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Developed with the University of California National Center for Free Speech and Civic Engagement.

Davis Journal of Legal Studies Editorial Staff

Volume IV: Spring 2024

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Letter from the Editor-in-Chief

Dear Reader,

It is with great enthusiasm that I present to you *Davis Journal of Legal Studies: Volume IV, Spring 2024*.

Davis Journal of Legal Studies (DJLS) was founded in June 2020 at the University of California, Davis. DJLS is a student-run publication committed to contributing to public legal scholarship, developing a community of undergraduate legal scholars, and creating opportunities in publication for undergraduate students.

I greatly appreciate the generous support from the University of California National Center for Free Speech and Civic Engagement and the Center's Executive Director, Michelle Deutchman. I would also like to thank Emma Tolliver, the founder of the Journal, who put her faith in me to continue running the project she worked so hard to develop. I am also grateful to our contributing authors, who are a diverse group of students, for strengthening our undergraduate legal community. Finally, I must thank the Davis Journal of Legal Studies editorial staff for their shared commitment to this work. Each new editorial team brings a unique combination of returning and new editors who I have had the pleasure to work with this year, and the Journal could truly not be possible without their dedication.

The articles in this volume consist of novel undergraduate scholarship and research related to unresolved issues in various legal fields, including ongoing domestic issues in environmental, financial, and immigration law, as well as the implications of international laws on global cooperation and human rights. It has been an honor to oversee the development of these efforts into the product I present to you now.

Happy reading,

Aaron Guerra
Editor-in-Chief
Davis Journal of Legal Studies, Volume IV: Spring 2024

Corruption and Foreign Direct Investment In Central and Eastern Europe

By Justin Davis

Justin Davis is a student at the University of California, Davis. He is pursuing a double major in Political Science and Sociology with an emphasis in Law and Society. Following undergrad, he hopes to attend law school and work toward a career as an attorney.

This study explores the relationship between Corruptions Perception Index (CPI) scores and foreign direct investment (FDI) as a percentage of gross domestic product (GDP) in Central and Eastern Europe (CEE). This paper first seeks to identify and explore the findings of similar studies in the literature review. Next, the "country cases" section provides background on the chosen countries and information on how the selection process mitigates confounding variables. Variables are then presented along with data, graphs, and explanations for trends. A bivariate regression analysis is conducted using the data and two specific case studies are analyzed as countries that did and did not follow the expected trend. The results unequivocally conclude at the 1.2% significance level that there is a negative relationship between corruption (CPI scores) and FDI as a percentage of GDP in CEE from 1998-2011.

Introduction

Following the collapse of the Soviet Union, many CEE countries attempted market reform in an effort to redress Soviet-era issues including shortages, central planning errors, and consumer dissatisfaction.[1] The immediate repercussions of these "shock therapy" reforms included uncontrolled inflation, unemployment, and the amplification of pre-existing wealth

[1] Paul Hare, "Economic Reform in Eastern Europe," *Journal of Economic Surveys* 1, no. 2 (1987): 34.

inequalities.[2] Privatization and the reformation of existing industries in the pursuit of a free market economy was particularly challenging and led to downsizing and layoffs.[3] One of the most significant obstacles to overcome was the creation of new economic institutions to support a privatized, open-market economy. This process was a complex bureaucratic undertaking that required new regulatory frameworks, infrastructure, and practices, all of which were financially impossible for countries to unilaterally achieve.[4] Despite the obstacles created by shock therapy, the transition opened up previously nonexistent markets for economic opportunities, specifically in terms of foreign portfolio investment, trade, and FDI. FDI in particular brought new technology, know-how, competent management, and corporate culture to CEE, leading to increased production, exports, and access to foreign markets.[5]

That being said, there is undoubtedly a credible causal mechanism indicating a negative relationship between corruption (CPI scores) and FDI as a percentage of GDP. For one, countries that attract FDI tend to be more transparent, less corrupt, and have increasingly stable economic policies that create a more optimal environment for investment.[6] The unpredictable nature of more corrupt (and often autocratic) countries decreases investor confidence and discourages FDI. FDI is a necessity for democratizing countries as investment from foreign entities bolsters gross domestic product (GDP), creates jobs, and improves government stability.[7] As such, this paper

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[2] Rey Koslowski, "Market Institutions, East European Reform, and Economic Theory," J*ournal of Economic Issues* 26, no. 3 (1992): 690.
[3] *Id*., 685.
[4] Cristina Mihaela Amarandei, "Corruption and Foreign Direct Investment. Evidence from Central and Eastern European States," *CES Working Papers* 5, no. 3 (2013): 311.
[5] Luiz R. De Mello, "Foreign Direct Investment in Developing Countries and Growth: A Selective Survey," *Journal of Development Studies* 34, no. 1 (1997): 1.
[6] Aparna Mathur and Kartikeya Singh, "Foreign Direct Investment, Corruption and Democracy," *Applied Economics* 45, no. 8 (2013): 998.
[7] *Id*., 993.

explores the impact of public sector corruption (CPI scores) on FDI as a percentage of national GDP. This paper argues that increased corruption leads to decreased FDI as a percentage of GDP.

Literature Review

The importance of studying corruption as a metric of evaluating democratic consolidation and backsliding cannot be understated. Public sector corruption, as measured by CPI, has infinite implications on a states' government, people, and relationships with external powers. Corruption is furthermore a key independent variable causing social inequality, political instability, environmental damage, human rights violations, and economic harm, including decreases in FDI.[8]

Specifically in CEE, studying CPI scores and their effect on FDI is paramount to understanding the economic and political trajectories of individual states and CEE as a whole. FDI was one of the primary factors fostering development in the region by providing desperately needed financial support, knowledge, and technology.[9] Especially in regard to the Copenhagen Criteria for European Union (EU) accession, the creation of new jobs, integration of trade, and increased political stability provided by FDI were key factors in guiding countries toward a free market economy.[10]

However, there is little literature pertaining to the effects of CPI scores on FDI in CEE. The primary study on this topic is a 2013 study conducted by Cristina Amarandei which concludes that increased corruption (lower CPI scores) leads to decreased nominal FDI. The study cites issues related to the stability and predictability of increasingly corrupt economies

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[8] Amarandei, "Corruption and Foreign Direct Investment," 311.
[9] Kálmán Kalotay and Gábor Hunya, "Privatization and FDI in Central and Eastern Europe," *Transnational Corporations* 9, no. 1 (2000): 50.
[10] *Id.*, 55.

originating from rampant bribery and coercion.[11] Through a multivariate regression analysis, the study finds a distinct, statistically significant negative impact of corruption on nominal FDI in CEE. The main shortcoming in this study is the usage of nominal FDI instead of FDI as a percentage of GDP. Nominal FDI is a less accurate metric of evaluating the significance of CPI as it is not standardized and ignores important contextual factors including economic size and fluctuations. FDI as a percentage of GDP serves to mitigate the impact of these confounding variables by providing a relative metric that is better suited to accurately determine the effects of CPI scores across countries and time.

Amarandei supports the "grabbing hand" hypothesis of CPI on FDI. She argues that corrupt industries suffer at the hands of bribe paying, "resources-wasting rent seeking activities" and "additional contact-related risks" which reduce profits and make countries less appealing for FDI.[12] This process creates a downward spiral of corruption causing industry failures, decreased FDI, and further cycles of industrial collapse. While there is a high degree of variation across CEE in regard to CPI scores and FDI impact, Amarandei's results unequivocally indicate a strong, negative relationship on the nominal level.

Furthermore, a 2002 study from Mohsin Habib and Leon Zurawicki conducted the most in-depth, multivariate analysis on CPI scores and their impact on FDI globally. Their research corroborates the trend found by Amarandei at the 5% significance level, finding statistically significant evidence that low CPI scores (high corruption levels) are associated with decreased FDI in their second model.[13] Their first, third, fourth, and fifth models explore further effects of

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[11] Amarandei, "Corruption and Foreign Direct Investment," 311.
[12] *Id.*, 314.
[13] Kálmán Kalotay and Gábor Hunya, "Privatization and FDI in Central and Eastern Europe" Transnational Corporations, vol. 9, issue 1 (2000): 302.

GDP per capita, political stability, TI chapters, and absolute difference on corruption respectively.

After in-depth research into CPI scores and their impact on FDI, I expect to find a statistically significant, negative relationship between corruption (CPI scores) and FDI as a percentage of GDP in CEE.

Country Cases

This paper examines data from Bulgaria, the Czech Republic, Lithuania, Poland, Slovenia, Croatia, and Romania between 1998 and 2011. The lower bound, 1998, was the first year of complete data from all CEE countries after the dissolution of the Soviet Union (USSR). The upper bound, 2011, was the last year before CPI scores were reformed and rendered incompatible with the current metric.

In an attempt to mitigate confounding variables, each of the selected countries is an EU member state. Each country participates in EU political institutions, successfully achieved a free market economy at the time of accession, and ought to have common values of respect for human dignity, democracy, and rule of law (in accordance with *acquis communautaire*). The key dissimilarity between the states is economic productivity (GDP/capita), important for generalizability and external validity. The purpose of ensuring relative similarity in background between selected countries is to isolate CPI scores as the primary factor leading to a change in FDI. For reference, Figure 1 shows the mean foreign direct investment (nominal and as a percentage of GDP) and CPI score for each country between 1998 and 2011.

Table 1) Foreign Direct Investment and Corruption Perceptions Index Scores

Country	Mean Nominal FDI (Billions USD)	Mean FDI (% GDP)	Mean CPI
Bulgaria	3.60	10.4	3.71
Lithuania	1.04	4.22	4.59
Poland	12.51	3.96	4.27
Slovenia	0.69	2.11	6.09
Croatia	2.14	4.77	3.68
Romania	4.71	4.34	3.21

Dependent Variable Presentation

The dependent variable in this paper is FDI. FDI data is pulled from the World Bank International Monetary Fund Balance of Payment database, which uses FDI in terms of today's USD in purchasing power parity. For simplicity, the unit of measurement is billions of USD with a higher number indicating greater FDI. World Bank Defines FDI as the "sum of equity capital, reinvestment of earnings, and other capital" entering a country from foreign investors where those investors have a significant degree of control over the foreign enterprise. Figure 1 shows a line graph of nominal FDI by country from 1998 to 2011.

There are clear similarities and trends across all countries: for one, each and every country experienced a nominal increase in FDI over the selected period of time. The greatest nominal change in FDI was in Poland, which experienced a start-to-finish increase of 12.1 billion USD. The smallest nominal change was in Croatia, which experienced an increase of only 0.3 billion USD.

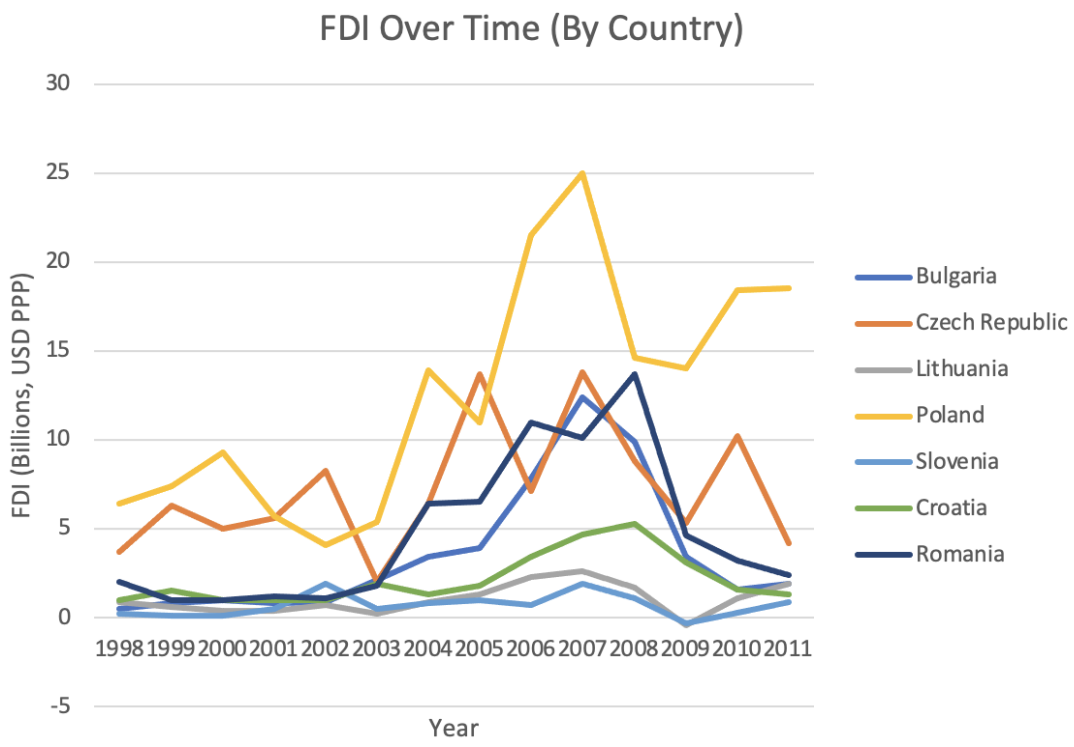

Figure 1

Another similarity across all countries is an FDI crash between 2008 and 2010 during the global financial crisis. Bulgaria, the Czech Republic, Lithuania, and Slovenia experienced the impact earliest in 2008 and continued to decline through 2010 before rebounding in 2011. Croatia and Romania were impacted later in 2009, with the crash continuing through 2011. Lithuania and Slovenia had a period of negative FDI in 2009, meaning that the loans from the countries to foreign powers "exceed[ed] the loans and equity capital" given from the parent country to the recipient.[14] The net increases in nominal FDI indicate a greater degree of financial integration of the selected states with the EU and outside states that is key to successfully developing new polities and market economies.

[14] OECD Investment Division, *Foreign Direct Investment Statistics Explanatory Notes* (Paris: 2013).

As shown in Figure 2, there is great variation in the amount of nominal FDI entering each country, which is to be expected considering differences in GDP. As such, countries with larger industries (e.g. Poland) will naturally have greater nominal FDI than smaller countries (e.g. Slovenia) due to factors of gross economic magnitude. To ensure that this discrepancy is controlled for, this paper instead opts to analyze the effects of corruption on FDI as a percentage of GDP. Figure 3 shows a line graph of FDI as a percentage of GDP from 1998-2011.

