Volume II | Spring 2022

Davis Journal of Legal Studies

Davis Journal of Legal Studies

Volume II: Spring 2022

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

Davis Journal of Legal Studies Editorial Staff

Volume II: Spring 2022

Table of Contents

Letter from the Editor-in-Chief

Dear Reader,

It is with great enthusiasm that I present to you *Davis Journal of Legal Studies: Volume II, Spring 2022*.

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 acknowledge Kate Andrup Stephensen, advisor of the University Honors Program: thank you for your guidance, support, and encouragement throughout this project. I am also grateful to our contributors, who are a diverse group of students from different universities, for strengthening our undergraduate legal community. Finally, I must thank the *Davis Journal of Legal Studies* editorial staff for their shared commitment in this work. Our operations have grown substantially from Volume I with the creation of new executive positions and the growth of our editorial team in size; it has been my pleasure and privilege to work with and watch this team grow throughout the development of Volume II.

The papers in this volume indicate the scholarly excellence of undergraduates in research related to human rights and ethics in law. This collection is concerned with issues such as policing, intersections between medical care and the law, climate justice, and violations of human rights law. These are timely, important matters, and we are grateful to the contributors of Volume II for entrusting us with their research so that we can provide a space for discussing, evaluating, and—most significantly—proposing solutions to these issues. It has been an honor to facilitate the publication of this critical, necessary scholarship through Volume II.

Good reading,
Emma Tolliver
Founder & Editor-in-Chief
Davis Journal of Legal Studies, Volume II: Spring 2022

The Colorado River Water Transfer Controversy

By Cayley Chan

Cayley Chan is a student at the University of California, Davis. She is studying Environmental Policy Analysis and Planning and Political Science—Public Service. Cayley is a fourth year and currently serves as one of the Student Advisors to the Chancellor. She is the President of Prytanean Women's Honor Society and a member of the 2021-2022 Gonzales Pre-Law Academy cohort. Her work, "Water of the United States Controversy," was published in *Davis Journal of Legal Studies: Volume I, Spring 2021*.

In the face of scarce and highly variable water resources in the western United States, tensions arise over the allocation between various water users, specifically agricultural and urban users. This scarcity of water also allows for stakeholders to profit off of the highly valuable water rights by transferring water resources from where they are available to areas of high demand. These tensions are evident in a current controversy over a proposed transfer of water from the Colorado River to a growing suburb in Queen Creek, Arizona. This paper explores the legal controversy of water transfers on the Colorado River and identifies likely outcomes should this proposed transfer transpire into litigation.

Introduction

The Colorado River supplies water to seven US states and parts of Mexico for purposes including hydroelectric power generation, municipal water supply, and agricultural irrigation. Because the water is allocated to a wide array of users for a multiplicity of uses, the Colorado River is often the center of litigation over allocation of the water resources. More recently, the issue of water transfers has been a growing concern for Colorado River stakeholders; as populations in cities bordering the river continue to grow, the demand to provide water for municipal uses increases exponentially. Furthermore, the increasing demand for water results in tension between agricultural users and urban users over priority in water allocation.

This main legal controversy of water transfers on the Colorado River manifests in an attempt by a water investment company to sell water to a populous suburb of Phoenix, Arizona, thereby diverting water away from agricultural users. The investment company acquired water rights to the Colorado River by purchasing farmland bordering the river.[1] Another legal issue that arises from this controversy is the application of the Administrative Procedures Act to allow another set of public hearings after the Arizona Department of Water Resources drastically increased the amount of water allowed to be transferred without public notice.[2]

Controversies around the profitability and allocation of water continue to arise in the West as demand for it steadily increases and as supply becomes more variable and constrained. This controversy is especially significant because, if the sale of water from the Colorado River to private Wall Street companies is permitted and the subsequent transfer of water to urban populations ensues, a flood of investors may begin scoping out western water to profit off of in the future. Furthermore, this controversy fuels the tensions between agricultural and urban water use where a decision in favor of allowing the transfer of water would result in an advantage for urban water users at the detriment of agricultural users.

Parties and Issue Description

Parties

The main parties involved in this issue are the Bureau of Reclamation and the Arizona Department of Water Resources, Arizona state and local elected officials, agriculture producers who rely on water from the Colorado River, the companies attempting to purchase and transfer the water including Greenstone, and the town of Queen Creek, where the water is proposed to be

[1] Ian James, "Tensions Rise over Company's Plan to Sell Colorado River Water in Arizona," *The Arizona Republic*, Arizona Republic, January 31, 2021, azcentral.com/story/news/local/arizona-environment/2021/01/30/plan-to-sell-colorado-river-water-in-arizona-sparks-tensions/4295089001/.
[2] *Id.*

transferred. The Bureau of Reclamation is responsible for approving the proposed deal to sell the water to Queen Creek.[3] Next, the state and local elected officials are tasked with representing the interests of their constituents, including the interests of the current water users of the Colorado River. Agricultural producers want their water rights protected by not allowing the water to be transferred out of the Colorado River Basin, whereas the town of Queen Creek wants to have a consistent source of surface water to "reduce their reliance on groundwater and improve long-term water supplies to help support growth."[4]

Though this controversy has not yet transpired into litigation, there is likely to be a multitude of lawsuits or other legislative actions taken against Greenstone, the Arizona Department of Water Resources (ADWR), and the Bureau of Reclamation if the proposed water transfer is accepted. For instance, the current agricultural water users may bring a lawsuit against the Bureau and Greenstone contesting the legality of the water transfers. In other words, if a lawsuit were to arise from this controversy, the plaintiffs would be the agricultural water users and the defendants would be Greenstone, the ADWR, and the Bureau. Additionally, if the Bureau does allow the water transfer, state and local elected officials may adopt policies and regulations in order to prevent the sale and transfer of water. On the other hand, if the Bureau denies the proposal, Greenstone would likely bring a lawsuit against the Bureau contesting the reason for denial. This paper will analyze the issue with the lens of the potential scenario that the Arizona state legislators and local officials, as well as agricultural producers with water rights to the Colorado River, are plaintiffs in a lawsuit contesting the approval of the water transfer to Queen Creek. The defendants in the hypothetical case are the ADWR, Bureau, and Greenstone.

---

[3] *Id*.
[4] Bret Jaspers, "Water Transfer from Colorado River to Central Arizona Faces Stiff Opposition," Cronkite News - Arizona PBS, December 31, 2019, cronkitenews.azpbs.org/2019/11/27/water-entitlement/.

Basic Facts

Between 2013 and 2014, the water investment company Greenstone purchased about 500 acres of farmland in Cibola, Arizona.[5] By purchasing the farmland, Greenstone also acquired a set of water rights to the Colorado River. Greenstone gained an annual entitlement of 2,083 acre-feet of water from the river, which they proposed to sell to Queen Creek for twenty-one million dollars.[6] Before this transfer could take place, Greenstone needed to obtain approval from both state and federal water agencies. The Arizona Department of Water Resources approved the proposal with the condition that only 1,078 acre-feet of water be transferred; however, after a reevaluation of the amount of water needed to remain on the land, the ADWR increased the allowed transfer amount to 2,033 acre-feet.[7]

History

Water transfers in the western United States have been a long-standing issue, especially with regard to the Colorado River. Furthermore, the debate between the value of agricultural use of water and the value of urban use of water is a highly contentious subject in the West. Recently, there have been multiple water transfer attempts on the Colorado River. For instance, the Central Arizona Water Conservation District (CAWCD) entered into an agreement with the Mohave Valley Irrigation and Drainage District (MVIDD) for the CAWCD to purchase farmland from MVIDD to transfer the water to benefit the Central Arizona Groundwater Replenishment District (CAGRD).[8] This proposed water transfer garnered a great deal of controversy and support. In favor of the water transfer are the development and homebuilding agencies, whereas opponents are rural interests who claim that only 10 percent of the water allocated to the Central Arizona

[5] James, "Tensions Rise."
[6] *Id*.
[7] *Id*.
[8] Arizona Municipal Water Users Association, "The Transfer and Transportation of Water in Arizona: An AMWUA Staff Analysis Revised March 12, 2018 I. Executive Summary Historic," AMWUA, 2018, https://amwua.org/uploads/1521847052665e54307.pdf.

Project would be reserved for use by on-river users.[9] This water transfer proposal was approved and implemented, which could have laid the groundwork for the current controversy.

This controversy arose from the growing population in the town of Queen Creek. To meet the demands of the citizens of Queen Creek, the town had been relying on groundwater to supply its 15,100 acre-feet requirement.[10] Because groundwater is an easily depletable and finite source of water, water availability issues persisted as the population of the town continued to increase. To solve this issue, Greenstone invested in sourcing water from the Colorado River by purchasing land and the associated water rights from farmers with prior appropriative rights to water from the Colorado River. Greenstone then planned to sell this water to the town for twenty-one million dollars after securing state and federal approval. After gaining the endorsement from the Arizona Department of Water Resources, Greenstone now only needs the approval of the Bureau of Reclamation for the water transfer to occur.[11]

As mentioned earlier in this paper, this controversy has not developed into litigation, presumably because the proposed water transfer has not yet occurred. Though, if the water transfer is allowed, there is likely to be a lawsuit from multiple different plaintiffs claiming to be negatively affected by this water transfer. This potential lawsuit could be avoided through alternative dispute resolution where some form of payment or retribution for the decreased flows and loss of "economic opportunity" is provided to the affected Colorado River communities.[12] Additionally, Greenstone and Queen Creek could agree on a lower amount of water to be transferred out of the basin. Finally, Greenstone and Queen Creek could provide a physical

[9] AMWUA, "Staff Analysis."
[10] Jaspers, "Water Transfers."
[11] *Ariz. Dep't of Water Res. v. McClennen*, 238 Ariz. 371, 360 P.3d 1023, 725 Ariz. Adv. Rep. 17 (Ariz. 2015).
[12] Jaspers, "Water Transfers."

solution—such as an engineering project—to provide the affected communities with the same amount of water that is proposed to be diverted to Queen Creek.

Relevant Laws

The Administrative Procedures Act

The Administrative Procedures Act (APA) streamlines the process that federal agencies must follow to create and implement regulations. One of the aspects of the APA is that federal agencies must allow for the public to respond to a proposed federal action by submitting "written data, views, or arguments" to the proposed action before enacting the regulation or action.[13] This act is relevant to the controversy because of the drastic change to the amount of acre-feet transference that the ADWR permitted for the proposed project. When first holding a public hearing about the proposed deal, the ADWR had noted that only 1,078 acre-feet would be allowed to be transferred; however, this amount increased to 2,033 acre-feet after the Director of the ADWR reevaluated the proposal without allowing for public comment.[14]

Given that the first public hearing of the proposal was firmly opposed by state legislators and local officials (because of fears that the proposal would be detrimental to farming businesses and potentially set a precedent for more water to be transferred to urban populations), the increased amount of water that is allowed to be transferred to Queen Creek will likely receive the same level of backlash from the public.[15] By preventing the public from voicing opinions on the matter, an argument of noncompliance to the APA could be made by Arizona state legislators, local officials, and agricultural workers who rely on the Colorado River.

---

[13] 16 U.S.C. ch. 35 § 1531 et seq.
[14] James, "Tensions Rise."
[15] Ian James, "Debate erupts over plan to move Colorado River water to Arizona suburb," AZCentral, https://azcentral.com/story/news/local/arizona-environment/2019/11/20/debate-erupts-over-plan-move-colorado-river-water-arizona-suburb/4241885002/.

National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (NEPA) is a national policy with the purpose of requiring Federal agencies to evaluate any environmental effects of a proposed Federal action before a decision to allow the plan to move forward is made. The NEPA states that the Federal government should take all of the steps necessary to "foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[16] Essentially, the NEPA is the overarching law that aims to protect the environment by requiring that impacts to the environment be systematically considered, analyzed, and mitigated before a governmental project or action is allowed to be implemented.

Relating to the current water transfer controversy, Mohave County supervisors have passed resolutions to oppose the proposal and Arizona's approval of it in particular.[17] In these resolutions, the supervisors call for a NEPA analysis to be conducted and for the Bureau to produce an Environmental Impact Statement (EIS) on the environmental effects of transferring the water out of the Colorado River basin. The transfer of water to Queen Creek would reduce flows in the river and potentially affect the health of the river negatively. Therefore, because the proposed water transfer would require a federal decision by the Bureau of Reclamation, a NEPA analysis and an EIS should be conducted to determine the environmental outcomes of allowing 2,033 acre-feet of water to be diverted out of the river and into a city.

[16] 42 U.S.C. §§ 4321 et seq.
[17] James, "Tensions Rise."

Endangered Species Act of 1973

Another area of concern brought up by the Mohave County Supervisors is that, according to the Endangered Species Act (ESA), an analysis of endangered species that may be affected by the Colorado River water transfer should be conducted to determine if the species would be impacted.[18] The ESA is a law designed to preserve species that are considered endangered. Section 7 of the ESA dictates that federal agencies must consult with the National Marine Fisheries Service (NMFS) to evaluate the impact on endangered species in the Colorado River.[19] These endangered species include the Humpback Chub, Bonytail, Colorado Pikeminnow, and the Razorback Sucker.[20] These analyses are called Biological Opinions and include a statement from the NMFS about the effect the proposed action would have on the species: no effect, no jeopardy, jeopardy, and unavoidable jeopardy.[21]

If it is determined that an endangered species would be negatively impacted, mitigation efforts will need to be put in place before the Bureau of Reclamation could approve the water transfer. For instance, if a statement of no jeopardy is issued, an Incidental Take Statement (ITS) would need to be made. If a finding of jeopardy is found, an ITS must be issued and "reasonable and prudent" alternatives to prevent the jeopardy should be implemented within the proposed plan.[22] Finally, if an unavoidable jeopardy is issued, the Endangered Species Committee must exempt the proposal from compliance to the ESA. All of these situations, except for a statement of no effect, would slow the progress of the proposed water transfer project.

---

[18] *Id*.
[19] 16 U.S.C. ch. 35 § 1531 et seq.
[20] Colorado River Endangered Fish Recovery Program. "About the Endangered Fish." 2020. coloradoriverrecovery.org/general-information/about-fish.html.
[21] 16 U.S.C. ch. 35 § 1531 et seq.
[22] *Id*.

Arizona Revised Statutes: Transfer of Water Rights, Application, Limitations, Required Consent

The Arizona Revised Statutes are statutory laws governing the transfer of water rights in Arizona. Title 45 - Waters §45-172 has multiple provisions that regulate water transfers in Arizona. One provision from §45-172 that relates to this controversy is that waters may be transferred with a limitation that, "Vested or existing rights to the use of water shall not be affected, infringed upon or interfered with."[23] This stipulation dictates that any transfer of water should not cause harm to those with existing water rights. The agricultural producers who use water from the Colorado River may argue that this transfer of water to Queen Creek will harm their agricultural businesses because of decreased flows from the river. Especially as water from the river becomes scarcer, the agricultural producers will have a stronger standing argument that the water transfer caused them harm.

The final provision in §45-172 that applies to this controversy is that the ADWR director must provide notice of the proposed water transfer and allow for written objections, similar to the Administrative Procedures Act.[24] Again, this provision can be used as an argument by Arizona state legislators, local officials, and agricultural producers against the ADWR for not complying with this provision in the Arizona Revised Statutes. This provision also articulates that under the director's discretion, in "appropriate cases, including cases in which an objection has been filed, an administrative hearing may be held before the director's decision on the application," which means that proposals deemed to be strongly opposed or contentious in nature may be subject to an administrative hearing before a decision is made.[25] Opponents to the water transfer may use this provision as an argument against the ADWR; because the proposal received a significant

[23] AZ Rev Stat § 45-172 (through 1st Reg Sess 51st Leg. 2013).
[24] *Id.*
[25] AZ Rev Stat § 45-172.

amount of opposition, the director should have held an administrative hearing before endorsing the proposal.

Arizona Department of Water Resources v. McClennen (2015)

Arizona Department of Water Resources v. McClennen (2015) was an Arizona Supreme Court case that evaluated the requirements of who can participate as an "interested party" in a water transfer decision by the ADWR.[26] The court ruled that an entity does not have standing to be considered an "interested party" unless the entity has "water rights or other interest that is protected under the water transfers statute."[27] This ruling determined that to have standing to oppose a water transfer through litigation, the plaintiff must have a water right or be protected under §45-172 of the Arizona Revised Statutes. The Colorado River water transfer controversy pertains to this ruling because it narrows who can oppose the proposal through litigation. For instance, Arizona state legislators or local officials cannot file a lawsuit to oppose the proposal. The only recourse that they can take to oppose the proposal is through legislative action. Furthermore, any person or entity that may be negatively impacted by the proposed transfer may not have standing to sue if they do not hold water rights on the Colorado River.

The Arizona Supreme Court also decided in *McClennen* (2015) that even though §45-172 of the Arizona Revised Statutes stipulates that the ADWR can reject a water rights transfer if the use is "against the interests and welfare of the public," this provision only applies to new appropriations of water and not water transfers.[28] Therefore, the opponents to the current water transfer proposal would not be able to claim that the proposed water transfer would conflict with the interests of those who use water from the Colorado River.

[26] *Ariz. Dep't of Water Res. v. McClennen*, 238 Ariz. 371, 360 P.3d 1023, 725 Ariz. Adv. Rep. 17 (Ariz. 2015).
[27] Wes Strickland, ""Arizona Supreme Court Clarifies Water Transfer Rules." *Private Water Law*, January 2, 2021, privatewaterlaw.com/2015/11/18/arizona-supreme-court-clarifies-water-transfer-rules/.
[28] AZ Rev Stat § 45-172; *Ariz. Dep't of Water Res. v. McClennen*.

Colorado River Fourth Priority Water (HB 2456)

In response to the proposed water transfer, Arizona Representative Regina Cobb introduced a bill that would enjoin this and similar water transfers from taking place. HB 2456, or the Colorado River fourth priority water bill, would amend the Arizona Revised Statutes by adding a section that would prohibit anyone with a water right to the Colorado River from transferring or conveying the right to any "location or use other than an agricultural, municipal or industrial use in a Colorado River community."[29] Essentially, this addendum to the Arizona Revised Statutes would only allow Colorado River water rights to be transferred to an entity that currently uses, benefits, or has rights to water from the Colorado River. If this bill is passed in the Arizona legislature, it would render the current water transfer controversy moot because the water transfer would be illegal under the Arizona Revised Statutes.

Evaluation

Based on the laws and precedential cases presented in this paper, if the issue were to culminate in a litigation against the allowance of the proposed water transfer to Queen Creek, the courts would probably decide that the water transfer should not be allowed, or at least be delayed until the proposal meets procedural requirements. For example, because the ADWR neglected to host an additional round of public comments after the increase in acre-feet of water allowed to be diverted to Queen Creek, the ADWR did not comply with either the Administrative Procedures Act nor one section of the Arizona Revised Statutes. As a result, the court would likely rule that the ADWR would need to meet the procedural requirements before the proposal can move forward. Furthermore, because a NEPA analysis has not been conducted for the environmental effects of the proposed water transfer, the court would likely decide that an EIS must be

[29] State of Arizona. House. *Colorado River Fourth Priority Water Act of 2021.* HB 2456. 55th Legis., 1st sess. https://azleg.gov/legtext/55leg/1r/bills/hb2456p.htm.

produced before the water transfer can occur. Again, this argument would not completely disallow the water transfer to occur; however, it would hinder the water transfer project from being implemented. Finally, the results from a Biological Opinion under the Endangered Species Act would most likely slow the process of the proposed water transfer because the amount of water that is proposed to be transferred is likely to have some impact on one of the mentioned endangered species in the Colorado River.

However, the Arizona Revised Statutes §45-172 may sway the court toward not allowing the water transfer to occur. Because the proposed water transfer may cause harm or result in negative effects to agricultural water users, which expressly contradicts the revised statutes, the court would likely rule against allowing the proposal to divert water to Queen Creek. However, according to the outcome of *McClennen*, this decision cannot be made preemptively; the plaintiffs would need to demonstrate that they are experiencing some harm as a result of the diversion of water before they have standing to bring the case to court. Additionally, if the Arizona State Legislature passes HB 2456, litigation on the legality of this particular water transfer may not occur; however, there may be some contention surrounding the newly issued law to prohibit water transfers in the Colorado River, which could lead to separate litigation.

Conclusion

Water in the West continues to be highly contentious as tensions between urban and agricultural water users arise as a result of the decreasing availability of water. Further, the value and profitability of the river continues to increase as demand increases. These two aspects of the river act as catalysts for controversies about transferring water rights to the Colorado River. The proposal to transfer water from farms on the Colorado River to an urban population in Queen Creek, Arizona is one example of a controversial water transfer issue in the West. This issue

involves the Arizona Department of Water Resources, the Bureau of Reclamation, the water investment company Greenstone, the city of Queen Creek, Arizona state legislators and local officials, and the agricultural producers who use water from the Colorado River. The pertinent laws and major cases that relate to this issue are the Administrative Procedures Act, the National Environmental Policy Act, the Arizona Revised Statutes, *Arizona Department of Water Resources v. McClennen,* and HB 2546. While this issue has not transpired into litigation, if a lawsuit were to occur, the court would likely halt the progression of the proposed water transfer or block the transfer from occurring.

