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**Legal Analysis and Policy Implications of *Board of Commissioners of Southeast Louisiana Flood Protection Authority-East vs. Tennessee Gas Pipeline Company, L.L.C. et al.***

By Cara Day

Global warming is widely recognized as one of the largest crises that our generation must face. Whether or not you believe in anthropogenic climate change, the fact that the Earth is warming more rapidly in recent years than ever before is indisputable. Coastal areas in particular suffer from this because increasing land temperatures statistically heighten the severity of storms and increase flood damage.[1]

Specifically, we have seen the devastation of flooding in Louisiana, a state heavily reliant upon a coastal levee system and wetlands to protect the state from flood damage. This is challenging because both of these methods of control are rapidly degrading and may be lost. According to the United States Geological Survey, Louisiana loses its wetlands at a rate of approximately seventy-five acres per year. Additionally, the state accounts for approximately forty percent of the nation's wetlands but over eighty percent of the nation's wetland losses. Unfortunately for the people of Louisiana, these net losses are expected to continue at an accelerated rate.[2]

Louisiana's levee system is the state's second line of defense against storm surges and flooding. Both naturally-occurring and man-made levees comprise this system. The natural levees of Louisiana exist "along most perennial channels subject to periodic overbank flooding emanating from a prominent low flow channel," whereas the man-made levees "originated by piling up additional earthen fill on top of these natural levees" (Rogers).[3] The state's flood protection mechanisms are particularly important to understand due to the spate of natural disasters, flooding, and man-made

[1] Holli Riebeek, *The Rising Cost of Natural Hazards* NASA EARTH OBSERVATORY (Mar. 28, 2005), https://earthobservatory.nasa.gov/Features/RisingCost/.
[2] Jolene S. Shirley, Louisiana Coastal Wetlands: A Resource At Risk. Louisiana Coastal Wetlands: A Resource At Risk - USGS FACT SHEET, USGS, pubs.usgs.gov/fs/la-wetlands/.
[3] David J. Rodgers. Historical Background on the New Orleans Levee System. NATIONAL HAZARDS MITIGATION INSTITUTE, https://web.mst.edu/~rogersda/levees/Historic%20background%20on%20the%20New%20Orleans%20Levee%20system%20-Chapter%204.pdf.

coastal destruction the state has faced in recent years. These factors prompted the state of Louisiana to take legal action in July of 2013.

In an attempt to rectify the large onslaught of flood damage their citizens had endured, the Board of Commissioners of Southeast Louisiana Flood Protection Authority (henceforth referred to as The Board) filed a lawsuit against ninety-seven independent corporations in the oil and gas industry. Each defendant was involved in the exploration and production of oil reserves near the Gulf coast of Louisiana. The importance of this case comes down to its two main aspects: the jurisdictional conflict and the substantive legal question of the original lawsuit.

The plaintiff alleged that since the 1930s, Louisiana's coastal landscapes--which are a buffer for flooding-- had been suffering land loss at alarmingly high rates. This loss of land threatened their second defense, the federally-regulated levee systems, thereby endangering coastal communities. The Board further asserted that this loss was due to the defendants' "dredging of an extensive network of canals to facilitate access to oil and gas wells" that they intended to use for their activities and drilling.[4]

The Board listed six distinct causes of action for recovery from the defendants: negligence, strict liability, natural servitude of drain, public nuisance, private nuisance, and breach of contract as to third-party beneficiaries. They sought all damages that the court deemed "just and reasonable under the given circumstances" and injunctive relief. This would take the form of a mandate that the defendants backfill and revegetate the canals which they had impacted, create wetlands and reefs, construct land bridges, restore ridges, protect shorelines and the structures along them, and stabilize waterway banks.[5] The plaintiff filed the original lawsuit in a Louisiana state district court; they believed none of their claims relied on a cause of action that existed under federal law. Their negligence, strict liability, and natural servitude claims were only viable under Louisiana state law.

[4] Board of Commissioners of Southeast Louisiana Flood Protection Authority-East vs. Tennessee Gas Pipeline Company, L.L.C., 850 F. .3d 714 (5th Cir. 2017).
[5] *Id.* at 721.

Rather than argue the merits of the case from the start, the defendants employed a clever procedural strategy. They began by filing a motion to remove the case to federal court. The Fifth Circuit Court of Appeals decides federal appellate cases for Texas and Mississippi as well as Louisiana. The Fifth Circuit is notoriously conservative and hostile toward environmental cases and plaintiffs confronting the oil and gas industry. The defendants knew this and determined that their likelihood of winning the case would increase exponentially if the case was tried under federal jurisdiction.

Following the removal, the Board filed a motion to remand the case to state court. The federal district court denied the Board's motion to remand and granted the defendants' motion to dismiss the case. The court ruled that the case met the factors required for federal jurisdiction, despite the existence of a state law cause of action. As established in *Empire Healthchoice Assurance v. McVeigh*,[6] there are four prongs for this narrow category of federal jurisdiction to exist; "(1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities."

The federal district court found that *Board of Commissioners of Southeast Louisiana Flood Protection Authority-East v. Tennessee Gas Pipeline Company, L.L.C.* met these conditions and was, therefore, subject to federal jurisdiction. They concluded that the plaintiff's negligence and nuisance claims relied on a standard of care from three federal statutes and that their third-party breach of contract claim was based on permits issued by the federal government, pursuant to federal law.[7]

They also concluded that the Board's requested form of injunctive relief could not possibly be granted under state law. The court argued that the nuisance claims posited a legal obligation to refrain from making alterations to levee systems, which are federally owned and regulated. All of these

[6] Empire Healthchoice Assurance v. McVeigh, 547 U.S. 677, 699 (2006).
[7] Board of Commissioners of Southeast Louisiana Flood Protection Authority-East vs. Tennessee Gas Pipeline Company, L.L.C., at 722.

factors led the Fifth Circuit Court of Appeals to affirm the ruling of the federal district court as to the jurisdictional aspect of the case.[8]

The Board attempted to fight these claims in a few ways. First, it cites the court's ruling in *MSOF Corp. v. Exxon Corp.*,[9] in which they held that being in violation of both state and federal law is not enough for the action to fall under federal jurisdiction. The Defendants asserted that this case is distinguishable from *MSOF* because the Board's remedy is also derived from federal regulation. In response, the plaintiff asserted that Louisiana law requires similar restoration for mineral exploration; however, the defendants rightfully indicated flaws in the argument, stating that the Louisiana Supreme Court has already "rejected the prospect that a statutory obligation of reasonably prudent conduct could require oil and gas lessees to restore the surface of dredged land."[10] Although both courts ruled against the plaintiff, they still decided to appeal the case to the Supreme Court of the United States. By this time, The Board had spent millions of dollars on its lawsuit and had received no sign that their claims had merit from any court. The question then becomes, why did they continue to appeal?

There are a few reasons why a plaintiff, who is aware they are fighting a losing battle, would continue to appeal their case, despite it costing an exorbitant amount of money. The first is to draw attention to the issue they raised in their suit. Often, when a case is pursued all the way to the Supreme Court of the United States, the claims gets more media coverage and public attention. The Board's case would interest the public because it would have widespread implications for the oil and gas industry. The American public has certainly heard about the impacts of oil spills and rare drilling disasters, but there is not much transparency in the actual environmental impact caused by the oil and gas industry. This lawsuit forced these issues to be revealed to the public and heard in front of the Supreme Court.

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[8] *Id* at 722.
[9] MSOF Corp. v. Exxon Corp., 295 F.3d 485 (5th Cir. 2002).
[10] Board of Commissioners of Southeast Louisiana Flood Protection Authority-East vs. Tennessee Gas Pipeline Company, L.L.C., at 723 (quoting Terrebone Parish Sch. Bd. v. Castex Energy Inc., 893 So.2d 789 (La. 2005)).

The second reason for the plaintiff's persistence with this case was their desire to establish precedent. It is likely that the Board knew it would lose the lawsuit from the beginning, but had hoped that if the court ruled against it, the resulting precedent would be favorable for its cause. This was not an unfounded hope, as this had happened in environmental cases before. In *Friendswood Development Company et al. v. Smith-Southwest Industries*, for instance, the court ruled against the appellee because there was insufficient legal framework to find in the appellee's favor; however, the court later clarified that they changed the precedent for future cases and urged the Texas legislature to create more laws and regulation around the issue at hand.[11] Though the plaintiffs did not have a favorable outcome in that case, it was a long-term victory. This is the same outcome that the Board wished to see in their lawsuit.

Twenty-six environmental law professors filed an *amicus curiae* brief supporting the Board's claims. These "friend of the court" briefs are filed to assist the court in ruling on legal issues. While the brief did discuss some legal precedent and jurisdictional issues, the most critical point in the brief was the broad environmental implications that a ruling against the plaintiff would have. This case had peaked their interests because the ruling of the court would either decrease or substantially increase the political capital of the oil and gas industry. It is likely that these amici knew that the plaintiff would lose but hoped that the court would see the importance of changing the legislative landscape to rectify the issue of offshore drilling degrading coastlines for future cases similar to this one at hand.

In support of the defendants, the United States Chamber of Commerce filed an *amicus curiae* brief. In its brief, they explained the economic implications of ruling in favor of the plaintiff. Ruling in favor of the Board would have major negative ramifications for the United States oil and gas industry, which is a significant aspect of the national economy and an important part of our involvement in foreign trade.

[11] *Friendswood Development Company et al. v. Smith-Southwest Industries*, 576 S.W.2d 21 (Tex. 1978).

While this case was a losing battle for the Board and for the people affected by the flooding in Louisiana, there are other ways to achieve the outcomes that motivated the Board to file the lawsuit. Because the courts found the Board's case had no legal merit, congressional legislation on the issue seems the best way to fix this problem. This could include a law which dictates that all oil and gas companies who drill must backfill the canals they dig, attempt to replant any vegetation which they disturb, and restore shorelines. However, the current political climate in the United States makes it unlikely that a law like this could ever pass both chambers of Congress.

Attempting to pass laws that mitigate the effects of global warming on a larger scale would be a secondary solution since global warming is the root cause of this onslaught of storms and flooding.[12] These laws could include a carbon tax, cap and trade programs, increased regulation of methane use and fracking, or increased efforts to shift the United States towards the utilization of more renewable energy rather than fossil fuels.

The field of contract law provides another method to resolve the issues raised in *Board of Commissioners of Southeast Louisiana Flood Protection Authority-East vs. Tennessee Gas Pipeline Company, L.L.C. et al.* . The plaintiff faced difficulties in court because the contract signed by the oil companies and the federal government gave companies permission to drill as they pleased. The companies would be permitted to drill with the federally-owned oil rigs, provided they pay a previously agreed amount. This contract was damning for the plaintiff's case because it had no stipulations requiring these oil companies to restore the land to its initial condition. While changing the requirements for contracting out these rigs would initially deter oil companies from signing contracts of this nature, they would ultimately be forced to do so because there would be no other option for them to drill on these lands.

[12] Holli Riebeek, *The Rising Cost of Natural Hazards* NASA EARTH OBSERVATORY (Mar. 28, 2005), https://earthobservatory.nasa.gov/Features/RisingCost/.

Overall, *The Board vs. Tennessee Gas Pipeline Company, et al.* raised some serious questions about how to preserve the environment via public policy. Courts like the Fifth Circuit Court of Appeals, who are notoriously hostile towards the environment, pose a serious threat to sustainability efforts. Though the Board's case did not result in tangible progress, it brought some important issues to light.

The case served as a reminder that big corporations often pose a threat to the environment. While the case focused on the drilling of the oil and gas industry, these companies neglect the environment in many other ways. In fact, the United States Environmental Protection Agency found that the oil and gas industry was the second largest national source of greenhouse gases, emitting a total of over 225 million tons of carbon dioxide into the atmosphere annually.[13] While many politicians are aware of this staggering figure, our policymakers have done almost nothing to regulate corporations in this area. To shield themselves from regulation, the oil and gas industry spends huge amounts of money lobbying politicians and Congress. In 2017 alone, the oil and gas industry spent almost 95 million dollars lobbying in the United States.[14] Companies burn fossil fuels and use other environmentally negligent methods to drill because it makes their work more cost-efficient. It will be near impossible to ever see reform or increased regulation if companies continue to garner political capital by lobbying. These companies use these practices, processes which actively neglect the well-being of the environment, to turn a profit.

The case also highlighted the importance of shorelines, which will be especially relevant given the recent deluge of storms, hurricanes, and natural disasters around the world. From hurricanes like Sandy and Harvey to the earthquakes in Mexico, our world has never seen global destruction from nature of this magnitude. Louisiana recognized how much coastal and wetland degradation had taken away their defense against these destructive forces.

[13] Environmental Protection Agency, "GHGRP Reported Data", EPA, www.epa.gov/ghgreporting/ghgrp-reported-data.
[14] "Lobbying in the Oil and Gas Industry." Center for Responsive Politics, 2017.

