ARTICLE

AVOIDING ANOTHER STEP IN A SERIES OF UNFORTUNATE LEGAL EVENTS: A CONSIDERATION OF BLACK LIFE UNDER AMERICAN LAW FROM 1619 TO 1972 AND A CHALLENGE TO PREVAILING NOTIONS OF LEGALLY BASED REPARATIONS

Carlton Waterhouse

Abstract: The growing body of literature on reparations consists primarily of articles showing that black reparations are consistent with various legal theories, promote racial justice, or further broader societal goals like eliminating poverty and promoting education. This article takes the distinct position of challenging reparations supporters to justify their confidence in the legal system to deliver meaningful reparations for slavery and segregation in light of the historic use of law as a means of instantiating white racial supremacy and the prospective individualistic approach to race adopted by contemporary judges and legislators. The article also challenges those who oppose reparations based on its supposed unfairness to contemporary citizens to explain how their position differs from that of past generations who opposed reparations and related legal efforts to redress racial injustices as unfair at that time. To support the challenge to reparations commentators, the article examines the historical framework of blacks’ relationship to the law through legislation and court rulings from 1619–1963. The article closes by presenting an alternative approach to reparations focused on building and strengthening black political, economic, and educational institutions.
NOTES

FREE SPEECH TO HAVE SWEATSHOPS? HOW KASKY V. NIKE MIGHT PROVIDE A USEFUL TOOL TO IMPROVE SWEATSHOP CONDITIONS

Julia Fisher

[pages 267–310]

Abstract: In 1998, consumer activist Marc Kasky sued Nike, claiming that Nike’s statements in the media denying sweatshop conditions in its factories were false advertising. This case, culminating in a controversial California Supreme Court decision, has attracted much criticism on its implications of free speech. Little attention has been paid to how Nike v. Kasky might be a useful tool for anti-sweatshop advocates, who have up until now had great difficulty holding companies accountable for their sweatshop labor conditions. This Note examines the anti-sweatshop movement and its lack of effective private enforcement techniques. It then explores how the California Supreme Court in Kasky expanded the commercial speech doctrine. Lastly, it analyzes how Kasky might be used by anti-sweatshop advocates against corporations with sweatshop conditions. This Note concludes that Kasky is an imperfect tool but one that, when used in moderation, would not have a strong chilling effect on corporate speech.

COUNTRY CLUB DISCRIMINATION AFTER COMMONWEALTH V. PENDENNIS

Alison Lasseter

[pages 311–350]

Abstract: In American country clubs, there is a long tradition of discrimination against racial minorities and women. These clubs maintain that they are private and thus able to operate free from government sanction. In 2004, the Supreme Court of Kentucky ruled that the state’s Commission on Human Rights had the statutory authority to investigate private country clubs to determine if they discriminate in their membership practices. In Kentucky, if a club is found to discriminate, its members are disallowed certain tax deductions. While this is a step in the right direction to end discriminatory practices at country clubs, the Supreme Court of Kentucky still points out that private clubs have the right to discriminate without fear of legal liability. This Note evaluates other states’ reactions and statutes regarding discrimination at private
clubs and contends that such approaches are more effective in eradicating discrimination in these clubs than tax consequences.

BOOK REVIEWS

WHY HARMFUL TAX PRACTICES WILL CONTINUE AFTER DEVELOPING NATIONS PAY: A CRITIQUE OF THE OECD’S INITIATIVES AGAINST HARMFUL TAX COMPETITION

Richard A. Johnson

[pages 351–376]


Abstract: Offshore tax havens have recently become the target of international criticism and reform efforts due to their role in eroding foreign tax bases through competitive tax practices. William Brittain-Catlin’s book, Offshore: The Dark Side of the Global Economy, discusses how offshore tax laws have been exploited and explains measures taken by international groups, such as the Organisation for Economic Co-operation and Development (OECD), to counteract harmful tax competition. This Book Review critiques the efforts of the OECD to mitigate offshore tax havens’ contribution to harmful tax competition by expanding on two of Brittain-Catlin’s conclusions. In doing so, the Book Review will demonstrate that the OECD’s actions have not only caused severe economic harm to numerous developing nation economies, but they have failed to elicit sufficient support to successfully curb harmful tax competition.

ELIMINATING CHILD MARRIAGE IN INDIA: A BACKDOOR APPROACH TO ALLEVIATING HUMAN RIGHTS VIOLATIONS

Jacqueline Mercier

[pages 377–396]


Abstract: Despite its illegality, child marriage occurs throughout the Indian landscape. In her book, Child Marriage in India: Socio-legal and Human Rights Dimensions, Jaya Sagade examines the prevalence of child marriage
among India’s various cultures and its impact on the human rights of young women. Sagade asserts that, notwithstanding minimal legislative efforts, the Indian government has not met the obligations set forth in the international human rights conventions that the country has ratified. Sagade asserts that the Indian government must not only work diligently to change the nation’s views on child marriage, but must also legislate more cohesively to prohibit the practice. This Book Review takes Sagade’s human-rights-based proposals a step further and suggests that, in a country reluctant to release longstanding traditions, addressing the Indian tax system and dowry laws will provide a more practical, financial incentive for eliminating the practice of child marriage.

FEDERAL TRADE ADJUSTMENT ASSISTANCE FOR WORKERS: BROKEN EQUIPMENT

Jessica Schauer

[pages 397–414]


Abstract: In The World Is Flat, Thomas Friedman argues that the convergence of various events and technologies over the past few decades have created a greater interconnectedness among individuals across the globe. One of the hallmarks of this latest wave of globalization has been the outsourcing of American jobs to foreign countries such as India. Friedman suggests that, in light of this trend, a comprehensive plan is needed to help Americans prepare for competition in the global economy. This Book Review analyzes whether the Federal Trade Adjustment Assistance program (TAA), part of the Trade Act of 1974, is a viable means for providing job training and assistance to Americans who have lost jobs due to offshore outsourcing. It concludes that the TAA program is largely ineffective and suggests various modifications.

SWEATY SUBURBS: CAN STATES AND WORKER CENTERS WASH THEM CLEAN?

Kate S. Woodall

[pages 415–439]
SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS.

Abstract: In Suburban Sweatshops, Jennifer Gordon paints a bleak picture of the current state of undocumented workers’ rights in suburban America’s service industry. As immigration law is increasingly interpreted to limit the rights of undocumented workers, undocumented immigrants are having a harder time organizing to demand workplace rights. In the face of this increasing exploitation, however, Gordon finds hope in alternatives to the traditional union structure. She focuses on the efforts of the Workplace Project, a Long Island worker center, to advocate for immigrant workers through participation in the political process and geographic organization. This Book Review examines the legal framework in which suburban sweatshops thrive and explores the effectiveness of alternative organizing groups, such as the Workplace Project, in effecting change for undocumented workers. Through the political process and geographic organization, worker centers around the nation have met with limited success in combating the abuse of undocumented immigrant workers.
AVOIDING ANOTHER STEP IN A SERIES OF UNFORTUNATE LEGAL EVENTS: A CONSIDERATION OF BLACK LIFE UNDER AMERICAN LAW FROM 1619 TO 1972 AND A CHALLENGE TO PREVAILING NOTIONS OF LEGALLY BASED REPARATIONS

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Abstract: The growing body of literature on reparations consists primarily of articles showing that black reparations are consistent with various legal theories, promote racial justice, or further broader societal goals like eliminating poverty and promoting education. This article takes the distinct position of challenging reparations supporters to justify their confidence in the legal system to deliver meaningful reparations for slavery and segregation in light of the historic use of law as a means of instantiating white racial supremacy and the prospective individualistic approach to race adopted by contemporary judges and legislators. The article also challenges those who oppose reparations based on its supposed unfairness to contemporary citizens to explain how their position differs from that of past generations who opposed reparations and related legal efforts to redress racial injustices as unfair at that time. To support the challenge to reparations commentators, the article examines the historical framework of blacks’ relationship to the law through legislation and court rulings from 1619–1963. The article closes by presenting an alternative approach to reparations focused on building and strengthening black political, economic, and educational institutions.

* © 2006, Carlton Waterhouse, Assistant Professor of Law, Florida International University, College of Law; B.A. Penn State University; J.D. Howard University; M.T.S. Emory University; A.B.D. Emory University. I am unable to express my gratitude to all of those who provided guidance and support during the preparation of this Article, but I would especially like to thank Charles Pouncy, Ediberto Roman, Heather Hughes, and Andre Smith for their comments. Rosta Telfort, Ronald Parkman, and Lina Busby provided important research assistance, for which I am grateful. I also extend special thanks to Derrick Bell, for taking the time to share his insights into the project. Finally, I wish to thank Roy Brooks and Al Brophy for their deliberate examination of early drafts of the article.
If you stick a knife nine inches into my back and pull it out three inches, that is not progress. Even if you pull it all the way out, that is not progress. Progress is healing the wound, and America hasn’t even begun to pull out the knife.

—El Hajj Malik El Shabazz (Malcolm X 1964)

INTRODUCTION

In a series of children’s books and a recent feature film, Lemony Snicket chronicles the lives of the Baudelaire orphans—three orphaned children from a wealthy family imperiled by a conspiring unscrupulous adversary, a neglectful guardian, and an otherwise dangerous world. Following the demise of their parents, these children find themselves subject to the schemes of uncaring adults seeking to gain their sizable fortune. Instead of rescuing them, the intervention of a neglectful banker responsible for providing them with a safe environment merely carries them from one set of unfortunate events to another. To survive, the children draw on their own unique abilities to stay alive and escape the plots launched against them. The title for this article emanates from that story because it offers a helpful, albeit imperfect, metaphor for blacks’ experiences under law in America, from their arrival in 1619 to the close of the second reconstruction in 1972 and beyond.

Rather than a crowning achievement of American democracy, the civil rights legislation of the 1960s and 1970s represented one more step in a series of unfortunate legal events that ultimately reflected the dominant attitude of society’s white majority toward ending the Jim Crow practices of the south. Despite their role in removing the

1 See generally Lemony Snicket, A Series of Unfortunate Events (1999).
2 See id.
3 See id.
4 See id.
6 See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 5–6 (2004) (discussing the historic relationship between civil rights laws and broader society); Derrick A. Bell, Brown v. Board of Educa-
imprimatur of legal legitimacy from much overt discrimination against blacks and others, these laws were merely a continuation in a series of unfortunate legal events. The courts’ subsequent rejection of affirmative action as a remedy for historic racial bias, and the shifting legal standards applied in Equal Protection, Title VI, and Title VII civil rights cases, over the intervening thirty-three year period, reflect the most recent events in the unfortunate series. Like the Baudelaire orphans, blacks still have not found a guardian whom they can depend on to protect them from those who would betray their rights.

This article contends that America’s laws and legal system constitute a poor guardian for blacks against the “the tyranny of the majority” because, in historic and contemporary analysis, they respond to and facilitate majoritarian racial bias in the executive, judicial, and legislative contexts. Rather than a general claim regarding all contemporary legal matters, this article asserts that legal issues explicitly regarding race such as affirmative action, civil rights law, and reparations reflect a majoritarian racial bias. In light of the foregoing, schol-
ars and activists advocating legal based reparations for American slavery and its legacy display what this article asserts is an unwarranted degree of confidence in the American legal system.

Specifically, the article challenges those supporting legal based reparations to explain their reliance on the legal system to provide reparations despite the historic and contemporary legal subordination of blacks and other racial minorities when it corresponds with the perceived interest of the majority. The article also challenges those opposing reparations, however, based on its supposed unfairness to America’s current citizens, to explain how their position differs from that of past generations of legal scholars and politicians who opposed reparations and related legal efforts to redress racial injustices. Failure by commentators, on both sides, to address law’s historic role of protecting the interest of the racial majority by subordinating blacks’ just legal claims presages a tenuous posture for legal reparations—a posture this article argues may encourage the development of yet another chapter in a series of unfortunate legal events.\(^\text{11}\)

Recent federal court decisions regarding the victims of the Tulsa, Oklahoma race riots and a suit by the descendants of enslaved blacks for reparations illustrate this point.\(^\text{12}\) In 1921, white rioters ravaged Greenwood—Tulsa, Oklahoma’s African American neighborhood—indiscriminately killing and injuring the community’s residents in the process.\(^\text{13}\) In 2004, survivors of the riot and their descendants brought a

\(^{11}\) If we consider the fact that no United States Congress or federal court to date has been willing to provide reparations to black Americans for slavery, much less the general harms of Jim Crow segregation and related discrimination, despite recurring arguments and requests to do so, then confidence that legislation or judicial cases will provide an acceptable award or provision of reparations seems unwarranted. See When Sorry Isn’t Enough: The Controversy Over Apologies and Reparations for Human Injustice 309–14 (Roy L. Brooks ed., 1999). See generally SHOULD AMERICA PAY?: Slavery and the Raging Debate on Reparations (Raymond A. Winbush ed., 2003). This confidence can be distinguished from the confidence in the legal system displayed by Thurgood Marshall and others in their campaign to end Jim Crow segregation. Marshall and others predicated their assault on Jim Crow laws upon a northern precedent of integrated educational facilities and southern states’ failure to provide equal services, facilities, etc. that the Court’s argument in Plessy v. Ferguson required. See Klorman, supra note 6, at 290–320.


\(^{13}\) “The riot destroyed an estimated 1,256 homes along with churches, schools, businesses, even a hospital and library in the African-American community of Greenwood. Between 100 and 300 people were killed.” Alexander v. Oklahoma (Alexander I), No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, at *1 (D. Okla. Mar. 19, 2004). In Alexander II, the federal district court offered the following description of the riots in its opinion:
claim against the city and state for damages associated with the riot.\textsuperscript{14} In affirming the judgment of the United States District Court for the Northern District of Oklahoma granting a summary judgment motion for the defendants, Chief Circuit Judge Deanell Reece Tacha wrote, “[t]he Tulsa Race Riot represents a tragic chapter in our collective history. While we have found no legal avenue exists through which Plaintiffs can bring their claims, we take no great comfort in that conclusion.”\textsuperscript{15}

A recent decision of the United States District Court for the Northern District of Illinois provides another example of the way courts view reparations based suits. After considering the claims brought by the descendants of enslaved Africans against corporations who supported enslavement and its legacy, the Court rendered a decision granting defendant corporation’s motion to dismiss.\textsuperscript{16} In that case, plaintiffs’ claims against the corporations included conspiracy, conversion, and unjust enrichment for their role in the institution of slavery and its legacy in the Untied States.\textsuperscript{17} After considering the allegations, the court offered the following conclusion:

It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation’s history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States. Neither can any reasonable person, however, fail to appreciate the massive, comprehensive, and dedicated undertaking of the free to liberate the enslaved and preserve the Union. Millions fought in our Civil War. Approximately six hundred and twenty thousand died . . . . The impact of this struggle on the

Armed with machine guns, the white mob ravaged Greenwood, scattering machine gun fire indiscriminately at its African-American residents. During the night, the Governor called in the Oklahoma National Guard to restore order. The guardsmen, often acting in conjunction with the white mob, disarmed the African-American men who were defending their community and placed them in “protective custody.” Thus purged of any resistance, the white mob burned virtually every building in Greenwood. By 11:00 a.m. on the morning of June 1, 1921, when the Riot ended, forty-two square blocks of the Greenwood community lay in ashes.

\textsuperscript{382} F.3d at 1212.
\textsuperscript{14} Alexander I, 2004 U.S. Dist. LEXIS 5131, at *1.
\textsuperscript{15} Alexander II, 382 F.3d at 1220.
\textsuperscript{16} African-American Slave Descendants Litigation, 375 F. Supp 2d at 743–44.
\textsuperscript{17} Id. at 721.
families of the wounded and the dead was immeasurable and lasting. The victorious and the vanquished together shared the cup of suffering . . . . The impact of this struggle on the Union as a whole was also significant. The enslavers in the United States who resisted or failed to end human chattel slavery sustained great personal and economic loss during and following the four years of the War. Generations of Americans were burdened with paying the social, political, and financial costs of this horrific War.18

These two cases and the judges’ opinions reflect a view that each set of circumstances represented unfortunate events in American history, but not ones that the law could address. While the opinion in the Tulsa case seems much more sympathetic to the unique suffering of the Plaintiffs and their descendants, the result and effect of the decision offers no more to the victims of the Tulsa riot than that provided by the reparations case to the slave descendants. These opinions reflect the judicial attitude that black reparations advocates can almost certainly expect to encounter from the American judiciary when seeking redress for America’s past racial injustices.19

Neither the American judiciary nor its legislatures has provided blacks with a consistent level of protection against, or remediation of, racial injustice.20 In America, race law is never settled; it remains, instead, in constant flux dependant on the prevailing attitude of the majority.21 This article contends that basing reparations on such an unstable and undependable legal system will likely produce undesirable and unsatisfactory results.

The article is divided into five parts. Part I considers some insights from moral philosophy to better explicate the goal of reparations. In using this approach, the article seeks to extend the discus-

18 Id. at 780.
19 A legal regime fashioned by the United States Congress to provide reparations likewise offers little likelihood of an adequate reparations scheme but would be even more subject to the whims of the majority that over time have proved disappointing for black Americans. See infra Part I.
20 See infra Part II (examining laws relating to blacks in particular from 1619 to 1963); see also supra note 8 (considering the dynamic nature of the last forty years of civil rights laws).
21 See generally Ediberto Román, Citizenship and the Dialectic of Membership and Exclusion (Mar. 29, 2006) (unpublished manuscript, on file with author) for a broader discussion of the fluctuating status of racial minorities in the United States and its territories as well as a consideration of the racial component of domestic laws rooted in the war on terror.
sion beyond the confines of traditional legal argument to deepen the consideration of reparations’ proper goal. This part then concludes by introducing arguments contesting the American legal system’s ability to meet reparations’ proffered goal. Part II discusses the foundations of the “Reign of Terror.” Part III presents a survey of laws governing black life from 1619 to 1972. The survey examines federal, state, and colonial laws used to restrain blacks’ educational, political, and economic rights and opportunities from their initial arrival to the civil rights era. The part also includes a brief consideration of civil rights laws passed from 1963 to 1972 and their efficacy for repairing the harms caused to black communities and individuals by the previous legal regime. Part IV assesses the proficiency of American laws to provide racial justice to blacks in light of Derrick Bell’s theory of racial realism, Kimberle’ Crenshaw’s understanding of restrictive and expansive civil rights jurisprudence, and the political insights of Ralph Bunche. Drawing on the work of each of these figures, this part explores the future prospects of the American legal system to protect blacks from the excesses of America’s non-black majority. In light of the insights gained from the analysis in Part IV, Part V looks to the work of Gary Peller in examining the theoretical roots of America’s historical discourse about race-consciousness and its rejection as an approach to racial issues. Extending Peller’s analysis, the part explores why race-consciousness constitutes an essential ingredient in pursuing the goals of a black reparations program.22 Finally, the conclusion highlights some specific proposals for a black reparations program designed to remedy the educational, political, and economic harms visited upon black communities.

I. Reparations’ Goals and Law’s Insufficiency

Commentators tend to agree that the goal of black reparations is to repair something, despite considerable disagreement over what should be repaired and how.23 This section considers the law’s ability to make such repairs by briefly exploring the nature of the harms caused by slavery, the nature of the reparations needed to redress the harms, and the desirable goals of a reparations program. To guide the

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23 See infra notes 33, 34.
investigation, two concepts developed by moral philosopher Timothy Jackson relevant to reparations are explored, along with arguments made by abolitionists Benjamin Franklin and Wendell Phillips in antebellum America.

Jackson develops two concepts of moral philosophy that are relevant to black reparations: abomination and liberation. He considers abomination from an anthropological perspective, supported by three dimensions of moral analysis: aretology, deontology, and teleology. Using these three perspectives, Jackson gleans a fuller sense of abomination. He writes:

It is possible to interpret the “inhumanity” of abominations in terms of debilitating consequences . . . but when seen deontologically, being abominable is not the effect of improper actions but their cause, not an atavistic breakdown after immorality but a violation of the moral law. In fact, a deontological abomination is most distinctively a conscious rejection of the moral law itself and with it practical standards for human conduct. Finally, when seen aretologically the abominable is a mode of existence that is so intrinsically vicious as to undermine the normativity of any state of character. As extraordinary vice or brutality, the abominable subverts the very idea of personal integrity.

Further, he maintains that certain limits precede and constrain any choices that are sensitive to the demands intrinsic to living with other people. In Jackson’s view, “an abomination might be defined as what radically undercuts or transgresses those bounds (material and cultural) that have made and continue to make an ordered human existence possible.”

By these standards, the American system of chattel slavery was certainly an abomination. The system reduced enslaved Africans to a raw commodity without personhood. All notions of human dignity were denied to the Africans in their transport and in their indoctrina-

25 These dimensions of moral analysis, thought to originate in Greek philosophy, serve as fundamental axes underlying both contemporary and historic approaches to moral philosophy. Id. at 98. Aretology treats the character of moral actors; deontology focuses on the form of actions; and teleology addresses the consequences of actions. Id. at 98–99.
26 Id. at 99–100.
27 Id. at 94.
tion to their new lives. In defining slavery in America, abolitionist David Barrow wrote:

When I use the word ‘slave’ or ‘slaves’, I would be understood to mean such beings of the human race who are (without any crime committed by them, more than is common to all men) with their offspring to perpetual generations, considered legal property; compelled by superior force, unconditionally to obey the commands of their owners, to be bought and sold, to be given and received, to go and come, to marry or forbear, to be separated when married at pleasure, to eat, drink, sleep, wear, labor, and to be beaten at their owner’s discretion . . . .

The denial of human dignity, in fact, was one of the principle defining characteristics of the American system of slavery. Abolitionist author William Goodell explained how legal treatises of his day defined “ownership” of the enslaved. He wrote, “[i]t is plain that the dominion of the master is as unlimited as that which is tolerated by the laws of any civilized country in relation to brute animals—to quadrupeds, to use the words of the civil law.” Enslaved African women suffered special victimization caused by rape and forced sexual service as breeders of new property for the slave master. This system of slavery constituted a total effacement of human dignity.

Abomination’s polar opposite—liberation or freedom—represents the other side of Jackson’s model and the focus of my analysis. In his discussion, he elaborates on two distinct understandings of freedom. Liberum arbitrium, he notes, represents “freedom of choice” while libertas signifies a “more holistic notion of good disposition, candor, and personal integrity.” He elaborates:

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31 Id.

32 Dorothy Schneider & Carl Schneider, Slavery in America: From Colonial Times to the Civil War 87–89 (2000).

33 Jackson, supra note 24, at 106.

34 Id. at 105.
External, telic liberation is \emph{from} something rather than \emph{for} something. Such liberation is often a very great good, crucial for autonomous individuals as well as for democratic polities, but it clearly does not exhaust the meaning of the word and is not the most positive sense of liberty . . . . For if the end of oppression and the offer of aid [to those liberated] do not fundamentally empower . . . [them] to care for and about themselves . . . then it is at best incomplete and at worst paternalistic.\footnote{Id. at 106.}

In simple terms, \emph{liberum arbitrium} suggests negative freedom—freedom from some external limiting force. \emph{Libertas}, in contrast, connotes a positive freedom—freedom for human flourishing. In antebellum America, many opposing slavery embraced the liberation of enslaved blacks with the limited sense of \emph{liberum arbitrium}. While thoroughly committed to emancipation, supporters of the colonization of enslaved blacks, like President Abraham Lincoln and Robert G. Harper, nonetheless lacked a commitment to enabling the newly freed to promote their full humanity by improving their moral, intellectual, and political condition.\footnote{Dumond, supra note 29, at 130. Robert G. Harper was one of the founders of the American Colonization Society.}

General emancipation schemes, like specific acts of manumission that merely freed the enslaved with no support or aid, also represent \emph{liberum arbitrium} by virtue of their failure to recognize and attend to the harms caused by a lifetime of bondage, or to take the steps necessary to enable the newly freed persons to flourish. Jackson points out the inadequacy of negative liberty alone, noting the necessity of positive conceptions of human well-being related to the development of human potential.\footnote{Jackson, supra note 24, at 106.}

Only the writings of radical abolitionists envision emancipation consistent with \emph{libertas} and the positive promotion of human flourishing.\footnote{See Dumond, supra note 29, at 16–25 (examining the varying views of emancipation held in antebellum America).}

Although in the minority, Benjamin Franklin and Wendell Phillips offered two robust views of emancipation consistent with the notion of \emph{libertas}. Benjamin Franklin, a former slave master who manumitted those he enslaved and joined the ranks of abolitionists, made the following remarks in a 1790 public address on the abolition of slavery:  

\begin{quote}
35\footnote{Id. at 106.}  
36\footnote{Dumond, supra note 29, at 130. Robert G. Harper was one of the founders of the American Colonization Society.}  
37\footnote{Jackson, supra note 24, at 106.}  
38\footnote{See Dumond, supra note 29, at 16–25 (examining the varying views of emancipation held in antebellum America).}
To instruct, to advise, to qualify those who have been restored to freedom, for the exercise and enjoyment of civil liberty; to promote in them habits of industry; to furnish them with employments suited to their age, sex, talents, and other circumstances; and to procure their children an education calculated for their future situation in life,—these are the great outlines of our annexed plan, which we have adopted, and which we conceive will essentially promote the public good, and the happiness of these our hitherto too much neglected fellow citizens.  

Franklin’s remarks demonstrate a response to slavery that approaches the full liberation associated with *libertas*. His call for attention to the needs of the emancipated shows a motivation consistent with a fuller notion of liberation. Franklin’s words display his intention to enable blacks to fully exercise and enjoy civil liberty.  

He speaks directly to the educational, economic, and political development of the emancipated as a matter of obligation. Jackson posits that “the most robust sense of ‘liberation’ involves internal empowerment, a revolution in the self rather than in the circumstances, a fundamental heightening of the capacity for personal care.” Franklin’s remarks point to the personal development of the emancipated as a vital aspect of their liberation. He recognized that such development required nothing less than a personal investment from those promoting abolition.  

Unfortunately, by the 1870s many abolitionists lost sight of the robust liberation envisioned by Franklin and limited their agitation to the provision of negative freedoms (i.e., civil liberties) for blacks. In a speech at the Republican Convention, Fredrick Douglas com-
mented, “[y]ou turned us loose to the sky, to the storm, to the whirlwind, and, worst of all, you turned us loose to the wrath of our infuriated masters.”

45 In the agricultural based society of the South, land was essential to meet the physical needs of individual families and entire communities. The principal skills of newly emancipated blacks rested firmly in agriculture. 

46 The provision of land, originally endorsed by abolitionists, along with education and the right to vote, was the single aspect of the abolitionist plan that addressed blacks’ daily needs for survival. 

47 The failure to make land available consigned “freedpeople” to dependency on their former enslavers. 

48 This dependency stifled rather than fostered full liberation for blacks because it prevented them from providing basic care for themselves and others. The former enslavers routinely abused the relationships that developed with the freedman and other blacks by denying them the ability to buy land and by cheating them out of promised income. The Thirteenth, Fourteenth, and Fifteenth Amendments as well as the Civil Rights Acts of 1866 and 1875 came in the breach.

49 Unfortunately, these legal mechanisms offered blacks the hope of civil liberties without the means to enjoy them fully, as understood decades earlier by Benjamin Franklin in 1790.

50 By the 1870s some abolitionists endorsed the idea that blacks needed to lift themselves up by their own bootstraps rather than receive additional assistance. 

51 Wendell Phillips served as one of a few exceptions to the trend. He actively lobbied Congress to create a department to oversee land distribution, loans, and other services for the emancipated.

52 In response to the bootstrap argument, Phillips wrote:

This adult man, a husband and father, we have robbed him of wages for forty years. The ‘root, hog or die’ advice, to such a victim is the coolest [sic] impertinence . . . . Every Negro

46 See Booker T. Washington, Up From Slavery 127 (Penguin Putnam 1986) (1901) (discussing emancipated blacks’ skills and opportunities to make a living following the War).
48 Smith, supra note 45, at 147.
50 See supra text accompanying notes 39–43.
51 See McPherson, supra note 47, at 79.
52 Id. at 78.
family can justly claim forty acres of land, one year’s support, a furnished cottage, a mule and farm tools, and free schools for life.\textsuperscript{53}

Phillips’ comments offered a model of full liberation that robustly addressed the needs of those who suffered the abomination of slavery. Franklin and Phillips present understandings of liberation consistent with Jackson’s conception of \textit{libertas}. Their goal was to provide the emancipated with the educational, political, and economic resources necessary to enable them to exercise and enjoy their full humanity.

Unfortunately, American society not only rejected the vision of liberation offered by Franklin and Phillips, but returned to its practices of peonage, abuse, and the legal subordination of blacks.\textsuperscript{54} The nation adopted the legal subordination of blacks as the prevailing response to the former centuries of enslavement.\textsuperscript{55} This widely embraced system of legal subordination inflicted fresh injuries upon new generations of blacks for the next one hundred years, and placed the descendants of the enslaved and emancipated blacks in need of educational, political, and economic provisions that would enable them to fully exercise and enjoy their humanity.\textsuperscript{56}

As established by Boris Bittker in \textit{The Case for Black Reparations} and James Forman in \textit{The Black Manifesto}, blacks need and have sought reparations for the harms America inflicted upon them beyond the civil rights legislation passed from 1964 to 1972.\textsuperscript{57} \textit{The Black Manifesto} does not differentiate the acts warranting reparations, stating simply, “[f]or centuries we have been forced to live as colonized people inside the United States, victimized by the most vicious racist system in the world. We have helped to build the most industrial country in the world.”\textsuperscript{58} It makes clear, nonetheless, that the legal claim for repara-

\begin{footnotes}
\textsuperscript{53} Id. Elsewhere Phillips writes, “[l]and should have been divided among the negroes, forty acres to each family, and tools—poor pay for the unpaid toil of six generations on that very soil. Mere emancipation without any compensation to the victim was pitiful atonement for ages of wrong.” Wendell Phillips, \textit{Views of an Old Abolitionist}, 128 N. Am. Rev. 258, 260 (1879), \textit{available at} http://memory.loc.gov/cgi-bin/query/r?ammem/ncps:@ªeld(docid+@lit(abq7578-0128-27)).
\textsuperscript{54} See \textit{infra} Part III.A–B.
\textsuperscript{55} See \textit{infra} Part II.C.
\textsuperscript{56} \textit{A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.}, 77 (James Washington ed., 1990).
\textsuperscript{58} Forman, \textit{supra} note 57, at 167.
\end{footnotes}
tions began centuries earlier and continues to the present. The National Black Political Convention likewise made a demand for reparations in 1972, rooted in “historic enslavement” and the “racist discrimination” inflicted upon blacks following the Civil War.59 Bittker, in contrast, makes the case that the long years of segregation and subordination from the civil war to the civil rights movement alone warrants reparations for blacks.60 In each example, the case is nonetheless clear that one hundred years after emancipation, blacks still sought the full liberation envisioned by Franklin and Phillips.

Today, despite the thirty year passage of time since the civil rights movement, the warrant and the need for reparations continue.61 This article contends that the goal of reparations today correlates with the vision articulated by abolitionists like Franklin and Phillips. Reparations also correlate to Jackson’s concept of libertas: providing blacks with the educational, political, and economic resources necessary to enable them to fully exercise and enjoy their civil liberties.

The issue of reparations for slavery in America continues to garner increasing attention in both academic and popular literature.62 In the legal scholarship, a growing number of scholars and articles have contributed to the discourse around the issue by exploring the justice claims and the legal basis for reparations as well as the societal and psychological basis for reparations.63 Despite significant contributions

59 Bittker, *supra* note 57, at 79. The convention sought reparations in unspecified land, capital, and cash while the Manifesto sought specific endowments for the development of educational, economic, and financial institutions.

60 *Id.* at 12–26.


62 Since 1998, more than thirty articles have been published on the subject, and four symposia have been held at the following schools: Boston University, Harvard University, Boston College, and New York University. See, e.g., Symposium, *Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?*, 24 B.C. THIRD WORLD L.J. 1 (2004); Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004); see also infra notes 59, 60, 85.

from a wide range of scholars over the last twenty years, this article addresses a remaining deficiency in the literature and the discourse more broadly regarding the American legal system’s ability to provide meaningful reparations to blacks for the harms of slavery and segregation.64 In consideration of the issue, however, this article serves as one part of a larger normative project investigating reparations for slavery, segregation, and legal subordination.65

Despite the legitimate justification and the genuine need, the American legal system seems unable to accommodate the demand for reparations. The law’s weakness in this regard results from two distinct causes. The first cause is fundamental and its full exploration rests beyond the scope of this article. It derives from the necessity that blacks must control and direct the reparative process that is required to redress the diverse harms outstanding from centuries of maltreatment.66 This perspective contends that blacks play the primary role in orchestrating the repair of their communities and families rather than judges or legislators.67 While this approach does not exclude legislative or judicial action as a vehicle to achieve some reparative ends, it does break with the notion that by presenting the “right case” blacks can “win” reparations or legislators can award reparations. Thus, this proposal differs with reparations models that place blacks in a passive role with reparations as something that the American judiciary or leg-

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65 As a legal scholar trained as a social ethicist, it appears to me that many of the articles on this subject are arguments based in an implicit normative social theory addressing three hallmark axes of ethics: deontology, arctology, and consequentialism. While this article does not address the significance of the normative theory and claims underlying the existing literature, the analysis of the issue flows from an intentional application of normative social theory to the question. See generally Waterhouse, supra note 22.