References

16 U.S.C. ch. 35 § 1531 et seq.

42 U.S.C. §§ 4321 et seq.

Ariz. Dep't of Water Res. v. McClennen, 238 Ariz. 371, 360 P.3d 1023, 725 Ariz. Adv. Rep. 17 (Ariz. 2015).

Arizona Municipal Water Users Association. "The Transfer and Transportation of Water in Arizona: An AMWUA Staff Analysis Revised March 12, 2018 I. Executive Summary Historic." AMWUA, 2018. https://amwua.org/uploads/1521847052665e54307.pdf.

Associated Press. "Arizona Endorses Plan to Sell Colorado River Water to Suburb." AP NEWS, Associated Press, September 7, 2020. https://apnews.com/article/60d7f58a9cbc44e0f4dacc7285e09320.

AZ Rev Stat § 45-172 (through 1st Reg Sess 51st Leg. 2013).

Azwater. "Arizona Water Resources Director Recommends a Denial of Lease Deal for Quartzsite's Colorado River Water." *Arizona Water News*, May 31, 2018. https://azwaternews.com/2018/05/29/arizona-water-resources-director-recommends-a-denial-of-lease-deal-for-quartzites-colorado-river-water/.

Colorado River Endangered Fish Recovery Program. "About the Endangered Fish." 2020. https://coloradoriverrecovery.org/general-information/about-fish.html.

James, Ian. "Debate erupts over plan to move Colorado River water to Arizona suburb." AZCentral. https://azcentral.com/story/news/local/arizona-environment/2019/11/20/debate-erupts-over-plan-move-colorado-river-water-arizona-suburb/4241885002/.

James, Ian. "Tensions Rise over Company's Plan to Sell Colorado River Water in Arizona." *The Arizona Republic*, Arizona Republic, January 31, 2021. https://azcentral.com/story/news/local/arizona-environment/2021/01/30/plan-to-sell-colorado-river-water-in-arizona-sparks-tensions/4295089001/.

Jaspers, Bret. "Water Transfer from Colorado River to Central Arizona Faces Stiff Opposition." Cronkite News - Arizona PBS, December 31, 2019. cronkitenews.azpbs.org/2019/11/27/water-entitlement/.

State of Arizona. House. *Colorado River Fourth Priority Water Act of 2021.* HB 2456. 55th Legis., 1st sess. https://azleg.gov/legtext/55leg/1r/bills/hb2456p.htm.

Strickland, Wes. "Arizona Supreme Court Clarifies Water Transfer Rules." *Private Water Law*, January 2, 2021, https://privatewaterlaw.com/2015/11/18/arizona-supreme-court-clarifies-water-transfer-rules/.

The Existence of a Constitutional Right to the Wilderness and Questions of Standing: *Animal Legal Defense Fund et. al v. United States of America et al.* (D. Or. 2019)

By Radhika Gawde

Radhika Gawde is a student at UC Davis. She is studying Political Science—Public Service and is double minoring in Economics and Environmental Policy and Planning (EPAP). She currently serves as Senate President Pro Tempore of the Associated Students of UC Davis Senate. She primarily works on issues relating to academic accommodations, student fees, and menstrual equity. Radhika also works for Congressman Jerry McNerney as Finance Coordinator for the *McNerney for Congress* Campaign and as an editor for *Davis Journal of Legal Studies*.

This paper analyzes the ongoing *Animal Legal Defense Fund et. al v. United States of America et al.* (D. Or. 2019). The paper provides a brief background on the parties involved in the case and the issues alleged in the plaintiffs' opening and appellate briefs. The precedent and case law relied on by the plaintiffs in their briefs is explained and an analysis is conducted, framed by this precedent, to assess the validity of the district court's opinion and the issues alleged by the plaintiffs. Finally, this paper argues that, while the district court erred in concluding that Animal Legal Defense Fund did not have standing to sue, it is unclear whether the case for a constitutional right to the wilderness will survive on its merits.

Introduction

Climate change is a pervasive problem that has grown to dominate our consciousness on a national and international scale. As noted by the 2018 IPCC Report, human activities have caused approximately 1.0°C of global warming above pre-industrial levels with global warming projected to reach 1.5°C between 2030 and 2052 if greenhouse gas emissions continue to increase at the current rate.[1] Projections support the fact that such warming will result in

[1] "Summary for Policymakers." Global Warming of 1.5 ºC. https://ipcc.ch/sr15/chapter/spm.

catastrophic effects, including increases in extreme weather events, wildfires, heavy rains, mudslides, pest invasions, increased spread of infectious diseases, droughts, and food supply disruptions.[2]

Due to growing frustrations with political and legislative processes, climate lawsuits have become the new norm. The United States currently has over twenty active lawsuits seeking redress for the harms of climate change.[3] These attempts have been largely concentrated on suits against private energy corporations, primarily those in the fossil fuel industry, due to a growing consensus that they should be held accountable for their role in exacerbating the effects of climate change.[4]

However, other efforts to seek redress have been spearheaded by young individuals from across the world who have litigated, oftentimes successfully, against their governments to seek relief for their role in failing to mitigate the effects of, and at times subsidizing the factors contributing to, climate change.[5] The United States is no different. Particularly, the *Juliana v. United States* (2016) case has garnered significant attention; the case's young plaintiffs assert that the United States government's actions have caused climate change which in turn allegedly violates the youngest generation's constitutional rights to life, liberty, and property as well as violates their constitutionally protected right to a "stable climate system."[6]

---

[2] *Id.*
[3] Rebecca Hersher, "Supreme Court Considers Baltimore Suit Against Oil Companies Over Climate Change." January 19, 2021. https://npr.org/2021/01/19/956005206/supreme-court-considers-baltimore-suit-against-oil-companies.
[4] *Id.*
[5] Laura Parker, "Kids suing governments about climate is a global trend." May 3, 2021. https://nationalgeographic.com/environment/article/kids-suing-governments-about-climate-growing-trend.
[6] *Juliana v. United States* 217 F. Supp. 3d 1224 (D. Or. 2016), https://lexisnexis.com/community/casebrief/p/casebrief-juliana-v-united-states.

The *Animal Legal Defense Fund v. United States* case, however, takes a unique approach in its endeavors to litigate relief for those impacted by the United States government's actions and inactions which have exacerbated the threat of climate change. This case concerns the question of whether or not American citizens are entitled to a constitutional "right to the wilderness" under the First, Fifth, and Fourteenth Amendments. It is this right which the plaintiffs assert has been violated by the actions of the federal government and its respective agencies in regard to climate change.[7] Plaintiffs draw upon John Locke, social contract theory, the due process clause, a constitutional right to "be let alone," and prominent privacy cases ranging from *Casey* (1992) to *Obergefell* (2015) to articulate a history of a "right to the wilderness" that is implicit not only in the constitutional right to privacy, but also in our nation's history.[8] However, prior to addressing whether Americans are entitled to a constitutional right to the wilderness, it is uncertain whether Plaintiffs have standing to sue; the courts must determine whether the plaintiffs allege a particularized harm and whether or not the claim is justiciable.[9]

Parties

Plaintiff and Appellant, Animal Legal Defense Fund (ALDF), along with Seeding Sovereignty, Cody Shotola-Schiewe, Ian Petersen, Willow Phelps through her mother Erika Mathews, and Dr. Sarah Bexell on behalf of future generations, seeks declaratory[10] and injunctive relief.[11] Plaintiffs are nonprofit groups and individuals who fear for their physical and mental wellbeing as a result of the impacts of climate change on federally owned and managed

[7] Complaint at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).
[8] Amended Complaint at *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019).
[9] *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019).
[10] Declaratory relief is best understood as a statement from the court declaring a right to be held by the plaintiffs.
[11] Injunctive relief is best understood as a court order requiring a certain action or requiring that a certain behavior cease.

public lands.[12] The Animal Legal Defense Fund in particular is the self-professed "legal voice for animals" and serves by filing high-impact lawsuits in support of animal rights and supporting animal protection legislation.[13]

Defendant and Appellee, the United States of America, is being sued in its capacity as a sovereign trustee of public lands. Plaintiffs assert that the United States, Defendants, the US Department of the Interior, Secretary of the Interior, US Department of Agriculture, the Secretary of Agriculture, Administrator of the US Environmental Protection Agency, US Department of Defense, and Secretary of Defense failed to limit greenhouse gasses from major sources falling under its purview and are thus responsible for exacerbating climate change.[14] Plaintiffs allege that Defendants have impermissibly infringed upon Plaintiffs' right to the wilderness, and endangered Plaintiffs in violation of their constitutional rights.[15]

Issues

In their October 2018 complaint, Plaintiffs sought declaratory relief establishing a fundamental right to privacy and autonomy and asked that the right "to be let alone free from human interference in wilderness" be recognized as a necessary precondition to those rights.[16] Additional declaratory relief was sought by Plaintiffs to establish that the United States government violated their constitutional rights under the First, Fifth, Fourteenth, and Ninth Amendments. Plaintiffs further alleged that the United States government had acted and continued to act with reckless disregard for their rights by impermissibly infringing upon

[12] Complaint at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019)
[13] Animal Legal Defense Fund. https://aldf.org/.
[14] Complaint at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019)
[15] *Id.*
[16] *Id.*

Plaintiffs' right to be let alone free from human influence in the wilderness.[17] Injunctive relief stopping the implementation of President Trump's Executive Order 13783 was additionally sought by Plaintiffs. The executive order was an effort to reduce environmental regulations due to the administration's position that they were hindrances to "energy independence." Plaintiffs argued that it should be declared unconstitutional.[18] Finally, Plaintiffs sought additional injunctive relief that the government be ordered to prepare and implement an enforceable national remedial plan to ameliorate various concerns enumerated by the plaintiffs. Plaintiffs asked that the plan protect the wilderness that current and future generations depend upon to exercise their fundamental autonomy and privacy rights.[19]

In May of 2019, Defendants filed to dismiss. Plaintiffs filed a response in July of 2019 to which Defendants submitted a reply in support of the motion to dismiss. In their motion to dismiss and reply brief, Defendants alleged that the Court lacked jurisdiction and that Plaintiffs failed to state a claim upon which relief can be granted.[20] Defendants asserted that climate change is a generalized grievance which, even if the plaintiffs' harms could be linked causally to the actions of the United States Government, the Court could not redress this claim given its limited jurisdiction to cases and controversies and the fact that it is unlikely that any remedy would ameliorate the plaintiffs' harms.[21] Defendants instead asserted that the plaintiffs' claims should have been brought up under the processes outlined in the Administrative Procedure Act.[22]

---

[17] *Id.*
[18] Executive Order 13783 of March 28, 2017, Promoting Energy Independence and Economic Growth, (2017): 16093-16097," https://federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth.
[19] Amended Complaint at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019)
[20] Motion to Dismiss at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019)
[21] *Id.*
[22] *Id.*

Defendants also rejected Plaintiffs' arguments under the First, Fifth, and Ninth Amendments claiming that they are faulty. Should the Court choose not to dismiss the case, however, Defendants asked the case be stayed until the completion of the *Juliana* (2016) appeals process given that both cases concern novel due process rights that Plaintiffs assert the United States government has violated.[23]

In July of 2019, the Court granted the defendant's motion to dismiss; the Court held that the plaintiffs lacked standing and failed to state a claim upon which relief can be granted. The Plaintiffs' opening brief for the appeal concerns the following questions: "Did the district court err in dismissing the claims without leave to amend because plaintiffs could not allege a particularized injury caused by the effects of climate change?," "Did the district court err in dismissing the plaintiffs' claims on the grounds that they failed to present a justiciable controversy under *Baker v. Carr* (1962)?," and "Did the district court err in dismissing the plaintiffs' claims that there is no clearly established 'right to wilderness' under the Constitution?"[24] Plaintiffs seek a reversal of the Court's dismissal and ask that the case be remanded for further litigation.

The facts of the case are not in dispute. Both Plaintiffs and Defendants agree that climate change has irrevocably altered the fabric of our nation and our global environment. Plaintiffs cite a broad range of failures by the federal government to regulate pollution, including its active support of industries such as agriculture, logging, and energy, and assert that the federal government's actions and inactions have exacerbated climate change. However, Plaintiffs contest the determination that their claim lacks standing, lacks subject matter jurisdiction, and that their

[23] *Id.*
[24] *Id.*

complaint fails to state a claim upon which relief can be granted. In their opening appellate brief, Plaintiffs noted that the District Court acknowledged the "serious" and "well recognized" harm that climate change engenders, yet still held that the plaintiffs' grievances were too generalized to satisfy the redressability requirement to establish standing.[25] The plaintiffs refuted these determinations, asserting that they have experienced concrete, personal injuries and cited the *Massachusetts v. EPA* (2007) doctrine that harms may be widely shared and yet not constitute a generalized grievance.[26] The opening appellate brief also alleged that the Court erred in holding that the issues asserted by the plaintiffs did not constitute a case or controversy under Article III. Similarly, Plaintiffs allege that the court erred in the determination that the case failed the *Baker v. Carr* (1962) political question doctrine's prongs of "a textually demonstrable constitutional commitment," a lack of clear and manageable judicial standards for resolution, and "discretionary, nonjudicial policy determinations."[27]

Relevant Laws

The ALDF lawsuit concerns several statutes, most prominently the 1964 Wilderness Act, in addition to several other laws granting authority to the various federal departments identified as defendants in the complaint. However, given that the case and appeal consider a constitutional question and questions of standing respectively, it is case law that is more relevant to the understanding of the ALDF case.

[25] Opening Appellate Brief at *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019).
[26] *Id.*
[27] *Id.*

Justiciability and Question of Standing

Standing

Standing is best understood as the legal right of a party to bring an action in court and is a mechanism for determining whether a party has a personal stake in the outcome of a case for which it is seeking relief. Article III Section 2 Clause I of the United States Constitution articulates the "case and controversy" requirement for standing which serves to limit the federal judiciary's jurisdiction to that of live disputes, thereby precluding the judiciary from acting as unelected lawmakers. The three requirements for Article III standing are best articulated by *Lujan v. Defenders of the Wildlife* (1992). Additionally, courts have developed various prudential standing considerations: a plaintiff's injury must come within a constitutional "zone of interest," may not concern "generalized grievances," and must allow for "third party standing."[28]

Justiciability

Justiciability concerns the court's ability to hear a case. In addition to standing, ripeness and mootness are two further doctrines stemming from Article III that may render a case nonjusticiable. A case that is not ripe has come too early to the courts such that the harm has not yet occurred and is thereby nonjusticiable. Conversely, a moot case is one in which the controversy existing at the beginning of the lawsuit is no longer live. Courts are further precluded from interpreting advisory opinions and violating the political question doctrine. The political question doctrine, as articulated in *Baker v. Carr* (1962), prevents the Court from involving itself in politically charged issues.

[28] "Standing Requirement: Prudential Standing," Legal Information Institute (Legal Information Institute), accessed March 22, 2022, https://law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-prudential-standing.

The most relevant case law pertaining to the question of standing cited in the ALDF case include: *Lujan v. Defenders of the Wildlife* (1992)*, Baker v. Carr* (1962)*,* and *Juliana v. United States* (2016). These cases interpret what is required to establish standing.

In *Lujan v. Defenders of Wildlife* (1992)*,* the Court considered whether the respondents had Article III standing to sue, seeking a declaratory judgment that the new Endangered Species Act amendment erred by providing for a geographic limit on the original law.[29] In answering no, the Court held that in order to have standing to sue, plaintiffs must fulfill three prongs. First, Plaintiffs must have an "injury in fact" that is particularized and concrete, and actual or imminent.[30] In other words, the plaintiff seeking relief must be among those impacted by the case. Second, there must be a fairly traceable causal connection between the defendant's actions and the plaintiff's injury.[31] Finally, the injury must be "likely" redressable rather than merely speculatively or hypothetically redressable.[32] The *Lujan* (1992) Court found that the injuries alleged by the plaintiffs were neither actual nor imminent.

In *Baker v. Carr* (1962)*,* the Supreme Court considered the constitutional question of whether the Court had jurisdiction over questions of legislative apportionment.[33] In answering yes, the Court through *Baker* (1962) established a six-part test falling under three major categories of: textual guidance, the existence of a clear and objective standard, and various prudential concerns. In regard to *Baker v. Carr*, it is this political question doctrine that is germane to this case; the Court held that the ALDF case was nonjusticiable under the *Baker*

[29] *Lujan v. Defenders of Wildlife* - 504 U.S. 555, 112 S. Ct. 2130 (1992) https://lexisnexis.com/community/casebrief/p/casebrief-lujan-v-defenders-of-wildlife.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Baker v. Carr*, 369 U.S. 186 (1962) https://oyez.org/cases/1960/6.

factors of a "textually demonstrable constitutional commitment of the issue to a coordinate political department," "a lack of judicially discoverable and manageable standards for resolving it," and "an impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[34]

In *Juliana v. United States* (2016), the Court considered whether the plaintiffs had standing to sue the federal government for alleged climate change related injuries caused by the federal government's act of continuing to "permit, authorize, and subsidize" fossil fuel. In answering no, the Court held that to have standing under Article III of the Constitution, the plaintiff must fulfill the following three-part test: Plaintiff must have a concrete and particularized injury that is caused by the challenged conduct and is likely redressable by a favorable judicial decision.[35] Specifically, the claims alleged in the *Juliana* case were deemed to fall beyond the powers of Article III courts to redress. Given that the *Juliana* case is ongoing, however, this holding may be reversed.

Constitutional Question

Pertaining to the constitutional question alleged by the plaintiffs, the complaint cites numerous cases including, but not limited to, *Olmstead v. United States* (1928), *United States v. Munoz* (1990), *Planned Parenthood v. Casey* (1992), *California Democratic Party v. Jones* (2000), and *Lawrence v. Texas* (2003); most concerning the existence of a Constitutional right to privacy. However, the three most pertinent cases are *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), and *Washington v. Glucksberg* (1997).

[34] Opening Appellate Brief at *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019).
[35] *Juliana v. United States* 217 F. Supp. 3d 1224 (D. Or. 2016), https://lexisnexis.com/community/casebrief/p/casebrief-juliana-v-united-states.

In *Griswold v. Connecticut* (1965), the Court held that a right to privacy can be inferred from several amendments in the Bill of Rights. In doing so, the Court established a "penumbra" of privacy for martial relations under the First, Third, Fourth, and Ninth Amendments.[36]

In *Roe v. Wade* (1973), the Court held, in the context of abortion rights, that a fundamental "right to privacy" exists within the Fourteenth Amendment's due process clause.[37]

In *Washington v. Glucksberg* (1997), the Court considered questions of whether assisted suicide fell under the due process clause of the Fourteenth Amendment. In answering no, the Court established the two-part *Glucksberg* test to determine whether a liberty interest is "fundamental" and thereby protected: the right must be historically and traditionally considered to be fundamental and second, the right must be clearly described and defined.[38]

Analysis

Question of Standing

The district court erred in holding that the plaintiffs do not have standing to sue; the plaintiffs' complaint sufficiently fulfills the Article III "case and controversy requirement," fulfills all three factors required for standing pursuant to *Lujan*, survives the political question doctrine, survives the *Glucksberg* test, and falls within the subject matter jurisdiction of the courts.[39]

---

[36] *Griswold v. Connecticut*, 381 U.S. 479 (1965), https://law.jrank.org/pages/24239/Washington-v-Glucksberg-Washington-Law-Challenged.html.
[37] *Roe v. Wade*, 410 U.S. 113, (1973), https://oyez.org/cases/1971/70-18.
[38] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[39] Opening Appellate Brief at *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019).

Article III Case and Controversy Requirement

It is readily apparent that the plaintiffs' complaint satisfies the Article III "case and controversy" requirement; the parties involved, namely the Animal Legal Defense Fund and the United States government, have adverse legal interests and the court has the ability to provide declaratory and injunctive relief to resolve the controversy in question.[40] Moreover, the plaintiffs' reliance on *Railway Mail Ass'n v. Corsi* (1945) and *Babbitt v. United Farm Workers Nat'l Union* (1979) to establish their fulfillment of the case and controversy requirement is well-founded.

Lujan v. Defenders of the Wildlife *(1992): Particularized Harm Requirement*

Plaintiffs clearly identify a particularized harm and meet the requirement of asserting "general allegations of fact" in their brief, thereby having pled sufficient facts to demonstrate that they have standing to pursue redress of the violation of their constitutional rights.[41] Notably, the *Massachusetts v. EPA* (2007) precedent of a widely shared harm still qualifying as a particularized harm when coupled with the plaintiffs' alleged concrete personal injuries is effective in further disproving the claim that the plaintiffs failed to allege a particularized injury; as in *Juliana,* injuries resulting from climate change can be particularized.[42]

Defendants may argue that the recently decided *Ramirez v. TransUnion* (9th Circuit 2020) case supports the claim that Plaintiffs have failed to state an injury in fact. In *TransUnion*, the court considered whether or not the plaintiffs were entitled to damages under Article III if the majority of the plaintiffs did not face the same injury as faced by the class representative. The *TransUnion* court held that risk of future harm is insufficient to establish a concrete injury in

[40] *Id.*
[41] Reply at *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019)
[42] *Id.*

fact.[43] Similarly, in *TransUnion*, the court suggested that emotional harms may be sufficient for Article III purposes but took no position on this claim given the facts of the case. This case is, however, distinguishable from *TransUnion*. In addition to referencing the risks of future harm that continued government inaction would exacerbate, the plaintiffs' complaint also includes various instances of past and ongoing harm that relief is being sought for, that they credit to the government's failures in mitigating the impacts of climate change. Plaintiffs, moreover, reference both physical and emotional harms to substantiate the existence of an injury in fact. As such, Plaintiffs' harm is both concrete and particularized thereby fulfilling the "injury in fact" requirement of *Lujan*.