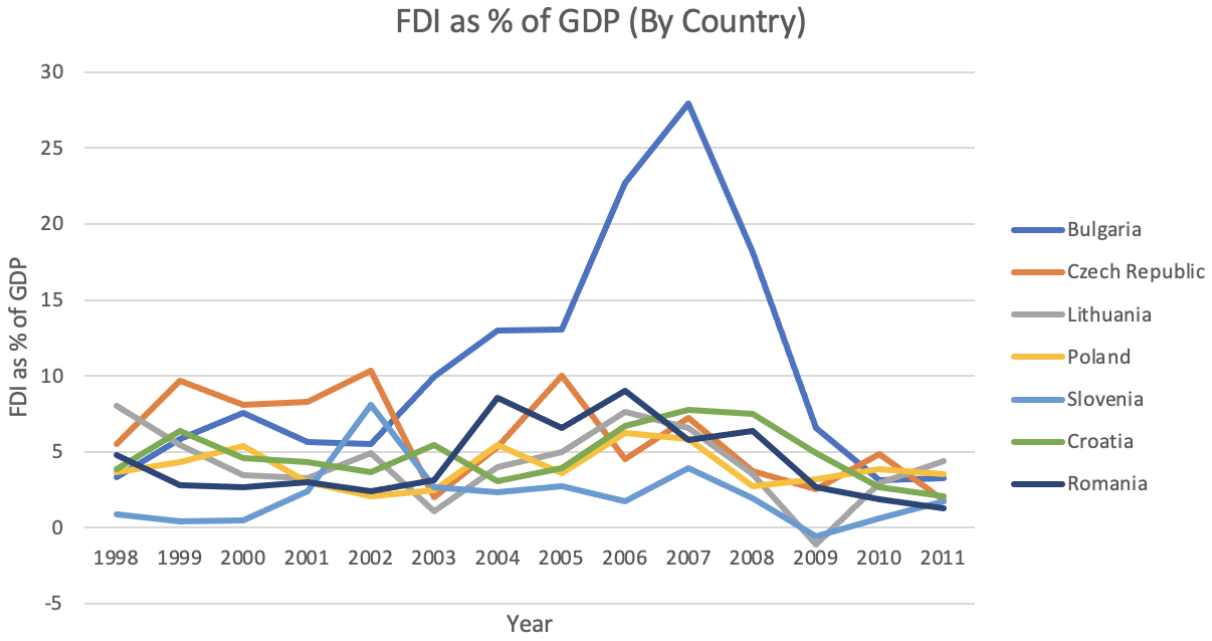

Figure 2

GDP data is sourced from World Bank International, the same source as FDI. There is a distinctly different trend in FDI as a percentage of GDP than nominal FDI in that six out of the seven countries selected had a higher percentage of their GDP as FDI in 1998 than in 2011. While this change is likely due to substantial economic growth during the period in question, it is still interesting to note that FDI did not increase proportionally with GDP. Furthermore, there is a clear outlier, Bulgaria, whose GDP consisting of 30% FDI in 2007 contained more than twice as

much relative FDI as the next leading country at its peak. Despite this divergence from the other states, Bulgaria also experienced a sharp decline in 2008 due to the financial crisis.

Key Explanatory Variable Presentation

The key explanatory variable in this paper is public sector corruption, measured through CPI. Transparency International offers a simple definition of corruption as "the abuse of entrusted power for private gain." Corruption includes bribery of government officials, misuse of public funds, and the granting of public jobs, contracts, and projects to friends or sponsors, all of which contribute to a lower CPI score.

CPI was created by Transparency International in an initiative led by Peter Eigen, the Chair of Transparency International from 1993 to 2005 to spur a movement against corruption. CPI underwent a sizable change in 2012, in which it began to rank countries from 1 to 100 in a method entirely incompatible with the prior rankings due to it being an objective measure. Prior to the change, CPI scores were relative, meaning that they followed a roughly normal distribution with a median of approximately 5, regardless of the actual degree of corruption. Figure 3 shows a line graph of CPI scores for the selected countries between 1998 and 2011.

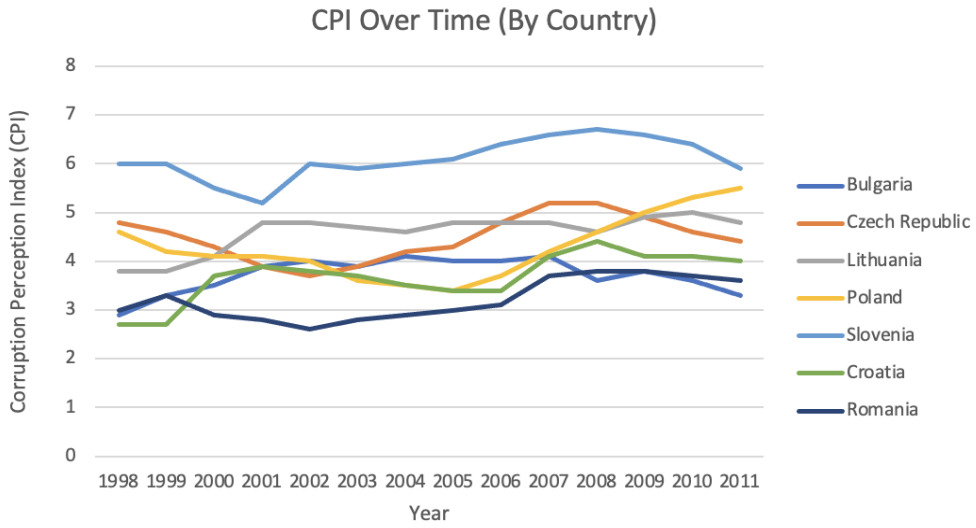

Figure 3

Considering the credible causal mechanism between CPI scores and FDI, I expect to see a strong correlation between the two variables. Particularly in regard to the "grabbing hand" FDI phenomenon from the Amarandei study, there is every indication from the literature that a strong, negative relationship will be found.[15]

Analysis of Results

Table 2 shows the regression table between CPI and FDI as a percentage of GDP. First and foremost, the intercept is 9.89, meaning that a country entirely devoid of corruption (i.e. CPI of 10) would have a predicted GDP with 9.89% FDI. A one unit change in CPI (from 10) is associated with a drop in FDI of approximately 1.1%. The p-value for this model is 0.012, indicating that there is only a 1.2% chance of obtaining this result or a result more extreme under the null hypothesis. Assuming a significance level of 5% (down to 1.2%) there is evidence to reject the null hypothesis. As predicted, the regression indicates a strong, statistically significant, negative relationship between corruption (measured through CPI) and the amount of FDI a country receives as a percentage of its total GDP.

Table 2) Regression Analysis of CPI on FDI

	Foreign Direct Investment	
Predictors	*Estimates*	*P-Value*
(Intercept)	9.89	1.18E-06
CPI	-1.10	0.012
Observations	97	

[15] Amarandei, "Corruption and Foreign Direct Investment,", 314.

Case Studies

For one, Poland is an example of a country which followed the trend found in the regression. Figure 4 is a line graph between CPI and FDI as a percentage of GDP, along with nominal FDI for reference.

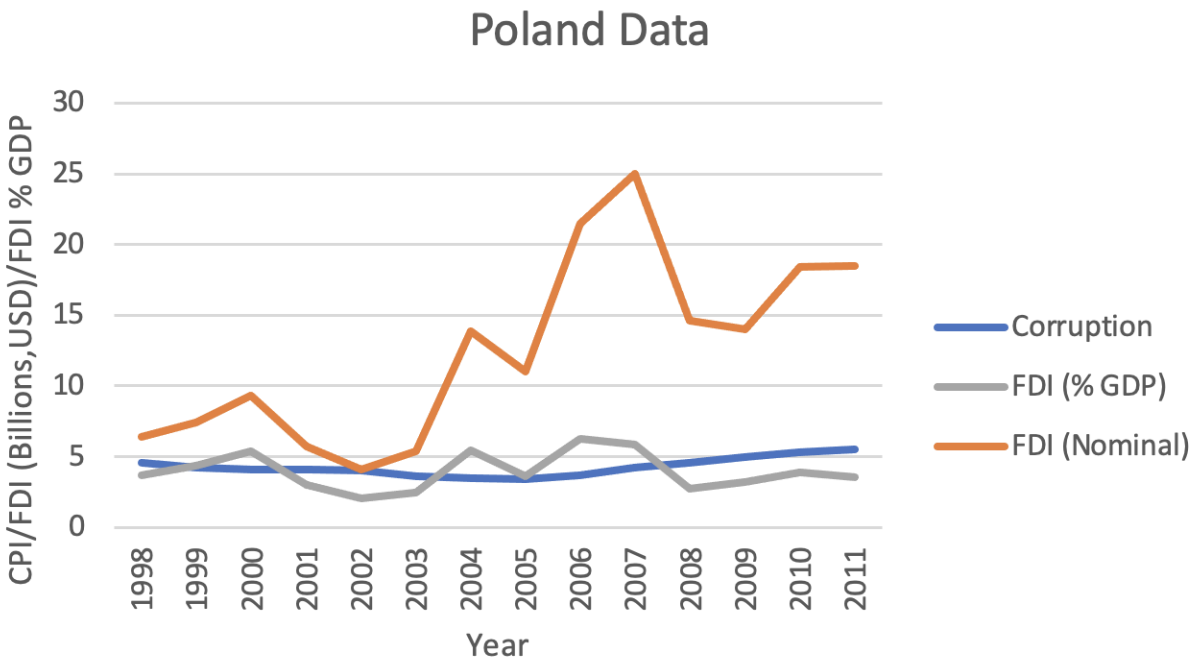

Figure 4

Throughout the selected period, CPI scores remained between 3.4 and 5.5, following a downward trend from 1998 to 2007 before rising back up in 2007. An analysis of FDI as a percentage of GDP in Poland perfectly typifies the trend found in the regression. Periods of increased CPI (improvements in corruption) saw corresponding increases in FDI (e.g. 2005–2007). Furthermore, when CPI decreased, FDI dropped alongside it (e.g. 2000–2002). Nominal FDI follows a similar trend as FDI as a percentage of GDP, further supporting the trend found in the regression. The only exception is the period between 2007 and 2008, which saw decreased FDI in a period of improved corruption due to the global financial crisis.

According to the National Bank of Poland, the leading foreign direct investors during the period in question were Germany, the Netherlands, France, the US, and the UK, in that order. Historically, Germany in particular invested heavily in Poland to augment their manufacturing and automotive industries, and a majority of the FDI in this period came from such developments.[16] Investment into stable industries mitigates many confounding variables when it comes to FDI inflow data and helps isolate CPI as the factor causing the change.

This is additionally an example of the "grabbing hand" phenomenon in which corruption hurts industry, the economy, and FDI for the benefit of a few corrupt individuals.[17] Such corruption creates a more unstable investing environment, reduces the efficacy of institutions and corporations, and hurts the reputation of a country as a safe area for investment, all of which perpetuate cyclical decreases in FDI.

On the other hand, Hungary, while deliberately not included in the regression due to an excess of political confounding variables, is an example of a country where there is little to no relationship between CPI and FDI. Figure 5 is a line graph of corruption (CPI), FDI (nominal), and FDI (% GDP) in Hungary. Data is obtained from the same sources as countries included in the regression.

[16] Andreas Lücke, "German Foreign Direct Investment in Poland: Problems and Perspectives," The Polish Review 37, no. 4 (1992): 457.
[17] Amarandei, "Corruption and Foreign Direct Investment," 314.

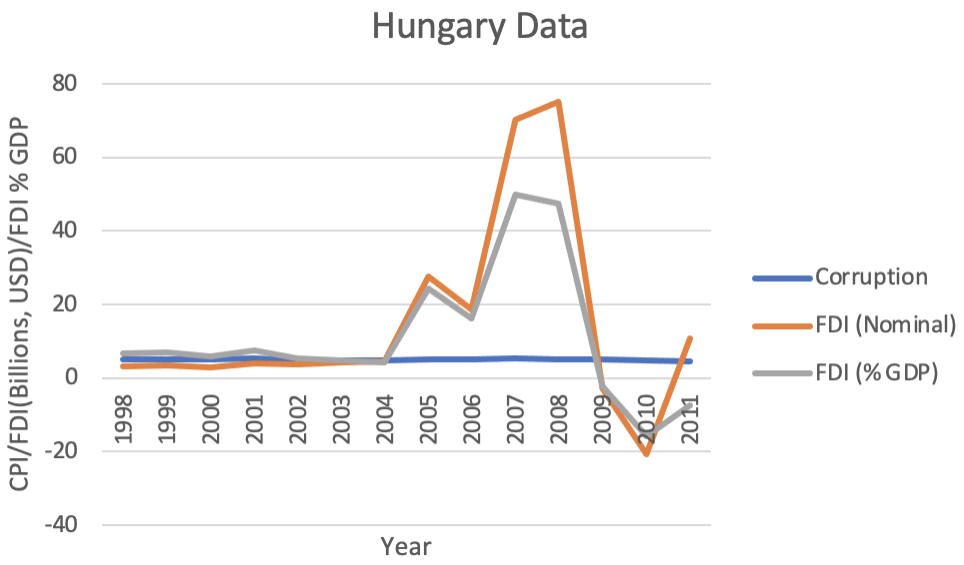

Figure 5

Throughout the period, CPI scores remained between 4.6 and 5.3 while FDI reached a peak of 75.1 billion USD and a low of -20.8 billion USD. Furthermore, the percentage of GDP that is FDI fluctuated between -7.54% up to 50%, comprising half of Hungary's GDP in 2007. There are periods of excessive FDI change, both nominal and relative to GDP, with little to no change in CPI score, contrary to what the regression and leading literature would suggest.

According to an FDI profile written by Magdolna Sass and Kalman Kalotay, FDI played a huge role in the economic development and initial democratization of Hungary. Hungary was particularly attractive for FDI due to its optimal location, ideal investment environment, and strong workforce.[18] However, Hungary's extreme pro-FDI stance and policies led to issues including increased cost of labor, competition from external markets, and the need to continue to fund education and other public works. This, combined with the global financial crisis, led to a drop of almost 100 billion USD in FDI between 2008 and 2010.