66 See infra text accompanying notes 364–65.

67 See infra text accompanying notes 364–65.
islature will provide.\textsuperscript{68} Efforts to redress past harms can actually be counter-productive, cruel, or insulting\textsuperscript{69} when they are not accompanied by actions that attend to both the needs and agency of the injured group.\textsuperscript{70}

Blacks will have to play a primary role in the creation, development, and implementation of a system that cements the sustained availability and use of economic, political, and cultural resources necessary to fully exercise and enjoy their civil liberties.\textsuperscript{71} Entrusting responsibility for the creation of such a program to judges or legislators for legal instantiation seems unwise. Numerous examples of failed, inadequate, and demeaning redress and reparations programs inform this position. The U.S. treatment of Native American reparations claims under the Indian Claims Commission Act, Japan’s handling of reparations for Korean comfort women during War World II, and German reparations for the gypsy victims of the Nazi regime all provide examples of how government-based reparations programs often frustrate, rather than fulfill, efforts to redress the wounds of past injustice.\textsuperscript{72}

Blacks’ experiences with law over 344 years of American history also demonstrate that the American legal system lacks the capacity to provide reparations.\textsuperscript{73} Rather than a means of securing or providing

\textsuperscript{68} The popular model for reparations often places past victims in the single role as claimant. To achieve the goal of reparations articulated above, however, blacks today will have to construct a reparative model that addresses the individual and communal harms inflicted. Simple claim based systems lack that capacity. Like an injured person recovering from trauma, blacks must play an active role in their own recovery. The passive receipt of money without a plan for regaining lost or impeded abilities would fall short of true reparation.

\textsuperscript{69} Redress or reparations provided to the several tribes of North America have often been inadequate and even offensive. See Nell Jessup Newton, \textit{Compensation, Reparations, and Restitution: Indian Property Claims in the United States}, 28 Ga. L. Rev. 453, 454 (1994) (assessing past redress for Native Americans).

\textsuperscript{70} Agency, here, refers to the active role or instrumentality of the group or its members in the reparative process. In contrast with the legal notion of agency that focuses on actions undertaken on another’s behalf, agency in this sense necessarily includes actions carried out on one’s own behalf.

\textsuperscript{71} Despite the advancements experienced by blacks from the 1940s to the 1970s and to a lesser extent from the 1970s to the present, blacks individually and collectively experience the cost of past discrimination in their political, educational, and economic resources. See Feagin, \textit{supra} note 61, at 24–27, 186–90. That cost ranges from the vast disparities in wealth between blacks and whites at comparable income levels to the dearth of blacks with doctoral degrees and the absence of blacks in statewide elected offices. See \textit{id}. Black overrepresentation in unemployment, high school drop-out rates, infant mortality, incarceration, and poverty likewise reflect America’s discriminatory past. See \textit{id}.

\textsuperscript{72} See \textit{When Sorry Isn’t Enough}, \textit{supra} note 11, at 8–11 (examining national and international reparations and their limitations).

\textsuperscript{73} See \textit{infra} Part III.
justice, the American legal system served as a primary element in the enslavement, segregation, and forced subordination of blacks through most of American history.\textsuperscript{74} This historic phenomenon did not derive from jurisprudential necessity, but resulted instead from the racialized nature of the legal system as means of securing majoritarian preferences. Derrick Bell’s theory of racial realism, the political insights of Ralph Bunche, and blacks’ experiences under law from 1619 to 1972 guide this analysis and support this position.\textsuperscript{75}

Today, the legal system continues to reflect the preferences of the society’s white majority.\textsuperscript{76} Both judges and legislators act with full awareness that the successful implementation of their decisions and enactments require the majority’s support.\textsuperscript{77} Notwithstanding Brown v. Board of Education’s success as the death knell of de jure segregation, the Supreme Court’s early and continued failure to achieve integrated education flowed directly from the white majority’s refusal to support the decision.\textsuperscript{78} Accordingly, any legally-based program for reparations will require the support of America’s white majority; however, no such support is likely to be forthcoming for a reparative program that meets the goals articulated above.\textsuperscript{79} The idea of benefiting blacks in a way that offers no apparent benefit to whites has never enjoyed popular support in America.\textsuperscript{80} The Reconstruction Congress came closest to this goal in drafting legislation for creating the Freedman’s Bureau as an agency to assist emancipated blacks.\textsuperscript{81} The Congress ultimately rejected that legislation, however, on the basis that it improperly favored blacks and adopted legislation that attended to the needs of

\textsuperscript{74} See infra Part III.


\textsuperscript{76} This underscores the implicit danger democracy poses to minority groups. For a discussion of the relationship between minority rights and the perceived interest of the white majority, see Bell, supra note 6, at 530.

\textsuperscript{77} See Klarmann, supra note 6, at 5–7 (discussing judicial decisions’ relationship to broader societal views); see also Black Protest Thought, supra note 75, at 196–202. Legislators are of course charged with representing their constituents and ignore such views at their own political peril.


\textsuperscript{80} See id.

\textsuperscript{81} See Rubio, supra note 49, at 46–49.
As polling on the question of reparations shows, whites today are still not interested in providing benefits exclusively to blacks because of the perceived unfair racial advantage it provides. Accordingly, reparations advocates who share the reparations goal adopted by this article need to explain their confidence that the American judiciary or the United States Congress can construct a viable reparations program.

Rather than warning against the likely shortcomings of a legally based reparations program, most of the existing scholarship argues the merits of reparations as a matter of law or social philosophy. Scholarship supporting reparations for blacks in America turns on three main


83 See Sedler, supra note 79, at 120–24. On the question of reparations, polls indicate that eighty percent of whites oppose reparations of any sort while blacks support the government payment of reparations at around the sixty-seven percent level. Courtland Milloy, Cash Alone Can Never Right Slavery’s Wrongs, Wash. Post, Aug. 18, 2002, at C01. Consider also society’s rejection of affirmative action as a remedial program for generalizable past discrimination on the basis that it provides an unfair advantage to blacks and others. Rubin, supra note 49, at 164–65.

84 Commentators pursuing reparations as a means to attain racial reconciliation or improved social welfare programs may still hold confidence in the law’s ability to achieve such ends. This article contends, however, that neither of these meets a fundamental requirement that reparations repair some substantive harm inflicted upon blacks. Reparation has two primary meanings in its derivation from late Middle English and its common origin with repair from the Latin reparare. SHORTER OXFORD ENGLISH DICTIONARY 2533 (5th ed. 2002). The first meaning is restoration or renewal, and the second is making amends or providing compensation for a wrong committed. Id. The concept represented by the second set of meanings—to make amends—of both repair and reparations exemplifies the dominant and popular notion of reparations in discourse and the literature. It also rests at the heart of the ambiguity of the proper goal of reparations. This article maintains that goals of reparations rooted in broader social policy objectives, rather than remediation, run the risk of using the past suffering of blacks as a means to an end. These approaches advance laudable goals for American society, but these are not reparations for slavery and segregation as much as broader social policy objectives rooted in a normative social theory of substantive equality. Clearly, most of these goals would be viable for American society even if the trans-Atlantic slave trade or Jim Crow segregation had never occurred.

85 Even though the position adopted in this article questions the level of confidence that many commentators have in the legal system to provide and sustain meaningful reparations, it endorses the substantial development of arguments by commentators establishing the legal and moral warrants for reparations. Those bringing reparations claims and promoting reparations legislation have, likewise, made a vital contribution to this important subject. See generally Troy Duster, Repairing the National Memory by Acknowledging the Living Presence of ‘Our Childhood Locked in the Closet’, 6 Afr.-Am. L. & Pol’y Rep. 43 (2004) (examining attendant benefits of bringing reparations claims); Emma Coleman Jordan, The Non-Monetary Value of Reparations Rhetoric, 6 Afr.-Am. L. & Pol’y Rep. 21 (2004).
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axes: perspective, methodology, and goals. Perspective describes the approach endorsed as either prospective or retrospective. Methodology represents the means preferred as either adjudicatory or legislative/political. Goals articulate the principal end sought as social conciliation, victim remediation, or societal transformation. Most of the legal literature on black reparations classifies as prospective, adjudicatory, and remedial/transformative. These articles seek to show that black reparations are consistent with various causes of action or legal theories, would promote racial justice, and/or further broader societal goals such as eliminating poverty, decreasing unfair incarceration, and promoting education. Another segment of the literature can be classified as prospective, legislative, and conciliatory. These writings conceptualize reparations as a meaningful step toward healing deep racial wounds caused by slavery and its legacy. The bulk of the remaining literature is an assortment of reflections based on comparative and international


87 See Brophy, supra note 63, at 530–31 (advocating a more deliberate consideration of goals and highlighting the conceptual and legal problems with reparations). Brophy draws attention to the insufficiency of the general conception of reparations while advocating for a less race specific reparative remedy. See id. at 509.

88 See infra note 89.


law, political philosophy, and traditional civil rights scholarship. In order to assess the legal system’s capability to provide reparations for blacks, assumed within most of the foregoing literature, this article now turns to a brief review of black life under law from 1619–1972.

II. The Foundations of the Reign of Terror

From the early seventeenth century to the mid-twentieth century, American law served as a frequent adversary and only an occasional ally of African Americans. Across the American landscape during this time period, racially biased laws instantiated white supremacy and black subordination.

The racialization of slavery as a perpetual legal status for blacks and their descendants in the early colonial period represents a major milestone in the legal subordination of black people. Examination of the early development of Virginia law shows that the twenty “negers” that arrived in Virginia in 1619 experienced a form of servitude similar to that of their white and Indian counterparts. By the mid-1600s, however, the law began to recognize a new category of laborer: blacks in perpetual servitude. Early deeds conveyed black women and their issue to whites for their “lifetime and their successors forever.” These conveyances, along with a 1640 legal decision mandating a punishment of three additional years of service for two white runaway servants, but a lifetime of service for their black accomplice, marked the beginning of a new status for blacks.

The introduction of this new status for these and other blacks in the Virginia colony represents a legal milestone in what this article identifies as the “Reign of Terror.” Formerly, white and black servants, with or without indenture, were protected by law from various forms

92 See infra Part III.A–B.
93 See infra Part III.A–B.
94 See Higginbotham, supra note 5, at 26–28.
96 See Higginbotham, supra note 5, at 26–28.
97 Id. at 26.
98 Id.
of abuse, including mistreatment during their term of service, a denial of payments upon their discharge, and felonious harm. The legislature removed these legal protections from blacks in Virginia, however, by enacting a statute acquitting slave masters for criminal charges for killing enslaved blacks while inflicting punishment. Virginia’s later legislation in 1680 became the model for black subordination throughout the nation. It forbade enslaved and “free” blacks from bearing arms of any type, required a certification from masters for enslaved blacks to leave their masters’ plantations, prohibited enslaved and “free” blacks from defending themselves against whites, and sanctioned the killing of runaway blacks who resisted apprehension. In 1691, the Virginia legislature further illustrated the significance of the new status of blacks through legislation that seriously discouraged some and prevented other slave masters from the manumission or release of enslaved blacks. The act established that “no Negroes or mulattoes be set free by any person whatsoever, unless such person pay for the transportation of such Negro out of the country within six months . . . .” The statute imposed a ten pound penalty upon offending slave masters for violating its provisions. Blacks freed in violation of the statute were to be seized and re-enslaved. Within two decades, the Virginia legislature had foreclosed manumission for almost all enslaved blacks in the colony. Under the new statute, the governor and the legislature reserved the few manumissions offered as a reward for blacks performing some “public service.”

From the passage of the aforementioned legislation of 1680 on, pernicious laws covered almost all aspects of life for both the enslaved


102 Id.


104 Id.

105 Id.

106 Id.

107 Id.

and the free black throughout America.\textsuperscript{109} South Carolina, the first colony with a black population exceeding that of whites, surpassed the harshness of Virginia laws with a statute passed in 1712.\textsuperscript{110} Of particular note were the penalties imposed for slaves who ran away or were in some way involved with supporting or encouraging escape attempts by others.\textsuperscript{111} To ensure that masters inflicted the prescribed penalties, the statute subjected them to both fines and forfeiture of their slaves if they failed to carry out the prescribed punishment.\textsuperscript{112}

“Free” blacks also suffered increasing erosion of their liberties as the rice economy grew in states such as South Carolina and the restrictions on enslaved blacks multiplied.\textsuperscript{113} A statute in 1740 highlighted the precarious status of “free” blacks by removing cases involving them from the regular courts to the slave court system under which the unworn testimony of enslaved blacks and Indians could be offered against them.\textsuperscript{114} Moreover, the statute subjected “free” blacks to a fine for “harboring slaves” and to the severe punishment of being sold at public auction upon non-payment of the fine.\textsuperscript{115}

The legal proscriptions, limitations, and restrictions established during this period reflected the social boundaries of black life that blacks, as well as whites, were bound to recognize. Black subordination was not merely a reflection of white personal preference, but rather a socially mandated reality that ordered the punishment of whites and blacks who disregarded its dictates.\textsuperscript{116} Although many northern states

\textsuperscript{109} The law of slavery addressed all aspects of the enslaved’s life—health, freedom, marriage, children, market value, and punishment. See generally Higginbotham, supra note 5. Although “free” blacks enjoyed more freedom than their enslaved counterparts, laws were likewise established regarding them in order to concretize the social order of white supremacy and black subordination. Id. at 203–09.

\textsuperscript{110} Id. at 169–87.

\textsuperscript{111} See id. at 176–77. Under the statute, persons encouraging escape were whipped and branded. See id. Those leaving the plantation without the intent to escape bondage were subject to forty lashes, branding on the right cheek, removal of an ear, castration and other punishment depending upon the number of previous offenses. See id. at 176–78. Blacks who ran away to escape slavery but were captured were punished by death, as were those who merely attempted to run away with the intent of gaining their freedom. See id. at 176–77.

\textsuperscript{112} See id. at 177.

\textsuperscript{113} See id.

\textsuperscript{114} See id.

\textsuperscript{115} See Higginbotham, supra note 5, at 205.

\textsuperscript{116} This is evident in colonial South Carolina’s restriction on manumission and the established penalties for anyone who afforded enslaved blacks humane treatment. The Statutes at Large of South Carolina, 1836–1841, at 177 (Thomas Cooper & David J. McCord eds.), cited in Higginbotham, supra note 5, at 169–87. The South Carolina law typifies the racial laws of the period by providing for the punishment of whites as well as
passed anti-slavery legislation during other times, most of the states also maintained race-specific restrictions on their “free” black populations until one of the two periods cited above.\textsuperscript{117}

\section*{III. American Legal History and Racial Subordination: Black Life from 1619-1972}\textsuperscript{118}

This section reviews the harmful constraints that racially biased laws placed on blacks from 1619 to 1963 during the “Reign of Terror.”\textsuperscript{119} The survey is separated into an examination of laws governing enslaved and “free” blacks across the three centuries. Rather than providing a litany of the wide ranging laws directed to the black population, it concentrates on laws governing three aspects of black life: education and political rights, and economic freedoms. The foregoing areas provide insight into three fundamental aspects of African Americans’ ability to participate individually and collectively in American society.

The review then addresses the legislation and legal decisions extending formerly denied civil liberties to blacks. This period is designated as the “Reign of Rights.” The purpose in organizing the review in this way is to highlight the divergent and paradoxical uses of law regarding African Americans. Law originally mandated the mistreatment of enslaved and “free” blacks, until its recent use to proscribe the very treatment formerly required.\textsuperscript{120} This article likens the laws designed to

\textsuperscript{117} Goodell, supra note 30, at 356–57.

\textsuperscript{118} The following survey narrowly focuses upon restrictive laws placed on enslaved and “free” blacks. Laws governing the treatment of other racial groups were also prevalent during this time and were frequently in the same statutes. This survey, however, limits its consideration to the law’s impact upon blacks.

\textsuperscript{119} Here, the term “Reign of Terror” describes the legally prescribed educational, political, and economic subordination of blacks. Scholars have traced the origins of the term “Reign of Terror” to the French Revolution’s bloodiest phase (1793–94), in which “terrorism” was defined as “state-sponsored violence by the party in control of the government” and then used to consolidate power through intimidation. James Pfander, Charles Was First, Legal Affairs, May-June 2004, at 20, 20. The laws during the “Reign of Terror” referred to in this article functioned to maintain the subordinate status of blacks by authorizing police and private citizens to designate blacks who violated these laws as lawbreakers.

\textsuperscript{120} These distinctions represent the predominant uses of law during the periods examined. As the survey below illustrates, in some cases jurisdictions awarded black Americans rights only to curtail, eviscerate, or eliminate them at some point in the future. See infra note 202 and accompanying text. The “Reign of Rights,” therefore, represents the most stable provision of rights afforded blacks in the past four hundred years, despite the sub-
subordinate blacks during the “Reign of Terror” to the knife thrust nine inches into a person’s back in Malcolm X’s metaphor. The civil rights laws developed during the “Reign of Rights,” represent the removal of the knife from the back of African American communities. Paradoxically, removing the knife completely from a stabbed person’s back can further the injury, unless the wound it created is treated. To wit, without treatment the person may bleed to death. Accordingly, this article contends that the civil rights laws during the “Reign of Rights” have been implemented in a way that obscures the necessity of repairing the harms inflicted during the “Reign of Terror.” Thus the “Reign of Rights” has caused its own harm—much like removing a knife without attending to the wound. Reparations, therefore, represent the intentional treatment of the wound caused by the “Reign of Terror.”

A. Laws Governing Enslaved Blacks

1. Education

Generally, laws prohibited enslaved Africans from being educated. Although the laws governing slavery varied from place to place, certain general prohibitions held across the states and colonies; education was one activity that was consistently prohibited. Kentucky and Maryland were the only two states that allowed slavery without prohibitions against the education of enslaved blacks. The remaining states generally prohibited anyone from teaching enslaved blacks to read or write. Punishment for violating these laws ranged from as many as twenty lashes to a five hundred dollar fine or an entire year in jail.

2. Political Rights

Although the American colonies exercised considerable political autonomy, the right to participate in self-governance was never extended to enslaved blacks. Charters in Maryland, Pennsylvania, North Carolina, South Carolina, and New Jersey all specified the enactment

sequent evisceration of a number of those legal rights by the United States Supreme Court from 1978 to the present. See infra Part III.C.

121 Goodell, supra note 30, at 319–25.
122 Id.
123 Id. at 323–24.
124 Id. at 319–25.
125 Id. at 319, 321.
of legislation only with “consent of the freemen.”126 In the original colonies and the states later joining the union, the law uniformly excluded enslaved Africans from participation in governance.127 This exclusion barred their involvement in choosing representation, holding office, and voting on political decisions.128 Furthermore, discussing abolition or other matters tending to produce discontent with the enslaved was a high crime in some states resulting in imprisonment or possibly death.129

3. Economic Freedoms

Enslaved Africans had no legal rights to property–real or otherwise.130 As property themselves, in most places whatever goods the enslaved claimed as their own could be taken to the justice of the peace by any white person, who was then entitled to half of its value with the remainder going to the court or the state.131 Laws also regularly denied the enslaved both ownership of livestock and land that they could harvest for sale, although Louisiana allowed slaves to cultivate land for their own food.132 Louisiana followed Roman law (peculium), which allowed slaves to keep a portion the “property” allotted to them by their masters.133 Besides that limited portion, Louisiana law conformed to other states’ laws establishing that the master owned all the possessions of enslaved blacks.134 State laws also prohibited the enslaved from obtaining real or personal property by means of a gift or through the provisions of a will.135 Furthermore, the enslaved were also restricted from transferring property through either of these means.136

126 See Higginbotham, supra note 5, at 114 (examining rights enjoyed in these early colonies). Colonists in Massachusetts established the Mayflower compact and only two colonies did not include self-governance provisions in their formation: New York and Georgia. Id. at 114, 218–20.
127 Id. at 218–20.
128 Id. In the original colonies, disenfranchisement was not limited to enslaved blacks—Indians, women, and anyone without property was also disenfranchised. See generally Higginbotham, supra note 5. The enslaved uniquely counted as 3/5 of a person for purposes of representation, however, under the Constitution. U.S. Const. art. I, § 2, cl. 3.
129 See Goodell, supra note 30, at 322–23.
130 See id. at 89.
131 Id. at 90–92.
132 Id. at 135.
133 Id. at 90–92.
134 Id. at 90.
135 Goodell, supra note 30, at 90–92.
136 Id. at 90.
With few exceptions, the enslaved had limited means to improve their material condition despite industry and thrift.\(^{137}\) In Georgia, the 1750 slave law prohibited slave masters from allowing the enslaved to be apprenticed to a craftsman or from being lent out to perform any work other than crop cultivation.\(^{138}\) The enslaved could not enter into contracts except on behalf of a master and, as a rule, others could not hire them out for their own benefit.\(^{139}\) Masters allowing enslaved blacks to hire themselves out, as well those who hired them, were subject to substantial fines.\(^{140}\) The law also denied the enslaved the ability to purchase anything for themselves or sell anything for their own benefit.\(^{141}\) As with hiring enslaved blacks, “trucking or trading” with the enslaved for their own benefit was an offense punishable by fine.\(^{142}\) Accordingly, by proscribing the enslaved from lawfully obtaining property or exercising ownership rights such as transferring property to their children or loved ones, the law barred the enslaved from creating or gaining wealth individually or collectively regardless of their frugality or industry.\(^{143}\)

**B. Pre-Civil War and Post-Civil War Laws Governing Free Blacks**

Heavy legal constraints existed upon “free” blacks\(^{144}\) in America from the seventeenth to the twentieth century.\(^{145}\) All of the original colonies and the states passed extensive legislation concerning and limiting the “free” blacks both before and after the Civil War.\(^{146}\) Through

\(^{137}\) See id. at 97–99.

\(^{138}\) Higginbotham, supra note 5, at 251.

\(^{139}\) Goodell, supra note 30, at 97–99.

\(^{140}\) Id. at 98–99.

\(^{141}\) Id. at 89.

\(^{142}\) Id. at 97–100.

\(^{143}\) Despite the legal prohibitions against gaining personal property, enslaved blacks with willing slave masters could occasionally use cunning and thrift to buy freedom for themselves and others. Ira Berlin, *Many Thousands Gone: The First Two Centuries of Slavery in North America* 275 (1998).

\(^{144}\) In 1790, there were an estimated 59,557 “free” blacks—relative to 697,624 enslaved blacks and a total of 757,181 blacks across the newly formed nation. Bureau of the U.S. Census, U.S. Dept. of Commerce, *Negro Population in the United States, 1790-1915*, at C3.2:N31 (1968). The number of “free” blacks had increased to 108,435 by 1800, as the number of enslaved blacks had grown to 893,602. Id.

\(^{145}\) Before undertaking this study, the author thought that “free” blacks enjoyed greater equality under the law before the Jim Crow era.

\(^{146}\) See Higginbotham, supra note 5, at 100–38 (discussing the life of “free” blacks during the colonial period). See generally John Hurd, *The Law of Freedom and Bondage in the United States* 1 (Negro Univ. Press 1968) (1862) for consideration of legislation governing enslaved and “free” black in the colonial and later periods.
law, states and colonies designated “free” blacks as a subordinate class without the fundamental rights and privileges afforded whites.\textsuperscript{147}

Of the multiplicity of race-based constraints before the Civil War, two rested at the foundation of the “free” blacks relationship to the law: the inability to testify against a white person in a court of law and the threat of enslavement or re-enslavement.\textsuperscript{148} The restriction against testifying against whites barred “free” blacks from basic legal protections—they were without legal recourse to protect their property, their liberty, or their families without a white benefactor who would testify on their behalf.\textsuperscript{149} Thus, “free” blacks without white employers or respected white friends lived at great peril, and with little recourse to the law for protection.

The constant threat of enslavement served to dissuade “free” blacks from entertaining notions of legal equality.\textsuperscript{150} Under federal, state, and colonial law, “free” blacks were subject to enslavement for the first time or re-enslavement based on a wide variety of circumstances.\textsuperscript{151} This penalty was common in the laws governing residency and travel.\textsuperscript{152} Slaveholding states regularly required freed blacks to leave the state or else be sold back into slavery, or prohibited the immigration of “free” blacks into the jurisdiction.\textsuperscript{153} Other states forbade travel by “free” blacks out of the state and mandated their sale into slavery should they return.\textsuperscript{154} Georgia, Maryland and other states prohibited “free” blacks from coming to the state upon penalty of being sold into slavery.\textsuperscript{155} Some states forbade free black sailors from disembarking in their states, or “quarantined” ships that employed black sailors.\textsuperscript{156} Moreover, “free” blacks were regularly subject to the designs of enslavers and slave catchers seeking to place them in, or return them to, a state of perpetual bondage.\textsuperscript{157} In the Northwest Territory, “free” blacks were required

\textsuperscript{147} The extensive restraints governed almost all aspects of life. See Goodell, \textit{supra} note 30, at 355–57.
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 357.
\textsuperscript{150} See \textit{id.} at 355–56.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 355, 360–61.
\textsuperscript{153} Goodell, \textit{supra} note 30, at 355–56.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 363.
\textsuperscript{157} See \textit{id.} at 355.
to bring a sizeable financial bond, a certificate of freedom, and other written documents to take residence there.\textsuperscript{158}

Following the Civil War, the status of the “freedmen” approximated in many respects the tenuous subordinate position held by “free” blacks in antebellum America.\textsuperscript{159} As a general matter, southern whites still regarded the masses of blacks as inherent inferiors subordinate to them and their interests.\textsuperscript{160} In reporting to President Andrew Johnson, after a tour of the South in 1865, former Union General Carl Schurz wrote:

Wherever I go—the street, the shop, the house, the hotel, or the steamboat—I hear the people talk in such a way as to indicate that they are yet unable to conceive of the Negro as possessing any rights at all. Men who are honorable in their dealings with their white neighborhoods, will cheat a Negro without feeling a single twinge of their honor. To kill a Negro, they do not deem murder; to debase a Negro woman, they do not think fornication; to take the property away from a Negro, they do not consider robbery.\textsuperscript{161}

As evidenced in the Supreme Court’s decision striking down the Civil Rights Act of 1875, the idea that blacks continued to lack the legal rights and privileges enjoyed by whites in post-Civil War America


\textsuperscript{159} DuBois, supra note 44, at 139. Elaborating on this situation DuBois writes, “[t]he Negro’s access to the land was hindered and limited; his right to work was curtailed; his right of self-defense was taken away, when his right to bear arms was stopped; and his employment was reduced to contract labor with penal servitude as a punishment for leaving his job.” Id. at 167. The following quote from a committee of the Florida legislature in 1865 helps illustrate the point:

But it will hardly be seriously challenged that the simple act of emancipation of itself worked any change in the social, legal or political status of such of the African race as were already free. Nor will it be insisted, we presume, that the emancipated slave technically denominated a “freedman” occupied any higher position in the scale of rights and privileges than did the “free Negro.” If these inferences be correct, then it results as a logical conclusion, that all the arguments going to sustain the authority of the General Assembly to discriminate in the case of “free Negroes” equally apply to that of “freedmen,” or emancipated slaves.

\textsuperscript{160} Id. at 136–37.

\textsuperscript{161} Id. at 136.
was in no way limited to southerners. Writing for the majority, in the *Civil Rights Cases*, Justice Bradley offered the following:

> There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by white citizens . . . .

The majority’s revisionist claims regarding “free” blacks’ equal enjoyment of “the essential rights, of life, liberty, and property” before the Civil War clearly ignores the degraded liberty and property rights provided “free” blacks. Moreover, as Justice Harlan points out in his lone dissent, the majority’s claims ignore the Court’s landmark decision in *Dred Scott v. Sanford* rejecting a black person’s ability to claim the rights enjoyed by whites under the Constitution:

> The judgment of the court was that the words ‘people of the United States’ and ‘citizens’ meant the same thing, both describing ‘the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the government through their representatives;’ that ‘they are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people and a constituent member of this sovereignty;’ but that the class of persons described in the plea in abatement did not compose a portion of this people, were not ‘included, and were not intended to be included, under the word ‘citizens’ in the constitution;’ that, therefore, they could ‘claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States’ . . . .

1. Education

“Free” blacks often experienced segregation and discrimination in their search for education for themselves or their children, and before

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162 See Rubio, *supra* note 49, at 59–61 (discussing *The Civil Rights Cases* and the supposed “special treatment” of blacks by the Court).


164 See *supra* Part III.B.

the Civil War, express prohibitions on educating “free” blacks. The laws governing the education of “free” blacks prior to Reconstruction may be divided into three types. The least common type barred teaching “free” blacks to read or write under any circumstance. These laws were in place in Georgia and Alabama. Virginia, South Carolina, and Ohio, in contrast, allowed the instruction of individual “free” blacks but prohibited “meetings” or schools to educate “free” blacks. Other common prohibitions excluded blacks from public education or segregated their attendance in schools. In Ohio, Missouri, and Indiana, legislation barred blacks from attending any public school, and in Massachusetts, the Supreme Judicial Court upheld de jure segregation under the state constitution.

Following the Civil War, legally mandated segregation in education blossomed in the South while it gradually declined in the North. In the South, segregation became the norm for public education. Through legislative action, state officials consistently provided unequal funding to African American schools as compared with their white counterparts. Discrimination by legislatures in funding segregated schools also included substantial discrepancies in the salaries of black and white teachers with comparable qualifications. In many instances, schools for blacks only came about through the funding of black parents and white philanthropists. In some cases, post-Reconstruction governments of the South refused to fund black education and, in other cases, officials opposed the establishment of schools regardless of

166 See Goodell, supra note 30, at 319–25 (discussing the educations of enslaved and “free” blacks).
167 Hurd, supra note 146, at 105, 151.
168 Id.
169 Goodell, supra note 30, at 319–21.
170 Hurd, supra note 146, at 170.
171 Id.
172 De facto segregation in education characterizes the historical and the contemporary reality for northern areas with large black populations. DuBois, supra note 44, at 637–69. Integrated education in areas with sizable black student bodies has never been a norm for American society. Id. In the South, law prevented it and in the North, practice prevented it. Milliken v. Bradley, 418 U.S. 717, 717 (1974) (highlighting the way local government and school officials in the North maintained school segregation in the absence of de jure legislation).
175 Id.
176 See DuBois, supra note 44, at 642–44.
funding.\textsuperscript{177} As illustrated by \textit{Cumming v. Board of Education of Richmond County}, school officials could close schools or refuse to fund entire levels of education for blacks despite its availability for whites.\textsuperscript{178}

In its 1896 \textit{Plessy v. Ferguson} decision, the Supreme Court upheld de jure segregation by the states.\textsuperscript{179} The precedent established in \textit{Plessy} continued as the law of the land until the 1954 Supreme Court decision in \textit{Brown v. the Board of Education}.\textsuperscript{180} The legally established discrepancies in teacher salaries, supplies, and facilities continued at various levels until well after 1954, when southern states and counties brought additional legal suits to challenge the implementation of \textit{Brown}.\textsuperscript{181}

2. Political Rights

Prior to 1865, “free” blacks encountered regular but varying bars to their participation in the political realm.\textsuperscript{182} Of the thirteen original colonies, only Virginia, North Carolina, and South Carolina expressly denied “free” blacks the elective franchise before the Revolutionary War.\textsuperscript{183} Nonetheless, as time passed, most of the remaining colonies withdrew the voting rights originally provided to “free” blacks.\textsuperscript{184} Maryland’s original \textit{Declaration of Rights} established in 1776, stated, “[e]very

\textsuperscript{177} Id. at 646–47.

\textsuperscript{178} Cumming v. Bd. of Educ. of Richmond County, 175 U.S. 528, 537 (1899) (upholding the Board of Education’s use of tax funds to build a new high school for white children despite its refusal to fund a high school for blacks).

\textsuperscript{179} Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

\textsuperscript{180} Prior to \textit{Brown}, the Supreme Court issued a series of decisions requiring states to provide equal funding for segregated school systems including the establishment of graduate and professional schools to accommodate black students. \textit{See Brooks, supra} note 174, at 10. States that did not offer an equal alternative were required to allow blacks to attend the white schools. \textit{See id.}

\textsuperscript{181} \textit{See generally} Brown v. Bd. of Educ. (\textit{Brown II}), 349 U.S. 294 (1955) (initiating a lengthy series of lawsuits by state and local governments regarding the implementation of \textit{Brown I}).

\textsuperscript{182} \textit{See generally} Emil Olbrich, \textit{The Development of Sentiment on Negro Suffrage to 1860} (1969).

\textsuperscript{183} In 1715, North Carolina expressly excluded blacks and Indians from voting. \textit{Id.} at 8. This exclusion was dropped in a 1735 law restricting the franchise to freeholders. \textit{Id.} South Carolina barred the voting and election privileges of blacks and Indians through a 1716 law, and Virginia barred the election privileges of blacks and Indians in 1705 and the voting privileges in 1762. \textit{Id.} Although a Georgia election law of 1761 did not bar blacks from voting, its preamble stated that only free white men with the proper qualifications should be able to vote. \textit{Id.} at 7–9.

man having property in, a common interest with, and an attachment to
the community, ought to have a right of suffrage.” 185 By 1809, however,
attitudes had changed and legislation was passed to restrict the elective
franchise to white men.186 Consequently, by 1865 only Maine, New
Hampshire, Vermont, Massachusetts, and Rhode Island provided equal
franchise to “free” black men.187 Although New York allowed “free”
black men to vote prior to 1865, it required a substantial monetary
payment from them not required of whites.188

Between 1790 and 1796, Kentucky, Vermont, and Tennessee all
joined the Union without racial discrimination in the suffrage provi-
sions of their constitutions.189 Further, in 1799 Kentucky restricted the
franchise to free white men in a new constitution.190 In its initial con-
stitution of 1802, Ohio also kept the franchise from “free” black
men.191 Tennessee did likewise through provisions in its 1834 constitu-
tion limit suffrage to white men.192 From 1844 to 1857, Missouri,
Iowa, Illinois, Minnesota, Michigan, Indiana, and California each de-
nied black men the franchise through racially discriminatory constitu-
tional provisions.193 In most cases, the decision resulted from the di-
rect vote of the electorate in the state.194 In 1847, Wisconsin also
decided, by referendum, to deny black suffrage.195 In 1849, however,
the question was resubmitted to the Wisconsin voters and black suf-
frage passed by a small margin with less than one third of the persons
voting in the election casting a vote on the question.196 Because of the
low percentage of votes cast on black suffrage, blacks did not receive
the elective franchise in Wisconsin until 1866 when the state Supreme
Court validated the seventeen year old election results on black suf-
frage.197

185 Hurd, supra note 146, at 19.
186 Id. at 19.
187 Of the original colonies, New Jersey and Connecticut expressly disenfranchised
“free” blacks as did most of the other states who joined the union. Olbrich, supra note
182, at 23–24.
188 See Higginbotham, supra note 5, at 261.
189 Id. at 21.
190 Id.
191 Id. at 22.
192 Id. at 39–40.
193 See Olbrich, supra note 182, at 79–107.
194 See id.
195 Id. at 86–87.
196 Id. at 88–89.
197 Id. at 89.
The opposition to black suffrage flowed from widespread notions of black inferiority and the commonly held fear of black immigration to the state. The following view of a Michigan constitutional delegate reflects another important sentiment held at the time:

Negroes were more enlightened and happy in America than back in Africa . . . . The obligations of justice had been more than satisfied, and the people of Michigan were not bound to be so imprudent as to divide their political authority with negroes, or to let them have a share in piloting the ship of state on which they had been suffered to become passengers.

