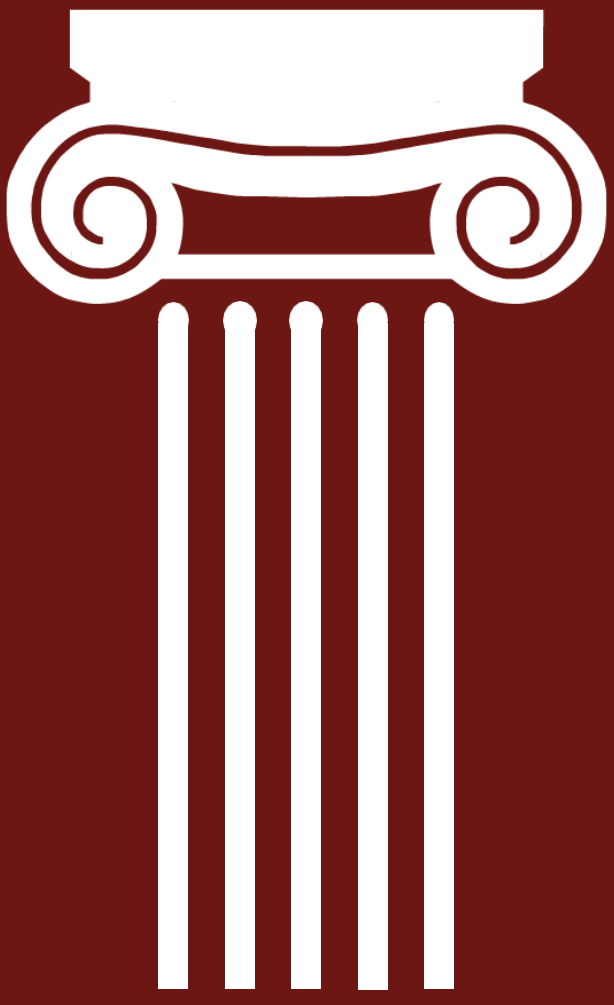
THE CLAREMONT JOURNAL OF

LAW & PUBLIC POLICY

WINTER 2021



Volume 9 • No. 1

Letter from the Editors

Dear Reader,

Welcome to Volume 9, Number 1 of the *Claremont Journal of Law and Public Policy.* The publication of this edition marks the ninth year of the Journal and a return to campus after more than a year of remote learning. This edition was put together over a semester of excitement, adjustment, and in-person engagement. We came together over weekly meetings in Edmunds Hall and meals at Frank and Frary, thrilled to finally be back on campus.

This edition includes writing on legal and public policy issues that mark the times we live in. As the pandemic continues to change our world, Samantha Meyer discusses the politicization of school boards and their increasing inability to be non-partisan institutions. Noor Akhter considers how COVID-19 has exacerbated educational disparities and, more hopefully, provides an opportunity for policymakers to reform test-reliant public-school systems. Our writers also respond to President Joe Biden's challenges during his first year in office — Michelle Lee recommends the Biden administration embrace a public-private partnership to effectively implement the bipartisan infrastructure spending bill, and Bryan Thomas suggests how the administration should respond to the thousands of unaccompanied minors arriving at the southern border. The ambitious attacks against women's reproductive rights have been another defining feature of 2021. Jessica Zou analyses the legal arguments of the Texas Heartbeat Bill and Mississippi's Gestational Age Act to understand the future of *Roe v. Wade.*

In a time when travel restrictions abound, Sae Furukawa takes us to Japan, where the country is grappling with its pacifist ideals, the balance of power in East Asia, and its relationship with the United States. This edition also includes discussions of topics that may not make it into the headlines but are nevertheless crucial policy issues. Chloe Mandel offers an overview of U.S. food labeling regulations and calls for consumer protections against deceptive labeling, while Sridha Chadalavada discusses period poverty in the U.S. and proposes legislation inspired by a progressive Scottish initiative that could improve the health and well-being of menstruators in America.

This edition would not have been possible without our wonderful staff writers, including those whose pieces are not in the print edition, for their commitment to the Journal top of their classes and numerous other commitments. We are grateful to our print edition editors Matt Fisch, Jordan Hoogsteden, Chris Murdy, Celia Parry, Ananya Sen, and Ethan Widlansky for supporting and inspiring writers throughout the editing process. We also want to thank our digital content editors Kelsey Braford, Izzy Davis, Nick Yi and Jon Burkart, our interview editor Lauren Rodriguez, our design editor Sofia Muñoz, and our webmaster Adeena Liang. Finally, we would like to thank our faculty sponsor, Professor Amanda Hollis-Brusky and our longtime partnering organization, the Salvatori Center at Claremont McKenna College. And of course, we want to thank you — our readers — who make this work worthwhile.

Happy reading!

Best,
Calla Li, Ciara Chow, and Rya Jetha
Editor-in-Chief, Chief Operating Officer and Managing Editor

About

The Claremont Journal of Law and Public Policy is an undergraduate journal published by students of the Claremont Colleges. Student writers and editorial staff work together to produce substantive legal and policy analysis that is accessible to audiences at the five colleges and be- yond. Together, we intend to build a community of students passionately engaged in learning and debate about the critical issues of our time!

Submissions

We are looking for papers ranging from 4 to 8 single-spaced pages in length. Our journal is especially receptive to research papers, senior theses, and independent studies or final papers written for classes. Papers need not be on American law or public policy. Students in any field of study are encouraged to submit their work, so long as their piece relates to the law or public policy.

Please submit your work (Word documents only) and direct questions or concerns by email to info.5clpp@gmail.com. We use *Bluebook* citations. Include your email address on the cover page.

Selected pieces will be published in the print edition of the *Claremont Journal of Law and Public Policy*. Other pieces may be selected for online publication only. Due to the volume of submissions that we receive, we will only get in touch with writers whose work has been selected for publication.

Executive Board

Editor-In-Chief
Calla Li PO ’22

Chief Operating Officer
Ciara Chow PO ’22

Managing Editor
Rya Jetha PO ’23

Print Edition Editors
Christopher Murdy PO ’22
Ethan Widlansky PO ’22
Ananya Sen PO ’22
Celia Parry PO ’23
Jordan Hoogsteden PO ’23
Matt Fisch PO ’23

Digital Content Editors
Kelsey Braford PO ’22
Izzy Davis PO ’22
Nick Yi PO ’22
Jon Burkart PO ’24

Interview Editor
Lauren Rodriguez PO ’22

Design Editor
Sofia Muñoz SC ’22

Webmaster
Adeena Liang PO ’23

In This Issue

Building America's Infrastructure Policy: A National Private-Public Partnership (P3) Framework
Michelle Lee (PO '25)

(not) *POM*, (not) *Wonderful*: The Merits and Drawbacks of Mechanisms for Food Labeling Regulation and Litigation
Chloe Mandel (PO '23)

Attacking Federal Precedent and Oversight: Legal Strategies in Mississippi's Gestational Age Act and the Texas Heartbeat Act
Jessica Zou (PZ '24)

An Emergency of Injustice: The Need to Further Provide for Unaccompanied Migrant Minors
Bryan Thomas (PO '24)

The Politics of Japanese Constitutional Amendment: East Asian Geopolitics and the US-Japanese Alliance
Sae Furukawa (PO '25)

Period Politics: A Comparative Analysis of Scotland and the United States
Sridha Chadalavada (PO '24)

A New Battleground for Partisan Policymaking: How the COVID-19 Pandemic Increased Interest in Local School Boards
Samantha Meyer (PO '23)

The Evolution of Standardized Testing: Pre and Post Pandemic
Noor Akhter (PO '25)

Building America's Infrastructure Policy: A National Private-Public Partnership (P3) Framework

Michelle Lee (PO '25)
Staff Writer

In the U.S.'s fast-paced, highly consumerist culture, we often jump to private goods and services to solve our problems, especially when it comes to matters of infrastructure. If public transportation is lacking, invest in a car. If tap water is undrinkable, buy filters and bottled water. When Internet service is spotty, purchase separate routers or premium packages. What we often overlook is the root of these problems: public infrastructure.

Since its inception in 1998, the Infrastructure Report Card, produced quadrennially by the American Society of Civil Engineers (ASCE), has been a primary authority in assessing the state of U.S. infrastructure.[1] Over the past two decades, the ASCE has consistently evaluated U.S. infrastructure to be performing at a D or D+ cumulative grade, indicating that the nation's infrastructure is performing at below average.[2] Since the 2017 report card's grade of D+, infrastructure has improved marginally, with the 2021 report card awarding the nation a C-, a barely average score.[3] Even beyond a report card, it is apparent that U.S. infrastructure is in clear need of improvement with poorly maintained roads, inconsistent broadband, and a lack of high-speed transit infrastructure present in many other developed countries. So why has the U.S., a global economic powerhouse, let its infrastructure decline to a point of barely average functionality?

Before 2021, the U.S. achieved its last major infrastructural success in 1956 with the passage of the Federal Aid Highway Act, which approved the construction of a 41,000-mile network of roads that eventually became known as the Interstate Highway System.[4] After the mid-20th century spending spree, during which the federal government invested heavily in the nation's transportation infrastructure, infrastructure spending dropped precipitously and has remained low for several decades.[5] The result is the state of our infrastructure today. Recent presidents have pushed the issue of infrastructure investment back onto the main stage of the presidential campaign. Former President Trump campaigned on an ambitious infrastructure agenda that ultimately fell through the cracks. President Biden has since taken the reins, unveiling a $1 trillion bipartisan infrastructure spending bill: the Infrastructure Investment and Jobs Act (IIJA). The bill passed through the Senate in August 2021,[6] and has finally passed through the House on November 6, 2021; it is now on its way to being signed into law.[7] The passage of the spending bill brings new possibilities for improving the nation's infrastructure; it is now the federal government's biggest infrastructure investment in a generation.[8] However, IIJA is only a spending bill that outlines provisions for increasing federal funding; it does not address any of the structural and bureaucratic policy issues that underlie the infrastructure problems we face today. The passage of the IIJA alleviates a symptom of the disease but does not cure the root cause. The act will ultimately fall short like the numerous spending bills passed previously unless the U.S.'s broader infrastructure policy framework receives its own major update.

This essay argues that, along with the spending bill, the U.S. needs to design a national private-public partnership (P3) policy framework to standardize and expedite the P3 procurement process, which will allow for the private sector to play a larger role in the construction and maintenance of infrastructure projects. Establishing a uniform federal infrastructure policy will facilitate the construction of large-scale projects that cross state-lines; currently, interstate projects are hindered by conflicting regulations and bureaucratic processes from state to state. Increasing private sector involvement would also enable states to deliver large-scale projects more quickly and at lower costs without compromising infrastructure quality. Allowing for partial private ownership of public good infrastructure would also

[1] *See Report Card History: ASCE's 2021 Infrastructure Report Card*, ASCE'S 2021 INFRASTRUCTURE REPORT CARD (2021), https://infrastructurereportcard.org/making-the-grade/report-card-history (last visited Dec 14, 2021).
[2] *See Id.*
[3] *See ASCE's 2021 American Infrastructure Report Card: GPA: C-*, ASCE'S 2021 INFRASTRUCTURE REPORT CARD (2021), https://infrastructurereportcard.org/ (last visited Dec 14, 2021).
[4] *See generally Congress Approves the Federal-Aid Highway Act*, U.S. SENATE: CONGRESS APPROVES THE FEDERAL-AID HIGHWAY ACT (2019), https://www.senate.gov/artandhistory/history/minute/Federal_Highway_Act.htm (last visited Dec 14, 2021). (discussing the history behind the Federal Highway Act)
[5] *See* William R. Childs, *How public and private enterprise built American infrastructure*, ORIGINS: CURRENT EVENTS IN THE HISTORICAL PERSPECTIVE (2017), https://origins.osu.edu/article/how-public-and-private-enterprise-have-built-american-infrastructure/page/0/0 (last visited Dec 14, 2021).
[6] *See* Reuters, *Factbox: What's in the bipartisan U.S. $1 trillion infrastructure bill?*, REUTERS (October 1, 2021, 9:52 AM PDT), https://www.reuters.com/world/us/whats-bipartisan-us-1-trillion-infrastructure-bill-2021-10-01/
[7] *See* Susan Cornwell and Makini Brice, *U.S. Democrats pass $1 trillion infrastructure bill, ending daylong standoff*, REUTERS (November 6, 2021, 12:15 AM PDT), https://www.reuters.com/world/us/bidens-sweeping-infrastructure-social-spending-bills-finally-get-vote-2021-11-05/
[8] *See Id.*

create more incentives for long-term maintenance so that the American public does not suffer from the crumbling infrastructure systems in the future. To address this issue, the essay examines the following topics:

i. The impacts of infrastructure investment on the economy and general living standards.
ii. The history of U.S. infrastructure spending from the 20th century to present and the current state of our infrastructure.
iii. Reasons why our current infrastructure policy is insufficient.
iv. Proposed reforms to U.S infrastructure policy modeled after Australia's infrastructure policy framework.

I. The Importance of Infrastructure

In discussing the role infrastructure plays in the economy, we must first define the term "infrastructure." In his book, *The Road Taken: The History and Future of America's Infrastructure*, civil engineering and history professor Henry Petroski writes that "infrastructure connotes the sum of a society's physical improvements." This definition includes "public works (that is, structure and systems like roads, bridges, and water supplies that serve the public) as well as the works of private enterprise (for example, the fiber-optic, wireless, cellular, and other information and communication networks)."[9] Outlining infrastructure in this way clarifies the full scope of services that are connoted by the term, not just public structures as commonly perceived.

The main economic impact that infrastructure has is on productivity, which refers to how much output can be produced with a given input.[10] The term "productivity" usually refers to two concepts:

a. Labor Productivity: defined as "output per worker or per hour worked." Changes in labor productivity reflect changes in inputs such as technology, management, skill, etc. [11]
b. Multifactor Productivity (MFP): defined as "output per unit of combined inputs … typically includ[ing] labor and capital, but can be expanded to include energy, materials and services." Changes in MFP indicate changes in output that cannot be traced to changes in input.[12]

In the U.S., productivity is measured using "the ratio of the output of goods and services to the labor hours devoted to the production of that output."[13] Good infrastructure, therefore, increases productivity by increasing the economic efficiency at which outputs can be produced. Take highway infrastructure, for example. Investing in highway infrastructure can increase productivity for businesses by reducing delivery costs, shortening travel times, and improving reliability. Similarly, good highway infrastructure lowers costs and commute times for employees and improves commute reliability on the individual level.[14]

Serious research into the economic impact of infrastructure began with a series of papers authored by economist David Aschauer in the late 1980s and early 1990s.[15] He found that "significant weight should be attributed to public investment decisions … when assessing the role the government plays in the course of economic growth and productivity improvement."[16] When considered in an aggregate production function (relating the total output in an economy to the total labor employed), "a 'core' infrastructure consisting of streets and highways, airports, electrical and gas facilities, mass transit, water systems, and sewers should possess greatest explanatory power for productivity."[17] Aschauer was the first to suggest that the reduction of public investment in infrastructure in the U.S. may be the explanation for the overall reduced productivity growth in the country.[18]

Public capital in the form of infrastructure enables the concentration of economic resources so that there are wider and deeper markets for output and employment, increasing

[9] Henry Petroski, *The Road Not Taken: Words, Reports, and Grades*, in THE ROAD TAKEN: THE HISTORY AND FUTURE OF AMERICA'S INFRASTRUCTURE 23–37 (2017) at 23.
[10] *See generally Productivity*, RES. BANK OF AUSTRALIA (2020), https://www.rba.gov.au/education/resources/explainers/productivity.html (last visited Dec 14, 2021). (discussing general information as to how productivity is calculated)
[11] *Id.*
[12] *Id.*
[13] *Labor Productivity and Costs (LPC)*, U.S. BUREAU OF LABOR STAT. (2021), https://www.bls.gov/lpc/faqs.htm (last visited Dec 14, 2021).
[14] *See Approaches to Making Highway Spending More Productive*, CONG. BUDGET OFF. (2016), https://www.cbo.gov/publication/50150#section1 (last visited Dec 14, 2021). (Refer to Section 2, titled: How Could Federal Spending Be More Productive?)
[15] *See* Josh Bivens, *The Potential Macroeconomic Benefits from Increasing Infrastructure Investment*, ECON. POL'Y INST. (2017), https://www.epi.org/publication/the-potential-macroeconomic-benefits-from-increasing-infrastructure-investment/ (last visited Dec 14, 2021). (Refer to the secion titled: How large a boost does private-sector productivity get from public investment?)
[16] David Alan Aschauer, *Is Public Expenditure Productive?*, 23 JOURNAL OF MONETARY ECON. 177, 197 (March 1989).
[17] *Id.* at 193
[18] *See* Tatyana Palei, *Assessing the Impact of Infrastructure on Economic Growth and Global Competitiveness*, 23 PROCEDIA ECON. AND FIN. 168, 170 (2015)

productivity.[19] In 2009, researchers Wulong Gu and Ryan MacDonald determined that "[w]hen the impact of MFP and public capital are disentangled, public infrastructure is found to have accounted for half the estimate of productivity growth" in Canada from the 1960s to 2000s.[20] However, in both Canada and the U.S., productivity growth before 1980 was much higher than afterward. Gu and MacDonald found that "alternate productivity measures that take into account the impact of public infrastructure substantially reduce the difference between the two periods [before and after the 1980s], thereby demonstrating that part of the higher growth in the earlier period came from the very substantial growth in public infrastructure before 1980."[21]

Infrastructure plays a vital role in productivity growth in part due to its powerful multiplier effect, where every dollar spent generates even higher payoffs in the future.[22] Josh Bivens, Director of Research at the Economic Policy Institute, found in 2017 that "[m]ost estimates of the output "multiplier" for infrastructure investment are substantially higher than for other fiscal interventions." If the fiscal boost of infrastructure investment were accommodated by monetary policymakers, each $100 billion in infrastructure spending would boost job growth but roughly [one] million full-time [employees]."[23] Greater public investment efforts can boost productivity in the long run by increasing public capital stock.[24] A review of dozens of studies on infrastructure indicate that "each $100 spend on infrastructure books *private-sector* output by $13 (median) and $17 (average) in the long run."[25] Colloquially speaking, out of all the public investments the government can finance, infrastructure provides the best "bang for the buck."

Beyond purely economic impacts, at its core, building adequate infrastructure is a mechanism through which we can improve quality of life. In many parts of the U.S., much of the clean water, electricity, and waste management, among other services, that we depend on in our everyday lives are contingent upon public infrastructure. Adequate water treatment and waste disposal services reduce disease and improve living environments.[26] Efficient public transit systems increase access to economic and leisure opportunities. Well-maintained roads decrease the number of accidents and improve public safety. [27] Sustainable infrastructure, such as the Dallas-Fort Worth International Airport (America's first carbon-neutral airport) and the Øresund Fixed Link (a bridge and tunnel complex connecting Sweden and Denmark with minimal environmental degradation), demonstrate how infrastructure can be designed to protect natural capital while still expanding lifestyle choices for users, facilitating the development of more sustainable societies.[28] Not to mention, with the increase in extreme weather events due to climate change,[29] structurally deficient infrastructure can pose a significant danger to commuters.[30] A lack of adequate infrastructure impairs governments from working toward the betterment of their citizens' lives. The U.S. clearly recognized the importance of developing infrastructure in the past two centuries, with the expansion of the railroad network in the 19th century and the Interstate Highway System in the mid-20th century.[31] However, that trend has not held up to the 21st century. Understanding the history behind the development of U.S. infrastructure will allow us to understand why our infrastructure has declined to present levels, and also what changes need to be made to infrastructure policy to lift the government out of this development slump.

III. Placing Our Current Infrastructure in Context

A. The History of U.S. Infrastructure Spending

If infrastructure plays such a crucial role in a society's functioning, how did the U.S. arrive at its current infrastructure crisis? To answer this question, we must trace the historical context and trends behind U.S. infrastructure spending. American capitalism operates as a mixed economy so "its infrastructures are built through private-public relationships." While the private sector has done most of the heavy lifting, the public sector has provided key support by "establishing a legal system, encouraging banking expansion, and offering direct and indirect subsidies to speed up

[19] *See* Wulong Gu & Ryan Macdonald, *The Impact of Public Infrastructure on Canadian Multifactor Productivity Estimates*, SSRN (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511698 (last visited Dec 14, 2021). (Refer to page 7)
[20] *Id.* at 28.
[21] *Id.* at 8.
[22] *See* Saurabh Bakliwal et al., *Infrastructure's Multiplier Effect on Well-being*, BCG GLOBAL (2021), https://www.bcg.com/publications/2019/infrastructure-multiplier-effect-well-being (last visited Dec 14, 2021).
[23] *Supra.* note 15.
[24] *See Id.*
[25] *Id.*
[26] *See* David Alan Aschauer, *Why is Infrastructure Important?*, 34 CONFERENCE SERIES; [PROCEEDINGS] 21, 25-27 (1990).
[27] *See Id.* at 59.
[28] *See* Jamie Montague Fischer and Adjo Amekudzi, *Quality of Life, Sustainable Civil Infrastructure, and Sustainable Development: Strategically Expanding Choice*, 137 JOURNAL OF URBAN PLANNING AND DEV. 39, 46 (March 2011).
[29] *See generally Extreme Weather*, NAT'L CLIMATE ASSESSMENT (2014), https://nca2014.globalchange.gov/highlights/report-findings/extreme-weather (last visited Dec 14, 2021). (discussing how climate change contributes to increases in extreme weather events).
[30] *See Id.*
[31] *See Supra.* note 5.

development."[32] The transformative railroads of the late 19th-century were mostly built by private companies with assistance from Congress in the form of land grants and legislation.[33]

Federal infrastructure investment increased drastically with the creation of the Works Progress Administration (WPA) under the New Deal. The WPA, designed to be a work-relief program, employed millions of Americans in constructing public works projects, such as the Hoover Dam.[34] The New Deal along with World War II ushered in the era of "Big Government," where the federal government's role was greatly expanded in matters traditionally handled by state and local governments, including infrastructure spending.[35] Petroski writes that in the booming post-war economy, "more and more people began switching to transportation by motor vehicle. The auto industry expanded rapidly, but the nation's road system could not keep up with the new demand."[36] While demand was surging, the government was slow to keep up; even when private investors provided the money, "politics [was] involved through concession, regulation, and legislation."

Throughout most of the 20th century, infrastructure projects were approved "almost exclusively when politicians appropriated the funds to have the work done."[37] Eventually, the Federal Highway Act was passed in 1956, authorizing $25 billion over twelve years to construct a "National System of Interstate and Defense Highways," financed by the newly created Highway Trust Fund. The legislation put the federal share of interstate construction costs at 90%,[38] a drastic increase from highway construction in the first half of the century, when the cost percentage breakdown was 57% federal and 43% state.[39] The interstate highway system provided vast economic benefits such as "creating new construction jobs, reducing transportation costs for manufacturers and retailers, and stimulating new business along and near the interstates."[40] The highways opened up a multitude of new lifestyle choices, rapidly accelerating the development of suburbs and increasing personal mobility.[41] However, the highway system spelled the slow decline of mass transit systems by "encourag[ing] the American cultural fetish of individuality embodied in the automobile."[42] By 1989, highways received around $13.5 billion from the trust fund while mass transit projects only received $3.5 billion.[43]

When the national debt grew to unprecedented heights after the 1980s, Congress responded by drastically decreasing infrastructure spending. Chronic deficits and high inflation rates "prevented lawmakers from sustaining portions of the infrastructure that made the affluent society possible."[44] Simultaneously, the costs of construction steadily increased, further inhibiting development. During the 1970s and 1980s, citizens and organized groups had increasing influence in construction decisions due to new legislation and statutes. For example, in the Interstate Highway System, citizens were able to demand more expensive highway features such as noise barriers and force diversions onto more expensive routes.[45] This influence mainly empowered those with higher income, allowing construction harms to disproportionately harm lower-income and minority communities.[46]

Many infrastructure sectors were also deregulated, reducing the amount of federal oversight in infrastructure projects, leaving decisions largely up to state and local governments, resulting in cumbersome bureaucratic processes that have stymied development.[47] Regardless, the lack of spending on infrastructure maintenance and expansion has been a persistent problem since the 1980s. This leads us to the crumbling state of our infrastructure today.

B. The Current State of U.S. Infrastructure

Even though the U.S. population has doubled since the 1960s, when most of the country's major infrastructure systems were designed, Congress has not supported any major repairs or expansions.[48] Many systems are "reaching the end of their lifespan and are dangerously overstretched."[49] Transportation infrastructure will require the most funding by far to repair, update, and expand existing systems. The U.S. Government

[32] *Id.*
[33] *See generally Railroads in the Late 19th Century*, THE LIBRARY OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/railroads-in-late-19th-century/ (last visited Dec 14, 2021). (discussing the history of railroads in late 19th century America).
[34] *See Supra.* note 9, *Perhaps the Better Claim: Iconic, Signature, and Stunning Spans*, 140-151 at 151.
[35] *See Supra.* note 5.
[36] *Supra.* note 9, *Diverged: Transcontinential Journeys and Interstate Dreams*, 50-60 at 56.
[37] *Id.*, *Just as Fair: Location, Location, Location—and Financing*, 125-139 at 125.
[38] *See Supra.* note 36 at 57.
[39] *See Supra.* note 5.
[40] *Id.*
[41] *See* Nathaniel Baum-Snow, *Did Highways Cause Suburbanization?*, 122 THE QUARTERLY JOURNAL OF ECON. 775, 800 (May 2007).
[42] *Supra.* note 5.
[43] *See Id.*
[44] *Supra.* note 5, at 1.
[45] *See* Leah Brooks & Zachary D. Liscow, *Infrastructure Costs*, SSRN ELEC. JOURNAL, 5 (2019).
[46] *See Id.*
[47] *See Supra.* note 44
[48] *See Supra.* note 5. *See* James McBride and Anshu Siripurapu, *The State of U.S. Infrastructure*, COUNCIL ON FOREIGN RELATIONS (2021), https://www.cfr.org/backgrounder/state-us-infrastructure (last visited Dec 14, 2021).
[49] McBride and Siripurapu, *Supra.* note 48.

