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About

The BLIS Law Review allows undergraduate students to develop their passion for legal scholarship at the University of California, Los Angeles. The objective of the BLIS Law Review is to foster critical thought about topics including, but not limited to, business law, public interest law, and capital markets. Our articles are published annually by undergraduate students who aspire to create meaningful change in the legal industry.

Having worked with the BLIS Law Review for the entirety of my time at UCLA, it is wonderful to see its growth and its tremendous display of aptitude, dedication, and effort. First off, I would like to thank all of the writers and editors that dedicated their time and effort to producing and polishing fascinating articles on subjects that they were particularly passionate about. Having met with them throughout the process, I am very proud of each of their individual efforts in addition to their collaborative ones. I would also like to thank Sydney Lester for her outstanding work, tireless effort, and constant dedication as Editor-in-Chief and most importantly for being a dear friend. In addition, the leadership and dedication of Vidya Patel and Darren Rosing has been a crucial factor to the success of this year's Law Review. Lastly, I would like to thank the entire Business Law and Investing Society for allowing us to provide a platform for our writers and editors to do what they love. Thank you all for yet another successful year, and I am very excited for what the future has in store.

Nicholas Rumteen
BLIS President

F O R E W O R D

I am so proud to present the 2022-2023 edition of the BLIS Law Review—it has been an incredible honor to work with such a talented group of people throughout my time as Editor-in-Chief, and my involvement with BLIS Law Review has truly been one of my most treasured experiences at UCLA. First and foremost, I would like to thank our president, Nico, for being not only an incredible leader but also an amazing friend. I am so proud of you for all you have accomplished in the time I've known you, and I couldn't ask for a better person to work alongside over the course of the past two years. I would also like to thank Vidya and Darren, my assistant editors, for their tireless dedication and thoughtfulness throughout the year. There are no better people to assume leadership come Fall of 2023, and I am confident they will take the law review to new heights in the coming years. And, of course, thank you to all of my writers and editors for your kindness, patience, and willingness to bring my vision for this year's law review to life. I am proud of each and every one of you and feel so fortunate that I was able to be a part of your academic experience.

Sydney Lester
Editor In-Chief

I am honored to have served as the Assistant Editor-In-Chief of the Business Law and Investing Society's Law Review this year. Given that I have had the chance to be a writer for this year as well as last year's review, it was incredibly rewarding to contribute to the organization and execution of this year's final publication. I especially enjoyed seeing each draft come together from each contributor and it was inspiring to see the hard work every member put in. I would like to thank Sydney, our Editor-in-Chief, and Darren, my co-assistant, for all of their advice and help throughout this process. I am so proud of this work and I am excited to see what the future holds for BLIS.

Vidya Patel
Vidya Patel
Assistant Editor-in-Chief

Over the past year, I've been privileged to work alongside such an impressive community of like-minded thinkers and scholars to create the third volume of the undergraduate BLIS Law Review Journal. As my particular role in the machine grew from an individual article editor to one of the managerial Assistant-Editors-in-Chief, I became increasingly enamored by the work ethic, intelligence, and competence on display at BLIS's union. I must recognize the unparalleled commitment to excellence that Sydney and my co-assistant Vidya have maintained, and I'd be remiss to not thank the entire staff of writers and editors for their unwavering support and enthusiasm. I am incredibly proud of this work and humbled to have played a part in its creation.

Darren Rosing
Assistant Editor-in-Chief

ARTICLES

Markets and Monopolies: Live Nation Entertainment Inc. and the Future of Antitrust Law in the United States

Written by Liam Chia
Edited by Seth Bobrowsky

ABSTRACT.

In the wake of ticket sales company Ticketmaster Entertainment Inc.'s infamous technological failures during sales for artist Taylor Swift's long-anticipated "The Eras Tour," Ticketmaster and its parent company Live Nation Entertainment Inc. have been scrutinized for the enormous amount of power they hold within the live ticket industry. As such, this article will summarize one of the most prominent class-action lawsuits against Live Nation to date, in addition to outlining the relevant antitrust law that has created legal controversy. It will also review the merger of Ticketmaster and Live Nation, which lies at the center of the monopoly accusations, and analyze charges brought against Live Nation. While many arguments against the ticketing giant hold much validity, a private suit against such a large company will likely fall short due to the broad nature of the case and opposition from such a large company's strong legal team. However, the Department of Justice and the US Supreme Court are poised to use such lawsuits to dismantle Ticketmaster's monopoly in higher courts as they have in cases before.

I. INTRODUCTION

On November 15th, 2022, tickets for singer-songwriter Taylor Swift's "The Eras Tour" went on presale. Swift, one of the most popular artists of the 21st century, is scheduled to travel the continental United States during the spring and summer of 2023 in one of the most highly anticipated tours in recent history. Millions of fans worldwide had put their lives on hold to purchase tickets to the tour online, but when a historic amount of activity flooded the ticket-seller Ticketmaster Entertainment, Inc.'s website, the site crashed for many users. Some had entered their information into the site as it crashed before officially purchasing tickets, and others were unable to access the site at all. Ticketmaster attempted another sale the following day, but again issues arose. Within minutes all tickets had been sold, and many were left without a fair chance to claim tickets they believed had been secured for them. Once the initial sale closed, the resale market opened, inflating ticket prices significantly. Fans continue to be outraged at the proceedings, including the all-but-proven activity of automated bots that purchased tickets for people hoping to take advantage of the resale market.

The common denominator for many of these issues was the lack of options for access to the tour. As is the case with most live events in the United States, Ticketmaster controlled all sales and resales for "The Eras Tour." In fact, the company controls over 70% of all live event ticket sales in the United States, due much in part to the deals it holds with major concert venues across the country. In this instance, the catastrophic collapse of its services inspired outcry from the public, calling Ticketmaster, and its parent company Live Nation Entertainment, a monopoly. On December 2nd, 2022, a class-action lawsuit was filed on behalf of 26 plaintiffs who tried and failed to purchase tickets to Swift's tour, alleging anti-competitive action in violation of the Cartwright Act by Live Nation.

The lawsuit accuses Live Nation of fraud and long-standing anti-competitive action. Its expansive influence over ticket sales forces consumers to use its services, including Ticketmaster, for presales, sales, and resales. Because of this, prices are thought to be higher than what one would see in a competitive market. It also accuses Ticketmaster of forcing artists like Swift to work with it as a result of their agreements with most major performance venues in America. Other allegations include misleading the public throughout the ticket sales process for Swift's tour, using competitor companies like SeatGeek, who charge the same prices as Ticketmaster, to shroud their actions, as well as the use of tying (the sale of a product on the condition that consumers buy another, illegal under California and federal law).

In January of 2022, Live Nation faced a similar lawsuit, alleging illegal threats to withhold shows from major venues if the venues did not agree to use Ticketmaster's services. Live Nation was accused of using these coercive tactics to grow massive influence over the ticket sales industry. Now they have been handed an even larger lawsuit, seeking $2,500 in reparations per violation (one Eras Tour ticket sale), an amount that could far surpass $29 million.

The case's outcome is still unknown, but the decision's implications on antitrust law will likely overshadow any individual gains from the suit —if there are any at all. This article provides an overview of such antitrust law in America, specifically in the state of California, as well as a comprehensive analysis of the case against Live Nation. It will review key events leading up to the lawsuit as well as what the decision will mean for antitrust law moving forward.

II. ANTITRUST LAW

A. What are monopolies?

As laissez-faire philosophy dictates, free markets are only achievable in the absence of government interference. Free economies are driven by competition; the market fluctuates as different bodies compete for the consumer's favor in an industry. This dynamic is contingent on the demands of the customer, as their preferences ultimately determine an individual company's success. However, industries are susceptible to large companies' manipulation without the presence of competing players. Capable of buy-outs and price undercutting, those large groups have the ability to drive smaller competitors out of the market. This leads to an industry with one main player that is free to act however it pleases without the threat of competition, effectively taking the power out of the hands of consumers. The creation of trusts enables such disempowering economic action. A monopoly, defined as a market that one entity solely controls, thereby emerges.

Historical examples of monopolies include John D. Rockefeller's Standard Oil Company and the American Tobacco Company, both of which were nearly the sole supplier of their respective products at the height of their power. However, since the U.S. government began taking action against rising industry superpowers in the early 20th century, massive companies like these are much less common.[1] Instead, the biggest threat to the economy regarding monopolization arises from mergers, which refers to the combination of two or more companies under one brand of ownership. A recent, controversial example of this was the recent merger of T-Mobile and Sprint Wireless in 2020. Several states objected to the merger of these two heavy players in the telecommunications industry, fearing it would reduce competition and raise cell service prices for consumers. Nevertheless, a federal judge ultimately ruled that there was insufficient evidence of an unavoidable monopoly for the merger to be halted preemptively.[2]

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[1] Kotsonis, Stefano, and Meghna Chakrabarti. "More than Money: Antitrust Lessons of the Gilded Age." wbur. wbur, February 16, 2022. https://www.wbur.org/onpoint/2022/02/16/more-than-money-antitrust-lessons-of-the-gilded-age-tarbell-monopoly.

[2] The United States Department of Justice, "Court Enters Final Judgment in T-Mobile/Sprint Transaction." Office of Public Affairs 20-353, April 1, 2020

Thus, while antitrust law has grown stricter to defend the American consumer, disbanding or preventing the formation of a monopoly remains an uphill battle.

B. What is antitrust law meant to accomplish?

Antitrust law refers to legislation aimed at protecting free trade by combating market dominance. The Sherman Act, passed in 1890 on the basis of Congress' constitutional right to regulate interstate commerce, represents the first federal antitrust law to exist in the United States. Many large companies had risen from the Industrial Revolution in the early 19th century, leading to monopolies in several industries. The same American values that promoted free markets and unrestricted economic action in pursuit of growth opposed the constraints monopolies necessarily applied to the economic environment, pushing policymakers to action. The state of Kansas was the first to pass an antitrust law, doing so a year before Congress in 1889, but the Sherman Act paved the way for the Federal Trade Commission Act of 1914. This in turn created the Federal Trade Commission and Clayton Act, which comprise the core of American federal antitrust law. The Sherman Act made monopolization and the conspiracy to monopolize illegal in the United States. But, in current circumstances, antitrust law mainly functions to prevent business action that threatens monopolization and monopoly-inducing mergers.

Enforcement of antitrust law can take many forms. These include civil and criminal cases brought to the Department of Justice, civil action taken to the Federal Trade Commission, and lawsuits filed by private parties. Often, class-action lawsuits are filed on behalf of a group of plaintiffs as a result of repeated abuse by a specific company. The collection of testimonials under a common message through a class-action lawsuit is most effective in combating the actions of large companies that are often difficult to hold accountable individually.

C. Antitrust law in California

Most states have their own antitrust law under federal restrictions, including California. The lawsuit against Live Nation Entertainment, based in Los Angeles, argues that the entertainment company violated California's Cartwright Act, one piece of several antitrust legislations, including the Unfair Practices Act and the Unfair Competition Act. All three are found under section 16600 of the Business and Professions Code and serve as the main elements of California antitrust law. They are, however, intentionally vague, leading most courts to resort to case law, using federal and state precedents as the standard for proceedings.

D. The Cartwright Act

The Cartwright Act serves as California's primary piece of antitrust legislation. It reiterates many elements of federal law seen in the Sherman Act and Clayton Act, prohibiting action or agreements that may constrain markets, affect prices, or alter competitive landscapes. Several actions are outlined by the Cartwright Act and deemed illegal with the consumer's protection in mind. Horizontal violations are described as agreements between competitors to fix prices, cited in the Sherman Act as a "restraint of trade." Tying is also banned under the Cartwright Act, as it is under Section 3 of the Clayton Act. Additionally, pricing restraints are addressed at length, yet no definition for them is given due to complications with distributors and the naturally fluid nature of markets. It is thus left to the courts to determine whether a certain price-affecting action is anti-competitive in nature, whether in intent or effect.

E. The Unfair Practices Act

The Unfair Practices Act of 2004,[3] another central piece to California's antitrust legislation, is broken down into several topics. One section bans locality discrimination, making it illegal to sell the same product at different prices at different locations in California. Sales below cost are also made illegal, as companies often use this strategy to undercut competitors and harm them to a point where they cannot compete. Similarly, loss leader sales, where a product is sold at a loss to attract customers or promote another product, are also banned. This form of undercutting, such as selling an electronic device at a competitive price, but selling the battery it needs to run on at a very high price, is a tactic only available to large companies who can afford to tactically sell products at a loss in order to out-muscle smaller competitors. Finally, secret rebates are prohibited, which is the allocation of discounts not available to the whole public.

F. The Unfair Competition Act

California law describes "unfair competition" as unlawful business practices or false, misleading, or fraudulent advertising. The Unfair Competition Act, [4] also referred to as California's Unfair Competition Law (UCL), is meant to protect consumers from false advertising and illegal business practices by giving the public an avenue to address the economic harm that has been placed on them by the actions above. Like the Cartwright Act, the UCL is broadly written but generally identifies false advertising, leaving the courts to analyze individual cases in context. It also gives courts the right to order injunctions in the case of a violation.

In order to prove such a violation, a plaintiff must provide evidence of unfair business practices by the defendant as well as personal injury as a result, whether that be loss of property or money. A statute of limitations applies four years after an alleged violation. Courts analyze all aspects of advertising in order to determine whether or not it can be considered misleading. This

[3] The California Unfair Practices Act of 2004, Bus. & Prof. Code § 17000 *et seq.*
[4] The California Unfair Competition Act of 1993, Bus. & Prof. Code § 17200 *et seq.*

includes language, images, appearance, and packaging, ultimately considered misleading if "members of the public are likely to be deceived."

III. TICKETMASTER, LIVE NATION, AND THE MERGER

In 1976, a group of college staffers and businesspeople from Phoenix, Arizona, created Ticketmaster. Originally created to sell computer programs and hardware to ticketing systems, it quickly grew on a local scale. In 1982, new CEO Fred Rosen moved Ticketmaster's headquarters to Los Angeles, where it began building contracts with major performance venues like the LA Forum. Within three years of this move, the company quickly switched to automated ticketing software as its primary function, selling tickets in the United States, Canada, and Europe. Ticketmaster continued to expand its influence through deals with concert venues and several major acquisitions. In just the month of January 2008, Ticketmaster absorbed Paciolan Inc. (a ticketing system developer), Getmein.com (a UK-based ticket marketplace), and TicketsNow (an American ticket reseller).[5] It quickly became a major force in the global ticket sales industry. Today, it operates its digital ticketing system, managing ticket presales and sales to thousands of concerts worldwide. It also hosts one of the most popular resale marketplaces on the internet, accounting for over 500 million ticket sales annually.[6]

In 1996, SFX Entertainment was founded as an events promoter and venue operator in Beverly Hills. It functioned as a media subsidiary to SFX Broadcasting, acquiring small groups and event promoters.[7] In 2005, it became Live Nation and expanded into the music industry by purchasing groups like the House of Blues.[8]

In 2009, Live Nation and Ticketmaster agreed to a merger deal under the new conglomerate Live Nation Entertainment.[9] Norway and Turkey were the first countries to approve the merger, and while the United Kingdom's Competition Commission initially rejected

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[5] "Our History." Ticketmaster.com. Ticketmaster Entertainment Inc., n.d. https://www.ticketmaster.com/about/our-history.html?tm_link=abouttm_history.

[6] *Annual Report Pursuant to Section 13 and 15(d)*. Beverly Hills, CA: Live Nation Entertainment Inc., 2023

https://www.salesforce.com/customer-success-stories/ticketmaster/#:~:text=Every%20year%20Ticketmaster%20sells%20nearly,more%20than%20a%20billion%20visits.

[7] The Associated Press. "SFX Broadcasting Buying Sunshine for $50 Million." The New York Times. The New York Times, March 12, 1997.
https://www.nytimes.com/1997/03/12/business/sfx-broadcasting-buying-sunshine-for-50-million.html.

[8] Matzer, Marla. "SFX Entertainment to Buy L.A. Concert Promoter Avalon." Los Angeles Times, March 19, 1998. https://www.latimes.com/archives/la-xpm-1998-mar-19-fi-30535-story.html.

[9] *The Ticketmaster/Live Nation Merger: What Does it Mean For Consumers And the Future of the Concert Business?, First Session, Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 111th Cong. 201 (2009)

https://www.govinfo.gov/content/pkg/CHRG-111shrg54048/html/CHRG-111shrg54048.htm the move, it later reversed its decision.[10] The merger was met with high levels of backlash from musicians, industry players, and the public alike, as groups like the National Consumers League and American Antitrust Institute immediately launched campaigns to block the merger.[11] Soon after, the United States Justice Department reviewed the merger for the first time, beginning a year-long investigation into the conditions of the deal. In January of 2010, the department officially passed the merger, under several key conditions.[12] First, Ticketmaster was forced to sell Paciolan, one of the ticketing system softwares it purchased in 2008, to a suitable competitor approved by the department (the sports entertainment company Comcast-Spectacor, founded in 1974 and based in Philadelphia, eventually purchased the software for an undisclosed amount). This measure was thought to protect competition in the industry by helping competitors keep up with the formation of such a large company. Additionally, Live Nation Entertainment was handcuffed to 10 years of supervision from the Department of Justice, subject to extensions if terms were violated, aimed at preventing possible abuses of power.[13] Immediately following the announcement of these conditions, the Department of Justice's Antitrust Division filed an antitrust lawsuit in the Washington D.C. District Court.[10] 17 state attorneys general participated, still concerned about the ramifications of the merger and unsatisfied by the conditions laid down. Ultimately, the case was unable to substantially impact the original decision.

Now, 13 years after the approval of Live Nation Entertainment, the company continues to grow. Live Nation is estimated to control 70% of all live event ticket sales in the United States – a staggering statistic that can be attributed to the company's numerous deals with performers, agencies, and concert venues[14]. Live Nation holds agreements with a large number of major performance locations across the country (80 of the top 100), forcing even artists who are unaffiliated with Live Nation to work with Live Nation to secure spots at desirable venues. Thus, it quickly becomes difficult for performers to avoid working with Live Nation today.

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[10] The United States Department of Justice, "The Ticketmaster/Live Nation Merger Review And Consent Decree In Perspective." Christine Varney Assistant Attorney General Antitrust Division, March 18, 2010 https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective

[11] Sisario, Ben. "Justice Dept. Clears Ticketmaster Deal." The New York Times. The New York Times, January 25, 2010. https://www.nytimes.com/2010/01/26/business/26ticket.html.

[12] The United States Department of Justice, "Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc." Office of Public Affairs 10-081, January 25, 2010 https://www.justice.gov/opa/pr/justice-department-requires-ticketmaster-entertainment-inc-make-significant-changes-its

[13] United States Securities and Exchange Commission, "Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934." 2022 https://www.sec.gov/Archives/edgar/data/1335258/000133525822000060/lyv-proxyx2022.htm#id7db7710921e442eb783478c5a622090_76

[14] Sisario, Ben, and Bowley. "Citing Violations, U.S. to Toughen Live Nation Accord on Ticketing." The New York Times. The New York Times, December 22, 2019. https://www.nytimes.com/2019/12/19/arts/music/live-nation-ticketmaster-settlement-justice-department.html .

In most cases, a vast majority of tickets to a given concert are not released directly to the public—instead, approximately 90% go to market sellers and companies like Live Nation.[15] This phenomenon is further compounded when it comes to select performances, as Ticketmaster can focus its efforts on dominating sales to particularly popular (and thus profitable) events. Consumers are then forced to navigate Ticketmaster's presale, sale, and resale markets if they want a chance to purchase tickets. This often results in inflated prices, particularly in the resale market; as the sole supplier of retail sales for a ticket, Live Nation has the ability to upcharge consumers. Not to mention, in the resale market, ticket scalpers and bot users have the ability to charge extremely high prices for tickets in high demand on Ticketmaster's site, where Ticketmaster makes a significant profit by taking a cut of each sale. All of this being said—it is becoming increasingly difficult to defend Live Nation's claims that it is not a monopoly.

Frustration has been building for years surrounding Live Nation's influence, culminating in the latest lawsuit against the giant. In 2019, Live Nation was under fire for similar grievances from the public. The Department of Justice performed an investigation and found that Live Nation had violated the terms of the merger in 2010 "repeatedly and over the course of several years."[16] In what they called "the most significant enforcement action of an existing antitrust decree by the department in 20 years," the DOJ settled with Live Nation to avoid a lawsuit. The terms included nothing more than several small fines, but the period of oversight outlined in the original merger terms was extended by five years. It was certainly more of a warning shot than an attempt at breaking Live Nation apart, but as of November 2022, the Department of Justice has opened another investigation into the company, which could bring much harsher consequences.

IV. THE CASE

Plaintiffs vs. Live Nation Entertainment, INC was introduced in a Los Angeles County court on December 2, 2022. The original impetus for the lawsuit came when the 25 plaintiffs in the class-action lawsuit were some of the thousands who were denied access to purchasing rights to Taylor Swift's highly anticipated performance tour in the summer of 2023. "The Eras Tour" will be Swift's sixth major tour since her rise to stardom in the mid-2000s and her first since the "Reputation Stadium Tour" in 2018. It will also be her first since the release in October 2022 of her latest hit album, "Midnights," which held the number one spot on Billboard's Top Album Sales chart for twelve consecutive weeks. These circumstances generated much excitement for

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[15] The City and County of Honolulu State of Hawai'i, "Audit of Neal S. Blaisdell Ticket Sales Operations, Resolution 19-264." Office of the City Auditor 20-06, November, 2020 https://www.honolulu.gov/rep/site/oca/oca_docs/Final_Report_Audit_of_NBC_Ticket_Sales_Operations_Reso_19-264.pdf

[16] The United States Department of Justice, "Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster." Office of Public Affairs 19-1,424, December 19, 2019 https://www.justice.gov/opa/pr/justice-department-will-move-significantly-modify-and-extend-consent-decree-live

fans across the world hoping to see Swift perform, but when sales for the tour opened in mid-November of 2022, the situation quickly soured.

As previously discussed, Ticketmaster holds agreements with all of the stadiums on Swift's tour, just a fraction of the major concert venues under Ticketmaster's influence. This is not a surprise given the scale of the tour, as most popular venues still independent of Ticketmaster cannot hold half the audience that Ticketmaster's venues can. This left Swift without any options – Ticketmaster would be the primary distributor of tickets to her performances.

Ticketmaster ultimately held control of all access to "The Eras Tour," including the presale and sale of every publicly available ticket in all twenty tour cities. Ticketmaster's program "TaylorSwiftTix," which took place from November 1 to 9 of 2022, was a presale system aimed at leveling the playing field for access to tickets between average fans and ticket scalping bots. This would not reach its desired goal, as thousands of tickets were believed to be purchased by automated software and hardware. Thousands of fans who purchased presale tickets through the program, which verified them as genuine fans, were not sent the electronic codes guaranteeing them access to tickets.

Due to Ticketmaster's resale policy, which demands that all tickets purchased on its site be put on the resale market through its own Secondary Ticket Exchange platform, those same thousands of tickets were resold on Ticketmaster's site for hundreds of times greater than the initial cost. Retail prices to "The Eras Tour" went for $49-$450 on Ticketmaster, while resales consistently reached $5,000, some peaking at $30,000. Because all such resales were conducted through Ticketmaster's Secondary Ticket Exchange, the company took a 15% commission from each. This generated hundreds of thousands, if not millions, of dollars in revenue for Live Nation. Economic principles predict that, due to the lack of options for both ticket resellers and those seeking to purchase resold tickets, resale prices on Ticketmaster's resale platform would have been inflated far beyond what one would see if there were several options to access the resale market. Accordingly, because ticket resales to Swift's tour were nearly solely available through Ticketmaster, those reselling tickets were able to price their products as high as they would be allowed to.

This series of events ultimately positioned Live Nation to be accused of engaging in anti-competitive action in pursuit of individual gains. Both elements are difficult to refute–there is little competition in the live ticket sales industry of which Live Nation holds a vast influence, and Ticketmaster has seen immense individual gains from the fallout. Officially, the December lawsuit accuses Live Nation Inc. of breach of contract, intentional misrepresentation, fraud, fraudulent inducement, and a series of six antitrust law violations. Those violations include unlawful tying, exclusive dealings, price discrimination, price fixing, group boycotting, and market division schemes.

Firstly, the suit alleges that Ticketmaster was in breach of the contract it entered into with thousands of customers involved in the ticket presales to "The Eras Tour."[17] It failed to prevent automated buyers and non-presale verified customers from participating in the early round of sales. It also failed to provide an electronic presale access code to some of those who received proper verification, which entitled them to presale access.

Secondly, Ticketmaster's presentation of the presales information was incomplete and inaccurate in many respects. Ticketmaster instructed the public, including the Plaintiffs, on how to participate in the presale. These instructions included information on how to earn a presale code, which Ticketmaster reported to be the only way to access the presale, and how to redeem it for a ticket to the tour. However, not only were more presale codes released than presale tickets available for sale, but many people who signed up for a code did not receive one. Additionally, thousands of tickets were bought by people who did not have a code, many of whom were scalpers whom Ticketmaster later profited off of in the resale market.

This behavior spurs the third charge of fraud against Live Nation–willfully deceiving the public in order to gain greater profits from the sale. The Plaintiffs hold Ticketmaster accountable for all the above mishaps–asserting that Ticketmaster either willfully ignored possible issues with the sales process and failed to inform customers of them or intentionally facilitated such failures to generate revenue. One such example of Ticketmaster's gains from this comes from one of the methods of accessing the ticket presale. One of the many ways one could earn a presale code was by spending a certain amount of money on official Taylor Swift merchandise. The promise of access to this code inspired many to purchase goods from merchandise sellers, whom Ticketmaster partnered with and thus benefited from in this program. However, many of these fans did not end up receiving a presale code despite purchasing enough merchandise to qualify for one, and more yet were unable to purchase a ticket despite having a code. In this instance and many others, fans reasonably operated based on information presented by Ticketmaster as fact, engaging in action favorable to Ticketmaster and often finding themselves without the tickets they sought. Under California's UCL (Civil Code Section 3294), Ticketmaster would be subject to recovering such damages to the Plaintiffs as well as additional exemplary fines determined by the court if found guilty.

According to the Plaintiffs, the above evidence outlines the structure of Live Nation's attempt to monopolize the primary and secondary ticket services market, a violation of the Cartwright Act that would place Ticketmaster responsible for the financial costs bore by the Plaintiffs in the thousands of dollars each.[18]

Firstly, and likely most obviously, Ticketmaster's domination of the secondary ticket sales market by demanding the resales of tickets sold on their primary platform constitutes tying, illegal under the Cartwright Act. Ticketmaster and all venues on the Taylor Swift tour mandate

[17] *Plaintiffs vs. Live Nation Entertainment Inc., D/B/A Ticketmaster LLC., and DOES 1 to 100*, CA. (2023) https://deadline.com/wp-content/uploads/2022/12/E383193070.pdf

[18] Mailand vs Burckle, 20 Cal. 3d367 (1978)

and actively enforce the policy dictating that all tickets sold on Ticketmaster's primary platform (making up a large majority of the total tickets sold) must be resold on Ticketmaster's Secondary Ticket Exchange (if at all). Ticketmaster will rescind tickets that violate these terms via other platforms. Thus, resales of the tickets sold on Ticketmaster's primary platform are tied to their secondary platform sales. This arrangement substantially harms competition from other secondary markets, allowing prices to rise along with Ticketmaster's profits from the resale market.

Live Nation's immense influence over the live events industry through its deals with major concert venues forces artists hoping to perform at such venues into exclusive dealings with Live Nation, an exercise of monopolistic power and illegal under California's Business and Professional Code. Control of over 70% of live ticket sales both serves as the product of and reinforces Live Nation's leverage over major performance locations and performers. These forced exclusive dealings allow Ticketmaster to potentially price tickets above the market medium. Because there is no clear justification for these dealings, such as industry efficiency, this anti-competitive action would hold Ticketmaster accountable for the estimated costs imposed on buyers under California law.

Ticketmaster has also been accused of both horizontal and vertical price fixing. *Horizontal price fixing* is defined as allyship between market competitors, formal or informal, to set a uniform price for a good. The lawsuit presents very little evidence to support this claim, only mentioning the fact that Ticketmaster and market competitors such as SeatGeek charge similar prices for similar tickets, preventing consumers from finding cheaper options elsewhere. No evidence of collusion between the two is presented. Contrarily, the vertical price fixing allegations bear significantly more weight. Vertical price fixing can be classified as any form of agreement between sellers and buyers when it comes to the resale of products. According to the Plaintiffs, Ticketmaster accomplishes this by forcing tickets purchased on its site to be resold on its secondary platform. Additionally, Ticketmaster enforces a 'dynamic pricing' policy, which allows a product's price to actively fluctuate based on demand after it has been released for sale. This agreement is forced upon resellers who purchased a ticket on Ticketmaster, which often results in higher prices for particularly popular tickets that benefit both Ticketmaster and the reseller. This action directly violates the Cartwright Act and would hold Ticketmaster liable for any economic damages upon the Plaintiffs determined in court.

The final charges brought upon Ticketmaster accuse the company of violating antitrust law and prior agreements with the United States Department of Justice by engaging in group boycotting and market division schemes. By threatening major concert venues and withholding services in response to any refusal to meet Ticketmaster's contractual demands, the company has repeatedly stepped beyond the bounds of restrictions set by the Department of Justice in 2010 (which were extended to 2025). This is easily classified as anti-competitive action, but this and the market division scheme allegations are especially significant given that they violate previously established terms by the Department of Justice when Live Nation last came under fire for monopolistic action. In regards to that second charge, Plaintiffs allege that Ticketmaster carves out market territories to give to competing companies such as SeatGeek in exchange for agreements to keep prices uniform. These market provisions would keep SeatGeek afloat and insulated from Ticketmaster's influence, but their price adjustments would shroud Ticketmaster's monopolistic actions by fronting a common market price for specific tickets.

V. CONCLUSION

Despite the convincing nature of many accusations against Live Nation, especially its effect on the secondary ticket sales market, the lawsuit lacks substance. The price-fixing allegations come with almost zero evidence to support the Plaintiff's argument, and while the line of argument in most accusations is certainly plausible, they leave much to be desired in terms of raw evidence. Live Nation began fighting back against this case and others like it as early as February of 2023, asking U.S. judges to halt proposed class-action lawsuits against them and force them into private arbitration.