Lujan v. Defenders of the Wildlife *(1992): Redressability Requirement*

The Plaintiffs' complaint meets *Lujan*'s requirement that, to have standing, plaintiff's injuries must be redressable by the Courts. It is clear that affirmative action by the Court would reduce the harms experienced by the plaintiffs even if the Court's holding would not solve the issue of climate change on the whole. Moreover, the case is distinguishable from *Juliana* in this respect; the remedy sought by the plaintiffs is largely declaratory in nature and, as such, falls within the purview of the federal judiciary. Moreover, the injunctive relief sought concerns a narrower scope than the relief requested in *Juliana* and, thus, survives the redressability prong required for standing; the federal judiciary is well equipped to grant a moratorium on drilling on federal lands.

[43] *Ramirez v. TransUnion LLC*, 951 F. 3d 1008, 1038 (9th Cir. 2020).

Baker v. Carr *(1962)*

As established by the plaintiffs, the *Baker* criteria identified by the Court does not apply to this case.[44] Analogous to *Juliana,* plaintiffs' claims do not involve a "textually demonstrable constitutional commitment on the issue to coordinate political department"; the Constitution neither expressly delegates climate change nor its impacts on federal lands to the Executive or Legislative Branch.[45] Additionally, Plaintiffs correctly noted that *Zivotofsky v. Clinton* (2012) allows for the consideration of political cases unless "narrow exceptions" exist under *Baker* to that responsibility.[46] Thus, even if the Court held that the issues at hand were political, given that the *Baker* criteria does not apply to the case, the Court would still be able to consider and rule upon the constitutional question pursuant to *Zivotofsky* (2012) precedent. Plaintiffs correctly asserted that constitutional standards to resolve their injuries would not require an initial policy determination. The district court's decision should be reversed and remanded.

Constitutional Question

In regard to the questions of whether the Court should grant declaratory relief affirming a constitutional "right to the wilderness" and, if so, whether they should grant injunctive relief, the answer is far less readily apparent. While the historical argument under *Glucksberg* (1997) holds and the First Amendment argument is compelling, the plaintiffs' due process and Fifth Amendment claims need to be further elucidated. Similarly, the plaintiffs' claim of significant harm and the causal link between their injuries to the actions of the United States government are tenuous at best in their current form.

[44] Opening Appellate Brief at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).
[45] *Id.*
[46] *Zivotofsky v. Clinton* 566 U.S. 189, 132 S. Ct. 1421 (2012).

Washington v. Glucksberg *(1997)*

This case survives both prongs of the *Glucksberg* test; the right in question has been historically and traditionally considered fundamental and has been explicitly defined and described. Plaintiffs go into excruciating detail regarding the historical and traditional precedent for the existence of a Constitutional "right to the wilderness" within the penumbra of privacy rights established by the Supreme Court. The arguments drawing on John Locke, the legislative history of the Wilderness Act, and social contract theory are particularly compelling. Similarly, the Court erred in accepting the defendant's mischaracterization of the plaintiffs' definition given that in its original form the plaintiffs' definition survives the *Glucksberg* test. The Plaintiffs clearly define the "fundamental right to the wilderness" in their complaint and opening appellate briefs as "[the] right of each American to have reasonable access to publicly owned wildlands maintained at a minimum baseline of natural, self-sustaining vitality."[47] The Court erred in determining that the Plaintiff's case failed both prongs of the *Glucksberg* test.

First, Fifth, and Fourteenth Amendment Claims

The Plaintiffs' reliance on *California Democratic Party v. Jones* (2000), to assert that a constitutional "right to the wilderness" falls within the First Amendment, is compelling. *California Democratic Party v. Jones* (2000) concerned the question of whether California's proposition changing primaries to a blanket primary violated a political party's right to freedom of association.[48] In addition to concluding that a First Amendment violation occurred, the Court identified the right not to associate as a corollary of the right to associate.[49] Plaintiffs cited this principle to argue that the government violated this right not to associate by degrading the

[47] Reply at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).
[48] *California Democratic Party v. Jones* :: 530 US 567 (2000).
[49] *Id.*

wilderness wherein Plaintiffs seek to exercise this right. This suggests a strong argument under the First Amendment if clarified further.[50]

Conversely, the plaintiff's privacy claims and arguments under the First and Fifth Amendments remain highly suspect. The plaintiffs' argument that the "right to the wilderness" falls under a Fifth Amendment right to be let to be alone is unconvincing in its current form as is the plaintiffs' claim that the "right to the wilderness" falls within the due process clause of the Fourteenth Amendment. The plaintiffs' arguments under *Griswold* (1965)*, Roe* (1973)*, Casey* (1992)*, Lawrence* (2003)*,* and *Obergefell* (2015) similarly need to be further developed. The assertion that a Constitutional "right to the wilderness" falls within a Constitutional "right to be let alone" which falls under a Constitutional right to privacy, while compelling, has not yet sufficiently been justified.

Further Limitations of the Animal Legal Defense Fund Complaint

The facts of the case, moreover, do not support a strong claim that significant harm is being experienced by the plaintiffs. Plaintiffs allege that they rely on federal lands for their mental and physical health and wellbeing. The United States government's subsidization of fossil fuel extraction, animal agriculture, and commercial logging, insofar as these activities have contributed to global warming, are responsible for their suffering and fear of harm given the adverse impacts of climate change on federal lands.[51] While these harms are serious, it is unclear if these emotional and intangible harms alone will be sufficient to yield declaratory relief establishing a constitutional "right to the wilderness" and a violation thereof; emotional distress is highly subjective and as such may not be deemed significant enough to merit damages

[50] Complaint at *Animal Legal Defense Fund et al. v. United States et al*., 6:18-cv-01860-MC (D. Or. 2019).
[51] *Id.*

according to the courts. In order to bolster their argument, Plaintiffs should expand upon the harm to their personal, economic, and aesthetic interests−which are briefly touched upon in portions of the complaint−quantifying, where possible, the harms they have faced.

Additionally, the causal link between the federal government's actions and the plaintiffs' harms has not been sufficiently argued. In the recently filed reply brief, plaintiffs alleged that an affirmative ruling would allow for a natural recovery of the ecosystem and thereby sustain the constitutional "right to be left alone." While their claims of the benefits of partial redress and the narrower scope of the relief sought in comparison to *Juliana* are compelling, the claim of causality is on far shakier grounds; although the plaintiffs noted that they have not forfeited the state-created danger argument, they have not established a clear causal connection between the government's actions and the manner in which their "right to be left alone" has been impeded. In order for the plaintiffs' argument to be upheld, not only will the *Juliana* precedent have to be sustained, but also a causal link between the government's actions and plaintiffs' harms will have to be further elucidated.

The various weaknesses of the plaintiffs' argument for declaratory and injunctive relief may be a direct result of the defendant's motion to dismiss; the vast majority of the briefs filed by the plaintiffs concern the question of standing given that the Court did not reach to consider the constitutional question on its merits. Thus, it is entirely likely that, as briefs continue to be filed, the plaintiffs' argument will be bolstered by additional facts supporting the constitutional "right to the wilderness" and further claims of harm caused by the violation of such a right insofar as the Court holds that it exists. However, it is unclear whether the case, if reversed and remanded, will survive the appellate process on its merits given the current facts and arguments.

Conclusion

Plaintiffs, the Animal Legal Defense Fund, contest the determination that their claim lacks standing, lacks subject matter jurisdiction, and that their complaint fails to state a claim upon which relief can be granted. Plaintiffs thereby seek a reversal of the District Court's dismissal and ask that the case be remanded for further litigation. Plaintiffs sought declaratory relief seeking the establishment of a constitutional "right to the wilderness," asserting that it falls within the penumbra of privacy established by various amendments of the Constitution.[52] Plaintiffs additionally sought injunctive relief requiring certain actions from the defendant, the government and agencies of the United States, in order to seek redress for violations pursuant to this right.

While it is clear that this case fulfills the requirements for standing and that the Court's decision should be reversed and remanded, the argument for a constitutional "right to the wilderness" will likely fail on its merits under the current facts. However, an affirmative ruling in favor of such a constitutional right would allow individuals to seek redress for the harms they have endured as a result of the United States government's failures both to mitigate the impacts of climate change and in actively exacerbating climate change. Should the questions of standing be overcome and declaratory relief establishing a constitutional "right to the wilderness" be granted, there would be increased opportunities for lawsuits to hold the United States government accountable for its actions and inactions contributing to environmental degradation and the resultant harms to future plaintiffs thereof. Moreover, an affirmative ruling would relax the requirements for standing and further clarify what sufficiently fulfills the required factors for

[52] *Id.*

standing in regard to climate change litigation. The ALDF case, should the appellate proceedings be successful, may yield precedent that further clarifies the standards set by *Massachusetts v. EPA* (2007)*, Juliana v. US* (2015)*,* and *Lujan v. Defenders of Wildlife* (1992) in regard to who has standing to sue for environmental and climate change harms. Such a holding in favor of a constitutional "right to the wilderness" would bolster the efforts of scientists and activists alike to preserve what little is left of our nation's natural resources and to safeguard our climate and environment for future generations. However, given that it is uncertain whether the plaintiffs will be successful in establishing a constitutionally protected "right to the wilderness," it is unclear if and when the field of climate change litigation will yield a case that will successfully allow for the redress of future plaintiffs' harms as caused by the United States government's actions and active failures in mitigating climate change.

References

Amended Complaint at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).

Animal Legal Defense Fund et al. v. United States et al., 6:18-cv-01860-MC (D. Or. 2019).

Opening Appellate Brief at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).

Baker v. Carr, 369 U.S. 186 (1962). https://oyez.org/cases/1960/6.

California Democratic Party v. Jones. 530 US 567 (2000).

Complaint at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).

"Executive Order 13783 of March 28, 2017, Promoting Energy Independence and Economic Growth (2017): 16093-16097."
https://federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth.

Griswold v. Connecticut, 381 U.S. 479 (1965).

Hersher, R. "Supreme Court Considers Baltimore Suit Against Oil Companies Over Climate Change." January 19, 2021.
https://npr.org/2021/01/19/956005206/supreme-court-considers-baltimore-suit-against-oil-companies.

Juliana v. United States 217 F. Supp. 3d 1224 (D. Or. 2016).
https://lexisnexis.com/community/casebrief/p/casebrief-juliana-v-united-states.

Juliana v. United States. (n.d.). https://ourchildrenstrust.org/juliana-v-us.

Lujan v. Defenders of Wildlife - 504 U.S. 555, 112 S. Ct. 2130 (1992)
https://lexisnexis.com/community/casebrief/p/casebrief-lujan-v-defenders-of-wildlife.

Massachusetts v. EPA 549 US 497 (2007).

Motion to Dismiss at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).

Parker, L. "Kids suing governments about climate is a global trend." May 3, 2021.
https://nationalgeographic.com/environment/article/kids-suing-governments-about-climate-growing-trend.

Ramirez v. TransUnion LLC, 951 F. 3d 1008, 1038 (9th Cir. 2020).

Response to Dismiss at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).

Reply at *Animal Legal Defense Fund et al. v. United States et al.*, 6:18-cv-01860-MC (D. Or. 2019).

Roe v. Wade, 410 U.S. 113, (1973) https://oyez.org/cases/1971/70-18.

"Standing Requirement: Prudential Standing," Legal Information Institute (Legal Information Institute). Accessed March 22, 2022.
https://law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-prudential-standing.

"Summary for Policymakers." Global Warming of 1.5 ºC. https://ipcc.ch/sr15/chapter/spm.

Washington v. Glucksberg, 521 U.S. 702 (1997).

"Washington v. Glucksberg - Washington Law Challenged." Washington Law Challenged - Court, Suicide, Assisted, and Person - JRank Articles. https://law.jrank.org/pages/24239/Washington-v-Glucksberg-Washington-Law-Challenged.html.

Zivotofsky v. Clinton 566 U.S. 189, 132 S. Ct. 1421 (2012).

Bostock v. Clayton County (2020): Originalism and Textualism Diverge

By Hunter Keaster

Hunter Keaster is a student at the University of California, Davis. He is studying Political Science with a minor in War-Peace Studies. He serves as a Behavioral Case Advisor at the Associated Students of UC Davis Student Advocate Office and as an editor for *Davis Journal of Legal Studies*. Hunter also works as a Legislative Intern at Shaw Yoder Antwih Schmelzer & Lange Advocacy Firm.

Though the judicial philosophies of originalism and textualism often arrive at similar conclusions and are therefore treated as sister philosophies, they ought not to be. Originalism is a judicial philosophy which emphasizes the understood meaning of a statute or law at the time of its adoption,[1] whereas textualism focuses on interpreting the plain meaning of the text of a statute or law.[2] Originalism and textualism are unique lenses through which jurists interpret the law and should be thought of as such. They sometimes arrive at vastly different conclusions, as in the case of *Bostock v. Clayton County* (2020), with one philosophy promoting a historic expansion of civil rights protections and the other promoting the preservation of the status quo. This distinction between originalism and textualism is vital to a holistic understanding of judicial philosophy. The following will utilize *Bostock v. Clayton County* as a case study through which to analyze the subtle but significant distinctions between originalism and textualism.

Introduction

After serving Clayton County, Georgia as a child welfare services coordinator for ten years, Gerald Bostock, a gay man, was fired shortly after publicly participating in a gay recreational softball league.[3] Prior to his termination, colleagues criticized his engagement with

[1] Ballotpedia, "Originalism," accessed January 15, 2022, https://ballotpedia.org/Originalism.
[2] Ballotpedia, "Textualism," accessed January 15, 2022, https://ballotpedia.org/Textualism.
[3] Oyez, "Bostock v. Clayton County," accessed January 13, 2022, https://oyez.org/cases/2019/17-1618.

the softball league and his sexual orientation.[4] Shortly thereafter, Clayton County began an internal audit of the funds Bostock was tasked with overseeing and established grounds for termination, citing "conduct unbecoming of its employees."[5] Bostock then filed charges against his former employer, alleging that its actions were in violation of Title VII of the Civil Rights Act of 1964 (henceforth CRA), which protects individuals from employment discrimination based on "race, color, religion, sex, and national origin."[6] After dismissal by lower courts, his case was argued before the Supreme Court of the United States. In a six-to-three decision, the Court overturned the lower courts' rulings, holding that the protections granted by Title VII apply to discrimination on the basis of homosexuality or transgender status.[7] The decision was written by textualist Justice Neil Gorsuch[8] and emphasized a literal interpretation of the text of the CRA. On the other hand, originalist Justice Samuel Alito argued that the Court erred in "ignoring everything other than the bare statutory text."[9] An originalist interpretation would value the meaning of the text of the CRA at the time of its ratification in 1964 over the meaning of the text as understood in 2018. The following will provide a brief legislative and case history alongside an analysis of originalist and textualist tensions in the decision.

Case Background

During his time serving Clayton County, Gerald Bostock received favorable performance evaluations and the county was given national awards while under his tenure.[10] In 2013, Bostock joined the gay softball league, "Hotlanta Softball League," and expressed that his office at

---

[4] *Id.*
[5] *Id.*
[6] United States Congress, *Civil Rights Act of 1964 § 7 (1964), 42 U.S.C.* § 2000e et seq.
[7] *Bostock v. Clayton County, 590 U.S. (2020)*.
[8] Ramesh Ponnuru, "Neil Gorsuch: A Worthy Heir to Scalia," *National Review*, January 17, 2013, https://nationalreview.com/2017/01/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir/.
[9] *Id.*
[10] Brian Sutherland, "Petition for Writ of Certiorari," *Bostock v. Clayton County (2020),* 2020, https://supremecourt.gov/DocketPDF/17/17-1618/48357/20180525170054025_36418%20pdf%20Sutherland%20br.pdf.

Clayton County was a channel for volunteer opportunities that league members could utilize.[11] Shortly thereafter, "his participation in the gay softball league and his sexual orientation were openly criticized by someone with significant influence in the Clayton County court system."[12] An internal audit was then conducted (which Bostock claims was a "pretext for discrimination") and it found grounds for termination in "conduct unbecoming of a county employee."[13] However, Bostock maintained that he "never engaged in any misconduct."[14]

Bostock then filed a lawsuit against Clayton County *pro se* (on his own behalf, without an attorney) alleging that his termination was in violation of Title VII of the CRA.[15] A federal magistrate judge dismissed the case and the US District Court for the Northern District of Georgia affirmed this dismissal on the grounds that Title VII does not classify sexual orientation discrimination as a "form of sex discrimination."[16] The United States Court of Appeals for the 11th Circuit later affirmed this judgment.[17]

Legislative History

The CRA was proposed by President John F. Kennedy in June of 1963.[18] Kennedy addressed the nation in the aftermath of the Birmingham Campaign, in which Martin Luther King Jr. led a campaign of nonviolent direct action with the purpose of drawing attention to racial discrimination.[19] Kennedy's address was primarily focused on the plight of African

---

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Ballotpedia, "Bostock v. Clayton County, Georgia," accessed January 15, 2022, https://ballotpedia.org/Bostock_v._Clayton_County,_Georgia.
[18] Theodore Sorenson, "Papers of John F. Kennedy. President's Office Files. Speech Files. Radio and Television Address on Civil Rights, 11 June 1963," John F. Kennedy Presidential Library and Museum, June 11, 1963, https://jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFKPOF-045-005.
[19] Stanford University, "Birmingham Campaign," Martin Luther King Jr. Research and Education Institute, accessed January 13, 2022, https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign.

Americans and called on legislative bodies to remedy the issue.[20] Subsequently, a bill was drafted and sent to Congress but was met with Democratic opposition and filibustered.[21] Just five months later, Kennedy was assassinated, making Lyndon B. Johnson president. With the political landscape now changed, President Johnson rallied Congress to pass the bill into law, voicing that, "No memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long."[22] After yet another filibuster, the bill eventually passed the Senate with a vote of seventy-two-to-twenty-seven and was subsequently signed into law.[23]

The paramount goal of the CRA was to address racial inequality brought to light by leaders of the civil rights movement. However, before passage, the bill was amended to include protections for women in American society and the workplace. This change was not expected with the proposal of the original bill. As Justice William Rehnquist noted in *Meritor Savings Bank v. Vinson* (1986), "the prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives . . . the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[24] This amendment is relevant to originalist implications of the Court's decision in *Bostock* (2020) because it is this amendment through which modern-day jurists evaluate the intent of the legislators of the CRA.

---

[20] Theodore Sorenson, June 11, 1963. "Papers of John F. Kennedy."
[21] United States Senate, "Civil Rights Filibuster Ended," accessed January 15, 2022, https://sena te.gov/about/powers-procedures/filibusters-cloture/civil-rights-filibuster-ended.htm.
[22] National Archives, "President Lyndon B. Johnson's Address to a Joint Session of Congress, November 27, 1963," The Center for Legislative Archives, accessed January 13, 2022, https://archives.gov/legislative/features/civil-rights-1964/lbj-address.html.
[23] GovTrack, "Hr. 7152. Passage.—Senate Vote #409—Jun 19, 1964," accessed January, 15 2022, https://govtrack.us/congress/votes/88-1964/s409.
[24] *Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).*

Opinion of the Court

The Court's six-to-three majority opinion was authored by Justice Gorsuch and established a textualist defense of the effective expansion of CRA protections to gay and transgender individuals.[25] The Court held that terminating an employee because of their sexual orientation or transgender status constitutes discrimination based on sex which is prohibited by Title VII of the CRA.[26] The Court reasoned that terminating an employee because of their sexual orientation or transgender status *necessitates* sex discrimination.[27] Justice Gorsuch explained why the type of discrimination at issue necessarily constitutes sex discrimination:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.[28]

Essentially, discrimination based on one's sexual orientation is sex discrimination because the state of being attracted to men is an "acceptable" state for female employees yet is grounds for termination for male employees. The reasoning for why transgender discrimination constitutes sex discrimination under Title VII utilizes similar logic: cisgender women inhabiting characteristics commonly associated with women is "acceptable" to an employer yet is unacceptable and grounds for discrimination for transgender women.[29]

One of the most vital components of the Court's decision lies in the statutory structure of Title VII. The full statute that is at issue reads:

[25] *Bostock v. Clayton County, 590 U.S. (2020).*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[30]

The language that the Court places emphasis on is the phrase "because of," near the end of the statute. The Court held that this phrase "means that a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."[31] They reasoned this by explaining that the "but-for test" should be used when applying this statute. The "but-for test" is a tool to determine if a particular result would still occur but-for a particular cause.[32] For example, if an employee would still be employed at a business but-for the fact that they are Canadian, a violation of Title VII has occurred (though, this time in the form of national origin discrimination). This fundamental nuance in the decision effectively established that a violation of Title VII occurs merely if sex was *a* "motivating factor" in alleged unlawful employment practice (sex does *not* have to be the *only*—or the most important—factor).[33]

Originalist and Textualist Divergence

While many use the term *originalism* as a synonym for *textualism* (and vice versa), the two judicial philosophies are distinct, and the decision in *Bostock* illustrates the differences between the two. This distinction is clearly illustrated in the opinion of the Court, penned by textualist Justice Gorsuch,[34] and originalist Justice Alito's[35] dissent. Alito dissented because he felt it is the Court's duty "to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'"[36] As he would go on to explain, if a survey were to be

---

[30] United States Congress, *Civil Rights Act of 1964 § 7 (1964), 42 U.S.C.* § 2000e et seq.
[31] Bostock v. Clayton County, 590 U.S. ___ (2020).
[32] *Id.*
[33] *Id.*
[34] Ramesh Ponnuru, "Neil Gorsuch: A Worthy Heir to Scalia."
[35] Matthew Walther, "Sam Alito: A Civil Man," *The American Spectator*, April 21, 2014, https://web.archive.org/web/20170522135245/https://spectator.org/58731_sam-alito-civil-man/.
[36] *Bostock v. Clayton County, 590 U.S. (2020) - Alito dissent.*

conducted of people in 1964 it is unlikely that any would consider discrimination based on sexual orientation or transgender status to be discrimination based on "sex."[37] Once more, Alito arrived at this conclusion because he values the meaning of the statute *at the time of adoption*, whereas Gorsuch values the meaning of the language as understood today. Justice Brett Kavanaugh accused Gorsuch (and the Court) of applying a sort of *literalism* rather than textualism in this case, simply ignoring historical context and interpreting statutory language literally.[38] Whether textualism or originalism arrives at the "correct" conclusion in this case, and by proxy in other cases, simply depends on one's understanding of the role of the Supreme Court and constitutional interpretation. If one believes that constitutional interpretation is meant to preserve the will of the people who ratified a statute, originalism is the "correct" philosophy. However, if one believes that jurists should follow the letter of the law wherever it may lead them, textualism is the favorable method of interpretation.