[18] Magdolna Sass and Kálmán Kalotay, "Inward FDI in Hungary and Its Policy Context." *Columbia FDI Profiles* (2012): 2167.

One possible explanation for Hungary's nonconformity is outlined in a paper by Mihaly Fazekas and Istvan Toth on the effects of state capture in Hungary. State capture is when powerful non-governmental organizations like interest groups or civil society organizations gain control of and manipulate the government for personal benefit.[19] An instance of a pro-FDI policy that contributed to state capture are tax havens, which provide a low-tax to tax-free environment for investors with the end goal of minimizing tax payments in their home country. These incentives provide investors (both internal and foreign) undue power and influence over domestic economics and institutions and dramatically skews FDI data accordingly.

For example, in the mid 2000s, there were numerous massive acquisitions in Hungary from foreign powers. Particularly notable was the purchase of 21.2% of the total shares of Hungarian gas and oil giant, MOL, by a Russian oil company, Surgutneftegaz.[20] This acquisition created a constant influx of Russian assets and investment into Hungary, creating a theoretically infinite amount of FDI and a bottomless area for investment. Most significantly, Russia's role in MOL, increased foreign power, and subsequent influence on the Hungarian government did not increase corruption as there was technically no change in CPI-measured criteria post-acquisition.

This trend is unique to Hungary in regard to the extent to which pro-FDI policy offered unprecedented tax benefits to investors.[21] This factor certainly contributed to the disparity in the correlation between CPI and FDI, both nominally and in terms of percentage GDP.

Conclusion

The findings in this paper have a high degree of internal validity and are consistent with topical literature on the topic. The regression performed in Figure 5 yielded a miniscule P value

[19] Mihály Fazekas and István Tóth, "From Corruption to State Capture: A New Analytical Framework with Empirical Applications from Hungary," *Political Research Quarterly* 69, no. 2 (2016): 320.
[20] Csaba Weiner, "Tracking Russian FDI in Hungary," *East European Studies* 1, no. 6 (2015): 12
[21] Fazekas and István, "From Corruption to State Capture," 321.

of 0.012, proving significance at the <2% level. As such, this paper concludes that there is a strong, negative relationship between corruption (measured through CPI scores) and FDI in CEE between 1998 and 2011.

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Crossing the "Red Line": The 2013 Ghouta Attack from an International Legal Perspective

By Hadil Djadri

Hadil Djadri is a third year student at the University of California, Davis. She is majoring in International Relations with an emphasis on Peace and Security in North Africa and the Middle East. She is also minoring in Arabic and Professional Writing.

This research paper analyzes the Syrian government's chemical attack on civilians in Ghouta, Syria, in 2013 from an international legal perspective. Based on in-depth analysis of international law and legal journals, this paper contends that the 2013 Ghouta attack was illegal under customary international law and the 1925 Geneva Protocol. However, international law was ultimately unsuccessful in preventing human rights violations in Ghouta. Issues with the jurisdictional scope of the Protocol have limited its ability to prevent signatory states like Syria from reneging on the agreement. Furthermore, the international community failed to hold the Syrian government accountable for war crimes, despite Syria joining the Chemical Weapons Convention in 2013 due to international pressure. This lack of accountability led the Syrian government to use chemical warfare on civilian populations.

I. Introduction

On August 21, 2013, the Syrian government under President Bashar Al-Assad launched a large-scale chemical attack on civilians in Ghouta, an area controlled by the opposition forces in the Syrian Civil War.[1] The Syrian government indiscriminately fired rockets containing sarin nerve gas on civilian neighborhoods, causing immense and unnecessary suffering.[2] This attack

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[1] Tom Ruys, "Digest of State Practice: 1 July 2013 - December 2013," *Journal on the Use of Force in International Law* 1, no.1 (August 2014): 174, https://heinonline.org/HOL/P?h=hein.journals/jufoint1&i=149.
[2] *Id.,* 174.

killed more than 1,400 civilians and left around 3,600 with symptoms of neurotoxicity such as body convulsions, blurry vision, and suffocation.[3] The international community widely condemned this attack, citing Syria's violation of human rights and international legal standards that prohibit the use of chemical weapons on civilians.[4] Based on secondary research on the 2013 Ghouta attack and international legal standards, I conclude that the Syrian government violated customary international law and the 1925 Geneva Protocol during this attack. Despite Syria's status as a signatory state to the treaty, the 1925 Geneva Protocol failed to prevent Syria from using chemical weapons because of key weaknesses in the treaty's design. In addition, the international community ultimately could not prevent Syria from using chemical weapons, and international institutions like the International Criminal Court could not prosecute human rights violations in Ghouta because of jurisdictional restraints.

II. Treaty Law and the 1925 Geneva Protocol

The 1925 Geneva Protocol bans "the use in war of asphyxiating, poisonous or other gasses, and of all analogous liquids, materials or devices," which have "been justly condemned by the general opinion of the civilized world."[5] This is the only treaty signed and ratified by Syria prior to 2013 concerning the use of chemical and biological weapons. Because Syria had

[3] Arms Control Association, "Responses to Violations of the Norm Against Chemical Weapons," *Arms Control Association* 11, no. 6 (April 2019), https://www.armscontrol.org/issue-briefs/2019-04/responses-violations-norm-against-chemical-weapons; International Law Students Association, "Country Watch: A Look at the Economic, Political, and Social Events that Shape International Law Around the World," *I.L.S.A. Quarterly* 22, no. 2 (December 2013): 13, https://heinonline.org/HOL/P?h=hein.jessup/ilsaqrtly0022&i=70.

[4] Ruys, "Digest of State Practice," 175.

[5] "Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare," June 17, 1925, *League of Nations Treaty Series* 94, no. 2138, 67, https://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf.

acceded to the treaty on December 17th, 1968, 45 years prior to the 2013 Ghouta attack, the Syrian government violated the Geneva Protocol.[6]

In practice, however, there are key treaty design issues with the 1925 Geneva Protocol that have undermined its effectiveness in preventing the use of chemical and biological weapons. For instance, the 1925 Geneva Protocol does not prohibit the production and stockpiling of chemical and biological weapons.[7] This presents a critical flaw in the treaty design because signatory states like Syria may be more likely to renege on the agreement if weapons of mass destruction are readily available for use. In addition, the 1925 Geneva Protocol is imprecise because of its brevity and vague language; the treaty does not clearly define the types of chemical and biological weapons that are prohibited, nor does it provide details on the regulations with which signatory states must comply.[8] Instead, the one-page treaty largely stipulates the process of ratification and accession to the treaty, as well as the obligation of member states to convince other states to accede.[9] The limited scope, brevity, and imprecision of the 1925 Geneva Protocol can hinder its effectiveness in practice by allowing signatory states like Syria to interpret the treaty in the way that best fits their interests.

Furthermore, the 1925 Geneva Protocol lacks enforcement and compliance mechanisms. The Protocol does not delegate authority to third-party enforcers who could, for instance, monitor compliance through means such as inspections and mandatory reports.[10] Establishing such a program would increase the effectiveness of the Protocol because it could disincentivize

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[6] "Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare," States parties and signatories, International Humanitarian Law Databases, accessed February 23, 2023, https://ihl-databases.icrc.org/en/ihl-treaties/geneva-gas-prot-1925/state-parties/us?activeTab=undefined.
[7] Baxter, R.R, and Thomas Buergenthal, "Legal Aspects of the Geneva Protocol of 1925," *American Journal of International Law* 64, no. 4 (October 1970): 855, https://heinonline.org/HOL/P?h=hein.journals/ajil64&i=861.
[8] Baxter and Buergenthal, "Geneva Protocol," *supra* note 4, 67,69.
[9] *Id*.
[10] *Id.*

states like Syria from reneging on the agreement if there were mechanisms in place to detect and report their non-compliance. In addition to a lack of enforcement mechanisms, the Protocol does not outline an explicit punishment for non-compliance.[11] Thus, the international response to the 2013 Ghouta attack depended on the efforts of individual states to punish Syria and prevent further chemical weapons use, which were ultimately unsuccessful.

III. Introduction to Customary Law

Customary law comprises the long-standing practices and rules that states are legally obligated to comply with, regardless of whether they explicitly consented to these customs via a treaty. This law is relevant to the 2013 Ghouta attack because it prohibits the use of chemical weapons by any international actor and in any type of conflict. Thus, it is legally more comprehensive in scope than the 1925 Geneva Protocol. The prohibition of chemical weapons use under customary law is a *jus cogens* (compelling law) norm, which in international law means that it causes unnecessary suffering and is therefore unjustifiable in any circumstance. As such, the ban on chemical weapons use has become an established state practice over time, which has created an obligation for all states to comply with customary law. Based on customary law, it is irrelevant whether Syria signed the 1925 Geneva Protocol, or any other treaty prohibiting the use of chemical weapons in warfare. Because all states are bound to comply with customary law, Syria violated customary law by using chemical weapons on civilians in Ghouta. Like treaty law, customary law does not entirely prevent international actors like the Syrian government from using chemical weapons because it is difficult to enforce international agreements on states that are unwilling to comply. However, it does encourage states in

[11] *Id.*

compliance with international law to punish other states like Syria that violate the law through cutting diplomatic ties, issuing sanctions and tariffs, and responding with military force.

IV. The ICRC's Study on Customary Law

In 2005, the International Committee of the Red Cross (ICRC) conducted a study on numerous treaties, military manuals, national legislation, United Nations resolutions and reports, and government statements that contain language banning the use of chemical weapons.[12] In the study's online database, there are several examples of treaties that codified the prohibition of chemical weapons use under customary law. The 1998 Rome Statute, which established the International Criminal Court, states that the use of asphyxiating gasses is a war crime in both interstate and intrastate armed conflicts.[13] Furthermore, the 1972 Biological Weapons Convention prohibits the development, production, and stockpiling of chemical and biological weapons; these are key regulatory standards that are absent in previous treaties like the 1925 Geneva Protocol.[14] Treaties like the 1998 Rome Statute and the 1972 Biological Weapons Convention are integral in analyzing how the 2013 Ghouta attack violated customary law. Although Syria did not ratify the cited treaties, the prohibition of chemical weapons use became customary law through established practice, which has reinforced the obligation of all states to comply with customary law regardless of whether or not they have signed a particular treaty.

The ICRC also presents around 150 pieces of legislation from different states that integrate customary law into domestic institutions by prohibiting the use, production, and stockpiling of chemical weapons.[15] States such as South Africa have passed legislation to

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[12] "Practice relating to Rule 74. Chemical Weapons," International Humanitarian Law Databases, accessed February 23, 2023, https://ihl-databases.icrc.org/en/customary-ihl/v2/rule74.
[13] *Id.*
[14] *Id.*
[15] *Id.*

transform ratified treaties, like the Chemical Weapons Convention, into domestic legal systems.[16] Furthermore, many states such as Canada have classified the use of chemical weapons as a war crime in their military manuals.[17] Such national legislation and military manuals reflect how many states have applied customary legal standards concerning the use of chemical and biological weapons to their domestic legal systems, which gives customary law greater legitimacy. As exemplified in the ICRC report, customary law creates an international expectation for all states to comply with its prohibitions, yet some states like Syria violate the law without being held accountable for their actions.

V. The International Criminal Court and Jurisdictional Constraints

Although the 2013 Ghouta attack was undoubtedly illegal under international law, jurisdictional issues have prevented the Syrian government from being prosecuted for the attack. The International Criminal Court (ICC) is an international body created by the 1998 Rome Statute to prosecute events that classify as war crimes, crimes against humanity, acts of genocide, or acts of aggression.[18] According to Article 8 Section 2 of the Rome Statute, "…it is criminalized to intentionally direct attacks against a civilian population or those who are not engaged in the fighting."[19] Furthermore, a crime against humanity is "...committed as part of a widespread or systematic attack directed against any civilian population," including "...other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health."[20] Based on this criteria, the use of chemical weapons in

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[16] *Id.*
[17] *Id.*
[18] Joshua Bauers, "Syria, Rebels, and Chemical Weapons: A Demonstration of the Ineffectiveness of the International Criminal Court," *Rutgers Journal of Law and Religion* 15, no. 2 (Spring 2014): 333-334, https://heinonline.org/HOL/P?h=hein.journals/rjlr15&i=328.
[19] *Id.,* 343.
[20] "Rome Statute of the International Criminal Court," July 17, 1998, *United Nations Treaty Series* 2187, no. 38544: 93, https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf.

Ghouta was a war crime and a crime against humanity because it deliberately caused widespread and immense suffering for civilian populations. Additionally, exposure to chemical weapons has long-term consequences on physical health and is highly traumatic for the victims of attacks.

The ICC is ultimately limited in its scope relating to the issues at hand because the international body can only prosecute events when the crime is committed on the territory of a member state, by nationals of a member state, or if non-member states give the ICC permission to prosecute an event that occurred within their territory.[21] Thus, the ICC cannot prosecute the 2013 Ghouta attack because the event falls outside of its jurisdiction. Syria did not ratify the 1998 Rome Statute, the relevant actors in the 2013 Ghouta attack were all Syrian nationals, and the event "did not occur outside or across national boundaries."[22] Per the Rome Statute, the United Nations Security Council (UNSC) may give the ICC the authority to prosecute the event through a UN General Assembly resolution.[23] However, the UNSC did not refer the 2013 Ghouta attack to the ICC because Russia and possibly China, key supporters of the Assad regime, would likely have vetoed the resolution as permanent members of the UNSC.[24] Additionally, it is highly unlikely that Syria would grant the ICC permission to prosecute the event because the Syrian government itself was responsible for the attack. Based on this analysis, the ICC's jurisdictional issues hinder the ability of international bodies to prosecute international law violations, which is a critical limitation of international law in practice.

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[21] Joshua Bauers, "Syria, Rebels, and Chemical Weapons," 333.
[22] *Id.,* 342.
[23] *Id.*
[24] Milena Stereo, "International Criminal Law in 2013: The Most Significant Developments," Proceedings of the Annual Meeting, published by *American Society of International Law* 108 (April 2014): 110.