Accountability Office finds that "nearly one in four bridges are deficient, with 10[%] categorized as structurally deficient and 14[%] categorized as functionally obsolete."[50] Aviation infrastructure is in similarly dire straits. U.S. airports carry the most passengers of any country in the world, overburdening the infrastructure with "some 20[%] of all arrivals and departures delayed in 2019" according to the Department of Transportation's Bureau of Transportation Statistics.[51]

The state of the country's rail systems is slightly more ambiguous. On one hand, the U.S.'s commercial rail system, a large portion of which is owned by the private industry, is one of the most developed in the world, transporting nearly 40% of the nation's goods.[52] On the other hand, investment in commercial rail has relegated passenger rail to be an afterthought. Amtrak, the main provider of passenger rail in the U.S., has more than $30 billion in backlog of infrastructure investments, meaning it has $30 billion in projects and work that still need to be completed.[53] Furthermore, the U.S.'s water systems are similarly overburdened due to lack of maintenance and population strain. The Environmental Protection Agency estimates that "drinking water, wastewater, and irrigation systems will require $632 billion in additional investment over the next decade."[54] Ports and waterways, which handle over 25% of the country's freight transport, face mounting delays like those experienced by airports.[55] The U.S.'s energy systems are in no better shape. Electrical grid operators are struggling to gather the funding needed to make necessary investments; increasing power outages, especially in the face of climate change and cyberattacks, are costing the economy billions of dollars.[56] Alongside electrical grid failures, the U.S. also has a "'broadband gap,' in which rural and low-income communities suffer from a lack of infrastructure to deliver reliable, fast internet."[57] The Federal Communications Commission found in 2020 that around eighteen million Americans, the majority living in rural areas, do not have access to any broadband networks.[58]

On a global scale, in 2019, the World Economic Forum's Global Competitiveness Report ranked the U.S. 13th in the world out of 141 countries in a broad measure of infrastructure quality, much lower than its ranking of 5th in 2002; this places the U.S. behind many other developed countries including France, Germany, Japan, Spain, and the United Kingdom.[59] In terms of rail travel, the U.S. has been unable to achieve the development of high-speed rail infrastructure that is available in many other comparable developed countries.[60] U.S. passenger trains are on average only half the speed of Europe's high-speed rails, negatively impacting businesses, workers, and travelers.[61] In terms of costs, the U.S. also gets less per dollar of infrastructure than other comparable countries. Recent transit projects in the U.S. are more expensive than similar projects in the rest of the world.[62] The World Economic Forum also ranks the U.S. 18th worldwide in broadband coverage; at the same time, Americans pay more and receive slower Internet speeds than their European counterparts.[63] Much of the discrepancy between the U.S.'s infrastructure and that of comparable countries can be traced to differences in funding levels. According to the Organization of Economic Cooperation and Development (OECD), the U.S. invests significantly less in transportation infrastructure as a percentage of GDP, only 0.55% annually, compared to other wealthy nations such as France, Germany, Japan, and the United Kingdom. U.S. infrastructure is clearly in need of investment across the board; however, the root of the problem does not just lie in funding, but in the U.S.'s infrastructure policy.

---

[50] *Id.*
[51] *Id.*
[52] *See Id.*
[53] *See* Christian Roberts, *Five Year Infrastructure Asset Line* Plan, AMTRAK (2019), https://aemtest.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/businessplanning/Amtrak-Infrastructure-Asset-Line-Plan-FY20-24.pdf (last visited Dec 14, 2021).
[54] *Supra*. note 49.
[55] *See Id.*
[56] *See* James McBride and Anshu Siripurapu, *How Does the U.S. Power Grid Work?*, COUNCIL ON FOREIGN RELATIONS (2021), https://www.cfr.org/backgrounder/how-does-us-power-grid-work (last visited Dec 14, 2021).
[57] *Supra*. note 49.
[58] *See* Federal Communications Commission FCC 20-50, (2020), https://docs.fcc.gov/public/attachments/FCC-20-50A1.pdf (last visited Dec 14, 2021), 52.
[59] *See* Klaus Schwab, *The Global Competitiveness Report 2019*, WORLD ECON. F. (2019), https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf (last visited Dec 14, 2021).
[60] *See* Richard Nunno, *Fact Sheet: High Speed Rail Development*, WORLDWIDE EVNTL AND ENERGY STUDY INST. (2018), https://www.eesi.org/papers/view/fact-sheet-high-speed-rail-development-worldwide (last visited Dec 14, 2021).
[61] *See Supra*. note 49.
[62] *See generally* Tracy Gordon & David Schleicher, *High Costs May Explain Crumbling Support for U.S. Infrastructure* REAL CLEAR POL'Y (2015), https://www.realclearpolicy.com/blog/2015/03/31/high_costs_may_explain_crumbling_support_for_us_infrastructure_1249.html (last visited Dec 29, 2021). (discussing multiple factors as to why U.S. infrastructure projects are costlier than they were in the past).
[63] *See Supra*. note 48.

IV. Why U.S. Infrastructure Policy is Lagging Behind

Current U.S. federal infrastructure policy faces three major problems: inefficient funding methods, conflicting incentives between federal and local governments, and diverse needs.[64] First, let us examine how U.S. infrastructure projects are currently financed.

The U.S. differs from most other industrialized countries in the sense that "it relies on local and state spending to meet its infrastructure needs."[65] In most European countries, the bulk of infrastructure development occurs at the national level, while in the U.S., currently only 25% of public infrastructure funding comes from the federal government, leaving cash-strapped local governments to bear the costs of maintenance and investment.[66] The federal government's primary funding mechanism is through direct grants to states paid from the Highway Trust Fund. Around 80% of the money is spent on roads and highways while the remainder goes to mass transit projects.[67] However, the trust fund is on the verge of bankruptcy, running a deficit of $6 billion as soon as 2022.[68]

Local governments, on the other hand, mostly rely on the municipal bond market, supported by the federal government, to finance infrastructure projects. The federal government offers tax incentives for these bonds, including interest that is exempt from federal taxes. Municipalities issue bonds to raise money from private investors.[69] Federal funding is also zero-sum, meaning that if one state receives more funding for projects, there is less funding for projects in other states. If federal funding is increased, it also means additional burdens on local taxpayers. However, there is a common perception that if states do not have enough funding, the federal government can freely step in to fill the gap without consequences, leading to unrealistic expectations about funding.[70] As a result, states often pursue overly ambitious and costly ventures that can be accomplished in more efficient ways; there is not enough cost consideration because of the perception that the federal government can make up the cost. This disconnect between the expectations and reality of funding in designing infrastructure projects makes it difficult to discuss policy reforms because local governments must completely recalibrate their fundamental cost metrics.[71]

The second major issue concerns misaligned incentives between the federal and local governments. Federal involvement in locally-owned infrastructure projects can also discourage investment and prolong delays.[72] When local governments receive federal funding, most of the funding goes toward new projects; decision-making and project-planning, along with maintenance, are still left to local governments, creating an "institutional bifurcation" in infrastructure policy.[73] Even though 75% of infrastructure investment is made at the local level, many local governments still expect to receive federal funding, incentivizing local leaders to postpone projects until they receive funding. Many will continue to delay decisions until the infrastructure becomes unacceptably dilapidated, which is the current situation in many states.[74] This gap between federal and local governments could also be an explanation for the continuously weak public-private partnership industry in the U.S. as well as the slow pace of adoption in smart infrastructure technology.[75]

The final major issue is, in the words of DJ Gribbins at the Brookings Institute, that "policymakers … are also facing a marvelously diverse set of infrastructure needs,"[76] a problem that is exacerbated by the bifurcation between federal and local governments. When the federal government began seriously investing in infrastructure during the 20th century, the country's needs were more clearly defined. Back then, the challenge was connectivity, which was addressed by the Interstate Highway System. Today, the challenges are congestion, functional broadband, old water pipes, and environmental impact, all of which differ by region.[77] To address these issues, there first needs to be a major overhaul of the current financing and bureaucratic system rather than just an increase in funding like the IJJA provides. For that, we look for inspiration in the infrastructure policy frameworks of other comparable countries, particularly Australia.

[64] *See* DJ Gribbin, *Why is Federal Infrastructure Policy so Difficult?*, BROOKINGS (2019), https://www.brookings.edu/blog/the-avenue/2019/02/28/why-is-federal-infrastructure-policy-so-difficult/ (last visited Dec 14, 2021).
[65] *Supra*. note 49.
[66] *See Id.*
[67] *See Id.*
[68] *See Id.*
[69] *See Id.*
[70] *See Supra*. note 64.
[71] *See Id.*
[72] *See Id.*
[73] Michael Bennon, M. Julie Kim & Raymond E. Levitt, *U.S. Infrastructure Gap(s): Federal Policy and Local Public Institutions*, SSRN (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036650 (last visited Dec 14, 2021).
[74] *See Supra.* note 64; *See also Id.*
[75] *See Supra.* note 73.
[76] *Supra.* note 64.
[77] *See Id*.

V. U.S. Infrastructure Moving Forward

A. Australia's Infrastructure Policy

Australia's infrastructure policy particularly merits comparative analysis due to its institutional similarity to the U.S., as both countries have large landmasses and federally-directed economies.[78] Although the World Economic Forum's Global Competitiveness report ranked Australia's infrastructure 29th out of 141 countries in 2019, there has been relatively rapid development compared to the stagnancy and deterioration in the U.S.[79] Compared to the World Economic Forum's 2018 Global Competitiveness report, Australia jumped from 31st to 29th in infrastructure while the U.S. fell from 9th to 13th.[80] Infrastructure projects in Australia are much more easily financed and managed, allowing for large-scale infrastructure projects and more frequent investment.[81]

Public-private partnerships (P3s) are the primary mechanism for delivering large-scale infrastructure in Australia.[82] While Australia has used the P3 model since the 1980s, in the past decade there has been a large uptick in P3 projects for infrastructure in all sectors, including roads, hospitals, and other social and economic infrastructure. [83] P3 projects generally use a contracting model in which government entities engage the private sector to design, finance, construct, maintain, and deliver related services on infrastructure over a concession term and return the asset to the government at the end of the term.[84] P3s extract long-term value for money (optimal combination of benefits and costs) by transferring some of the risk to the private sector over the life of the project, allowing governments to authorize more development.[85]

To maximize the efficiency and effectiveness of P3s, the Australian federal government has developed a federal P3 policy framework and created organizations at the state level to facilitate the process. First, we examine the legislation that makes P3s so effective in Australia. The National Public Private Policy Framework (National PPP Policy) outlines the core elements of a P3 project: the provision of infrastructure and any related services by the private sector, the use of private investment or financing, and the long-term sharing of risks and rewards between the private and public sectors.[86] It is endorsed by all Australian state and territory governments and applies to all P3s that are released to the market; some states supplement the federal policy with state-specific P3 guidelines. The federal policy sets financial thresholds that must be applied in deciding whether to use a P3 model. Financial thresholds vary between jurisdictions, but generally, the policy identifies projects that exceed a total capital value of around $40 million to have the potential to provide value for money using a P3 model. A government will usually be required to consider a P3 model if the capital value of the project is between $40-$75 million.[87]

P3s are generally awarded through a competitive, market-based tender process that allows the government to obtain a proposal that maximizes value for money.[88] The first step of the process is for the government to release an invitation for expression of interest (EOI), informing the market about the terms and conditions of procurement. The EOI phase also allows the government to gauge the viability of the project in the market. The government will then shortlist a group of bidders and request project proposals from them as well as provide bidders with a list of criteria that will be considered (RFP phase). Following the RFP phase, the government will select a preferred bidder based on the criteria established; governments usually have broad discretion in formulating the criteria it applies, but procurement guidelines and process contracts ensure that governments will apply the criteria consistently across bidders.[89] Once a preferred bidder is selected, then both parties are left to negotiate any remaining differences so contracts can be finalized and executed. The key advantage of P3 models is that the government entity can allocate the risks it believes may be more efficiently priced or managed to the private sector.[90] The National PPP Policy sets out guidelines for the typical allocation of risks in PPPs, which are supplemented and adapted by additional state and territory guidelines that reflect their particular P3 approach.[91]

Australia has created new institutions and public organizations to "manage alternative infrastructure and asset management programs, primarily at the state or provincial level," such as Infrastructure New South Wales, which was

[78] *See Supra.* note 73.
[79] *See Supra.* note 59.
[80] *See* Klaus Schwab, *The Global Competitiveness Report 2018*, WORLD ECON. F. (2018), https://www3.weforum.org/docs/GCR2018/05FullReport/TheGlobalCompetitivenessReport2018.pdf (last visited Dec 14, 2021).
[81] *See* Andrew Griffiths and Nicholas Carney, *The Public-Private Partnership Law Review: Australia*, THE LAW REVIEWS—THE PUBLIC-PRIVATE PARTNERSHIP LAW REV. (2021), https://thelawreviews.co.uk/title/the-public-private-partnership-law-review/australia (last visited Dec 14, 2021).
[82] *See Id.*
[83] *See Id.*
[84] *See Id.*
[85] *See Id.*
[86] *See Id.*
[87] *See Id.*
[88] *See Id.*
[89] *See Id.*
[90] *See Id.*
[91] *See Id.*

created to develop infrastructure strategies for the state.[92] These organizations are designed to "reduce the transaction costs of P3s [Public-Private Partnerships], apply a rigorous screening of potential new projects, increase transparency, and help manage life-cycle procurements for large infrastructure projects that often cross institutional boundaries.[93] No such P3 institutions exist in any U.S. states, making the P3 procurement process a bureaucratic nightmare.[94]

B. Applying Australia's P3 Model in the U.S.

In the past, the notion of privatizing infrastructure faced intense political backlash in the U.S. and still does today to a certain extent. Backlash is mostly centered around the P3 model widely utilized around the 1980s, where the private sector took full responsibility for project development while the public sector played a minimal supporting role.[95] The model was abandoned in the mid-1990s for a more collaborative model where public and private entities shared different responsibilities in almost all aspects of project development.[96] However, despite this new model, the main reason why the P3 industry has failed to develop in the U.S. to the extent it has in Australia is due to the lack of policy guidelines and bureaucratic organization.

Infrastructure P3 projects "are likely to have incomplete contracts and new risks/problems that might emerge continually,"[97] so it is critical that governments first enhance their capacities to manage P3 projects and reform their institutions to build organized and efficient operating environments for P3 development.[98] Many local governments already use a form of the bidding process; now, it is just a matter of further developing and refining it. Developing federal P3 legislation but allowing states to supplement and adapt it to their needs, similar to the Australian model, would greatly reduce the bureaucratic sludge that plagues the P3 process and also boost market confidence among private-sector contractors.[99]

Under the current U.S. system, government entities are mainly responsible for project design, financing, and subcontracting to the private sector; thus, the resulting infrastructure is almost fully government owned. Transferring some of the risk to the private sector by allowing partial ownership would also ensure that infrastructure is properly maintained in the long-term, providing the best value for money in terms of public benefit as well. Providing the private sector with equity incentives would drastically promote private investment, allowing government entities to close the funding gap while still maintaining infrastructure quality.

Creating state-level institutions specialized in handling P3 project management would also increase accessibility for private contractors and ensure that the government can obtain optimal project delivery successfully. The beginnings of these institutional reforms are already present in some states. According to data compiled by the Public Works Financing in 2016 on thirty-four P3s awarded in the U.S., only seven states—Texas, California, Virginia, Colorado, New York, New Jersey, and Florida—have developed a "project pipeline" that consists of more than one project. All these states created new organizations to manage their P3s, even though none of them were independent, non-sector agencies like those in Australia. The U.S. has almost all the starting points necessary to reform its infrastructure policy framework: grassroots P3 procurement processes in various local governments and the groundworks of specialized P3 institutions. Now, it's just a matter of putting them together as a piece of concrete federal legislation.

As of right now, much of the 2021 IIJA regards increasing funding for existing programs and apportioning funding for newly created programs for different infrastructure goals, such as the Promoting Resilient Operations for Transformative, Efficient, and Cost Saving Transportation (PROTECT) program, as well as the new Carbon Reduction Program.[100] Additionally, the bill also lists out federal assistance provisions for several P3 programs in infrastructure areas such as electricity grid security, transportation, and broadband.[101] Each of these sections details processes local governments and private investors must undertake to qualify for federal assistance. For example, projects must have an estimated cost of $100 million or more and public entities must conduct a review of the project no more than three years after it is open to traffic.[102] However, it is not enough for the federal government to simply provide funding. Instead, Congress must flesh out the bureaucratic processes laid out in the IIJA and lay out a comprehensive P3 framework that can be adapted by all 50 states. Passing a

[92] *Supra.* note 73.
[93] *See Id.*
[94] *See Id.*
[95] *See* Yin Wang, *Evolution of Public-Private Partnership Models in American Toll Road Development: Learning Based on Public Institutions' Risk Management*, 33 INT'L JOURNAL OF PROJECT MGMT. 684, 1 (2015).
[96] *See Id.*
[97] *Id.* at 2.
[98] *See Id.* at 10.
[99] *See Id.*
[100] *See* Adie Tomer et al., *America has an Infrastructure Bill. What Happens Next?*, BROOKINGS (2021), https://www.brookings.edu/blog/the-avenue/2021/11/09/america-has-an-infrastructure-bill-what-happens-next/ (last visited Dec 14, 2021).
[101] *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021)
[102] *See Id.*

national P3 policy as a supplement to already existing P3 regulations would have a higher chance of gathering bipartisan support than existing initiatives over other polarizing issues, especially with the recent cooperation over the IIJA.[103] Australia's model of a national framework, while providing for modifications by states, would be highly applicable to the U.S. since it allows states to remain the primary deliverers of infrastructure, following the conventional U.S. federalist model.

VI. Conclusion

For the past few years, solving the infrastructure crisis has been near the top of the presidential agenda.[104] Working with divided Congresses, both Obama and Trump failed to support their bold infrastructure plans with legislation.[105] President Biden has already taken a major step in delivering on his campaign pledges with the IIJA. It is the biggest investment in infrastructure that the country has seen in a generation. However, legislative and bureaucratic reforms are still needed to deliver on the bill's promises. It is time that the federal government realizes that money alone cannot solve all the problems and inefficiencies in the current infrastructure system. The root of the infrastructure crisis is not only in financing but also in the bureaucratic process.

Even though P3 infrastructure projects have been carried out in the past, the lack of uniformity and organization in procurement processes by states have deterred the private sector from investing at the necessary levels, especially for large-scale, inter-state projects. Pushing states to adopt a standardized baseline P3 policy would increase private-sector confidence in infrastructure investment and encourage more cooperative projects. Congress needs to leverage the momentum generated from the IIJA to codify more concrete bureaucratic processes to supplement already existing P3 regulations. Some states have already taken the initiative to create administrative agencies for multi-project pipelines; the federal government must now do its part to encourage the creation of these agencies to facilitate P3 projects, further increasing private-sector confidence in cooperating with local governments. Australia, with its booming P3 industry and rapid infrastructure development, provides a working model on both fronts. Now is the perfect time for the federal government to continue building on its recent successes, even if it means looking down under to do so.

[103] *See Supra.* note 100

[104] *See* Eli Stokols, *After two presidents failed, can Biden actually get infrastructure done?*, L.A. TIMES, (March 4, 2021 4:38 PM PT), https://www.latimes.com/politics/story/2021-03-04/president-biden-us-infrastructure-plans-face-challenges

[105] *See Id.*

(not) *POM*, (not) *Wonderful*: The Merits and Drawbacks of Mechanisms for Food Labeling Regulation and Litigation

Chloe Mandel (PO '23)
Staff Writer

For today's consumers, trying to interpret the claims made on food labels can be a daunting and seemingly impossible task. Vague flavor descriptions like "chocolat*ey* chips" and ambiguous terms like "natural" and "healthy," for example, have appealing connotations but mask the actual ingredients and nutritional content of the products they describe. Food companies tend to capitalize on the average grocery store shopper's positive associations with such abstract terms, which can be used to label products that really contain artificial ingredients and have negative health effects. Deceptively labeled foods and beverages fill shelves despite an existing system for label regulation. While some consumers may recognize food companies' deceit and still choose to buy their products, others may be completely oblivious to the misleading nature of their claims. In any case, these labels compromise consumers' knowledge of what they put into their bodies, potentially jeopardizing their health and safety.

This paper analyzes the two main mechanisms for the regulation of food labels: the Food, Drug, and Cosmetic Act (FDCA) and the Lanham Act. While both statutes have served to prevent uninformed consumers from making purchasing decisions based on false impressions, their stated aims differ significantly. The former was enacted for the express purpose of ensuring public awareness of ingredients in food, drug, and cosmetic products. The latter, on the other hand, concerns commercial interests, safeguarding businesses from unfair competition through other companies' use of misleading product descriptions. Each piece of legislation has its limitations in shielding consumers from the deception of false labeling. However, when interpreted as complementary statutes, they can work ─ and have worked ─ in tandem (though not in all cases) to curtail misleading advertising and ultimately protect the interests and health of the public.

In the 2014 Supreme Court case *POM Wonderful, LLC v. The Coca-Cola Company*, the Court made such an interpretation. Its holding that the FDCA does not preclude the application of the Lanham Act to false advertising claims has eased the way for companies, both in and outside of the food industry, to challenge deceptive competitors. However, *POM Wonderful's* impact is limited in several important ways. First, the FDCA still preempts misleading labeling claims in some cases. Second, the primary jurisdiction doctrine permits dismissal of certain claims. Lastly, the case's precedent does not improve prospects for *consumers* bringing suits against corporations; rather, it serves *other companies* seeking protection from competitive damage, which can only indirectly protect individuals.

Section I of this paper describes the goals, functions, and limitations of the FDCA and the Lanham Act. Sections II and III detail the background, holding and implications of *POM Wonderful*, recognizing the constructive impact of the holding while acknowledging persisting challenges in ensuring the validity of labels. Ultimately, this paper aims to provide a comprehensive overview of US food labeling regulations and relevant court cases in order to convey a persisting need for consumer protection against deceptive advertising.

I. The Food, Drug, and Cosmetic Act and the Lanham Act

Enacted in 1938, the FDCA bars the use of deceptive advertising tactics in order to ensure public health and well-being.[1] Should food and beverage companies use "false or misleading labels," neglect to "prominently" place required information on their labels, or fail to include "the common or usual name of the food, if any there be,"[2] the Food and Drug Administration may enforce compliance with FDCA guidelines through warning letters or other enforcement measures.

The FDA is the sole entity responsible for enforcement of the FDCA, meaning individuals cannot bring private suits against companies that neglect to cooperate with its provisions.[3] This is problematic because the FDA devotes more time and resources to the regulation of pharmaceutical products than to food and beverages. For example, it only pre-approves labels for the former and not the latter. While the FDA's website contains no explanation for this prioritization of drug products over food products, it does state that the agency "does not have the resources or authority under the law for

[1] Gene Markin, *Misleading Food Labeling and Advertising under the Lanham Act and the FDCA*, 34 GPSOLO 18, 19 (2017).

[2] *Federal Food, Drug, and Cosmetic Act (FD&C Act)*, FDA, https://www.fda.gov/regulatory-information/laws-enforced-fda/federal-food-drug-and-cosmetic-act-fdc-act (last visited Nov. 28, 2021).

[3] Markin, *supra* note 1, at 19.

pre-market approval"[4] of cosmetics. Food and beverages probably do not receive as much FDA consideration for this reason. Before 2014, when the Supreme Court decided *POM Wonderful*, all hope of enforcement of FDCA guidelines in response to mislabeled food and beverage products depended on whether the FDA deemed the labels threatening to public health.[5]

In response to public frustration concerning the inaccuracy of food labels, Congress enacted the Nutrition Labeling and Education Act (NLEA) as an amendment to the FDCA in 1990. The NLEA gives the FDA greater authority to *require* food and beverage labels, if not *preapprove* them. Under the NLEA, food products are considered misbranded unless their labels contain nutrition information including serving sizes, the number of servings per container, and amounts of macronutrients such as fat, cholesterol, and sodium as well as vitamins and minerals.[6] The act authorizes the Secretary of Health and Human Services to require that companies portray information on labels in a clear and comprehensible manner, so that the public can "understand its relative significance in the context of a total daily diet."[7] Most notably, the NLEA provides a preemption clause that prohibits states from issuing food labeling standards that are not deemed "identical"[8] to the FDCA's labeling requirements. In other words, states cannot forbid companies from labeling products in a manner "expressly permitted"[9] by the FDCA.

This preemption clause has concerning implications for the average consumer. Several court case holdings from the last two decades have revealed how the preemption of laws not identical to those of the FDA leads to arbitrary decisions that allow for continued public deception. In the 2008 case *PepsiCo, Inc., Bottled Water Marketing & Sales Practices Litigation*, the plaintiffs alleged that Pepsi used misleading labels on its Aquafina water bottles to give consumers the impression that its purified tap water came "from a mountainous source."[10] According to the district court, because the FDA has no distinct regulations concerning the disclosure of "purified" water sources — even though it *does* provide such regulations for other water types such as "artesian," "mineral," and "spring" — the allegations against Pepsi called for a restriction that was non-identical to the FDA's guidance. Therefore, the plaintiff's claims were preempted, and Pepsi could retain its misleading advertising. Moreover, in *Carrea v. Dreyer's Grand Ice Cream, Inc. (2012)*, the Ninth Circuit dismissed a class action lawsuit against the ice cream company for labeling its products as "0g Trans Fat" when they actually contained between 0 and .5 grams of trans fat per serving. Since the FDA explicitly requires that companies whose products contain less than .5 grams of trans fat label that quantity as 0, the court concluded that the NLEA preempted the plaintiff's allegations. This decision incentivizes companies to continue misleading practices related to trans fats, because they are able to keep their amounts below 0.5 grams while labelling the quantity as 0. Instead of encouraging companies to leave out the notoriously unhealthy ingredient from their products entirely, the courts became complicit in deceiving the public about the contents of their food on the basis of the NLEA's restrictive requirements.

Granted, the NLEA's preemption clause has not curtailed *all* attempts to discourage deceptive advertising. But the above case decisions demonstrate the FDCA's limitations in fulfilling its stated goal of defending "the health and safety of the public at large."[11] Fortunately, the 1946 Lanham Act provides an additional method of protecting public interest, even though this is not its stated goal. Whereas Congress enacted the FDCA expressly to protect individual *consumers*, the Lanham Act was designed to serve the interests of *businesses*. Companies affected by unfair competition from other companies' "false advertising, false product descriptions and false representations about the nature of a product or service"[12] may sue under Section 43(a) of the act if they can prove that the defendant's advertisements meet the following conditions: 1) untrue, 2) deceptive or capable of deception, 3) material, or likely to have impacted purchasing decisions, 4) involved in interstate commerce, and 5) potentially or actually damaging to the plaintiff in terms of sales or customer reception.[13] While the Lanham Act does not give consumers a private right of action against companies whose labels deceive them, Section 43(a)'s protection of commercial interests can indirectly benefit individuals, as the Supreme Court's holding in *POM Wonderful* demonstrates.

