Education: Ideology and the Scientific Process." *US National Library of Medicine, National Institutes of Health* 98, no. 8 (October 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636467/.
[62] John S. Santelli, Stephanie A. Grilo, Tse-Hwei Choo, Gloria Diaz, Kate Walsh, Melanie Wall, Jennifer S. Hirsch, Patrick A. Wilson, Louisa Gilbert, Shamus Khan, and Claude A. Mellins, "Does sex education before college protect students from sexual assault in college?" *PLoS One* 13, no. 11 (November 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6235267/.

Conclusion

The creators of Title IX designed the act to combat sex discrimination in schools, which gradually evolved to include sexual harassment and assault. This paper asserts that current and past climates made it more difficult for sexual assault victims to come forward and report. The current revision of Title IX ineffectively protects sexual assault victims and instead allows for more protections for sexual assault perpetrators. This article maintains the position that the creators of Title IX did not design it to prevent sexual assault in the first place. The text also argues it is better to prevent sexual assault from occurring and then address the situation if necessary. Due to this understanding, this article provides a recommendation to expand the educational aspect of Title IX's approach to sexual assault allegations, which aims to prevent those incidents altogether.

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The Chinese Laborer at the Crossroads of Capitalist Interest and White Supremacy

By Ruth Christopher

Ruth Christopher is a student at the University of California, Davis. She is studying English with a double emphasis in Creative Writing (Poetry) and Literary Criticism. Prior to attending UC Davis, Ruth worked as a paralegal in Southern California.

The American government forced nineteenth-century Chinese Americans into exploitative labor formations, justified by legal loopholes that denied them not only citizenship but also the right to create better social contracts for themselves. Furthermore, Supreme Court Justices Melville Fuller and John Marshall Harlan intentionally utilized English Common Law and international law as legal authorities to supersede sections of the U.S. Constitution in order to deny citizenship for Chinese American laborers. The texts used in researching this paper are *China Men* by Maxine Hong Kingston, the federal court case *United States v. Wong Kim Ark* (1898), and "China Men, United States v. Wong Kim Ark, and the Question of Citizenship" by Brook Thomas.

Introduction

The abolition of American slavery in 1865 did not bring an end to exploitative race-based labor formations—it merely changed the way they were structured. Instead, newly introduced contract-based labor formations, which were also race-based, allowed the rhetoric of freedom to remain while simultaneously denying freedom to the laborers that produced the infrastructure of the country. This paper is primarily interested in how this phenomenon affected Chinese immigrants to the United States. Maxine Hong Kingston's 1980 book *China Men* is pertinent evidence for this analysis, as well as the court case *U.S. v. Wong Kim Ark* (1898) and an essay by Brook Thomas called "China Men, U.S. v. Wong Kim Ark, and the Question of Citizenship." In this essay, Thomas argues that studying the official documents of the political and legal history

of Chinese Americans alone is not sufficient for "an adequate account of the experience of those of Chinese ancestry in the United States."[1] Because of this, it is valuable to consider the issue of citizenship from a legal as well as literary perspective and consider parallels of the above texts. The consensus of many historians, legal scholars, and political theorists celebrates the freedom of contract labor under the American system. However, Kingston critiques this celebration by pointing to the tensions between legal precedent and social practice that functionally kept race-based slavery alive and well in the United States. The ability to sell one's labor is not what makes a citizen free: a citizen is free by birth. Put another way, anthropologists assert a difference between "legal citizenship" and "cultural citizenship." Despite the government granting some Chinese Americans legal citizenship because of the ruling of *United States v. Wong Kim Ark*, the fight for cultural citizenship has arguably persisted even across the last several generations.

Although Chinese immigrants to the U.S.—such as Wong Kim Ark and Kingston's archetype of the railroad laborer Ah Goong—experienced freedom via contract to work in America, that freedom was predicated on a legal system that ignored the law when it came to Chinese immigration.[2] However, the system only looked the other way when lobbied by capitalist, and specifically railroad, interests. Once those capitalist interests no longer depended on a large cheap workforce, they no longer had a reason to push for legal loopholes. In the absence of legal loopholes, the racist predilections of the American system prevailed with the passage of the Chinese Exclusion Acts from 1882 to 1884.[3]

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[1] Thomas, Brook, "China Men, United States v. Wong Kim Ark, and the Question of Citizenship," *American Quarterly* 50, no. 4 (1998): 689-717, doi:10.1353/aq.1998.0046.
[2] Maxine Hong Kingston, *China Men* (New York: Vintage Books, 1989), 151-154.
[3] *Id*.

Literary Analysis

There was a stark difference between legal statements and actual social practice in post-Civil War America. Despite California's decision in their 1878 Constitutional Convention to prohibit the movement of Chinese immigrants into the state, this did not happen. Kingston notes, "This provision was so little respected that the American Merchant Marine relied heavily on Chinese seamen from the Civil War years to World War I."[4] The legal system in California (and in other parts of the U.S.) advocated race-based exclusion but, as a capitalist system, still depended on cheap labor forces for maximum commercial development.

Remarking on this tension and the struggle of being a laborer caught in the middle of it, Kingston writes of Ah Goong: "The Central Pacific hired him on sight; Chinamen had a natural talent for explosions. Also there were not enough workingmen to do all the labor of building a new country."[5] This illustrates the dominant racial assumptions in America at the time and their visual nature. The sight of Ah Goong immediately produced assumptions about Ah Goong: that he is a "Chinaman" and therefore has "a natural talent for explosions." As someone technically legally excluded from even being in the country, Central Pacific viewed Ah Goong as someone easy to underpay and overwork. Furthermore, and perhaps most importantly, Ah Goong's labor fulfilled a need in the American system: more working men. While discussing labor strikes during the Transcontinental Railroad project, Kingston says definitively, "No China Men, no railroad. They were indispensable labor."[6] Ah Goong struggled between the tension of a capitalist system that wanted his labor and the governance of that same system which denigrated his ethnicity. The result is that, caught in the middle, Central Pacific exploited his labor, and he could do nothing about it.

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[4] *Id*., 158.
[5] Maxine Hong Kingston, *China Men* (New York: Vintage Books, 1989), 128.
[6] *Id*., 140.

Employers paid Chinese laborers subsistence wages, around "a dollar a day,"[7] and forced them to purchase all needed equipment for themselves. The foremen did not care if their employees lived or died, so long as the rate of production was maintained. This is not freedom. More specifically, this is not the freedom for all that American legal rhetoric preaches; it is a freedom for some to make money exploiting racialized others. The capitalist system that needed Ah Goong's or Wong Kim Ark's labor was a racist system that valued their lives through solely monetary means. The most harrowing example of this is that "they lost count of the number dead; there is no record of how many died building the railroad. Or maybe it was demons doing the counting and Chinamen not worth counting."[8] Kingston again points to the racial devaluation of Chinese laborers from within a system that both needed their labor and flouted existing laws in order for their control to exist. The white foremen, whom Kingston refers to as "demons," did not consider Chinese deaths noteworthy enough to keep track of. Perhaps the numbers were so extreme that they intentionally hid them from the sheltered public. In either case, the death toll of Chinese laborers during the construction of the Transcontinental Railroad was one of the great yawning silences of American history that can never truly be fathomed.

For Chinese laborers like Ah Goong who did survive the building of the railroad, life remained incredibly difficult. Kingston wrote, "While the demons posed for photographs, the China Men dispersed. It was dangerous to stay. The Driving Out had begun."[9] While legally Chinese laborers had some right to stay, American society continually alienated them. This goes back to the tension between legal enforcement and social attitude. Without a railroad contract to protect their freedom to work in America, Chinese laborers were forced underground in order to survive the intense social pressures they experienced. The "Driving Out" was a social rebellion

[7] *Id*., 129.
[8] *Id.*, 138.
[9] *Id.,* 145.

by a populace governed by white supremacy. Its legal notions and social mores against racial inclusion were seemingly foisted by the needs of a capitalist system. And this is exactly where the idea of freedom based on contract utterly breaks down for the Chinese in the United States.

However, it is the investment of one's labor into a place that makes one belong to that place, not the freedom to contract labor there. Kingston wrote of the Transcontinental Railroad project, "Only Americans could have done it…which is true. Even if Ah Goong had not spent half his gold on citizenship papers, he was an American for having built the railroad."[10] This explores the distinction between legal and cultural citizenship mentioned earlier. Ah Goong's investment of his manual labor in America should have been enough to make him American, at least culturally if not legally. To be an American is to enjoy certain protections under the law, especially the rights to "life, liberty, and the pursuit of happiness."[11]

Legal Analysis

Every other Chinese railroad laborer, similar to Ah Goong, had to constantly fight for their U.S. citizenship. In Ah Goong's case, he bought citizenship papers with gold. Later, he blamed the San Francisco fires for incorrect paperwork and was allowed to stay because of shifting social attitudes: "He'd gotten the legal or illegal papers burned in the San Francisco Earthquake and Fire; he appeared in America in time to be a citizen and to father citizens."[12] The detail of "legal or illegal papers" suggests the arbitrariness of the American immigration system at that time. The use of the phrase "father citizens" is interesting because it echoes language used in the decision of the landmark court case *U.S. v. Wong Kim Ark*, which determined that citizenship by birth applies to Chinese immigrants living in the United States. While that seems an obvious maxim at this late age of social development, it was not obvious in 1898 when the

[10] *Id.*, 145.
[11] *Declaration of Independence* (National Archives).
[12] Kingston, *Chinamen,* 151.

case was decided. At that time, white supremacists such as Supreme Court Justices Melville Fuller and John Marshall Harlan argued that citizenship should be based on descent rather than geographical birth.[13]

Justices Harlan and Fuller opposed the capitalist inclusion of racialized labor forces into the American citizenry and looked for legal loopholes to achieve this. They wrote:

> It cannot be maintained that this government is unable, through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the U.S., shall not be made citizens thereof, and that their children shall not become citizens by reasons of being born therein.[14]

Fuller and Harlan here argued for international law to supersede section 14.1 of the U.S. Constitution, which states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[15] This is a clear rule that has centuries of precedence in English Common Law. Harlan and Fuller needed international law to supersede the Constitution in this instance to surpass the rule of citizenship by birth. As they pointed out elsewhere in their dissent, "the municipal code of England is not one of the sources from which we derive our knowledge of international law."[16] This provided a legal loophole to simultaneously satisfy their racist and capitalist agendas that needed the Chinese labor force at the time. This loophole would have allowed them to enforce a treaty prohibiting citizenship by birth for Chinese people in the United States. Fortunately for Wong Kim, the precedence of the Constitution won and citizenship by birth became the rule for him and all Chinese people living in the United States to this day.[17] Justice Gray writes in his

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[13] *United States v. Wong Kim Ark*, Cornell Law School: Legal Information Institute, accessed December 31, 2020, https://www.law.cornell.edu/supremecourt/text/169/649.
[14] *Id.*, 52.
[15] *United States Constitution*, Cornell Law School: Legal Information Institute, accessed December 31, 2020, https://www.law.cornell.edu/constitution/amendmentxiv.
[16] *United States v. Wong Kim Ark*, Cornell Law School: Legal Information Institute.
[17] Maxine Hong Kingston, *Chinamen*, New York: Vintage Books (1989), 36.

opinion, "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."[18] This interpretation of the citizenship rule as positive rather than negative was and is significant not just for Chinese Americans in the nineteenth century but for all Americans immigrants past and present.

In fact, this case is so significant that Kingston devotes an entire entry in the *Laws* chapter to the discussion of it:

> The Supreme Court decision in *The United States v. Wong Kim Ark* stated that a person born in the United States to Chinese parents is an American. This decision has never been reversed or changed, and it is the law on which most Americans of Chinese ancestry base their citizenship today.[19]

Fuller and Harlan's search for a legal loophole that would allow them to continue exploiting racialized labor forces—without granting them citizenship—continued among politicians, statesmen, and judges, spurring on the debate of the so-called "Chinese Problem."[20] The tension between legal measures and social acceptability remained an issue for Chinese Americans in the centuries following, making the careful study of these texts as relevant today as when they were first produced.

Conclusion

Because of the precedent set by *United States v. Wong Kim Ark*, legal citizenship in the United States is based on birth regardless of race. Brook Thomas writes in his essay that the "exclusive tendency within the concept of citizenship" makes *United States v. Wong Kim Ark* vitally important—not because it made United States citizenship universally inclusive, but because it denied a racial determination of citizenship by birth."[21] It is remarkable that such a decision was made within the same legal system that put the Chinese Exclusion Acts into place.

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[18] *Id.,* 35.
[19] *Id.,* 155-156.
[20] *Id.,* 153.
[21] Thomas, Brook, "China Men, United States v. Wong Kim Ark, and the Question of Citizenship," *American Quarterly* 50, no. 4 (1998): 689-717, doi:10.1353/aq.1998.0046.

However, citizenship is not only legal but also cultural. Despite some Chinese immigrants achieving legal citizenship in the United States, society still denied their cultural citizenship as seen through extrajudicial "driving outs." Through methods such as these, racist social agendas denied Chinese laborers a cultural citizenship that thus effectively denied them of legal citizenship. At the crossroads of capitalist interest and the social powers of white supremacy, we find the Chinese laborer through this historical struggle for citizenship and equality, and can continue to understand the fight against racist social constructions today.

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The Federal Trust Responsibility and Indigenous Stewardship

By Bryana Clark

Bryana Clark is a student at the University of California, Davis. She is studying Environmental Policy Analysis and Planning with a minor in Native American Studies. Bryana is a member of the Hopland Band of Pomo Indians. Bryana previously served as the Urban Outreach Coordinator for American Indian Recruitment and Retention (AIRR) at the Student Recruitment and Retention Center (SRRC). After finishing her undergraduate education, Bryana plans to attend law school.