VI. Crossing the "Red Line": The International Response

The international response to Syria's violation of customary and treaty law represents a key feature of international law where individual states "threaten" and punish violators of the law in the absence of an international governing authority. The most prominent international reaction to the 2013 Ghouta attack came from the United States. In 2012, President Obama warned Syria that the use of chemical weapons would cross a "red line" and that the United States would respond to such a violation of international law by using military force against Syria.[25] True to this promise, the United States was prepared to take military action in response to the Ghouta attack a year later.[26] However, to avoid a U.S.-led intervention that could undermine Russia's military and strategic influence in Syria, Russia convinced Syria to accede to the Chemical Weapons Convention (CWC).[27] This treaty requires signatory states to not only refrain from using chemical weapons, but also to remove and eliminate their chemical weapons arsenals.[28] The 1925 Geneva Protocol served as a foundation for this treaty, yet the CWC has been more effective in regulating the use of chemical weapons. The CWC is precise because it outlines compliance mechanisms, like inspections, that hold states accountable to the agreement.[29] Unlike the Protocol, this treaty also requires member states to disarm and eliminate their chemical weapons stocks, which in practice should prevent attacks from occurring in the first place.[30]

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[25] Jillian Blake and Aqsa Mahmud, "A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict," *U.C.L.A. Law Review Discourse* 61 (2013): 246, https://heinonline.org/HOL/P?h=hein.journals/ucladis61&i=243.

[26] Arms Control Association, "Responses to Violations of the Norm Against Chemical Weapons."

[27] *Id;* Anna Borshchevskaya, "Russia's Strategic Success in Syria and the Future of Moscow's Middle East Policy," The Washington Institute for Near East Policy, last modified January 23, 2022, https://www.washingtoninstitute.org/policy-analysis/russias-strategic-success-syria-and-future-moscows-middle-east-policy

[28] "Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction," September 3, 1992, *United Nations Treaty Series* 1974, no. 33757: 327, https://treaties.un.org/doc/Publication/UNTS/Volume%201974/v1974.pdf.

[29] *Id.,* 325-330.

[30] *Id.,* 319.

Syria's accession to this ambitious treaty due to international pressure reflects how individual states force violators of international law to comply or otherwise risk punishment. Despite the CWC's precise treaty design and preventative measures, the Syrian government continued to use chemical weapons on civilians even after acceding to the CWC, and this includes the Khan Sheikhoun attack in 2017 that killed at least 90 civilians using sarin gas.[31] This failure to prevent Syria from reneging on an internationally recognized agreement demonstrates a critical weakness in enforcing international law.

VII. Conclusion

Syria violated the 1925 Geneva Protocol and customary international law by using chemical weapons in the 2013 Ghouta attack. This attack is a relevant case study in understanding international law and its limitations; it also highlights the successes and shortcomings of customary and treaty law respectively. Customary law creates a legal obligation that all states are bound to regardless of whether they signed the treaties prohibiting the act. Because of this, issues with weak treaty design have undermined the Geneva Protocol's success in preventing signatory states like Syria from using chemical weapons. Furthermore, the 2013 Ghouta attack sheds light on jurisdictional issues that limit the overall effectiveness of international law. International bodies like the ICC cannot prosecute the 2013 Ghouta attack as a war crime or crime against humanity despite the death of more than 1,400 innocent civilians and the neurological and emotional trauma it had inflicted on survivors. Ultimately, the ability of international actors to commit heinous crimes without retribution makes international law largely unsuccessful in preventing and prosecuting human rights violations.

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[31] "Death By Chemicals: The Syrian Government's Widespread and Systematic Use of Chemical Weapons," Human Rights Watch, last modified May 1, 2017, https://www.hrw.org/report/2017/05/01/death-chemicals/syrian-governments-widespread-and-systematic-use-chemical-weapons.

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“Rome Statute of the International Criminal Court.” July 17, 1998. *United Nations Treaty Series* 2187, no. 38544. https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf.

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Page Act of 1875

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The US has a history of engaging in anti-Asian sentiment, including the enactment of discriminatory race-based laws and policies restricting immigration. Among these policies is the Page Act of 1875, signed into law by President Ulysses S. Grant to limit the immigration of women from East Asia to the United States in fear that they would pose a threat to the nation's economy by partaking in cheap labor and increasing prostitution rates.[1] After the enactment of the Page Act, anti-Asian sentiment was leveraged, targeting primarily Chinese immigrant women in denying their access to the US. This paper analyzes and critiques the Page Act of 1875 to discuss the policy's lasting impact on the experiences of Chinese immigrant women and the broader Asian women community in America. Through this paper, I intend to expand on three major consequences of the Page Act and the policy's role in shaping the experiences of Asian women: the sexualization and fetishization of Asian women, the AAPI community suffering as a collective from racialized hate crimes, and the drastic income disparities and workplace conditions of Asian women workers from post-9/11 to present-day.

Historical Narrative

When the Page Act proved inefficient for limiting immigration, Congress passed the Chinese Exclusion Act in 1882, taking extreme measures to minimize the number of Chinese

[1]George Anthony Peffer, "Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882," *Journal of American Ethnic History* 6, no. 1 (1968): 28, accessed May 18, 2023, https://www.jstor.org/stable/27500484.

immigrants coming to America to conserve the country's jobs for Americans. The Chinese were viewed as economic competition in the American workforce as many Chinese men immigrated to America to work on the railroad project. This law was formed to restrict the immigration of East Asian workers from oriental countries to prevent them from partaking in "coolie labor" in the United States, a term that was coined toward Asian immigrants who worked unskilled jobs for meager wages for means of subsistence. Congress sought to restrict the naturalization of Chinese immigrants and labeled them as an inferior group, undeserving of equal economic and social opportunities. There was an increasing tension between white workingmen and the Chinese workers as these workingmen became fearful of the gradual detraction of work opportunities as Chinese workers continued to come to America. This rising concern over the scarcity of employment opportunities for white workingmen led to the organization of preventative actions to restrict coolie labor. Soon after California passed the state-wide Anti-Coolie Act in 1862, the Anti-Coolie Association was formed in March 1867 to target and sabotage industries that hire Chinese workers.[2]

The passage of these discrimination laws sought to tackle the unemployment crises among white workers in the US, blaming Chinese immigrants for taking job opportunities. Before the Chinese Exclusion Act was signed into law to broadly limit Chinese immigration, the nation took a more targeted approach by enacting the Page Act of 1875 which significantly restricted the immigration of Chinese women, deeming them as prostitutes who came to America to do "filthy labor." In hindsight, the broader goal of the policy sought stricter immigration laws to ultimately ban immigration of Chinese women.[3] The Page Act proved effective at drastically

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[2] Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco's Chinatown* (Berkeley, Los Angeles, London: University of California Press, 2001), 27-28.

[3] Ming M. Zhu, "The Page Act of 1975: In the Name of Morality," *Legal History Workshop* (2010): 19, http://dx.doi.org/10.2139/ssrn.1577213.

decreasing the rate of the immigration of Chinese women to the US from 6.4 percent to 4.6 percent.[4] This contributed to the widening of the Chinese female-to-male ratio in California. The repercussions of the Page Act increasingly limited the number of Chinese families in the US and increased the rate of separation between the husband from his wife and children.[5] The Page Act served as sex- and race-based discrimination law, posing as a barrier for Chinese immigrant women to assimilate to American culture and access to economic opportunities. Thus, its portrayal of Asian women as prostitutes has not only contributed to elevated levels of socioeconomic struggles, but also made them victims to sexualized violence.

The Page Act's Contribution to the Fetishization of Asian Women

The Page Act's consequences continue to disintegrate the experiences of Asian American women, contributing to the sexualization of Asian women from post-9/11. The law sought to depict Chinese women immigrants as hypersexual beings, associating Asian women with the image of a prostitute which heightened the fetishization of Asian women in American society. In 2021, a 21-year-old white male Robert Aaron Long, engaged in a shooting rampage, killing six Asian women spa workers in Atlanta, later revealing that he had a sex addiction and needed an outlet to satisfy his desire. The attack was linked to the fetishization of Asian women. The Page Act's labeling of Asian women as hypersexual enforces the Asian prostitute stereotype which serves as a contributor to the fetishized violence.[6] This race and gender-based attack was ultimately downplayed and disregarded by police, with officer Jay Baker explicitly stating that

[4] *Id.,* 29.
[5] *Id.*
[6] Ashley Park, "Fetishization of Asian Women in US Culture and Media," in *John Jay's Finest,* ed. Jeffrey Heiman and Adam Berlin (New York: John Jay College, 2022), 14.

Long "was having a bad day."[7] Officer Baker's remarks point toward the ignorance to legitimize the perpetrator's actions, and contribute to the minimization of the underlying motives for the discriminatory-based attack. The implication of Chinese women as sex workers through the Page Act promotes the detrimental ideology that contributes to the white man's fetishization of Asian women.

In a broader historical lens, orientalism and colonialism take part in driving this domination over Asian women. In the unfolding of the second World War "comfort women" were situated at military bases in East and Southeast Asia to serve as a form of "escape and refuge" for soldiers to satisfy their sexual desires.[8] The use of comfort women first emerged in the Japanese empire where women from other countries in Asia, including Korea, China, Vietnam, and Taiwan, were subjugated toward a system of violence, sexual assault, and verbal and physical harassment by Japanese soldiers during World War II.[9] During the war, the Japanese government viewed prostitution and sex work as indistinguishable from one another, and these two practices were lumped into a homogenous group. Prostitution was already shamed upon and villainized by the Japanese society which contributed to the justification of imposing sexual slavery among these women.

This linkage of Asian women with prostitution is detrimental. As our society continues to demonize prostitution and negatively view sex workers, this painting of Asian women as prostitutes makes them vulnerable to violence. Drawing back to the Page Act's legal outline, the law was specifically formed around limiting the immigration of Chinese women since they are

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[7] Angela Wang, "From the 1885 Chinese Immigration Act to the 2021 Atlanta Spa Shooting: An Exploration of Anti-Asian Sentiment against Asian Migrant Sex Workers Within North America," in *Hardwire: The Undergraduate Journal of Sexual Diversity Studies,* issue 6 (University of Toronto: 2022-2023).
[8] Margaret Stetz and Bonnie B. C. Oh, *Legacies of the Comfort Women of World War II* (London and New York: Routledge, 2015), 3.
[9] *Id*.

deemed prostitutes partaking in cheap labor. This adds to the circulation of mistrust and disdain for Chinese women in America, consequently playing a factor in heightening acts of violence against the broader Asian women community in America.

Portrayal of Asian Women in Film & Media

The prostitute Asian woman image that the law imposes is also reflected in the post-9/11 media and entertainment industry through the sexualization and fetishization of Asian women in popular culture. In the film industry, Asian women are depicted as the "sex temptress," the "Lotus Flower," or the "Dragon Lady."[10] Although the Page Act does not directly push for these films to portray Asian women this way, the law contributes to the detrimental stereotype of viewing Asian women as hypersexual. An example of this stereotype enforced in Western films is the movie *Goldmember,* where the male lead, Austin Powers, is seen with two Japanese girls, Fook Mi and Fook Yu, who were actively "pursuing" Powers throughout the film. The girls were depicted in the stereotypical Asian school girl attire and characterized as obedient and hypersexual, appealing to the white man by initiating to engage in a sexual activity with him.[11] Fook Mi and Fook Yu were pictured seducing Mr. Powers, alluding to the Western narrative that Asians and the East need to be dominated or controlled by the West in order to maintain civility and organization.

These films perpetuate the prostitute image, ultimately painting Asian women as sex objects that are used to satisfy the white male fantasy, leading to the dehumanization and objectification of Asian women. The film and media industry's depiction of Asian women feeds into the Page Act's rhetoric of Asian women as prostitutes, equating them to "expendable

[10] Ashley Park, "Fetishization of Asian Women in US Culture and Media," 10-16.
[11] *Id*., 12-13.

objects" which makes them susceptible to racialized violence. Moreover, the Page Act reinforces this notion of instrumentalizing Asian bodies, diminishing them to mere sexual gratification and pleasurable enclaves.

The Page Act also exemplifies the difficulties Asian women experience as they assimilate into American culture. They were not seen as American enough to fit into the Western culture and thus were subjected to prejudice and oppression. Although the sexualization and fetishization of Asian women through the Page Act made Asian women targets of sexualized violence, the law also generated a great wave of Asian hate crimes, planting anti-Asian sentiment in America's minds which also contributed to the racialized brutality today. This same hostility towards Asian Americans today in society as Asian hate crimes continued to rise during COVID-19.

AAPI Hate Crimes During the Pandemic

Before COVID-19 struck the world, the US's attitude toward Asian immigration was accusing and unwelcoming. This disdain was also reflected regionally within the US, including San Francisco, California. During the 1860s, there was an influx of Chinese male workers who immigrated to San Francisco during the Central Pacific railroad project. The growing Chinese occupation threatened Caucasian communities residing in the area who feared that these inclining numbers of Chinese families would soon outnumber them. The increasing spread of Chinese residence also meant that many businesses and industrial companies were soon largely occupied by Chinese community members. This growing predominance led to a scarcity in residential spaces, and many Chinese workers began living in bunking houses to conserve space.[12] These bunking houses were overcrowded and the lack of space increased the risk of contracting sickness and diseases. Health officials became overly concerned about the spread of

[12] *Id*., 26-27.

disease and particularly investigated these Chinese-occupied homes. San Francisco city health officer, C.M. Bates compared their lifestyles to those of "cattle or hogs." Bates continued to argue that "[the Chinese] mode of life is the most abject in which it is possible for human beings to exist."[13] Bates's participation in dehumanizing these Chinese by comparing them to farm animals and labeling them as "filthy" reinforces the narrative that Chinese people are an inferior group. These harmful connotations stump the growth for socioeconomic mobilization among the Chinese community and further circulate the stereotype that Chinese people are unsanitary and are carriers of diseases and illnesses.

This mistreatment of Chinese immigrants in San Francisco connects back to an underlying component not explicitly stated in the Page Act: the perception of Chinese women as filthy prostitutes that carry diseases. According to the anti-Chinese organizers and supporters of the Page legislation, the practice of prostitution, particularly by Chinese women, is "counter to the moral integrity of Californians" and these women were blamed for "spreading diseases to young boys."[14] Moreover, anti-Chinese health officers claimed that Chinese women were seen as "a source of syphilis and leprosy that would, it was feared, weaken the "superior" white race." [15] This connection of Chinese people to disease is greatly damaging as it shapes the stereotype that the Chinese are disease-carriers. This anti-Asian sentiment resurfaces in our nation's present-day attitudes and mistreatment toward Asian communities, and is exemplified during COVID-19.