[4] Cosmetics Labeling Regulations, FDA, https://www.fda.gov/cosmetics/cosmetics-labeling/cosmetics-labeling-regulations (last visited Nov. 28, 2021).
[5] *Id.*
[6] H.R. Rep. No. 101-538, at 1 (1990).
[7] *Id.*
[8] Markin, *supra* note 1, at 20.
[9] *Id.*
[10] *Id.*
[11] 21 U.S.C. §§321(f), 331, 343.
[12] Donald Shemwell, *False Advertising and Labeling Suits Two Years After the Landmark Supreme Court Decision in Pom Wonderful Versus Coca Cola: Implications for the Marketing Professoriate*, Digital Commons, https://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1104&context=ama_proceedings (last visited Nov. 28, 2021).
[13] Stephen White, *How Far Does the Apple (Pomegranate) Fall from the Tree? Preclusion of Lanham Act Claims by the Food, Drug, & Cosmetic Act and Pom Wonderful, Llc V Coca-Cola Co.*, 15 Wake Forest Journal of Business and Intellectual Property Law 263, 269 (2015).

II. POM Wonderful, LLC v. The Coca-Cola Company: Background and Opinion

The 2014 case *POM Wonderful* confirmed the complementary nature of the FDCA and the Lanham Act, setting a positive precedent both for injured market competitors and the general public.

In 2007, The Coca-Cola Company introduced a Minute Maid juice product labeled "POMEGRANATE BLUEBERRY" with the words "100% JUICE" placed "strategically" in "large font" next to the flavor name.[14] These claims appeared much more prominently than a small-font disclaimer that the product consisted of a "flavored blend of five fruit juices."[15] In actuality, it only contained ".3 percent pomegranate juice and .2 percent blueberry juice" (cheap concentrated apple juice constituted the majority percentage).[16] POM Wonderful LLC, a "health conscious" company offering "super premium"[17] fruit products, also sold pomegranate-blueberry juice at the time. Unlike Coca Cola's "blend," POM's product only listed pomegranate and blueberry juices as ingredients. When Coca Cola's product entered the market, it competed with POM's at a price that was five times cheaper.

POM sued Coca Cola under Section 43(a) of the Lanham Act, claiming that its labeling was "deceptive and misleading."[18] POM argued that the low pomegranate and blueberry juice content in Coca-Cola's drink enabled it to set lower prices, misleading customers who purchased that product under the assumption that both companies' beverages were of the same quality. According to the plaintiff, this allowed Coca-Cola to draw sales from POM and other honest competitors.

The district court held that FDCA regulations precluded POM's claims, asserting that the FDA's guidelines permit the characteristics of Coca-Cola's label. The Ninth Circuit Court Appeals affirmed this ruling, justifying its decision with the notion that a Lanham Act suit against Coca-Cola would undermine the FDA's authority over juice beverage labeling. In its opinion, the Supreme Court first asserted that *POM Wonderful* does not address "pre-emption," which would require a ruling on "whether a federal statute supersedes a state law."[19] Rather, it concerns "preclusion," analyzing whether one statute (the FDCA) prevents the application of part of another statute (the Lanham Act). According to the Court's unanimous decision, the FDCA does *not* preclude this type of Lanham Act suit. Indeed, there is "nothing in the text, history, or structure" of neither the FDCA nor the Lanham Act that implies congressional intent to "forbid" claims like POM's.[20] Justice Kennedy wrote in the opinion that the two statutes serve a complementary function in the regulation of deceptive labels.[21] The NLEA includes a preemption clause but does not explicitly state that a federal law may preclude another federal law's labeling guidelines. Therefore, the Court reasoned, Congress must not have desired that the FDA be the sole authority over food and beverage labeling.

Furthermore, Kennedy wrote, it does not make sense for the FDA to be completely responsible for the enforcement of the FDCA because of the agency's limited scope and insight. Since the FDA does not preapprove food and drink labels and cannot regulate "all objectionable labels,"[22] Lanham Act claims are often the only means of targeting false advertisements. The Lanham Act acknowledges private parties' unique "expertise in assessing market dynamics that day-to-day consumers possess."[23] Suits under this act, therefore, protect both businesses and consumers in a way the FDA cannot.

Ultimately, the Court reasoned, Congress could not possibly have intended the FDCA to be "a ceiling on the regulation of food and beverage labeling."[24] Instead, the Lanham Act and the FDCA should work in tandem to prevent unfair competition and safeguard public interest.

III. The Implications of *Pom Wonderful*: Concrete Benefits with Significant Room for Growth

The Court's decision in *POM Wonderful* has set a general precedent for lower courts to assume that the FDCA does not preclude false labeling suits under the Lanham Act. However, this precedent does not apply in all cases. Perhaps most problematically, it only applies to competitor-driven suits, non-consumer-driven ones. This section explores *POM Wonderful*'s implications and contends that while the decision is a step in the right direction, it does not adequately ensure the transparency of food and beverage labels.

The obvious benefit of the case's precedent is that businesses can challenge competitors under the Lanham Act when the defendants' labels fall under FDCA guidelines. Subsequent lower court cases have ruled against companies whose labels

[14] Shemwell, *supra* note 11.
[15] Shemwell, *supra* note 11.
[16] Shemwell, *supra* note 11.
[17] Complaint for False Advertising Under Lanham Act 43(A) at 4, *Pom Wonderful LLC*, 727 F. Supp.2d 849 (No. 2:08-cv-06237).
[18] Matt Busch, *POM Wonderful v. Coca-Cola and the Implications of Granting Competitors the Right to Challenge False or Misleading Food and Beverage Labels Under the Lanham Act*, 48 Loyola of Los Angeles Law Review 525, 528 (2015).
[19] *Id.* at 529.
[20] POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 111 (2014).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

attempted to deceive their customers, marking the progressive nature of *POM Wonderful*'s decision.

In the case *Quesada v. Herb Thyme Farms, Inc.*, the California Supreme Court ruled that Herb Thyme Farms could not label its products as "organic," even though the use of this term did not violate FDA regulations. In *Hi-Tech Pharmaceuticals v MusclePharm Corp. 2016*, moreover, the plaintiff brought a successful Lanham Act challenge against a competitor whose products contained deceptive (but permitted under federal law) claims about their amounts of whey protein. Lower courts have not only applied *POM Wonderful*'s precedent to food and beverage-related cases, but to Lanham Act claims concerning non-food industries. Court opinions over the last several years have used the *POM Wonderful* holding's reasoning to settle conflicts over the labeling of pharmaceuticals, medical devices, and dietary supplements, demonstrating the broad reach of *POM Wonderful*'s outcome.

Despite these encouraging results, *POM Wonderful*'s precedent still leaves room for dishonest advertising. For one thing, lower court judges have identified "some circumstances"[25] in which FDCA preclusion of the Lanham Act *does* apply. For example, Lanham Act cases that address issues "more properly within the exclusive purview"[26] of the FDA, according to many courts, should not presume against preclusion. This notion arises from the "primary jurisdiction doctrine,"[27] or the principle that courts may dismiss claims on the grounds that the policy questions they invoke "should be" answered by relevant agencies and not the judicial branch.[28] In the case *Saubers v. Kashi Co.*, for instance, the plaintiffs claimed that the label "evaporated cane juice" was misleading because this term simply refers to regular refined sugar. The district court ruled that because the FDA had not yet finalized guidelines concerning that specific term, it could dismiss the claim under the primary jurisdiction doctrine.

Moreover, *POM Wonderful*'s decision does not ease the path for consumers hoping to take class actions for deceptive labels. Consumer-driven suits are in fact quite difficult to file. In the 2013 case *Comcast Corp. v. Behrend*, the Supreme Court ruled that consumer plaintiffs must "establish that damages are capable of measurement on a classwide basis" when pursuing class certification, which has "significantly" hindered their chances of attaining it.[29] So even though *POM Wonderful*'s precedent empowers businesses to sue competitors more easily, consumers ─ who are arguably the parties most directly impacted by misleading labels ─ have little ability to fight their own battles against deceptive defendants.

IV. Conclusion

Despite *POM Wonderful*'s influence, many Lanham Act claims are dismissed because of pre-emption and the primary jurisdiction doctrine, and individuals seeking to bring suits against companies face significant challenges. From where can more substantial reform emanate?

One attractive but unlikely prospect is the Food Labeling Modernization Act of 2021, or the FMLA. Introduced in Congress in August, the FMLA is intended to increase food label transparency by amending the FDCA to provide more specific labeling guidelines. The bill would follow on the heels of 2016's Modernized Nutrition Facts Label, a revamped FDA-required nutrition label that resulted from Michelle Obama's efforts to improve US nutrition through the *Let's Move!* program.[30]

Among the proposed changes are a "standard front-of package labeling system for all FDA-regulated food products."[31] The system would involve an "easily recognizable symbol" that would give consumers a general idea of the product's healthiness. A traffic light icon, for example, would appear green on labels for the healthiest foods, red for junk-style foods, and yellow for foods somewhere in between.[32] The FMLA would also require that products touting healthy ingredients like fruits and whole grains on their labels list the exact amounts or percentages of these ingredients on the front of the package. These mandates reflect research showing that consumers are more likely to respond to "front-of-pack" labels than standard back-of-package nutrition-fact labels and that the average shopper does not have "the time or bandwidth to read and consider complicated labels."[33] Some European countries and Chile

[25] Hi-Tech Pharm., Inc. v. Hodges Consulting, Inc., 230 F. Supp. 3d 1323, 1330 (N.D. Ga. 2016)(emphasis added).
[26] *Hi-TechPharm.*, 230 F. Supp. 3d at 1330.
[27] Rachel Simon, *After the Juice Wars: The Post-POM Wonderful Legal Landscape and its Implications for FDA-Regulated Industries*, 75 Food and Drug Law Journal 430, 449 (2020).
[28] *Id.*
[29] *supra* note 17 at 533.
[30] *Announcing The Modernized Nutrition Facts Label*, Let's Move, https://letsmove.obamawhitehouse.archives.gov/blog/2016/05/20/announcing-modernized-nutrition-facts-label (last visited Nov. 28, 2021).
[31] *Food Labeling Modernization Act Introduced in Congress*, National Law Review (Aug. 5, 2021), https://www.natlawreview.com/article/food-labeling-modernization-act-introduced-congress (last visited Nov. 28, 2021).
[32] Tess Joosse, *Is This Food Really Healthy? New Packaging Labels Would Tell You*, Scientific American (Aug, 25, 2021), https://www.scientificamerican.com/article/is-this-food-really-healthy-new-packaging-labels-would-tell-you/ (last visited Nov. 28, 2021).
[33] *Id.*

have already implemented similar systems to positive effect; consumers have become more "engaged in nutrition" and food companies have reduced amounts of sugar, salt and fats in their products in response.[34] The FMLA also directs federal regulators to provide uniform definitions for currently meaningless labeling terms like "natural" and "healthy."[35] The measure offers the prospect of meaningful reform, but it is unlikely to come to fruition. Though nutritionists and other proponents of healthy eating have backed the bill, food industry lobbyist opposition threatens its chances of passing in Congress.

But even if some form of stricter food labeling legislation *does* pass, individual consumers should still be more empowered to take legal action when they believe themselves harmed by misleading labels. That businesses and profit-margins, not people, are explicitly protected against damages from deceptive advertising under *POM Wonderful*'s precedent speaks to fundamental flaws in legislative priorities. In other words, what may benefit companies like POM Wonderful may not be best for public health and well-being. Some may argue that Americans *want* to be convinced of the "healthy" nature of products known to be the opposite. In a country in which food produces "happiness in terms of repeatable pleasure, if not health"[36] for many, these claims certainly have merit. But for those consumers who *do* actively desire transparency and liability from the companies that feed them, the current system is inadequate.

As such, elected officials should not only work to strengthen labeling regulations, but to give individuals greater agency to retaliate against dishonest companies. Improving the integrity of the US food labeling system will require both greater *precautions* (more specific labeling guidelines) and stronger mechanisms for *accountability* when companies inevitably find ways to continue misleading their customers. *POM Wonderful* may be a promising start, but ensuring corporate honesty and consumer empowerment will depend on policy priorities.

[34] *Id.*
[35] *supra* note 30.
[36] Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 The University of Chicago Press 754, 778 (2007).

Attacking Federal Precedent and Oversight: Legal Strategies in Mississippi's Gestational Age Act and the Texas Heartbeat Act

Jessica Zou (PZ '24)
Staff Writer

In the United States, 59% of adults believe abortion should be legal in all or most cases while 39% of adults think abortion should be illegal in the same circumstances, making the issue highly contentious throughout the country. Different perceptions about individual liberties and the sanctity of life have long characterized abortion as a battle over fundamental American values. The liberal atmosphere of the 1960s and 1970s generated support for women's rights to make decisions regarding their bodies. The Supreme Court decision in *Roe v. Wade* provided limited federal protections for women's access to abortion, but states have attempted to regulate abortions ever since the ruling. Currently, the Texas Heartbeat Act and Mississippi's Gestational Age Act have generated significant attention due to their potential effects on furthering the pro-life agenda and imposing additional restrictions on abortion access throughout the country. Many perceive the current Supreme Court as conducive to challenging abortion access due to the Court's conservative majority.[1] Even so, the increasingly politicized perceptions of the judiciary may encourage the Justices to preserve the Court's image as independent and insulated from politics.[2] Both the Texas Heartbeat Bill and Mississippi's Gestational Age Act show how legislators utilize different strategies to challenge the federal government's protection of abortion rights, acting as a potential guide for instituting abortion restrictions in other states. Despite these sustained and legally creative attacks on abortion rights, the Texas and Mississippi laws will likely fail to stop federal proceedings that will bolster current abortion laws. This paper argues that the laws will not succeed in curbing abortion rights due to their unconvincing legal arguments and the Court's desire to preserve its legitimacy.

Through analyzing the different strategies and objectives of the Texas and Mississippi Bills, this paper will provide a complete picture of the ongoing legal battles over the two laws. The first section of this paper will discuss the legal history of abortion within the United States, explaining the effects of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The second section will investigate the Texas Heartbeat Bill while the third section focuses on Mississippi's Gestational Age Act, both examining the legal pushback towards each piece of legislation. This paper will then analyze and compare the legal arguments in these cases, discussing how Supreme Court Justices may perceive them.

I. Legal Precedent on Abortion

In 1970, articles 1191-1194 and 1196 of the Texas Statute criminalized receiving and performing abortions except when the mother's life is endangered and depends on the operation.[3]A woman using the pseudonym Jane Roe initiated a class-action lawsuit against the District Attorney of Dallas County with the hope of rendering Texas' abortion restrictions unconstitutional. She also aimed to obtain an injunction on the District Attorney's enforcement of Texas' abortion laws. Roe centered her legal argument on individual privacy. Citing constitutional protections for one's right to privacy, Roe stated that the Texas Statute infringed upon her individual liberties by preventing her from making a private decision about her health and body. [4] Henry Wade, the District Attorney of Dallas County, argued that the state of Texas has an obligation to protect prenatal life, defining fetus as a person whose constitutional rights must be considered and protected. The Federal District Court ruled in favor of Roe, and the defendant appealed the case to the Supreme Court. The Supreme Court decision in *Roe v. Wade* stated that a woman's right to receive an abortion is indeed protected under the Due Process Clause of the Fourteenth Amendment to the U.S Constitution, which affirms, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[5] In a 7-2 ruling, the Court

[1] *See, e.g.*, Nina Totenberg, The Supreme Court's conservatives cook up a stew of abortion, guns, religion, and more, NPR (Oct. 4, 2021), https://www.npr.org/2021/10/04/1041713663/the-supreme-courts-conservatives-cook-up a-stew-of-abortion-guns-religion-and-mo. a-stew-of-abortion-guns-religion-and-mo. Press Release: Justice Department Sues Tex. Over Senate Bill 8, https://www.justice.gov/opa/pr/justice-department sues-texas-over-senate-bill-8/.

[2] Adam Liptak, A Supreme Court term marked by a Conservative Majority in Flux, N.Y. TIMES, (July 2. 2021), https://www.nytimes.com/2021/07/02/us/supreme-court-conservative-voting-rights.html.

[3] *E.g.*, KELLY WEISBERG, APPLICATIONS OF FEMINIST LEGAL THEORY, 953 (1996).

[4] *Id.* at 594

[5] U.S. Const. amend. XIV, § 1.

stated that a woman's decision regarding abortion is a matter of individual privacy and cannot be regulated by the state.[6]

Despite attributing constitutional protections to abortion, the Supreme Court established a framework for states to approach abortion legislation, which allows for certain forms of limitations. The Court determined that in the first trimester of a woman's pregnancy, no state laws can prohibit a woman from receiving an abortion, but in the second trimester, states may impose restrictions on abortion.[7] States have the ability to completely prohibit abortions during the third trimester, which the Court deemed as a stage where the fetus has reached "viability," meaning that the fetus may have a reasonable chance of survival outside the womb. The Supreme Court's decision drew intense criticism and controversy due to this explicit framework on how states may enact abortion laws. Many accused the Court of overstepping its responsibilities as a judicial body and essentially creating legislation on abortion. By establishing the constitutionality of pre-viability abortions in relation to the Fourteenth Amendment, the Court significantly reduced state power over abortion laws, triggering many subsequent challenges to the precedent set in *Roe v. Wade*.

A major attempt at dismantling *Roe v. Wade* appeared in 1992 when the state of Pennsylvania enacted a law requiring women to meet several conditions to gain access to an abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, abortion clinics and other pro-choice parties challenged the Pennsylvania Abortion Control Act of 1982 and brought a suit against the state Governor Robert Casey.[8] Although the Supreme Court upheld Pennsylvania's laws that mandated requirements for receiving an abortion, the Justices preserved the privacy doctrine in *Roe v. Wade*. The Court determined an "undue burden" principle that prohibits states from placing a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[9] The Justices permitted Pennsylvania to mandate informed consent, 24-hour wait periods prior to abortion procedures, and the requirement of parental consent for minors to obtain abortions. The Court decided that these restrictions were not "substantial obstacles" that put an "undue burden" on women who hoped to access abortions in the state. *Casey* also established that states have a legitimate interest in protecting fetal life from the outset of pregnancy, confirming states' abilities to restrict abortion after viability.[10] Despite reiterating that states cannot prohibit access to abortion prior to the third semester, the Supreme Court allowed states to regulate abortions to a greater extent.

The *Casey* decision motivated states to establish laws that regulated abortion more stringently than before. Chief Justice Rehnquist stated in his concurring opinion that "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[11] His statement proved accurate as many conservative states adopted restrictive laws, making abortion access more difficult.[12] In 1992, before the ruling, almost no states had informed consent laws, but by 2005, thirty-three states enforced them. Similarly, no states had mandated waiting periods for abortions in 1992, and in 2005, twenty-two states required women to wait certain periods before they could receive an abortion.[13] Laws that targeted restrictions on abortion providers (TRAP laws) became common in conservative states. For example, the Texas Omnibus Abortion Bill in 2013 required abortion clinics to meet the same building codes as outpatient surgical centers and for abortion doctors to have admitting privileges at a hospital within thirty miles of the abortion clinic. Other states have enacted and adopted TRAP laws, including Arizona, Arkansas, Louisiana, Indiana, and Missouri.[14] In 2016, the Supreme Court deemed Texas' requirements unconstitutional because they "do not confer medical benefits that are sufficient to justify the burdens they impose on women seeking to exercise their constitutional right to an abortion."[15] Drawing from the undue burden principle, the Court reaffirmed its *Casey* decision in striking down the 2013 Texas Omnibus Abortion Bill. The ruling may have triggered Texas legislators to seek novel methods of regulating abortion that could circumvent legal obstacles from the precedent established by *Roe* and *Casey*. As seen in the subsequent section, Texas sought out unusual methods to regulate abortion that differed from the state's previous attempts.

II. Texas Heartbeat Bill

Texas legislators passed Senate Bill 8, commonly referred to as the Texas Heartbeat Bill, which came into effect on September 1st, 2021.[16] Although the Bill appears similar to other abortion bans in different states, Texas legislators

[6] Roe v. Wade, 410 U.S. 113 (1973).
[7] *Id.*
[8] Parenthood v. Casey, 505 U.S. 833, 112 (1992).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See* Michael J. New. "Analyzing the Effect of Anti-Abortion U.S. State Legislation in the Post-Casey Era." state politics & policy quarterly, vol. 11, no. 1, Sage Publications, Inc., 2011, pp. 28–47,
[13] *Id.*
[14] "Targeted Regulation of Abortion Providers." GUTTMACHER INST., https://www.guttma cher.org/state policy/explore/targeted-regulation-abortion-providers
[15] *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016).
[16] Tex. Heartbeat Act, S.B.8, 87 Cong. (2021).

designed this law to withstand potential challenges in court. The law allows private citizens to wage lawsuits worth at least $10,000.00 against women who received abortions after the detection of a fetal heartbeat and against individuals that aided and abetted women in accessing such abortions.[17] By designating enforcement responsibilities to private citizens, the law evades judicial review since individuals cannot sue a state official for enforcing the law. The question of a law's constitutionality arises when a party suffers an injury due to the enforcement of the law, resulting in a judicial controversy. In performing judicial review, the Supreme Court and federal courts determine the validity of the law and how it applies to the controversy at hand. Under judicial review, courts interpret the Constitution and have the power to keep other branches of government accountable. In this process, courts may find the law unconstitutional and strike it down to adjudicate the controversy.[18]As seen in both *Roe* and *Casey*, the appellants sued the District Attorney and Governor since they enforced the state's abortion laws. If no state office enforces the Texas Heartbeat Bill, potential plaintiffs do not have the opportunity to challenge the legislation's constitutionality. As a result, one cannot challenge the constitutionality of the Bill by suing Texas government agencies. Furthermore, the Texas Heartbeat Bill does not explicitly criminalize abortion, meaning that it does not directly contradict *Roe*. The Supreme Court decided in *Roe v. Wade* that "state criminal abortion laws (…) without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy."[19] The Heartbeat Act is not a "state criminal abortion law" since it does not criminalize receiving an abortion after the detection of a fetal heartbeat, but champions individual citizens to initiate civil lawsuits instead. Texas' indirect methods of restricting abortion avoid federal oversight and prevent individuals from seeking remedies for the law's potential harm.

Before the Texas Heartbeat Bill commenced in September, abortion providers and pro-choice organizations in Texas unsuccessfully challenged the legislation in district courts and the U.S Court of Appeals for the Fifth Circuit. After applicants submitted an injunction request to the Fifth Circuit, the court issued an administrative stay on all challenges against the Texas Heartbeat Bill, which halted legal proceedings regarding the bill. Concerned about the law's consequences that would begin before hearings regarding its constitutionality, an applicant group led by Whole Woman's Health, filed an application to the Supreme Court for an injunction on the bill.[20] The applicants stated that the Court of Appeals' administrative stay "was an abuse of discretion, as was its decision to deny an injunction pending appeal and Applicants' request to expedite that appeal."[21] Without further avenues for relief, the applicants requested the Supreme Court for a writ of injunction against the bill. The applicants stressed that the Texas Heartbeat Bill relied on "outsourcing to private individuals the authority to enforce an unconstitutional prohibition," which is a "flagrant defiance of this Court's clearly established constitutional precedent."[22] Although the application focuses on immediate relief in the form of an injunction, the applicants argue the inherent unconstitutionality of the Texas Heartbeat Bill, expressing the severity of the situation at hand.

The Court decided on the injunction through an atypical procedure that is commonly regarded as the "shadow docket." The Court normally reserves this procedure for emergency matters such as death penalty cases. Instead of attending to extensive briefs and oral arguments, the Justices make accelerated decisions for shadow docket cases. To bring a case onto the "shadow docket," litigants must apply to one of the nine Justices who will choose whether to bring the matter to the full Court. If at least five Justices vote in favor of the application, the matter will proceed through the Court's accelerated procedure. Through a shadow docket hearing, the Supreme Court denied the applicant's request for an injunction because the applicants "have not carried their burden" in proving the immediate harm that may result from the Texas Heartbeat Bill.[23] Justices Alito, Barret, Cavanaugh, Gorsuch, and Thomas constituted a majority in denying the application while Roberts, Breyer, Kagan, and Sotomayor dissented. The conservative Justices stated that for an injunction application to prevail, applicants must make "a 'strong showing' that it is 'likely to succeed on the merits,' that it will be 'irreparably injured absent a stay,' that the balance of the equities favors it, and that a stay is consistent with the public interest."[24] They stated that "it is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner

[17] *Id.*
[18] *See, e.g.*, Rhodes, Charles W. (Rocky) and Wasserman, Howard, Solving the Procedural Puzzles of Tex.' Fetal Heartbeat Law (August 17, 2021). Florida Int'l Univ. Legal Studies Research Paper No. 21- 15, https://ssrn.com/abstract=3906693 or http://dx.doi.org/10.2139/ssrn.3906693.
[19] Roe v. Wade, *supra* note 5.
[20] Emergency Application to Justice Alito for Writ of Injunction and, in the Alternative, to Vacate Stays of Dist. Court Proceedings, *Whole Woman's Health v. Jackson*, No. 21A24 (Supreme Court of the United States).
[21] *Id.*
[22] *Id.*
[23] 594 U. S. (2021)
[24] *Id.*

that might permit our intervention."[25] Since no governmental body shall enforce the abortion restrictions, the Court majority could not foresee damage from the bill with certainty, rendering an injunction unnecessary. In dissent, Chief Justice Roberts characterized the case as "not only unusual but unprecedented," observing the Texas legislators' intent to "insulate the State from responsibility for implementing and enforcing the regulatory regime" of the Texas Heartbeat Bill.[26] Since constitutional questions regarding the case have yet to be resolved, Chief Justice Roberts stated that he would approve the applicant's request for an injunction "to preserve the status quo ante—before the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner."[27] Chief Justice Roberts also emphasized that although the case rejected an injunction on the bill, this opinion does not signify the constitutionality of the legislation.[28] Justice Breyer, along with Justice Kagan and Justice Sotomayor, wrote a strongly worded dissent to the Court's rejection of the applicant's injunction request. He claimed that the Texas Heartbeat Bill shall bring "imminent and serious harm" to women and service providers in the state, making an injunction on the law highly appropriate. Justice Breyer stressed the immediate constitutional harm Texas' law would bring, citing *Planned Parenthood of Central Missouri v. Danforth*[29] where it was decided that a "State cannot delegate . . . a veto power [over the right to obtain an abortion] which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy." The ruling applies to Texas' attempt at delegating enforcement powers to private individuals to prohibit abortion, which Breyer and the other dissenting Justices view as unconstitutional. Justice Kagan and Justice Sotomayor expressed similar sentiments in their dissenting opinions. Constitutional harm would immediately follow the passage of the Texas Heartbeat Bill, which would make an injunction on the law necessary. Even though Chief Justice Roberts swung to the liberal side, the Court's conservative majority held the power to reject the injunction request.