Conclusion

The distinction between originalism and textualism is significant, though often understated. The two judicial philosophies can sometimes result in two diametrically opposed rulings as in the case of *Bostock v. Clayton County* (2020). The discrimination suffered by Gerald Bostock on the basis of his sexual orientation is now prohibited under the textualist interpretation of the Civil Rights Act of 1964, where an originalist interpretation would have required new legislation to be passed through Congress to afford the same protections. No matter one's preference for judicial philosophy, it is clear through the *Bostock* ruling that the often interchanged originalism and textualism are meaningfully distinct.

[37] *Id.*
[38] *Bostock v. Clayton County, 590 U.S. (2020) - Kavanaugh dissent.*

References

Ballotpedia. “Bostock v. Clayton County, Georgia.” Accessed January 15, 2022. https://ballotpedia.org/Bostock_v._Clayton_County,_Georgia.

Ballotpedia. “Originalism.” Accessed January 15, 2022. https://ballotpedia.org/Originalism.

Ballotpedia. “Textualism,” Accessed January 15, 2022. https://ballotpedia.org/Textualism.

GovTrack. “Hr. 7152. Passage.—Senate Vote #409—Jun 19, 1964.” Accessed January 15, 2022. https://govtrack.us/congress/votes/88-1964/s409.

National Archives. “President Lyndon B. Johnson’s Address to a Joint Session of Congress, November 27, 1963.” The Center for Legislative Archives. Accessed January 13, 2022. https://archives.gov/legislative/features/civil-rights-1964/lbj-address.html.

Oyez. “Bostock v. Clayton County.” Accessed January 15, 2022. https://oyez.org/cases/2019/17-1618.

Ponnuru, Ramesh.. “Neil Gorsuch: A Worthy Heir to Scalia.” *National Review.* January 17, 2013. https://nationalreview.com/2017/01/neil-gorsuch-antonin-scalia-supreme-court-textualist-originalist-heir/.

Sorenson, Theodore. “Papers of John F. Kennedy. President’s Office Files. Speech Files. Radio and Television Address on Civil Rights, 11 June 1963.” John F. Kennedy Presidential Library and Museum. June 11, 1963. https://jfklibrary.org/asset-viewer/archives/JFKPOF/045/JFKPOF-045-005.

Stanford University. “Birmingham Campaign.” Martin Luther King Jr. Research and Education Institute. Accessed January 13, 2022. https://kinginstitute.stanford.edu/encyclopedia/birmingham-campaign.

Sutherland, Brian. “Petition for Writ of Certiorari.” *Bostock v. Clayton County (2020).* 2020. https://supremecourt.gov/DocketPDF/17/17-1618/48357/20180525170054025_36418%20pdf%20Sutherland%20br.pdf.

United States Congress. *Civil Rights Act of 1964 § 7 (1964),* 42 U.S.C. § 2000e et seq.

United States Senate. “Civil Rights Filibuster Ended.” Accessed January 15, 2022, https://senate.gov/about/powers-procedures/filibusters-cloture/civil-rights-filibuster-ended.htm.

U.S. Equal Employment Opportunity Commission. “The Equal Pay Act of 1963,” EEOC. Accessed January 13, 2022. https://eeoc.gov/statutes/equal-pay-act-1963.

Walther, Matthew. “Sam Alito: A Civil Man.” *The American Spectator.* April 21, 2014. https://web.archive.org/web/20170522135245/https://spectator.org/58731_sam-alito-civil-man/.

Undocumented Immigrants and the Human Right to Health: Constructing Health Disparities as a Rights-Based Issue

By Arieh Lisitza

Arieh Lisitza is a student at the University of Washington. They are studying Molecular, Cellular, and Developmental Biology.

Undocumented immigrants within the United States have highly limited access to healthcare. They are additionally subject to structural violence that disparately increases the rates of a number of health conditions. Although there is no explicit body of law within the US that would guarantee a right to health for undocumented immigrants, there is a precedent for the inclusion of this right within customary international law. This paper argues that health disparities in undocumented immigrant populations are a violation of customary international law. Additionally, it provides policy recommendations for promoting health equity for undocumented immigrants.

Introduction

On the world stage, the United States often plays the role of chastising other nations for human rights violations, particularly via economic sanctions. Despite this, gross human rights violations continue to exist within the US itself. This is particularly true in cases of minority groups, especially for socioeconomic rights. In recent years, the numerous violations of undocumented immigrants' rights have received national attention.[1] It should come as no surprise, then, that undocumented immigrants also have alarmingly disparate health outcomes and disproportionately low rates of healthcare access.[2] Regardless of the US's stance on

[1] "Human Rights and Immigration," ACLU, accessed November 22, 2021, https://aclu.org/issues/human-rights/human-rights-and-immigration.
[2] Nancy Berlinger and Michael Gusmano, *Executive Summary: Undocumented Patients: Undocumented Immigrants and Health Care Access in the United States*, The Hastings Center, March 2013,

undocumented immigrants and social safety nets, the fact remains that undocumented immigrants, as human beings, are entitled to equitable health outcomes. Health disparities for undocumented immigrants, due to both explicit exclusion from existing health equity initiatives and dangerous stress from structural violence, constitute a violation of their human right to health.

Access to Healthcare

Undocumented immigrants are generally not eligible to enroll in Medicaid, Medicare, the Child Health Insurance Plan (CHIP), or any other federally funded health insurance plan.[3] Some state or local governments may use their own funds to run insurance plans for undocumented children, but these vary heavily by location and do not cover adults.[4] Undocumented immigrants may also, in theory, acquire insurance via employment or private purchase.[5] In practice, however, these options are infeasible because undocumented status often results in enforced poverty and worker exploitation. In one survey of undocumented immigrants residing in New York City, only half were insured.[6]

A few exceptions exist to this widespread lack of affordable healthcare access. Certain deferred action groups—not including Deferred Action for Childhood Arrivals (DACA) recipients—may enroll in federally funded insurance plans; however, this constitutes a small minority of the undocumented immigrant population.[7] On a federal level, the Emergency

---

http://undocumented.thehastingscenter.org/wp-content/uploads/2013/03/Undocumented-Patients-Executive-Summary.pdf.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Nancy Berlinger et al., *Report and Recommendations to The Office of the Mayor of New York City: Undocumented Immigrants and Access to Health Care in New York City*, The Hastings Center, April 2015, http://undocumented.thehastingscenter.org/wp-content/uploads/2015/04/Undocumented-Immigrants-and-Access-to-Health-Care-NYC-Report-April-2015.pdf.

[7] HealthCare.gov, "Find out What Immigration Statuses Qualify for Coverage in the Health Insurance Marketplace®," https://healthcare.gov/immigrants/immigration-status/.

Medical Treatment and Active Labor Act (EMTALA) also requires hospitals to stabilize any patients seeking emergency services regardless of their ability to pay.[8] The only remaining options are safety net systems that specifically serve uninsured populations. These include state-level Emergency Medicaid that authorizes Medicaid coverage for emergency services and Federally Qualified Health Centers providing primary care.[9]

Chronic conditions are extremely difficult to treat under this system. Emergency Medicaid does not cover many of the interventions needed to *prevent* emergency care, such as diabetic test strips or Hepatitis C drug therapies.[10] Many undocumented, uninsured cancer patients even choose to spread out their treatments to lower out-of-pocket costs, resulting in longer times to complete treatment regimens, overall poorer health, and lengthened periods of extreme illness and pain.[11] Rather than seeking medical care, undocumented patients are incentivized to risk death for fear of being reported for their immigration status or turned away due to an inability to afford care. In a qualitative study of undocumented patients with end-stage renal disease, recurrent near-death experiences and weekly episodes of life-threatening symptoms were core themes.[12] This resulted in extreme death anxiety for patients, disruptions in child care, and economic inefficiency for the health system as a whole.[13] Many participants had family members who wanted to donate kidneys, but were unable to access transplants because Emergency Medicaid would not cover post-transplant care.[14] These patients and their families

[8] Lawrence Gostin, "Is Affording Undocumented Immigrants Health Coverage a Radical Proposal?" *JAMA* 322, no. 15 (October 15, 2019): 1438–39, https://doi.org/10.1001/jama.2019.15806.
[9] Berlinger and Gusmano, *Executive Summary: Undocumented Patients*.
[10] Berlinger et al., *Report and Recommendations to The Office of the Mayor of New York City*.
[11] *Id.*
[12] Lilia Cervantes et al., "The Illness Experience of Undocumented Immigrants With End-stage Renal Disease," *JAMA Internal Medicine* 177, no. 4 (2017): 529–535, accessed November 22, 2021, doi:10.1001/jamainternmed.2016.8865
[13] *Id.*
[14] *Id.*

had to undergo a slow, painful death despite having treatable conditions.[15] Although those with life-threatening diseases may be considered extreme cases, these themes are broadly applicable to all uninsured undocumented immigrants. The exclusion of undocumented immigrants from Medicaid forces patients to wait for the extreme deterioration of their health before seeking care.

Impact of Immigration Enforcement

The present US immigration enforcement regime itself also causes large-scale health effects. Even when accounting for differences in insurance coverage, increased activity by US Immigration and Customs Enforcement (ICE) results in statistically significant decreases in Hispanic adults' likelihood of having a regular medical provider.[16] Alarmingly, this trend holds true for those with a diabetes diagnosis, implying even those with a strong need for ongoing care forgo medical services due to fear of detention and deportation.[17] Each time ICE activity increases, the health of undocumented patients deteriorates further.

Undocumented workers, from a historical standpoint, exist to be exploited. Undocumented immigrants—excluding DACA recipients and other deferred action categories—do not have access to work permits, meaning their employment options are often limited to work that legal residents are unwilling to do and often with a high risk of occupational injury or illness.[18] Although undocumented workers are technically protected by labor laws, they are also at unique risk of retaliation if they report workplace offenses or otherwise exercise their rights.[19] Employers may also financially abuse undocumented workers by making offers of

---

[15] *Id.*
[16] Abigail Friedman and Atheendar Venkataramani, "Chilling Effects: US Immigration Enforcement And Health Care Seeking Among Hispanic Adults," *Health Affairs* 40, no. 7 (July 2021): 1056-065, doi:10.1377/hlthaff.2020.02356
[17] *Id.*
[18] Sarah Bronwen Horton, *They Leave Their Kidneys In The Fields: Illness, Injury, and Illegality among US Farmworkers* (Oakland: University of California Press, 2016).
[19] "Employment Rights of Undocumented Workers," Legal Aid at Work, accessed November 22, 2021, https://legalaidatwork.org/factsheet/undocumented-workers-employment-rights/.

employment contingent on using loaned identifiers on W-4 forms.[20] Those with loaned identity documents are then exploited by employers who have them work under multiple identities to avoid paying overtime,[21] use workers' undocumented status to employ minors who are otherwise too young to work,[22] or refuse to pay workers compensation in the event of a death or injury.[23] Undocumented workers often are threatened with deportation by their employers if they report these conditions, leaving them with few options for legal redress in the face of this exploitation.[24] This produces a labor force at extremely high risk of occupational health issues. *They Leave Their Kidneys In The Fields*, an ethnography of medical issues in undocumented workers, notes that undocumented farmworkers, for instance, are at particular risk of multiple medical issues, including heatstroke,[25] joint pain,[26] and kidney disease.[27] The end result of this system of exploitation is the widespread destruction of undocumented workers' health with little means of recompense.

Stress and trauma caused by immigration status also have population-level health effects. Chronic stressors, such as interpersonal violence or poverty, have long been acknowledged as social determinants of illnesses like hypertension or type 2 diabetes.[28] Undocumented immigrants often attribute these health experiences to *coraje*, a form of embodied anger that is culturally specific to Hispanic Americans.[29] However, it would be reductive to claim these disparities are purely the result of individual-level violence. In undocumented populations, immigration status

[20] Horton, *They Leave Their Kidneys In The Fields*, 83.
[21] *Id*, 84
[22] *Id*, 85.
[23] *Id*, 86.
[24] *Id*, 90.
[25] *Id*, 17.
[26] *Id*, 80.
[27] *Id*, 149.
[28] Mayo Clinic, "Chronic stress puts your health at risk," accessed April 12, 2022, https://mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress/art-20046037.
[29] *Id*, 96.

may be considered a "master stressor," which can itself predict other downstream determinants of health. Interviews with undocumented women, for example, note that "structural and legal violence . . . precipitated multiple forms of 'everyday violence' such as discrimination and sexual abuse."[30] These in turn predict negative health outcomes on a population level.

These disparities are not limited to the realm of physical health; the long-term sense of hopelessness and frustration undocumented immigrants experience also has severe mental health effects. Undocumented teenagers and young adults who grew up in the US and therefore have a sense of belonging in the United States are at particular risk of depressive and anxiety symptoms when faced with the stress of undocumented adulthood.[31] The end results are extremely high rates of depression, anxiety, and in many cases suicide within the first and second generations of Mexican immigrants.[32] For example, one study found that Mexicans who immigrate to the US before the age of twelve and US-born Mexican Americans are at an elevated risk of suicide relative to both Mexicans who do not migrate and Mexican immigrants who migrate after the age of thirteen.[33] There have also been numerous deaths by suicide within ICE detention facilities, and the per capita rate of these deaths has only increased in recent years.[34] Chronic fear, stress, and exploitation at the hands of both labor markets and ICE are key themes in the lives of undocumented immigrants. It is no coincidence that this population has severe downstream health effects.

---

[30] Horton, 97.
[31] Roberto Gonzales, *Lives in Limbo: Undocumented and Coming of Age in America* (Oakland: University of California Press, 2015), 199.
[32] *Id*, 204.
[33] Guilherme Borges, "Immigration and Suicidal Behavior Among Mexicans and Mexican Americans," *American Journal of Public Health* 99, no. 4 (April 2009): 728–733, https://doi.org/10.2105/AJPH.2008.135160.
[34] Parsa Erfani et al., "Suicide rates of migrants in United States immigration detention (2010–2020)," *AIMS Public Health* 8, no. 3 (May 13, 2021): 416-420, doi: 10.3934/publichealth.2021031.

International Human Rights Law

The immigration enforcement regime in the US has violated a number of human rights.[35] However, the violations of the human right to health are particularly pressing because the denial of them results in widespread death and pain. Legally, the right to health for undocumented immigrants is on tenuous grounds within the United States. Article 25 of the Universal Declaration of Human Rights (UDHR) states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . medical care."[36] The UDHR occupies an ambiguous space in international law. It is not a treaty, but rather a declaration of ideals to which all United Nations members have informally agreed to adhere.[37] As such, it is not legally binding.

Filártiga v. Peña-Irala (1980) did, however, specifically name the UDHR as a source of customary international law.[38] Customary international law constitutes a body of traditions and practices that have not been explicitly enshrined in treaties but are so universal that it is presumed all nations have implicitly agreed to uphold them.[39] *Filártiga v. Peña-Irala* found that the inclusion of a human right in the UDHR is evidence that right has been implicitly agreed upon; therefore, it can be considered a source of customary international law.[40] Certainly, undocumented immigrants in the US have not, thus far, been afforded the right to health enshrined in Article 25 of the UDHR.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is an international treaty requiring nations to provide basic socioeconomic rights (e.g., housing) to

[35] "Human Rights and Immigration," ACLU.
[36] "Universal Declaration of Human Rights," United Nations, accessed April 12, 2022, https://un.org/en/about-us/universal-declaration-of-human-rights.
[37] Micheline Ishay, *The History of Human Rights* (University of California Press: 2008), 223.
[38] Filártiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980).
[39] Mark Janis, *An Introduction to International Law* (Aspen: 2003), 42-43.
[40] *Filártiga v. Peña-Irala.*

everyone within their borders. Article 7(b) of the ICESCR guarantees a right to "[s]afe and healthy working conditions," and Article 12 mandates the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[41] The United States signed the treaty in 1977, which indicated an informal agreement to work toward making the treaty legally binding.[42] However, the treaty was never formally ratified, which is reflective of the United States' long-standing hesitancy to uphold socioeconomic rights.[43] The lack of ratification means the ICESCR is not legally binding within the US. However, it has been ratified by the vast majority of countries worldwide.[44] This, in combination with the right to healthcare within the UDHR, makes the denial of the right to health for undocumented immigrants within the US a clear violation of customary international law.

Article 1 of the UDHR states, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[45] This established one of the central tenets of human rights theory: that human rights are intrinsic to all people on the sole basis of being human. Human rights are not in the domain of any particular body of law. Therefore, the status of the human right to health within international law has no bearing on the ethical obligation to uphold this human right within the US. Socioeconomic rights are a hotly debated topic, with some scholars believing they are less essential than civil and political rights. The right to health, however, is in fact essential to the protection of political rights. When a nation denies the right to health, as the United States

---

[41] "International Covenant on Economic, Social and Cultural Rights," United Nations, accessed April 12, 2022, https://ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.
[42] "Status of Ratification Interactive Dashboard," United Nations Human Right Commission, accessed November 11, 2021.
[43] Ishay, *The History of Human Rights*, 221.
[44] "Status of Ratification Interactive Dashboard," United Nations Human Right Commission.
[45] "Universal Declaration of Human Rights," United Nations, accessed April 12, 2022, https://un.org/en/about-us/universal-declaration-of-human-rights.

has done with undocumented immigrants, it ensures members of this group will die or be incapacitated in larger numbers. This then serves the goal of preventing political action within that group—dead people cannot exercise their rights to free speech. Undocumented immigrants, as human beings, are as entitled to medical care and freedom from illness as any other group.

Policy Suggestions

A number of the aforementioned issues arise from the enforced poverty, instability, and exploitation faced by undocumented immigrants, and can only truly be rectified by immigration reform. At present, undocumented immigrants have no clear pathways to citizenship, despite constituting an essential portion of the economy. The current wait time for a Mexican American applying for a green card for their brother or adult married child is approximately a century.[46] The average estimated wait time for an employment-based visa is currently thirty-two years, and that is if one is able to find an employer who is willing to sponsor them at all.[47] Even for groups eligible for immediate green cards, anyone who has previously been unlawfully present in the US must wait years before applying to return. This means there are not, at present, any true pathways to citizenship for this population.

Fundamentally, undocumented status results in repeated victimization by legal and economic systems, inevitably leading to health disparities. The most efficient way to promote health justice for this community is therefore to grant clear pathways for citizenship to long-term undocumented residents.[48] David Bier also suggests the US government "cap wait times at no more than five years, and . . . create a temporary work visa program for year-round jobs not requiring a college degree."[49] Many DACA recipients with secondary education are also unable

[46] *"Why Don't They Just Get in Line?": Barriers to Legal Immigration, Before the Subcommittee on Immigration and Border Security*, 117th Congress (2021) (testimony of David J. Bier, Research Fellow, Cato Institute).
[47] *Id.*
[48] *Id.*
[49] *Id.*

to find skilled jobs because they were not eligible for work permits until 2012, and therefore have highly limited work experience.[50] The development of reintegration programs to help transition this population to the skilled labor force is therefore also necessary to alleviate socioeconomic stressors in this demographic.[51]

That said, access to healthcare cannot be put on hold indefinitely while immigration reform bills are debated. To quote the Hastings Center, "as immigration reform attempts to fix this problem, fairness also requires attention to the health, welfare, and safety of all members of our society as equal persons and social citizens. One low-income population's access to medically appropriate health care should not wait on the resolution of the immigration backlog."[52] Undocumented immigrants need to be made immediately eligible for Medicaid and other federally funded health equity initiatives, provided they meet all other eligibility requirements. Lack of documentation is not an adequate reason to deny a largely low-income group access to health insurance.