In 2020, when COVID-19 began spreading globally, the Chinese were blamed for the shelter-in-place protocols and countrywide lockdowns. Asian Americans endured severe lashes of xenophobia, and the Page Act's labeling of Asians as "disease-ridden," was a narrative that

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[13] *Id*., 27.
[14] Erika A. Muse, "Page Act (1875)," in *Asian American History and Culture: An Encyclopedia*, ed. Huping Ling and Allan Austin (New York: Routledge, 2015), 213.
[15] *Id*.

circulated during the pandemic. Asian hate crimes disproportionately affected Asian women, and studies have found that AAPI women were 2.2 times more susceptible to be victims of hate crimes compared to that of AAPI men.[16] Atlanta's spa shooting demonstrates the intersection of gender and race as exemplifying the vulnerability of Asian American women to violence.

To expand on the various forms of hate crimes in addition to physical violence that Asian women experienced during the height of the pandemic, these anti-Asian hate crimes also arise in the form of verbal harassment, some pertaining to their citizenship status, that can lead to mental stressors. A Korean woman in her 20s spoke about her verbal harassment experience in a public area when a white woman approached her and said she "[was] disgusting" and proceeded to try to hit her.[17] The victim was threatened by the perpetrator's response and was worried that the discrimination that was associated with the targeted assault may affect her citizenship status. The Korean woman disclosed that she and her boyfriend had recently immigrated to the US and she was afraid that the perpetrator's attack would result in deportation.[18] This fear of being deported due to discrimination the victim faced ties back to the significance of the Page Act and what the law entails: restricting Asian women from immigrating to the US. The law raises the risk of these Asian women immigrants being sent back to their country of their birth if they found themselves "getting in trouble" with the system or the community around them. The Page Act's implication and consistent reiteration that Asians are "unsanitary" and "foreign" reinforces the othering narrative, subjugating them as targets to blame for spreading diseases. The stereotypes, microaggressions, and aligning the image of Asian women to the disease carriers forms a

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[16] Shoba Sivaprasad Wadhia and Margaret Hu, "Decitizenizing Asian Pacific American Women," in *University of Chicago Law Review,* (Colorado: The University of Colorado Law School, 2022), 336.
[17] Neil G. Ruiz, Carolyne Im, and Ziyao Tan, "Asian Americans and Discrimination during the COVID-19 Pandemic," Pew Research Center, last modified November 23, 2023, https://www.pewresearch.org/race-ethnicity/2023/11/30/asian-americans-and-discrimination-during-the-covid-19-pandemic/.
[18] *Id.*

harmful narrative that upholds and engages in oppressive and discriminatory acts against Asian Americans.

Unequal Income Distribution and Workplace Conditions

Not only do the Page Act's repercussions play out in the form of racist bigotry and physical and verbal harassment toward Asian women, but the law also has lasting effects on the income distribution among the workforce. Illustrating Asian women as prostitutes who "get easy money" through sex work contributed to the divided distribution of income between Asian women and their white male counterparts. Moreover, this harmful association perpetuates the model minority myth: the ideology that Asian people are innately socioeconomically successful. There are five misconceptions surrounding the myth:

1. Asian Americans are all the same
2. Asian Americans are not really racial and ethnic minorities
3. Asian Americans do not encounter major challenges because of their race
4. Asian Americans do not seek or require resources and support
5. College degree completion is equivalent to success [19]

These misconceptions distort and detract from the realities and barriers Asian Americans face navigating socioeconomic mobility and stability. The Model Minority Myth diminishes the obstacles and barriers that Asian immigrants encounter while assimilating to American culture. Moreover, this lumping of Asian Americans as one homogenous group ultimately dismisses their financial struggles and overlooks the income gaps between the various Asian ethnic communities.[20]

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[19] Samuel D. Museus and Peter N. Kiang, "Deconstructing the Model Minority Myth and How it Contributes to the Invisible Minority Reality in Higher Education Research," in *New Directions for Institutional Research,* no. 142, 2009, pg. 7-10.

[20] Miranda Oshige McGowan and Lindgren, James, "Testing The "Model Minority Myth," in Northwestern University Law Review (Illinois: Northwestern University School of Law, 2006): 331.

The Page Act was not only enacted to limit East Asian immigration to America in fear of jeopardizing the economy with "coolie labor" and "prostitution," but also left an imprint on the overall American perception of Asians, viewing Asian immigrants as undeserving of equal employment and fair pay. It is notable that Asian women are paid significantly less than their white male counterparts. Studies have shown that Asian women in 2015 were making only 85 cents for every dollar their white male coworkers make.[21] Despite working full-time a year, Asian women working in low-wage occupations receive only 81 cents for every dollar the white man makes,indicating a significant income divide between Asian women and their white male counterparts.[22] Despite obtaining the same educational level as white men, Asian women's earnings continue to be less than white men. Though, the pay gap becomes slightly less drastic for Asian women who have received higher levels of education.[23] The Page Act served as a contributing factor to the income disparities as it denied Asian women immigrants the same pay as white men because they were not "American enough" to be paid equally. Moreover, the connotation of Asian women's bodies to mere forms of sexual labor exacerbate the ideology that Asian women should not receive equal pay because they are seen as "inferior."

Moreover, the model minority myth fails to account for the reality of the vast population of Asian women immigrant workers who engage in harsh labor practices for meager pay. Asian women make up a high percentage of the garment worker population in the US and they work in dangerous and unsanitary environments that detrimentally impact their health. For instance, Filipino American women who work at sweatshops in Silicon Valley are at constant exposure to toxic chemicals in "clean rooms," which can put them at a risk for developing cancer or

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[21] "Workplace Justice: The Wage Gap and Asian Women," *National Women's Law Center,* March 2017, https://nwlc.org/wp-content/uploads/2017/03/Asian-Women-Equal-Pay-2.pdf.
[22] *Id*.
[23] *Id*., 4.

neurological, vision, respiratory, or reproductive damage.[24] This highlights the bleak realities of the workplace conditions that Asian women in America endure.

Conclusion

It is important that we view the Page Act of 1875 through the lens of intersectional feminism as the law was enacted to target Asian women, a mutually constitutive identity that cannot be separated. This targeted discrimination means that immigrants both identifying as a woman and of an Asian background are intersectional aspects that exemplify the discrimination. Black feminist author, Kimberley Crenshaw, speaks on the issue of violence against women of color, noting that women of color possess many dimensions of their identity, and those dimensions are all factors that make them susceptible to these oppressive experiences. These intersectional dimensions of race, gender, and sexuality cannot be mutually exclusive and it is significant to evaluate how these social identities cooperate with one another.[25] Thus, it is essential to draw our attention to the Page Act and how the policy sought to eradicate and exclude the immigration of women who are Asian.

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[24] Lora Jo Foo, "Asian American Women: *Issues, Concerns and Responsive Human and Civil Rights Advocacy*," Asian American Women: Executive Summary, https://aapip.org/wp-content/uploads/2012/10/aawp_executive_summary.pdf.

[25] Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1242, https://www.jstor.org/stable/1229039.

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Juliana v. United States

By Nikki Pezeshkian

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This paper intends to analyze the ongoing case brought against the federal government targeting the unconstitutional fossil fuel system that currently governs the United States. The main issues discussed are the 14th Amendment, the Public Trust Doctrine, and the Due Process Clause. Finally, the analysis in the paper suggests that the case may not receive a successful resolution, but will influence change within the legal system and environmental sector.

Introduction

The accelerated rate of global warming needs immediate action for the Earth to remain habitable to humans in the coming decades. As time goes on climate change will only become a more pertinent issue; it has inclined many countries to begin working toward making greener and more sustainable policies. The current level of inaction has already led to certain climate goals not being met, the Earth's temperature will increase and we will see unusual side effects from the high level of CO2 in the atmosphere.[1] The United Nations Sustainable Development Progress Report states that "progress on more than 50 per cent of targets of the SDGs [Sustainable Development Goals] is weak and insufficient; on 30 per cent, it has stalled or gone into reverse,"[2] without immediate action the 2030 sustainability agenda will pass the world by.

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[1] "Juliana v. United States," Our Children's Trust, accessed December 24, 2023, https://www.ourchildrenstrust.org/juliana-v-us.

[2] "Energy - United Nations Sustainable Development," United Nations, https://www.un.org/sustainabledevelopment/energy/.

The United States has a high dependence on fossil fuels to run many structures in society, including a fossil fuel based energy system that is intertwined throughout the country.[3] As fossil fuel emissions continue to be a leading factor in the increase of atmospheric CO2, there needs to be a revision of this fossil fuel system, removing the reliance on nonrenewable resources, and an alternative energy source must become the main resource for the states. Renewable energy sources such as wind and solar power have the potential to vastly reduce CO2 emissions and move the market forward. Countries like Denmark, Uruguay, and Namibia have already taken the step forward, with wind and solar acting as over 60% of their energy resources.[4] While the clean energy transition poses a challenge of economic stability, their costs are consistently dropping, and if the USA reaches 57% total renewable energy, they will be on track to 2030 climate goal of limiting global warming to only 1.5 degrees Celsius.[5]

In 2015, 21 youths alongside organizational 'Earth Guardian' plaintiffs filed a lawsuit in the U.S. District court of Oregon against the federal government. The plaintiffs filed against the United States for human rights protection against climate change, calling attention to the improper care of the climate that could have been prevented if the government had taken earlier measures to lessen the nation's dependence on fossil fuels.[6] They believe that this has led to a decreased quality of life for the next generations and will possibly be responsible for an inability to reverse the effects already occurring of climate change. They argue that the U.S. fossil fuel

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[3] "Global Carbon Emissions from Fossil Fuels Reached Record High in 2023," University of Exeter and Stanford Doerr School of Sustainability, last modified December 5, 2023, https://sustainability.stanford.edu/news/global-carbon-emissions-fossil-fuels-reached-record-high-2023.

[4] Joel Jaeger, "These 8 Countries Are Scaling up Renewable Energy the Fastest," World Resources Institute, last modified July 12, 2023, https://www.wri.org/insights/countries-scaling-renewable-energy-fastest.

[5] "The Sustainable Development Goals Report 2023," United Nations, https://unstats.un.org/sdgs/report/2023/.

[6] "Settlement Talks End Without Resolution in Juliana v. U.S. Climate Case; Youth Plaintiffs Await Ruling from Federal District Court," Our Children's Trust, released November 1, 2021, https://static1.squarespace.com/static/571d109b04426270152febe0/t/6181ba9912336b4fc5c01345/1635891865535/2021.11.01.juliana+v+us+settlement+ends.pdf.

system is unconstitutional as it is taking away future generations' access to life, liberty, property, and equal protection under the law[7].

Plaintiffs are waiting for response from the courts on new actions, since settlement talks that had been going on for two years prior were ended without resolution. There was an issue raised by the Department of Justice as to if the plaintiffs had proper standing to be filing this claim against the government and if the case could be properly tried and get back results. To bring a suit to court, one must be able to prove the potential of harm unto the party filing the complaint. Plaintiffs have amended their complaint and hope to focus it on how the United states fossil fuel based energy system is unconstitutional.

Parties and Issue Description

Parties

The plaintiffs are referred to collectively as Juliana. The title ‘Juliana’ was coined from the lead plaintiff of the case, Kelsey Juliana, who co-filed the initial lawsuit with the support of Our Children's Trust, a non profit organization that provides legal services to youth clientele. Today, ‘Juliana’ includes: 21 youth plaintiffs represented by Our Children's Trust, ‘Earth Guardians’ acting as the organizational plaintiff for the youth plaintiffs, and ‘future generations’ represented by scientist James Hansen. The plaintiffs seek to win their declaratory judgment on the constitutionality of the nation's fossil fuel system.

The defendants are The United States government, president, and multiple executive branch agencies, including the Department of Justice (DOJ), Environmental Protection Agency (EPA), Council on Environmental Quality (CEQ), and the US Department of Energy. The

[7] “The Fourteenth Amendment Due Process Clause,” National Constitution Center, accessed December 24, 2023, https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701.

defendants denied that they had caused specific climate change impacts and also questioned the plaintiffs standing in the case.

Previous parties of interest, three fossil fuel industry groups, initially intervened on the case on the defendants side to get the case dismissed, but were denied their motion to dismiss.

Issues

In 2015 the case was first filed with youth plaintiffs that could prove injury from recent climate events. The plaintiff complained that the government's lack of action had reduced the quality of life for the youths. They believe that the federal government had knowledge of the immense effects of CO2 for many years and did not take needed action as soon as possible[8]. Defendants tried to get the case dismissed before it went to trial, arguing that there was no constitutional backing to provide a sustainable future. The court did not accept and the trial was initially planned for 2017. Defendants responded to the complaint in late 2016 stating that they did not believe they were responsible for causing climate change.[9] Finally a trial date was set for 2018.

In mid 2017 the Department of Justice filed an objection with the court, petitioning the Ninth Circuit to provide a writ of mandamus–a judicial remedy that could be used to compel a lower court to take action, in this case to decide the case without trial–on the basis that there was not proper standing from the plaintiffs and that many points written into the complaint were too large of a task to be dealt with without further evidence or analysis.[10] The Ninth Circuit denied the DOJ's writ of mandamus, Which led the defendants to petitioning the Supreme Court, hoping

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[8] Our Children's Trust, "Settlement Talks End."

[9] Ann Aiken, Opinion and Order in *Juliana v. United States* (9th Cir. 2016).

[10] Ann Aiken, Letter Re: *United States v. United States District Court for the District of Oregon.* US District Court of Oregon, dated August 25, 2017, https://static1.squarespace.com/static/571d109b04426270152febe0/t/59a08038cd39c3292add0e79/1503690808950/US+District+Court+letter+to+Ninth+Circuit.pdf.

to find a flaw in the plaintiffs footing. They hoped to put a hold on the trial as they motioned for the case to be dismissed. In 2018 the Supreme Court once again denied the defendant's request for the dismissal. Yet, the head judge initially on the case, Judge Aiken, reversed her previous decision, granting the government's request for an interlocutory appeal–one that reverses a non-final order or decision made during the case–and so the case would no longer go to trial.[11] The Ninth Circuit decided that the 'court lacked authority' to issue the government to deal with climate change because of its standing as a lower court, and the fact that it would be near impossible for the defendants to provide reasonable mitigation efforts to deal with the entirety of climate change.[12]

Many amicus briefs were filed in the plaintiffs defense from states, government officials, and citizens of the USA. The plaintiffs motion to appeal was denied at the Circuit court level and Judge Aiken ordered both parties to meet and discuss a settlement. In March of 2021, the plaintiffs filed for a second motion to amend their complaint against the federal government. They wanted to revise the remedy they sought out in the initial claim, now choosing to target the harm at a more constitutional level that could be feasibly redressed.[13] 17 states filed as interveners to the defendants side of the Juliana case, objecting to potential settlement.[14] Settlement talks between the parties ended in late 2021 without resolution and the plaintiffs now await a response for their motion to file an amended complaint and the motion to intervene.