Shortly after the Texas Heartbeat Bill came into effect due to the Supreme Court's rejection of the injunction application, the U.S Department of Justice under President Joe Biden waged a lawsuit against the state of Texas on September 9th, 2021, arguing that the mechanisms employed in the legislation signified an "obvious and expressly acknowledged intention" to prohibit abortions.[30] The Justice Department initiated the suit in the United States District Court for the Western District of Texas, which once again requested an injunction on the bill.[31] In their motion for an injunction, the Justice Department stated that the "federal government, therefore, brings this suit directly against the State of Texas to obtain a declaration that S.B. 8 is invalid, to enjoin its enforcement, and to protect the rights that Texas has violated."[32] The motion also listed the bill's "devastating effects" that Texans have already experienced, which include "the vast majority of people seeking abortions being turned away, some people forced to seek care in other states, scheduling backlogs in other states because Texans are claiming 50-75% of appointments, and losing health care professionals who fear liability."[33] On October 6th, 2021, Judge Robert Pitman granted the Justice Department's motion for an injunction. Nominated by President Obama in 2014, Judge Pitman has frustrated Texas' Republican leadership with his past rulings on voting rights and free speech.[34] In his Order for approving the injunction, Judge Pitman stated that the federal government had legitimate standing to sue Texas because the federal government suffered a particularized injury from the Texas Heartbeat Bill. Judge Pitman asserted that the "United States is a government chartered by the people, and its sovereignty is conditioned on its ability to safeguard the rights of its citizens," so when a state attempts to evade federal judicial review and circumvent people's constitutional rights, "the United States possesses a sovereign interest in preventing such a harm."[35] Furthermore, "the State can have no interest in enforcing a law that is likely unconstitutional on its face, nor can it have any valid interest in shielding an arguably unconstitutional law from judicial review."[36] According to Judge Pitman, the Texas Heartbeat Bill will cause imminent injury by infringing upon the federal government's ability to protect the constitutional rights of citizens. Thus, the court decided that "a remedy in equity is warranted," which meant granting the injunction.

Despite this ruling, the Court of Appeals for the Fifth Circuit struck down the Order two days later, reinstating the Texas

[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Planned Parenthood v. Danforth, 428 U.S. 52 (1976).
[30] Katie Benner, *The Justice Dep't Sues Tex. Over its New Restrictive Abortion Law,* N.Y. TIMES (Sep. 9, 2021), https://www.nytimes.com/2021/09/09/us/politics/texas-abortion-law-justice-department-lawsuit.html.
[31] *E.g.*, Press Release: Justice Dep't Sues Tex. Over Senate Bill 8, https://www.justice.gov/opa/pr/justice department-sues-texas-over-senate-bill-8/.
[32] Mot. Prelim. Inj., Dkt. 8.
[33] *Id.*
[34] Jon Jackson, *Who is Robert Pitman, judge who blocked Tex. Abortion Bill?,* NEWSWEEK (Oct. 7, 2021), https://www.newsweek.com/who-robert-pitman-judge-who-blocked-texas-abortion-bill-1636548.
[35] Order, Dkt. 68.
[36] *Id.*

Heartbeat Bill.[37] The State of Texas submitted an emergency motion to the Fifth Circuit, requesting a stay on the injunction granted by Judge Pitman, which the Court of Appeals approved on October 8th. As a result, the bill remained in effect and the Department of Justice appealed the case to the Supreme Court. By directly suing the state of Texas, the Justice Department had the intention of bringing this matter before the Supreme Court once again to determine the bill's constitutionality. The federal government understood the Court of Appeal's ability to reverse lower court Orders, but by initiating the lawsuit against Texas, the Justice Department pushed the Supreme Court to rule on the bill with urgency since the Court also faces *Whole Woman's Health v. Jackson,* where another injunction request presents itself. The pair of cases support one another in pushing the Court to decide on procedural questions within the Texas bill. Although the Court will avoid ruling on the constitutionality of pre-viability abortion restrictions, it will decide whether Texas "can insulate from federal court review a law that prohibits exercise of a constitutional right."[38] If the Court upholds the enforcement mechanism in the Texas Heartbeat Bill, other states can utilize similar methods to restrict abortion access even if pre-viability abortions are deemed unconstitutional. Like in Texas, other state legislators have recognized the current opportunity to adopt abortion restrictions, which could be seen with Mississippi's attempt to challenge the existing viability standard.

III. Mississippi Abortion Bans: Dobbs v. Jackson Women's Health Organization

Unlike *United States v. Texas* or *Whole Woman's Health v. Jackson,* Mississippi's abortion law, *Dobbs v. Jackson Women's Health Organization,* directly asks the Supreme Court to rule on the constitutionality of pre-viability abortion bans. In 2018, Mississippi passed House Bill 1510, also known as The Gestational Age Act, which prohibited abortions after fifteen weeks of pregnancy, directly conflicting with the decision in *Roe* that protects against pre-viability abortion restrictions created by state governments.[39] The Gestational Age Act refers to establishments in *Casey* that confirmed states' interests in preserving fetal life. The bill's main argument centers around the inhumane nature of permitting abortions after a gestational period of fifteen weeks. Someone who violates the Act "shall be guilty of a felony and shall, upon conviction, be imprisoned in the custody of the Department of Corrections not less than one nor more than ten years."[40] The law explicitly criminalizes abortion and calls upon the state's Attorney General and the Mississippi State Board of Medical Licensure to enforce the Act.[41] The Act limits abortion access before a woman's third trimester of pregnancy, in direct opposition to the trimester framework established in *Roe* and the undue burden principal in *Casey*.

In 2018, Jackson Women's Health Organizations along with other pro-choice groups challenged the Gestational Age Act in a district court, which ruled in their favor, rendering the Act unconstitutional. Upon appeal to the Fifth Circuit Court of Appeals, the Judges once again reaffirmed the lower court's ruling.[42] Thomas Dobbs, as the state health officer of the Mississippi Department of Health, appealed the case to the Supreme Court. In June 2020, Thomas Dobbs filed a Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals' decision, which the Court granted.[43] Dobbs did not refrain from posing the question of the Gestational Age Act's constitutionality as the primary focus of the case. Dobbs and the Petitioners team stated two major arguments. The first argument questions "viability" as defined in *Roe*, since it must fluctuate as new scientific developments occur, meaning that one could consider the fetus as a potentiality of life earlier on during a woman's pregnancy.[44] Since states have an "important and legitimate interest in preserving the potentiality of human life," as established in *Roe,* state laws should not be bound to the existing federal viability framework.[45] Instead, Mississippi should reserve the right to enact and enforce the Gestational Age Act.

In their second argument, the Dobbs and the Petitioners team stated in their merit brief that "a right to abortion is not a "liberty" that enjoys substantive protection under the Due Process Clause.[46] They claim that during the Fourteenth Amendment's Ratification in 1868, states actively passed laws prohibiting abortion, which means that the Fourteenth Amendment could not be construed to protect access to abortion as a fundamental right.[47] The Petitioners argued that in the era of the Amendment's passage, "the public would have understood that, consistent with the Fourteenth Amendment, states could restrict abortion to pursue legitimate interests and could do so throughout pregnancy."[48]

[37] Order on Appeal from the United States Dist. Court for the Western District of Tex., No. 21-50949 (U.S Court of Appeals for the Fifth Circuit).
[38] *E.g.*, Amy Howe, *Biden Administration Asks Justices to Block Enforcement of Tex. Abortion Law*, SCOTUSBLOG (Oct 18, 2021), https://www.scotusblog.com/2021/10/biden-administration-asks-justices-to-block -enforcement-of texas-abortion-law/.
[39] MS Code § 41-41-191 (2018)
[40] *Id.*
[41] *Id.*
[42] Petition for a Writ of Certiorari, *Whole Woman's Health v. Jackson,* (No. 19).
[43] Stay Order, *Whole Woman's Health v. Jackson,* (No. 21-50792).
[44] Petition, *supra* note 35.
[45] Roe v. Wade, *supra* note 5.
[46] Petition, *supra* note 35.
[47] *Id.*
[48] *Id.*

Using an originalist constitutional interpretation method, Mississippi stresses that how the public understood a law when it passed the legislature should dictate one's interpretation of the law. The original expectations of the law's meaning and impact would largely rest on contextual considerations of the time, which may involve references to existing legal texts, debates, and data at the time.[49] By referencing the ongoing abortion restrictions that passed throughout the country during the Fourteenth Amendment's passage, the petitioners exclude the possibility of abortion as protected under the Fourteenth Amendment's privacy clause. Bolstering this argument, the Petitioners stress that abortion, as the "termination of potential life" differs from other interests that under the Fourteenth Amendment, "the Court has protected under the rubric of personal or family privacy and autonomy."[50] Concluding that the right to privacy cannot encompass the right to abortion, the Petitioners advocate for the reversal of *Roe* and *Casey*.

The Respondents, led by Jackson Women's Health Organizations, emphasized in their merit brief that all the Petitioner's arguments have been addressed and rejected in *Casey*. During *Casey*, the Court already rejected arguments regarding new scientific evidence that could alter viability definitions.[51] The Respondents cite *Brown v. Board of Education*, in which the Court stated,[52] "[T]he vitality of [] constitutional principles . . . cannot be allowed to yield simply because of disagreement with them." The statement asserts that as new developments change opinions in society, fundamental protections offered by the constitution must remain in place. According to the Respondents, new information often has the power to shift perceptions, but these changes should not affect protections of individual liberties grounded in the Constitution. The Supreme Court affirmed the viability line decided in *Roe* when ruling on *Casey*, repeatedly stating that "until viability, the individual's right to determine whether to continue a pregnancy categorically outweighs the state's interests, including in fetal life."[53] Rather than viewing viability as an arbitrary standard, the Court has stated that it is "a rule of law and a component of liberty we cannot renounce."

Citing *Roe* and *Casey*, the Respondents argued that the Court's past rulings rested upon an established interpretation of the Fourteenth Amendment that emphasized the protection of personal liberties. Justices have regarded liberty as including "the right to make family decisions and the right to physical autonomy" in *Casey* and five other Supreme Court cases.[54] Even so, the Petitioners disagreed that the Fourteenth Amendment inherently protects the right to abortion. Attacking the Petitioners' originalist argument, the Respondents explained that legislative actions at the time of a Constitutional Amendment's passage could not justify the overturning of precedent. The Respondents stated, "The same Congress that enacted the Fourteenth Amendment also segregated the D.C. public school system," so *Brown v. Board of Education* would be overruled according to the Petitioners' logic.[55] The Respondents also cited *Gideon v. Wainwright* and *Loving v. Virginia*, two cases where the laws passed by the legislature at the time contradicted Constitutional Amendments enacted by the same legislature.[56] The passage of abortion laws during the enactment of the Fourteenth Amendment has no impact on the amendment's definition of liberty according to the Respondents. Laws passed during a certain era do not necessarily reflect the full meaning of a Constitutional Amendment that originated within that time frame. On December 1st, 20201, the Court shall hear these arguments and confront a major constitutional decision that they avoided when considering injunction requests from *Whole Woman Health.*

IV. Different Legal Strategies

Unlike the Texas Heartbeat Bill, the Gestational Age Act aims to dismantle existing legal precedent rather than circumvent judicial review. Despite their differences, the two matters bolster one another in restricting abortion access throughout the country. If the Court rules in favor of Mississippi and finds the Gestational Age Act constitutional, the decision will nullify over half a century of legal precedent. Under those circumstances, the battle over the Texas Heartbeat Bill becomes futile since pre-viability abortion bans would be constitutional regardless of the enforcement mechanisms they employ. Similarly, if the Court upholds the enforcement mechanisms in the Texas Heartbeat Bill as constitutional, then all states, including Mississippi, can regulate abortions through delegating enforcement responsibilities to private citizens.

[49] *See, e.g.*, Steven G. Calabresi, On Originalism in Constitutional Interpretation, INTERACTIVE CONSTITUTION, https://constitutioncenter.org/interactive-constitution/white-papers/on-originali sm-in-co nstitutional-interpretation.
[50] Petition, *supra* note 35.
[51] Brief in Opposition, Dobbs v. Jackson's Women Health Organization, (No. 19-1392).
[52] Brown v. Board of Education, 347 U.S. 483, 490 (1954).
[53] *Id.*
[54] Brief, *supra* note 43
[55] *Id.*
[56] *Id.*

Legislators understood that with its unusual enforcement mechanisms, the Texas Heartbeat Bill undoubtedly raises legal questions. In both *United States v. Texas* and *Whole Woman Health v. Jackson*, the Act has not resulted in a claimed injury, so courts did not consider the constitutionality of the Act, but instead, decided to deny an injunction on it. The Texas lawmakers' legal strategy of designating enforcement to private citizens has already proven effective as seen in the Court of Appeals and the Supreme Court's rejection of injunction applications. Most of the Supreme Court Justices agreed that they could not predict how private citizens would enforce the law or foresee definite damages from the Act, rendering an enjoinment unnecessary. The Supreme Court and the Fifth Circuit all consist of conservative majorities, providing a conducive environment for the legislation to remain in effect.[57] The Texas Heartbeat Bill attracted national attention and revealed the conservative legal atmosphere that may allow for the passage of restrictive abortion laws.[58] By refocusing national attention on abortion by drawing attention with the Heartbeat Act, Texas lawmakers amplify pro-life voices that support their legislation and other abortion bans. In the case that the Supreme Court strikes down *Roe* and *Casey*, Texas could regulate abortions through the Texas Heartbeat Bill or other legislation if the Act's enforcement mechanisms prove problematic. Although the constitutionality of the Act appears intrinsically tied to its pre-viability abortion ban, the Court will only decide on the legitimacy of the enforcement procedure it employs in blocking federal judicial review. If the decision renders the Act unconstitutional, it would be based on evading federal oversight rather than the Act's violation of federal abortion standards.

In *Dobbs v. Jackson's Women Health Organization*, the Supreme Court must address the constitutionality of pre-viability abortion bans that contradict the findings in *Roe* and *Casey*. Overruling the landmark cases would definitively alter legal precedent regarding the Fourteenth Amendment. Not only would dismantling *Roe* and *Casey* hinder women's ability to access legal abortions, re-interpreting the Fourteen Amendment could threaten other individual liberties as well. If the Justices decide to overrule *Roe* and *Casey*, they face the task of redefining liberty as referred to in the Fourteenth Amendment since ruling in favor of Dobbs would give state governments greater ability to interfere in the personal lives of citizens. If liberty does not entail one's ability to receive an abortion, questions regarding other personal decisions arise, especially ones concerning medical treatment and family planning. If liberty does not entail "the right to make family decisions and the right to physical autonomy," states could have a basis for hindering federal protections for same-sex marriage as established in *Obergefell v. Hodges* and block contraception access by challenging *Griswold* v. *Connecticut.*[59] Overruling *Roe* and Casey, affects more than abortion issues, putting numerous cases that protect personal liberties on the line because they depend upon existing interpretations of the Fourteenth Amendment.

While the majority of current Supreme Court Justices are conservative, they hope to present themselves as politically insulated actors who do not bend at the will of ideological winds even when it favors their own beliefs. The public's faith in the Supreme Court gives the judicial branch its legitimacy and if people begin to see Justices as "politicians in robes" striving to further their own agendas, citizens will lose respect for the rule of law and the government in general. The Justices' recent public statements show their desire to preserve the Court's legitimacy and distance themselves from established political ideologies. At the University of Louisville, Justice Barret said, "My goal today is to convince you that the court is not comprised of a bunch of partisan hacks."[60] Justice Thomas also expressed concerns about public perceptions of the Court: "The media makes it sound as though you are just always going right to your personal preferences. They think you become like a politician. That's a problem. You're going to jeopardize faith in legal institutions."[61] Justices emphasize their judicial philosophies as directing the outcome of cases rather than their political beliefs. While in *United States v. Texas*, the Justices could easily attribute their decision to legal understandings of factors that rightfully warrant an injunction, the constitutionality question central to *Dobbs* contains a more political nature. Justices who decide in favor of *Dobbs* must explain in detail how their judicial philosophies led to overruling decades worth of legal precedent and established definitions of the Fourteenth Amendment.

Although conservative judicial philosophies often entail originalism, most Justices hold legal precedent in high regard since it represents the independent and reliable nature of the

[57] *E.g.*, Ruth Marcus, The 5th Circuit is staking out a claim to be America's most dangerous court, WASH. POST (Aug. 31, 2021), https://www.washingtonpost.com/opinions/2021/08/31/5th-circuit-is-staking-out-claim-be-americas most-dangerous-court/.

[58] *See, e.g.*, Justine Coleman, Tex. law opens door for other states to pursue restrictions, (Sep. 3, 2021), THE HILL, https://thehill.com/policy/healthcare/570801-texas-law-opens-door-for-other-states-to-pursue-abortion-restrictions.

[59] Planned Parenthood v. Casey, *supra* note 8.

[60] Linda Greenhouse, *The Supreme Court's Pain and Our Anger* (Oct 7, 2021), N.Y. TIMES.

[61] Carley Lanich, *Justice Clarence Thomas Laments a 'Race-Obsessed World' in lecture at Notre Dame* (Sep 17, 2021), SOUTH BEND TRIBUNE, https://www.southbendtribune.com/story/news/2021/09/17/notre-dame-clarence thomas-supreme-court-justice-lecture-south-bend-indiana/8370397002/.

Supreme Court.[62] Originalism becomes a difficult interpretational lens for older laws, especially ones that do not define important terms. *Dobb's* reference to legislative actions during the Fourteenth Amendment's ratification fails to build a convincing originalist argument. The Fourteenth Amendment does not convey a definition for liberty and a large variety of sources can shape modern perceptions of the original public meaning of liberty. Reliance on a single historical source to define liberty may not reflect widespread understandings of liberty during the nineteenth century. Lawmakers could have established many policies based on political calculations without consideration of their constitutionality. When citizens suffered due to such policies, their legal battles had the power to reveal the laws' deviation from constitutional standards. Society's understanding of liberty at the time of the Fourteenth Amendment's passage may have differed immensely, and to this day, people perceive individual liberties differently. By looking to established precedents, Justices could arrive at common definitions of liberty that withstood the test of time and repeated legal challenges. Even for the conservative Justices, the precedent could inform their perceptions of liberty more than sources from the 19th century due to the concept's highly debatable nature.

V. Potential Outcomes

By analyzing their judicial philosophies, one can expect the Court's liberal wing, consisting of Justices Breyer, Kagan, and Sotomayor to rule against Mississippi in *Dobbs*. The three Justices already revealed their intentions to rule against Texas when dissenting against the Court's rejection of the injunction application in *United States v. Texas.* Their statements support abortion as a constitutionally protected right, signifying their support of the Respondents in *Dobbs*. Chief Justice Roberts has sided with liberal Justices throughout his career, and in *Dobbs,* he also dissented against the majority's rejection of the injunction application. Although he did not reveal his perspective on the constitutionality of the Act, Roberts' past rulings reveal his respect for legal precedents, including those involving abortion rights. In *June Medical Services v. Russo,*[63] Roberts joined the majority that struck down abortion restrictions in Louisiana, citing that the state's laws mirrored those previously deemed as unconstitutional in past cases. Even if Roberts did not agree with the Court's rulings, his emphasis on precedent guided his decision-making in abortion rights cases. Such a pattern suggests that Justice Roberts hopes to preserve the Court's reputation as a legitimate institution independent from politics. His efforts to salvage the Court's image could further incentivize him to deviate from the conservative majority. Out of the Court's conservative wing, consisting of Justices Alito, Barret, Gorsuch, Kavanaugh, and Thomas, there is a possibility that several Justices may prioritize legal precedent and rule against *Dobbs*. Justice Alito, despite clearly stating his disagreement with *Roe v. Wade,* ruled to overturn abortion bans in New Jersey when he was a Court of Appeals judge because "the Supreme Court had struck down a similar law in Nebraska just weeks before."[64] Similarly, Justice Kavanaugh has stated that when ruling on a past case that "all parties to this case recognize that Roe v. Wade and Planned Parenthood v. Casey are precedents we must follow," even though he disagreed with the rulings.[65] Justices Barrett, Gorsuch, and Thomas are less likely to stray from their established stance on abortion. Despite Justice Barret's attempts to portray Justices as apolitical, her appointment to the Supreme Court revealed calculated political strategies from the Trump administration. President Trump promised his supporters that he would place a pro-life Justice on the Supreme Court and proceeded to nominate Justice Barrett, whose voting record suggests her suitability for Trump's political goals. She has also expressed a willingness to overrule precedent: "Public response to controversial cases like Roe reflects a public rejection of the proposition that [precedent] can declare a permanent victor in a divisive constitutional struggle."[66] Condemning the rationality behind Roe itself, Justice Thomas asserted that the Constitution does not offer "a shred of support" to the protection of abortion as a right, making him more prone to agree with Mississippi's arguments.[67] As a proponent of judicial restraint, Justice Gorsuch seems likely to attribute abortion regulation decisions to state governments.[68] The ruling in *Roe* contradicted Gorsuch's philosophy of avoiding judicial legislating since the Court specified detailed legal standards like lawmakers creating new legislation. By establishing details for a legal standard, the Court oversteps its judicial duties and acts as a legislator without any legitimacy according to Gorsuch. Different judicial

[62] *See, e.g.*, Stephen Wermiel, SCOTUS for law students: Supreme Court Precedent (Oct 2, 2019), SCOTUSBLOG, https://www.scotusblog.com/2019/10/scotus-for-law-students-supreme-court-precedent/.

[63] June Medical Services L.L.C. v. Russo, 591 U.S. ___ (2020).

[64] Diane Cheng, Judging Samuel Alito on Abortion Rights (Jan 24, 2006), NPR, https://www.npr.org/20.

[65] Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017).

[66] *E.g.*, Amy C. Barrett, *Precedent and Jurisprudential Disagreement,* 91 Tex. L. Rev. 1711 (2012-2013).

[67] Jamie Ehrlich, *Justice Clarence Thomas says Roe decision doesn't have 'shred' of constitutional support (July 9 2020), https://www.cnn.com/2020/06/29/politics/clarence-thomas-abortion-dissent/index.html.*

[68] *See* Thomas Jipping, What Kind of Justice is Neil Gorsuch (May 25, 2018), THE HERITAGE FOUND, https://www.heritage.org/courts/commentary/what-kind-justice-neil-gorsuch.

philosophies undergird the three conservative Justices' interpretational methods, but they all point to a promising outcome for Mississippi in *Dobbs.* Even so, a vote from either Justice Kavanaugh or Justice Alito in favor of the Respondents would be sufficient for reaffirming the unconstitutionality of pre-viability abortion vans through *Dobbs*.

VI. Conclusion

While *Roe* and *Casey* have guided judicial activity for decades, increasingly common state abortion restrictions have shown an unrelenting pro-life movement in the country. Legislators in Texas and Mississippi, two states with firm pro-life bases, shaped their legislation with an understanding of the challenges they would face in court. Although pro-life legislators and organizations have unsuccessfully attempted to dismantle legal precedent in the past, many have deemed the current Supreme Court as promising for overruling major abortion cases. Even so, the Court's motivation to maintain a reputation of impartiality may guide their decision-making in the two cases, which makes victories for Texas and Mississippi highly unlikely.

The Texas bill intends to circumvent judicial review and federal oversight with an unprecedented technique of attributing enforcement responsibilities to private citizens. Allowing the Texas law to remain in place can trigger vehement pushback from pro-choice groups and abortion providers, resulting in more abortion-related controversies that would further the public scrutiny of the Court. Furthermore, Mississippi fails to offer convincing arguments for the overhaul of established legal precedent. Using a weak originalist argument to appeal to the court's conservative Justices, Mississippi attempts to redefine liberty in the Fourteenth Amendment and reduce the individual liberties guaranteed by the Constitution by referring to cherry-picked 19th-century laws. By brazenly asking the Court to rule on the Gestational Age Act's constitutionality, Mississippi may help reaffirm *Roe* and *Casey*. Mississippi's meager originalist argument and the Court's respect of legal precedent indicate the low possibility of the Court blatantly striking down constitutional protections for abortion access decided in *Roe* and reaffirmed in *Casey*.

An Emergency of Injustice: The Need to Further Provide for Unaccompanied Migrant Minors

Bryan Thomas (PO '24)
Staff Writer

The United States is in the midst of yet another 'crisis' at its southern border. Throughout the last 12 months, over 1.7 million migrants have been detained – the highest number ever recorded.[1] Another statistic is equally alarming. More than 145,000 of the migrants encountered by US authorities were unaccompanied minors.[2]

Upon arrival, these minors are labeled unaccompanied alien children (UAC) by US Customs and Border Patrol (CBP). UAC immediately enter federal custody and begin the process of entering the United States. But the abusive nature of this process has been exposed by lawyers around the country[3] and organizations like ProPublica.[4] Krish O'Mara Vignarajah, president and CEO of the Lutheran Immigration and Refugee Service, has declared that "we need to address an emergency situation of unaccompanied children coming across the border who have already been through so much and need our help now."[5]

In this paper, I first describe how and why so many unaccompanied minors are traveling to the US border and the legal process they encounter upon arrival. In the second section, I provide a background of the history of US refugee admission and migrant detention. Next, I describe the poor conditions many unaccompanied minors endure both during and following their time in federal custody, such as neglect, unsafe living conditions, and a lack of support, and I argue for increased oversight of their care. In the fourth section, I discuss the myriad legal injustices unaccompanied minors face in immigration court, namely a lack of representation and the unjust process through which their futures are determined. Finally, I conclude by stressing the importance of increased federal resources for migrant minors and expanded oversight of their treatment to ensure due process and equal opportunity. The US Department of Health and Human Services (HHS) should continue to prioritize the rate at which they release unaccompanied minors to sponsors, increase oversight of federal holding facilities to ensure that the conditions of the Flores Settlement are upheld, keep track of newly released children to ensure that they are properly supported, and allow unaccompanied minors without sponsors to enter the domestic foster care system. And after these children have settled in the United States, states should provide them with legal counsel in court to ensure that they receive a fair trial and a just determination of their futures.