Ultimately, the strength of the lawsuit is not, and has never been, of great importance. With a company of Ticketmaster's size, it is very difficult for a private legal team to shoulder the burden of proof for several reasons. First, Live Nation's own legal staff is likely powerful enough to challenge any other team and vigorously defend the company. Second, it may not be possible to prove many elements of the case. Depending on how Ticketmaster went about conducting their business, finding evidence of alleged backroom negotiations with concert venues and market competitors like SeatGeek will be difficult. Thus, even a thoroughly crafted breakdown of each argument may not have been enough to win anyway.

Live Nation is probably guilty of many of the charges brought against it. Particularly convincing are the breach of contract and tying allegations, simply because they are based on Ticketmaster policies that are actively causing the damages listed. Because of this, despite private settlements or court decisions unlikely to fall in favor of the Plaintiffs, what will likely be the result of this case and the others surrounding Live Nation is the insertion of the Department of Justice into the equation. This was presumably the primary goal of most lawsuits against Ticketmaster–providing a means for the government to step in and handle Live Nation with full authority. Similarly to what happened in 2019, the DOJ may soon deem these cases worthy of their review and bring Live Nation before them in hearings. All the class-action lawsuits had to do was bring enough attention to the situation and raise as many accusations as they reasonably could.

As soon as this summer, the Department of Justice could take action to an extent of which they have not done in over 100 years. In 1911, in the case of *Standard Oil Co. of New Jersey v. United States,* the Standard Oil Company monopoly was broken up into several independent companies by the Supreme Court after a suit in cooperation with the Department of Justice.[19] If they were to file a lawsuit against Live Nation today, the result could very likely be the dismantling of the company. Key public cases like *Plaintiffs v. Live Nation Entertainment Inc*. allow for federal and state prosecutors to get their foot in the door as the likelihood of government intervention in Live Nation rises. With the Department of Justice already investigating Live Nation, and a history of Ticketmaster violating previous agreements, there is a significant chance that Ticketmaster and Live Nation will be forced to separate. Repeated infractions have historically convinced higher courts to change the terms of the law, such as in the case of *Citizens United v. FEC*. This landmark decision raised private contribution limits to political campaigns following occasions of repeated suppression of political advertisements in super-majoritarian states.[20] This trend continued in 2021 in *Van Buren v. United States*, when the Supreme Court established a stricter definition of "exceeds unauthorized access" in the Computer Fraud and Abuse Act while cybersecurity concerns grew more pressing in the modern technological age.[21] Other outcomes in which a federal court or the Supreme Court finds Live Nation to be in violation of antitrust laws involve heavy restrictions on the company, similar to the outcome of *Apple v. Peppe*r in 2019.[22] To summarize, *Plaintiffs v. Live Nation Entertainment Inc.* will likely not amount to much for the Plaintiffs involved. However, the case could potentially catalyze higher-level litigation where federal courts are more inclined to make decisions that are considered unfavorable by corporations.

Considering how Live Nation Inc. has grown to such extreme influential power even under supervision by the DOJ for more than ten years, the issues raised with Ticketmaster will likely lead to tighter restrictions and stricter punishments handed down by the government in all future cases of potential monopolization (such as the hearing with Live Nation in 2019). Even if Live Nation's monopoly is not broken up, antitrust law across America could see a shift in the way judges and lawmakers approach big businesses. In the wake of the COVID-19 pandemic, large corporations have taken over many marketplaces, while small businesses that were forced to close down have yet to make a resurgence.[23] Anti-corporate sentiments have grown among Americans as the country makes its way out of the economic hole experienced in 2020, possibly a cultural precursor to changes in how the law deals with powerful industry leaders.[24] The balance between free market values and monopolistic control of markets will remain an issue, as

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[19] *Standard Oil Co. of New Jersey v. United States, 221 U.S. (1911)*

[20] *Citizens United v. FEC*, 558 U.S. 310 (2010)

[21] *Van Buren v. United States*, 593 U.S. (2021)

[22] *Apple v. Pepper,* 587 U.S. (2019)

[23] Goolsbee, Austan. "Big Companies Are Starting to Swallow the World." The New York Times. The New York Times, August 30, 2020. https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html .

[24] Household Pulse Survey Data Tables § (2023). https://www.census.gov/programs-surveys/household-pulse-survey/data.html.

it has been for Americans for over a century. Nevertheless, the fall of Live Nation could spell the decline of domestic monopolies in the current-day American marketplace.

Garment Sweatshop Labor in the United States

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ABSTRACT.

In response to the backlash against globalization, the "Made in America" movement has led many garment manufacturers to shift production from overseas back to the United States. However, the phenomenon of sweatshop labor remains prevalent in the domestic garment industry. This article discusses and analyzes the legal implications of sweatshops. By examining the results of past legal cases involving sweatshops and the Federal Labor Standards Act, the article argues that current law enforcement contains various loopholes that enable sweatshops to continue operating under unlawful and unethical conditions. Eliminating sweatshops in the United States requires holding manufacturers and garment production contractors accountable, which implies closing existing loopholes and strengthening labor law enforcement.

I. INTRODUCTION

As economic globalization continues to bring unprecedented flows of trade between nations, the United States has become home to a remarkable number of multinational corporations and manufacturers that operate garment factories all across the world. In recent years, however, the "Made in America" movement has gained considerable momentum, while critics argue that multinational corporations often bypass poorly enforced local labor laws and exploit cheap labor in developing countries, thus profiting enormously.[25] In garment factories in developing countries such as Bangladesh and Vietnam, the plagues of child labor, gender-based violence, poor and hazardous working conditions, unfair wages, and a lack of benefits for factory workers persist. Both former presidents Trump and President Biden have focused on promoting U.S. manufacturing and reducing the country's reliance on foreign supply chains. Many consumers and organizations have vowed to avoid supporting unethical sweatshops, buying items made exclusively in the U.S. Despite such efforts to counter sweatshop labor, the question of whether a "Made in America" label translates to "ethically made" and guarantees fair labor practices remains unanswered. The reality is that illegal working practices are still prominent in the U.S. today and labor laws are not adequately enforced. The advent of the "Made in America" movement may have effectively fueled the rise of domestic sweatshops in the garment industry.

According to findings reported by the American Apparel and Footwear Association in 2012, approximately 97% of clothing items worn by U.S. consumers was made abroad.[26] However, the fact that sweatshops are prevalent in overseas factories does not mean the U.S. has not suffered from similar problems. Data from the U.S. Bureau of Labor Statistics revealed that 93,800 employees worked in the apparel manufacturing industry by the end of 2022, with the highest numbers of employees present in California, New York, and Texas.[27] As years of investigations by the Department of Labor find, violations such as wage thefts and overwork are present in numerous garment factories across the country.[28]

Garment workers tend to be low-income women, people of color, and immigrants who are vulnerable to exploitation since they are not equipped with knowledge of their legal rights and are forced to accept the job in order to earn a living. This problem is exacerbated by the fact that the garment industry is often dominated by powerful corporations that have a great degree of

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[25]Richard Freeman, *Globalization, Labor Markets, and Inequality,* Carnegie Endowment for International Peace, February 2, 2012, accessed April 14, 2023, https://carnegieendowment.org/2012/02/02/globalization-labor-markets-and-inequality-pub-47028.

[26]American Apparel & Footwear Association, "AAFA Releases ApparelStats 2012 Report," WeWear, accessed April 14, 2023, https://www.wewear.org/aafa-releases-apparelstats-2012-report/.

[27] U.S. Bureau of Labor Statistics, "Industries at a Glance: Apparel Manufacturing: NAICS 315," accessed April 14, 2023, https://www.bls.gov/iag/tgs/iag315.htm.

[28] U.S. Department of Labor, "U.S. Department of Labor cites South Carolina garment manufacturer for Wage and Hour Violations," news release, March 22, 2023, accessed April 14, 2023, https://www.dol.gov/newsroom/releases/whd/whd20230322-0.

control over the pricing of labor. As a result, wage theft, gender-based violence, and unreasonable overtime are persistent in the garment industry. The COVID-19 pandemic has further worsened working conditions. Many garment workers have no access to protection from the virus and have no choice but to continue working in a high transmission environment and accept even lower wages due to the decline in production and company profitability.[29]

These cases reveal a critical issue: the fundamental labor standards for garment workers are violated in the U.S. today. Federal labor laws such as the Fair Labor Standards Act (FLSA) clearly pertain to factors such as working conditions, workers' benefits, fair wages, and the prohibition of child labor.[30] On the international level, the Declaration on Fundamental Principles and Rights at Work adopted by the International Labor Organization (ILO) also provides an ethical framework that advocates for protecting workers with basic human rights.[31] Thus, understanding the issue of sweatshops requires an examination of the enforcement of labor laws.

Sweatshop labor in the U.S. raises issues of both legality and morality. Law-enforcement agencies fail to effectively protect the most vulnerable groups of people in society from unnecessary suffering in their workplace. By examining the economic incentives and legal challenges behind the continued existence of sweatshop labor, this article will argue in favor of strengthening labor laws in post-pandemic America. First, the article explores the background of the resurgence of domestic manufacturing in the U.S. It will proceed to examine significant court cases involving sweatshop labor and relevant statutes. Finally, it analyzes the main reasons why sweatshop labor is difficult to eliminate from a legal perspective.

II. RELEVANT BACKGROUND

A. Globalization, fast fashion, and "Made in America"

The garment manufacturing industry in the U.S. has undergone tremendous transformations since the 1970s. The integration of global economies facilitated free trade agreements, which allowed U.S. corporations to establish operating plants overseas. As a result, since 1973, the ratio of imported apparel to exports has been consistently rising. Today, around 97% of all apparel products consumed in the U.S. are imported.[32] Garment brands such as Nike, Forever 21, Guess, and Calvin Klein relocate their production sites to developing countries with

[29] Kate Hodal, "Garment workers face destitution as Covid-19 closes factories," The Guardian, March 19, 2020, accessed April 14, 2023, https://www.theguardian.com/global-development/2020/mar/19/garment-workers-face-destitution-as-covid-19-closes-factories.

[30] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2021).

[31] International Labour Organization, "ILO Declaration on Fundamental Principles and Rights at Work," adopted June 18, 1998, accessed April 14, 2023, https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm.

[32] Lauren Sherman, "The Myth of 'Made in America'," The Business of Fashion, October 13, 2015, accessed April 14, 2023, https://www.businessoffashion.com/articles/news-analysis/the-myth-of-made-in-america-ttp-agreement/.

weak labor laws and exploit them by paying them unfair wages and offering little to no worker protection. This practice, famously known as "outsourcing," has been criticized by many opponents of globalization. As people become more affluent, the demand for new and more versatile styles of clothing items also increases. This pushes garment producers to shorten the production cycle to meet the ever-increasing demand of clothes at the expense of workers who have to work overtime and receive little compensation.

In the 1980s and 1990s, the advent of fast fashion—cheap, rapid cycles of clothing production by sampling ideas from catwalk or celebrity culture and encouraging consumers to dispose of them in a few years before buying new ones—allowed consumers to access affordable and trendy clothing, providing them with transient gratification. The impact of fast fashion on the garment industry is faster production cycles and more outsourcing of labor in order for multinational corporations to earn a profit.[33]

As these unethical practices have become more visible to the public eye and trade relations between countries deteriorated in recent years, the call for supporting domestic "Made in America" production is on the rise. Proponents argue that by consuming domestically made apparel, consumers can advocate for an ethical cause, boost the domestic economy, and help end sweatshop labor abroad. The underlying assumption behind the movement is that a "Made in America" label means the clothing item is ethically produced. However, evidence reveals that this assumption is far from being realized in the status quo.

B. A brief history of sweatshops in the U.S.

According to the U.S. Department of Labor, a sweatshop is defined as "a factory that violates 2 or more labor laws."[34] While sweatshop is a ubiquitous term used in media and people's daily conversations today, its history in the U.S. dates back to the late 19th century, an era when manufacturing in the format of assembly lines became common and big corporations started to dominate the economy. The rise of sweatshops is inextricably linked to the influx of immigrants into the U.S. Waves of immigrants from eastern Europe, Scandinavia, and Asia seeking economic opportunities entered garment factories and took on many low-skilled jobs. By 1910, most residents in the largest U.S. cities were immigrants or children of immigrants. They fueled industrial growth while becoming the main victims of harsh working conditions inside the sweatshops.

The contractor system developed in the early 20th century allows manufacturers to divert their attention to marketing and retailing while leaving the burden of production to a group of contractors. The mode of the garment businesses shifted from manufacturing to retailing. In the

[33] World Resources Institute, "By the Numbers: The Economic, Social and Environmental Impacts of 'Fast Fashion'," accessed April 14, 2023, https://www.wri.org/insights/numbers-economic-social-and-environmental-impacts-fast-fashion.

[34] United States General Accounting Office, "Sweatshops in the U.S: Opinions on Their Extent and Possible Enforcement Options," GAO, 1988, 1.

vibrant marketing of apparel, competition forced stores to cut prices for consumers, which further led retailers and manufacturers to cut production costs. This downward spiral translated into lower wages for workers.

A landmark case in the U.S. history of sweatshops is the discovery of the El Monte sweatshop. In August of 1995, the California Department of Industrial Relations raided an apartment in El Monte, California and found a factory with horrifying working conditions. 72 illegal Thai immigrants were trapped in fences and forced to sew garments. It was revealed that the sweatshop was operated by contractors hired by several garment retailers and manufactures. The operators pleaded guilty and were sentenced for two to seven years.[35] Almost 30 years after the El Monte incident, many people argue that this may only symbolize the tip of the iceberg.

III. MAJOR CASES AND LAWS

A. Court cases

One of the most notable cases involving garment sweatshops is *Kasky v. Nike, Inc.*, a case heard by the Supreme Court of California in 2003.[36] In this case, the activist Marc Kasky sued Nike, alleging that the company had engaged in false advertising by making deceptive statements in its public relations materials about its improved labor practices. Kasky asserted that "in order to maintain and/or increase its sales," Nike made a number of "false statements and/or material omissions of fact" concerning the working conditions under which Nike products are manufactured.[37]

Rather than resolving the issue, the decision was controversial because it did not directly address the substantive issue of labor conditions in Nike's factories. Rather, the central question of the case is whether public statements made by corporations to increase their sales and profits should be considered as commercial speech subject to regulation. Both the trial court and the California Court of Appeals dismissed the claim based on lack of standing to bring a claim under California's unfair competition law. In 2003, the Supreme Court effectively let the California Supreme Court's ruling stand. Later, Nike and Kasky agreed to settle for $1.5 million. As part of the settlement, Nike promised to invest in strengthening fair workplace monitoring.

The ruling had the effect of limiting the ability of individuals and organizations to bring claims against companies for false or misleading statements made in public relations materials. But more significantly, it failed to address the broader issue of labor conditions in the global garment industry or the specific allegations against Nike regarding its labor practices. Following the court's decision, Nike stopped publishing its annual Corporate Responsibility Report and

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[35] Julie Su, "What the El Monte Case Means to Me," U.S. Department of Labor Blog, August 2, 2021, accessed April 14, 2023, https://blog.dol.gov/2021/08/02/what-the-el-monte-case-means-to-me.

[36] *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003).

[37] *Nike, Inc. v. Kasky*, Oyez, https://www.oyez.org/cases/2002/02-575 (last visited Apr 14, 2023).

refused to pursue a listing in the Dow Jones sustainability index.[38] The *Nike* decision thus stifled the transparent reporting of corporate social responsibility (CSR) because companies may feel that it is better to not publicize their CSR practices if doing so risks being accused of making false statements.

In 2012, another significant case unfolded as a group of immigrant workers in a New York City garment factory filed a class-action lawsuit against their employer, Gristedes Operating Corp., and other defendants. The case, *Torres v. Gristedes Operating Corp. et al.*, centered around allegations of wage theft and violation of overtime laws.[39] Workers claimed they were subjected to sub-minimum wages and sweatshop conditions. The case was eventually settled for $3.5 million, providing compensation to the affected workers.

In 2016, the U.S. Department of Labor's Wage and Hour Division conducted an investigation into 77 garment factories in Los Angeles. The investigation revealed that 85% of these factories were in violation of federal minimum wage, overtime, and record-keeping laws, with many workers paid below minimum wage and denied overtime pay. As a result of the investigation, over $1.3 million in back wages were recovered for more than 1,500 garment workers.[40] Two years later, the New York State Attorney General's Office similarly announced settlements with four garment manufacturers in New York City's garment district. The settlements came after an investigation found that these factories had violated state labor laws, including failing to pay minimum wage and overtime. As a result of the settlements, over $90,000 in back wages were recovered for 77 workers.[41]

The fact that these court cases and investigations have resulted in settlements and compensation rather than significant legislative changes highlights some of the challenges in addressing the problem of garment sweatshops. Settlements often involve a payment by the company to the affected workers, but they do not address the underlying issues that led to the violations in the first place. While settlements can provide some form of compensation to workers and help to raise public awareness of the issue, they do not lead to systemic change in the garment industry. In order to effectively address the problem of garment sweatshops, there needs to be greater enforcement of labor laws and regulations, as well as greater transparency and accountability throughout the supply chain.

B. Federal Fair Labor Standards Act (FLSA)

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[38] Vicki McIntyre, "Nike v. Kasky: Leaving Corporate America Speechless." (William Mitchell Law Review, 2004).

[39] *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447 (S.D.N.Y. 2008).

[40] Beth Greenfield, "TJ Maxx, Forever 21, Macy's, and Nordstrom guilty of using California sweatshops," Yahoo! Sports, September 30, 2016, accessed April 14, 2023, https://sports.yahoo.com/news/tj-maxx-forever-21-macys-and-nordstrom-guilty-of-using-california-sweatshops-180605945.html.

[41] New York State Office of the Attorney General, "Attorney General James Recovers $90,000 in Stolen Wages for Queens Laundry Workers," news release, October 18, 2022, accessed April 14, 2023, https://ag.ny.gov/press-release/2022/attorney-general-james-recovers-90000-stolen-wages-queens-laundry-workers.

The Fair Labor Standards Act (FLSA) is a federal law that establishes minimum wage and overtime pay requirements for most workers in the United States, including those working in the garment industry. The FLSA sets a federal minimum wage that employers must pay their employees, currently set at $7.25 per hour.[42] It also requires that non-exempt employees receive overtime pay at a rate of 1.5 times their regular rate of pay for the number of hours worked over the typical 40 hour workweek.[43] The FLSA contains provisions to protect workers from wage theft, a common problem in the garment industry. Employers are required to keep accurate records of their employees' hours worked and wages paid, and must provide workers with a pay stub that details their earnings and deductions. In addition, the FLSA establishes child labor standards, which prohibit children under the age of 16 from working in certain hazardous occupations, including many jobs in the garment industry. The law also limits the number of hours that children under the age of 18 can work.

C. Senate Bill 62: Garment Worker Protection Act

As one of the pioneer bills in eliminating sweatshops today, the Garment Worker Protection Act is a law passed in the state of California in 2021 to protect garment workers in the state's garment industry from wage theft and other labor violations. The law went into effect on January 1, 2022. The law requires garment manufacturers to register with the state and obtain a license to operate. It also mandates that manufacturers provide garment workers with itemized pay statements that include the number of hours worked, rate of pay, and any deductions made from their pay. The law also establishes a wage bond program that requires manufacturers to post a bond to cover unpaid wages and other labor violations.

The Garment Worker Protection Act is intended to address the widespread labor violations that have been reported in California's garment industry, including wage theft, unsafe working conditions, and the exploitation of immigrant workers. Key provisions of SB 62 include:

1. Elimination of the "piece-rate" system: The bill aims to abolish the piece-rate payment system, where workers are paid per item produced rather than an hourly wage. This system often results in workers being paid below the minimum wage. Under SB 62, garment workers would be guaranteed an hourly wage.
2. Joint liability for labor violations: The bill establishes joint liability for both manufacturers and the companies that contract with them (such as fashion brands and retailers) for labor law violations in the garment industry. This provision is intended to hold all parties in the supply chain accountable for wage theft and other labor violations.

[42] Federal Labor Standards Act of 1938 (FLSA), 29 U.S.C., Chapter 8 sec. 206(a) (2011).
[43] Id. 216(b) (2011).

3. Strengthening enforcement mechanisms: SB 62 also seeks to enhance enforcement of labor laws in the garment industry by empowering the California Labor Commissioner's office to investigate and enforce compliance with the new regulations.

IV. ANALYSIS OF THE CURRENT BATTLE AGAINST SWEATSHOPS

A. Legal loopholes and obstacles

1. Subcontracting: The difficulty of holding manufacturers accountable

The heart of the sweatshop labor system lies in subcontracting: the practice by which manufacturers delegate the jobs of sewing and cutting apparel pieces to contractors and subcontractors.[44] Companies often outsource the production of goods to smaller, often less-regulated businesses, leading to potential labor rights violations and poor working conditions. This hierarchical system consists of retailers (such as department stores or boutiques), manufacturers, contractors, and the garment workers. The manufacturers design the piece, give jobs to the contractors, and sometimes provide the fabrics. The contractors run garment factories and employ cutters, seamstresses, trimmers, and pressers to produce the items. As this hierarchy goes downward, the profit margin decreases and competition among subcontractor firms increases, which results in downward pressure of prices. Many contractors thus limit workers' wages to reduce their cost of input.

The rise of subcontracting in the U.S. garment industry can be traced back to the 1960s and 1970s, when large apparel manufacturers and fashion brands began to outsource production to cut costs and increase flexibility. This trend accelerated with globalization, as companies increasingly turned to subcontractors both in the U.S. and overseas to take advantage of lower labor costs. Subcontracting often creates complex supply chains with multiple layers of intermediaries, making it challenging to monitor labor practices and enforce labor laws. In many cases, apparel brands and retailers may be unaware of the working conditions at the subcontracted facilities, as they do not have direct contractual relationships with the workers. This lack of visibility and accountability can contribute to the persistence of sweatshop conditions.[45]

Subtracting is an effective way of dodging legal responsibilities of manufacturers, as they can argue that they are simply not aware of the situation in the sweatshops perpetuated by their subcontractors.[46] Arguments against manufacturer liability often defend that a manufacturer

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[44] Shirley Lung, "Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers,"(Loyola University Chicago Law Journal, 2003).

[45] Cowie, Jefferson. Review of *A Century of Sweat: Subcontracting, Flexibility, and Consumption*, by Edna Bonacich, Richard P. Appelbaum, Nancy L. Green, Miriam Ching Yoon Louie, Leon Stein, and Tom Vanderbilt. *International Labor and Working-Class History*, no. 61 (2002): 128–40. http://www.jstor.org/stable/27672775.

[46] Leo L. Lam. *"*Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshop*s*," (University of Pennsylvania Law Review, 1992).

ignorant of the wrongdoings of its contractors should not be held liable. The core defense against manufacturers' liability is that manufacturers could invoke the distinction between employees and independent contractors. Employees have a direct employment relationship with their employer, while independent contractors are typically self-employed individuals hired to perform specific tasks or services for a client on a contractual basis. The employer has control over an employee's work, often dictating how, when, and where the work is performed. In contrast, independent contractors have more autonomy over their work and can decide how to complete the tasks assigned to them.[47] Such differences subsequently entail different legal obligations of the employers. The FLSA establishes labor regulations and standards within the context of an employer-employee relationship. However, independent contractors are not considered "employees" under the FLSA's definition. As a result, garment sweatshop owners classified as independent contractors can potentially exempt manufacturers from liability for labor law violations occurring in the sweatshop.

2. Lack of relief from owners of sweatshops

Today, sweatshop owners can easily circumvent labor laws by the piecework wage system and the use of "homework."[48] Under the piecework wage system, workers are paid based on the number of items they produce or tasks they complete, rather than receiving an hourly wage. Employers argue that this system is efficient as it incentivizes workers to work faster and earn more. However, it essentially allows employers to avoid the minimum wage standards. Another strategy is to assign workers with "homework" to be completed for the next day. This strategy contributes to inaccurate wage and hour recording, thus helping employers avoid paying for overtime wages. These fraudulent practices misrepresent the true efforts of workers and insulate sweatshop owners from investigation of their labor malpractice.

In addition to the difficulty of finding proof, FLSA has largely failed to sanction adequate remedies from sweatshop owners. As the previous section discusses, both the collective action of garment workers to file a lawsuit against their employers and investigations by district attorneys frequently resulted in settlement and compensation. The effects of greater exposure of these incidents do not necessarily translate into concrete legislative actions. The penalties imposed on employers under FLSA are too inadequate to deter exploitative labor practices.

3. Lack of protection for immigrants

The rapid inflow of immigrants, both legal and illegal, into the United States coincides with the spur of domestic garment production. They provide a huge pool of potential labor to be

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[47] U.S. Department of Labor, "Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA)," Wage and Hour Division, accessed April 14, 2023, https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship.

[48] Lam, 635-636.

exploited by manufacturers and contractors. 70% of workers in the Los Angeles garment industry, the largest in the country, are immigrants. A 2013 report found that around 64% of garment workers in New York City are immigrants, too.[49] At the same time, the country's ambition to curb unauthorized immigrants has been on the rise. The Immigration Reform and Control Act of 1986 (IRCA) prohibits the employment of workers who are not authorized to work in the United States.[50] Under the Trump administration, the president's pledge to eliminate illegal immigration resulted in stricter border control and a higher number of arrests and deportation of illegal immigrants.

Driven by financial need and having insufficient language skills, vulnerable immigrants are often coerced into the job and are incapable of fighting for their labor rights. Rather than deterring immigration, the law gives contractors opportunities to exploit immigrant workers, knowing that "these workers will not risk losing a paycheck to report abuse to labor agencies."[51]

Furthermore, the undocumented status of some immigrants enables employers to fire them without compensation. In the 2002 case *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board,* an unauthorized immigrant was laid off for engaging in union activities.[52] The court held that the NLRB was precluded from awarding the worker with back pay to redress the unlawful discharge by the employer as the hiring of unauthorized immigrants violated IRCA. In *Montero v. Immigration and Naturalization Service* in 1997, the court held that evidence of the workers' unauthorized working status obtained by employers could be used by the Immigration and Naturalization Service to deport the illegal immigrant worker.[53] Thus, immigrants face the risk of being retaliated against by their employers when involved in legal disputes. These precedents have established the foundational justification of hiring and firing unauthorized immigrants based on the preferences of contractors without being held liable.

B. Legal implications of FLSA: Holding manufacturers liable

Finally, this section explores the question left unresolved: if both manufacturers and contractors are absolved from legal responsibilities as they are able to circumvent labor standards, how should the United States respond to the long-lasting problem of sweatshop labor? The heart of the solution lies at holding manufacturers accountable for their contracting actions. Manufacturers, sitting at the top of the supply chain and earning the highest profit margin, are able to build their brand image and attract consumers while evading their responsibilities to

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[49] U.S. Bureau of Labor Statistics, "How Much Do Consumers Spend on Apparel?" (2012), accessed April 14, 2023, http://www.bls.gov/spotlight/2012/fashion/

[50] Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324(a) (1994).

[51] Lora Jo Foo, "The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation." *The Yale Law Journal* 103, no. 8 (1994): 2179–2212. https://doi.org/10.2307/797044.

[52] *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (00-1595) 535 U.S. 137 (2002).

[53] *Montero-Ubri v. I.N.S,* 229 F.3d 319 (1st Cir. 2000).

ensure their apparels are produced by fairly treated workers. Thus, the FLSA law should be extended to guarantee the legal responsibility of manufacturers and protect garment workers from abuses.

The language used in FLSA provisions include the protection of labor employed by contractors. The congressional goal of the law is to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[54] The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."[55] It defines "employ" as including "to suffer or permit to work."[56] Clearly, this is a broad definition that encompasses both manufacturers and contractors, for which the former is often hidden in the hierarchical supply chain.

In addition, the FLSA states that garment workers "may stand in the relation of an employee" to more than one entity at the same time.[57] This provision is known as the Joint Employment Relationship of FLSA. Under the Joint Employment Relationship, a finding of joint employment is appropriate when the worker's job "simultaneously benefits two or more employers" and "one employer is acting directly or indirectly in the interest of the other" or if two employers "share control of the employee, directly or indirectly."[58] The FLSA thus expressly recognizes that manufacturers and contractors should be joint employers who are held individually and jointly responsible for compliance with the FLSA.

From the perspective of legislative intent, the FLSA was drafted and passed with a clear intent of protecting vulnerable workers, including the least educated and most exploitable people who are unaware of their rights. In his 1937 statement to Congress, President Franklin D. Roosevelt explicitly stated that "Legislation can, I hope, be passed at this session of the Congress further to help those who toil in *factory* and on farm."[59] Undoubtedly, garment workers are protected based on the intent of the FLSA.

Judicial precedents demonstrate that the FLSA should be interpreted broadly to cover workers who do not fall under the conventional employer-employee relationship. A narrow classification fails to close the existing loophole in the FLSA provision. The court in *NLRB v. Hearst Publications, Inc.,* for example, held that the FLSA must "be understood with reference to the purpose of the Act and the facts involved in the economic relationship."[60] In *United States v. Silk,* the court reiterated the aforementioned problem and reasoned that:

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[54] 29 U.S. Code § 202(a) (2011).
[55] Id. § 203(d) (2011).
[56] Id. § 203(g) (2011).
[57] Joint Employment Relationship Under Fair Labor Standards Act of 1938, 29 C.F.R. § 791.2(a) (2002).
[58] Id. § 791.2(b).
[59] Franklin D. Roosevelt, "Fireside Chat on the New Deal," May 24, 1937, accessed April 14, 2023, Pepperdine University School of Public Policy, https://publicpolicy.pepperdine.edu/academics/research/faculty-research/new-deal/roosevelt-speeches/fr052437.htm.
[60] *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944).

> a constricted interpretation…would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers to avoid the immediate burdens at the expense of the benefits sought by the legislation.[61]

Thus, the FLSA provides strong legal justification of holding manufacturers in the garment industry liable for the contractor's labor malpractice, from the standpoint of both legislative and judicial intent. This framework of employer-employee relationship is critical and ought to be adopted to improve sweatshop conditions in the United States. Given that the work performed by garment workers is integral to the day-to-day business of manufacturers, establishing the employment relationship is a step that must be taken to increase manufacturers' liability.