While the Board was not legally successful, there are actions that areas prone to flooding can take to mitigate the effects of these environmental hazards . For instance cities could plant mangroves on their shorelines to prevent further damage. Mangroves are a type of natural barrier that help prevent erosion of shorelines by protecting the natural rock or soil along the coast. Cities can also improve their floodplain management and create flood zones to minimize the effects that flooding has on livelihood of the people residing in these flood-prone areas.

Despite legal failure, the Board's case exposed many issues within our political systems. Most prominently, the case confirmed that corporations, in conjunction with the United States government, repeatedly neglect our shorelines and our planet. Viable solutions to the degradation of shores that do not require the involvement of our American legal systems exist. Ultimately, the government will have to become involved as the Earth continues to warm, putting millions of citizens at risk. While certain parties have different views on the cause of climate change, our world is getting to the point where the cause doesn't matter -- only the solutions do. It's time for our country to step-up and take action.

**The Nullifying Jury is Nothing New**

By Akshar Patel

"In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact" - Thomas Jefferson.[1] The role of the jury is commonly thought to be that of merely deciding the facts of the case. In reality, it is widely accepted among legal scholars that jurors have the power to decide both the facts of the case and the law itself. The debate is over whether the jury has the *right* to decide the law.[2] Jurors have the power to decide the law via jury nullification. Jury nullification happens whenever jurors refuse to apply the law to the given facts of the case.[3] Jury nullification can occur in both criminal and civil cases; it can be for an acquittal or conviction.[4] However, criminal acquittal due to jury nullification deserves special attention, as only that result possesses genuine consequences. In such a scenario, the judge cannot review the jury's verdict and the defendant is released.[5] That jury nullification exists may shock some observers who claim that it is in conflict with the rule of law. Many writers have argued that there are scenarios in which jurors ought to nullify despite a conflict between jury nullification and the rule of law.[6] Jury nullification's conflict with the rule of law is not as intense as critics claim, and there are cases for which nullification is not only justifiable, but morally necessary.

Before arguments can be made for or against jury nullification, some terms need defining. Brenner Fissell, of the Georgetown University Law Center, offers a comprehensive definition. Jury

[1] Thomas Jefferson, *Query XIV*, NOTES ON THE STATE OF VIRGINIA 191, at 191.
[2] Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103 (2014), at 1108.
[3] Brenner M. Fissell, *Jury Nullification And The Rule Of Law*, 19 LEGAL THEORY 217 (2013), at 218.
[4] *Id.* at 219.
[5] *Id.* at 219.
[6] Aaron McKnight, Supra note 2, at 1104.

nullification only occurs in a *functional democratic society* when the legislative intent and purpose, the judge's instructions, and the text of the statute are all in alignment.[7] If the sources of law as listed above do not agree with each other, then what appears to be an act of jury nullification may actually be an attempt to reinforce a statute in light of its true meaning.[8] Fissell's definition of jury nullification is in the context of a disagreement between the three sources of law: "a jury's ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute."[9] Aaron McKnight, of the Brigham Young University Law Review, offers a similar definition except for the lack of additional stipulations (as listed by Fissell) necessary for an acquittal to be an act of jury nullification.[10] What makes McKnight's definition inferior is that it lacks the requirement that the three sources of law agree with each other. For example, if the law's original legislative intent has been distorted by the judicial decisions and instructions of various judges, it is hard to qualify a criminal acquittal as jury nullification. Again, jurors may simply be choosing a certain interpretation of a law, rather than outright rebelling against the law wholesale. Fissell's definition is superior because it more precisely identifies the unique feature of jury nullification. Indeed, as Fissell points out, the definition of the verb *nullify* is to "render [it] of no value, use, or efficacy; to reduce to nothing, to cancel out."[11]

Another term that needs defining is the *rule of law*. As Fissell points out, the rule of law is not concerned with the content of any law. Instead, the rule of law is about the way in which laws are made and implemented.[12] Lon Fuller, former professor at Harvard University, identifies eight properties of the rule of law: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence.[13] As Fissell points out, only generality and congruence need further clarification because they are the main aspects of the rule of law that are relevant to his analysis of

[7] Brenner M. Fissell, Supra note 3, at 219.
[8] *Id.* at 219.
[9] *Id.* at 219.
[10] Aaron McKnight, Supra note 2, at 1105.
[11] Brenner M. Fissell, Supra note 3, at 219.
[12] *Id.* at 221.
[13] *Id.* at 221.

jury nullification.[14] Matthew Kramer, Professor of Legal and Political Philosophy at the University of Cambridge, defines generality: "[Law] operates through general norms" and congruence: "its norms are generally effectuated in accordance with what they prescribe, so that the formulations of the norms (the laws on the books) are congruent with the ways in which they are implemented (the laws in practice)."[15] There is mostly agreement in the academic legal community over the eight aspects of the rule of law and Kramer's definitions of them, so these definitions will be used.[16]

Given the preceding definitions of the rule of law and jury nullification, there is now an apparent conflict between the two.[17] Many advocates make the mistake of not directly responding to the rule of law objection to jury nullification. They do this by focusing on the ideal scenario in which a just jury nullifies an unjust law, and also by barely mentioning what Fissell calls the "inverse" scenario.[18] The ideal example of jury nullification is that of northern juries who refused to convict defendants accused of violating the Fugitive Slave Act of 1850 by helping slaves escape to the northern United States.[19] The inverse scenario of jury nullification is that of an unjust jury nullifying a just law.[20] The classic example of the inverse scenario is white southern juries refusing to convict white defendants of racial violence against black victims.[21] That jury nullification has historically been used for both moral and immoral ends is an important concession, but not so important that juries should never commit nullification as a matter of principle. Also, the fact that jury nullification has centuries of historical precedent behind it, in both the United States and abroad, undermines the argument that jury nullification cripples the rule of law.[22] After all, America is currently not a lawless dystopia. Yet another piece of evidence against the argument that jury nullification incapacitates the rule of law is that jury nullification is similar to the less controversial practices of prosecutorial

[14] *Id.* at 222.
[15] *Id.* at 221-222.
[16] *Id.* at 222.
[17] *Id.* at 222.
[18] *Id.* at 227.
[19] *Id.* at 227.
[20] *Id.* at 227.
[21] *Id.* at 227.
[22] Aaron McKnight, Supra note 2, at 1108.

discretion and executive clemency.[23] Jury nullification can be thought of as juror discretion. Just as prosecutors may decide that a crime may not merit a prosecution, a jury may decide that a prosecution may not merit a conviction. Executive clemency is another tool whereby individuals can be freed from the consequences of unjust laws. Yet, executive clemency is more open to abuse than jury nullification as elected officials may be pardoning for political gain, whereas properly selected jurors have no personal gain via nullification. Jury nullification only harms the rule of law as much as prosecutorial discretion and executive clemency do. Moreover, if one tries to argue for or against nullification on constitutional grounds, one will stumble upon a paradox. On one hand, jury nullification might conflict with the rule of law even when both vicinage morality and jurisdictional morality align.[24] Jurisdictional morality is the morality of the jurisdiction that provides inputs into, and is affected by, a particular statute.[25] Vicinage morality is the morality of the region from which a panel of jurors will be chosen.[26] If it were not for the Constitution, jury nullification that reflected both the sentiment of local community (vicinage morality) as well as the larger national sentiment (jurisdictional morality) would not be in conflict with the rule of law. This is because of accordance with the principles of generality and congruence. If public opinion is unanimously set against a criminal statute (congruence with the ultimate source of the law), then that necessarily means that jury nullification would happen in all similar trials (generality).[27] Notwithstanding the preceding facts, in America jury nullification can be in conflict with the rule of law even when it reflects both vicinage and jurisdictional morality accurately. This can arise because the U.S. operates under a counter majoritarian scheme of government; laws are *supposed to* be hard to change so that laws that were once popular can persist even though they have lost popular support.[28] On the other hand, Constitutional provisions necessarily

[23] Contrary to Orin Kerr, *The Problem With Jury Nullification*, WASHINGTON POST (Aug. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/10/the-problem-with-jury-nullification/?utm_term=.cbccb16c379a.
[24] Brenner M. Fissell, Supra note 3, at 234.
[25] *Id.* at 229.
[26] *Id.* at 229.
[27] *Id.* at 222.
[28] *Id.* at 234.

lead to the creation of a nullification power. These protections include the stipulations that a jury in a criminal trial has the right to deliver a verdict, judges cannot order a jury to convict regardless of circumstances, and acquittals cannot be undone due to the Double Jeopardy clause.[29] This is the paradox that arises when one examines the Constitutionality of jury nullification. For these reasons, among others, recent judicial opinions on jury nullification range from ambiguous support of it without explicit approval to the idea that jury nullification instructions and arguments should be prohibited in court. There are many good reasons to nullify in contemporary America, as will be further elaborated upon.

However, substantive criticisms of jury nullifications tend to have less merit. One criticism is that jury nullification is undemocratic, because a panel of twelve people supposedly cannot serve as an adequate representation of a given community.[30] The flaw with this argument is that for jury nullification to occur, all twelve jurors must return a verdict of "not guilty". What are the chances that twelve people can come to an unanimous decision to nullify the law that is also out of touch with the community that they are selected from? Such a scenario seems unlikely. If just one juror wants to nullify, the result will be a hung jury, and the prosecutor can retry the case.[31] Also, unjust laws create a moral obligation for jurors to nullify. For example, the mere possession of marijuana is a federal crime that can lead to a year in jail.[32] That it is a federal crime for an adult to choose to what to put into his own body (especially when such a choice does not necessarily harm anyone else) is absurd. That possession of marijuana is a federal crime is even more undemocratic when one considers that a rapidly increasing majority of Americans supports marijuana legalization.[33]

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[29] Aaron McKnight, Supra note 2, at 1108.
[30] *Id.* at 1123.
[31] Jerod Gunsberg, *A Unanimous Vote From The Jury Is Required For A Conviction and Acquittal?*, JUSTIA (2012), https://answers.justia.com/question/2011/05/09/unanimous-vote-jury-required-conviction--16627.
[32] United States Sentencing Commission, Weighing The Charges: Simple Possession of Drugs in the Federal Criminal Justice System (Sep. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/201609_Simple-Possession.pdf.
[33] Abigail Geiger, *Support For Marijuana Legalization Continues To Rise*, PEW RESEARCH CENTER (Oct. 12, 2016), http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/.

Another argument against jury nullification is that it causes "too much uncertainty" for defendants.[34] The absurdity of this argument cannot be exaggerated. After acquittal, any given defendant would be relieved despite the initial distress that emerged from his uncertainty over whether or not the jury would hold him accountable for his crime. Psychological distress from uncertainty is certainly preferable to a prison sentence.

Furthermore, a strong positive argument in favor of jury nullification is that juries may have no value as mere arbiters of the facts, and that it only makes sense to have juries if they nullify when they feel that a law is unjust. Many scholars have argued that prosecutors and judges (especially judges) are better are determining the facts of the case than are juries.[35] Prosecutors know about a defendant's criminal record, inadmissible pieces of evidence, and why a particular crime merits prosecution in the first place.[36] Clearly, juries are meant to be more than mere fact-finders, unless they exist for solely aesthetic reasons.

Hysteria over jury nullification is unwarranted. Scholars estimate that about 4% of all cases result in jury nullification.[37] Progress is being made against unjust laws and over criminalization. For example, a 2012 New Hampshire law allows defense attorneys to inform juries of their nullification power. That same year, a man was brought to court for growing marijuana and the jury chose to nullify after his lawyer informed the jury of its power to nullify the law.[38] Although nullification struggles against the rule of law, it does not destroy the rule of law and ultimately gives citizens a powerful way to send a message to unresponsive legislatures.

[34] Aaron McKnight, Supra note 2, at 1123.
[35] *Id.* at 1122.
[36] Orin Kerr, Supra note 23.
[37] Aaron McKnight, Supra note 2, at 1109.
[38] *The Dangers Of Jury Nullification*, CHICAGO TRIBUNE (Jan. 27, 2014), http://articles.chicagotribune.com/2014-01-27/opinion/ct-jury-nullification-edit-0127-20140127_1_jury-nullification-law-professor-jurors.

**Theory of the Ninth Amendment**

By Brendan Meece

The Constitution of the United States is a remarkable document both for what it covers and intentionally leaves vague. Perhaps the most notable example of this is the Ninth Amendment, which has been used as justification for much of what was not originally specified in the Constitution. As a part of the Bill of Rights, it states that rights granted by the Constitution should not be used to deny other rights.[1] This has taken on many different interpretations throughout the years. Originally, many framers were worried about a Bill of Rights because they believed it could be easily misinterpreted to deny others certain rights, thus allowing for the broad, blanket-statement-like language of the Ninth Amendment.[2] However, this ample room for interpretation can cause much confusion and chaos. Many even question its modern existence. In fact, Justice Goldberg of the Supreme Court argued in *Griswold v. Connecticut* that "The language and history of the Ninth Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights...which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[3] Another popular interpretation was that the Ninth Amendment was used by the framers as a kind of a blanket statement to cover the many rights which would not be possible to list completely in the Constitution. As a part of the Bill of Rights, the Ninth Amendment states that rights granted by the Constitution should not be used to deny other rights.[4] This paper will explore cases associated with the Ninth Amendment, different ways that the Ninth Amendment has been interpreted, and its ambiguous modern purpose.

