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Articles

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Letter from the Editor

Dear Reader,

On behalf of the executive and editorial boards, I am proud to present the Fall 2017 issue of the Columbia Undergraduate Law Review. This semester, our board had the difficult task of publishing only five articles out of the many high-quality submissions, and we are proud to offer the following.

In her article "Institutionalized Xenophobia: The Effects of an Electorate's Prejudice on Swiss Institutions," Nadia Almasalkhi discusses the global rise of right-wing politics and xenophobia, specifically examining their varying influence on Swiss legal institutions and policies.

"Reforms with History: The Return of Prison Farms," by Darby Hopper, probes and problematizes the close relationship between farming and American correctional facilities.

In "The Religious Exemption: To What Extent Should Religious Organizations be Exempt from Civil Rights Laws?", Emad Jabini investigates the balance between religious liberties and civil rights, raising a number of relevant legal exemptions and discussing Brigham Young as a case study.

Archita Mohapatra explores the United States' historical ties to the Paris Agreement, Trump's reasoning for withdrawal from the Agreement, and the legal and environmental ramifications of Trump's decisions in "The United States' Withdrawal from the Paris Agreement and its Implications."

Finally, Grace Weatherall explores significant lawsuits against the Clean Power Plan and its previous iterations in "Hope for the Future or Unconstitutional Disaster? The Clean Power Plan and West Virginia et al. v. EPA," ultimately arguing that the Supreme Court should authorize EPA administration of the CPP.

With each continuing publication, the Columbia Undergraduate Law Review strives to increase intellectual debate and discussion of legal issues, especially among undergraduates. To achieve this goal, we highly recommend visiting our online journal with shorter legal articles on our website – written by current Columbia students on our online staff.

We hope that you enjoy reading both our print and online articles.

Sincerely,
Alicia Schleifman
Editor-in-Chief

MISSION STATEMENT

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must inclde a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

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Table of Contents

Articles:

Institutionalized Xenophobia: The Effects of an Electorate's Prejudice on Swiss Institutions

Nadia Almasalkhi | University of Kentucky

Edited By: Kelcie Gerson, Sarah Drory, Marco Della Genco, Nora Salitan

Abstract

To understand how the global surge of right wing politics will affect the thousands of refugees arriving in Europe each month, this research uses a subnational comparative analysis of Switzerland to compare how refugees are affected by living in an area with strong anti-immigrant sentiment versus an area with weak anti-immigrant sentiment. Through a data-driven analysis, refugee employment rates, cantonal integration policies, and asylum application acceptance rates are considered and compared to the strength of support for xenophobic popular initiatives in each Swiss canton. This research finds that even within a single country, differences in xenophobic sentiment between two areas are predictive of differences in integration policies and of rates of refugee recognition by the federal courts housed in those two areas. The research further suggests that federal asylum-granting institutions recognize a higher proportion of asylum-seekers when the local electorate's level of support for xenophobic politics decreases. This research also highlights the discrepancies between federal immigration law and how the law is actually carried out based on the political climate of each subnational region. Finally and most importantly, this study reveals how refugees may be deprived of their rights not only in Switzerland, but also in any decentralized or federal system.

I. Introduction

According to the United Nations High Commissioner for Refugees (UNHCR), there are more than 60 million refugees worldwide, making the modern refugee crisis the largest on record.[1] Despite the ballooning global refugee population, this crisis only began to capture Europeans' attention once refugees literally began arriving on Europe's shores. Though migration experts predicted that refugees from the Middle East and Africa would not remain in the Global South—the developing nations of Asia, Africa, and South America—European governments were still unprepared when the deluge of asylum-seekers moved towards their countries. The subject of this research is Switzerland, which is not a member of the European Union, but is incorporated in the Schengen Area that allows for free movement among twenty-six European countries. Similar to its neighbors, Switzerland does not have established institutions for refugee resettlement and is now witnessing a rise in refugee arrivals.

In 2015, EU countries received 1.26 million new asylum applications.[2] The Dublin II Regulation, which Switzerland is party to as a Schengen Area member, unequally distributes responsibilities for handling asylum-seekers to EU countries located along the Union's external border. As Langford points out, this legal issue fosters frustration and bitterness in the EU border countries and often leads countries to enact policies and practices meant to minimize the amount of asylum-seekers arriving on their shores.[3] The unfair asylum system has contributed to frustration along the exterior of the EU, which often translates into anti-immigrant sentiment, as has been seen in Greece and Italy. Anti-immigrant sentiment has even spread to interior countries like Switzerland, as it shares a border, and therefore migration concerns, with Italy. This paper will focus on anti-immigrant sentiment in Switzerland, where the far-right Swiss People's Party (SVP/UDC)[4] has held the plurality of federal parliament seats since 2011.[5]

The objective of this research project is to analyze the effects of living in communities with strong anti-immigrant sentiment on refugees' integration. In this paper, refugee is used as a broad term to refer to people who have fled their home country due to conflict or persecution. By contrast, asylum-seeker will be used only to specify those who are in the process of claiming asylum, as previously defined. Cantons, which are Swiss administrative regions analogous to states in the U.S., constitute the communities examined in this research. Switzerland is a federal system that gives considerable discretion to its twenty-six cantons in implementing federal policy. Because of this, a subnational analysis of Switzerland at the cantonal level can be used to determine how anti-immigrant sentiment may affect cantonal integration policies, refugees' ability to find work, and the execution of the federal asylum regime within a canton. Although each canton has its own distinct identity, culture, and political climate, a comparison of integration, laws, and courts in different cantons provides a high "degree of comparability" that is "barely reachable at the cross-national comparative level."[6] Certain Swiss cantons exhibit anti-immigrant sentiments and other cantons represent more welcoming environments, all while operating under the same political structure. This research attempts to isolate the variable of xenophobia by comparing institutions in two cantons with the highest degree of comparability: one with stronger anti-immigrant sentiment called Ticino, and another with weaker anti-immigrant sentiment called Vaud.

Besides the work of Dr. Anita Manatschal, very few studies have examined subnational variations in policy, particularly in the field of migration. Migration literature tends to focus on the national or international level, ignoring the advantages of analyzing federal systems. Dr. Manatschal's 2011 article examines the diversity in integration policy across cantons and will be drawn upon later as part of this research. Efionay, Wanner, and Niederberger's Migration Policy Institute article details how integration policies changed

over time while responding to different pressures. Their article helps make sense of discrepancies in integration policies among cantons by providing historical context.

Ostendarp's work provides an overview of the history of modern asylum policy in Switzerland, and combining Ostendarp's thesis with Holzer, Schneider, and Widmer's research on the efficacy of Switzerland's deterrence policies towards asylum-seekers allowed for a critical and reflective understanding of the national asylum regime. Holzer, Schneider, and Widmer examine whether or not restrictive asylum policies were effective at decreasing the quantity of asylum applications received by Switzerland. They conclude that the policies were effective in some cases, but that unusually large influxes of refugees, particularly from geographically close areas, negated the effects of legislative deterrence. These works elucidate the policy goals of Switzerland's asylum regime.

On the topic of anti-immigrant discourse, Cihodariu and Dumitrescu's 2013 article provides analysis of right wing rhetoric. They identify anti-immigrant rhetoric in Europe as a trend that began "mainstreaming"[7] in the 1990s and typically uses one of three arguments: that immigration will cause economic downturn, that immigration will threaten national identity, or that immigration will threaten the safety and security of citizens.[8] These characteristics formed the operational definition for this research of xenophobic rhetoric. Meanwhile, Julie Schindall's online feature for the Migration Policy Institute speaks specifically to the trend of anti-immigrant sentiment in Switzerland, narrowing the focus from the EU level to the national level, and providing information on the Swiss political context.

This paper directly addresses refugees and is timely, especially considering the current surge in asylum applications across Europe, as well as Europe's failure to implement a uniform asylum system. This research considers recent anti-immigrant referenda in Switzerland and Switzerland's response to contemporary refugee

migrations. Existing literature tends to analyze integration at the policy level, but this paper will discuss the results of those policies, especially where it affects employment and the legal statuses of asylum-seekers.

II. History of Swiss Asylum Policy

Switzerland has a history as being a host country to refugees, primarily Protestant refugees in the 16th century, as Geneva was then known as the "Protestant Rome." In contemporary times, however, Switzerland's attitudes and policies towards refugees have become more ambiguous. During the Second World War, Switzerland remained officially neutral and accepted several thousand Jewish refugees from neighboring countries. However, Switzerland also turned away several thousand Jews fleeing Germany and Vichy France, with the knowledge that Germany had begun using concentration camps. During the war, the Swiss foreign ministry cooperated with German officials to create special passports for Swiss Jews and declined to aid Swiss Jews in Nazi-controlled territories. Swiss banks also profited off of the Holocaust as property and goods stolen from Jews were deposited in Swiss banks.[9]

Following the Second World War, the Ludwig Report, which heavily criticized Switzerland's treatment of Jewish refugees, was published.[10] The shame that accompanied the Ludwig Report coupled with anti-communism led to the generous reception of Hungarian and Czechoslovakian refugees[11] during the Cold War. Switzerland "showed great flexibility"[12] in aiding Eastern European refugees and showed friendliness towards those refugees. However, as refugee migrations globalized and refugees increasingly immigrated to the West from the Global South, deterrent policies towards refugees became the standard across Europe.[13]

In the 1970s, asylum applications began arriving in Switzerland from Chilean[14] and Vietnamese[15] applicants. Unlike refugee

flows from Eastern Europe, which numbered in the thousands, Chilean and Vietnamese applicants numbered in the hundreds. Still, the fact that any asylum-seekers at all were now choosing their destination country, rather than the country choosing from where it would take refugees,[16] caused alarm in Swiss government. That alarm was likely intensified by the fact that those applications were submitted by citizens of the Global South, who were ethnically different from the Swiss. Following the receipt of Chilean and Vietnamese asylum applications, parliamentarians suggested the drafting of a codified asylum regime,[17] and in 1981, the Asylum Act (AsylA) was enacted. According to the research of Holzer, Schneider, and Widmer, AsylA caused a massive reduction in the acceptance rates of asylum applications. From 1975 through 1979, the overall acceptance rate of asylum applications was 86 percent. Following the passage of AsylA, this rate dropped to 6 percent from 1985 through 1989.[18] In 2003, when refugee flows from former Yugoslavia and the former Soviet Union had abated, and refugee flows from the Middle East were rising, the Swiss government amended AsylA to reduce social assistance available to asylum-seekers whose applications had been rejected or dismissed. The Swiss government confirmed in the parliamentary commentary accompanying this amendment that they intended for AsylA to deter future asylum-seekers from making their applications in Switzerland. These temporal shifts in Swiss asylum policy exhibit Switzerland's growing reluctance to host refugees who are not culturally or racially similar to Europeans.

II. Formulation and Design

This research focuses mainly on the comparison of two cantons: one with strong anti-immigrant sentiment and one with weak anti-immigrant sentiment. To determine which cantons to compare, the canton-by-canton results of three national initiatives were analyzed. Switzerland is a direct democracy, allowing its citizens to

propose and vote on initiatives and to veto legislation passed by the government. In the case of a proposed initiative, just 100,000 people out of Switzerland's population of 8 million must sign a petition within an eighteen-month period to trigger a national vote on the proposed constitutional amendment. Voting results by canton for these initiatives and referenda are available online, making it possible to gauge the popular opinion towards a certain initiative or piece of legislation in a canton. Because all Swiss citizens can participate in this process, this data provides an accurate reflection of public sentiment.

One criticism of using referendum results to understand public opinion is that Switzerland has relatively low voter turnout rates (between 40 and 50 percent).[19] This means that the results of a referendum may only reflect the ideas of the people in the canton who feel most strongly about the issue. The three referenda considered in this case had 53.76 percent,[20] 56.57 percent,[21] and 63.73 percent[22] voter turnout, respectively. While these turnout rates are relatively high, the results of these referenda may not be representative of all Swiss people's opinions. Referendum analysis only shows when there are more people who are strongly anti-immigrant than people who are strongly anti-racism, or vice versa. In this case, low turnout rates are not a limitation to understanding xenophobia and racism, since apathetic citizens tend to be complacent bystanders to right wing xenophobic or racist rhetoric and actions. Therefore, the referendum results reflect the rhetoric and actions taking place on the ground in the cantons. This is because citizens who are unmotivated to vote are unlikely to engage in activism or challenge immigration activists on either side of the political spectrum.

To determine which cantons have the strongest anti-immigrant sentiment, the results of three referenda were analyzed: the 2009 initiative "Contre la construction des minarets," which sought to prohibit the construction of minarets; the 2014 initiative called "Contre l'immigration de masse," or "against mass immigration";

and the 2016 initiative concerning so-called criminal foreigners, which sought to expel all foreigners residing in Switzerland who are convicted of one felony or two misdemeanors.

The 2009 popular initiative was passed, prohibiting the construction of minarets (architectural features of mosques). This initiative directly targeted Muslims in Switzerland, most of whom are immigrants or the descendants of immigrants. The far-right party created and circulated one of the most popular advertisements in support of this initiative. The advertisement staged multiple silhouettes of minarets on the Swiss flag, creating the image of rocket missiles ready to launch. This defines foreigners and foreign cultures as threats to Swiss safety. On the same advertisement is a cartoon woman in a niqab[23] superimposed before the minaret-missiles. By displaying a woman in this form of dress, proponents of this referendum make the statement that Islamic culture is far different from Swiss culture and that the Muslim population (or Arab population, since Islamophobia is often racialized to create fear of all Middle Easterners and North Africans) threatens Swiss identity, which is another aspect of xenophobic rhetoric.

The 2014 referendum was also passed, tasking the Swiss government with instating immigration quotas. Though immigration quotas would be in violation of bilateral agreements with the EU, the initiative was supported by the parliament's largest party, the UDC. The rhetoric used to defend it framed the national-foreigner relationship as one between a victim and an invader. A popular advertisement[24] for the initiative, which bore the UDC's logo, displayed immigrants as an army marching onto Swiss soil. The UDC also specifically mentioned the problems posed by EU immigration, including increased crime, economic hardship, and abuse of asylum.[25] These characterizations fit within the operational definition of xenophobic rhetoric.

The 2016 referendum, on the other hand, was not passed. It aimed to expel all foreigners who are convicted of a serious crime,

or any foreigner who commits two minor crimes within a ten-year period.[26] The proposed law would not have allowed a judge's discretion in choosing whether or not to deport the foreigner. The primary proponent of this initiative was the UDC. The most popular advertisement in support of the initiative, shown below as Figure 1, invoked racist imagery and ideals of purity, casting the dark-colored figure as bad and out of place while casting the white-colored figure as a defender of Switzerland. It also evoked the idea of foreigners being threats to the security of citizens, a feature of right wing xenophobic rhetoric according to Miriam Cihodariu and Lucian-Stefan Dumitrescu.

Figure 1. Advertisement for 2016 initiative.

Because these referenda specifically targeted immigrants

and used xenophobic rhetoric, support for these referenda was used to determine the strength of anti-immigrant sentiment. Using data from the Swiss government's online archive,[27] a listing of the twenty-six cantons was created in order of strongest support for the referendum in question. Each canton was then assigned a number according to the strength of support for the initiative. For example, in the 2014 referendum, the canton of Ticino had the largest proportion of voters in support of the anti-immigrant initiative, so the score assigned to Ticino was twenty-six. In the same round of voting, Appenzell Rhodes Interior had the second highest proportion of voters in support of the anti-immigrant initiative so the score assigned to Appenzell Rhodes Interior was twenty-five, and so on. These lists were made and scores were given for the 2009, 2014, and 2016 referenda.

Each canton's scores from each of the three referenda were then added together. The cantons with the highest scores (referred to in Figure 2 of the appendix as "Xenophobia Points") had the highest and most consistent support for anti-immigration initiatives. The cantons with the lowest scores exhibited the lowest support for those same initiatives. This system of comparative ranking was employed instead of a method that simply adds the percentages supporting the three initiatives for each canton in order to limit the influence of outliers on the perceived strength of xenophobia and allow for variance in the levels of national support for the initiatives, all while maintaining a comparative focus.

Once the cantons with the strongest and weakest anti-immigrant cantons were identified, the three most xenophobic (Ticino, Appenzell Rhodes Interior, and Schwyz) and the three least xenophobic cantons (Vaud, Basel City, and Geneva) were compared in order to identify which two cantons were most culturally and demographically similar and could therefore be compared with the least interference of extraneous variables. The demographic factors considered were size of population, proportion of population living

in urban areas, unemployment rate, language group, and the proportion of foreign national residents in the canton. As Manatschal's work has shown, there are differences in culture and ideas of citizenship between German-speaking cantons and cantons speaking Latin languages.[28] By restricting the comparative analysis to one language group, these extraneous variables are reduced. The two chosen cantons were Ticino, representing an anti-immigrant community, and Vaud, representing a more welcoming community. Comparing these two cantons provides additional advantages in that both cantons host an office of the Secrétariat d'État aux migrations (SEM), or the State Secretariat for Migration, where asylum-seekers are briefly detained and where asylum applications are processed and decided upon. Both offices are likely staffed by people who live (and therefore vote) in Vaud and Ticino respectively.

Raw data available through the SEM's website provided information about the income-generative activity of refugees with N permits, F permits, and B permits. N permits are for asylum-seekers. F permits are granted to those who are not to be immediately deported, but were not granted asylum; they are renewable every twelve months. B permits are for permanent residence and are given to successful asylum-seekers. The number of permit-holders between the ages of eighteen and 65 are given along with the number of working permit-holders in that age range. The numbers from the three data sheets were compiled to gauge the total rates of activity by canton for refugees and asylum-seekers.

The numbers of asylum applications received and approved by canton were also available through the SEM. Attention was paid exclusively to asylum applications filed from Vaud and Ticino, which each house a regional SEM center within their borders. Because Vaud and Ticino house SEM centers, asylum petitions filed in Vaud or Ticino are decided upon within their respective canton. While the SEM centers that process asylum applications are under federal authority and operate under the same laws,[29] they have dif-

ferent staff members handling the applications. This opens the door to variations in how applications are treated in various cantons.

To understand cantonal integration policies, Swiss political culture, and the history of asylum law in Switzerland, qualitative and quantitative academic articles and reports were consulted. Four interviews were carried out with experts in the field of migration, refugee advocacy, and social work specializing in helping asylum-seekers. All interviews were recorded with the interviewees' permission to ensure accuracy. All interviewees were notified before the publication of this article and had the right to retract their statements before publication.

III. Cantonal Integration Policies

This research seeks to discover if there is a correlation between the prevalence of xenophobia in a canton and the restrictiveness of that canton's integration policy. To understand cantonal integration policies, Manatschal's 2011 work must be consulted. Manatschal assesses the liberality of each canton's integration policies in a system that takes into account immigrants' individual rights, such as "access to nationality," "anti-discrimination" protections, "political participation" rights, "labour market access," and right to "family reunion,"[30] as well as cultural rights. Cultural rights refer to the right for an immigrant to retain his or her cultural distinctiveness rather than assimilating fully with Swiss culture. The research also considers cultural rights and requirements such as "cultural requirements for naturalization," "religious rights outside public institutions," "cultural rights in public institutions," "political representation rights," and "group specific affirmative action" in the "labor market."[31] Using this holistic view of integration policy, Manatschal gives a score to each canton in each category.

When the numerical representations of liberality of integration policies created in Manatschal's paper are added and organized

from left to right in order of most to least xenophobic cantons (with Ticino and Vaud marking the extremes) alongside those cantons' respective xenophobia scores, a general trend can be seen (Figure 3). The dark gray line represents the openness of the canton's integration policies. The light gray line represents the canton's Xenophobia Points, which were calculated based on cantons' voting history. The Xenophobia Points are divided by ten for scale.

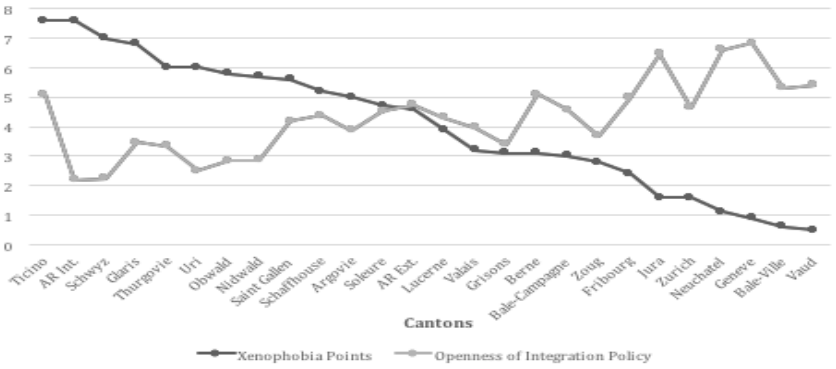

Figure 3. Relative strength of xenophobia compared to objective liberality of cantonal integration policies.

The right half of the graph (showing the thirteen cantons that are less xenophobic) overall has more liberal integration policies than the left half (showing the thirteen cantons that are more xenophobic). This means the more xenophobic cantons tend to provide fewer individual rights, fewer anti-discrimination protections, and fewer cultural accommodations to their immigrant populations.

The two-line graph provides a subnational comparative view of cantonal integration policies. In order to compare the two extremes of xenophobic sentiment in Switzerland with the fewest extraneous variables, this section will now take a closer look at the integration policies in Vaud and Ticino. Vaud and Ticino were chosen for com-

parison because they share similar proportions of foreign residents (between 27 and 34 percent), unemployment rates (between 3.5 and 5 percent, slightly above the national average), proportions of residents living in urban areas (between 89 and 92 percent),[32] and both have a Latin language (Italian in Ticino and French in Vaud) as their sole official language. These statistics indicate what demographic and social stressors may exist; by comparing two cantons in similar contexts, extraneous variables are avoided. The significance of choosing two cantons in the same language group will be explored in detail later.

Vaud's integration policy is more liberal than Ticino's integration policy, but both have integration policies that are more liberal than the average Swiss canton. In Manatschal 2011, Ticino's integration policy was shown to be more liberal than those of the following eight most xenophobic cantons. The relative liberality of Ticino's integration policy is counterintuitive considering the national trend. Two factors may explain why Ticino does not follow the inverse trend between strength of xenophobia and liberality of integration policies as closely as other cantons.