I. How and Why Children are Traveling to the Southern Border

Most migrant minors at the Southern US border come from the so-called 'Northern Triangle' nations of Central America: El Salvador, Guatemala, and Honduras. They are primarily driven from their home nations by high crime rates, gangs, and growing economic instability, all of which have prompted the United Nations High Commissioner for Refugees to call the Northern Triangle "one of the most dangerous places on Earth."[6] Accordingly, unaccompanied minors from Central America consistently cite gang or cartel violence as their primary reason for asylum. Gang recruitment often begins in adolescence,[7] and most unaccompanied minors from Central America are the target recruitment demographic. 70% are male, and about 75% are ages fifteen to seventeen.[8] Most

[1] Record high migrant detentions at US-Mexico border, BBC News, October 23, 2021, https://www.bbc.com/news/world-us-canada-59019791 (last visited Oct 25, 2021).
[2] Ibid.
[3] Isaac Chotiner, Inside a Texas Building Where the Government Is Holding Immigrant Children, The New Yorker, 2019, https://www.newyorker.com/news/q-and-a/inside-a-texas-building-where-the-government-is-holding-immigrant-children (last visited Oct 12, 2021).
[4] Dara Lind, "No Good Choices": HHS Is Cutting Safety Corners to Move Migrant Kids Out of Overcrowded Facilities, ProPublica, https://www.propublica.org/article/no-good-choices-hhs-is-cutting-safety-corners-to-move-migrant-kids-out-of-overcrowded-facilities?token=_ZxdeE_wocC45nxQoi4TRYZ4jEdTGjPb (last visited Jan 5, 2022).
[5] Jasmine Aguilera, What to Know About What's Happening to Unaccompanied Minors at the Border, Time (2021), https://time.com/5950832/unaccompanied-minors-border/ (last visited Oct 10, 2021).
[6] Central America Refugee Crisis: Aid, Statistics and News | USA for UNHCR, https://www.unrefugees.org/emergencies/central-america/ (last visited Oct 27, 2021).
[7] Celeste Lebowitz, A Guide to Children Arriving at the Border: Laws, Policies and Responses, UNICEF Global Development Commons, https://gdc.unicef.org/resource/guide-children-arriving-border-laws-policies-and-responses (last visited Oct 10, 2021).
[8] Facts and figures: Deportations of unaccompanied children by USA and Mexico, Amnesty International (2021), https://www.amnesty.org/en/latest/news/2021/06/facts-figures-deportations-children-usa-mexico/ (last visited Oct 10, 2021).

unaccompanied migrant minors are drawn to the US by the appeal of economic opportunity or the desire to reunite with family members. Over 80% of unaccompanied minors have relatives in the US, and over 40% have parents in the US.[9] Historically, children have migrated alone as a result of their parents' determination that they are safer alone due to the presumed lower risks of violence and persecution for young children.[10] But some minors have notably fled their home countries for the US of their own volition, choosing to escape domestic abuse or community violence.[11]

The characteristics of the current crisis are comparable to other southern border migrant surges that have occurred throughout the last decade; but the current one is the most severe due to the desperate economic conditions created by the pandemic and natural disasters that have ravaged Central America.[12] The number of Haitians attempting to cross the US border has also risen in recent months due to political instability and the aftermath of the 2010 earthquake.[13] The migration is quite dangerous and often deadly for minors,[14] who traditionally travel to the border via a combination of buses, trains, smugglers, and walking. Along the way, they face the threat of exploitation by gangs and smugglers in addition to natural dangers and other common risks children face while traveling alone.[15]

US policy itself is also partially responsible for the recent increase in unaccompanied minors at the border. In March 2020, the Trump administration invoked section 265 of Title 42 of US health law to completely shut the southern border to migrants, citing public health concerns amid the COVID-19 pandemic.[16] Since that date, all migrants and refugees have been turned away at the border. However, at the beginning of the Biden administration, the US Department of Homeland Security decided to continue this Title 42 ruling but with the modification to no longer expel unaccompanied migrant children.[17] Since this decision, there have been numerous accounts of families sending their children to the border alone.[18] They hope to guarantee their children's acceptance to the US, which would be more difficult to accomplish if they arrived as a full family.[19] This phenomenon proves the faults of the new Title 42 policy. Moving forward, the government should end or modify the Title 42 ruling to reduce the incentive for families to send their children to the border alone.

When unaccompanied minors arrive at the US border, they are apprehended by officials from the US Customs and Border Protection (CBP) and temporarily placed in CBP holding facilities. At CBP facilities, authorities determine whether the minors qualify as UAC, based on whether they arrived alone or are separated from adults CBP deems unrelated or dangerous due to suspected involvement in human trafficking, suspected child abuse, or a referral for criminal prosecution.[20] Within seventy-two hours, US Immigration and Customs Enforcement (ICE) transfers the children to the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services, where long-term shelter is arranged for the children. HHS is responsible for finding and vetting a sponsor through a series of interviews and background checks. Children with available sponsors – usually their closest relative in the US – are placed with their sponsors while their court cases continue and their legal statuses and futures in the US are determined. But children without sponsors are placed in group homes or foster care facilities. US Citizenship and Immigration Services rules on asylum cases, while the Justice Department rules on other immigration cases.[21] Ultimately, the ruling of the immigration court determines whether children can remain in the United States or face deportation back to their home countries.

---

[9] Ibid.

[10] Danilo Zak, Fact Sheet: Unaccompanied Migrant Children (UACs), National Immigration Forum (2020), https://immigrationforum.org/article/fact-sheet-unaccompanied-migrant-children-uacs/ (last visited Oct 11, 2021).

[11] Amelia Cheatham, U.S. Detention of Child Migrants, Council on Foreign Relations (2021), https://www.cfr.org/backgrounder/us-detention-child-migrants (last visited Oct 10, 2021).

[12] Nick Miroff, Andrew Ba Tran & Leslie Shapiro, Hundreds of minors are crossing the border each day without their parents. Who are they?, Washington Post, March 11, 2021, https://www.washingtonpost.com/nation/2021/03/11/unaccompanied-minors-immigrants-border/ (last visited Oct 10, 2021).

[13] Southern Border Humanitarian Crisis, Center for Disaster Philanthropy (2021), https://disasterphilanthropy.org/disaster/southern-border-humanitarian-crisis/ (last visited Oct 10, 2021).

[14] Nick Miroff, Andrew Ba Tran & Leslie Shapiro, Hundreds of minors are crossing the border each day without their parents. Who are they?, Washington Post, March 11, 2021, https://www.washingtonpost.com/nation/2021/03/11/unaccompanied-minors-immigrants-border/ (last visited Oct 10, 2021).

[15] Nick Miroff, Andrew Ba Tran & Leslie Shapiro, Hundreds of minors are crossing the border each day without their parents. Who are they?, Washington Post, March 11, 2021, https://www.washingtonpost.com/nation/2021/03/11/unaccompanied-minors-immigrants-border/ (last visited Oct 10, 2021).

[16] A Guide to Title 42 Expulsions at the Border, American Immigration Council (2018), https://www.americanimmigrationcouncil.org/research/guide-title-42-expulsions-border (last visited Oct 27, 2021).

[17] Jasmine Aguilera, What to Know About What's Happening to Unaccompanied Minors at the Border, Time (2021), https://time.com/5950832/unaccompanied-minors-border/ (last visited Oct 10, 2021).

[18] Ibid.

[19] Ibid.

[20] Myth vs. Fact: DHS Zero-Tolerance Policy, Department of Homeland Security (2018), https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy (last visited Nov 7, 2021).

[21] Amelia Cheatham, U.S. Detention of Child Migrants, Council on Foreign Relations (2021), https://www.cfr.org/backgrounder/us-detention-child-migrants (last visited Oct 10, 2021).

II. A History of Refugee Admission in the United States

Migrants granted refugee status, also known as asylum, have historically received legal protections that secure their status in the United States. The United Nations 1951 Convention and 1967 Protocol define a refugee as a "person who is unable or unwilling to return to his or her home country and cannot obtain protection in that country due to past persecution or a well-founded fear of being persecuted in the future on account of race, religion, nationality, membership in a particular social group, or political opinion."[22] Within the US, asylees are protected from deportation, authorized to work, may apply for a Social Security card, may request permission to travel overseas, and can petition to bring family members to the United States.[23] Such privileges make American asylees active members of the workforce and society, but deportation protection is the primary reason that migrants apply for asylum.[24]

The US grants two forms of asylum: affirmative asylum and defensive asylum.[25] Affirmative asylum can be actively pursued by a migrant not in removal proceedings, whereas defensive asylum is applied for to remain in the US during the removal process. Almost all migrants applying for asylum use the credible fear screening process, which regards the credible fear of persecution or torture in one's home country.[26] But these applicants must prove the validity and severity of their cases through individual testimony, which can be a difficult process.[27]

The US has recently seen a sharp rise in asylum cases, the majority of which have come from Mexico and the Northern Triangle. From 2013 to 2015, there were more asylum applications from the Northern Triangle nations than in the previous fifteen years combined, which accounted for 37% of all US asylum cases.[28] This trend has caused immigration judges to deny a growing proportion of claims from Central America compared with other regions of the world,[29] which is the result of American efforts to balance refugee admissions by global region.[30] But doing so contradicts the nation's historical commitment to refugee protection.

III. Conditions and Oversight in Federal Custody

Once migrant minors arrive at the US border, their hardship often continues within federal custody. In 1985, several activist groups filed a class-action lawsuit on behalf of undocumented children in federal holding facilities, most notably a fifteen-year-old Salvadoran girl named Jenny Flores, who reported a series of mistreatments in federal custody.[31] The lawsuit resulted in the well-known Flores Settlement, which outlines standards for the care of all migrant minors in federal custody, including access to food and water, emergency medical services, bathroom facilities, and ventilated, temperature-controlled surroundings.[32] The most prominent standard is that children cannot be held at CBP facilities for more than seventy-two hours before their transfer to the Department of Health and Human Services.

However, due to a lack of oversight roles and responsibilities for reviewing CBP obligations,[33] the protections guaranteed for children by the Flores Settlement are being violated. As a result of the high number of unaccompanied minors at the border, many children are staying in CBP custody for longer than seventy-two hours – often in large tents or emergency facilities that were not built to house even adults for long periods of time.[34] These holding facilities are overcrowded and regularly lack sufficient food or even sufficient toothbrushes.[35] Recent reports have described them as having "extreme cold temperatures, lights on twenty-four hours a day, no adequate access to medical care, basic sanitation, water, or adequate food"[36] in addition to conditions that were "tantamount to intentionally causing the spread of disease"[37]

---

[22] Asylum in the United States, American Immigration Council (2014), https://www.americanimmigrationcouncil.org/research/asylum-united-states (last visited Oct 11, 2021).
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] D'Vera Cohn, Recent trends in Guatemala, Honduras, El Salvador immigration, Pew Research Center's Hispanic Trends Project (2017), https://www.pewresearch.org/hispanic/2017/12/07/recent-trends-in-northern-triangle-immigration/ (last visited Jan 3, 2022).
[29] Asylum in the United States, American Immigration Council (2014), https://www.americanimmigrationcouncil.org/research/asylum-united-states (last visited Oct 11, 2021).
[30] Cara Labrador, A history: Asylum in the United States, Southern Poverty Law Center (2018), https://www.splcenter.org/20181002/history-asylum-united-states (last visited Oct 11, 2021).
[31] Patrick McHugh, The History of the Flores Settlement, CIS.org (2019), https://cis.org/Report/History-Flores-Settlement (last visited Nov 19, 2021).
[32] Ibid.
[33] U. S. Government Accountability Office, Southwest Border: CBP Needs to Increase Oversight of Funds, Medical Care, and Reporting of Deaths, https://www.gao.gov/products/gao-20-536 (last visited Nov 19, 2021).
[34] 1. Dara Lind, The horrifying conditions facing kids in border detention, explained, Vox (2019), https://www.vox.com/policy-and-politics/2019/6/25/18715725/children-border-detention-kids-cages-immigration (last visited Oct 12, 2021).
[35] ibid.
[36] Ibid.
[37] Ibid.

– during the height of a global pandemic. Throughout 2019, three children died in CBP custody.[38] Nonetheless, CBP holding facilities accused of abuse are still receiving funding.[39] Moving forward, the government should improve the vetting process of CBP facilities to uphold the standards of the Flores Settlement and prioritize the rate at which HHS can release children to their sponsors to reduce this crisis.

When children are transferred out of CBP custody, they enter the custody of the Office of Refugee Resettlement (ORR) of HHS. The ORR is responsible for placing them within the "least restrictive setting,"[40] which is either placement with a related sponsor already in the US or 'out-of-home' placement. 'Out-of-home' placements generally consist of settings such as foster care or group homes via the Unaccompanied Refugee Minors (URM) Program. In 2018, roughly one-third of youth entering the URM Program were refugees, one-third were victims of trafficking, and one-third had a Special Immigrant Juvenile classification, in which children obtain permanent lawful status because they cannot reunite with their parents due to abuse, abandonment, or neglect.[41]
But even after unaccompanied minors leave direct federal custody, they are harmed by maltreatment enabled by a lack of federal support and oversight. Many times, child sponsors cannot provide adequate childcare and lack funding to do so.[42] Yet HHS does not provide sponsors with child support and routinely neglects to conduct effective follow-up for the children it oversees. The department is only required to make one 'wellness check' phone call thirty days after placement, and it is not even obligated to follow up if the sponsors do not pick up the phone.[43] In 2018, even upon discovering that twenty-eight unaccompanied migrant youth had run away from their sponsor families, ORR "took no action to locate the children,"[44] multiple of whom were later found in the streets.[45]

ORR's carelessness with child placements has also led to even more severe consequences in the form of its role in human trafficking. Traffickers have transported Central American teens to the southern border with American accomplices posed as sponsors. The accomplices receive the minors from ORR and transport them around the country to live in squalid conditions and work against their will.[46] HHS's lack of oversight and support of the children's treatment after their placement permits such instances to occur beyond federal knowledge. As a result, it harms the US government's reputation, crediting it as a facilitator of child labor trafficking.

Unaccompanied minors without sponsors are often placed into the federal foster care system, which is less effective than the state-based, domestic systems.[47] However, the federal foster system does not have enough homes for all the migrant children who need them, while, in some states, the number of local children in foster care is at an all-time low.[48] Yet many states are reluctant to accept migrant children into their foster system, even if the federal government would subsidize their care. They claim that unaccompanied children would displace those already in state foster care or limit states' ability to make new placements.[49] In April 2021, Governor of South Carolina, Henry McMaster, asserted that state-licensed foster care facilities should reject migrants because "sending unaccompanied migrant children from the border to states like South Carolina only makes the problem worse."[50]

Because of the shortage of foster homes within the federal foster system, many migrant minors without sponsors are placed into shelter-type facilities or group home care.[51] These large group facilities are required to undergo formal vetting processes and provide a baseline standard of care with adequate food, medical care, mental health services,

[38] U. S. Government Accountability Office, Southwest Border: CBP Needs to Increase Oversight of Funds, Medical Care, and Reporting of Deaths, https://www.gao.gov/products/gao-20-536 (last visited Nov 19, 2021).
[39] Dara Lind, "No Good Choices": HHS Is Cutting Safety Corners to Move Migrant Kids Out of Overcrowded Facilities, ProPublica, https://www.propublica.org/article/no-good-choices-hhs-is-cutting-safety-corners-to-move-migrant-kids-out-of-overcrowded-facilities?token=_ZxdeE_wocC45nxQoi4TRYZ4jEdTGjPb (last visited Jan 5, 2022).
[40] Swathi Kella, From the Border, into Foster Care, Harvard Political Review (2021), https://harvardpolitics.com/from-the-border-into-foster-care/ (last visited Oct 14, 2021).
[41] Kimberly Foley et al., Final Report of the Descriptive Study of the Unaccompanied Refugee Minors Program, OPRE Report 2021-81 (2021).
[42] Swathi Kella, From the Border, into Foster Care, Harvard Political Review (2021), https://harvardpolitics.com/from-the-border-into-foster-care/ (last visited Oct 14, 2021).
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Patrice Taddonio, Inside the Hidden Reality of Labor Trafficking in America, FRONTLINE (2018), https://www.pbs.org/wgbh/frontline/article/inside-the-hidden-reality-of-labor-trafficking-in-america/ (last visited Nov 11, 2021).
[47] Swathi Kella, From the Border, into Foster Care, Harvard Political Review (2021), https://harvardpolitics.com/from-the-border-into-foster-care/ (last visited Oct 14, 2021).
[48] Randi Mandelbaum, This is what happens to child migrants found alone at the border, from the moment they cross into the US until age 18, The Conversation (2021), http://theconversation.com/this-is-what-happens-to-child-migrants-found-alone-at-the-border-from-the-moment-they-cross-into-the-us-until-age-18-163205 (last visited Oct 10, 2021).
[49] Kristian Hernandez, Republican Governors Block Unaccompanied Migrant Children, Stateline (2021), https://pew.org/3nt23Ni (last visited Nov 7, 2021).
[50] Ibid.
[51] Swathi Kella, From the Border, into Foster Care, Harvard Political Review (2021), https://harvardpolitics.com/from-the-border-into-foster-care/ (last visited Oct 14, 2021).

education, and recreation.[52] Yet due to a lack of oversight, they frequently fail to meet these criteria. Investigations have discovered "hundreds of standard violations at licensed facilities,"[53] proving that the children that remain in direct federal custody are often not properly supported either.

IV. Immigration Court

Unaccompanied migrant minors also face unjust circumstances in immigration court once their court date arrives. According to the Homeland Security Act of 2002, § 279(g)(2), UAC are "noncitizens without lawful immigration status" and therefore vulnerable to deportation if not granted asylum.[54] The Department of Homeland Security (DHS) also grants specialized relief visas for human trafficking and domestic violence,[55] but the majority of unaccompanied minors are dependent on immigration court to determine their futures in the United States. And because immigration cases are civil proceedings, migrant minors are not provided with attorneys.[56]

As a result, unless children can hire an immigration lawyer or find a pro-bono lawyer, they are subject to navigating the complex immigration system by themselves, despite the trouble learning English that many migrant minors experience.[57] 75 to 90 percent of migrant minors face immigration court without an attorney, whereas the DHS, which acts as the prosecutor in immigration court and argues for the child's deportation, is represented in every case by a lawyer trained in immigration law.[58] The effects of this imbalance are profound. More than 80% of unaccompanied minors without legal representation are deported, compared to only 12% of those represented by an attorney.[59] This phenomenon exposes an instance of injustice in which children are being deported based on their financial capabilities or access to resources rather than the legitimacy of their cases. The children without resources and legal support are likely even the ones most in need of asylum.

Another reason for the unjust consequences for unrepresented children is *in absentia* cases. In *in absentia* cases, immigration judges can order children removed after they fail to appear in court, which leaves unrepresented and under-resourced children especially vulnerable. 95% of children represented by an attorney appear in immigration court, versus only 33% of those not represented.[60] Additionally, children who fail to update their address with the DHS – a complicated process for those without lawyers – are commonly deported *in absentia*.[61] These issues prove the extent to which the process of determining children's futures in the United States is unjust, especially for children who lack developmental resources and legal counsel.

V. Policy Recommendations

The United States must make several changes to improve the justice of the process by which it accepts and integrates unaccompanied migrant minors into the country. As refugees, or at least probable refugees, which is proven by the desperate conditions under which they arrive, they deserve protection of both their living conditions and legal rights.

First, the government should prioritize the rate at which HHS releases children to their sponsors to reduce the current crisis at the border. Since taking office, the Biden Administration has already started to make progress on this front. They should continue to pay travel costs for migrant minors whose parents cannot afford it[62] to increase the rate and eligibility of their placements with sponsors. And they should continue to work with advocacy groups identifying minors in Northern Mexico who are preparing to cross so that the children can do so safely and reunite with sponsors more quickly.[63] Continuing these efforts will prevent overcrowding at border

[52] Ibid.
[53] Ibid.
[54] Annie Chen, An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings, American Bar Association, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/urgent-need-unaccompanied-children-access-to-counsel-immigration-proceedings/ (last visited Nov 7, 2021).
[55] Amelia Cheatham, U.S. Detention of Child Migrants, Council on Foreign Relations (2021), https://www.cfr.org/backgrounder/us-detention-child-migrants (last visited Oct 10, 2021).
[56] Ibid.
[57] Children in Immigration Court: Over 95 Percent Represented by an Attorney Appear in Court, American Immigration Council (2016), https://www.americanimmigrationcouncil.org/research/children-immigration-court-over-95-percent-represented-attorney-appear-court (last visited Oct 10, 2021).
[58] Celeste Lebowitz, A Guide to Children Arriving at the Border: Laws, Policies and Responses, UNICEF Global Development Commons, https://gdc.unicef.org/resource/guide-children-arriving-border-laws-policies-and-responses (last visited Oct 10, 2021).
[59] Carlee Goldberg, Legal Aid for Unaccompanied Children in the U.S. Illegally (2020), https://www.ncsl.org/research/immigration/legal-aid-for-unaccompanied-children-in-the-u-s-illegally.aspx (last visited Oct 14, 2021).
[60] Ibid.
[61] Unaccompanied Immigrant Children, National Immigrant Justice Center (2020), https://immigrantjustice.org/issues/unaccompanied-immigrant-children (last visited Oct 10, 2021).
[62] Nick Miroff, Andrew Ba Tran & Leslie Shapiro, Hundreds of minors are crossing the border each day without their parents. Who are they?, Washington Post, March 11, 2021, https://www.washingtonpost.com/nation/2021/03/11/unaccompanied-minors-immigrants-border/ (last visited Oct 10, 2021).
[63] Ibid.

facilities and assist the process of reunification that the minors and their sponsors deserve. But also, the government should end or modify the Title 42 ruling to reduce the incentive for families to send their children to the border alone.

While unaccompanied minors are within federal custody, the government should increase oversight of their care in the form of more frequent inspections. Doing so will ensure that the guidelines of the Flores Settlement are upheld and that the children are provided with living conditions suitable for children of their age and with the trauma many unaccompanied minors endure. Additionally, children not fortunate enough to be placed with a sponsor should enter higher-quality state-run foster systems. There is evidence that "much of the American public,"[64] wants to assist with the unaccompanied minors' dilemma, which could indicate that many domestic foster parents would be willing to take in migrant minors, especially if the federal government can assist in providing the resources migrant minors need, such as education, English language support, and physical and mental health services. And children living with sponsors should be monitored far beyond a single phone call[65] to ensure that they are sufficiently supported and protected during their time in the United States and not victims of trafficking.

Finally, the government should provide migrant minors in immigration court with proper legal representation, like New York and California already do and states such as Maryland, Tennessee, and Illinois have piloted programs to do.[66] These programs ensure that a fair trial is held with equal representation on both sides and therefore a just decision is made about the futures of the vulnerable children's lives. In 2018, New York and California allocated a total of $7 million to their programs that provide public defense for unaccompanied minors.[67] And New York, Connecticut, Hawaii, and Illinois have all introduced legislation that would mandate legal representation or appropriate funds for unaccompanied minors.[68] Such investments in these children may be costly, but they will yield benefits. Providing for desperate migrants will help the United States retain its reputation as a nation of migrants and uphold its global commitment to refugee protection. Additionally, as Dany Bahar, a senior fellow at the Brookings Institution, has affirmed, "by providing [refugees] with the right to work, to health, and to education, [they] can start productive lives"[69] in the United States and ultimately give back to our country.

[64] Dara Lind, The horrifying conditions facing kids in border detention, explained, Vox (2019), https://www.vox.com/policy-and-politics/2019/6/25/18715725/children-border-detention-kids-cages-immigration (last visited Oct 12, 2021).
[65] Swathi Kella, From the Border, into Foster Care, Harvard Political Review (2021), https://harvardpolitics.com/from-the-border-into-foster-care/ (last visited Oct 14, 2021).
[66] Carlee Goldberg, Legal Aid for Unaccompanied Children in the U.S. Illegally (2020), https://www.ncsl.org/research/immigration/legal-aid-for-unaccompanied-children-in-the-u-s-illegally.aspx (last visited Oct 14, 2021).
[67] Ibid.
[68] Ibid.
[69] Dany Bahar, Why accepting refugees is a win-win-win formula, Brookings (2018), https://www.brookings.edu/blog/up-front/2018/06/19/refugees-are-a-win-win-win-formula-for-economic-development/ (last visited Oct 21, 2021).

The Politics of Japanese Constitutional Amendment: East Asian Geopolitics and the US-Japanese Alliance

Sae Furukawa (PO '25)
Staff Writer

The Japanese Constitution is widely regarded as the oldest unamended Constitution in the world. Within the Constitution, Article 9 specifically formulates the jurisdiction that the nation shall employ force as a defensive tool solely in the face of external attack. Often known as the "Peace Constitution," this article reflects Japan's transition away from its pre-WWII militarism and imperialism and toward more pacifist ideals. While Japan has refrained from international conflict for seventy years, there has been a rise in skepticism among some critics suggesting that Japan's so-called pacifist article is no longer compatible with today's volatile geopolitical climate. Specifically, critics argue that Japanese sovereignty has been put at risk by the rise of China as a competing superpower that has demonstrated military capacity at par with the United States, Japan's biggest ally. Additionally, North Korea's increasing use of its nuclear development programs as a diplomatic tool to threaten its neighboring nations has also raised alarms in Japan.

It is against this contextual backdrop that Japan has witnessed increasing debate over the possibility of the Article 9 amendment, which is designed to address several contradictions and ambiguities within the current version that presumably restricts Japan's defense capacity in the face of external security threats. At the same time, however, some critics also interpret the Article 9 amendment as the government's ruthless attempt to expand Japan's military influence in the international context. In 2015, the previous administration of Shinzo Abe approved a constitutional reinterpretation of Article 9, paving the way for Japan to directly engage in collective defense military operations.[1] This suggests that Japan has the constitutional authority to assist its allies in case of armed attacks even if Japan itself is not directly threatened by perpetrators.