Undocumented immigrants should also be able to seek healthcare without any fear of detention or deportation. Healthcare professionals should disinvest from ICE to the greatest extent possible, and Congress should pass laws limiting ICE officers' access to healthcare settings while acting in a professional capacity. At present, ICE has issued a memorandum stating enforcement activities will not occur within hospitals or healthcare settings except in exigent circumstances or with explicit prior approval from the agency.[53] However, this is subject to change. The current memorandum also does not prevent immigration officers, with or without a warrant, from entering healthcare facilities and questioning doctors.[54] A federal law fully

[50] Gonzales, *Lives in Limbo*, 3.
[51] *Id*, 3.
[52] Berlinger and Gusmano, *Executive Summary.*
[53] "Health Care Providers and Immigration Enforcement: Know Your Rights, Know Your Patients' Rights," National Immigration Law Center, April 17, 2017.
[54] "Health Care Providers and Immigration Enforcement," National Immigration Law Center.

banning enforcement activity within healthcare settings and expanding the definition of enforcement activity to include the investigation and questioning of staff would help ensure healthcare settings remain the safe haven that they are intended to be.

Conclusion

The denial of the right to health for undocumented immigrants constitutes an act of violence on the part of the United States. The immigration enforcement regime in the US has done everything in its power to ensure this population will both experience undue illness and injury and will not have access to necessary healthcare when they do. This is not coincidental; the current practices within the US virtually guarantee population-level health disparities. The US needs to establish a coherent set of policies to protect the health of undocumented immigrants and their families. Even more importantly, however, the US needs large-scale immigration reform, including pathways to citizenship for undocumented immigrants, if it wishes to truly address health inequity for this population.

References

Berlinger, Nancy and Michael Gusmano. *Executive Summary: Undocumented Patients: Undocumented Immigrants and Health Care Access in the United States*. The Hastings Center, March 2013. http://undocumented.thehastingscenter.org/wp-content/uploads/2013/03/Undocumented-Patients-Executive-Summary.pdf

Berlinger, Nancy, Claudia Calhoon, Michael Gusmano, and Jackie Vimo. *Report and Recommendations to The Office of the Mayor of New York City: Undocumented Immigrants and Access to Health Care in New York City.* The Hastings Center, April 2015. http://undocumented.thehastingscenter.org/wp-content/uploads/2015/04/Undocumented-Immigrants-and-Access-to-Health-Care-NYC-Report-April-2015.pdf

Borges, Guilherme. "Immigration and Suicidal Behavior Among Mexicans and Mexican Americans." American Journal of Public Health 99, no. 4 (April 2009): 728–733. https://doi.org/10.2105/AJPH.2008.135160

Bronwen Horton, Sarah. *They Leave Their Kidneys In The Fields: Illness, Injury, and Illegality among US Farmworkers*. Oakland: University of California Press, 2016.

Cervantes, Lilia, Stacy Fischer, Nancy Berlinger, Maria Zabalaga, Claudia Camacho, Stuart Linas and Debora Ortega. "The Illness Experience of Undocumented Immigrants With End-stage Renal Disease." JAMA Internal Medicine 177, no. 4 (2017): 529–535. Accessed November 22, 2021. doi:10.1001/jamainternmed.2016.8865.

"Chronic Stress Puts Your Health at Risk." Mayo Clinic. July 08, 2021. https://mayoclinic.org/healthy-lifestyle/stress-management/in-depth/stress/art-20046037.

"Employment Rights of Undocumented Workers," Legal Aid at Work, accessed November 22, 2021, https://legalaidatwork.org/factsheet/undocumented-workers-employment-rights/

Erfani, Parsa, Elizabeth Chin, Caroline Lee, Nishant Uppal and Katherine Peeler. "Suicide rates of migrants in United States immigration detention (2010–2020)." AIMS Public Health 8, no. 3 (May 13, 2021): 416-420. doi: 10.3934/publichealth.2021031.

Filártiga v. Peña-Irala, 630 F.2d 876. 2nd Cir., 1980.

Friedman, Abigail and Atheendar Venkataramani. "Chilling Effects: US Immigration Enforcement And Health Care Seeking Among Hispanic Adults." Health Affairs 40, no. 7 (July 2021): 1056-065. doi:10.1377/hlthaff.2020.02356.

Gonzales, Roberto. *Lives in Limbo: Undocumented and Coming of Age in America.* Oakland: University of California Press, 2015.

Gostin, Lawrence O. "Is Affording Undocumented Immigrants Health Coverage a Radical Proposal?" *JAMA* 322, no. 15 (October 15, 2019): 1438–39. https://doi.org/10.1001/jama.2019.15806.

HealthCare.gov. "Find out What Immigration Statuses Qualify for Coverage in the Health Insurance Marketplace®." Accessed March 22, 2022. https://healthcare.gov/immigrants/immigration-status/.

"Health Care Providers and Immigration Enforcement: Know Your Rights, Know Your Patients' Rights," National Immigration Law Center, April 17, 2017.

"Human Rights and Immigration." ACLU. Accessed November 22, 2021. https://aclu.org/issues/human-rights/human-rights-and-immigration.

Ishay, Micheline. *The History of Human Rights*. University of California Press, 2008.

Janis, Mark. An Introduction to International Law. Aspen: 2003.

United Nations. "International Covenant on Economic, Social and Cultural Rights." Documents. Accessed April 12, 2022. http://un.org/en/universal-declaration-human-rights/.

United Nations. "Universal Declaration of Human Rights." Documents. Accessed April 12, 2022. http://un.org/en/universal-declaration-human-rights/.

"Status of Ratification Interactive Dashboard," United Nations Human Right Commission. Accessed November 11, 2021, https://indicators.ohchr.org/

"Why Don't They Just Get in Line?": Barriers to Legal Immigration. Before the Subcommittee on Immigration and Border Security, 117th Congress. 2021. Testimony of David J. Bier, Research Fellow, Cato Institute. https://cato.org/testimony/why-dont-they-just-get-line-barriers-legal-immigration.

Regression of Reproductive Rights: An Analysis of *June Medical Services LLC v. Russo* (2020)

By Ashley Lo and Chloe Porath

Ashley Lo is a student at the University of California, Davis. She is studying Economics and Political Science. She is the President of Mock Trial at UC Davis and the Co-Founder and Co-President of Aggie House, a student-run transitional housing shelter. She will be attending the University of Virginia College of Law in August 2022.

Chloe Porath is a student at the University of California, Davis. She is studying Communication and Political Science with a minor in Philosophy. She is Vice President of Mock Trial at UC Davis, the Social Vice President of Prytanean Women's Honor Society, an editor for *Davis Journal of Legal Studies,* and a research assistant studying effects of gender and identity on politics. She will be attending the University of Illinois—Urbana Champaign College of Law in August 2022.

This paper seeks to detail the facts and opinions of *June Medical Services LLC v. Russo*, an abortion case heard by the Supreme Court in 2020. Concepts such as *stare decisis* and the undue burden standard are explained in order to show the reader past precedent on the issue, as well as future impacts of this case.

Extended Case Brief

Introduction

The right to abortion has been a part of the American legal system for decades, but due to recent court cases, that right may be stripped away. In Louisiana, for example, if a woman is seeking an abortion, she has few options for clinics. These limitations may require women to drive across the state to access this medical procedure. Abortion clinics are few and far between in Louisiana because of the stringent laws and requirements regulating the clinics, making it increasingly difficult for them to provide healthcare. The abortion conditions in Louisiana were brought to the attention of the Supreme Court through *June Medical Services LLC v. Russo* (2020).

Case Background

In 2014, Louisiana passed Act 620, also known as the Louisiana Unsafe Abortion Protection Act, which required doctors performing abortions to have admitting privileges at a hospital thirty miles from the location of the abortion procedure.[1] The doctors would need to be granted permission from a hospital to admit patients at their medical institution. This legislation was heavily inspired by HB2—a 2016 law passed in Texas. HB2 was struck down by the Supreme Court in *Whole Woman's Health v. Hellerstedt* (2016) because it imposed an "undue burden" on those seeking an abortion.[2] Act 620 was a carbon copy of HB2 and had the explicit goal of shutting down abortion clinics.

Five abortion clinics and four abortion providers filed suit challenging the Louisiana law, claiming that there were no significant health benefits to the legislation. Therefore, the law did not meet the undue burden standard from *Planned Parenthood v. Casey* (1992), which held that abortion legislation must be struck down if it presented an undue burden for those who sought to obtain an abortion.[3] *Casey* (1992) upheld the essential holding from *Roe v. Wade* (1973) that abortion is a constitutional right for Americans, but *Casey* allowed for stricter laws surrounding the circumstances of obtaining an abortion. The clinics in the case at hand stressed the importance of precedent; nothing significant had changed from *Hellerstedt* (2016) and there was no reason to ignore that case's holding. The state countered with arguments against both *Hellerstedt* and the issue in question, contending that the former was decided under a wrongful standard.[4] Additionally, the state argued that June Medical had no standing to sue in this case and

---

[1] Graham Vogtman, "A Testament to Precedent: June Medical Services v. Russo," Benchwarmers, July 5, 2020, benchwarmersblog.com/2020/07/04/a-testament-to-precedent-june-medical-services-v-russo/.
[2] Constitutional Accountability Center, "June Medical Services L.L.C. v. Russo: Case Summary," 2021, https://theusconstitution.org/litigation/june-medical-services-l-l-c-v-gee/.
[3] Planned Parenthood of Southeastern PA. v. Casey, 505 U. S. 833, 878 (1992).
[4] Gretchen Borchelt, "Symposium: June Medical Services v. Russo: When a 'Win' is not a Win," SCOTUSblog, June 30, 2020, https://scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/.

that there was "a conflict between the plaintiff's interests and the interests of the individuals whose rights the plaintiff [sought] to protect."[5] However, this argument had not been used at the district or appellate court level. The issue of standing was not brought up until arguments for the Supreme Court.

A US district court held in their favor, but when that holding was further challenged, the Court of Appeals upheld Act 620. The Supreme Court took up the case and needed to answer whether or not June Medical had the standing to sue on behalf of its clients and whether or not *Hellerstedt* was the ruling precedent for this case.[6]

Plurality Opinion

Justice Stephen Breyer, who wrote for the plurality, found Louisiana's law to be unconstitutional. Resolving the issue of standing, Breyer asserted that because the state had failed to raise the issue in the lower courts, the court waived the argument.[7] Moving to the merits of the case, the Court drew from *Hellerstedt* and held that the provisions were unnecessary regulations that created a substantial obstacle for women who sought abortions, thereby imposing an undue burden on the right to access an abortion.

Justice Breyer added that the law did not serve any legitimate state interest. The Court of Appeals argued that the admitting privileges requirement "performs a real, and previously unaddressed, credentialing function" that promotes the wellbeing of women.[8] However, Breyer concluded that the law did not serve to protect the health of women seeking an abortion. He upheld the factual findings of the district court, which asserted that Louisiana's abortion procedures had been extremely safe, with low rates of serious complications. The district court

---

[5] Amy Howe, "Argument Analysis: Justices Grapple with Louisiana Abortion Law," SCOTUSblog, March 4, 2020, https://scotusblog.com/2020/03/argument-analysis-justices-grapple-with-louisiana-abortion-law/.
[6] *Id*.
[7] Howe, "Argument Analysis."
[8] June Medical LLC v. Russo, 591 U.S., 018-1323, p.3 (2020).

had not found any evidence that abortion complications had been treated improperly, nor that negative outcomes would be avoided by imposing the requirement.

The Court found that the admitting privileges requirement would be a substantial obstacle to women's ability to obtain an abortion. Although the doctors had made good faith efforts to comply with the law, they had "very limited success for reasons related to Act 620 and not related to their competence."[9] The district court found that over ten thousand women obtain abortions in Louisiana each year, and those women were served by six doctors at five abortion clinics at the outset of the litigation. Therefore, enforcing the admitting privileges requirement would lead to a significant reduction in the number and geographic distribution of providers. The Court held that due to this reduction in quantity, a burden would be placed on women and providers, and those seeking a legal and safe abortion procedure in the state would be unable to obtain one. Finally, the Court weighed the asserted benefits of the law against the burdens and held that the Act did not advance Louisiana's interest in protecting the health of women who sought abortions. Instead, the law "would increase the risk of harm to women's health by dramatically reducing the availability of safe abortion in Louisiana."[10]

Concurring Opinion

Concurring with the previous opinion, Chief Justice John Roberts relied heavily on the principle of *stare decisis,* recognizing that the severity of the burden created by Louisiana's law, as well as the purpose, was virtually equivalent to the scenario in *Hellerstedt*. *Stare decisis*, meaning "to stand by things decided" in Latin, is the doctrine through which courts adhere to precedent when making decisions.[11] Chief Justice Roberts acknowledged his dissent in

[9] June Medical LLC v. Russo, 591 U.S., 018-1323, p.7 (2020).
[10] Benjamin Parks, "Burdens, Benefits, or Both? The Impact of Chief Justice Roberts's June Medical Concurrence on Courts' Analyses of Abortion Regulations," Louisiana Law Review, 2014, https://lawreview.law.lsu.edu/2021/03/12/burdens-benefits-or-both-the-impact-of-chief-justice-robertss-june-medical-concurrence-on-courts-analyses-of-abortion-regulations/.
[11] Legal Information Institute, December 2021, https://law.cornell.edu/wex/stare_decisis.

Hellerstedt and asserted that he continued to believe that *Hellerstedt* was wrongly decided. His central point of contention surrounded *Hellerstedt's* addition of a balancing element to the standard laid out in *Casey.* Roberts disagreed with the plurality in this case weighing the State's interests in protecting potential human life and the health of women, against the liberty of women to define their "own concept of existence, [and] of meaning."[12] He argued that the Court was unfit to assign weight to such intangible values and that it would not be able to appropriately compare them. However, given the similarity of the Texas and Louisiana laws, as well as the lack of factual error on the part of the district court, Roberts concluded that he was bound to the ultimate holding in *Hellerstedt*. In turn, Louisiana's law was held as unconstitutional given the precedent.

Dissenting Opinion

Justice Samuel Alito, joined by Justices Neil Gorsuch, Clarence Thomas, and Brett Kavanaugh, dissented. In his dissent, Alito pointed to the conflicting nature of the Court in deciding what an abortion right requires and what standards to evaluate that right under. Subsequently, Alito argued that the plurality was employing the balancing test set forth in *Hellerstedt*, which went too far, and that the constitutional precedent set in *Casey* should be used instead.[13] Furthermore, because the parties in this case have not asked the Court to reevaluate *Casey*, that case and *Hellerstedt* remain in conflict, thus creating a confusing and impractical standard for the Court. In short, the dissent took issue with the decision in *Hellerstedt* and contends that the holding in this case should overturn that precedent and go back to the standards in *Casey*. Alito also disputed the factual findings of this case. He wrote that "there is ample evidence in the record showing that admitting privileges help to protect the health of women by

[12] June Medical LLC v. Russo, 591 U.S., 018-1323, p.6 (2020).
[13] *Id.*

ensuring that physicians who perform abortions meet a higher standard of competence than is shown by the mere possession of a license to practice."[14] This evidence, coupled with the "wide discretion" Alito believed should be afforded to the legislature in this case, led him to conclude that the case should be remanded and that *Hellerstedt* should be overturned.

Analysis of the Court's Decision

Evaluation

Stare decisis is the notion that the Court must adhere to previous rulings and precedents. This is essential to uphold consistent and evenhanded legal principles free from political influence.[15] Although it is important to look at past cases critically and overturn them when necessary (i.e., *Plessy v. Ferguson* (1896)), the Court cannot simply reverse a previous decision if there has been a shift of ideology in the Court. Accordingly, it is "not enough that five Justices believe a precedent wrong," as in order to reverse a decision, significant justification must be demonstrated.[16]

Based on the principle of *stare decisis*, the plurality opinion was the proper application of the precedent set in place, particularly regarding the undue burden standard. Although the dissent, specifically Justice Thomas' dissent, advocated for the overturn of *Casey*, the requirements for *stare decisis* were not met. Thomas claimed that *Casey* "creat[ed] the right to abortion out of whole cloth," but that alone does not outweigh the duty of the Court under *stare decisis* to treat like cases alike.[17] Since Act 620 in the case at hand is nearly identical to the Texas law in *Hellerstedt*, the precedent can clearly be applied.

---

[14] June Medical LLC v. Russo, 591 U.S., 018-1323, p.5 (2020).
[15] Adam Liptak, "Supreme Court Strikes Down Louisiana Abortion Law, With Roberts the Deciding Vote," New York Times, June 29, 2020, https://nytimes.com/2020/06/29/us/supreme-court-abortion-louisiana.html.
[16] Knick v. Township of Scott, 588 U.S. 17-647. (2019).
[17] June Medical LLC v. Russo, 591 U.S., 018-1323, p.2 (2020).

There was a clear demonstration that Louisiana's law created substantial obstacles and undue burdens to abortion access. The requirement would have closed three of five abortion clinics, leaving two providers: one in Shreveport, and the other in New Orleans. However, the doctor in Shreveport testified that they would shut down should this occur, due to their fears for safety and an increase in their workload. Thus, there would be only one doctor remaining in Louisiana performing abortions in the early stages of pregnancy and none for abortions between seventeen to twenty-one weeks of pregnancy. The district court heard further testimony from this last remaining doctor that the maximum number of abortion cases that they could see in one year was three thousand, or thirty percent of demand. The Court correctly concluded that the closure of the majority of clinics would inevitably result in longer wait times and overcrowding.[18] Moreover, some patients would likely have to travel hundreds of miles to access an abortion provider.

Further, Louisiana's law would have been the direct cause of the undue burden. The district court monitored the efforts of four doctors, who repeatedly tried and failed to obtain admitting privileges at thirteen hospitals over the course of a year and a half. Breyer noted that there was direct evidence these applications "were denied for reasons that had nothing to do with their ability to perform abortions safely."[19] Rather, hospital bylaws and criteria that discouraged granting admitting privileges to abortion providers, in combination with the effect of Louisiana's law, were the reason that doctors were unable to meet these requirements.

Chief Justice Roberts suggested that the original *Casey* standard would be preferable due to its supposed lack of judicial subjectivity. Yet, the *Casey* standard, which focuses on whether

---

[18] Amy Howe, "Opinion Analysis: With Roberts Providing the Fifth Vote, Court Strikes Down Louisiana Abortion Law," SCOTUSblog, June 29, 2020, https://scotusblog.com/2020/06/opinion-analysis-with-roberts-providing-the-fifth-vote-court-strikes-down-louisiana-abortion-law/.
[19] *Id*.

an undue burden exists in the path of a woman seeking an abortion, still involves judicial interpretation. Roberts criticized the balancing element, stating that it would elevate judges to the status of legislators. In rejecting the balancing test, Roberts suggested that *Casey* should be applied in a more straightforward manner, by merely requiring a demonstration of a substantial obstacle. However, the very notion of "undue," along with the definition of an "undue restriction," established by the Court as one with "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion," calls for the exercise of judicial discretion. There is a lack of precision in this test, which empowers judges in the same way that Roberts takes issue with the balancing test.[20] Thus, the plurality was correct in weighing the purported benefits of the law against the resulting burdens.

The plurality's use of the balancing test additionally ensures that the state is acting within its powers and interests. The district court found no evidence that patients would have better outcomes if admitting privileges were required.[21] Roberts advocated for the courts to simply look for a legitimate purpose in adopting the regulation, and subsequently determine whether it creates a substantial obstacle.[22] However, absent the benefits for women's health, there is no reason to impose unnecessary barriers on access to abortion. As such, simply looking for a substantial obstacle would not suffice. Removing the claimed benefits from consideration would ignore the very purpose of permitting state regulation in the first place, which is explicitly for "protecting the woman's own health and safety" and potential life.[23] In turn, weighing the burdens and benefits is essential to recognizing the two crucial matters of a woman's interests in

[20] Jane Schacter, "Symposium: June Medical and the Many Faces of Judicial Discretion," SCOTUSblog, June 30, 2020, https://scotusblog.com/2020/06/june-medical-and-the-many-faces-of-judicial-discretion/.
[21] *Id.*
[22] Cynthia Yee-Wallace, "Symposium: Chief Justice Roberts Reins in the Cavalry of Abortion Providers Charging Toward the Elimination of Abortion Regulation," SCOTUSblog, June 29, 2020, https://scotusblog.com/2020/06/symposium-chief-justice-roberts-reins-in-the-cavalry-of-abortion-providers-charging-toward-the-elimination-of-abortion-regulation/.
[23] *Roe v. Wade*, 410 U. S. 113 (1973).

dignity, autonomy, and equality, as well as the state's interest in protecting health and potential life.