By barring the franchise from “free” black men, the aforementioned states removed blacks’ opportunity to play the most basic role in the political governance of their lives or their communities. As the following section will show, denying blacks the franchise prevented them from gaining political power in their communities that could threaten the country’s ubiquitous racial hierarchy.

With the ratification of the Fourteenth Amendment in 1868 and the continued protection of Union troops in the former confederate territories, black men in the South quickly became involved in politics. African Americans were placed in the United States House of Representatives, the United States Senate, hundreds of local offices, and on a state supreme court. Less than ten years later, however, the tables turned. The South had unseated its black elected officials and again

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198 Across the state constitutional conventions, opponents of black suffrage regularly contested the black franchise because of its potential to attract “free” blacks to the state. See Olbrich, supra note 182, at 79, 90–92, 95, 100–02.
199 Id. at 97.
200 The disenfranchisement of “free” black men had unique significance in that it represented the complete disenfranchisement of all blacks regardless of their gender, wealth, or servitude. See supra notes 126–29 and accompanying text.
201 Klarman, supra note 6, at 10.
202 This provides one example of the instability of black rights. Rather than a slow and steady march toward freedom, blacks living through the “Reign of Terror,” at best meandered to America’s discordant refrain of rights and liberties. See Higginbotham, supra note 5, at 32–40. Subsequent generations of blacks often experienced the removal of rights and privileges that their foreparents enjoyed. Id. The original Africans in the colonies came as indentured servants, but within two generations blacks and their progeny had become enslaved chattel in perpetuity. DuBois, supra note 44, at 417–40. In Maryland, Tennessee, New Jersey, and other states, blacks who enjoyed voting rights during one period had them legally removed from subsequent generations. Id. This pattern occurred again following Reconstruction when blacks reached high political offices only to lose these offices and the right to vote in a twenty year time span. John Hope Franklin, Legal Disenfranchisement of the Negro 215–241 (Paul Finkelman ed., 1992).
denied black men the franchise, while the North had permanently extended political citizenship rights. By 1878, southern officials had begun the systematic exclusion of blacks, who represented a majority in many southern counties, from political involvement. In addition to physical violence and the destruction of homes and crops, southern whites used legal enactments and referenda, ultimately upheld by state and federal judiciaries, to prevent black political involvement. Arkansas, Florida, and Tennessee passed legislation to bar black participation, while Mississippi, South Carolina, Louisiana, Alabama, Virginia, North Carolina, Texas, and Georgia all modified their constitutions to exclude blacks through poll taxes and registration requirements. White officials selectively administered new registration requirements to legitimize the exclusion of blacks from political participation. Along with violence and intimidation, racially discriminatory voting laws governed the political participation of the vast majority of African Americans until the passage of the Voting Rights Act of 1965.

3. Economic Freedoms

To maintain economic subordination, white officials systematically and tenaciously used antebellum and post-reconstruction law to deny “free” blacks the opportunity to compete fairly with whites and to amass wealth. Legally imposed restraints, common against “free” blacks both before and after the Civil War, greatly limited their ability to pro-

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203 The passing of the Fifteenth Amendment led to mass enfranchisement outside of the South, but was largely nullified within it through racially biased election laws and practices. See Armand Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 541–42 (1973).

204 See When Sorry Isn’t Enough, supra note 11, at 401–404; Woodward, supra note 202, at 83–85.


206 See generally Hurd, supra note 146 (providing a state by state examination of legal restraints).
vide for themselves and their families. These laws regularly limited their employment as well as their enterprise opportunities.

The greatest economic threat facing “free” blacks was the constant danger of enslavement. The majority of the states passed laws prohibiting “free” blacks from immigrating into their jurisdictions, subjecting violators to a substantial fine and enslavement. Besides these common prohibitions on travel and the threat of slave catchers and kidnappers, colonies and states implemented additional legal mechanisms that placed “free” blacks at considerable risk. The District of Columbia provides one interesting example. In 1820, the federal government disenfranchised the “free” blacks of Washington D.C. by limiting the election of city officers to white citizens. Congress granted a special power to these officers to set the terms and conditions of residence for “free” blacks in the city. By ordinance, in 1827 the officers set several restrictions on “free” blacks present in the district. These restrictions included registering their presence, obtaining two freehold sureties of five hundred dollars for their good behavior, and proving their freedom. Further, the ordinance required that any black person unable to prove their freedom would be sold into slavery. Along similar lines, Florida law required that a “free” black who failed to satisfy a judgment for a debt within five days be sold at an auction to satisfy the debt. Perhaps the most egregious of these laws were those found in Pennsylvania, Rhode Island, Delaware, Georgia and Illinois, allowing authorities to hire out “free” blacks as lifetime “servants” when they deemed it proper.

In addition to these laws, states and colonies placed a multitude of legal restrictions on “free” blacks’ ownership rights and employment opportunities. In the early eighteenth century, New York and

210 Id.
211 Id.
212 See supra text accompanying notes 150–51.
213 See supra text accompanying notes 150–51.
215 Id.
216 Id.
217 Id.
218 Id.
219 Id. at 40.
220 Hurd, supra note 146, at 76, 104. Pennsylvania went further by ordering that all the children of “free” blacks be bound out until the age of twenty-one for girls and twenty-four for boys. Higginbotham, supra note 5, at 285.
New Jersey excluded “free” blacks from owning real property.\textsuperscript{221} More than a century later, the United States Congress excluded “free” blacks from homesteading opportunities in the Pacific Northwest.\textsuperscript{222} During the same time period, California restricted blacks from the homesteading within its borders.\textsuperscript{223} Some states specifically prohibited “free” blacks from owning a white Christian indentured servant.\textsuperscript{224} In such cases, the blacks’ purchase of such a servant was deemed to acquit the indenture.\textsuperscript{225} Financially, some states required “free” blacks to make greater contributions in taxes than whites: Georgia required “free” blacks to pay a tax on their own heads (six times higher than masters paid per head for enslaved blacks), and South Carolina placed an exclusive capitation tax on “free” blacks.\textsuperscript{226}

The most extensive legal constraints on “free” blacks’ economic opportunities, however, related to employment or enterprise in the South. These laws restricted a wide range of engagements for “free” blacks including handicraft, pioneering, trading, print setting, retail clerking, home repair, masonry, mechanics, home construction and repair, law, and carrying or handling the United States mails.\textsuperscript{227} Severe racial distinctions in the law otherwise governing “free” blacks further restricted their economic liberty.\textsuperscript{228}

States’ and colonies’ general prohibition against “free” blacks testifying against whites also severely limited their ability to protect their earnings or enforce contracts against whites.\textsuperscript{229} In some states, challenging whites itself had legal ramifications. In Louisiana, “free” blacks were subject to imprisonment for conceiving of themselves as

\textsuperscript{224} \textit{Cf. Hurd}, \textit{supra} note 146, at 9.
\textsuperscript{225} \textit{Id.} Likewise, “free” blacks purchased enslaved blacks in many instances to free the enslaved parties.
\textsuperscript{226} Higginbotham, \textit{supra} note 5, at 205, 264.
\textsuperscript{228} \textit{See Goodell}, \textit{supra} note 30, at 355–63.
\textsuperscript{229} \textit{See id.} at 356–57.
equal with whites and showing them disrespect or making an insult.\textsuperscript{230} Even when “free” blacks owned property, discriminatory laws prevented them from protecting those rights by force of arms or law.\textsuperscript{231}

After the Civil War, Southern states passed the Black Codes which placed further restrictions on African American economic opportunity.\textsuperscript{232} For example, through these codes, white police officers had the authority to arrest and fine blacks as vagrants if they were not employed by a white person.\textsuperscript{233} Although reconstructed southern legislatures annulled the most offensive aspects of these codes by 1868, a new system rose from its ashes at the close of the reconstruction era.\textsuperscript{234} South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, Virginia, Arkansas, and North Carolina each enacted new similar vagrancy laws between 1893 and 1909.\textsuperscript{235} Under the new regime, authorities arrested blacks on vagaries such as idleness or immorality if they “had no property to support them.”\textsuperscript{236} Once arrested, authorities would require blacks to work for a white planter to pay their fine and court costs.\textsuperscript{237} Blacks were then required to work for the planter who would also charge them for food and lodging.\textsuperscript{238} These charges invariably equaled or exceeded the earnings the black workers were entitled to at the end of the year.\textsuperscript{239} Consequently, the original fine the workers were required to pay off would never be liquidated and the workers would find themselves unable to free themselves from the relationship.\textsuperscript{240}

This system of near servitude was sometimes coupled with convict-leasing, a practice that operated in many parts of the South well into the twentieth century.\textsuperscript{241} Under convict-leasing, white officials would arrest African Americans on some minor misdemeanor and charge them a fine and substantial court fees.\textsuperscript{242} At the courthouse, a white

\begin{thebibliography}{9}
\bibitem{230} Hurd, \textit{supra} note 146, at 162.
\bibitem{231} See Goodell, \textit{supra} note 30, at 356–57; Hurd, \textit{supra} note 146, at 159.
\bibitem{233} \textit{Id.} at 112.
\bibitem{234} Klarman, \textit{supra} note 6, at 71.
\bibitem{236} \textit{Id.}
\bibitem{237} \textit{Equal Protection}, \textit{supra} note 232, at 181–82.
\bibitem{238} \textit{Id.}
\bibitem{239} \textit{Id.}
\bibitem{240} \textit{Id.}
\bibitem{241} Cohen, \textit{supra} note 235, at 50–53.
\bibitem{242} \textit{Id.} at 53.
\end{thebibliography}
employer would pay the fine and fees in exchange for working off the debt.243 Most blacks who refused the offer found themselves leased out on a chain gang or other prison work unit to work in the mines or to build roads, bridges, and railroads.244 Through this and similar laws, blacks found themselves locked into an inescapable cycle of debt and work.245

Whites excluded blacks from law enforcement, and from judicial, legal, and other public offices throughout the South, despite the significant number of blacks in southern communities.246 Teaching and administrating segregated schools represented the one public sector position that was generally available to blacks. Nonetheless, as shown in Alston v. School Board of Norfolk, Va., southern states routinely paid blacks substantially less money for the same teaching jobs.247 The Supreme Court’s earlier ruling in the Civil Rights Cases protected the right of whites to discriminate against blacks in the private sector. The public sector generally followed the same practice until Brown v Board of Education.248

Further, routine and lawful discrimination against blacks also denied them entry into higher education, which severely restricted their ability to gain the skills and knowledge needed to enter certain careers and occupations. Further, states discriminated against black land grant colleges by providing limited funding for their operation.249 Black colleges’ curriculums offered very little beyond education courses.250 Instead of mechanical or professional training, black land grant colleges could only offer courses in limited areas such as shoe-making and repair, tailoring, and carpentry.251

In the southern private sector, whites paid blacks lower wages for the same work in both agricultural and limited industrial positions.252 Lawful discrimination in the credit sector foreclosed the opportunity

243 Id.
244 Id. at 55–58. In addition to the lost economic opportunities, blacks regularly lost their lives while performing hazardous work under brutal and unsafe conditions. Id.
246 Thernstrom & Thernstrom, supra note 203, at 26–30.
249 Rubio, supra note 49, at 72.
250 Id. at 73.
251 Id.
252 Thernstrom & Thernstrom, supra note 203, at 33–35.
to obtain financing for a majority of blacks. Lenders regularly denied blacks’ requests for credit. This practice, in conjunction with mob violence by whites, functioned to keep blacks in a subordinate, non-competitive economic position.

Following the civil war, blacks in northern cities also faced substantial discrimination in employment, housing, and access to credit. Labor unions, employers, and private individuals legally discriminated against blacks with impunity. The preference for whites in employment provided job opportunities to newly arrived European immigrants that were unavailable to black workers. In housing, private restrictive covenants prohibiting sales to African Americans were in force and upheld in court. In the absence of strict Jim Crow laws, however, northern blacks still enjoyed more freedom than their southern counterparts. The North thus attracted large numbers of blacks hoping to escape the Black Codes and lynching laws that openly ruled in the South. In response to the influx of blacks from the South into northern cities, urban white residents increasingly utilized the ultimate economic constraint on blacks: violence.

The federal government also participated in the economic subordination of blacks through the administration of its programs and its employment policies. President Woodrow Wilson lawfully instituted segregation policies in federal employment in 1913 and continued the military segregation policies that limited blacks’ opportunities to ad-

253 See Rubio, supra note 49, at 121 (providing examples of routine discrimination by banks in providing loans to blacks); see also Michael Belknap, Federal Law and Southern Order: Racial Vio- lence and Constitution/Conflict in the Post-Brown South 5–7 (1987) (examining violence as a means of maintaining white supremacy in all aspects of life).

254 Belknap, supra note 253, at 5–7.

255 See Rubio, supra note 49, at 84–86 (considering violence as an additional means of economic control of blacks).

256 Feagin, supra note 61, at 62.

257 Id. at 62–67.

258 Id.

259 The Supreme Court’s ruling in Corrigan v. Buckley, that private housing discrimination did not offend the Constitution, legally sanctioned and encouraged the use of racially restrictive covenants to limit blacks’ ability to obtain real property. See 271 U.S. 323, 331 (1926).

260 Rubio, supra note 49, at 86. “Besides Wilmington [North Carolina], post-Recon- struction white supremacist pogroms occurred in such cities as Danville, Virginia, in 1883; Phoenix, South Carolina, in 1898; New Orleans and New York in 1900; Springfield, Ohio, in 1904; Atlanta and Greenberg, Illinois, in 1906; and Springfield, Illinois, in 1908.” Id. at 68. See also Leon Litwick, North of Slavery 158–60 (1961) for an examination of white labor hostility toward black competition and northern violence against blacks.

261 See Feagin, supra note 61, at 181–82.
advance through the military ranks. During the New Deal, the federal government instituted a host of federal programs that were intended to aid Americans in a wide range of areas. These programs, however, routinely discriminated against blacks in employment, housing, and funding. New Deal programs provided special financial assistance to white farmers, businesses, and bankers that were unavailable to blacks. The Federal Housing Administration discriminated against blacks in obtaining housing subsidies and supported racially restrictive covenants that barred blacks from purchasing many homes. During this period preceding and following World War II, the federal government offered numerous programs to aid white contractors, builders, and other businesses that were unavailable to their black counterparts.

The foregoing laws illustrate a very critical characteristic of the “Reign of Terror:” racism as legal right and obligation. Under the laws above and those articulated below, the mistreatment of and discrimination against blacks often represented a legal obligation. One consistent aspect of many of the laws passed was the imposition of penalties upon white who failed to follow the laws. Rather than the actions of a select group of unenlightened white persons, the subordination and exclusion of blacks constituted the politically and socially mandated conduct for all whites. This political mandate, moreover, flowed from democratic institutions at the heart of American society, rather than from a tyrannical imposition forced upon citizens by their government. Discriminatory laws were passed by freely elected legislatures. Generally, these laws stood as reflections of communal desire to maintain the subordination and servitude of free blacks.

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262 Rubio, supra note 49, at 82.
263 Feagin, supra note 61, at 181–82.
264 Id. at 182.
265 Id.; see also Rubio, supra note 49, at 120–23 (discussing the Fair Housing Administration’s segregationist policies that encouraged discrimination against blacks in housing).
266 See Feagin, supra note 61, at 181–82. Building permits, franchises, and licenses were also made available to whites in a racially biased manner. Id.
267 See supra Part III.
268 See De Toqueville, supra note 9, at 348–75.
269 America’s brand of democracy, during most of this time, excluded white women from participation along with blacks and others. See Franklin, supra note 202, at 215-41.
270 The regular and consistent use of lynching and race riots by whites, with few if any legal ramifications, provided an ultimate check on black life. See Rubio, supra note 49, at 64–68 (considering the use of race riots and lynchings by whites to suppress black political and economic competition).
C. Civil Rights for African Americans

After the Civil War, two sets of competing laws were passed concerning African Americans. At the state level, many southern governments adopted Black Codes that established a quasi system of slavery. At the federal level, however, a series of constitutional amendments were ratified that promised blacks equal treatment before the law. The 13th Amendment prohibited slavery and involuntary servitude, the 14th Amendment promised equal protection before the law, and the 15th Amendment provided black men with enfranchisement. In the South, all three of these amendments were effectively nullified through racially neutral state laws and private actions held beyond the reach of constitutional protections by the Supreme Court. Additionally, the reconstruction Congress passed the Ku Klux Klan Act, restricting Klan activity, and the Civil Rights Act of 1875, prohibiting some forms of private discrimination. Both of these laws were later ruled unconstitutional by the Supreme Court. In the early part of the twentieth century, the Supreme Court began to require that states provide equal services under segregation. By 1954, the federal government had begun to prohibit discrimination and segregation in its own practices concerning the military and some federal employment.

After Brown, federal courts began to find segregation in a variety of areas unconstitutional. Ten years after Brown, Congress joined the courts in challenging racial discrimination against blacks in public accommodations, employment, and the use of federal funds. Congress went on the next year to pass the Voting Rights Act of 1965, the Fair Housing Act in 1968, and the Equal Employment Opportunity Act (EEO Act) in 1972 barring discrimination in the elections process, housing, and guiding affirmative employment practices, respectively.

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272 U.S. Const. amend XIII.
273 U.S. Const. amend XIV.
274 U.S. Const. amend XV.
275 See generally Race, Law, and American History 1700–1990, supra note 271.
277 Id. at 140–44.
278 Id. at 236–37.
279 Klarman, supra note 6, at 361–62.
281 Id. at 277–82, 289–91.
None of these acts, however, focused specifically upon African Americans as a group or the actions necessary to repair the individual and collective harms visited upon blacks over the preceding one hundred years. Instead, each statute prohibits discrimination generally based on race, color, or national origin. Together, these statutes extend the civil liberties enjoyed by whites to blacks and others, but still fall short of the full sense of liberation advocated by abolitionists Benjamin Franklin and Wendell Phillips and elaborated by moral philosopher Timothy Jackson. Consequently, the legislation protects the rights of all Americans—black, white, and otherwise—against racial discrimination. But the laws fail to move toward the goal of reparations: to provide blacks with the educational, political, and economic resources necessary to enable them to fully exercise and enjoy their civil liberties.

The foregoing analysis provides a glimpse, albeit abbreviated, into the legal regime governing the lives of African Americans from their initial arrival in Virginia to the passage of the EEO Act of 1972. The sketch illustrates that positive law functioned as the formal means by which whites denied African Americans their humanity and their citizenship over four centuries.

The sketch also demonstrates that, in contrast, during the latter part of the twentieth century, law served as the formal means by which the federal government required state governments and private citizens to cease and desist from discriminatory acts against persons based on race. In other words, this period reversed the legal subordination that characterized so much of African Americans’ experience over the previous four centuries. These civil rights laws were instituted to proscribe discrimination based on race, color, or national origin, and offered protection to all Americans from mistreatment and discrimination. Through investigating both the laws used to deny African Americans’ humanity and citizenship, and the laws intended to protect them, this article highlights a fundamental limitation of the later: rather than remedying the past effects of the laws denying African American humanity and citizenship, civil rights laws merely prohibited future denials of the humanity and citizenship rights of its residents and citizens. These laws represent crucial legislation to direct and enforce the reordering of social relations to prevent the types of harms

282 Id.
283 See supra Part I.
284 See supra Part III.A–B.
285 See supra Part III.C.
286 See supra Part III.C.
suffered by African Americans and others from being visited upon anyone in the future, but they leave the question of repairing past wrongs unaddressed.\textsuperscript{287} 

D. An Analysis of the Legal Issues

In light of the damage done to African Americans and their communities educationally, politically, and economically by the law, civil rights laws represented a needed yet insufficient response by federal, state, and local governments. Today, civil rights laws are crucial to support the ideas of fairness and justice for all races in American relations. These laws are the primary formal means of ensuring that race no longer justifies legal inferiority.\textsuperscript{288} They do not offer remedies, however, for the regular and recurring disenfranchisement of African Americans that was experienced by “free” and enslaved blacks in both the North and the South.\textsuperscript{289} Likewise, civil rights laws fail to offer any remedial scheme to redress the systematic exclusion of the enslaved and “free” blacks from equitable participation in the economic system. Civil rights laws have reversed the centuries-old practice of excluding African Americans from public educational institutions and iniquitously funding black schools at the tertiary, secondary, and primary levels of education.\textsuperscript{290} These laws do not mention how to remedy three centuries of educational exclusion affecting over seventeen generations of African Americans.\textsuperscript{291}

Under the “Reign of Terror,” most statutes, ordinances, and decisions regarding African Americans focused on the conduct of enslaved and “free” blacks.\textsuperscript{292} Even when legislation penalized whites for their interaction or involvement with blacks, the true purpose of the laws was to prevent African Americans from exercising certain free-

\textsuperscript{287} See supra Part III.C. American civil rights legislation characteristically omitted measures for compensatory or injunctive relief for the victims of historic discrimination against blacks in voting, education, or lending—much less enslavement, forced peonage, unequal wages, or the denial of public services—that characterized black life under the “Reign of Terror.” Brooks, supra note 49, at 156–57.

\textsuperscript{288} Needless to say, while these laws establish a standard for behavior that persons can be held accountable for, they do not and cannot prevent discrimination and mistreatment based on race against African Americans, Latinos, Native Americans, Asians, and whites.

\textsuperscript{289} See supra Part III.C.

\textsuperscript{290} Equal Protection, supra note 232, at 269–72.

\textsuperscript{291} See id. at 275.

\textsuperscript{292} Early legislation and decisions also addressed enslaved and free Indians.
doms reserved for whites.\textsuperscript{293} An example of this is seen in the fairly common legislation in most states proscribing enslaved blacks from buying or selling goods.\textsuperscript{294} Under these laws, whites would be penalized, though not as harshly as their black counterparts, for buying, selling, or trading with blacks. Other examples were laws prohibiting blacks from being taught to read or from hiring themselves out “for work on their own account.”\textsuperscript{295} Blacks caught violating these laws were punished for reading, trading, or hiring themselves out, while whites charged with violating these statutes were penalized for their support or encouragement of unlawful conduct by blacks.\textsuperscript{296}

The “Reign of Rights,” in contrast, directs its focus upon the behavior of those who would deny persons the liberty to engage in covered activities. The Fair Housing Act focuses upon the conduct of persons using race, color, or national origin to deny housing to someone else.\textsuperscript{297} Likewise, Title VII focuses upon the improper conduct of those who base hiring, promotion and other job opportunities on race, color, or national origin.\textsuperscript{298} Public accommodations legislation also looks specifically at actions taken to deny persons access to public accommodations based on their race color or national origin.\textsuperscript{299} In each of the foregoing statutes, the legislation seeks to prevent the denial of rights based on some impermissible criterion such as race. Persons found guilty of violating these statutes are required to cease such conduct and to allow persons discriminated against to participate in the governed activity.\textsuperscript{300}

One way of understanding these laws in relation to African Americans’ legal history would be that the “Reign of Terror” inflicted harm upon enslaved and “free” blacks because of their race, and that the “Reign of Rights” guards their descendants against similar harm based on their race. In this light, the essential role of civil rights law for blacks today is to protect them from the type of treatment visited upon their ancestors.\textsuperscript{301} Moreover, the “Reign of Rights” goes beyond

\begin{itemize}
\item \textsuperscript{293} See Higginbotham, supra note 5, at 26–28 (considering the motivations of legislatures, judges, and others in establishing the laws governing black life).
\item \textsuperscript{294} See supra text accompanying note 131–36, 140.
\item \textsuperscript{295} See supra text accompanying notes 138–40.
\item \textsuperscript{296} See supra notes 130–143 and accompanying text.
\item \textsuperscript{297} Fair Housing Act, 42 U.S.C. § 3601 (1968).
\item \textsuperscript{299} See 42 U.S.C. § 2000(a).
\item \textsuperscript{300} Equal Protection, supra note 232, at 267–74, 289–91.
\item \textsuperscript{301} During the “Reign of Terror” others suffered substantial discrimination as well. Native Americans, immigrants, and other racial minorities were victimized under the system,
the protection of blacks from racially-based harms—it protects Latinos, Asians, Native Americans, and other minority groups from such mistreatment as well.\textsuperscript{302} The laws likewise extend to whites.\textsuperscript{303} Although no governmentally sanctioned injustices have been perpetrated against whites because they were white, extending civil rights protection to them was also necessary to ensure that no citizens found themselves the victims of the kinds of harms perpetrated upon blacks during the “Reign of Terror.” In a pluralistic society like America, whites, like all other participants, also need the protection of law to secure their rights.

Between the framework of the two regimes, however, a legal void still lingers. African Americans and their communities suffered specific harms and damages from the “Reign of Terror” distinct from those experienced by Latinos, Asians, and Native Americans.\textsuperscript{304} Civil rights laws that merely guard against future wrongs committed against any racial group, do not attend to the damage inflicted by the 353 year lifespan of the “Reign of Terror.”\textsuperscript{305}

\textbf{IV. Rights but Not Remedies}

Due to the law’s prominent role in subordinating blacks, this article maintains that African Americans today cannot depend on the law alone as the guarantor of their status and well-being.\textsuperscript{306} Instead, although the racial badge of slavery and Jim Crow were affixed to blacks in unique ways. See generally \textsc{A Reader on Race, Civil Rights and American Law: A Multiracial Approach} (Timothy Davis et al. eds., 2001).

\textsuperscript{302} Race based civil rights legislation uniformly prohibits discrimination based on race, color, and national origin. \textsc{Equal Protection}, supra note 232, at 267-73.


\textsuperscript{304} The enslavement visited upon successive generations of blacks over the course of three centuries followed by their systematic disenfranchisement and subordination as a matter of law and practice represents a unique experience among America’s racial and ethnic groups. See Feagin, supra note 61, at 205–09.

\textsuperscript{305} See supra Part III.C.

\textsuperscript{306} Blacks’ status under American law has been a cyclical fluctuation from hostility to facial neutrality. See supra Part III.A–B. Rather than a constant progression in their legal status from the beginning of the “Reign of Terror” to the end of the “Reign of Rights,” blacks have often had legal freedoms and equality stripped from them at both the state and federal level through executive actions, legislation, or judicial decisions. See supra Part III.A–B. Just as the first enslaved Africans enjoyed freedoms and protections under law that many of their descendants would never experience, generations of “free” blacks had voting rights, economic rights, and educational rights under the law that were subsequently stripped from them and their children. See supra Part III.A–B. From a historical perspective, for 344 years of blacks’ 386 year sojourn in America, the law was repeatedly and intentionally used to maintain black subjugation to whites. See supra Part III.A–B.
they must focus upon gaining and maintaining power in the educational, political, and economic spheres of society. By doing so, blacks can gain a level of protection for both their well-being and their legal status, which the law alone cannot provide.\textsuperscript{307} To examine this issue further, this article explores the work of scholars Kimberle’ Williams Crenshaw, Derrick Bell and Ralphe Bunch who analyze the successes and failures of civil rights laws in protecting blacks. In different ways, each author highlights the historic limitations of the “Reign of Rights” and the American legal system more broadly. These contributions support the contention presented in this article that the law alone is unable to secure blacks’ status and well-being.

In one of the foundational articles on critical race theory, Kimberle’ Williams Crenshaw examines civil rights history to point out two competing views historically present in civil rights laws: the Restrictive View and the Expansive View.\textsuperscript{308} The Restrictive View, often adopted by conservatives, characterizes civil rights laws as creating a formal equality irrespective of race, without regard to results.\textsuperscript{309} The Expansive View, in


\textsuperscript{308} Crenshaw, supra note 8, at 1341. This article critiques the characterization of the civil rights law given by neoconservative Thomas Sowell and the Critical Legal Studies appraisal by Thomas Kushnet. Using both men as representatives of larger critiques of contemporary civil rights advocacy, Crenshaw methodically demonstrates the significant shortcomings of both ideological boundaries. \textit{Id.} at 1334. In brief, according to Crenshaw, Sowell maintains that civil rights laws were intended merely to remove the barriers of racial injustice to establish equal opportunity, regardless of race, as the new paradigm for American decision-making in politics, economics, and education. \textit{Id.} at 1338–41. According to Crenshaw, Sowell maintains that this is embodied through a system of formal equality that disregards race consciousness in decision making. \textit{Id.} Sowell therefore maintains that race-based programs are antithetical to civil rights and equal opportunity and should be abolished. \textit{Id.} Moreover, Sowell argues that the experience of poverty by a black underclass results from their individual choices and not their race, so affirmative action and related programs misdirect them to look to a government program to remedy their situation and not their own impoverished culture. \textit{Id.} at 1343–46.

\textsuperscript{309} \textit{Id.}
contrast, characterizes civil rights laws as attending to the consequences of historic racism by considering the results as well as the process of decision-making. Crenshaw’s chief critique of the Restrictive View is that it neglects the present consequences of past discrimination and the line of historic judicial decisions supporting the use of civil rights laws to address such consequences. She also points out that past discrimination had adverse consequences that extend into the present and future, which were not addressed by anti-discrimination law based on equality as a process.

In critiquing the Restrictive View, Crenshaw highlights the historic tension between the two views, but fails to note the Restrictive View’s greater consistency with the racially biased history of the American legal system. In short, the Restrictive View’s vision of the civil rights law is the most compatible with the narrow and formalistic reading of judges who intended to maintain society’s system of racial subordination of blacks. Under this regime, as shown above, the American legal system authorized and frequently dictated the subordination of blacks to whites. Over the course of three centuries, legal decisions such as Plessy v. Ferguson, The Civil Rights Cases, and Dred Scott ostensibly used neutral legal principles as the basis for maintaining blacks’ racial subordination to a dominant white majority. The courts’ ventures into the Expansive View, though real, represent the exception more than the rule. As shown above, the courts, legislatures, and executive branches regularly used neutral legal principles as a means of securing and preserving the interests of America’s white majority. As seen with the abysmal failure to integrate America’s schools despite the bold pronouncements of Brown, as well as the courts’ concessions in post-Brown cases, the white majority prefers a Restrictive View of civil rights that supports what is understood as in its best interests. As used today, the Restrictive View arguably accomplishes a similar purpose—to protect

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310 Id.
311 Id. at 1342–43.
312 Id. at 1345.
313 See supra Part IIIA–B.
314 See supra Part IIIA–B.
315 See supra Part IIIA–B.
318 See supra Part IIIA–B.
319 See generally Bell, supra note 6 (discussing this point regarding civil rights law developments from 1954 forward).
the interest of the country’s white majority from losing benefits to African Americans and others.\textsuperscript{320}

In this regard, Derrick Bell’s assessment of what he calls “Racial Realism” provides an important and more accurate assertion that equality is beyond the limits of what America’s existing legal system can and will provide. Bell explains:

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it and move on.\textsuperscript{321}

This article’s examination of the “Reign of Terror” supports Bell’s claim that America’s racial history regarding blacks has been a cyclical process of advancements and setbacks, depending upon the needs and perceptions of the white majority.\textsuperscript{322} Any confidence in progress as either a historical necessity or predetermined outcome of societal enlightenment on race is misplaced. African Americans continue to occupy a tenuous precipice between advancement and setback.\textsuperscript{323}

Similarly, political scientist Ralph Bunche clearly recognized the limitations of law and the Constitution on racial matters in the 1930s. Bunche felt that black reliance on civil liberties to secure equal status

\textsuperscript{320} This could be based on a simple utilitarian calculus or a notion of white entitlement. See \textit{Feagin}, supra note 61, at 88–93, 99–103. This phenomenon is implicit in modern political practices and rhetoric regarding affirmative action, welfare, reparations, and any topics viewed as primarily promoting the interests of African Americans. See \textit{id.} The actual relationship between the issue and African American benefits is much less relevant than the perception. See \textit{id}.

\textsuperscript{321} Bell, \textit{supra} note 75, at 79.

\textsuperscript{322} \textit{See supra} Part III.A–B.

\textsuperscript{323} Although some would maintain that slow and steady progress is made from the process of advancement and setback, history shows that the conditions of the particular time period examined better predict the experience of African Americans than the passage of time alone. \textit{See supra} Part III.A–B; \textit{see also} \textit{Black Protest Thought}, \textit{supra} note 75, at 194–95. \textit{See generally} Bell, \textit{supra} note 75. As shown above, laws were more oppressive and restrictive regarding African Americans from 1819 to 1865 than they had been over the preceding two hundred year history—consider the Dred Scott decision of 1856. \textit{See supra} Part III.A–B. In short, African Americans had and still have nothing in American law that they can depend on to ensure that the white majority will not again reverse itself and subject African Americans to oppressive practices worse than or comparable to those of the past. \textit{See supra} Part III.A–B. This article argues that African Americans must develop and institutionalize power in a domestic and international context that can help forestall if not prevent certain setbacks.
was a mistake.\textsuperscript{324} In this regard, he recognized that the Constitution could not “be anything more than the controlling elements of the society wish[ed] it to be” and that the courts and legislatures could not make it be anything more than “what American public opinion wish[ed] it to be.”\textsuperscript{325} Bunche, like Bell, bases his conclusions on his experiences as an activist and an academic.\textsuperscript{326} Accordingly, both of these men recognized that political and economic dynamics rooted in the needs and wishes of the white majority dictated blacks’ opportunities, rather than the ideals articulated in judicial cases or constitutional amendments.\textsuperscript{327}

My analysis of Bell, Bunche, and Crenshaw demonstrate that African Americans can not “count on the law” alone as the guarantor of their freedom, much less as the means to secure reparations for three and one half centuries of mistreatment.\textsuperscript{328} Instead, this article suggests that African Americans use other means to ensure that past harms from slavery, segregation, and legal subordination are repaired and their communities restored.