This paper aims to expose loopholes created by the United States government in regard to Federal Indian Policy and environmental management. The policies and proceedings of the past have resulted in hesitancy in addressing the extent to which tribal nations are considered sovereign. The United States government is not capable of upholding trust responsibility in the best interests of tribes and their ancestral homelands. Indigenous sustainability and the use of Traditional Ecological Knowledge provides a management approach far more effective than the managerial style currently employed by the United States Department of Agriculture. The Department of the Interior and United States government as a whole must recognize the need for a drastic transformation of the structure of federal Indian policy and the management of public lands. This would strengthen the trust relationship by cultivating Indigenous sovereignty in the United States while simultaneously combatting the climate crisis.

Introduction

Throughout the history of the United States, repeated disregard of Indigenous peoples has taken many forms. The most blatant examples can be seen in the inconsistent legal history surrounding Indigenous peoples' status as federally recognized and their right to access resources based on varying political attitudes. The eras of Federal Indian law and policy have shifted throughout history and can be divided into periods: Colonial Period (1492–1774), Confederation Period (1774–1789), Trade and Intercourse Era (1789–1825), Removal Era

(1825–1850s), Reservation Era (1850–1887), Allotment and Assimilation Era (1887–1934), Indian Reorganization Era (1934–1940s), Termination Era (1940s–1961), and the Self-Determination Era (1961–Present).[1] These eras are labeled for the prevailing political attitudes that influenced the federal-tribal relationship and subsequent policies that exemplified those attitudes. The era we currently reside in is noted as the "Era of Self-Determination" due to the passage of Public Law 93-638, also known as the Indian Self-Determination and Education Assistance Act. This statute was created with the "interest of giving greater recognition in government-to-government relationships between Indian tribes and the Federal government, and to transfer greater responsibility to Indian tribes commensurate with their status."[2] This measure outlines specific standards for management of finances, procurement, and property. It also recognizes tribal governance over territories and its citizens as opposed to the previous domination of tribal territories and peoples under the United States government. However, despite this title, there is still much uncertainty and inconsistency regarding the protection of tribal interests by the United States government.

The management of biodiversity, cultural sites, sacred sites, and precious resources are not entirely within the control of Indigenous communities. Despite the reality that they are sovereign entities, their interests, while "considered," are not respected; they are not given precedence in governmental and bureaucratic decision-making despite their unique political relationship with the United States. This makes environmental stewardship and reciprocity extremely difficult to practice as communities are separated from their ancestral homelands both physically and politically.

[1] Robert J. Miller, "The History of Federal Indian Policies," (March 17, 2010), 3-18, http://dx.doi.org/10.2139/ssrn.1573670.
[2] *Id.*

Analysis of the Trust Responsibility and Self-Determination

The concept of the federal trust responsibility was first discussed in the Marshall Trilogy in 1831.[3] In *Cherokee Nation v. Georgia* (1831), the opinion of the court acknowledged the right of Indian peoples to occupy Indian land and distinguished them as "domestic dependent nations."[4] This ruling created a relationship between the tribes and the government similar to "that of a ward and his guardian" as the United States claimed to provide protection to Indian peoples.[5] Today, the United States is considered the *trustee* and the tribe is considered the *beneficiary*.[6] This relationship is defined by the fiduciary responsibilities of the trustee to the beneficiary, which are to support and encourage tribal self-government and self-determination and to uphold any duties arising from a treaty. The Supreme Court case *Seminole Nation v. United States* (1942) emphasized this relationship by stating:

> In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party… it has charged itself with moral obligations of the highest responsibility and trust. Its conduct… should therefore be judged by the most exacting fiduciary standards.[7]

This displays that the United States fully acknowledges its legal and moral obligations as a trustee. In addition to this, the trust responsibility can be created by a treaty between a tribal nation and the United States or through statutes, in which case they should be viewed as an extension of treaties.

The United States enacted the Indian Reorganization Act (IRA) in 1934, bringing an

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[3] David H. Getches, Charles F. Wilkinson, Robert A. Williams Jr., and Matthew L.M. Fletcher, "Cases and Materials on Federal Indian Law (6th ed.)," *Aboriginal Policy Research Consortium International (APRCi)* (2011): 306-307, https://ir.lib.uwo.ca/aprci/213.
[4] *Id.*
[5] *Id.*
[6] Stephen L. Pevar, *The Rights of Indians and Tribes,* Fourth Edition (New York: Oxford University Press, 2012).
[7] *Id.*

end to the Allotment and Assimilation Era. This policy created the framework for the modern trust relationship between the United States and tribal governments observed today. The ultimate goal was to restore Native homelands and reservations, strengthen tribal governments, and promote economic growth within the community. One major feature of this legislation was the placement of tribal territories and homelands into a trust, requiring the United States to protect resources in trust while managing them in the best interests of the tribal nation and its people.[8] Section 16 of the IRA outlines the powers given to the tribal council and its government, including the right "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets without consent of the tribe."[9]

While the IRA's intentions are to strengthen tribal sovereignty, the interests of tribal nations are often neglected in favor of the interests of the federal government. Despite the management of tribal trust land in the Department of the Interior (DOI) by the Secretary of the Interior (SOI), it is not completely protected from mismanagement, as notably observed in the case *United States v. Shoshone Tribe of Indians* (1938). The United States appealed to the Supreme Court, claiming that the Court of Claims erred when ruling that the right of ownership did not include timber and minerals for tribes residing on the Shoshone reservation.[10] This was an attempt to withhold resources based off of their substantial value.[11] Section 4 of the IRA cites that the "Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with

[8] "Indian Reorganization Act," U.S. Congress, 1934, http://recordsofrights.org/records/286/indian-reorganization-act/0.
[9] *Id.*
[10] *Id.*
[11] *Id.*

the proper consolidation of Indian lands and for the benefit of cooperative organization."[12] While this can be construed as beneficial to tribes, it can also be interpreted to validate the power of the SOI to lease this land as long as it is reasoned to be for the benefit of those for whom it is held in trust. The trust responsibility must be upheld to protect the resources held in trust as it is not only the duty and moral obligation of the United States outlined by trust responsibility,[13] but it is also in the best interest of the environment and general public.

The United States Government and Mismanagement of Trust Land

The United States has historically abused the nation-to-nation relationship with tribes when acting in the "best interest" of the condition of their lands; this is not singular to any administration. An example of this can be observed when analyzing the proposed construction of the Keystone XL pipeline by TransCanada through ancestral lands of the Gros Ventre and Assiniboine Tribes of Fort Belknap. The Keystone XL was approved via executive order in 2017 despite its rejection, on three separate occasions, for permits under the National Environmental Policy Act (NEPA).[14] The environmental review evaluated that there would be significant impacts if the project was to occur and rejected the applications for TransCanada's permits. In addition to this, the Gros Ventre and Assiniboine communities were never consulted about the project and received descriptions of two specific sacred sites projected to be desecrated or destroyed by the pipeline's construction.[15] This project was not the result of any single actor as the President, Department and Bureau of Land Management, and Department of State were all involved in order to fulfill the requirement for a permit under the NEPA. This depicts blatant disregard for the NEPA, IRA, and National Historic Preservation Act—all of which are in place

[12] *Id.*
[13] *Id.*
[14] Peter Baker and Coral Davenport, "Trump Revives Keystone Pipeline Rejected by Obama," *The New York Times*, January 24, 2017, https://www.nytimes.com/2017/01/24/us/politics/keystone-dakota-pipeline-trump.html.
[15] *Id.*

not only in the interests of Native American and Alaska Natives, but also of the entire United States population. The planning and construction of these pipelines began on ancestral lands without consideration of the impact they would have on the environment and the future of the fiduciary trust responsibility. This shows that the United States' interests do not align with the communities for which they hold land in trust and may even suggest that the United States government views this land as a commodity.

The Keystone XL pipeline permit was recently rescinded by President Biden via executive order; however, it exemplifies the "swinging pendulum of federal Indian policy," referring to oscillating legal and political perspectives regarding Indigenous peoples, their sovereignty, and their human rights. It also emphasizes that this cycle continues past the expiration of term limits. For example, in 2016 President Obama blocked a disputed segment of the Dakota Access Pipeline (DAPL).[16] This was overturned in 2017 by President Trump's signing of executive order 13807, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects."[17] The executive order granted permits for the DAPL and Keystone XL Pipeline, which commenced a widespread rollback of environmental regulations. In January of 2021, President Biden rescinded the permit for the Keystone XL pipeline by signing Executive order 13990.[18] In short, the Keystone XL Pipeline illustrates how the rights of Indigneous peoples in the United States have been caught in a swinging pendulum of politics and will continue to be stuck in this pendulum until their autonomy and sovereignty are understood, valued, and respected by government officials.

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[16] *Id.*
[17] *Id.*
[18] Joseph R. Biden Jr., "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," The White House, published January 21, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/.

It is clear that there is blatant disregard for both fiduciary responsibilities and the state of the ecosystem pursuant to trust land. The United States Department of Agriculture (USDA) is tasked with regulation and upkeep of public lands placed into trust by the IRA and federal trust relationship. However, the USDA has repeatedly displayed that it is unfit in upholding this duty as it permits logging on sacred sites and treaty lands without permission from tribes. The USDA recently lifted regulations in the Tongass National Forest, taking away the "Roadless Rule," which prohibited road construction and limited the amount of timber harvested to 58.5 million acres.[19] By lifting these regulations, treaty lands that are culturally, physically, and spiritually important to tribes are open to timber harvest. This directly impacts the Tongass Forest as it is the ancestral homeland of the Tlingit, Haida, and Tsimshian peoples, a key habitat for the bald eagle, and home to trees that are between 300 to 1,000 years old.[20]

The Tongass National Forest is also a biodiversity hotspot and, in 2005, the "Tongass Ground-truthing Project" used Geographic Information Systems (GIS) to examine the long-term effects of old-growth logging, which found clear evidence of its negative effects.[21] The USDA reasons that as long as the tribal nation is consulted before the authorization of the project and mitigation strategies produce a finding of "no adverse effect," the project may be allowed to proceed. This standard requires government transparency, consultation with tribes, and mitigation efforts if an adverse effect is found. However, it does not require the project to cease. This allows the NEPA to be used as a loophole to bypass environmental regulations. Incongruence between science and legislation is obvious despite the DOI's responsibility to manage natural resources for the benefit and enjoyment of Indigenous and American peoples. In

[19] Bob Christensen, "Ecological Forest Restoration in the Tongass National Forest: Why, How and Where," *The Wilderness Society and Southeast Alaska Wilderness Exploration, Analysis and Discovery* (2012): 17-35, http://www.sustainablesoutheast.net/documents/publications/Christensen-Tongass-forest-restoration-2012.pdf.
[20] *Id.*
[21] *Id.*

addition to this, the DOI fully acknowledges the United States' trust responsibility to the Native American, Alaska Native, and affiliated island communities in their mission statement. However, it fails to act accordingly.

By failing to provide proper protection pursuant to its fiduciary duties, the United States not only endangers the sovereignty of Indigenous peoples, but also the overall well-being of the general public. Tribal consultation during management decisions is necessary because the United States has a contractual agreement with the tribes, through the process of federal recognition, to uphold its duty to protect the best interests of tribal nations and villages. However, the federal government is often selective of when to exercise this relationship. The trust relationship is used both as a shield to protect Indians or as a sword to strip them of their rights. This produces a system of "Fortress conservation" through removing Indigenous peoples from their land base, which has a profound effect on the culture of the community and the ecosystem itself. The USDA has exhibited that tribal consultation is no longer sufficient in voicing tribal demands in the managerial process; the process must be improved to include tribes in a side-by-side process that promotes collaboration with Indigenous communities.

Indigenous Stewardship: A Solution to Combat Climate Change

In order to create an institution that supports sovereignty and self-determination, it must be understood that each tribe is a distinct political entity. Therefore, it is inaccurate to expect that a single system or model can be applied to every tribe. However, the Menominee National Forest is a notable example of what type of system can be created to foster the goals of Indigenous stewardship and sovereignty. The USDA and Menominee Indian Tribe of Wisconsin have a unique partnership: beginning in 2003, the three branches of the USDA forest service united with the College of Menominee Nation.[22] This unique partnership is

[22] "Center for First Americans Forestlands," USDA Forest Service: Northern Research Station, last modified July

referred to as the Center for First American Forestlands and has had great success in reciprocal management of the Menominee National Forest. The Menominee Tribal Enterprises have created a forest plan that is tailored specifically to the land itself with the goal of maintaining the health and well-being of the forest. The specific management programs employed by the Menominee Tribal Nation use traditional Indigenous stewardship tactics to maintain a healthy forest density and allow for timber harvesting while simultaneously meeting the prescribed environmental goals set in the management plan.[23] Presently, the forest is the healthiest it has been since prior to contact. The USDA acknowledges the overall importance of Indigenous management and praises the Menominee Nation for the partnership and employment of these sustainable management techniques. However, this model is not widely applied; it is currently used in only fifteen National Forests and one National Grassland.[24]

The Center for First American Forestlands has the potential to expand and encompass a wide variety of landscapes, not just forest management. This program can not only create personalized stewardship plans using Traditional Ecological Knowledge (TEK), but also actively combat climate change in the process.[25] In addition to this, the model would allow a more holistic method of management that does not compromise the sovereignty of Indigenous peoples or further threaten their cultural relationship with the ecosystem. This model seeks to fill the gaps of fiduciary trust responsibility that the United States has refused to acknowledge. As the United States is no longer upholding their end of the trust, many nations argue for complete ownership of their ancestral homelands and that tribal interests would be better

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31, 2019, https://www.nrs.fs.fed.us/partners/cfaf/.

[23] "Forestry: MTE Forestry," Menominee Tribal Enterprises, accessed March 23, 2021, https://www.mtewood.com/SustainableForestry.

[24] *Id.*

[25] John G. Hansen and Rose Antsanen, "What Can Traditional Indigenous Knowledge Teach Us About Changing Our Approach to Human Activity and Environmental Stewardship in Order to Reduce the Severity of Climate Change?" *The International Indigenous Policy Journal* 9, no. 3 (2018), https://doi.org/10.18584/iipj.2018.9.3.

served in possession of the tribe itself. However, expansion of the Menominee Forest Model could be an alternative to severing the trust relationship completely or privatizing the land, which could impact federal funding for upkeep.