The first factor is its language. According to Manatschal 2011, cantons speaking French or Italian tend to be influenced by France's construction of citizenship.[33] As put forth in Brubaker 1998,[34] ideas of citizenship in France are based largely on where someone is born and where they live, what is called the jus soli principle.[35] In an immigration context underpinned by the jus soli principle, citizenship is not restricted to members of a particular ethnicity, religion, or culture. The jus soli principle hypothetically allows for parity among all people born within the nation's borders, regardless of ancestry. This leads to more open and liberal integration policies. Manatschal theorized that cantons speaking Latin languages are influenced by the jus soli principle that characterizes France's constructions of nationality, as shown in Brubaker's Citizenship and Nationhood in France and Germany. In support of Manatschal's

hypothesis, Italian- and French-speaking cantons in Switzerland all have more liberal integration policies than average (with the exception of Valais, whose integration policies are slightly more restrictive than average;[36] Valais also happens to be a bilingual French and German canton, bordered primarily by German-speaking cantons). The fact that the four cantons with the most liberal integration policies are the four cantons whose official language is solely French also supports this theory.

Meanwhile, German-speaking cantons are theorized to be influenced more by traditional constructions of nationality in Germany, which is based on the idea of inheritance through a bloodline. This principle limits citizenship to members of a single ethnicity, regardless of how the ethnic makeup of a country changes over time due to immigration. This model is referred to as a jus sanguinis model and leads to more restrictive and exclusive integration policy,[37] which may explain why the twelve cantons with the most restrictive integration policies are German-speaking. This linguistic difference translates into a cultural difference in understanding nationality. Switzerland's political parties seem to understand this.

The far-right party discussed in this paper, the UDC, adapts its name depending on the linguistic region. In Italian and French, its name translates to Democratic Union of the Center (Union démocratique du centre). In German, its name translates to the Swiss People's Party. Among populations with a jus soli concept of nationhood, the party paints itself as centrist, but among people who subscribe to the more exclusionary principle of jus sanguinis, the xenophobic and racist party presents itself as representing the Swiss people, which is to say, Europeans of a certain bloodline who are the rightful inheritors of Switzerland. This cultural difference in understanding nationality is one explanation for why Ticino's integration policy is relatively liberal, unlike other similarly xenophobic cantons, which are mostly Germanic.

If the consideration of cantonal integration policies were

limited to the Latin linguistic group, then Ticino, the most xenophobic of the cantons, still only has the third most restrictive integration policy based on Figure 3. This comparison among Latin cantons is shown below as Figure 4.

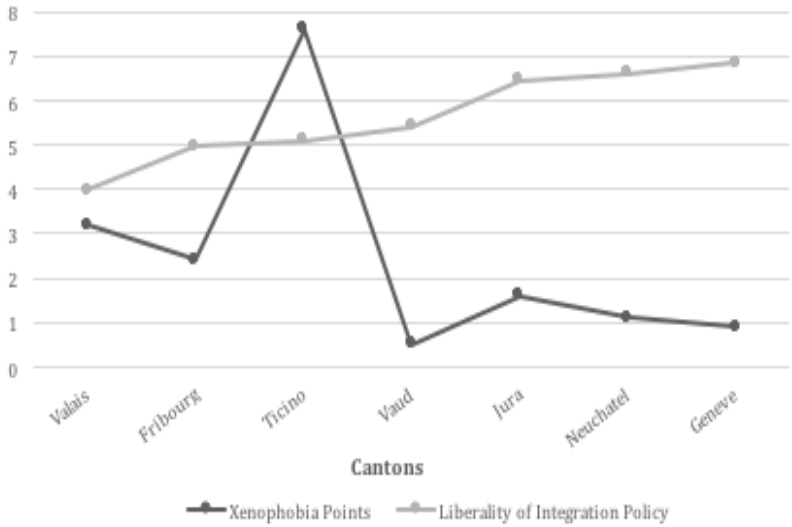

Figure 4. Relative strength of xenophobia compared to liberality of integration policies in Latin and partly Latin cantons.

Ticino's cantonal integration policies are more liberal than the bilingual French-German cantons of Valais and Fribourg and are more liberal than all German cantons, regardless of strength of xenophobia in those cantons. Among monolingual Latin cantons, Ticino is both the most xenophobic and the most restrictive in cantonal integration policies.

Though Ticino's linguistic group satisfactorily explains the liberality of its integration policies in relation to those of other xenophobic cantons, a second explanation is needed to understand why Ticino's anti-immigrant sentiment is not expressed more strongly in

its integration policies. The difference between the levels of xenophobia in Ticino and in Vaud is wide, but the difference in the liberality of their integration policies is slight. The second explanation lies in Ticino's history of using guest workers from Italy and Spain.

In the mid- to late-1900s, Switzerland created bilateral agreements with Italy and Spain to allow guest workers to come to Switzerland for one year at a time. Switzerland preferred a policy that constantly brought new workers to work in Ticino's agricultural industry, rather than allowing workers to remain in Switzerland for multiple working seasons. To that end, several restrictive policies were adopted that impeded access to nationality, permanent residency, and family reunion, ensuring that these guest workers would not become permanent residents.[38] In the 1960s, Switzerland and the cantonal government of Ticino experienced pressure from the International Labor Organization, the Organization for European Economic Cooperation (the predecessor of the Organization for Economic Cooperation and Development), and the Italian government to enact more generous employment laws and more humane family reunification laws;[39] these rights, privileges, and protections are factors in measuring the liberality of integration policies. The external pressures acting specifically upon the canton of Ticino caused Ticino to liberalize its integration policy. It is because of those historical pressures that Ticino's integration policies are more liberal than two other cantons in its linguistic group and more liberal than the next fifteen most xenophobic cantons (which are all Germanic with the exception of bilingual Valais). When Ticino was left to design its own integration policy without external pressures, its policies were restrictive and widely criticized as unjust.

This analysis shows that there is an inverse correlation between the strength of xenophobia among a canton's population and the extent to which a canton accords privileges to immigrants and refugees. The relationship is neither strict nor unwavering, but this section has shown that if linguistic associations and the historical

international pressures are considered, anomalies are sufficiently explained.

IV. Refugee Employment Rates

As of January 2016, 1,865 refugees with B permits,[40] F permits, and N permits were eligible to work[41] in Ticino and 5,694 refugees were eligible to work in Vaud.[42] Of the people in those categories, only 11.2 percent reported being engaged in lucrative activity in Ticino, compared to 12.2 percent in Vaud. These results are not statistically significant and it cannot be claimed that the strength of anti-immigrant sentiment in a community affects the ability of refugees holding those permits to find work. There is also no significant difference in the ability of refugees with B permits who have lived in Switzerland for four to five years to find work in Ticino or Vaud. The same is true for employment rates of refugees with F permits who have been in Switzerland for six to seven years.[43]

Figure 5 of the appendix shows the employment rates of refugees with B, N, and F permits compared to the level of xenophobia in all twenty-six cantons. This graph exhibits no trend or correlation between the strength of anti-immigrant sentiment and refugee employment rates, and this remained true even when variations due to urban population, quantity of refugees, linguistic group, and unemployment rates were controlled for. This is interesting and counterintuitive; discrimination against immigrants in the labor market often affects their ability to find work.[44] One explanation for the anomaly lies in the Swiss government's policy of assigning N and F permit holders to live in particular cantons. The consistency of refugee employments across cantons shows that this refugee allocation scheme is an effective method of ensuring that no canton is overwhelmed and unable to absorb the refugees into its labor market. Another explanatory factor could be the tenacity of refugees in seeking work. The data reflects how many refugees and asylum-seekers

were engaged in lucrative activity, but not the difficulty associated with finding that work.

More investigation should be done to understand if refugees from certain countries are less likely to find employment in anti-immigrant communities. Such research would help understand if there is a racial bias in employment rather than a bias based on nationality or immigrant status. Further research should also differentiate among those who are sufficiently employed, underemployed, and unemployed.

V. Asylum Application Acceptance Rates

Switzerland has a unitary asylum regime, and regional offices of the SEM handle all asylum cases. Because all asylum requests are processed at the federal level and all SEM offices operate under the same law, outcomes for asylum applications should be similar whether the application goes to the SEM office in Chiasso, Ticino or Vallorbe, Vaud.

Data on asylum acceptances by canton[45] show that results differ wildly between applications filed in the two cantons. Out of all 6,882 petitions for asylum filed in Ticino from the start of 2009 through September 2016, only 765 were accepted. Of the 15,718 cases filed in the same time period in Vaud, 2,734 were granted asylum. That makes the acceptance rate for asylum-seekers just 11.11 percent in Ticino and 17.39 percent in Vaud. This difference is statistically significant, with 99.9 percent certainty. This means that an asylum application handled by the SEM center in Vaud is significantly more likely to be accepted than one handled in Ticino.

One counter argument to this information invokes geopolitics. The counter argument says that the fact that Ticino is further south than Vaud and borders Italy means that there are more West African asylum-seekers applying in Ticino, and globally, West African asylum-seekers are rarely accepted.[46] This argument proposes

that the disproportionate amount of West African asylum-seekers artificially deflates the overall acceptance rate.

The problem with this argument, however, is that it is firmly disproven by data. Between 2013 and September 2016 inclusive, Vaud had more West African asylum-seekers in quantity and in proportion. West African asylum-seekers[47] made up 17.84 percent of all of Ticino's closed cases. In that same time period, West African asylum-seekers made up 18.85 percent of all of Vaud's closed cases. In fact, statistical analysis shows with 91 percent certainty that Vaud has a significantly larger proportion of West African asylum-seekers than Ticino. The premise that Ticino has a larger proportion of West African applicants is untrue, and the logic that a canton with a larger proportion of these applicants would necessarily have a lower overall acceptance rate is also false. This group of refugees who are purported to deflate Ticino's overall asylum acceptance rate is actually an even smaller portion of their caseload than it is in the canton with a high acceptance rate, Vaud.[48]

This information not only disproves the counter argument that demographic differences in the two cantons' asylum-seeking populations is at fault for their difference in asylum acceptance rates—it actually supports the theory that SEM centers in anti-immigrant communities grant asylum significantly less frequently. In the time period studied, Ticino only granted asylum to 0.15 percent of West African asylum-seekers. In Vaud, asylum was granted to 2.31 percent of West African asylum-seekers. The difference between these two rates is statistically significant, with 99.9 percent certainty. Even when sending countries are controlled for, the SEM center in the more xenophobic canton has a significantly lower rate of granting asylum.

One possible explanation for Ticino's low rate of granting asylum is that perhaps Ticino grants provisional admission through an F permit significantly more often than they grant asylum and permanent residence through a B permit. This would be one strategy

to keep the asylum-seekers in a safe country while also keeping the refugees in a state of instability, as F permits must be renewed every twelve months by the canton. These provisional admission permits are often given to asylum-seekers whose deportation is logistically impeded, meaning that once transportation can be more easily arranged, or travel documents are obtained, the refugee will have their F permit revoked and be returned to their country of origin. Other refugees with F permits are deported when their country of origin is deemed safe again. The problem with this policy is that states may not always be objective in their designations of safe states; following the British withdrawal from the Afghanistan War, the United Kingdom labeled Afghanistan a safe state,[49] though it continues to be ranked among the most conflict-ridden countries in the world by the Global Peace Index. F permit-holders who stay in Switzerland and are not deported are delayed in their route to permanent residence and later, citizenship. The instability of provisional admission has the potential to be a major obstacle to integration. However, the information published by the Swiss government does not specify how many applicants in each canton are granted F permits, meaning that this theory cannot be corroborated with the data presently available.

Finally, rates of granting asylum during high-tension years were analyzed. High-tension years are years in which xenophobic initiatives are on the ballot nationally and asylum data is available. By looking at this information, one can see if and how the SEM offices react to the same stimuli in environments with low and high anti-immigrant sentiment. The years in which xenophobic initiatives are voted upon are called high-tension because of the attention they attract from the Swiss electorate and media. These initiatives are heavily advertised in public spaces (and those advertisements rarely go un-vandalized, pointing again to the tense atmosphere) and receive higher voter turnout rates than other initiatives. They also receive coverage in foreign news outlets and spark debate across

Europe as well as within Switzerland. The high-tension years considered are 2009, 2014, and 2016. The astonishing results of these comparisons can be seen below in Figure 7.

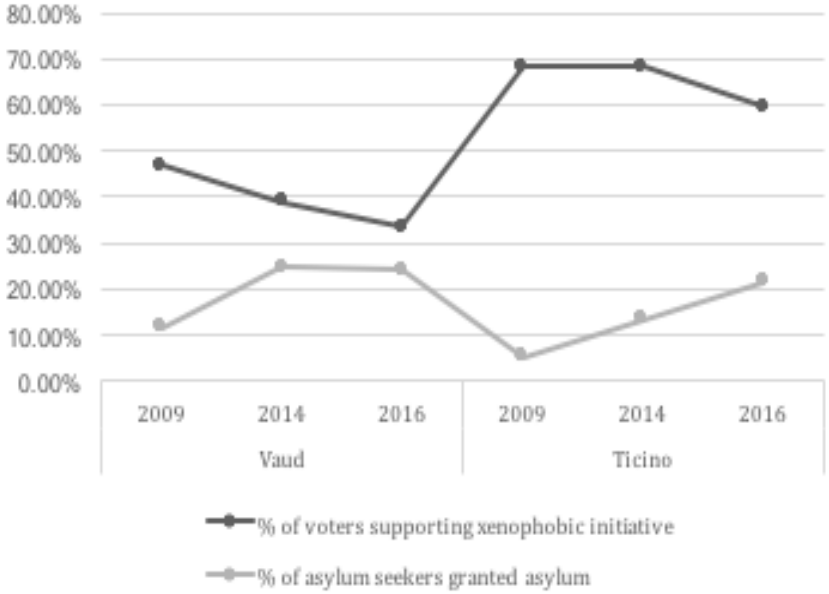

Figure 7. Refugee recognition rate and electorate's support for xenophobia in high-tension years.

Regardless of the overall relative accepting or excluding culture of the canton, which is what the Xenophobia Points measure, the courts in each canton seem to respond to year-by-year fluctuations in anti-immigrant sentiment among the electorate. Both Vaud and Ticino saw decreasing support for xenophobic initiatives between 2009 and 2016; concurrently, the courts began granting asylum to a greater proportion of asylum-seekers. The trend holds even when Syrian applicants after 2011 are excluded from calculations. From this data, it can be concluded that there is an inverse correlation between the strength of xenophobia in a canton and the rate of

acceptance for asylum applications. The data also shows that the rate of acceptance for asylum applications inversely reacts to the proportion of the population supporting xenophobia in a given year. To understand why this correlation exists, it is important to remember that the officials within the SEM are imbedded in the same social context as other citizens in their respective cantons. The right wing rhetoric that affects and convinces their countrymen affects SEM officers as well, and the research suggests that it is possible that the officials of the SEM are not fully capable of separating their private opinions from their public duties, or that perhaps popular anti-immigrant sentiment discourages the SEM, as an institution, from allowing more foreigners to live in Switzerland.

The process that determines the fates of refugees in Switzerland is meant to be impartial. All refugees are entitled to fair judicial processes. The outcome of their asylum petition must be based on the specifics of their situations and should not, in any case, have their safety or stability of life threatened by political tensions within the country of refuge, or by unluckily choosing one area of the country of refuge over another to file their petition.

VI. Conclusions

Recent decades in Switzerland have brought rapid demographic shifts, especially in the growth of Switzerland's foreign national population. The country's twenty-six cantons have responded to the increase in diversity in different ways. Though Switzerland has a legacy of hosting refugee populations,[50] anti-immigrant sentiment has risen in many cantons, stoked by right wing parties' use of racialized scapegoating tactics. This research revealed that anti-immigrant sentiment affects certain aspects of refugees' and asylum-seekers' lives. By examining where popular initiatives negatively targeting immigrants have most support, this research was able to determine which cantons' populations held the strongest an-

ti-immigrant views.

In a subnational analysis that included all twenty-six cantons, there was no correlation shown between the employment rates of refugees and asylum-seekers and the strength of xenophobic sentiment in their communities. The same remained true when the comparison was reduced to two demographically and culturally comparable cantons at opposite ends of the xenophobic spectrum: Vaud and Ticino. While other research has shown that there is discrimination against immigrants in the Swiss labor market,[51] there is no evidence in this paper that the prevalence of xenophobia in the canton affects refugees' ability to find work. A point for further research would be to investigate the underemployment of refugees, as SEM data used in this paper only reports on how many refugees are engaged with "lucrative activity."[52]

There is no evidence in this paper that individuals in highly xenophobic communities tend to discriminate against refugees and asylum-seekers. Rather, this research shows that the negative effects of living in a canton with strong anti-immigrant sentiment come from a structural systemic level. Institutions in highly xenophobic communities discriminate against refugees. There is a positive trend between the strength of xenophobic sentiment and the restrictiveness of cantonal integration policies. This means that refugees and asylum-seekers living in a highly xenophobic community are impeded in their access to nationality, family reunion, political participation rights, religious rights, and more.

A second systemic expression of anti-immigrant sentiment is the asylum application process itself. Asylum applications are handled at regional offices of the federal SEM. Because these offices operate under the same federal asylum law, rulings from the SEM center in Ticino should be similar to rulings from the SEM center in Vaud. Data analysis, however, proves that this is not the case. Over the past approximately eight years of asylum applications filed from Ticino (and therefore handled at the Chiasso SEM center), only

11.11 percent of applicants were granted asylum. Cases filed from and handled within Vaud were granted asylum 17.39 percent of the time. Data analysis also shows that differences in Vaud's and Ticino's asylum-seekers' origin countries do not account for discrepancy. Additionally, when the sending countries are controlled for, Vaud maintains its significantly higher asylum-granting rate compared to Ticino. Ticino is, in effect, a hostile asylum jurisdiction in addition to being the most xenophobic canton in Switzerland.

Even though the system is governed at the federal level, the fact that there are different regional offices whose staffs are made up of the people who live in the area around the federal office changes the outcomes of asylum applications. The staffers at the Chiasso SEM center possibly hold more anti-immigrant views than the staffers at the Vallorbe SEM center, which leads them to interpret cases differently. The law governing all SEM centers and related courts is the same, but the unconscious—or conscious—biases of the people processing and deciding upon asylum applications are different. This research proves that by living and requesting asylum in a canton with strong anti-immigrant sentiment, asylum-seekers may be losing their right to a fair review of their case. This finding may be applicable to other countries with similarly decentralized immigration agencies and courts, like the United States.

Possible remedies for this violation of refugees' rights may include a process of secondary review, which could level the discrepancies among the regional SEM centers. For example, an application filed by an asylum-seeker in Ticino is first decided upon in Ticino and would then be then sent for secondary review at the SEM center in Zurich or Geneva. A randomized system where any SEM center is as likely as another to be the center of second review for any given application would be optimal. This kind of system, however, could slow the asylum process and would require teams of translators, as there are SEM centers in German-, French-, and Italian-speaking regions of Switzerland.

The fairness of the system may also be improved by a real and sustained effort to increase the diversity of SEM employees, not only in low-level positions, but also in positions with supervisory powers. Xenophobia exploits the fears of members in the dominant culture and wields those fears against already-marginalized groups. By having a higher proportion of SEM employees of immigrant backgrounds or from marginalized groups, the effects of recurrent cycles of xenophobia on the regulatory and judicial systems may be reduced.

Finally, an internal investigation of the SEM must be conducted. This research can conclude that xenophobia among the electorate is negatively correlated with rates of granting asylum, but it cannot conclude how this is facilitated. An internal investigation could bring to light whether individual SEM employees are bringing their prejudice to work, expose regional offices where the management sometimes instructs lower-level employees to reject more applications, or explore other explanations.

The current state of institutionalized xenophobia is unjust, inhumane, and unbefitting of Switzerland's reputation as a welcoming and generous host of refugees since the 1500s. Switzerland and its cantonal governments must take steps forward to ensure that immigrants and refugees have full and equal rights across the country. Anything less is a disservice to their values of liberal democracy and human rights.

Appendix

Figure 1. Advertisement for 2016 initiative. German-language advertisement in support of 2016 referendum in a train station. The sign reads, "Finally guarantee our security. YES to the effective deportation of criminal foreigners." The photo was taken by the researcher

Canton	Xenophobia Points
Ticino	76
Appenzell Rhodes Int.	76
Schwyz	70
Glaris	68
Thurgovie	60
Uri	60
Obwald	58
Nidwald	57
Saint Gallen	56
Schaffhouse	52
Argovie	50
Soleure	47
Appenzell Rhodes-Ext.	46
Lucerne	39
Valais	32
Grisons	31
Berne	31
Bale-Campagne	30
Zoug	28
Fribourg	24
Jura	16
Zurich	16
Neuchatel	11
Geneve	9
Bale-Ville	6
Vaud	5

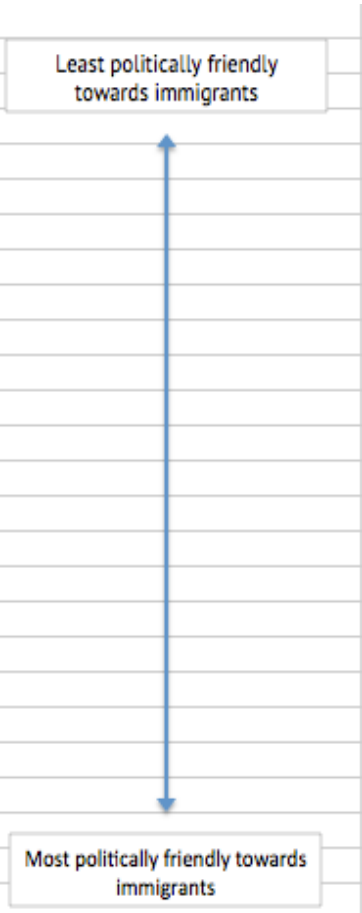

Figure 2. Table of Xenophobia Points. Table lists all twenty-six cantons in order of most xenophobic to least xenophobic based on the results of the 2009 initiative Contre la construction des minaret, the 2014 initiative Contre l'immigration de masse, and the 2016 initiative Renvoi effectif des etrangers criminels.