[1] Bill of Rights Institute, "Bill of Rights of the United States of America," BILL OF RIGHTS INSTITUTE, https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/.
[2] Cornell University Law School Legal Information Institute, "Ninth Amendment," CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/anncon/html/amdt9_user.html#amdt9_hd1.
[3] *Id.* at 2.
[4] *Id.* at 1.

The Ninth Amendment is often associated with both the Tenth and Fourteenth Amendments. A key reason for this is the vagueness of the Ninth Amendment and the confusion as to when it should be invoked. The Ninth Amendment can be used alongside the Tenth to justify states' rights involving procedures not mentioned specifically in the Constitution. In fact, even James Madison himself wrote that "If a line can be drawn between the [federal] government powers granted and the rights retained, it would seem to be the same thing."[5] The Ninth and Tenth Amendments both have the function of limiting the federal government by giving more power to states and individuals. The Fourteenth Amendment also contains similar language with a purpose similar to these other amendments. The first section of the Fourteenth Amendment states that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[6] This statement is another broad statement along the lines of the Ninth Amendment used to provide the Constitution with power that is otherwise not explicitly mentioned in the document. This wording allows the Constitution to theoretically adapt to different times and circumstances.

There are only a few major Supreme Court cases involving the Ninth Amendment, the most notable of which is arguably *Griswold v. Connecticut* (1965). In this case, the Supreme Court declared that birth control is legal in part due to the Ninth Amendment as evidence that the Constitution should be a broadly interpreted document, backed up by the Fourth and Fourteenth Amendments' declarations invoking privacy. The dissent to this case, by Justice Potter Stewart, wrote that the Ninth Amendment is a form of limiting the federal government and giving more powers to the states and people, rather than something which can be used to "annul a law passed by the elected representatives of the people."[7] This marks an interesting shift in the fundamental purpose and interpretation of the Ninth Amendment. The Constitution was unable to contain a full list all of the

[5] Steve Lackner, "Original Purpose of the Most Significant and Ignored Amendments to the Constitution: The 9th and 10th," FREE REPUBLIC, http://www.freerepublic.com/focus/news/2742555/posts.
[6] Cornell University Law School Legal Information Institute, "14th Amendment," CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/constitution/amendmentxiv.
[7] Tom Head, *Ninth Amendment Supreme Court Cases: The Often Overlooked Ninth Amendment*, THOUGHT CO. (Jul. 31, 2017), https://www.thoughtco.com/ninth-amendment-supreme-court-cases-721170.

rights which the government has or does not have, and one could interpret the Ninth Amendment as serving a placeholder to prevent the government from stepping over their boundaries. Steward's dissent argues that there is a flaw in this absolute interpretation. A law is not necessarily unconstitutional solely because it involves a right that is not mentioned in the Constitution. The second interpretation rejects the interpretation that the Ninth Amendment can be used as a tool to legalize anything not explicitly mentioned in the Constitution.[8] This reduces the Ninth Amendment to a principle to be understood and recognized rather than a barrier for constitutionality. In other words, when creating a law, lawmakers should be aware that the text of the Constitution is not a complete document in terms of all legal regulations. However, once a law is passed with this in mind, the Ninth Amendment does not have much power in declaring that the law is unconstitutional.

Another key case that has helped foster interest in differentiating the Ninth Amendment from the similar Tenth Amendment is *United Public Workers v. Mitchell* (1947). In this case, Justice Reed wrote "when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the union is taken."[9] However, this "rights-powers conception of the Ninth Amendment has been criticized for claiming "that there can never be a conflict between a constitutional right and a delegated power."[10] If no conflict could exist, then there would be no need for the Ninth Amendment. This is because the Ninth Amendment can be used to determine if delegated powers bypass constitutional rights or unlawfully deny other rights. Conflict can arise throughout the years as law in the United States expands legal code and the application of the law, and the Ninth Amendment should continue to serve as a guide to the constitutionality of these new laws. The fact that laws and the Constitution can contradict each other brings the need of the Ninth Amendment to exist to determine when should legal contradictions exist.

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[8] *Id.* at 7.
[9] 7. Randy E. Barnett, *Two Conceptions of the Ninth Amendment*, 12 HARVARD JOURNAL OF LAW & PUBLIC POLICY 29-41 (1989), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2278&context=facpub.
[10] *Id.* at 9.

Because of the flaws connected with the rights-powers conception and Reed's interpretation of the Ninth Amendment's purpose, others propose looking at the Ninth Amendment using the "power-constraint" conception. This interpretation maintains that the Ninth Amendment serves to limit the federal government, as James Madison said, to provide instances "in which government ought not to act" and other cases where "government ought…to act only in a certain mode."[11] Therefore, this interpretation Ninth Amendment either limits the government from acting at all in some circumstances or giving them severely limited power in other circumstances. Per the wording of the Ninth Amendment, it is not entirely clear as to when it should be invoked to completely or partially limit the legal role of the federal government. As there are only a handful of cases primarily focused on the Ninth Amendment, there are also limited practical applications to when it should be invoked. However, if the Ninth Amendment is as broad as the framers intended it to be, then theoretically any future Supreme Court case has the potential to contribute to precedent for the adaption of this amendment. Just as any case that involves a dispute concerning states' rights can be theoretically analyzed under the Tenth Amendment, so can any case involving the federal government's role outside of the Constitution be analyzed under the Ninth Amendment.

The vague wording of the Ninth Amendment and the relative lack of Supreme Court Cases invoking it means that the Ninth is among the most difficult amendments to effectively analyze. Understanding this amendment involves looking at the few cases that prominently reference the Ninth Amendment, as well as trying to understand the historical and theoretical reasons for its creation. Some believe that the Ninth Amendment is a way to provide the federal government with the sense that they cannot look at the Constitution, see that a right is not explicitly mentioned or protected, and decided to restrict this right from the people. There is no way for the framers of the Constitution to effectively predict future legal advances and regulate them, so the Ninth and Tenth Amendments can prevent the Constitution from being outdated. However, within the last 30 years, several different

[11] *Id.* at 9.

schools of thought have emerged regarding the Ninth Amendment's meaning after Robert Bork likened it to an "inkblot" that is not worth trying to interpret or has no significance whatsoever.[12] Different modern interpretations of the Ninth Amendment focus on different phrases within the amendment. Some such as Russell Caplan have taken the phrase "rights retained… by the people" to refer to state laws.[13] Caplan wrote the article "The History and Meaning of the Ninth Amendment" for the Virginia Law Review.[14] Other such as Thomas McAffee believe that the phrase focuses on "residual' rights that are not surrendered by the enumeration of powers."[15] The states' laws interpretation makes the Ninth Amendment even more similar to the Tenth Amendment, once again indicating that they both serve to broadly protect rights and delegate more power to the states. The residual rights could be considered more of the idea that the amendment keeps the federal government vaguely limited as was the intent of some of the framers. However, if the Ninth Amendment does not serve either of these two purposes, then what meaning does it truly hold? If the Ninth Amendment serves to further expand states' rights, it seems unwarranted because the Tenth Amendment is also a part of the Bill of Rights. It also seems as though the Constitution will never interpreted in a way that allows for one to see that a right is not explicitly mentioned within it and use this as justification for refusing to pass a law. Nonetheless, if the documents recording the framers' original ideas around the Bill of Rights are correct, it seems as though they were worried about the Constitution being used to limit rights in the future, explaining the broadness of the Ninth Amendment.

The Ninth Amendment remains a challenge to fully interpret. Its initial purpose proposed by Madison as a way to protect rights without explicitly mentioning them in the Constitution holds weight. However, the Ninth Amendment continues to have little development by way of precedent, causing individuals of high legal standing to question whether it serves any true purpose. *United*

[12] Barnett, Randy E. and Seidman, Louis Michael, "Amendment IX: Non-Enumerated Rights Retained by the People," CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/amendments/amendment-ix.
[13] *Id.* at 12.
[14] Russell L. Caplan, *The History and Meaning of the Ninth Amendment,* 69 Virginia Law Review, March 1983, https://www.jstor.org/stable/1072779?seq=1#page_scan_tab_contents.
[15] *Id.* at *12*.

*Public Workers v. Mitchell* and *Griswold v. Connecticut* are among the primary cases invoking the Ninth Amendment, and do little to elaborate on its meaning except seemingly associating the amendment with the right to privacy. Due to the difficulty of understanding when the Ninth Amendment should be invoked, it is best to consider it an outlier from the rest of the Bill of Rights and something to be referred to on a basis of principle rather than legal application.

**How The International Court of Justice Can Strengthen Global Governance**

By Jessie Yin

For most of the people in the world today, globalization is an accepted reality. The world has moved past the point of questioning whether or not globalization will happen and onto whether or not it is a positive or a negative change. However, many people continue to dissent over the validity of global governance, in which the most vehement of the globalists would argue will gradually lead to a world government. Has our world gravitated so far into multilateral foreign policies that we will one day reach a world government? If so, how would this progression come about? It is possible for a world government to materialize, and it would begin through judicial processes rather than through legislative ones.

First, enough state actors must be favorable to the idea of increasingly systematic global governance, setting aside any of the objections against the globalists regarding cultural or linguistic barriers to integration. The definition of global governance encompasses both the global cooperation of non-governmental organizations seeking to influence the actions of states and the gravitation of states towards solutions of multilateralism in international conflicts.[1] And the meaning of the term globalists shall refer to those in academia or in policy creation that support this theoretical development. The concept emerged in the 1990's after the end of the Cold War, and there has been an observable push towards multilateralism following the announcement of the United Nations' Millennium Development Goals[2], which encouraged member states to participate in an international movement to improve the quality of life around the world. The United Nations also plays an undeniably large role in global governance, and many see the United Nations as the beginning structure of a world government if one were to emerge. The UN consists of the General Assembly, the Security Council, and the International Criminal Court in conjunction with the International Court of

[1] Klaus Dingwerth, *Global Governance as a Perspective on World Politics*, 12 Global Governance 185–203 (2016).
[2] Participatory governance and the millennium development goals (MDGs), UNITED NATIONS (2008), https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2008%20Participatory%20Governance%20and%20MDGs.pdf.

Justice, which correspond with the legislative, the executive, and the judicial components, respectively.[3] If this international system exists as the starting ground, then how would a world government develop from this point?

Previous discussions about expanding the current power of the United Nations have included the establishment of a permanent Parliamentary Assembly, but this idea has been rejected by different states on the grounds of excessive interference with state sovereignty. The Parliamentary Assembly was first proposed as early as the era of the League of Nations. The Parliamentary Assembly is imagined as a body in conjunction with the General Assembly for members of different parliaments around the world.[4] It would usher in a level of global governance that is unprecedented, and states worry about ceding that much authority over to a multilateral international organization as this new requirement would shift the value the parliament members and their political equivalents place on international interests versus the local interests of their constituents. By bringing these political representatives into the United Nations, the hope is that it would promote a global democracy and that any resolutions passed by the United Nations would see a greater chance of being implemented within those countries if these members must be expected to be held accountable to their colleagues in the Parliamentary Assembly. While this is an idealistic proposal, it is too straightforward in its motivations towards the furtherance of a controversial global platform. Resistance to such a proposal is to be expected as its implementation would be instantaneous and hard to reverse . Also, it should be questioned whether the resolutions written by any such assembly are even legitimate.

The nature of government is such that those who control the laws are the ones who hold governing power. As it stands, the United Nations has actually not created many pieces of law in its time. Most notable are the Geneva Conventions[5], the Convention on Human Rights[6], and the

[3] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: http://www.refworld.org/docid/3ae6b3930.html.
[4] Klaus Dingwerth, *Global Governance as a Perspective on World Politics*, 12 Global Governance 185–203 (2016).
[5] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.
[6] U.N. GA. "Universal Declaration of Human Rights." 217 (III) A, 1948, art. 1.

Convention on the Law of the Sea.[7] What these three have in common is that they resolve conflicts between countries that would expand past what most countries can unilaterally settle in various treaties and they also set a baseline for foreign policy. Due to the absence of an enforcement mechanism, much of the interpretation and enforcement of laws is sporadic and falls to the judicial entities of the International Criminal Court or the International Court of Justice. The reality of international law means that although there is not a centralized source of global law-making, the currently existing system is comparable to common law in how the law is decided primarily through the courts and judges instead of the actual legislators.[8] The major differentiation between common law and international law would be the lack of an executive enforcement of the law, but the judicial enforcement of laws could bring the creation of international law closer to our understanding of common law. The International Criminal Court is limited to the trials of individuals while the International Court of Justice handles state and non-state actors as well as international or domestic parties. In terms of global governance, the jurisprudence process, decisions, and potential, the International Court of Justice would be more beneficial to analyze when considering supranational governance since it specializes in judicial settlement of conflicts between states.[9] Furthermore, this interpretation of the future of a globalized governing system favors graduality and allows for the parameters of this system to be defined in stages. These qualities make it preferable to the ratification of a Parliamentary Assembly in the United Nations or the extension of the powers of the Security Council.