Relevant Laws

[11] Our Children's Trust, "Settlement Talks End."
[12] Juliana V. United States, No. *18-36082, 2021 U.S. App.* Climate Case Chart, 11565804 (9th Cir. Jan. 17, 2020)
[13] "Youth Plaintiffs in Constitutional Climate Change Case Ask Court's Permission to Amend Complaint, Adjust Remedy Requested In Line With 9th Circuit Ruling," Our Children's Trust, released march 9, 2021, https://static1.squarespace.com/static/571d109b04426270152febe0/t/6047b082456ca3052391eb61/1615310978432/Motion+to+Amend+030921.pdf.
[14] Our Children's Trust, "Juliana v. United States."

U.S. Constitution Amendment XIV, S1.

Section 1 of 14th amendment in The U.S. Constitution, ratified into law in 1868, goes into detail on the 'right to life' given to all citizens of the United States as well as 'equal protection of laws' under the constitution. Both points are heavily important in the Juliana conflict, as the plaintiffs call upon these integrated rules to back their standing in the case.[15] The case also calls on 'Brown v. Board of Education,' a previous suit, which fought and won using the same backing from the constitution for a fair condition of life for all as well as the public trust doctrine mentioned below.

Due Process Clause

As mentioned above, the 14th amendment focuses on the right to life, liberty, and property. The Due Process Clause is also written into the 14th amendment. It "guarantees 'due process of law' before the government may deprive someone of 'life, liberty, or property'"[16]. There are three types of due process: procedural, incorporated, and substantive. Procedural due process refers to the procedures the government must follow before denying someone their rights, alongside what is defined by 'life, liberty, and property.' The idea of what is property became crucial to have a clear understanding of as cases were filed on this topic as 'property' went beyond that of what was monetarily obtained. 'Incorporated' rights in due process refer to the Bill of Rights against the States. The Bill of Rights initially was written to only counter the federal government, so people going against the states had to use different laws and arguments and could not be protected under the Bill of Rights. The due process clause allowed for many sections of the bill of rights to get incorporated into state rights and were forced to be abided by

[15] Our Children's Trust, "Settlement Talks End."
[16] *Id.*; National Constitution Center, "The Fourteenth Amendment Due Process Clause.

in a state court instead of only at a federal level. Substantive due process speaks on certain topics that are not enumerated in the constitution and are important enough to be listed as infringeable. Many rights that are not specifically written out in the constitution are held under this type of due process and precedent carries them on through future cases that arise. The plaintiffs of the case can argue under the due process clause that though it is not explicitly written, the defendants still violate an interpretation of the 14th amendment.

Public Trust Doctrine

The public trust doctrine is a legal doctrine that states specific resources should be "preserved for public use, and that the government owns and must protect and maintain these resources for the public's use."[17] Most of the time this doctrine applies to water bodies, but can be used on other natural and cultural resources in the United States. The government is held responsible under the public trust doctrine to protect lands for citizens and future citizens of the U.S.A. When these resources are no longer accessible or face potential damage it is proper to take up offense against the government and call attention to the issue. Atmospheric trust litigation is attempting to have the atmosphere considered into the public trust doctrine claiming that they are also elements that are essential to survival.[18] The atmospheric trust is also relying on the Juliana case to proceed with its credibility; if Juliana succeeds, the chance of having the atmospheric trust litigation succeed will skyrocket as well.

[17] "Public trust doctrine," Legal Information Institute, accessed May 12, 2023, https://www.law.cornell.edu/wex/public_trust_doctrine.
[18] Ipshita Mukherjee, "Atmospheric Trust Litigation – Paving the Way for a Fossil-Fuel Free World," Stanford Law School, last modified July 5, 2017, https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/.

Art III.S2.C1.2.5.1

Article three, section two, clause one in the U.S. Constitution depicts the standing requirement. Standing is the legal right of a party to bring a suit to court and to sue. If there is a personal stake in the situation a party can sue, but if they are not involved in the issue at hand they do not hold the right to file a complaint. A plaintiff needs to show their connection to the defendant in regards to the harm they received. Standing has three parts: injury, causation, and redressability. Injury is about concrete, particularized, and actual or imminent harm that could come upon the party. Causation is when injury is traceable to or caused by the actions of the defendant. Redressability is when a favorable ruling would redress the harm and there would be a possible way to mitigate the issue so that the ruling would not be moot.

Juliana was targeted by the defendants for not having proper standing in their claim and rebutted on the fact that individuals in the party had already faced concrete injury from increasing environmental changes and would continue to do so.[19] The judges dismissed the case under the base of Article III Standing that the government would not be able to create a solution to mitigate the issue at hand. Juliana then filed an amended complaint to target a more specific issue that could be dealt with by the federal government.

Clean Air Act (CAA) Title 42 U.S.C. ch. 85

The updated Clean Air Act of 1970 gave state and federal agencies the power to create regulations on emissions from mobile and industrial sources. As Juliana specifies their complaint to focus on fossil fuel emission regulations, the Clean Air Act will become more prominent. Since it specifies that industrial emissions should be regulated, Juliana has a greater basis in requesting agencies like the EPA start enforcing new policies on the topic.

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[19] *Id.*; Our Children's Trust, "Juliana v. United States."

State and Federal Agencies Involved

Department of Justice (DOJ)

Prior to the trial, the Department of Justice argued against the plaintiffs, claiming that a 'pollution free environment' was not under the government's capacity and took the defense for major fossil fuel industries involved in the case. After their hearings and the fossil fuels motion to dismiss was denied, in 2017 the DOJ filed a motion to have the Judge rule again on the previous motion for an interlocutory appeal on the basis that this argument should not be heard in court since it is not the proper setting. They argued that there were points in the plaintiff's complaint that were incorrect and if the case was to be continued, these points would need to be corrected. Eventually the interlocutory appeal was renewed and the trial was put on hold until the appeal was ruled on.

Environmental Protection Agency (EPA)

The EPA was established in 1970 by Nixon, in order to create and enforce laws and regulations to protect the environment. They are one of the main defendants in the case as the plaintiffs believe they have not taken proper action to support the environment and protect the air, water, and overall quality of the ecosystem. The EPA lost a major court case in 2007, Mass v EPA. In this court case, petitioners filed against the EPA for taking improper action on greenhouse gas emissions from new motor vehicles, calling on the CAA's updates. This is important because Juliana can be seen as making a very similar request from the EPA to implement policies or regulate air pollutants such as fossil fuel emissions and greenhouse gasses.

Council on Environmental Quality (CEQ)

The Council on Environmental Quality works with other federal agencies to develop new environmental policies and initiatives. The CEQ is one of the agencies that the plaintiffs are

filing against, although they have been silent in this debate, they are an important part of the claim being made. The CEQ is being targeted by Juliana for not providing proper care and concern to reduce and mitigate CO2 emissions as an agency under the federal government.

Evaluation

The application of the public trust doctrine is the policy most likely to be effective in legitimizing the Juliana plaintiffs case on the basis of protecting and maintaining natural resources for public use. If the atmosphere was grouped into natural resources protected under the public trust doctrine, then I believe that Juliana would win against the defendants. However, the atmospheric trust litigation depends on Juliana to get confirmed into law. Without a concrete decision on the atmosphere being a resource upheld by the public trust doctrine, there is not enough backing for Juliana to solely use the public trust doctrine in this complaint.

While the DOJ has filed a motion to stay–a request to halt legal proceedings–Juliana is currently preparing for trial as their 2nd amended complaint was granted, they are now focusing particularly on the unconstitutionality of the fossil fuel based energy system in the United States. By declaring this system unconstitutional, the defendants hope the government will stop policies and practices that violate the constitution. By narrowing the focus of their claim, they are able to appeal further to redressability and hopefully get their complaint through to the courts instead of ending in settlement between the parties.

The other policies that Juliana has used in their case are very broad, with interpretations that can be malleable in the eyes of the defendant. Although there is hope for Juliana to further their case with the amended complaint and a stronger push with the public trust doctrine, the main issue remains the people in positions of power that do not care to see a change to the United States energy structure and hold an economic stakes in the current state of the fossil fuel

industry. The case can still go in either direction, but if Juliana succeeds it will create a strong precedent for all future environmental cases in the United States and will cause a large shift to sustainable energy.

Conclusion

Juliana v USA is a complex controversy that fights for the environmental rights of present and future generations. Rights to life, the public trust doctrine, and due process are all used to back Juliana and their standing in bringing the case to court. Juliana is fighting for an issue that is already progressing at a rapid rate and will have dire consequences. Anthropogenic sources have raised global climate temperatures by 1.1 degrees Celsius, causing extreme weather events and health effects and action must be taken immediately to mitigate these damages.[20] Citizens have the strongest say in the future of the United States energy system and if there is a larger demand for change and a backing of the youth plaintiffs. Although the federal government is pushing back, if this case can continue on and target relevant issues on a smaller scale there will be a positive outcome for the environment.

It is unlikely to see a large scale resolution to constitutional rights of life regarding the environment at a high speed rate, but as more and more cases arise against the government for their inaction on climate change, there will no doubt be a reversal in the negative factors feeding into the rising CO2 and pollution levels in the United States.

[20] "Ar6 Synthesis Report: Climate Change 2023," IPCC, https://www.ipcc.ch/report/sixth-assessment-report-cycle/.

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The Structural Inequities and Failed Promises of the International System: An Analysis of the Incentives that Uphold the Global Order

By Gaius Ilupeju

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In the first half of the twentieth century, territorial and political conflict between numerous states led to two world wars. During the latter half of the century, these states established multinational organizations in an effort to deter undesirable state behavior, incentivize collaboration, and promote peace.[1] Together these organizations (e.g. United Nations, World Trade Organization, etc.) developed the international system. Numerous treaties, conventions, and international statutes were produced through these institutions in accordance with their charters and functional purposes. Although the international system has engendered multilateral agreements that are adhered to by a majority of the world's states, it lacks uniform enforcement of the laws that it establishes. This reality is the result of the permanent fixture of five countries in the United Nations Security Council, the limited jurisdiction of international judiciaries, and a lack of effective enforcement mechanisms. Ultimately, a state's decision to comply with international law can be best explained by the consideration of multiple incentives: the effect of initial commitment, selection bias, the fear of reciprocity, and lack of parity. These inducements encourage cooperation, allowing states to arrive at agreements that maintain collective stability, but often contravene their sole interests. This paper will demonstrate that international law does not constrain state behavior due to the complicated interplay between

[1] "History of the United Nations," United Nations, accessed November 18, 2023, https://www.un.org/en/about-us/history-of-the-un.

states' interests and substantially limited international institution authority, by citing multiple examples of noncompliance.

Introduction

Theorists of international law such as Louis Henkin and Sean Murphy have long debated the ability of international laws to effectively constrain state behavior by examining why certain multilateral agreements are successful and why others fail. Some scholars like Richard Bilder argue that state behavior is constrained due to the effect of initial commitment which asserts that states enter treaties they are likely to adhere to because the long-term benefits of entering them outweigh any short term benefits that might be received without entering the treaty. Since this long-term benefit can only exist if other states comply with the terms of the agreement, states enter treaties that they believe their counterparts will adhere to. Consequently, they make the effort to be in compliance with the agreement as well. Thus, the behavior of all states involved in a multilateral agreement are constrained by international law. The ability that states have to impose reservations on certain statutes of a treaty that they may not want to follow, provides them with further demonstrates this theory.[2] Additionally, theorists such as Andrew Guzman argue that treaties effectively constrain state behavior because of the reputational consequences that occur when a state violates the terms of an international agreement. They point to the fact that humans instinctively seek to remain in good-standing with other members of society and this observation can be extrapolated and applied to the global stage.[3] States fear the reputational consequences of violating international law because it could prevent them from negotiating desired agreements in the future.[4]

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[2]Sean Murphy, *Principles of International Law*. Third edition. St. Paul, MN: West Academic Publishing, 2018, 199.
[3] *Id.*
[4] *Id.,* 201.