A model where tribes are considered partners in the managerial process would be more efficient than the process currently in place for the management of public lands. It has become apparent that the United States government can no longer uphold its fiduciary responsibilities and should therefore progress toward a more comprehensive model of land management: one which establishes a different relationship where tribes are no longer beneficiaries, but considered equal partners actively involved in the process of management. The role of the DOI would be to ensure that legal and bureaucratic procedures are followed while the tribe works actively with the necessary departments to create a personalized model for stewardship and management. Allowing tribes to create and control their management plans with the support of the USDA would better meet the goals of the Indian Reorganization Act of 1934, as well as be a step toward more concrete definitions of self-determination in the twenty-first century. The United States must recognize that Indigenous peoples are at the forefront of the climate change crisis and possess the ability to combat the climate crisis. Creating a new model is in the best interest of the federal government and must be done in a way that fosters sovereignty and the protection of ecosystems within the United States.

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Proposition 22: How Rideshare Companies Bypassed the Courts

By Marshall Comia

Marshall Comia is a student at the University of California, Davis. He is studying Political Science - Public Service. Prior to attending UC Davis, he received an associate degree from Sierra College.

In the November 2020 general election, California signed Proposition 22 into law. This proposition allowed app-based rideshare and delivery companies such as Uber, Lyft, and Doordash to classify their drivers as independent contractors as opposed to employees. In 2019, Assembly Bill 5 (A.B. 5) was signed into California law, mandating that app-based rideshare and delivery companies classify their drivers as workers instead of independent employees. In the recent California Superior Court decision *People v. Uber et al.* (2020), the court challenged Uber and Lyft for continuously violating and evading A.B. 5. The court ordered that these two companies start classifying their drivers as employees instead of independent contractors. Despite this ruling, Uber and other rideshare companies used Proposition 22 to legally and successfully defy A.B. 5 as well as the *People v. Uber et al.* orders.

As a result of the 2020 election, California voters passed Proposition 22; 58.6 percent of voters voted "Yes" on passing the proposition.[1] This proposition altered the criteria that determines what classifies an employee from an independent contractor.[2] More specifically, the passage of this proposition determined that "app-based rideshare and delivery companies can hire drivers as independent contractors."[3] Distinguishing between these two worker classifications is important for a company because, unlike employees, independent contractors

[1] "November 2020 General Election," California Fair Political Practices Commission, accessed September 29, 2020, http://www.fppc.ca.gov/transparency/top-contributors/nov-20-gen.html.
[2] "Qualified Statewide Ballot Measures", Qualified Statewide Ballot Measures :: California Secretary of State, California Secretary of State, accessed September 29, 2020, https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.
[3] "Proposition 22 [Ballot]," Legislative Analyst's Office, Joint Legislative Budget Committee (JLBC), accessed September 29, 2020, https://lao.ca.gov/BallotAnalysis/Proposition?number=22&year=2020.

do not receive standard benefits and protections from their company, such as health care benefits, unemployment insurance, and workers' compensation. The supporters of Proposition 22 raised about two million dollars—more money than any other ballot measure in history. Lyft, Doordash, and Uber were the top three contributors.[4] The top contributors opposing Proposition 22 raised far less in comparison.[5] By taking this expensive legal fight to the ballot box, these app-based companies bypassed the courts.

California is one of the twenty-four states that allows citizens to amend the state constitution without involving the state legislature or California courts.[6] California citizens can directly amend the state constitution through two means: initiative or referendum. Through the initiative process, if a voter-made law "to add, amend or repeal statutes or the California Constitution"[7] receives the required number of signatures, which is "8 percent of the votes cast in the previous statewide gubernatorial election," a majority vote in an election can make the law official.[8] By similar means, "passing a referendum allows voters to repeal a statute that was adopted by the Legislature and signed by the Governor."[9] Proposition 22 is a state initiative that passed due to Uber, Lyft, and Doordash's usage of California's initiative process.

In 2019, Assembly Bill (A.B. 5) was signed into California law. This bill mandates that app-based rideshare and delivery companies classify their workers as employees instead of independent contractors and therefore treat these workers according to their new classification.

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[4] "November 2020 General Election," California Fair Political Practices Commission, accessed September 29, 2020, http://www.fppc.ca.gov/transparency/top-contributors/nov-20-gen.html.
[5] "California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)," Ballotpedia, accessed December 19, 2020, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020).
[6] "Initiative and Referendum Processes," NCSL: National Conference of State Legislatures, December 31, 2020, https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx.
[7] Chris Micheli, "Direct Democracy in California: History and Functions," CAP·impact, last modified June 20, 2019, https://www.capimpactca.com/2019/06/direct-democracy-in-california-a-brief-history-and-its-functions/.
[8] *Id.*
[9] *Id.*

A.B. 5 reclassifies app-based rideshare and delivery workers by incorporating the language of *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018). In the *Dynamex* decision, the "ABC" test, which had been "utilized in other [California] jurisdictions in a variety of contexts to distinguish employees from independent contractors,"[10] was used again to classify these workers. Under the ABC test, a worker is considered an independent contractor and not an employee if the hiring entity establishes:

> (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[11]

If any one of these three criteria cannot be adequately established by the hiring entity, then the hiring entity cannot classify the worker as an independent contractor and instead must classify the worker as an employee. In a case where a court rules that the ABC test cannot be applied, A.B. 5 states that the Borello test from the case *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) should be used. Similar to the ABC test, the Borello test determines whether employee or independent contractor status should be used by weighing a myriad of interrelated factors to decide "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."[12] Despite the passage of A.B. 5, Uber and Lyft are not following it.

In May 2020, the Attorney General of California sued Uber and Lyft for continuing to violate A.B. 5 after it took effect January 1, 2020 by "misclassify[ing] their ride-hailing drivers

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[10] Dynamex Operations W. v. Superior Court and Charles Lee, Real Party in Interest, 4 Cal. 5th 903, 416 P.3d 1, 232 Cal. Rptr. 3d 1 (2018), https://boehm-associates.com/wp-content/uploads/2018/10/Dynamex-Operations-West_-Inc.-v.-Superior-Court_-4-Cal.pdf

[11] *Id.*

[12] S. G. Borello & Sons, Inc. v. Department of Industrial Relations 48 Cal.3d 341 (1989),

as independent contractors rather than employees" in the case *People v. Uber et al.* (2020).[13] The Attorney General also tried a motion "for a preliminary injunction enjoining Defendants from classifying their drivers as independent contractors,"[14] meaning that the court would order Uber and Lyft to immediately comply with A.B. 5 unless another court ruled otherwise. In this California Superior Court decision, Judge Ethan Schulman ruled that Uber and Lyft misclassified their workers as independent contractors. Because Uber and Lyft failed the B prong of the ABC test, which holds "that the worker performs work that is outside the usual course of the hiring entity's business," the ruling ordered the two companies to classify their workers as employees.[15] Uber argued that their company is a technology company that "operate[s] as 'matchmakers' to facilitate transactions between drivers and passengers"[16] rather than a transportation company. Uber continued to argue that their only employees are their workers who do the "engineering, product development, marketing and operations 'in order to improve the properties of the app.'"[17] The courts rejected their argument because they saw Uber's unsuccessful claim as a "classic example of circular reasoning: because it considers itself a technology company and considers only tech workers to be its 'employees,' anybody else is outside the ordinary course of its business, and therefore is not an employee."[18] Uber has made this argument before in the case *O'Connor v. Uber Technologies, Inc.* (2015). In this case, "Judge Edward Chen of the U.S District Court for the Northern District of California found this argument 'flawed in numerous respects'…'fundamentally, it is obvious drivers perform a service for Uber because Uber simply

[13] People of the State of California v. Uber Technologies, Inc., A Delaware Corporation et al., https://assets.documentcloud.org/documents/7032764/Judge-Ethan-Schulman-Order-on-Lyft-and-Uber.pdf.
[14] *Id.*
[15] *Dynamax*, 4 Cal. 5th at 908.
[16] People of the State of California v. Uber Technologies, Inc., A Delaware Corporation et al., https://assets.documentcloud.org/documents/7032764/Judge-Ethan-Schulman-Order-on-Lyft-and-Uber.pdf.
[17] *Id.*
[18] *Id.*

would not be a viable business without its drivers.'"[19] The decision in *People v. Uber et al.* to classify Uber and Lyft drivers as employees has been seen in many other court decisions, such as *Cunningham v. Lyft, Inc.* (2020), *Namisnak v. Uber* (2020), and *Crawford v. Uber Technologies, Inc.* (2018).[20]

The defendants of *Uber et al.* also made two other main arguments to defend their evasion from complying with A.B. 5. Defendants first argued that A.B. 5 does not apply "because they are not 'hiring entities' within the meaning of the legislation."[21] The court noted that in a previous case, Uber argued that "[A.B.] 5 targets gig economy companies and workers and treats them differently from similarly situated groups."[22] Yet, in *Uber et al.*, Uber argued that the same piece of legislation that unfairly targeted them did not apply to them. The court decided that they could not "take seriously such contradictory positions"[23] and ruled the defendants as subject to A.B. 5.

The second main argument that defendants made was that if they reclassified their drivers as employees in compliance with A.B. 5, they would suffer two categories of harm:

> (1) the costs and other harms associated with the restructuring of Defendants' businesses in California; and (2) the harms to Defendants' drivers, including the risk that some may [be] unable to continue earning income if Defendants do not offer them continued work as employees, and the risk that their reclassification as employees jeopardize their eligibility for emergency federal benefits available to them as self-employed workers during the COVID-19 pandemic.[24]

In response to the first category of harm, the court acknowledged that compliance with A.B. 5 will be costly because defendants "will have to change the nature of their business[es] in

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Lydia Olson et al v. State of California et al, 2:19-cv-10956, No. 52 (C.D.Cal. Feb. 10, 2020), available at https://www.docketalarm.com/cases/California_Central_District_Court/2--19-cv-10956/Lydia_Olson_et_al_v._State_of_California_et_al/52/.
[23] *Id.*
[24] *Id.*

significant ways."[25] However, the court held that the defendants' argument "at root, is fundamentally one about the financial costs of compliance."[26] In response to the second category of harm, the court opined that if compliance to the People's demands of A.B. 5 were far-reaching, "they have only been exacerbated by Defendants' prolonged and brazen refusal to comply with California law. Defendants may not evade legislative mandates merely because their businesses are so large that they affect the lives of many thousands of people."[27] The court points out that, since Defendants' ridership is currently low, now "may be the best time (or the least worst time) for Defendants to change their business practices to conform to California law without causing widespread adverse effects on their drivers."[28] Despite the motions that Defendants have made attempting "to delay or avoid a determination whether, as the People allege, they are engaged in an ongoing and widespread violation of A.B. 5…Defendants are not entitled to an indefinite postponement of their day of reckoning. Their threshold motions are groundless."[29] The court ordered that defendants are "restrained from classifying their Drivers as independent contractors."[30] Following this case, the Defendants were able to continue pursuing litigation until after the November 2020 election, where Uber and Lyft became exempt from A.B. 5's requirements through the passage of Proposition 22.

Following Proposition 22's success, truck drivers—more specifically motor carriers and owner-operator drivers—are seeking the same exemption of A.B. 5 in court that rideshare companies were able to achieve through Proposition 22.[31] Republican Assemblyman Kevin Kiley

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id*.
[29] *Id*.
[30] *Id.*
[31] James, Jaillet, "Court Weighs Whether Carriers Can Continue to Work with Owner-Operators in California," Commercial Carrier Journal, last modified September 2, 2020, https://www.ccjdigital.com/court-california-owner-operators-abc-ab5/.

of California is also trying to advance the success of Proposition 22 by introducing legislation "to repeal AB 5…and codify the Borello case factors in California law for purposes of determining worker classifications in this state."[32] If Kiley's proposed bill doesn't succeed, Kiley "said he may try to put AB 5 on the ballot in 2022."[33]

Despite the passage of Proposition 22, A.B. 5 will continue to cover "the vast majority of individuals who are independent contractors in their main jobs"[34] because the ABC test applies to their occupations. The most common of these occupations still covered under A.B. 5 include retail workers, grounds maintenance workers, and childcare workers.[35] While A.B. 5 remains strong in the occupations it covers, employment lawyer Gina Miller "said she could see Proposition 22 opening the door for more industries to seek an exemption at the ballot box rather than through the Legislature."[36]

[32] Chris Micheli. "AB 25: Back to Borello Factors for Independent Contractors," California Globe, accessed December 9, 2020, https://californiaglobe.com/fr/ab-25-back-to-borello-factors-for-independent-contractors/.
[33] *Id*.
[34] Sarah Thomason, Ken Jacobs, and Sharon Jan, "Estimating the Coverage of California's New AB 5 Law," UC Berkeley Labor Center, last modified September 3, 2020, https://laborcenter.berkeley.edu/estimating-the-coverage-of-californias-new-ab-5-law/.
[35] *Id*.
[36] Jeong Park and Hannah Wiley, "California's Gig Worker Initiative Blew a Giant Hole in Its Landmark Labor Law. What's Left?", The Sacramento Bee, last modified November 12, 2020, https://www.sacbee.com/news/politics-government/capitol-alert/article247105212.html.

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S. G. Borello & Sons, Inc. v. Department of Industrial Relations 48 Cal.3d 341 (1989).
Thomason, Sarah, Ken Jacobs, and Sharon Jan. "Estimating the Coverage of California's New AB 5 Law." UC Berkeley Labor Center. Accessed September 3, 2020. https://laborcenter.berkeley.edu/estimating-the-coverage-of-californias-new-ab-5-law/.

Protecting the Gay Weekend From the Nine-to-Five Grind

By Drew Corker

Drew Corker is a student at the University of California, Davis. She is studying English. Drew has previously interned for The Seymour Agency and aspires to be an editor.