V. CONCLUSION

Globalization, the "Made in America" movement, and sweatshops in the garment industry are interconnected factors that shape the modern apparel sector. Globalization has facilitated the expansion of trade and the exchange of goods and services, which has enabled companies to source materials and labor from around the world. As a result, many businesses have outsourced production to countries with lower labor costs, often leading to the rise of sweatshops in the garment industry. However, the recent "Made in America" movement did not change the situation for the better, as sweatshops are simply being relocated back to the United States. Despite federal and state regulations, law enforcement on protection of labor rights in the garment industry remains weak due to the significant loopholes which allow manufacturers to evade their responsibilities. The supply chain system, which gives contractors and sweatshop owners considerable freedom to control the production, has also led to rapidly deteriorating labor conditions in the garment industry. Both federal and state investigations and court decisions demonstrate that merely raising awareness of the issue is not enough, as manufacturers and contractors would rather use settlements to continue earning profits. Going forward, the key to changes is finding ways to hold manufacturers accountable as they sit at the top of the supply chain. Holding them accountable would both reduce the probability of choosing exploitative contractors and eliminate sweatshops. The FLSA clearly includes provisions for protecting labor rights and holding manufacturers and contractors jointly liable for their wrongdoings. Thus, the legislature and judiciary should use the language and intent of the FLSA to justify greater control of giant manufacturers and provide remedy for the injuries imposed on vulnerable garment workers.

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[61] *U.S.v. Silk*, 331 U.S. 704,711-12 (1947).

Striking a Balance: Regulating Cryptocurrency

Written by Jordan Lee
Edited by Rafay Siddiqui

ABSTRACT.

The intersection of cryptocurrency and the law has been one of controversy for many years. Regulators face a tight balance between overregulating a lucrative industry and underregulating a potentially dangerous and destructive market. Cryptocurrency's rise to stardom has been accompanied by various pitfalls, which can affect everyone, even people who are not involved. In this paper, I will be analyzing past and current cryptocurrency regulation and its efficacy, presenting court cases involving cryptocurrency, and projecting the future path of cryptocurrency regulation. There is strong evidence supporting the idea that the intersection between cryptocurrency and the law is incredibly complex and opaque and that more research and regulation are needed to ensure steady crypto growth, safety, and financial stability for all. All in all, cryptocurrency regulation is a transnational issue that must be addressed by everyone, and without global cooperation and transparency over regulation, little progress will be made to solve this plaguing issue.

I. INTRODUCTION

The rise of financial technology, or fintech, has increased the efficiency and convenience of previously esoteric and obscure financial transactions to an inconceivable level. The constant struggle between fintech startups and large commercial banks continues to wage on, seemingly without an end in sight. Big banks fear that these startups could overthrow institutions that have stood for centuries within a few years using their revolutionary technologies. Peer-to-peer transaction platforms, like Paypal and Venmo, and digital loan platforms, like Sofi and CreditKarma, have modernized fundamental services, like transferring money and borrowing loans. Now, people have found ways to revolutionize currencies, one of the most established and rooted financial instruments in our modern economy.

Currency is a crucial facet of the modern economy – a reliable, universally-backed method of exchanging physical goods and services for mere pieces of paper and bits of metal. However, in an ever-digitalized era, even money has become commonplace in digital transactions and e-wallets. This new form of currency is known as cryptocurrency, or "crypto" for short. In recent years, crypto has grown exponentially by developing an alternative business model that is incredibly attractive to younger generations. The main appeals of crypto include its emphasis on separation from any governmental body, anonymity in transactions, and unmatched efficiency in said transactions. However, because of these main factors of attraction, governments worldwide are concerned about various issues surrounding cryptocurrency, including its instability and lack of supervision. Devastating crashes of various coins, illegitimate crypto scams, and crypto's use in the criminal underworld are all direct results of the lack of regulation that crypto faces, and they bring into the picture legal issues of securities fraud, racketeering, and ransom, just to name a few. Therefore, politicians, economists, investors, world leaders, and many more have called for sufficient national and international regulation of cryptocurrency.

Despite these cries for change, progress has been limited. Policymakers struggle to make regulations that protect user transactions without trampling on the main purposes of cryptocurrency: anonymity and isolation from government supervision. As will be seen in later examples, the U.S. has yet to strike a balance between pushing for too little regulation, which allows illicit crypto activities to run rampant, and pushing for too much regulation, which completely disregards the reasons why cryptocurrency was invented. Ultimately, this article discusses the various legal issues with cryptocurrency, successful and unsuccessful attempts at taming the crypto market, the future of regulation, and, overall, why the fragile balance between law and cryptocurrency is more complex than it may seem.

II. A BACKGROUND ON CRYPTOCURRENCY REGULATION

A. The creation and rapid rise of cryptocurrency

In 2009, an anonymous figure named "Satoshi Nakamoto" introduced Bitcoin, a "Peer to Peer Electronic Cash System."[62] Basically, Bitcoin and other cryptocurrencies serve the purpose of providing a digital payment system without having to utilize traditional institutions, like banks. Since then, activity has skyrocketed on the blockchain, a system that logs transactions permanently, securely, and anonymously in "blocks," or digital databases, and thereby eliminates the middleman. The growing blockchain led to other cryptocurrency coins being introduced into the market and revolutionary peer-to-peer services on the blockchain being established. Self-regulating markets, where centralized control of the market is nonexistent and is instead in the hands of all participants, seemed like a revolutionary way to challenge the old, restrictive stock and bond markets. The simple access, guaranteed anonymity, and unparalleled efficiency created conditions for exponential growth in use and popularity. Given these attributes, however, legal trouble seems inevitable. These factors, in addition to others, have led to dangerous amounts of speculation, volatility, and losses, exacerbated by the inexperience of many cryptocurrency investors, who simply want to take advantage of the "get rich quick" scheme that is constantly associated with cryptocurrencies. All of the characteristics that define the cryptocurrency market, positive and negative, have contributed to the illicit activity for which cryptocurrency is utilized.

B. The unavoidable intersection of cryptocurrency and crime

As mentioned above, the reason behind the creation of cryptocurrency is why so much criminal activity is associated with crypto. Cryptocurrency, mainly Bitcoin, is the main vehicle of transactions on the dark web and for cybercrime in general. The aforementioned emphasis on anonymity is what makes Bitcoin and other cryptocurrencies so appealing to criminals. Bitcoin is used to purchase illegal goods, including guns and narcotics, and it is used to facilitate ransomware. For example, in 2021, Colonial Pipeline, a major supplier of fuel to the Eastern Seaboard, was hacked. This breach of security crippled fuel supply to this important region. The hackers demanded $4.4 million in ransom, paid out with Bitcoin, which the company ended up paying. However, the FBI managed to seize approximately $2.3 million of the ransom, or around 63.7 Bitcoins by accessing the key to one of the hackers' cryptowallets. FBI Deputy Director Paul Abbate asserted, "There is no place beyond the reach of the FBI to conceal illicit funds."[63] Despite the FBI's success, this statement is, unfortunately, difficult to believe. The use of foreign cryptocurrency exchanges, especially those of eastern Europe and Russia, prevents the US government from adequately supervising and regulating illicit transactions due to the lack of

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[62] Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System," *SSRN Electronic Journal*, 2008.

[63] "Department of Justice Seizes $2.3 Million in Cryptocurrency Paid to the Ransomware Extortionists Darkside." The United States Department of Justice, June 7, 2021. https://www.justice.gov/opa/pr/department-justice-seizes-23-million-cryptocurrency-paid-ransomware-extortionists-darkside.

access to these obscure platforms. Beyond cybercrime, the simple lack of regulation has led to a number of other illegal operations, many of which had devastating effects. For example, when a new coin is introduced to the blockchain, the coin undergoes an ICO, or initial coin offering, similar to a company's IPO, or initial public offering, which allows stock of the company to be publicly traded on an exchange. IPOs, however, are constantly scrutinized and supervised by governing bodies like the Securities and Exchange Commission (SEC), but ICOs have basically no regulation. Many smaller companies, therefore, have found ICOs much more efficient and accessible than IPOs, which also require significant out-of-pocket costs. This accessibility, however, comes at a major risk. ICOs can easily be scams run by those who seek to take advantage of young, inexperienced investors.[64] Clearly, the blockchain, subject to little to no control, poses serious issues to the stability and legality of its operations. So, questions arise: who is to regulate the blockchain, and therefore crypto, and how?

C. The inception of cryptocurrency regulation

To this day, 13 years after the inception of Bitcoin, those questions have not been answered at all. Various organizations are vying for control over the blockchain, which include some powerful names: the SEC, the Federal Trade Commission (FTC), the U.S. Treasury, the World Bank, and many more. However, considering its immense vastness and mysteriousness, the cryptocurrency market cannot possibly be controlled by a singular entity. The unimaginable diversity of the types, purposes, and knowledge of crypto coins is daunting, and placing the responsibility of regulation in the hands of a single organization will lead to inevitable disaster and mismanagement. Furthermore, cryptocurrency was invented to avoid forms of federal supervision and regulation. Blocks that contain cryptocurrency transactions are intentionally encrypted with complex cryptography methods, basically guaranteeing anonymity from any prying eyes.

Regulators have failed to reign in on cryptocurrency as it has gained popularity over the past decade, especially in the United States. Currently, legislators view cryptocurrency as a form of property subject to certain capital gains and losses, just like stocks, but have yet to create solid, tangible regulation of cryptocurrency to curtail its inherent risks. Currently, the government faces two extremes regarding cryptocurrency regulation: either exert a firm grip on the cryptocurrency industry or allow the cryptocurrency market to self-regulate with little to no intervention. Both alternatives, however, come with massive downsides. The first option, which is to enforce tight cryptocurrency laws, would significantly limit or even destroy a lucrative and rapidly-growing industry founded on the idea of self-regulation and freedom from supervision. On the other hand, the government cannot subject the cryptocurrency industry to lax or

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[64] Oranburg, Seth C. "Cryptocurrency Regulation." In *A History of Financial Technology and Regulation*, 129–52. Cambridge: Cambridge University Press, 2022. doi:10.1017/9781316597736.011.

nonexistent regulations due to the high risks it can impose upon American citizens and national security.[65]

III. FORMS OF CRYPTOCURRENCY REGULATION

A. Cryptocurrency regulation against violent and dangerous crime in the U.S.: *United States of America v. Ross William Ulbricht*

Cases relating to cryptocurrency and crime have already appeared numerous times in the court of law. A recent case in the Second Circuit of the United States Court of Appeals involved a man who committed a laborious list of crimes that all stem from Bitcoin usage. The dark web, as mentioned above, sees frequent transactions through Bitcoin and other difficult-to-trace cryptocurrencies. In *United States of America v. Ross William Ulbricht*, the defendant, Ross William Ulbricht, head of the notorious dark web marketplace Silk Road, was convicted of distributing narcotics, engaging in continual criminal enterprise and money laundering among others.[66] Ulbricht ran Silk Road, a dark web site where individuals could purchase illicit narcotics, false documentation, and other goods using Bitcoin. Ulbricht's dealings and illicit activity resulted in the deaths of numerous individuals who purchased drugs using Bitcoin from Ulbricht's site, and Ulbricht also hired hitmen on numerous occasions using Bitcoin as well. In summary, Ulbricht's operations and site could not have existed without Bitcoin. Bitcoin's anonymity in transactions and lack of supervision made these transactions go unnoticed, and it was only thanks to undercover agents monitoring Silk Road that Ulbricht was arrested and the site was taken down. This case in particular truly showcases the issues that exist without adequate regulation of cryptocurrency.

Ransom is also a crime beyond distributing narcotics and orchestrating murder that can involve Bitcoin, as shown by the Colonial Pipeline affair earlier. Criminals who commit these kinds of crimes utilizing cryptocurrencies are incredibly difficult to arrest, so the United States has focused more on limiting the profits criminals can receive from cryptocurrency exchanges. Secretary of the Treasury Janet Yellen stated, "As cyber criminals use increasingly sophisticated methods and technology, we are committed to using the full range of measures, to include sanctions and regulatory tools, to disrupt, deter, and prevent ransomware attacks." Yellen did not explicitly mention that they would be capturing these cybercriminals, instead only attempting to limit their access to ill-begotten profits. For example, the Treasury recently placed harsh sanctions on the Russia-based exchange SUEX, where 40% of known transactions executed using the platform involve illicit activities. Though the Treasury is taking some steps towards better protecting U.S. citizens and companies from ransomware attacks, it shows the limited

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[65] Wolff, Josephine. "The Competing Priorities Facing U.S. Crypto Regulations." Brookings. January 13, 2023. brookings.edu/techstream/the-competing-priorities-facing-u-s-crypto-regulations-bitcoin -ethereum/.

[66] *United States of America, Appellee v. Ross William Ulbricht*, 858 F.3d 71 (2d Cir. 2017)

ability that the U.S. has in fighting crime involving cryptocurrency. Clearly, there is yet to be a definite and long-term solution from which the U.S. can benefit.[67]

It is abundantly clear that the United States needs to find a way to regulate cryptocurrency and minimize crypto-related crimes without completely dampening the growth of the industry. This compromise, however, has proven difficult to achieve. The United States Federal Reserve has plans to create a central bank digital currency (CBDC). In a March 2022 executive order, President Biden claimed that his administration "... places the highest urgency on research and development efforts into the potential design and deployment options of a United States CBDC."[68] Unfortunately, this CBDC, despite being heavily backed by the Biden administration, is a seemingly unintuitive solution. This CBDC would compete with major currencies like Bitcoin and Ethereum in an attempt to phase out these currencies and provide more oversight and stability. Most people would be very hesitant to use a CBDC because it is run by the Federal Reserve, a government-related agency, and sensitive information will most likely be collected. Even the Federal Reserve itself acknowledges these concerns: "[A] general-purpose CBDC would likely involve the collection and storage of sensitive PII [personally identifiable information] and information about users' financial transactions. Given the sensitivity of this information, central banks and other institutions involved in the implementation of a CBDC would need to ensure this information is securely held to prevent harm to consumers from fraud and theft arising out of stolen PII as well as unauthorized disclosure of information."[69] This statement seems to contradict the foundational principles that cryptocurrency was built upon: anonymity and lack of supervision. Despite the numerous solutions that the US has devised, none of them seem to provide enough security over these violent and dangerous crimes that put American people, companies, and the government at serious risk.

B. Cryptocurrency regulation against securities fraud in the U.S.: *SEC v. Ripple*

Another frequent and equally dangerous crime involving cryptocurrency is securities fraud. From devious hackers to dishonest businesspeople, individuals constantly commit cryptocurrency fraud, laundering, and other crimes of the sort for personal gain. For example, in 2016, Ilya Lichtenstein and his wife, Heather Morgan, managed to steal $4.5 billion worth of Bitcoin from the massive cryptocurrency exchange, Bitfinex. These individuals went undetected until February of 2022, when they were arrested in Manhattan in relation to these crimes. The Department of Justice claimed that this arrest and seizure of $3.6 billion of the original $4.5

[67] "Treasury Takes Robust Actions to Counter Ransomware." U.S. Department of the Treasury, September 21, 2021. https://home.treasury.gov/news/press-releases/jy0364.

[68] "Executive Order on Ensuring Responsible Development of Digital Assets." The White House. The United States Government, March 9, 2022. https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/09/executive-order-on-ensuring-responsible-development-of-digital-assets/.

[69] Wolff, "The Competing Priorities Facing U.S. Crypto Regulations"

billion was the largest in the department's history, showing the incredibly gigantic scale on which cryptocurrency fraud is. The couple utilized various tactics to cover their tracks, including converting their stolen Bitcoin into anonymity-enhanced virtual currency (AVC), making it even harder for law enforcement to identify the culprits. Acting Executive Associate Director Steve Francis of Homeland Security Investigations (HSI) claimed, "Financial crime strikes at the core of our national and economic security. With a hack of this magnitude, public and private sector collaboration is crucial to ensure continued consumer confidence in our financial system."[70] Although the government was able to track down these criminals, it will become increasingly difficult to do so as criminals continue to improve their strategies and technologies while the government continues to only take action after the crime has been committed. It took the government six years to fully resolve the case, and considering the magnitude of this incident, smaller and less public frauds will simply go unnoticed or will be nearly impossible to solve. Public and private sector collaboration will also become more difficult as investors in the cryptocurrency market are worried about their anonymity and private security, which can and will be breached with this so-called collaboration.

Securities fraud in the context of cryptocurrency does not only occur with couples or individuals acting alone. Large corporations can be subject to such crimes, and they do so quite often. For example, Ripple Labs, the creator of the cryptocoin XRP, was found to be raising funds in an unregistered securities offering to investors worldwide through XRP. Basically, Ripple Labs failed to register XRP as a legitimate security, making any sale of it illegal. The Securities and Exchange Commission is accusing co-founder Christian Larsen and current CEO Bradley Garlinghouse of using XRP to illegally raise capital for their business as well as distributing XRP for non-cash consideration, including labor. The company allegedly raised around $1.4 billion from XRP alone, with XRP being one of the largest cryptocurrencies in the entire world. The SEC filed the complaint in December of 2020, and the case is ongoing in the District Court of the Southern District of New York.[71] The SEC claims that the company violated Sections 5(a) and 5(c) of the Securities Act of 1933, which essentially means that the company failed to submit a registration statement for XRP with the SEC, thereby making any sale of XRP illegal. The SEC argues that the XRP asset falls perfectly under the definition of an investment contract under precedent from the landmark case *SEC v. WJ Howey Co*. in 1946.[72] The case held that an investment contract is an "investment in a common venture premised on a reasonable expectation of profits to be derived from the … efforts of others." From this evidence, the SEC states that XRP is an investment contract because investors did expect a profit from this asset and the size of their profits were directly tethered to the size of their stake in the investment. Ripple

[70] "Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency." The United States Department of Justice, February 8, 2022. https://www.justice.gov/opa/pr/two-arrested-alleged-conspiracy-launder-45-billion-stolen-cryptocurrency.
[71] *Securities and Exchange Commission v. Ripple Labs, Inc*., 20-CV-10832 (S.D.N.Y. 2021)
[72] *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946)

Labs, however, argues that XRP is not an investment contract, as an actual "contract" was required after the sale of XRP to the investor, which Ripple Labs did not offer. If the SEC manages to win this case, it would solidify the idea that cryptocurrencies are subject to rules that govern investment contracts. However, if Ripple Labs wins, this would be one of the worst defeats the SEC has suffered regarding cryptocurrency regulation, and there would be much more freedom surrounding the sale of cryptocurrency tokens on the open market.

IV. FUTURE PLANS FOR REGULATIONS AND IMPLICATIONS OF RULINGS

As it may seem, cryptocurrency regulation is incredibly difficult to implement and looks to be a fruitless venture. Though this may be the case currently, major organizations all across the globe are committed to fighting those who illegally utilize a promising and revolutionary technology for their own selfish gains. For example, the Biden administration has pledged to both support the innovation of cryptocurrencies as well as fight against crime involving said cryptocurrencies. So far, the United States and its financial bodies have implemented domestic regulation, including sanctions, against major crypto exchanges that host a plethora of illegal activities, such as Suex. The United States has also kept a scrutinizing eye on its own major crypto exchanges to ensure financial stability and soundness, another massive concern beyond crime. For example, the Supreme Court recently oversaw a case called *Coinbase v. Bielski*, where Coinbase, the second largest crypto exchange in the world, was accused of not taking action when a Coinbase account-holder, Abraham Bielski, lost over $30,000 to a scammer. This case draws from the Electronic Funds and Transfers Act (EFTA), which basically states that any financial institution must conduct a timely and thorough investigation of fraudulent transfers and transactions. Bielski argues that Coinbase should be considered as a "financial institution" and therefore, by law, must take action immediately. By holding these crypto exchanges accountable, it may provide the US government and other governments with a simpler task when dealing with fraud and potential economic collapse. The case is still ongoing, and its result could provide massively important precedent for future cases involving cryptocurrency fraud.[73]

Another potential solution is the aforementioned CBDC that the U.S. Federal Reserve is currently experimenting with. The Federal Reserve chairman, Jerome Powell, claimed that the Fed is diligently working to find ways to implement a potential CBDC in his testimonies to the House of Representatives and the Senate on March 8th and 9th, respectively. Countries like China, however, have already implemented CBDCs of their own through trial launches in select Chinese cities. The CBDC, known as the digital renminbi, or e-CNY, is still showing unclear signs of success or failure. The Chinese government, though very advanced in CBDC research relative to the rest of the world, faces intense competition from the private digital payment market, which are dominated by Alipay (over 50% of market share) and WeChat Pay (over 40%

[73] *Coinbase Inc. v. Bielski*, 22-105 (2023)

of market share). Breaking into this market would be incredibly difficult to accomplish, especially when a government-backed cryptocurrency would raise concerns from those who wish to keep their transactions more private. The Chinese government would have to implement some regulation or laws to forcefully develop the success of the e-CNY and fully integrate it into the Chinese economy. Though there is an alarming lack of success of the e-CNY and a lack of meaningful action to implement a CBDC from the Fed, it is still a promising solution that requires time to truly understand and successfully utilize.[74]

The future of cryptocurrency regulation requires many complicated conditions and involves far too many factors to handle. How the U.S. and the international community moves forward with cryptocurrency regulation in the coming years is absolutely crucial in ensuring that criminals and malicious organizations cannot further abuse the cryptocurrency market for their benefit. Domestically, if countries do not want to see their own companies and citizens continue to be scammed and frauded of millions of dollars, the government must maintain up-to-date lists of sanctioned and flagged intermediaries, or crypto exchanges that have high levels of criminal activity, that individuals and businesses can use to avoid certain exchanges or figure out whether or not they did business using these intermediaries in the past. This would significantly limit the risk that people and businesses are exposed to when engaging in the cryptocurrency market and would raise awareness of the dangers of using cryptocurrency with specific intermediaries. Therefore, illicit cryptocurrency flows would be cut off completely, which would greatly hinder the ability of criminal organizations to engage in fraud and, therefore, survive. Once this is actually successful, the government can then implement its own CBDC or other government-backed cryptocurrency to bring stability to an otherwise unstable and volatile market. This would then largely decrease the risk of cryptocurrencies failing, which in turn lowers the possibility of total economic collapse. On an international level, countries must come together to collaborate on ways to create and stand by cohesive and collaborative regulation. Currently, international regulation of cryptocurrency is sparse and severely lacking in solidarity, which only supports an ever-increasing web of international cybercrime and trafficking. Without collaboration involving all countries, developed or developing, international cryptocurrency regulation will never succeed and will always fall short when fighting crime and financial instability.

IV. CONCLUSION

The relationship between the law and cryptocurrency is incredibly complex. Law aims to control, but the whole point of cryptocurrency is promoting a lack of oversight and control by

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[74] Benzmiller, Theodore. "China's Progress towards a Central Bank Digital Currency: New Perspectives on Asia." CSIS, April 19, 2022. https://www.csis.org/blogs/new-perspectives-asia/chinas-progress-towards-central-bank-digital-currency.

external bodies. Therefore, a balance must be struck, and this balance has proven to be very difficult to achieve. Though the world's most powerful economies have set their sights on tackling the issues of fraud and financial instability stemming from a lack of control over cryptocurrency, little progress has been made in stopping the problem at its core. Criminals and malign organizations continue to run rampant, putting innocent civilians and businesses in harm's way. Effective action towards regulation must be taken immediately without hindering innovation within the cryptocurrency industry. Fortunately, many of the world's leading economies recognize this, and there are attempts being made. Although many of these attempts may be unsuccessful, the fact that governments are actively trying to discover a solution ensures that there will be a way to find that balance. The global community must come together as a cohesive whole against this looming issue, and only then there will be success at last.

Environmental vs. Business Law: A Comparative Analysis of Corporate Climate Litigation

Written by Vidya Patel
Edited by Katherine Greene

ABSTRACT.

The urgent need for climate action and accountability, and the lack of tangible progress, have led to an increase in corporate climate litigation. This field of litigation aims to establish corporate liability, outline financial risks, and discuss due diligence through balancing environmental demands and business interests. Environmental demands often require cost structure adjustments and manufacturing adaptations that many corporations are unwilling to comply with, creating the cases landing in courtrooms today. The goal of this publication is to analyze the legal language, jurisdiction mapping, domestic laws, and international standards at play within successful corporate climate cases. Specifically, *Milieudefensie et al. v Royal Dutch Shell* (2021), *McVeigh v Retail Employees Superannuation Trust* (2020), as well as pending German automobile cases (Volkswagen, BMW, and Mercedes-Benz), will be analyzed. Given the global effort that is required for climate action, learning from these successful cases serves to assist and inspire the various countries around the world that are currently facing barriers when enforcing climate accountability. Replicability of and uniform success within corporate climate litigation ultimately lies in the ability to incorporate environmental law into corporate law and vice versa. With respect to all cases analyzed, understanding the value of integrating environmental and corporate law will result in more progress, rather than viewing the two fields as opposing forces.

I. INTRODUCTION

In the past decade, countries around the world have started to acknowledge the climate crisis, however, on a global scale inadequate measures have been taken to address the effects of climate change. Facing rising temperatures and extreme weather conditions, climate scientists and environmental advocates are running out of hope and ways to emphasize the dire need for change. Corporations and governments habitually make empty promises by creating "green" policies and enacting sustainable laws but have little to no enforcement or follow-through. As a result, the climate crisis made its way into courtrooms worldwide, with over 1,000 cases filed in the last seven years.[75] The cases are classified as climate litigation, referring to lawsuits brought before investigatory bodies centered around climate change mitigation, adaptation, and the science of global warming.[76]

Climate litigation is a key instrument for enforcing commitments made by governments and corporations and has expanded to encompass different areas of law and legal rights. However, the difficulty with climate litigation is that while there are physical boundaries separating countries, thus distinguishing the rules, laws, and regulations, there are no physical environmental boundaries. One country's pollution affects the environmental safety of another country, just as much as one country's mitigation efforts affect the global environment. Therefore, the jurisdiction of environmental legal rulings is difficult to establish, especially when one country is taking steps in the right direction, but its progress is overshadowed by mass emissions from another country. Similarly, jurisdiction issues arise when considering the global scale many large corporations operate on.

Recently, increased emphasis has been placed on the human rights violated through the lack of climate action taken by high-emitting corporations. While many of these cases are brought against governments, the most impactful have been levied against companies with high emissions. Corporate and financial market cases have increased, primarily targeting private companies. The fundamental legal issue within corporate climate litigation is the unbalanced weight afforded to business interests over the need for climate action, through the lens of environmental law. Although corporations outline firm theoretical sustainable policies, in practice these proposals involve economic adjustments that many companies are unwilling to appraise. Specifically, the decreased profits and increased costs often associated with sustainable practices are concessions untenable to corporations.

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[75] Setzer, Joana, and Catherine Higham. 2021. "Global trends in climate change litigation: 2021 snapshot." London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science. https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

[76] UN Environment Programme. 2021. "Climate Litigation Report." UN Environment Programme. https://www.unep.org/news-and-stories/press-release/surge-court-cases-over-climate-change-shows-increasing-role.

Corporate climate litigation aims to establish corporate liability, outline financial risks, and discuss corporate due diligence. Specifically, the goal is to encourage companies to think critically about increasing their corporate social responsibility and taking accountability for how their actions shape the environment. These cases take on the role of balancing business interests and the pressing need for climate action, which may require reconstructing corporate priorities and profit structures. Analyzing the legal language, jurisdiction mapping, and domestic versus international laws at play within successful legal cases allows for blueprints to be made for other countries facing resistance from corporate climate litigation. With this outline, it will be determined whether corporate climate litigation can be uniformly addressed globally, especially in nations with high corporate emissions.

II. BACKGROUND ON CORPORATE CLIMATE LITIGATION

All legal proceedings related to the cases and consequences of anthropogenic climate change fall under climate litigation, but two separate actions are typically wielded under its umbrella. First is vertical climate action, which includes the interrelation between private individuals and the state to address whether or not climate policy is sufficient. Vertical climate action generally falls under public law and encompasses the human rights violated in climate change consequences. Specifically, the cases discuss the country's duty to protect human rights under international laws established through climate and human rights agreements. A successful vertical climate action case took place in 2019, when the Supreme Court of the Netherlands, *Hoge Raad*, demanded the Dutch state reduce their greenhouse gas emissions by 25% from their 1990 emission levels by the end of 2020.[77] Not only was this case successful, but it also sparked action across the world, with similar attempts made in Belgium, Italy, and Poland.

The second category of actions are horizontal climate actions, which are brought by individuals against companies and emphasize the responsibility of the private sector, in light of high private sector emissions contributing to climate change. Horizontal climate actions will primarily be discussed throughout this paper, with specific attention focused on the business and environmental laws affecting final legal rulings. These cases are commonly brought before civil courts and rely heavily on claims made under private laws implemented in order to protect health, property, or the body. A key distinction to keep in mind is that fundamental human rights, as well as international agreements, do not impose obligations on companies directly in horizontal cases. The absence of legal obligation creates an opportunity for private companies to neglect their responsibility and duty to alter their actions to prioritize human rights.

Relevant international agreements, including the United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, and the Paris Agreement, have attempted to establish consistency across the world by setting guidelines and ideological standards for

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[77] Weller, Marc-Philppe, and Mai-Lan Tran. 2022. "Climate Litigation against companies." *Climate Action* 1, no. 14 (July). https://doi.org/10.1007/s44168-022-00013-6.

countries to uphold.[78] The Kyoto Protocol reduced emissions in many countries and has been crucial in developing systems for greenhouse gas (GHG) emissions tracking and reporting. Similarly, the Paris Agreement allowed for policy development, at both the national and sub-national levels, that aims to enhance transparency within countries' mitigation efforts. Climate litigation has increased and expanded geographically since the adoption of the Paris Agreement, however, these international agreements are not legally binding and can only be used as motivation in legal cases.

Some countries have made significant progress and seen success in terms of mitigating negative climate impacts, while other countries are facing legal barriers and corporate challenges. These barriers include domestic policies, limiting the extent to which environmental regulations can affect business practices. Recently, in the United States, the Supreme Court restricted the Environmental Protection Agency's (EPA) authority to mandate carbon emission reductions. Specifically, the court judged that neither the EPA, nor any other agency, can establish rules that transform the manufacturing economy.[79] The only way change can be implemented is if Congressional hearings address specific problems. This creates an obstacle for corporate climate litigation, as there are limited ways to check the power of large businesses and their emissions.[80] Another key barrier, briefly discussed above, is jurisdiction. Many corporations have headquarters in several worldwide locations, therefore when their practices are called into question in one nation's court, the ruling does not necessarily apply to practices in other locations. This, in many ways, makes it burdensome to create consistent environmental standards.