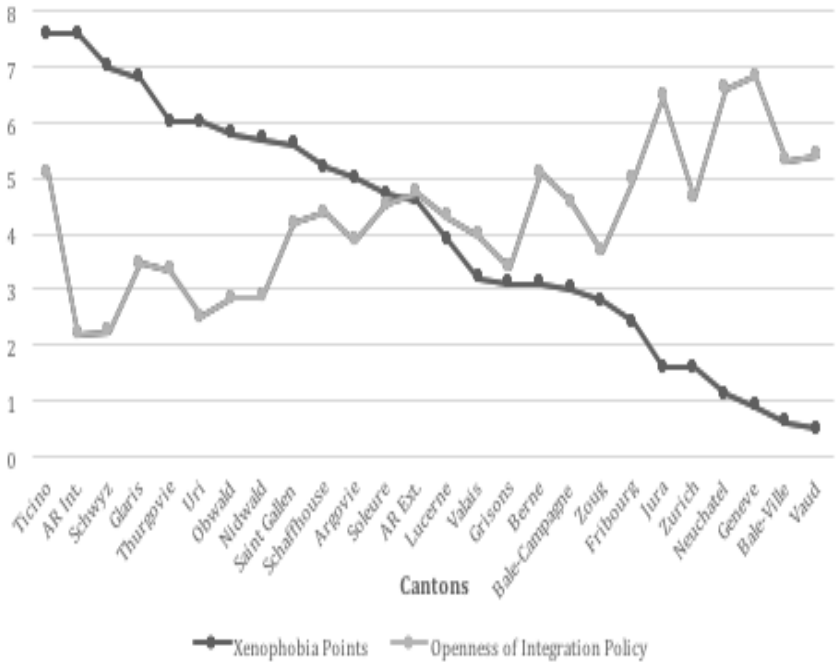

Figure 3. Relative strength of xenophobia compared to objective liberality of cantonal integration policies. Cantonal integration policies arranged in order of most to least xenophobic cantons. The values represented by the red line were calculated based on Table 2 of Manatschal's "Taking Cantonal Variations of Integration Policy Seriously." The black line represented the Xenophobia Points listed in Figure 2, divided by ten for scale.

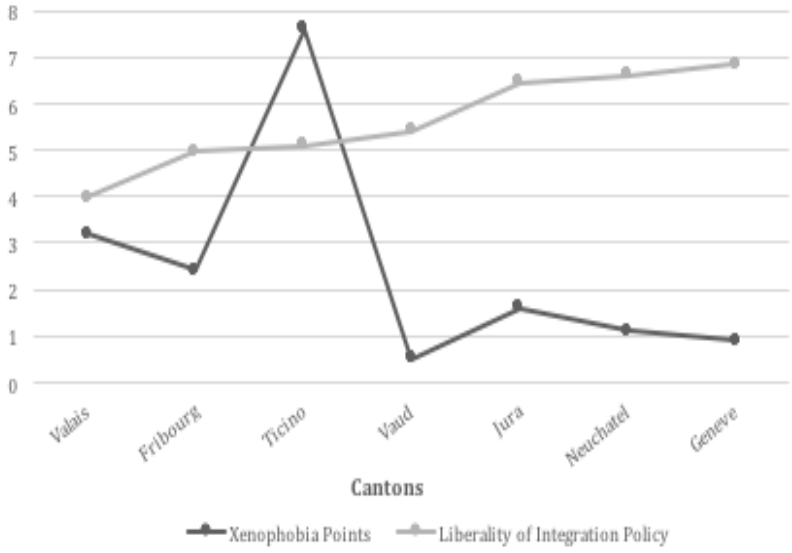

Figure 4. Relative strength of xenophobia compared to liberality of integration policies in Latin and partly Latin cantons.

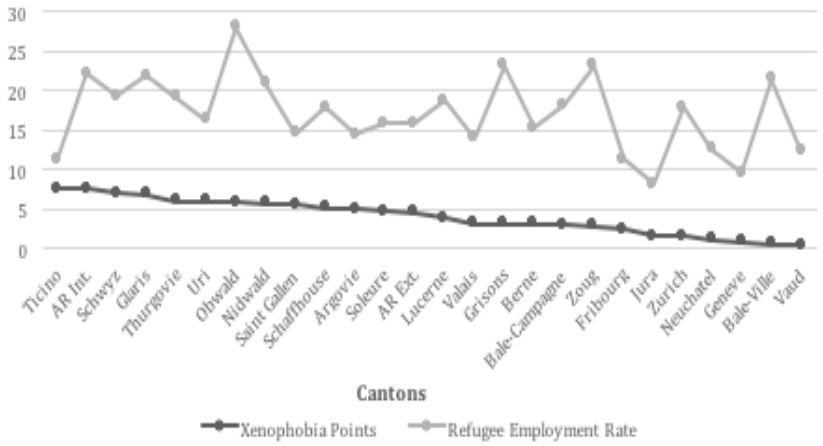

Figure 5. Relative xenophobia and refugee employment by canton. The black line indicates amount of Xenophobia Points accrued by the canton, divided by ten for scale, and the gray line indicates the proportion of refugees with N, F, and B permits who are eligible to work report being engaged in lucrative activity as of January 2016.

Ticino 2013-2016		**Vaud 2013-2016**	
Total asylum requests:	3609	Total asylum requests:	8930
Requests from WA	644	Requests from WA	1648
% of total requests from WA	17.8442782	% of total requests from WA	18.4546473
Ticino 2013-2016		**Vaud 2013-2016**	
Asylum requests from WA	644	Asylum requests from WA	1648
# of applications accepted:	1	# of applications accepted:	39
Acceptance rate for WA	0.1552795	Acceptance rate for WA	2.36650485

Figure 6. Raw data regarding West African asylum-seekers in Ticino and Vaud. Compilation of raw data regarding applications for asylum filed from Ticino and Vaud.

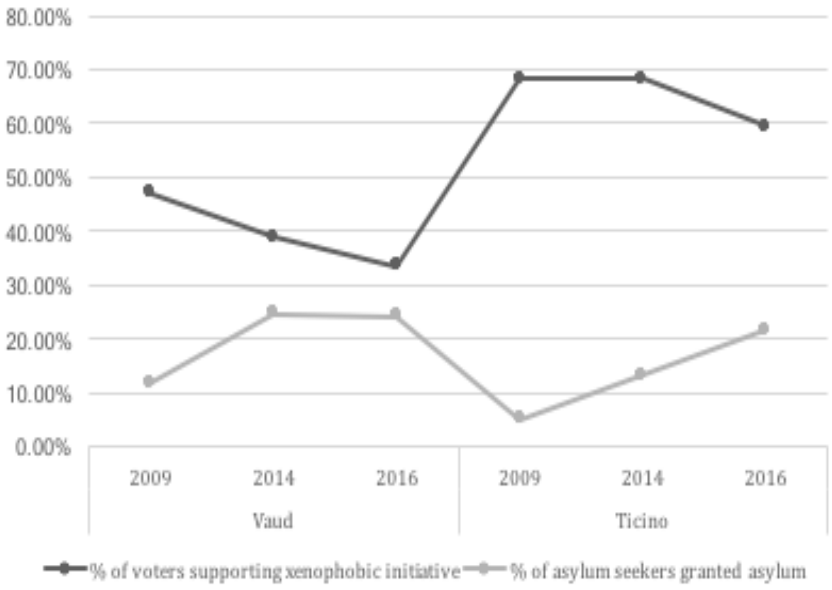

Figure 7. Refugee recognition rate and electorate's support for xenophobia in high-tension years. Graph showing support for xenophobic measure in Vaud and Ticino respectively, and the respective rates of granting asylum in those same years.

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[2] "Eurostat, "Asylum Statistics," Eurostat, June 21, 2017, accessed April 3, 2016, http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

[3] Lillian M. Langford, "The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity," Harvard Human Rights Journal 26 (2013): 217-64.

[4] This political party has different names in German and Latin cantons. In Italian and French, the party's name is abbreviated as UDC. In German, the abbreviation is SVP. As a French-speaker, I will refer to this party as the UDC for the remainder of this paper.

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[8] Ibid., 55.

[9] Roger Cohen, "The (Not So) Neutrals of World War II," New York Times, January 26, 1997, http://www.nytimes.com/1997/01/26/weekinreview/the-not-so-neutrals-of-world-war-ii.html.

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[14] Ibid.

[15] Thomas Holzer, Gerald Schneider, and Thomas Widmer, "The Impact of Legislative Deterrence Measures on the Number of Asylum Applications in Switzerland (1986-1995)," International Migration Review 34.4 (2000): 1182-216, doi: 10.2307/2675979.

[16] Philippe Wanner (associate professor at Université de Genève), in discussion with the author, April 2016.

[17] Holzer, Schneider, and Widmer, "The Impact of Legislative Deterrence," 1185.

[18] Ostendarp, "Asylum Applications Dismissed," 6.

[19] Armando Mombelli and Urs Geiser, "Silent Majority Always Wins Swiss Ballots," SWI Swissinfo.ch, June 30, 2007, http://www.swissinfo.ch/eng/silent-majority-always-wins-swiss-ballots/7746.

[20] Chancellerie Fédérale, "Votation populaire du 29.11.2009," Administration fédérale, accessed October 21, 2016, https://www.admin.ch/ch/f/pore/va/20091129/index.html.

[21] Chancellerie Fédérale, "Votation populaire du 09.02.2014," Administration fédérale, accessed October 21, 2016, https://www.admin.ch/ch/f/pore/va/20140209/index.html.

[22] Chancellerie Fédérale, "Votation populaire du 28.02.2016," Administration fédérale, accessed October 21, 2016, https://www.admin.ch/ch/f/pore/va/20160228/index.html.

[23] A niqab is the modest dress worn by some Muslim women. It covers the body in loose black clothing, leaving only hands, feet, and eyes uncovered. The niqab is not commonly worn by Muslim women outside of the Arabian Peninsula.

[24] Associated Press, "'Oui' à l'initiative contre l'immigration de masse," Bilan, February 9, 2014, http://www.bilan.ch/economie/oui-linitiative-contre-limmigration-de-masse.

[25] Cihodariu and Dumitrescu, "European Right-wing Discourse on Immigrants," 57-8.

[26] Associated Press, "Swiss Voters Reject Nationalist Plan to Expel Foreigners for Minor Crimes," The Guardian, February 28, 2016, http://www.theguardian.com/world/2016/feb/28/swiss-peoples-party-vote-foreigners-minor-crimes.

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[29] Wanner, discussion.

[30] Manatschal, "Taking Cantonal Variations of Integration Policy Seriously," 340.

[31] Ibid., 340. Refer to this work for a complete and detailed list of measured indicators.

[32] Federal Statistical Office, "Portraits of the Cantons." Federal Statistical Office. 2017. Accessed October 26, 2017. https://www.bfs.admin.ch/bfs/en/home/statistics/regional-statistics/regional-portraits-key-figures/cantons/ticino.html.

[33] Manatschal, "Taking Cantonal Variations of Integration Policy Seriously," 350.

[34] Roger Brubaker, Citizenship and Nationhood in France and Germany, (Boston: Harvard University Press, 1998), cited in Anita Manatschal, "Taking Cantonal Variations in Integration Policy Seriously," 336-350.

[35] Manatschal, "Taking Cantonal Variations of Integration Policy Seriously," 338.

[36] Ibid., 348.

[37] Ibid.

[38] Efionayi, Denise, Philippe Wanner, and Josef Martin Niederberger, "Switzerland Faces Common European Challenges," Migration Policy Institute, February 1, 2005, http://www.migrationpolicy.org/article/switzerland-faces-common-european-challenges.

[39] Ibid.

[40] Not all holders of B permits are refugees, and not all refugees hold B permits. However, the B permit holders included in this statistic are all refugees. Wanner, discussion.

[41] Eligibility to work is defined as being between the ages of eighteen and sixty-five.

[42] Secrétariat D'État Aux Migrations SEM, "Statistique En Matière D'asile, Septembre 2016," Département fédérale de justice et police DFJP, last modified October 10, 2016, accessed October 30, 2016, https://www.sem.admin.ch/sem/fr/home/publiservice/statistik/asylstatistik/archiv/2016/09.html.

[43] Ideally, the lengths of stays used would both be four to five years, but the SEM reports the lucrative activity of B permit holders who have lived in Switzerland for four to five years and the lucrative activity of F permit holders who have lived in Switzerland for six to seven years.

[44] Wanner, discussion.

[45] Secrétariat D'État Aux Migrations SEM, "Statistique En Matière D'asile, Septembre 2016."

[46] Wanner, discussion.

[47] West Africa includes Benin, Burkina Faso, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

[48] Raw data available in appendix as Figure 6.

[49] Maeve McClenaghan, "Refugee Crisis: Afghanistan ruled safe enough to deport asylum-seekers from UK," The Independent, March 3, 2016. http://www.independent.co.uk/news/uk/home-news/refugee-crisis-afghanistan-ruled-safe-enough-to-deport-asylum-seekers-from-uk-a6910246.html.

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Reforms with History: The Return of Prison Farms

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Abstract

The utilization of farms as a method of reform in correctional facilities is as nuanced as the soil that fuels these programs. Farm-to-prison is a 21st century concept. Old, though, is the tie between agriculture and prisons. Ever since Reconstruction, southern states have converted old slave plantations into prison plantations, imprisoning brown and black bodies in new chains. Today, the intersection of farms and the incarcerated world takes on a different form.

On one hand, some prisons have programs where the imprisoned are producing food for themselves, usually in an attempt to get more fresh produce into prisoners' diets. Additionally, prisoners are genuinely thrilled for the opportunity to spend time in nature, a rarity in life behind bars. However, programs that use prisoners as extremely low-paid farmhands to replace undocumented migrant workers are running the line of re-instating slave labor for the predominantly non-white people who make up the prison system. Some argue that programs that teach gardening skills make the newly freed more employable, but this rationale is debatable as long as ex-convicts' prior records are still included as a major factor in licensing procedures.

While flaws abound in all aspects of the over-lobbied, under-funded, and brutally racist American prison system, the inconvenient truth seems to be that the focus of these programs is just not in the right place. An emphasis on cost-efficiency with little regard for the wellness or recidivism rates of inmates, inherent to all of the discussed programs, degrades and dehumanizes the lives at stake. As it stands, agriculture in United States prisons is black and brown bodies sweating into dark dirt for someone else's gain — an American institution if there ever was one, but not an institution we should be praising as anything different from all that has come before it.

I. Introduction

The farm has served as a place of confinement for people incarcerated in the US since slavery was outlawed after the Civil War. Though the big plantation farms of decades past have been ushered out, prisons across the United States have spent recent years implementing more subtly sinister "farm-to-prison" programs that rely upon a relationship between agriculture and the cell. An interesting dichotomy exists in the modern connection between the system of incarceration and the farm. Genuine benefits for prisoners, such as fresh fruit and time outside, go hand-in-hand with unpaid labor. The former makes agriculture in prisons somewhat legitimate; the latter leaves this relationship as a repackaged version of the plantation system. With that difference in mind, this paper divides the scope of agriculture in prisons into three sections: 1) programs that simply get fresh produce into prisons and cut costs, 2) certification-based opportunities for job skills, and 3) the utilization of prisoners for unpaid or underpaid labor.

If we want to reform the prison system with agriculture, we need to make sure the prisoners are reaping the benefits of their work through fair wages, access to healthy produce, and the reduction of obstacles for re-entering the workforce with agriculture knowledge and certifications. Until significant change happens, these reform programs are in many ways just modern iterations of America's original unpaid labor system for people of color: slavery.

II. History

Reconstruction was, for a fleeting moment in this country's narrative, a time of hope for those seeking justice for the enslaved. For southern states, however, it was an opportunity to convert old plantation farms into self-sustaining plantation prisons where increasingly large numbers of black inmates worked the fields under

the supervision of businesses that cared about their lives even less than they had cared for the lives of their slaves — after all, they no longer had a personal stake in their existence as property.[1] Though Texas developed several prison plantations, other southern states generally tended to consolidate their operations into one massive penal farm.[2] In Louisiana, that was the 18,000 acre Angola farm, named after the country the old plantation's slaves came from. In these isolated prisons, physical whippings reminiscent of the slave era were the norm. In 1933, 68 years after slavery was outlawed in the United States, 23,889 whips cut through the air in Louisiana alone.[3]

To the east, the story was no better. Around the turn of the century, the state of Mississippi started buying up arable land around the Mississippi River, developing a state penitentiary that operated as a "for-profit cotton plantation."[4] Such a phrase is not simply a modern critique — the governor at the time compared the prison, known as Parchman Farm, to "an efficient slave plantation" meant to provide young (black) men with "proper discipline, strong work habits, and respect for white authority."[5] Decades later, a court sided with the inmates in a suit against Parchman, calling for the end of "beating, shooting, administering milk of magnesia, or stripping inmates of their clothes, turning fans on inmates while they are naked and wet, depriving inmates of mattresses, hygienic materials and/or adequate food, handcuffing or otherwise binding inmates to fences, bars, or other fixtures, using a cattle prod to keep inmates standing or moving, or forcing inmates to stand, sit or lie on crates, stumps or otherwise maintain awkward positions for prolonged periods."[6] That mandate came in 1972.

Though the prison's Unit 32, which the ACLU characterized as possessing "some of the harshest and most violent conditions in the nation," has been shuttered, Parchman Farm is still open today.[7] In 2014, 2,056 of its 3,037 prisoners were black males. According to the Mississippi Department of Corrections, Parchman inmates

worked a total of 212,160 hours in the agricultural program in fiscal year 2017.[8]

Though Parchman's doors stay open, traditional prison farms have fallen out of favor in the American penal system. So goes the story of American incarceration; time brought more prisoners and more prisoners necessitated more prisons. Decades later, we still live with the result: more people live behind bars in the United States than in any other place on earth.[9] Instead of continuing the trends of the past and building new institutions on more old farms, facilities popped up around small towns in need of sources of work. Due to the success of these pop-up prison towns and the advent of mechanized agriculture, farm labor was no longer a feasible way to handle the country's prison population. Correctional facilities pulled their focus away from the farm and into the jail cell. By 2005, the Bureau of Justice Statistics reported that fewer than 300 facilities across the country still utilized agriculture in their prison programming.[10] Angola still exists and has faced multiple[11] lawsuits[12] for its treatment of inmates, but the Angola-style plantation has been more or less phased out.

Instead, farming has found its way back into the world of incarceration through reforms that seek to cut costs, provide nutritional food options, and offer farm-based certification options, each of which this paper will address. Unfortunately, these programs, while attractive as a concept to some neo-liberal reformists, lack the strength necessary to offer any real change to prisoners. In terms of substance, they are but a different iteration of their parent plantations, where photographs of everyday practices look like they could be images from slave plantations in the early 1800s.[13]

III. Reform #1: Prisoners Eat the Food They Produce

Though few would expect prison meals to be anything impressive, the extent to which they can fail to meet basic stan-

dards of humanity can easily go unnoticed. In general, prison food services can vary from mildly nutritious to, as one recent lawsuit put it, "not for human consumption."[14] Much like public school kitchens, prisons operate on a limited food budget: the average cost of a meal in a California prison in 2003 was $2.45, a far cry from the $8.12 average for Americans across the board.[15] Ex-law enforcement officer Joe Arpaio, who earned the nickname "America's toughest sheriff," once sent out a bragging tweet on how the 2013 Thanksgiving meal served at his prison cost only $0.56 per plate.[16] The meal consisted of 5 ounces of soy turkey casserole (Arpaio permanently cut out meat to save costs), a dinner roll, a pat of margarine, a cup of mashed potatoes, a cup of glazed carrots, a brownie square, and half a cup of fresh fruit.[17] Arpaio's usual meals averaged 15-40 cents a plate and were served just twice a day.

While flaws in school food programs make major headlines,[18] prison problems tend to fly under the radar — a side effect of the racial and socioeconomic biases essential to the prison system. In the aforementioned lawsuit, filed in May of 2017 against officials in the Oregon Department of Corrections, four of Oregon's prisons (which, in total, hold 40 percent of the state's inmates) engaged in "unsafe, unsanitary and neglectful" kitchen practices.[19] According to the prisoners, they were forced to eat "green meat and moldy, spoiled food," spoiled milk and bait fish marked "not for human consumption." A 2014 report from the Southern Center for Human Rights accused a Georgia prison of neglecting its inmates so harshly that they resorted to eating toothpaste and toilet paper.[20]

Complaints related to the food produced by massive corporations spurred the first category of agriculturally-inspired reform: putting prisoners to work to make their own food. In Florida's Marion County, that means that inmates are in charge of their meals from the 58-acre Inmate Work Farm to the kitchen, where the Food Services Unit provides three meals a day for themselves

and their fellow inmates.[21] The Marion County website highlights the skills — gardening, prepping, cooking — practiced in this system, but makes no mention of any genuine certification offered either on the farm or in the kitchen. Indeed, the site goes so far as to say "the primary goal [of the program] is to reduce the mounting cost of feeding inmates, a burden normally assumed by the citizens of Marion County, while teaching the inmates to be productive."[22] Notable is what is not said: that the Marion County jail system has implemented the Inmate Work Farm to make sure its inmates receive nutritious, healthy food on a regular basis. The cost-saving techniques seem to have worked: a local newspaper reported in 2014 that while the average cost to feed a prisoner in the Florida Department of Corrections was $1.54, the per-plate cost at the jails associated with the Marion farm was closer to $0.50.[23] The same article reported that the farm workers do not get paid for their logged hours and instead are "paid" through the time taken off of their sentences, though the newspaper did not specify to what extent, and Marion County does not offer data on its correctional systems website.[24]

Thousands of miles away, in San Diego, the Richard J. Donovan Correctional Facility offers a similar program. The privately-funded Farm and Rehabilitation Meals (FARM) program is a combination farming-and-nutrition program where around 20 inmates grow produce for their own cafeterias.[25] In interviews, the program's coordinator said that the FARM program was started because of data that suggested recidivism rates for inmates who work on prison farms are around 5-10 percent, a steep drop from California's recidivism rate of well over 50 percent.[26] In the interview, conducted in 2014, the coordinator also mentioned that she would like to someday offer official certification programs, but that the program was founded to simply reduce the costs of feeding prisoners and offer more nutritional meals.

It remains difficult to dismiss agricultural programs that

allow prisoners to at least consume some of what they produce, as fresh produce is a rarity in the in the incarcerated world. The same could be said for time spent in the fields: there's no excuse for unpaid labor, but sunshine and fresh air are sacrosanct. It follows, then, that programs that offer inmates the chance to farm and cook meals of greater quality than they would otherwise receive aren't inherently bad — they simply fall short of creating any real change in a monstrous system. Programs such as those in Marion County and San Diego are better than no programs at all, but to consider them adequate or equitable is a dangerous path to head down.