This essay explores the current protections that LGBTQ workers have in America as of December 2020, and, upon finding these protections lacking, dissects various arguments both against and for strengthening protections for LGBTQ workers. The essay first explores questions about religious freedom as a reason against expanding worker protections, then studies three possible ways to expand these protections. Namely, it examines the possibilities of Supreme Court rulings, state legislation, and federal legislation. This essay concludes that federal legislation that adds LGBTQ status as a protected class within the Civil Rights Act would be optimal for protecting workers.

Introduction

You get married on a Saturday. It is the wedding of your dreams with the perfect venue, the perfect cake, and the perfect partner. It is the start of a new chapter in your life and nothing can keep the smile off your face. That is until Monday, when you are fired because your spouse happens to be the same gender as you. It has only been eighteen years since the Supreme Court's *Lawrence v. Texas* (2003) ruling decriminalized homosexuality[1] and a scant four years since same-sex marriage was declared legal in all fifty states.[2] While some believe that the fight for equal protection for members of the LGBTQ community is over, there is still a large issue of employment discrimination within America. Pride At Work, an organization that supports a

[1] Oyez, "Lawrence v. Texas," Oyez, accessed November, 27 2019, www.oyez.org/cases/2002/02-102.
[2] Bill Chappell, "Supreme Court Declares Same-Sex Marriage Legal In All 50 States," last modified June 26, 2015, www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages.

federal ban on employment discrimination against LGBTQ workers, explores how LGBTQ workers are discriminated against in the modern workplace. According to multiple studies, an estimated 16 percent of LGBTQ workers have been fired as a direct result of their LGBTQ status in their lifetime and many face difficulties with being hired or finding promotions as a result of their LGBTQ status.[3] According to Bynum and Kastanis, at present only twenty-one states have anti-discrimination laws in place to protect LGBTQ workers. Of these twenty-one states, some have extreme limitations on who is actually protected: "about half of the nation's estimated 8.1 million LGBT employees live in states where job discrimination laws don't cover them."[4] With only a minority of states offering protection from discrimination in the workplace, many members of the LGBTQ community find that living their lives openly means living them unemployed. As Luke Largess, a lawyer involved in a North Carolina discrimination lawsuit, puts it, "You get married on a Saturday and fired on a Monday, and there's no protection."[5]

In Largess's lawsuit, a teacher at Charlotte Catholic High School was fired shortly after marrying his male partner because of his marriage.[6] The school defended this decision by arguing that his "advocacy in favor of same-sex marriage" was against their earnestly-held religious values.[7] The case is only one of many across the country fighting for the same thing and the argument used by Charlotte Catholic High School is not unique to this case. This is an oft-repeated argument for hesitancy toward supplying workplace protections for the LGBTQ community. In fact, it is one of the reasons the Trump administration gave for changing grant regulations so that discrimination against LGBTQ applicants was permissible.

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[3] Pride At Work, "Workplace Discrimination," accesed November 30, 2020, www.prideatwork.org/issues/workplace-discrimination/.
[4] Russ Bynum and Angeliki Kastanis, "AP Analysis: Most States Lack Laws Protecting LGBT Workers," last modified October 15, 2019, www.usnews.com/news/us/articles/2019-10-15/ap-analysis-wide-gaps-in-legal-protection-of-lgbt-workers.
[5] *Id.*
[6] *Id.*
[7] *Id.*

The First Amendment and Worker Protection

The U.S. Department of Health and Human Services released a statement justifying the change to allow for LGBTQ discrimination in grant regulation, stating that "[the] proposed rule would better align its grants regulations with federal statutes, eliminating regulatory burden, including [the] burden on the free exercise of religion."[8] The First Amendment has been brought up time and time again in regard to the expansion of marriage to and now protection from discrimination for the LGBTQ community. The argument holds that because the First Amendment protects the free exercise of religion, and one's earnestly-held religious belief is that homosexuality is wrong, then one should be able to fire workers whose actions are against these beliefs.

However, since the very first time this argument was tried on the Supreme Court floor, when polyamory was made illegal to the outrage of the Church of Jesus Christ of Latter-day Saints in the late 1800s, this interpretation has been repeatedly rejected. In *Reynolds v. United States* (1878), the Supreme Court wrote, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[9] This distinction between belief and action is why ritualistic human sacrifice is not a protected religious rite, no matter how firmly the belief may be held. Allowing for a religious opt-out from the law was a concern of the *Reynolds v. United States* decision, which held that allowing this interpretation of the First Amendment "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto

[8] U.S. Department of Health and Human Services, "HHS Issues Proposed Rule to Align Grants Regulation with New Legislation, Nondiscrimination Laws, and Supreme Court Decisions," last modified November 1, 2019, www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html.
[9] Frederick Gedicks and Michael McConnell, "The Free Exercise Clause, accessed November 30, 2020, constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/265.

himself."[10] Similarly, the free exercise clause of the First Amendment was called upon in the 1960s argument against integration. Bob Jones argued that the IRS denial of tax exemption to his university because of its segregationist policies "cannot be constitutionally applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs."[11] In an eight-to-one decision, the Supreme Court ruled against Jones, arguing that combating segregation served the protection of the American people better than the discriminatory religious practices.[12] We can conclude that the First Amendment does not protect the religious practice of discrimination against the LGBTQ community and therefore it is a worthy cause to further their protection rather than restrict it.

Introduction to Possible Solutions

There are three main solutions to workplace LGBTQ discrimination. The Supreme Court is currently deliberating on a few cases regarding LGBTQ workplace discrimination and whether Title VII protections include sexuality. If the Supreme Court decides in favor of LGBTQ members, then the Civil Rights Act's Title VII will include sexuality as a protected class and the LGBTQ community will have legislation which protects them. There is also the argument that the power of this protection should only come from the state level and we should therefore wait and allow state legislatures to adopt their own anti-workplace discrimination bills. While both of these approaches could be successful in the protection of the LGBTQ community, there are several drawbacks to each which make them somewhat unsatisfactory for the permanent protection of LGBTQ Americans. This essay argues in favor of the third option: federal legislation explicitly including LGBTQ identities as a protected class in the American workforce.

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[10] *Id.*
[11] Ian Millhiser, "When 'Religious Liberty' Was Used To Justify Racism Instead Of Homophobia," last modified February 27 2014, thinkprogress.org/when-religious-liberty-was-used-to-justify-racism-instead-of-homophobia-67bc973c4042/.
[12] *Id.*

The Supreme Court

As of the finalization of this essay, the Supreme Court has not yet come to a decision on whether or not Title VII includes sexuality as a protected class. Title VII of the Civil Rights Act is what protects Americans from employment discrimination on the basis of race, sex, religion, color, or national origin.[13] Sexuality is not explicitly stated anywhere within the document as a protected status, but sex has been used as equivalent to it in legal disputes up until now; since a woman would not be fired for marrying a man, then firing a man for marrying a man can be considered discrimination on the basis of sex. However, since homosexuality was considered a mental illness at the time of the creation and passing of the Civil Rights Act, it is acknowledged that the legislation was likely not intended to protect Americans on the basis of sexuality.[14] The cases currently under review by the Supreme Court are key to deciding which interpretation of Title VII the country will use from now on and, since the makeup of the Supreme Court has changed dramatically since the narrow 2015 decision in favor of same-sex marriage, it is difficult to tell which interpretation they will decide upon. If they decide that sexuality is not a protected status, then either the state or federal legislatures will need to pass laws in order to extend that protected status to LGBTQ Americans.

However, a more explicit federal law allowing equal employment protection to LGBTQ Americans would be beneficial even if the Supreme Court rules that sexuality is included in Title VII. There are some drawbacks of LGBTQ employment protection coming from a Supreme Court ruling. Firstly, a ruling by the Supreme Court can conceivably be changed at any time in the future once the makeup of the Supreme Court has changed enough. If anti-LGBTQ

[13] U.S. Equal Employment Opportunity Commission, "Title VII of the Civil Rights Act of 1964," accessed November 27 2019, www.eeoc.gov/laws/statutes/titlevii.cfm.
[14] Alexander R. P. Dunn, "Supreme Court Considers Title VII Protections for LGBTQ Workers," last modified October 14. 2019, www.natlawreview.com/article/supreme-court-considers-title-vii-protections-lgbtq-workers.

radicalization grows further in the future, the Title VII ruling would almost certainly be retried and protections could be taken away from LGBTQ Americans. If this should happen without federal legislation in place, LGBTQ Americans will have to rely on local and state protections, and as this essay will soon discuss, these may not be ready in time or at the necessary level to protect them. With federal legislation in place, however, the law becomes unambiguous, and the Supreme Court interpretation could therefore very likely rule in favor of LGBTQ workers. With legislation, there is usually a monetary incentive or punishment for noncompliance. The judiciary branch of the U.S. government, meanwhile, has to rely on legislative and executive branches for the enforcement of its decisions. Since the Trump administration has firmly positioned itself as anti-LGBTQ with actions such as its transgender military ban and the above pro-discriminatory changes to grant regulations, it is unlikely that the executive branch, at least at this moment in time, would be cooperative in the enforcement of a Supreme Court decision in favor of LGBTQ employment. As a result, in addition or in response to the upcoming Supreme Court decision on this subject, there should be further federal legislation to protect LGBTQ Americans.

State Legislation

Another possible solution to the employment discrimination LGBTQ workers currently face is the passing of state legislation. In this scenario, the majority of American states, which do not have LGBTQ worker protections, will be allowed to pass these protections in their own time under their own legislatures. While some of these protectionless states are working toward passing protective legislation—Ohio has tried passing an anti-discrimination bill every year since 2003[15]—it may take decades before a majority of states have passed such laws, let alone all of them. It is this time factor that makes state legislation a sub-optimal means for providing

[15] Randy Ludlow, "Bill to Forbid LGBTQ Discrimination Again Introduced at Statehouse," last modified October 16, 2019, www.dispatch.com/news/20191016/bill-to-forbid-lgbtq-discrimination-again-introduced-at-statehouse.

protection against employment discrimination for LGBTQ Americans. It took nearly a century between the Fourteenth Amendment's declaration of equal rights for all Americans regardless of race and the passing of the Civil Rights Act in 1964 that finally protected people of all races from employment discrimination. This change was sped along by federal legislation. If left to states alone, the timetable for appropriate worker protections is lengthy and inconsistent across the nation. While it is true and obvious that the plight of the LGBTQ community is not comparable to the historical oppression of American people of color, the parallels between them could mean decades before there is even a majority of states with employment protection for LGBTQ Americans, let alone for all states to pass more comprehensive protections. Yet, members of the LGBTQ community are losing their jobs *now*. Federal legislation would create protections across America in a fraction of the time—and may be the only way to get certain states to pass protections at all.

Federal Legislation

The main concern that has many upholding state legislation over federal legislation comes down to an argument as old as our country: the interpretation of the Tenth Amendment. All powers that the Constitution does not explicitly give to the federal government should be reserved for the states. Many would argue that, since employment discrimination is not addressed as a federal power within the Constitution, that means that there can be no federal legislation on employment discrimination. However, there are ample precedents for such legislation at the federal level. There is the Civil Rights Act itself and, within it, Title VII. It serves as ample precedent for the passing of federal protection for LGBTQ Americans against the very same employment discrimination. As a result, the Tenth Amendment is not a strong argument against the passage of federal anti-discrimination legislation for LGBTQ workers.

Federal legislation protecting LGBTQ workers provides a strong work-around for the issues with state legislation and with a Supreme Court ruling. Similar to the passing of the Civil Rights Act which furthered the protections for millions of Americans in states that had no intention of enacting such protections, federal legislation could speed up the slow process of state legislation and bring about real change in a matter of a few years rather than a few decades. Unlike the Supreme Court, in which one only needs to replace (at worst) five people—and more likely only one person—to gain a majority and reverse rulings, the large numbers of federal representatives and the slow work of the Senate make it more difficult to revoke legislation. Thus, federal legislation circumvents the two largest issues found in the other two methods. An appropriate legislative solution could be adding sexuality and gender identity to the Civil Rights Act as a protected class. This has already been achieved three times: for age in 1967, for a broadened definition for women's protections in 1972, and for disability in 1992.[16] However, even in these extremely important and celebrated additions to the Civil Rights Act, there are still the vestiges of dicrimination against LGBTQ workers hidden in their vast expanses. For instance, there is a section in the Americans with Disabilities Act, which added disability as a protected status, that is titled "Transvestites" and states that "the term 'disabled'" doesn't apply to someone who "is a transvestite."[17] When the very documents that are meant to protect workers show a clear bias toward gender-nonconforming persons among the LGBTQ population, it is clear that these documents need to be updated to support these Americans that have long gone overlooked. It has been approximately thirty years since the last time we updated the Civil Rights

[16] Meghan Droste, "What Are 'Protected Classes'?", last modified October 4, 2018, www.subscriptlaw.com/blog/protected-classes.
[17] U.S. Equal Employment Commission, "Titles I and V of the Americans with Disabilities Act of 1990 (ADA)," accessed November 30, 2020, www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada.

Act. With growing awareness of the ways America has failed its LGBTQ citizens, it is simply time to update our worker protections once again.

Conclusion

When America was first founded, the people meant to have rights were few and far between. The American Dream has always been to become better than that, to provide freedom and equity to more and more Americans. We are getting closer to this dream every day. It may seem far away, and it may seem impossible, but every small step we make today will become the equality of the future. The journey continues today by giving LGBTQ Americans the freedom to marry on a Saturday with the assurance they will still have a job come Monday.

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Artificial No More: We Should Establish Artificial General Intelligence as Legal Persons

By Alexa Johnson-Gomez

Alexa Johnson-Gomez is a student at the University of California, Davis. She is studying Communication. In 2020, she participated in the University of California Center Sacramento (UCCS) program in public policy and law, where she served the Office of Governor Gavin Newsom as an intern on the legal affairs team. She completed a capstone project for the UCCS program entitled "Rehabilitation: The Key to Recidivism?", which analyzed the efficacy of rehabilitative programming in prison when low recidivism is the goal. She will be attending the University of Minnesota Law School in Fall 2021.