V. RACE AND REPARATIONS

Blacks still retain a valuable, though underutilized, resource to provide their communities with the educational, political, and economic institutions needed to enable community members to fully enjoy

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{324} Black Protest Thought, supra note 75, at 183; see also Greene, supra note 82, at 1539-40 (providing an insightful consideration of Bunche’s theory in light of Supreme Court jurisprudence).
\item \textsuperscript{325} Greene, supra note 82, at 1540.
\item \textsuperscript{326} Bell, supra note 75, at 91–92.
\item \textsuperscript{327} This does not suggest that landmark judicial cases, legislation, and constitutional amendments have been insignificant to African American well-being, but that these legal mechanisms only have the authority that the broader society invests in them. Accordingly, the Fifteenth Amendment operated as a dead letter law for most African Americans from 1875 to 1968. See generally Race, Law, and American History, supra note 271. Though intended to enfranchise African American men, neither the state nor the federal courts stopped the wholesale disenfranchisement of African American men and eventually women over a ninety-three year history. Black Protest Thought, supra note 75, at 195. If the establishment of laws alone secured the freedoms they intended, then as Malcolm X often pointed out, there would have been no need to pass civil rights legislation to secure voting rights. See generally Malcolm X, It’s the Ballot or the Bullet, 60 Militant (1964) (providing context for Malcolm X’s statement). Likewise, if the state and federal governments of today lose their political will to protect the rights of African Americans, the various laws of the civil rights regime will be of little value.
\item \textsuperscript{328} See supra Part III.A–B.
\end{enumerate}
\end{footnotesize}
their civil liberties: each other.\textsuperscript{329} The approach to reparations advanced in this article calls for a particular conception of race rarely engaged by those focused upon the traditional civil rights struggle: race-consciousness. This consciousness and its relationship to the civil rights advocacy over the past twenty-five years are skillfully explored by Gary Peller in his article of the same name.\textsuperscript{330} This article intends to highlight the importance of a race-conscious approach to remedying the harms of slavery and segregation.

Peller contends that current liberal conceptions of race result from a “tacit consensus” that “the replacement of prejudice and discrimination with reason and neutrality—is the proper way to conceive of racial justice . . . .”\textsuperscript{331} Nationally, the cost of the commitment to reject white supremacy, he argues, was “the rejection of race consciousness among African Americans.”\textsuperscript{332} This rejection, Peller explains, grew out of the “integrationist perspective” that defined racism in terms of irrationality growing from ignorance and superstition.\textsuperscript{333} This ignorance results in bias and prejudice that cloud rational judgment based on non-racial criteria.\textsuperscript{334} As a result, rather than biased decision-making based on racial groups, integration resulted in decision-making rooted in individual identity.\textsuperscript{335} Peller writes:

Once neutrality replaced discrimination, equal opportunity would lead to integrated institutions; experience in integrated institutions would, in turn, replace the ignorance of racism with the knowledge that actual contact provides. This deep link between racism and ignorance on the one hand, and integration and knowledge on the other hand, helps explain the initial focus of integrationists on public education: Children who attended integrated schools would learn the truth

\textsuperscript{329} This article’s commendation of self-reliance and self-determination neither rejects nor minimizes the contribution that well meaning whites, Latinos, Asians, and Native Americans can make to such efforts. Nevertheless, blacks will have to play a primary role in the creation, development, and implementation of a system that cements the sustained use and availability of economic, political, and cultural resources.
\textsuperscript{330} See generally Gary Peller, \textit{Race Consciousness}, 1990 DUK\textsc{e} L.J. 758.
\textsuperscript{331} \textit{Id.} at 760.
\textsuperscript{332} \textit{Id.}
\textsuperscript{333} \textit{Id.} at 768.
\textsuperscript{334} \textit{Id.} at 768–69.
\textsuperscript{335} \textit{Id.} at 770.
about each others’ unique individuality before they came to believe stereotypes rooted in ignorance.\textsuperscript{336}

These views, Peller notes, grew out of a high level of abstraction rooted in a type of universalism that associates particularism with ignorance and universalism with truth.\textsuperscript{337} Through this lens, he points out, “racism becomes equivalent to other forms of prejudice and discrimination based on irrational stereotype. Social domination based on race, gender, sexual preference, religion, age, national origin, language, and physical disability or appearance can all be categorized as the same phenomenon because they all represent bias . . . .”\textsuperscript{338} This bias, he makes clear, represents a deviation from a rational standard rooted in neutral principles.\textsuperscript{339} As a result of the abstraction, the relationships between Anglos and other groups, such as African Americans and Hispanics, are all viewed through the lens of discrimination against racial minorities in legal and political dialogue.\textsuperscript{340} This view, that focuses upon numeric terms rather than particular historic contexts, represents a uniform understanding of “discrimination.”\textsuperscript{341} From this perspective, anyone can be a victim of racism and anyone can practice it because racism represents a “deviation from a universal norm of objectivity.”\textsuperscript{342} As a result, Peller explains, “power relations” and “historical contexts” have no relationship to the integrationist conception of racism.\textsuperscript{343} Instead, racism is understood as “possessing a race-consciousness” that sees race as a relevant factor in social relations.\textsuperscript{344}

Peller contrasts the integrationist perspective with the race-consciousness framework of black nationalism during the 1960s and 1970s.\textsuperscript{345} At the core of the disagreement is the conception of the person. Within liberal ideology the individual seeks independence from the constraints of group identity in social relations to attain freedom, while under nationalist ideology the basis of social relations flows out

\begin{footnotes}
\footnote{336}{Peller, \textit{supra} note 330, at 770.}
\footnote{337}{\textit{Id.} at 772.}
\footnote{338}{\textit{Id.} at 773.}
\footnote{339}{\textit{Id.}}
\footnote{340}{\textit{Id.}}
\footnote{341}{\textit{Id.}}
\footnote{342}{Peller, \textit{supra} note 330, at 773.}
\footnote{343}{\textit{Id.}}
\footnote{344}{\textit{Id.} at 773–74.}
\footnote{345}{\textit{Id.} at 773–95. Peller points out that the nationalists rejected integration on multiple grounds, often incomprehensible to integrationists because of their rejection of the liberal theories at the foundation of integrationist ideology.}
\end{footnotes}
of a particularist history that provides the basis for social meaning.\textsuperscript{346} From the nationalist perspective, “[n]ationhood, understood as a historically created community, assumes that social bonds of identity, recognition, and solidarity can be liberating and fulfilling . . . .”\textsuperscript{347} Under this view, the liberal notion of whites and blacks as essentially “the same” is rejected for the view that whites and blacks are different, “in the sense of coming from different communities, neighborhoods, churches, families, and histories . . . .”\textsuperscript{348} This outlook, Peller notes, flows from an understanding that successive generations of blacks and whites, experienced “dissimilar conditions of life,” which provided the basis for a group identity distinct from the traditional liberal notions governing group/individual relations.\textsuperscript{349} The nationalist argument, consequently, challenged the commitment to universality over particularity and the ostensible “objectivity” and “neutrality” in social relations that allegedly accompanied it.\textsuperscript{350}

The remainder of this review of race-consciousness focuses on the group relations dynamic implicit in the nationalist perspectives discussed by Peller. In an examination of school integration, Peller illustrates that nationalists sought local control of schools and resources to guide and direct the education of black children, thereby rejecting the integrationists’ idea that improved education for black children meant educational association with white children and assimilation into the predominant culture. Black nationalist Stokely Carmichael once explained: “The goal is not to take black children out of the black community and expose them to white middle-class values; the goal is to build and strengthen the black community . . . .”\textsuperscript{351} The integrationist sought the “integration” of blacks into the white community as individuals whose racial identity was irrelevant. Nationalists, on the other hand, wanted to develop the “black community” through the transfer of resources and power—integration

\textsuperscript{346} Id. at 793–95.
\textsuperscript{347} Id. at 794.
\textsuperscript{348} Peller, supra note 330, at 792.
\textsuperscript{349} Id. at 793.
\textsuperscript{350} Id. at 804. Peller points to two principle disagreements the nationalist perspective raised to those notions—the necessity and value of local control and the false objectivity of norms and standards developed under systems of racial exclusion and domination. Concerning false objectivity claims Peller explains, “[a]ccording to nationalists in the 1960s, these traditional categories of liberal and enlightenment thought do not constitute an aracial or culturally neutral standard that measures social progress in overcoming partiality, parochialism, and bias; rather they are simply elements in the dominant worldview of white elites.” Id. at 803.
\textsuperscript{351} Id. at 795.
had almost the opposite effect by redirecting resources and people away from the community.\footnote{Peller explains: Hence, rather than providing the material means for improving the housing, schools, cultural life, and economy of black neighborhoods, nationalists saw mainstream race reform as entailing ‘progress’ only through blacks moving into historically white neighborhoods, attending historically white schools, participating in white cultural activities, and working in white-owned and white-controlled economic enterprises. \textit{Id.} at 797.} The result of this trend, nationalists feared, would be the elimination of the black community.

The nationalists’ fears were not realized, but another travesty did result. African American communities and institutions lost very important resources and support essential to their survival.\footnote{\textit{Id.} at 845–46.} Many of these institutions and resources had been developed with a reparative element that sought to build educational, economic, and other resources denied under the “Reign of Terror.”\footnote{See Waterhouse, \textit{supra} note 22, for an examination of the reparative nature of historic black institutions.} Consequently, the redirection of resources and support away from African American communities led to the elimination of some and the evisceration of other institutions operating with a reparative mission.

This present reality coincides with the view of the historical subordination of blacks under the “Reign of Terror” adopted in this article. Rather than the “cognitive distortion of stereotype and prejudice” identified by Peller as the integrationist understanding of racism, the examination of law beginning this chapter suggests an analysis rooted in the development of laws and policies intended to preserve the benefits derived from black subordination.\footnote{The \textit{Dred Scott} opinion, the Fugitive Slave Act, and various laws designed to disenfranchise blacks reflected decisions intended to preserve material and psychological benefits derived from the subordination of blacks. \textit{Feagin, supra} note 61, at 24, 205. These laws represented group-based decision-making that constrained black life based on group membership rather than individual characteristics. \textit{See id.}} From the laws proscribing the education of enslaved and “free” blacks, to the “lawful” disenfranchisement of most blacks throughout the past three centuries, white racial domination was a way of preserving the socioeconomic benefits of racism. This article thus challenges the view that the American legal system will act contrary to what is perceived by the majority of whites as in their best interests. More specifically, the courts are unlikely to require, against the wishes of the white majority, that
today’s society take responsibility for repairing harms that the previ-
ous society deemed in their and their offspring’s best interests.

White baby boomers represent the chief living beneficiaries of the white domination of the previous centuries.\textsuperscript{356} These benefits, however, are rendered invisible in the liberal conception of race, so that accomplishments are viewed in exclusively individualistic terms that disregard superior access to resources and opportunities based on racial criteria for that generation and the preceding generations. Hence, contemporary power relations are based on neutral principles of objectivity that deny racial significance and instead are based on individual achievement. Justice Scalia demonstrates this view in his opinion in \textit{Adarand Constructors, Inc. v. Pena} in which he wrote:

Individuals who have been wronged by unlawful racial dis-

crimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual . . . . To pursue the concept of racial en-
titlement—even for the most admirable and benign of pur-
poses—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.\textsuperscript{357}

In his opinion, Justice Scalia associates race-consciousness under the Constitution with the racial subordination associated with historic white supremacy.\textsuperscript{358} This perspective adopted by Justice Scalia promotes a revisionist view of history that faults racially-based government action as the basis for historic injustice rather than the democratically expressed bias of the nation’s racial majority.\textsuperscript{359} Accordingly, Justice Scalia’s view equates race-neutral principles with racial justice—although the poll taxes, literacy tests, and grandfather clauses of the Jim Crow South show how racially-neutral legal principles can serve to protect racial majoritarian bias in the law.\textsuperscript{360}

\textsuperscript{356} As the living beneficiaries of lawful discrimination in wages, education, and politics during the first sixty-three years of the twentieth century, these persons directly benefited from the exclusion of blacks from economic, educational, and political competition. \textit{See} \textit{Feagin}, \textit{supra} note 61, at 175–92.


\textsuperscript{358} \textit{Id.} at 240–41.

\textsuperscript{359} \textit{Id.}

\textsuperscript{360} In light of the fact that these “race neutral” laws were passed by popularly elected legislators and upheld by numerous judges before they were overturned through legisla-
Under this view, slavery and discrimination are characterized as acts of individual choice based on race-consciousness rather than a systematic racial subordination secured through neutral principles of law. Contrary to this claim, the legal survey at the beginning of the article illustrates that discrimination was regularly a collective decision provided through “democratic” and Constitutional means. See Black Protest Thought, supra note 75, at 196–201.

These collective decisions take the form of legislation and judicial reasoning that allows and frequently requires black subordination. Consider the laws prohibiting black education, employment in certain trades, ownership of property, and voting as a few examples. Persons treating blacks as equals in these instances were subject to punishment by the community for breaching the norm that demanded black subordination. In this context, it becomes more apparent how racism, defined as an individual expression of bias, serves to hide the collective nature of white domination and the governmental and institutional structures that maintained it. Contemporary American society rejects responsibility for the historical decisions of some of its citizens to enslave blacks and otherwise discriminate against them. It has yet, however, to accept that slavery and segregation reflected the collective choice of the predominant white society as expressed through the decisions of democratically elected local, state and federal officials.

By employing a race conscious view, the necessity that blacks turn to themselves to repair the harms of slavery, segregation, and legal subordination suffered by their communities becomes more apparent. To see reparations manifest, blacks, like the Baudelaire children in Lemony Snicket’s tale, will have to look to their own resources and abilities to secure the remediation of longstanding harms. In
making that decision, blacks do not divorce themselves from aid or assistance of others or even the use of the legal system, when viable. Instead, they recognize their own centrality in determining their own future and their ability to prosper despite the series of unfortunate events behind them and probably ahead of them.

Conclusion

To meet the goal of reparations to provide black communities with the educational, political, and economic resources necessary to enable their members to exercise and enjoy their civil liberties, I propose a plan of institutional development.\(^{366}\) The development I propose facilitates the enjoyment of freedom envisioned by abolitionists Benjamin Franklin and Wendell Phillips and embellished by moral philosopher Timothy Jackson in his discussion of *libertas*.\(^{367}\) This approach takes full account of the limitations of the legal system in securing community remediation, in accord with the political sensibilities of Ralph Bunche and the “racial realism” of Derrick Bell. Finally, the solutions proposed herein embrace the race-consciousness counseled by Gary Peller as a vital component of an institutional approach to reparations.

Community well-being and the quality of life of community members have been shown to correlate with the strength of community institutions.\(^{368}\) In the most depressed and blighted communities in America, the educational, political, and economic institutions range from weak to non-existent.\(^{369}\) To repair the longstanding harms resulting from the “Reign of Terror,” I advance the creation of new and the reformation of existing black educational, political, and economic institutions. My proposal begins with the creation of three independent trust funds: the Educational Fund, the Political Fund, and the Economic Fund. Each of these funds will operate in accordance with a governing

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\(^{366}\) See supra Part I.

\(^{367}\) See supra Part I.


\(^{369}\) Peach, *supra* note 368, at 245–47.
Educational reparations would focus on improving the education provided to the youth of black communities. To accomplish this, I suggest that the Educational Fund provide grants to aid in the establishment of charter schools in black communities. These schools would be open to all children, but their curricula would be geared toward meeting the educational needs of black children. Similar to businesses funded by the Economic Trust, schools gaining support would show their commitment to promoting the values adopted by the Education Trust. Trust-sponsored schools would retain their freedom to design their charters in different ways as long as the values of the Education Trust are included. School types should vary widely to include diverse educational foci such as math and science, performing arts, international language and culture, and public service among others. Along with seeding the creation of new charter schools, the Educational Fund would support the creation and expansion of private academies open to all students but dedicated to meeting the educational needs of black youth. My proposal also includes substantial funding for targeted programming by historically black colleges and universities. These grants would cover scholarships and fellowships for students, endowed chairs for faculty, as well as reparations related research. The Educational Fund would also make scholarships and fellowships available to undergraduate, graduate, and professional students at majority institutions who commit to black institutional service.

The focus of the Political Fund would be the creation and development of black political institutions. This trust would have the responsibility for funding institutions and organizations that enhance the political awareness of black community members and increase their political influence. While these organizations would demonstrate a commitment to the communal and other values proffered by the Political Fund, they could use a variety of means and approaches tailored to their primary constituency. Black political institutions would likely begin with a local and regional focus by organizing the black electorate in the southern states and a selection of large cities with substantial populations.

370 The values anchoring the charters of the three trusts emanate from the African American holiday of Kwanzaa. Unity, Purpose, Collective Work and Responsibility, Cooperative Economics, Faith, Creativity, and Self Determination serve as communal values to guide trust operations.

371 Along with the communal values identified above excellence, other values would become necessary parts of sponsored schools charters.
black populations.\textsuperscript{372} Sponsored institutions would develop constituent support by designing local and regional goals and objectives in light of the political ideologies of black communities.\textsuperscript{373} One organization might be a non-partisan issue oriented membership organization. This organization would operate through local chapters and a national policy office. It will conduct grass roots organizing to inform residents about the political process and then support their involvement around local and regional issues. Young adult involvement, education, and organizing should be a fundamental strategy of this organization. By training and involving youth, the organization furthers two critical objectives: 1) strengthening its volunteer workforce, and 2) building a foundation for future political organizing.

My proposal also includes the creation of a Bethune Washington Institute to support the scholarship mandate of the reparations charter. The Institute would operate like the Brookings Institute as a non-partisan organization committed to supporting the research of a wide range of scholars related to questions of reparations. Scholars with full-time commitments to other institutions would serve as affiliates working along with Institute fellows in conducting research, publishing findings and making policy recommendations based on that research. Beyond governmental policy, Institute scholarship would address the political, educational, economic, and legal policies of private groups and individuals. Through the work of the Institute, black educational, political, and economic institutions committed to reparations would receive meaningful insights into fulfilling their objectives. Furthermore, fellows can address relevant questions regarding cultural, medical, and familial reparations through research, publication and the use of developed networks of dissemination.

In the economic realm, I propose that the trust support the development of new and existing black businesses that demonstrate a commitment to the goal of reparations. Enhancing the quality and number of black businesses serves two purposes: providing jobs and increasing the availability of quality goods and services to community members. Specific businesses ideas could include such as a national newspaper and a major production studio for the creation of television and cin-
ema productions, collaborative business ventures with Caribbean and African nations, and development programs focused on training black youth for future business ownership and management.

These programs would compose a communal approach to reparations rooted in the formation and reformation of black institutions. This approach differs from the prevailing notions of reparations focused on legal theory or congressional enactment, in its independence from governmental action and its emphasis on institutional development. Rather than a court-ordered remedy or a legislative design, my proposal begins and ends with black communal action. In this sense blacks, like the Baudelaire orphans, will use their own abilities to secure their futures in the world. In the event that those who owe them duties and responsibilities meet their obligations, they can accept their acts with pleasure as a complement to their own efforts. By focusing on their own abilities and initiative, however, blacks need not risk the disappointment and damage that might result from the ongoing series of unfortunate legal events.

374 It is worth noting that this approach does not foreclose monetary awards obtained from legal action by the judiciary or legislative branches of the American government. My proposal, however, allows the integration of legally based awards into the funding scheme for the three reparations trust funds contemplated within my proposal, though it is not dependent upon such awards. See Waterhouse, supra note 22 for a full elaboration of my proposal, including the institutional mechanisms, motivations, and funding methodology.
FREE SPEECH TO HAVE SWEATSHOPS?
HOW KASKY V. NIKE MIGHT PROVIDE A
USEFUL TOOL TO IMPROVE SWEATSHOP
CONDITIONS

JULIA FISHER*

Abstract: In 1998, consumer activist Marc Kasky sued Nike, claiming that Nike’s statements in the media denying sweatshop conditions in its factories were false advertising. This case, culminating in a controversial California Supreme Court decision, has attracted much criticism on its implications of free speech. Little attention has been paid to how *Nike v. Kasky* might be a useful tool for anti-sweatshop advocates, who have up until now had great difficulty holding companies accountable for their sweatshop labor conditions. This Note examines the anti-sweatshop movement and its lack of effective private enforcement techniques. It then explores how the California Supreme Court in *Kasky* expanded the commercial speech doctrine. Lastly, it analyzes how *Kasky* might be used by anti-sweatshop advocates against corporations with sweatshop conditions. This Note concludes that *Kasky* is an imperfect tool but one that, when used in moderation, would not have a strong chilling effect on corporate speech.

Introduction

On Saturday, November 8, 1997, Marc Kasky picked up a copy of the *New York Times* and was struck by the front page headline, “Nike Shoe Plant in Vietnam is Called Unsafe for Workers.”¹ The story detailed how a disgruntled Nike employee had leaked a damning internal audit of a Nike factory in Vietnam, uncovering numerous illegal and dangerous working conditions.² Massive amounts of carcinogens were discovered in the air of the factory, and employees were found to routinely work ten and a half hour days, six days a week, in violation of

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² Greenhouse, *supra* note 1, at A1, D2. The *New York Times* received the report in very circuitous fashion. *Id.* at D2. A Nike employee gave the internal audit to Dara O’Rourke, an employee of the United Nations Industrial Development Organization, who inspects factories in Vietnam. *Id.* O’Rourke gave the audit to The Transnational Resources and Action Center, who then made the report available to the *New York Times*. *Id.*
Vietnamese law.\textsuperscript{3} Seventy-seven percent of the workers suffered from respiratory diseases, likely caused by the poor air quality in the factory.\textsuperscript{4} The article contrasted the audit’s findings with statements from Nike spokesperson Vada Manager, who commented that “there is a growing body of documentation that indicates that Nike workers earn superior wages and manufacture product under superior conditions.”\textsuperscript{5}

The article sparked a strong reaction within Mr. Kasky, a San Francisco consumer activist who had stopped buying Nike shoes several years earlier because of their sweatshop practices.\textsuperscript{6} Mr. Kasky had recently been heartened when Nike released a code of conduct, which mandated certain health, safety, worker’s rights and environmental standards by which all foreign Nike factories must abide.\textsuperscript{7} The \textit{New York Times} article revealed to Mr. Kasky that these codes were seemingly a sham.\textsuperscript{8} It also made him feel uneasy because, as he explained later, “[it] struck me as false advertising. . . . The Nike code of conduct is marketing their products. They’re marketing it to me under false grounds.”\textsuperscript{9} Kasky then contacted an old friend, lawyer Alan Caplan, to discuss bringing a claim against Nike under California’s false advertising and unfair competition laws.\textsuperscript{10}

This was the genesis of \textit{Kasky v. Nike}, a false advertising case that sparked a controversial 2002 California Supreme Court decision con-

\textsuperscript{3} \textit{Id.} at A1, D2. In the Tae Kwange Vina Factory, which makes 400,000 shoes a month and employs 9,200 workers, the audit found that

\begin{quote}
[c]arcinogens that exceeded local legal standards by 177 times in parts of the plant and that 77 percent of the employees suffered from respiratory problems. The report also said that employees at the site . . . were forced to work 65 hours a week, far more than Vietnamese law allows, for $10 a week.
\end{quote}

\textit{Id.}

\textsuperscript{4} \textit{Id.}

\textsuperscript{5} \textit{Id.}

\textsuperscript{6} Parloff, \textit{supra} note 1, at 108. While by profession Kasky assisted cities by transforming unused military bases into community cultural centers, he had filed two similar false advertising lawsuits in the past. \textit{Id.} One was against Perrier for claiming its water was spring water, another was against Pillsbury Co.’s labeling certain products as “San Francisco style” when they were actually produced in Mexico. \textit{Id.} Kasky made no money from either lawsuit. \textit{Id.}

\textsuperscript{7} \textit{Id.}

\textsuperscript{8} \textit{Id.}

\textsuperscript{9} \textit{Id.}

\textsuperscript{10} \textit{Id.} At the time Kasky filed the suit, both laws allowed claims to be filed by either a public prosecutor or a private attorney general who is defined as “any person acting for the interests of the general public.” \textit{Kasky v. Nike}, Inc., 45 P.3d 243, 249 (Cal. 2002). Therefore, private citizens could file such suits even though they may not have been personally injured. \textit{Id.}
cerning the blurry line between free speech and commercial speech. Kasky alleged that many of Nike’s factual assertions concerning its labor practices abroad were false and misleading—assertions Nike made in a letter to the editor of the New York Times, a press release, a posting on Nike’s website, and a letter to university presidents and athletic directors. That the false advertising suit addressed statements made during a public relations campaign, and not in the traditional context of an advertisement, destined Kasky for controversy. Nike reframed the case as a First Amendment issue, claiming its assertions were not commercial speech and therefore could not be be challenged under the false advertising law.

To the chagrin of many free speech advocates and corporations, the California Supreme Court disagreed, holding that Nike’s statements lose full First Amendment protection when they “concern facts material to commercial transactions—here, factual statements about how Nike makes its products.” In a surprising move, the U.S. Supreme Court initially agreed to hear Kasky on appeal, but after oral arguments issued a decision that the writ of certiorari was “improvidently granted,” and declined to discuss the merits of the case.

In the aftermath of the Supreme Court’s nonruling, little discussion has followed regarding how the California Supreme Court’s decision in Kasky might provide anti-sweatshop activists with an innovative way to hold corporations accountable for their labor conditions in fac-

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11 See Nike, Inc. v. Kasky, 539 U.S. 654, 654 (2003); Kasky, 45 P.3d at 262; Rosemary Feitelberg & Joanna Ramey, Nike Supreme Court Case Tests Free Speech, Footwear News, Feb. 10, 2003, at 12, available at http://lexis.com. Confusingly, the order of the names of the parties switched from Kasky v. Nike to Nike v. Kasky on appeal to the U.S. Supreme Court. See Nike, 539 U.S. at 654; Kasky, 45 P.3d at 243. For clarity’s sake, this Note will consistently refer to the case as Kasky in the main text, since it was the California Supreme Court’s decision that potentially created this new tool for activists, but citations will follow Bluebook protocol.

12 Nike, 539 U.S. at 672; Kasky, 45 P.3d at 248. Specifically, Kasky claimed Nike made six misrepresentations as to its labor practices: 1) that workers who make Nike shoes are never subject to corporal punishment or sexual abuse, 2) that Nike workers were treated in accordance with applicable local government laws relating to wages and hours, 3) that Nike workers were also treated in accordance with applicable local laws relating to health and safety, 4) that Nike pays double the minimum wage in Southeast Asia, 5) workers who produce Nike products receive free meals and health care, and 6) that Nike guarantees a living wage for all workers who make Nike products. Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App. 2000).

13 Kasky, 93 Cal. Rptr. 2d at 857.

14 Kasky, 45 P.3d at 261.

15 Nike, 539 U.S. at 655, 657.
tories overseas. Kasky exploited the uncertainty of the commercial speech doctrine to create a novel cause of action: suing corporations based on their false statements concerning labor conditions, not based on the actual conditions themselves. Although such lawsuits address only speech, they may still be very attractive to labor activists, who historically have had little success in seeking legal recourse against U.S.-based corporations for their labor practices abroad. A proliferation of Kasky-style lawsuits, however, risks chilling corporate speech so that companies may decline to discuss labor conditions in their factories. Indeed, this chilling may already be occurring, as many corporations and advertising groups declared after Kasky that they would refrain from publicly discussing any important public issues.

This Note will examine the utility of Kasky-style lawsuits to challenge or change corporate labor practices both abroad and at home. Part I discusses the anti-sweatshop movement of the 1990s that functions as the context for Kasky. Part II examines the inadequacy of existing techniques anti-sweatshop activists use to try to hold corporations accountable for unfair labor conditions abroad and domestically. Part III explores the commercial speech doctrine, focusing on the California Supreme Court’s holding in Kasky with regard to the doctrine, and

16 See, e.g., Thomas C. Goldstein, Nike v. Kasky and the Definition of Commercial Speech, in 2003 Cato Sup. Ct. Rev. 63, 63 (2003). Generally, discussion has centered on critiquing the California Supreme Court’s commercial speech analysis and the United States Supreme Court’s strange disposal of the case. See id. Corporations and advertising groups have also bemoaned that the case will cause corporations to withdraw from public debate for fear of lawsuits from activist groups. See David M. Bigge, Bring on the Bluewash: A Social Constructivist Argument Against Using Nike v. Kasky to Attack the UN Global Compact, 14 Int’l Legal Persp. 6, 17 (2004); Theresa Howard, Advertisers Say Ruling Leaves Them in Limbo, USA Today, July 27, 2003, at 9B.

17 Howard, supra note 16, at 9B.

18 See Lena Ayoub, Nike Just Does It—And Why the United States Shouldn’t, 11 DePaul Bus. L.J. 395, 422 (1999); Lisa G. Balthazar, Government Sanctions and Private Initiatives: Striking a New Balance for U.S. Enforcement of Internationally Recognized Workers’ Rights, 29 Colum. Hum. Rts. L. Rev. 687, 714 (1998). Kasky settled three months after the Supreme Court’s decision, with Nike agreeing to pay $1.5 million to the Fair Labor Association, an organization that was created by companies, international rights groups, and universities to monitor labor conditions in companies’ factories abroad. Russell Mokhiber, Nike’s Come-From-Behind Win, Multinational Monitor, Oct. 1, 2003, at 7, available at http://lexis.com. Although this action disappointed labor activists, the consequence was that the California Supreme Court’s controversial decision became good law. Id.

19 See Nike, 539 U.S. at 682 (Breyer, J., dissenting); Kasky, 45 P.3d at 271 (Brown, J., dissenting).

20 Howard, supra note 16, at 9B. Indeed, Nike in the wake of the lawsuit declared it would not release its corporate responsibility report for the year of 2002 and would limit its participation in public events and media engagements in California. Mokhiber, supra note 18.
the implications of the U.S. Supreme Court’s subsequent decision not to discuss the merits of the case. Part IV examines how the holding in Kasky could be used by labor activists, and compares the utility of Kasky-style lawsuits to other current methods. This section also addresses the potential chilling effect of such lawsuits on corporations’ speech about labor conditions abroad and at home. Finally, this Note concludes that although Kasky is an imperfect instrument, anti-sweatshop activists could use Kasky-style lawsuits in moderation to effect change in corporate behavior without unduly chilling corporations’ speech.

I. THE FOUNDATION: THE ANTI-SWEATSHOP MOVEMENT

Kasky can be understood best within the context of the massive anti-sweatshop movement that has snowballed in the U.S. over the last decade. Composed of a loose coalition of college students, labor unions, human rights groups, churches and others, the movement began as a reaction to reports of terrible labor conditions in the factories of American corporations both abroad and at home. These diverse groups have the common goal of trying to improve labor conditions and have used a variety of techniques ranging from consumer boycotts to lawsuits with limited success thus far. Any discussion of the anti-sweatshop movement, however, must be grounded in an examination of the economic conditions that have sparked the reemergence of sweatshops both within the United States and abroad.

Although outsourcing has recently become a hot political topic, apparel and textile companies have been outsourcing their production facilities since the early 1970s. From 1961 to 1996, the percentage of foreign-made clothes sold in the United States rose from 6% to over 60%. The domestic garment industry has shifted its production from America to developing nations for three reasons: low priced imports from abroad, cheap labor, and favorable trade rules. In the 1960s, low priced apparel imports from abroad flooded the United States, causing

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22 Moberg, supra note 21, at 15.