The dissenting opinions pointed toward an initial flaw in the decision in *Hellerstedt*, yet the position failed to take into account the importance of *stare decisis*. By ignoring precedent simply when there is an ideological shift in the majority of the Court, it undermines the Court as a whole.[24] Aside from this, there was not sufficient change in circumstance or societal understanding of the two cases for the overturning of a case to be justified.

Broader Implications

Although *June Medical* (2020) may appear as a win for abortion access facially, Roberts' concurrence opened the door for states to further regulate abortion within the boundaries of the *Casey* standard. *Roe v. Wade* first conferred the strict scrutiny standard upon a woman's reproductive choice. Establishing a trimester framework, the Court required the state to provide justification for any interferences with abortion by demonstrating a compelling interest. Regulations on pre-viability abortions were limited to those that narrowly promoted maternal health. However, *Casey* replaced *Roe* (1973)'s standard with the more lenient undue burden standard, holding that abortion restrictions are unconstitutional if they constitute a substantial obstacle.[25] This weaker standard resulted in numerous states passing abortion restrictions. Supporters of protecting abortion rights were frustrated because the *Casey* standard "permitted anti-abortion politicians to pass medically unnecessary laws intended only to restrict abortion and shame those who sought abortion care."[26] *Hellerstedt* further clarified the *Casey* standard, and the dissenting justices in *Hellerstedt* criticized it for reimagining the undue burden standard

[24] Howe, "Argument Analysis."
[25] Sonia M. Suter, "June Medical Services v. Russo: A Temporary Victory for Reproductive Rights," The George Washington Law Review, September 5, 2020, gwlr.org/june-medical-services-v-russo-a-temporary-victory-for-reproductive-rights/.
[26] Borchelt, "Symposium."

and transforming it into strict scrutiny. However, the cost inquiry introduced by the balancing test made it easier to invalidate abortion restrictions that presented no legitimate purpose. Following *Hellerstedt,* abortion providers filed lawsuits in various states, seeking to invalidate abortion regulation laws. Abortion opponents believed that this was reminiscent of the post-*Roe* era when "essentially no abortion regulations could be upheld if they regulated abortion with the first two trimesters of pregnancy."[27]

Therefore, *June Medical* is an important case as it once again reverses course through Chief Justice Roberts' recommendation of moving back to the *Casey* standard. Although *June Medical* sided with the abortion providers challenging the law, the result was a plurality. Because it is a plurality instead of a majority opinion, the circuit courts have the discretion in giving weight to either the plurality opinion or the dissenting opinion when deciding future cases. Some suggest that as established in *Marks v. United States* (1977), "[t]he holding of the Court may be viewed as that position taken by those [m]embers who concurred in the judgments on the narrowest grounds." In this scenario, Chief Justice Roberts' concurrence would be the most significant addition to abortion jurisprudence from this case.[28] Opponents of abortion acknowledge that had the *Hellerstedt* balancing test prevailed, "abortion jurisprudence would have been drastically transformed."[29] They recognize that very few state regulations could pass this standard, thereby granting trial courts "unbridled discretion to determine that a law must provide sufficient judicially perceived benefits before it [can] be upheld."[30] Therefore, *June Medical* is significant as it halts the charge of pro-choice groups toward eliminating abortion regulations. Another significant element of the case is that *June Medical* departed from the

[27] *Id.*
[28] Seth Smitherman, "A Circuit Split Emerges on Post-June Medical Abortion Standards," The Federalist Society, December 7 2020, fedsoc.org/commentary/fedsoc-blog/a-circuit-split-emerges-on-post-june-medical-abortion-standards.
[29] *Id.*
[30] *Id.*

wait-and-see approach in *Hellerstedt*. Whereas in that case, the Court invalidated Texas' law after it had taken effect and the number of abortion providers in the state reduced drastically, *June Medical* involved a challenge to a law whose consequences had not been enforced, due to a restraining order.

The outcome of *Planned Parenthood v. Indiana State Department of Health* (2019), a case concerning a law in Indiana that required eighteen hours between a state-mandated ultrasound and abortion procedure, might provide an indication of how *June Medical* will be applied going forward. Before the Supreme Court remanded this case, the 7th Circuit Court concluded that Indiana was unable to produce credible evidence that the eighteen-hour requirement was "medically necessary or created opportunities for patients' meaningful reflection."[31] However, following Chief Justice Roberts' concurrence in *June Medical,* purported benefits may no longer be necessary to prove. In light of this return to the *Casey* standard, a "patently pretextual assertion that a state was attempting to protect a woman's health by restricting access to abortion" would be upheld so long as it did not constitute a substantial obstacle.[32] Therefore, as *Planned Parenthood* (2019) moves forward, Indiana may only be required to demonstrate an interest in providing patients with information and time for reflection, regardless of whether or not patients truly learn more about their decision.

Chief Justice Roberts' concurrence invites further abortion regulations and even suggests a potentially weaker standard, which will likely result in states attempting to test these new boundaries. In a footnote in his opinion, Roberts specifies that his opinion solely pertains to the Louisiana admitting privileges requirement, thereby supporting Justice Alito's dissenting opinion

[31] Rachel Rebouche, "Abortion Restrictions After June Medical Services," The Regulatory Review, University of Pennsylvania Law School, January 5 2021, theregreview.org/2020/08/04/rebouche-abortion-restrictions-june-medical/.
[32] Bernadette Meyler, "Retaining Stare Decisis in June Medical Services v. Russo," Stanford Law School, June 30, 2020, law.stanford.edu/2020/06/30/retaining-stare-decisis-in-june-medical-services-v-russo/.

that "the validity of admitting privileges laws 'depend[s] on numerous factors that may differ from State to State.'"[33] He also acknowledges that changing factual and legal circumstances may require a departure from *stare decisis*, suggesting that this is not absolute. Thus, this may encourage anti-abortion legislators to introduce admitting privileges, rather than halting similar requirements emerging in other states. Furthermore, although Roberts supported the continuation of *Casey's* substantial burden standard, proponents of protecting abortion rights view this as a "smoke screen" as Roberts has yet to meet an obstacle to abortion that he considers substantial. In his concurrence, Roberts noted that demonstrating a substantial obstacle requires more than merely showing that the law makes it more difficult to obtain an abortion. Although Roberts advocated for a return to the *Casey* standard, he noted that there had been no request to revisit the constitutional validity of the undue burden standard created by *Casey* entirely. This comment suggests that the Court may welcome a challenge to the standard, and favor one that is more lenient toward abortion restrictions.[34]

Abortion opponents view *June Medical* as a victory and hail Roberts' concurrence for casting aside the uniform interpretation of *Hellerstedt*, saving abortion precedent, and preserving the ability of the states to regulate abortion. The removal of the balancing test benefits states as the weight of purported benefits against the burdens is no longer taken into consideration. Thus, even if a state provides no evidence that an abortion regulation would benefit health, the restriction may be upheld, so long as it is not a substantial burden. This leeway will likely result in emerging abortion restrictions, and the increased litigation may result in judges upholding abortion restrictions that should be struck down, in defiance of *Hellerstedt*.

[33] *Id.*
[34] Borchelt, "Symposium."

Recently, the Supreme Court heard arguments on *Dobbs v. Jackson Women's Health Organization*. This case brought to fruition many worries abortion proponents had concerning *June Medical*. In 2018, a Mississippi law called the Gestational Age Act banned all abortions after fifteen weeks of pregnancy. Argumentation within this case centered around Jackson Women's Health Organization—the only abortion provider in Mississippi. Particularly, *Dobbs* focused on the difficulty of applying *stare decisis* within the context of *Planned Parenthood v. Casey* with Mississippi arguing that the undue burden standard applies to outright bans on abortion, rather than legislation on viability. Jackson Women's Health took the position that the undue burden standard requires that the fifteen week mark of viability is an undue burden to those seeking an abortion.[35] The Supreme Court seems poised to overturn many abortion rights which were enumerated in *Roe v. Wade.*[36] The decisions in June Medical set the stage for *Dobbs*, serving as a stepping stone for the Supreme Court to be much more stringent on abortion cases. This has been a tracked trend since *Casey* that can make abortions even more difficult to access in the US.[37] The use of the undue burden standard first seen in *Casey*, expanded upon in *Hellerstedt*, applied in *June Medical*, and now seen as even stricter in *Dobbs* may further be used to make it almost impossible for Americans to access their right to abortion.

[35] *Dobbs v. Jackson Women's Health Organization Oral Arguments,* Docket Number 19-1392. Dec 1, 2021. https://supremecourt.gov/oral_arguments/audio/2021/19-1392.
[36] Amy Howe, "Argument Analysis."
[37] *Id.*

References

Borchelt, Gretchen. "Symposium: June Medical Services v. Russo: When a 'Win' is not a Win." SCOTUSblog. June 30, 2020. https://scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/.

Constitutional Accountability Center. "June Medical Services L.L.C. v. Russo: Case Summary." 2021. https://theusconstitution.org/litigation/june-medical-services-l-l-c-v-gee/.

Dobbs v. Jackson Women's Health Organization Oral Arguments, Docket Number 19-1392. Dec 1, 2021. https://supremecourt.gov/oral_arguments/audio/2021/19-1392.

Howe, Amy."Opinion Analysis: With Roberts Providing the Fifth Vote, Court Strikes Down Louisiana Abortion Law." SCOTUSblog. June 29, 2020. https://scotusblog.com/2020/06/opinion-analysis-with-roberts-providing-the-fifth-vote-court-strikes-down-louisiana-abortion-law/.

Howe, Amy. "Argument Analysis: Justices grapple with Louisiana Abortion Law," SCOTUSblog. March 4, 2020. https://scotusblog.com/2020/03/argument-analysis-justices-grapple-with-louisiana-abortion-law/.

Howe, Amy. "Argument Analysis: Majority of Court Appears Poised to Roll Back Abortion Rights." SCOTUSblog. December 1, 2021. https://scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippis-ban-on-most-abortions-after-15-weeks/.

June Medical LLC v. Russo, 591 U.S., 018-1323, (2020).

Liptak, Adam. "Supreme Court Strikes Down Louisiana Abortion Law, With Roberts the Deciding Vote." New York Times. June 29, 2020, https://nytimes.com/2020/06/29/us/supreme-court-abortion-louisiana.html.

Meyler, Bernadette. "Retaining Stare Decisis in June Medical Services v. Russo." Stanford Law School, June 30, 2020. law.stanford.edu/2020/06/30/retaining-stare-decisis-in-june-medical-services-v-russo/.

Parks, Benjamin. "Burdens, Benefits, or Both? The Impact of Chief Justice Roberts's June Medical Concurrence on Courts' Analyses of Abortion Regulations." Louisiana Law Review, 2014. https://lawreview.law.lsu.edu/2021/03/12/burdens-benefits-or-both-the-impact-of-chief-justice-robertss-june-medical-concurrence-on-courts-analyses-of-abortion-regulations/.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 878 (1992).

Rebouche, Rachel. "Abortion Restrictions After June Medical Services." The Regulatory Review. University of Pennsylvania Law School. January 5, 2021. theregreview.org/2020/08/04/rebouche-abortion-restrictions-june-medical/.

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

Schacter, Jane. "Symposium: June Medical and the Many Faces of Judicial Discretion." SCOTUSblog. June 30, 2020. https://scotusblog.com/2020/06/june-medical-and-the-many-faces-of-judicial-discretion/.

Smitherman, Seth. "A Circuit Split Emerges on Post-June Medical Abortion Standards." The Federalist Society, December 7, 2020. fedsoc.org/commentary/fedsoc-blog/a-circuit-split-emerges-on-post-june-medical-abortion-standards.

Suter, Sonia M. “June Medical Services v. Russo: A Temporary Victory for Reproductive Rights.” The George Washington Law Review, September 5, 2020. gwlr.org/june-medical-services-v-russo-a-temporary-victory-for-reproductive-rights/.

Vogtman, Graham. “A Testament to Precedent: June Medical Services v. Russo.” Benchwarmers. July 5, 2020. benchwarmersblog.com/2020/07/04/a-testament-to-precedent-june-medical-services-v-russo/.

Woman's Health v. Hellerstedt, 579 U.S., 136 S. Ct. 2292; 195 L. Ed. 2d 665 (2016).

Yee-Wallace, Cynthia. “Symposium: Chief Justice Roberts Reins in the Cavalry of Abortion Providers Charging Toward the Elimination of Abortion Regulation.” SCOTUSblog. June 29, 2020. https://scotusblog.com/2020/06/symposium-chief-justice-roberts-reins-in-the-cavalry-of-abortion-providers-charging-toward-the-elimination-of-abortion-regulation/.

California's Criminal Gang Enhancements: The STEP Act

By Mia Machado

Mia Machado is a student at the University of California, Davis. She is studying Political Science and Luso-Brazilian Studies. Outside of her studies, Mia is passionate about human rights, journalism, and athletics.

As gang violence rates continue to rise, gang activity has proven all but impervious to legislative attempts to curb its activity. This paper analyzes anti-gang legislation in California, focusing primarily on the Street Terrorism Enforcement and Prevention (STEP) Act which made it a substantive offense to be a member of a criminal street gang and added enhancements for offenses committed for the benefit of a gang. It discusses the legislative purpose behind the STEP Act and the circumstances that led to its enactment, and examines how the STEP Act has expanded significantly from its original legislative intent. It explores how the legislation has succeeded in providing prosecutors a powerful tool to target gang activity, but how it has also fallen short of its goal to curb overall gang violence. This paper also looks at the STEP Act's history of implementation challenges given the statute's broad language, and tackles its unintended consequences on the criminal court system as well as its disproportionate effect on California's minority communities. Finally, this paper suggests possible legislative reforms and alternative methods for combating criminal gang activity, such as prioritizing intervention and rehabilitation over harsher and longer prison sentences.

Introduction

The existence of gangs in the United States has been documented as far back as 1873.[1] Now, gangs are present in all fifty states, with the National Gang Center reporting more than 750,000 gang members across the nation. While their presence is predominantly felt on

[1] US Department of Justice Bureau of Justice Assistance, History of Street Gangs in the United States, by James C. Howell, May 2010, 1.

American streets, gangs are also found throughout schools, federal and state prisons, and even across many branches and ranks of the military.[2] However, with close ties to the illegal drug trade and often heavily armed, the presence of gangs has "translated into this country's most significant crime problem."[3]

Beginning in the 1980s, many legislatures turned to anti-gang legislation as a possible solution. Anti-gang legislation, often justified due to the difficult nature of prosecuting gang members, provides district attorneys with new tools to effectively prosecute their criminal activity and alleviate some of the previous barriers. California became the first state to adopt this type of legislation with the passage of California's Street Terrorism Enforcement and Prevention (STEP) Act in 1988.[4] Whether the STEP Act actually achieves its goal of curbing criminal gang activity, however, "has been hotly contested."[5] As the STEP Act's efficacy, broad language, and disproportionate effect on minority communities has come under scrutiny by many experts, it is time that the STEP Act be reexamined.

The STEP Act, once seen as a promising solution to California's gang violence crisis, has proven itself ineffective, unjust, and an interpretational nightmare. After subsequent revisions in the 1990s, the STEP Act strayed from the legislation's original intent to be a narrowly applied statute, making it easier to use and undermining the safeguards put in place to check the potential

---

[2] Scott H. Decker, "Legislative Approaches to Addressing Gangs and Gang Related Crime," in *The Handbook of Gangs* (Hoboken, NJ: John Wiley & Sons, 2015), 345, https://search.library.ucdavis.edu/permalink/f/1ns6oht/TN_wilbooks10.1002/9781118726822.ch19.

[3] H. Mitchell Caldwell, "Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution," University of Pennsylvania Journal of Law and Social Change 18, no. 4 (2015), 344, https://heinonline.org/HOL/P?h=hein.journals/hybrid18&i=357.

[4] Samuel DiPietro, "STEPping into the "Wrong" Neighborhood: A Critique of the People v. Albillar's Expansion of California Penal Code Section 186.22(a) and a Call to Reexamine the Treatment of Gang Affiliation," *The Journal of Criminal Law and Criminology*, no. 623 (2020). https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss3/6/.

[5] Erin R. Yoshino, "California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners," *Southern California Review of Law and Social Justice* 18, no. 1 (Fall 2008), 140, https://heinonline.org/HOL/P?h=hein.journals/scws18&i=119.

abuse of power by prosecutors. Despite the statute's expansion, gang violence in California continues to rise. While it succeeds in providing prosecutors better tools to prosecute gang members, the harsher sentences received through gang enhancements do little to prevent gang involvement, while also decreasing an individual's chances at rehabilitation. Moreover, the STEP Act's language is overly broad, making it almost impossible for a consensus on when the statute should appropriately be applied. The STEP Act has had significant unintended consequences on the criminal court system and has disproportionately targeted and harmed communities of color. Legislators should instead look to alternative methods for combating criminal gang activity, such as investing in tactics of intervention and rehabilitation.

PART I: The STEP Act

The Passage of the STEP Act and Its Policy Goals

For decades, Los Angeles has been an "epicenter for gang activity" in California and across the United States. During the 1980s, when California observed an explosion of gang violence, an article in *Time* "estimated that there were approximately 350 gangs comprised of 20,000 to 30,000 members in the Los Angeles area alone."[6] With this rise in gang activity came a disproportionate spike in crime. In 1986, Los Angeles County alone accounted for 328 murders, with this number only increasing the following year by eighty percent.[7] Confronted with this "state of crisis," the California State Legislature passed its first anti-gang bill on September 24, 1988, known as the Street Terrorism and Enforcement Act, or the STEP Act. [8]

The STEP Act, codified in Section 186.22 of the California Penal Code, contained two key sections. The first section made it a substantive crime for "active participation in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of

[6] Caldwell, "Reeling in Gang," 345.
[7] Yoshino, "California's Criminal," 118.
[8] Caldwell, "Reeling in Gang," 346.

criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang."[9] The second section imposed enhancements for crimes committed "for the benefit of, at the direction of, or in association with any criminal street gang."[10] An enhancement, as included in the second section of the STEP Act, imposes additional prison time on a defendant's baseline sentence.[11] As a result of the enhancement, defendants can receive sentences more than three times the length of what they would have served for the underlying offense.[12] Though the STEP Act was initially drafted with a sunset clause that would repeal the Act in 1992, it has since been extended indefinitely.[13] Following California's lead, all fifty states and the District of Columbia have passed their own forms of anti-gang measures. Thirty-one of those states now have laws that enhance penalties for gang-related crimes, while twenty-eight others have laws focused instead on "gang prevention." Some states, including Louisiana, Georgia, and Missouri, have passed anti-gang laws that "are nearly carbon copies of California's STEP Act." Others, such as Florida, South Dakota, and Illinois "have moved in new directions," focusing on enhancements for gang-related felonies, but not punishing for participation.[14] However, since its enactment, the California STEP Act has undergone a dramatic transformation.

[9] *Id.*, 347.
[10] *Id*., 348.
[11] Franklin J. Sigal, "When the California Street Terrorism Enforcement and Prevention Act Stumbles into Penal Code Limits," *Golden Gate University School of Law* 38 (2007), https://digitalcommons.law.ggu.edu/ggulrev/vol38/iss1/1.
[12] Van Hofwegen and Sary Lynn, "Unjust and Ineffective: A Critical Look at California's STEP Act," *Southern California Interdisciplinary Law Journal* 18 (2009), https://search.library.ucdavis.edu/permalink/f/1ns6oht/TN_gale_legal209505854."
[13] Caldwell, "Reeling in Gang," 347.
[14] *Id*., 348.

Part II: How the STEP Act Has Expanded From Its Original Intent

During the passage of the STEP Act, the California legislature "took pains to indicate the STEP Act was a tool to be used cautiously by prosecutors to take down serious criminals."[15] They were careful to limit its scope, ensuring that any prosecution under the law would be "very difficult to prove except in the most egregious cases."[16] Understanding possible prosecutorial abuses if the STEP Act was too easy to apply, the original language limited prosecution to defendants who had provable knowledge of two or more prior serious felonies committed by other members of their gang. The original legislation also ensured that the enumerated offenses a gang member needed to have knowledge of were limited to seven serious felony offenses: "assault with a deadly weapon; robbery; homicide or manslaughter; sale, manufacture, and possession for sale of narcotics; shooting at an inhabited dwelling or occupied vehicle; arson; and witness and victim intimidation."[17]

However, the STEP Act soon succumbed to the "tough on crime" era that succeeded its passage. Assisted by "the California legislature, the electorate, and a particularly punitive form of judicial activism," the STEP Act was "continuously revised and expanded," moving well beyond its deliberately narrow scope of enforcement.[18] The subsequent revisions undermined the intended safeguards of the STEP Act that aimed to place a check on prosecutorial power, and prevent the overuse or abuse of the statute. For example, the severity of STEP Act's sentencing increased significantly.[19] Originally, the imposition of an enhancement cost a defendant at most an additional one to two years. In 1994, however, the low term of one year was increased to

---

[15] Ryan Nelson, "Overdue Justice: People v. Valenzuela and the Path Toward Gang Prosecution Reform." *Loyola of Los Angeles Law Review* 53, no. 6 (Winter 2020). https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=3075&context=llr.
[16] Caldwell, "Reeling in Gang," 347.
[17] *Id*.
[18] Nelson, "Overdue Justice," 501.
[19] Yoshino, "California's Criminal," 119.

sixteen months. In 2000, terms were increased even more, adding an additional two to four years. If a crime was considered "serious" or "violent" under the Penal Code, gang members could receive an enhancement term as high as five or ten years, or even a life sentence.[20]

Later, the California Supreme Court's *People v. Gardeley* (1996) decision effectively made it easier for prosecutors to establish a credible case for the STEP Act. *Gardeley* (1996) ruled that prosecutors could now use a defendant's own crime as one of the two prerequisite offenses they needed to have known about to use the STEP Act. After the ruling, if a defendant "knew of one previous incident, but was charged with two of the serious crimes on the list found in the statute, one of those two could serve as the foundation for meeting the knowledge requirement."[21] The ruling diverged from the original intent of the STEP Act to provide defendants with a "notice of liability" before the statute is applied, by essentially reducing the crime knowledge requirement to a single incident. In 2000, the California electorate successfully passed Proposition 21, which expanded the enumerated crimes listed in the STEP Act. Now the list of originally seven offenses has grown to thirty-three. Instead of only applying to serious crimes such as robbery or manslaughter, the list includes relatively minor crimes such as felony vandalism.[22] The STEP Act's scope was expanded even further after an appellate decision in *People v. Albillar* (2008), that ruled the predicate acts required to issue a gang enhancement do not have to be gang-related, nor do they have to be gang members at the time of commission.[23] Having discussed how the STEP Act has expanded and transformed, we can now assess the efficacy of the law, and the outcomes of its implementation.