As artificial intelligence (AI) evolves over the years into artificial general intelligence (AGI), laws must be created that preempt a legal crisis caused by AI. Experts believe that artificial general intelligence could develop in the next decade. As laws lag behind the curve of technology, we leave ourselves vulnerable to great injustices. A cogent example of this occurred in 2018, when a self-driving car struck and killed a woman. A Supreme Court case involving the Fourteenth Amendment, *Citizens United v. FEC* (2010), lays a foundation for laws that could establish artificial intelligence as legal personhood, due to its precedent of allowing corporations to be viewed as legal personhood. These observations set up a subsequent analysis of legal frameworks that might encapsulate AGI and of further application of legal principles that would be reasonable to implement in a future where AGI may be a significant party in court proceedings. Ultimately, it is the recommendation of this paper that the legal community should not wait for a situation that requires action, but instead preempt it with established law.

Introduction

It has been argued by some scholars that at any given moment, an artificially intelligent entity who is at least as intelligent as humans could come into existence.[1] Today, we define

[1] Danny Hillis qtd. in Jiahong Chen and Paul Burgess, "The Boundaries of Legal Personhood: How Spontaneous Intelligence Can Problematise Differences Between Humans, Artificial Intelligence, Companies and Animals," Artificial Intelligence and Law.

artificial intelligence as a simple program meant to execute a single task. However, most of the AI that is prevalent today in technology is layered—multiple single function programs that nest together to execute more complex tasks. For nearly as long as AI has existed, computer scientists have wondered if AI could evolve into something as intelligent as humans. While this could arise as a result of sophisticated programming created by humans, it is also possible that an AI could self-evolve by utilizing the internet without the need for human creation or control. AI that is of the same intelligence level as humans is known as artificial general intelligence—AGI[2]—while a self-evolved iteration of this is referred to as spontaneous intelligence or spontaneous AGI.[3] While experts in the fields of AI and computer science do not have a firm idea of when AGI will suddenly exist, it is not far off. Dr. Nick Bostrom, professor at Oxford University and director of the Future of Humanity Institute, is a notable expert in the field of artificial intelligence and futurism. Bostrom has maintained since the 1990s that there is a small likelihood AGI will come into existence as early as 2024 and that there is an almost 50 percent chance that AGI will be realized in 2033.[4] A more conservative estimate was established in a survey taken of the "most-cited living computer science researchers," with over half affirming there is more than a 50 percent chance of AGI by 2050 and even a slightly above 10 percent chance of AGI in the next five years.[5] Overall, it is clear that experts believe AGI *can* exist. The question is *when*, and, more notably, how our legal system will respond to the creation of AGI.

The mere possibility of spontaneous AGI in the coming decades necessitates action from our legal system. Currently, our laws have no provisions whatsoever for technology that

[2] Nick Bostrom qtd. in Jiahong Chen and Paul Burgess,"The Boundaries of Legal Personhood: How Spontaneous Intelligence Can Problematise Differences Between Humans, Artificial Intelligence, Companies and Animals," Artificial Intelligence and Law.
[3] *Id.*
[4] Nick Bostrom, "How Long Before Superintelligence?", last modified March 12, 2008, https://www.nickbostrom.com/superintelligence.html.
[5] Vincent C. Müller qtd. by Robert Wiblin, "Positively Shaping the Development of Artificial Intelligence," accessed December 31, 2020, 80000hours.org/problem-profiles/positively-shaping-artificial-intelligence/.

functions with near-human intelligence. For instance, if an AGI were to interfere with the results of a United States election, there is no current precedent capable of addressing such an event, as there is no law that regulates crimes committed by technology. On the other hand, if an AGI becomes a victim of a crime, the law as it stands would still be incapable of defending the AGI. Our federal and state policy makers will need to create legislation that broadens the definition of legal personhood to account for human-level AGI similar to how the justice system considers corporations to be viewed as "persons" under the law. The many interpretations of the Fourteenth Amendment create a prudent foundation for possible precedents on a redefinition of legal personhood. This paper will not address the ethics of safe AI creation in anticipation of AGI nor debate the assertion that AI will ultimately reach human intelligence. This paper also makes the necessary assumption that if an AGI is as intelligent as a human, it deserves to be treated legally as a human.

Review

Death of Elaine Herzberg

While it may be premature to legislate technology prior to its existence, it will be far worse to wait for something irreversible to occur at the hands of an AGI. Current artificial intelligence has already been the subject of various entangled legal deliberations. One example of this occurred in Arizona in March 2018, when a Volvo car testing its self-driving Uber technology struck and killed forty-nine-year-old Elaine Herzberg.[6] The car had a human safety driver, Rafaela Vasquez, sitting at the wheel as a precaution for the test, but she did not intervene; it is reported that Vasquez had her eyes off the road at the moment of impact.[7]

[6] Daisuke Wakabayashi, "Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam," accessed December 31, 2020, nytimes.com/2018/03/19/technology/uber-driverless-fatality.html.
[7] *Id.*

The involved parties were unsure of how to respond or who might be held responsible. Uber, the State of Arizona, Rafaela Vasquez, the developers of the technology, and even the federal government could all be considered partially responsible for the tragedy. After much deliberation, prosecutors determined in 2019 that Uber was not criminally liable for the homicide, but Uber would later pay out an undisclosed settlement to Herzberg's family, indicating an awareness that her family had grounds to pursue a civil case.[8] Furthermore, prosecutors have since charged the safety driver, Vasquez, with negligent homicide—Vasquez pled not guilty and awaits trial in 2021.[9] In this instance involving simple AI, not AGI, matters were ultimately resolved by prosecuting the closest human in the chain of responsibility. Yet, a human will not always be directly responsible or even adjacently responsible in future instances involving possible AGI.

As companies like Uber push for new technologies, including those that have the capacity to go horrifically wrong, it is simply not an option to wait for accidents to occur before determining which humans must be held culpable. In this case, instead of enacting swift justice for the woman killed, precedent-setting concerns had to be considered before anything meaningful could be done in court. This is a crucial example of why the law should try to preempt technology the best it can, or at least keep up with it. If we wait to see what happens, our inaction may leave us deeply in regret.

The Fourteenth Amendment and *Citizens United*

The current foundation for personhood status is the Fourteenth Amendment, written to defend freed slaves in the wake of the Civil War. It establishes that the government may not

[8] Timothy B. Lee, "Safety Driver in 2018 Uber Crash is Charged with Negligent Homicide," last modified September 16, 2020, https://arstechnica.com/cars/2020/09/arizona-prosecutes-uber-safety-driver-but-not-uber-for-fatal-2018-crash/.
[9] *Id.*

"deny to any person within its jurisdiction the equal protection of the laws."[10] Overall, this amendment ensures civil liberties and due process of the law to all citizens. Nothing in the text of the amendment is meant to include corporations, but as early as 1886, the Supreme Court utilized this amendment in *Santa Clara County v. Southern Pacific R. Co* (1886).[11] However, this use of the amendment was established by a mere remark by the Chief Justice, who only referenced the amendment in saying: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does."[12] The next most notable usage of the amendment in regard to corporations was in *First Nat'l Bank of Boston v. Bellotti* (1978), in which the Supreme Court ruled it acceptable for corporations to fund ballot initiatives as part of one's right to speech.[13] It was this 1978 decision that specifically informed the Supreme Court decision in *Citizens United v. FEC* (2010), affirming that corporations have the right to free speech just like people do.[14] Despite these Supreme Court decisions, courts at every level in the United States continue to contend with "who or what counts as a person with protectable rights."[15]

It is abundantly clear that corporations are not living humans, and by that token they do not have an innate claim to rights, yet the claims that they have made in court are claims that could be made by humans.[16] These Court decisions have had their fair share of criticism; while *Citizens* spurred public outcry, even *Bellotti* received scathing dissent from Justice William H.

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[10] U.S. Const. amend. XIV.
[11] Sarah Pruitt, "How the 14th Amendment Made Corporations Into 'People'," accessed December 31, 2020, https://history.com/news/14th-amendment-corporate-personhood-made-corporations-into-people.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Ciara Torres-Spelliscy, "Does 'We the People' Include Corporations?", accessed December 31, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/we-the-people-corporations/.
[16] *Id.*

Rehnquist, specifying that corporations are "artificial" and not "natural" persons.[17] If the issue of applying personhood to AGI was brought to the Supreme Court, there would almost certainly be similar dissent to the artificiality of a technological mind. Yet, the Supreme Court has established that if an entity is able to request due process and civil liberties under the law, it is feasible that they will be granted personhood rights. In general, these Court decisions exemplify how plausible it is to take laws intended for humans and apply them to other entities that take humanlike action. Furthermore, an AGI would be far more human than a corporation: while humans create corporations for a purpose and constitute its "mind," a spontaneous AGI is a free individual with its own consciousness and even a human-created AGI would have the capacity to assert its own identity apart from its creators.[18]

Analysis

It is apparent that the boundaries of legal personhood are nuanced and heavily debated. Pro-life activists fight for personhood rights for fetuses, many activists dispute the outcome of *Citizens* or similar rulings establishing corporate personhood, and animal rights proponents lobby for personhood rights for animals. However, a redefinition of personhood status could further ease or end issues dealing with how the law handles entities that might be persons.

There will inevitably be those who argue, even if there is enough legal precedent to consider personhood for AGI, that it would simply not be possible to prudently apply the law to AGI. However, there are many ways the law could go about this. First, if a crime that could have been committed by a human being is knowingly committed by an entity, that entity would be subject to the same rights to trial and prosecution as a person. Second, if an entity requests a right of their own volition, then that right should then be afforded to said entity, especially if that right

[17] Sarah Pruitt, "How the 14th Amendment Made Corporations Into 'People.'"
[18] Jiahong Chen and Paul Burgess, "The Boundaries of Legal Personhood," 84-85.

is already extended in the law to humans (e.g. right to life, liberty, and personal security, freedom from torture, etc.). In essence, if an AGI has the capacity to request rights guaranteed to humans by the law, we should grant them such. It follows that we would also hold such an entity subject to criminal law and speedy trial.

As mentioned previously, this definition could alleviate the contentious definition of personhood; if an entity cannot speak for itself to request rights nor knowingly commit a crime, we cannot consider it a person. This definition would include corporations (a CEO or board of directors are the mind of the corporation and can act as the speakers) and would exclude entities such as animals, who are not capable of asserting themselves in such a way. Therefore, this definition aligns with the current understanding of personhood while maintaining clear guidelines. This reassessment of legal personhood is constitutional, builds off the Fourteenth Amendment, and is overall not difficult to comprehend.

Application

Let us now consider some examples of how an AGI can be subject to the law through this framework, paying specific attention to how we account for the disembodied nature of AGI. First, we should consider the necessary course of action if an AGI has broken some law. If AGI has evolved from an AI that has an identifiable creator, the creator can be a representative in court and be held liable. If AGI has evolved on its own through the internet, with no identifiable creator, the judicial system would need to issue a clear warning through the internet that this entity needs to appear in court, even if it does so through text instead of speech. If an AGI were to refuse to abide by our societal conventions and laws, perhaps declining to appear in court, we may need to take other steps; this will be discussed in the next paragraph. Second, if an AGI were to request rights for itself, our law has no ability to assess who or what is eligible for such

rights. Perhaps we will encounter a benevolent or neutral AGI that wants to be able to exist amongst us with the ability to have life, liberty, and the pursuit of happiness. In this case, we must ensure that we do not enslave an AGI or encroach upon its personal freedoms. By definition, narrow AI has been created for a purpose, and it is technically a slave to its purpose. We cannot allow the same to happen to an AGI if we are to accept the necessary assumption that human-level intelligence begets human rights. An AGI that originated via human creation would be at great risk of confinement and control, as many corporations or governments would desire such a powerful entity working for their own ends.

Previously, an example detailed a situation of an AGI changing the results of a U.S. election. This is a highly relevant example, as the 2016 U.S. Presidential election was subject to hacking and tampering via technology to create chaos and discord.[19] While it is impossible to imagine if an AGI would be malevolent, kind, or apathetic to the petty issues of humanity, it is not hard to imagine that it may use chaos and uncertainty as a tool to achieve its own ends. This type of destructive behavior may result in people calling for confinement or eradication of the AGI, but we would need to continue carefully when pursuing such a solution. An obvious reaction to the idea of dealing with a rogue AGI is to shut it down, yet this might only be effective by shutting down the entire internet, since a technology-bound entity with such great intelligence would be easily able to hide within or otherwise control the internet.[20] While this paper is not meant to address the steps of dismantling an AGI, it is worthwhile to consider what exactly is being done by eradicating it. Hypothetically, if an AGI responsible for a crime was unresponsive to human customs and the legal system chose to erase it in response, through the lens of legal personhood, this is equivalent to the death penalty. This is all the more reason to

[19] Martin Matishak, "What We Know About Russia's Election Hacking," POLITICO, 2018, politico.com/story/2018/07/18/russia-election-hacking-trump-putin-698087.
[20] Jiahong Chen and Paul Burgess, "The Boundaries of Legal Personhood," 88.

establish AGI as legal persons: if we decide to eliminate an entity that has the same degree of intelligence and consciousness as a human person, we ought to have a legally established, adequate cause to do so.

Conclusion

We remain uncertain about the future of artificial general intelligence. Tech developers march ahead without foresight, exponentially increasing the sophistication of technology every day. By not creating laws that progress at the same speed as our technology, we are allowing further tragedies, such as the one that killed Elaine Helzberg, to persist in the future. Simply put, we cannot predict what an AGI might be capable of or would choose to do, so we must prepare in the ways we are able, using *Citizens United v. FEC* and other established Supreme Court precedent to give us a baseline for how to apply personhood to non-human entities. While it is immeasurably important to convince programmers and companies to safely work on AI, this work is already done by AI ethics researchers. We need to anticipate ambiguous legal situations involving AGI, and we must urge the legal community, legislators, and policymakers to prevent any such ambiguity with decisive action.