23 See id. at 15–19.


26 Ross, supra note 24, at 22.
a crisis in the domestic garment industry.\textsuperscript{27} In order to remain competitive, manufacturers had three options: “automate, relocate, or evaporate.”\textsuperscript{28} As a result, many industries chose to relocate abroad because labor was considerably cheaper in developing nations, and corporations could operate there with a minimum of government regulation and scrutiny.\textsuperscript{29} Moreover, domestic trade regulations encouraged the garment industry to do so.\textsuperscript{30} Since 1963, a special provision in the U.S. Tariff Schedule allows pre-cut fabric to be exported for assembly as a garment and then reimported to the United States, with duties being charged only for the value added to the garment overseas.\textsuperscript{31} Further, during the 1980s, President Reagan’s free trade policies reduced or eliminated tariffs for goods coming from the Caribbean and Central America, providing another incentive for garment manufacturers to move abroad.\textsuperscript{32}

An unintended consequence of the apparel industry relocating most of its production facilities abroad has been the revival of the sweatshop, both abroad and in the United States.\textsuperscript{33} A “sweatshop” is generally defined as a business with grossly substandard working conditions,

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\textsuperscript{27} Id. \\
\textsuperscript{28} Id. The nature of the apparel industry precludes complete mechanization, which encourages outsourcing overseas. Id. Cloth is a flexible and pliant material, which makes its use in mechanical assembly lines difficult. Michael Piore, \textit{The Economics of the Sweatshop, in No Sweat, supra} note 24, at 135, 138. Also, styles in the apparel industry often change rapidly by the season. Id. This constant change makes the investment in machinery hard to justify because this flexibility can be more easily achieved by a seamstress, a sewing machine, and patterns. Id. Since the seamstress can be paid less abroad, companies have an incentive to outsource manufacturing overseas. \textit{See infra} note 29 and accompanying text. \\
\textsuperscript{29} Ross, \textit{supra} note 24, at 22; Appelbaum & Dreier, \textit{supra} note 21, at 72–74. Whereas in the United States a manufacturer must pay $5.25 per hour to each employee, in Honduras, wages are typically 31¢ an hour, and in Haiti, 12¢. Ross, \textit{supra} note 24, at 24. Even though most countries have minimum wage laws, prohibitions against child labor, and safety regulations, many nations are so eager for foreign investment that they do little to enforce such laws. Id. \\
\textsuperscript{30} Ross, \textit{supra} note 24, at 22. \\
\textsuperscript{31} Id. \\
\textsuperscript{32} Id. at 22–23. Many of these policies were the result of Reagan-era initiatives to fight communism in the nation’s backyard. Id. at 22. During the 1970s, many socialist governments were taking hold across the Caribbean and Central America. Id. at 23. President Reagan pushed for greater free trade within the region, in the hope that this would lessen the allure of socialism by raising the standard of living. Id. In this spirit, Congress passed the Border Industrialization Initiative, which established free trade zones in several Central American countries, and the Caribbean Basin Initiative, which gave tariff free status to many products coming from the Caribbean. Id. at 22. Both policies were meant to encourage United States industries to invest abroad. Charles Kernaghan, \textit{Paying to Lose Our Jobs, in No Sweat, supra} note 24, at 79, 81. \\
\textsuperscript{33} Piore, \textit{supra} note 28, at 135; Ross, \textit{supra} note 24, at 12, 22.
\end{flushright}
where management regularly violates one or more laws governing child labor, wages and hours, or health and safety.\textsuperscript{34} Those apparel manufacturers who relocated abroad found substandard working conditions were tolerated and, in some ways, encouraged by host governments.\textsuperscript{35} Reports of working conditions that were grossly substandard—such as forced birth control on female workers, the suspicious deaths of union workers, routine twenty hour work days—began to trickle out of many garment factories in developing nations in the 1990s.\textsuperscript{36} At the same time, those manufacturers who remained in the U.S. were forced to cut costs to remain competitive with the lower-priced imports.\textsuperscript{37} Many did so by adopting illegal practices such as paying below the minimum wage, and ignoring overtime provisions and health regulations.\textsuperscript{38} 

In the early 1990s, unions, human rights groups, and consumer groups began to respond to the reports of terrible treatment in many garment factories.\textsuperscript{39} These groups attempted to get the attention of the

\textsuperscript{34} Gen. Accounting Office, Data on the Tax Compliance of Sweatshops 1 (1994), available at http://www.unclefed.com/GAOReports/ggd94-210fs.pdf; Ross, supra note 24, at 10–14. No federal law or regulation defines sweatshop. Gen. Accounting Office, supra at 1. Historically, the term sweatshop derives from the system of subcontracting apparel work that flourished in the United States at the turn of the 20th century. Piore, supra note 28, at 135; Ross, supra note 24, at 13. In this system, instead of having garments fully assembled in one factory, the garment would be sent to several different contractors who had shops to do one specific task on the garment, such as sewing linings into coats. See David Von Drehle, Triangle: The Fire That Changed America 40 (2003); Ross supra note 24, at 13. The term sweatshop arises from the idea that these contractors literally “sweated” the profits out of the workers by forcing them to work long hours for little pay. Von Drehle, supra at 36. In the 1990s, the General Accounting Office created a working definition of sweatshop as “a business that violates more than one federal or state law governing wages and hours, child labor, health or safety, workers compensation, or industry registration.” Gen. Accounting Office, supra at 1.

\textsuperscript{35} Howard, supra note 25, at 157 (for an explanation of why host countries are reluctant to enforce or improve working conditions, see infra notes 109–12 and accompanying text).

\textsuperscript{36} Ross, supra note 24, at 25–27.

\textsuperscript{37} See Piore, supra note 28, at 135.

\textsuperscript{38} Id. at 12. It is estimated that one third of New York City’s shops are sweatshops, as are ninety percent of the shops in Los Angeles. Id. Many citizens were justifiably shocked by such reports, particularly because the United States had fought and been fairly successful in eradicating sweatshop conditions domestically during the first third of the twentieth century. Piore, supra note 28, at 135. The Progressive Movement first began trying to improve the conditions of sweatshops during the early twentieth century, but sweatshops were not truly obliterated until the New Deal and passage of the Fair Labor Standards Act of 1938. Id. at 135, 139.

\textsuperscript{39} Kernaghan, supra note 32, at 44. In Europe, an anti-sweatshop movement began in the 1980s when a European department store chain retaliated against sweatshop workers organizing for better treatment in the Philippines. Maria Gillen, The Apparel Industry Partnership’s Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor’s New
mainstream media and force changes in corporate behavior, with few victories.\textsuperscript{40} One rare success was a campaign of the National Labor Committee (NLC) in 1992.\textsuperscript{41} The NLC became aware of abuses taking place in Central American factories, which were owned by American companies and supported by tax incentives through the Agency for International Development (USAID).\textsuperscript{42} In an election year that focused on the economy, the NLC successfully framed the problem as one of U.S. tax dollars supporting the outsourcing of jobs to Central America.\textsuperscript{43} “60 Minutes” aired a segment on the situation in Central American factories, prompting presidential candidate Bill Clinton to speak on the topic, and Congress to pass a law forbidding such incentives.\textsuperscript{44}

In the mid-1990s, however, two events focused the public and media attention on the many human rights violations occurring in sweatshops abroad and at home.\textsuperscript{45} In August 1995, federal and state agents raided a garment factory in El Monte, a suburb of Los Angeles, and found seventy-one Thai immigrants being held in involuntary servitude.\textsuperscript{46} These workers, many of whom had been held in captivity for years behind barbed wire fences, were forced to work up to eighty-four hours a week making clothes bound for Filenes, Macy’s and Nordstrom’s.\textsuperscript{47} This incident sparked outrage throughout the nation,

\textit{Clothes?}, 32 N.Y.U. J. Int’l L. & Pol. 1059, 1067 (2000). A boycott against the department store chain was organized, and after its partially successful conclusion, an organization called the Clean Clothes Campaign arose. \textit{Id.} This group has chapters in almost a dozen European countries and focuses on empowering garment workers abroad. \textit{Id.}

\textsuperscript{40} See Kernaghan, \textit{supra} note 32, at 44; \textit{All Things Considered: Toycott} (NPR radio broadcast Dec. 17, 1996). For example, in 1991, the AFL-CIO, together with the National Consumer’s League and Tibetan rights groups, initiated a “toycott” of toys made in China to protest the use of child labor and forced prison labor to produce these toys. Tom Brown, \textit{Groups Announce Chinese ‘Toycott’—Slave Labor, Child Labor Alleged in Manufacture}, \textit{Seattle Times}, Nov. 25, 1991, at B4, available at http://lexis.com. The toycott transpired on and off for about five years without any real results. \textit{All Things Considered, supra} (discussing that after five years the toycott had been largely unsuccessful).

\textsuperscript{41} Kitty Krupat, \textit{From War Zone to Free Trade Zone}, in \textit{No Sweat}, \textit{supra} note 24, at 51, 72–73. The NLC was originally formed to protest the AFL-CIO’s support of U.S. policies in El Salvador and Nicaragua and had formed many contacts with labor leaders in Central America. \textit{Id.} at 64–68. During these campaigns, the NLC became aware that many United States companies were relocating their manufacturing facilities to Central America, with terrible work conditions. \textit{Id.} at 65–66. USAID set up many incentives to encourage such relocation, including cheap loans, and tax rebates. \textit{Id.} at 72–73.

\textsuperscript{42} Krupat, \textit{supra} note 41, at 72–73.

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} at 73.

\textsuperscript{45} Appelbaum & Dreier, \textit{supra} note 21, at 74.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} Ross, \textit{supra} note 24, at 29; Appelbaum & Dreier, \textit{supra} note 21, at 74.
and was only overshadowed by the revelation that child labor in Honduras produced Kathie Lee’s clothing line at Wal-Mart. On April 29, 1996, a fifteen-year-old worker from a factory that manufactured the Kathie Lee line testified at a congressional hearing as to the terrible working conditions. Kathie Lee herself initially denied both knowledge and responsibility as to how her clothing line was produced, but in the face of an intense media storm, she quickly changed course. She not only apologized to the worker, but also urged Wal-Mart to establish an independent monitoring system of its factories abroad, and she has since become an anti-sweatshop advocate.

These stories popularized the anti-sweatshop movement, drawing diverse groups together to mobilize campaigns on the issue. The Interfaith Center for Corporate Responsibility and Domini Social Investments began offering stockholder resolutions demanding a halt to labor rights abuses. Unions, such as Union of Needle Trades, Industrial and Textile Workers (UNITE) and the International Textile, Garment and Leather Workers’ Foundation began major campaigns to organize sweatshop workers domestically and abroad. Consumer groups such as the NLC and Human Rights Watch continued highly publicized campaigns against the GAP, Philips–Van Heusen, Disney and Star-

48 Ross, supra note 24, at 27. These revelations about Kathie Lee’s clothing line were orchestrated by the National Labor Committee. Krupat, supra note 41, at 59–61.
49 Krupat, supra note 41, at 59–60. Fifteen year old Wendy Dias testified that at Global Fashion, there are about 100 minors like me—thirteen, fourteen years old—some even twelve. On the Kathie Lee pants, we were forced to work almost every day from 8 am to 9 pm. . . . Working all these hours, I made at most 240 lempiras, which is 31 U.S. cents. . . . The supervisors insult us and yell at us to work faster. . . . The bathroom is locked and you need permission and can use it twice a day.

Id. at 60.
50 Id. at 61.
51 Id. at 61–62.
52 Moberg, supra note 21, at 15.
54 Moberg, supra note 21, at 16. Organizing both abroad and at home, however, has been difficult due to the nature of the garment industry, where shops can be shut down or opened with ease. Appelbaum & Dreier, supra note 21, at 71. When UNITE tried to organize sweatshops that produced garments for Guess, in Los Angeles, Guess removed its business from those shops and began contracting with shops in Mexico. Moberg, supra note 21, at 16. Guess’ move was entirely legal, as the National Labor Relations Act only protects unionized employees against the actions of employers. See National Labor Relations Act of 1935, 29 U.S.C. § 158 (2005). Here, Guess did not employ the workers, but was instead a customer of the independent garment shops that did employ them.
bucks.\textsuperscript{55} Unexpectedly, college student groups also came to play a major role in the anti-sweatshop movement.\textsuperscript{56}

The anti-sweatshop movement benefited greatly from the support and participation of college students.\textsuperscript{57} Student activist groups such as the United Students Against Sweatshops targeted a very narrow slice of the garment industry: the collegiate licensing industry.\textsuperscript{58} This industry, which includes large corporations such as Nike, Champion and Fruit of the Loom, is responsible for manufacturing the sweatshirts, caps, tee-shirts and other clothing articles that bear the logo of various universities.\textsuperscript{59} Anti-sweatshop student activists demanded that their university’s clothing be manufactured in safe working conditions for fair wages and during reasonable hours.\textsuperscript{60} The first success came in 1997 at Duke University, where student activists convinced the administration to require all licensing companies to adhere to a code of conduct forbidding child labor, requiring the minimum wage, and allowing visits by independent monitors.\textsuperscript{61} This victory sparked student activists on 100 campuses across the country to begin their own campaigns, with varying degrees of success.\textsuperscript{62}

Despite the anti-sweatshop movement’s large coalition, the movement’s achievements have been limited mostly to attracting media attention and gaining support from the public, as opposed to instituting meaningful reform.\textsuperscript{63} This is due to the limitations of the consumer boycott—the technique of choice for most of the anti-sweatshop movement.\textsuperscript{64} Boycotts succeed in bringing attention and embarrassment to the targeted company, and usually wring out concessions from the

\textsuperscript{55} Moberg, \textit{supra} note 21, at 15.

\textsuperscript{56} Appelbaum & Dreier, \textit{supra} note 21, at 71–78.

\textsuperscript{57} \textit{Id.} The anti-sweatshop student movement is arguably the most pervasive example of student activism since the South African divestment campaign of the 1980s. \textit{Id.} at 71.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} \textit{Id.} at 75–76.

\textsuperscript{60} \textit{Id.}

\textsuperscript{61} Appelbaum & Dreier, \textit{supra} note 21, at 71.

\textsuperscript{62} \textit{Id.} Student activists have used a variety of techniques to convince the administrations of the campuses to fight against sweatshops. \textit{Id.} at 75–76. These range from 1960s-style occupations of administrative buildings, to less disruptive publicity stunts such as fashion shows discussing the conditions in which college clothes were made to presenting the college chancellor with a giant check for 16 cents—the hourly wage of factory workers in China. \textit{Id.} at 75.

\textsuperscript{63} Moberg, \textit{supra} note 21, at 15–19.

\textsuperscript{64} \textit{Id.} at 16.
company such as promises to improve labor practices.\textsuperscript{65} After the media storm has moved on, companies often put little effort into changing labor practices, or revert back to old ways, leaving activists to fight the same fights over again.\textsuperscript{66} The lack of long-term enforcement mechanisms, either through governmental framework or the court systems, allows corporations to avoid genuine reform.\textsuperscript{67} As the next section shows, anti-sweatshop activists have had limited success working within existing governmental framework, using the courts to enforce agreements, or holding companies financially accountable for unjust labor conditions.\textsuperscript{68}

II. Legal and Governmental Barriers to Improving Sweatshop Conditions

Although the anti-sweatshop movement has attempted to improve sweatshop conditions using many different strategies, thus far most have provided limited achievements.\textsuperscript{69} Domestically, federal and state laws that address the problems of sweatshops are not enforced effectively, and anti-sweatshop advocates have had limited success using the courts to curb sweatshop abuses for a variety of reasons.\textsuperscript{70} Techniques to fight foreign sweatshops are even more limited, due to the com-

\textsuperscript{65} Id.; \textit{The Shame of Sweatshops}, \textit{Consumer Rep.}, Aug. 1999, at 18, 19. Usually those concessions take the form of adopting codes of conduct for their factories. Moberg, \textit{supra} note 21, at 16–18.

\textsuperscript{66} Moberg, \textit{supra} note 21, at 16; \textit{The Shame of Sweatshops}, \textit{supra} note 65, at 19. For example, Liz Claiborne adopted a code of conduct in the face of pressure in 1994. \textit{Id.} In 1998, however, workers in several factories in El Salvador continued to work eighty-five hours a week, seven days a week. \textit{Id.} These workers told the NLC that when monitors came to look at the factories, the factories were cleaned and painted. \textit{Id.}

\textsuperscript{67} See Moberg, \textit{supra} note 21, at 18.

\textsuperscript{68} Id. at 15–19.

\textsuperscript{69} Id.

\textsuperscript{70} Edna Bonacich & Richard P. Appelbaum, Behind the Label: Inequality in the Los Angeles Apparel Industry 221–61 (2000). While \textit{Kasky} is aimed at corporations’ labor abuses abroad, a discussion of barriers to curbing domestic sweatshop abuses is important for two reasons. \textit{Kasky} v. Nike, Inc., 45 P.3d 243, 247–48 (Cal. 2002). First, the problems of domestic and foreign sweatshops are interrelated. \textit{See supra} notes 39, 55 and accompanying text. It was the apparel industries’ move overseas that created the resurgence of sweatshops domestically. \textit{See supra} notes 39, 55 and accompanying text. Second, the anti-sweatshop movement has largely viewed sweatshops abroad and domestically as being two facets of the same problem. \textit{See, e.g., Piore, supra} note 28, at 135. The Apparel Industry Partnership (AIP) was created to deal with both problems, and the resulting Fair Labor Association (FLA) inspects both domestic and foreign factories. \textit{See Bonacich & Appelbaum, supra} at 242–43; Fair Labor Association Public Reporting, http://www.fairlabor.org/all/transparency/reports.html (last visited Jan. 13, 2006).
plexities of international law. The United States currently is under no treaty obligation to hold its corporations accountable for their labor conditions abroad, and enforcement mechanisms within host countries are weak. Nor do American courts currently provide an effective venue for anti-sweatshop advocates to take U.S.-based corporations to task for their abuses abroad. Private initiatives, such as corporations adopting codes of conduct, have had only limited success. The following section explores these issues in greater detail.

A. Domestic Sweatshops

Due to the lack of effective public enforcement of labor laws, anti-sweatshop advocates have attempted to use the courts to make corporations accountable, and also to advocate for new, more effective laws. Both strategies have had mixed results thus far.

Strong federal labor laws address the problematic conditions of domestic sweatshops, but current enforcement efforts are not sufficient to conquer the problem. The Fair Labor Standards Act of 1938 (FLSA) established within the United States a minimum wage, a forty-hour work week, overtime compensation, and a prohibition of child labor. It also included the “Hot Goods” provision, which makes it a crime for any person to transport or sell an item made in a factory that violated any of the above provisions. Strong governmental enforcement of the “Hot Goods” provision virtually eliminated sweatshops in the United States from the 1930s to the 1970s. Afterwards, the “Hot Goods” provision fell into disuse until Clinton Administration Labor Secretary Robert Reich began enforcing it again in the early 1990s as a way to hold manufacturers, as well as shop owners, liable.

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71 See infra notes 119–31 and accompanying text.
72 See infra notes 113–18 and accompanying text.
73 See infra notes 119–25 and accompanying text.
74 See Gillen, supra note 39, at 1064.
75 Ross, supra note 24, at 31; Moberg, supra note 21, at 15–19.
76 Moberg, supra note 21, at 15–19.
77 Id. at 18.
79 Id. § 215. The Department of Labor can bring suit against such persons, with penalties including a $10,000 fine and jail time. Id. § 216(a). It also establishes a cause of action for employees to sue and receive double their unpaid minimum wage or unpaid overtime compensation, plus attorney’s fees. Id. § 216(b).
80 Moberg, supra note 21, at 18.
81 Bonacich & Appelbaum, supra note 70, at 228. While sweatshop owners are typically the ones to violate wage and hour provisions, clothing manufacturers are usually able to escape liability by claiming that they only contract for work with these owners and are not
of Labor (DOL) has used this technique to force manufacturers to sign compliance agreements guaranteeing that they would only work with contractors who comply with the FLSA, and promising to monitor to ensure conformity.\textsuperscript{82} Although these compliance agreements have recovered 1.3 million dollars in back wages for more than 3000 sweatshop workers in California alone, the DOL’s approach has only impacted a small portion of the sweatshop industry.\textsuperscript{83} This is due primarily to limited resources—the DOL has only 800 inspectors nation-wide and conducts only 300 investigations per year for the more than the estimated 22,000 sweatshops in the nation.\textsuperscript{84} Thus, anti-sweatshop advocates must turn to some mechanism of private enforcement to meaningfully alleviate domestic sweatshop conditions.\textsuperscript{85}

The anti-sweatshop movement has had greater success using the court system to hold manufacturers accountable for domestic sweatshop conditions.\textsuperscript{86} Many activists assist sweatshop workers to initiate suits based on violations of the FLSA wage and hours provisions, hoping to set useful precedent to hold retailers accountable.\textsuperscript{87} For example, the captive Thai workers from El Monte initiated a suit against the retailers of clothing they had manufactured, claiming that the retailers were negligent per se based on the “Hot Goods” provision.\textsuperscript{88} When the retailers attempted to have this claim dismissed, the judge ruled the claim was viable, leaving this avenue open as a means of holding retailers and manufacturers accountable to future plaintiffs.\textsuperscript{89}

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\textsuperscript{82} \textit{Bonacich} \& \textit{Appelbaum}, \textit{supra} note 70, at 229–30.
\textsuperscript{83} \textit{Id.} at 236; \textit{Ross}, \textit{supra} note 24, at 28–29.
\textsuperscript{84} \textit{Bonacich} \& \textit{Appelbaum}, \textit{supra} note 70, at 233; \textit{Ross}, \textit{supra} note 24, at 28–29. The Bush Administration has continued many of the enforcement practices that Reich began in the 1990s, as the Department of Labor recovered $6 million in back pay for garment workers in 2002. Press Release, Dep’t of Labor, Labor Department Enforcement Reaches 10-Year High (Dec. 12, 2002), http://www.dol.gov/opa/media/press/esa/ESA2002694.htm.
\textsuperscript{85} \textit{See} \textit{Ross}, \textit{supra} note 24, at 28–29.
\textsuperscript{86} \textit{Bonacich} \& \textit{Appelbaum}, \textit{supra} note 70, at 308–09.
\textsuperscript{87} \textit{See id.; see, e.g., Bureerong v. Uvawas}, 959 F. Supp. 1231, 1236 (D.Cal. 1997).
\textsuperscript{88} \textit{Bureerong}, 959 F. Supp. at 1236.
\textsuperscript{89} \textit{Id.} at 1236–39. The defendants challenged this claim early on, and the judge allowed it to be dismissed based on insufficiency of evidence because the plaintiffs had not alleged all four elements of negligence per se under California law. \textit{Id.} at 1236–37. The claim was dismissed without prejudice, however, because the judge decided that even though the “Hot Goods” provision did not explicitly create a private form of action, precedent allowed federal and state statutes to set the standard of care in state negligence per se.
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The utility of such lawsuits is limited, however, because anti-sweatshop activists often face difficulty in finding workers who are willing to sue. Many sweatshop workers in the United States are illegal immigrants who fear deportation if they come forward. The situation is exacerbated by the 1986 Immigrant Reform and Control Act, which created higher penalties for employers who hire illegal immigrants, thus limiting the pool of employers willing to hire illegal immigrants. Therefore, immigrants are desperate for whatever work they find; a fact exploited by employers who still hire illegal immigrants. These employers then can create illegal substandard working conditions because they know they are unlikely to be reported. Moreover, following the Supreme Court’s decision in Hoffman Plastics Compounds v. NLRB, few remedies may be available to illegal immigrants for certain workers’ rights violations.

In Hoffman Plastics, the Supreme Court held that the National Labor Relations Board (NLRB) was not allowed to award backpay to an illegal alien even though he made out a successful National Labor Relations Act (NLRA) violation. They reasoned that awarding backpay in this case was beyond the discretion of the NLRB, because it violated the spirit and intention of the Immigration Reform and Control Act of 1986 by encouraging future violations of immigration law. Subsequent federal court decisions, however, have interpreted Hoffman Plastics very narrowly, as foreclosing an award of backpay to illegal aliens only under the NLRA. In Rivera v. Nihco, 364 F.3d 1057, 1066 (9th Cir. 2004); Flores v. Amigon, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002). In Rivera, the 9th Circuit distinguished Hoffman from the Title VII case in front of it, reasoning that Hoffman Plastics limited the discretion of the NLRB, but not that of federal courts, who have the authority to interpret and weigh all laws. Moreover, many courts have limited the ability of defendants to request immigration status during discovery, believing such requests would chill the reporting of civil rights and wage violations. See Rivera, 364 F.3d at 1057. Thus, Hoffman Plastics’ impact is unclear.
alien fired for being a union supporter because of his immigration status.96 Not only does Hoffman Plastics further deter lawsuits by illegal immigrants for other workplace violations, it suggests the fundamental reluctance on the part of courts to provide full labor rights to illegal immigrants.97

Anti-sweatshop advocates also have the option of turning to the legislative process to create state or federal laws to ease the problems they encounter in pursuing lawsuits.98 On the state level, union advocates have had some legislative success in creating joint liability for the manufacturers and the retailers complicit in the violation of labor laws.99 In New York, for example, unions successfully lobbied for the Joint Liability Act of 1998, which holds manufacturers liable for sweatshop conditions at contracted factories.100 On the federal level, however, a similar bill called the Stop Sweatshops Bill, which would have held both retailers and manufacturers jointly liable for contractor sweatshop violations, was introduced in 1996 but never made it out of committee.101 Sweatshop advocates could also turn their attention to lobbying for increased Department of Labor funding for sweatshop law enforcement, or ensuring remedies for illegal immigrants who come forward with labor law violations.102 So far, however, the sweatshop

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96 535 U.S. at 140.
97 See id. at 150. But again, lower courts have been more protective of immigrant rights. See supra note 95.
98 Bonacich & Appelbaum, supra note 70, at 309.
99 See id.
100 See N.Y. Lab. Law § 345-a(1) (Consol. 2004); Bonacich & Appelbaum, supra note 70, at 309. The law sets up a damages level of 200% of the wages owed for repeating violators, and creates a misdemeanor felony for such violators, with a fine of $20,000. Bonacich & Appelbaum, supra note 70, at 245.
101 Stop Sweatshops Act of 1996, H.R. 4166, 104th Cong. § 14A (1996); Bonacich & Appelbaum, supra note 70, at 244; Ross, supra note 24, at 31.
102 See Hoffman Plastics Compounds v. NLRB, 535 U.S. 137, 140 (2002); Bonacich & Appelbaum, supra note 70, at 31, 233. Another loophole ripe for legislative change is the special status of the American territories of Saipan and American Samoa. These territories are allowed to sew a “made in the U.S.A.” label onto garments and ship to the United States duty-free, but have the authority to set their own lower minimum wage and have more lax immigration policies. Jennifer Lin, Island Sweatshops Ignore U.S. Laws, FLORIDA TIMES-UNION, Feb. 28, 1998, at A1, available at http://lexis.com. These territories host many sweatshops, where “guest workers” live and work in deplorable conditions, and could be improved by a federal law applying federal immigration and labor laws to these islands. Id. While such laws have been proposed in Congress, the Republican Party in the House of Representatives has staunchly blocked these proposals. Id. Former House Majority Leader Dick Armey labeled such bills as counter to the “principles of the Republican Party.” Id.
movement has done little lobbying on the federal level for such changes.  

B. International Sweatshops

Anti-sweatshop advocates face greater difficulty in holding U.S.-based corporations accountable for their actions in foreign nations, due to complexities in international law and the realities of free trade in the developing world.  

Host countries are unlikely to enforce adequate labor conditions, despite international obligations to do so. Nor do they have much incentive to compel adequate working conditions, because international governmental organizations have shied away from dealing with labor issues. Compounding this problem, the United States thus far has been unwilling to apply its labor laws extra-territorially to U.S.-based corporations abroad. Moreover, private enforcement mechanisms, such as corporate codes of conduct, have thus far been inadequate.

Host nations of sweatshops are reluctant to strongly enforce their own labor laws primarily due to economic competition with other developing nations. Developing nations are desperate for foreign investment, which could improve the economy and living conditions. They compete with other developing nations to attract investment by offering incentives such as economic subsidies and minimal regulation of labor and safety. Thus, despite treaties requiring these nations to enforce certain labor standards, few countries do so for fear of a competitive disadvantage with other developing nations.

Nor do existing international trade or labor institutions provide a viable framework for the anti-sweatshop movement to ensure compli-

103 See Lin, supra note 102, at A1.
104 See Ayoub, supra note 18, at 424.
105 Id.
107 Ayoub, supra note 18, at 424.
108 Gillen, supra note 39.
109 Ayoub, supra note 18, at 422–23.
110 Id.
111 Id.
112 Id. For example, some 142 countries have ratified the Minimum Age Convention, which sets the minimum age for employment to be 15 years old, or in some exceptional cases, 14 years old. Minimum Age Convention, June 26, 1973, ILO Doc. C138. Among the signatories is Honduras, home to the notorious Kathie Lee sweatshop scandal involving child workers as young as twelve years old. See id.; supra note 50 and accompanying text.
ance with labor standards. The World Trade Organization (WTO), which has the power to sanction member countries for unfair trade practices, has not defined ‘unfair trade practices’ to include labor rights issues. While the United States and the European Union have pushed for such a definition, delegates from developing countries have successfully prevented the adoption of trade sanctions to enforce labor standards. Instead, the WTO has delegated jurisdiction over labor issues to the International Labor Organization (ILO), a United Nations affiliated agency that sets international labor standards through a series of international conventions. Although the ILO has broad power to sanction signatory nations that violate a convention, it has rarely invoked this power, and instead has sought compliance through public pressure and threats of lessened privileges within the ILO.

This failure of the international community to deal with the problem of sweatshops has led many activists to try to use the American court system to hold U.S.-based corporations accountable for labor rights abuses abroad. These activists have had limited success, however, because courts are generally reluctant to apply American labor

113 See Ayoub, supra note 18, at 417–20.
114 DiMatteo, supra note 106, at 97. Nonetheless, the WTO allows countries to pass laws that restrict imports for reasons that protect public morals and safety concerns. Id. at 126. Thus, it is possible that the United States could circumvent the current definition of “unfair trade practices” by passing a law requiring imported products be produced in certain labor conditions, if such a law was explicitly for the purpose of protecting safety and public morals. See id. Such a law might survive a WTO challenge on these grounds. See id.
115 Id. at 121. One way to reform the WTO would be to construe the International Labor Organization convention violations as social dumping (article VI). Id. at 125. Social dumping is the idea that labor violations are an unfair subsidy on the cost of a country’s products, putting other countries that do avoid labor violations at a competitive disadvantage. Id. at 125–26. The WTO currently has provisions that allow dumping to give rise to a cause of action within WTO jurisdiction. Id. Thus, including labor violations as dumping might provide a cause of action to bring countries with many labor violations to task. See id.
116 Balthazar, supra note 18, at 699, 701–02; DiMatteo, supra note 106, at 123.
117 Kimberly Ann Elliot & Richard B. Freeman, Can Labor Standards Improve Under Globalization? 102 (2003). The ILO has broad power to impose economic and other sanctions, although it has never actually exercised this power. Id. at 103. While the ILO often threatens to sanction countries to comply, it has only actually sanctioned a country once. Id. at 104. Complaints were brought against Burma for forced labor in 1996, and, after years of continued non-compliance, in 2000, the ILO imposed sanctions against Burma. Id. at 105. These sanctions called on member states to “review their relationship with the Government of Myanmar and to take appropriate measures.” Id. Most nations took no action, however, and forced labor continues in Burma to this day. Id. at 106. The ILO rarely takes strong measures because most ILO member nations balk at imposing economic sanctions. See id.
118 Balthazar, supra note 18, at 714.
laws extraterritorially.\textsuperscript{119} The plain language of some labor laws, such as the FLSA, explicitly excludes application of the law in a “foreign country.”\textsuperscript{120} Moreover, courts will presume that a law applies only in the United States unless there is an explicit statement of Congress’ intent to apply a law extraterritorially.\textsuperscript{121} For example, in \textit{Equal Employment Opportunity Commission v. Arabian America Oil Co. (Aramco)}, the Supreme Court found that Title VII of the 1964 Civil Rights Act did not protect American citizens working for American corporations abroad because the language of the bill never stated its intent to apply extraterritorially.\textsuperscript{122} Congress quickly responded by amending Title VII to define “employee” as “a citizen of the United States,” which provided the necessary explicit intent.\textsuperscript{123} Following this congressional action, Title VII became the only American labor law to apply abroad.\textsuperscript{124} Its utility in compensating for sweatshop abuses abroad is limited, however, because it applies only to American citizens.\textsuperscript{125}

Although Congress has passed laws that grant foreign nationals certain legal rights with regard to labor conditions internationally, labor activists have faced resistance within the U.S. court system in enforcing such laws.\textsuperscript{126} For example, Congress amended the U.S. Generalized System of Preferences (GSP)—a trade act that allows products from developing countries duty-free access to the U.S.—to give developing countries benefits only if they were taking steps to improve labor conditions for workers.\textsuperscript{127} When unions filed suit against the federal government for failing to enforce these provisions, however, their suit was dismissed based on lack of standing, thus limiting the availability of the GSP to protect foreign workers.\textsuperscript{128} Similarly, labor activists have faced great difficulty in using the Alien Torts Claims Act (ATCA), which allows aliens to bring a tort claim based on a violation of a U.S. treaty

\textsuperscript{121} Gibney & Emerick, supra note 119, at 132.
\textsuperscript{124} Gibney & Emerick, supra note 119, at 123–34.
\textsuperscript{125} See id. at 134.
\textsuperscript{126} See Balthazar, supra note 18, at 707–12.
\textsuperscript{127} Id. at 707–08. Specifically, these rights were supposed to include freedom of association, the right to organize, a prohibition on forced labor, and acceptable minimum wages and conditions, and minimum age for employment. Id. at 708.
\textsuperscript{128} Id. at 712.
against U.S. nationals. Although the ATCA has been successfully used against foreign officials involved in human rights violations, the courts have never allowed an ATCA claim against a U.S.-based corporation for labor rights abuses, due to lack of subject matter jurisdiction, lack of standing, and lack of state action.

Furthermore, the United States has no international obligation to regulate the actions of U.S.-based corporations abroad that violate international treaties. The United States is not a signatory to the International Covenant on Economic, Social, and Cultural Rights (ICESC), the Convention on the Elimination of Discrimination Against Women (CEDAW) or the Convention on the Rights of the Child (CRC)—the three fundamental international treaties that address labor rights. The United States also has refused to ratify ten of the eleven basic labor rights conventions of the ILO. Ratification of these treaties would at least form a basis for governmental responsibility to regulate the actions of U.S.-based corporations and perhaps strengthen the possibility of a successful claim under the Alien Torts Claims Act. Absent such a legal basis to take American corporations to task for labor violations abroad, labor activists have had to search for other ways to regulate corporate conduct.