The specific instance of how the International Court of Justice may play a role in determining how the United Nations' Convention on the Law of the Sea would affect territorial claims within the slowly melting Arctic Circle. This case is a critical example since the area contains the immediate territory interests of two of the P5+1 powers, countries within the Security Council with veto power,

[7] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.
[8] Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 Harvard Law Review 172–201 (1891).
[9] Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 Duke Law Journal 1779–1812.

in addition to Canada and a coalition of European nations. The Arctic Sea is said to hold 30% of the earth's undiscovered natural gas and 13% of the undiscovered oil. The melting ice sheets not only makes the extracting of these fossil fuels easier, it also opens up more routes of trade on the sea. Yet, unlike dispute over borders on land, this conflict is complicated by this ever-changing face of the Arctic Circle, making it difficult to ascertain data on the parameters for countries wishing to establish an Exclusive Economic Zone (EEZ). An EEZ is defined under UNCLOS as the area extending 200 miles into the sea around any continental shelf within a country's territorial claim.[10]

The most pressing contemporary conflict concerns the actions that Russia has taken in staking out disputed continental shelf beyond their current EEZ, a claim that was submitted to the UN Commission on the Limits of the Continental Shelf on December 20, 2001, and has yet to be confirmed or denied by the commission.[11] Russia's claim to the continental shelf has encroached upon territory that is claimed by Canada and the island Svalbard located in the Arctic sea, which is recognized as being under the jurisdiction of Norway.[12] Additionally, Canada is to submit its own official claim to territory to the Commission in 2018, which also contains American interests as the two countries have expressed the desire to work in a partnership in developing resources in the region. However, this official submission will no doubt raise contradictions with the Russian submission. The International Court of Justice would then be in a position where it could settle this case should it be brought to them. It has yet to take on a territorial dispute case of this nature or magnitude, but if we were to assume that the dispute was unable to be settled through diplomatic negotiations and the International Court of Justice is still preferable to armed conflict, then this case would indeed fall into the hands of the judges of the ICJ.

To put this into the context of law creation in the real world, it would be comparable to the court case that determined interstate commerce in the United States. In 1824 during the case of

[10] Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.
[11] Trude Pettersen, UN to consider Russia's Arctic continental shelf claim this summer Anchorage Daily News (2016).
[12] Svalbard Treaty, U.S., -Dk., -No., etc., August 14,1925,43 Stat. 1892, U.N.T.S.686.

*Gibbons v. Ogden,* the Marshall Court decided on an interpretation of Article I, Section 8, Clause 3 of the Constitution that gave the federal government supremacy over that of the state.[13] It is often stated by historians that the state of the United States in this early stage of our union holds greater similarity to a collection of separate tinier countries than an unified front. Much of the work towards establishing national jurisdiction over that of the states was the direction that common law took under the Marshall Court in these early confrontations. While there are recognizable differences between a case that would be brought between the Russian Federation and Canada to the International Court of Justice and the case of *Gibbons v. Ogden*, they both represent momentum and precedent.

Combining these two examples, this argument assumes that any action taken by the International Court of Justice, without regard to the ultimate decision of the ruling, would be the beginning of an assertion of international supremacy over state sovereignty. It would set a precedent in a similar way to the Marshall case. Whether a case such as this will ever appear before the International Court of Justice remains to be seen, but this paper aims to present a dimension of increased global governance that would lie outside of diplomatic international relations, which is how ardent globalists envision this happening. This paper contemplates the importance of gradualism in shifting power away from states and into the hands of a globalized entity and how the familiar process of common law domestically could translate onto the international stage.

The body of the essay has existed in the world of hypothetical, but it attempts to examine how theories on the nature of law and governing, when applied to the idea of global governance, present such a scenario in which the globalists could see their will done. It remains to see where the reach of globalization ends.

[13] Gibbons v. Ogden, 22 U.S. 9 Wheat. 1 1 (1824).

## Supreme Court: Adherence and Departure from Precedent

By Madison Gaona

**Introduction:**

Judicial precedent comprises a core component of the Supreme Court of the United States (SCOTUS). This concept compels the Court to rule according to its prior decisions; however this obligation is not absolute. The goal of judicial precedent is to provide society with a stabilizing force, as this procedure encourages the Court to maintain a level of consistency in their decisions. While it is paramount that the judiciary remains consistent, there are occasions when the Court must deviate from this principle. Freedom of religion and freedom of privacy provide examples of cases in which the Court draws distinctions from precedence, denounces it altogether, or justifies its adherence to it.

**Religion: Sherbert v. Verner and Employment Division v. Smith**

In 1963, the Court decided *Sherbert v. Verner,* a case involving a Seventh-day Adventist who was fired from her place of employment for not working on Saturday for religious observation. Subsequently, Sherbert was unable to find work that would accommodate her inability to work on Saturday. She was denied unemployment benefits as a result of a South Carolina law which called for the denial of benefits when the applicant failed to accept work when offered without a "good cause." The State Court affirmed the South Carolina law; however, the Supreme Court later reversed the lower court's decision.[1]

Several years later, in 1990, *Employment Division v. Smith* came before the Court. In this case, two men were denied unemployment compensation due to "misconduct." They were dismissed from their counselor positions at a drug rehabilitation facility after failing a drug test.

[1]KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW 1574 (Robert C. Clark, Daniel A. Farber, Heather K. Gerken, Samuel Issacharoff, Herma H. Kay, Harold H. Koh, Saul Levmore, Thomas W. Merrill, Robert L. Rabin & Carol M. Rose ed., Foundation Press, 2013).

These men had consumed peyote during a religious ceremony as members of the Native American Church. Prior to being taken up by SCOTUS, the Supreme Court of Oregon found the prohibition on the sacramental consumption of illegal drugs to be a violation of the Free Exercise Clause. However, the Supreme Court did not agree and held in favor of the Employment Division by a vote of 6-3.[2]

Here, we can see the Supreme Court's deviation from precedent. In deciding *Sherbert,* the Court first determines that a burden is placed on Sherbert by making her choose between her eligibility for benefits and a religious obligation. This burden, when induced by the government, acts as a fine on Sherbert's religion. In deciding *Sherbert,* the Court develops a balancing test for determining when the government's denial of employment benefits amounts to an infringement on an individual's Free Exercise. This test involves first determining whether (1)the individual's claim involves a sincere religious belief, and (2)whether the government's action places a "substantial burden" on acting on this belief. In response, the government must show that (1)the restrictive action is in pursuit of a "compelling government interest" and (2)it has implemented the least restrictive/burdensome tactic to achieve the interest.[3] In evaluating *Sherbert* under this new criteria, the Court narrowly tailors its holding, stating that South Carolina cannot establish eligibility requirements which force citizens to choose between religious convictions and state benefits.

*Employment Division v. Smith* confronts a different issue - whether a religious conviction exempts an individual from a general prohibition under the Free Exercise Clause. The Appellants claimed that their findings in *Smith* contradict precedent in *Sherbert* and two other cases. *Thomas v. Indiana Employment Security Division* guarantees employment benefits to employees who quit due to a religious objection to their employer's line of work. *Hobbie v. Unemployment Appeals*

[2] *Id.* at 1587.
[3] *Id* at 1573.

*Committee of Florida* guarantees employment benefits to employees who are terminated due to their refusal to work certain shifts on account of religious observation.[4] The Court counters that *Sherbert, Thomas,* and *Hobbie* were distinguishable from *Smith* via the absence of illegal religious conduct. The Court also cautions that if a law is directly targeted a religious practice, then their holding might be different.

The Court contends that they have never held that an individual's religious belief offers them an exemption from a generally applicable law, as was the case in *Sherbert*. This can be contrasted with the *Smith* case, in that the prohibition on peyote was applicable to all rather than those of a specific religion. This assertion highlighted the fact that the Court sees a distinction between *Sherbert* and *Smith* and thus does not feel bound by *Sherbert* as precedent. It instead views *Reynolds v. United States*, which upheld anti-bigamy legislation, as the precedent providing the guiding principle employed in *Smith*. *Reynolds* guides the Court to deny the Respondent's claim that all actions accompanied by a religious conviction must be free from state regulation.[5]

The Respondents in *Smith* then attempt to suggest that their case be evaluated using the balancing test established in *Sherbert.* The Court responds to this by stating that only the denial of unemployment benefits have been subject to the Sherbert test, refusing to extend it to other areas.[6] The Court thus recognizes a distinction between *Sherbert* and *Smith*. *Sherbert* centers on the denial of unemployment benefits as a result of religious belief, whereas *Smith* concerns a violation of a generally applicable law due to religious beliefs - resulting in the denial of unemployment benefits. The fact that *Smith* involved an action illegal for all, rather than a specific religion, seems to be the primary grounds for drawing a distinction between the two cases, justifying the variant

[4] *Id.* at 1576.
[5] *Id.* at 1570.
[6] *Id.* at 1585.

interpretations of the Free Exercise Clause. Ultimately, the ruling added nuance to the Free Exercise Clause that was absent from *Sherbert*.

Simultaneously, the Court asserts that other cases establish precedent for excluding *Smith* from the Sherbert test. They determine that an alternate finding would have substantial implications, subjecting the law to a wide array of religious beliefs. Similarly, the Court rejects the suggestion of a "compelling government interest" requirement. The Free Exercise Clause may be implemented in other areas of law to ensure equality of treatment, but its improper application would grant individuals the private right to claim exemptions from generally applicable laws.[7]

The *Smith* opinion argues an alternative view of the Free Exercise Clause. The court cites several obligations that would be subject to numerous religious exemptions, including military service, taxes, and vaccinations. Finally, it acknowledges that many states allow an exemption to their drug laws for the religious use of peyote, but claim that this is different from making such an exemption a constitutional requirement.[8] While leaving such exemptions to the states may leave minority religions at a disadvantage, the Court finds this outcome preferable to the alternative of each religious conviction necessitating a legal exemption.

**Privacy: Bowers v. Hardwick and Lawrence v. Texas**

In June of 1986, the Court decided *Bowers v. Hardwick*, a case involving two consenting adult males engaged in homosexual sodomy within the private residence of one of the participants. A local police officer observed the acts while legally on the property, and Mr. Hardwick was charged under a Georgia law that prohibited acts of sodomy. Harwick challenged the constitutionality of the Georgia statute in federal court, but it dismissed the challenge. The Court of Appeals reversed and remanded, finding the statute unconstitutional, after which the decision was appealed to the Supreme Court of the United States. The Supreme Court held that the

[7] *Id.* at 1586.
[8] *Id.* at 1587.

constitution did not confer a fundamental right to engage in sodomy; therefore Mr. Hardwick's liberty under the Due Process Clause was not infringed upon. As such, the Court upheld the constitutionality of the statute by a vote of 5-4.[9]

Seventeen years later, the Court overruled *Bowers* in the 2003 case *Lawrence v. Texas.* *Lawrence* involved a similar occurrence in which a Houston police officer observed Mr. Lawrence and an adult male companion engaged in consensual homosexual sodomy within the privacy of Mr. Lawrence's home. The pair was arrested and charged under the Texas law that prohibited members of the same sex from engaging in certain sexual acts, including sodomy. The Texas Court of Appeals did not find a Due Process Clause violation under the Fourteenth Amendment, in accordance with the ruling in *Bowers.* In taking up the case, the Supreme Court reversed 6-3, thus overruling *Bowers.*[10] Addressing why the Court decided to overrule *Bowers* requires identifying how the issue was framed in each case. In *Bowers,* Justice White identifies the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy".[11] The Court concludes that this narrowly defined right was not fundamentally established under the Due Process Clause. Contrarily, in *Lawrence,* the Court views the issue more broadly, questioning whether acts of sodomy violate the individual liberty one possesses over private, intimate acts. This change in the framing of the issue was likely a result of the expansion of privacy rights in other areas of law.

In *Bowers,* the Court considers prior privacy cases, including *Griswold v. Connecticut, Eisenstadt v. Baird,* and *Roe v. Wade*. The Court finds that each of these cases conferred a fundamental Due Process right to decide whether or not to produce a child. Those cases were distinguishable from the issue at hand, that is, the right of homosexuals to engage in sodomy. The

[9] *Id.* at 551.
[10] *Id.* at 565.
[11] *Id.* at 536.