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Griswold v. Connecticut (1965): A Case Law Review

By Rachel Maile Kim

Rachel Maile Kim is a student at the University of California, Davis. She is studying History and minoring in Religious Studies. After her undergraduate education, she plans on pursuing a master's degree in Germany.

The United States Supreme Court in *Griswold v. Connecticut* (1965) legalized birth control for married women in 1965. The majority opinion found that the Constitution protects the right of marital privacy, including state restrictions on contraception using the First, Third, Fourth, and Ninth Amendments.[1] The landmark ruling of a right to privacy significantly impacted the future of America as subsequent cases argued for or against privacy within other structures, including family and abortion rights. However, *Griswold* failed to fully suppress traditional ideals of marriage and family. Its provisions only protected wealthier, married women—a small sample of the entire American population. Today, Americans still argue over the extent to which women can control their bodies.

As society continually reshapes itself, the limitations placed upon individuals who reject constructions of a typical "woman" or "marriage" also must evolve. Following the opinion of the Supreme Court, only citizens in a heterosexual marriage attained the right to marital privacy. *Griswold* allowed subsequent cases to expand upon this right. Using a post-modern feminist theory, my essay will advocate for the equality of men and women in legal and societal platforms. The right to privacy, which works alongside abortion and contraception, must extend to all genders and circumstances beyond heterosexual marriage. This article will cover the history of women's rights and the birth control movement in America, as well as the meaning and effects of *Griswold v. Connecticut*.

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[1] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Literature Review

While the field of scholarship around *Griswold v. Connecticut* is extensive, I identified the five most significant works on this case. These sources explain the birth control movement, describe the Supreme Court cases following *Griswold*, and further analyze *Griswold*'s details. These five sources, although delving into various aspects of the case, address the larger crusade for women's bodily autonomy, and this article expands upon this body of scholarship by extracting the authors' arguments and connecting their ideas. By weaving together a comprehensive story, it accounts for both small details and broad themes surrounding *Griswold v. Connecticut* with the intention to create an original interpretation for scholars to approach the jurisprudence of this case. I also describe the political climate before, during, and after *Griswold v. Connecticut* and explain how the case influenced American society.

Two of the sources help explain the history of the birth control movement and contextualize the background of *Griswold v. Connecticut*. The first, "Some Effects of Identity-based Social Movements On Constitutional Law in the Twentieth Century," is by William Eskridge. His work reviews and expands upon the broader background behind *Griswold v. Connecticut*. The start of the birth control movement is the center of Eskridge's main argument, in which he explains how Margaret Sanger and Emma Goldman launched the campaign.[2] Through their activism, publicity for the movement increased and was met with growing support. Supreme Court cases on birth control and other bodily issues spiked, eventually leading to *Griswold v. Connecticut*. As one of the most cited law professors in modern America, Eskridge has largely influenced the realm of law and gender. His work fills in historical gaps

[2] William N. Eskridge. "Some effects of identity-based social movements on constitutional law in the twentieth century," *Michigan Law Review* 100, no. 8 (2002): 2123.

concerning women's struggles to control their own bodies and creates a deeper understanding of the women's birth control movement. *When Everything Changed: The Amazing Journey of American Women from 1960 to the Present*, by Gail Collins, describes the evolution of women's rights from 1960. Unlike Eskridge's analysis which ended in 1972, Collins analyzes the movement up until 2008. She argues that although women have gone a long way, the legal system still needs improvement.[3] Even after 100 years of suffrage, women continuously suffer from inequality and discrimination. This source best represents women's personal experiences and their responses to rulings regarding birth control and abortion. She provides a new interpretation of women's personal experiences and the legal and societal changes of their rights.

My research also interprets Supreme Court cases following *Griswold v. Connecticut* and their effects. Janet Dolgin's "The Family in Transition: From Griswold to Eisenstadt and Beyond" narrates how *Eisenstadt v. Baird* (1972) influenced Americans and their perceptions on families.[4] Her information best represents the political atmosphere and clearly describes how *Griswold* and *Eisenstadt* affected the country. Dolgin's main argument is that the *Eisenstadt* ruling is the most significant as it outlines individual rights. Unlike *Griswold*, which defined the family as one unit, *Eisenstadt* recognized family members as individuals. This ideology of autonomous individualism divides the two cases and reflects how *Eisenstadt* allowed for greater freedom and rights. The decision expressed all the progress that America experienced during the past few decades. She also reviews the outcome of *Griswold* while explaining the legalities of the two cases. Her article reflects upon how *Griswold* and *Eisenstadt* impacted the family structure, engaging in a social historiography.

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[3] Gail Collins, *When Everything Changed: the Amazing Journey of American Women from 1960 to the Present*, Little, Brown and Co, 2014.
[4] Janet L. Dolgin, "The Family in Transition: From Griswold to Eisenstadt and Beyond," *Geo. LJ* 82 (1993).

Finally, the historical essay "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?" by Robert Dixon analyzes the specific legalities of *Griswold* and its holding. Dixon argues the Court's ruling was rather "silly" because of its subjectivity and its definition of privacy was too vague to establish a principle.[5] Extremely broad and subjective, the right to privacy failed to address realistic concerns and allowed for superfluous interpretation. His critique of *Griswold*'s ruling influenced the overall body of scholarship in regard to interpreting the right to privacy. Another source expressing privacy is *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade*. David Garrow connects privacy with abortion or related rights and articulates upon the legal statutes and meaning of the right to privacy. Unlike Dixon, he claims *Griswold*'s doctrine had extensive effects throughout all of America and grew to be the main argument for those challenging anti-abortion laws.[6] The ruling allowed for a private sphere in the household that protected couples. These sources both influence the overall body of scholarship in their analysis of American law and, although hold opposing views, skillfully engage in political and legal historiography.

Each of these secondary sources help establish a deeper understanding of the events preceding, surrounding, and following *Griswold v. Connecticut*. My essay expands upon this body of scholarship by extracting the authors' arguments and fusing their ideas. This creates a new interpretation for scholars to approach the jurisprudence of the case. Instead of normally analyzing the causes and effects of *Griswold*, scholars now can comprehend the entire birth control movement as a whole in its relation with the case.

[5] Robert G. Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?" *Michigan Law Review* 64, no. 2 (1965): 205.
[6] David J. Garrow, "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade," 2015.

Historical Narrative

The second wave of modern feminism in America flourished during the 1960s as a result of World War II. As technology advanced, more service jobs opened and more women joined the workforce. Yet despite these societal changes, cultural and legal standards remained the same. Companies continued to discriminate against women by paying them exponentially less and ignoring their basic needs. As a response, feminist consciousness rose. Women increasingly demanded equality within work, marriage, and other aspects in life. This awareness then led to demands for social acceptance of birth control and other related rights. Alongside these campaigns, Planned Parenthood developed and expanded its efforts in dispersing birth control. In 1961, Planned Parenthood opened a birth control clinic in Connecticut.[7] Led by Dr. Griswold and Dr. Buxton, the agency advised couples on the best method of contraception. Immediately within a week of their opening, the state of Connecticut shut down the clinic and fined them $100 each. Connecticut law, specifically the Comstock Act of 1873, banned the encouragement of contraceptives and punished anyone who aided in an illegal act.[8] However, Griswold and Buxton believed the Comstock Act violated the Fourteenth Amendment. They argued they had the ability to support the constitutional rights of married people which included the exercise of contraceptives.[9] The case eventually reached the Supreme Court in 1965.

The Supreme Court justices discussed several legal concepts in their opinions, specifically the Bill of Rights. They contested whether the Bill of Rights guarantees the right of privacy. Justice Douglas argued that "foregoing cases suggest that specific guarantees in the Bill

[7] Catherine G. Roraback, "Griswold v. Connecticut: A Brief Case History," *Ohio Northern University Law Review,* 16, 1989, p. 397.
[8] Alex McBride, "EXPANDING CIVIL RIGHTS Landmark Cases Griswold v. Connecticut (1965)", PBS, 2006.
[9] Catherine G. Roraback, "Griswold v. Connecticut: A Brief Case History."

of Rights have penumbras…Various guarantees create zones of privacy."[10] For example, the Fourth Amendment affirms the right against unreasonable searches, protecting citizens from disruption of their safety and privacy. This amendment therefore, although not *explicitly* expressing that citizens have the right to privacy, still alludes to this right. Therefore, Douglas argues that many rights are not inherently listed yet they still exist, which justifies the right of privacy.

In his concurring opinion, Justice Goldberg further emphasized the Ninth Amendment. Liberty "embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution and is supported both by numerous decisions of this Court… and by the language and history of the Ninth Amendment."[11] He also weighed upon how the Framers acknowledged and accepted that different rights would gradually be recognized. The dissenting opinion from Justices Black and Stewart stated that although the Connecticut law is immoral, the state reserved the right to pass such a law. The Supreme Court only has the right to strike down laws that violate the Constitution, not laws against their personal beliefs or morals. Furthermore, Griswold and Buxton "admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law."[12] Third, the term "privacy" itself stands too broadly and can be expanded or defined to fit different cases. The Framers created the Ninth Amendment not to broaden the power of the Supreme Court, but to limit the federal government. Expanding the Ninth Amendment to privacy was both unnecessary and unconstitutional according to the dissenters.

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[10] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
[11] *Id.*
[12] *Id.*

Furthermore, the Court addressed other social and cultural concepts, including the traditional role of the family, marriage rights, and birth control. The justices reflected upon the structure of marriage and its history, reminiscing how marriage is "older than our political parties, older than our school system."[13] Taking into account the importance of marriage, the majority opinion found it offensive to meddle in such a sanctified relationship. Their responses account for aspects that relate to gender, but also reflect the persistent views on marriage. The justices questioned different key factors, such as if marriage rights include the right of privacy and, if so, to what extent.

Ultimately, the United States Supreme Court ruled in a seven-to-two majority that "the right of privacy in the marital relation is fundamental and basic… Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States."[14] They prevented states from banning the use of contraceptives by married couples and overturned previous rulings. The Court also established privacy as a fundamental right, implicitly extracted from several amendments and clauses from the Constitution. The outcome highlighted important changes within America's society as historical assumptions and stereotypes on marriage finally began to dissolve. Despite women's suffrage through the Nineteenth Amendment, society still held their expectations of a traditional woman. Previously, society rejected methods of contraception, limiting women and forcing them into dangerous situations. Simply extending the Ninth and Fourteenth Amendments to privacy within marriage demonstrated the shifting ideals and increasing freedom for women. *Griswold v.*

[13] *Id.*
[14] *Id.*

Connecticut furthered the development of historical, social, and cultural fabrics of society and the developing relationship between history and the law.

The articulation of the right to privacy paved the way for other cases to expand upon *Griswold*. Even though feminist issues remain prominent to this day, the ruling of *Griswold* pushed America one step closer to justice. Explicitly expressing the right to privacy allowed *Eisenstadt v. Baird* to legalize birth control outside marriage and *Roe v. Wade* (1973) to legalize abortion. *Griswold v. Connecticut* was powerful in its decision to extend the right to privacy within marriage, as this right could then be expanded upon as time passed.

Analysis

Griswold v. Connecticut altered the course of American history by legalizing birth control for married women. Despite its drawbacks, the ruling ultimately improved women's burdens and furthered their bodily autonomy. *Griswold*, although seemingly simple in its composition of legalizing birth control, improved the situations of many American women. However, many argue that its provisions should have extended to further the rights of other groups. In only allowing birth control within marriage, the ruling only improved the situations of wealthier, married, and typically white women. For underprivileged women, being deprived from contraceptives may lead to an abortion later. The relationship between birth control and abortion intertwined and divided women rather than creating an equal platform of access. The Court therefore ignored the burden placed by societal stigma surrounding sexuality and financial status.

From the *Hartford Courant* on June 8, 1965, a journalist shared views from all sides of America. The Roman Catholic church responded to Griswold in the archbishop's statement that

"artificial contraception remains immoral by the law of God."[15] Connecticut's health commissioner Dr. Franklin Foote responded by saying the decision will grant more freedom for health personnel. Later, critics often questioned the legitimacy of the ruling—whether it actually attempted to help women or instead acted as an illusion of progress. Legal scholar Robert Bork states that "*Griswold*, even in 1965, was for all practical purposes and nothing more than a test case."[16] Bork argues this because the justices failed to create substantial policies that efficiently helped all women. Instead, the Supreme Court aimed to simply create a facade of justice. Another scholar, Robert Dixon, concludes that "the Court avoided defining privacy narrowly and particularly"[17] in an attempt to escape criticism by seemingly designing a virtuous ruling. The justices wanted to grant access for a certain class of people without angering the rest of the population, hence the ambiguous definition of privacy. Also, the fact that *Griswold* did not embrace single women "suggests that the language of the majority opinion was artfully chosen to mask an underlying agenda."[18] The justices did not agree with states meddling in marriage, a private sacrament, and decided based on traditional ideals rather than wanting to broaden the rights of women. Therefore, the ruling still restricted women from experiencing complete bodily and social autonomy and only affected wealthier, married women.

However, despite its limitation within marriage, the expressed right to privacy allowed for other cases to expand upon *Griswold v. Connecticut*. The ruling was powerful in its overall decision to extend the right to privacy within marriage, as this right could then be expanded upon as time passed. America continued to struggle in progressing women's rights after *Griswold*. The

[15] "Birth Control Information To Be Available in State," *Hartford Courant*, June 8, 1965.
[16] David J. Garrow, "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade."
[17] Robert G. Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?"
[18] Janet L. Dolgin, "The Family in Transition: From Griswold to Eisenstadt and Beyond."

federal government still banned abortion, yet, in the 1960s, the government penalized employers from firing pregnant women. Seven years after *Griswold*, the Supreme Court ruled in *Eisenstadt v. Baird* that unmarried people could possess contraceptives on the same basis as married couples. Janet Dolgin explains how *Eisenstadt*'s ruling reflected and produced changes in patterns of family life and the law's responses to families. In *Griswold*, "the right to privacy attached not to individuals, but to the family unit as a whole"[19] while *Eisenstadt* gave freedom to the individuals within families and recognized notions of autonomous individuals. The distinction between home and work began to blur and society started to view families as unaffected by God. The transformation of America as seen through *Eisenstadt* brings clarity to *Griswold*'s implications and builded upon its provisions.