131 Ayoub, supra note 18, at 398, Balthazar, supra note 18, at 708.
132 Ayoub, supra note 18, at 398. While these treaties lack sanctioning ability, they form the basis of obligations for signatory nations to pass laws banning child labor (CRC), establishing safe working conditions (CEDAW, ISESC) and ensuring that workers receive an adequate wage (ISESC). Id. at 414–16. The treaties suggest that nations must regulate the conduct of corporations based in their country as well. Id. Currently, however, these covenants are treated mostly as statements of purpose. Balthazar, supra note 18, at 698. Professor Ayoub suggests, however, that the International Covenant of Civil and Political Rights, which the U.S. has signed, creates a duty for the United States to regulate the behavior of U.S.-based corporations and their subsidiaries abroad in terms of labor conditions. See Ayoub, supra note 18, at 398–99.
133 Balthazar, supra note 18, at 708. The United States has signed the Abolition of Forced Labor Convention, but has refused to ratify conventions dealing with freedom of association, equality of opportunity and treatment, and others. Id. at 708–09. The United States has maintained that it does not need to ratify these conventions because it has already passed domestic laws that guarantee labor rights exceeding those mandated by the conventions. Id. at 708. The ILO cannot enforce the standards against a country that has not signed the convention. Id. at 700.
134 See 28 U.S.C. § 1350 (2005); Balthazar, supra note 18, at 698.
Increasingly, labor activists have turned to pressuring corporations to adopt codes of conduct, which are private initiatives in which corporations set standards for the labor conditions of their factories abroad. Anti-sweatshop codes of conduct typically mandate that the corporation will only do business with a contractor who eschews child labor or forced labor, sets a minimum wage and maximum hour caps, and maintains some level of health and safety in the workplace. Many corporations have adopted these codes, often after negative publicity generated by the anti-sweatshop movement, in an effort to show consumers that they do care about sweatshop conditions. Nonetheless, these codes generally lack effective monitoring and enforcement mechanisms, and thus actually do little to improve sweatshop conditions. Generally, monitoring is done by employees of the corporation, who are biased and unlikely to report factory conditions accurately. If a corporation does find violations within its factories, there are no mechanisms to make these violations public, and so the corporation faces few sanctions. Moreover, when a corporation does find a violation, their reaction is often to terminate their contract with the offending factory, effectively punishing the workers who reported the violations by eliminating their jobs.

The Fair Labor Association (FLA), a nonprofit organization that provides a unified code of conduct and monitoring for many companies, was created to address some of the problems with individual codes of conduct. The FLA grew out of the Apparel Industry Partnership (AIP), a taskforce of garment manufacturers, unions and human rights groups created by President Clinton in 1996 to investigate the sweatshop issue. In 1998, the AIP taskforce created the FLA to run a moni-

135 Balthazar, supra note 18, at 718. The practice is modeled on the Sullivan Principles, a code of conduct mandating nondiscrimination policies that was adopted by twelve U.S.-based firms doing business in South Africa during the anti-apartheid movement. Id. at 716–17.
136 Ayoub, supra note 18, at 403–04; Gillen, supra note 39, at 1069–70.
138 Ayoub, supra note 18, at 405.
139 Id. at 405–06.
140 Id. at 405.
141 Bonacich & Appelbaum, supra note 70, at 306. This is exactly what happened during an NLC campaign against The GAP in 1995. Id. After making public violations at a GAP contracted factory, GAP announced it would take its work away from that factory. Id.
142 Appelbaum & Dreier, supra note 21, at 71–72; Moberg, supra note 21, at 18–19.
143 Bonacich & Appelbaum, supra note 70, at 242–43; Appelbaum & Dreier, supra note 21, at 74. The garment industry members of the AIP generally were companies who had been the target of media campaigns exposing sweatshop practices in these factories. See
onitoring system for member companies based on a unified code of conduct, and make the results public.\textsuperscript{144} Several corporations in the apparel industry have embraced the FLA as a way to demonstrate their commitment to the sweatshop issue to the public.\textsuperscript{145}

Nonetheless, many in the anti-sweatshop movement doubt the legitimacy of the FLA.\textsuperscript{146} The AIP-member unions and the Interfaith Center of Corporate Responsibility dropped out of the FLA, claiming that the code of conduct was far too lax because it denied workers a living wage and set the maximum number of working hours per week at sixty.\textsuperscript{147} The code of conduct also allows contractors to evade this maximum number of hours in “extraordinary business circumstances,” and bars child labor only below the age of fourteen.\textsuperscript{148} The FLA’s monitoring mechanism has also been criticized because companies get to choose their external monitors, who examine only five percent of the company’s factories and are not required to disclose the locations of inspected factories.\textsuperscript{149}

Similar difficulties arise in the efforts to improve sweatshops within the United States and abroad. In both arenas, public enforcement of labor laws has not been effective at eradicating the problem.\textsuperscript{150} Domestically, the federal government has not allotted sufficient funds to fully enforce the law.\textsuperscript{151} Internationally, host countries are reluctant to enforce their own laws, and multinational enforcement mechanisms are weak.\textsuperscript{152} Nor has private enforcement been fully effective in either

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\item[\ref{145}] Gillen, \textit{supra} note 39, at 1070.
\item[\ref{146}] See Moberg, \textit{supra} note 21, at 16–18.
\item[\ref{147}] Bonacich & Appelbaum, \textit{supra} note 70, at 244.
\item[\ref{148}] Gillen, \textit{supra} note 39, at 1075–76, 1083.
\item[\ref{149}] \textit{Id.} at 1091; Bernstein, \textit{supra} note 144. While the FLA monitors few factories and does not disclose the name of such factories, it does publicize on its website specific results of factory inspections broken down by company. See Fair Labor Association, \textit{supra} note 70.
\item[\ref{150}] See \textit{supra} notes 77–84, 118–25 and accompanying text.
\item[\ref{151}] See \textit{supra} notes 84–85 and accompanying text.
\item[\ref{152}] See \textit{supra} notes 109–17 and accompanying text.
\end{enumerate}
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arena. In the United States, advocates have had some success, but their efforts are hindered due to the difficulty in finding workers to come forward. Internationally, advocates have struggled to find a vehicle to enforce labor standards in American courts, and the use of codes of conduct such as the FLA have thus far been inadequate in curbing the problem. Since public enforcement seems to be weak, activists need an effective method to privately enforce labor standards. Thus, suits such as Kasky, which use speech as the grounds for a suit, may provide an alternative that activists could utilize to encourage corporations to enact meaningful changes.

III. KASKY’S EFFECT ON COMMERCIAL SPEECH

Considering the dearth of effective techniques to reign in sweatshop abuses both abroad and at home, Kasky may provide an innovative cause of action for sweatshop activists to hold corporations accountable. Understanding Kasky’s importance requires a brief overview of the commercial speech doctrine, specifically focusing on definitions of commercial speech.

A. COMMERCIAL SPEECH DOCTRINE: DEFINITIONS

Modern jurisprudence is clear that commercial speech is protected by the First Amendment at a lower level than other kinds of speech.

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153 See supra notes 86–97, 126–30, 135–49 and accompanying text.
154 See supra notes 86–97 and accompanying text.
155 See supra notes 118–31, 135–49 and accompanying text.
156 See supra notes 86–97, 118–31, 135–49 and accompanying text.
158 Erwin Chemerinsky, Constitutional Law Principles and Policies 903 (2d ed. 2002). This lesser level of protection gives the government greater latitude to regulate commercial speech. Id. Until the 1970s, the Supreme Court had held that commercial speech was not protected at all by the First Amendment. See Valentine v. Chrestensen, 316 U.S. 52, 54–55 (1942); Chemerinsky, supra at 1044. In Bigelow v. Virginia, however, the Court reversed this long-held conclusion, finding that a state law prohibiting advertisements of abortion services was unconstitutional. 421 U.S. 809, 829 (1975); Chemerinsky, supra at 1045. Since then, the Court has protected commercial speech in certain settings, developing what is essentially a four part intermediate scrutiny test to determine if government regulation is constitutional. See Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980); Chemerinsky, supra at 1058. First, a court must determine whether the commercial speech is false or misleading, or concerning illegal activities, and thus is not protected by the First Amendment. Cent. Hudson, 447 U.S. at 566. If the speech is protected by the First Amendment, the court then must determine if the government’s interest in restricting such speech is substantial. Id. If it is substantial, the court must then determine whether the law in question “directly advances” this asserted government inter-
but the Supreme Court has never given a clear or comprehensive
definition of commercial speech. In an early treatment of the issue,
the Court considered commercial speech to be a statement that “pro-
pose[s] a commercial transaction.” This definition is vague and
probably overly narrow, as it would exclude descriptions of products
and services that the Supreme Court later found to be commercial
speech. In Central Hudson Gas & Electric Corp. v. Public Service
Commission, the Court defined commercial speech in a different way, as an
“expression related solely to the economic interests of the speaker
and its audience.” This definition is probably overly broad, because
it might implicate areas traditionally fully protected by the First
Amendment, such as a newspaper or a book publishing company.
The Court’s most clear definition of commercial speech came in Bol-
ger v. Young Drug Products Corp., where the Court defined commercial
speech under a totality of circumstances test. This test considers
whether the speech is some sort of advertisement, whether it refers to
a specific product, and whether the speaker had an economic motiva-
tion for making the speech. Nonetheless, the Bolger test may be too
narrow in terms of the word “advertisement.” While Bolger suggests
that an advertisement is defined as speech occurring within a traditional print/media setting, the Court has since expanded commercial

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est. If the law does directly advance the interest, the court must also inquire as to
whether the law is “more extensive than necessary” to achieve this government interest. Id.

159 Chemerinsky, supra note 158, at 1047–48.
(1976). In each case, the Court tends to invent a definition which best fits with the product
in question. See id. at 749. In Virginia State Board, a Virginia law forbid pharmacists from
advertising the price of prescription drugs. Id. In that case, the speech in question really
did “no more than propose a commercial transaction” because it was literally an offer of a
price. See id. at 762.

161 Chemerinsky, supra note 158, at 1047. Subsequent cases have recognized items
such as an alcohol content label on a beer bottle, statements on a business card, and
statements on a financial letterhead as commercial speech, which all fall beyond the nar-
row purview of proposing a commercial transaction. See Rubin v. Coors Brewing Co., 514
U.S. 476, 481–82 (1995) (alcohol label); Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation

162 Cent. Hudson, 447 U.S. at 561.
163 Chemerinsky, supra note 158, at 1048.
165 Id. The court found that the combination of all three factors in this case was enough
to determine that it was commercial speech, while no one factor on its own was enough to
support that conclusion. Id.
166 Chemerinsky, supra note 158, at 1048.
speech to include some speech that occurs outside a traditional advertising format.\footnote{See, e.g., Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation Bd. of Accountancy, 512 U.S. 136, 142 (1990) (accepting statements on business cards and a letterhead as commercial speech); Bolger, 463 U.S. at 66. In Bolger, the speech in question was mass mailings to the public that included flyers promoting condoms and discussing the benefits of contraceptives in general. Id. at 62. This fits into a more traditional conception of an advertisement. See id. at 66.}

Despite the ambiguity of the definition of commercial speech, the Supreme Court has clearly held that only truthful commercial speech is protected by the First Amendment.\footnote{See Bolger, 463 U.S. at 69 (finding that “the State may deal effectively with false, deceptive, or misleading sales techniques”); Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980) (finding that “[f]or commercial speech to come within that provision [of the First Amendment], it at least must concern lawful activity and not be misleading”); Chemerinsky, supra note 158, at 1054. This idea is so universally accepted that it has become incorporated into the first part of the Central Hudson test. See supra note 158. Interestingly, the Court has come to this conclusion even though the Supreme Court has never directly heard a challenge to a false advertising law on First Amendment grounds. Chemerinsky, supra note 158, at 1054.}

Thus, the states and the federal government are allowed to regulate false and misleading advertising without any interference.\footnote{Bolger, 463 U.S. at 69; Virginia State Bd. of Pharmacy, 425 U.S. 748, 771–72 (1976).} Although most false speech is protected,\footnote{See, e.g., N.Y. Times v. Sullivan, 376 U.S. 254, 271–73 (1964) (finding First Amendment protection for false statements contained in an editorial advertisement).} false commercial speech differs from other kinds of false speech in fundamental ways that justifies its unprotected status.\footnote{Chemerinsky, supra note 158, at 1054–55.} The truthfulness of commercial speech can be more easily verified than other kinds of speech because commercial speech is typically objective information that the advertiser possesses.\footnote{Va. State Bd., 425 U.S. at 772 n.24 (concluding, “[t]he truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone.”); see also id. at 777 (Stewart, J., concurring) (concluding that, “[t]he commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser’s access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.”).} Further, commercial speech is seen as less likely to be chilled than other kinds of speech because of the motive of commercial speakers.\footnote{44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (finding that “the greater ‘hardiness’ of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation”); Va. State Bd., 425 U.S. at 772 n.24.} And lastly, commercial speech is in-
tended to sell products and increase profits, so even if the false commercial speech is regulated, commercial speakers will continue to speak in order to continue selling.\textsuperscript{174} Moreover, false commercial speech is uniquely harmful because it distorts the marketplace by misleading consumers.\textsuperscript{175} The government has a right to protect consumers from economic harms that stem from Congress’ power to regulate commercial transactions in general.\textsuperscript{176}

One area of uncertainty within the commercial speech doctrine is what level of protection should be given to expressions that combine commercial and non-commercial speech.\textsuperscript{177} The Court has frequently commented that a commercial speaker who “links a product to a current public debate” does not necessarily gain full protection of the First Amendment.\textsuperscript{178} Otherwise, the Court has said, advertisers would be able to “immunize” false advertising from government oversight by linking the product to a current public debate.\textsuperscript{179} Nonetheless, in \textit{Riley v. National Federation of the Blind}, the Supreme Court found that commercial speech and non-commercial speech were “inextricably intertwined” in such a way that the whole expression had to be fully protected by the First Amendment.\textsuperscript{180} Later, the Court limited this holding in \textit{Board of Trustees, State University of New York v. Fox}, finding that commercial and noncommercial speech are “inextricably intertwined” only if a state or federal law mandates that the two kinds of speech have to be combined in the same statement.\textsuperscript{181} Due to these varying approaches, the issue of how courts should treat statements

\begin{footnotes}
\item[175] \textit{Rubin v. Coors Brewing Co.}, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (holding that false advertising laws ensure that “that consumers are not led, by incomplete or inaccurate information, to purchase products they would not purchase if they knew the truth”).
\item[176] \textit{44 Liquormart}, 517 U.S. at 499 (Stevens, J., concurring) (concluding that “the State’s power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is ‘linked inextricably’ to those transactions”).
\item[179] \textit{Bolger v. Young Drug Products Corp.}, 463 U.S. 60, 68 (1983) (reasoning “a company has the full panoply of protections available to its direct comments on public issues, so there is no reason for providing similar constitutional protection when such statements are made in the context of commercial transactions”).
\item[180] \textit{Riley}, 487 U.S. at 795–96. There a North Carolina statute mandated that, prior to a solicitation, professional fundraisers must declare the percentage of money their company raised that actually went to charity. \textit{Id.} at 786 n.2.
\end{footnotes}
that combine commercial and noncommercial speech remains ambiguous.\textsuperscript{182}

B. Kasky v. Nike \textit{in the California Supreme Court}

The California Supreme Court took on \textit{Kasky} precisely because the fact pattern invoked the unclear definition of commercial speech and the difficult situation of speech that combines commercial and noncommercial elements.\textsuperscript{183} Kasky sued Nike under California’s anti-competition law and false advertising laws, alleging in his complaint that Nike made statements about its labor practices to the public of California that were false and misleading.\textsuperscript{184} Specifically, Nike claimed that its workers abroad received on average double the local minimum wage, and worked in conditions that were in compliance with local safety laws.\textsuperscript{185} Nike made these claims in press releases, letters to the editor, letters to university presidents and athletic directors, and newspaper advertisements, along with statements of opinion.\textsuperscript{186} In the trial court, Nike filed demurrers to the complaint, alleging that application of California’s anti-competition and false advertising laws in this case was barred by the U.S. Constitution because Nike’s statements were protected under the First Amendment.\textsuperscript{187} The trial court dismissed Kasky’s claim, and the Court of Appeals affirmed, finding that Nike’s statements were not commercial speech.\textsuperscript{188}

\textsuperscript{182} See \textit{Fox}, 492 U.S. at 474; \textit{Riley}, 487 U.S. at 786 n.2.
\textsuperscript{183} See \textit{Kasky v. Nike, Inc.}, 45 P.3d 243, 247 (Cal. 2002).
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Kasky v. Nike, Inc.}, 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App. 2000). Nike challenged Kasky at the complaint stage, meaning no discovery or trial had been conducted. \textit{Id.} at 858. Thus, when Nike filed a motion to have the complaint dismissed, the trial court up to the Supreme Court had to assume that Kasky’s allegations within the complaint were true—i.e., that Nike had indeed misrepresented facts about labor conditions in its factories. \textit{Id.} at 857 (“On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, appellate courts assume the truth of all facts properly pleaded by the plaintiff-appellant.”). But at this point no evidence had been introduced to show that Nike had actually made false statements. \textit{Id.}
\textsuperscript{188} See \textit{id.} at 857, 863. The Court of Appeals believed that Nike’s statements did not convey information about their products, but instead were intended to create a “favorable corporate image.” \textit{Id.} at 860. The court found Nike’s statements were not made as a product advertisement but as part of the public debate about labor practices in the context of globalization. \textit{Id.} at 860–61. Moreover, the court believed that many of the expressions Kasky challenged did not meet two of the \textit{Bolger} commercial speech definition factors: advertising format and reference to specific product. \textit{Id.} at 860.
The California Supreme Court reversed, finding Nike’s statements to be commercial speech in a controversial opinion that sidestepped the unclear definitions of commercial speech entirely.\(^{189}\) Instead, the California Supreme Court created a new test to determine a subset of commercial speech: false commercial speech.\(^{190}\) Due to the procedural stance of the case, a motion to dismiss the complaint, the California Supreme had to assume at the onset that Nike’s speech was indeed false.\(^{191}\) Thus, the court believed the question was not whether Nike’s speech was commercial or not, but whether it was false commercial speech or false noncommercial speech.\(^{192}\) Therefore, the court did not need to use the existing definitions for commercial speech.\(^{193}\) Since the U.S. Supreme Court treats false commercial speech differently than commercial speech in general, the California Supreme Court believed a definition for only false commercial speech could be construed from precedent.\(^{194}\) Using the rationale that false commercial speech should be unprotected, along with U.S. Supreme Court general definitions of commercial speech, the California Supreme Court created a three-part “limited-purpose” test to determine the existence of false commercial speech only.\(^{195}\)

To be false commercial speech under the limited purposes test, the first two elements require that the speaker of the challenged expression must be engaged in commerce, and the intended audience must be potential buyers or customers of the speaker’s goods or services.\(^{196}\) The


\(^{190}\) See id. The California Supreme Court labeled the limited-purpose test as identifying “whether particular speech may be subjected to laws aimed at prevented false advertising or other forms of commercial deception.” Id. at 256. For brevity and clarity’s sake, this Note describes the limited purpose test as identifying false commercial speech. Any speech that may constitutionally be regulated under false advertising laws must be false commercial speech. See supra note 168 and accompanying text. To be clear, this definition does not determine the veracity of speech. See Kasky, 45 P.3d at 256.

\(^{191}\) See id. at 247. Because the Supreme Court was ruling on a motion to dismiss at the complaint stage, the California Supreme Court had to accept for the purposes of review that Kasky’s allegations were true. See supra note 187 and accompanying text. Thus, the court had to assume Nike’s speech was false. See Kasky, 45 P.3d at 247.

\(^{192}\) See id. at 256. False commercial speech is unprotected by the First Amendment which false noncommercial speech is generally fully protected by the First Amendment. See supra note 168 and accompanying text.

\(^{193}\) Kasky, 45 P.3d at 256. While the court does not make its reasoning clear, it seems to believe that the definition of commercial speech is broader than the definition of false commercial speech. See id.

\(^{194}\) See supra notes 168–76 and accompanying text.


\(^{196}\) Id. at 256.
California Supreme Court derived these two elements from U.S. Supreme Court definitions of commercial speech. The court reasoned that these elements were implicit in the “commercial transaction” definition of commercial speech because it implies that commercial speech is a communication between a buyer and a seller. Moreover, the court found the Bolger definition, which included advertising and economic motivation of the speaker, also implies that the intended audience must be consumers and the speaker must be someone engaged in commerce. Advertisements typically are speeches about products or services directed at potential consumers of those goods. The economic motivation factor suggests that the speaker is engaged in commerce, hoping that the speech will lead to a commercial transaction.

If the first two elements are met, a challenged expression is false commercial speech if the “factual content” of the speech is commercial in nature. The factual content is found to be commercial if it makes representations about the speaker’s products or services for the purpose of promoting sales of that product or service. The California Supreme Court based this third element in part on the Bolger definition. The court argued that the third factor of the Bolger definition—referring to a specific product—has been interpreted very broadly to include many facts about goods and services beyond just price. This interpretation suggests that any factual content will be considered a “product reference.” The California Supreme Court also based this third element in the rationales for denying full First Amendment protection to false commercial speech. The U.S. Supreme Court has said that commercial speech is both easier to verify,

197 Id. Specifically, as mentioned below, the California Supreme Court made use of the Bolger definition and “commercial transaction” definition. Id.
198 Id.
199 Id.
201 Id.
202 Id.
203 Id.
204 Id. at 256–57.
206 Kasky, 45 P.3d at 256–57.
207 Id. at 257.
and more hardy than other kinds of speech because it includes facts and is spoken in the pursuit of profit.\textsuperscript{208}

The California Supreme Court then applied the test to Nike’s speech, and concluded that it was false commercial speech.\textsuperscript{209} The court held that Nike was indeed a commercial speaker as a large corporation engaged in commerce of shoes and apparel.\textsuperscript{210} The court considered Nike’s intended audience to be consumers and would-be buyers—particularly those concerned about Nike’s sweatshop practices.\textsuperscript{211} Clearly, Nike’s letters to university presidents had Nike customers as an intended audience, but the court found even Nike’s letters to the editors, press releases, and advertisements were arguably intended to reach consumers.\textsuperscript{212} Lastly, and most importantly, the court held that the content of Nike’s speech included facts of a commercial nature.\textsuperscript{213} In these letters, press releases, and advertisements, Nike had made factual representations about the working conditions in which Nike products were manufactured.\textsuperscript{214}

The California Supreme Court’s limited-purpose test is problematic in that it relies on U.S. Supreme Court precedent on commercial speech but does not follow it.\textsuperscript{215} Despite the California Supreme Court’s insistence that the limited purposes test is grounded in prior cases, the court essentially conceived a brand-new test to determine a narrow slice of commercial speech, false commercial speech.\textsuperscript{216} By doing so, the California Supreme Court has created a bifurcated system in which false commercial speech is defined under the limited-purpose test, and all other kinds commercial speech will be defined

\textsuperscript{208} Id.
\textsuperscript{209} Id. at 258.
\textsuperscript{210} Id.
\textsuperscript{211} Kasky v. Nike, Inc., 45 P.3d 243, 258 (Cal. 2002).
\textsuperscript{212} Id. Kasky had in fact alleged that Nike’s actions were meant to increase profit in his complaint. \textit{Id}. As proof, he offered a letter from Nike to the editor saying, “during the shopping season, we encourage shoppers to remember that Nike is the industry’s leader in improving factory conditions.” \textit{Id}.
\textsuperscript{213} Id.
\textsuperscript{214} Id. These statements of fact about labor conditions were presumably within Nike’s knowledge. \textit{Id}. If nothing else, Nike is in the best position to verify the truth of these statements, having direct contact with subcontractors managing labor conditions. \textit{See id}. Again, Nike’s purpose in making these statement was to make a profit. \textit{Id}. If regulation of Nike’s statements makes Nike attempt to verify its statements more carefully, the California Supreme Court believed that that was the very purpose of false advertising laws. \textit{Id}.
\textsuperscript{215} \textit{See id}. at 256–58.
\textsuperscript{216} \textit{See Kasky}, 45 P.3d at 256. However, many pundits have missed this distinction—believing that the California Supreme Court has created a new definition for commercial speech as a whole. \textit{See, e.g.}, Goldstein, \textit{supra} note 16.
according to the U.S. Supreme Court’s commercial speech definitions.217 The California Supreme Court’s reasons for creating such a divide are unclear, especially because the U.S. Supreme Court has never indicated that false commercial speech should be defined differently than other kinds of commercial speech.218 While the U.S. Supreme Court has held that false commercial speech has no First Amendment protection and truthful commercial speech does, the Court has never suggested that this distinction should lead to separate definitions.219 Thus, it is unclear why the California Supreme Court invented a new definition, instead of expanding interpretations of the existing commercial speech definitions to include Nike’s speech.220

The California Supreme Court may have departed from precedent because Nike’s statements did not seem to be traditional commercial speech221 and yet clearly seemed to misleading consumers.222 The rationales for denying First Amendment protection to false commercial speech seem to apply to Nike’s statements, even if traditional definitions of commercial speech do not.223 Nike is in the best position to verify what is happening in its own factories.224 Nike’s speech is unlikely to be stifled, as it wants to continue to sell shoes, and so has a motive to continue speaking.225 Regulation of the veracity of Nike’s comments falls within longstanding governmental practice to regulate false representations of where and how a product is made.226 Moreover, al-

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217 See Kasky, 45 P.3d at 256–57. For example, this limited purposes test definition would not be used in cases that challenge statutes that prohibit certain kinds of commercial speech—such as a law prohibiting the truthful publishing of alcoholic content on the label. See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 481–82 (1995).


219 See Bolger, 463 U.S. at 69; Cent. Hudson, 447 U.S. at 566.


221 Kasky, 45 P.3d at 247–48. Nike’s speech was not made in a traditional advertising format, and included statements of opinion and fact mixed together. See id.


223 See Kasky, 45 P.3d at 258.

224 Id.

225 See id. This rationale does not mean that Nike will continuing saying untruthful things about its labor practices abroad, but rather that Nike will likely continue speaking about its shoes and sweatshop practices in general because it needs to advertise to survive. See id.

226 Id. at 258–59. For example, the federal government prohibits false descriptions of the origin of products, and California prohibits misrepresentations that a product was
though Nike commingled its statements of fact with opinions about workers rights, the court found this should not immunize its factual allegations about how its products are made from being commercial speech. The California Supreme Court followed the U.S. Supreme Court to find that the commercial and noncommercial elements of Nike’s speech were not inextricably intertwined because, following Fox, no law compelled Nike’s speech to be combined in the same forum.

Thus, the California Supreme Court’s opinion relied on the principles that underlay the commercial speech doctrine, although it did not strictly follow the definitions of commercial speech. That using the underlying principles could lead to a different result than existing definitions suggests that the current definitions of commercial speech are inadequate. Kasky raises several issues that existing commercial speech doctrine has not sufficiently explained: what speech outside of traditional advertising formats can be considered commercial; whether Bolger and other commercial speech definitions are adequate; and how to analyze expressions that contain both commercial speech and non-commercial speech. When Nike appealed the California Supreme Court decision, pundits on both sides of the issue looked to the Supreme Court to clarify and update its commercial speech doctrine.


228 See Kasky, 45 P.3d at 260. “No law required Nike to combine factual representation about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.” Id. at 267.

229 See id. at 256–58.

230 See id. at 268 (Brown, J., dissenting).


232 See Kasky, 45 P.3d at 256. This is implicitly what the California Supreme Court suggests by creating a new test. See id.

233 See id. at 260, 266–67 (Chin, J., dissenting). The California Supreme Court believed that the presence of opinion on a public debate did not immunize the statements of fact, and moreover will not chill Nike’s opinions because they are not the subject of the lawsuit. Id. at 260. Chin’s dissent states that at the least Nike’s opinions are inextricably entwined with the statements of fact, so that the law cannot separately analyze one without looking at the other. Id. at 266–67.

234 See Goldstein, supra note 16, at 63–64.
C. The U.S. Supreme Court’s Non-Decision

After granting certiorari to Kasky, hearing oral arguments and receiving thirty-one amicus briefs, the U.S. Supreme Court issued a per curiam opinion dismissing the writ of certiorari as improvidently granted.235 This decision meant that the Court had changed its mind about hearing the case in the first place, and thus left the case’s important commercial speech questions unanswered.236 The concurrence, signed by Justices Stevens and Ginsburg, and joined in part by Justice Souter provided three procedural reasons for dismissing the writ:237 lack of finality,238 lack of standing,239 and to avoid premature adjudication of the novel First Amendment questions Kasky raises.240

236 See id. at 655.
237 Id. at 656, 658 (Stevens, J., concurring). Justice Souter joined only as to the third reason. Id. at 656, 663.
238 See id. at 658. By law, the Supreme Court can only review cases in which there has been a final judgement or dissent decree. See 28 U.S.C § 1257 (2005). The California Supreme Court’s decision in Kasky was to reverse and remand, which is not a final decree. Nike, 539 U.S. at 658, 658–60 (Stevens, J., concurring). Nike had argued, however, that Kasky fell under an exception that allowed the Court to hear cases that are not final if state courts have finally decided a federal issue, and reversal of this issue would end the litigation. See id. at 658–59. Stevens found this argument to be “theoretically” true, but only if the Court could find all of Nike’s comments to be absolutely protected. Id. at 659. Due to the nature of the case, however, such an outcome was highly unlikely—the Court could construe some of the comments to be commercial and some not, or reverse in such a way that would give Kasky the option of amending his complaint. Id. at 660. In such scenarios more state proceedings would follow, and new First Amendment issues might arise. Id. Therefore, Kasky was not final in such a way that fell within the exception. Id.
239 Id. at 661–63. Justice Stevens found that neither party had the required injury needed for standing. Id. at 661. Kasky had no injury; indeed, Kasky had never claimed to suffer a personal injury when he initiated the suit. Id. Kasky had filed as a private attorney general alleging no personal injury, but instead enforcing California laws on behalf of the public of California. Id. There was no final judgement against Nike, so Nike had no injury in fact either. Id. Thus, Nike would not have been able to commence this case in federal court in the first place. Id. Nonetheless, the Supreme Court has adopted an exception to this rule when there is a state court judgement on a federal issue that causes injury to a party. See ASARCO Inc. v Kadish, 490 U.S. 605, 623–24 (1989). Nike argued that it fell into this ASARCO exception. See Reply Brief for the Petitioners at 5–6, Nike, Inc. v. Kasky, 539 U.S. 654, 655, 667 (2003) (No. 02-575). Stevens found that ASARCO was distinguishable in the present case because ASARCO involved a final declaratory judgement that a state law was illegal and so tangible legal rights were effected. Nike, 539 U.S. at 662 (Stevens, J., concurring). Since the judgement in Kasky was not final, no legal rights were effected yet and so Nike was not injured. Id.
240 Nike, Inc. v. Kasky, 539 US. 654, 655, 663–64 (2003) (Stevens, J., concurring). Lastly, Stevens believed that Kasky was not the appropriate vehicle to explore important First Amendment issues. Id. at 663. Kasky was only at the pleading stage, lacking a factual record that would assist the Court greatly in such complicated and important commercial speech issues. See id. at 664–65. It is likely this last reason that convinced the Court to dis-
Although both sides claimed victory in some of the concurrence and dissent opinions’ language, the real victory belonged to Marc Kasky as his lawsuit was allowed to go forward.241

Although the dismissal of certiorari allowed the California Supreme Court’s decision on *Kasky* to stand, both the dissent and concurrence expressed disagreement with that decision.242 Both opinions highlighted the intermingling of commercial speech and noncommercial speech with Nike’s statements, an issue the California Supreme Court had quickly dismissed.243 The dissent believed that Nike’s speech had “predominant[ly]” noncommercial characteristics inextricably intertwined with commercial speech.244 Even the concurrence defined Nike’s speech as “a blending of commercial speech, noncommercial speech and debate on an issue of public importance,” although the opinion did not suggest how to deal with such a “blending.”245 These opinions imply that the California Supreme Court’s limited purpose test was unnecessary. The limited-purpose test was meant to find only false commercial speech, which the U.S. Supreme Court has found to merit no First Amendment protection.246 Both the dissent and concurrence at minimum would require some First Amendment protection

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241 See Linda Greenhouse, *Nike Free Speech Case Is Unexpectedly Returned to California*, N.Y. Times, June 29, 2003, at A16. Laurence Tribe, the esteemed law professor at Harvard who argued Nike’s appeal in front of the Court, commented that the concurrence’s language showed that Nike’s statements were not “garden variety commercial speech.” *Id.* Ohio Representative Dennis Kuchinich claimed that the decision was a “victory for consumer protection and corporate accountability.” *Id.*

242 See *Nike*, 539 U.S. at 663–64 (Stevens, J., concurring); *Id.* at 676 (Breyer, J., dissenting).

243 *Nike*, 539 U.S. at 663 (Stevens, J., concurring); *Id.* at 667 (Breyer, J., dissenting); *Kasky v. Nike*, Inc., 45 P.3d 243, 260 (Cal. 2002).

244 *Nike*, 539 U.S. at 677 (Breyer, J., dissenting). Justice Breyer suggested that while false advertising laws are important, there was no difference in determining whether speech is commercial for the purposes of false advertising or other state intrusions. See *id.* at 679. Justice Breyer focused on both the format of the speech, and whether the speech links to a public debate are central, not peripheral. *Id.* at 678. Here, Justice Breyer believed that Nike’s speech was in a nontraditional advertising format and the links to a public debate are central, so Nike’s speech was not “pure” commercial speech. *Id.* at 678–79.


for Nike’s speech due to the mixing of commercial and non-commercial speech.\textsuperscript{247}

Nonetheless, the Court did restate its commitment to the principles of the commercial speech doctrine on which the California Supreme Court based its decision.\textsuperscript{248} The dissent, while finding that Nike’s speech was not commercial, reiterated the importance of false advertising law and the commercial speech doctrine as advancing important “public objectives.”\textsuperscript{249} The concurrence also seconded the California Supreme Court in that it does not mention the format of Nike’s comments—an ad, letters to customers, etc.—as disqualifying it from being commercial speech, and instead mentioned the important governmental goal of consumer protection.\textsuperscript{250} Thus, had the U.S. Supreme Court ruled on the issue, it likely would have provided some lesser level of protection to Nike’s comments than full first Amendment protection, which would have allowed some regulation.\textsuperscript{251}

Despite these hints that the California Supreme Court had not decided *Kasky* correctly, the U.S. Supreme Court’s dismissal of certiorari led to the California Supreme Court’s decision becoming final.\textsuperscript{252} A few months after the dismissal of certiorari, Kasky and Nike settled the case.\textsuperscript{253} The parties disclosed that Nike had agreed to donate $1.5 million to the Fair Labor Association for worker development programs abroad.\textsuperscript{254} Thus, the California Supreme Court’s decision in *Kasky* is now precedent in that state, possibly handing advocates a powerful tool in their fight against sweatshop conditions.\textsuperscript{255}

\textsuperscript{247} See *Nike*, 539 U.S. at 664 (Stevens, J., concurring); *Id.* at 679 (Breyer, J., dissenting).