IV. Reform #2: Prisoners Earn Farm Skill Certifications

Starting a farm entails a multitude of upfront costs. However, when exclusively maintained by low-wage or wageless inmate workers, agriculture programs are relatively inexpensive. Cheap labor, when paired with the cutting-out or cutting-down of contracts with big food production companies, can allow farms to decrease spending by thousands.[27] As seen above, these numbers explain why systems such as the ones found in Marion County and San Diego are so widespread in prisons across the United States.

Nonetheless, certain correctional facilities do propose certification programs which provide tangible outcomes to prisoners who work and are trained on farms. Reform and/or profit-based programs in prisons have existed for decades. In 1979, the National Corrections Industry Association, with financial assistance from the U.S. Department of Justice, set up the Prison Industry Enhancement Certification Program, which, by its own definition, aims to "encourage states and units of local government to establish employment opportunities for offenders that approximate private-sector work opportunities" by lifting commercial regulations on prison-produced goods.[28] In these arrangements, prisoners get a small salary and skills-based training, while companies reduce

costs in areas such as health care, retirement savings plans, and vacation time.[29] Other types of programs are vocational, but without profit: barber school and carpentry lessons are common examples. The most well-known prison certification programs, however, are academic. Across the country, certain prisons offer GED programs, literacy courses, and even community college classes.

When it comes to agriculture, the most commonly proposed certification program is the Master Gardener certification. In 2009, there were just under 95,000 Master Gardeners in the United States.[30] Considered "experts" in horticulture, Master Gardeners are expected to be volunteer resources in their communities, offering demonstrations and advice in everything from soil health to sustainable gardening to pest management. As such a description would suggest, Master Gardener status is largely a position for pleasure. Unlike a GED, Master Gardener-ship does not offer many marketable benefits. However, there's certainly something to be said for the ability to know the earth and its products to their very core, especially for many ex-cons in search of a second chance.

In Washington State, the Department of Corrections has teamed up with Evergreen State College, a public liberal arts college in Olympia, to develop the Sustainability in Prisons Project (SPP) aiming to "bring science, environmental education, and nature into prisons" through connecting inmates with scientists and students to study the outside world.[31] SPP's offerings are specifically designed to fall within the scope of a Washington State statute which forbids spending taxpayer money on college credit in four-year programs.[32] The classes offered through SPP focus on lighter topics such as an environmental literacy course, where prisoners can learn to properly sort waste and recycling.[33]

Today, SPP offers programs in every single one of Washington State's correctional facilities,[34] with a particular focus on prairie restoration, a significant environmental conservation issue

in the State of Washington. However, Washington State Prisons have not all opted to pursue the same vocational classes. Whereas three prisons offer vocational horticultural classes that can be transferred to community colleges as credit, other facilities in the state have chosen to offer beekeeper certification, wastewater treatment operations certification, environmental literacy certification, or the Master Gardener certification.[35]

Down the coast, the Oregon Department of Corrections has chosen to focus on sustainability, and has opted to join the SSP National Network. In Oregon, this partnership looks to advance pressing environmental needs in the state. Reducing energy consumption, expanding composting practices, and increasing recycling opportunities are just a few of the aims of its sustainability campaign.[36]

Although Oregonian Correction Facilities do not offer the wide range of opportunities found in Washington, the Master Gardener Program has been a resounding success. As of 2013, seven Oregon prisons offered the certification through a collaboration with Oregon State University and the Lettuce Grow Garden Foundation.[37]

Observationally, it seems that certification programs are offered almost exclusively when a partnership with a nonprofit or university is involved. Since 2012, the Salvation Farms organization has partnered with the Vermont Department of Corrections to offer certifications to deserving prisoners.[38] Theresa Snow, the executive director of Vermont's Salvation Farms, said in an email that while Salvation has temporarily stopped prison programming (the Vermont Department of Corrections continues the work on its own), it continues to train the formerly-incarcerated.[39]

As such, the Master Gardener program illustrates the success — and shortcomings — of the Sustainability in Prisons Project. On the one hand, these certifications allow prisoners to obtain documents officiating and vouching for their achievements

and qualifications. But despite the valiant efforts of partnerships such as SPP, farm skills, both informal or backed by official certifications, rarely succeed in expanding prisoners post-incarceration opportunities due to restrictions on the employment of ex-criminals. In Oregon, any ex-felon may have her farm/forest laborer license denied, suspended, or revoked at the discretion of a judge.[40] In California, most ex-criminals are forbidden from selling farm products and produce.[41] At the federal level, anyone convicted of a felony, "crime of moral turpitude" or "crimes involving fraud, dishonesty, misrepresentation or money-laundering" is automatically ineligible to receive assistance from the Farm Credit Administration.[42] In fact, any controlled-substances-related offense immediately disqualifies one's farm loan application from the Department of Agriculture.[43]

All these restrictions mean that in most states, the farm skills offered in prisons are only applicable to personal gardening purposes — a leisure activity unaffordable for those in desperate need of a job. Due to state and federal restrictions on ex-convicts, certification programs, while well-intentioned, ring hollow against the full picture of accessibility.

V. Reform #3: Prisoners Produce Food for Outside Groups

Many of the programs discussed above underscore a difficult contradiction between morally sound and morally corrupt. Tangible benefits, such as fresh and nutritious food options, square up against the use of imprisoned bodies for free labor. This third category of reforms, though, is less entrenched in the gray area. Victoria's Secret[44] and Walmart[45] have made headlines for their utilization of prison labor to churn out cheap, mass-produced goods. But supermarkets — even so-called "organic" ones, such as Whole Foods — are also complicit, benefitting from prison-produced fish, coffee and vegetables.[46]

Haystack Mountain Goat Dairy, a Boulder-based company, offers what it calls an "internationally recognized, premium selection of handcrafted raw and pasteurized cheeses."[47] As a locally-owned, small-batch cheese company, Haystack has long been the perfect match for specialty groceries around the U.S. And until mid-2016, Haystack cheese was sold at Whole Foods Markets across the country.[48]

But Whole Foods had to drop the cheese, which became a public relations nightmare when activists revealed the "ethical" company's inclusion of prison-produced products in its supply chain.[49] Haystack was partnered with Colorado Correctional Industries, a division of the state's Department of Corrections, which employed over 2,000 Colorado convicts in its 17 small business partnerships as of 2014.[50] In a 2015 interview with Vice News, CCI's director said inmates are paid between $0.74 and $4.00 per day for their labor; in comparison, he also said CCI generated just over $60 million in revenue that year.[51] A 2015 audit from the state found many statutory violations within CCI operations; the audit still recommended that the agency remain open and work to increase its long-term profitability.[52]

That this type of low-wage labor remains viable for mass-market clothing brands such as Victoria's Secret is problematic enough, but the success of Haystack and CCI in infiltrating not just general-service grocery stores but Whole Foods, a chain that prides itself on its ethical practices, raises alarms about the standards by which we measure the acceptability of prison labor in comparison with other "sustainable" and "cruelty-free" strategies. While it certainly is important to have discussions about free-range pigs and cows, such conversations should not and cannot come at the expense of black and brown imprisoned bodies working long hours at miniscule wages to produce the artisan butter that seeps into the cracks of seven-grain handmade dinner rolls.

This third route by which states have reintroduced agricul-

ture in their prison systems is by far the most egregious — and the most demonstrative of how little progress we have made in pairing "green practices" with truly ethical systems. Whole Foods has publicly promised the end of prison-labor-produced items in its aisles. But Whole Foods controls less than two percent of the grocery business.[53] As long as the vast majority of our systems condone the utilization of cheap prison labor, it will only be the products, and not the practices, that separate our modern systems from the "for-profit cotton plantation" of the Mississippi State Penitentiary of decades past.

VI. Where Did They Come From?

As noted in the beginning of this paper, the number of prison farms as they appeared in their original form have decreased significantly across the United States.[54] But increasingly, prison labor has found its way back into agriculture due to backwards policies in another sector of American legislation: immigration. As the Idaho state senator who sponsored a recently-passed law that allows private agricultural employers to hire incarcerated Idahoans said, "People aren't coming across [the border] like they used to."[55] After Georgia passed HB 87, an anti-immigration bill that vastly reduced the number of migrant farmworkers in the state, farmers struggled to find help in their fields; the struggle was so great, in fact, that a study from the University of Georgia's Center for Agribusiness and Economic Development found that between seven crops, Georgia farmers lost over $70 million and over 5,000 jobs. For the governor, the obvious solution was to send inmates and probationers into the fields to save the Vidalia onions.[56]

The best explanation for these initiatives, at least according to filmmaker Ava DuVernay, — director of award-winning documentary on race and mass incarceration 13th — is written into the 13th Amendment of the Constitution: "Neither slavery nor invol-

untary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[57] The outsourcing of prisoners for labor, though a heinous practice, is arguably legal under current constitutional law. It is a fundamental flaw in one of our most prized amendments: the loss of the right to freedom at the hands of the cruel and compounded U.S. justice system. And when paired with the undeniable racial realities of that justice system, where minorities, particularly black males, are vastly overrepresented in orange suits in every corner of the nation, the terrible, terrible irony of the 13th Amendment in the context of prison farms reveals itself.

A smaller, though no less significant, factor in the development of these three major types of prison reforms has been the growing farm-to-table, back-to-nature movement that has swept the world, particularly the United States. The topic of food justice is murky, but one element that is hard to dispute is the general whiteness of efforts to institute CSAs, farmers markets, and, in this case, prison farm programs.[58] Emphasis on the joys found in "getting your hands dirty" ignores the deeply racial history of American agriculture, where centuries worth of black and brown bodies were forced to spend their lives with their necks to the sun.[59] While this movement does not tend to directly advocate for farming programs in prisons, its popularity with the general public most certainly plays a role in the minds of politicians, advocacy groups, and prison wardens brainstorming reform options.

VII. Across a Different Border

In 2009, following a review of its correctional programs, Canada decided to close the country's six federal prison farms. A spokesperson for Corrections Canada told the Toronto Star that the programs, which cost the nation millions more than they generated,

were not worth their societal benefit, as less than one percent of released convicts end up working in agriculture.[60] Canada utilized prison farms for over a century before the closings, but by 2009, only a few hundred prisoners were involved in the programs.[61] Despite the small number of prisoners involved, a protest movement erupted around the closings; according to one report, diverse interest groups swarmed the issue with arguments of "sustainability, community and democracy."[62] At the time, the conservative leadership focused on profitability and efficiency. Now, Prime Minister Justin Trudeau's administration is considering reopening the farms in the name of local food systems and good life skills.[63] Several former inmates have argued on behalf of reopening the farms.

Yet while Canadian correctional operations might be facing a similar dilemma when it comes to the usefulness of prison farms, the debate has a much milder history because the prison-industrial complex of the United States is far more intense, punitive, and racially. Canada's prison populations have risen in recent years,[64] but compared to the US, the percentage of the population that lives behind bars is relatively low. Canada's incarceration rate is 114 per 100,000.[65] The United States has an incarceration rate of 666 per 100,000.[66] Perhaps most importantly, the average sentencing period in Canada is just about four months, or 61 fewer than in the United States.[67] These realities, paired with our country's entrenched legacy of slavery and racism, make Canada's debate over prison farms inapplicable to the U.S. The uniquely "American" qualities of the U.S. prison system — size, racism, and harshness, to name a few — are exactly why there can never be a place for agriculture in the American systems of incarceration until we find a way to differentiate the practices in a meaningful way from our treacherous past. This conclusion follows the same logic used by this country's biggest patriots and loudest dissenters: there is no place on earth quite like the United States.

VIII. Conclusion

If one thing is clear from this paper, let it be this: the utilization of farms within correctional facilities is as complex as the soil that fuels these programs. On one hand, some prisons have programs where the imprisoned are producing food for themselves, usually in an attempt to get more fresh produce into prisoners' diets. In these cases, more often than not, prisoners are genuinely thrilled at the opportunity to spend time in nature. The ethics of calling for the removal of these strategies seem questionable; in a life so barren of freedom (and often justice), how can those of us on the outside ask to take away those small moments with nature? On the other hand, programs that use prisoners as extremely-low-paid farm labor to replace undocumented migrant workers are running the risk of re-instating slave labor for people of color, who predominantly make up the prison system. Some argue that the gardening skills are employable, and they certainly are, but employability helps no one when prior records are still included as a major factor in licensing procedures. Furthermore, any system that exploits labor in the name of profit, particularly in a historical context as racialized as farming in America, is too problematic to be seen as anything other than a modern rendition of slave labor.

While the intersection of black and brown imprisoned bodies and agriculture will always have negative connotations, the solution is not to keep environmental programs out of prisons all together. Such a "solution" would completely ignore all of the potential benefits — fresh air, sunlight, time in nature — that can come with a properly implemented farm-inspired reform program. The problem, then, is that the focus of these programs is just not in the right place. An emphasis on cost-efficiency, inherent to all of the discussed programs, degrades and dehumanizes the lives at stake. Centering sustainability in the prison system has its benefits, but environmental efforts are not enough: that focus needs to also

address the prisoners' quality of life. That means fair wages for prison workers, access to healthy produce, relevant agricultural certification programs, and the elimination of obstacles to re-entering the workforce. As it stands, agriculture in United States prisons is black and brown bodies sweating into dark dirt for someone else's gain — an American institution if there ever was one, but not an institution we should pretend is anything different from all that has come before it.

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The Religious Exemption: To What Extent Should Religious Organizations be Exempt from Civil Rights Laws?

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Abstract

The oldest civil liberty afforded to the citizens of the United States of America is religious liberty, the right to exercise one's faith free of persecution. From the disembarkation of the Mayflower Pilgrims at Plymouth Rock in 1620 to the Religious Freedom Restoration Act of 1993, religious liberty remains an integral aspect of American society, law, and politics. As societal norms unfolded, movements to encompass greater civil liberties captured the nation's attention. Yet, as more and more civil liberties were established and religion evolved from simple congregations into multinational organizations and affiliated academic institutions, clashes of ideology began to manifest cracks in the proverbial relationship between church and state. The question explored in this paper is to what extent a religiously affiliated organization should be exempt from adhering to civil rights statutes. The conflict arises between the nation's goals to protect the workplace from discrimination and harassment and the nation's tradition of protecting the religious liberty and autonomy of all citizens and organizations. In our legal system, can a balance be achieved between religious liberty and civil rights or are they mutually exclusive? Is it prudent to allow religious organizations to make employment decisions based entirely on race, gender, disability, or sexual orientation? At what point is there compelling government interest to mandate adherence to secular anti-discrimination statutes?
First, the article will explore the history of religion and civil rights law and analyze where exemptions exist and who they apply to specifically. Next, the article provides a legal analysis arguing against such exemptions based on legal precedent and statutes. Finally, in light of the development of absolute religious autonomy, an analysis of Brigham Young University, a religiously affiliated university, will be provided. The article will end with a brief conclusion about the state of the religious exemption.

I. Background

It is important to address what constitutes a religious organization and which faith-based establishments receive exemption from federal statutes. In order for any claimed house of worship to qualify as a religious organization, it must engage in the administration of sacerdotal functions and the conduct of religious worship in accordance with the tenets of a particular religious body.[1] A religious organization, in the context of employment, is defined as a private or public nonprofit enterprise that claims to be involved with a particular religion or system of beliefs, with an infrastructure base that distributes salaries to a cohort of employees. The number of employees necessary for the Civil Rights Act of 1964 to apply to any establishment is fifteen, therefore all religious organizations discussed must maintain said number of employees.[2] There is a pivotal distinction to be made between nonprofit and for-profit corporations and public and private entities. There is a particular distinction in the syntax. Nonprofit or not-for-profit does not mean without profit. It only denotes that the organization is devoted to charitable causes and not towards the acquisition of wealth. Both public and private non-profits receive the religious exemption. Private for-profit corporations can receive certain exemptions if their claim is not based on a pre-textual argument, whereas public for-profit corporations cannot. A public for-profit institution cannot prove loyalty to a particular faith because of the multitude of varying opinions.[3] In the recent Supreme Court ruling on *Burwell v. Hobby Lobby*,[4] the court stipulated that Hobby Lobby had the right to abstain from providing contraceptives to female employees if that would violate the owner's religious beliefs. Furthermore, because a single family privately owns Hobby Lobby, as opposed to a wide array of public shareholders, the Supreme Court ruled that their religious beliefs were legitimately applied to the rest of the company. This is one particular example where a for-profit organization received an exemption.

Moving to the other end of the spectrum, a private or public non-profit religious organization is defined to be committed consistently to a charitable mission and is thus eligible for the non-profit exemption.[5] However, there are opportunities for such an exemption to be abused. An example of this is the LDS church, which is purported to receive $7 billion annually, with assets ranging close to $35 billion, and engages in a wide array of profitable activities, including financing a shopping mall and apartment complex in Salt Lake City. Yet, they are still classified as a non-profit organization.[6] A particular area of discrepancy exists in relation to private religiously-affiliated universities, such as Brigham Young University or Notre Dame University. Although both universities are privately owned and operated, they are designated as public accommodations. Any individual can, theoretically, satisfy the admissions requirements and gain a place at the university.

In 1964, the United States Congress passed a Civil Rights Act that forever changed the nature of employment. Amongst the breadth and scope of the legislation was Title VII, which ensured that employers could not discriminate against individuals based on some innate characteristics, particularly religion, race, color, national origin, and gender.[7] Eventually, legislation was passed that provided protections for age, veterans' status, and disability. The chief legislative intent was to do away with arbitrary characteristics that prevented economic mobility. With regards to religious employers, a particular exemption was carved out to ensure that religious organizations maintained their autonomy with respect to occupational qualifications. Section 702 of Title VII grants religious organizations the right to discriminate in employment decisions where religion is an occupational requirement.[8] The logic follows that a Catholic organization should not be obligated to hire a Jewish minister on the pretext of equality. The issue to consider, then, becomes how far this exemption can extend. Since 1987, the consensus amongst the courts and various legislatures has been that religiously affiliated

organizations must receive absolute exemption from the aforementioned civil rights statute to avoid entanglement with the government.

The definitive case that allowed such exemptions to be granted was *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos* (1987), when Arthur Mayson, a nonreligious employee at a religious organization, was dismissed from his job for not satisfying certain religious conditions.[9] Mayson claimed that Section 702 violated the Establishment Clause of the First Amendment by allowing for discrimination by religious organizations against even those employees who did not require religious conditions to successfully meet job requirements. In a unanimous decision, the Supreme Court reasoned that the Establishment Clause attests only that the federal government cannot use legislation to advance the agenda of any particular religion or religion in general. All enacted statutes must promote a secular legislative purpose.[10] They found that Section 702 did not violate this because it does not rigidly define what constitutes a religious activity and allows individual religious organizations or irreligious groups to determine what they constitute as religious activity or worship. The *LDS v. Amos* decision gave religious organizations the right to define what constituted a religious activity and thus paved the way for pre-textual religious arguments to justify any discriminatory employment behavior with no repercussions from the federal government.[11]

The situation for employees was further exacerbated by the 2004 Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*.[12] Cheryl Perich had accepted a job as a teacher at Hosanna-Tabor. Her job included teaching secular subjects and a religion class. During her employment, Perich developed narcolepsy and left the school on disability leave. She was subsequently replaced by Hosanna-Tabor. When she filed an ADA suit with the Equal Em-

ployment Opportunity Commission, Hosanna-Tabor claimed the "ministerial exception", arguing that their status as a religious organization made them exempt from ADA employment suits.[13] In a unanimous decision, the court ruled that the plaintiff, Cheryl Perich, by accepting the job at Hosanna Tabor, was knowingly participating in a religious occupation and that her role in a religious organization outweighed any secular duties the job possessed or any protections offered by the Americans with Disabilities Act. The court failed to define what constituted a religious occupation, leaving it to the discretion of religious organizations.[14] Thus, Hosanna Tabor, and any religious organization thereafter, was justified in terminating employees for any reason.[15] This supersedes all forms of civil rights legislation, including the Americans with Disabilities Act of 1990, the Family Medical Leave Act of 1993, the Pregnancy Discrimination Act, and all other forms of civil rights statutes such as Title VII. The only protection that employees of religious organizations have is the threat of negative publicity. Over time, courts and legislators have broadened the scope of religious accommodations which threaten the fundamental rights of employees.[16] In order to assess the issue of religious autonomy and civil rights, analysis must be presented on legal arguments for the revocation of civil rights accommodations and methods for effective jurisprudence.

II. Legal Analysis

The central dispute in both *LDS v. Amos* and *Hosanna-Tabor v. EEOC* was the issue of the Establishment Clause. The clause, interpreted by the Supreme Court in *Lemon v. Kurtzman* (1971), prohibits establishment, entanglement, and endorsement of religion or irreligion by a governing body. The court's contention is that any form of regulation presents excessive entanglement on the government's part. This same argument has been used in justifying tax and licensing exemption status for nonprofit religious organizations.

Although religious organizations have protections under the First Amendment, their employees are not entirely devoid of constitutional protection, which reaches far beyond the Civil Rights Act of 1964. The constitutional provisions that allow for civil rights statutes are the Commerce Clause of Article 1 of the U.S. Constitution and the 14th Amendment. While the Commerce Clause is inapplicable to individual rights, the 14th Amendment forbids states from denying any citizen "life, liberty, and property," without due process of the law, and guarantees to all persons the "equal protection of the law." The issue then becomes a balancing act between separate fundamental rights: whether religious liberty or individual civil rights should be favored. A particular amendment does not nullify the rights granted by another. Religious organizations do not exist in a realm of their own and are still obligated to follow criminal statutes on the federal and state levels.[17] Since both religious freedom and civil rights are constitutionally valid, one right cannot be favored over the other, unless a compelling government interest exists that can be narrowly tailored.

The secondary issue presented by the Supreme Court is whether a governmental organization can step in and define what constitutes religion. It is argued that such an action is in direct violation of the Establishment and Free Exercise Clauses of the First Amendment. Textually this argument is valid; however, the notion of justifiable religious practice has been historically open to some governmental oversight. Certain religious practices are not legal and subject to a full criminal procedure. Practices such as human sacrifice, stoning, and polygamy are historically religious tenets that have been deemed criminal by the government.