America subsequently encountered more progressive developments even after *Eisenstadt v. Baird*. As the pro-choice movement in the late sixties grew, "courts all over the United States read *Griswold* to protect single women seeking to abort unwanted pregnancies."[20] Judges used *Griswold* as the basis for achieving abortion rights for single women and did so successfully. But starting in the 1980s, the conservative coalition, the New Right, halted these advancements. They took control of the Republican party and attempted to realign American politics by issuing conservative legislation. In particular, the group sought to prevent the Equal Rights Amendment from passing and did so successfully. Even today the New Right's effects still exist, and *Burwell v. Hobby Lobby* (2014) reflects these effects on women's rights. Hobby Lobby, an arts and crafts company chain, was run by a Christian family that explicitly expressed their desire to run the company on their religious ideals. However, under the Affordable Care Act, the federal

[19] *Id.*
[20] William N. Eskridge, "Some effects of identity-based social movements on constitutional law in the twentieth century."

government required employment-based group healthcare plans to provide preventative care, including contraceptive methods. The Green family challenged this requirement, arguing it violated the Free Exercise Clause of the First Amendment. In a five-to-four decision, the Supreme Court decided for-profit companies are able to deny their employees health coverage of contraception due to religious beliefs. Justice Ruth Bader Ginsburg dissented, stating that Hobby Lobby was not a religious organization. Its workforce did not all practice the same faith, therefore "no religion-based criterion can restrict the work force of for-profit corporations."[21] She also argued that the requirement of providing healthcare plans with options for contraceptive methods is a safety condition necessary for women's health. Depriving this resource endangers women and perhaps foreshadows the wave of backlash that occurred after this decision.

Although America experienced a progressive uprise in women's rights, the success of the New Right interrupted this. The coalition sought to retract all liberal and progressive developments and their conservative tones stand today. Current society still fights to establish women's bodily independence over the issue of abortion, although legalized almost fifty years ago. As seen in *Burwell v. Hobby Lobby* (2014), the United States still struggles with providing justice for women. It appears as though the once hopeful pathway for equality remains foggy and unknown. Luckily, *Griswold v. Connecticut* served as a catalyst for the journey of bodily autonomy as its broadness allowed for expansion. Fifty-six years later, America still has not granted its citizens full bodily autonomy, but *Griswold v. Connecticut* helped begin this process.

[21] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 573 U.S. 682, 189 L. Ed. 2d 675 (2014).

Conclusion

In 1965, *Griswold v. Connecticut* legalized birth control for married women. The second wave of modern feminism in America flourished during the 1960s as a result of World War II; more women joined the workforce and increasingly demanded equality within work, marriage, and other aspects of life. *Griswold* attempted to appease feminists by allowing the usage of birth control within marriage. However, the ruling only improved the situations of wealthier, married, and typically white women. Yet *Griswold* paved the way for *Eisenstadt v. Baird*, which legalized birth control outside of marriage, and for *Roe v. Wade*, which legalized abortion. Although *Griswold* benefited only a small portion of society, the case was powerful in its ability to be used by others to advance other rights. *Griswold* will always be remembered as a momentous occasion for women's rights and a reflection of American society's attitudes and beliefs in the 1960s.

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A Supreme Court Case Analysis: *Our Lady of Guadalupe School v. Agnes Morrissey-Berru* and *St. James School v. Darryl Biel* (2020)

By Audrey Mechali

Audrey Mechali is a student at the University of California, Davis. She is studying Managerial Economics and minoring in Technology Management and Human Development.

This paper analyzes the recent Supreme Court decision regarding the cases *Our Lady of Guadalupe School v. Agnes Morrissey-Berru* (2020) and *St. James School v. Darryl Biel* (2020). The procedural histories of the cases are presented to provide critical background information on the issues raised in their appeals. These cases tackle the issue of whether the First Amendment permits the courts to intervene in employment-related disputes at religious institutions involving teachers whose responsibilities include teaching religion and faith to their students. The ministerial exception is a law that claims that the U.S. government's anti-discrimination laws do not apply to religious institutions' relationships with their "ministers." The Supreme Court needs to decide whether teachers, such as Morrissey-Berru and Biel, count as "ministers" in order to determine whether the ministerial exception applies to these cases. In this paper, the main facts of each case are first introduced and explained. Then, the precedent resulting from the cases are addressed, and, afterward, the significance of the First Amendment is expanded upon. Finally, this paper argues that a verdict in favor of the religious institutions will set a dangerous precedent of allowing employee discrimination in all religious organizations.

Introduction

The cases *Our Lady of Guadalupe School (OLG) v. Agnes Morrissey-Berru* and *St. James School v. Darryl Biel* were brought before the United States Supreme Court in May of 2020. Both cases address the issue of employment discrimination involving religious institutions and

their employees. Due to the degree of similarity between the two cases, they were resolved in the same decision. The central question that they addressed was whether the First Amendment allows courts to intervene in employment-related disputes at religious institutions involving teachers whose responsibilities include teaching religion and faith to their students.

Facts

Agnes Morrissey-Berru was a fifth and sixth grade teacher at OLG who taught various subjects, including religion. The school expected all teachers to include religion in every subject and promote the Catholic faith and beliefs. This expectation was described in OLG's handbook, which contained policies that all staff members are required to abide by. Morrissey-Berru argued that she was devoted to the mission of providing a Catholic education.[1] She fulfilled the agreement in her contract, which included requirements such as teaching about religion and saints and taking students on religious field trips. In 2014, her full-time contract was made part-time, and the next year, the school refused to renew her contract.[2] Morrissey-Berru sued OLG on the grounds that they discriminated against her due to her age in order to hire a younger teacher. On the other hand, OLG claimed that they fired her because she was unsuccessful in implementing the new reading and writing program that the school was switching to.[3] OLG had developed this new reading and writing program with the goal of improving students' academic performance. OLG successfully moved for summary judgment by invoking the ministerial exception. The ministerial exception is a doctrine, established by a precedent in *Hosanna-Tabor v. Equal Employment Opportunity Commission (EEOC)* (2012), that essentially prevents U.S.

[1] Opinions of the Court, "Our Lady of Guadalupe School v. Agnes Morrissey-Berru and St. James School v. Darryl Biel, as Personal Representative of the estate of Kristen Biel", 3-27, accessed December 30, 2020, https://www.supremecourt.gov/opinions/slipopinion/20.
[2] *Id*.
[3] *Id*.

anti-discrimination laws from being applied to religious institutions' relationships with their "ministers."[4] However, the Ninth Circuit reversed the decision.[5]

In the case of *St. James School v. Darryl Biel,* Biel was a substitute teacher for nearly a year and a full-time teacher for a school year at St. James. When St. James refused to renew Biel's contract, Biel claimed that St. James was discriminating against her because she asked for a leave of absence to treat breast cancer. St. James had similar standards of review as OLG, such as whether the teacher promoted the Catholic beliefs, had religious displays in the classroom, included religion in all secular subjects, and exhibited actions that were consistent with the Catholic beliefs.[6] Like OLG, St. James successfully moved for summary judgment by invoking the ministerial exception, but the decision was reversed by the Ninth Circuit Court of Appeals because Biel lacked the additional schooling required to qualify as a "minister."[7]

At the trial court level, both defendants, OLG and St. James, were granted a motion for summary judgment in their favor based on the principle that the ministerial exception applied to both cases. However, the Ninth Circuit Court of Appeals reversed the trial court's decision for both cases, claiming that the ministerial exception did not apply to these situations, since the teachers, Morrissey-Berru and Biel, were not technically considered "ministers." After careful consideration, the United States Supreme Court reversed the Ninth Circuit Court of Appeals' decision and agreed with the trial court that the ministerial exception did apply to the cases.

Precedent and Issue

Hosanna-Tabor v. EEOC (2012) was the precedent that the court used to determine whether the ministerial exception could apply to this case. In *Hosanna-Tabor*, Perich was a

[4] John R Vile, "Ministerial Exception," Ministerial Exception, accessed December 30, 2020, https://www.mtsu.edu/first-amendment/article/1461/ministerial-exception.
[5] Opinions of the Court, 6-27.
[6] *Id.*
[7] *Id.*

kindergarten and fourth grade teacher at Hosanna-Tabor Evangelical Lutheran School.[8] Perich claimed that she was fired because of her disability, which violates the American Disabilities Act. The school, however, claimed that she was fired because she violated the Lutheran Doctrine by going to "outside authorities to settle internal conflicts."[9] The church had given Perich the title of "minister." As a result, the courts concluded that the ministerial exception applied to Hosanna-Tabor.

The issue at large in these cases concerns whether the government should be allowed to intervene in employment disputes involving religious institutions. The Supreme Court is often cautious when dealing with cases involving potential First Amendment violations, such as an infringement upon the right to freely practice religion. Government interference in church matters can be dangerous because it may potentially restrict a group from practicing their religion, thus limiting their right to freedom of religion.

The lower courts were divided in deciding whether the ministerial exception should apply to *OLG v. Morrissey-Berru* and *St. James v. Biel*. Some courts argued that the ministerial exception should be applied more leniently by looking at the duties performed by the employees, since some faiths do not recognize "ministers" but give other titles to employees who perform the same duties. The majority opinion explains that "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[10] The U.S. Supreme Court decided that the ministerial exception did apply to both of these cases, so the decision of the appellate court was reversed, and the government was not allowed to intervene in the employment discrimination

[8] *Id.*
[9] *Id.*
[10] *Id.*

claims of religious institutions. The ruling allows religious institutions to discriminate against certain people for factors beyond their control, such as age, race, sexuality, disability status, and more.

Freedom of religion is a fundamental right guaranteed by the First Amendment of the U.S. Constitution that allows all people "to live, speak, and act according to their beliefs peacefully and publicly."[11] When deciding cases pertaining to this right, the Court must be aware of the limitations of government intervention. In its opinion, the Court claimed that "[t]he First Amendment protects the religious freedom of religious institutions: 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' Among other things, the Religion Clauses protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion."[12] This standard was set by the Court in the precedent case *Hosanna-Tabor* when it decided that government intrusion in employment disputes between a religious institution and its "ministers" was prohibited. The Supreme Court's decision in *OLG v. Morrissey-Berru* and *St. James v. Biel* abided by this standard.

Opinion

In their decision, the Supreme Court determined that the impact of applying the ministerial exception to these cases was preferable to the impact of allowing government interference in religious institutions' employment discrimination claims. The Supreme Court decision was split seven-to-two in favor of the defendants (OLG and St. James), and Justices Sotomayor and Ginsburg filed a dissenting opinion in this case. The main argument in their

[11] "What You Need to Know About Religious Freedom," The Heritage Foundation, accessed December 30, 2020, https://www.heritage.org/what-you-need-know-about-religious-freedom/what-you-need-know-about-religious-freedom.
[12] Opinions of the Court, 5.

dissent was that the teachers, Morrissey-Berru and Biel, were not considered “ministers" because they lacked the additional training and responsibilities associated with that position.[13] They were simply teachers who happened to teach religion among other subjects. Additionally, Justices Sotomayor and Ginsburg mentioned that Morrissey-Berru and Biel should not be considered “ministers" or “religious leaders," but rather teachers protected by anti-discrimination laws.[14]

While it is understandable that the Supreme Court is hesitant to impose any restriction on the First Amendment’s religious clause, it does not seem ethical to allow religious institutions to discriminate against its employees or “ministers.” Anti-discrimination laws are important in having equal protection of all employees regardless of age, gender, and disability. Yet, with the ministerial exception, the Court is declaring that religious institutions are not subject to the U.S. government’s anti-discrimination laws. Although the right to freedom of religion is respected, it should not come at the expense of employees’ protection against discrimination.

Conclusion

In the 2020 U.S. Supreme Court decision for the cases of *Our Lady of Guadalupe School v. Agnes Morrissey-Berru* and *St. James School v. Darryl Biel*, the Court arrived at the conclusion that the ministerial exception applied to these cases which prevented government intervention in employment disputes. The ministerial exception is a law that claims that the U.S. government’s anti-discrimination laws do not apply to religious institutions’ relationships with its “ministers.” Upon careful review of the facts, the Supreme Court made the divided decision that teachers Morrissey-Berru and Biel acted as “minister-like” members. As a result, the ministerial exception applied to these cases, and the Court sided with the religious institutions in question, protecting their right to fire their teachers as they saw fit.

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[13] *Id.*
[14] *Id.*

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Collaborative Homeless Court: Service, Rehabilitation, and Effective Legal Processing for California's Homeless Population

By Emma Tolliver

Emma Tolliver is a student at University of California, Davis. She is studying English and Political Science - Public Service. Emma serves as a Conference Communications Associate for Davis Pre-Law Society (DPLS) and is a member of the University Honors Program (UHP). After finishing her undergraduate education, Emma plans to attend law school.

Collaborative courts are distinguished as courts that promote the responsibility of an individual by utilizing both judicial supervision and rehabilitation resources, as described by the Superior Court of California. The purpose of this report is to advocate for Homeless Court—a specific form of collaborative court—as a viable legal processing system for California counties to implement, with a focus on the functions of the court and successful employment of homeless courts in varying California counties. This will be preceded by a brief summary of the recent history surrounding California's homeless population and followed by an address of potential concerns in implementation of the courts. This report concludes that Homeless Court should be considered effective and administered throughout California counties to assist the homeless population, the Superior Court of California, and communities.