*Bower's* Court saw no connection between the privacy right of procreation decisions from the present case of privacy right of sexual conduct.[12]

In the *Lawrence* opinion, Justice Kennedy articulates a more general issue, of whether Lawrence was "free as an adult to engage in private conduct in the exercise of his liberty under the Due Process Clause of the Fourteenth Amendment".[13] The *Lawrence* Court considers earlier precedents, beginning with *Griswold* and the right to privacy as it relates to marriage as a procreative relationship. The Court confirms that the right to privacy extended beyond the marital relationship as affirmed in *Eisenstadt, Carey,* and *Roe*. Justice Kennedy emphasizes that the sole purpose of the legislation outlawing homosexual sodomy was an attempt to prohibit a sexual act that falls within the liberty of individuals in the most private of interactions, in the privacy of their home.

Kennedy attacks the historical rationale for the *Bowers* decision. He asserts that historically, laws prohibiting sodomy were targeted at both heterosexual and homosexual interactions alike in an effort to deter non-procreative sexual acts. He argues that historically, laws prohibiting sodomy were not meant to show approval or disapproval of homosexuality, but instead to ensure that no distinction was made between heterosexual and homosexual couples.[14]

The Court addresses the issue of enforcement, citing that laws against sodomy have generally not been pursued as they apply to consenting adults acting in private. Rather, such laws have only been enforced consistently when consent was in question. The Court points to more recent legislation to suggest a growing understanding that liberty includes private sexual acts between adults. Specifically, since *Bowers,* the states that possess laws against sodomy have declined by nearly 50%, while those states that maintain such laws rarely enforce them.

[12] *Id.* at 564.
[13] *Id.* at 538.
[14] *Id.* at 565.

The subsequent cases of *Planned Parenthood v. Casey* and *Romer v. Evans* also call *Bowers* into question. *Casey* affirms constitutional recognition of intimate decisions as integral to one's autonomy, providing the Court with precedent to overrule *Lawrence* as a privacy violation.[15] In *Romer*, the Court uses Equal Protection to strike down an amendment to the Colorado Constitution that prohibited the identification of homosexuals as a protected class.[16] As such, *Romer* presents the Court with the option of striking down the Texas law in *Lawrence* as an Equal Protection violation since the prohibition only applied to homosexual sodomy. The Court rejects this option in favor of addressing the constitutionality of *Bowers* under the issue of privacy. In addition, if the Court had opted to invalidate the Texas law as an Equal Protection violation, the validity of a similarly drafted statute that applied to both heterosexual and homosexual participants would remain in question.

In addressing the importance of stability as it relates to overruling precedent, the Court articulates that *Bowers* itself caused uncertainty, both when examining the privacy cases that precede it and subsequent holdings that contradict it. Contrarily, the Court contends that a different reasoning should have been applied to *Bowers*. One cannot deem an act impermissible due only to its immorality, and liberty extends to intimate decisions made by both married and unmarried individuals - procreative or otherwise. In overruling *Bowers* and deeming it non-binding precedent, the Court stresses that *Lawrence* did not involve minors, coercion, public conduct, or formal recognition of homosexual relationships. As such, the state can claim no legitimate interest in encroaching upon the individual liberty over intimate relationships.[17]

**Privacy: Roe v. Wade and Planned Parenthood v. Casey**

[15] *Id.* at 535.
[16] *Id.* at 557.
[17] *Id.* at 565.

In 1973, the Supreme Court took up *Roe v. Wade*, a case that called into question the Texas law that criminalized the procurement of abortions not deemed medically essential to saving the life of the mother. A woman's right to an abortion was affirmed in *Roe* 7-2.[18] Nearly twenty years later, the Court decided to follow *Roe* as precedent when deciding *Planned Parenthood v. Casey*. *Casey* involved changes to Pennsylvania laws on the clinical discussion of abortion, informed consent, a 24-hour waiting period, parental consent for minors, and spousal notification. By a vote of 5-4, the Court upheld all provisions of the Pennsylvania law except for spousal notification.[19]

*Casey* begins by affirming the holding of *Roe*, asserting that the right of a woman to terminate her pregnancy resides in the personal liberty conferred by the Due Process Clause. The right of privacy as it relates to personal and intimate decisions has also been affirmed in decisions such as *Griswold v. Connecticut, Eisenstadt v. Baird*, and *Carey v. PSI*, which support the reasoning put forth in *Roe*. The Court then goes on to describe under what circumstances precedent may be overruled and why *Roe* does not meet those qualifications. For one, a prior holding may be considered "unworkable," but the Court asserts that although *Roe* has necessitated change it does not qualify as unworkable.[20] The Court then considers society's reliance on the decision in *Roe*. Specifically, they cite the twenty years in which women and couples have planned and organized their intimate relationships around access to abortion. In addition, the availability of abortion has allowed many women to strive for social and economic equality that may have otherwise been unattainable without the ability to take direct control over their reproductive lives. They conclude that while the reliance on *Roe* cannot be directly measured, neither can the societal cost in the event of it being overruled.[21] Thirdly, the Court finds that evolution of a legal principle that would leave *Roe* in a weaker state than it was twenty years prior

[18] *Id.* at 522.
[19] *Id.* at 536.
[20] *Id.* at 533.
[21] *Id.* at 533.

has not occurred. Lastly, the Court concedes that while time has served to necessitate adjustments to the specifics of the *Roe* decision, such as the trimester framework, the central holding remains sound. In addition to the above considerations, the Court stresses the importance of *stare decisis*, the guiding legal principle of precedent. Unjustified departures from this principle would greatly jeopardize the stability, legitimacy, and overall authority of the Court.[22]

After the defense of *Roe*, the Court took up the specifics presented by *Casey*. While *Roe* confirms a woman's right to terminate a pregnancy until the third trimester, the Court uses *Casey* to establish that this liberty is not without its limits. To balance a woman's liberty with the interests held by the State, the Court introduces a new standard - the undue burden. An undue burden may be defined as "a state regulation, which has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus".[23] As a result, the Court abandons the strict trimester framework that was enacted with *Roe*.

The Court contends that the adoption of the undue burden standard does not undermine the central holding in *Roe*. They assert that the State's interest in potential life may serve as justification to regulate abortion in an effort to persuade women to choose to give birth rather than have an abortion. Health and safety regulations continue to be permissible; the new standard only guarantees that the regulation does not amount to a substantial obstacle. It is with this new standard in mind that the Court addresses the disputed provisions in *Casey*.

The Court upheld Pennsylvania's provision on informed consent. Making an exception only for a medical emergency, the Court determines that the legislation aimed at ensuring informed consent was acceptable under the state's interest of protecting life.[24] In addressing the 24-hour waiting period, the Court hesitates slightly at the "troubling" burden that women with

[22] *Id.* at 565.
[23] *Id.* at 518.
[24] *Id.* at 535.

limited financial resources may face in attempting to procure an abortion.[25] However, they move forward in permitting the State to enact legislation that incentivizes women to undergo childbirth. The Court then takes up the issue of spousal notification, finding that it constitutes an undue burden and therefore striking it down. They claim that people in healthy relationships are likely to discuss such intimate decisions, while women in unhealthy and even violent relationships may have pressing reasons for not sharing their abortion with their spouse. This safety concern is enough to prevent a substantial amount of women from seeking an abortion. Furthermore, spousal notification may effectively facilitate a veto power amongst husbands, impermissibly diminishing the liberty of married women. The Court gives a trite affirmation of parental consent legislation before similarly upholding reporting requirements on abortion facilities, citing medical research as a justifiable State interest.[26]

Ultimately, the Court uses *Casey* as an opportunity to confirm the precedent established and *Roe*. However, it adopts a new standard--the undue burden--in order to adapt their prior legal reasoning to developing medical advances. In doing so, they find several abortion restrictions permissible as justified by state interest in fostering human life. However, they reject spousal notification as an impermissible infringement into the privacy of the woman as conferred by the *Roe* decision.

**Conclusion:**

In American society we expect the judicial branch to be objective and free of political and ideological influences. We have images that reflect this belief, such as a blindfolded lady of justice and impartial scales. These beliefs and the images that reinforce them come in stark contrast to those of the other two branches of government. The priorities of the executive and legislative branches change, differing by time, individual, and ideology. It is for this reason that

[25] *Id.* at 536.
[26] *Id.* at 535.

precedent is so crucial to the judicial system. In binding justices to prior decisions, our society ensures a level of legal stability. It is only with a great deal of time and societal change that precedent can be overruled. In addition, precedent serves a legitimizing role for the judicial branch. It demands consistency, irrespective of the individual in office or their political or ideological leanings. This perceived objectivity contributes to the judiciary's authority and provides for a general respect for the rule of law. However, precedent is not infallible. The ability to overrule and draw distinctions from precedent allows the judicial branch to account for societal changes, technological advances, and even misinterpretation. It is the dynamic nature of this concept that makes it such a crucial tenet of the judicial branch.

**International Human Rights Law:**

**United States and the International Covenant on Economic, Social and Cultural Rights (ICESCR)**

By Evelin Caro Gutierrez

## Introduction

The International Bill of Rights is composed of three main pillars: The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together, they form the core of the international human rights regime. Although the US has signed and ratified the UDHR and the ICCPR, it has not ratified the ICESCR. The ICESCR reiterates and affirms the basic economic, social and cultural rights of individuals and nations, including the right to earn wages sufficient to support a minimum standard of living, equal pay for equal work, equal opportunity for advancement, the right to form trade unions and strike, free primary education and accessible schools at all levels.[1] The United States signed the covenant in 1977 under President Jimmy Carter but Congress never ratified it. Rationales against ratification included the association of economic and social rights with Soviet and communist ideals, and the misalignment of these rights with American domestic law.[2] This paper will 1) analyze the validity of both rationales against ratification under current political circumstances, 2) offer arguments for the ratification of this treaty and 3) assess genuine concerns that are applicable to the current political climate. Despite opposition and legitimate obstacles, the US should ratify the International Covenant on Economic, Social and Cultural Rights.

## Rationales against Ratification

*i. Association of Economic, Social and Cultural Rights with Communist Ideals*

[1] Jeffrey A. Frieden, David A. Lake & Kenneth A. Schultz, World Politics, 496, (3rd ed. 2015).
[2] Barbara Stark, Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy", 44 Hastings L.J. 81, 84. (1992).

The Universal Declaration of Human Rights includes political and civil rights, as well as economic, social and cultural rights, hence, the ICESCR and ICCPR were originally intended to be "constituent parts of a single treaty."[3] However, the introduction and negotiation of these human rights treaties took place during the Cold War, a period characterized by hostile tensions and ideological divisions between two major superpowers: the US and the Soviet Union. These nations' "ideological rivalry over the status of economic and social rights" led to the adoption of parallel documents, one upholding the supremacy of political and civil rights (ICCPR), and the other affirming the importance of economic, social and cultural rights (ICESCR). While "the communist bloc wanted [economic, social and cultural rights] included as human rights; the capitalist West did not."[4]

Despite this tension during treaty negotiations, a decade after the adoption of the ICESCR, President Carter signed the treaty and sent it to Congress for ratification in 1977. However, Cold War tensions proved to be paramount as Congress refused to take action. Congress affirmed that while the US exemplified Western liberalism and focused on the civil and political rights of liberty, the Soviet Union professed a communist ideology focused on the economic, social and cultural rights of equality and brotherhood.[5] Because of this tension, social and economic rights came to face tremendous opposition in American society, as they were associated with the principles advanced by the communist Soviet Union. As a result, the ICESCR got trapped in this fight and was dismissed by the American public and Congress. However, decades later, after the collapse of the communist Soviet Union, "detractors can no longer link economic rights with Soviet sympathies."[6] The initial rationale against ratification of this treaty is no longer applicable; therefore, it does not impede the incorporation of the ICESCR's provisions into American domestic law.

*ii. Social Rights are Foreign to US Domestic Law*

[3] Wade M. Cole, Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 70 American Soc. Rev. 472 (2005).
[4] *Id*.
[5] Frieden, Lake, & Shultz, supra note 1, at 496.
[6] Stark, supra note 2, at 84.
Frieden, Lake, & Shultz, supra note 1, at 496.