Proponents of the assertion that international law constrains state behavior also offer the idea that states fear reciprocity to advance their position. They argue that the possibility of other states retaliating against a state that chooses not to comply with an agreement deters that state from defection, opposition to the intended action. When multiple issues are simultaneously linked together in a negotiation to reinforce cooperation, the effect of retaliation against a defector multiplies substantially.[5] Additionally, scholars argue that even when states choose not to comply and engage in the contravention of international law, coercive mechanisms exist that can constrain their behavior. Firstly, states and international organizations can apply diplomatic sanctions which attempt to dissuade the defector from their current course of action by terminating political relations between the two entities. States can also apply economic sanctions which alter economic exchanges in an effort to negatively impact their target but it usually yields minimal results.[6] For example, the UN General Assembly encouraged its members to strategically apply sanctions on South Africa's precious resources and valued imports when it was under apartheid. Instead of crippling its economy, the sanctions forced South Africa to innovate and become more self-reliant in areas it previously had not.[7] According to policy experts at the Center for a New American Security, sanctions have only been effective in 40 percent of all the instances in which they have been applied.[8] Secondly, states and international organizations can force a state to comply with international law through military action.[9] In the international system this is only allowed under two circumstances. According to the United

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[5] *Id*., 202.
[6] *Id*., 213 – 214.
[7] Robin Wright, "Why Sanctions Too Often Fail," The New Yorker, last modified March 7, 2022, https://www.newyorker.com/news/daily-comment/why-sanctions-too-often-fail.
[8] Dursun Peksen and Sarah B. Danzman, "When Do Economic Sanctions Work Best?" Center for a New American Security, last modified June 10, 2019, https://www.cnas.org/publications/commentary/when-do-economic-sanctions-work-best.
[9] *Id.*

Nations (UN) Charter, a state may only exact force in self-defense or through UN Security Council authorization.[10]

Scholars such as Sean Murphy point out that international law can constrain state behavior when it is related to existing national laws within a state. They emphasize the prominence of selection bias in international agreements. This bias occurs when states make international commitments that align with their interests. Since it is likely that these states would have or already adopted the measures of certain treaties without their decision to accede to the agreement. However, the agreement can not be proven to have an effect because it does not possess the ability to force states to comply with international law. In order to disprove this assertion, theorists that believe international law constrains state behavior have to demonstrate examples of compliance when it interferes with the sole interests of member states.[11] They highlight the fact that in the global system powerful states are often in compliance with international laws because they align with their interests. This claim is supported because in the United Nations, five members (United States, Russia, China, United Kingdom, and France) have a permanent seat on the Security Council, its highest governmental body. The UN Security Council has the power to create laws that the rest of the UN membership is obligated to follow as well as the ability to veto any resolutions that emerge from the UN General Assembly.[12] This veto power only belongs to the five permanent members of the Security Council and can be employed by just a single one of these states. As a result of this disproportionate power, they are able to negotiate international laws that suit their interests.[13]

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[10] "Charter of the United Nations," 1945, *United Nations Treaty Collection*, art. 41, https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf.
[11] Murphy, *Principles of International Law*, 111-112.
[12] "Charter of the United Nations," art. 23.
[13] *Id.*

Russia's Compliance with International Law amidst the Russo-Ukrainian War

A recent example of noncompliance with international law is the ongoing Russo-Ukrainian war and Russia's utilization of its veto power in order to maintain its illegal military operations in Ukraine. On February 24, 2022 Russia launched a full-scale invasion of Ukraine in an effort to annex its eastern regions of Donetsk and Lunhansk under the false pretext of protecting ethnic Russians. The following day the UN Security Council introduced a draft resolution that condemned Russia's violation of Article 2 of the UN Charter which affirms the territorial integrity of all states.[14] The resolution demanded that Russia should abide by previous international agreements it had agreed to, affirmed Ukraine's territorial integrity, and implored the Security Council to perform its peacekeeping duties by responding to Russia's invasion.[15] Predictably, Russia vetoed the resolution and this resulted in an emergency session of the UN General Assembly in which six non binding resolutions were introduced that had minimal effect on the situation.[16] Undeterred by the international community's condemnation, Russia has continued its illegal incursion since. This is in stark contrast to international opposition to Iraq when it committed the same actions during the Gulf War and violated Article 2 of the UN Charter.

Iraq's Invasion of Kuwait

In 1990, Iraq invaded Kuwait under the leadership of Saddam Hussein. The Security Council condemned this behavior in UNSC Resolution 660 and applied economic sanctions against Iraq that all UN member states were bound to enforce in UNSC Resolution 661. In

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[14] Center for Preventive Action, "War in Ukraine | Global Conflict Tracker," Council on Foreign Relations, accessed November 18, 2023, https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine.
[15] United Nations Security Council, Draft Resolution, S/2014/189, (March 15, 2014) https://documents.un.org/doc/undoc/gen/n14/266/57/pdf/n1426657.pdf?token=qkoj8kmejpPBFedPLv&fe=true.
[16] Center for Preventive Action, "War in Ukraine."

addition, it allowed states to execute military responses collectively or individually in defense of Kuwait.[17] This provision allowed the United States to launch an assault against Iraq which resulted in its expulsion from Kuwaiti territories within the span of six months and decimated its economy.[18] If Iraq was a permanent member of the Security Council, the likelihood of this reality would be greatly diminished. Russia was able to contravene international law due to the lack of parity between member states of the United Nations, demonstrating the inability of international law to constrain the behavior of the most powerful states in the international system. In addition, Ukraine has been adversely affected by this inequitable arrangement because unlike Kuwait the Security Council has not been able to approve proposals to deter Russia.

An Argument in Russia's Favor

Critics of the argument against permanent veto power may argue that by exercising its ability to veto UN Resolutions Russia was complying with international law and this proves that even powerful states like those in the Permanent Five are constrained by international law. Russia entered the UN Charter in 1945 as the former Union of Soviet Socialist Republics and agreed to Article 23 of the UN Charter, thereby accepting the veto power that it was granted.[19] This demonstrates the effect of initial commitment because Russia chose to enter the treaty and decided that its long-term benefits outweighed any short-term benefits that might have been gained by not signing it. According to this theory, it signed on because it believed it would eventually acquire these long-term benefits because other states were constrained by it as well. By signing on and choosing to employ this power in defense of its national interests, Russia effectively complied with international law. Some positivists might even add that because the

[17] United Nations Security Council, Resolution 660, Iraq-Kuwait, S/RES/660, (Aug. 2, 1990); United Nations Security Council, Resolution 661, Iraq-Kuwait, S/RES/661, (Aug. 6, 1990)
[18] Robin Wright, "Why Sanctions Too Often Fail."
[19] "Charter of the United Nations," art. 23.

resolutions issued by the General Assembly were non-binding, Russia was not violating them by deciding not to adhere to them, regardless of our negative moral perceptions of its actions. However, this entire argument fails to acknowledge the numerous instances when powerful nations have chosen to ignore international rulings for the sake of their interests.

China's Defiance of International Law

In 1994, the UN Convention on the Law of the Sea (UNCLOS) was entered into force and China accepted it as international law in 1996. This law established that three maritime zones exist beyond the land territory of states that border the sea and determined these boundaries.[20] When its neighbors (Taiwan, Malaysia, and the Philippines) began to dispute the boundaries of their maritime territories in the South China Sea, China responded by claiming additional territory and carrying out naval operations in disputed waters. It also began to build artificial islands in order to extend its maritime zone by claiming additional territory.

In 2016, a UN arbitration tribunal rejected China's claims, stating that it had failed to comply with international law because of its occupation of one of the Philippines' maritime zones. The Chinese government maintained its operations and continued to develop military installations on the artificial islands, in clear defiance of international law. Although the United States and other countries have called China's actions illegal, very little has been to force it to comply with the statutes it had agreed to. This is especially significant because China is one of the permanent five members of the UN and has not dealt with major consequences as a result of its noncompliance. This demonstrates that even when they do not have the ability to veto resolutions or reverse rulings, powerful states still flout international law and face few

[20] "Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982," registered November 16, 1994, *United Nations Treaty Collection* 1836, no. 31364 (1995): 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-6-a&chapter=21&clang=_en.

consequences. Russia only utilized its veto power against a resolution that called its actions into question because this form of compliance aligned with its interests. Without the opportunity that this power presented it is uncertain that Russia would have chosen to continue to abide by Article 23 of the UN Charter.[21]

The Enforcement Failures of International Judiciaries

China's decision to ignore the tribunal's ruling also reveals the inability of international judiciaries to enforce their judgements. The International Court of Justice (ICJ) is a judiciary within the UN that settles disputes between states. Although being a member of the UN allows states to become parties to its rulings, that does not mean that they are automatically under its jurisdiction. States must consent to its jurisdiction in order for it to be able to issue legally binding judgements, which they are bound by agreement to follow. As of 2023, 73 states have accepted its jurisdiction as compulsory, with some states such as the United Kingdom entering reservations on certain issues in which they do not consent to its jurisdiction. Initially, the United States (US) accepted the compulsory jurisdiction of the ICJ and placed two reservations on its judicial authority.

The United States and Compulsory Jurisdiction

When the US lost a case over its illegal intervention in Nicaragua's domestic affairs, it withdrew from this agreement in 1985. This meant that the United States was able to argue to the international community that it was not bound by the ICJ's ruling. Nicaragua rejected and it angered numerous nations in the international community, motivating the introduction of UN Security Council Resolutions that were intended to force it to abide by the ruling. In response, the US utilized its veto power. Another major judicial body that issues rulings on the

[21] Murphy, *Principles of International Law*, 481-487.

international level is the International Criminal Court (ICC) which exists outside of the UN. The ICC is an organization created by the Rome Statute that is charged with prosecuting war crimes and humanitarian offenses. It has 123 member states whom it depends on for the enforcement of the warrants it issues against individuals. Similar to the ICJ, it has limited jurisdiction and can only prosecute crimes after the entry of the Rome Statute into force. The ICC's jurisdiction includes: cases that occurred on the territories of members of the Rome Statute, occurred in the territories of states that have accepted its jurisdiction after the Rome Statute, or if they were referred by the UN Security Council.

The Darfur Conflict

An assessment of humanitarian law renders the inability of judicial bodies to enforce international law increasingly apparent. This is because both powerful and non-powerful states alike disregard the rulings of the ICC and ICJ. For example, in the early 2000s groups in Darfur, Sudan engaged in violent acts against the government. As a response, the Sudanese government decided to eliminate them through excessive military operations in the region, resulting in the deaths of 400,000. Then in 2008, the ICC charged Omar Al-Bashir (Sudan's President) with crimes against humanity and genocide. The ICC issued an arrest warrant which member states under its jurisdiction were obligated to execute under established international law.[22] However, Bashir continued to make diplomatic visits around the world even to ICC member states such as South Africa, and many African states refused to comply with the ICC's judgement.[23] The African Union also pointed out that the United States had intentionally withdrawn from the jurisdiction of the judicial body when it had expressed interest in investigating American war

[22] Murphy, *Principles of International Law*, 352.

[23] Yousif Mansour Ahmed Abdalla AlZarouni, "Why Sudan won't hand over former president al-Bashir to the International Criminal Court," The Conversation, published May 28, 2019, https://theconversation.com/why-sudan-wont-hand-over-former-president-al-bashir-to-the-international-criminal-court-117810.

crimes.[24, 25] Ironically, the US was a key player in the referral of the Sudanese President to the ICC. This situation proves that less powerful states are incentivized not to comply with international law when they observe that powerful nations apply them hypocritically. It also demonstrates that international law is fluid and often enforced when it aligns with the interests of states.

The Rwandan Genocide

Another example of US interests impeding the prevention of an humanitarian crisis is the Rwandan Genocide, an horrific event that occurred in 1994 when underlying tensions between the nation's two largest ethnic groups erupted, culminating in widespread killings. Decades prior the nation was under colonial rule and the Tutsis received preferential treatment. This resentment remained until the late twentieth century when the Hutus were in control of government. They blamed the more successful Tutsis for their impoverishment and killed their president in response to a plan to allow more Tutsis in government. During the Rwandan Genocide, the US hesitated to send soldiers to prevent the Genocide because a year earlier it lost troops in Somolia who were sent as part of a UN peacekeeping force. It delayed the classification of the event as a genocide because that would necessitate some from of action on its part. As a result, the genocide occurred and nearly a million Tutsis and Hutu sympathizers were killed.

Analysis

Ultimately, the international system lacks uniform enforcement due to the absence of effective enforcement mechanisms. One way that international organizations attempt to coerce states to behave in compliance with international laws is the use of sanctions. Due to the

[24] *Id.*
[25] Murphy, *Principles of International Law*, 352.

symbolic nature of political sanctions, they typically employ economic sanctions. However, the track record of this enforcement method shows that it has little utility. This is not surprising when considering the response to Iraq after its invasion of Kuwait. Although economic sanctions diminished its economic standing and reduced the quality of living in Iraq, its government continued to be noncompliant with the laws of the international system.[26] The situation only improved when the United States and other states deployed forces, proving that the sanctions would have remained largely ineffective without military intervention. One major cause of ineffective sanctions is the prevalence of exemptions on valuable resources which the sanctioned state can continue to profit from and use to fund its operations. Another major reason that sanctions are largely ineffective is that oftentimes they are hindered by the domestic politics of their target, particularly states with autocratic regimes. During the Gulf War, Saddam Hussein resisted the effects of sanctions because he repressed dissent and ensured his loyalists were not negatively affected.[27] This is harder to achieve in democratic states because the public is able to pressure the government to comply as the sanctions begin to affect their material conditions.

The ineffectiveness of sanctions leaves military action as one of the only other viable enforcement mechanisms. Since the UN has no standing army or police, it relies on its powerful nations to provide their personnel for peacekeeping missions and military interventions. The obvious problem with this is that they might be hesitant to deploy their forces whenever the cause for deployment conflicts with their interests. It can be argued that fear of reputational consequences and reciprocity prevents powerful states from withholding military help. While this was partly the case in the United States' decision to send a peacekeeping force after the

[26] Robin Wright, "Why Sanctions Too Often Fail."

[27] Abdullah Yusuf, "Saddam Hussein: how a deadly purge of opponents set up his ruthless dictatorship," The Conversation, published July 22, 2019, https://theconversation.com/saddam-hussein-how-a-deadly-purge-of-opponents-set-up-his-ruthless-dictatorship-120748.

Rwandan Genocide and its subsequent apologies for not acting sooner. Even if the US had not made these decisions, its position on the world stage would not have changed significantly. As we have already discussed, the US has acted in ways that have caused many states to believe that a lack of concordance exists between its interests and values. Likewise, fear of reciprocity presents minimal challenges to US foreign policy because the United States is one of the most dominant powers in the world and most states can not effectively retaliate against it. Consequently, they can not force powerful states like the US to adopt behaviors they would prefer, or in many instances, to comply with international law.

Conclusion

In summation, theorists of international law debate whether the behavior of states are constrained by international agreements. Many of these scholars argue that this is true because states have incentives to follow them and they freely choose to sign onto them after considering the long-term benefits that could ensue. Additionally, the ability of states to impose reservations upon treaties makes them more palatable to their interests. According to scholars, states will choose to comply with their agreements out of fear of the reputational consequences that would occur if they do not and the ways in which this damage could hinder future negotiations. However, compliance in the international system typically occurs because states accede to agreements that align with their interest. This is due to a lack of effective enforcement. Powerful states possess the ability to resist coercive action that attempts to constrain their behavior, rendering enforcement measures against them useless. In addition, international judiciaries are unable to enforce the rulings they issue to resolve disputes, which allows states to adhere to rulings when they are in accordance with their interests. Lastly, the United Nations' dependency

on powerful states for maintaining global security further reinforces their elevated status and highlights the lack of uniform enforcement throughout the international system.