The goal of this publication is to analyze how barriers were overcome in other countries throughout their trial processes. Success, in terms of sustainable verdicts and rulings, is derived from the ability to balance business law and environmental law. The purpose of business and corporate law is to regulate the rights and obligations of corporate business operations. These corporate activities can range from the formation of the company to ownership, operation, and management. When considering business priorities, it is in the interest of the corporation to prioritize profits, financial commitments, and efficiency.[81] On the other hand, the main objective

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[78] Council on Foreign Relations. 2022. "Global Climate Agreements: Successes and Failures." Council on Foreign Relations. https://www.cfr.org/backgrounder/paris-global-climate-change-agreements.

[79] Totenberg, Nina. 2022. "Supreme Court restricts the EPA's authority to mandate carbon emissions reductions." NPR. https://www.npr.org/2022/06/30/1103595898/supreme-court-epa-climate-change.

[80] Roscoe, Charlotte, Francesca Dominici, and Aaron Bernstein. 2022. "Supreme Court limits EPA's power to curb emissions | News | Harvard T.H. Chan School of Public Health." Harvard T.H. Chan School of Public Health. https://www.hsph.harvard.edu/news/features/the-supreme-court-curbed-epas-power-to-regulate-carbon-emissions-from-power-plants-what-comes-next/.

[81] George, Elizabeth. 2019. "Can Corporate Social Responsibility Be Legally Enforced?" Forbes. https://www.forbes.com/sites/uhenergy/2019/10/11/can-corporate-social-responsibility-be-legally-enforced/?sh=2fbd9fbf3d44.

of environmental law is to protect the environment against public and private harm.[82] The key tension inherent within climate litigation is the profit-maximizing and cost-minimizing objectives of corporations conflicting with the dire need for production changes to reduce emissions and meet environmental standards.

III. RELEVANT CASES

A. *Milieudefensie et al. v Royal Dutch Shell* (2021)

Milieudefensie et al. v Royal Dutch Shell is a pivotal corporate climate litigation case that balanced business interests with the fundamental need for environmental change, resulting in a favorable environmental ruling. Milieudefensie/Friends of the Earth Netherlands were co-plaintiffs and filed their case against Royal Dutch Shell, arguing that the corporation violated their "duty of care under Dutch law and human rights obligations."[83] Specifically, the lawsuit was catalyzed by Plaintiffs supported by seven non-governmental organizations (NGOs), who brought forward the case, and over 17,379 individuals who wished to implement regulations on Shell's emission output.

The Paris Agreement was a key international law used, given the goals of the agreement imposed a responsibility on Shell to alter and reduce their greenhouse gas emissions, while also taking accountability for the negative environmental harm. Domestically, Dutch Civil Code Article 6:162 affirms unwritten standards of care by defining tortious actions as "an act or omission in violation of what is societally accepted according to unwritten law."[84] Although the Paris Agreement is not legally binding, this code allowed the Plaintiffs to argue that Royal Dutch Shell has an obligation to reduce their CO2 emissions, in line with the country's recognition of the agreement. In this case, domestic law was used as an instrument to legally bind the international agreement. To clearly address jurisdiction concerns, Plaintiffs presented Article 7 of the Rome II Regulation, which guarantees that "where a non-contractual obligation arises out of environmental damage, [Plaintiff] may choose to base its claim on the law of the country in which the event giving rise to the damage occurred."[85] This clause highlighted the environmental damages occurring in the Netherlands, where Royal Dutch Shell established headquarters, in order to circumvent corporate policy applying to Netherland production and output.

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[82] Legal Information Institute. n.d. "Environmental Law." Cornell Law School. https://www.law.cornell.edu/wex/Environmental_law.

[83] Columbia University. 2023. "Milieudefensie et al. v. Royal Dutch Shell plc. - Climate Change Litigation." Climate Change Litigation Databases.

[84] Pardikar, Rishika. 2022. "Piercing The Corporate Climate Veil." The Lever. https://www.levernews.com/piercing-the-corporate-climate-veil/.

[85] Connellan, Clare, Seth Kerschner, William D. Catelle, and Thomas Hansen. 2021. "Milieudefensie et al v. Shell: Climate change claimants prevail again in Dutch Court." White & Case LLP. https://www.whitecase.com/insight-alert/milieudefensie-et-al-v-shell-climate-change-claimants-prevail-again-dutch-court-time.

International and domestic laws also worked in tandem through Dutch Civil Code Article 6:162 and the European Convention on Human Rights (ECHR). Dutch Civil Code and ECHR Articles 2 & 8 guarantee rights to life, private life, family life, home, and correspondence. Plaintiffs utilized these laws similarly to the previous ruling of *Urgenda Foundation v State of the Netherlands*. In this case, the court concluded that the Dutch government unlawfully violated Articles 2 & 8 of ECHR. Specifically, the court ruled that the government has a duty of care to protect all rights defined in the articles from the irreversible threats of climate change.[86] Plaintiffs relied on both the laws and the language of the Urgenda case, pointing out Royal Dutch Shell's knowledge of climate change, their misleading action plans, and inadequate action to tangibly reduce emissions.

The Defense was keen to ensure the court's awareness of Royal Dutch Shell's corporate sustainability policies presently working toward reducing production emissions. Defense specifically argued that Royal Dutch Shell was already taking steps in anticipation of climate change, accurately reporting and accounting for their emissions and business activities, in line with legal standards, and changing their domestic and foreign investments to meet climate demands. Additionally, Defense argued that the Plaintiff statement was far too general to fall in the frame of Articles 2 & 8 of ECHR. They primarily alleged that concerns over national and international policy are not within the domain of corporations, therefore there was no accurate way to determine that the emissions are directly tied to Royal Dutch Shell.[87] Specifically, Royal Dutch Shell pointed out that "corporate responsibility only requires that business enterprises 'respect human rights' and that does not incur an international law obligation."[88] When the ruling was determined, the court acknowledged Royal Dutch Shell's corporate strategies for energy transitioning, but deemed them "intangible, undefined, and non-binding."[89] The court found the policies to be performative and far too vague to make a tangible change towards the goals of concrete and immediate emission reduction, especially given the corporate policies to be met by 2050.[90]

[86] Columbia University. 2023. "Urgenda Foundation v. State of the Netherlands." Climate Change Litigation Databases. http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/.

[87] Columbia University. 2023. "Milieudefensie et al. v. Royal Dutch Shell plc. - Climate Change Litigation." Climate Change Litigation Databases. http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/.

[88] Columbia University. 2019. "Defense Statement Hague District Court Case." Climate Change Litigation Databases. http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20191113_8918_reply.pdf.http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20191113_8918_reply.pdf.

[89] Bevan, Alex, Ben Shorten, and Christopher M. Ryan. 2021. "Milieudefensie V. Shell - a Landmark Court Decision For Energy And Energy-intensive Companies." Shearman & Sterling. https://www.shearman.com/perspectives/2021/06/milieudefensie-v-shell--landmark-court-decision-for-energy-companies

[90] Challe, Tiffany. 2021. "Guest Commentary: An Assessment of the Hague District Court's Decision in Milieudefensie et al. v. Royal Dutch Shell plc - Climate Law Blog." Columbia Law School Blogs. https://blogs.law.columbia.edu/climatechange/2021/05/28/guest-commentary-an-assessment-of-the-hague-district-courts-decision-in-milieudefensie-et-al-v-royal-dutch-shell-plc/.

In the final 2021 ruling, the court relied on international soft law including United Nations Guiding Principles (UNGP) on business and human rights, which are not legally binding, but universally endorsed.[91] The court understood that Royal Dutch Shell could not single-handedly solve the global climate crisis, but they also cannot neglect their individual culpability as a major corporation in the emissions they release. Using UNGP, the court indicated that corporations have responsibility over their production for two key reasons. First, for human rights violations at the hands of climate change. Second, for business relations that take place in the manufacturing and distribution of products. Therefore, in the final ruling, it was determined that Royal Dutch Shell is responsible for the impact of Shell group companies, corporations where production materials are purchased from, and the end-users of their products. The court ruling order requires Royal Dutch Shell to reduce their 2019 emissions by 45% by 2030.[92]

B. *McVeigh v Retail Employees Superannuation Trust* (2020)

McVeigh v Retail Employees Superannuation Trust (REST) was a case filed in 2018 by Australian pension fund member, Mark McVeigh, who claimed that the REST super fund was not following the guidelines set by the Corporations Act 2001, which mandates the incorporation of climate risks in business filings. Specifically, McVeigh argued that REST did not transparently outline the climate risks of business actions, nor did it provide measures to address and incorporate these risks into business plans. Along with the Corporations Act, McVeigh also relied on the Superannuation Industry Act 1993, which requires trustees to "act with care, skill, and diligence to perform duties and exercise their powers in the best interest of their beneficiaries."[93] The plaintiff believed that climate change risks fall under this scope and thus uses this Act to highlight REST's negligence.

The case builds upon esteemed Australian lawyer Noel Hutley and Australian Bar Association President James Mack's legal opinions from 2017, who advised that trustees must take into account climate change in their risk assessments. They specifically advised that trustees "inform themselves of the physical impact of climate change, consider how these factors will affect fund performance, and act with diligence to address all risks."[94] Understanding the lack of

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[91]United Nations Human Rights. 2011. "Guiding Principles on Business and Human Rights," Implementing the United Nations "Protect, Respect and Remedy" Framework. United Nations. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[92] Macchi, Chiara, and Josephine v. Zeben. 2021. "Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell." *Review of European, Comparative & International Environmental Law (RECIEL)*, 1-7. doi: 10.1111/reel.12416.

[93] Columbia University. 2019. "McVeigh v. Retail Employees Superannuation Trust - Climate Change Litigation." Climate Change Litigation Databases. http://climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/.

[94] Equity Generation Lawyers. 2020. "| McVeigh v Rest – Equity Generation Lawyers .." Equity Generation Lawyers. https://equitygenerationlawyers.com/cases/mcveigh-v-rest/.

transparency of this fund, as well as many others internationally, rests in clearly comprehending the corporations and economic consequences that come with climate change risks.

The Defense acknowledged that climate change is a financial, investment, market, reputational, and strategic risk that should be disclosed. The court found this case socially significant and raised concerns beyond the single pension fund member, as the matter illustrates the importance of fundamentally understanding climate risks in the development of business plans, as opposed to after years down the line. The final settlement resulted in REST agreeing to incorporate climate change financial risks into their investments. Concretely, REST set a net-zero carbon footprint by 2050 goal, which they seek to accomplish through monitoring, measuring, and adjusting climate progress with public disclosures. The final settlement was reached solely through the parties.

C. Pending Cases for German Automakers

The success of *Milieudefensie et al. v. Royal Dutch Shell* served as motivation for German environmental organizations to fight harder against corporations negatively impacting the environment. No settlement or court ruling has been decided for these cases, nonetheless understanding the laws and arguments of each side is exceedingly important, given the large corporations being sued. Starting with *Kaiser v Volkswagen (VW),* Plaintiffs argued that the automobile company is "infringing on the right to climate protection by not committing to achieve carbon neutrality by 20230 in the production and intended use of internal combustion engine cars."[95] Plaintiffs relied primarily on the Paris Climate Agreement and domestic German Tort Law when forming their suit. The reduction targets requested by the Plaintiff are derived from the Paris Agreement, which rests in scientifically recognized climate scenarios. Specifically, Germany must "commit themselves to reduce global warming well below 2 degrees Celsius but if possible 1.5 degrees Celsius and to achieve greenhouse gas neutrality by the middle of the century."[96] The Plaintiffs also relied on the previous *Neubauer v Germany* ruling, where the court accepted that Germany has a "limited total CO2 emissions budget remaining at its disposal," highlighting the severe contribution CO2 emission has to environmental harm.[97] In December 2021, VW released its corporate development plans, including the production of another internal combustion engine car, and intends to continue selling it until 2040. Carbon monoxide, nitrogen oxides, and hydrocarbons are released when fuels burn in internal

[95] Columbia University. 2019. "McVeigh v. Retail Employees Superannuation Trust - Climate Change Litigation." Climate Change Litigation Databases.

[96] Attorneys Gunther. 2021. "Kaiser et al vs Volkswagen." https://www.greenpeace.de/publikationen/20220311statementofclaim.pdf.

[97] Grantham Research Institute on Climate Change and the Environment. 2019. "Neubauer, et al. v. Germany." Climate Change Laws of the World. https://climate-laws.org/geographies/germany/litigation_cases/neubauer-et-al-v-germany.

combustion engines, creating a multitude of tangible adverse environmental and health consequences that further emphasize the urgency of Plaintiff's case.[98]

Similarly, environmental organizations Greenpeace and Environmental Action Germany are suing automobile manufacturers BMW and Mercedes-Benz. The Plaintiff is demanding a complete ban on the sale of damaging engines by 2030, 5 years earlier than the European Union ruling. All of these cases are filed with the intent to ensure that automakers plan and produce within the restrictions of the Paris Agreement. It is the Plaintiff's understanding that these companies are not operating in line with the agreement and are thus committing unlawful acts.

All three manufacturers have announced sustainability plans involving more eco-friendly electric cars. However, environmentalists are arguing that the plans, and the execution of production, are vague and non-binding, similar to the Royal Dutch Shell proceedings. Daimler AG, the manufacturing corporation of Mercedes-Benz, responded to the lawsuit, arguing that they see "no basis" for any legal action and will defend themselves through all legal means.[99] Similarly, BMW refuted the suit, claiming that they already practice corporate policies that are aligned with the Paris Climate Agreement.

IV. ANALYSIS

In order to determine whether or not corporate climate litigation can be addressed uniformly across the world, the strategic interactions that allowed for the success of the previous cases will be analyzed. In particular, the legal language, tactical interplay of domestic and international law, strength of the defense, court's leaning, public opinion, and precedent will be scrutinized through the lens of replicability. These crucial components of the trial process are where barriers are faced, and historically where the most trouble arises for unsuccessful corporate climate lawsuits. Importantly, the way these components interact plays an important role in the success, or projected success, of the cases analyzed above.

Beginning with Royal Dutch Shell, the primary defense argument relied on the belief that the legal language presented by the Plaintiff was not applicable to their actions. Specifically, they argued that corporate actions do not fall under the domain of the national and international legal language levied against them. Along the same line, the defense argued that the legal language only required them to "respect human rights," which they believe their sustainability initiatives adequately have. Secondly, the defense stated there is no way to directly trace emissions to their manufacturing. This is a common argument expectedly utilized in many corporate climate litigation cases, however, the way the court and Plaintiff addressed this played an important role

[98] Göldner, Lisa. 2021. "Greenpeace sues Volkswagen for fuelling the climate crisis and violating future freedom and property rights." Greenpeace. https://www.greenpeace.org/international/press-release/50625/greenpeace-sues-volkswagen-for-fuelling-the-climate-crisis-and-violating-future-freedom-and-property-rights/.

[99] Deutsche Welle. 2021. "Climate groups to sue German carmakers – DW – 09/03/2021." DW. https://www.dw.com/en/climate-groups-to-sue-german-carmakers/a-59071653.

in the overall success of environmental activists. Here, the defense spotlighted indefinite legal language and indetermination of blame as their argument. These components were strategically countered through the Plaintiff's use of domestic and international law, as well as the court's leanings. The Plaintiff used domestic law to legally bind international law, which is a pivotal move unique to this case and not easily replicable around the world. To further expand, although the Paris Climate Agreement is not legally binding, given the value and importance of the content of the agreement, the Plaintiffs used domestic law to legally implement the expected demands. When considering replicability, this strategy could allow for progress to be made in countries where there are barriers to legally implementing non-binding international agreements. Moving to the indetermination of blame, it was the court's leanings and their understanding of corporate climate responsibility that allowed the Plaintiffs to navigate the arguments presented by the Defense Council.

Second, with *McVeigh v. Retail Employees Superannuation Trust*, there was an interesting relationship between the defense and legal language, in that the defendant understood and acknowledged where their faults lay. This is definitely an anomaly and self-recognition is a rare defense to see in corporate cases. The legal language, in isolation from the prior ruling that was used, was indistinct, as it only discussed transparency within legal actions. Broad legal language around transparency, respect for human rights, and corporate social responsibility that does not specifically address the climate and particular emission regulations make it easier for the defense to make their case. However, Hutley and Mack's 2017 legal opinion distinctively pointed towards climate risk inclusion within the development and execution of trusts. The language within the aforementioned opinion eliminated the potential defense argument that the case used blurry legal language not applicable to their actions as a trust management firm.

As mentioned before, for the pending automobile cases, the motivating factor behind the case filing was the success of *Milieudefensie et al. v Royal Dutch Shell*. Therefore, we expect the precedent of this case to play a role in the rulings for all three automobile companies. The rulings depend on the Plaintiff's ability to circumvent the defense's argument that the companies already meet necessary environmental standards and are taking obligatory actions to reduce their emissions. Once again, the ability to construct and apply legal language targeting the specific environmental harm companies are committing will be critical in the outcome of the case. The court's leaning and public opinion cannot be neglected when considering these pending cases as well. The court, as seen in the Royal Dutch Shell case, seems to utilize precedent and define rulings in a way that prioritizes the environment, which will serve as a benefit for these automobile cases. Public opinion, however, can be inconsistent. On one hand, the everyday citizen might be impacted by harsher regulations or fines imposed on the automobile companies, as prices may increase or the ability to use already purchased vehicles may change, negatively affecting them as consumers. On the other hand, some citizens want to see large corporations taking accountability for actions that directly impact the wellbeing of the environment and community. The difficulty arises when the corporate interests and subsequent repercussions can influence public opinion, which makes court leaning and objectivity incredibly significant.

Sustainable verdicts, as seen in the cases above, include the ability to utilize laws and precedents in a specific and applicable manner. For all the cases, there is an essential role of precedent and the value previous cases held in the outcome of the ruling. This is especially important when evaluating why some countries might have more successful outcomes compared to others. These cases built off the successes of past cases and utilize specific laws and arguments that were successfully applied to climate lawsuits. If countries do not have strong precedential cases, then it is more challenging to establish a new criterion and even more challenging to work around barriers that arise in the case process. Nonetheless, this demonstrates the power that precedent holds and emphasizes the importance of setting new legal precedent. Along the same line, the ability to extract and highlight specific legal language is valuable, as many corporate climate litigation cases fail to use laws not nuanced enough to the environmental concerns brought forward.

V. CONCLUSION

The ability to replicate the success of the aforementioned cases hinges on the ability to navigate vague legal language and precedent, understand the interaction of domestic and international law, and recognize the advantage at the hands of court leanings. When analyzing the success, or lack thereof, across corporate climate litigation, it is important to recognize factor variability and no one-size-fits-all approach to a successful case. The significance of certain sectors to a nation's economy will influence the extent to which production can be curtailed and cost structures can be restructured. A country's current political climate and urgency around environmental activism will influence the court's leanings, use of international law precepts, and ultimately the final ruling. Public opinion and the extent to which it matters varies greatly; in some countries, public opinion will aid environmental advocates greatly, whereas in others it may not matter.

Past, present, and future plaintiffs should learn a great deal from the successes in the Netherlands and Australia: how to strategically implement non-legally binding international law and take a stance on where environmental priorities lie. However, the use of precedent and historic legal opinions will take time to build and incorporate into statutes across the world. Climate change mitigation requires global collaboration and the crucial recognition that some countries are in completely different developmental stages and, therefore, their economic abilities to reduce emissions will largely differ. Along the same line, export processing zones (EPZs) and similar practices, wherein a country relocates manufacturing and production to another where costs are cheaper, create a new host of complications in understanding jurisdictions and pinpointing action. Having a global perspective of corporate emissions and production levels reveals the varying nature of each case and, thus, the ability to mitigate emissions.

The goal of this publication was to determine whether or not corporate climate litigation can be addressed uniformly across the world. Through analysis, the necessary interactions for successful litigation were determined; however, it is found that the subjectivity across legal jurisdictions will ultimately make it difficult to universally address corporate climate litigation. Uniform success ultimately lies in the incorporation of environmental law into corporate law. This is possible through robust environmental, social, and governance (ESG) requirements for corporations at the national level or, similar to REST, increased transparency in the early stages of business and product development plans. In this regard, and with respect to all cases analyzed, understanding the value of integrating environmental and corporate law will result in more progress than viewing the two fields of law as diametric contradictions.

U.S. Corporate Tax Inversion: The Context, Legality, And Exponential Threat It Poses To U.S. Government Stability

Written by Maher Salha

ABSTRACT.

The United States corporate tax rate is among the highest in the world. In a time of increasing global competition, multinational corporations continually search for ways to maximize their net profit—primarily, by minimizing their tax burden. U.S. multinational corporations are increasingly pursuing the strategy of tax inversion: relocating their *place of incorporation* to be identified and taxed as a foreign parent corporation as opposed to a domestic U.S. corporation, in order to evade the high U.S. corporate tax rates. However, while inverting is seen as a win for corporations and their shareholders by profiting more, corporate tax inversion poses a significant threat to the safety and stability of the U.S. government. Corporations that invert to foreign tax continue to utilize the benefits of many powerful U.S. resources, including legal protections, an educated workforce, and federal markets, yet do not pay their fair share of redistributing back to society while shifting the burden of tax onto the average American taxpayer. This law review article will analyze the legal implications of tax inversion among U.S. corporations, and explore the negating light such a strategy has in unequally distributing citizens' public goods and undermining the government's integrity. Many legal steps have already been taken with the goal of restricting these harmful inversions, however in analysis of the precedent rulings in *Chamber of Commerce v. The IRS* and *Ireland v. The Commission* deciphered in this article, tensions on the matter continue to increase. Yet ultimately the solution proposal arises that the U.S. shifts to a territorial tax system—where income is taxed based on the country it is earned in—rather than its current worldwide tax, with corporations then being much less incentivized to legally invert.

I. INTRODUCTION

The United States often finds itself atop many aspects across the globe, whether analyzing literacy rates, educational standards, GDP, and so on. However, a list the United States finds itself bitterly claiming the highest ranking is corporate tax rates. The United States' top statutory tax rate sits at 35% on a corporation's income earned both domestically and internationally—among one of the highest of developed countries in the world.

In an era of ever-revolutionizing competition among globalizing products, services, and strategies, corporations are continually eager to maximize their net profits while also striving to reduce their amount of profit taxed—and, more specifically, where that profit is taxed. Many U.S. multinational corporations, businesses operating in the United States that also maintain operations in other countries, have found refuge in pursuing the strategy of corporate tax inversion in order to evade the high U.S. tax rate.[100]

United States corporate tax is primarily dictated on whether a parent corporation is considered domestic or foreign. If a corporation is considered foreign, it is taxed much less than it would be if considered domestic in the United States. Such is the loophole playing field that corporations pursuing tax inversion reside in: if corporations that, despite being founded and heavily existing in the U.S., can reach foreign consideration (by inversion), then they will be taxed substantially less by the United States government. According to the Internal Revenue Code, a corporation is considered domestic if it is created or *organized* in the US; conversely, it is considered foreign if it is formed in a foreign nation. Meaning the *place of incorporation* in particular directly determines whether a corporation is treated as domestic or foreign in tax law, without consideration of other factors such as the location of a corporation's management activities, shareholders, sources of revenue, etc.[101] Such a gray area is the key feature that allows multinational corporations to pursue subsidiaries abroad and achieve foreign tax recognition while still having heavy aspects of operations in the U.S. Corporations are greatly incentivized to do so as a "domestic" U.S. corporation is subject to taxation on all of their income—both earned overseas and within the United States—meanwhile corporations that are considered "foreign" by U.S. tax law are taxed by U.S. rates only on income that has sufficient connection to the United States. Such policy ultimately leads companies to invert on paper purely for tax purposes without actually moving their operations overseas.

While corporate tax inversion may be seen as strategic in the eyes of the beneficiaries, inversions are becoming exponentially ruled upon. Inverted companies undermine public confidence in the U.S. Tax System, and take advantage of the beneficial aspects unique to the

[100] "An Analysis of Corporate Inversions - Congressional Budget Office." Congressional Budget Office, September 2017. https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/53093-inversions.pdf.

[101] Hale E. Sheppard "Fight or Flight of U.S.-Based Multinational Businesses: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend." Scholarly Commons: Northwestern Pritzker School of Law, 2003. https://scholarlycommons.law.northwestern.edu/.

United States that are driven off of such taxes, including a highly educated workforce, advanced legal systems, federally funded research, and dominating U.S. markets. In evading this fair distribution of tax, multinational corporations shift the burden of tax costs onto American taxpayers and other companies.

II. RELEVANT BACKGROUND

A. Mechanics of corporate tax inversion

In a typical inversion, a US corporation acquires a smaller company based in a foreign country, usually a low-tax nation, then locates the official residence of the combined company in the foreign country for tax purposes. By doing such on paper but not actually moving their operations overseas, the corporation enjoys the many benefits of being a U.S. company while not paying U.S. corporate taxes.[102]

Corporate tax inversions are considered "reverse" mergers. In a typical merger, Company A acquires the net assets of Company B, resulting in a larger Company A, holding both the original assets of Company A and now the assets of Company B, in exchange for cash or stock. However, in the case of corporate tax inversion, this case is merely reversed: Company A that initiates the merger is not the ultimate standing company.[103] In a typical merger, the company that would gain new corporate status abroad would be Company B by merging with Company A. However in corporate inversions, the foreign corporation takes on the U.S. name while still maintaining its status, and is restructured so that the foreign company replaces the U.S. parent company in order to establish a new headquartered "place of incorporation" status in the foreign country, with the U.S. branch simply becoming a subsidiary of the now new foreign one.[104] Such fulfills the US tax code of determining whether a company is considered foreign or not, and ultimately allows for corporate tax to now be paid in the foreign country and thus be inverted.

B. U.S. corporate tax inversion, in context

Essentially all developed nations require firms to pay taxes on income earned domestically. However, the United States in particular requires its firms to pay taxes on income earned both domestically and internationally. Such is a significant incentive for corporations to pursue tax inversion in the first place. The Institute of Taxation and Economic Policy estimated

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[102] Zients, Jefrey, and Seth Hanlon. "The Corporate Inversions Tax Loophole: What You Need to Know." National Archives and Records Administration. National Archives and Records Administration, April 8, 2016. https://obamawhitehouse.archives.gov/blog/2016/04/08/corporate-inversions-tax-loophole-what-you-need-know.

[103] Mueller, Hannah J. "Corporate Tax Inversions: A Brief Overview." University of San Diego, May 22, 2016. https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1024&context=honors_theses.

[104] Marples, Donald J., and Jane G. Gravelle. "Corporate Expatriation, Inversions, and Mergers: Tax Issues." Congressional Research Service, May 27, 2014. https://americansfortaxfairness.org/files/CRS-Expatriation-Inversions-Mergers-Tax-Issues-5-27-14-2-1.pdf.

in 2017 that approximately $2.6 trillion has not been repatriated back to the United States in corporate tax, and that Fortune 500 companies are avoiding up to $767 billion in federal income taxes.[105] Further, a study conducted by the Congressional Budget Office of the United States notified that in 2011 alone, over $30 billion was inverted out of the United States amongst only nine corporations.[106] Such truly signifies the substantiality of capital being inverted.

Two conditions in particular make a country an attractive destination for inversion: a low corporate tax rate, and a tax system that does not tax foreign source income. The following table extracted from the Congressional Budget Office report of the United States visualizes the comparison of corporate tax rates among G20 countries, with the United States notably leading trends in high statutory tax rates:[107]

Corporate Tax Rates in G20 Countries, From Highest to Lowest, 2012

Top Statutory Corporate Tax Rate[a]		Average Corporate Tax Rate[b]		Effective Corporate Tax Rate[c]	
United States	**39.1**	Argentina	37.3	Argentina	22.6
Japan	37.0	Indonesia	36.4 [d]	Japan	21.7
Argentina	35.0	**United States[e]**	**29.0**	United Kingdom	18.7
South Africa	34.6	Japan	27.9	**United States**	**18.6**
France	34.4	Italy	26.8	Brazil	17.0
Brazil	34.0	India	25.6	Germany	15.5
India	32.5	South Africa	23.5 [d]	India	13.6
Italy	31.4	Brazil	22.3	Mexico	11.9
Germany	30.2	Russia	21.3	Indonesia	11.8
Australia	30.0	South Korea	20.4	France	11.2
Mexico	30.0	Mexico	20.3	Australia	10.4
Canada	26.1	France	20.0	China	10.0
China	25.0	Turkey	19.5	South Africa	9.0
Indonesia	25.0	China	19.1	Canada	8.5
South Korea	24.2	Australia	17.0	Saudi Arabia	8.4
United Kingdom	24.0	Canada	16.2	Turkey	5.1
Russia	20.0	Germany	14.5	Russia	4.4
Saudi Arabia	20.0	United Kingdom	10.1	South Korea	4.1
Turkey	20.0			Italy	-23.5

Source: Congressional Budget Office, using data from KPMG International, the Organisation for Economic Co-operation and Development, the Internal Revenue Service, and the Oxford University Centre for Business Taxation.

G20 = Group of 20.

In the eyes of a multinational corporation, it is transparent as to why they would want to evade U.S. taxes—they not only lead the world with a top statutory corporate tax rate of 39.1%, but they also have an average corporate tax rate of 29%. Put simply, why would a corporation willingly surrender such a stimulus of their profits when they could face the opportunity of paying substantially less in another developed country? Corporations are exponentially appealing to the opposite side of the spectrum for economic refuge, among nations such as Saudi Arabia,

[105] Fuller, Phillip, and Henry Thomas. "Tax Inversions: The Good The Bad and The Ugly." West Georgia University,2017. https://www.westga.edu/~bquest/2017/taxinversion2017.pdf.

[106] Congressional Budget Office, "An Analysis of Corporate Inversions," 2017.

[107] "International Comparisons of Corporate Income Tax Rates." Congressional Budget Office of the Congress of The United States, March 2017. https://www.cbo.gov/system/files/115th-congress-2017-2018/reports/52419-internationaltaxratecomp.pdf.

South Korea, and Russia—countries globally seen growing not only in foreign investments throughout their nations, but in overall GDP. Such, in part, may be attested to corporations' desires to invert there as a result of their appealingly low tax systems and rates.