\textsuperscript{248} See *Nike*, 539 U.S. at 664 (Stevens, J., concurring); *Id.* at 679 (Breyer, J., dissenting).

\textsuperscript{249} *Id.* at 678–79 (Breyer, J., dissenting).

\textsuperscript{250} *Id.* at 663–64 (Stevens, J., concurring). The dissent, however, believed that the format is a concern, suggesting that since Nike’s statements were not in “traditional advertising or labeling contexts,” it was not commercial speech. See *id.* at 677 (Breyer, J., dissenting).

\textsuperscript{251} See *id.* at 677 (Breyer, J., dissenting).

\textsuperscript{252} See Mokhiber, *supra* note 18.

\textsuperscript{253} *Id.* The Supreme Court’s dismissal of certiorari meant the California Supreme Court’s orders to reverse and remand held. See *id.* However, the settlement came before discovery ever occurred in trial court. See *id.*

\textsuperscript{254} *Id.* The FLA was not a party in Kasky’s suit. See *Kasky v. Nike*, Inc., 45 P.3d 243, 243 (Cal. 2002). As far as can be determined, the donation to the FLA was made at Kasky’s request, in lieu of a payment towards him directly. See Mokhiber, *supra* note 18. This is in keeping with Kasky’s behavior in his previous lawsuits, in which he made no money. See Parloff, *supra* note 1, at 108.

\textsuperscript{255} See Mokhiber, *supra* note 18.
IV. The Utility of Kasky-Style Lawsuits

Until the Supreme Court clarifies the definition of commercial speech, a Kasky-style lawsuit is a viable option for anti-sweatshop advocates to try to hold corporations accountable for their sweatshop conditions.256 Such a lawsuit would involve suing a corporation based not on their sweatshop conditions, but on the falsity of a statement in a press release, letter to the editor, etc. concerning labor conditions.257 On first glance, a Kasky-style lawsuit may be an effective means of private enforcement because it evades many of the barriers anti-sweatshop advocates have encountered using other techniques.258 Nonetheless, a Kasky-style lawsuit must overcome two difficult issues: standing and remedies.259 Moreover, Kasky risks chilling the speech of corporations, which ultimately could be disadvantageous to sweatshop activists.260 A Kasky-style lawsuit gives a company two choices: improve sweatshop conditions or stop talking about sweatshop conditions at all.261 Only a nuanced and careful campaign on the part of anti-sweatshop advocates can lead to the former alternative.262

A. Kasky-style Lawsuits Compared to Other Techniques

At least in California, Kasky might allow false advertising and unfair competition laws to be used in an innovative way.263 A Kasky-style lawsuit would enable activists to sue corporations for making false statements

256 See Kasky, 45 P.3d at 262.
257 See id. at 247–48.
258 See id. at 262; see, e.g., Balthazar, supra note 18, at 712–14.
260 See Kasky v. Nike, Inc., 45 P.3d 243, 271–72 (2002) (Brown, J., dissenting). Fearing lawsuits, companies might refrain from speaking about social issues and participating in forums such as the FLA that might eventually lead to positive change. See Bigge, supra note 16, at 18.
261 See Lu, supra note 137, at 628. The Federal Trade Commission could also legitimately take an active role in prosecuting false advertising violations in order to improve sweatshop conditions. Id. at 604.
262 See id. at 628. Companies will likely only improve sweatshop conditions if a well-informed consumer public pressures them to do so, because otherwise companies will be tempted merely to stop talking about sweatshop issues. Id. If consumers make it known that their decisions are based on sweatshop conditions, companies will be more tempted to make changes. Id.
263 See Kasky, 45 P.3d at 262. While Kasky’s holding is only precedent in California, it certainly is persuasive authority elsewhere, which could enable activists to expand Kasky’s holding to other states. See Bigge, supra note 16, at 17.
about sweatshop conditions, which in itself could be leverage to pressure companies to improve these conditions. Moreover, the California Supreme Court’s decision found certain company “image enhancing” tools to be commercial speech even though they fell outside traditional advertising formats. Nike’s press releases, statements on its website, letters to the editor, letters to prominent customers and image ads were all considered commercial speech because they included factual statements about how Nike products were made. Companies are more likely to make statements about sweatshop conditions in such formats, often responding to media or anti-sweatshop allegations of poor conditions, than in traditional advertising contexts. Since a company’s public image is seen as vital to business, this gives advocates a powerful tool to use false image-making statements against an offending company.

Kasky may be more effective than other methods of private enforcement because it circumvents many of the barriers that have traditionally prevented advocates from using the court system effectively. Because Kasky deals with speech and not actions, it avoids many of the complex international problems anti-sweatshop activists have faced in using the court system. Activists have had difficulty because few labor laws apply extraterritorially, and those laws that do are difficult to enforce. Kasky, however, is a cause of action based on domestic law

264 See Bigge, supra note 16, at 17. Of course, prior to Kasky, advocates could sue based on express claims made in traditional advertising formats. See, e.g., CAL. BUS. & PROF. CODE § 17500 (stating that it is unlawful for someone in the pursuit of commerce to make untrue and misleading facts “in any newspaper or other publication, or any advertising device”). The problem was that companies often intermingle such speech with opinions, which have greater protection by the First Amendment. See Kasky, 45 P.3d at 260. Kasky holds, among other things, that this intermingling does not immunize the factual claims. Id.

265 See Kasky, 45 P.3d at 260.

266 See id. at 262.

267 See Bigge, supra note 16, at 13. Nike’s response to allegations of sweatshop conditions that sparked Kasky is the classic example of this. Id. In response to accusations in the media that Nike had been using sweatshop labor abroad, Nike began a media campaign to resurrect its image. Id. During this campaign, Nike made the comments that Kasky singled out as false and misleading. Id.

268 See id. at 16. A company’s image is increasingly seen as important to their bottom line. See Lu, supra note 137, at 613. Commentators have stated that when a company is found to use child labor to produce its garments, it “ranks somewhere up there with toxic dumping or unsafe products in the list of evils that can blacken the image of a successful corporation.” Id.

269 See supra notes 86–97, 126–30, 135–49 and accompanying text.

270 See Kasky, 45 P.3d at 262; supra notes 126–30 and accompanying text.

271 See Kasky, 45 P.3d at 262; supra notes 126–30 and accompanying text.
where labor abuses abroad are evidence of false advertising.\textsuperscript{272} This avoids the complicated and delicate issues involved in applying a law extraterritorially.\textsuperscript{273} Therefore, courts dealing with \textit{Kasky}-style lawsuits may be more willing to hold corporations accountable.\textsuperscript{274}

A \textit{Kasky}-style lawsuit might also provide a vital follow-up to boycotts and codes of conduct.\textsuperscript{275} Private codes of conduct, such as that enforced by the FLA, have no mechanism to punish companies that violate the codes, or even to make most of the circumstances public.\textsuperscript{276} A \textit{Kasky}-style lawsuit could argue that the words of the codes of conduct that companies place on their websites are a representation of fact about the product, and then sue for false advertising if there are violations of the code.\textsuperscript{277} This would provide a much needed financial incentive for companies to comply with codes of conduct, which might lead to companies substantially improving sweatshop conditions to avoid lawsuits.\textsuperscript{278} Similarly, if anti-sweatshop advocates are boycotting a company for its sweatshop practices abroad, and the company denies the allegations, the activists could sue with a \textit{Kasky}-style lawsuit.\textsuperscript{279} Further precedent-building would be necessary before activists could sue based solely on codes of conduct.\textsuperscript{280}

Nonetheless, the problem of standing is a significant barrier to using \textit{Kasky} as a model to enforce such codes.\textsuperscript{281} Kasky brought suit under the California false advertising and unfair competition laws, which at the time allowed him to sue as a “private attorney general” without a per-

\begin{footnotesize}
\footnote{272 See \textit{Kasky} v. Nike, Inc., 45 P.3d 243, 262 (2002); \textit{supra} notes 126–30 and accompanying text.}
\footnote{273 See \textit{Kasky}, 45 P.3d at 262; \textit{supra} notes 126–30 and accompanying text.}
\footnote{274 See \textit{Kasky}, 45 P.3d at 262; \textit{supra} notes 126–30 and accompanying text.}
\footnote{275 See \textit{Kasky}, 45 P.3d at 262; \textit{supra} notes 135–49 and accompanying text.}
\footnote{276 See \textit{supra} notes 144–52 and accompanying text. Again, the FLA does publish information about the violations found in the factories it monitors, but not the name or location of the specific factory. \textit{See} Fair Labor Association, \textit{supra} note 70. This makes the information impossible to check or verify. \textit{See id.}}
\footnote{277 \textit{Lu}, \textit{supra} note 137, at 619–21.}
\footnote{278 See \textit{id.} at 628.}
\footnote{279 See \textit{id.}}
\footnote{280 See \textit{Kasky} v. Nike, Inc., 45 P.3d 243, 247–48 (2002). \textit{Kasky} certainly might lead to such a holding, but did not hold a code conduct to be commercial speech. \textit{See id.} at 247–48, 262. As discussed below, the wording of codes of conduct make it unclear whether they are statements of fact or promises, so activists may have difficulty using codes of conduct. \textit{See infra} note 310 and accompanying text.}
\footnote{281 \textit{See Cal. Bus. & Prof. Code} §§ 17203, 17204, 17206 (West 2005).}
\end{footnotesize}
sonal injury. Most states, however, require some showing of injury or damages for an individual to sue based on the false advertising or unfair competition laws. Following Kasky, the voters of California passed an initiative changing the standing requirements for the state’s unfair competition and false advertising laws to require that a plaintiff have an injury in fact and have lost money or property. This new standing requirement will make it more difficult for anti-sweatshop advocates to file suit in California, the only state where Kasky is precedent. Nonetheless, in states requiring injury, many have found that nominal damages are sufficient to create an injury. Many states also allow for non-economic injuries such as emotional distress to establish an injury. Thus, it is possible that advocates could make out an injury if they find a plaintiff who had purchased the corporation’s product, and later there were media reports that the corporation did have sweatshops.

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284 See Cal. Bus. & Prof. Code § 17204. This ballot, number 64, was approved by voters November 2, 2004, and went into effect the next day. Cal. Proposition 64, 2004 Cal. Legis. Serv. (West), available at http://vote2004.ss.ca.gov/voterguide/propositions/prop64.text.pdf. The proposition is framed as a way to curb frivolous lawsuits initiated by lawyers whose “clients who have not used the defendant’s product or service, viewed the defendant’s advertising, or had any other business dealing with the defendant . . . without any accountability to the public and without adequate court supervision.” Id.

285 See Cal. Proposition 64, supra note 284.

286 See Cohen, supra note 283, at 207. Minnesota, Washington and Hawaii all explicitly allow nominal damages to create injury. See id. For example, in Wexler v. Brothers Entn’t Group, the Court of Appeals of Minnesota found standing based on a wrongful $11.89 telephone charge. 457 N.W.2d 218, 222 (Minn. Ct. App. 1990). Only Florida requires a “non-nominal” injury. Cohen, supra note 283, at 206–07. Since California’s new law only took effect in November 2004, no case law has developed as to whether nominal damages would be accepted.

287 See Cohen, supra note 283, at 212–15. Louisiana, Massachusetts, and Texas have recognized a non-economic injury to be standing in such cases. Id.

But this would be breaking new ground and require setting precedent, which may make it difficult for advocates, at least initially, to use *Kasky* in most states.\(^{289}\)

The limited remedies available under false advertising and unfair competition statutes present another barrier to using *Kasky* to improve sweatshop conditions.\(^{290}\) In California, for example, the remedies for an unfair business practice are an injunction to stop that practice,\(^{291}\) compensation for the injury created by the unfair business practice,\(^{292}\) and discretionary civil penalties.\(^{293}\) The unfair business practice in *Kasky* was Nike’s false and misleading statements.\(^{294}\) Thus, a *Kasky*-style lawsuit could result in an injunction to stop the misleading speech about sweatshop conditions, but not to stop the actual sweatshop practices themselves.\(^{295}\) It is possible, however, that damages from a *Kasky*-style lawsuit could be so punitive as to persuade the defendant company to improve sweatshop conditions to avoid future lawsuits.\(^{296}\) The difficulty is that there is no court order and no guarantee that companies who are punished with a costly lawsuit will upgrade working conditions, rather than take the less costly alternative of stifling their speech.\(^{297}\)

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\(^{289}\) Cohen, *supra* note 283, at 197–205, 208–212. Perhaps the easiest way to remedy the standing problem is to advocate for attorneys general of the states and the Federal Trade Commission to bring such suits instead of private individuals. See *Lu*, *supra* note 137, at 617–18. The government needs to prove no injury to bring suit. See *id*.


\(^{291}\) *Id.* § 17203.

\(^{292}\) *Id.* Essentially this is to compensate for the injury, although in *Kasky* there were none. Parloff, *supra* note 1, at 108.

\(^{293}\) Cal. Bus. & Prof. Code § 17206.


\(^{295}\) *See id*.

\(^{296}\) See Mokhiber, *supra* note 18. It is hard to measure how punitive such damages could be, if an individual’s injury is buying a shoe. On the other hand, Kasky received a settlement of a 1.5 million dollars, showing that financially the stakes can be high. *Id*.

B. The Potential Chilling Effect of Kasky-style Lawsuits

*Kasky*'s chilling effect on corporate speech has in practice been quite limited, although many warned to the contrary.298 Indeed, the dissenters in the California and U.S. Supreme Court believed the chilling effect of *Kasky* would be severe.299 Many in the business community called the decision “devastating,” warning that businesses would now refrain from discussing important public issues such as cloning and FDA drug approval.300 Nike announced in the wake of *Kasky* that it would withhold its annual Corporate Responsibility Report and would refrain from discussing social issues either with the media or at public events.301 Rhetoric aside, however, many companies are still speaking about social issues, albeit phrasing these statements carefully to include fewer factual statements.302 This suggests *Kasky*’s impact was less than expected, either because of corporations’ profit motive or because of *Kasky*’s uncertain holding.303 Therefore, the use of *Kasky*-style lawsuits may not chill corporate speech, at least if they are used in moderation.304

Many companies, including Nike, still do discuss corporate responsibility.305 Of the eight companies that were involved in the Apparel Industry Partnership, five still have codes of conduct for labor conditions in factories posted on their website.306 While these codes are not

298 See *Kasky*, 45 P.3d at 262; supra note 177 and accompanying text.
300 See Sandy Brown, For Corporate Speech, the Other Shoe Is Yet to Drop, *Adweek*, June 30, 2003; Howard, supra note 16. Even some activists believed in the chilling effect of *Kasky*, warning that it would be better for companies to speak about the issue untruthfully, and participate in organizations like the FLA freely, than not at all. See Bigge, supra note 16, at 18.
301 See Nike, 549 U.S. at 682 (Breyer, J., dissenting).
304 See Lu, supra note 137, at 628.
305 See infra note 309. Unsensitively, I looked at those companies who were members of the AIP because they were all the target of boycotts and campaigns of the anti-sweatshop movement before joining the taskforce.
factual statements, they do represent a promise to consumers that factories will be conducted in a certain way. If all or most of a corporation’s factories do not meet the standard as represented in the code of conduct, this code might be misleading speech that could fall under unfair competition or false advertising laws. Of the five companies that do have codes of conduct, only one, Reebok, makes factual claims about improvement of labor conditions. If false, these factual claims could be grounds for a false advertising suit under Kasky. Most companies are avoiding factual claims such as those that led to the suit against Nike. Nonetheless, companies have not withdrawn from discussing social issues altogether, and by posting these codes of conduct may be exposing themselves to a lawsuit. The reason why companies act this way, despite the risk, is important in analyzing whether Kasky-style lawsuits will chill corporate speech.

Companies may be continuing to speak about social issues because of their profit motive. The Supreme Court has explained that commercial speech has a “greater hardiness” than noncommercial speech because companies speak for the purpose of increasing their profit by


307 See, e.g., Reebok: Our Business Practices, Our Standards, supra note 302. Reebok’s code, for example uses the word “shall”: “[n]o factory making Reebok products shall use forced or other compulsory labor.” Id. Using the word “shall” suggests a future promise. See id.

308 See Lu, supra note 137, at 621–22. Although codes are not express claims, most false advertising or unfair competition laws discuss misleading speech. See id. If a statement is “likely” to deceive, then it might fall under such statutes. See id. This, however, is not Kasky’s holding, and would be an expansion of it. See Kasky, 45 P.3d at 262; supra note 280 and accompanying text.


311 See Kasky, 45 P.3d at 247–48; Reebok: Our Business Practices, Our Improvements, supra note 309. Many companies make express claims only about their monitoring systems, which would be more difficult to challenge. See Nike: Workers and Factories, supra 302.

312 See supra note 307 and accompanying text.

313 See Kasky, 45 P.3d at 252–53, 262.

314 See Kasky, 45 P.3d at 252–53; supra note 175 and accompanying text. The U.S. Supreme Court has identified the profit motive as justifying the lack of First Amendment protection for false commercial speech. Kasky, 45 P.3d at 252–53.
selling goods and services.\textsuperscript{315} Even if commercial speech is regulated, corporations will continue to speak because their existence is based on how much of the product or service they can sell.\textsuperscript{316} Thus, it is possible that companies are continuing to post codes of conduct on their websites because they believe that despite the liability, speaking on such issues is vital to selling products.\textsuperscript{317} The anti-sweatshop movement has made it clear to companies that consumers do care about the labor conditions in which their garments are made.\textsuperscript{318} Companies may have done a cost-benefit analysis, finding that it is advantageous to have a reputation of social responsibility, even if it opens up the potential of lawsuits.\textsuperscript{319}

Moreover, a close reading of the holding of the California Supreme Court allows companies to continue offering their opinions on social issues, but not false factual statements.\textsuperscript{320} The California Supreme Court held that the opinions about globalization and workers rights within Nike’s statements were fully protected by the First Amendment.\textsuperscript{321} Only the “description[s] of actual conditions and practices” of the factories that manufactured Nike’s products were held to be false commercial speech.\textsuperscript{322} Thus, \textit{Kasky} holds that commercial speech extends only to a company’s factual statements, not a company’s opinion about social responsibility.\textsuperscript{323} \textit{Kasky} might be expanded in the future to include codes of conduct as commercial speech because promises fall within gray area between opinions and factual statements.\textsuperscript{324} Currently, however, companies can only be held liable for false factual claims.\textsuperscript{325}

\textsuperscript{315} See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (finding that “the greater ‘hardiness’ of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation”).

\textsuperscript{316} See id.

\textsuperscript{317} See Lu, \textit{supra} note 137, at 620. For example, a spokesperson from Reebok said that “consumers today hold companies accountable for the way products are made, not just the quality of the product itself.” \textit{Id.} at 624.

\textsuperscript{318} See id. Polls taken by Marymount University and the National Bureau of Economic Research in the 1990s show that three-fourths of the respondents would avoid purchasing products if they knew they were produced in unsafe environments, and would pay more for an item if they knew it was produced in a safe and worker-friendly factory. Brief for Global Exchange as Amici Curiae at 2–3, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575).

\textsuperscript{319} See Lu, \textit{supra} note 137, at 628.


\textsuperscript{321} See id.

\textsuperscript{322} See id.

\textsuperscript{323} \textit{Id.} What was more revolutionary about \textit{Kasky} was that factual statements in nontraditional advertising formats were found to be commercial speech. \textit{See id.} at 262.

\textsuperscript{324} See \textit{id.} at 247, 260, 262.

\textsuperscript{325} \textit{See.} Kasky, 45 P.3d at 262.
Following *Kasky*, companies make few express claims that could be verified easily, but seem to have realized that their liability for opinions and promises is limited at this time. Thus, it seems likely that companies will continue to speak about social issues, but will be careful not to make false factual statements.

Since companies continue to speak about social issues because of the limited holding of *Kasky* and the profit motive, advocates must use *Kasky*-style lawsuits in moderation. If advocates flood corporations with *Kasky*-style lawsuits, the economic calculus will change for these corporations, and they will stop speaking about social issues. Anti-sweatshop activists might want to expand *Kasky*’s holding to include codes of conduct as commercial speech, but again, if they push this too far, companies will stop releasing codes of conduct. To try to counteract the financial pressures of such lawsuits, activists need to maintain consumer pressure on corporations about sweatshop issues, so that companies will know it is in their best interest to keep speaking about labor. Moreover, consumer pressure accompanying such lawsuits could convince corporations to actually improve sweatshop conditions. Thus, anti-sweatshop activists must use *Kasky*-style lawsuits in moderation, and in conjunction with consumer pressure, to avoid chilling corporate speech.

**Conclusion**

*Kasky* has created a new but flawed tool for anti-sweatshop activists to use to hold corporations accountable for their sweatshop conditions. In a time when public enforcement is ineffective in improving sweatshop conditions both at home and abroad, advocates have searched for an effective private enforcement device. In some ways, *Kasky* can provide such a device, because it expands commercial speech

326 See Kasky v. Nike, Inc., 45 P.3d 243, 260 (2002); supra note 309 and accompanying text. Thus, on its website, Nike makes ambiguous comments such as “Nike opposes child labor.” See Nike: Workers and Factories, supra note 302. No one will be able to sue Nike if these kinds of statements are characterized as opinions. See *Kasky*, 45 P.3d at 260.

327 See *Kasky*, 45 P.3d at 260; supra note 309 and accompanying text.

328 See *id.*

329 See *id.*

330 See *id.*

331 See *id.*

332 See *id.*

333 See *id.*, supra note 137, at 628.


335 See supra notes 77–149 and accompanying text.
for the purpose of false advertising laws.\textsuperscript{336} Nonetheless, significant barriers remain to using \textit{Kasky} effectively.\textsuperscript{337} The need for an injury to file suit will make \textit{Kasky} difficult to utilize.\textsuperscript{338} Moreover, the limited remedies inherent in false advertising statutes suggest that \textit{Kasky} in itself will not lead to corporations improving sweatshop conditions.\textsuperscript{339} There is also the danger that the Supreme Court will at some point overturn the reasoning behind \textit{Kasky}, as they expressed disapproval of the California Supreme Court’s opinion.\textsuperscript{340} The chilling effect of \textit{Kasky}, however, was less than expected, suggesting the \textit{Kasky}-style lawsuits used in moderation might not chill corporate speech on social issues.\textsuperscript{341} In conjunction with consumer pressure, a \textit{Kasky}-style lawsuit could lead corporations to improve sweatshop conditions.\textsuperscript{342} In sum, \textit{Kasky} is an imperfect instrument, but one anti-sweatshop activists should explore and expand.\textsuperscript{343}

\textsuperscript{336} See \textit{Kasky}, 45 P.3d at 262.
\textsuperscript{337} See supra notes 281–97 and accompanying text.
\textsuperscript{338} See supra notes 281–89 and accompanying text.
\textsuperscript{339} See supra notes 290–97 and accompanying text.
\textsuperscript{340} See supra notes 243–51 and accompanying text.
\textsuperscript{341} See supra notes 298–27 and accompanying text.
\textsuperscript{342} See Lu, supra note 137, at 628.
Abstract: In American country clubs, there is a long tradition of discrimination against racial minorities and women. These clubs maintain that they are private and thus able to operate free from government sanction. In 2004, the Supreme Court of Kentucky ruled that the state’s Commission on Human Rights had the statutory authority to investigate private country clubs to determine if they discriminate in their membership practices. In Kentucky, if a club is found to discriminate, its members are disallowed certain tax deductions. While this is a step in the right direction to end discriminatory practices at country clubs, the Supreme Court of Kentucky still points out that private clubs have the right to discriminate without fear of legal liability. This Note evaluates other states’ reactions and statutes regarding discrimination at private clubs and contends that such approaches are more effective in eradicating discrimination in these clubs than tax consequences.

Introduction

Augusta National Golf Club (Augusta National), constructed in 1931 in Augusta, Georgia is one of the most prominent golf courses in the world.1 It has hosted the Masters tournament for almost seventy years and has included members such as President Eisenhower, who joined the club in 1948.2 Augusta National’s beautiful scenery is displayed through the magnolia trees that line the club, individually selected plants that decorate and name each of the eighteen holes and a variety of plants that have been added to the landscape since the

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course was built. Although the grounds of Augusta National are aesthetically pleasing and diverse, the club’s members are not very different, but are instead similar in appearance and background.

Much controversy has surrounded Augusta National over the past few years as a result of its exclusive membership policies. The club refuses to admit women, and of the approximate 300 members, fewer than ten are African-American. Unfortunately, Augusta National’s exclusionary policies are not unique, as discrimination against racial minorities and women is a deep seeded tradition in American country clubs. History shows that the country club is “one of the least diverse

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4 See id.; McCarthy & Brady, supra note 2, at 1C. Augusta National is a men’s only golf club. Id. Journalists McCarthy and Brady point out that the club’s members “are a who’s who of corporate power and old money.” Id. It is the definition of an “old boys club,” in that the average age is seventy–two, more than a third of the members are retired, and the majority are a part of “old-line industries,” such as banking, oil and manufacturing. Id. Only twenty–five of Augusta’s 199,570 residents are members. Id. As of July 2002, only six of the nearly 300 member club were African-American. See Charpentier, supra note 1, at 131–32.

5 See Charpentier, supra note 1, at 112; Scott R. Rosner, Reflections on Augusta: Judicial, Legislative and Economic Approaches to Private Race and Gender Consciousness, 37 U. Mich. J.L. REFORM 135, 135 (2003); Gary Mihoces, Burk Wants Federal Officials out of Exclusionary Clubs, USA TODAY, Apr. 1, 2003, at 3C. Martha Burk, chair of the National Council of Women’s Organizations, has led an unrelenting campaign to open membership at Augusta National to women. See Mihoces, supra, at 3C. On the other side of the argument, a Ku Klux Klan splinter group applied for a protest permit in order to demonstrate at the 2003 Masters to show support of the exclusionary policy. See Charpentier, supra note 1, at 112 n.11. Joseph J. Harper, the imperial wizard of the American Knights of the Ku Klux Klan, said, “[t]his equal rights stuff has gotten out of hand.” Id.

6 See Rosner, supra note 5, at 136. Augusta National’s new members are nominated by current members and as a result, one cannot apply for membership. See McCarthy & Brady, supra note 2, at 1C. The club did not admit its first African-American member until 1990 and did so as a result of problems involving a tournament at Shoal Creek Golf and Country Club, an all-white Alabama club. See Charpentier, supra note 1, at 131. The Professional Golfers Association (PGA) Championship took place at Shoal Creek only after it admitted its first black member and Augusta National followed suit a month later. Id.

Rosner contends that the “barriers to African-American golfers . . . were largely ignored by the popular press until a much-publicized interview in 1990.” Rosner, supra note 5, at 179. When asked about Shoal Creek’s racially discriminatory admissions policy weeks before the club hosted the 1990 PGA Championship, the president and co-founder of the club, Hall Thompson, responded, “[t]he country club is our home and we pick and choose who we want . . . . I think we’ve said we don’t discriminate in every other area except for blacks.” Id. When questioned whether members brought African-American guests to the club, Thompson stated, “that’s just not done in Birmingham.” Id. at 179–80.

7 See Rosner, supra note 5, at 136.
American institutions by design." The membership of Augusta National and many other present day clubs reveal that this tradition of prejudice continues.

While country clubs have been condemned over the years for their discriminatory membership practices, most clubs assert the defense that they are distinctly private and thus able to operate and discriminate free from government sanction. In response, many states have taken steps to eradicate discrimination in private clubs by broadly interpreting and writing their public accommodations laws or by enacting legislation that specifically targets these clubs. A recent example of this kind of state approach occurred in Commonwealth v. Pendennis Club, decided in 2004 by the Supreme Court of Kentucky (Kentucky Court). In that case, the Kentucky Court held that the Kentucky Commission on Human Rights (the Commission or KCHR) had the authority to investigate private country clubs to determine if they deny membership based on race. If the Commission concludes

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8 Jennifer Jolly-Ryan, Chipping Away at Discrimination at the Country Club, 25 Pepp. L. Rev. 495, 495 (1997). Country clubs were generally created by wealthy Caucasian Protestants between 1880 and 1930 and were never meant to be welcoming to everyone. See id. at 495–96. Allegedly, President Kennedy was once questioned by his Secretary of Labor, future Supreme Court Justice Arthur Goldberg, about his membership to the Links Country Club because of its exclusion of Jews. Id. at 495 n.3 (citing Frank Whelan, Few Minorities at Country Clubs, Allentown Morning Call, June 5, 1997, at D1). President Kennedy reportedly chuckled and replied, “[h]ell, Arthur, they don’t even allow Catholics.” Id.

In some cases, because of the discriminatory policies, those excluded opted to form their own country clubs that discriminated against other minority groups. See id. at 496. For example, when wealthy Irish and German Jewish Americans were denied membership to Protestant-only country clubs, they formed their own private clubs and excluded Italians and African-Americans. See id.

9 See Rosner, supra note 5, at 136.

10 See id. at 137.

11 See John P. McEntee & Walter J. Johnson, Teed Off: Female Golfers Seek Equal Access, N.Y. L.J., Dec. 8, 2000, at 1, 6. For example, some states deny liquor licenses to clubs that discriminate as to who can be a member, while other states eliminate tax exemptions for these clubs. Id.

12 See generally 153 S.W.3d 784 (Ky. 2004).

13 Id. at 789. The Pendennis case started 14 years ago after Louis Coleman filed complaints against the Pendennis Club, the Louisville Country Club, and the Idle Hour Country Club claiming that they used discriminatory membership practices. Id. at 786. A 2002 article about private clubs in Kentucky describes the Pendennis Club in Louisville as a social club where the city’s “business and political leadership have entertained, dined, dined and networked.” Lisa Summers, Behind Closed Doors, The Lane Rep., Sept. 2002, http://www.kybiz.com/lanereport/issues/september02/behindcloseddoors.html. Unlike Augusta National, the Pendennis Club allows women access in all areas of the club, but did not do so until 2001, 120 years after its opening. Id. The Club’s three floors contain a library, dining and meeting rooms, a men’s athletic area, a squash court and a main ballroom. Id. In 2002, the Club had around 800 members, all of whom had been approved for
that a club discriminates in its membership practices, Kentucky law prohibits members from taking tax deductions for amounts paid to the club.\(^{14}\)

*Pendennis* is an important decision that upholds the Kentucky Commission on Human Rights’ authority to look into the practices of private clubs and “refuse[s] endorsement” of discriminatory conduct by disallowing tax deductions to members.\(^{15}\) Yet, questions remain regarding whether the state is doing enough to end racist and sexist policies at country clubs.\(^{16}\) The Kentucky Commission on Human Rights’ mission is “[t]o eradicate discrimination in the Commonwealth through enforcement of the Kentucky Civil Rights Act.”\(^{17}\) While *Pendennis* was a victory for the KCHR, this Note argues that in light of other state statutes and cases, there may be other measures that Kentucky can take to accomplish more fully the KCHR’s goal of eradicating discrimination.\(^{18}\)

Part I of this Note presents a brief history of the KCHR and how it attempts to eradicate discrimination. Part II provides an overview of the constitutional, legislative and U.S. Supreme Court precedent that involves private club discrimination. Part II also discusses the reasoning behind *Pendennis* and its implications for the effectiveness of the KCHR. Part III examines what other states, like California and Connecticut, have done to ensure that county clubs will end their dis-


\(15\) *See Pendennis*, 153 S.W.3d at 789.

\(16\) *See id.* The Kentucky Court explicitly states that the case is not about whether clubs actually discriminate nor the rights of the clubs or their members. *Id.* at 785. In furtherance of this idea, the Kentucky Court clearly makes the point that private clubs “have a statutory right . . . to discriminate in affording the benefits of membership without fear of legal liability.” *Id.*


Country Club Discrimination

This Note concludes with recommendations for Kentucky to help rid country clubs of discrimination.

I. History and Overview of the Kentucky Commission on Human Rights

Since the 1960s, the Kentucky General Assembly has passed laws and established a Commission to address issues of discrimination. The KCHR is a state agency that was created by the Kentucky legislature in 1960 “to act only as a forum for minority groups in seeking peaceful Solutions to racial problems.” The Kentucky Civil Rights Act, which prohibits discrimination in employment and places of public accommodation, was passed in 1966, and a Fair Housing Law was passed in 1968, protecting against discrimination in housing. Although amended over the years, the Kentucky Civil Rights Act presently prohibits discrimination on the basis of race, color, religion, sex, disability, national origin, age, smoking and familial status in housing situations.

Eleven commissioners, who are appointed by the governor, review, guide and approve the day to day activities of the executive director.


21 See generally Ky. Rev. Stat. Ann. § 344 (LexisNexis 1997); Overview, supra note 19. The Civil Rights Act outlines the KCHR’s powers and duties, such as, “to conduct research . . . and publish reports on discrimination . . . to receive and investigate complaints of discrimination and to recommend ways of eliminating any injustices occasioned thereby,” and “to make an annual report to the Governor of its activities.” § 344.180 (2), (3), (7).

22 See § 344.120. The last change to the Kentucky Civil Rights Act was made in 1994 when the Kentucky General Assembly amended the Act to prohibit discrimination in employment based on age. See Overview, supra note 19.
and staff at the KCHR. The Commission’s major focus is receiving, investigating and carrying out complaints filed by Kentucky citizens. Any person who believes that he or she has been affected by a discriminatory practice or act may file a complaint with the KCHR, which in turn, “collect[s] and summarize[s] the evidence” to see if there is probable cause that discrimination has occurred. If probable cause exists, a formal attempt to settle the case is made, and if achieved, “a written Consent Agreement” is signed and submitted to the KCHR for approval. If a settlement cannot be reached, the case is tried at an administrative hearing with a KCHR attorney representing the complainant and a hearing officer or appointed commissioner presiding. A final order by the KCHR is binding, although either party may appeal.