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Consumer Finance Protection Bureau v. Community Financial Services Association of America

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This paper examines the constitutional implications of the Supreme Court case, Consumer Financial Protection Bureau v. Community Financial Services Association of America (2023). When analyzing legal precedent, it becomes clear that, notwithstanding the federal government's arguments, Congress violated the Appropriations Clause and the nondelegation doctrine in establishing the unique funding structure for the Consumer Financial Protection Bureau (CFPB) under the Dodd-Frank Act, where the Director of the CFPB is authorized to demand as much money as he deems necessary from the Federal Reserve without congressional budget appropriation. Such a funding structure delegates too much congressional authority to the executive branch while insulating the CFPB from oversight by appropriate committees of Congresspeople elected by the American citizenry. The Supreme Court must recognize that the CFPB's funding mechanism violates the Constitution by extending beyond the limits of Congress's exclusive power to allocate funding to executive agencies. By doing so, the Court would restore the intended separation of powers and checks between the legislative and executive branches.

I. Executive Brief

The doctrine of nondelegation has remained a long-standing legal principle, upholding the separation of powers between the branches of the Federal Government. In 2010, Congress authorized the creation of the Consumer Financial Protection Bureau (CFPB) under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), hereafter the Dodd-Frank Act, to ensure that consumers are protected from "unfair, deceptive, or abusive" lending practices.[1] Section 1017 of the Dodd-Frank Act (12 U.S.C. 5497) establishes the CFPB's funding mechanism, which derives its monies from the Federal Reserve's Board of Governors at the request of the Director and is not subject to review by House or Senate Appropriation Committees. In 2017, the CFPB issued a rule entitled Payday, Vehicle Title, and Certain High-Cost Installment Loans (82 FR 54472), the Payday Lending Rule, to prohibit lenders from withdrawing payments from borrowers' bank accounts following two consecutive failed attempts.[2] The CFPB's funding mechanism is the foundation component which the Supreme Court must determine if Congress's delegation of authority to the Bureau's unique funding structure is a violation of the Appropriations Clause and the Constitution's separation of powers.

In 2022, the Community Financial Services Association of America (CFSA) and the Consumer Service Alliance of Texas, representatives of the payday lending industry, filed suit against the CFPB's Payday Lending Rule to the U.S. District Court for the Western District of Texas. After losing in the District Court, an appeal was brought to the Fifth Circuit Court, which unanimously ruled to void the Bureau's Payday Lending Rule. Their central ruling found that Congress ceded its authority over the CFPB's budget by insulating its funding structure from

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[1] *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Public Law 111-203, 124 Stat. 1980 (2010): 606.

[2] Amy Howe, "Court Will Review Constitutionality of Consumer-Watchdog Agency's Funding," SCOTUSblog, last modified February 27, 2023, https://www.scotusblog.com/2023/02/supreme-court-will-review-constitutionality-of-consumer-watchdog-agencys-funding-cfpb/.

annual appropriations, thereby violating the Constitution's Appropriation Clause that exclusively states: "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."[3] Thereafter, Solicitor General Elizabeth Prelogar filed a petition for certiorari to review the Fifth Circuit ruling.

Congress' exclusive power of the purse is essentially the most fundamental check on the power of the executive branch. This Court's decision can set a precedent for how future courts may apply the Appropriations Clause, particularly because the Framers originally intended the power of the Purse to be exclusively vested in Congress to maintain separation of powers. Thereby, the statute enacted by the CFPB is a product of its funding mechanism. Upholding the CFPB's statute grounded on its funding structure would grant the sole Director of the CFPB the authority of the Purse. Former Solicitor General, Noel Francisco, counsel for the CFSAA, emphasized that the Framers warned us that transferring this sweeping power to the executive would destroy our separation of powers designed by our Constitution to preserve individual liberty.[4] The *Federalist Papers* stressed that the separation of powers equally divides the three branches of government, but particularly emphasized the power of the purse as "the most complete and effectual weapon which any Constitution can arm the immediate representatives of the people."[5] The Constitution's purpose, through the Appropriations Clause, is to allow Congress the power to have a check on the funds of the Treasury–but in this case, Congress has transferred that expansive authority to the sole Director of the CFPB. The CFPB's funding mechanism undermines the Framers which could lead to the collapse of the sword and purse—

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[3] U.S. Constitution, art. I, sec. 9, cl. 7.
[4] Transcript of Oral Argument in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*, Ltd. Case No. 22-448 (2023), 104-106.
[5] Carrie Campbell Severino, "The CFPB Returns to Court," National Review, last modified October 2, 2023, https://www.nationalreview.com/bench-memos/the-cfpb-returns-to-court/.

the case at bar transfers Congress' exclusive power of the Purse directly to the CFPB's sole executive Director, this raises concerns for future congresses having to regain this legislative authority.

II. Advisory

The Supreme Court must affirm the ruling of the Court of Appeals because the CFPB's funding structure violates the Constitution's Appropriation Clause and does not preserve the separation of powers.

A. In violation of the Appropriation Clause, the CFPB's funding mechanism encroaches on Congress' exclusive power over the purse.

Solicitor General Prelogar claims "[t]hose indicators of intent here are overwhelmingly on our side," meaning text and history, but it could not be more opposite.[6] Congress's intent in establishing the CFPB was to make it entirely independent of the political process. The establishment of its funding mechanism was not a mere extension of Congress' authority, but rather a hindrance to congressional power by constituting the CFPB's sole director to have boundless authority over the agency's appropriations. In the Senate, proponents of the Dodd-Frank Act argued that it was essential that the Bureau received funding through a mechanism "independent of the Congressional appropriations process."[7] Furthermore, during oral arguments, Justice Alito directly derived from the text of the legislation that "the Bureau fund 'shall not be construed to be government funds or appropriated monies.'"[8] The Solicitor General claimed the provision is "intended to just allow Congress to control for the interaction of various statutory

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[6] Transcript of Oral Argument in *CFPB,* 24.
[7] Francisco, et. al., Brief for Respondents in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited* (2022), 6.
[8] Transcript of Oral Argument in *CFPB*, 20.

provisions in this context."[9] There is no alternative at this point: either the provision is incorrect, and these are monies duly appropriated and subject to the appropriations process, or it is correct, and the funding mechanism under the Dodd-Frank Act violates the Appropriations Clause.

The Dodd-Frank Act puts Federal Reserve funding mechanisms in the hands of non-electorally accountable individuals, as such, this undermines legislative authority. This is a violation of the fundamental principle from the *U.S. Dep't of the Navy v. FLRA* (2012) that "[d]eciding the amount that an agency may draw from the government's accounts is the key legislative function that the Appropriations Clause vests 'exclusive[ly]' in Congress."[10] Furthermore, the Dodd-Frank Act provides that "CFPB's funds derived from the Federal Reserve…shall not be subject to review by the Committees on Appropriations."[11] The ability to be exempt from political accountability and congressional oversight from an Appropriations Committee proves the CFPB's ability to supersede the Appropriations Clause through yet another measure.

The CFPB, as established in the text of the Dodd-Frank Act and by the intent of its proponents, was inherently designed to be entirely insulated from political accountability. The 2010 Congress doubly insulated the CFPB through its funding structure, providing it with the means to fund itself through securities and holdings from the Federal Reserve Board.[12] Congress refrains from directly appropriating monies to the CFPB and, instead, unilaterally authorizes the Director to get annual funding strictly from the Federal Reserve. Finally, the CFPB's exemption from review of an Appropriations Committee underscores the CFPB's lack of compliance with

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[9] *Id.,* 22.
[10] Francisco, et. al., Brief for Respondents, 19.
[11] *Id.*, 14.
[12] Web Arnold, "Analysis: Three Ways the Supreme Court Could Nix the CFPB," Bloomberg Law, last modified November 5 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-ways-the-supreme-court-could-nix-the-cfpb.

the political process. For the foregoing reasons, the CFPB's funding mechanism has violated the Appropriations Clause and must be struck down as unconstitutional. It is reasonable to conclude that the Fifth Circuit's judgment in *CFSA v. CFPB*, written by Judge Cory T. Wilson was correct in determining that "the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's unconstitutional funding scheme" and "[p]laintiffs were thus harmed by the Bureau's improper use of unappropriated funds to engage in the rulemaking at issue."[13] Thus, the Payday Lending Rule promulgated as a direct effect of the funding mechanism is unconstitutional and needs to be struck down.

B. Congress unconstitutionally delegated too much power to the CFPB in their funding mechanism.

i. There is no intelligible principle from Congress that restrains the CFPB

The Court set forth the intelligible principle test to determine if Congress' delegation of power to the executive branch violates the nondelegation doctrine and separation of powers.[14] The intelligible three-part standard consisted of the following requirements: (1) Policy objectives must be specifically tailored to meet their interest; (2) A conditional legislation must exist, which requires that the authorization of an administrative agency must be triggered by a particular condition; (3) Enforcing efficient boundaries of the agency's authority.[15] In the case at bar, the application of the intelligible standard must define the limits of Congress' delegation powers to the director of the CFPB and his "plenary power to determine" their annual funding demands that fall outside the discretion of Congress' Appropriations Committee. The *Hampton* Court

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[13] Francisco, et. al., Brief for Respondents, 27.

[14] *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

[15] Meaghan Dunigan, "The Intelligible Principle: How It Briefly Lived, Why It Died, and Why It Desperately Needs Revival in Today's Administrative State," *St. John's Law Review* 91, no. 1 (Spring 2017), https://scholarship.law.stjohns.edu/lawreview/vol91/iss1/7/.

founded this test to establish the "boundaries" of Congress' delegation powers. Once those limits were established, the Court unanimously voided the broad delegation of the President to approve or adopt codes of fair competition which "lacked adequate standards" and his "virtually unfettered" authority to control laws he deemed necessary.[16] Under Congress' unconstitutional delegation, the CFPB's funding mechanism similarly lacks standards for why the Bureau's Director must possess this unprecedented authority. If the Court were to confirm vesting this power to a single executive officer, it would destabilize the breadth of cases such as *Hampton* and *Schechter,* which uses the intelligible principle test to determine whether Congress violated the limits of delegation authority by transferring legislative responsibilities that are overly broad or lack of guidelines—in this case, it is clear that the CFPB's funding structure is deemed impermissible under this test.

In *Gundy v. United States* (2019), the Court established that "Congress…may not transfer to another branch powers which are strictly and exclusively legislative,' even pursuant to legislation."[17] *Gundy* saw Congress delegated to the Attorney General "authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter…and to prescribe rules for the registration of any such sex offender," which, as Justice Neil Gorsuch wrote in his dissenting opinion, means the Attorney General has "free rein to write the rules for virtually the entire existing sex offender population in this country."[18] Even if the legislature was willing to hand over certain powers, there is a limit to how much power can be delegated. Gorsuch laid out the philosophical idea behind the importance of the nondelegation doctrine, claiming that it would inherently oppose the system of government

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[16] *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 542 (1935).
[17] Francisco, et. al., Brief for Respondents, 19.
[18] *Gundy v. United States*, 588 U.S. ___ (2019).

under the Constitution. Congress possesses the discretionary authority to transfer its legislative power to the executive, but this power comes with boundaries outlined in the non-delegation doctrine and upheld by this Court's precedent. To guarantee both branches would not be left unaccountable to the people, this Court must hold the CFPB's funding structure to the standards established by the intelligible principle and the limits of delegatees' authority to maintain separation of powers.

ii. The CFPB's framework is unprecedented

Solicitor General Prelogar uses Justice Scalia's opinion in *Clinton v. City of New York* (1998) concurring in part with the majority opinion and dissenting in part to justify the "appropriations" in the CFPB funding mechanism, stating that "[f]rom 1789–1791, the First Congress made lump-sum appropriations for the entire Government—'sum[s] not exceeding' specified amounts for broad purposes" and "[e]xamples of appropriations committed to the discretion of the President abound in our history."[19] However, these examples do not apply here, as Congress has not officially appropriated any sums of money but mandated the Federal Reserve to give from their accounts monies as the Director of the CFPB requests, a "mere enactment of a law [which], by itself, does not satisfy the clause's requirements."[20] In the oral arguments, Justice Kagan is concerned that particular features of the CFPB's funding scheme may have a historical precedent, but the specific combination of features in relation to the CFPB—funds put into the Bureau Fund are not to be considered appropriated monies, the CFPB's funds are not subject to oversight from the congressional Appropriations Committees, the fact that the CFPB can obtain funds from the Federal Reserve Board, an agency "that, in turn,

[19] *Clinton v. City of New York*, 524 U.S. 417, 466 (1998).
[20] Prelogar, et. al., Brief for Petitioners in *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited* (2022), 39a.

does not get its money from a congressional appropriation in the normal sense of that term but gets it from the private sector"[21]—cannot be pointed to a single historical precedent that supports this particular funding mechanism for any other agency.[22] Petitioner contended that the CFPB's funding structure is similar to other agencies including the Customs Service and the Post Office. Still, the Fifth Circuit Court of Appeals found that "[n]either is the Bureau's structure comparable to mandatory spending programs such as Social Security. The Bureau self-directs how much money to draw from the Federal Reserve; the Social Security Administration (SSA) exercises no similar discretion."[23] The Petitioner posits that an independent agency like the CFPB is opposite to financial regulating institutions such as the Post Office and the National Mint, however they are contrarily funded by fees charged for their services. Similarly, the OCC and FDIC are funded through charges to the entities they regulate.[24] These assessment and fee-funding regulators have financial systems that must preserve their political accountability to the public, unlike the CFPB. The CFPB's rule eliminated short-term loans, which 12 million American consumers per year relied upon.[25] Enforcing this rule would contrarily not affect the funds the CFPB receives. Finally, this showcases that the CFPB's funding structure of double insulation with the vested authority into its sole Director will only impact the CFPB's unique funding mechanism.

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[21] Transcript of Oral Argument in *CFPB*, 32.
[22] *Id.*, 145-146.
[23] Prelogar, et. al., Brief for Petitioners, 41a.
[24] *Id.*, 15.
[25] Nick Bourke, "Proposed Payday Lending Rule Would Leave Borrowers Vulnerable," The Pew Charitable Trusts, last modified June 2 2016, https://www.pewtrusts.org/en/research-and-analysis/articles/2016/06/01/proposed-payday-lending-rule-would-leave-borrowers-vulnerable.

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U.S. Constitution, art. I, sec. 9, cl. 7.

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