However, such a process occurring is directly harming the United States itself despite often utilizing U.S. resources. Not only do these corporations inverting away deprive the U.S. of hundreds of millions of tax dollars that may be reinvested back into the well-being of the nation and its capital goods, but it also deprives the U.S. of possible GDP growth, as these multi-billion-dollar companies are no longer legally "incorporated" in the U.S. Despite such, these corporations still get to free-ride off the very advantages that distinguish the United States from other nations in the first place, with having access to a plethora of unique markets and still being able to employ a much higher educated workforce in comparison to the nations being inverted to.

C. Benefits & contradictions of tax inversion

To better understand corporate tax's controversy, both perspectives of its benefits and contradictions must be seen. A fundamental goal of business management is to enhance shareholders' wealth and minimize overall expenses and responsibilities. By pursuing an inversion, no laws are specifically being broken or jeopardized while still standing true to this goal. When a company goes through inversion, the corporation and its shareholders save a surplus of capital and goods on an unfathomable scale, subsequently fulfilling this fundamental goal of business management. In the eyes of the corporation, reducing tax liabilities through inversion is simply a strategy.

However from the perspective of the state and the common man, a corporation's tax savings is the government's loss, and therefore a loss to society for further investment into the quality of life in the U.S. In the last century, the federal government has been running a budget deficit nearly every year, with the national debt more than tripling.[108] Such leaves the public of the United States worried and curious, questioning if the common taxpayer will be demanded more of, or if the federal government will provide less funding to the military, public health, education, infrastructure, and other desirable projects. By purposely funneling hundreds of millions of dollars out of U.S. capabilities, the overwhelming majority of society (the same individuals that allow the inverting corporations to operate in the first place, whether through being employed directly or playing large parts in the supply-chain system of its multinational character) are harmed by the few controlling minority. It is difficult to discover the impact corporate inversion tax losses directly have on these pressing taxpayer questions, however it is vital to acknowledge the notoriety of such an increasing process. And as analyzed in the latter, major public action has progressed to take a stand against this threatening corporate tactic.

[108] Fuller, Phillip, and Henry Thomas. "Tax Inversions: The Good, The Bad and The Ugly," 2017.

D. Legal actions taken restricting U.S. corporate tax inversion

Policymakers have taken heavy notice of inversions, and have pushed to reform against them. The key regulatory action in particular being Congress' American Jobs Creation Act of 2004, which specifically included Internal Revenue Code Section 7874.[109]

Section 7874 states that in new corporate acquisition mergers overseas, if 80% or more of owners of the new inverted company were owners of the former domestic firm, then the foreign firm is *taxed as if it were still a U.S. corporation and is not given recognition of foreign place of incorporation*.[110] Such a legal domain targets the previous occurrences in past inversions, as only legal documentation of incorporation was changed between companies, rarely ever capital or management positions. The section further states that if the former owners of the corporation own 60% but less than 80% of the foreign corporation, the foreign corporation then loses its ability to use tax attributes for up to ten years after the inversion, a powerful Federal blockade in preventing further strategic inversions.[111]

This section code also notably included the rights of *Expanded Affiliated Groups (EAGs)*—new members acquired in the new foreign branch of acquisition. Section 7874 defines that if these new members acquired in the acquisition have "substantial business activities" in the foreign firm's country of incorporation, then the regulations of the Section Code do not apply and may be recognized as a true merger.[112] Meaning under Section 7874, foreign mergers are allowable if the acquired firm has what is considered "substantial business activity" in the new foreign parent company's country, however, if it does not, then the government flags the "merger" as an attempt of corporate inversion. Legal protection to true free market doctrines is still ensured while the government has also notably stepped to reduce inversions. Yet specifically, this protection is signified by the (purposefully) broad legal term: "substantial business activities." Such is the baseline dictator in the Section 7874 Code, and is understood to be a broad standard on purpose to deter corporations looking to invert.

Corporations are no longer left with a definite line of resolution between what affiliated groups their company can employ and whom they cannot, as they have no legal confidence in proclaiming an inversion as "natural." It has been seen that legitimate mergers and expansions of affiliated groups have proven true and passed, but, corporations looking to invert are now faced with a much greater challenge of having to shift substantial business activities rather than simply

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[109] Crouch, Larry, and Jeffrey Quinn. "Treasury and IRS Issue Final Regulations on Inversions." Shearman & Sterling LLP, July 23, 2018. https://www.shearman.com/en/perspectives/2018/07/final-regulations-on-inversions#:~:text=Generally%2C%20an%20inversion%20transaction%20is,more%20of%20the%20stock%20of.

[110] Fuller, Phillip, and Henry Thomas. "Tax Inversions: The Good, The Bad and The Ugly," 8.

[111] Hwang, Cathy. "The New Corporate Migration." Stanford Law School, September 2015. https://law.stanford.edu/wp-content/uploads/2015/09/Inversions-final.pdf.

[112] Sheppard, Hale E. "Fight or Flight of U.S.-Based Multinational Businesses: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend."

fabricating them on paper as heavily done in the past. Such a factor of Section 7874 has deterred numerous corporations from inverting since its passing, and has greatly reduced the minuscule "on paper" changes corporations had been exploiting for years past.

By 2006, an Expanded Affiliated Group's substantial business activity was greater specified, and came to be known definitely as at least "10% of the EAG's (both firms) employees, assets, and sales being from the foreign corporations country."[113] Such meant that inverting corporations actually required real change—indicating massive action taken by the government and a push for a solution.

Further, in 2012, the U.S. Treasury issued a temporary regulation known as T.D. 9592 that changed this "substantial business activity" requirement of Section 7874. It required that instead of 10% of an EAG's assets, sales, and employees being in the foreign branch, it must now be increased to at least 25%.[114] Such was a massive blow by the U.S. government to discourage multinational corporations from inverting, especially as many of them are not particularly concentrated in one area and is subsequently difficult to satisfy this 25% requirement to invert while still abiding by the law. Within a matter of 8 years, the restrictions among inversion increased exponentially.

This temporary IRS regulation requiring 25% of an acquired company to hold assets and sales came in timing after the announcement of the proposed $159 billion merger of Pfizer Inc. incorporated in the United States and Allergen PLC incorporated in Ireland.[115] In efforts to tighten anti-inversion rules as this particular inversion would be drastic, the former expandability of the "EAG" term was defined strictly in order to ensure this drastic merger would be prevented.

Despite this signatory, many argued that this drastic jump in regulation may also be seen as an overstepping act by the government, as corporations and shareholders began to become angry at the government's greater regulation of the economic free market. Such controversy between the government's right to regulate and prevent inversions against corporations' advocacy for an unregulated, liberalized market is explored in the following sections of this article.

III. LANDMARK CASES OF CORPORATE TAX INVERSION

The line distinguishing between a fair and legal overseas merger with the intent of free-market doctrines and an overseas merger with the blatant intent of corporate tax inversion is becoming increasingly indiscernible. The following landmark cases serve as examples of the growing tension between weeding inversions out from legitimate mergers, and are drastic in

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[113] Hwang, Cathy. "The New Corporate Migration," September 2015.

[114] Marples, Donald J., and Jane G. Gravelle. "Corporate Expatriation, Inversions, and Mergers: Tax Issues."

[115] Mello, Daniel. "Anti-Inversion Rules, the Pfizer-Allergan Merger, and the U.S. Chamber of Commerce's Challenge." Boston University: Review of Banking & Financial Law 36 (2016). https://doi.org/https://www.bu.edu/rbfl/files/2017/03/DA-2.pdf.

currently setting precedents in the business law sector that may be used for many years to come in the globalizing world.

A. *Chamber Of Commerce* v. *The IRS*

The 2017 lawsuit between the U.S. Chamber of Commerce and the Texas Association of Business against the U.S. Internal Revenue Service speaks directly to the controversy examined previously—the spontaneous passing of Temporary Regulation 9592 by the IRS in efforts to greater restrict inversions through the monitoring of EAG shares.

Temporary Regulation 9592 revised previous standards of Section 7874 in requiring that Expanded Affiliate Groups acquired in mergers now must be increased to 25% of all substantial business activities taking place in the new foreign branch, an increase from the original mandate of 10%.[116] The U.S. Chamber of Commerce filed a legal challenge to this action by the IRS, claiming that it attempts to prevent certain corporate mergers that are otherwise permitted under Section 7874 of the Internal Revenue Code. The record states that "The administration [the IRS] asked Congress to give it the authority to eliminate corporate inversions, and when Congress would not do so, the Treasury and the IRS ignored the clear limits of Section 7874 and simply rewrote the law unilaterally [by adding T.D. 9592]," said U.S. Chamber President and CEO Thomas J. Donohue.[117]

With the overwhelming atmosphere of the case deeming "that is not the way government is supposed to work in America," the court ruled the U.S. Chamber of Commerce's challenge victorious over the IRS, claiming that the IRS's actions under Section 7874 were used to block certain corporate mergers, and that Section 7874 set sufficient numerical thresholds governing merger transactions previously, with T.D. 7874 artificially expanding on many of them. The district court's decision established immense precedent in the growing debate of corporate tax inversion, in that the IRS is not immune from judicial review and that procedural requirements also apply to the IRS's rulemaking.

B. *Ireland* v. *The Commission*

The landmark case of *Ireland v. Commission*, taken place in the European General Court of Appeals, speaks greatly to the same construct of before, but with a fascinating twist—did the governing body of law overstep their power in not trying to restrict an inversion, but aid inversion to keep greater economic activity within their state? The case regards the United States' infamously known corporation, Apple, and its tax efforts incorporated in the nation of Ireland, known for its low corporate tax rates.

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[116] Fuller, Phillip, and Henry Thomas. "Tax Inversions: The Good, The Bad and The Ugly," 2017.
[117] "Chamber of Commerce v. IRS." U.S. Chamber Litigation Center, June 12, 2019. https://www.chamberlitigation.com/cases/chamber-commerce-v-irs.

The Apple Group channels its overseas sales through two primary subsidiary companies incorporated in Ireland—Apple Operations International (AOI) and Apple Sales International (ASI). Both subsidiary companies legally hold the Apple Group's intellectual property licenses, but were founded in Ireland, by definition allowing for the optimal inversion setting to occur: a company being incorporated overseas yet being directly controlled by its U.S. co-side. United States International Tax Law rules that a foreign corporation is considered foreign based on its place of incorporation abroad; as Apple's two subsidiary companies of AOI and ASI are incorporated in Ireland, they are then recognized as foreign and do not pay domestic U.S. corporate tax for sales overseas (inversion). In addition, according to Irish law, if a group has at least one trading Irish subsidiary, as the massive corporation Apple does in the form of units that employ its 4,000 staff, then the company may also be deemed as a non-tax resident in Ireland, with the company's "central management control" being outside of the country. Meaning Apple has inverted to both foreign tax status in the U.S. and non-Irish resident tax in the haven of Ireland, as their subsidiary companies are incorporated in Ireland while also not being a tax resident there. Such has resulted in massive corporate tax inversion for Apple, with them paying taxes worth only 2% of its $74 billion in overseas income over the past 3 years.[118]

In 2016, The European Commission sued the Irish Tax Authorities for 13 billion euros in unlawful tax advantages for breaking Article 107 (1) of the TFEU (European Union law), claiming that Ireland granted ASI and AOI tax advantages allowing for this inversion to occur.[119] The European Union claimed Ireland broke statutes of the EU commission that a "Member State or through State resources in any form cannot whatsoever grant aid which distorts or threatens to distort competition by favoring certain undertakings [Article 107 (1) TFEU]," a statute in efforts to uphold a free market in the European Union.[120]

The case seeks to rule whether the Irish Tax Authorities violated statute Article 107 (1) of the TFEU through Apple's tax inversion. And in decision, The General Court annulled the contested decision, ruling that the European Commission did not show requisite legal standard that there was advantage as needed to be deemed illegal per Article 107.[121] The Court reasoned

[118] Bergin, Tom. "The Irish Loophole behind Apple's Low Tax Bill." Reuters. Thomson Reuters, May 21, 2013. https://www.reuters.com/article/us-apple-tax-loophole/the-irish-loophole-behind-apples-low-tax-bill-idUSBRE94K0MH20130521.

[119] "The General Court of the European Union Annuls the Decision Taken by the Commission Regarding the Irish Tax Rulings in Favour of Apple" General Court of the European Union, July 15, 2020. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200090en.pdf.

[120] "The General Court of the European Union Annuls the Decision Taken by the Commission Regarding the Irish Tax Rulings in Favour of Apple" General Court of the European Union, July 15, 2020. https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200090en.pdf.

[121] "The General Court of the European Union Annuls the Decision Taken by the Commission Regarding the Irish Tax Rulings in Favour of Apple" General Court of the European Union.

that in order to prove direct advantage purposes the Irish Tax Authorities may have committed, the Commission must have shown that income obtained from the Apple Group's sales were carried out by the Irish branches themselves, but rather, they were carried out by ASI and AOI legally through their intellectual property licenses.

IV. ANALYSIS

A. Challenge of context in *Chamber Of Commerce* v. *The IRS*

In regard to the section 7874 Statute seen in this case, it is blatantly seen that the IRS overstepped its power in unfairly enforcing its temporary regulation. However, what the case lacked in analyzing was the intended theory of regulation the statute has against inversions, and it being a reflection of the growing concern for society and the growing tax dispersity corporate inversions are causing in the U.S. Congress struck a balance through section 7874 in permitting legitimate business decisions while also meddling out hollow transactions designed for inversion. Yet merely 50 bills have been introduced to modify section 7874, visualizing the extent to which government and public efforts are being directed to discourage corporate tax inversions to keep U.S. money reinvested into the U.S., not solely restricting the free market. Although Section 7874 was ruled against in this case, it is not to be disregarded that even the IRS, an institution every individual in the U.S. puts their trust in regulation, deemed the Pfizer inversion as so harmful to the extent they overstepped law to set the precedent and urgency of growing corporate inversion waves.

The precedent in now greater challenging the IRS's legal making decisions is holistically a win for all people—despite whether supporting corporate tax inversions or resenting it. The foundation of the United States is built upon the keystone of checks and balances, and with the ruling of the *U.S. Chamber of Commerce v. The IRS*, all Americans are now assured greater trust in fair making decisions. For future inversion-restricting laws, the IRS and Congress now have a greater understanding of what standards are constitutionally allowed to be made and what are not, ultimately leading to greater strength in democracy and government as a whole in allowing both sides of the debate to be fairly represented.

B. Contradiction in *Ireland* v. *The Commission*

Although appealed in favor of Apple and Ireland, it is important to note that Apple transfers part ownership of its intellectual property created in the United States to the Irish subsidiaries. This enables Apple to "shift profits generated from most of the world to Apple's Irish subsidiaries where it pays virtually no tax and avoids paying U.S. taxes."[122] With the

[122] "Highlights of Apple's Tax Dodging." Americans For Tax Fairness, n.d. https://americansfortaxfairness.org/issues/corporate-taxes/highlights-of-apples-tax-dodging/.

transfer of intellectual ownership to its Irish subsidiary, Apple is effectively removing its key commodity out of the United States—the very nation that facilitated its ultimate success. 95% of Apple's research and development is in the United States, which is largely responsible for cultivating the success of its products, and two-thirds of Apple's employees are in the United States. Yet because of Apple's move to shift its intellectual property out of the U.S., Apple barely pays reparations back to the U.S. and its state that the majority of its success stems from. In comparison, Ireland conducts only 1% of Apple's research and development and only employs 3.5% of its total workforce.[123] Such blatantly supports the thesis of the societal harm and unfairness of such an inversion by Apple despite it being ruled legal in support of the statute. It is important to address this issue as many US workers under Apple contribute their high skill level to the corporation while Apple unjustly redirects reparations away from the people for corporate benefit.

Further, an important statute that the case missed was Ireland's own corporation tax code Section 291A (c). In January 2018, it was revealed, by the Chairman of the State's Irish Fiscal Advisory Council Seamus Coffey, that Apple restructured their subsidiary company ASI into a particular tool named CAIA, Capital Allowances for Intangible Assets.[124] CAIA is a profit-shifting tool regarding the amount of capital costs that a company can deduct each year from its revenue on intangible assets, often abused for shifting money throughout subsidiary companies under a corporation as a common form of inversion.[125] In Irish tax code Section 291A (c), it is specifically prohibited to use CAIA schemes where the main purpose is "the avoidance of, or reduction in, liability to tax" and reasons that are not intended for commercial use. Meaning with Ireland's knowledge of Apple's doing of shifting to CAIA, Ireland is merely contradicting themselves of inversion against their own statute, proving the harm and bordering illegality Apple is balancing on.

C. Proposed solution

The United States uses a "worldwide" tax system: all the income of a person is subject to taxation in the United States, regardless of the country in which the person directly earns the income. Such applies to the study of corporations analyzed thus far—a U.S. corporation is taxed on all of its income, even if profits are not earned in the United States. By contrast, many other

[123] "Highlights of Apple's Tax Dodging." Americans For Tax Fairness.
[124] Setser, Brad W. "Ireland's Statistical Cry for Help..." Council on Foreign Relations. Council on Foreign Relations, November 1, 2019. https://www.cfr.org/blog/irelands-statistical-cry-help.
[125] "Apple's EU Tax Dispute." Wikipedia. Wikimedia Foundation, n.d. https://en.wikipedia.org/wiki/Apple%E2%80%99s_EU_tax_dispute#Further_controversy.

developed countries utilize "territorial" tax systems, where tax is imposed on income only that is earned within a nation's boundaries.[126]

In means to prevent inversions, a proposed solution may be that the United States adopts a territorial tax system, and joins the majority of other developed nations that have done so. By limiting taxation to strictly within the United State's borders, the argument may be made that domestic corporations will now be more enabled to simply stay put within the U.S., and that corporations will then be more competitive internationally. Several groups have already begun advocating for this solution, including Apple CEO Tim Cook testifying to the U.S. Senate subcommittee that the Apple Group is in fact supportive of a possible change to a territorial tax system in the United States.[127] Many corporations would be released of the pressure to invert, and subsequently be more incentivized to keep their capital within the United States. Of course, such a solution would come with immense repercussions and filibusters within the domestic legislative processes of the government, however, a change is significant in the exponentially pressuring burden of the United States debt crisis.

V. CONCLUSION

U.S. corporate tax inversion undermines public confidence in the U.S. Tax System. They abuse the dominating aspects of the United States that are driven off taxes, yet do not contribute their proportional share back; among such aspects are a highly educated workforce, personal liability protection, business security and continuity, and dominating U.S. markets. In evading this fair distribution of tax, multinational corporations shift the burden of tax onto American taxpayers and other companies. However, increasing legislative action has been targeting the inversion strategy, primarily with the passing of IRS Section Code 7874. Aspects of such legal actions are still prone to legal fault and challenge—primarily by pro-inversion business interest groups—and continue to leave the legal playing field of inversion open. Such is the case in the *Chamber of Commerce v. the IRS*, with the constitutionality of restricting businesses being ruled upon.

Corporate tax inversion is a challenge yet to be solved. With the precedent rulings in favor of both the U.S. Chamber of Commerce and Ireland, both beneficiaries in favor of tax inversion protections in their respective cases, the battle of regulation is far from over. Yet it can be confidently said, whether in support or against the strategy, that both sides are being given equal and impartial tries. With the proposed solution of the U.S. shifting to a territorial tax system, endless opportunities may arise for corporations to be incentivized to stay in the United States, and with proper education and advocacy, such is possible.

[126] Sheppard, Hale E. "Fight or Flight of U.S.-Based Multinational Businesses: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend." Northwestern Journal of International Law & Business, 2003. https://scholarlycommons.law.northwestern.edu/.

[127] "Highlights of Apple's Tax Dodging." Americans For Tax Fairness, n.d. https://americansfortaxfairness.org/issues/corporate-taxes/highlights-of-apples-tax-dodging/.

The #MeToo Movement: Revealing the Prevalence of Sexual Harassment, Gender Discrimination, and Gender-Based Power Imbalances in the Legal Industry

Written by Sameera Singh
Edited by Allison Massey

ABSTRACT.

This article aims to illustrate how the #MeToo movement is connected to the future of women in the legal profession within the United States. This movement has led to many women sharing stories of experiencing sexual harassment in the workplace and to the high-profile convictions of male authority figures. This article will analyze the following: 1) the major statutes and cases relevant to this movement; 2) the enhanced policies implemented by law firms in response to the #MeToo movement; 3) women's representation in the legal field; 4) testimonies from female employees; and 5) popular solutions for enhancing the safety of women in professional settings. In addition to this analysis, this article will also include an explanation of how the #MeToo movement gained traction in the media, as well as how it has affected the lives of politicians and renowned professional figures in positions of power. Finally, the article will reveal how this movement is especially relevant to women working in the legal field due to the prevalence of overlooked sexual abuse and gender discrimination within the industry. This will be achieved by connecting how frequently employers have played a critical role in enabling gender-based sexual harassment and abuse to the policy enhancements made by many corporations since the popularity of the #MeToo movement peaked in 2017. With this, readers will be able to understand how this movement has evolved and created legal and social change.

I. INTRODUCTION

The #MeToo movement has shed light on gender discrimination in the workplace, effectively amplifying the long-silenced voices of many women within a professional setting. It has also had an impact on the policies of numerous companies, including law firms, and on workplace culture more generally. As a result of the movement, many women have shared their stories of sexual harassment in the workplace, and several serious high-profile convictions of authority figures have been made. Subsequently, employers who still fail to take significant action to enact change and address sexual misconduct claims in the workplace run a greater risk of suffering irreparable reputation and financial ramifications. Nevertheless, public policy has yet to address the roots and impacts of the #MeToo movement, and this seems unlikely to change in the near future. Thus, female employees are still hindered from competing on equal footing with their male coworkers. This lack of public policy will have a negative impact on society in a number of ways, but for the legal industry specifically, law firms across the United States are poised to face irreparable reputation and financial consequences if they fail to implement changes aimed at eliminating gender discrimination in the workplace.

In order for businesses to survive as the #MeToo movement gains momentum, businesses must examine and overhaul policies, procedures, reporting mechanisms, and training. They also must evaluate cultures, address gender imbalances, create efficient and transparent communication plans, and most importantly, hold offenders and those in positions of power accountable. This article will demonstrate how this movement has impacted the legal field by examining the relevant statutes and cases surrounding it, the influence of law firms enhancing their policies, the increased representation of women within the industry, testimonies of female employees in this field, and finally, by critiquing the proposed solutions for enhancing the safety of women in professional settings.

II. RELEVANT BACKGROUND

Although activist Tarana Burke coined the term “#MeToo” in 2006, the movement didn't gain momentum until 2017. On social media, public and private figures alike began sharing their own stories, sparking a discussion about the relationship between gender and power in the workplace. Five years have now passed since the #MeToo movement peaked in response to *The New York Times* and *The New Yorker's* investigation into Harvey Weinstein's sexual misconduct at Miramax and The Weinstein Company. With thousands of survivors coming forward, women's voices became too loud to be ignored when speaking in the boisterous collective. People began discussing their traumatic encounters with sexual assault, harassment, and generalized sexism.[128] It is clear that this movement changed the professional workplace environment, which can be seen through the termination of over 500 CEOs and several public personalities suffering numerous allegations and scandals. This event became the trigger society needed for other professionals to take action within their own workplaces.

Politicians in the federal and state governments were also affected by the #MeToo movement. In fact, numerous legislators were accused of harassing or assaulting women in the days and weeks that followed the Weinstein revelations. For example, following claims of sexual harassment, former Senator Al Franken, former Congressman Pat Meehan, and former Representative Trent Franks all announced their resignations.[129] The allegations surrounding these men also exposed a perplexing procedure in place in Congress for processing reports of harassment, where victims were required to remain working with the harasser for a thirty-day cooling-off period. The ethics of this, for many, seems questionable. Consequently, many Americans have begun to protest for an updated process that prioritizes the victim.

The #MeToo movement also showed how the legal system can be abused to both facilitate and cover up harassment. Weinstein used contracts, threats, and a strong legal network to successfully hide his tracks for many years. Weinstein signed a number of settlement contracts with non-disclosure and non-discreditation clauses. In some instances, these agreements not only forbade the victim from criticizing Weinstein, but also compelled her to defend him if the press got in touch with her. Additionally, Weinstein vowed to ruin the names of anybody who came forward about his crimes. The legality of his actions raises the issue of what happens next from a public policy standpoint, given the position of power and authority many abusers have access to.

A. Relevance of the #MeToo movement in the legal industry

The #MeToo movement is pivotal within the legal sector, considering that sexual harassment, sexual assault, and gender discrimination are all particularly prevalent in the male-dominated field. The ongoing and widespread issues in the legal sector, particularly in the failure to report and take action, illustrate this. In the fields of technology, finance, legal, energy, and healthcare, a poll of 4,764 professional women and 1,030 professional males found that sexual misconduct is still prevalent, and employers that fail to take meaningful action to bring about change face a high risk of irrecoverable reputational and financial consequences."[130] Professional women will use their purchasing power and talent as leverage for change. Nearly

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[128] Courtney E. Smith Elena Nicolaou, *A #MeToo Timeline to Show How Far We've Come - & How Far We Need To Go*, Me Too Movement 2-Year Timeline Most Important Moments, https://www.refinery29.com/en-us/2018/10/212801/me-too-movement-history-timeline-year-weinstein.

[129] *Here Are the 7 Congressmen Accused of Sexual Misconduct since #Metoo*, Roll Call, https://rollcall.com/2018/04/27/here-are-the-7-congressmen-accused-of-sexual-misconduct-since-metoo/.

[130] Kathryn Rubino, *#MeToo in the Legal Industry: Over a Third of Senior Women in the Law Say They've Been Sexually Harassed,* (Above the Law, October 19, 2018), https://abovethelaw.com/2018/10/metoo-in-the-legal-industry-over-a-third-of-senior-women-in-the-law-say-theyve-benn-sexually-harassed/.

half of the women polled indicated that they would be less likely to apply for a job at a firm that has a public #MeToo issue or to purchase goods or shares from a company with allegations.[131] In order for businesses to survive as the #MeToo movement gains momentum, whole sectors of the economy must evaluate cultures, address gender disparities, develop effective and transparent communication plans, and, ultimately, hold violators and those in a position to stop questionable behavior, accountable.

Furthermore, when viewing FTI's elaborate results, it was found that among legal professionals, 56% of women and 49% of men said they were more inclined to have a bad opinion of a business that is dealing with the #MeToo scandal. Looking at women's experiences with discrimination in the legal sector yields some profound data.[132] 27% of female attorneys responded "yes" when asked if they had personally experienced or observed unwelcome touching in the workplace within the previous year. According to the research, which was further split down by experience levels, women are more likely to cope with these problems as they advance in their job. Compared to 33% of senior-level women, 25% of entry-level women report having encountered or seen it in the past year. It is important to acknowledge that this question is only applicable to the year following the #MeToo movement, and the harassment of women in the legal profession, especially those in senior positions, is still a problem. 26% of women in the legal profession responded that they had directly encountered sexual harassment or sexual misconduct when the question was expanded to cover incidents from the previous five years. Once more, senior-level women in the profession are more likely to report having experienced sexual harassment in the last five years, with 36% responding in the affirmative compared to 24% of junior-level women and 21% of mid-level women. It is clear that women feel more at ease speaking up when they are in higher positions of power in the workplace. Unfortunately, women who still lack sufficient seniority or experience are more inclined to prioritize their careers over their needs to prevent jeopardizing their future by disclosing their unfavorable work experience.

Sexual harassment is not uncommon in the legal profession, and action is essential in order to put an end to it. 50% of women in the legal sector claimed that they reported experiences of sexual misconduct.[133] These results were startling considering this reporting percentage is 7% lower than the total average for working women and considering how normalized it is for these serious events to go unreported and unnoticed. This is likely due to the fact that survivors want to ensure their livelihood and success in their careers. Based on these poll results, the main reasons why women in the legal profession did not report harassment were fear of retaliation, a desire to avoid seeming weak at work, and a desire to avoid a poor career impact. They are not only dealing with the psychological effects of their experiences as a result of the conduct of their coworkers, but they are also having to suffer inconveniences and

[131] Rubino, *Industry*, 3
[132] Rubino, 4
[133] Rubino, 4

punishment to uphold the respectable career they have worked so hard to establish. These figures are alarming, and they demonstrate that the legal field is not immune to sexual harassment and action is required to stop the issue.

B. Employer policies on gender discrimination and sexual harassment in the workplace

Studies have looked at the legal tactics businesses have previously used to maintain the secrecy of harassment and discrimination claims, as well as how potential legislative improvements would limit their use. There are two types of limitations on an employee's right to report harassment:

(1) Ordinary workplace policies or agreements meant to safeguard the business secrets and overall reputation of the organization and (2) Settlement agreements that conclude an employment-related dispute or lawsuit. The two sorts of restraints are handled very differently by current legal regulations. Employees may legally report harassment or discrimination under the National Labor Relations Act and Title VII of the Civil Rights Act concerning the first category, regardless of any provisions to the contrary in a policy or contract.[134]

Employers are currently altering their procedures and will probably keep doing so in the future. Employers have already demonstrated a greater willingness to fire known harassers. This will make it possible for companies to reprimand violators in ways that they had previously shied away from, like demotions, rejections of promotions, and significant pay cutbacks.[135] Additionally, employers have the option to update their privacy policies and create executive employment agreements with broader definitions of "cause." Although employers' inquiry procedures have come under fire during the #MeToo movement, some criticisms confuse those procedures with the results-driven method employers traditionally used to reprimand. #MeToo also changed companies' willingness to publicly announce their choice to fire a known harasser after an investigation. In the past, employers revered personnel records and made every effort to keep high-level employee terminations quiet. High-level executives who were suspected of misbehavior and then fired had the choice to resign in the open.[136] Since employees do not have a right to privacy based on their misconduct, companies may incorporate disclaimers in their privacy policies stating that they reserve the right to publish inquiry findings and disciplinary actions. This means that the future of the legal field involves a shift in the balance of power between highly ranked harassers, those being harassed by them, and the company. The harasser's rank may no longer have a hold on law firms in the future if firms continue to enforce their policies of termination and publicly vocalize their decisions regarding disciplinary actions for their employees, regardless of rank.