Furthermore, religion has been used by defendants to justify actions that would be considered abhorrent today. In the *Loving v. Virginia*[18] decision of 1967, the circuit court of Caroline County validated their decision to convict Mildred and Richard Loving for interracial marriage by issuing the following statement: "Almighty God

created the races white, black, yellow, Malay and red, and he placed them on separate continents. Moreover, but for the interference with his arrangement, there would be no cause for such marriage. The fact that He separated the races shows that He did not intend for the races to mix."[19] Similar testimonies based on Judeo-Christian morals have been used in the jurisprudence of *Obergefell v. Hodges*,[20] *Lawrence v. Texas*,[21] and *Roe v. Wade*,[22] involving slavery, same-sex marriage, sodomy laws, and abortion respectively. The aforementioned activities were once considered immoral by religious organizations, who at various points attempted to block their legalization.

Likewise, an employee that performs a service for an organization is not necessarily endorsing the rules or beliefs of said organization. The same can be said of organizations. Referencing the 1996 U.S. 9th Circuit Court of Appeals case, *Tucker v. California Department of Education*,[23] the precedent was set by the court that allowing an individual the right to religious expression was not an institutional endorsement of religion. The reverse is applicable as well; the adherence to a particular set of laws is central to a functioning society and following the ordinances set forth by such laws does not correlate with formal endorsement and therefore does not damage the "liberty interests" of all religions. Thus, there exists a compelling government interest to protect the civil rights of its citizens and the rights of employees.[24]

A rebuttal can be made that the federal government is in direct violation of the aforementioned clauses of the First Amendment regardless of its position in jurisprudence. However, there is a marked difference in the treatment of nonprofit religious organizations and nonprofit secular organizations, which include irreligious organizations. Secular nonprofit organizations, such as American Atheists, are bound by all employment discrimination statutes and cannot disqualify or terminate employees, whereas religious organizations, such as the LDS Church, are free to forgo such statutes, demonstrating a double standard. Furthermore, the Church Audit Procedures

Act of 1984 makes investigation of the financial records of religious organizations much more difficult than that of a group such as American Atheists.[25] Religious organizations are not mandated to release financial documents or prove to the government that they are carrying out charitable work, as opposed to secular nonprofits.[26] The IRS has the power to ascertain the correctness of any federal tax return, to make a return where none has been filed, to determine the liability of any person or organization for any federal tax, and to collect any federal tax. However, the Church Audit Procedures Act of 1984 requires that before any inquiry can be made, the IRS must receive permission from a regional commissioner, give notice before conducting any investigation, and offer a pre-examination conference. In addition, the IRS is barred from making declaratory judgements and must conclude the investigation within a two-year window.[27] Such provisions are not available to secular organizations. Although they are not affiliated with a particular faith, atheism, agnosticism, and all manner of secular and irreligious beliefs are protected under the Establishment Clause of the First Amendment, and should be entitled to the same accommodations given to religious organizations. The U.S. government's inability to grant irreligious organizations the same legal protections as religious organizations demonstrates the discriminatory approach taken when granting accommodations.

The disparate impact of the tax code exemption and the civil rights law exemption establishes the precedent that the state and federal governments are endorsing a particular religion, while trying to expand U.S. plurality. In addition, since *LDS v. Amos*, the courts have created an "orthodoxy's right" out of the Establishment Clause,[28] which allows dismissal of any case brought about to challenge the employment practices of religious organizations.[29] Although the Supreme Court maintained the neutrality of the United States Federal Government in the application of legislation against religious organizations, it inadvertently created a system that places the beliefs of entities over the civil rights of individuals, creating an

endorsement for religion in general. This led to government directly aiding in the advancement of the principles of religious organizations, particularly Judeo-Christian moral values. Allowing religious organizations to operate outside the control of the law undermines the authority of the federal government. Furthermore, it destabilizes the purpose for which the law was enacted, and it strips United States citizens of their individual fundamental rights.

In addition, the *Hosanna-Tabor* decision brought about another issue of contention: the fundamental right of privacy and its relation to religious autonomy.[30] The exemption that *Hosanna-Tabor* provided delves much further into personal liberties than originally anticipated with *LDS v. Amos*.[31] Privacy as a fundamental right was established in the controversial decision of *Roe v. Wade*.[32] The Supreme Court contended that, although not explicitly mentioned in the United States Constitution, privacy was concealed within 'penumbras'.[33] Unless a compelling government interest is present, the right of citizens to privacy in their personal lives cannot be violated.[34] The same expectation is present, yet unfulfilled in this scenario. Although *LDS v. Amos* and *Hosanna-Tabor v. EEOC* give religious organizations the right to determine what constitutes religious fulfillment, they have created precedent for decisions based on political and personal ideology under the pretext of religion. In religious organizations, employees can be reprimanded for all manner of activities deemed inconsistent with the church, a primary example being sexual promiscuity, the right to control one's body as one sees fit.[35] The trend becomes a migration of the workplace into the home and grants religious employers unprecedented access to personal activities. It becomes yet another permitted violation of the Civil Rights Act of 1964, by allowing constant harassment of employees about their personal lives, including matters that have no impact on job performance. The violation of individual rights creates what the workers in the 2005 case, *Lown v. Salvation Army*,[36] described as a hostile work environment, which intruded upon the employee's

religious and personal practices. The Salvation Army implanted inquiries into the sexual lives of their employees.[37] Religion is a private activity, but employees are subject to their employer's religious principles regardless of their function for the organization.

This impediment that employees of religious organizations face, in relation to their personal lives, also pertains to the First Amendment, particularly the Free Exercise Clause. The clause, as it has come to be interpreted, stipulates that congress shall make no law prohibiting the free exercise of religion, unless a narrowly tailored compelling government interest can be demonstrated. Historically, government has regulated the free exercise of individuals and religious organizations, most notably in *Reynolds v. United States*,[38] where the Supreme Court upheld the federal statute prohibiting polygamy. The trend that emerges here is the reshaping of religious values to fit both societal and legal concepts of civility. Of course, a private religious organization has the right to limit the religious observances of its employees; however government has as much a compelling interest to protect the religious freedom of individuals as it does organizations and to enforce statutes that promote civil equality. As in the case of *LDS v. Amos*, hiring an individual that does not conform to the church's ideology to maintain a secular-use building results in negligible interference with religion.[39] "No LDS leader would assert that a gymnasium is central to Mormon ideology. By ruling in favor of the LDS church, the Supreme Court gave preferential treatment to the free exercise of organizations over individuals."[40] What follows is an elevated status for religious organizations, above both irreligious organizations and individual freedoms, such as privacy and independent religious exercise.

III. The Case of Brigham Young University

Within the realm of exemptions, the most controversial is the religiously affiliated academic institution, chief among them

Brigham Young University. It is important to note that other religiously affiliated universities such as Notre Dame or Georgetown University do not operate as BYU does and are bound to such federal statutes as the Civil Rights Act of 1964, the ADA, FMLA, and PDA. Because of its size and budget, BYU is not obligated to adhere to any of the aforementioned statutes and possesses the right to dismiss professors and expel students for a wide array of reasons.[41] In order for a student to be admitted to BYU, they must first receive an ecclesiastical endorsement.[42] An endorsement is received from a bishop of a ward or a local ecclesiastical leader and this policy is applied to members of different faiths as well. It is not explicitly mentioned how a student may receive or the conditions for which they may lose their ecclesiastical endorsement. If a student does lose their endorsement, disaffiliation from the university occurs and the student is removed from BYU's records.[43]

In conjunction with the ecclesiastical endorsement is BYU's Church Educational System Honor Code. Similar to BYU's unique position among academic institutions, its honor code is constructed primarily around the tenants of the LDS Church.[44] The Honor Code of Notre Dame University and many other religious universities are centered entirely on an academic honesty policy, extending no further than discouraging plagiarism and academic dishonesty.[45] BYU's Honor Code extends much far beyond and is broken into varying sections including, the Academic Honesty Policy, the Dress and Grooming Standards, the Residential Living Standards, and the Continuing Student Ecclesiastical Endorsement, while adhering to the Honor Code statement and rules of conduct.[46] The Honor Code statement encompasses the moral virtues of the LDS church: Be honest; live a chaste and virtuous life; obey the law and all campus policies; use clean language; respect others; abstain from alcoholic beverages, tobacco, tea, coffee, and substance abuse; participate regularly in church services; encourage others in their commitment to comply.[47] Sexual misconduct and obscene or

indecent conduct or expressions, disorderly or disruptive conduct, participation in gambling activities, involvement with pornographic, erotic, indecent, or offensive material, and any other conduct or action is inconsistent with the principles of The Church of Jesus Christ of Latter-day Saints and is not permitted.[48] Furthermore, standards of conduct also include daily grooming rituals, including that male students are expected to be clean-shaven, although exceptions can be made for medical reasons.[49] BYU has recently garnered public outcry for its handling of sexual assault cases. A student who is the victim of a sexual assault can be dismissed from the university for violating the honor code.[50] Under the very same system, a member of the LDS cannot convert to another religion, if they choose to, they will lose their admission or their job.[51] This brings forth the notion of harassment, along with objective job criteria, disparate treatment, and religious freedom issues. Through the proxy of ecclesiastical endorsements, BYU enforces policies that disparately burden LDS students who may be at odds with the tenants of their faith and places undue hardship on students of other faiths who attend the university. Similarly, employees that perform purely secular tasks are still subject to BYU's honor code.

The guidelines stated apply to appointed faculty, staff, and visiting students and the very same standards are functioning at BYU-Hawaii, BYU-Idaho, and the LDS Business College. Failure to adhere to any standard mentioned may result in expulsion from the university.[52] The last mandate of the Honor Code is one of the most controversial: the policy towards homosexual behavior. The official statement of BYU is not opposition towards homosexuality, instead towards homosexual activities.[53] Similar to the sodomy laws of *Bowers v. Hardwick*[54] and *Lawrence v. Texas*,[55] BYU explicitly bans all forms of homosexual behavior, which includes sexual relations between members of the same sex, and all forms of physical intimacy that give the expression of homosexual feelings.[56] Because sexual orientation is not a protected class under the

Civil Rights Act of 1964 and no Utah State protection statutes exist, any corporation, religious or otherwise, is well within its rights to discriminate based on sexual orientation. However, should sexual orientation become a federal protected class, would BYU be given yet another exemption? The historical answer has been a resounding no.

The first significant civil rights dispute involving a religiously-affiliated university occurred in 1971 with Bob Jones University, a non-denominational Protestant university, known for their conservative ideology.[57] In 1971, the university began admitting married African-American students and in 1975, unmarried students, while enacting a policy that prohibited any form of interracial intimacy. In the wake of the 1967 *Loving v. Virginia*[58] decision, interracial marriage became a fundamental right, and the Internal Revenue Service revoked Bob Jones University's tax-exempt status on the grounds of the university's discriminatory policies.[59] The lawsuit that ensued led the Supreme Court to rule in an 8-1-0 decision, that the IRS was within its legal authority to strip Bob Jones of its 501(c) (3) tax exemption.[60] The court cited that it "would be wholly incompatible with the concepts underlying tax exemption to grant tax-exempt status to racially discriminatory private educational entities. Whatever may be the rationale for such private schools' policies, racial discrimination in education is contrary to public policy. Racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the above "charitable" concept or within the congressional intent underlying 501(c) (3)."[61]

The Bob Jones ruling is not the only example of the U.S. government favoring civil rights over religious conservative ideology. In *Coit v. Green*,[62] the Supreme Court rejected as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment the use of tax grants to allow only white students to attend private schools in opposition to desegregation in the aftermath of

Brown v. Board of Education.[63] [64] In terms of racial discrimination, the Supreme Court has not directly ruled against religious interests, however, they have acknowledged that a compelling government interest exists in prohibiting racial discrimination. In the case of BYU, regardless of the fact that sexual orientation is not a protected class, the ability to carry out relationships and the fundamental right of marriage was won by homosexual persons in the landmark *Obergefell v. Hodges*[65] decision.[66] BYU's policy against homosexual relationships and residential living standards, which bar homosexual couples from living together, violate common law interpretations of charity. Revocation to their tax-exempt status would not be a violation of the Establishment Clause of the First Amendment. Identical legal reasoning justifies the application of employment civil rights statutes to religious organizations. A compelling government interest exists, as did in *Bob Jones University v. United States* and *Reynolds v. United States*, to promote equality and dispel discrimination and harassment, regardless of its effect on any religious denomination.[67]

The only protected class the IRS has acted on to date is race, leaving all others to the mere threat of negative publicity. This is the reason that BYU's equal opportunity office is so insignificant. Conversely, Notre Dame is not given the same exemptions as BYU, due to its sheer size and the amount of government funding it receives. Yet, BYU toes this line; refusing expansion in order to preserve the right to refuse employment to those who do not share the same ideology. Apart from the standard 501(c) (e) tax exemption, BYU also receives Pell Grants from the federal government. Due to this method of funding, BYU is required to adhere to Title IX of the Education Amendments Act, which prevents any health plan from engaging in gender-based discrimination.[68] Receiving a tax exemption is akin to reverse welfare, where the government is not investing money into BYU, but it is forgoing income on BYU's behalf. If gender equality can be established

through the distribution of Pell Grants, then, in theory, reversal of tax exemption should justify mandating equality in employment. Concurrently, it is pertinent to mention BYU's struggle to receive accreditation from the Northwest Commission on Colleges and Universities. One of the principle guidelines for accreditation is that the university in question adheres to section 2.A.18, which states: "the institution maintains and publishes its human resources policies and procedures and regularly reviews them to ensure they are consistent, fair, and equitably applied to its employees and students."[69] BYU's discriminatory Honor Code stands in the way of maintaining fair and equitably distributed civil rights. Although this may create a cornelian dilemma for BYU, the NWCCU seeks to promote the welfare of students and employees at all the institutions it monitors, and similar to the IRS, may use this power to achieve employee civil rights at BYU.

Referring back to the Civil Rights Act of 1964, exemptions exist for jobs, if the central role of the job was religious. The provision in the Civil Rights Act of 1964 granting exemptions based on specific job criteria can be applied to analyze BYU's exemptions and define the central role of a religiously-affiliated university. Referring to *Wilson v. Southwest Airlines Co.*[70] and the recent *EEOC v. Abercrombie & Fitch*,[71] the Supreme Court ruled that although an organization can have a self-identified "Look Policy" to regulate physical appearance of employees, the hiring requirements must be based on bona fide occupational qualifications, skills necessary to perform the task.[72] Any such policy enacted by a corporation cannot have a disparate impact on a protected class of individuals. The same logic follows for employers with religious affiliations, particularly BYU. Similar to the aforementioned cases, BYU's central goal is educating students in preparation for a career in the real world, whether it has a religious affiliation or not. In the 1990s, six professors were fired from BYU for their support of feminism and women's rights.[73] In 2006, a philosophy professor

was fired because of his support for gay marriage.[74] BYU's trend of firing professors borders closer to political conservativism than religious ideology. However, even if a religious argument is used at BYU, the central aim of professors is still to provide students with knowledge. Therefore, not conforming to the institution's ideology does not actually prevent an individual from performing their job, whether they be faculty or staff.

Furthermore, allowing an institution such as BYU to forgo employment discrimination statutes paves the way for workplace harassment. In the case of a university, privacy is the concept of academic freedom, which includes the right to publish papers and criticize the establishment without fear of retribution. Being a private university, BYU does not have to adhere by any of these standards. However, there exists a compelling government interest in the promotion of free speech and religious tolerance, not just for BYU's hired professors, but its students as well. The mere right of possessing the ability to discriminate and harass in employment based on protected classes should constitute a violation of charitable constructs.

Many times, the quarrel between religious liberty and civil rights has led to debates that question the reason behind applying such statutes to religious organizations. Why don't individuals uncomfortable with such policies attend a different school or work for another organization? Of course, such arguments are valid, but only in theory. In a place like Provo or Salt Lake City, the LDS Church is unavoidable. The church is involved in a number of non-profit and for-profit businesses throughout the United States and employs paid individuals in a variety of jobs via everything from the LDS Temple to the City Creek Shopping Center in Salt Lake City.[75] This influence spreads much further when you consider contracted workers who are subjected to ideologies they have no interest in, as was the case in *Lown v. Salvation Army*.[76] From a historical standpoint, the United States has strived to protect

the rights of the minority. From *Brown v. Board of Education* to *Obergefell v. Hodges*, the civil liberties of citizens have been protected to advance the greater good, regardless of popularity. Without sufficient protection of the rights of the minority, oppression over the minority populace would ensue and the will of the majority, however tyrannical, would rule.

IV. Conclusion

Recently, rhetoric has emerged which suggests waging a war on religion. From an employee's perspective, this could not be further from the truth. Repeatedly, the United States Supreme Court has expanded the civil rights exemptions received by religious organizations. The history of the United States is rooted in plurality, however, the question must be posed: To what extent should religious institutions be exempt from regulation, and if they do abuse exemptions, how should this be dealt with?

One solution may be to grant exemptions only if they are consistent with objective job criteria. For religious organizations, exemptions towards employment practices can range no further than purely religious jobs, such as the roles of bishops and rabbis. A government can only eradicate employment discrimination and harassment by holding all persons and corporations to the same standard. Use of one fundamental right to veto others and the stagnation of compelling government interest have given way to unprecedented religious autonomy. In the digital age, religious organizations are no longer local churches. They have evolved from small congregations to international associations with revenue, assets, and thousands of employees. As shown in the case of BYU, religion can be used as a pre-textual argument to justify and advance a particular agenda, which can overshadow the sole function of an institution. Creating a perpetual state of harassment and discrimination is not conducive to efficient functioning of employ-

ment or academic instruction.

There is no true definition of democracy, only how we interpret it. Confrontation and disagreement are necessary, but so is the ability to accommodate all people. Religious organizations can still maintain self-governance, whilst they respect the rights of those who perform compensated secular tasks. President Harry S. Truman famously said that "every segment of our population, and every individual, has a right to expect from their government a fair deal." If our government begins to favor certain organizations and strip away the rights of others, we risk damage to our democratic republic's basic principles of equality and freedom for all peoples.

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The United States' Withdrawal from the Paris Agreement and its Implications

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Abstract

The issue of climate change, and how best to address it, has been at the center of controversy for decades. In order to tackle this expansive problem, many countries have tried to enact laws and regulations at the domestic level. However, it eventually became clear that the colossal nature of the problem would necessitate a collaborative international effort and that the success of such an effort would require the participation of particularly those countries that emit the greatest amount of greenhouse gasses (GHGs). In recent years, the goal of mitigating climate change has gained momentum on the international stage, leading to the negotiation of the Paris Agreement. However, the Trump administration's sudden announcement in June 2017 that it would withdraw the United States from the Agreement delivered a tremendous blow to the international community, as the United States is the second largest emitter of GHGs. U.S. President Donald Trump's retrogression on the issue of climate change triggered a number of questions regarding the legality of pulling out of an executive agreement and the United States' rightful role in protecting the environment. This article first explores the manner of admittance of the United States into the Paris Agreement. Second, it describes President Trump's justification for withdrawing the United States from the Agreement and analyzes the legality of this potential action. Third, it delves into the various implications of such a withdrawal upon climate change, with a particular focus on the effects on developing countries. Lastly, this article examines the likelihood of the United States rejoining the Agreement and the ways in which local governments and businesses have stepped up in the interim to help mitigate climate change.

I. Introduction

Although it is now evident to many scientific experts that climate change is an important phenomenon that is intrinsically linked to people's lifestyle choices, it is an issue that policymakers have failed to appropriately address for quite some time.[1] After years of ignoring the issue of climate change, in 1988, the United Nations (UN) formed the specialized body titled the Intergovernmental Panel on Climate Change (IPCC), in hopes of formulating strategies that would mitigate the negative long-term effects of global warming.[2] Specifically, the IPCC was tasked with preparing comprehensive reviews of the risks associated with human-accelerated climate change, its potential impacts, and alternatives to fossil fuels. Importantly, the reports that originated from the IPCC's sixth assessment cycle provided some of the data and research for the Paris Agreement, which was created under the UN's Framework Convention on Climate Change (UNFCCC).[3]

The first Assessment Report of the IPCC played a vital role in shaping the UNFCCC, an international environmental treaty. Adopted in 1992 at the Rio Earth Summit, the UNFCCC recognized the problem of climate change, and has been praised particularly for addressing the question of how to balance the need for environmental protection with the developmental goals of various states. The UNFCCC outlined general obligations for countries to meet and established the specific objective of stabilizing the amount of GHG emissions flowing into the atmosphere.[4] At the same time, rather than creating mandates for reductions in GHG emissions, the UNFCCC allowed states to independently assume the responsibility of setting their own goals.

In 1997, the Kyoto Protocol was signed, more firmly establishing the commitment of particular countries to achieving the emissions reduction targets set forth by the UNFCCC.[5] Those countries were given the flexibility to choose the methods that they

wanted to adopt in order to meet those targets.[6] The Protocol was legally binding for all of its signatory parties; however, the developing countries that signed the Protocol were exempted from the requirement of meeting the mandatory targets for reducing GHG emissions.[7] However, one year after the Protocol came into effect, it became clear that the agreement would be unsuccessful, as many of the participating developed countries did not succeed in fulfilling their mandatory obligations. This failed attempt at reducing GHG emissions led world leaders to negotiate another international agreement that consisted of more flexible targets for the signatory states.

II. Mitigating Climate Change Through the Paris Agreement

Subsequently, the Paris Agreement was adopted on December 12, 2015.[8] While the Agreement requires the signatory parties to meet Nationally Determined Contributions (NDCs), these obligations can be altered at a country's request.[9] The specific objectives of the Agreement were enshrined under Article 2 of the Agreement, and they include maintaining the increase in global temperature below 2°C per year and increasing the ability of countries to adapt to the adverse effects of climate change.[10] Significantly, the Paris Agreement is the first of its kind to bring 195 states together for the common cause of reducing GHG emissions.[11] This Agreement attempts to shift away from the categorical differentiation of Annex 1 (developed countries) and non-Annex I (developing) countries that was present in the Kyoto Protocol.[12] Rather, it bestowed the responsibility of abating climate change upon all signatory parties, including developing states, by adopting NDCs. The Agreement sets forth the following strategy for mitigating climate change: first, the developing countries that signed the Paris Agreement are to undertake rapid reductions of GHGs once they reach a certain level of emissions.[13] Second, the Agreement seeks to

maintain transparency and accountability among its parties. It does so by requiring the parties to submit their emission inventories and information to facilitate the tracking of the progress of each state in accomplishing its national target. Third, the Agreement mandates that the developed countries support the developing countries, financially or otherwise, in achieving the latters' long-term goals.