This paper explores various implications of the Article 9 amendment. It first focuses on arguments advanced by proponents of the Article 9 amendment and whether they offer a valid insight into its potential benefits. Then the paper discusses broader implications of the Article 9 amendment on Japan's alliance and its relations with neighboring countries, as well as the role it may play in an international context. Finally, the paper addresses the complexity and nuances surrounding the Article 9 amendment. The paper argues that while the formal recognition of the current Self-Defense Forces (SDFs) that can operate beyond its current framework may be necessary to equip Japan with sufficient self-defense capacities, the amendment may also lead to Japan's enhanced collective defense capacity that could also be used to pursue the current U.S.-focused diplomatic policies and security alliances.

I. Article 9 and Its Historical Context

One reason why the Article 9 amendment is promoted by its supporters is because the current Japanese Constitution was primarily drafted by the United States: Japan's original constitution was written under the leadership of then-Army General Douglas MacArthur when Japan was under American occupation following the end of World War II. As Article 9 is often construed as America's attempt to demilitarize Japan eternally and ensure that the country can never pose an existential threat to the U.S, the amendment is seen as a way for Japan to take control of its own security and policy. The English translation of Article 9 follows:

"Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."[2]

The first line of the Article speaks to Japan's pacifist ideal — the country pledges not to deploy the "use of force" to intervene in international conflicts, therefore rebutting its pre-war imperialistic policies. The second line bans Japan from

[1] Sieg, L *Abe's mission unaccomplished: Pushing to revise Japan's pacifist charter*. Reuters. (November 13, 2019). https://www.reuters.com/article/us-japan-abe-legacy-analysis/abes-mission-unaccomplished-pushing-to-revise-japans-pacifist-charter-idUSKBN1XN089 (last visited: December 2, 2021).

[2] Sterling, D. P. *Governing japan: The perception, influence and theoretical interpretation of Article 9 of the Japanese Constitution and what it means for its security policy in the 21st century, if revised*. Open Journal of Social Sciences. (November 9, 2020) https://www.scirp.org/journal/paperinformation.aspx?paperid=104414 (Last visited: December 1, 2021).

essentially maintaining any form of "armed forces" that could potentially be used as tools to incite wars and violence on other sovereignties. With that being said, there is clearly a contradiction between the spirit of Article 9 and Japan's current military capacity: Self-Defense Forces (SDFs) are undoubtedly armed forces, and ironically, they boast one of the largest military budgets in the world. The historical interpretation of SDFs among successive Japanese cabinets is that the use of SDFs is limited in case of a direct attack on Japanese sovereignty.[3] However, not only is the existence of SDFs considered unconstitutional by some critics, but also the ambiguity surrounding conditions authorizing the use of SDFs has prompted a series of debates involving various case studies. For instance, one debate centers around the hypothetical situation where another country is about to launch a missile rocket at Japan: in this case, will preventive action be ruled unconstitutional under the current legal constraints on Japan's SDFs? While government officials have explained that preventive action is not necessarily unconstitutional, the controversy arises inevitably from the existing reality that the current constitution does not formally define the limits and capacities of SDFs.

II. Nature of the Article 9 Amendment

In early debates of the constitutional amendment back in 2012, the Liberal Democratic Party (the majority party) advocated replacing the SDFs with the "national armed forces." The revision of Article 9 essentially allows SDFs to engage in military operations beyond non-combatant UN peacekeeping operations. Moreover, if this revision is implemented, Japan will no longer face prohibition on possessing or producing nuclear weapons, although their introductions will almost inevitably provoke extreme reactions from its neighboring countries, including China, North Korea, and South Korea.[4]

In 2017, then-Prime Minister Abe responded to criticisms from opposition parties regarding his push for the Article 9 amendment, claiming that Japanese forces would not join wars abroad and that the amendment would be merely an attempt to establish the constitutionality of SDFs, rather than to expand their overseas deployment. Despite such claims, increasing overseas deployment of SDFs in the name of peacekeeping operations offers a different narrative. For example, in 2017, Japan dispatched SDFs to South Sudan in support of the United Nations Missions in South Sudan; later though, the Abe administration was forced to retreat SDFs as the cease-fire—a condition that was a prerequisite for sending the forces abroad—deteriorated significantly. Still, in 2019, Japan sent its SDF members to Egypt as a part of the first non-U.N. peacekeeping missions in its history.[5] Participation in peacekeeping operations beyond the U.N. projects symbolizes the government's increasing desire to augment Japan's involvement in the handling of international disputes, however "non-militaristic" the operation may be. Therefore, when discussing the Article 9 amendment, it is imperative to consider its implications on overseas involvement regardless of the "intentions" alleged by Japanese officials.

III. Japan's Self-Defense Capacity

The Article 9 amendment will be unlikely to impact the size and capacity of the current SDFs, which already form one of the biggest military forces in the world. Nevertheless, it's well contended that the amendment will likely raise the morale among SDF officers. Noboru Yamaguchi, former GSDF Lieutenant General and National Defense Academy Professor, offered his view in one interview: "The biggest change may be psychological. The cloud hanging over our heads will finally dissipate, as we'll no longer need to worry about our very existence being unconstitutional. Another big factor is that an amendment will represent the collective will of the people, making it quite different from a government decision to renew its interpretation of the Constitution."[6] According to Yamaguchi, the Article 9 amendment would clarify the legality of the very existence of SDFs and facilitate the use of force as a self-defense tool as it will be ruled constitutional by the amendment.

Another major implication of the amendment on Japan's self-defense capacity resides in the way it influences the existent U.S.-Japan security alliance, which is largely defined by a series of diplomatic treaties made between two countries back in the 1950s and 1960s, notably the U.S.-Japan Status of Force Agreement. Its common interpretation among the Japanese public is that when Japan is directly attacked by another country, the United States has the legal responsibility to defend Japan at all costs. Therefore, Japan is immune to any potential armed attack as long as Japan maintains its

[3] id.

[4] Mark, C. *Japan debates changing its pacifist constitution*. The Diplomat. (2017, May 18), https://thediplomat.com/2017/05/japan-debates-changing-its-pacifist-constitution/ (last visited: December 1, 2021).

[5] KYODO NEWS+. (March 19, 2019). *Japan to make 1st SDF dispatch to non-U.N. peacekeeping force in April*. Kyodo News+. https://english.kyodonews.net/news/2019/03/e2234e8996a8-japan-to-send-sdf-members-for-peace-operations-in-egypt-in-april.html (last visited: December 1, 2021).

[6] Yamaguchi, N. *Why a constitutional amendment would be a good idea : an interview with former GSDF lieutenant general Noboru Yamaguchi: List of articles: International Information Network Analysis*. The Sasakawa Peace Foundation. https://www.spf.org/iina/en/articles/yamaguchi_01.html (last visited: Retrieved December 1, 2021)

existing security alliance with the U.S. However, this is a misleading interpretation of the Agreement: while the clause does state the U.S's obligation for "security commitment" to Japan, this does not immediately indicate the country's responsibility to send its armed forces to combat zones and defend Japan at "all costs." Rather, "security commitment" may merely indicate support in the form of sending ammunition, aircraft, fuels, or medical supplies, depending on how the U.S. wishes to interpret it.[7] Considering the fact that the U.S. President is formally required to first seek congressional authorization for involvement in wars abroad, coupled with the reality that decades of the U.S.'s failures in Afghanistan and Iraq have caused "war fatigue" among the public and their representatives in Congress, Japan appears to be latching its security onto an ideal scenario that would unlikely materialize. The mismatch between the reality and the Japanese perception of the security agreement is deeply problematic to Japan's national security as it causes a false sense of security that underestimates the importance of possessing the self-defense capacity that can operate independently from the U.S. stationed troops. Of course, one amendment will unlikely alter the nature of the existing SDFs at the logistical level; however, the formulation of "national army forces" in Japan can be seen as an inevitable step in clarifying Japan's responsibility for self-defense and rebutting the misconception that the U.S. is an ultimate guardian of the Japanese populace.

IV. Japan and its East-Asian Relations

The Article 9 amendment would certainly be met with critical responses from Japan's neighboring countries. At its best, the countries would view Article 9's language as a possibility that Japan may engage in offensive behavior toward neighboring countries, and at its worst, as a revival of the country's militarism. Asian countries that were particularly affected by Japan's past colonialism believe that the Japanese government has not sincerely expressed apologies or owned up to its past actions.[8] Especially among these East and Southeast Asian countries, perhaps the most resistance will come from China and Korea, whose diplomatic relations with Japan are still largely defined by a sense of antagonism and distrust. Korea and Japan are arguably at one of the lowest states of diplomatic relations since the end of WWII due to the recent ruling of the Korean Supreme Court ordering compensation for wartime Korean laborers during the Japanese occupation. Japan argues that all compensation had been settled under a 1965 treaty normalizing relations with Seoul and that the South Korean court ruling violates international law. On the other hand, the South Korean public largely views such a stance as Japan's refusal to own up to its misdeeds.[9] Thus, the Article 9 amendment will almost inevitably exacerbate current diplomatic tensions. As for China, its wariness over the Article 9 amendment rather comes from the fact that Japan operates under the U.S.'s nuclear umbrella. As China will have to face both the U.S. and Japan as its security threats, Japan's militarization will alter the power dynamics in the East Asian region, coupled with the fact that Japan will no longer face prohibition on processing or producing nuclear weapons. Moreover, Japan's militarization could be regarded as a hindrance to China's territorial expansion in the South China Sea, an internationally contested area where the country has carried out land reclamation that threatens the interests and sovereignties of neighboring countries. Thus, this political reality makes it almost impossible for Japan to amend Article 9 without encountering criticisms and resistance from its neighboring countries and fundamentally changing the power dynamics of East Asia.

V. Japan's Collective Defense Capacity

For the better part of a century, Article 9 has served as a primary factor in limiting Japan's involvement in foreign wars and conflicts. Yet, Japan's pacifism has also led to a series of criticisms from its western allies for failing to intervene or participate in collective endeavors. For instance, Japan was heavily criticized for refusing to send troops during the 1991 Persian Gulf War, though the country did make substantial monetary contributions in support of the western alliance.[10]

After 9/11, however, Japan's role in international conflicts has mildly increased, primarily as a part of its endeavors to support the United States. For example, Japan dispatched naval forces to the Indian Ocean to provide logistical support for the Afghanistan War, and it has also deployed 600 ground troops to participate in humanitarian activities in Iraq, although such a move stirred controversy over its constitutionality from domestic critics.[11] Furthermore, as previously mentioned, the Abe administration's controversial

[7] *日米安保条約で「アメリカには日本防衛の義務がある」という誤解：朝日新聞GLOBE＋*. 朝日新聞GLOBE＋. (January 28, 2020). https://globe.asahi.com/article/13077339. (last visited: December 1, 2021)

[8] Sterling, D. P. *Governing japan: The perception, influence and theoretical interpretation of Article 9 of the Japanese Constitution and what it means for its security policy in the 21st century, if revised*. Open Journal of Social Sciences. (2020, November 9). https://www.scirp.org/journal/paperinformation.aspx?paperid=104414 (last visited: December 1, 2021)

[9] Al Jazeera. *Japan, South Korea look to deepen bilateral ties despite tensions*. News | Al Jazeera. (October 15, 2021). https://www.aljazeera.com/news/2021/10/15/japan-south-korea-bilateral-ties-tensions. (last visited: December 1, 2021)

[10] Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 Mich. J. Int'l L. 55 (2005).
Available at: https://repository.law.umich.edu/mjil/vol27/iss1/2

[11] id.

reinterpretation of Article 9 in 2015 significantly widened Japan's collective defense capacity. More specifically, this reinterpretation states:

"The Government has reached a conclusion that not only when an armed attack against Japan occurs but also when an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty, and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measures for self-defense in accordance with the basic logic of the Government's view to date."[12]

While the constitutionality of this reinterpretation is still contended, the clause has essentially paved the way for the country to use armed forces abroad for collective-self defense—in an instance where a certain threat of force provoked toward Japan's close ally is also deemed an imminent danger to the security and protection of Japanese populace. However, this reinterpretation has remained theoretical since the current Article 9 does not allow the use of forces abroad altogether. This is a primary reason why the past SDF operations have been all restricted to the non-combatant area—it has been simply too risky to dispatch SDFs to combat areas when Japan does not have the legal authority to "fight back."

The militarization of Article 9 will assist Abe's endeavor by allowing the SDFs to engage directly in the conflict zones and carry out military operations against third parties for the purpose of collective defense. For instance, in the scenario that Taiwan is unconditionally attacked by China, the amended Article 9 authorizes Japan to carry out defensive attacks against China in support of Taiwan if China's offense toward Taiwan is deemed an existential threat to Japan itself, and this reasoning is plausible given an ongoing territorial dispute between Japan and China.[13] More importantly, though, the implication of Japan's expanded collective defensive capacity due to the Article 9 amendment goes beyond East Asia geopolitics: it means that the SDFs will be able to engage more directly in international conflicts abroad and exercise military force—whether it means joining the U.S.-led counterterrorism operations, bombing pirates in support of its ally's cargos, or in extreme cases, waging war on a third country that is believed to pose a serious danger to the Japanese sovereignty.

Japanese conservatives believe that the heart of national security resides in supporting the U.S. missions abroad and strengthening the U.S.-Japan alliance—therefore, deterring China's militaristic endeavors both at the regional and global level. However, there are a few concerns about this approach. First, such a defense approach essentially situates China as an ultimate enemy of Japan and assumes that the U.S. will continue to hold regional interest in defending its allies against China's potential offensives. However, as previously mentioned in Section IV, there is no guarantee that the U.S. will uphold its current policy toward China in the future; the country may reverse its current East Asia strategies when they are deemed no longer compatible or feasible in the face of the evolving geopolitical power dynamics. However, the implications of such a policy reversal on Japan are far more grave: coupled with the fact that Japan is situated just south of China and shares some common natural resources, there exist unresolved historical and territorial disputes that have periodically paralyzed their diplomatic relations. Therefore, the U.S.-focused defense strategies that Japan has devoted itself to since the end of World War II are increasingly viewed as a pitfall of Japanese foreign policy that has led to Japan's alienation from China and stagnation of any meaningful progress in their bilateral relations. If anything, Washington's growing reluctance in foreign intervention propelled by its failures in Iraq and Afghanistan further highlights the need for Japan to reassess its existing foreign policy.

Another primary concern over the expansion of Japan's collective defense capacity has to do with the country's increasing involvement in international conflicts. In short, engaging in a foreign war in support of Japan's allies—mainly the U.S.—will increase Japan's security risk to itself as the U.S.'s enemies would also become enemies of Japan.[14] In the international context, more enemies mean a higher risk of being targeted militarily. In fact, Japan already paid the ultimate sacrifice of supporting the U.S. 's war effort during the 2003 Iraq War, when five Japanese citizens were kidnapped by Iraqi militia groups in retaliation against the SDFs' involvement in the conflict (although SDFs were not militarily engaged, they supported the U.S. through logistical

[12]Sasakawa Peace Foundation. *Collective self-defense and the U.S.-Japan Alliance*. Sasakawa USA. (2019, July 19). https://spfusa.org/research/collective-self-defense/ (last visited: December 2, 2021)

[13] Kotani, Tetsuo. *The most dangerous place on the earth,* TOYO KEIZAI. 79 (June 15, 2021)

[14] Rakuten Infoseek News. *孫崎享氏　安倍氏の「憲法改正、国防軍」発言は米の意向反映*. Rakuten Infoseek News. (December 15, 2012) https://news.infoseek.co.jp/article/postseven_161991/ (last visited: December 1, 2021).

aspects).[15] The abductors demanded the Japanese government to pull out SDFs from Iraq—a crucial reminder of how Japan's compliance to the U.S.'s War on Terror can lead to a higher security risk to Japanese citizens. If the Article 9 amendment expands Japan's collective capacity in a way that leads to higher involvement in international conflicts and disputes in accordance with the U.S.'s war endeavors, then Japan will face new security risks both to itself and Japanese citizens living abroad.

VI. Conclusion

This paper examines various implications of the Article 9 amendment on Japan's defense capacity, regional relations, and national security. It finds that while the formal recognition of the Self-Defense Forces as the national armed forces may establish the legal framework indispensable to equipping Japan with sufficient self-defense capacities in the context of increasingly volatile geopolitical climate, mainly due to a rise of China and nuclear threat from North Korea, the amendment may also accompany a series of security risks that result from Japan's increased participation in foreign wars and conflicts in the name of humanitarian missions. As discussed in Section IV, it has long been contended that Japan needs self-defense capacity that can sufficiently defend the country from regional security risks independently from the U.S.-alliance framework, and the militarization of Japan following the Article 9 amendment can be viewed as one step to strengthen Japan's autonomy over its national security. It must be noted, however, that such an argument is largely limited to the discussion of legality, and this paper does not touch on the feasibility of the militarization plan such as Japan's financial capability of equipping itself with independent armed forces. While proponents of the Article 9 amendment, notably the former Abe administration, argue for a greater need to define the constitutional framework of SDFs, it's also misleading to assume that the amendment is a mere attempt to clarify ambiguity over their existence. The revision of Article 9 entitles the SDFs to engage militarily in combat zones—which is considered unconstitutional under the current Article 9—and through such involvement, Japan could unintentionally risk itself being targeted by third parties—whether they be nations, militia groups, or individuals—who perceive Japan as their ultimate enemy.

By investigating the effect of the Article 9 amendment, this paper also finds that its potential implications may reside not so much in the constitution itself but rather the administration's interpretation of it. Article 9 of the Japanese Constitution generally restricts the government's war power and ensures that Japan will not return to the state of militarism or imperialism. On the other hand, the 2015 Abe administration's reinterpretation has demonstrated the ability to bypass the constitutional constraint and use the clause in a way that favors its interest. If the Article 9 amendment is used to expand Japan's collective defense capacity to further its U.S.-focused diplomacy and security alliance, Japan may have to pay the price of antagonizing China and getting caught up in U.S.-led wars across the world. Unfortunately, as the Liberal Democratic Party—the oldest and most powerful party who has upheld Japan's existing pro-U.S. foreign policy ever since the end of World War II—continues to dominate the Japanese politics in the face of weak and fragmented opposition factions, the Article 9 amendment will likely be used to pursue the existing U.S. centered diplomatic policies and alliances rather than to reverse them.

[15] Marie Thorsten. *The homecoming of Japanese Hostages from Iraq: Culturalism or Japan in America's Embrace?.* 22. The Asia Pacific Focus (May 25, 2009) https://apjjf.org/-Marie-Thorsten/3157/article.html

Period Politics: A Comparative Analysis of Scotland and the United States

Sridha Chadalavada (PO '24)
Staff Writer

Note: this paper will sometimes use gendered language because many studies regarding periods primarily include girls and women as participants. However, it is important to note that not all women are menstruators, and not all menstruators are women.

Periods. They are taboo. Rarely discussed and even more rarely thought about in public policy circles. Policymakers may not see the stigmatization of periods and menstrual health as a global and public health issue; however, it can and should be classified as one. Specifically in developing countries, menstruators who cannot afford menstrual products are left using cardboard or even trash to care for a basic bodily need. Even economically and socially "developed" nations, like the United States, struggle to eliminate or even address period poverty. The American Medical Women's Association defines period poverty as the inadequate access to menstrual hygiene tools and education, including but not limited to sanitary products, washing facilities, and waste management.[1] Many marginalized and minority groups are disproportionately affected by period poverty, including those who are low-income or have a disability.[2] Period poverty can be mainly attributed to the fact that many individuals are not informed and educated about menstrual hygiene at a young age, causing the topic to be stigmatized.[3] However, some economically equivalent countries are making significant strides to bring menstrual equity to the forefront of their discussion of healthcare and bodily autonomy.

Scotland is one such example. In 2020, Scotland passed a bill that provides *free* menstrual products across the nation to anyone in need of them.[4] So, why has the United States not implemented an effective solution for period poverty? This paper will compare the U.S. and Scotland to analyze how Scotland became the first country to pass a bill that provides free menstrual products nationwide and why the U.S. is lagging so far behind. Furthermore, it will look at case studies and statistics to predict when the United States may pass similar bills to Scotland's in the future.

I. Background

Despite the inaccessibility to period products being a globally prevalent issue, stigma prevents people from even talking about periods. The stigmatization in some countries like Nepal extends to "menstrual huts" designated for women and girls on their period because they are considered too impure to partake in daily life.[5] This practice of physically separating women is known as *chhaupadi*.[6] Studies worldwide have even revealed that many young girls skip school out of fear and shame stemming from their period.[7] For instance, *Always*, the menstrual product company, found in a study that 1 in 5 girls in the United States has missed school because of their period.[8] This can be attributed to how the shame and stigma that many societies place on periods detracts from the education of girls and women. Statistics like these show that period poverty is not simply an issue in underdeveloped countries; rather, it is ubiquitous. Access to period products is a fundamental aspect of overall hygiene. Sanjay Wijeskara, the former UNICEF Chief of Water, Sanitation, and Hygiene, has stated: "Meeting the hygiene needs of all adolescent girls is a fundamental issue of human rights, dignity, and public health."[9]

Fortunately, the U.S. does not experience the same level of overt stigma as countries like Nepal. However, despite the U.S. being more socially and politically progressive than many countries, a more implicit, latent stigma continues to prevent public policy reform around the topic. In a study done by the PERIOD organization in the U.S. in 2021, 1,010

[1] Alexandra Alvarez, *Period poverty American Medical Women's Association* (2019), https://www.amwa-doc.org/period-poverty/.
[2] *Id.*
[3] *Id.*
[4] Laurel Wamsley, *Scotland becomes 1st country to make period products free* NPR (2020), https://www.npr.org/2020/11/25/938893768/scotland-becomes-first-country-to-make-period-products-free.
[5] Sushmita Roy, *Nepalese girls share stories of period shame in this short documentary* Global Citizen (2019), https://www.globalcitizen.org/en/content/nepal-chhaupadi-menstruation-period-documentary/.
[6] *Id.*
[7] Alexandra Alvarez, *Period poverty American Medical Women's Association* (2019), https://www.amwa-doc.org/period-poverty/.
[8] *Always doubles down on their efforts to tackle period-related challenges*, Procter & Gamble (2021), https://us.pg.com/blogs/always-raises-awareness-surrounding-menstruation/.
[9] Erica Sánchez & Leah Rodriguez, *Period poverty: Everything you need to know* Global Citizen (2019), https://www.globalcitizen.org/en/content/period-poverty-everything-you-need-to-know/.

students were surveyed, ranging from ages 13-19.[10] The study found that about 23% of menstruators who are students have struggled to afford menstrual products at some point in their life.[11] Furthermore, 65% of the students surveyed felt that American society actively teaches menstruators to feel shame about their periods.[12] There is a direct causality between the lack of access to menstrual products and the lack of education about menstrual health on an institutional level. More than 4 out of 5 students in this survey also said that they learned more about the biology of frogs than the human female body in school.[13] These results show gaping holes in institutional curriculums when it comes to menstruation and human biology.

Scotland experienced levels of period poverty similar to the U.S. before 2020, prior to the passing of a bill to provide free period products nationally. A Scottish organization called Women for Independence found in a 2018 study that 1 in 5 women go without period products because of financial inaccessibility.[14] Furthermore, 22 percent of participating individuals reported that they did not regularly replace their menstrual hygiene products.[15] Before the bill's enactment, 1 in 5 Scottish women experienced a shortage in period products.[16] This is comparable to the U.S. statistic mentioned previously in this paper, where 23 percent of student menstruators struggled to afford menstrual products.[17] Such data findings show how both the U.S. and Scotland faced similar rates of period poverty in the years leading up to 2020. However, Scotland's proactive legislation to end period poverty has improved women's lives and effectively solved the public health issue of period poverty.

The U.S. has a great deal to learn from Scotland's experience passing legislation to end period poverty. However, before the U.S. can consider making period products free and accessible to all, it must first abolish policies that are making period products extremely inaccessible in the first place. The most infamous of these policies is the so-called "Pink Tax": a gender price differential in some consumer goods.[18] National Public Radio found through a report produced by the city that in New York City "women pay more than men for certain goods, like clothes, home health products, and personal care products. The study found that women pay as much as 13 percent more for some categories of products."[19] The pink tax applies to multiple gendered products, such as razors, causing them to be more expensive for women.[20] While some states have the pink tax, others have a tax specifically on tampons called "The Tampon Tax."[21] Assemblywoman Cristina Garcia performed a study around 2016 and found that "Women in California pay about $7 in taxes per month over the course of 40 years for tampons and sanitary napkins."[22] Statewide, it adds up over $20 million annually in taxes.[23] Menstrual hygiene products are already inaccessible, but the government is essentially exploiting a bodily need for profit with these extra taxes.

II. Scotland's Period Products Bill

While over half of the states in the U.S. still have the tampon tax, Scotland has no tax on its menstrual products.[24] Furthermore, Scotland took an even further leap in 2020 with legislation for menstrual equity. In 2020, politician and former member of the Scottish Parliament (MSP) under the Scottish Labour Party, Monica Lennon introduced and unanimously passed the "Period Products Bill " in Scotland to help end period poverty.[25] This bill requires free period products to be provided across the nation, decreasing the financial burden of purchasing them.[26] Monica Lennon has publicly discussed the intersection between sustainability and period products.[27] She stated that while sustainability in conjunction with period products is important, this change will be brought about over time.[28] Lennon expressed how local institutions can determine whether or not they want to make reusable menstrual hygiene products available through

[10] *State of the period 2021* - period.org | home, (2021), https://period.org/uploads/State-of-the-Period-2021.pdf.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Period poverty: Scotland poll shows women go to desperate lengths*, The Guardian (2018), https://www.theguardian.com/society/2018/feb/05/period-poverty-scotland-poll-shows-women-go-to-desperate-lengths.
[15] Jennifer Philipp & Kim Thelwell, *Period poverty in Scotland Archives* The Borgen Project (2021), https://borgenproject.org/category/period-poverty-in-scotland/.
[16] *Id.*
[17] *State of the period 2021* - period.org | home, (2021), https://period.org/uploads/State-of-the-Period-2021.pdf.
[18] Karen Duffin & Stacey Vanek Smith, *The problem with the Pink Tax* NPR (2018), https://www.npr.org/sections/money/2018/11/13/667539767/the-problem-with-the-pink-tax.
[19] *Id.*
[20] *Id.*
[21] Sarah Larimer, *The 'tampon tax,' explained* The Washington Post (2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/08/the-tampon-tax-explained/.
[22] *Id.*
[23] *Id.*
[24] Amy Woodyatt, *UK abolishes 'Tampon tax' on menstrual products* CNN (2021), https://www.cnn.com/2021/01/02/uk/tampon-tax-abolished-intl-scli-gbr/index.html.
[25] Laurel Wamsley, *Scotland becomes 1st country to make period products free* NPR (2020), https://www.npr.org/2020/11/25/938893768/scotland-becomes-first-country-to-make-period-products-free.
[26] *Id.*
[27] *Id.*
[28] *Id.*

this bill.[29] Scotland is ensuring that the issue of period poverty is first being encountered, and more policy will be implemented in the future to create environmentally sustainable changes as well.[30]

Despite the global COVID-19 pandemic in Scotland, the bill to provide free menstrual products was still able to pass in November 2020.[31] However, many social and institutional projects relating to period poverty that were contemporaneously brainstormed and started were put on hold.[32] However, following the initial peak of the pandemic in the West, other projects are slowly starting back up.[33] Consider policies implemented in Aberdeen, a city in Northern Scotland, for example.[34] The city is starting from the ground up and financially investing in ending period stigma through education and distribution of menstrual products.[35] The vice-chancellor of their city council, Tauqeer Malik, stated that "Aberdeen City Council has been at the forefront of tackling period poverty and we are proud that we invested £40,000, over and above national funding, in a free distribution scheme across Aberdeen schools to ensure the dignity and wellbeing of our young people is enhanced."[36] On a more local level, the Cornhill Primary School in Aberdeen, is making great strides in its fight for menstrual equity through Monica Lennon's initiative to incorporate education around reusable period products to students.[37]

III. Policy

The United States and Scotland have emerged as two contrasting landscapes in their fight for menstrual equity. Despite both countries being modernized and economically wealthy, the U.S. persists with high rates of menstrual inequity and the tampon tax. At the same time, Scotland recently passed a bill providing free menstrual products across the country. Perhaps the reason for the U.S. lagging behind can be attributed to its lack of both allocation of resources and interest in gender-equality-related issues. Furthermore, it speaks to how Scotland has, to some extent, destigmatized the discussion around periods, while the U.S. rarely sees positive public policy reform regarding women's bodily autonomy rights. Will the U.S. ever be able to catch up? If there is proactive change and economic reallocation of resources, the answer is yes. However, the work is currently happening slowly on the individual, state-level instead of federal level like in Scotland.