A second rationale against ratification is the suggestion that the rights set forth in the Covenant are foreign to the US's conception of rights.[7] The US Constitution is indeed viewed as an instrument of negative rather than positive rights. While negative rights require only "forbearance on the part of others," positive rights require "others to provide goods, services, or opportunities."[8] The text of the Constitution outlines what the "government may not do rather than what it must do."[9] In this sense, economic rights might be considered foreign because they are not explicitly stated in the supreme law of the land. However, some scholars have rejected this criticism of "foreignness" and argued that "while economic rights are in fact quite different from negative rights, they are well-entrenched on the state level."[10] Barbara Stark contends that the alleged hostility toward economic rights has only served as a "mask assumed for purposes of foreign policy."[11] The reality is that "we have historically accepted the idea of economic rights on the domestic state level."[12] Stark argues that even before the formation of the Union, "constitutions established the states as the primary source of economic rights."[13]

In addition, Gillian MacNaughton & Mariah McGill examine the national and state-level implementation of social and economic rights. They conclude that "despite the ambivalence of the US government toward [social and economic] rights, they are being implemented in the United States at the local, state, and even national level."[14] They also found that "the United States seems to be heading back in the direction of respecting, protecting, and fulfilling the full array of rights set out in the holistic framework of the Universal Declaration of Human Rights."[15] The findings by Stark,

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[7] *Id.* at 89.
[8] Donnelly, Jack. "Universal human rights in theory and practice" Third Edition. New York: Cornell University Press, 2013, 42.
[9] Piccard, Ann M. "The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?" *Stetson University College of Law.* Stetson University College of Law Legal Studies Research Paper Series, 04 Apr. 2011, 239.
[10] Stark, "Economic Rights in the United States and International Human Rights Law," 89.
[11] *Id.* at 91.
[12] *Id.*
[13] *Id.* at 94.
[14]MacNaughton, Gillian, and Mariah McGill. "Economic and Social Rights in the United States: Implementation Without Ratification." *Northeastern University Law Journal*, vol. 4, no. 2, 2012, pp. 365–406.
[15]*Id.*

MacNaughton and McGill legitimize the claim that economic rights are, in fact, not foreign at the domestic level, rather, they have always been at the heart of national and state practices.

**Rationales for Ratification**

*i. American Society does accept Economic, Social and Cultural Rights*

Throughout the history of the United States, various presidents have challenged the assumption that political and civil rights trump social and economic rights in Western liberal ideology. President Franklin D. Roosevelt, one of the most popular presidents in American history, exemplified this pushback against the rejection of social rights when he said in his 1944 State of the Union Message:

> "As our nation has grown in size and stature . . . political rights proved inadequate to assure us equality in the pursuit of happiness . . . [T]rue individual freedom cannot exist without economic security and independence . . . People who are hungry and out of a job are the stuff of which dictatorships are made . . . In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a *second bill of rights* [emphasis added]."[16]

The challenge against the assumption that the American public does not uphold the importance and validity of economic and social rights is not a matter of the past; in fact, the previous presidential race strongly demonstrates this opposition. In the 2016 election, Democratic candidate Bernie Sanders declared himself a Democratic Socialist. Sanders proposed an agenda centered on economic and social rights including "healthcare for all, tuition-free college and a big minimum wage increase."[17] Polls indicated that in terms of a single-payer healthcare plan, "over 50 percent of people said they supported the idea, including one-quarter of Republicans."[18] During the presidential race, Sanders gained a great amount of support, especially among young voters. Sanders won the votes of more than 1.5 million young people, which was higher than the number of votes cast from this group for Trump

[16] Franklin D. Roosevelt: "State of the Union Message to Congress," January 11, 1944. available at http://www.presidency.ucsb.edu/ws/index.php?pid=16518.
[17] Nick Sanchez, *10 Socialist Ideas Bernie Sanders Is Pushing.*, NEWSMAX, Feb. 8, 2016.
[18] Sarah Ferris, *Majority Still Supports Single-payer Option, Poll Finds*, THE HILL, Feb. 4, 2016.

and Clinton combined.[19] Although he was not elected as the Democratic nominee, the widespread support he and his agenda received from younger generations demonstrates a shift toward more acceptance of economic and social rights as fundamental rights that all Americans are entitled to.

*ii. ICESCR as a Decisive Tool to Reduce Poverty in the US*

Ratifying the ICESCR would represent a concrete step to reduce poverty and income inequality in the United States. This treaty would provide domestically enforceable rights for poor Americans since it guarantees most of the benefits advocates for the poor have been seeking during past decades: education, living wages, health care, housing, child care, etc.[20] More than five decades ago, President Lyndon B. Johnson declared a War on Poverty. Although this initiative managed to reduce poverty from 26% in the 1960s to 16% in 2012, poverty is still prevalent in the United States.[21] Even though the United States is the world's wealthiest economy, currently over 1 in 6 Americans, including 20% of children, live in poverty.[22] Statistics for income inequality are even more astonishing as America's top 10% receives, on average, an income nearly 9 times as much as the bottom 90% receives, while the nation's top 0.1% takes in over 184 times the income of the bottom 90%.[23]

It is time to admit as a nation that domestic efforts have not been successful in eradicating poverty. It is time to turn to international mechanisms to finally achieve this goal. In a study, Wade M. Cole analyzed the effect of a country's membership in the ICESCR on the extent of its domestic income inequality. He found that membership in the ICESCR reduces income inequality over time. Cole found that after 25 years of treaty membership, income inequality in high-income nations declined by an average of 29%, while in lower-income countries inequality declined by 10%.[24] There is currently no course of American law that might support a person's right to an adequate standard of living. Ratifying the ICESCR would correct that omission. Once the legislature domestically enacts

[19] Blake, Aaron, *Bernie Sanders: The 74-year-old's Dominance among Young Voters in One Chart*, THE INDEPENDENT, 18 Mar. 2016.
[20] Piccard, supra note 9, at 240.
[21] Matthews, Dylan. *Everything You Need to Know about the War on Poverty.* THE WASHINGTON POST, Jan. 8th 2014.
[22] *Poverty Program: USA Poverty*, POVERTY PROGRAM, Aug. 2016.
[23] Priester, Marc, and Aaron Mendelson Mendelson. *Income Inequality*. Inequality.org, n.d.
[24] Cole, Wade M. supra note 3, at 378.

these provisions, they "would give advocates for the poor a foot in the door of the judicial system."[25] Those who have been denied access to fundamental economic and social rights in the past will have a body of law that protects their human right to a decent standard of living. Lawyers for the poor will finally be able to take significant steps to reduce the gap between the rich and the poor in this country.

**ICESCR Ratification under Current Political Climate**

*i. Pushback on Redistributive Measures*

Ratifying the ICESCR will certainly be an extremely effective tool to address many of the social problems Americans face in the United States. However, it is important to consider the political limitations of the actual implementation of this treaty. Enforcing these rights would not be a matter of whether we have enough wealth but rather, how we choose to allocate and spend it to ensure poverty is finally eradicated. Once the treaty is ratified, rights such as universal healthcare and a living wage would immediately become an entitlement. Providing for those fundamental entitlements will require wealth redistribution, which the conservative elite drastically opposes. In the US, the top 1% holds 35% of the total national wealth, which makes them incredibly influential in exercising power at the political level.[26] Since the elite is a small group with concentrated interests, they are easily organized to lobby politicians, and thus, more likely to get their concerns addressed. Just like the poor will gain an entitlement to free healthcare and a living wage, the elite will contend that they are also entitled to their wealth, which they have accumulated through generations and often by their own efforts. These conflicting interests are a huge obstacle to ratifying the ICESCR. It will take a brave leadership to stand up against the interests of the wealthy and place the welfare of the general society at the forefront.

[25] Piccard, supra note 9, at 241.
[26] Domhoff, William. *Power in America: Wealth, Income, and Power. Who Rules America?* University of California at Santa Cruz, Sept. 2005.

*ii. US Sovereignty Concerns*

Additionally, the ratification of the ICESCR raises concerns about infringement on US sovereignty. This is a legitimate concern given the strong emphasis the Constitution poses on federalism and states' rights. In fact, federalism and the division of power have been at the center of American politics since the framing of the US Constitution. Hence, accepting the authority and jurisdiction of an international treaty which lays out an obligation to provide for economic and social rights can threaten states' sovereignty. On the other hand, Piccard has suggested that two mechanisms of this treaty might alleviate this fear. First, the US would only be required "to take steps […] to the maximum of its available resources […] to achieve progressively the full realization of the rights."[27] Second, the ICESCR is not self-executing, which means that the US will draft its own legislation to fulfill the requirements of the covenant.[28] In his view, these provisions could make the ICESCR effective in the US. Infringement on states' sovereignty is a legitimate concern. However, if Americans internalize the importance of economic and social rights for a successful and prosperous society, like they did when President Franklin D. Roosevelt implemented the New Deal, then ratifying the ICESCR will no longer be considered intrusive, but rather complementary to national and states' efforts.

**Conclusion**

The ICESCR is a highly controversial international human rights treaty. This paper has assessed rationales against ratification of this treaty in the US, including the original association of economic, social and cultural rights with communist ideals and the assertion that these rights are foreign to US domestic law. Besides offering counterarguments to these rationales, this paper also offered arguments supporting the ratification of this treaty, which include the assertion that the American public does uphold the importance of economic, social and cultural rights, and the proposition that the adoption of this treaty would represent an effective tool to eradicate poverty and

[27] Piccard, supra note 9, at 241.
[28] See *Id.* at 242.

income inequality in the US. While initial concerns of association of the treaty with communist influence and the perception of economic rights as foreign are no longer valid, there are still concerns domestically to adopt the treaty's provisions as the law of the land. The conservative elite fears wealth redistribution and political leaders and states fear a threat to their sovereignty. However, there is no reason to be discouraged; American society now takes for granted laws and practices that were controversial in the past such as the abolition of slavery and women's suffrage. With a strong leadership determined to ensure the welfare of all instead of a few, the United States can ratify the International Covenant on Economic, Social and Cultural Rights and incorporate its provisions into the American legal body to ensure equality and opportunities for all Americans.

**Expanding The Definition of Underrepresented Minority in College and Graduate School Admissions**

By Naqibah Ashraf

Generally speaking, affirmative action policies refer to any actions taken by an institution or organization to improve opportunities for historically excluded groups in American society.[1] However, affirmative action is commonly associated with college entrance policies, the subject of this paper. In such policies, universities consider the race of an applicant, and if he/she fits within a certain race widely classified under the category of underrepresented minority(URM), the applicant can often gain admission with a lower GPA and test scores than students who are not URM. While affirmative action programs in college admissions have enabled many students of color gain admission into higher education primarily based on race, what constitutes a disadvantaged group(URM) is limited and should be expanded to include groups that are disadvantaged on the basis of economics as well as race for two reasons. Firstly, economically disadvantaged groups fit the technical definition of URM since they are underrepresented in college admissions; secondly, these groups suffer from the same effects that affirmative action programs were meant to remedy for the minorities that benefit from them.

In order to understand why affirmative action policies in college admissions should be expanded to further encompass economically disadvantaged students who would not otherwise be able to benefit from such programs merely on the basis of race, it is helpful to digest the reasoning that led to affirmative action in the first place; as it is this reasoning that the argument for expansion is based. In 1970's, many universities began enacting policies allowing for the consideration of race in admissions policies, often resulting in students of color gaining admission more easily than their non color counterparts or in quotas (requirement that incoming class include a fixed percentage of students of a particular race). One case that involves such a policy is University of California v Bakke, where Bakke, a white applicant, sued on the basis of being denied admission into medical school on the basis

[1] Human Resources, *Equal Opportunity*, NORTHWESTERN UNIVERSITY (2017), https://www.northwestern.edu/hr/ equlopp-access/index.html.

of his race upon finding that he had higher academic qualifications than many admitted minority students. The admissions of the minority students were possible because of the school's quota system, which required a specific number of minorities to be admitted each year. By alleging that he had been discriminated against on the basis of his race, Bakke claimed that the school's quota system violated the Equal Protection clause which mandates each person within a state's jurisdiction must be treated equally under the law. Bakke's equal protection allegation stemmed from the fact he was treated unequally in the college admissions process due to students with lesser qualifications being admitted supposedly merely on the basis of race, as that was the only differentiating factor between them and himself. The school claimed to deny him admission on the basis that allowing him entry would interfere with the school's strict policy mandating a certain number of African American students to be admitted. The issue in this case was whether or not his rejection violated the equal protection clause In this case, the Supreme Court did rule that affirmative action was constitutional, but quota systems were not because they result in individual discrimination, in violation of the Equal Protection clause which mandates equal treatment on an individual basis.[2] The Court found that by fixing a certain percentage of minority students to be admitted, this interfered with applicants being looked at individually for two reasons. The first reason concerns the minority student admitted to fulfill a quota system; the quota system leaves much discretion to a school to admit a student based on race rather than individual merit since it requires for a certain amount of seats to be filled based on racial background. The second reason is the result of the first reason, which is that filling a quota may result in minority students being admitted on the basis of race as in this case, and that creating a fixed percentage of admitted minority students takes away the seats of non-minority students that can be accepted. Because seats are taken away from non-minority students, that inherently results in increased competition among them, making some students look less competitive for acceptance that would not be without the quota system. Therefore, it can lead to the denial of non-minority students

[2] United States Supreme Court, University of California Regents v. Bakke FINDLAW, (2017), https://caselaw.findlaw.com/us-supreme-court/438/265.html.

that would otherwise be accepted, which means that they are not being fully considered on their individual merits as the Equal Protection mandates. As stated, however, the Court ruled that merely considering race in admissions decisions is not unconstitutional, because it held that this consideration did not take away from one individual being looked at on the basis of merit and therefore treated equally compared to another to the extent that the quota system did, and it did therefore not infringe on Equal Protection rights to the same extent. Furthermore, due to the possibility of infringement that could arise by considering race, the affirmative action that allows for this consideration had to survive a strict scrutiny test, which requires an asserted government interest, and that the policy be narrowly tailored to achieve this interest. Nonetheless, the government interest that the affirmative action policy allowing for race to be considered sought to advance was rooted in the history of college admissions. There was no denying that during the 70's, applicants and students of colleges were overwhelmingly white. Consequently, they had greater access to education and living a decent life. Moreover, the majority of blacks did not have equal access to education due to having been widely discriminated against throughout history as well as the workplace, making it hard to earn money to pay for an education. Thus, the government interest proposed by affirmative action was to remedy these effects of discrimination to allow for greater minority representation in higher education. The Court further concluded that the consideration of race through affirmative action was narrowly tailored to achieve this interest because knowledge of an applicant's race allowed an admissions committee to factor in the hardships associated with that particular race that the applicant may have overcome to fulfill his or her achievements. Furthermore, factoring these hardships (such as overcoming racial discrimination or academic expectations due to race) allowed to the committee greater insight about an applicant's personal qualities, resilience, and work ethic; factors which are evaluated in the admissions process.