Under the Obama administration, the United States announced that it would provide $3,000 million towards the Green Climate Fund, a financial mechanism under the UNFCCC, in accordance with the decision at Marrakech Climate Change Conference to mobilize $100 billion annually by 2020.[14] Out of this amount, during his last term in office, President Obama transferred $1,000 million towards the Green Climate Fund in order to begin fulfilling the United States' obligations under the Agreement.[15] Moreover, the United States pledged to double its grant-based climate finance by 2020, thus promising an increase of more than $400 million towards annual climate adaptation finance, or finance for the purpose of helping developing countries adapt to climate change and strengthen their own climate resilience.[16] Because of the negative effect that withdrawing from this financial commitment will likely have on the ability of developing countries to tackle climate change themselves, the international community is concerned with President Trump's intention to withdraw the United States from the Paris Agreement.[17]

III. The Rational for a U.S. Withdrawal from the Paris Agreement

The United States, one of the developed country parties to the Paris Agreement, is one of the major contributors of GHG emissions.[18] Arguably, the United States should thus be more active than other signatory parties in addressing climate change. However, President Trump opposes this notion, arguing that the Agreement

puts excessive pressure on America to reduce GHG emission levels and fulfill the national targets set by his predecessor.[19] One of the main aspects of the Paris Agreement that the Trump administration opposes is the disparate responsibilities that developed and developing countries are expected to take on. President Trump alleged that the Paris Agreement is too accommodating to the non-Annex I countries like India and China, as it allows them to continue building coal plants and permits them to choose not to contribute financially to the Green Climate Fund.[20] Because the Paris Agreement does not give developed countries, such as the United States, such flexible treatment, President Trump contends that American coal sector jobs would get transferred out of the country and to developing countries, thus placing a tremendous financial burden on the United States.

Additionally, President Trump has argued that even if the United States fully complied with its obligations under the Paris Agreement, the actions that it could take to reduce GHG emissions would not make a significant positive impact on the environment as a whole. Specifically, the United States is expected to lower the atmospheric temperature by only two tenths of one degree Celsius by 2100.[21] As President Trump stated, "14 days of carbon emission from China would wipe out gains from America's expected reductions in 2030, after having spent billions of dollars, lost jobs, closed factories and suffered higher energy costs for our business and homes."[22] Further, President Trump is against the provision of the Agreement that states that developed countries will pay $100 billion per year, because he believes that the United States does not have the means to do so, as the country is $20 trillion in debt and millions of its people are unemployed.[23] Ignoring the potential long-term benefits of investing in sustainable energy, President Trump refused to invest billions of dollars in the Green Climate Fund.[24]

However, the majority of signatory countries have a different outlook on the Paris Agreement. Other parties have stated that the Agreement is in fact balanced.[25] They argue that it caters to the

specific needs of both developed and developing countries around the globe. For example, since all of the parties to the Agreement have differing financial circumstances, it was necessary to adopt the principle of common but differentiated responsibilities. The Paris Agreement mandates that each signatory party takes measures towards mitigating climate change, but allows each country to exercise discretion in choosing a method for doing so, as per their respective capabilities. Since the United States is one of the major emitters, under the Agreement, it has taken up the responsibility of maintaining reduction targets and providing financial contribution proportionately, and, importantly, it can choose to alter these responsibilities. However, despite the justification of the Paris Agreement that developing countries have put forth, the Trump administration does not find the terms of the Agreement acceptable.

IV. The Procedure of U.S. Admittance into the Paris Agreement

During the negotiations of the Paris Agreement, its legally binding nature was a major concern for the United States. The Obama administration conveyed that the United States could not be party to the Agreement if the obligations were binding in character, since President Obama knew that there were not enough votes for the Agreement in the Senate for it to be passed as an Article II Treaty. Hence, a slight change was made to the final text of the Paris Agreement at the last moment to keep the United States on board.[26] The French Prime Minister, Laurent Fabius, led the effort to make sure that the United States would sign the Agreement. He brought forth a technical revision to Article 4 paragraph 4 of the Paris Agreement.[27] Thus, the mandatory compliance of country targets under Article 4 was made optional by changing the term "shall" to "should" in order to accommodate the interests of the United States.[28]

In this way, the summit tasked with drafting the Paris Agreement concentrated on catering to the needs of the United States

rather than negotiating the Agreement on terms more in line with the preferences of developing countries. The signatory parties did this in order to ensure that the United States, a major emitter, would remain as a party to the Agreement. Consequently, the summit formed a procedural agreement by removing the substantive obligations that the U.S. government had found to be unacceptable. This act was criticized by other nations since it was done secretly, rather than as a general objection from the floor.

President Obama signed the Paris Agreement as an executive agreement, rather than as an Article II Treaty by exercising his presidential power. Under municipal law of the United States, there are two types of international agreements, each with its own procedure for ratification. The first type is an Article II Treaty, which requires Senate ratification by a super-majority i.e. two-thirds of the Senate.[29] The other type of international agreement is an executive agreement, which can be established as a congressional-executive, treaty-executive, or presidential-executive agreement.[30] President Obama exercised his authority to sign the Paris Agreement as a presidential-executive agreement, using the President's independent constitutional authority over external affairs of the State to legitimately sign the Paris Agreement without Senate approval.[31]

However, such constitutional authority of the U.S. President can be exercised only under a few conditions. First, when signing the agreement mandates the country to take an action that is in accordance with existing domestic laws. Second, when the agreement solely calls for non-binding commitments, it need not be ratified by the Senate. Lastly, when there is no obligation upon the United States to release finances towards any fund relating to the agreement. Thus, had the obligations been mandatory under the Paris Agreement, it would have required Senate approval, since the content of its provisions are not already part of U.S. domestic law. Thus, while the final draft was amended as a 'technical error' to replace the term 'shall' with 'should' under Article 4, in actuality, this change was made so

that the Agreement could bypass Senate approval in order to ensure that the United States could join it as a signatory party.[32]

V. Withdrawal Procedure of the United States from the Agreement

Under international law, there are various methods of withdrawing from international agreements and treaties.[33] One method consists of the operation of one of the provisions of the treaty or resorting to the provisions of a parent treaty which, in this case, is the UNFCCC.[34] If no withdrawal clause is provided in either of the documents, then the Vienna Convention on the Law of Treaties acts as a means of last resort.[35] In accordance with Article 28, the withdrawal provision of the Paris agreement, a party to the Agreement may withdraw by giving written notification to the Depositary at any time after three years from the date on which the Agreement has come into force for that party.[36] Any such withdrawal shall take effect one year from the date that the Depositary received the notification of withdrawal, or on a later date as may be specified in the notification.[37]

On June 1, 2017, the United States invoked Article 28 in order to withdraw from the Agreement, but its withdrawal will not be official until November 2020.[38] What this action means for the United States, at the moment, is that the country can refrain from participating in meetings or further sessions of the Conference of the Parties.[39] It may also cease to work towards fulfilling its national targets or NDCs under the Agreement. Furthermore, the United States no longer must make contributions towards the Green Climate Fund, as it was expected to do as per the provision that developed countries would raise $100 billion.

VI. A Domestic Law Justification of a Potential U.S. Withdrawal

In line with his "America First" doctrine, President Trump decided to withdraw the United States from the Paris Agreement, as he determined that its short-term costs to the U.S. economy would outweigh its long-term potential benefits of slowing down climate change and increasing climate resilience around the globe. While it is likely that the withdrawal of the United States from the Paris Agreement will reduce the effectiveness of the Agreement, as the United States is the second largest emitter of GHGs and a wealthy developed country, it is important to acknowledge that several precedents in U.S. domestic law demonstrate that President Trump has the legal right to decide to withdraw the United States from an agreement of this nature, at least, until the Supreme Court decides otherwise.

U.S. law states that if the Senate has not ratified or approved the actions of the former President, then his successor can modify or decide not to be bound by it.[40] Additionally, any international agreement can be terminated either by an executive action of a future president, or by a future enactment by Congress that is inconsistent with the provisions of the treaty, irrespective of the method of ratification or approval.[41] Thus, both Article II Treaties and executive agreements can be withdrawn, even though an Article II Treaty is less likely to be, given that it is enacted with more political support than a presidential executive agreement. However, the Supreme Court has not yet determined the constitutionality of these U.S. domestic law principles, as it has not made a clear decision on whether a President needs the approval of the Senate before unilaterally nullifying an executive agreement or an Article II treaty.[42]

In its decision in the 1979 case *Goldwater v. Carter*, which arose after Senator Barry Goldwater and other members of Con-

gress challenged the right of President Jimmy Carter to nullify an executive agreement called the Sino-American Mutual Defense Treaty, arguing that to do so, the President required Senate approval, the Court ruled to dismiss the case.[43] By doing so, the Court left the question of whether or not a President can unilaterally withdraw the United States from an international treaty unresolved, effectively allowing future administrations to follow in President Carter's footsteps. Further, this precedent of U.S. leaders pulling the country out of international agreements was reinforced by President George W. Bush's withdrawal of the United States from the Kyoto Protocol in 2001, which did not result in any legal repercussions for his administration.

VII. International Law Implications of a U.S. Withdrawal from the Paris Agreement

Although President Trump's withdrawal of the United States from the Paris Agreement abides by U.S. domestic law, this action is likely to have many repercussions internationally. Under international law, there are certain underlying cardinal principles that, if breached, destroy the essence of treaties. First, scholars have agreed that the Principle of the Common Concern of Humankind (CCH) plays a significant role in the development of international agreements. International law scholar Dinah Shelton writes that "the issues of common concern are those that inevitably transcend the boundaries of a single state and require collective action in response."[44] This concept has been incorporated into the Preamble to the UNFCCC in the hopes that countries would collectively fight the issue of climate change.[45] CCH is a powerful mechanism that is supposed to facilitate the collaboration of states on issues of mutual importance, such as climate change. Thus, the United States' withdrawal from the Agreement dilutes the value of this cardinal principle by putting its own short-term econom-

ic interests first and therefore deemphasizing the urgent need to address the global problem of climate change. Further, the United States' declaration that its own interests are more important than a collective interest in protecting the environment may provoke other major developed countries to withdraw from the Paris Agreement using similar justifications. This will decrease the likelihood that the Agreement would achieve its objective of lowering overall GHG emissions.

Second, the Paris Agreement has been negotiated under the aegis of the UNFCCC, which is partly based upon the principle of Common but Differentiated Responsibilities (CBDR).[46] In relation to the Paris Agreement, this principle acknowledges that some countries, due to their population size and state of industrialization, contribute more towards climate change than other countries, and thus those countries should take responsibility for the fact that the entire international community is forced to reckon with the significant amount of GHGs that they emit. This principle is particularly relevant to the United States, as it is one of the primary polluters, and thus this concept suggests that it should have a greater responsibility to curb its GHG emissions. The principle of CBDR, which the Trump administration has objected to, appears in the Preamble and in Article 4 paragraph 3 of the Paris Agreement. Under Article 4, "each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."[47] The withdrawal of the United States from the Paris Agreement signals an unwillingness of President Trump to sacrifice fulfilling his country's proportional share of responsibilities for protecting the environment for a supposed short-term economic benefit that may be gained by exploiting the United States' non-reusable domestic energy resources.

Third, the Principle of Good Faith (Pacta Sunt Servanda) played a part in the creation of the Paris Agreement. This maxim, which was enshrined under the Vienna Convention on the Law of Treaties,[48] states that every treaty is binding for its signatory parties and must be performed in good faith.[49] By signing the Paris Agreement, the United States essentially became bound to the good faith obligation, from the perspective of the international community, and therefore, the United States' withdrawal from the Agreement represented a breach of this obligation. The United States' withdrawal from the Agreement has significant implications for the principles that lay the foundation for international agreements, as it has demonstrated that these principles are rarely enforceable on a practical level.

Lastly, the principle of Sustainable Development is essential to international efforts to mitigate climate change. This principle is understood as the "development which meets the needs of the present generation without compromising the ability by future generations to meet their own needs."[50] The principle of Sustainable Development is relevant to the Paris Agreement because the Agreement tailored its obligations to the varying present conditions of its signatory parties by distinguishing between developed and developing states. By pulling the United States out of the Agreement, President Trump has essentially refused to form a compromise between the needs of America's current generation and those of future generations, as the increasing prevalence of GHGs in the atmosphere will continue to increase temperatures around the world. As one of the world's major emitters of GHGs, according to the international Principle of Sustainable Development, the United States should take a larger role in combating climate change in order to ensure the future security of its own citizens, as well as people around the world.

VIII. The Impact of a U.S. Withdrawal from the Paris Agreement on Developing Countries

By joining with developed countries and entering the Paris Agreement to combat the serious issue of climate change, many developing countries have assumed the responsibility of striving to reduce GHG emissions and maintain national targets. Although it is not mandatory for developing countries to meet NDCs until they reach a predetermined peak amount of emissions or to contribute financially towards the Green Climate Fund, some developing countries have chosen to do so, understanding the necessity of reducing atmospheric temperature and investing in reusable energy.[51]

Since the United States is the second largest contributor of GHG emissions, its withdrawal would likely make it significantly more difficult for the signatory parties to the Paris Agreement to fulfil the primary goals of the agreement.[52] When the United States withdrew from the Kyoto Protocol in 2001, the target by different state parties had to be altered to compensate for the gap created,[53] and the differences between the old and new targets within the Kyoto Protocol were remarkably high.[54] It can thus be inferred that a similar shift will occur within the Paris Agreement, and that the countries that are still committed to the Agreement will likely be unable to meet their higher targets in order to compensate for the United States' rescindment of its commitment to reduce GHGs.

The United States' withdrawal from the Paris Agreement will also decrease the likelihood that the Agreement will be successful in reaching its financial contribution goal. The developed countries (Annex 1), including the United States, pledged to mobilize $100 billion annually by 2020 for the Green Climate Fund.[55] The highest contributor to the Green Climate Fund was originally supposed to be the United States, which, under President Obama, had announced its plans to contribute $3,000 million.[56] It is unlikely that any other countries, especially developing countries,

would be equipped to compensate for this loss in promised funds, as there is a significant difference between the amount of financial aid that the United States pledged and the amount that other countries' promised to contribute.[57] Moreover, the Agreement provided incentives for using greener technologies like non-carbon emitting resources, solar and wind power, and geo-thermal resources.[58]

Along with reducing GHG emissions and contributing financial support, developed signatory parties also committed to cooperating on technological development and the transfer of technologies to developing countries. Unfortunately, the United States' withdrawal from the Agreement will likely hinder these efforts to use technology to facilitate climate resilience. In line with Article 7 of the Paris Agreement, President Obama's administration transferred technologies that could be useful in fighting climate change to developing countries.[59] In addition to the U.S. government, private firms in the United States also transferred technologies, while still retaining copyright protection, to developing countries, in accordance with the UNFCCC's Technology Mechanism.[60] However, after the withdrawal of the United States, such assistance would end. Even though the Green Climate Fund cleared several projects that are aimed at combatting climate change in the developing world, which would cost $745 million in total so far,[61] many of these projects deal with technologies in nascent stages of development that will no longer receive their needed funding because of the United States' withdrawal. Along with providing financial and technology support, the developed countries are also mandated to help the developing countries to implement the provisions of the Agreement in an effective manner. Developed countries, including the United States, are also required to provide transparent and consistent information for the developing country parties biennially[62] in order to help them implement adaptation and mitigation strategies.[63] In addition, the United States was tasked with helping developing countries with training and public awareness regarding

the problem of climate change.[64] Thus, the United States' withdrawal will have significant negative implications for the developing signatory countries, since they will lose one of their most powerful support systems.

Further, in addition to international implications, it is important to acknowledge that withdrawing from the Paris Agreement will likely have negative consequences for the United States. First, by withdrawing from the Agreement, the United States has essentially decided to stand beside Syria and Nicaragua, the only two countries that have not signed the Paris Agreement, and the regimes of both of these countries are known for their many human rights abuses.[65] Furthermore, by abandoning the Agreement, it is possible that the multilateral trade system of the United States would be hampered since many of the United States' trade partners support the Paris Agreement. President Trump's decision could worsen the United States' trade relations with other countries, thus having detrimental effects and lessening the United States' economic power vis a vis China, a growing economic power that could establish even better trade relations with the other signatory parties. Additionally, the economic deterioration that could result from the Paris Agreement may end up costing the United States more money than it may gain through exploiting its domestic oil reserves, since the costs of recovering from the devastating effects of climate change in the long-term may result in the United States paying more than it would in the short-term, if it decided to follow the provisions of the Agreement. In the same vein, it is possible that investing in the Paris Agreement, and particularly in the sustainable technologies that the Green Climate Fund provides for, might be more cost beneficial than pulling out and needing to account for the effects of climate change at a later date.

IX. Ramifications of a U.S. Withdrawal on the Paris Agreement's Effectiveness

The main objective of the Paris Agreement, which is to limit the increase in atmospheric temperature to 2°C or less, would likely be unattainable without the United States' commitment to meeting its responsibilities as a signatory party to the Agreement, since the United States is the second biggest carbon emitter after China. Climate Interactive, a renowned not-for-profit organization based in Washington DC, statistically determined the damage that would be caused as a result of the United States' withdrawal from the Paris Agreement. Climate Interactive found that:

> First, if the US pulls out and reverts to an emissions-as-usual strategy but other countries maintain their current pledges, Climate Interactive calculates that by 2025, the US would emit 6.7 gigatons of CO2 instead of the 5.3 gigatons of CO2 that would be emitted if the US follows its commitments; Second, if Paris pledges are followed by the world but not improved on, Climate Interactive calculates that by 2100, the world will be 3.3°C warmer than in pre-industrial times; Third, if the world were to drop the Paris agreement altogether and follow current trends, Climate Interactive calculates the world would be 4.2°C warmer by 2100.[66]

X. The Implications of the Revised U.S. Energy Policy for Climate Change

Upon assuming office, President Trump promised to accomplish his "Contract with the American Voter'" during his first hundred days in office. An essential pillar of President Trump's

"contract" is his "America First Energy Plan" which commits to introducing energy policies that lower the costs for U.S. citizens and optimize the use of resources to make America "energy independent."[67] President Trump's energy plan was primarily designed to eliminate policies framed during the Obama Administration, such as the Climate Action Plan and Waters of the United States rule, in hopes of increasing the wages of Americans by $30 billion over a period of seven years.[68] Moreover, it commits to exploiting the estimated $50 trillion in untapped shale, oil, and natural gas reserves in order to bring more jobs and prosperity to the nation.[69] The plan also promised to bring clean coal technology and revive America's coal industry, which President Trump argues has been declining for many years.[70] One way in which he plans to achieve this goal is by de-regulating the coal industry.[71] Additionally, President Trump assured the American public that all restrictions on the production of $50 trillion worth of job-producing energy reserves, including natural gas and clean coal, would be lifted,[72] and he also stated that the billions of dollars worth of payments made towards UN-led efforts to slow down climate change each year would be redirected towards fixing America's water and environmental infrastructure.[73] In order to understand the dramatic shifts in policy, such as those aforementioned, that President Trump's "America First" policy for climate change entails, it is essential to look back at the significantly more environmentally protectionist policies that the previous administration had implemented, as well as President Trump's reasoning for wanting to rescind them.