For example, the district of New York under Congresswoman Grace Meng introduced her Menstrual Equity for All Act in May 2021 that stated the following goals outlined:[38]

- Giving states the option to use federal grant funds to provide **students** with free menstrual products in schools – these grants already provide funding for health and wellness efforts;
- Incentivizing **colleges and universities** to implement pilot programs that provide free menstrual products to students;
- Ensuring that **incarcerated individuals and detainees** in federal (including immigration detention centers), state, and local facilitates have access to free menstrual products, including requiring guidance on distribution;
- Allowing **homeless assistance providers** to use grant funds that cover shelter necessities (such as blankets and toothbrushes) to also use that money to purchase menstrual products;
- Requiring **Medicaid** to cover the cost of menstrual products;
- Directing large employers (with 100 or more employees) to provide free menstrual products for their employees **in the workplace**; and
- Requiring **all public federal buildings**, including buildings in the U.S. Capitol complex, to provide free menstrual products in restrooms.[39]

One part of her proposed Act that is important to note addresses incarcerated and detained individuals' access to free period products in federal institutions.[40] Period products can be *especially* unavailable for imprisoned and incarcerated individuals. The District of Columbia and just 12 other states have passed legislation around the access to period products for incarcerated people in the United States.[41] At the time, then Senator Kamala Harris, and other senators Elizabeth Warren and Richard Durbin, passed an act to provide free menstrual products for imprisoned individuals called the Dignity for Incarcerated Women's Act.[42] Furthermore, in

[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Meng introduces bold plan to improve access to menstrual products*, Congresswoman Grace Meng (2021), https://meng.house.gov/media-center/press-releases/meng-introduces-bold-plan-to-improve-access-to-menstrual-products.
[39] *Id.*
[40] *Id.*
[41] Jean Lee, 5 pads for 2 cellmates: *Period products are still scarce in prison* The 19th (2021), https://19thnews.org/2021/06/5-pads-for-2-cellmates-period-inequity-remains-a-problem-in-prisons/.
[42] Derek Gilna, *New Policies for Federal and State Prisoners Guarantee Feminine Hygiene Products* | Prison Legal News (2018), https://www.prisonlegalnews.org/news/2018/apr/2/new-policies-federal-and-state-prisoners-guarantee-feminine-hygiene-products/.

2018, the First Step Act was passed by Congress, which intended to direct attention to the issue of period poverty and make menstrual products *more* accessible to incarcerated individuals.[43] The emphasis here is on "more" accessible, because a lot of these kinds of legislation are not concrete, too broad, and sometimes lack actual implementation methods.[44] This is true especially because legislation is often passed to support those incarcerated in federal prisons, even though most incarcerated women are placed in state prisons.[45] Congresswoman Meng's Act is just one example of the necessary work being done in the United States to reach menstrual equity. While the work is happening, it is happening on a comparatively smaller scale in the U.S. compared to Scotland.

In Scotland, there is more concrete political reform to assist incarcerated menstruators. In 2019, the entire U.K. passed a bill for menstruators to have free sanitary products in all detention facilities.[46] According to the Custody Visiting Association (ICVA), an independent organization meant to assess the welfare and health of detainees,[47] "No detainee should be left to bleed for want of a difficult conversation or a cheap tampon. These changes should ensure that never happens," said Kate Kempen, chief executive of ICVA.[48] Kempen's words demonstrate the active destigmatization of incarcerated individuals receiving access to basic healthcare. Back in the U.S., work towards ending the tampon tax across the nation is being carried out on a limited scale. Most recently, on November 4th of 2021, Michigan Governor Gretchcen Whitmer signed a bill exempting period products from the state's 6% sales tax.[49] This bill was originally written by a college student from Detroit, Brionne Davis.[50] Davis was directly impacted by period poverty leading her to advocate for menstrual equity across the nation.[51] This is just one example of how change is spurring from students of low-income backgrounds sharing their personal stories of needing to choose between clothes or menstrual products. Vocalizing such stories has the potential to affect real change at the state-level, and hopefully, trickle up to the federal level.

IV. Economic Observations and Conclusion

Looking at menstrual equity from an economic perspective, Scotland estimated that their bill to pass free menstrual products costs about £24 million a year, which is equivalent to $32 million.[52] Scotland's journey to ensuring free menstrual products began winding its way through the public policy sector two years ago.[53] This bill was passed to supply free menstrual products across *all* schools and universities.[54] Hence, it is clear that the subsequent unanimous passing of their "Period Products (Free Provision) (Scotland) Bill" was quickly implemented as there was only a two-year gap between its proposition in 2018 to its implementation in 2020.[55] The United States has seen many schools independently provide free period products, but there has been no comparable policy action on a national scale.

The gap between Scotland and the United States in attempting to achieve menstrual equity is currently substantial. According to Ke'ala Akau, a fellow at the Women's Health Research Organization at Yale University:

In the United States, the road to a similar piece of legislation will likely be long and arduous. At least 30 states still maintain period products as taxable items. However, organizations such as Tax Free Period are demanding the removal of such "tampon taxes." And we should look to Scotland's bill with hope. Its passing is a great stride forward in the fight to end period poverty and proves that providing free, country-wide access to period products can be a viable piece of legislation. Other countries within the United Kingdom and beyond should look to Scotland as an example of how much progress can be made in a few short years when a government decides to prioritize the health and dignity of its women, girls, and people who menstruate.[56]

---

[43] *Id.*
[44] Jean Lee, 5 pads for 2 cellmates: *Period products are still scarce in prison* The 19th (2021), https://19thnews.org/2021/06/5-pads-for-2-cellmates-period-inequity-remains-a-problem-in-prisons/.
[45] Sushmita Roy, *Sanitary products will be free for women in UK detention facilities Global Citizen* (2019), https://www.globalcitizen.org/en/content/sanitary-products-free-for-inmates-in-uk-prison/.
[46] *Id.*
[47] *About ICVA (The Independent Custody Visitors Association)*, ICVA, https://icva.org.uk/about/#:~:text=The%20Independent%20Custody%20Visitors%20Association%20(%E2%80%9CICVA%E2%80%9D)%20is%20a,and%20Policing%20Authority%20led%20schemes.
[48] Sushmita Roy, *Sanitary products will be free for women in UK detention facilities Global Citizen* (2019), https://www.globalcitizen.org/en/content/sanitary-products-free-for-inmates-in-uk-prison/.
[49] Nushrat Rahman and Dave Boucher, *Whitmer signs 'tampon tax' bill, exempting feminine hygiene products from some taxes* Detroit Free Press (2021), https://www.freep.com/story/news/politics/2021/11/04/whitmer-bill-exempt-tampons-taxes/6282421001/.
[50] *Id.*
[51] *Id.*
[52] Laurel Wamsley, *Scotland becomes 1st country to make period products free NPR* (2020), https://www.npr.org/2020/11/25/938893768/scotland-becomes-first-country-to-make-period-products-free.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Ke'ala Akau, *Scotland becomes first country to make period products free* Yale School of Medicine (2020), https://medicine.yale.edu/news-article/scotland-becomes-first-country-to-make-period-products-free/.

The United States' lack of effort in eliminating period poverty is evident. However, citizens must hold out hope. The U.S. is slowly beginning to take many of the steps that Scotland took in previous years. For instance, perhaps we can conjecture that period products will be free in all public schools and universities in the next five years due to recent traction in these institutions. The U.S. must continue looking towards Scotland as an example for legislation that can achieve similar public policy outcomes of ending period poverty. However, the U.S. functions quite differently, which can be seen in how it is still in the nascent stages of raising awareness and most of the public policy being implemented is at the local and state levels. So while the proposed bills pertaining to public schools and universities tend to have a much higher rate of being enacted, bills related to restrooms in public facilities and in prisons receive much less attention.[57] Therefore, only certain pockets of the U.S. are seeing progress in this fight for menstrual equity. There must be national recognition of the severity of period poverty in order for the U.S. to see tangible and universal progress.

When the term "period poverty" is heard, individuals often think of developing countries where shame and stigma persist around having a period. Yet it is surprising but necessary to note the jarring data in the U.S. as well. Scotland's proactivity in this issue has led to reformative legislation over the past two years. There was a range of public policy implementation from abolishing taxes on menstrual products to providing free menstrual products across the country. This jump is a large one that possibly the United States' political system cannot handle until menstrual equity and reproductive rights are prioritized.

[57] *Update on menstrual equity policies in the United States*, Women's Voices for the Earth (2021), https://www.womensvoices.org/2021/01/11/period-health-policies-is-your-state-working-to-make-menstrual-equity-a-priority/.

A New Battleground for Partisan Policymaking: How the COVID-19 Pandemic Increased Interest in Local School Boards

Samantha Meyer (PO '23)
Staff Writer

Just a month ago, a little-known agency called the National School Boards Association received major headlines when it published a letter it had sent to President Biden.[1] For the first time, this association, which represents school board members from across the country, asked the federal government to provide greater protections for the local officials it represents at their meetings, citing a dramatic increase in politically motivated crimes against school boards in the last year. The letter blamed the politicization of mask mandates and the propaganda against so-called "critical race theory" for increasing violence. It expressed that many public school board members fear for their lives due to arise in threats and violence. Performing a google search for news about school-board-related violence finds examples of this described recent increase in harassment spans the country, with stories about school boards in all regions of the country being subject to harm. In this paper, I examine how such extreme acts against school board members signify the decreasing ability of United States school boards to remain nonpartisan as well as the growing recognition of the importance of school boards as policymaking bodies as local issues come into the national forefront.

I. The Partisanship of School Boards

School boards as an institution predate the formation of the Constitution in the United States. The first recorded board of education was formed with the first American public school system in Massachusetts in 1647. Later, in the 1820s, Massachusetts put practice into law when it mandated that school boards be independent of local governments. This autonomous model still prevails today across much of the country, though variations exist between different states.

Within the history of school boards, the recent focus on partisan issues within the policymaking purview of board members is not necessarily new. Issues like common core or contraceptive education have stoked discussion and controversy for school boards in recent decades. Still, the nationwide focus on partisanship is historically unprecedented. The vast majority of school board members in the United States are elected using "nonpartisan" ballots that do not list a party affiliation. Only an estimated one-quarter to one-third of school board ballots even allow the candidate to list a party affiliation on their application.[2]
However, this trend has been changing quite drastically within the policy sphere over the past five years. State legislatures in Kansas, Indiana, North Carolina, Tennessee, and Florida all have considered legislation either mandating that their local boards of education begin holding partisan elections or allowing districts to switch to a partisan model.[3] Moreover, more national hot-button issues such as mask mandates, so-called critical race theory, and religion in schools are now highlighted at a highly local level. Now, it is a neighbor in a board member role viewed as an advocate or opponent of a certain controversial topic, no longer a national politician. Together, these factors make it impossible for local school boards to remain nonpartisan.

In particular, the politicization (and localization) of issues such as "critical race theory" and school masking has made even "nonpartisan" school board members pick political sides. In Cleveland, Ohio, the heightened focus on these issues has caused a 50% increase in school board candidates since the last election in 2017, after several years of declining interest in the races.[4] Cleveland's board of education races are explicitly nonpartisan, as candidates are never asked to disclose a party affiliation. However, polling done by the Ohio School Boards Association found that the majority of the new candidates said that they were motivated to run by the prevalence of polarizing issues such as critical race theory. One candidate lamented, "This race wasn't supposed to be political… It wasn't supposed to be about these single issues, but it's gone that way, unfortunately."[5]

[1] School Boards Ask for Federal Help as Tensions Rise Over Covid-19 Policies - WSJ, , https://www.wsj.com/articles/school-boards-ask-for-federal-help-as-tensions-rise-over-covid-19-policies-11633043343 (last visited Nov 2, 2021).
[2] Evan Crawford, Why Nonpartisan – Versus Partisan – School Board Elections Do Not Tell the Whole Story, Scholars Strategy Network , https://scholars.org/contribution/why-nonpartisan-versus-partisan-school-board-elections-do-not-tell-whole-story (last visited Nov 17, 2021).
[3] Evan Crawford, *Why Nonpartisan – Versus Partisan – School Board Elections Do Not Tell the Whole Story*, Scholars Strategy Network , https://scholars.org/contribution/why-nonpartisan-versus-partisan-school-board-elections-do-not-tell-whole-story (last visited Nov 17, 2021).
[4] School masking, critical race theory draw record number of candidates to school board races - cleveland.com, , https://www.cleveland.com/news/2021/10/school-masking-critical-race-theory-create-division-in-communities-drawing-record-breaking-number-of-candidates-for-school-board-positions.html (last visited Nov 17, 2021).
[5] *Ibid*

Similarly, Colorado has experienced this trend with its school board candidates. The state has witnessed the formation of new interest groups advocating against pandemic restrictions at the school board level.[6] The new group, calling itself MAD (not an acronym), was created by concerned families who wanted to advocate collectively against remote learning, as well as against "partisan leanings in [the] curriculum." MAD endorses school board candidates who align with their concerns. Although collective advocacy by parents and community members is not a new phenomenon in local races such as these, the fact that many of the issues being debated are more national and explicitly partisan in nature is relatively new. As the University of Colorado at Colorado Springs Professor Josh Dunn expresses, "It used to be that local and state races weren't affected a lot by what's going on at the national level… but this could be carrying down into school board races." Groups such as MAD are popping up across the country, with Mask Choice 4 Kids (MC4K) in Kansas and the 1776 Project in New York (a group that describes itself as an alternative to the 1619 project that is focused on our identity and history as Americans specifically) being only a few examples of other parent groups focused on school board-specific issues and candidates. These local groups show that seemingly nonpartisan races can be more implicitly divided along national party lines by local interest group endorsements from associations that describe themselves as "conservative" or "liberal."

II. Backlash as a Result of Increased Partisanship

This recent localization of hot button national issues has not come without consequences. Although some groups, like MAD and Mask Choice 4 Kids, have chosen to organize in the form of lobby groups, other parents have turned instead to threats and violence directed at local school board members. Across the country, neighbors have turned into enemies as political battles have come so close to home for so many.[7] The result, according to complaints registered by the National School Board association, is that many local policymakers no longer feel safe in their own homes, or especially at their board's public meetings.[8]

Some examples of these threats have received nationwide coverage after the fact, such as with the case of Loudoun County, Virginia, where a school board meeting about policies for transgender students and racial equity led to violence so severe that police had to clear the entire room.[9] Members of the Proud Boys have been recorded breaking into schools and taking over meetings with their faces covered in Vancouver, Oregon, and Nashua, New Hampshire.[10] Mobs of parents in North Carolina and California staged apparent coups of their school boards during meetings, with parents threatening current board members into leaving, and declaring themselves the new decisionmakers. [11] Adam Laats, a professor of education at Binghamton University SUNY, explained in the *Washington Post* that the attraction of in-person school board meetings as a place to express the extreme frustration seen around these issues is "that they are generally so accessible; there's an open-mike aspect to them."[12]

However, especially during the pandemic, other threats to school board members have been launched virtually. Whether in the form of anonymous phone calls, threatening emails, or comments in the chat function of virtual school board zoom meetings, these threats can have a lasting mental and emotional effect on local policymakers despite not being immediately physically threatening. In Oregon, newly re-elected board member Sami Al-Abdrabbuh received text messages with pictures of bullet holes through his campaign signs, after which he told the *New York Times,* "I love serving on the school board, but I don't want to die for it."[13] He is one of few willing to go on the record about such messages, but recently the FBI began using a new tag for school-issue related threats via anonymous phone call or message, citing a drastic increase in the number of recent reports.[14]

---

[6] Debbie Kelley & The Associated Press debbie.kelley@gazette.com, *Local school boards emerge as hot races in November election in Pikes Peak region, U.S.*, Colorado Springs Gazette , https://gazette.com/news/education/local-school-boards-emerge-as-hot-races-in-november-election-in-pikes-peak-region-u/article_3fb6fcfe-2ad2-11ec-aa50-fb7c1bb752f1.html (last visited Nov 2, 2021).

[7] Anya Kamenetz, What it's like to be on the front lines of the School Board Culture War NPR (2021), https://www.npr.org/2021/10/21/1047334766/school-board-threats-race-masks-vaccines-protests-harassment (last visited Dec 13, 2021).

[8] School Boards Ask for Federal Help as Tensions Rise Over Covid-19 Policies - WSJ, , https://www.wsj.com/articles/school-boards-ask-for-federal-help-as-tensions-rise-over-covid-19-policies-11633043343 (last visited Nov 2, 2021).

[9] Condé Nast, The Increasingly Wild World of School-Board Meetings, The New Yorker (2021), https://www.newyorker.com/news/daily-comment/the-increasingly-wild-world-of-school-board-meetings (last visited Dec 5, 2021).

[10] *Ibid*

[11] *Ibid*

[12] School board meetings used to be boring. Why have they become war zones?, Washington Post, https://www.washingtonpost.com/outlook/2021/09/29/school-board-meetings-used-be-boring-why-have-they-become-war-zones/ (last visited Dec 5, 2021).

[13] Alan Feuer, *'I Don't Want to Die for It': School Board Members Face Rising Threats*, The New York Times, November 5, 2021, https://www.nytimes.com/2021/11/05/us/politics/school-board-threats.html (last visited Dec 5, 2021).

[14] Katie Benner, *F.B.I. Set Plan to Track Threats Against School Boards and Teachers*, The New York Times, November 17, 2021, https://www.nytimes.com/2021/11/16/us/politics/fbi-school-threats.html (last visited Dec 5, 2021).

III. Remote Accessibility as a Factor of Interaction

The nationalization of mask-wearing and remote learning debates is not the only way the pandemic has increased the interest in school boards as policy-making bodies. In addition, the transition of many districts to remote meetings open to the public has greatly increased constituent participation, as both recorded and synchronous public meetings have become more accessible to families.

For instance, we can see this trend in the Charlottesville, North Carolina board of education.[15] For this school board, meetings prior to March 2020 that garnered an average of 30 attendees now regularly get between 1,500 and 3,000 viewers on Facebook Live. Public comments have also skyrocketed with the virtual switch. The School Board Chair says that overall, families have expressed a desire to continue to have a virtual option to view and interact with the meetings even as pandemic restrictions draw to a close. This trend is also apparent in Palo Alto, California, with parents expressing similar views during a recent virtual board of education meeting. These parents explicitly said they would not have been able to be as involved in the policy process of their local school board had it not been for the increased accessibility of the virtual option.[16] However, it is crucial to note that some accessibility problems persist based on language barriers and internet access, as school boards often lack the infrastructure and funding to provide both internet and language services to all who may require it.

Conclusion

With hot-button issues being shifted to a much more local level and remote meetings increasing accessibility for many families to participate in their local political process, it is clear that school boards felt the force of the COVID-19 pandemic and its associated political effects. These effects are seen through communities' increased participation with school board meetings and politicization of school board elections. As the country as a whole begins to emerge from significant gathering and masking restrictions, it is yet unclear the effect that this current drastic increase in interest will have long-term, or even post-pandemic. Political factors such as the debate over mask-wearing may wear off as the need for such restrictions recedes with case numbers, but institutional changes such as the creation of parent groups like MAD, some states requiring a political affiliation to qualify as a school board candidate, or the decisions by some school boards to continue to provide a remote method of participating, may be more permanent.

[15] School board meeting attendance skyrockets from dozens to thousands after going virtual during pandemic, , https://www.cvilletomorrow.org/articles/school-board-meeting-attendance-skyrockets-from-dozens-to-thousands-after-going-virtual-during-pandemic/ (last visited Nov 2, 2021).

[16] Zoe Morgan, *As school boards resume in-person meetings, will the public still get to comment from home?*, https://www.paloaltoonline.com/news/2021/09/07/as-school-boards-resume-in-person-meetings-will-the-public-still-get-to-comment-from-home (last visited Nov 2, 2021).

The Evolution of Standardized Testing: Pre and Post Pandemic

Noor Akhter (PO '25)
Staff Writer

Since the start of the century, standardized testing has experienced a boom in usage for student, teacher, and school accountability, measuring a plethora of criteria from curriculum effectiveness to student performance. Although standardizing testing has existed in the United States for centuries prior[1], the passing of legislation such No Child Left Behind Act in 2002[2] and Every Student Succeeds Act in 2015 by the Bush and Obama administrations respectively built up the system of standardized testing to integrate testing into the regular functioning of American public schools.[3] Concurrently, annual state spending on standardized tests rose from $423 million prior to 2002 to almost $1.1 billion in 2008.[4]

Standardized testing in grade school was expanded to increase equity and uplift less privileged and minority students by understanding their academic needs, evident by the very names of the aforementioned legislations. In a speech immediately following the signing of No Child Left Behind, President Bush said; "There's no greater challenge than to make sure that every child… every single child, regardless of where they live, how they're raised, the income level of their family, every child receive a first-class education in America."[5] Yet, since the enacting of No Child Left Behind in 2001, standardized testing has instead resulted in the narrowing of curriculums, the teaching of testing strategies instead of actual content, neglecting of social sciences and the teaching of critical thinking skills, and undermining of teachers.

The COVID-19 pandemic has caused schools and education systems to re-evaluate their teaching pedagogy as they continue to navigate new challenges in education. Such challenges include, but are not limited to remote learning, the implementing of new methods of teaching, and providing support to students isolated in their homes. Inequity and disparities in public education are being exposed: according to the McKinsey study on COVID-19 related educational disparities, as Black and Latino students are performing disproportionally worse than their peers in school.[6] The study found that Black and Latino students are more likely to be learning remotely and are less likely to have stable access to the internet. The potential for discussions surrounding these disparities and challenges give us the chance to rethink our reliance on standardized testing and the priorities of the modern American public education system.

In this paper I aim to critique the current test-reliant nature of US public education, analyze the pandemic's effects on K-12 education, and suggest methods of reforms beneficial to students' well-being as opposed to those centered on standardized accountability in schools. Such accountability measures often fail to take into account the concerns and issues of individual schools or districts and are ultimately inadequate in resulting in improvements in education. First, I discuss legislation passed regarding standardized testing and outline the issues they created in American school systems, especially in limiting curriculum, undermining teachers, and increasing stress on students. Second, I argue that standardized testing ultimately fails to address the individualized problems of school systems and instead exacerbates these problems by dehumanizing the learning experience and address the disproportional prominence of standardized testing urban high schools over suburban ones. Thirdly, I assess the pandemic's impact on education, more specifically the recent discussions of societal and external factors having a large influence on student performance and how this can lead to reforms in public education. Finally, I offer suggestions for reforms that focus on student needs, a curriculum based on critical learning and an ultimate reduction in standardized testing.