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[134] Tippett, Elizabeth C., *The Legal Implications of the MeToo Movement*, (Minnesota Law Review, 2018). 57. https://scholarship.law.umn.edu/mlr/57

[135] Tippett, *Movement,* 239

[136] Tippett, 242

Judges are more likely to uphold confidentiality clauses in settlement agreements because doing so encourages conflict resolution. Employees are broadly protected by Title VII from retaliation for "resistance" to workplace harassment or discrimination. There is some support for the idea that more open forms of disclosure are protected, even though such opposition often takes the form of internal complaints to the employer. In cases involving public opposition, it has also been established that it must be reasonable and that "severe" opposition, while opposition that seriously impairs the plaintiff's productivity or the workplace is not protected. This means that a worker may receive some, but not complete, protection for choosing to report harassment or discrimination on social media, perhaps through a #MeToo post.[137] An employee may have a retaliation claim if their employer decides to discipline them following its social media policy. In other words, because Title VII protects employees, social media posts made by employees about workplace harassment in any form are protected, and employees cannot have their employment terminated as a result of a social media post. They have the flexibility to express the suffering and emotion brought on by terrible events on their personal social media profiles without having to worry about the repercussions of linking their bad experiences to the company brand.

However, these policies are constantly shifting, considering how throughout time employers' disciplinary procedures and associated policies may have changed. Since the #MeToo movement, several states have been debating whether or not to outlaw specific non-disclosure agreements or have already done so. Multiple measures are being considered in California. New York has already approved one law on non-disclosure and is currently debating a second one. The proposed bills in these states differ in three crucial areas. First, they differ in the kinds of disclosures that cannot be limited by contract. Second, they differ in terms of whether they apply to all agreements or only those that are signed under specific circumstances. Third, some have an exemption for non-disclosure clauses that the victim has requested.[138] As one can determine, the #MeToo movement is generally forcing transparency into employment practices. It is evident that employers are more likely to respond when an employee speaks out publicly about harassment or discrimination because they are jeopardizing the image of their brand in a very revealing way. Additionally, pending state legislation aims to restrict businesses' use of contracts to prevent workers from speaking in public.[139] Provisions in employer contracts and practices that restrict employee speech will be limited, but not eliminated if states approve legislation banning secrecy for claims of harassment or other employment-related issues.

It can be safe to assume that employers may continue to rely on some of their current clauses in contracts and policies as long as they include an exception for particular kinds of disclosures, allowing some room for improvement while not completely going against their original policies. Other clauses will need to be restricted or eliminated outright, particularly clauses that provide confidentiality to an employee under investigation for misbehavior. Beyond

[137] Tippett, 250
[138] Tippett, 242
[139] Tippett, 243

what is required by law, employers are expected to make significant modifications to their procedures. The risks connected to harassment allegations underwent a significant change as a result of the #MeToo movement.

III. STATUTES INVOLVED

A majority of states have laws known as "statutes of limitations" that mandate that criminal charges be brought against a suspect within a certain amount of time after the defendant is first suspected of having committed a crime. These deadlines have discouraged victims from pursuing older claims for justice, despite the fact that they were meant to encourage prompt prosecutions. NDAs are now prohibited from being used to hide sexual harassment and abuse in some states, including Washington and California. NDAs cannot be demanded of employees by individuals who are accused of misconduct in California; only plaintiffs in sexual harassment or assault cases are allowed to do so. Adult sexual assault victims, specifically in California, have up to ten years to initiate a civil case against an offender under Assembly Bill 1619, which was signed into law in September 2018.[140] There should be more time given for victims of sexual assault to file any complaints against their attacker. It makes sense that there must be a statute of limitations because it is difficult for a system to entirely remove something that has been established and used in the system by many states for many years. Ten years, though, is hardly enough time for a victim of a crime as serious and violating as sexual harassment or abuse, and it's difficult enough for victims to have a time restriction already.

A. Case study: case dismissed by statute of limitations

Michelle Manning Barish, a political activist, made public charges of physical and psychological abuse by former New York Attorney General Eric Schneiderman while they were involved romantically. Ms. Barish was one of only two women to publicly discuss Schneiderman's harassment. She recounted his habit of verbal threats, mental abuse, and physical assault with a sexual partner, involving choking and slapping. Schneiderman resigned as New York's attorney general a few hours after the news of the story's publication surfaced. In April 2021, Schneiderman admitted to breaking the code of conduct, which included abusing Ms. Barish physically, verbally, and emotionally. Schneiderman's ability to practice law was suspended for a year as punishment for his misconduct.

Regarding potential legal action, it was disclosed in November 2018 that the special prosecutor chosen to look into abuse claims surrounding Schneiderman had decided not to file charges. She claimed that after an "exhaustive examination" by the investigators, she personally

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[140] *The #MeToo Movement and the Law*, (Findlaw, November 13, 2018), https://www.findlaw.com/employment/employment-discrimination/the--metoo-movement-and-the-law.html.

spoke with each of the women who had accused Schneiderman of abuse.[141] Members of Schneiderman's security detail were also interviewed by the investigators. She came to the conclusion that there were too many "legal hurdles" to indict Schneiderman, including statutes of limitations.[142] No wrongdoing by Schneiderman's employees at the attorney general's office was discovered, she added. Schneiderman stated that he did not view the ruling as an exoneration. In his final statement, Schneiderman said he accepted "full responsibility for [his] conduct in relationships with [his] accusers, and for the impact it had on them," and that the "decision not to prosecute does not mean [he has] done nothing wrong."[143]

In this case, he was charged with using physical force while having intercourse and on additional occasions that either did not constitute criminal activity or occurred after the applicable statute of limitations had expired. Given that claims against Schneidermann were dropped because the law only permits criminal charges in situations when the offender's intent when punching someone during sex is to "alarm, disturb, or annoy" the victim, this case is a consequence of statutes of limitations. The plaintiff was expected to demonstrate that they endured "severe discomfort" within a specific time frame. The claimed behaviors of Schneiderman did not fit those descriptions.

IV. LEGAL ANALYSIS

A journalist named Katherine Yon Ebright addresses a very important question regarding the incident of Justice Brett Kavanaugh, who was accused of sexual misconduct, which reveals possible solutions to allow progress for women's safety within law firms. The question states, "If these women had been assaulted, why did they not report immediately?[144] There are several possible responses to this rhetorically-posed issue by those who defended Justice Kavanaugh, that do not rest on a categorical denial of the claims or postponed accusations. Until cultural norms and legal frameworks change to make reporting safer, easier, and more successful, victims of gender violence will continue to report their incidents later, if at all. Of course, not all claims of gender violence are made against federal judges or have anything to do with a topic as important and controversial as the nomination of a Supreme Court justice. The same problems exist across the legal sector and beyond. The way the legal industry approaches these issues demonstrates that it does not take sexual violence— let alone less overt forms of gender discrimination—seriously. Attorneys who engage in rape, sexual assault, sexual harassment, or domestic violence rarely face professional repercussions. Several jurisdictions have determined

[141] Michael Balsamo, *Former NY Attorney General Won't Face Abuse Charges*, The Columbian (Associated Press, November 8, 2018), https://www.columbian.com/news/2018/nov/08/former-ny-attorney-general-wont-face-abuse-charges/.

[142] Balsamo, *Former,* 2

[143] Balsamo, 2

[144] Ebright, Katherine Yon, *Taking #MeToo Seriously in the Legal Profession* (March 1, 2019). Georgetown Journal of Legal Ethics, Vol. 32, No. 1, 2019

that these gendered activities are not covered by the standards of professional conduct. An attorney can face disciplinary action for not filing his tax returns but not for threatening to hurt his wife physically. Another question may arise regarding whether or not it is reasonable to believe that this has produced legal systems that are less protective of women's rights and wellbeing, which has generally resulted in worse outcomes for female legal practitioners, litigants, and victims of criminal conduct.[145] The answer, unfortunately, is not appearing unreasonable.

Opinions on the effects of this movement have ranged from favorable to unfavorable. The United States has recently made a concerted effort to achieve gender equality. Women's rights have risen to the top of the list of national concerns since the #MeToo movement's emergence. Large firms changed their bylaws and ethical standards in response to public pressure for an inclusive workforce. Men previously made up the majority in the top tier of the workforce. However, the workforce is diversifying more and more as a result of this push toward gender equality. Currently, minorities, immigrants, and women make up more than half of the labor force in the United States, making white, native-born men a statistical minority, specifically within the force, even though they are unquestionably still the majority.

Additionally, American businesses can now attempt to increase their adaptability, compete more successfully for both domestic and international markets and workers, and draw in as much talent as they can. However, the fight against gender discrimination in the workplace is far from over. There is a persistent lack of gender diversity in the most prestigious and prominent positions in the legal profession, and progress in the sector is still in its infancy. There is still a glaring gender imbalance in law schools, law firms, and on the bench. Only 6% of the top 200 American law firms' managing partners are women, while roughly 20% of deans at law schools are women.[146] Some academics blame the disparity on unfavorable preconceptions that portray women as competitive workers or, on the other hand, as secretaries or stay-at-home mothers. As a result, decision-makers continue to treat women as inferior to males at the highest echelons of the legal profession.

V. CONCLUSION

To reiterate, many people in the U.S. have been worried about the future of women in the workplace, specifically those working in the legal profession, since the movement first made the

[145] Ebright, *Profession,* 13

[146] Samuel Rosario, *Gender Bias in the Legal Profession*, University of San Francisco Law Review Forum 54 (2019-2020): 23-29

news. The movement has led to the sharing of many women's experiences with workplace sexual harassment as well as several significant high-profile prosecutions of their authority figures. Employers who do not respond firmly to address sexual misconduct allegations in the workplace during, and in the years following, the height of the #MeToo movement anticipate a higher chance of incurring catastrophic reputational and financial consequences. Nevertheless, the #MeToo movement's causes and effects have not yet been addressed by public policy, and this situation is unlikely to change anytime soon. As a result, female employees will continue to be subject to unsafe work environments and held back in competitions against their male colleagues.

This gender-based power imbalance is an inherent breach of the ideological foundations upon which our society was built. In order to make progress in creating a more equal workplace, and, more broadly, a more equal society, professionals should be aware that each profession has an implicit contract with society. It's critical to remember that one's employment should contribute to issues like social justice and ecological stability in addition to the idea of generating money and profits. The importance of ethical behavior in society needs to be emphasized, and perhaps even prioritized, over monetary gains.

The Struggle for Governmental Regulation in Free Markets

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ABSTRACT.

The lasting economic effects of the COVID-19 pandemic have left the United States' capital markets vulnerable to collapse. Currently, the country is dealing with the problems of both high inflation and low employment. This predicament calls into question the level of power that should be attributed to the government to regulate the economic activities of the country. This article discusses how the Federal Reserve is attempting to modify interest rates for loaning and borrowing money, which could have unintended consequences on businesses that are recovering from the previous downturn in the economy. The article will also dive into various legal cases and acts that have both established and modified the government's ability to regulate the country's banking system, focusing on how consumer confidence is key to maintaining a well-functioning capital market. Lastly, the article will go into how a potential universal basic income system could mitigate the risks of high government regulation.

I. INTRODUCTION

In 1913, the modern Federal Reserve system was enacted in the United States to protect and preserve the economic health and prosperity of the nation.[147] This indirect extension of the government allowed for an overarching controlling body over the money supply. Through this agency, the government gained the power to better control inflation rates and GDP, mitigating the risk of hyperinflation or high unemployment during times of recession or economic burnout.

With the pitfalls of the Great Depression in the early 1930s, the government turned to the developing economic theories of the time that insisted on increased use of the Federal Reserve's powers, setting the floor for its present-day importance. In the current system, Congress is responsible for overseeing the entire Federal Reserve system, which consists of three distinct groups. The first of these groups is the Federal Reserve Banks, which are banking institutions that hold and loan the nation's money to commercial banks and other financial institutions, acting as a central bank in the middle of the entire U.S. banking system. The second group is the Board of Governors, which consists of members from each of the branches of the Federal Reserve banks as well as the Chairman of the Federal Reserve. The third group is the Federal Open Market Committee, which is responsible for buying and selling treasury bonds, bonds issued by the government, in order to either increase or decrease the money supply.[148]

After the widespread impact of the COVID-19 pandemic, the United States experienced a massive economic downturn as stock markets crashed, inflation rates increased, and supply chain issues prevented consumers from being able to get the goods necessary for day-to-day operations. As it currently stands, the Federal Reserve is mainly interested in slowing down the rapidly increasing inflation rates, which could lead to improper oversight of all the other economic issues this country is facing as a result of the current economic crisis. The board's current plan is to increase interest rates to make borrowing money more expensive in an effort to reduce spending and thereby decrease inflation. However, this may play a large role in impacting businesses and overall financial market health, which could drastically affect the wealth of many middle-class families. When dealing with financial recessions and scandals in the past, the government passed regulations that increased the faith placed in the financial markets by citizens, a key portion of the financial system and the overall well-being of the country. Since the early 2000s, the emphasis of financial acts has been to increase regulation on large corporations and Wall Street so that individuals can have more trust in the value of their stock investments. The government needs to counter the Federal Reserve's control over the stock market by passing laws that increase consumer confidence to stabilize the economy, utilizing the actions of prior administrations during past financial recessions.

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[147] Chen, James. "1913 Federal Reserve Act: Definition and Why It's Important." Investopedia. Investopedia, December 1, 2022. https://www.investopedia.com/terms/f/1913-federal-reserve-act.asp.

[148] Federal Reserve System. "The Fed Explained." Federal Reserve Board - The Fed Explained, August 2021. https://www.federalreserve.gov/aboutthefed/the-fed-explained.htm.

II. RELEVANT BACKGROUND

A. COVID-19's effect on the economy

There are a multitude of factors that go into explaining the inflationary effects of the U.S. economy since 2020. Primarily, the COVID-19 pandemic halted operations, leading to a major economic recession. The S&P 500, an index fund meant to track the general performance of the overall stock market, dropped by over 20% during the pandemic, the largest stock market dropoff since the 2008 financial crisis.[149] Models from the Singapore Economics Review show that there is a positive correlation between the total COVID case count and the volatility of global financial markets as measured by the increase in the standard deviation of overall market stock prices over 52-week highs and lows.[150] Across a sample of studies done during the peak of the virus spread, approximately 45% of small businesses had closed permanently due to the economic implications of the pandemic.[151]

B. Impact of the recession

The current economic downturn post-2020 can be related to the economic hardships faced by the country in the late 2000s. In 2008, there was a global recession that was caused largely by a crash in the United States housing market. The main cause of this was the trading of fraudulent securities that occurred in the mortgage-backed security market. Mortgage-backed securities are assets that are backed by mortgage payments that homeowners have to pay on their real estate properties for the loans they collected from the bank to afford the purchase in the first place.[152] The bond agencies played a big role in unfairly overvaluing and rating the values of certain mortgages, which allowed banks to take massive risks on individuals that had no income, jobs, or assets. As reported by the U.S. Consumer Bureau, the national GDP experienced a 4.3% drop as a result of the massive economic repercussions experienced by both the country and its

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[149] "The Continued Impact of Covid-19 on Financial Markets: U.S. Bank." The Continued Impact of COVID-19 on Financial Markets | U.S. Bank, August 26, 2021. https://www.usbank.com/investing/financial-perspectives/market-news/how-does-the-covid-vaccine-affect-the-economy.html#:~:text=Financial%20market%20trends%20since%20COVID&text=The%20S%26P%20500%20index%20fell,between%2022%25%20and%2066%25.

[150] Kumar, Sanjeev, Faculty of Management Studies, Jaspreet Kaur, Mosab I. Tabash, Dang K. Tran, Institute of Business Research, and Raj S Dhankar. "Response of Stock Market during COVID-19 and 2008 Financial Crisis: A Comparative Evidence from BRICS Nations." The Singapore Economic Review, August 31, 2021. https://www.worldscientific.com/doi/10.1142/S0217590821500387.

[151] Bartik, Alexander W, Marianne Bertrand, Zoe Culland, and Edward L Glaeser. "The Impact of Covid-19 on Small Business Outcomes and ... - PNAS." PNAS, June 23, 2020. https://www.pnas.org/doi/10.1073/pnas.2006991117.

[152] Kagan, Julia. "Mortgage-Backed Securities (MBS) Definition: Types of Investment." Investopedia. Investopedia, May 1, 2023. https://www.investopedia.com/terms/m/mbs.asp.

global trading partners.[153] This ultimately led to the passing of the Dodd-Frank Act against Wall Street to restore faith in the American banking system, an act passed by the Obama administration in response to the economic pitfalls of the 2008 global recession. This act increased measures to prevent risk-taking by large banks and corporations in order to prevent the original types of actions that led to the 2008 crisis. It was focused on swaps which were a leading cause of consumer trading that influenced recessions and also provided further protections for consumers from mortgage payments and future recessions.[154]

III. CASES

A. *McCulloch* v. *Maryland*

Throughout American history, there have been a few key landmark cases and statutes that have either established or reshaped a core part of the economic system. The capability of the government to establish the modern-day federal reserve banking system was granted through the principle of implied powers, a doctrine affirmed to the government in the case of *McCulloch v. Maryland* in 1819.

In 1816, the Congress of the United States chartered a second national bank to fund their debts from the War of 1812. This federal bank had branches in many states, one of which was in Maryland, which had a tax on banks that were not established by the state itself. The cashier of the national bank, James McCulloch, refused to pay the tax citing that it was a federal bank issued by Congress. McCulloch ended up taking the state legislators to the Supreme Court to debate the issue. The primary issue of the case was whether or not it was constitutional for the national government to establish a federal bank under the powers of the Constitution. After both sides argued on behalf of their perspectives, the court unanimously ruled in favor of McCulloch, citing that the federal government did indeed have the authority to set up the national bank branch in Maryland under the powers granted to them in the Constitution. The Judges ruled that the “necessary and proper clause” cited in Article 1, Section 8, gives Congress the power to enact certain laws that are necessary and proper for the betterment or survival of the country. This explained why the federal government was allowed to establish its own national banking system that had locations within the states themselves. This ruling also established the doctrine of implied powers, in which the government can enact and enforce laws implied by the

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[153] Weinberg, John. “The Great Recession and Its Aftermath.” Federal Reserve History, November 22, 2013. https://www.federalreservehistory.org/essays/great-recession-and-its-aftermath#:~:text=Effects%20on%20the%20Broader%20Economy,-The%20housing%20sector&text=The%20decline%20in%20overall%20economic,recession%20since%20World%20War%20II.

[154] House of Representatives. “Text - H.R.4173 - 111th Congress (2009-2010): Dodd-Frank Wall Street ...,” June 29, 2010. https://www.congress.gov/bill/111th-congress/house-bill/4173/text.

Constitution, even when not directly stated.[155]

This monumental Supreme Court case set the precedent for the establishment of a national banking system, which ultimately culminated in The Federal Reserve Act of 1913. This act established the modern Federal Reserve banking system in the United States, which uses monetary policy as a way to control GDP and inflation in the country's economy. The Federal Reserve bank is also responsible for managing the storage of central bank currency as well as foreign exchange market operations with other nations. This act also established other key features of the system, such as the technical requirement for the bank to have several branches across multiple states and fourteen members to oversee it. The ability to develop this system is given to Congress under the implied powers doctrine established in the precedent of the *McCulloch v. Maryland* Case.

B. *SEC* v. *Enron*

However, the U.S. legal system has been utilized to reshape public perception of capital markets post controversy as well. A major example of this was the response to the Enron accounting scandal in the early 2000s. This case was taken up by the Securities and Exchange Commission (SEC) in 2001 to investigate the potential criminal and fraudulent practices of this corporation's higher-level executives. Enron was a large corporation that was focused on being a mediator between consumers and energy companies for the trading of power and energy derivatives. In 2001, they allegedly used manipulative accounting tricks to boost their share price to deceive investors that their profits were higher than they actually were. The SEC launched an investigation after Enron filed for bankruptcy. Many investors started to liquidate and sell their positions after hearing media news about how the company may be overvalued. Over 20,000 jobs and nearly 2 billion in employee retirement funds were lost as a result of this bankruptcy. The SEC's main priority was to look into whether or not the accounting activities performed by the Enron corporation misled current and potential shareholders. Ultimately, the executive officers Kenneth Lay, Jeffrey Skilling, and Richard Causey pled guilty to counts of securities fraud and wire fraud. The ruling, in this case, came from a plea deal that was determined and agreed upon by the prosecution and defense. The top executive leaders from Enron at the time of the alleged illegal accounting activities were punished with criminal charges for their role in the unfair market manipulation practices committed by the corporation as a whole.[156]

This investigation led to a massive fallout in consumer trust on Wall Street. As a way of addressing the larger issue, the government turned its attention to legislation as a way of mitigating the potential problems for the future of the stock market. This led to the passing of

[155] "McCulloch v. Maryland (1819)." National Archives and Records Administration. National Archives and Records Administration, May 10, 2022. https://www.archives.gov/milestone-documents/mcculloch-v-maryland.

[156] Hayes, Adam. "What Was Enron? What Happened and Who Was Responsible." Investopedia. Investopedia, March 28, 2023. https://www.investopedia.com/terms/e/enron.asp.

the Sarbanes-Oxley Act, a critical piece of financial legislation that still has pertinent applications in risk and compliance today. The Sarbanes-Oxley Act was passed in 2002 in response to the Enron scandal and had a primary goal of upholding the financial regulations required for corporations to disclose their accounting practices and financial statements. The goal of this act was to help public investors identify examples of fraudulent statements reporting practices in financial markets.[157]

IV. WEIGHING REGULATION AGAINST FREEDOM

A. Government power struggle with citizens

In essence, these legal cases and acts highlight a fundamental problem in the nation's financial system, the struggle between regulation and freedom. At its core, the United States' economic system thrives on the idea of a free market, or at least the perception of it. Despite this ideal, the government remains in a constant battle to find a balance of power between the people and regulatory organizations such as the Fed. Even though it may seem that markets are unfair towards non-institutional investors when they are highly regulated, this level of oversight does provide a blanket of security that is otherwise unattainable under a purely free market. While investors might feel scared that financial markets are under the control of larger government institutions, it is important to have the assurance that the system can be trusted.

The cases of *McCulloch v. Maryland* and the *SEC v. Enron* are important because they shifted the power of the "free market" into the hands of the government by increasing regulation. The subsequent effects that financial regulation has had on the level of consumer confidence that existed in capital markets illustrate the importance of preserving investor faith, an idea that can be easily shaken when the people lack trust in the fairness of the system. Acts such as the 1913 Federal Reserve Act, The Frank-Dodd Wall Street Reform Act, and the Sarbanes-Oxley Act, all serve the purpose of boosting investor trust in stock markets, despite the fact that they are simultaneously making the markets less "free." The role of the government now is to ensure that this balance is optimal, maintaining the safety of markets while not compromising the integrity of its outcomes.

B. The role of the Federal Reserve

After the devastating economic pitfalls of the 2020s, the Federal Reserve now has an obligation to deal with the rapidly increasing levels of inflation across the country. Failing to do so may lead to a discouragement of savings, unanticipated redistribution of wealth, and ultimately a weakened future economic outlook. The issue of interest rates has been a heavily

[157] House of Representatives. "H.R.3763 - Sarbanes-Oxley Act of 2002 107th Congress (2001-2002)," July 24, 2002. https://www.congress.gov/bill/107th-congress/house-bill/3763.

debated topic in the current economic climate as to how they may mitigate inflationary problems but may accelerate poor stock market performance. If interest rates are increased, inflation may be slowed but ultimately at the cost of tanking the stock market and potentially accelerating the rate of recession. An intervention into the stock market by the federal reserve is legal under our current system, yet poses issues for investors who judge the "fairness" of the system. In doing so, the Federal Reserve is making a long-term play that may very likely jeopardize the short-term health of our economy. This could have disproportionate ramifications in the wealth of the country, placing a heavier burden on many middle and lower-class American families at a volume that will not be as severe for upper-class families. Individuals could lose jobs, homes, and access to education, all of which could spell disaster for the current millennial generation that already grew up amongst the lasting effects of the 2008 financial recession.

C. UBI as a solution

The government needs to look to the aftermaths of previous recessions and financial downturns to see how to stabilize capital markets in case of another bear market collapse. The banking industry has been weakened and will continue to suffer from the current financial state of the country, leaving the government in charge of the country's vulnerable economic position. Most importantly, investors need to have confidence that markets can stay up without crashing monumentally due to federal monetary policy. To mitigate the damages of any potential policy and bring back consumer confidence in the markets, it is necessary for legal action to be taken. An option that the government has here is to implement a policy that advocates for a form of Universal Basic Income (UBI). Under this repayment structure, tax-payers would be subject to a small recurring payment that they would be given the freedom to use as they see fit.[158] This type of system could be funded through the alteration of current legislation surrounding food and healthcare subsidy programs, or the implementation of new tax laws such as a value added tax, financial transaction tax, or a new wealth tax. This would serve three main purposes for the country. First, it would redistribute wealth in a way that is more beneficial to lower-income households. Secondly, it would shift economic power from the government and regulatory agencies back to the people, as the government would have to relocate its own purchasing power back to the general public. Lastly, it would incentivize investors to divert more money back into capital markets, which would allow them to stay afloat in times of panic or manipulation by the Federal Reserve, essentially creating a market safety net that allows inflation to be halted without creating a sudden economic collapse.

V. CONCLUSION

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[158] Peters, Katelyn. "What Is Universal Basic Income (UBI), and How Does It Work?" Investopedia. Investopedia, January 20, 2023. https://www.investopedia.com/terms/b/basic-income.asp.

The Federal Reserve Banking system has been monumental in the financial development of our country. After repeated economic downturns in the 2020s, job markets have dwindled, stock markets have become increasingly volatile, and many businesses have been permanently altered or shut down completely. With inflation rates running rampant, the financial regulatory agencies of this country are searching for ways to combat inflation while preventing a potential recession, an optimization problem that could impact the livelihoods of millions of Americans.

With the impending news of the Fed using interest rates as a way to manipulate economic performance, it calls into question how much power in the free market has been drawn away from consumers over the development of our modern financial and banking system. After the sudden influx of economic disturbances that arose from the COVID-19 pandemic, the United States once again faces the problem of how to balance freedom and regulation in its domestic markets. The government now has the opportunity to shift that balance depending on the

direction it chooses on how to handle the current economic crises.

Prior cases and acts from the last few centuries have given the power to the federal government to create the banking system that manages our current economy. Subsequently, reactions to some of the major financial disasters of the 2000s have given prior examples of how legislation has played a significant role in altering market performance and consumer trust in those markets after the fact. In our current situation, the implementation of a UBI structure repayment system may be the solution to the post-covid economic dilemma. By enacting legislation that alters our subsidy payments and creates new forms of taxes on the wealthy, the government could recuperate enough money to create this plan. This would ultimately serve as a way of redistributing wealth, shifting power back to the free market, and increasing investors' ability to prop up capital markets.

A Utilitarian Defense of Affirmative Action in *Gratz v. Bollinger* (2003)

Written by Mandy (Zhiyao) Tang
Edited by Vana Hovsepian

ABSTRACT.

The legality and constitutionality of affirmative action in higher education have always been challenging in terms of ethics and fairness. This essay argues that affirmative action in the *Gratz v. Bollinger* case (2003), one of the landmark cases on the constitutionality of affirmative action in college admission, can be justified as ethical from a utilitarian perspective. In the first section, this essay provides a case review of the *Gratz v. Bollinger* (2003) case and relevant background information. In the second section, this essay evaluates the economic and educational effects of the University of Michigan's practices of affirmative action in a relevant five-year period from 1995 to 2000. Michigan states' economic index and related literature on the educational effects of affirmative action will be discussed in this section. In the final section, this essay introduces *Grutter v. Bollinger* (2003), another landmark case examining the University of Michigan Law School's affirmative action policies, and discusses the comparison between the two cases.

I. INTRODUCTION

The debate on the efficiency and fairness of affirmative action has once again been brought to light with the hearing of oral arguments in the cases *Students for Fair Admission v. Presidents and Fellows of Harvard College* (2014) in the U.S. Supreme Court on October 31, 2022.[159] The *SFFA v. Harvard College* (2014), Students for Fair Admission (SFFA), claimed that Harvard College violated Title VI of the Civil Rights Act of 1964 by discriminating against Asian American applicants and implementing a soft racial quota in its undergraduate admission. Harvard responded to its race-consciousness admission policies by referencing the Supreme Court's ruling of *Grutter v. Bollinger* (2003). This case demonstrated that for college admissions processes to take race into account when evaluating applicants, institutions must prove that racial considerations must be narrowly tailored and used only to achieve the compelling interest of diversity in higher education.[160,161,162]

Affirmative action in higher education is usually designed to increase the representation of historically underrepresented groups—such as racial and ethnic minorities and individuals from low-income backgrounds—in the college admission process. [163] While affirmative action in higher education aims to advocate against discrimination towards minorities and increase the probability of the minority group's eventual socioeconomic equality by means of education, it does not always result in a positive outcome. Employment and business ownership issues, such as reverse discrimination toward nonminority, often arise. For example, in the *Fisher v. University of Texas* (2016), petitioner Abigail Fisher—a white student who applied to the University of Texas at Austin in 2008—argued that the university denied her application because of its use of race in the admission process, an act which would thus violate the Equal Protection Clause of the Fourteenth Amendment.[164] However, with the university providing a compelling justification for its race-conscious policies, the Supreme Court confirmed that the University of Texas's use of race-conscious admission processes was necessary to achieve the goal of diversity.

While it seems that practices of affirmative action in college admissions ensure access to opportunities for underrepresented minorities and are thus ethical in promoting diversity and equality in society, critics argue that the utilization of affirmative action in college admission

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[159] Fernandez, Mariel. "SFFA V. Harvard and SFFA V. UNC FAQ." *Legal Defense Fund*, 22 Mar. 2023, www.naacpldf.org/case-issue/sffa-v-harvard-faq.

[160] "Students for Fair Admissions v. President and Fellows of Harvard College." Oyez. Accessed April 8, 2023. https://www.oyez.org/cases/2022/20-1199.

[161] "Grutter v. Bollinger." Oyez. Accessed April 8, 2023. https://www.oyez.org/cases/2002/02-241.

[162] *Grutter v. Bollinger* (2003) will be later addressed in the essay.

[163] Harry J. Holzer and David Neumark, "Affirmative Action: What Do We Know?," *Journal of Policy Analysis and Management* 25, no. 2 (2006): pp. 463-490, https://doi.org/10.1002/pam.20181, 3.B

[164] "Fisher V. University of Texas at Austin, 579 U.S. ___ (2016)." *Justia Law*, supreme.justia.com/cases/federal/us/579/14-981.

might deprive non-minorities of academic opportunities. The mechanism and potential consequences of affirmative action practices in higher education have been a challenge to both ethics and legality.