Bakke illustrates an important lesson to consider when deciding how affirmative action is implemented in college and graduate admissions decisions by showing the necessity of a government interest to uphold affirmative action. This interest relied on the notion of uplifting underprivileged

groups. Thus, it only makes sense that members of similarly disadvantaged communities should be given equal consideration comparable to minorities in university admissions decisions, since they experience the same effects of discrimination that affirmative action was designed to remedy. Examples of students who come from the disadvantaged groups suffering from similar discriminatory effects as minorities but whose applications are not similarly considered under affirmative action include poor whites. Moreover, "the historically disadvantaged" groups in society that affirmative action was meant to benefit are often reflected in the very definition of URM, an acronym used in the admissions process for the term underrepresented minority" and generally reserved for African Americans, Hispanics, and Native Americans.[3]

Thus, what constitutes an underrepresented minority in the admissions process is based on race. This remains true despite the fact that students who apply on the basis of their disadvantaged economic status[defined as family of 4 earning approx. $24,000,[4] are also greatly underrepresented in the admissions process, given that the average parents of college freshman today earns 60% above the national average.[5] Thus, it is difficult to absorb the fact that an black applicant whose parents are doctors may mark that he or she is an underrepresented minority in the college admissions process merely based on skin color, while a white applicant whose parents earn an income to be qualified for living in poverty or at least below the national average may not. This is absurd given that the black applicant may share more in common with the rest of the applicants since his/her household income would allow for similar educational and lifestyle experiences and would therefore not suffered from the effects that affirmative action was designed to remedy. On the other hand, the poorer white applicant may have eaten less nutritious meals during his schooling while also attending a lesser quality high school as well has having endured other financial hardships and therefore being

[3] Office of Diversity and Outreach, *URM Definition*, UNIVERSITY OF CALIFORNIA, SAN FRANCISCO (2018), https://diversity.ucsf.edu/URM-definition.
[4] Timothy Hill, *2017 Federal Poverty Level Standards,* CENTER FOR MEDICAID AND CHIP SERVICES (Mar. 24, 2017), https://www.medicaid.gov/federal-policy-guidance/downloads/cib032417.pdf .
[5] Kathy Wyer, *Today's College Freshmen Have Family Income 60% Above National Average* (Apr. 9, 2007), UNIVERSITY OF CALIFORNIA, LOS ANGELES, http://newsroom.ucla.edu/releases/Today-s-College-Freshmen-Have-Family-7831.

disadvantaged compared to the rest of the applicant pool. Yet, he or she may not mark that they are "under represented" on the application. One might ask that they need not do this, on the basis that it will be clear to colleges the income of such poorer students once it is reported on the application, which can then be considered in the admissions process in the same way that race is.

However, this would only be true if marking URM did not afford greater preference in the admissions process than does a lesser household income. Such an assertion is doubtful, given that students who need financial aid might get passed over when compared with one who does not, as this is especially true with the more elite colleges where admission is extremely competitive**.**

It does not make sense then, that a policy (affirmative action) designed to "remedy effects of past discrimination" and "increase diversity in the admissions process", primarily benefits an exclusive group of minorities whilst leaving out another segment of the disadvantaged population that suffers from very similar effects as those discriminated against race. Such poorer applicants could equally enhance diversity in universities, since they could bring in different experiences into the classroom pertaining to resilience due to having overcome financial barriers. Nonetheless, if the asserted government interest is to "remedy the effects of past discrimination" , effects which consist of the difficulty in obtaining resources such as education and jobs that allow groups to mobilize upwards economically, and that interest is not limited to one group, the definition of affirmative action should be expanded to fulfill the governmental interest it is meant to serve.

**From Concept to Law: The Volcker Rule in the Greater Context of Dodd-Frank**

By William M. Kniep

Surveying a brief history of the recession of 2008 and a legal analysis of the implications surrounding the 2010 *Dodd–Frank Wall Street Reform and Consumer Protection Act* provides insight into the surrounding circumstances in which the government took action against the worst financial crisis of the 21st century. Paired with examining congressional procedure and the executive rulemaking processes, this essay will follow the Stages Model of policy, following the issue emergence requiring congressional action, public calls for action that set the agenda, alternative selection surrounding partisan politics and Wall Street, and the enactment and implementation of the law under the Obama administration.

The *Dodd–Frank Wall Street Reform and Consumer Protection Act* was the landmark financial reform law signed by President Barack H. Obama in 2010. In response to the recession ensuing the burst of the housing bubble in 2007, then candidate and U.S. Senator Barack Obama called for strong reform measures to help Americans recover.[1] As part of the historic Wall Street reform law – The *Volcker Rule,* a ban on proprietary trading amongst banks and financial firms, took the center stage.

Analyzing the procedural legitimacy of the *Volcker Rule* will help to make informed determinations as to whether the *Volcker Rule* is sound policy. Critics and proponents alike offer insight as to how the rule works from Wall Street all the way down to local financial institutions. While addressing the crowd at the signing ceremony of the bill, President Obama stated that the desired outcome of the new law was in essence to achieve a financial system that Americans could comfortably interact with and that "these reforms will lift our economy and lead all of us".[2] Critics suggest that this policy has made it more difficult for institutions to achieve that outcome, whereas proponents believe it has accomplished exactly what it has intended to do.

[1] Ben Rooney, *Bailout foes hold day of protests,* CNN MONEY (Sept. 25, 2008), http://money.cnn.com/2008/09/25/news/economy/bailout_protests/?postversion=2008092517.
[2] Barack Obama, *President Obama Announces Volcker Rule*. Address (Jan. 21, 2010).

The United States housing market had held strong throughout the late 20th Century.[3] In the mid-1990s, the U.S. Department of Housing and Urban Development [HUD] had agreed to adopt policies per recommendation of the Clinton Administration "to let Fannie and Freddie get affordable-housing credit for buying subprime securities that included loans to low-income borrowers."[4]

Following the adoption of the Clinton administration's policy, financial lenders began to increase the issuance of Alternative A-Paper [Alt A] loans. "Alt-A, or loans that required little or no asset and income documentation, allowed many people who would not qualify for the inflated property values to obtain financing."[5] Significant financial risk was placed squarely on the backs of the federal government and American taxpayers in 2004 when Fannie Mae and Freddie Mac – two major government sponsored entities chartered by Congress that were charged with regulating the American mortgage markets – had been allowed to purchase $175B in subprime and high risk mortgage loans, owning approximately 44% of the subprime security market.[6]

Investment banks such as Bear Stearns, among others, began to take extremely high positions in the credit default swap market – types of derivatives in which one company guarantees to insure the other's assets and bonds in return for interest payments – essentially placing a bet against market trends and any potential underlying risk to secure large profits.[7] Several major American and global financial institutions had taken on excessively large positions in the swap market, and hedge funds had dangerously leveraged their assets [debt to asset ratio] as the demand for collateralized debt obligations rose.[8]

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[3] Alan R. Fowler, SuSheila Dhillon, and Brian Handal, *A Brief History of the Modern American Mortgage and Today's Financial Crisis*, EMERGING MARKET CONSULTING GROUP (Dec. 22, 2008), http://www.themonticellogroup.com/American_Mortgage_Market.pdf.
[4] Carol D. Leonnig, *How HUD Mortgage Policy Fed The Crisis*, THE WASHINGTON POST (Jun. 10, 2008), https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-06-10%20Washington%20Post%20How%20HUD%20Policy.pdf.
[5] *Id.* at 3.
[6] *Id. at 4.*
[7] Eric Petroff, *Who Is To Blame For The Subprime Crisis?*, INVESTOPEDIA (Nov. 17, 2017), https://www.investopedia.com/articles/07/subprime-blame.asp/.
[8] *Id.* at 7.

By March of 2007, the market began to slow. Investor confidence plummeted as defaults on subprime mortgages began to rapidly increase.[9] American home-owners began filing for bankruptcy as their mortgages went under-water, risking foreclosure.[10] July of 2008 marked a significant drop in Fannie Mae and Freddie Mac stock value, who at this point had amassed $5.5T in overall debt and investors feared a government takeover would shortly follow.[11]

All within one week during September of 2008, Fannie and Freddie had officially been placed under a government conservatorship; Lehman Brothers filed for bankruptcy on September 15th due to insolvency; the Dow Jones Industrial Average sank 778 points within a single day as a result of severe panic selling; and AIG announced that they were on the verge of a collapse – jeopardizing global financial markets, as international institutions were highly invested.[12] Americans would soon be feeling the direct effects of an economic recession.

As Wall Street unraveled, major banks became unable or unwilling to lend, and consumer credit markets began to freeze. Major financial institutions resorted to merging or filing for bankruptcy. "We are in the midst of a serious financial crisis, and the federal government is responding with decisive action". On September 24th, 2008, President Bush addressed the nation from the White House. He briefed the country on the status of the American economy and his administration's plan for immediate action, the Troubled Asset Relief Program.

The federal Wall Street bailouts under the Bush Administration, formally known as the Troubled Asset Relief Program, were not well-received. Protesters took to the streets of New York City the day after, vocalizing their adversity to the taxpayer-funded asset recovery initiatives.[13] Additionally the program drew sharp criticism from pundits and political spectators alike. In 2010, Ross Douthat, a New York Times contributor published an op-ed titled *The Great Bailout Backlash* in

[9] *Id.* at 3.
[10] Paul Kosakowski, *The Fall of the Market in the Fall of 2008*, INVESTOPEDIA (May 08, 2017), https://www.investopedia.com/articles/economics/09/subprime-market-2008.asp.
[11] Barry Nielsen, *Fannie Mae, Freddie Mac And The Credit Crisis Of 2008*, INVESTOPEDIA (Aug. 17, 2017), https://www.investopedia.com/articles/economics/08/fannie-mae-freddie-mac-credit-crisis.asp.
[12] *Id.* at 10.
[13] *Id.* at 1.

which he expressed that the bailouts "implicated our government in the kind of crony capitalism you'd expect from a banana republic."[14]

President Barack Obama had made financial reform and economic recovery a major cornerstone of his campaign, and decided that the time to act was in that moment.[15] Just two months after President Obama took office, negotiations with Congress were already underway. In June of 2009, the President began to lay out his plan. In an address from the East Room of the White House, the President stated "today, my administration is proposing a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression."[16]

During a June East Room address, the President announced that he would be working closely with two close Democratic allies in Congress, Chairman Chris Dodd of the Senate Banking Committee and Chairman Barney Frank of the House Financial Services Committee.[17] That same day, the Congressman and Senator together confirmed to the press that legislation was already underway.[18] By December 2nd, 2009 *H.R. 4173*, the long-awaited [*Dodd-Frank*] reform bill had been introduced in the House.[19]

At the start of the new year, the crusade for reform was far from over. On January 21st, 2010, President Obama, in an additional address, made clear his intentions to see that the *Volcker Rule* was adopted in *H.R. 4173*, now under consideration in the Senate.[20] The ban on proprietary trading was introduced by the former Federal Reserve Chairman Paul Volcker, who was now heading the President's economic recovery team.

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[14] Ross Douthat, *The Great Bailout Backlash*, THE NEW YORK TIMES (Oct. 25, 2010) https://www.nytimes.com/2010/10/25/opinion/25douthat.html.
[15] CNNMoney.com, *Obama blames lobbyists, politicians for financial crisis*, CNN POLITICS (Sept. 22 2008) http://www.cnn.com/2008/POLITICS/09/22/campaign.wrap/index.html.
[16] Barack Obama, *Presidential Remarks on Regulatory Reform*, THE WHITE HOUSE (Jun. 17, 2009) https://obamawhitehouse.archives.gov/the-press-office/remarks-president-regulatory-reform. .
[17] *Id.* at 17.
[18] Chris Dodd and Barney Frank, *Democratic Reaction to Financial Regulatory Reform*, CSPAN (Jun. 07, 2009) https://www.c-span.org/video/?287097-4/democratic-reaction-financial-regulatory-reform.
[19] Barney Frank, *H.R. 4173 – Dodd Frank Wall Street Reform and Consumer Protection Act*, CONGRESS.GOV (Dec. 02, 2009) https://www.congress.gov/bill/111th-congress/house-bill/4173.
[20] *Id.* at 20.