[1] *Testing in American Schools*, Princeton, https://www.princeton.edu/~ota/disk1/1992/9236/923606.PDF
[2] No Child Left Behind Act of 2001, P.L. 107-110, 20 U.S.C. § 6319 (2002).
[3] Every Student Succeeds Act, 20 U.S.C. § 6301 (2015).
[4] Pauline Vu, *Do State Tests Make the Grade?*, stateline.org, (Jan 17, 2008).
[5] George W. Bush, No Child Left Behind Bill Signing Address (Jan. 8, 200)
[6] Emma Dorn, et al., *COVID-19 and learning loss—disparities grow and students need help*, McKinsey & Company, December 8, 2020, https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help

I. Past Legislation and Its Flaws

No Child Left Behind was signed by President Bush in 2002 out of concern that US education was not internationally competitive,[7] as American students consistently were ranked below students from Finland, Canada, and Japan on international tests of mathematics, science, and reading.[8] The act tested student performance through annual "adequate" tests administered to all grade levels — grades three to eight, once in high school — in ELA (English Language Arts) and mathematics. The goal was to provide more opportunities for students of color, students living in poverty, special education students, and students whose second language is English, after assessing their test scores and responding to their needs. School accountability was the key element of NCLB. Schools were expected to report results of their standardized tests to the government. Significantly, they had to report "subgroup" results showing how students of particular identity groups were performing, in order to gauge achievement differences among different groups of students.[9] Students were expected to meet federal proficiency levels on tests. If schools did not meet these levels, they were punished accordingly with measures such as closures and less funding.[10]

Critics of NCLB argued that these punishments were punitive and often counterintuitive. [11] The threat of such punishments transformed the school environments, making learning test oriented. [12] The increased focus on mathematics and ELA decreased time for subjects such as the arts, social studies, and even student leisure in recess. [13] Building of critical thinking skills and other skills that are qualitatively rather than quantitatively measured were subsequently neglected in schools, which had a strong incentive to cater their curricula to the requirements of standardized testing. Schools instead developed strategies for meeting the federal levels, such as selecting the best performing students to be a part of the 95 percent of students required to take the tests. The other 5% were exempt from testing, meaning their data was not reported to the government.[14]

Students also recognized the accountability factor of standardized testing, evident in a report by the Northwest Evaluation Association conducted in 2014. The report found that 55% of students cited that they understood that their school would be evaluated based on the results of their test scores.[15] Students recognizing that their performance on standardized tests can be used to evaluate their schools and teachers is dangerous. The perception that a test of a student's learning impacts something other than themselves heightens the pressure of the test, diverting the focus of the test for the student from learning. Stress is already a concerning outcome of NCLB's increased use of testing on students, which causes them to associate a greater sense of consequence with learning and testing.[16] Young children face physical and mental challenges as a result of stressing over tests, and this is recognized by the administrators of these tests. After assessing ten states' manuals for testing administrators, it was found that five of them included guidelines for if the testing packet became soiled by vomit. In addition, the Partnership for Assessment of Readiness for College and Career's testing packet, administered by eight states, contained the same guidelines.[17] In general, standardized testing frequently categorizes student grades into "proficient" and "less proficient", as opposed to letter or number grades on localized tests that give a wider range of assessment. The binary system of assessment can have a negative effect on how students perceive their ability as learners, further increasing their stress and developing a warped sense of self perception.[18]

The NCLB Act fundamentally changed how teacher effectiveness was measured and how they were compensated — standardized testing became the primary method to measure teacher effectiveness and to determine their

---

[7] Alyson Klein, *No Child Left Behind: An Overview*, Education Week (April 10, 2015), https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04

[8] Diane Ravitch & Antonia Cortese, *Why We're Behind: a Report by Common Core*, Common Core (2009)

[9] Sasha Zucker, *Fundamentals of Standardized Testing*, Harcourt (2003), http://images.pearsonclinical.com/images/PDF/assessmentReports/Fundamentals_of_Standardized_Testing_Final_old.pdf

[10] No Child Left Behind Act of 2001, P.L. 107-110, 20 U.S.C. § 6319 (2002).

[11] David Hursh, *Exacerbating inequality: the failed promise of the No Child Left Behind Act*, The University of Rochester (2007), https://people.wou.edu/~girodm/foundations/Hursh.pdf

[12] Daniel Koretz, *The Testing Charade*, The University of Chicago Press (2017).

[13] Natalie Wexler, *What To Do About Standardized Testing*, Forbes (Nov 15, 2018, 12:50pm), https://www.forbes.com/sites/nataliewexler/2018/11/15/what-to-do-about-standardized-tests/?sh=1a7ccb283074

[14] Andrew J. Rotherham and Erin Dillon, "*States' Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB,"* Education Sector at American Institutes for Research, (July 23, 2007).

[15] *Make assessments matter*, Northwest Evaluation Association (2014), https://www.nwea.org/content/uploads/2014/04/MakeAssessmentMatter_5-2014.pd

[16] Larson et al., *Reducing test anxiety among third grade students through the implementation of relaxation techniques*, Journal of School Counseling (2010), http://eric.ed.gov/?id=EJ885222

[17] Partnership for Assessment of Readiness for College and Career, *Test coordinator manual. For computer-based and paper-based testing. Grades 3-8 and high school English language arts/literacy and mathematics*, (2016).

[18] Dutro, E., & Selland, M, *"I like to read, but I know I'm not good at it": Children's perspectives on high-stakes testing in a high-poverty school*, Curriculum Inquiry, (2012).

salaries.[19] The scores of students were used to assess the teachers' abilities in the classroom and their effectiveness in educating their students. Yet, teachers, like students, want encouraging, creative, collaborative spaces to work in,[20] not ones where they are competing for pay. The accountability factor of NCLB places a heavy weight of pressure on teachers, who are stripped of creative power to build their own curriculums and assessments and treated as if they are distrusted to make professional judgements on how best to educate their students.[21] Standardized testing also limited the time teachers had to educate their students. The Center for American Progress found that students in grades three through eight, those primarily tested by NCLB, spent an average of fifteen to sixteen hours during the school year on testing, more than all other grades.[22] Teachers also agree that there is an excessive amount of time spent on testing[23] with over fifty three percent of respondents in a 2013 survey agreed with this sentiment.[24] Competent teachers should and are able to assess their student's performance based on the assessments they develop and administer, and should be given the time to do so, calling into question whether or not tests are valuable for evaluating student academic performance, and if perhaps there is a better way to do so.[25] The accountability and tough nature of standardized testing aligns with many politicians' agendas for "raising the bar" and disciplinary policies. With standardized tests that are administered to every student in the nation, politicians can produce concrete, quantitative results to present to their constituents as well as concurrent, clear-cut "punishments" for inadequate results. Although this is politically beneficial for elected officials, students ultimately suffer the consequences of a punitive and inadequate school system.

A decade and a half later, lawmakers finally understood that NCLB required reform. Under President Obama, the Every Student Succeeds Act was signed into law.[26] Under this legislation, states were given more freedom in determining the content of the tests they administer, as the US Department of Education can no longer enforce a certain set of curriculum standards. The punitive measures associated with NCLB, such as the closing and restructuring of schools that did not meet the adequate expected scores, were also eliminated. Furthermore, only three out four indicators for school performance tested had to be academic, the other could be another metric related to "school quality and student success" such as attendance, giving a wider breadth of understanding of a school's situation.[27] Yet, despite the reforms, ESSA perpetuated the same reliance on standardized testing launched by NCLB. The solutions the ESSA purported to offer were ultimately superficial. There still existed the system of using quantitative data to assess student, teacher, and school performance and continuing to provide no methods of reform. Although states are given more freedoms, they have proven to not taken advantage of the rights, developing curriculum plans that were hasty and short on detail,[28] while still being expected to test their students. Teachers and local districts were still deprived of these freedoms, and the underlying concerns of socioeconomic disparities continued to remain largely unaddressed.

II. The Real Crisis

The inherent problem with standardized testing is that it relies on elaborate data analysis to measure student performance, which often fails to consider nuanced realities like socioeconomic status that contribute to access to resources and home situations of students and teachers.[29] It puts no faith in professionals and their creative skills to educate, subsequently placing much of the blame for the "failure" of American public schools on teachers. Although it is true that in low-income communities, teachers are typically not as well-trained as those in more affluent neighborhoods, it is because of low funding that schools are left with an

[19] Eva L. Baker et al., *Problems with the use of student test scores to evaluate teachers*, Economic Policy Institute (August 27, 2010), https://www.epi.org/publication/bp278/

[20] Gail L. Sunderman et al., *Listening to Teachers: Classroom Realities and No Child Left Behind*, The Civil Rights Project of Harvard University (2004), https://www.civilrightsproject.ucla.edu/research/k-12-education/nclb-title-i/listening-to-teachers-classroom-realities-and-no-child-left-behind/sunderman-tracey-kim-orfield-listening-teachers.pdf

[21] James E. Schul, Ohio Northern University, Unintended Consequences: Fundamental Flaws That Plague the No Child Left Behind Act (2011), https://in.nau.edu/wp-content/uploads/sites/135/2018/08/Unintended-Consequences-ek.pdf

[22] Melissa Lazarin, *Testing Overload in America's Schools*, Center for American Progress (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/LazarinOvertestingReport.pdf

[23] Goldhaber & Ozek, *How Much Should We Rely on Student Test Achievement as a Measure of Success?*, Educational Researcher (2019).

[24] *Make assessments matter*, Northwest Evaluation Association (2014), https://www.nwea.org/content/uploads/2014/04/MakeAssessmentMatter_5-2014.pd

[25] Jeremiah Gawthrop, *Measuring Student Achievement: A Study of Standardized Testing and Its Effect on Student Learning*, (2014), http://my.jessup.edu/publicpolicy/wp-content/uploads/sites/39/2014/04/Gawthrop_Jeremiah_Final.pdf

[26] Every Student Succeeds Act, 20 U.S.C. § 6301 (2015).

[27] Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, Education Week (March 31, 2016), https://www.edweek.org/policy-politics/the-every-student-succeeds-act-an-essa-overview/2016/03

[28] Andrew Saultz, Jack Schneider, & Karalyn McGovern, *Why ESSA has been reform without repair*, Phi Delta Kappan (September 23, 2019), https://kappanonline.org/why-essa-has-been-reform-without-repair-saultz-schneider-mcgovern/

[29] Joshua P. Starr, *Pandemic offers opportunity to reduce standardized testing*, Kappan (2021), https://journals.sagepub.com/doi/pdf/10.1177/0031721721992569

inadequate array of resources to educate their kids.[30] There is an implication that reform will follow the analysis of test results, however, nowhere is it explained in any of the legislations pertaining to standardized testing what this reform actually is. All that comes out of poor testing is lower funding to schools, which is counterintuitive and counterproductive.[31]

The potential improvement of American schools depends on direct support for the students themselves. The initial purpose of standardized testing was to gauge what schools needed assistance. It should only serve as one of the measures for understanding school reform needs. The fact is that the data standardized testing provides does not consider the variations and particularities of school situations and students' lives. In fact, standardized testing does more to expose wealth disparities in students. Wealthier students are exposed to more learning experiences from their parents, allowing them to have advantages like developing reading skills at a younger age.[32] The Massachusetts Consortium for Innovative Education Assessment finds that there is a strong correlation between success on standardized testing and variables such as family income and parents' education. As a result, more privileged students have a wider vocabulary and more background knowledge that allow them to perform better on tests.[33] These findings indicate that real reform of standardized tests can stem from providing resources to underprivileged students and developing engaging learning environments. These reforms, as are the problems they address, are far more nuanced than standardized testing reliance has ever been by considering a larger plethora of conditions and indicators. Concurrently, the understanding that the tests do not suit students of all backgrounds calls into question the extent to which they can assess learning of those whose culture is incongruent with the information on the test. A teacher who taught at a school with a high Latino population administered a test with a question that used the word "fad" and found that most of her students had never heard of the word, and therefore could not answer the question.[34]

Standardized testing encourages learning built on rote memorization and testing strategies as opposed to testing more critical skills based on inquiry and exploration. This perpetuates the achievement gap between wealthier students — who are given the spaces to experience this aforementioned learning — and low-income students who receive heavily scripted teaching designed to merely improve memorization-based performance on tests.[35] A report done by the Center for American Progress reveals that urban high school students spend around 266% more time taking standardized tests than students in suburban high schools.[36] The Council of the Great City Schools found that in urban school districts, students spend between twenty to twenty-five hours on testing, disproportionately higher han the aforementioned average of fifteen to sixteen.[37] As there has been no formal nationwide study on testing, there is no concrete explanation as to why this is the case. Yet, the time suburban students spend not on testing is spent on actual learning, time that urban students are losing. It leaves us to question if the school reforms that exist now were put in place to help students, or to improve test scores.

The reliance on standardized testing allows us to blame the situation of US schools on teachers, students, and administrators instead of on the systems that inherently neglect student emotional and social needs. Conditions such as students' home lives, the support they receive outside the classroom, the experiences they have both in and out of school, and the environment of the classroom are all what standardized testing fails to measure and understand, and, ironically, the things that should receive the most attention, for they have the largest influence on student success. A study done by Farooq Nawas Khan et al. revealed that care from family members, a balanced diet, and home atmosphere all

[30] U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Resource Comparability*, (Oct. 1, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf; s

[31] Allison Woods, *The No Child Left Behind Act: Negative Implications for Low-Socioeconomic Schools*, University of Texas at Austin (2015), https://cns.utexas.edu/images/CNS/Allison_Woods-NoChildLeftBehind.pdf.

[32] Meeri Kim, *The link between children's academic achievement and family income*, BOLD (April 13, 2018), https://bold.expert/the-link-between-childrens-academic-achievement-and-family-income/

[33] Nicole Intschert, *The Downside of Standardized Testing*, Partnership for the Public Good (2013), https://ppgbuffalo.org/files/documents/education/k-12_education/education-_downside_of_standardized_testing.pdf

[34] Wilson Criscione, *The pandemic forced the region's colleges and K-12 schools to ditch standardized tests. Some hope the change is permanent*, Inlander (April 29, 2021), https://www.inlander.com/spokane/the-pandemic-forced-the-regions-colleges-and-k-12-schools-to-ditch-standardized-tests-some-hope-the-change-is-permanent/Content?oid=21568620

[35] Alfie Kohn, *How school reform damages poor children*, Washington Post (April 27, 2011), https://www.washingtonpost.com/blogs/answer-sheet/post/how-school-reform-damages-poor-children--kohn/2011/04/26/AFTTCbtE_blog.html

[36] Melissa Lazarin, *Testing Overload in American Schools*, Center for American Progress, (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/10/LazarinOvertestingReport.pdf

[37] Hart et al., *Student Testing in America's Great City Schools: An Inventory and Preliminary Analysis*, Council of the Great City Schools (2015), https://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/87/Testing%20Report.pdf

have impacts on student performance.[38] The achievement gap between wealthy and low-income students exists for a reason, as low-income communities seldom receive increased funding as compared to more well-off communities.[39] It is time to attempt to put funding into providing low income students those same resources instead of throwing funding at standardized testing.

III. Testing in the Pandemic

The sudden onset of the COVID-19 pandemic took everyone, in every walk of life, by complete surprise. The restructuring of our everyday lives was especially a challenge for school administrators all over the globe, unsure how to navigate learning when in person instruction was simply not an option. In May 2020, a national survey determined that less than 15% of elementary schools expected for their students to be receiving more than four hours of instruction per day, the pre-pandemic average being an hour longer.[40]

In the early days of the pandemic, standardized tests in America were cancelled, from the federal ones to admission tests such as the College Board's Advanced Placement (AP) and SAT tests.[41] However, as of the spring of 2021, the Biden administration is once again asking states to administer standardized testing to students[42], despite the majority of parents supporting the cancelling of the tests.[43] In late February of 2021, the US Department of Education announced they would not be issuing waivers for the annual mandated standardized testing.[44] Policy makers have argued that this is the time where standardized testing is required the most, in order to gauge and assess the effects of the pandemic on student learning and where funding needs to be allotted going forward.[45]

Following the release of the test scores, states found an expected, and dramatic, decrease in performance. The Missouri Department of Education found that 45% of students met grade level in English Language Arts, 35% in Math, and 37% in Science. The last time students were tested, in spring of 2019, 49% of students were proficient in English, 42% in math and 42% in science.[46] Again, these results were expected. Testing has not shown us anything that we already have not known — the pandemic overall had a negative effect on student learning. Yet, the essential concept of standardized testing has been rendered futile during the pandemic. It is inherently illogical to make blanket comparisons of mid-pandemic test scores and pre-pandemic ones. Testing conditions cannot be standardized out of school, especially not at a time where communities of color and low-income communities are disproportionately bearing the brunt of the pandemic.[47] Students within these communities are more likely to experience hardships such as increased responsibilities, loss of family members, struggles with food and housing, lack of access to internet connection and technology.[48] As of February 2021, somewhere between 37,300 and 43,000 children have lost a parent to COVID-19, black children making up 20% of the total despite only making up 14% of children in the United States.[49] Access to technology in relation to remote learning is especially crucial, yet, according to one survey, nearly a third of teachers in primarily black schools reported their students lacked proper access to technology. In contrast, only one in five teachers reported a similar concern in schools where less than 10% of the students were black.[50]

COVID-19 has had innumerable negative effects on students whose second language is English, students with disabilities lacking access to learning resources and aids, students with

[38] Farooq Nawaz Khan et al., *Relationship between Students' Home Environment and their Academic Achievement at Secondary School Level*, Pakistan Journal of Distance & Online Learning, (2019), https://files.eric.ed.gov/fulltext/EJ1266643.pdf.

[39] Matthew M. Chingos & Kristin Blagg, *Do Poor Kids Get Their Fair Share of School Funding?*, Urban Institute (2017), https://www.urban.org/sites/default/files/publication/90586/school_funding_brief.pdf

[40] Jordan Rickles, et al., *Approaches to Remote Instruction: How District Responses to the Pandemic Differed Across Contexts*, American Institutes for Research (2020), https://www.air.org/sites/default/files/COVID-Survey-Approaches-to-Remote-Instruction-FINAL-Oct-2020.pdf

[41] Stephanie Sarkis, *Unexpected Pandemic Outcome: The Demise Of The SAT Exam*, Forbes (January 24, 2021), https://www.forbes.com/sites/stephaniesarkis/2021/01/24/unexpected-pandemic-outcome-the-demise-of-the-sat-exam/?sh=1f12742f51fd .

[42] **How to cite a letter?**

[43] Silver, D., & Polikoff, M, *Getting testy about testing—K–12 parents support canceling standardized testing this spring*, The 74 (2020).

[44] *U.S. Department of Education Releases Guidance to States on Assessing Student Learning During the Pandemic*, US Department of Education (February 22, 2021), https://www.ed.gov/news/press-releases/us-department-education-releases-guidance-states-assessing-student-learning-during-pandemic

[45] Evie Blad, *How Two Years of Pandemic Disruption Could Shake Up the Debate Over Standardized Testing*, Education Week (March 05, 2021), https://www.edweek.org/teaching-learning/how-two-years-of-pandemic-disruption-could-shake-up-the-debate-over-standardized-testing/2021/03

[46] Statewide 2020-21 Missouri Assessment Program (MAP) Results (2021), https://dese.mo.gov/college-career-readiness/assessment

[47] Joseph R. Betancourt, *Communities of color devastated by COVID-19: Shifting the narrative*, Harvard Health Publishing (October 22, 2020), https://www.health.harvard.edu/blog/communities-of-color-devastated-by-covid-19-shifting-the-narrative-2020102221201

[48] Linda A. Jacobson, *Digital and Economic Divides Put U.S. Children at Greater Educational Risk During the COVID-19 Pandemic*, PRB (2020), https://www.prb.org/economic-and-digital-divide/

[49] Rachel Kidman et al., *Estimates and Projections of COVID-19 and Parental Death in the US*, JAMA PEDIATRICS (Apr. 5, 2021), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2778229/.

[50] Matthew A. Kraft et al., *Teachers' Experiences Working from Home During the COVID-19 Pandemic*, UPBEAT (2020), https://www.rand.org/pubs/research_reports/RR4402.html.

unstable house environments who faced frequent abuse and isolation, and students, often Asian, who faced identity-based harassment.[51] In general, a majority of students faced new stress inducing circumstances that could ultimately inhibit their academic performance.[52] Therefore, it is unnecessary to attempt to understand where funding needs to go, it is already clear that funds need to be funneled into providing students with relief for their social and economic hardships so that their academic performance can subsequently thrive. Standardized testing at this time will only increase stress for both students and teachers. Teachers and parents alike have strongly opposed testing: the California Teachers Association has a petition to halt testing for the year with more than 46,000 signatures.[53] In Florida, more than 7,000 parents have signed petitions asking for state assessments to be cancelled.[54]

The spring 2021 mandate raised questions regarding the efficiency of testing in a pandemic and suggested modifying the tests to increase equity and take into consideration the hardships of the pandemic. Yet, these changes could also result in a shift in the reliability of the data itself[55] which could subsequently intensify the conversation regarding the reliability of standardized testing as a whole. After all, many of the hardships students experienced during the pandemic were just exacerbated conditions they were already experiencing. If it is not ethical to administer these tests during the pandemic because of these conditions, then it is not ethical to administer them at all, because these conditions have always existed. The pandemic has presented the opportunity for policymakers and educators to rethink and reassess K-12 education as a whole. It does not seem logical to resort to methods that have proven to not be adequate in solving the problems in such a time.

IV. The Solutions

In general, both during the pandemic and in the aftermath, efforts to foster student learning and improve the state of American schools should be a more localized process. Although we can make generalized statements about the effects of the pandemics on students, students in different parts of the country will have been affected in innumerably different ways, and it should be up to the schools to diagnose and understand their students' needs. This does not mean that the federal government should back out completely; however, schools and districts can provide a much better assessment of what their students need. The government can then provide funding accordingly.

I do not intend to present a fully developed plan for standardized testing's replacement, because, if there is one thing the failures of standardized testing has taught us is that education is not a one-size-fits-all concept. States and school districts will have to assess their student's needs and develop a set of reforms accordingly. However, I can emphasize the foundations by which these reforms should be based: students' social and emotional needs. Standardized testing has clearly illustrated one thing: that there is a strong correlation between student performance and household income, subsequently determining that funding for public schools can and should be allotted to addressing broader social problems that contribute to student conditions. Never has this concept been more crucial than in the pandemic, when, again, these social conditions, and in turn emotional conditions, have been exacerbated. This starts with ensuring students have access to nutrition in and out of school — nearly half of students in the United States qualify for free or reduced lunches[56] — and safe and decent housing, which is clearly a broader problem that should be addressed by the federal government.

On a more local basis, students need assistance from administrators and school officials to address the problems at home: they need help with obtaining necessary resources, having richer experiences, and finding time to do their schoolwork surrounding other responsibilities. Even simpler, they need to be in environments that foster learning, that encourage student growth instead of a 'good' grade on a test. There is no right answer as to what these types of reforms will and can look like, that, again, is up to the schools and their students. It can, however, start with limiting class sizes for students to receive more individual attention, allowing

[51] *Education in a Pandemic*, US Department of Education, (2021), https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf

[52] Jenny Brundin, *'All Kinds Of Trauma': Students Are Returning To School, But Are We Ready To Help Them Cope?*, CPR News (Apr 5, 2021), https://www.cpr.org/2021/04/05/all-kinds-of-trauma-students-arereturning-to-school-but-are-we-ready-to-help-them-cope/

[53] Melissa Gomez, *Despite concerns over increasing student stress, standardized testing to go on with some limits*, Los Angeles Times (February 25, 2021, 4:07 PM), https://www.latimes.com/california/story/2021-02-25/standardized-testing-required-california

[54] Linda Jacobson, *Parents Expected to Opt Children Out of Spring Testing in Large Numbers, Especially in Places Where Schools Haven't Reopened*, T74, (March 1, 2021), https://www.mynews13.com/fl/orlando/news/2021/01/29/parents--teachers-call-for-fsa-to-be-postponed-this-school-year

[55] Emma Keith, *2021 standardized testing scores not reliable data, NPS admin, experts say*, Norman Transcript (Nov 14, 2021), https://www.normantranscript.com/news/2021-standardized-testing-scores-not-reliable-data-nps-admin-experts-say/article_08eeeacc-44a6-11ec-9653-43b297361498.html

[56] Diane Ravitch, *The Education Reform Movement Has Failed America. We Need Common Sense Solutions That Work*, Time Magazine (February 1, 2020, 7:00 AM), https://time.com/5775795/education-reform-failed-america/

teachers to develop their own assessments, and deemphasizing test/assessment scores in general as a method for student achievement.

All in all, I call for a limiting of standardized testing and the redeveloping of schools with a strong and rich curriculum and more internal accountability measures. With the latter comes the need for better teacher training instead of punishing them for not being provided the resources and knowledge they need to educate their students. A curriculum surrounding the development of critical thinking skills is much more beneficial over time than rote memorization of test type mathematics and English.

Testing is not the only method of assessment that exists, and with more power given to teachers, more creative ways of assessing students could be explored. These assessments could range from art projects to presentations to portfolios (which provides a wider range of student work)[57] — which allow students to explore and build their creative and intellectual interests. Experts have especially emphasized the use of portfolio learning as a replacement for high stakes assessments. With the accumulation of students' work throughout the year, students can take pride in the completion of a long-term project, and they can visibly recognize how they have improved since the beginning of the year.[58] The extent of improvement can be an indicator for teacher performance. Although this is arguably vaguer than the quantitative measure of improvement that testing provides, it allows for more flexibility by giving teachers and administrators the space to understand in terms of their own school environment what improvement looks like. If we are to keep testing as an accountability measure, it should be low-stakes and formative. Teachers should receive results promptly and address areas for growth, effectively offering opportunities for student tests, as opposed to the current tests that are more summative in nature.[59]

V. Conclusion

Looking at the tumultuous journey of American public schools since the passing of No Child Left Behind in 2001, it is difficult to advocate for the continued use of standardized testing — especially in the way it is administered now. An educational system reliant on data analysis that lacks nuance for America's inequality and wide spectrum of social realities is flawed and beneficial to only the wealthiest citizens. Standardized testing creates a stressful environment for teachers and students alike and perpetuates pre-existing inequalities in American society. Furthermore, it alters the school environment and warps the meaning of education entirely by narrowing curriculums and emphasizing memorization and strategy over actual engagement.

Although, culturally, assessing concerns on a numerical and scientific basis, and then finding satisfaction when numbers increase makes logical and comfortable sense. Yet, when it comes to such a diverse and wide range of students, the same logic cannot be applied. Standardized testing is a measure of efficiency over effectiveness, which is, admittedly, easier to do, but less beneficial for students in the long run. Learning is not something that can be measured quantitatively. Testing does not measure crucial skills such as creativity, motivation, imagination, curiosity, judgement, nuance, or good will, all skills that are inarguably extremely valuable to education and a student's development. All it can measure are specific skills and facts that are essentially useless in the long run.[60] Although this can be said for much of the US school system, it is perpetuated by standardized testing.

The arrival of the COVID-19 pandemic has made this conversation especially important, with practically every student's social condition being altered, and their pre-existing hardships exacerbated. What students need at a time like this is not to be administered high stakes tests after experiencing a beyond abnormal school year. What they do need is social and emotional support from administrators and teachers, support that they may not be finding at home. The inherent problems with our education system stem from other societal issues — disproportionately affecting marginalized communities — that have routinely and historically been neglected by policymakers. Education is perhaps one of the most key elements that builds and develops society. The addressing of the aforementioned problems can result in not just growth for our students, but for our nation. With every aspect of society in a state of restructure because of the pandemic, now is truly a golden opportunity for those with the resources, capabilities, and education to enact the necessary reforms to do so.

[57] *Work Sampling System*, FairTest: The National Center for Fair and Open Testing (July 2, 2007, 10:34 AM), http://fairtest.org/work-sampling-system

[58] W. James Popham, *Why Standardized Tests Don't Measure Educational Quality*, UCLA (March 1, 1999)

[59] Carly Berwick, *What Does the Research Say About Testing?*, Edutopia (October 25, 2019), https://www.edutopia.org/article/what-does-research-say-about-testing

[60] Alfie Kohn, *The case against standardized testing: raising the scores, ruining the schools* (2000).

WWW.5CLPP.COM

Find us on 

WWW.FACEBOOK.COM/CLAREMONTLAWJOURNAL/