In order to discuss the ethics of affirmative action policies in a specific lawsuit, this essay focuses on *Gratz v. Bollinger* (2003) to investigate the extent to which affirmative action can be considered ethical from a utilitarian perspective. In *Gratz v. Bollinger* (2003), petitioners Gratz and Hamacher filed a class action lawsuit against the University of Michigan, alleging that the University's use of racial preferences in undergraduate admissions had violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S. C. § 1981.[165] On June 23, 2003, the court determined in a 6-3 decision that the University of Michigan's Office of Undergraduate Admission (OUA) did discriminate against nonminority applicants with its use of racial preferences in undergraduate admissions. Furthermore, the discrimination was deemed unconstitutional.[166]

In determining what denotes the "ethics" of affirmative action, this essay refers to John Stuart Mill's philosophy of utilitarianism. To define, the basic principle of Mill's utilitarianism falls under the principle of greatest happiness, also called the principle of utility, in which Mill argues that actions should take place in a way that maximizes the happiness or well-being of the greatest number of people.[167] When evaluating an action or a decision, Mill would argue that its impact on both individuals and society should be considered. In Mill's account, actions that promote the greatest happiness for the greatest number of people are ethically and morally right, and vice versa. Following the core of Mill's utilitarian perspective, this essay intends to define and evaluate the utility—economical and educational—generated under the university's affirmative action policies to examine whether affirmative action can be justified as ethical in *Gratz v. Bollinger*. Further discussions on the Supreme Court's decisions and case comparison with another landmark case of affirmative action—*Grutter v. Bollinger* (2003)—will be provided.

II. RELEVANT BACKGROUND

A. Case review: *Gratz v. Bollinger* (2003)

Gratz v. Bollinger challenged the affirmative action policies used by the University of Michigan's OUA, which granted automatic points to applicants from underrepresented racial and ethnic groups. In *Gratz v. Bollinger*, petitioners Gratz and Hamacher, with a shared background of Michigan residents and Caucasians, applied to and got rejected from the University of Michigan's College of Literature, Science, and the Arts (LSA) respectively in 1995 and 1997.

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165 *Gratz v. Bollinger*, 539 U. S. 244 (2003).
166 "Gratz v. Bollinger." Oyez. Accessed April 8, 2023. https://www.oyez.org/cases/2002/02-516.
167 West, Henry R. 2004. *An Introduction to Mill's Utilitarian Ethics*. N.p.: Cambridge University Press.

Though Gratz was informed to be well qualified and Hamacher was told to be within the qualified scale by the LSA, both were denied in early admission rounds. In 1997, the two petitioners filed a class action lawsuit in the United States District Court for the Eastern District of Michigan regarding the use of racial preferences in the University's admissions process. The petitioners believed that using racial preferences in the admissions process would violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S. C. § 1981.[168]

During each academic year, the University of Michigan's OUA evaluates undergraduate applications using a written guideline and a point-grade system, in which 100 points are needed out of the 150-point scale to guarantee admissions. During all relevant periods, the University of Michigan's OUA awards applicants from underrepresented minorities—African Americans, Native Americans, and Hispanics—with an extra 20 points, and the OUA virtually admits every qualified applicant from these minority groups. The point system was designed to increase diversity on campus, as the university believed that a diverse student body would provide a better educational experience for all students.[169]

In examining the constitutionality of race-consciousness policies in *Gratz v. Bollinger*, the court applied the strict scrutiny standard of review, a standard of judicial review for determining the constitutionality of policies, actions, or laws. To pass strict scrutiny, the institution—University of Michigan's OUA—must provide its compelling justification for its actions or policies of affirmative action in a way that demonstrates its actions are narrowly tailored and are the least restrictive means of achieving its goals of diversity.[170] Chief Justice William H. Rehnquist represented the majority opinion in the case. The decision was based on the idea that the OUA's affirmative action policies made race a decisive factor in undergraduate admissions and were not narrowly tailored to achieve educational diversity as the respondent Bollinger proposed. Nearly every applicant from the "underrepresented minorities" was admitted, which provided evidence against Bollinger's proposition.[171]

Under the application of a strict scrutiny standard of review, the court held that the university's affirmative action programs must be narrowly tailored to achieve the sole purpose of diversity, and that the university should prove that it has considered race-neutral alternatives before the implementation of the race-consciousness policies. However, the results indicated that the University of Michigan's use of a race-based point-grading system in undergraduate admissions failed to achieve the compelling interest of diversity. Rather, the court decided, the system used race and ethnicity as a determining factor of admission, which thus provided an unfair advantage to minority groups.

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[168] *Gratz v. Bollinger*, 539 U. S. 244 (2003).
[169] *Gratz v. Bollinger*, 539 U. S. 244 (2003).
[170] "Strict scrutiny | Wex | US Law | LII / Legal Information Institute." n.d. Law.Cornell.Edu. Accessed April 14, 2023. https://www.law.cornell.edu/wex/strict_scrutiny.
[171] "Gratz v. Bollinger." Oyez. Accessed April 8, 2023. https://www.oyez.org/cases/2002/02-516.

B. From a utilitarian perspective

In accordance with Mill's utilitarianism, the objective of social action is to maximize the greatest happiness of the greatest number of people in society. Actions should be judged right or wrong to the extent in which they increase or reduce societal utility, happiness, and well-being.[172] From a utilitarian perspective, the university's affirmative action policies should be judged in terms of their overall impact on society as well as on individual student bodies based on an evaluation of their ability to promote the greatest amount of happiness and utility in society. In the context of *Gratz v. Bollinger*, the OUA's affirmative action policies are to be judged by their usefulness in generating societal benefits and enhancing individual advantages. This essay intends to categorize utility in two aspects—economical and educational—and examine if the university's practices of affirmative action in undergraduate admissions generate an upward growth in social welfare during the relevant period from 1995 to 2000. Though the Supreme Court's hearing on *Gratz v. Bollinger* took place in 2003, it was in 1997 that the two petitioners filed a lawsuit in the United States District Court for the Eastern District of Michigan against the University and the two petitioners applied to the university respectively in 1995 and 1997.[173] Therefore, it would be more reasonable to examine the economic and educational effects of affirmative action in this case in a relevant five-year period from 1995 to 2000.

Applying the utilitarian theory to *Gratz v. Bollinger*, this essay contends that if there was an upward growth in the statewide social welfare from 1995 to 2000, then the university's use of affirmative action can be justified as ethical within a utilitarian framework since general social welfare and societal utilities were enhanced. The statewide social welfare will be examined through the state's economic index and related literature as well as relevant records of individual experiences regarding the university's affirmative action policies.

III. ANALYSIS

A. An ethical decision to be justified

In this section, two ways of evaluating the general societal utilities will be presented: (1) a review of the university's affirmative action policies' statewide and national economic effects with relevant data; and (2) the educational benefits of diversity—one of the most critical elements in the constitutional defense of affirmative action in higher education in the *Gratz v. Bollinger* case—including an excerpt from the book *Defending Diversity* written by several faculty members from the University of Michigan on the issue of affirmative action.

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[172] Welch, Christopher J. "Utilitarianism." *Palgrave Macmillan UK eBooks*, Palgrave Macmillan, Jan. 1989, pp. 257–69. https://doi.org/10.1007/978-1-349-20313-0_35.

[173] *Gratz v. Bollinger*, 539 U. S. 244 (2003).

Given that the University of Michigan's intentions center around providing a high-quality education to students who, upon graduation, will make up the workforce that is crucial to the state's ongoing development, this essay argues that the state's economic index as well as reading of related literature during the relevant period from 1995 to 2000 could sufficiently indicate the direct or indirect economic effect under the affirmative action practiced by University of Michigan's OUA.[174] As Figure 1 shows, from 1995 to 2000, the general Michigan State employment demonstrated a steady, upward increase in employment from 4,567,643 in January 1995 to 4,950,193 in December 2000, indicating the growing local labor force.[175] Figure 2 reflects the growth of the statewide labor force participation rate, with an increase from 66.4 in January 1995 to 68.5 in December 2000, which indicates that the percentage of all people of working age who are employed or are actively seeking jobs is increasing. In turn, this implies that the job market and workforce are becoming increasingly robust.[176] As John Engler, governor of Michigan, suggests in the State of Michigan: 2000 Economic Report of the Governor, Michigan State had a more diverse economy with more workforce entering high-tech jobs and the highest percentage of highly skilled technical workers in the nation during the 1990s.[177] The increasingly diverse workforce in high-tech jobs implies the benefits of the states' mature higher education system to enable the workforce with better capacity and advanced ability in technology, especially during the 1995-2000 period when the automotive industry was expanding.

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[174] *Mission | Office of the President*. president.umich.edu/about/mission.

[175] *BLS Data Viewer*. beta.bls.gov/dataViewer/view/timeseries/LASST260000000000005.

[176] *BLS Data Viewer*. beta.bls.gov/dataViewer/view/timeseries/LASST260000000000008.

[177] John Engler (2001), State of Michigan 2000 Economic Report of the Governor Progress in the 1990s, https://www.michigan.gov//media/Project/Websites/treasury/MISC_2/2000ERG_posted_10082009.pdf?rev=2573d641cea94dfea4e3ce21432822d2

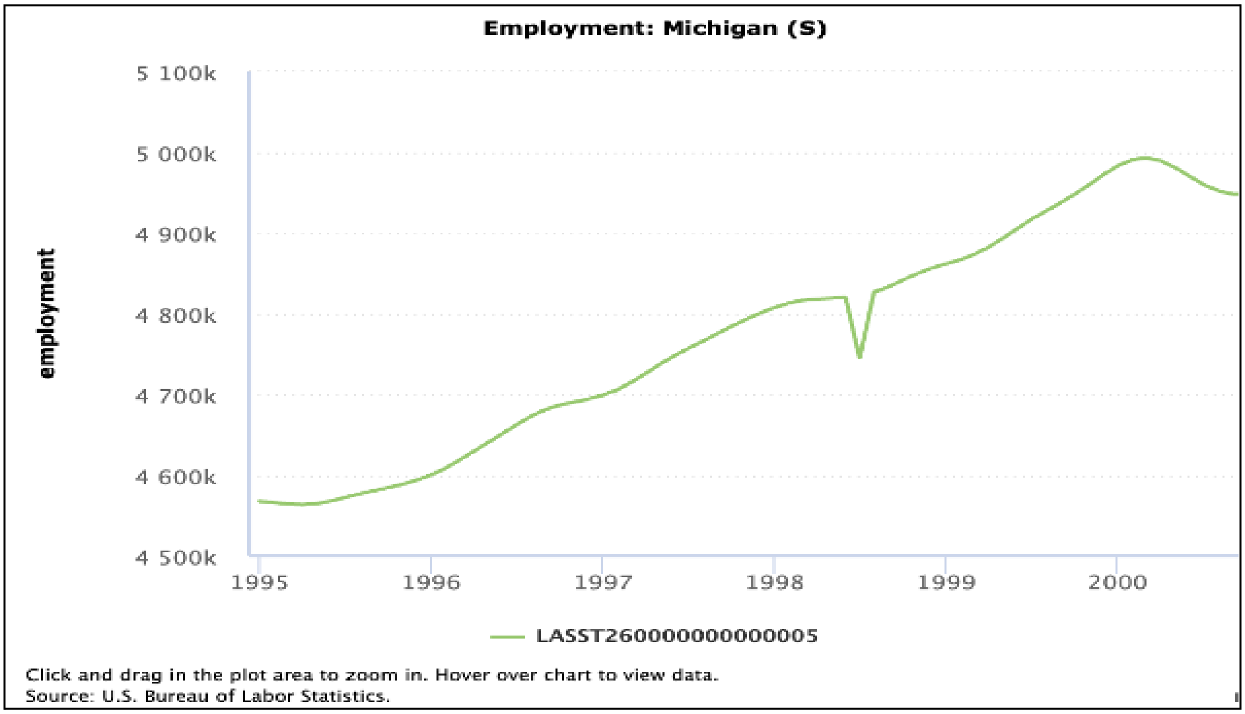

Figure 1. Michigan State employment from 1995 to 2000.

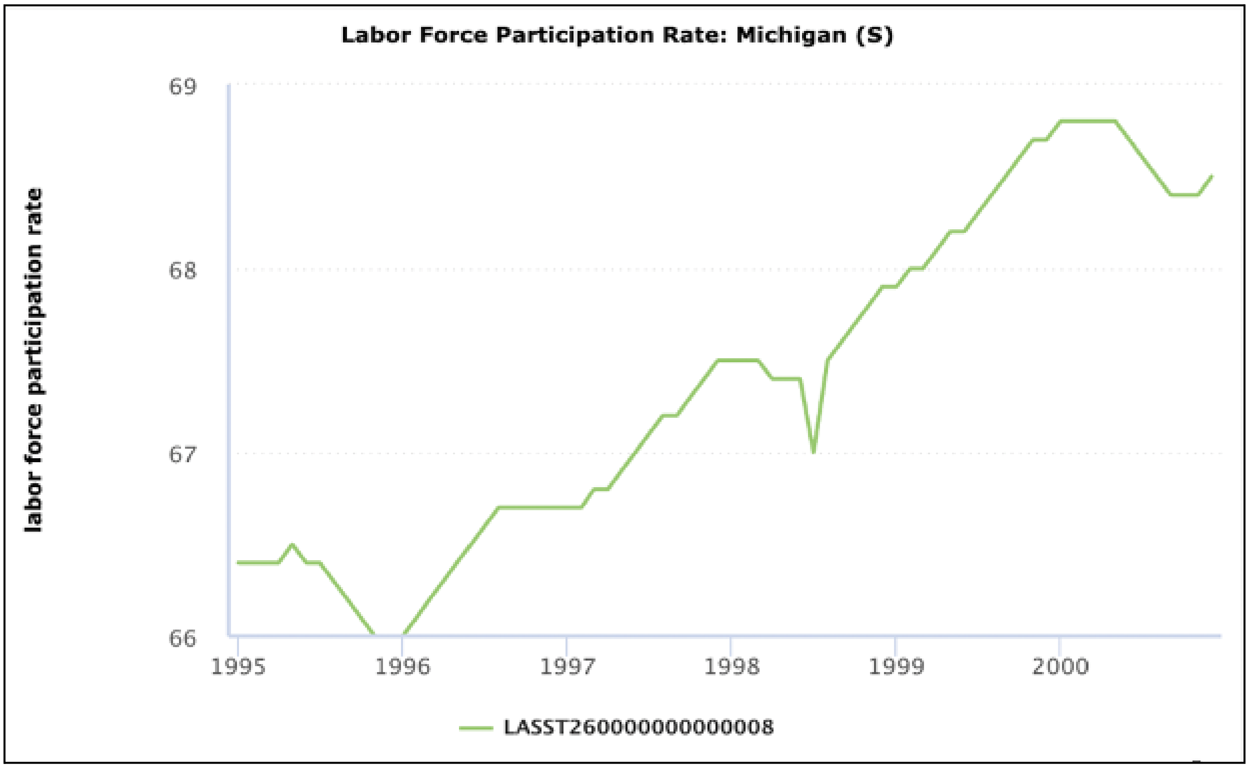

Figure 2. Michigan State Labor Force Participation Rate from 1995 to 2000.

Additionally, after reviewing several lawsuits on affirmative actions in higher education (e.g, *Gratz v. Bollinger* (2003), *Grutter v. Bollinger* case (2003), etc.) and related empirical data, Holzer argues that affirmative action applied in higher education could generate positive labor market effects among states.[178] With the influence of affirmative action favoring minorities in higher education, the distribution of employment between white males – the ethnicity group that is believed to have racial dominance in society – and minorities changes significantly. Based on his analysis of a cross-sectional survey of roughly 3,000 employers in four metropolitan areas in 1992 -1994, Holzer finds that the share of total employment accounted for by white males was about 15-20% lower in establishments using affirmative action than in those that do not, proving that the affirmative action programs could effectively increase diversity in the workplace.[179, 180] In terms of that, it seems important to examine the general job performance of those who benefit from such shifts in the ethical redistribution of the workforce. When analyzing the employee credentials and performance of employees with different demographic backgrounds within the relevant periods, Holzer concludes that while there is evidence that minorities hired under affirmative action have a lower educational background, there is no solid evidence of weaker job performance among most of these candidates.[181] It might be contradicting that minorities with lower educational backgrounds demonstrate similar job performance as employees who are non-minorities. In response, Holzer argues that the firms' various tactics and mechanisms— including extensive recruitment, advanced training, etc.— shall offset the potential productivity shortfalls and even allow for more economic benefits.[182] Holzer later concludes that affirmative action would reduce the educational and employment gaps that U.S. minorities have suffered from.

In order to investigate the educational effects of the university's practice of affirmative action, Gurin, a professor at the University of Michigan, has offered a strong defense for the University of Michigan's OUA's use of affirmative action by interviewing a large student body at the university and measuring the campus-wide "diversity" level. In doing so, she measured the

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[178] Holzer, Harry J. "The Economic Impact of Affirmative Action in the US." *SWEDISH ECONOMIC POLICY REVIEW*, vol. 14, 2007, pp. 41–71. www.government.se/contentassets/6310cf0f5c5049c6b0ee15d1cfc49b74/harry-holzer-the-economic-impact-of-affirmative-action-in-the-us.

[179] The four metropolitan areas are: Atlanta, Boston, Detroit, and Los Angeles

[180] Holzer, Harry J., and David Neumark. "Are Affirmative Action Hires Less Qualified? Evidence From Employer‐Employee Data on New Hires." *Journal of Labor Economics*, June 1996, https://doi.org/10.1086/209930.

[181] Holzer, Harry J. "The Economic Impact of Affirmative Action in the US." *SWEDISH ECONOMIC POLICY REVIEW*, vol. 14, 2007, pp. 41–71. www.government.se/contentassets/6310cf0f5c5049c6b0ee15d1cfc49b74/harry-holzer-the-economic-impact-of-affirmative-action-in-the-us.

[182] Holzer, Harry J. "The Economic Impact of Affirmative Action in the US." *SWEDISH ECONOMIC POLICY REVIEW*, vol. 14, 2007, pp. 41–71. www.government.se/contentassets/6310cf0f5c5049c6b0ee15d1cfc49b74/harry-holzer-the-economic-impact-of-affirmative-action-in-the-us.

students' learning outcomes, interactions among the student body, and the cultivation of "democracy." Gurin's studies validate that the University of Michigan's practices of affirmative action in fact generate long-term, nationwide efficiency and educational benefits of diversity.[183] Gurin suggests that engagement in learning with diverse peers has great benefits for students in their late adolescence, guiding them to become better citizens and leaders of democracy. Therefore, students with distinct precollege backgrounds are able to develop mature identity formation and intellectual growth through interactions with peers of different ethnicities.

To offer an authentic glimpse into the learning experience for students at the University of Michigan, Gurin records interviews with several students on how the university's diversity has cultivated their growth despite their homogeneous backgrounds. One of the students—an Asian American male from California—mentions that the university's diverse environment and the active student body have made him realize that people with different ethnicities do not just coexist in the name of cultural fusion but really form a strong bonding between each other. Gurin suggests that the university's practices of affirmative action had enhanced social and cultural diversity across campus, and this guaranteed the students a rigorous learning environment.[184]

When considering these cases, it becomes clear that the University of Michigan's practices of affirmative action increase overall social welfare, both from an economic perspective and an educational perspective. Statistics in the relevant period from 1995 to 2000 and Holzer's findings indicate that utilization of affirmative action in the statewide, or even nationwide, higher education will boost the overall economic welfare in society as well as lessen the rigid employment gaps, thus validating the "ethics" of affirmative action from a utilitarian perspective. In implementing affirmative action, greater societal utilities are generated. Similarly, Gurin's arguments and investigations suggest that the University of Michigan's utilization of affirmative action enables a diverse environment for the students to engage more in their learning process and learn to become global, democratic citizens, thus defending the university's educational rationale and supporting the societal positive externalities.

B. A different court decision

While it seems that from a utilitarian perspective, the University of Michigan's OUA's practice of affirmative action can be justified as ethical because of its positive result in upward economic growth and social welfare, the Supreme Court nevertheless deemed the university's practice of affirmative action as unconstitutional. Justice O'Connor explained that the University of Michigan's "mechanical" procedure of the grade point system in undergraduate admissions does not fully consider all aspects of each application, thus failing to really contribute to the

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[183] Gurin, Patricia, et al. *Defending Diversity: Affirmative Action at the University of Michigan*. University of Michigan Press, 2004.

[184] Gurin, Patricia, et al. *Defending Diversity: Affirmative Action at the University of Michigan*. University of Michigan Press, 2004.

student body diversity on campus.[185] An example is provided regarding the court's opinion on the significant relationship between race as a factor and the university's grade point system as a whole: three students—A, B, and C—applied to the same university as incoming freshmen. A was the child of a black physician and had extraordinary achievements with promising academic superiority. B was a black born in an inner-city ghetto with semi-literate parents; compared to A, B had lower academic achievements but had demonstrated strong leadership and passion for black power. C was a white student with unique talents in arts, which might provide them a huge advantage over A and B. Given that the Admissions Committee is forced to grant only one out of the three college admission, it is likely for A to be accepted if a good number of black students like B have already been accepted. Similarly, if the Committee has accepted fewer students like B, then the Committee might prefer B. In this scenario, even if C has fantastic talents for the arts like Picasso or any other prominent artists, they will at most receive five points under the university's grade point system. Concurrently, every single student of underrepresented minorities - like A and B - receives the automatic 20 points for merely submitting their application to the university.[186] This example has revealed the problematic nature of the grade point system as the individual talents of each applicant can easily be overlooked when the Admissions Committee applies the mechanical grade point system. Justice Connor includes in her concurrence that the diversity contributions of each applicant are not individually assessed based on the university's affirmative action policies.[187] Connor's view implies that any applicant to the university deserves an equal, well-rounded moral evaluation of their applications that reflects their personal qualities and pursuits.

The court's ruling on *Gratz v. Bollinger* signifies the unconstitutionality of the grade point system the University of Michigan's OUA applied in undergraduate admission. However, the court does not simply reject the use of race or ethnicity as a major factor in college admission for an educational institution: it is required for the institution to sufficiently prove under the standard of strict scrutiny that its practices or policies of affirmative action are narrowly tailored to achieve the compelling interest of diversity in higher education.[188]

C. Case comparison: *Gratz v. Bollinger* and *Grutter v. Bollinger*

On the same day, the Supreme Court announced the decision on *Gratz v. Bollinger* (2003), another landmark affirmative action case, *Grutter v. Bollinger* (2003) was also decided. Both cases challenged the University of Michigan's affirmative action in college admissions, respectively in undergraduate admissions and law school admissions. In *Gratz v. Bollinger*, the plaintiffs claimed that the University's point-based system for admissions was unconstitutional

[185] *Gratz v. Bollinger*, 539 U. S. 244 (2003).
[186] *Gratz* (2003).
[187] *Gratz* (2003).
[188] "Gratz v. Bollinger." Oyez. Accessed April 8, 2023. https://www.oyez.org/cases/2002/02-516.

because it gave preferential treatment to minority applicants based on their race. The Supreme Court ruled that the University's point-based system was unconstitutional because it did not sufficiently consider other factors that might be more relevant to an applicant's qualifications despite racial factors.[189] In *Grutter v. Bollinger*, the plaintiff, Barbara Grutter, also claimed that the University of Michigan Law School's affirmative action policies were unlawful because they gave preferential treatment to minority applicants based on their race. However, in this case, the Supreme Court ruled that the University's affirmative action policies were constitutional as under a strict scrutiny standard of review, they served a compelling state interest in promoting diversity in higher education.[190]

Gratz v. Bollinger and *Grutter v. Bollinger* both dealt with the issue of affirmative action in admissions at the University of Michigan, but the cases had different outcomes. *Gratz v. Bollinger* repealed the University's use of a point system that automatically awarded points to certain underrepresented minority groups, while *Grutter v. Bollinger* upheld the University of Michigan Law School's use of race as only one factor among many in its admissions process. The Court argued that diversity was a compelling state interest because it promoted cross-racial understanding and prepared students for a diverse workforce and society.[191]

The impact of the Supreme Court's decisions in the cases also differed greatly. Due to the *Gratz v. Bollinger* ruling, the point-based system regarding affirmative action in college admissions was entirely eradicated as it was deemed unconstitutional. In *Grutter v. Bollinger*, the Supreme Court's decision affirmed the University of Michigan Law School's affirmative action policies under a standard of strict scrutiny, which allowed the law school to continue its consideration of race in admission as a main determinant factor so long as it took various qualifications of each applicant into consideration on a case-by-case basis.[192]

The comparison between these two cases highlights that the constitutionality of affirmative action policies in university admissions is to be closely examined under the strict scrutiny standard of review. *Grutter v. Bollinger* has set a precedent for the use of race as a factor in university admissions, but in doing so, the Court emphasized that the use of race must be subject to strict scrutiny and be narrowly tailored to the compelling interest of diversity. Moreover, the comparison between these two cases highlights the ongoing debate about the role of affirmative action in promoting diversity and equality in higher education. Supporters of affirmative action argue that it is necessary to ensure that underrepresented minority groups have access to educational opportunities and to promote diversity in the classroom, while opponents might argue that affirmative action is discriminatory and violates the principle of equal treatment under the law.

[189] *Gratz v. Bollinger*, 539 U. S. 244 (2003).
[190] *Grutter v. Bollinger,* 539 U.S. 306 (2003).
[191] *Grutter v. Bollinger,* 539 U.S. 306 (2003).
[192] *Gratz v. Bollinger*, 539 U. S. 244 (2003).

IV. CONCLUSION

In conclusion, John Stuart Mill's utilitarian theory can be applied to the utilization of affirmative action in Gratz v. Bollinger. Based on Mill's principle of utility, this applies the concept of maximizing happiness for the most people possible through affirmative action in Michigan State's admission process. This essay aims to justify the practices of affirmative action in the *Gratz v. Bollinger* case by demonstrating that it is ethical by referencing Michigan state's economic development during the relevant period from 1995 to 2000. In addition, it discusses related literature to validate increasing educational benefits and social welfare resulting from the university's utilization of affirmative action. A case comparison between the *Gratz v. Bollinger* and *Grutter v. Bollinger* cases is also provided.

Evaluating The Success Of California's Climate Policies On Promoting EV Production

Written by Rio Wakura
Edited by Amy Bains

ABSTRACT.

This article evaluates the success of California's climate policies in promoting the production of electric vehicles (EVs). Part I introduces the current trends of EV production in California and the rest of the US. Part II introduces the history behind California's climate policies and an overview of three main climate policies currently used in California that will be analyzed later. Part III provides an in-depth analysis focusing on three California climate policies: the Automobile Emission Standards, the Zero-Emission Vehicle (ZEV) Program, and the local ordinance on EV charging stations. These policies are then compared to the efforts of other states targeting the transportation sector to reduce emissions. The final part of the article evaluates the overall success of California's EVs-focused climate policies.

I. INTRODUCTION

The transportation sector is the biggest contributor to the US's greenhouse gas emissions.[193] Currently, over 90% of fuel used for transportation in the US is petroleum-based. However, EVs have fortunately accelerated the switch to renewable energy. Tesla, the world's largest EV manufacturer,[194] wrote in its 2020 impact report that it helped accelerate the world's transition to sustainable energy by avoiding 5.0 million metric tons of carbon emissions.[195]

Nevertheless, producing EVs is not cheap; EVs are currently more costly to produce than gas-powered vehicles due to high battery costs.[196] Climate policies can help encourage EV production through financial incentives and emission regulations. Although these policies exist in the US, their effectiveness is often unclear. After examining three climate policies promoting EV production in California, this article will argue that there needs to be stricter and narrower policies in order to ensure an effective EV promotion.

This article will focus on California's climate policies since the state has sufficient data on the correlations between EV production and climate policies; California has the most registered automobiles in the US,[197] and EVs make up 18% of new cars sold in California—a number which surpasses the 6% nationwide average.[198] As such, this article will analyze the following three California climate policies: the Automobile Emission Standards, the ZEV Program, and the local ordinance on EV charging stations.

II. BACKGROUND ON CALIFORNIA CLIMATE POLICIES

A. The history of California's climate policies

California took early climate action, already establishing its own automobile emission standards in the 1960s before the 1963 Clean Air Act, a major federal climate bill.[199] In the standards, California required automakers to manufacture energy-efficient cars that can attain 54.5 miles per gallon by 2025, while federal standards were more lenient at 37 miles per gallon. The Trump administration revoked California's standards in 2019, but Biden restored it in 2022, ending its temporary suspension.

In the 1990s, California also implemented Zero Emission Vehicles to break the consumption cycle of conventional vehicles and help attain its long-term carbon emission

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[193] EPA, Sources of Greenhouse Gas Emissions (2022).
[194] Hall, The 15 Largest EV Companies in the World (2022).
[195] Tesla, 2020 Impact Report (2020).
[196] Dreibelbis, Profit vs. the Planet: Here's Why US Automakers Are All-In on Electric Vehicles (2022).
[197] Statista, Automobile registrations in the United States in 2021, by state (2021).
[198] Lambert, Electric cars reach 18% of new car sales in California compared to 6% in the US (2022).
[199] Cremen, What are California's emissions standards, how they're different and why the Trump administration wants to end them (2019).

reduction goal.[200] The bill requires large and medium car manufacturers to produce a certain proportion of EVs relative to their total car production.

In 2006, California passed the Global Warming Solutions Act to implement a statewide greenhouse gas emissions limit on all sources. In the same year, the California state filed a complaint to the district court claiming that General Motors Corp. cars were emitting substantial amounts of greenhouse gas emissions, incurring millions of dollars in climate change damages to the State.[201] However, the district court granted General Motors the right to "dismiss" the complaint, which they did, referring to the complaint as "political questions" not of concern to the corporation. However, the effort of the California government to apply pressure on car companies has not gone to waste; in fact, in 2021, General Motors announced its promise to sell only zero-emission vehicles by 2035, proving that the law can somewhat change corporations' attitudes.[202]

In 2015, California passed a local ordinances bill related to EV charging stations. The bill intended to encourage widespread EV adoption and required local governments to establish guidelines to streamline EV production. These efforts paid off, and by 2022, California had sold over 1 million EVs and became the leading ZEV market in the nation in every category, including affordability to low-income consumers.[203]

There have been more climate initiatives in California recently. However, for the limited scope of the research, this article will focus on three main climate initiatives.