The Obama administration introduced the Climate Action Plan in 2013, which included the Clean Power Plan (CPP). It was initially proposed by the Environmental Protection Agency (EPA) in June of 2014, but it was unveiled by former President Obama on August 3, 2015.[74] It aimed to reduce carbon dioxide emissions that are produced by power generators by 32% by 2030.[75] The CPP focused on limiting the use of coal-burning power plants and

increasing the use of renewable energy. This measure was adopted to meet the emission reduction targets that the United States had pledged to abide by under the Paris Agreement. Under the CPP, every state in the United States was required to frame a plan, which the EPA would need to approve, for reducing carbon dioxide emissions.[76] However, after President Trump signed the executive order on "Promoting Energy Independence and Economic Growth" on March 28, 2017, the CPP came to a standstill.[77]

Even before President Trump assumed the office of the President, the CPP faced many obstacles in its implementation. For example, once the CPP was brought to fruition, some states declared that they were unwilling to maintain the reduction targets that the plan had set. Specifically, in January 2016, North Dakota requested an immediate stay of execution and enforcement of the CPP before the Supreme Court, which the Court ended up denying.[78] However, a month later, the Supreme Court accepted a stay application that was filed by West Virginia along with 27 other states and a number of companies.[79] By a majority decision of 5:4, the Court halted the implementation of the Obama administration's CPP on February 9, 2016.[80]

Since President Trump assumed office, the laws on climate change underwent a series of changes. For example, the Trump administration mandated a review of the CPP via its Executive Order on "Promoting Energy Independence and Economic Growth." On March 28, 2017, President Trump signed this executive order, mandating that the EPA conduct a review of all existing regulations that could potentially burden the development or use of domestic energy resources, such as the CPP.[81] After the review, the EPA was asked to appropriately revise, suspend, or rescind the regulations depending upon the report.[82] Recently, the U.S. Court of Appeals for the D.C. Circuit has put a hold on all litigation proceedings for an additional 60 days from the date of the order, which was August 8, 2017.[83] Moreover, the Trump Administration directed the EPA

to continue to file status reports in 30 day interval period, starting from the date of the order.[84]

XI. The Role of Non-state Stakeholders in Fulfilling the NDS of the United States

The practical effect of President Trump's pledge to withdraw the United States from the Paris Agreement has partly been that it has reinforced the U.S. public's and many states' commitment to mitigating climate change. According to an opinion poll conducted by the Yale Program on Climate Change Communication, voters believe that the United States should participate in the Paris Climate Agreement by a margin of 5:1.[85] Moreover, about half of the voters who voted for President Trump also think that the United States should participate in the Paris Agreement.[86] Taking advantage of this enthusiasm for protecting the environment, various cities and states have taken up the responsibility of continuing to fulfill the reduction targets of the CPP, even though it is undergoing review and the courts have stayed its implementation.[87] States with democratic leadership, such as California, Washington, and New York, have come together to form a United States Climate Alliance, a separate entity committed to upholding the commitments that the United States pledged in the Agreement.[88] Recently, 14 states and Puerto Rico joined the Climate Alliance in an attempt to fulfill the objectives of the Agreement.[89] Similarly, through his energy policy called Reforming the Energy Vision (REV), New York Governor Andrew Cuomo aims to achieve a 40% reduction in GHGs from 1990 levels and a reduction of energy consumption by buildings by 23% from 2012 levels. Additionally, his goal is for 50% of electricity to eventually be generated from renewable sources.[90]

Further, while the membership of the Paris Agreement includes only countries or regional economic integrations,[91] the Paris

Agreement encourages non-state stakeholders to individually support the cause of fighting climate change and to contribute towards accomplishing the objectives of the Agreement.[92] Individuals and corporations in the United States, such as ExxonMobil and Chevron, have also shown interest in supporting the Paris Agreement, thus defying President Trump's decision in a sense. Additionally, Michael Bloomberg, one of America's wealthiest businessmen and a former UN envoy for Climate Change, pledged $15 million to support the Agreement's coordination agency.[93] Further, Bloomberg has been expanding support for the Paris Agreement by creating a coalition consisting of thirty mayors, three governors, approximately eighty university presidents, and more than 100 business organizations.[94]

XII. Prospects of a Renegotiation of or Reengagement with the Paris Agreement

Even in his statement announcing his intention to withdraw the United States from the Paris Agreement, President Trump said that he would be open to renegotiating the terms of the Agreement, suggesting that he might consider reentering the Agreement under "fairer terms" for America.[95] However, the renegotiation of the Agreement, which took nearly a decade to negotiate in the first place, does not seem practical. Most of the developed as well as the developing countries are in the process of speeding up their efforts to reach their GHG reduction targets, and many of them have already invested significant amounts of money in an effort to do so. As a result, renegotiating the Agreement would mean stalling the entire process, which would lead to the signatory parties incurring huge losses. The leaders of various nations, such as Italy, France, and Germany, have already stated that they would not participate in the renegotiation of the Paris Agreement, since they do not believe that it treats any particular countries, including the United States,

unfairly.[96] Further, the original Agreement took almost a decade to be finalized and approved, and thus the 195 signatory parties are unsure if they could again reach an agreement with the United States in the foreseeable future without discarding the ambitious goals of the Agreement. Moreover, the Trump administration has yet to clarify what it means by "fairer terms" for America, which it has stated would be necessary for a renegotiation of the Paris Agreement.[97] Additionally, in August 2017, President Trump sent a letter to the UNFCCC reaffirming the United States' intent to withdraw from the Agreement. However, he also mentioned that there was a possibility of "re-engaging'" with the Agreement, a term that does not quite hold the same meaning as "renegotiating."[98] This change in vocabulary has thus further confused signatory parties about President Trump's vision of U.S. involvement in the Paris Agreement.

XIII. Conclusion

When considering President Trump's withdrawal of the United States from the Paris Agreement it is important to note that the issue of climate change is growing more severe every day and may have dreadful repercussions if it is not confronted. These consequences are already evident in the increase in frequency of natural disasters, such as earthquakes, hurricanes, and floods. Similarly, the receding glaciers in the Antarctic,[99] the increase in GHG emissions,[100] the depletion of the ozone layer,[101] and the melting of Permafrost in the Arctic[102] certainly cannot be ignored.[103] As far as international agreements on the topic of climate change go, the recently negotiated Paris Agreement seems to be the most effective plan to mitigate worsening climate conditions since the nullification of the Kyoto Protocol, though its effectiveness may reduce significantly after the United States withdraws from it.

This article attempts to describe President Trump's justi-

fication for withdrawing from the Paris Agreement, as well as the changes in U.S. energy policy that the Trump administration implemented after the announcement of the withdrawal. This article also examines the legality of the United States' entry and subsequent withdrawal from the Agreement by analyzing U.S. domestic law as well as international principles related to agreements and treaties. Further, this article discusses the likely implications of President Trump's intention to withdraw the United States from the Paris Agreement, in terms of its effect on the overall environmentalist objectives of the Agreement and the negative effects that it will likely have on developing countries. Finally, this article reviews the feasibility of a "renegotiation" of the terms of the Agreement or a "reengagement" with the Agreement that President Trump suggested. In doing so, it has deduced that such a rejoining of the Paris Agreement is unlikely, and that efforts taken by U.S. state and city government officials, as well as businesses, are likely the only means through which the United States will lower its pollution levels so that they are close to the levels enumerated within the Paris Agreement.

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Hope for the Future or Unconstitutional Disaster? The Clean Power Plan and West Virginia et al. v. EPA

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Abstract

On August 3, 2015, then President Obama introduced the Clean Power Plan (CPP), the first federal policy to set a national limit on power sector carbon emissions. The CPP was built on Environmental Protection Agency (EPA) authority outlined in the Clean Air Act, as well as past legal precedent in air pollution cases. Since its introduction, however, the CPP has faced an extraordinary set of legal challenges, including a series of lawsuits, and, most recently, an executive order by President Trump. This executive order, made on March 28, 2017, directed the EPA to review the legality of the CPP. This article considers the most significant of the lawsuits against the CPP and its previous iterations: a suit which, despite the Trump administration's March 28th executive order, remains under review by the Courts. *West Virginia et al. v. EPA* was presented by a coalition of twenty-seven states and several energy interests against the EPA. After considering each of the plaintiff's arguments against the CPP, examining both the Clean Air Act's regulatory provisions and relevant legislative precedent for federal emissions regulation, the article concludes that the CPP is both constitutional and legal under Sections 111(b) and 111(d) of the Clean Air Act, and that it will not cause undue harm to the states concerned. Therefore, the paper will argue that the Supreme Court should authorize EPA administration of the Clean Power Plan according to its administrative authority under the Clean Air Act.

I. Introduction

On August 3, 2015, then President Obama announced a historic plan to combat climate change.[1] On this day in August, following the warmest six months of any year on record, the president introduced the Clean Power Plan: a policy which he declared to be "the single most important step" in the United States' fight against climate change.[2] The first federal policy to set a national limit on power sector carbon emissions, the Clean Power Plan was also significant because it entered the national stage in the context of two major international climate agreements.[3] The first of these was a 2014 agreement between the United States and China, in which the U.S. agreed to a significant reduction in carbon emissions before 2025.[4] The second agreement, the accord signed following the 2015 United Nations Climate Change Conference in Paris, was still to come at the time of the Clean Power Plan's introduction.

The United States must take comprehensive regulatory action if it wishes to meet climate change mitigation goals and protect the health and livelihoods of its current and future citizens, and the Clean Power Plan (CPP) has the capacity to play an essential role in this effort. Since its introduction, however, the CPP has faced an extraordinary set of both legal and political challenges. The most significant legal challenge, and the primary focus of this article, is a series of lawsuits presented by a coalition of twenty-seven states and several energy interests against the Environmental Protection Agency (EPA),[5] referred to as *West Virginia et al. v. EPA.*[6] On February 9, 2016, the Supreme Court under Chief Justice John Roberts Jr. granted a Stay on the CPP as requested by *West Virginia et al.*, pending consideration of the applicants' petitions for review.[7] On September 27, 2016, *West Virginia et al.* was reviewed by the D.C. Circuit Court, with President Obama's nominee for the Supreme Court, Merrick Garland, recusing himself from the case.[8]

Under the administration of President Donald Trump, a new threat to the future of the CPP has emerged. This time, the threat comes from within the EPA itself. On October 9, 2017, Administrator Scott Pruitt struck a devastating blow to the CPP when he announced the Trump administration's proposal for its repeal.[9] Considering the fact that the EPA, the very agency responsible for administering the CPP, is now opposed to the Plan's existence, the CPP's future looks grim. Yet it is important to note two factors that complicate the administration's plans, and offer hope for the CPP's future. First, the Trump administration's proposal for repeal is based on the argument that the CPP is illegal; and second, the EPA must propose a replacement rule in exchange for the CPP.[10] This is important because both the Trump administration's argument against the CPP and its eventual replacement regulatory proposal will face legal opposition from such entities as the Natural Resources Defense Council, Earthjustice, and attorneys general Eric Schneiderman of New York and Xavier Becerra of California, all of whom have announced their intention to sue.[11]

After over a year of pitched legal battle, and in light of the EPA's reversal of its position of the issue due to the advent of a new presidential administration, the legal issues at stake in the fate of the CPP are convoluted. Despite this confusion, the primary arguments for and against the CPP are laid out in the original lawsuit, *West Virginia et al. v. EPA*. *West Virginia et al.*'s arguments against the CPP provide the basis for the Trump administration's proposal for repeal, and the arguments that the Obama administration's EPA originally made in defense of the CPP reflect the arguments that will be made in defense of the CPP now. It is thus a worthwhile exercise to isolate *West Virginia et al. v. EPA* from the current political maelstrom in order to consider the arguments introduced in this case; and in this article I will do just that.

The plaintiffs in *West Virginia et al. v. EPA* have argued that the Plan is unconstitutional, that it is illegal under the regulatory powers delegated to the EPA under the Clean Air Act, and that it will cause undue economic harm to the States upon which it is imposed.[12] After considering each of the plaintiff's arguments against the CPP and weighing these against an examination of both the Clean Air Act's regulatory provisions and relevant legislative precedent for federal emissions regulation, this paper concludes that the CPP is both constitutional and legal under Sections 111(b) and 111(d) of the Clean Air Act and that it does not cause undue harm to the states concerned. This paper will therefore argue that, assuming the legal process continues, and appeals bring the case of *West Virginia et al. v. EPA* to the Supreme Court, the Supreme Court should ultimately deny the petition by *West Virginia et al*. and authorize the EPA's administration of the CPP according to its administrative authority under the Clean Air Act.

II. Background

1. Legal Basis for EPA Administration of the Clean Air Act

Before delving fully into the legal issues at stake, it will be helpful to further develop the context and history of the CPP and to examine the legal framework that lends the CPP its legitimacy. Because the CPP is largely an extension of the Clean Air Act, and specifically of Section 111(d) of the Act, it is instructive to begin this examination with a background of the Clean Air Act (the CAA). Like nearly every other federal environmental law, the legal framework of the CAA originally rests on the power of the Commerce Clause. Article I, Section 8 of the United States Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian

Tribes."[13] The federal authority to regulate commerce between the states is essential to major environmental legislation such as the Clean Water Act and the CAA, because this authority is based on a Supreme Court assumption that "commerce" is defined not merely as the exchange of commodities, but more broadly as any form of commercial "intercourse." This can include navigation and even, crucially to environmental regulation, pollution.[14] In 1968, in *United States v. Bishop Processing Co.*, the Supreme Court determined that air pollution exchanged between Maryland and Delaware had an effect on commerce (in this instance, a negative one) and thus fell under the powers granted to Congress by the Commerce Clause.[15] This is the reasoning that grants legitimacy to the CAA, which was established in 1970 and grants the EPA the power to regulate pollution from stationary and mobile sources, and to establish National Ambient Air Quality Standards (NAAQS) to protect public health and welfare.[16]

It is worth noting that legal challenges to the scope of the Commerce Clause have become more frequent in recent years. However, the CAA boasts a long history of legal precedent to establish its legitimacy under the Commerce Clause. Because the CPP is implemented under the legal authority of the CAA, the salient issue in this case is not whether the CAA itself is constitutional, but whether or not the EPA has the authority to regulate carbon dioxide from new and existing power plants under the CAA: in other words, whether or not the EPA's interpretation of the CAA is constitutional.

2. Establishing the EPA's Ability to Regulate Greenhouse Gas Emissions

The EPA's authority to regulate greenhouse gas emissions has been established by a series of legal cases over the past decade.

The first of these was the case of *Massachusetts et al. v. Environmental Protection Agency.*[17] The state of Massachusetts, along with several other states and a coalition of non-governmental organizations, sued the EPA for not regulating the emissions of four greenhouse gases, including carbon dioxide, from the transportation sector. According to the plaintiffs, the EPA was failing to uphold its duty to regulate harmful pollutants.[18] The Supreme Court ruled in favor of the plaintiffs, arguing that greenhouse gases were causing harm to the state of Massachusetts through adverse climate effects such as sea level rise, and that the EPA's responsibility under the CAA to protect public health and welfare extended to the regulation of carbon emissions from the transportation sector.[19] The Supreme Court also determined in this case that greenhouse gases could be unequivocally defined as air pollutants under the CAA. Justice Stevens, in delivering the Court's opinion, stated that greenhouse gases "fit well within the Act's capacious definition of "air pollutant."[20] By establishing that greenhouse gases could be defined as an air pollutant under the CAA, the Supreme Court's decision in *Massachusetts v. EPA* authorized the EPA Administrator to officially categorize greenhouse gases as pollutants to be regulated under the CAA. In December of 2009, EPA Administrator Lisa P. Jackson did just that, issuing an Endangerment Finding for greenhouse gases under Section 202(a) of the CAA.[21] This Endangerment Finding officially classified six greenhouse gases as threats to the health and welfare of current and future generations, and thus as pollutants, under the CAA.[22]

Two years later, in 2011, the Supreme Court reinforced the EPA's authority to regulate greenhouse gases under the CAA with its decision in *American Electric Power Company v. Connecticut*.[23] In this case, a group of plaintiffs including eight states, the City of New York, and three land trusts sued a group of energy corporations under a public nuisance claim. The plaintiffs argued that these

corporations were causing a threat to public health and welfare by contributing to climate change through their power plants' greenhouse gas (GHG) emissions.[24] The Supreme court ruled against the plaintiffs, but its reasoning laid the groundwork for EPA regulation of GHGs from stationary sources. Specifically, the Court held that corporations cannot be sued for GHG emissions under federal common law because the CAA delegates GHG management to the EPA.[25] More importantly, while *Massachusetts v. EPA* had specifically concerned the transportation sector, *American Electric Power Company v. Connecticut* established precedent for EPA regulation of stationary source greenhouse gas emissions.

The precedents established in *Massachusetts v. EPA* and *American Electric Power Company v. Connecticut*, as well as the institution of the 2009 Endangerment Finding, authorized the EPA to develop regulations for greenhouse gases from stationary sources under Section 111 of the CAA. Regulation of pollution from stationary sources—in other words, power plants—is outlined in Sections 108 through 112 of the CAA.[26] Sections 108 through 110 concern regulation of "criteria pollutants," which are regulated under the assumption that they are harmless in small amounts but detrimental to human health and welfare over a certain threshold.[27] Of these, six are officially listed: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead.[28] Section 112, meanwhile, regulates hazardous air pollutants (HAPs) such as arsenic, asbestos, and mercury (in other words, poisons).[29] The CAA also provides for some discretion of the regulating agency, although such discretion faces further limitations today in the context of the recent challenge to the Chevron deference precedent, as will be discussed below. Further, the CAA includes another Section to allow regulation of other pollutants that the EPA itself determines to be detrimental to human health and welfare.[30] This is Section 111, which authorizes regulation of pollutants that are not addressed in sections 108, 109, 110,

and 112.[31] Greenhouse gases are one of those pollutants not elsewhere addressed, and following the 2009 Endangerment Finding which classified greenhouse gases as pollutants worthy of regulation and whose authority is reinforced by *Massachusetts v. EPA* and *American Electric Power Company v. Connecticut*, the EPA bases its regulation of greenhouse gas emissions on Section 111 of the CAA. Specifically, the EPA relies on section 111(b) and 111(d), which concern regulation for new, modified, and existing power plants.[32]

The EPA cites Sections 111(b) and 111(d) of the CAA for its legal authority in enforcing the CPP because these two sections form the framework of federal regulation of greenhouse gas emissions in the United States. Section 111(b) instructs the EPA Administrator to list any category of stationary sources for emissions regulation if (emphasis added) "in [the Administrator's] judgment [the source category] causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[33] Together with the authority of *Massachusetts v. EPA* and *American Electric Power v. Connecticut* precedent, Section 111(b) thus authorizes the EPA Administrator to list major emitters of GHGs such as fossil steam units and natural gas power plants as categories for regulations.[34] Once these categories of power plants have been listed for regulation, whether they are new, modified, or existing, Section 111(b) also requires the EPA to set emission performance standards for each category.[35] Section 111(d), meanwhile, grants the EPA the authority to engage with the states in setting guidelines for existing power plants. Under Section 111(d), the CPP requires each state to submit a plan to the EPA administrators which establishes emissions standards for existing sources, and grants the EPA the authority to impose its own plan upon any state that fails to provide a satisfactory plan and to enforce any plan that the state fails to properly enforce itself.[36]

3. The Obama Administration and the Development of the Clean Power Plan

The CPP itself is directly based on Section 111(d)'s provision for the EPA's engagement with states on setting greenhouse gas emission standards, and specifically its authorization for the EPA Administrator to "prescribe regulations which shall establish a procedure… under which each State shall submit to the Administrator a plan" establishing emission standards of performance.[37] In its final form, the CPP is that "procedure" described in Section 111(d) of the CAA. Before reaching its final form on August 3, 2015, however, the CPP underwent two years of development and review.[38] The evolution of the CPP, and of President Obama's major executive involvement in climate change policy, began in 2013 with the Climate Action Plan. Recognizing that stationary sources of greenhouse gas emissions (power plants) accounted for nearly forty-percent of U.S. GHG emissions, but that stationary source emissions were not federally regulated, President Obama and the EPA initially developed a proposal for emissions regulations that would reduce domestic carbon emissions to seventeen percent below 2005 levels by 2020.[39] The result, introduced on June 25, 2013, was the Climate Action Plan: a series of proposals for the first-ever greenhouse gas emissions regulation for stationary sources in the United States.[40] Specifically, the Climate Action Plan relied on the authority outlined in Section 111(d) of the CAA, and directed the EPA to work with states to develop carbon pollution standards for new and existing power plants.[41]

Because the Climate Action Plan was structured as a series of proposals with no established standards, however, it was always intended as a means to an end. On June 2, 2014, President Obama introduced such an end in the form of the draft CPP.[42] The draft CPP aimed for a more ambitious and far-reaching emissions reduction

goal than that of the Climate Action Plan, calling for a thirty-percent reduction in GHG emissions by 2030.[43] In order to ensure the achievement of this significant emissions reduction goal, the draft CPP established specific emissions reduction targets for all fifty states. Under the proposed model, states would be directed to develop their own approaches to meeting these targets, and then to submit these proposals to the EPA for review.[44] The release of the draft CPP was followed by one year of review under EPA administrator Gina McCarthy, during which time the EPA collected 4.3 million public comments on the draft Plan.[45] McCarthy and her team considered these comments, which included concerns expressed by state legislatures about the timeline and requirements of the Plan, and expert opinions regarding the functionality of certain programs, and then adapted the Plan accordingly to develop the final CPP for release in 2015.[46]

4. Political and International Context

On November 11, 2014, during the period of public comment on the CPP and one year before the Paris Climate Agreement discussions began, the United States and China announced a bilateral emissions reduction agreement.[47] This agreement was notable both because China and the United States have historically disagreed over their relative responsibilities for climate change mitigation, and because it marked China's first official commitment to emissions reduction.[48] In reference to the bilateral agreement and in his introduction of the CPP, President Obama argued, "[t]he only reason that China is now looking at getting serious about its emissions is because they saw that we were going to do it, too."[49]

Ironically, however, the tables have since turned on climate relations between the United States and China. While Beijing continues to pursue its emissions reduction goals, two major decisions

by the Trump administration have crippled the U.S.'s ability to maintain its role as a climate leader.[50] The first decision was President Trump's June 1, 2017, announcement of his intention to withdraw from the Paris Agreement. The second was EPA Administrator Scott Pruitt's October 9th, 2017 announcement that the Trump administration will propose a repeal of the CPP, arguing that the CPP exceeded the bounds of federal law.[51] A repeal of the CPP would have devastating impacts, but for the purpose of this article it is more pertinent to note that the Trump administration is incorrect in this argument.

III. Architecture of the Clean Power Plan

As President Trump has demonstrated, international climate agreements cannot force any country to follow such an agreement. The final CPP, however, is designed to do what those agreements cannot: compel the United States to meet domestic emissions reduction goals through direct, active legislation. In order to achieve its emissions reduction goal of 730 million metric tons of carbon by 2030, the CPP establishes two sets of standards. The first set of standards, unique to each one of the fifty states, is a pair of uniform emissions rates: the first for coal, oil, and gas power plants, or "fossil steam units," and the second for natural gas power plants.[52] These uniform emissions rates limit the carbon that may be released by any new or existing power plant, and they are uniform across fossil steam unit and natural gas power plant in the state in question.[53] However, no power plant is required to meet these standards on its own: instead, each state may shift its specifically designated emissions reduction burden around to different power plants or energy sources within its jurisdiction.[54] This trading method is one way in which states can choose to meet the second major set of standards established by the EPA: overall emissions reduction targets for all

fifty states.[55] These emissions targets are unique to each state, and are developed according to the number of coal and gas plants in the state and current state emissions performance.[56]

Following its assigned emissions reduction target, each state is directed to develop its own method for achieving the EPA-assigned target.[57] Allowing each state to develop its own reduction plan is meant to ease the emissions reduction process, and as part of its guiding effort the EPA developed "best system of emissions reductions" (BSERs) as a part of the CPP.[58] The CPP BSERs are divided into three so-called "building blocks" of emissions reduction strategies. These are: one, improving the efficiency of existing coal-fired power plants by between 2.1 and 4.3 percent, two, substituting natural gas plants for coal-fired plants, and three, substituting zero-carbon renewable energy for carbon emitting power plants.[59] This last BSER is referred to as "generation shifting" in *West Virginia et al. v. EPA* and in the EPA's response to the lawsuit.