[20] Yoshino, "California's Criminal," 19.
[21] Nelson, "Overdue Justice," 507.
[22] Caldwell, "Reeling in Gang," 351.
[23] DiPietro, "STEPping into," 632.

Part III: Efficacy Analysis—How the STEP Act Has Succeeded or Fallen Short of Its Original Goals

Positive Outcomes of Its Implementation

The STEP Act sought to deter gang violence through the imposition of harsher sentences for gang activity. However, when prosecuting gang members, prosecutors encounter a number of unique issues. Often the most problematic obstacle they face is the issue of gang intimidation. Given the amount of influence many gangs have over the neighborhoods where they reside, witnesses and victims are oftentimes too afraid to cooperate with the police or prosecutors and will reluctantly refuse to file criminal charges or testify against a known gang member. As a tactic of intimidation, gang members are known to sit or stand outside a courthouse or courtroom where a fellow gang member is on trial and "engage in tactics such as taking or pretending to take pictures of witnesses."[24] Oftentimes prosecutors do not have the available resources to protect victims or witnesses from the threat of retaliation. There also exists a code of silence among gang members, "along with a similar neighborhood culture that often discourages 'snitching.'"[25] Given these difficulties, the passage of the STEP Act equipped prosecutors with a powerful tool to prosecute gang members previously unavailable to them under traditional criminal laws and statutes. For example, because sentence enhancements under the STEP Act can be applied to any type of offense, the prosecutor only needs to demonstrate that the offense "was committed for the benefit of the gang or at the direction of the gang" to secure a harsher sentence.[26]

[24] Decker, "Legislative Approaches," 354.
[25] *Id*., 354.
[26] *Id*., 354.

However, the passage of anti-gang legislation such as the STEP Act granted advantages to prosecutors that "often exceeds the tools available to the defense."[27] While obstacles such as gang intimidation will make it difficult for prosecutors to prove a defendant's underlying felony count, the prosecutor's ability to now introduce a gang allegation can often cause jurors to become highly prejudicial when deciding on a verdict. A gang allegation, however loose, has a direct impact on a defendant's chances of being found guilty.[28] This dynamic is discussed further in Part V's evaluation of the STEP Act's unintended consequences.

Where the STEP Act Falls Short

Whether the STEP Act successfully achieves its goal of curbing criminal gang activity remains largely disputed.[29] While taking effect in 1988, the STEP Act only came into regular use once the severity of its penalties were increased in the 1990s.[30] Despite California's more aggressive use of the statute since its expansion, criminal gang activity continues to rise. Gang scholars have also confirmed that the rates of gang violence have continued to rise at "exceptional levels over the past decade despite the remarkable overall crime drop."[31] From 1998 to 2007, the California Department of Justice reported a 16.1 percent increase in the number of gang related homicides.[32] Other estimates predict that Los Angeles County's gang violence "claims an average of one life per day, and costs California taxpayers more than two billion dollars annually."[33] As Los Angeles County "continues to be recognized as the 'gang capital' of

[27] Yoshino, "California's Criminal," 134.
[28] Yoshino, "California's Criminal," 136.
[29] *Id*., 140.
[30] Caldwell, "Reeling in Gang," 351.
[31] Decker, "Legislative Approaches," 345.
[32] California Department of Justice, "Homicide in California: 2007," Office of the Attorney General, https://oag.ca.gov/all/cjsc/ homicide07-full-report.
[33] Caldwell, "Reeling in Gang," 346.

the United States," it is likely that anti-gang legislation such as the STEP Act has been of little help in solving the problem.[34]

These disappointing trends are likely because the STEP Act focuses on the suppression of gang violence through longer and harsher sentences, rather than attempting to disincentivize gang affiliation. Experts suggest that longer prison sentences do not reform gang members and do not incentivize them "to leave their gangs, or lives of crime."[35] While incarcerating gang members temporarily removes them from neighborhoods, it does little to disrupt their gang affiliation. In fact, due to the prevalence of gangs in prison, many incarcerated gang members find themselves unable to break ties and focus on rehabilitation. Longer incarceration terms have even been found to "decrease the probability that the member will eventually exit the gang, and may even increase gang ties," as members lean on their gangs to cope with incarceration.[36] After surviving a long prison sentence, some gang members even earn newfound respect and authority from their fellow gang members, which often increases or intensifies their continued involvement.[37]

Part IV: Implementation Challenges of the STEP Act

Statutory Interpretation Challenges

Since its passage, the STEP Act has encountered various statutory interpretation challenges, with the California Supreme Court even referring to the STEP Act as a "thicket of statutory construction issues."[38] Statutes are meant to be "written in such a way that the average, reasonable person would be able to understand what types of behaviors the statute proscribes."[39] However, the STEP Act's definitions, such as "member of criminal street gang," "pattern of

[34] *Id*., " 351.
[35] Hofwegen, "Unjust and Ineffective," 10.
[36] Decker, "Legislative Approaches," 360.
[37] Hofwegen, "Unjust and Ineffective," 11.
[38] Yoshino, "California's Criminal," 122.
[39] Decker, "Legislative Approaches," 355.

criminal gang activity," and "specific intent to promote, further, or assist in any criminal conduct by gang members" have all been accused of being unconstitutionally vague and overbroad.[40] With such broad and ambiguous definitions, the STEP Act provides law enforcement insufficient guidance for when to apply its statutes, and is subject to inconsistency in its application across jurisdictions.[41]

Legal experts continue to struggle to provide needed clarity to the STEP Act, because "creating a bright line definition of a gang or gang member is a difficult and complicated task."[42] Many experts still disagree on what actually constitutes a gang, with "[l]aw enforcement, legislatures, and scholars frequently employ[ing] different definitions."[43] The problem is exacerbated by the various levels of involvement or commitment that gang members may have within a given gang.[44]

There also lies some ambiguity in determining what constitutes a "pattern of criminal activity." Under the STEP Act, for a group to be defined as a gang, prosecutors must find that members engage in a pattern of criminal activity. The courts have allowed this to be demonstrated either by "individual gang members committing a series of criminal acts over time or by multiple members committing one or more offenses in a single incident." However, critics argue that "allowing a 'pattern' of criminal activity to be demonstrated in a single time frame is unconstitutional."[45]

A third contested aspect of the STEP Act involves its gang enhancement statute and "whether a crime, even if committed by known gang members, was committed for the benefit of a gang." Oftentimes, gang members will be charged with an enhancement despite ambiguity

[40] Yoshino, "California's Criminal," 122.
[41] Decker, "Legislative Approaches," 355.
[42] Yoshino, "California's Criminal," 127.
[43] Decker, "Legislative Approaches," 355.
[44] Yoshino, "California's Criminal," 127.
[45] Decker, "Legislative Approaches," 356.

around the intent of the crime. Some estimates predict that at least fifty percent of violent crimes committed by gang members were falsely labeled as gang-related, "thereby rendering half of the charged gang enhancements in California courts inapplicable."[46]

Part V: Unintended Consequences of the STEP Act and Who It Hurts

Unintended Consequences on the Criminal Court System

The application of anti-gang legislation such as the STEP Act has produced a series of unexpected consequences on the dynamics of the court system. For example, the mere allegation of gang affiliation disrupts the dynamics of plea bargaining. When a defendant is arraigned on their charges, prosecutors will often offer a plea deal. A defense attorney will then provide a defendant advice on whether to accept the plea or take the case to trial. The introduction of gang enhancements undermines this dynamic and has "caused a drastic change in the advice that an attorney" gives their client. For example, in the case of "wobblers"—crimes that can be charged as either misdemeanors or felonies—prosecutors often become more unwilling to negotiate the charges as a misdemeanors, because gang enhancements can only be applied to felonies. As gang enhancements can increase a defendant's felony to a strike, under the Three Strikes Law, defense attorneys will often advise their client to decline the offer and take the case to trial.[47]

On the other hand, if any suspected gang activity is listed in the police report, defense attorneys may advise their clients to accept the prosecutor's offer, even if the case otherwise appears beatable. Defense attorneys understand that if the case proceeds to preliminary hearing, testimony may reveal gang activity or involvement, which may then lead the prosecution to add the gang enhancement.[48] The "mere possibility of having a gang enhancement added at the preliminary hearing" will cause a defense attorney to suggest accepting the plea because: gang

[46] Yoshino, "California's Criminal," 132.
[47] Yoshino, "California's Criminal," 138.
[48] *Id*., 139.

enhancements substantially increase a defendant's sentencing exposure; create prejudice during trial that often leads to the defendant's conviction; and leave the individual with the only defense being that they were a minor gang member.[49] According to Pepperdine Law Professor H. Mitchell Caldwell, "it is not unreasonable to suggest that the introduction of such gang evidence could be enough to result in a guilty verdict when its absence would otherwise lead to an acquittal."[50] Gang enhancements thus increase the likelihood that "many innocent people simply cannot gamble on fighting their cases."[51]

Outside of plea bargaining, gang allegations often create highly prejudicial trials, and turn a "group of jurors that otherwise would have been the most receptive to the defendant's case into skeptical and unforgiving adversaries."[52] If pursuing a gang enhancement, prosecutors will introduce evidence to court of the "defendant's affiliation—however loose—with a particular gang." Even when the jury is not convinced of a defendant's gang affiliation, the introduction of gang evidence affects the way the jury views the underlying felony count.[53] A 2014 study supported this conclusion by finding that of 212 participants in a simulated trial, "the introduction of testimony indicating any sort of association with a gang, even a weak one, can have a significant prejudicial effect on jury verdicts."[54] Further, the evidence prosecutors introduce to prove the elements of a gang enhancement are often "extremely prejudicial." To demonstrate the gang's predicate acts, "the prosecution's expert witness will often testify about a gang''s most heinous and violent crimes."[55] Defendants are also often unable to find expert

[49] *Id*., 138.
[50] Caldwell, "Reeling in Gang," 365.
[51] Yoshino, "California's Criminal," 139.
[52] *Id*., 144.
[53] Caldwell, "Reeling in Gang," 367.
[54] *Id*., 368.
[55] Yoshino, "California's Criminal," 144.

witnesses to rebut the prosecution, or their expert witness's testimony is denied on account of "lack of relevance."[56]

An Evaluation of Equity: Who the STEP Act Hurts

While the STEP Act increases the ability of prosecutors to address gang violence, it often results in the stigmatization and over-incarceration of minority communities and communities of color.[57] Recent trends reveal that white youth compose the largest group of adolescent gang members, and that "Caucasians are the prominent racial group for all gangs formed after 1991."[58] Despite this, studies show that in its application, the STEP Act "overwhelmingly led to the incarceration of individuals belonging to minority racial groups."[59] Scholars suggest that the disproportionate prosecution of people of color stems from the fact law enforcement agencies "frequently and inaccurately perceive that gangs are a primarily urban, minority, and male problem, causing them to ignore white involvement" and disproportionately focus on people of color.[60] This bias is seen in the tendency of law enforcement to label minority juveniles as gang members with little real evidence of gang involvement, while simultaneously refusing to recognize primarily Caucasian groups as gangs, even with the sufficient criteria met to apply the STEP Act. Further, law enforcement is extended broad discretion in determining who to label and document as a gang member.[61]

In 1997, California implemented the Cal/Gang database in an attempt to better identify and track gang members across the state.[62] The Cal/Gang database contains information gathered from Field Interview cards (FI cards) that are completed by law enforcement officers who

---

[56] *Id*.
[57] Decker, "Legislative Approaches," 360.
[58] Hofwegen, "Unjust and Ineffective," 4.
[59] *Id.*
[60] *Id.*
[61] *Id*., 7.
[62] Yoshino, "California's Criminal," 118.

encounter a person who is either a known, or suspected to be a gang member.[63] While "each jurisdiction has its own criteria and guidelines for how and when individuals are added to these databases," departments generally have loose requirements for determining membership, such as being seen with a known gang member, or wearing clothes that resemble gang apparel. If an individual is added to a gang database, they do not receive a notification, or a chance to challenge the identification. Further, "FI cards are not only issued for arrests, but also for routine stops by neighborhood gang cops without probable cause."[64] Due to the often "inaccurate perception of gangs on the part of law enforcement officials," scholars assert that databases do not accurately reflect gang involvement, and instead disproportionately target minority youths. This significantly increases the risk that people of color are "disproportionately arrested and incarcerated at rates that do not reflect their actual participation in gangs."[65] In 2000, the California database "contained entries for over 250,000 individuals, with nearly ninety percent of Fl cards being minority youths." In Los Angeles County, approximately two-thirds of the database were Latinx, and one-third were African American.[66] Given poor monitoring of databases, much of the content has become increasingly out of date, with few to no procedures to get off or remove one's name from the list.[67] Further, prosecutors often use the information from the Cal/Gang database to then support possible gang enhancement charges on defendants.

Part VI: Reforms and Alternatives to the STEP Act

It is indisputable that the rising gang violence in California and across the United States is a problem that needs to be addressed. However, gang violence has proven largely immune to laws such as the STEP Act that are designed to combat it. Instead, the STEP Act has raised a

[63] *Id*., 127.
[64] Decker, "Legislative Approaches," 361.
[65] Hofwegen, "Unjust and Ineffective," 6.
[66] Yoshino, "California's Criminal," 128.
[67] Decker, "Legislative Approaches," 361.

number of concerns over its fairness and effectiveness, and should likely be reconsidered as the primary means of combating California's epidemic of gang violence. There are aspects of the STEP Act, as well as the criminal justice system as a whole, that could be rethought to better achieve our goals. The remainder of this paper will discuss proposals for reform and alternative solutions for addressing gang violence.

Decreasing Scope and Discontinuing Gang Enhancements

Due to the STEP Act's significant expansion in the 1990s, the statute has become "an area ripe for the abuse of prosecutorial discretion."[68] It is likely that a first good step for reform would be to reverse its expansion attempts and "bring the STEP Act back in line with its original intent."[69] Without a narrow scope and a more rigorous criteria for its application, there are few safeguards to limit the power of prosecutors and prevent the statute's overuse in relatively minor crimes. As it stands now, the STEP Act "serves as a blunt instrument rather than a careful deterrent against serious gang members."[70] However, a more meaningful step would be to discontinue the use of gang enhancements and rely on the current statutory ranges for criminal offenses alone as a sufficient method to hold gang members accountable and protect public safety. As previously mentioned, the extended terms received through gang enhancements do little to deter crime or rehabilitate gang members. In fact, according to Fordham Law Professor John Pfaff, there is strong empirical support that long sentences imposed by gang enhancements "provide little additional deterrence, often incapacitate long past what is required by public

[68] Caldwell, "Reeling in Gang," 363.
[69] Nelson, "Overdue Justice," 519.
[70] *Id.*

safety, impose serious and avoidable financial and public health costs in the process, and may even lead to greater rates of reoffending in the long run."[71]

Various counties across California have already heeded the warnings of experts and have taken action to discontinue the use of gang enhancements in their district attorney's offices. For example, on December 7, 2020, District Attorney George Gascon published a special directive with new policy plans pertaining to enhancements. He announced that the County of Los Angeles, the largest in California, would ban the further use of enhancements, including those of the STEP Act. Reinforcing previously discussed findings, Gascon asserted that sentencing enhancements are "a legacy of California's 'tough on crime' era" and need to be transitioned out of use. Gascon further maintained that "current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety."[72] According to a study conducted by the Stanford Computational Policy Lab on San Francisco's use of sentencing enhancements from 2005 to 2017, despite initially preventing crime through incarceration, "each additional sentence year causes a 4 to 7 percent increase in recidivism that eventually outweighs the incapacitation benefit."[73] Other district attorneys, such as San Francisco District Attorney Chesa Boudin, are following Los Angeles' lead. On February 22, 2020, Boudin released a policy directive announcing the office's termination of the use of enhancements, reiterating that original sentences for an underlying crime "are sufficient to protect public safety."[74]

---

[71] Los Angeles District Attorney's Office, *Special Directive: Sentencing Enhancements/Allegations*, by George Gascón, December 7, 2020, accessed June 4, 2021, https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf.

[72] Los Angeles District Attorney's Office, Special Directive, 3.

[73] *Id.*

[74] San Francisco District Attorney's Office, Policy Directive: Status Sentencing Enhancements, by Chesa Boudin, February 22, 2020, https://sfdistrictattorney.org/wp-content/uploads/2020/11/Status-Sentencing-Enhancements.pdf, 1.

Intervention and Rehabilitation

Historically, law enforcement and other government agencies have sought to combat gang violence by relying on tactics of suppression. The failure of the STEP Act to successfully decrease gang violence in California suggests that a "more effective strategy involves a focus on prevention and intervention strategies that address the reasons why gangs are formed and why they are able to maintain their membership levels."[75] Gang experts have long recognized that "in order to be truly effective, strategies need to be part of a multifaceted approach to solving the gang problem."[76] In addition to approaching the reform from a legislative lens, tactics to combat gang violence should be explored through strategies of intervention and rehabilitation.

Intervention

Combating gang violence by increasing prison sentences only acts to perpetuate "the cycle of gang membership by increasing the likelihood that children with incarcerated parents will turn to a gang for identity and belonging, due to the lack of familial support."[77] To support this, studies show that children who grew up with incarcerated fathers "are seven times more likely to go to prison themselves."[78] Further, forty-eight percent of the incarcerated population has at least one parent who has been incarcerated, and fifty percent of incarcerated youth "have a parent who is also currently behind bars."[79] A more effective way to approach gang activity is to "address the problems in low income and minority communities, where gang violence is most prevalent."[80] This may include the creation of community outreach and after school programs; the goal of these programs would be toprovide youth a space to foster a sense of community and

[75] Nelson, "Overdue Justice," 16.
[76] Decker, "Legislative Approaches," 364.
[77] Hofwegen, "Unjust and Ineffective," 18.
[78] *Id.*
[79] *Id*.
[80] Yoshino, "California's Criminal," 149.

to establish positive role models. Focusing on the issues that incentivize the initial entrance into gang participation will likely reduce long-term gang violence rates.[81]

Rehabilitation

As strategies of intervention focus on long-term success, ending the cycle of gang violence must also consist of an emphasis on rehabilitation, to address California's alarming recidivism rates among gang members. To promote opportunities for gang members to rehabilitate themselves during and after incarceration, "more resources should be devoted to education and vocational training within our state prisons."[82] While gang members often become increasingly hardened by their extended prison sentences, they also receive few educational and job training opportunities to prepare them for life once released. Upon release, formerly incarcerated individuals experience difficulty securing a job with a decent, livable wage and "often find themselves reverting back to crime on the streets."[83] Increasing their access to educational and job training opportunities within prisons will better prepare gang members for more opportunities for success.

This type of support should be available outside of the prison system as well, by increasing funding for organizations that provide formerly incarcerated individuals with support securing new jobs. An example of this type of program is Homeboy Industries, "a Los Angeles based gang intervention organization that helps former gang members find employment, [and] has been lauded for its efforts to help gang members leave the gang lifestyle."[84] They reportedly help an approximate three hundred individuals a year, many of whom are former gang members, secure prospective job opportunities.[85]

---

[81] *Id*.
[82] *Id*., 150.
[83] Hofwegen, "Unjust and Ineffective," 10.
[84] *Id.,* 19.
[85] *Id*.

Conclusion

The STEP Act has proven itself fundamentally unjust and ineffective. While doing little to disrupt California's upward trend of gang violence, the STEP Act leaves incarcerated populations worse off and more susceptible to reoffending or continuing their gang affiliations once released. The STEP Act does nothing to address a gang member's need for rehabilitation and relies on a carceral system with little or no systems in place to prepare incarcerated individuals for a successful life beyond bars. Additionally, strategies of anti-gang enforcement possess implicit biases that allow law enforcement to disproportionately target low-income communities and communities of color, while largely ignoring the same activities carried out by a significant population of white gang members. Even worse, the STEP Act's very definitions, even as simple as defining a gang member, remain alarmingly vague and ambiguous, allowing for the misinterpretation and poor application of the statute. When a prosecutor does choose to pursue a gang enhancement, the STEP Act disrupts plea bargaining, forcing defendants to accept plea deals on otherwise beatable cases to avoid the negative consequences of a gang allegation on the opinions of a jury.