B. Overview of current climate policies in California

One of the climate policies that this article will analyze is California's emission standards. As mentioned earlier, the standards were revoked for three years between 2019 and 2022 due to a disagreement with federal standards. However, as this temporary revocation is only a small part of its history since the standards have been around since the 1960s, this article will still investigate this policy. Under this law, all new vehicles need to be labeled indicating compliance with the California emission standards of 54.5 miles per gallon, with the exception of certain types of vehicles including fully-electric motorcycles.

Another policy that this article will analyze is the Zero-Emission Vehicle (ZEV) Program, a part of the broader Advanced Clean Cars regulations package. This policy was passed with the goal of meeting California's long-term emission reduction goals through the wide-scale adoption of ZEVs. The program requires certain car manufacturers to sell at least a specific number of full-battery electric, hydrogen fuel cell, or plug-in hybrid-EVs. Moreover, the law requires new vehicles produced from 2035 to be 100% ZEV and clean plug-in hybrid EV. The regulation

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[200] California Air Resources Board, History (N.A.)
[201] Climate Change Litigation Databases, California v. General Motors Corp. (N.A.)
[202] Boudette & Davenport, G.M. Will Sell Only Zero-Emission Vehicles by 2035 (2021).
[203] State of California, California Leads the Nation's ZEV Market, Surpassing 1 Million Electric Vehicles Sold (2022).

includes revised ZEV warranties so that consumers can replace their old ZEVs with new or used ZEVs that meet their needs, helping create a cycle of ZEV adoption. The bill sets different targets for manufacturers of different sizes.[204] The manufacturers required to comply include big companies such as BMW, Ford, General Motors, and Honda, as well as medium-sized companies including Jaguar Land Rover. Large manufacturers are required to sell ZEVs that amount to around 4.5% of their total cars, with a minimum of 2% being ZEVs and the rest allowed to be transitional ZEVs, which are vehicles that use ZEV fuel (battery-electric or hydrogen fuel cells) but still emits low-level emissions.[205] Smaller manufacturers with the exception of some are not required to meet these requirements but can earn ZEV credits if they do meet the requirements. If companies go above and beyond minimum requirements, they can sell their extra credits to manufacturers that did not meet the requirements. In this way, the ZEV program works similarly to the cap-and-trade program by setting limits and discouraging fuel consumption. However, the ZEV distinguishes between larger and smaller car manufacturers, making the requirements more feasible and pushing companies with the capability to reduce their emissions to do so. The California State releases annual credit bank balances to record these annual progresses. The ZEV has been modified multiple times over the last 30 years to reflect the changing state of ZEV technology, with updated battery requirements and ZEV proportion requirements.

In 2015, the California state passed a bill related to local ordinances on EV charging stations. This bill requires local governments within California to develop streamlined ordinances for EV charging infrastructure such as providing an easily accessible permitting checklist for installation of EV charging station and the implementation of consistent statewide standards set by the "Zero-Emission Vehicles in California: Community Readiness Guidebook" for timely and cost-effective installation of EV charging stations.[206] This helps simplify and expedite the process of deployment of EV charging stations, helping in turn create more incentive for consumers to adopt EVs since charging stations are readily available.

III. ANALYSIS

A. Automobile emission standards

The automobile emission standard in the 1960s helped spread awareness of EVs and helped force car companies and their consumers to rethink their production/consumption habits. Although there is not much data before the 1960s to refer to, a national poll revealed that over a majority of the population in 1980 thought that the environment should be protected at the cost of economic growth, which shows the emission standards could have helped stir more climate

[204] California Air Resources Board, Zero-Emission Vehicle Program (N.A.).

[205] Lexus, WHAT ARE THE CLASSIFICATIONS OF EMISSIONS, AND WHAT IS DIFFERENCE BETWEEN THE CLASSIFICATIONS? (2022).

[206] California Plug-In Electric Vehicle Collaborative, Plug-In Electric Vehicle Infrastructure Permitting Checklist (2000).

awareness nationwide.[207] Moreover, California cars became the cleanest in the world between the 1980s and the 1990s—after the start of the automobile emission standards— which thus suggests that the standards could have contributed to this trend by raising climate awareness. However, there was also a rise in gas prices in the 1960s and 1970s, which could have also contributed to increased demand for alternative fuel vehicles.[208]

In sum, the automobile emission standards *may* have helped raise climate awareness. Although the lack of data in the 1960s made comparisons of climate awareness before and after the implementation of the standards difficult, this article assesses that, from the timing of the change, the rise in climate awareness in the 1980s can be somewhat attributed to the automobile emission standards.

B. ZEVs program

The ZEV program began in 1990 but was modified in 2012 to reflect the new, updated, state of technology. The program is continually subject to changes, with annual ZEV credit requirements increasing from 2015 to 2025 to reflect more affordable EV production with cheaper and more readily available EV batteries. Overall, the program can be seen as unsuccessful in increasing the proportion of ZEV in large and intermediate manufacturer car production, but relatively successful in encouraging sustainable economic growth of intermediate manufacturers into large manufacturers.

According to California Air Resources Board annual ZEV credit reports, car manufacturers (such as Honda, Ford, and Jaguar Land Rover) that did not experience significant company growth had around the same or less ZEV credits than they started from 2016 to 2019, omitting 2020 data to prevent the pandemic disruption from affecting the data. For example, Honda ZEV credits actually fell from 313,136 in 2016 to 78,400 in 2019.

However, companies such as KIA and BMW, which grew from intermediate to a large volume status manufacturer from 2017 to 2018, experienced a growth in their ZEV credits. BMW ZEV credits increased from 77,035 in 2017 to 83,575 in 2018. Although Kia's ZEV credits temporarily decreased from 72,052 in 2017 to 62,654 in 2018, it rebounded to 69,334 in 2019. In this way, ZEV credits have encouraged sustainable growth by providing growing car manufacturers with numerical targets for its emissions.

C. Local ordinance on EV charging stations

This bill also helped streamline the building of EV charging stations by setting a state-wide guideline for a permitting checklist for charging stations. This bill was passed with the intention of getting rid of the main culprit of slow installation—permit delays. Since it has been

[207] GALLUP, Environment (N.A.).
[208] Department of Energy, Timeline: History of the Electric Car (N.A.).

8 years since the introduction of this bill, with an average timeline of 8-12 months for EV charging station installations from scratch in California, there is adequate data to investigate how the bill helped raise the quantity of EV charging stations.[209]

The bill mostly refers to the state-wide guidebook "Zero-Emission Vehicles in California: Community Readiness Guidebook." However, this is a state-mandated local program, allowing flexibility in the application of the ordinance in different counties. Moreover, the state can also reimburse local agencies for certain costs mandated by the state from the bill, increasing the feasibility of different counties to comply with the bill.

The bill was successful in increasing the number of EV charging stations. This is evident from the fact that counties with clear and accessible permitting checklists tend to have higher numbers of EV charging stations. Quarterly updated data from California Energy Commission in 2022 showed that the top 5 counties with the highest number of EV charging stations also had online, accessible permits, such as LA county with the highest number of stations at 1,598[210] and a clear permitting checklist online. Santa Clara, Orange, San Diego, and San Bernardino counties also were among the top counties in EV charger numbers and all have online permits, with some counties even having expedited permits. The success of permitting checklists could be attributed to how the permit simplifies and expedites the process by allowing easy access to charger building information. Thus, transparency of EV-related information can be an important factor in its widespread adoption in California.

Since this bill is a state-mandated local program, there is a lot of flexibility in the application of the ordinance in different counties. The state can also reimburse local agencies for certain costs mandated by the state from the bill, which makes the bill even more feasible to comply with for the individual counties.

Although it is difficult to assess the impact of this bill on actually reducing greenhouse gas emissions from passenger vehicles, data on the greenhouse gas emissions from 2016 to 2020 does not show much progress.[211] However, it is expected that the bill may help increase EV adoption and lower greenhouse gas emissions in the long-run.

IV. COMPARATIVE ANALYSIS

A. New York state

New York State established CP-49, a series of policies for the Department of Environmental Conservation to incorporate more climate change considerations into its activities, including the implementation of an annual reporting process.[212] It was recently

[209] McCarthy, EV charger installations in California are bogged down by local permitting (2021).
[210] California Energy Commission, Electric Vehicle Chargers in California (2023).
[211] California Air Resources Board, Current California GHG Emission Inventory Data (2022) 11.
[212] New York State Department of Environmental Conservation, CP-49 / Climate Change and DEC Action (2010).

amended in 2019 to include more specific requirements, but the analysis of these policy effects will exclude data after 2019 since it is too soon to analyze 2019 data; only the effectiveness of 2010 policies will be evaluated. CP-49 recommends the department to “encourage” jurisdictions to take climate action, “assess” policies with climate change considerations, and “seek opportunities” to further reduce greenhouse gas emissions.

Compared to California’s climate laws, the wordings in the New York State Laws seem to lack force or solid numbers in their targets. Although this may give New York more flexibility in its climate actions, the goals seem to be too vague to be implemented. Moreover, New York State’s climate laws do not focus on reducing transportation emissions. In fact, New York state’s greenhouse gas emissions show a slight decline from 2010 to 2019 in its emissions report,[213] but its statewide emissions from the transportation sector have seen little change from 2010 to 2019, suggesting that this policy is relatively ineffective in reducing emissions from vehicles.

B. Massachusetts

In 2008, Massachusetts passed the Global Warming Solutions Act, which was one of the first climate laws in the country.[214] A similar law was passed in California in 2006. The Global Warming Solutions Act requires Massachusetts to meet two main goals: lower its emissions to a level 10-20% below 1990 levels by 2020 and lower its emissions to a level 80% below 1990 levels by 2050. Its specific regulations include but are not limited to requiring Massachusetts largest sources to report its carbon emissions before 2019 and making projections for Massachusetts emissions for 2020.

From 2010 to 2015, Massachusetts has seen a generally steady decline in its emissions, with the biggest drop from 2010 to 2011.[215] From 2018 to 2021, the State also saw a steady decline in emissions.[216] In total, Massachusetts experienced a drop in emissions from approximately 27 million metric tons of CO2 to 13 million metric tons of CO2, more than halving its emissions. Thus, it can be analyzed that Massachusetts’ numerical goals and specific regulations allowed it to be successful in reducing emissions.

Although Massachusetts has more recently implemented EV-related laws, Massachusetts tends to focus more on reducing economy-wide emission rather than specific sectors, compared to California. However, Massachusetts has been successful in increasing its number of EV and Plug-in hybrid electric (PHEV) vehicles: the number of EV and PHEV vehicles steadily increased from 3,333 in 2013 to 58,957 in 2022.[217] It also experienced an especially significant

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[213] New York State Department of Environmental Conservation, 2022 Statewide GHG Emissions Report (2022).
[214] Executive Office of Energy and Environmental Affairs, Global Warming Solutions Act Background (N.A.).
[215] MassDEP, MassDEP GHG Reporting Program Summary Report and Facility List (2016).
[216] Massachusetts Department of Environmental Protection, Facility GHG Emissions Reports (2022).
[217] Massachusetts Department of Environmental Protection, Apply for MassEVIP Fleets Incentives (N.A.).

growth in the number of EVs. Although these numbers are not as high as California's numbers, both California and Massachusetts have seen significant growth in EV numbers over time. Moreover, Massachusetts' electric vehicle production has been increasing more steadily than California's, with no drops over time, which is surprising given California's greater focus on EV incentives.

In sum: the Global Warming Solutions Act, in both Massachusetts and California, seems to have succeeded in reducing emissions and raising EV production. This is despite the slight difference in timing of implementation; the overall higher numbers of EVs in California could be attributed to the focus of its other policies on EV production.

V. CONCLUSION

Ultimately, California's climate laws pertaining to EVs have not been hugely successful in reducing emissions and/or significantly improving EV production. That being said, there needs to be stricter, and more specific, climate policies that provide significant incentives to producers for focusing on EVs. Clearly, although perhaps more effective than in other states, the loose recommendations that California's climate policies currently provide are inadequate in reducing carbon emissions to the extent that is necessary to achieve environmental preservation goals.

However, policies such as the automobile emission standards *have* raised climate awareness, which is an important first step in driving further climate action. Moreover, the local ordinances on EV charging stations could help boost EV production in the future, as more consumers are incentivized to purchase EVs. The ZEVs program was not successful in encouraging more EV production in big car manufacturers, but has, nevertheless, helped encourage sustainable growth in intermediate car manufacturers. Thus, it could be said that California's climate laws are helpful in raising awareness of emissions in the automobile industry.

A future direction of research on this topic may involve investigating additional climate policies that have more data available for analysis. Doing so is likely to provide more sophisticated insights into the impact of climate policies due to the fact that older policies simply do not have the amount of data necessary for a thorough analysis of effectiveness. Particularly of interest for future research is Massachusetts' climate policies, as the state's EV production is currently steadier than California's. Therefore, although this article provides a jumping-off point which illuminates some connections between policy and the rate of EV production, the continued gathering of information will be of much use for identifying additional factors that make a policy successful in encouraging EV production.

The Commercial Space Industry: Perils of Government Contract Laws and Oligopoly

Written by Howard Zhang
Edited by Juliana Abraham

ABSTRACT.

The current commercial space industry is an oligopoly with few major players and high barriers to entry. New companies have difficulties competing for government contracts with established firms like SpaceX, which have a significant technological advantage. Space is the next frontier for humanity's expansion and should not be exploited by a small number of private companies. Therefore, new government contracting practices and regulations are necessary for the equitable development of space and competition within the space industry. This paper will focus on antitrust cases against various space companies and the U.S. government, which were filed by competitors who were unable to win government contracts. The issue will be analyzed by examining the results of the case and how courts have interpreted antitrust laws when applied to the government procurement system. This paper finds that new government contracting practices are necessary to promote competition in the commercial space industry. After all, space is the final frontier and its development is critically important to the future of humanity.

I. INTRODUCTION

A. Rise of commercial aerospace

The 20th century saw rapid technological progress as humanity went from the first flight of the Wright brothers to walking on the moon in under 70 years. While advances are occurring in aerospace to this day, space flight is no longer the exclusive domain of government agencies such as NASA or Roscosmos.[218] NASA's budget as a percentage of the federal budget has fallen from its peak of around 4.5% to about 0.5% in 2020. Less money is being put into the government's own research and development, but is instead going to aerospace companies in the form of lucrative government contracts.

Traditionally, these contracts have been awarded to established aerospace companies such as Boeing, Lockheed Martin, or other defense contractors. However, a new batch of aerospace companies have emerged to cater directly to commercial and government spaceflight: which desperately need government funding to stay afloat. This has led to many lawsuits between these companies, alleging antitrust violations on the part of government agencies in how they choose to award these contracts. For example in *SpaceX v. Boeing* (2006), Boeing and Lockheed Martin had teamed up to win an exclusive contract with the U.S. Air Force in the production of evolved expendable launch vehicles (EELVs). SpaceX claimed that Boeing was attempting to eliminate competition and violate the Sherman Act by collaborating with Lockheed to obtain this contract.[219] However, it was found that as a competitor, SpaceX would not have been able to win the contract anyways so the case was thrown out of court.[220] [221] Due to the "winner-gets-all" nature of government contracts, smaller companies have a harder time competing with established companies. Meaning, new aerospace companies are only possible through lots of private funding.

B. Environmental consequences

The recent growth of spaceflight companies has also presented a risk to the environment. Record numbers of orbital launches in 2021 pose risks of not only polluting the atmosphere, but also space itself. For example, the sheer quantity of Starlink satellites in orbit increases the risk

[218] Khushboo Sheth, Did You Know Only 66 Years Separated The First Successful Plane Flights And Moon Landings? (World Atlas, 2017).

[219] Braddock Gaskill, SpaceX vs. Boeing and Lockheed: Case Closed (NASA Space Flight, 2006)

[220] Rhoda Kwan and Jon Henley, China berates US after 'close encounters' with Elon Musk satellites (The Guardian, 2021).

[221] Rajeev Suri, What's the environmental impact of space debris and how can we solve it? (World Economic Forum, 2022)

of collisions with other objects.[222] The Chinese Tiangong space station allegedly suffered two near misses with Starlink satellites in 2022, raising geopolitical tensions and concerns about the regulation of private spaceflight.

In addition, the commercialization of space brings up ethical concerns. Space is the next frontier for human expansion and is critical to the future of humanity as a whole; intuitively it seems unfair for a small number of private companies to profit off of space and extract resources for their own benefit. In the evolving world of aerospace, new laws and regulations are needed to ensure the equitable development of space and to protect the environment.

II. BACKGROUND ON COMMERCIAL SPACEFLIGHT

A. Aerospace companies

In this paper, spaceflight will be defined as the launch of any satellite, vessel, or human into near-Earth orbit and beyond. Different companies have focused on varying aspects of spaceflight in attempts to make their niche profitable. Companies, such as SpaceX, have developed reusable rockets to launch satellites and other spacecraft into space for NASA and private companies. They have also entered the telecommunications business with Starlink, which is advertised to provide satellite cellular service anywhere in the world.[223] Other companies like Virgin Galactic are offering flights past the edge of space for ordinary citizens while Blue Origin is trying to do a bit of everything. Despite the promising future of this industry, many companies operate on deficits; In March of 2023, Virgin Orbit owned by billionaire Richard Branson went bankrupt after failing to find a source of funding.[224] That is why government contracts are so important for these companies as a source of revenue.[225] Another similarity between these companies is that they were founded recently. The 'space-for-earth' economy itself is a relatively new concept but has grown to generate over $300 billion in revenue in 2019. The US alone spent $43.3 billion on space activities in 2017, a number that will likely grow as the US pursues more programs such as the Space Force.[226] Much of this spending comes in the form of government contracts.[227] These are agreements to procure goods and services for the government. Aerospace companies provide both goods and services through launches of government spacecraft, passengers, and cargo or the procurement of rockets and spacecraft.

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[222] Rhoda Kwan and Jon Henley, China berates US after 'close encounters' with Elon Musk satellites (The Guardian, 2021).

[223] Elizabeth Howell, SpaceX: Facts about Elon Musk's private spaceflight company (Space, 2022).

[224] Lina Tran, The Private Companies Pioneering the (New) Space Race (AFAR, 2022).

[225] Michael Sheetz, Virgin Orbit fails to secure funding, will cease operations and lay off entire workforce (CNBC, 2023).

[226] Matthew Weinzierl and Mehak Sarang, The Commercial Space Age Is Here (Harvard Business Review, 2021).

[227] 2017 – United States Government Space Budget – Snapshot (The Space Report, 2017).

B. Government contract law

To understand how the government procures spaceships and rockets from the commercial aerospace industry, one must understand the rudimentary basics of government contracts. This includes the field of law known as government contracts law, which intersects with anything—from business law to IP law, and antitrust law. To win a government contract, companies submit proposals known as bids which get evaluated objectively by the government based on their criteria for each contract. A successful company is chosen by the government to procure what the contract requires. Sometimes, a company that fails to win a contract may file an antitrust complaint against the government.

One of the most important antitrust laws is the Sherman Act, which outlaws attempts by the public to monopolize free trade and eliminate competition. Under the Sherman Act, acts that limit competition and affect interstate commerce are prohibited, protecting consumers from monopolies and oligopolies.[228] However, the Sherman Act has limited influence on government contracts, as the government is treated like the consumer and a Contracting Officer has the discretion to choose a single contractor as long as it follows Federal Acquisition Regulations (FAR).[229]

III. OVERVIEW OF CASES

A. *SpaceX v. Boeing* (2006)

In the world of government contracts, antitrust acts are common and usually occur when competitors join together to win a contract and shut out other bidders. Due to the government's status as the customer, it is hard to take action using existing antitrust legislation. These standards were applied to the aerospace industry and upheld in SpaceX v. Boeing (2006).[230]

In 2006 SpaceX filed an antitrust action against Boeing which was dismissed without prejudice on February 16, 2006. A second antitrust action was filed and dismissed on May 12, 2006. SpaceX alleged that Boeing and Lockheed Martin had violated antitrust laws when they negotiated with the U.S. Air Force to have exclusive deals in the making of evolved expendable launch vehicles (EELVs).[231] In 2005, the USAF granted an exclusive contract to a united venture between Boeing and Lockheed Martin. SpaceX then filed an antitrust action on the basis that the

[228] The Antitrust Laws (Federal Trade Commission, Last Accessed 2023).

[229] Introduction to the Federal Acquisition Regulation [FAR] (FDIC, Last Accessed 2023).

[230] Stephen L. Braga and Robert J. Wagman Jr, Antitrust Enforcement in Federal Procurement - DOJ's New Lawsuit to Block a Merger Suggests that Things May Be Getting Interesting (Bracewell LLP, 2022).

[231] Braddock Gaskill, SpaceX vs. Boeing and Lockheed: Case Closed (NASA Space Flight, 2006).

two companies violated (1) § 1 of the Sherman Act, (2) § 2 of the Sherman Act, and (3) § 7 of the Clayton Act. These sections set the basic antitrust measures which aim to prohibit contracts that restrain free trade and competition. SpaceX argued that by collaborating for an exclusive contract, Boeing and Lockheed Martin created an oligopoly that prevented competition from smaller aerospace companies. However, the United States District Court for the Central District of California concluded on May 12, 2006 that Boeing and Lockheed Martin did not violate the Sherman Act or Clayton Act as SpaceX had not proven that they suffered an injury necessary to prove an antitrust violation. Their reasoning was that SpaceX was a competitor in the bidding process for government contracts and not a consumer. Thus, SpaceX had to prove that they suffered an injury from the contract. However, it was found that they would not have been able to provide an EELV in the timeframe the USAF required, so they suffered no injury when the USAF gave an exclusive contract to Boeing and Lockheed Martin. As a consumer, the US government did not have an obligation to choose multiple contractors in order to create competition. Instead, one company or group wins the contract and reaps the rewards.

B. *Blue Origin v. United States & Space Exploration Technologies Corp.* (2021)

In recent years, SpaceX has joined older aerospace companies such as Boeing and Lockheed Martin on the production of spacecraft, rockets, and many other products for the government. However, only a small number of companies are the main commercial contractors for NASA, creating an oligopoly. In 2021, Blue Origin filed a complaint against NASA in *Blue Origin v. United States & Space Exploration Technologies Corp. (SpaceX)* over its $2.9 billion contract to SpaceX to help it develop its Starship Human Landing System.[232] NASA previously selected SpaceX to develop its lunar lander in 2018 after dismissing Blue Origin's proposals as inadequate.[233] Blue Origin then claimed that NASA was unfair in its evaluation of the several proposals for a lunar lander, discriminating against Blue Origin's proposal. They alleged that NASA had violated contract law when it awarded the contract solely to SpaceX. In July 2021, the Government Accountability Office determined that NASA did not violate contract law as the evaluation process was reasonable, leading to the case's dismissal by the Court of Federal Claims on November 4th, 2021. Once again, the government's right to select a sole contractor was upheld in court. Companies had to prove that they suffered an injury from some form of foul play in order to have any standing in court.

The nature of government contracts is imperfect as competition is limited by the fact that usually only one company wins each contract, denying sources of revenue from other firms. Currently, the government has the most authority and flexibility when it comes to choosing contractors. There are many ways in which contract law could be improved in order to encourage competition.

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[232] Commercial Space Company Summaries (NASA, Last Accessed 2023).
[233] Jackie Wattles, Judge rules against Blue Origin in standoff with SpaceX, NASA (CNN Business, 2021).

IV. ANALYSIS

A. Issues with government contracts

The way contracts are awarded to companies in the aerospace industry inherently limits competition. Larger, more established companies maintain an advantage over startups in winning bids and government contracts, creating an oligopoly where the market is controlled by a few major players. Thus, newer companies such as SpaceX, Virgin Galactic, and Blue Origin are forced to operate on a deficit, burning investor capital while they develop their aerospace systems for the commercial market and the government procurement system. This isn't to say it is [18] impossible for new companies to enter the industry; SpaceX is now a major supplier of rockets that transport cargo and humans into space for the US government despite being founded recently in 2002.[234] It has done so by being awarded billions of dollars in government contracts, but that has not always been the case as the company lost contracts to the likes of Boeing and Lockheed Martin in its infancy as demonstrated in SpaceX v. Boeing. Now, the same problems persist as SpaceX has received billions from the government while other companies lag behind.

The current system of government contracts has been upheld in courts. After losing a bid, companies lose a major source of revenue for the product that they have developed. Especially if the good was designed specifically to meet the needs of the government. In the majority of cases, antitrust actions and complaints over the loss of a bid are thrown out of court as the government maintains the jurisdiction to choose contractors. There are ways in which the contract system could be [19] improved.[235]

B. Multiple winners for each contract

The choice of multiple contractors for the same contract could improve competition in the aerospace industry. Currently, Federal Acquisition Regulations (FAR) discourage the awarding of contracts to multiple contractors due to the cost and complexity associated with having multiple contractors. However, the benefits to the aerospace industry include a more [20] competitive market in which multiple companies can fulfill the government's needs allowing it to choose a cheaper bid.[236] This system has been successful, such as in NASA's Commercial Crew Program. In this project, NASA utilized multiple commercial companies to build rockets and spacecraft for the same purpose. Both Boeing and SpaceX were charged with producing rockets and the crew module for transporting astronauts and cargo to the International Space Station and back. SpaceX produced the Falcon 9 rocket and Crew Dragon spacecraft while

[234] Business Insider, The Financial Toll of a SpaceX Explosion is Staggering (Futurism, 2017).
[235] Steve Charles, Lost a Federal Contract Bid? How the Protest Process Works (CRN, 2014).
[236] Federal Acquisition Regulation (acquisition.gov, 2023).

Boeing produced the CST-100 Starliner and Atlas V rocket, which in itself is a joint venture with Lockheed Martin. The program has also been tremendously successful for NASA. The Commercial Crew Program has been the agency's 'lowest-cost human spacecraft effort in nearly 60 years.[237]

C. Contracting smaller companies

Another solution would be for NASA to develop its own rockets and outsource the production of individual parts to different companies. An advantage of this solution would be that smaller companies that are not capable of designing and manufacturing entire launch systems can secure smaller contracts that will let them reinvest in research and development. NASA has historically developed rockets and spacecraft when no commercial products can fit its requirements. A recent example would be the Space Launch System, which currently has the highest payload capacity of any rocket ever created. While developed by NASA, parts of it have been produced by companies such as Northrop Grumman, Boeing, and Lockheed.[238]

D. Ethical concerns of the commercial space industry

However, the existence of a commercial space industry in itself creates ethical qualms. Space itself is the final frontier for the expansion of human civilization. Certain valuable resources such as minerals and even water are found on asteroids, planets, and the moon, making space a target for commercial utilization in addition to expansion. Resources in space will only be accessible to government entities and aerospace companies in the foreseeable future, meaning most of Earth's population will not directly benefit from the exploitation of space's resources. Many of the well-established space companies such as SpaceX and Blue Origin are owned by billionaires, raising concerns over how inequitable the commercial space industry really is. As the future habitat of mankind, it seems inherently unethical for private entities to profit from space and extract its resources.[239] Currently, international laws do not say who owns resources and even space itself but do maintain that government entities are unable to make claims of territory or resources in space. On paper, individuals can keep whatever resources they manage to extract from space; effectively, only corporations will benefit as they are the only ones with the means to commercialize space in the near future.[240]

That is why ensuring fair competition in the aerospace industry is so important today. If the current oligopoly persists, the commercialization of space will profit a handful of companies and its benefits will only trickle down to humanity. High barriers to entry into the space industry make it difficult for new competitors to appear, which is why something must be done now to

[237] Commercial Crew Program (NASA, Last Accessed 2023).
[238] 3 Space Launch System (NASA, Last Accessed 2023).
[239] Chris Morris, 8 iconic billionaires who plan to conquer outer space (CNBC, 2016).
[240] Space Foundation Editorial Team, International Space Law (Space Foundation, Last Accessed 2023)

ensure future competition. A competitive space industry will undoubtedly benefit consumers even though the future of the space industry is speculative.[241]

V. CONCLUSION

The aerospace industry is a characteristic oligopoly due to high barriers to entry, a small number of established firms, and price-setting ability. Many startups are created but often fail to be successful as they rely on investor seed money and have few revenue streams early on. A critical source of income for these companies are government contracts, which are awarded to big firms which lead the industry in technology.[242] As a result, many antitrust actions and complaints are filed against the government's procurement from commercial aerospace companies.

However, courts generally maintain the government's authority as a sovereign entity in awarding bids and choosing government contractors. Cases such as SpaceX v. Boeing and Blue Origin v. SpaceX have put the burden of proof on plaintiffs to prove that the bidding process was flawed or unfair. On top of that, the government is treated as the consumer, so it has no obligation to choose multiple contractors and usually chooses the cheapest bid that meets its requirements. Such a system is detrimental to the health of the aerospace industry as it discourages competition.

Some solutions would be to award contracts to multiple contractors. Government agencies like NASA have done this effectively in the past, tasking Boeing and SpaceX to build rockets for the same purposes or contracting several companies to build different parts for a rocket NASA itself developed. While Federal Acquisition Regulations discourage the practice of selecting multiple contractors, it should instead be encouraged to give contracts to a multitude of companies, especially smaller startups to promote competition and lower future costs through a competitive industry.

Finally, the future of space exploration and expansion itself is unclear. Resources in space and space itself should be utilized for the betterment of mankind, making it potentially unethical for private companies to exploit space's resources. Unfortunately, space may only be accessible to private companies in the near future, especially if government contracting practices remain the same. That is why it is important for government acquisition processes to change so there can [27] be more competition in the aerospace industry.[243] A market with many competitors will benefit consumers in the future, even though it is still unclear what the economics of space will

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[241] Scott Benjamin, Exploration to Exploitation: An Industry Analysis of Suborbital Space Tourism (Mary Ann Liebert, 2018).

[242] Nicholas Gerbis, 10 Major Players in the Private Sector Space Race (howstuffworks, Last Accessed 2023).

[243] Matthew Weinzierl and Mehak Sarang, The Commercial Space Age is Here (Harvard Business Review, 2021)

eventually look like. In conclusion, the future of humanity is tied to space, which is why its proper regulation must be implemented for the benefit of mankind.