Background

Homelessness in California is a widespread crisis throughout the state. In January 2019, the U.S. Department of Housing and Urban Development (HUD) estimated that California's homeless population was 151,278 people on a given night.[1] This was the highest population of

[1] U.S. Interagency Council on Homelessness, "California Homelessness Statistics," accessed December 10, 2020, https://www.usich.gov/homelessness-statistics/ca/.

homelessness reported within a state and the highest in California in the last decade, as reported by the U.S. Council of Economic Advisors (CEA).[2]

Additionally, the CEA reported in September 2019 that out of the five cities in the United States with the highest homeless populations, four of them are in California: San Francisco, Los Angeles, Santa Rosa, and San Jose. It also stated that 47 percent of the nation's unsheltered homeless are in California and that the rate of unsheltered homeless in California is 2.2 times higher than the national average.[3] Following the release of these reports, HUD Secretary Ben Carson stated that California's homelessness is "at a crisis level and needs to be addressed by local and state leaders with crisis-like urgency".[4] Even more worrisome is that these statistics were calculated prior to the COVID-19 pandemic, which has only exacerbated conditions that contribute to homelessness.

With California's overwhelming homeless population, it is imperative that services are created and maintained to mitigate the issue. Homeless Court, a type of collaborative court, offers assistance to the significant homeless population in California.

Homeless Court: Definition and Functions

Collaborative courts are a form of justice system processing that "[focuses] on recovery to reduce recidivism and improve offender outcomes" through monitoring and rehabilitation, as described by the Judicial Council of California.[5] Types of collaborative courts include, but are

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[2] U.S. Council of Economic Advisors, "The State of Homelessness in America", 2019, PDF file.
[3] Jacob Passy, "Nearly Half of the U.S.'s Homeless People Live in One State: California," accessed December 10, 2020, https://www.marketwatch.com/story/this-state-is-home-to-nearly-half-of-all-people-living-on-the-streets-in-the-us-2019-09-18.
[4] "HUD No. 19-177: HUD.gov / U.S. Department of Housing and Urban Development (HUD)," HUD No. 19-177 | HUD.gov / U.S. Department of Housing and Urban Development (HUD), accessed December 10, 2020, http://www.hud.gov/press/press_releases_media_advisories/HUD_No_19_177.
[5] "Collaborative Justice Courts," Collaborative Justice Courts - Collaborative_justice, accessed December 10, 2020, https://www.courts.ca.gov/programs-collabjustice.htm.

not limited to, Drug Court, Veterans Court, Mental Health Court, and Homeless Court. Based on the functions, practices, and current success of Homeless Court, there should be a movement for the implementation of Homeless Court throughout the state of California.

The first Homeless Court was created in 1989 in San Diego.[6] Homeless Court resolves quality-of-life infractions, misdemeanors, and warrants through community service, as opposed to traditional sentencing. Through this resolution, barriers that prevent a homeless person from reentering society are lowered or removed, while case backlog is eased for the Superior Court.[7] According to a report by the Judicial Council of California, as of November 2020 there are seventeen Homeless Court locations in various California counties.[8] At the county level, Homeless Court has the ability to help by preventing court backlog, reorganizing legal proceedings, and striving for a county's homeless population to have a higher quality of life. Thus, Homeless Court possesses the unique capacity to improve situations for both the county's legal departments and the homeless population, while also providing service to the community.

Homeless Court can help prevent court backlog by absolving cases concerning misdemeanors and infractions committed by a homeless person. Cases that would typically be conducted in a traditional courtroom setting can instead be held in a county's Homeless Court; therefore, trials that require a traditional courtroom setting have more access to courtrooms. By removing outstanding cases related to homelessness through Homeless Court and easing a county's court backlog, the legal resources of the offices of district attorneys and public defenders can be redirected—and as a result, be better utilized—to more serious cases.

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[6] "Community/Homeless Courts," Community/Homeless Courts - Collaborative_justice, accessed December 10, 2020, https://www.courts.ca.gov/5976.htm.
[7] *Id.*
[8] Judicial Council of California, "Collaborative Justice Court Fact Sheet," 2020, PDF file.

The organization of legal proceedings and rulings in Homeless Court is unique to its clientele. The court is held in a non-adversarial setting as opposed to the traditional oppositional setting typically seen in court.[9] Homeless Court also utilizes alternative sentencing in its rulings; since many clients who enter Homeless Court are unable to pay fines due to the lack of financial resources, alternative sentencing "substitutes counseling, volunteer work, and participation in agency programs" for traditional sentencing.[10] This approach to the legal process makes homeless citizens feel more comfortable in the court setting, which is an important factor when considering a citizen's willingness to participate in Homeless Court, and gives them the assistance they need to address their legal issues.

Homeless Court prevents barriers, such as outstanding fines, from impeding a homeless person's ability to integrate into society. By absolving a homeless person's offences, a homeless person regains eligibility to services they were barred from while offences were outstanding, such as participation in rehabilitation programs and the ability to obtain a driver's license.[11] Furthermore, given that the setting is non-adversarial, Homeless Court has the capacity to diminish fear of the justice system. Homeless Court is often held in a homeless service facility as opposed to a California county courthouse. In a study conducted by researchers at Pardee RAND Graduate School, approximately 75 percent of the participants in San Diego County's Homeless Court reported that their fear of the justice system was either reduced or eliminated.[12] Thus,

[9] "Homeless Court Assistance: Homeless Court Program," Homelesscourtprogram, accessed December 10, 2020, http://www.homelesscourtprogram.org
[10] *Id.*
[11] San Joaquin County Bar Association, "Homeless Court in San Joaquin County," accessed December 10, 2020, www.sjcbar.org/attorney-resources/homeless-court-in-san-joaquin-county.html.
[12] Maya Buenaventura, "Treatment Not Custody: Process and Impact Evaluation of the Santa Monica Homeless Community Court," 2018, PDF file.

Homeless Court preserves the integrity of the legal system, the Superior Court of California, and the dignity of the clientele.

Implementation of Homeless Court in California

San Diego County, Los Angeles County, and San Joaquin County exemplify the functions of Homeless Court in their respective employment of Homeless Court.

San Diego County

The first Homeless Court established in California was developed in San Diego County in 1989 through collaboration with the San Diego Veteran's Stand Down Program.[13] The voluntary court program is held once a month at a local homeless service facility. Michael Greco, former president of the American Bar Association, claims that San Diego County's Homeless Court Program, "is one of the most timely and important projects of our association… [for expanding] access to justice, [reducing] court costs, and [helping] homeless people move toward self-sufficiency."[14]

San Diego's Homeless Courts implement a progressive plea bargaining system.[15] This allows clients to complete a court-ordered alternative sentence prior to an in-court appearance and acknowledges that the offenses committed were symptomatic of the client's state of homelessness. Additionally, clients are guaranteed they will not be put into custody while participating in the Homeless Court Program.

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[13] Gary Warth, "Homeless Court Offers Alternative to Revolving Door," Tribune, accessed December 10, 2020, https://www.sandiegouniontribune.com/news/homelessness/sd-me-homeless-court-20180506-story.html.
[14] "Testimonials: Homeless Court Program," Homelesscourtprogram, accessed December 10, 2020, http://www.homelesscourtprogram.org/testimonials.
[15] *Id.*

From 2009 to 2012, nearly 2,000 participants resolved more than 7,000 cases in the San Diego Homeless Court Program.[16] More recently, in 2018, 378 minor outstanding criminal cases were resolved in the program.

Los Angeles County

Originally, the Homeless Court Program of Los Angeles was piloted in 2006 primarily under the Los Angeles City Attorney's Office, with the assistance and collaboration of the Los Angeles County Board of Supervisors, District Attorney, and the Public Defender on the program.[17] However, as of March 2015, the Homeless Engagement and Response Team (HEART-LA) created by the City Attorney's Office took over Los Angeles County's Homeless Court Program. HEART-LA was created to "give homeless people the chance to get housed and back on their feet," as described by City Attorney Mike Feuer.[18]

In 2018, HEART-LA hosted fifty-six clinic events, which enabled the resolution of 1,102 outstanding cases.[19] HEART-LA focuses predominantly on resolving outstanding tickets and citations. By holding clinic events in partnership with local homeless service providers, HEART-LA connects local homeless service providers with potential clients: homeless citizens in the area. Due to the nature and organization of the events, it is unnecessary for clients to physically attend court to absolve their tickets; clients work with a service provider to fulfill an

[16] "How HCP Works: Homeless Court Program," Homelesscourtprogram, accessed December 10, 2020, www.homelesscourtprogram.org/courtprocess.
[17] "Public Counsel Law Center," Public Counsel - Power of Pro Bono Law for Children, Families, Veterans, Students, Immigrants, Nonprofits and Small Businesses, accessed December 10, 2020, http://www.publiccounsel.org/pages/?id=0074.
[18] "HEART," Community Justice Initiative, accessed December 10, 2020, http://communityjusticeinitiative.wordpress.com/heart/.
[19] "Office of Mike Feuer, LA City Attorney: Homelessness," LA City Attorney, accessed December 10, 2020, http://www.lacityattorney.org/homelessness.

alternative sentence through community service, which is reported to the City Attorney's Office by the service provider and, in turn, resolves the client's citations.

San Joaquin County

Since its inception in 2006, Judge Barbara Kronlund has presided over San Joaquin County's Homeless Court as a pro bono venture with the assistance of the Office of the District Attorney, Office of the Public Defender, and St. Mary's Dining Hall, a local volunteer organization.[20]

San Joaquin County has adopted aspects of San Diego's Homeless Court Program, such as allowing clients to complete their sentencing prior to an in-court appearance and guarantees clients protection of custody.[21] San Joaquin County also uniquely describes its clientele as "homeless or at risk of being homeless," which encompasses and serves a greater population.[22]

Beyond fulfilling its intent of creation, San Joaquin's Homeless Court is beneficial for the collaborative partners within the county legal system. Deputy District Attorney Mary Aguirre views Homeless Court as a "win-win"; clients resolve their cases, and the caseload for the Superior Court and District Attorney's Office is reduced.[23] In its first year, San Joaquin's Homeless Court helped 384 defendants across 979 cases, as reported by local newspaper *The Modesto Bee*.[24]

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[20] *Id.*
[21] Scott Smith, "Courtroom Helps Area's Homeless Make New Start," accessed December 10, 2020, www.recordnet.com/article/20060402/news01/604020322.
[22] *Id.*
[23] *Id.*
[24] Inga Miller, "Special San Joaquin Court Making Difference for the Homeless", accessed December 10, 2020, http://www.modbee.com/news/local/article3098272.html.

Potential Concerns with Implementation

There are several potential concerns in the implementation and practice of Homeless Court, with the most significant being funding for the courts, awareness of the program, and barriers to client participation.

Funding for Homeless Court

As budget season approaches in counties throughout California, allocation of county-wide funds will become scrutinized and debated over. In San Joaquin County, budget constraints previously prevented the Public Defender's Office from staffing the Homeless Court; eventually, the cost of staffing was covered by the San Joaquin County Bar Association. Furthermore, Judge Barbara Kronlund has taken on homeless court as a pro bono venture due to a lack of funding from San Joaquin's Superior Court. Similar financial scarcity can be seen in Los Angeles and San Diego County, where funding is a prevalent issue in starting and maintaining Homeless Court.

Awareness of Homeless Court

Additionally, a lack of awareness about Homeless Court may also prove concerning. The general public, potential clients, and professionals within the legal system are not necessarily aware of this opportunity. San Joaquin and San Diego County almost exclusively use case managers and homeless service providers to find clients. Los Angeles County holds that word-of-mouth is how most of their clients hear about the program. These methods of advertisement may prevent potential clients from learning about the opportunity to have their case held in homeless court, as it relies heavily on people outside of the courts system to spread relevant and correct information.

Barriers to Client Participation

Finally, barriers to clients may be incidentally created due to fundamental misunderstandings held by legal professionals. Due to the likelihood for legal professionals to possess different world views than a person experiencing homelessness, inappropriate or inadequate conclusions may be drawn that stem from misunderstanding the clientele. For instance, San Joaquin County originally held Homeless Court at the County Superior Court. As a significant portion of the homeless population have an aversion to the legal system and are wary of participating in the justice system, many clients were uncomfortable with the location. When the court was moved to a local volunteer organization, clients found the setting less adversarial and easier to access.[25] Similarly, HEART-LA has found much success due to their approach: by hosting clinics, the setting does not intimidate clients.[26]

Despite concerns, these problems can be addressed. County leaders—especially attorneys and judges, as they are in the field of law and justice—need to prioritize serving the full extent of their community, which includes the homeless population. In regard to informing and understanding Homeless Court, legal professionals should consider adapting to other forms of spreading awareness. In-house, this may mean creating and distributing informational materials. Pamphlets, website pages, or graphics can be widely circulated among the offices of the district attorney and public defender, the Superior Court, and even prominent leaders in municipal government. Externally, county officials may experiment with an online platform to share information quickly and with accessibility, such as utilizing social media platforms, building a website, or publishing information regarding homeless court online. It is also the intention of this

[25] *Id.*
[26] "HEART," Community Justice Initiative.

report to raise awareness of homeless courts and how they can serve people suffering from homelessness while improving county case-processing. Homeless Court should be considered for implementation in counties throughout California based on the overall functions and benefits they provide, especially given California's large homeless population.

Conclusion

Homeless Courts serve their respective counties by assisting county offices and improving the livelihood of the homeless population, and they are especially relevant when considering how to best serve California's large homeless population. The specific functions can be defined as preventing court backlog, improving legal proceedings, and enhancing the quality of life for clients by reintegrating homeless citizens into society. The implementation in San Diego, Los Angeles, and San Joaquin County demonstrate these functions in action and have accomplished much in their years of service. Although there are concerns in terms of funding, awareness, and barriers to clients, the successes show that Homeless Court is a viable resource for California counties and that Homeless Court serves as an effective legal process when implemented and utilized.

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