"It's important that we not lose sight of what lead us into this mess in the first place," the President said to the press; "this economic crisis started out as a financial crisis, when banks and financial institutions took huge, reckless-risks in pursuit of quick profits…"[21] In his address, he made clear his intent – at the behest of Paul Volcker – to enact a 21st Century ban on proprietary trading within the banking industry. The age of the 'too big to fail' was over.[22]

On February 4th of 2010, the Senate Banking Committee heard testimony on the ambitious *Volcker Rule* from industry experts and high-ranking officials at Goldman Sachs and Co., as well as academics from the Massachusetts Institute of Technology and Harvard, among others.[23] During testimony given by Gerald Corrigan, the Managing Director of Goldman Sachs, and Co., opposition to a broad ban on proprietary trading had begun when Corrigan stated that "…outliers [non-investment banks] can be dealt with on a case-by-case basis, either with existing rules, much less with the enhanced rules that I am sure will flow out of the reform process."

The reform that was seemingly a nonstarter at the time of President Obama's announcement suddenly garnered unexpected traction from experts. On February 21st, 2010 Reuters broke a story that five former Treasury secretaries had urged Congress to adopt the rule. In a letter addressed to lawmakers "The five former Treasury secretaries – Michael Blumenthal, Nicholas Brady, Paul O'Neill, George Shultz and John Snow – said in their letter that banks should not be involved in speculative trading activity and still receive taxpayer backing."[24]

Legislation was well underway in the Congress; however, as to which bill would emerge as the leading contender for a presidential signature was uncertain. The Senate version of the financial reform bill was *S.3217*, titled the *Restoring American Financial Stability Act of 2010*. In the Senate bill, initial attempts to implement the President's vision for the *Volcker Rule* failed. While considering

[21] Barack Obama, *The President speaks at the signing of the Wall Street Reform and Consumer Protection Act*, THE OBAMA WHITE HOUSE (Jul. 21, 2010), https://www.youtube.com/watch?v=bIsBFUAVxhE.
[22] *Id.* at 22.
[23] *Id.* at 20.
[24] Reuters Staff, Ex-Treasury secretaries back Volcker rule, REUTERS (Feb. 21, 2010), https://www.reuters.com/article/us-financial-regulation-secretaries/ex-treasury-secretaries-back-volcker-rule-idUSTRE61L0BB20100222.

amendments, then Majority Leader Harry Reid introduced SA3739 on April 29th – a 'strike-all' substitution for the original language in *S.3217*.[25]

While considering the Majority Leader's amendment, Senator Sam Brownback, a Republican from Kansas introduced SA3789, an amendment to SA3739. Brownback's amendment intended to strip authority from the Bureau of Consumer Financial Protection [CFPB] regarding rulemaking over key elements of the auto industry [p S3814].[26]

While deliberations were underway, Senator Merkley of Oregon, and Senator Levin of Michigan spotted an opening; their plan was to amend Senator Brownback's amendment with one of their own – a ban on proprietary trading.[27] On May 19th, 2010, Senator Merkley moved to amend SA3789 with his own amendment SA4115, popularly known as the *Merkley-Levin Amendment* [p S3987].[28] The text of amendment was simple:

> "At the appropriate place, insert the following: SEC. __. PROHIBITIONS ON PROPRIETARY TRADING AND CERTAIN RELATIONSHIPS WITH HEDGE FUNDS AND PRIVATE EQUITY FUNDS" [p S3987].[29]

Though it is uncertain as to whether SA4115 was deliberately attached as a poison pill – Senator Brownback, aware of Senator Merkley's amendment – voluntarily withdrew SA3789 the next day, thus killing the short-lived proposal to ban proprietary trading [p S3987].[30] Though partisan tensions were rising in the Senate over financial reform, progress was about to be made.

The next morning, the Senate took up *H.R. 4173*, the House version of the *Dodd-Frank Act*. To expedite the legislative process, the Senate voted 59-39 to strike the text of *S. 3217* and substitute the House language after the enacting clause [p S4078].[31] The Presiding Officer of the Senate exclaimed

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[25] *Id.* at 20.
[26] Ryan Grim, *GOP Blocks Three Key Anti-Wall Street Amendments*, THE HUFFINGTON POST (May 18, 2010), http://www.huffingtonpost.com/2010/05/18/gop-blocks-two-key-anti-w_n_580747.html.
[27] *Id.* at 28.
[28] *Id.* at 20.
[29] *Id.*
[30] *Id.*
[31] *Id.*

that "the Senate insists on its amendments and requests a conference with the House of Representatives…" [p S4078].[32]

Prior to the conference, Senators Brownback and Hutchinson motioned to instruct Senate conferees on their amendments that previously had not passed; meanwhile, in the House, Chairman Frank motioned that the House reject the Senators' amendments, which succeeded.[33] After eight conferences, the report was filed by the House on June 29th, 2010. Ranking Member Spencer Bachus, of the House Financial Services Committee, then moved to recommit the conference report, which promptly failed. the House agreed to the conference report 237-192.

Now in the hands of the Senate, the conference report was under consideration. No Senator raised a vote to recommit the report to conference, however, some did have objections. Senator Richard Shelby of Alabama was granted unanimous consent to speak in opposition of the conference report [p S5876].[34] In a tirade against the language of the bill, he stated:

> C*ongress could have written a bill to streamline regulation and eliminate the gaps… This bill does the opposite by making our financial regulatory system even more complex. We will still have the Fed, FDIC, SEC, CFTC, OCC, and the remainder of the regulatory alphabet soup*" [p S5876].[35]

The *Volcker Rule*, which he is likely criticizing in that statement had made the conference report in § 619.[36]

Within only a number of hours of debate, a cloture motion to adopt the conference report was invoked by a vote of 60-38 [p S5880].[37] Under a point of order, the Senate had agreed to adopt the

[32] *Id.*
[33] *Id.*
[34] *Id.* at 20.
[35] *Id.*
[36] *Id.*
[37] *Id.*

conference report in a vote of 60-39.[38] The Senate sent the House a message on its action, which then presented the bill to the President the same day.[39]

On July 21st, 2010, President Barack Obama signed the *Dodd–Frank Wall Street Reform and Consumer Protection Act* into law. "Passing this bill was no easy task. To get there, we had to overcome the furious lobbying of an array of powerful interest groups and a partisan minority determined to block change," stated the President before signing the bill.[40]

The *Volcker Rule*, now carrying the full force of law in § 619 of the *Act*, had not yet been implemented, however, banks began to wind down proprietary trading ahead of the anticipated rule proposals.[41] According to the Congressional Research Service, Congress delegated 80% of rulemaking authority of *Dodd-Frank* to five federal regulatory agencies.[42]

Understanding which regulatory agencies and other government entities play a factor in this process is imperative to understanding its implementation. The text of § 619, Public Law 111-203 places "…prohibitions on proprietary trading and relationships with hedge funds and private equity funds and adopt rules to carry out this section…." and delegates the enforcement to "appropriate federal banking agencies."[43]

According to the Federal Register [82 FR 36692], "*Section 13 of the BHC Act authorized the Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System (the "Board"), Federal Deposit Insurance Corporation ("FDIC"), Commodity Futures Trading Commission ("CFTC"), and Securities and Exchange Commission ("SEC")*" (FR, 2017). These agencies were responsible for drafting the rule and voting on its approval. They also work together in overseeing and executing of the various provisions.

[38] *Id.*
[39] *Id.*
[40] *Id.* at 22.
[41] Interactive Tracker, *Tracking the Volcker Rule*, THE NEW YORK TIMES (Dec. 10, 2013) https://archive.nytimes.com/www.nytimes.com/interactive/2013/12/09/business/dealbook/09volcker-timeline.html#/#time295_8268.
[42] C.W. Copeland, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, CONGRESSIONAL RESEARCH SERVICE (Nov. 3, 2010) http://www.llsdc.org/assets/DoddFrankdocs/crs-r41472.pdf.
[43] *Id.* at 44.

By October, 2011, federal regulators began to propose drafts of rules. The public commenting period was opened on November 7th, 2011 in Vol. 76 No. 215 of the Federal Register. The Office of the Comptroller of Currency [OCC], Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation [FDIC], and The Securities Exchange Commission [SEC] all accepted comments on their respective proposed rules (FR, 2011). The public comment period was extended from January of 2012, to February per the Board of Governors.[44]

Per the *Act*, the rule was to be finalized by July 12th, 2012. Federal regulators were unable to meet this date, prompting a delay. On December 13th, 2013 the rule reached consensus between the five regulatory agencies charged with its implementation. According to the *rule*, the Federal Reserve Board was vested the right to grant three extensions to financial institutions to ensure compliance. The final extension deadline was in July, 2017 for "banking entities to divest ownership in certain legacy investment funds and terminate relationships with funds that are prohibited under the rule."[45] The rule is now fully operational as mandated by law.

Several criticisms of the *Volcker Rule* are often made across public and private sectors regarding its procedural legitimacy. Various political, economic, and legal issues are most frequently contested. For the sake of analyzing the policy implications of the *Volcker Rule*, focusing on the legal and financial reforms serves best to understand the government's role in regulatory policy and its actors, as well as other institutions affected.

A chief complaint heard from financial institutions is regarding the rule's sweeping definition of what may be considered proprietary trading. Kirill Lelchitski, LL.M. Candidate at the University of California Berkeley, contends, "The *Volcker Rule* is often criticized for its lack of 'practicality' and unclear and excessively broad definitions and requirements."

[44] Press Release, *Federal Reserve Board formalizes previously announced one-year conformance period extension for certain Volcker rule legacy fund investments*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (Jul. 07, 2016). https://www.federalreserve.gov/newsevents/pressreleases/bcreg20160707a.htm.
[45] *Id.* at 46.

Another criticism of the *Volcker Rule* surrounds its legality. Addressed in a report from the Wharton School's Public Policy Initiative, David Arthur Skeel, JD, suggests that this provision of the *Dodd-Frank Act* plays fast and loose with the law. In his issue brief, he cites an Office of the Comptroller of the Currency [OCC] report in which they estimate it will cost around $4.3B for smaller financial institutions to remain in legal compliance. Not only does this projection disproportionately burden smaller banks financially, Skeel notes that smaller banks also "don't have legal resources comparable to the biggest banks." It is particularly concerning that these major gaps in policy passed over Congress during the year it spent in the capitol.

The *Volcker Rule* is not intended to affect a bank's ability to participate in market-trading (e.g., holding onto securities for the sake of selling to customers later at an appreciated value); however, its language creates uncertainty as to what may qualify as a violation, creating major compliance and operational issues. While the statutory ambiguity does discredit much of its legitimacy insofar as the vast confusion it has cast over the private sector, it is arguably very legitimate in regards to the fair and deliberative process that led to its passage within *Dodd-Frank.*

Within the Stages Model of public policy making, the *Volcker Rule*'s creation fits neatly into the step by step process by tracking reform from the start of the recession, to the President's signature in July, 2010. Though the recession ended in June, 2009 when real GDP growth resumed, the Obama Administration felt it necessary to ensure another recession would never again be caused by financial recklessness. The true test of *Dodd-Frank* is yet to be seen, as there has not been another recession.

While the *Volcker Rule* seems to have negative implications on smaller financial institutions, there is otherwise no means of measuring efficacy. The future of the *Volcker Rule* is not entirely certain. President Donald Trump recently nominated Jerome Powell to be the next Chair of Federal

Reserve, who has been skeptical of the *Volcker Rule's* efficiency, while being otherwise a proponent of *Dodd-Frank*.[46]

As of the 115th Congress, the United States Senate has passed a bill that would work to exempt financial institutions ≤$10B in assets from the *Volcker Rule*.[47] If passed, this provision could potentially absolve the law of its potentially dubious legality. Additionally, the 'too big to fail' standard for banks under this piece of legislation would raise the threshold from $50B to $250B in assets.[48] Critics of the bill in the senate believe that this could expedite, if not trigger another financial crisis. Only until another period of recession or a financial crisis occurs in the United States, consumers and the government alike will be unable to gauge the performance of the financial reform law, and the effects of any potential deregulatory measures taken by Congress.

[46] Steve Matthews, *Here's What You Need to Know About Powell's Fed Chair Selection*, BLOOMBERG (Nov. 1, 2017), https://www.bloomberg.com/news/articles/2017-11-01/here-s-what-you-need-to-know-about-powell-s-fed-chair-selection.
[47] Donna Borak and Ted Barrett, *Senate votes to roll back parts of Dodd-Frank banking law*, CNN POLITICS (Mar. 14, 2018) https://www.cnn.com/2018/03/14/politics/banking-bill-vote-mike-crapo/index.html.
[48] *Id.* at 49.