The final CPP retains the draft Plan's initial submission due date of September 6, 2016 for states' emissions reduction plans, but after consideration of public comments the final Plan also allows for a two year extension until September of 2018 to provide for states that need additional time.[60] Upon submission, the EPA will evaluate the plan and within twelve months will either approve the plan or send it back to the state for revisions.[61] The final Plan also pushed back the beginning of mandatory emissions reductions, from 2020 to 2022; although it is important to keep in mind that due to pending legal review, existing political opposition, and, theoretically, a final Supreme Court decision, the CPP is not currently active. Thus, even assuming the Supreme Court decides in favor of the EPA, these dates would likely change out of necessity.[62] These mandatory emissions reductions, moreover, are implemented on a timeline, rather than in the form of a single deadline.[63] In this way, performance rate stringency is "phased in" over an eight-year period, in which

the years 2022 to 2024 require lower reduction rates than the years 2024 to 2028.[64] However, the CPP allows states to meet these per-year emissions goals "on average" over the eight year period, so states may choose to backload or frontload progress.[65] If a state does not submit a plan, or if it fails to submit a "satisfactory" plan as determined by the EPA, the EPA will design its own plan for the state in question.[66] Finally, once the plan is approved, whether it has been designed by the state or the EPA, its provisions become federally enforceable under the CAA.[67]

IV. *West Virginia et al. v. EPA*

1. Introduction: Plaintiffs' Argument and Defendent's Response

On August 1, 2015, before the official release of the CPP, a coalition of states began a series of lawsuits against the EPA's administration of the CPP.[68] These lawsuits, collectively referred to as West Virginia et al. v. EPA, pursued a filing to the D.C. Circuit Court on August 13, October 23, and November 3 of 2015, as well as January 26 of the following year.[69] The suits are many but they share a general theme: the plaintiffs argue that the CPP's system of mandatory emissions reductions and state-designed plans is illegal, unconstitutional, and an "unprecedented power grab" by the EPA.[70] Specifically, the plaintiffs' case against the CPP can be broken down into three main arguments. Each of these arguments is addressed in the January 26, 2016, petition for Stay of Action and this petition will hereafter be used as reference in citing the plaintiffs' case.[71] The plaintiffs' first argument is that the CPP is burdensome and unfair, and that in particular its inclusion of "generation shifting" as a possible BSER under the CPP is unlawful.[72] Second, the plaintiffs argue that the CPP is unconstitutional because it denies state power and violates the Tenth Amendment's "anti-coercion" principle.[73]

Third, the plaintiffs contend that, because of an apparent conflict between two separate amendments made to Section 111(d) of the CAA in 1990, the EPA may not regulate any carbon emissions from stationary sources under Section 111(d) that are already regulated under Section 112.[74] This concept is known as "Section 112 exclusion."[75]

On March 28, 2016, in response to the plaintiffs' lawsuit and in direct conversation with the January 26, 2016, petition for stay of action, the EPA submitted a brief to the Washington D.C. Court of Appeals.[76] In this brief, filed together with the Office of General Council and the U.S. Department of Justice Environmental Defense Section, the EPA offers counterpoints to each of the plaintiffs' arguments.[77] First, the EPA rejects the argument against generation shifting and the related claim that the CPP is unfairly burdensome to states. The EPA argues that its standards are both thoughtfully developed and conservative, that generation shifting is a cost-effective and reasonable measure, and that it "properly exercised its... authority" under Section 111(d) by including generation shifting within its "best system of emissions reduction[s]," or BSERs.[78] The EPA further argues that generation shifting standards are demonstrably achievable. Contrary to the plaintiffs' argument that generation shifting constitutes an unprecedented and damaging transformation to the energy sector and that there is no existing precedent for generation shifting, the EPA argues that generation shifting has already been demonstrated as an appropriate technique of greenhouse gas emissions reduction.[79] Second, the EPA argues that the CPP does not violate the Tenth Amendment and instead that the rule is merely an example of "cooperative-federalism," and thus is both legal and comparable to many other federal programs.[80] Finally, the EPA argues in its brief that the plaintiffs' concept of Section 112 exclusion must be rejected because such an interpretation of the CAA would prevent the EPA from administering the CAA in accordance

with the Act's "design and purpose".[81]

2. Generation Shifting Argument

After considering the arguments of both the plaintiffs and the EPA, I have concluded that the EPA was correct in its assessment of the CPP's constitutionality and legality under the CAA. Nonetheless, the case is complex and worthy of review. In my defense of the CPP I will begin with one of the more contentious issues at stake: namely, the plaintiffs' argument that the CPP is unfairly burdensome, and that the inclusion of "generation shifting" as one of the possible BSERs is unfair and unlawful. The plaintiffs' argument that this inclusion of generation shifting is unlawful is based on the claim that generation shifting "is a power that [the] EPA has 'discover[ed]' in Section 111(d) for the first time in that provision's 45-year history," and that "there simply is no argument that the statute can be read to 'clearly' confer on [the] EPA such transformative authority over the American economy."[82] It is important to give due attention to the continued function of the United States economy when designing a regulatory system of federal regulation, but the plaintiffs' statement is disingenuous. Far from representing an unprecedented exercise of transformative authority by the EPA over the U.S. economy, the CPP's inclusion of generation shifting in its system of BSERs is based on both legal and technological precedent. The CPP represents the first federal regulation of greenhouse gas, but it does not represent the first federal regulation of the energy sector, nor does it represent the first instance of generation shifting in energy technology. In fact, the energy sector has undergone a series of generation-shifting evolutions since the implementation of the CAA in 1970; the energy, industrial, and transportation sectors have all adapted to EPA emission standards under the CAA. Ambient air pollution has decreased dramatically since the CAA's inception:

The Union of Concerned Scientists reports an overall reduction of sulfur dioxide and nitrogen dioxide concentrations of 71 percent and 46 percent, respectively, from 1980 to the present day.[83] Importantly, this significant reduction in ambient air pollution has been due in large part to major technology overhauls of stationary and mobile pollution sources, and shifts to cleaner power plants. A 2013 report by the Pacific Research Institute, which corroborates the Union of Concerned Scientists' findings of significant air pollution reduction, states that technological improvement has been the greatest factor involved in air pollution reduction since the implementation of CAA.[84] Moreover, the Pacific Research Institute identifies the significant role of the CAA regulatory mandates in this reduction in ambient air pollution.[85]

We can safely conclude from the above evidence that the EPA is in fact acting under the authority of significant precedent in including generation shifting in its BSER system. The plaintiffs also argue, however, that generation shifting would place an undue burden on the states, and threaten their economies. Professor Lawrence Tribe of Harvard Law School agreed with the plaintiffs' view in a testimony on the EPA's proposed rule that he delivered to the House's Committee on Energy and Commerce Subcommittee on Energy and Power on March 17, 2015.[86] In his testimony, Tribe argued that the CPP would wreak havoc on state economies because it would allow the EPA to "effectively dictate the energy mix used in each state by determining the 'state goal' for emissions."[87] Tribe's words, however, are misleading. The state goals determined by the CPP require each state to modify certain factors of its energy production in order to reduce total emissions, but they do not require any states to modify their means of energy production in any specific way.[88] In the straightforward words of Professors Jody Freeman and Richard Lazurus, both colleagues of Professor Tribe, in their rebuttal to his arguments against the CPP:

"States that do file plans are committing to meet [the] EPA's performance standard—that's all. How to do so is up to them."[89] Indeed, the CPP is specifically designed to allow the states to dictate their own energy mixes. States may select their preferred system of BSERs in order to achieve their state target, and thus need not restructure their energy production systems around renewable energy.[90]

The EPA draws its "best systems of emission reduction" (BSER) method from Section 111(a) of the CAA, which directs the EPA to set standards of performance for power plants and other pollutant emitters which can be achieved "through the application of the best system of emission reduction [emphasis added] which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."[91] Thus, the CAA defers to the EPA Administrator to design a system of BSERs according to the Administrator's own consideration of both health and environmental impact and the economic factors involved. In other words, the EPA should consider cost effectiveness in designing standards and BSERs. In this case, the EPA is right to argue that its system of BSERs for carbon emissions reduction do indeed constitute "cost-effective generation-shifting", because generation shifting in the case of carbon emissions has already been demonstrated as a cost-effective mitigation option.[92] In fact this should be unsurprising because, as noted by the Pacific Research Institute, while regulatory standards were essential to pollution reduction over the last several decades, market forces, economic growth, and trends toward efficiency were also important factors.[93] In the case of GHG generation shifting, the power sector has been experiencing a significant trend away from coal and toward natural gas over the past several years.[94] In 2008, coal represented 48% of total U.S. energy production, but by August 2012, it had decreased to only 36%.[95] Natural gas production, meanwhile, increased by 33%

between 2005 and 2013.[96] In 2013, BENTEK Energy, an energy analytics company, reported that 18,000 megawatts of natural gas-fired capacity were under development in the northeastern U.S. for completion by 2018, while 13,000 megawatts of coal-fired generation were being retired over the same timeline in the Northeast.[97] Simply put, the natural gas market is booming. Furthermore, renewable energy is also on the rise: renewable energy's share of the energy market has increased significantly over the past decade, and this growth is projected to continue. Based on past patterns of growth--which included a 12% growth in wind capacity in 2015 alone--the U.S. Energy Information Administration projects the total proportion of renewable energy in the U.S. energy market to increase by 11.3% in 2016 and 4.4% in 2017.[98]

The EPA's inclusion of generation shifting as a BSER for GHG regulation, therefore, is particularly cost effective because, far from causing a traumatic transformation of the electric grid, the fossil fuel industry is already moving in the direction of lower-emissions power generation and renewable energy. The EPA itself points out that cost effective generation shifting also exists in the form of cap and trade programs between cleaner and dirtier plants.[99] Furthermore, while historical pollution reduction under the CAA in the case of hazardous pollutant regulation, for instance, has in large part been the result of technology forcing-a contentious approach to legislation lent legal precedent and legitimacy by the CAA-the CPP would not impose technology forcing on the States.[100] In fact, so many natural gas plants have replaced coal in recent years that nationwide greenhouse gas emissions have already decreased by nearly half of the CPP's thirty percent goal-twelve percent between 2005 and 2012 alone.[101] At that rate, the United States as a whole would need to cut emissions by only one percent a year to meet the CPP goal.[102] By that metric, not only is the CPP far from the burden that *West Virgina et al.* claim it to be, it is also hardly an ambitious goal.

3. Tenth Amendment Argument

The plaintiffs' second major argument contends that the CPP is unconstitutional because it denies state power and "violates the Tenth Amendment's anti-coercion principle by threatening to punish States that do not carry out federal policy."[103] This claim, however, is baseless.[104] First, states are not required to submit an emissions reduction plan to the EPA, they are merely encouraged to do so in the interest of preserving maximum flexibility in the structure and implementation of the plan. No state will be punished by the EPA in the event that it refuses to submit a plan or fails to submit a satisfactory plan. Indeed, the EPA includes a provision in its final CPP forbidding the imposition of any sort of sanction on any state that refuses to submit a plan.[105] Nonetheless, the plaintiffs argue, the EPA's intent to pose its own plan in the absence of a state plan amounts to a "threat," suggesting that "because efficiency improvements that could be federally administered are nowhere near sufficient" to achieve EPA targets, a federal plan would "require states to take regulatory action to administer and facilitate generation shifting, on pain of suffering massive injury and dislocation if they refuse to do so."[106] This categorization of the EPA's intent to impose a plan in the event that a state refuses to submit its own as a coercive "threat," however, is mere hyperbole. As I have demonstrated above, generation shifting is a functional, cost-effective, and established system of emissions reduction. Generation shifting would cause limited strain to state energy markets, especially given the national trend toward natural gas power plants in particular--a trend that has that appeared in the absence of any federal greenhouse gas regulation at all. Furthermore, while the EPA encourages the states to develop their own plans in order to allow greater flexibility, an EPA designed emission reduction plan would not be a punitive measure. Any federal plan would be subject to statutory requirements under both the

CAA and Administrative Procedure Act that forbid the federal imposition of any regulation that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[107]

Having put the coercion argument to rest, we can now address the larger claim that the EPA oversteps its federal authority under the CPP implementation of emission reduction plans and that the CPP constitutes a "power grab."[108] This too is untrue. First of all, the concept of a State Implementation Plan (SIP) is nothing new: the EPA has administered SIPs under the CAA many times since 1970.[109] Furthermore, these SIPs operate in the same way that state implementation plans under the CPP would and do so according to Supreme Court precedent. The District of Columbia Circuit Court noted the existence of such precedent in its decision on *State of Texas et al. v. EPA* in 2013, when it wrote that Supreme Court precedent has "repeatedly affirm[ed] the constitutionality of federal statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it."[110] Despite the insistence of the plaintiffs, the CPP is nothing new. As the EPA correctly points out in its brief, the CAA, the CPP, and many other instances of federal law function under a system of cooperative federalism.[111] In fact, the United States Constitution was designed in the interest of cooperative federalism, and without this system, the federal government would have no regulatory power at all. The CPP works within this system and functions according to the same regulatory precedent followed by every other agency program. It would therefore be nonsensical to reject the CPP on constitutional grounds.

4. Section 112 Exclusion Argument and Precedential Response

Having rejected the plaintiff's first two modes of attack, we must finally consider the question of Section 112 exclusion.

This third argument arose as a reaction to two apparently conflicting amendments to Section 111(d) of the CAA that were put in place separately by the House and the Senate.[112]Specifically, the plaintiffs argue that the wording of the House amendment forbids the EPA to regulate under Section 111(d) any greenhouse gas emissions from stationary sources that are already regulated under Section 112. The confusion of the apparently conflicting amendments arose in 1990, when Congress originally chose to amend both Sections 111 and Section 112 of the CAA because it determined that the EPA had not taken sufficient action in regulating pollutants under the authority of these sections.[113]In an attempt to remedy this problem, Congress broadened the definition of Hazardous Air Pollutants (HAPS) in Section 112 to include pollutants that threaten to cause "adverse health effects...or adverse environmental effects."[114]It also established a list of all pollutants and pollutant source categories to be regulated in Section 112 to which the EPA would be permitted to add pollutants.[115]Thus far, the 1990 amendments posed no apparent challenge to the CPP. The issue arose, however, when both the House and Senate chose to amend Section 111(d), which originally authorized the EPA to regulate any pollutant which it judged to be harmful to human health and welfare and "which is not included on a list published under [various other sections]...or [112] (b)(1)(A)."-[116]Because GHGs are not listed under the HAP program in Section 112, the original version would have authorized the CPP. Unfortunately, this single phrase from Section 111(d) was subsequently given two different amendments with differing instructions. The House amendment commands the legislature to "strik[e] 'or 112(b)(1)(A)'" and insert "or emitted from a source category which is regulated under section 112." The Senate amendment, meanwhile, merely instructs that the legislature strike "112(b)(1)(A)" and insert "112(b)" in its place.[117]This is problematic because, according to the wording, it appears that the Senate amendment would authorize the CPP,

while the House amendment would forbid the CPP since coal-fired power plants are source categories listed under Section 112.[118] Through the implementation of a series of legal methods, however, I find that the EPA's assumption that the CAA continues to authorize the regulation of greenhouse gas emission is borne out.

4a. Chevron Deference

The first of these methods is Chevron deference. Chevron deference is a principle of administrative law developed in the Supreme Court decision of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, which was decided by the Supreme Court in 1984.[119] Under this principle, also known as the "Chevron Two Step," when a court faces a legal challenge against an agency's interpretation of a statute, the court first determines whether or not a statute is clear, and if the statute is not clear, the court defers to the agency interpretation of the statute unless the agency's interpretation is unreasonable. The apparent conflict between the House and Senate amendments to Section 111(d) of the CPP creates ambiguity. It would therefore be reasonable under Chevron deference for the Supreme Court to defer to the EPA's interpretation of the statute. Given the option of two amendments to the same phrase, the EPA could conceivably choose to ignore the House amendment and follow the Senate wording instead. Such a choice would surely be a reasonable interpretation of the statute's ambiguity. In this case, the EPA should be allowed to continue to enforce the CPP under Section 111(d) of the CAA. In fact, this was the approach that the EPA followed in the draft CPP of 2014: it found the two amendments to be conflicting and therefore ambiguous, and it proposed to follow the Senate version.[120]This might have been the EPA's ultimate approach as well, were it not for the outcome of *King v. Burwell,* a case decided by the Supreme Court on June 25, 2015, just over a week

before the EPA released the final CPP.[121]

4b. *King v. Burwell* (2015) Decision

In its *King v. Burwell* decision, the Court decided in favor of the Obama administration's regulation of the Affordable Care Act, but instead of ruling in favor of the Government according to Chevron deference--that is, finding the statute ambiguous and deferring to the Government's reasonable interpretation--Chief Justice Roberts argued that in cases of "deep economic and political significance" Chevron deference does not apply.[122] In such cases, Roberts argued, Congress surely had not wished to delegate the responsibility of interpretation to agencies.[123]

The EPA was quick to respond to the new precedent created by *King v. Burwell*. Sensing danger in a pure Chevron approach to the matter of Section 111(d), it instead argued in the final CPP that the apparently conflicting amendments were only ambiguous when examined out of context.[124] Indeed, the EPA even cited *King v. Burwell* in the text of the CPP in making its argument for reading the amendments in context. Justice Roberts stated in his opinion on *King v. Burwell* that in certain statutes the meaning of words or phrases may only become clear in context, and thus when the Court attempts to determine if the language is plain, it "must read the words 'in their context and with a view to their place in the overall statutory scheme.'"[125] Following this logic, the EPA argued that in the larger context of the CAA the House and Senate amendments can be interpreted harmoniously, and that the House amendment need not prevent regulation of greenhouse gases under Section 111(d), even though those sources that emit greenhouse gases are already regulated under Section 112.[126]

The EPA was wise to attempt to avoid the danger of relying on ambiguity and Chevron deference, because the plaintiffs in

West Virginia et al. v. EPA seized the *King v. Burwell* precedent in their suit against the CPP, and argued that the CPP was an issue of "economic and political significance" and thus it required a "clear statement" from Congress.[127] Though the Supreme Court could still reasonably defer to the EPA under Chevron deference, we can assume that this avenue has been blocked for the CPP. In this case, however, the EPA's argument for harmonious interpretation successfully rebuts the plaintiffs' contention of Section 112 exclusion. The EPA cites the precedent established by Justice Roberts in *King v. Burwell*, when he argued that words and phrases must be interpreted according to their legal context. Following this logic, the most reasonable interpretation of the House amendment is to conclude that the amendment was meant to prevent the regulation of the same pollutants under two different Sections. That is, Section 112 exclusion would prevent the regulation of hazardous air pollutant (HAP) emissions under Section 111(d) when the source category for those emissions is already regulated under Section 112.[128] This makes sense, because Section 112 was created to regulate HAP emissions, and would be unnecessary and cumbersome to regulate HAPs under sections 111(d) and Section 112.

In the case of greenhouse gas emissions, the EPA's interpretation of Section 111(d) of the CAA is likely correct and legally defensible on the grounds of simple logic and legislative intent. Beyond the fact that it makes sense for Congress to attempt to streamline the regulation process and regulate HAPs under only one section of the CAA, it would be patently absurd to conclude that the legislature intended to preclude the regulation of certain pollutants under Section 111(d) simply because the sources of those pollutants were already regulated under the HAPs program. Such an interpretation is not only nonsensical; it also prevents the EPA from carrying out its administrative duty under the CAA. The CAA instructs the EPA to regulate those pollutants and pollution sources that it

determines to be an endangerment to public health and welfare. Thus, the EPA must be able to regulate any pollutant that it finds to endanger public health and welfare and, according to *Massachusetts v. EPA*, greenhouse gases are among these pollutants. It is therefore not only illogical but insupportable for the EPA to be prevented from regulating GHG emissions because of what amounts to a legislative typo.

VI. Conclusion

After having examined the CPP in depth and considered the arguments leveled against it by the State of West Virginia and its fellow plaintiffs, this paper concludes that the CPP is not only constitutional but also reasonable. It functions according to years of administrative precedent, and its system of State Implementation Plans (SIPs) is both established procedure under the CAA and a flexible means of imposing emissions reduction requirements. Moreover, despite the opposition stacked against it, both political and otherwise, the CPP has an important role to play. Over the past forty years, the CAA has cleared our air of millions of tons of toxic and smog-causing chemicals, saving lives across the nation, and has helped to preserve the planet's ozone layer.[129] The CPP has the potential to continue to combat climate change. At its inception, the CPP existed in concert with an international effort to reduce emissions, represented by the Paris climate agreement. On April 22, 2016, the historic Paris Agreement was signed by 175 nations, including the United States, at the United Nations in New York.[130] Half a year later, on September 3, 2016, then President Obama ratified the United States' participation in the Agreement through executive order.[131] But the story of the Paris climate agreement was not over yet. On November 8, 2016, just four days after the Agreement officially entered into force in the United States, Donald Trump was elected

president. Before the election, candidate Trump had made U.S. withdrawal from the Paris climate agreement one of his major campaign promises, and his actions on March 28, 2017 in releasing an executive order aimed ultimately at rolling back the CPP's regulation introduced a clear challenge to the United States' ability to meet the Paris Agreement's guidelines. Just over a month after that, on June 1, 2017, President Trump officially announced his intention to withdraw from the Paris Climate Agreement.[132]

It is worth noting, however, that the effects of President Trump's announcement will be tempered by two significant factors. First, per Article 28 of the Agreement, the earliest date that the United States may withdraw from the Paris Agreement is November 4, 2020: in other words, one day after the next United States presidential election.[133] The next elected President, then, has the potential to reverse President Trump's intended withdrawal. Second, and significantly for the future of the CPP, while the current federal government has made its intentions clear regarding climate change regulation, a coalition of fifteen states and several cities have since expressed their intention to meet the Paris climate agreement standards individually.[134] This coalition, known as the U.S. Climate Alliance, cites the CPP as guidance to meet its goal, and its state members plan to meet or exceed the CPP's requirements.[135]

There remains, thus, some hope for the Paris climate agreement, in tandem with the CPP's guidelines, as a method of climate change mitigation in the United States at the state level. Ultimately, however, without federal participation and regulation the United States will never be able to appropriately combat the issue of climate change. The CPP remains an essential component of climate change mitigation in the United States, and if *West Virginia et al. v. EPA* continues through the appeals process to the Supreme Court, the Supreme Court's ruling in favor of the EPA would play a crucial part in the international effort to preserve our global ecosystem.

More importantly to the matter at hand, the Supreme Court must rule in favor of the CPP, not because of the CPP's role on the world stage, but because the CPP is legal. Today, in 2017, the CPP faces opposition from public and private actors, but its future should be a matter of law, not politics. Therefore, in the case of *West Virginia et al. v. EPA,* the District of Columbia Circuit Court and, ultimately, the Supreme Court, should rule in favor of the EPA and establish the CPP as federal law.

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