The complete failure of the STEP Act to decrease gang activity suggests that it is time to focus less on punishment and more on addressing the root of gang participation. While relying on original statutory ranges for criminal offenses—instead of gang enhancements—as appropriate punishment, and investing into intervention and rehabilitation strategies, we can prevent new gang members from entering a life of crime, while helping current members finally have the resources they need to leave.

References

Caldwell, Mitchell H. "Reeling in Gang Prosecution: Seeking a Balance in Gang Prosecution." *University of Pennsylvania Journal of Law and Social Change* 18, no. 4 (2015): 341-76. https://heinonline.org/HOL/P?h=hein.journals/hybrid18&i=357.

California Department of Justice. "Homicide in California: 2001." Office of the Attorney General. December 2008. https://oag.ca.gov/all/cjsc/ homicide07-full-report.

Decker, Scott H. "Legislative Approaches to Addressing Gangs and Gang-Related Crime." *The Handbook of Gangs*. Hoboken, NJ: John Wiley & Sons, 2015. 345-68. https://search.library.ucdavis.edu/permalink/f/1ns6oht/TN_wilbooks10.1002/9781118726822.ch19.

DiPietro, Samuel. "STEPping into the 'Wrong' Neighborhood: A Critique of the People v. Albillar's Expansion of California Penal Code Section 186.22(a) and a Call to Reexamine the Treatment of Gang Affiliation." *The Journal of Criminal Law and Criminology*, no. 623 (2020). https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss3/6/.

Hofwegen, Van, and Sary Lynn. "Unjust and Ineffective: A Critical Look at California's STEP Act." *Southern California Interdisciplinary Law Journal* 18 (2009). https://search.library.ucdavis.edu/permalink/f/1ns6oht/TN_gale_legal209505854.

Los Angeles District Attorney's Office. *Special Directive: Sentencing Enhancements/Allegations*. By George Gascón. December 7, 2020. Accessed June 4, 2021. https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf.

Nelson, Ryan. "Overdue Justice: People v. Valenzuela and the Path Toward Gang Prosecution Reform." *Loyola of Los Angeles Law Review* 53, no. 6 (Winter 2020). https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=3075&context=llr.

San Francisco District Attorney's Office, Policy Directive: Status Sentencing Enhancements, by Chesa Boudin, February 22, 2020. https://sfdistrictattorney.org/wp-content/uploads/2020/11/Status-Sentencing-Enhancements.pdf.

Sigal, Franklin J. "When the California Street Terrorism Enforcement and Prevention Act Stumbles into Penal Code Limits." *Golden Gate University School of Law* 38 (2007). https://digitalcommons.law.ggu.edu/ggulrev/vol38/iss1/1.

US Department of Justice Bureau of Justice Assistance. *History of Street Gangs in the United States*. By James C. Howell. May 2010. https://nationalgangcenter.ojp.gov/sites/g/files/xyckuh331/files/media/document/history-of-street-gangs.pdf.

Yoshino, Erin R. "California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners." *Southern California Review of Law and Social Justice* 18, no. 1 (Fall 2008): 117-52. https://heinonline.org/HOL/P?h=hein.journals/scws18&i=119.

The Unlawful Relocation of a Diplomatic Mission

By Ella Piper

Ella Piper is a student at the University of California, Davis. She is studying Spanish and International Relations with a minor in Human Rights Studies. She is Chapter Director of Camp Kesem at UC Davis, a campus tour guide, and passionate about international law. Ella is graduating one year early and plans on attending law school after completing her Coro Fellowship in Pittsburgh.

The following paper spotlights how the relocation of the United States embassy to Israel violated international law. Through an analysis of intergovernmental organizations' oversight—such as that of the United Nations (UN)—and an examination of legal documents, the paper claims that the United States reneged on its commitments to international and customary law by moving its embassy from Tel Aviv to Jerusalem. The paper defines and analyzes nations' legal rights under an anarchic international system and the possible conflict between domestic and international law.

Introduction

The Holy City of Jerusalem has found itself at the center of international conflict for the better part of the last century—with Israel and Palestine each declaring it as their lawful territory. Both actors' assertions of control over the Holy City represent their respective claims to self-recognition and sovereignty. The prospect of peace between Palestine and Israel is improbable and continues to be a struggle the international community attempts to solve. One of the most important factors in the fulfillment of a nation's claim to a territory is the acceptance of this declaration by intergovernmental organizations and other states. With the right to Jerusalem disputed heavily, many international actors have established their diplomatic missions in Tel Aviv to prevent the infringement upon either Israel's or Palestine's right to self-determination. The United States of America established its diplomatic embassy to Israel in 1948 in the city of

Tel Aviv.[1] However, in 2017, President Donald Trump announced that the US embassy would move to Jerusalem in the next year.[2] The 2018 relocation of the United States embassy to Jerusalem not only violated international law efforts to adhere to domestic law but also further opposed customary law practice surrounding the contested Holy City.

Relevant International Systems

The relocation of the US diplomatic mission fulfilled a law ratified by the domestic legislature almost twenty-two years before the embassy was moved. In 1995, Congress passed Public Law 104-45, also known as the Jerusalem Embassy Act.[3] This law, under section 3(a), affirmed that the United States believed Jerusalem should be undivided, "recognized as Israel's capital[,] and that the US embassy should be moved to Jerusalem by 31 May 1999."[4] The law, however, granted sitting presidents the authority to waive the transition for six months. As such, despite each president standing in solidarity with Israel in regard to their claim over Jerusalem, this waiver clause was consistently invoked.[5] It was not until President Trump that the defining nature of the law was enacted.

Understanding the history of the disputed territory of Jerusalem is important in understanding the illegality of the locational move of the United States' diplomatic mission to Israel. The establishment of the state of Israel was the result of colonialism and centuries of persecution of the Jewish people. In 1917, three decades of British rule over the territory began, during which Jerusalem was named the colonial capital.[6] After the Holocaust and World War II, movements for protecting Jewish people through the creation of a Jewish state pressured Great

---

[1] Mick Dumper, "The U.S. Embassy Move to Jerusalem: Mixed Messages and Mixed Blessings for Israel?" *Review of Middle East Studies* 53, no. 1 (2019): 35, JSTOR, www.jstor.org/stable/26731399.
[2] Mona Boshnaq et al. "The Conflict in Jerusalem Is Distinctly Modern."
[3] Abdul Rashid Moten, "US Embassy in Jerusalem: Reasons, Implications and Consequences," *Intellectual Discourse* (2018), https://journals.iium.edu.my/intdiscourse/index.php/id/article/view/1112.
[4] *Id.*
[5] *Id.*
[6] Boshnaq et al., "The Conflict in Jerusalem."

Britain and the newly formed United Nations to ensure a solution. In 1947, the United Nations created a partition plan for the territory of Palestine in which there would be an Arab state and a Jewish state (Israel); the Holy City of Jerusalem would become an international city, outside of the control of either nation.[7] War soon broke out between the two states and Israel retained control of the Western side of Jerusalem, declaring the city its nation's capital.[8] The Holy City remains a contested territory to this day, with both Israel and Palestine claiming authority over it.

The United Nations

The intergovernmental organization the United Nations (UN) was established in an effort to prevent potentially violent situations like the Israel-Palestine conflict. The organization is a forceful international actor but gains its authority over international conflicts solely by the continued acceptance by member states of its power. Should a member state decide to ignore their lawful obligations set forth by the UN, the organization does not have the power to punish it. However, other member states do have the individual power to punish the offending member state as well as to band together to influence all member states to adhere to UN protocols. The founding document of the UN is its Charter and in it, the foundation of two of the organization's core organs and principles are laid out: the powers of the United Nations Security Council (UNSC) and the responsibilities of the General Assembly.[9] In the international system, nations are rational actors focused on protecting their self-interests; therefore, it can be assumed that any member state of the UN entered the organization because being present for negotiations and ratifications of resolutions set forth by the UN was within the self-interest of the state.

The Security Council of the United Nations (UNSC) is granted specific powers. Outlined in Chapter VII of the UN Charter, the UNSC retains the power to "maintain or restore

[7] *Id.*
[8] *Id.*
[9] United Nations, "PDF," Charter of the United Nations and Statute of the International Court of Justice, 1945.

international peace and security" in any sovereign territory where the Security Council believes a threat to peace is present.[10] Additionally, UNSC decisions are binding to all member states under Article 25 of the Charter, and member states are tasked with accepting and carrying out all of the Security Council's verdicts. However, there is contention surrounding UNSC resolutions aimed to promote peace that are not ratified under Chapter VII and whether the resolutions must be observed as law. Regardless of the legal constraints Article 25 places on member states' responsibilities to uphold UNSC decisions, in 1971 the International Court of Justice advocated that customary practice and established UNSC resolutions not adopted under Chapter VII were still viable sources of international law to which all UN member states must adhere.[11] The United States is a member state of the UN and therefore, all UNSC resolutions enacted into law are expected to be observed by the nation.

Important International Documents

The UNSC invoked its power to establish international laws throughout the 1980s by passing resolutions that emphasized Israel's illegal claim to the whole of Jerusalem and outlined other member states' responsibilities regarding the Holy City. In 1967, Israel began establishing Jewish settlements in the Arab-controlled East Jerusalem, extending the Israeli municipality to encompass the entire city.[12] That same year, Israel passed the Law and Administration Ordinance that aimed to integrate East Jerusalem and its Arab residents into the Israeli legal system.[13] This earned an unfavorable response by the international community as several UNSC resolutions condemning Israel's actions were passed in the next decade.[14] Despite this, Israel continued establishing Jewish settlements in East Jerusalem and, in 1980, the state passed the "Jerusalem

[10] *Id.*
[11] Victor Kattan, "Why U.S. Recognition of Jerusalem Could Be Contrary to International Law," *Journal of Palestine Studies* 47, no. 3 (2018): 83, https://doi.org/10.1525/jps.2018.47.3.72.
[12] Dumper, "The U.S. Embassy," 40.
[13] *Id.*
[14] Kattan, "Why U.S. Recognition," 73.

Law," which declared the entire city of Jerusalem, including the Arab, east section, the "complete and united . . . capital of Israel."[15] In return, the UNSC in 1980, with the support of the United States, passed Resolution 465 condemning Israeli annexation of Jerusalem and insisted there was no legal validity in the nation's claim to the territory.[16] The same resolution called for Israel "to dismantle the existing settlements and in particular to cease, on an urgent basis, the establishment, construction and planning of settlements."[17] This resolution became a formal recognition of the illegality of Israeli settlements in East Jerusalem. Similarly, in that same year, the UNSC passed Resolution 478, which declared the Jerusalem law "null and void."[18] The resolution reaffirmed "that the acquisition of territory by force is inadmissible," rejecting any claim Israel invoked over Jerusalem.[19] Therefore, international law under UNSC Resolution 478 directly prohibits Jerusalem as a territory of Israel, since the nation has no lawful demand for the land. Both Resolution 465 and 478 unequivocally stated that Israel's claim over Jerusalem and the annexation of the east city is illegitimate and established a clear precedent against any future Israeli settlements and attempts to confirm control over the city.

Resolution 478 expanded further on the responsibilities of international actors in regard to holding Israel's colonial actions accountable. The resolution affirmed that states with current diplomatic missions established in Jerusalem are legally obliged to relocate and any state with established embassies "in Tel Aviv are under the legal obligation not to relocate their embassies to Jerusalem."[20] Since the United States' embassy to Israel was situated in Tel Aviv beginning in 1948, the United States, under Resolution 478, was legally committed to ensuring its diplomatic

[15] Moten, "US Embassy."
[16] Kattan, "Why U.S. Recognition," 83.
[17] *Id.*
[18] Moten, "US Embassy."
[19] Kattan, "Why U.S. Recognition," 82.
[20] Basheer Alzoughbi, "The Relocation of the U.S. Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America): A Commentary on the Merits of the Case, Jurisdiction of the International Court of Justice and Admissibility of Palestine's Application," University of Bologna Law (2020): 124.

mission was not transferred to Jerusalem.[21] Thus, the movement of the United States embassy in 2018 from Tel Aviv to Jerusalem clearly violated international law.

An Analysis of Customary Law

Even if the embassy's relocation was not illegal under Resolution 478, the move was a breach of customary law and presents strong evidence of *opinio juris*. Customary law is developed through years of state practice and is consistently and generally adhered to by a nation.[22] The concept of *opinio juris* emphasizes a state's recognition of such customary law as their perceived legal obligation and not just a habitual or convenient practice that is in their interest.[23] Establishing diplomatic missions outside of Jerusalem is affected by "a constant and sufficiently long practice," and thus constitutes customary law, adhered to by the international community.[24] The United States maintained its embassy to Israel in Tel Aviv and thus falls into the category of states following customary law. As the majority of international actors did not maintain an embassy in Jerusalem, the emergence of *opinio juris* is clearly shown. States, including the United States, perceived their legal obligation to encompass confirming the location of their diplomatic missions as outside of the Holy City.

For twenty-two years (from 1995-2017), United States presidents neglected the enactment of domestic law in an effort to adhere to their perceived legal obligation to maintain an embassy outside of Jerusalem. In 2017, after President Trump declared that the United States embassy would move, a UNSC draft resolution (S/2017/1060) that called upon all nations not to establish diplomatic missions in Jerusalem, in accordance with Resolution 478, was vetoed by the United States.[25] After the nation vetoed the draft resolution, the United States Ambassador to

[21] Dumper, "The U.S. Embassy," 35.
[22] Dixon, "International Law and National Law," 11.
[23] *Id.*, 36.
[24] Alzoughbi, "The Relocation of the U.S. Embassy," 130.
[25] *Id.*, 136.

the UN, Nikki Haley, recalled how former US Secretary of State Edmund Muskie explained that Resolution 478 was perceived by the nation as "not binding" and "without force."[26] However, even if the United States legal obligation under Article 25 of the UN Charter to follow all UNSC decisions was removed, one question must still be asked: if the United States truly believed that Resolution 478 was "not binding," why had its embassy stayed in Tel Aviv since 1948, especially after the ratification of the domestic "Jerusalem Embassy Act" in 1995? Why had it adhered to a treaty "without force"? Even though Resolution 478 was a binding form of international law and the United States clearly violated its protocols, the nation also breached customary law that continued the practice against diplomatic missions in Jerusalem. The notion of *opinio juris* is thus brought to fruition as the United States perceived, since at least 1995, that it had a legal obligation to maintain their embassy in Tel Aviv and therefore violated customary law by relocating its diplomatic mission.

Additional Information on the Embassy's Illegality in Jerusalem

Moreover, the legal definition of an embassy exemplifies the illegality of the United States' relocation of its diplomatic mission to Jerusalem. Under Article 21, subsection 1, of the 1961 Vienna Convention on Diplomatic Relations, the receiving state of an embassy is legally obligated to "facilitate the acquisition on *its* territory . . . premises necessary for its mission."[27] This treaty, ratified by the United States in 1972, emphasizes that a nation's diplomatic mission must reside on the receiving nation's lawful territory.[28] In the case of Israel, the nation's claim to the city of Jerusalem was rejected by the international community under UNSC Resolution 478 in 1980 as an unlawful attempt of annexation, hence declaring that the Holy City was not lawfully Israel's territory. Therefore, the relocation of the United States embassy from Tel Aviv

[26] Kattan, "Why U.S. Recognition," 76.
[27] United Nations, "PDF," Vienna Convention on Diplomatic Relations 1961, United Nations, 2005.
[28] *Id*.

to Jerusalem is not only illegal under Resolution 478, but is also in violation of the Vienna Convention on Diplomatic Relations as Jerusalem is not legally the territory of Israel and, consequently, cannot be the soil upon which a diplomatic mission sits.

The UNSC has passed further resolutions that exemplify the illegality of the United States' relocation of its embassy to Jerusalem. Security Council Resolution 252 of 1968 considered all legislative and administrative actions taken by Israel to alter the legal status of Jerusalem to be "invalid."[29] Security Council Resolution 476 of 1980 reconfirmed that all measures taken by Israel "to alter the character and status of the Holy City of Jerusalem have no legal validity and constitute a flagrant violation of the Geneva Convention."[30] Security Council Resolution 2334 of 2016 reestablished that it did not recognize Israel's affirmation to any territory they claim as theirs after June 4, 1967, including Jerusalem, and called upon all member states "to distinguish, in their relevant dealings [with Israel], between the territory of the State of Israel and the territories occupied since 1967."[31] Thus, the relocation of the United States' diplomatic mission to Israel not only violates the aforementioned UNSC Resolutions and the Vienna Convention on Diplomatic Relations, but also opposes UNSC Resolution 252, 476, and 2334. Additionally, this movement of the diplomatic mission into the boundaries of Jerusalem, in both a legal and political sense, is not differentiating between the State of Israel and its occupied territories, thus breaching UNSC Resolution 2334. The United States violated various UNSC Resolutions and therefore disregarded international law it is mandated to observe.

The Extent of the United States Influence

The United States' relocation of its embassy to Jerusalem has played a pivotal role in illuminating the power of international law, or lack thereof. In the same month that the United

[29] Alzoughbi, "The Relocation of the U.S. Embassy," 136.
[30] *Id.*
[31] *Id.*, 137.

States' embassy was moved, Paraguay and Guatemala followed the US's lead and relocated their diplomatic missions from Tel Aviv to the Holy City as well.[32] This mirroring act shows the threat that the United States' relocation of its embassy poses to international law as a whole. One of the core features of the international system is that there is no world government or enforcement mechanism; it is up to individual nations to apply pressure to others in order to ensure international law is upheld and peace is kept. The United States' violation of Resolution 478, international law, and customary law exemplifies how powerful players in the international system are capable of disregarding laws they are bound to on a global scale with very few repercussions. The subsequent move of the Guatemalan and Paraguayan embassies showcases the power that large international actors, like the United States, have in persuading other states to follow their lead, even if it violates international law.

Conclusion

Aside from the many political implications the relocation of the US embassy to Jerusalem has, the act itself clearly violated international law as well as customary law. The United States, as a member state of the United Nations, has a clear responsibility to ensure its embassy to Israel is not in the contested Holy City. However, the inability of the international system to truly dismiss and punish offenses against established international legal obligations has allowed for offenses like the relocation of the US embassy to Jerusalem to occur. The conflict intergovernmental organizations, like the United Nations, face is the assurance of adherence to international law while maintaining the balance between respecting the sovereignty and domestic responsibilities of member states. The relocation of the United States' diplomatic mission to Israel exemplifies how international systems remain ill-equipped to ensure all international law is upheld and relies on unity between individual nations to maintain order.

[32] *Id.*, 135.

References

Alzoughbi, Basheer. “The Relocation of the U.S. Embassy from Tel Aviv to Jerusalem (Palestine v. United States of America): A Commentary on the Merits of the Case, Jurisdiction of the International Court of Justice and Admissibility of Palestine's Application.” University of Bologna Law (2020): 114-205.

Boshnaq, Mona et al. “The Conflict in Jerusalem Is Distinctly Modern.” Retrieved December 13, 2021.

Dumper, Mick. “The U.S. Embassy Move to Jerusalem: Mixed Messages and Mixed Blessings for Israel?” *Review of Middle East Studies*, vol. 53, no. 1 (2019): 34-45. JSTOR, https://jstor.org/stable/26731399. Accessed 19 Feb. 2021.

Dixon, Martin. “International Law and National Law.” *Textbook on International Law*, 2013, 11-36. https://doi.org/10.1093/he/9780199574452.003.0004.

Moten, Abdul Rashid. “US Embassy in Jerusalem: Reasons, Implications and Consequences.” *Intellectual Discourse*, 2018. https://journals.iium.edu.my/intdiscourse/index.php/id/article/view/1112.

Kattan, Victor. “Why U.S. Recognition of Jerusalem Could Be Contrary to International Law.” *Journal of Palestine Studies* 47, no. 3 (2018): 72-92. https://doi.org/10.1525/jps.2018.47.3.72.

United Nations, Security Council. “United Nations Security Council Resolution 478.” United Nations, 1980.

United Nations. “PDF.” Charter of the United Nations and Statute of the International Court of Justice, 1945.

United Nations. “PDF.” Vienna Convention on Diplomatic Relations 1961, United Nations, 2005.

Acknowledgements

This journal would not have been possible without the support and generosity of our partners. Volume II was developed with the University of California National Center for Free Speech and Civic Engagement. On behalf of Davis Journal of Legal Studies, I thank the Center sincerely for their investment and support in advancing public understanding, legal research, and undergraduate scholarship.

I am especially grateful to Kate Stephensen, Michelle Deutchman, and the University Honors Program for their support and guidance throughout the production of this volume. I would also like to note my appreciation for Dr. Lisa-Jane Klotz, Dr. Lauren Young, Lolita Adkins, and Joseph Martinez, who provided me with support and encouragement throughout this project.