After Pendennis, the KCHR has the ability to respond to complaints about country clubs by going through the investigative and fact-seeking process described above to determine if discriminatory membership practices are employed. Prior to the case, the KCHR dismissed such complaints, reasoning that the clubs were private and thus exempt from the Kentucky Civil Rights Act. The KCHR’s con-

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23 See Overview, supra note 19.
24 See id. The KCHR is divided into three separate groups: the Enforcement Branch, the Legal Division and the Research & Information Branch. Id. The Enforcement Branch handles the case processing when a citizen calls the office or an appointed commissioner brings an issue to the staff’s attention. Id. This group also investigates the complaint by interviewing parties and reviewing records to determine if there is probable cause. Overview, supra note 19. The Legal Division provides legal services to those who allege discriminatory grievances by negotiating conciliation agreements and representing the complainant in an administrative hearing or the state’s court system. Id. Finally, staff members who are part of Research & Information coordinate the agency’s field offices, community relations and public affairs. Id.
26 See id. If the agreement is approved by the KCHR, a Consent Agreement has the same effect as a final order. Id.
27 Id.
28 Id. If the KCHR holds that discrimination did occur, a final order may involve a “cease and desist order and require further affirmative action that will eliminate discrimination.” Id. Such action might include reinstatement to a job, monetary relief or making a home or apartment available to the complainant. Id.
30 Pendennis, 153 S.W.3d at 786. The KCHR dismissed Louis Coleman’s complaints because the Kentucky Civil Rights Act states that “[a] private club is not ‘a place of public accommodation, resort or amusement’ if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests.” See Ky. Rev. Stat. Ann. § 344.130 (1) (LexisNexis 1997); Pendennis, 153 S.W.3d at 786.
firmed power to investigate private clubs is a step forward in accomplishing its goal of eradicating discrimination.31

While country club membership may not appear to be the most important source of discriminatory practices, it is a significant and timely area for Commissions like the KCHR to pursue.32 For example, Scott Rosner, a lecturer at the University of Pennsylvania, argues that membership in a private country club generates a business advantage because of the networking relationships that are cultivated in the club setting.33 Another reason to acknowledge and attack discrimination in private clubs is because the discrimination is not so obvious.34 Lastly, private club discrimination is a timely issue in that it negatively impacts many minority groups.35 Despite the KCHR’s important accomplishment, there may be stronger measures the Commission and states can employ to fight the exclusionary practices in country clubs.36

31 See Pendennis, 153 S.W.3d at 789.
32 See Rosner, supra note 5, at 138–39, 142.
33 See id. at 138–39. The exclusion of minorities from membership thus “manifests itself” in their exclusion “from significant parts of the marketplace” and “perpetuates the socioeconomic differences between the excluded and non-excluded groups.” Id. at 139. Terminating discrimination at country clubs, Rosner contends, results in benefits like, “[p]reventing stigmatization, leveling the playing field . . . and promoting diversity.” Id. at 142. Martha Burk recently expressed this idea when asked if she would attend the 2005 Masters golf tournament. See Deborah Solomon, Questions for Martha Burk: Women’s Work, N.Y. TIMES MAG., Mar. 6, 2005, at 17. Burk responded, “I wouldn’t go near a golf course. I am so disgusted with what I learned about the way corporate America uses golf and how women are excluded from the business access that it provides.” Id.
34 See Jolly-Ryan, supra note 8, at 529. Jennifer Jolly-Ryan, a law professor, makes the point that discrimination in private clubs might not seem like a pressing issue when compared to acts like hate crimes, but the fact that the blatant prejudice can be entirely legal because of the clubs’ private status may actually be even “more harmful to the excluded individuals and society as a whole.” Id. at 528–29.
35 See id. at 528. Most recently, private country clubs have become defendants in law suits involving same-sex partners. See Ann Carrns, Gay Club Members Seek Spousal Rights, WALL ST. J., Feb. 20, 2004, at A11. Many country clubs have policies of giving privileges to members’ significant others, including Druid Hills Golf Club in Atlanta, Georgia. Id. When registered domestic partners Lee Kyser and Lawrie Demorest decided to join the club, however, they were told that they would each have to join as individuals and pay separate $40,000 initiation fees. Id. Dr. Kyser joined anyway and her formal requests for spousal status for Demorest have been denied twice. Id. An attorney in Atlanta claims that “the legal and political battles that will arise from the Druid Hills case will have a long-term impact on how gays are treated in Atlanta and Georgia,” which clearly displays the importance of the issue. See Cameron McWhirter, High Stakes in City-Club Dispute, ATLANTA J. CONST., Jan. 9, 2005, at 1A.
II. Overview and Implications of the Law Behind Country Club Discrimination

Before understanding *Pendennis* and its potential effectiveness for accomplishing the KCHR’s goal of eradicating discrimination, one must be familiar with the constitutional, legislative and U.S. Supreme Court precedent that deal with freedom of association and private clubs. Specifically, most private clubs deny that they impose any legal harm with their discriminatory practices because of their private status and the right of freedom of association.

A. Legislation

Although one might believe that the Constitution and federal and state civil rights statutes protect minorities from discrimination at private clubs, the anti-discrimination laws are applicable only to places of public accommodation, and therefore private clubs are usually beyond their scope. The U.S. Constitution, for example, does not offer a remedy for discrimination at private country clubs because the Equal Protection Clause of the Fourteenth Amendment applies only to prohibitions of state, not private, action. There are three common law tests, however, that when satisfied would trigger the Equal Protection Clause and could qualify a private club as a state actor: 1) the public functions test, 2) the state compulsion test, and 3) the joint action or “nexus” test. Unfortunately, these tests probably would not make a

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38 See U.S. CONST. amend. I; Rosner, *supra* note 5, at 137. When Martha Burk wrote a letter to Augusta National chairman Hootie Johnson urging the club to admit women, he responded defiantly stating, “members are people who enjoy each other’s company and the game of golf” and their “membership alone decides [thei]r membership—not any outside group with its own agenda.” *See id.* at 181–82 n.294. He continued, “[t]here may well come a day when women will be invited to join our membership, but that timetable will be ours and not at the point of a bayonet.” *Id.* He ended the letter by hoping that “Dr. Burk and her colleagues recognize the sanctity of [the club’s] privacy.” *Id.*
40 U.S. Const. amend. XIV, § 1. The Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” *Id.*; Kamp, *supra* note 39, at 92.
41 See Kamp, *supra* note 39, at 92–93. The public functions test allows for a private entity to be considered a state actor if the entity performs a function traditionally done by the government. *See Marsh v. Alabama*, 326 U.S. 501, 508 (1946) (ruling that a privately owned town was a state actor). The state compulsion test looks to see if the state has become so involved with the private action that the state seems to endorse the private conduct. *See Reitman v. Mulkey*, 387 U.S. 369, 380–81 (1967) (holding state’s legislation allow-
private club a state actor, and thus, the Constitution does not apply to discrimination at a private club.\textsuperscript{42}

In an attempt to offer remedies for private discrimination, Congress enacted the Civil Rights Act of 1964.\textsuperscript{43} The Act contained various titles that dealt with specific areas of discrimination, such as discrimination in employment (Title VII), education (Title IX) and public accommodations (Title II).\textsuperscript{44} Although the Civil Rights Act of 1964 broadly proscribes discrimination in or by public accommodations, the act contains an express exemption for private clubs.\textsuperscript{45} The Act does not define “private,” which has led to various interpretations of the word and these interpretations have caused some clubs to comply with the standards of the Act.\textsuperscript{46} Determining whether a club is private has become a fact-based question that courts have construed both narrowly
and broadly. Because of the different interpretations that have arisen in federal courts, federal civil rights law is not the most effective or dependable way for minorities to gain equal access to private clubs.

Because of the vague definitions in the Civil Rights Act, the majority of states have adopted their own form of civil rights legislation, but the laws “fall short of establishing a clear precedent to be followed in cases involving country club discrimination.” These statutes usually define public accommodations broadly, which may result in including some country clubs within the protections of these laws. Other states have adopted laws that specifically deal with discrimination at country clubs and are discussed below in comparison to Kentucky’s response to private club discrimination.

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47 See Jolly-Ryan, supra note 8, at 509. Courts may look at several factors, such as the selective nature of the club’s membership practices, the history and purpose of the organization, the use of facilities by non-members, the club’s size and the membership’s control over the club’s policies. See id. at 510–15.

48 Kamp, supra note 39, at 95. Kamp also points out that Title II of the Civil Rights Act does not protect against gender discrimination and therefore a woman could not sue a private club for equal membership and privileges under the Act. Id.

Interestingly, it has been argued that federal courts are hospitable places to litigate civil rights violations because they are more objective in their approaches than state courts. See Karl A. Cole-Frieman, Note, The Ghosts of Segregation Still Haunt Topeka, Kansas: A Case Study on the Role of the Federal Courts in School Desegregation, 6 Kan. J.L. & Pub. Pol’y 23, 24 (1996). In a discussion of Brown v. Board of Education, Cole-Frieman contends that the federal courts are the only institution insulated and powerful enough to protect the constitutional rights of black children. See also Cole-Frieman, supra, at 37–38. See generally 347 U.S. 483 (1954). Martin Luther King, Jr. once wrote:

> It was a great relief to be in a federal court. Here the atmosphere of justice prevailed. No one can understand the feeling that comes to a Southern Negro on entering a federal court unless he sees with his own eyes and feels with his own soul the tragic sabotage of justice in the city and state courts of the South . . . . But the Southern Negro goes into the federal court with the feeling that he has an honest chance before the law.

Cole-Frieman, supra, at 23 (citing MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 151–52 (1964)).

49 See Rosner, supra note 5, at 159.

50 See id. These laws do not specifically discuss country club discrimination, but courts have interpreted anti-discrimination laws as including country clubs when the clubs meet certain criteria. Id. For example, if a club allows wedding receptions or fundraising events where guests enter the facilities, a court could find the club to be a public accommodation under the state statute. See Kamp, supra note 39, at 101.

51 See Rosner, supra note 5, at 159. Some states have simply included country clubs in the definition of “public accommodation” in their anti-discrimination laws. Id. at 166. In Kansas, for example, private clubs are included within the definition of public accommodations if they have over 100 members, provide regular meal services, and receive payment for dues, services or use of facilities from non-members. See Kan. Stat. Ann. § 44-1002
B. Litigation

U.S. Supreme Court precedent has presented another issue in private country club discrimination: a member’s right to freedom of association. In the 1980s the Supreme Court decided a trilogy of landmark cases that involved discrimination in private country clubs. In each case, the Court held that state legislatures that have enacted public accommodation laws have a compelling interest in preventing discrimination, which overrides a member’s right to freedom of association.

In Roberts v. United States Jaycees, the U.S. Jaycees, a non-profit organization founded to “promote and foster the growth and development of young men’s civic organizations,” brought an action challenging the Minnesota Department of Human Rights’ application of the state’s Human Rights Act. The Minnesota Human Rights Act forbids discrimination on the basis of sex in “places of public accommodation” and the Jaycees did not allow women to vote or hold office in their organization. The Jaycees argued that the law requiring them to accept women as equal members violated the current members’ right of free association. The Supreme Court held that neither the right to intimate association nor the right to expressive association were violated by the Human Rights Act and that the state’s compelling interest in eliminating discrimination justified the result.

52 See Rosner, supra note 5, at 146–47. The Supreme Court has ruled that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).


54 See id.

55 Roberts, 468 U.S. at 612; Kamp, supra note 39, at 97–98.


57 Roberts, 468 U.S. at 615; Kamp, supra note 39, at 98.

58 Roberts, 468 U.S. at 623; Kamp, supra note 39, at 98–99. Intimate association includes personal affiliations that are shown by certain characteristics and, therefore, involve personal relationships people have with one another. See Rosner, supra note 5, at 147. Expressive association is part of the First Amendment because of the idea that “[a]n individual’s freedom to speak, to worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” Roberts, 468 U.S. at 622; Rosner, supra note 5, at 147.
In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Supreme Court reaffirmed *Roberts*.\(^5^9\) When the Rotary Club of Duarte’s charter was revoked by Rotary International because it admitted women as members, the Duarte Club sued Rotary International for violating California’s public accommodation statute.\(^6^0\) The Supreme Court found for the Duarte Club by holding that Rotary Clubs did not have a right to intimate association and their right to expressive association was outweighed by the state’s interest in eradicating discrimination.\(^6^1\)

Lastly, *New York State Club Association, Inc. v. City of New York* involved an amendment to New York City’s human rights law that banned discrimination by any “place of public accommodation, resort, or amusement,” but exempted distinctly private organizations.\(^6^2\) The law defined “distinctly private” as follows:

[An] institution, club or place of accommodation . . . shall not be considered in its nature distinctly private [if it] has more than 400 members . . . provides regular meal service and regularly receives payments for dues, fees, usage of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business.\(^6^3\)

After the enactment of the amendment, 125 private clubs filed suit claiming that the law was facially invalid for being vague and overbroad.\(^6^4\) The Supreme Court rejected these arguments and found the law valid, as it sufficiently defined what constituted a distinctly private

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\(^5^9\) 481 U.S. at 549.

\(^6^0\) See Charpentier, *supra* note 1, at 126 (citing *Rotary*, 481 U.S. at 541).

\(^6^1\) See *Rotary*, 481 U.S. at 546, 549; Kamp, *supra* note 39, at 99–100. Kamp points out that the Rotary Clubs did not have a right of freedom of intimate association because the “relationships within the Rotary were not of the intimate, familial type that are granted constitutional protection.” Kamp, *supra* note 39, at 99 (citing *Rotary*, 481 U.S. at 549). The Court found that some of the clubs had more than 900 members, there was a high drop-out rate and many of the activities were completed individually instead of as a group. See Kamp, *supra* note 39, at 100 (citing *Rotary*, 481 U.S. at 546).

\(^6^2\) See *N.Y. State Club*, 487 U.S. at 5; Kamp, *supra* note 39, at 100 (citing *N.Y. City Admin. Code §§ 8-101, 8-102(9) (1986)).

\(^6^3\) See Kamp, *supra* note 39, at 100 (citing *N.Y. City Admin. Code § 8-109(9)).

\(^6^4\) See Kamp, *supra* note 39, at 100 (citing *N.Y. State Club*, 487 U.S. at 7.)
club. In the Supreme Court’s view, the private clubs that filed suit were not distinctly private but “commercial” in nature because of the business deals and contacts that are created at these clubs. After this case, states like Kansas and Florida responded by passing laws similar to New York City’s law, which contain specific factors highlighting the commercial nature of clubs.

Roberts, Rotary and New York State Club are encouraging because in each decision the Supreme Court ruled in favor of non-discrimination over freedom of association for club members. The U.S. Supreme Court’s most recent look at the issue, however, could raise concern about the future of cases involving prejudice in private organizations of all kinds. In Boy Scouts of America v. Dale, James Dale, a homosexual member of the Boy Scouts, had his adult membership in the Boy Scouts revoked because of his sexual orientation. Dale sued, claiming the revocation violated New Jersey’s public accommodation statute, which prohibited discrimination on the basis of sexual orientation in places of public accommodation.

The case eventually reached the United States Supreme Court, where Justice Rehnquist wrote for the majority and reversed the New Jersey Supreme Court ruling in favor of Dale. The Court found that applying the state’s public accommodations law to the Boy Scouts violated its members’ rights to expressive association, relying on the fact that the organization had a mission to promote certain values. The decision could affect future cases that involve country club discrimination because, even though this case did not deal with intimate association, a private country club could make amendments to their by-laws to convey that, like the Boy Scouts, they are organized to

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65 See N.Y. State Club, 487 U.S. at 12.
66 See Kamp, supra note 39, at 101. Kamp mentions that the Supreme Court did not rule out the ability for a private club to make a fact-based claim that it has special characteristics to provide protection for freedom of association. Id.
68 See Rosner, supra note 5, at 155.
70 530 U.S. at 645.
72 See id. at 643–44.
73 See id. at 649. The Court concluded that the general mission of the Boy Scouts was “to instill values in young people” by encouraging “morally straight” behavior. Id. at 649–50; Rosner, supra note 5, at 157.
promote certain values. With a few subtle changes to their rules, private country clubs may be able to claim they are protected from government interference under *Boy Scouts of America*.

C. Discussion of Commonwealth v. Pendennis, Inc.

The *Pendennis* litigation, a recent case regarding country club discrimination, commenced in 1991 and concluded in 2004. Thirteen years after the case’s origination, Acting Executive Director of the KCHR, Morgan Ransdell, stated, “[t]his important decision by the Kentucky Supreme Court demonstrates that the Commission has not been lax in its work, and . . . . [t]he Commission is vigorously striving to reach the goal set forth by the General Assembly in the Kentucky Civil Rights Act, namely to eradicate unlawful discrimination.” Ransdell went on to say that “[a]ll private clubs in Kentucky should sit up and take notice that the Kentucky Revenue Cabinet will deny business expense deductions regarding payments to private clubs that are found by the Commission to discriminate.”

It took a long time for the KCHR to demand that the clubs in Kentucky take notice. Although the original complaints alleged that Louis Coleman was denied membership to three clubs based on his race, the KCHR dismissed them, concluding that although the Commission had the jurisdiction to investigate places of public accommodation for discrimination, private clubs are specifically exempt from being classified as a public accommodation in the Kentucky Civil Rights Act. After the KCHR dismissed the complaints, Representa-

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74 See Rosner, *supra* note 5, at 158. Rosner presents an example of a club including by-laws that a particular religion is against its beliefs. *Id.* at 158 n.160. This would most likely limit the possibility for followers of that religion from joining the club; a Muslim, for instance, would not want to join a club that states that the Muslim faith is against its beliefs. *Id.* People of the particular religion could be members of a minority group in the United States and the country club would thus be discriminating without government intervention. *See id.*

75 See *id.* at 158.


78 *Id.*

79 *Id.*

tive Anne Northup, who sponsored the Revenue Code amendments that prohibited tax deductions for discriminatory clubs, was concerned that the Commission had passed up an investigation that the new amendments ordered, and requested an opinion by Attorney General Fred Cowen.81 In November of 1991, the Attorney General issued an opinion that stated that the KCHR had the “legal authority” to investigate clubs to determine if they engage in discriminatory practices.82 He based this opinion on the Revenue Code, which stated that a determination of such practices was to be made by the courts or by “an agency established by the General Assembly and charged with enforcing the Civil Rights Laws of the Commonwealth.”83

Two years after the Attorney General’s opinion, KCHR Commissioner Mae Cleveland filed complaints against each of the three clubs.84


[a]ny deduction for amounts paid to any club, organization, or establishment which has been determined by the courts or an agency established by the General Assembly and charged with enforcing the civil rights laws of the Commonwealth, not to afford full and equal membership and full and equal enjoyment of its goods, services, facilities, privileges, advantages, or accommodations to any person because of race, color, religion, national origin or sex.


81 See Brief for Appellants, supra note 80, at 5. Representative Northup wrote a letter asking if “the bill passed in 1990 implicitly grant[s] the Human Rights Commission the authority to make a determination of discrimination with regard to the clubs.” Id. at 5–6. She went on to assert that Kentucky “has a right to ensure that it does not continue to be an ‘enabler’ to discrimination.” Id. at 6.

82 See id. at 6–7.

83 See Ky. Rev. Stat. Ann. § 141.010(11)(d), (13)(f); Brief for Appellants, supra note 80, at 6–7. The KCHR is the only agency that meets this definition. Brief for Appellants, supra note 80, at 7.

84 See Brief for Appellants, supra note 80, at 7. The Cleveland complaints specifically alleged that pursuant to the Revenue Code, “the Commission is authorized to take appropriate action and make the necessary determinations pursuant thereto.” See Ky. Rev. Stat. Ann. § 141.010(11)(d), (13)(f); Brief for Appellants, supra note 80, at 7. Commissioners of
The clubs sought to dismiss these complaints, arguing that the KCHR was bound by its prior dismissal of the Coleman complaints. On March 15, 1995, the KCHR followed the Attorney General and denied the clubs’ motion to dismiss, reasoning that the KCHR had jurisdiction to investigate private clubs under the Revenue Code. At this point, the KCHR requested membership lists from the clubs, but they refused to turn over the information and filed suit in federal court claiming that the request for lists violated their club members’ constitutional right of free association.

The U.S. District Court narrowly construed the Kentucky Civil Rights Act and the Revenue Code by holding that it was not within the KCHR’s statutory powers to investigate private clubs. Two years after this decision, the United States Court of Appeals for the Sixth Circuit reversed and vacated the decision, reasoning that the federal district court should have let state courts handle the case. Because the federal litigation was concluded, the KCHR made another request that the clubs reveal “bare statistical demographic information regarding their membership.” The clubs refused to provide the information, leading the KCHR to seek a judicial declaration in state circuit court concerning the scope of the Commission’s investigative authority. Eventually, the KCHR are allowed to initiate complaints under the Kentucky Civil Rights Act. See Ky. Rev. Stat. Ann. § 344.190(8); Ky. Rev. Stat. Ann. § 344.200(1).

85 See Brief for Appellants, supra note 80, at 7.
87 See Brief for Appellants, supra note 80, at 8. In their brief, the appellants’ make note that although the clubs claimed that they did not engage in discriminatory membership practices, the clubs “sought to hide behind an asserted right of intimate association” and further alleged that the KCHR violated the civil rights of the club members by asking for membership lists. Id. The brief points out that the clubs have not provided any information about their membership policies, “which many clubs openly display on their walls, for members and guests alike to see.” Id.
88 See id. The KCHR argued that the opinion written by Judge Hood was flawed because he mistakenly thought that the General Assembly could only grant the KCHR powers explicitly found in the Kentucky Civil Rights Act. Id. at 8–9. Alternatively, the KCHR alleged that the legislature gives state agencies’ powers in different Kentucky statutes. Id. at 9.
89 See Louisville Country Club v. Watts, 178 F.3d 1295, 1999 WL 232683, at *3 (6th Cir. Apr. 16, 1999) (unpublished per curiam). The Sixth Circuit decision was binding upon the parties and the U.S District Court dismissed the clubs’ federal case. See Brief for Appellants, supra note 80, at 9.
90 See Brief for Appellants, supra note 80, at 9.
91 See id. at 10. The KCHR wanted a declaratory judgment affirming the Attorney General’s opinion as well as a declaration stating that the Commission had the authority to investigate private clubs for the limited purpose of enforcing the Revenue Code provisions.
both the KCHR and the clubs filed motions for summary judgment and the issue came down to whether the Revenue Code read in conjunction with the Kentucky Civil Rights Act granted the KCHR the authority to investigate private clubs to determine if they discriminate.\textsuperscript{92}

On August 29, 2000, a state circuit court issued a partial summary judgment in favor of the clubs, holding that the KCHR lacked statutory authority to investigate private clubs.\textsuperscript{93} After the Commission appealed in 2002, the Kentucky Court of Appeals affirmed the state circuit court, reasoning that the drafters should have been explicit in granting the Commission the power to investigate private clubs in the Revenue Code.\textsuperscript{94} The KCHR then appealed to the Kentucky Supreme Court.\textsuperscript{95}

Although \textit{Pendennis} certainly involved the evils of discrimination, the Kentucky Court made clear that the case was not about whether the alleged discriminatory practices existed, but rather about statutory construction.\textsuperscript{96} The question before the Kentucky Court was whether the KCHR had the statutory authority to investigate private clubs to determine if they discriminate.\textsuperscript{97} In the Appellants’ brief, the Attorney General and the KCHR argued that the General Assembly intended for the KCHR to investigate private clubs when it amended the Revenue Code provisions.\textsuperscript{98} Alternatively, the clubs argued in the Appellees’ Brief that the KCHR does not have such authority because neither the Kentucky
Civil Rights Act nor the Revenue Code expressly states this power. In addition to the statutory construction question, both appellants and appellees presented other arguments in favor of their respective views.

The *Pendennis* Court ruled in favor of the appellants and reversed the lower court decisions. The Kentucky Court held that although the Revenue Code does not explicitly authorize the KCHR’s investiga-

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100 See Brief for Appellants, supra note 80, at 41–44; Brief for Appellees, supra note 99, at 25, 44. The Attorney General and the KCHR discussed the implications of the case at the end of their brief by stressing the problem of discrimination and the history of prejudice in private clubs. See Brief for Appellants, supra note 80, at 41–44. The appellants argued that this archaic practice of discrimination in country clubs has contributed to the small number of women and minorities in top business or government fields today. *Id.* at 41–42. They noted that Tiger Woods would likely not be allowed to join some Kentucky golf clubs because “bigoted members would undoubtedly blackball him and argue this is their constitutional privilege.” *Id.* at 42. These passionate public policy arguments demanded a liberal interpretation of the statute in order to advance “the cause of equality and justice.” *Id.* at 44.

The clubs responded with extreme examples by alleging that if the appellants’ argument were accepted, the KCHR’s jurisdiction would be without limit and “every family, business and religious organization in Kentucky” would be subject to the oversight of the Commission. See Brief for Appellees, supra note 99, at 25. In this same vein, the brief called the KCHR an “over-zealous agency” that would then be able to investigate any club “it arbitrarily presumes is immoral or bigoted.” *Id.* at 44. They also attacked the Commission by saying it stereotypically assumes “that golfers who look like Jack Nicklaus (but not Tiger Woods) are ‘evil.’” *Id.* In a Reply Brief, the appellants asked the Kentucky Court to ignore the clubs’ personal attacks and distortions. See Appellants’ Reply Brief at 10, Commonwealth v. Pendennis Club, Inc., 153 S.W.3d 784 (Ky. 2004) (No. 2002–SC–00508–DG). They also requested that the Kentucky Court find the legislative intent in the statutes “and if additional guidance is needed,” look to the public policy arguments. *Id.*

Interestingly, Tiger Woods reportedly told Oprah Winfrey that he has dealt with discrimination at country clubs and stated, “I got kicked off of golf courses numerous times; been called some pretty tough words to my face.” See Jolly-Ryan, supra note 8, at 498 n.28 (citing Frank Whelan, *Few Minorities at Country Clubs*, Allentown Morning Call, June 5, 1997, at D1). Despite his experiences with prejudice, Tiger Woods continues to play at the Masters Tournament at Augusta National and won, for his fourth time, the most recent Masters Tournament on April 10, 2005. See Terence Moore, *The Masters: Dramatic Win at 18th a Gift to Ailing Father*, Atlanta J. Const., Apr. 11, 2005, at 1C. No professional golfers, including Woods, have boycotted the championship because of the club’s discriminatory policies. See Charpentier, supra note 1, at 112.

101 See *Pendennis*, 153 S.W.3d at 785.
tory powers, they exist by implication.\textsuperscript{102} By looking at the purpose of the KCHR as well as the purpose behind the Revenue Code amendments, the Kentucky Court concluded that the General Assembly had intended to prohibit discriminatory clubs from benefiting from tax deductions, and that the KCHR was legally entitled to investigate in furtherance of that goal.\textsuperscript{103}

Although \textit{Pendennis} was a victory for the KCHR in that it clarified the Commission’s statutory right to investigate private clubs, the Kentucky Court points out several times in the opinion that private clubs have a constitutional right to discriminate based on race.\textsuperscript{104} Justice Lambert stated that the KCHR is authorized to investigate private clubs “[t]o assure that no such tax deduction is taken” and that neither the KCHR nor any court can force a club to discontinue its discriminatory practices.\textsuperscript{105} These qualifications are a reminder that nothing can bar these clubs in Kentucky from discriminating.\textsuperscript{106} The KCHR can investigate a club, and if it discovers discriminatory membership practices, the Commission informs the Revenue Cabinet, and club members are denied tax deductions.\textsuperscript{107} Although the tax consequences deter discrimination in private clubs and is a common strategy in many states for dealing with private club discrimination, tax consequences do not eliminate the discrimination itself.\textsuperscript{108} The blatant reminders in \textit{Pendennis}...
nis that discriminatory practices are legal among private clubs cast a negative light on an otherwise positive decision and raise the question of whether the KCHR, given its goal of eradicating discrimination in Kentucky, can do anything else to stop discrimination in private country clubs.109

California disallows deductions for taxpayers’ “expenditures made at, or payments made to, a club which restricts membership or the use of its services or facilities on the basis of age, sex, race, religion, color, ancestry, or national origin.” See Cal. Rev. & Tax. Code § 24343.2(a) (West 2004); Jolly-Ryan, supra note 8, at 523. Professor Jolly-Ryan claims that prohibiting discriminatory private clubs from taking tax exemptions and deductions is “attractive from moral, social, and political standpoints.” Jolly-Ryan, supra note 8, at 524. She quotes Representative Northup of Kentucky, who said, “[w]e can’t force people to change who they associate with, but they should not enjoy any government benefit at all if they choose to discriminate.” Id.

The tax consequences for private clubs do not necessarily deter them from eliminating the discrimination in their policies. See Kamp, supra note 39, at 106. In 1986, the Maryland Legislature barred country clubs with discriminatory membership or guest privilege practices from qualifying for preferential tax assessment. See Md. Code. Ann., Tax–Prop. § 8-212, -214 (West 2005). Burning Tree Country Club, located in Montgomery County, Maryland was informed that its lands would be assessed at their full cash value because the club restricted its membership to men. See Brief for Appellants, supra note 80, at 34. In State v. Burning Tree Club, the Maryland Court of Appeals held that governments do not have “to sanction, subsidize or support discrimination by private entities.” 554 A.2d 366, 384 (Md. 1989); Brief for Appellants, supra note 80, at 35. The case permitted the Maryland tax assessor to retroactively apply taxes to the club which amounted to a reported $938,000. See Kamp, supra note 39, at 106. Despite the financial loss and the disqualification from tax benefits, Burning Tree still prohibits women from entering its grounds. See id.

Interestingly, Burning Tree Country Club has appeared in the news again recently, displaying the idea that eliminating tax benefits did not discourage the club from discriminating against women. See Mihoeces, supra note 5, at 3C. Martha Burk supported U.S. Representative Carolyn Maloney of New York’s introduction of a House resolution that no member of Congress, the federal judiciary or the executive branch should belong to a club that discriminates on the basis of sex or race. See H.R. Con. Res. 130, 108th Cong. (2003); Mihoeces, supra note 5, at 3C. The resolution was a response to the controversy surrounding Augusta National, but also to clubs like Burning Tree, of which Senator John Warner of Virginia and Senator Don Nickles of Oklahoma are members. See id. Representative Maloney stated that by excluding women, these clubs are sending a message to women that “you are not our equal partner, and you do not deserve the opportunity to mix and mingle with CEO’s of America’s top corporations.” See Press Release, Rep. Carolyn B. Maloney, Maloney & Burk: It’s Time for Fair Play (Mar. 31, 2003), available at http://www.house.gov/maloney/press/108th/20030331FairPlay.html. The bill was referred to the House subcommittee on the Constitution on May 5, 2003. See GovTrack, H. Con. Res. 130[108]: Fair Play—Equal Access in Membership Resolution, http://www.govtrack.us/congress/bill.xpd?bill=hc108-130 (last visited Jan. 15, 2006).

109 See Pendennis, 153 S.W.3d at 785, 789; Our Mission, supra note 17.
III. Other State Approaches to Eliminating Country Club Discrimination

It may be difficult for federal and state statutes to reach private clubs because usually they are not found to be places of public accommodation.\textsuperscript{110} Some states, however, have enacted bold pieces of legislation that specifically address private club discrimination and more effectively discourage and, in some instances, ban prejudicial membership policies.\textsuperscript{111} Such measures addressed below indicate how, although \textit{Pendennis} was a positive step to end discrimination, the General Assembly of Kentucky could go further to accomplish the KCHR’s goal of eradicating discrimination in the state.\textsuperscript{112}

A. Connecticut

In 1997, the Connecticut Legislature, representing a state “known for its affluent golfers and bucolic New England surroundings,” passed a law explicitly prohibiting discrimination at private country clubs.\textsuperscript{113} This far-reaching equal access law prevents a private country club that has at least twenty members and nine holes of golf and which either financially profits from nonmembers or holds a liquor license from discriminating in its membership or access policies.\textsuperscript{114} It also requires that private clubs allow all members equal access to the facilities.\textsuperscript{115}

\textsuperscript{110} See Kamp, \textit{supra} note 39, at 92.


\textsuperscript{112} See \textit{Pendennis}, 153 S.W.3d at 785, 789; Our Mission, \textit{supra} note 17.

\textsuperscript{113} See § 52-571d; Chervin, \textit{supra} note 18, at 176. Chervin adds that “Connecticut has always been in the forefront of ensuring equality among all its citizens.” See Chervin, \textit{supra} note 18, at 187. In furtherance of this point, he cites \textit{Evening Sentinel v. National Organization for Women}, which stated that the legislators of the state unambiguously displayed intent to abolish sex discrimination when it approved the equal rights amendment to the United States Constitution. See 357 A.2d 498, 504 n.5 (Conn. 1975); Chervin, \textit{supra} note 18, at 186 n.75.

\textsuperscript{114} See \textit{Conn. Gen. Stat. Ann.} § 52-571d. The statute provides in relevant part:

(a) For purposes of this section, “golf country club” means an association of persons consisting of not less than twenty members who pay membership fees or dues and which maintains a golf course of not less than nine holes and (1) receives payment for dues, fees use of space, facilities, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers or (2) holds a permit to sell alcoholic liquor . . .
After hearing testimonials from female country club members regarding the discriminatory practices of the clubs throughout the state,

(b) No golf country club may deny membership in such club to any person on account of race, religion, color, national origin, ancestry, sex, marital status or sexual orientation.

(c) All classes of membership in a golf country club shall be available without regard to race, religion, color, national origin, ancestry, sex, marital status or sexual orientation.

(g) Any person aggrieved by a violation of the provisions of this section may bring a civil action in the Superior Court to enjoin further violations and to recover the actual damages sustained by reason of such violation or two hundred fifty dollars, whichever is greater, together with costs and a reasonable attorney’s fee.

(h) If, an action brought under subsection (g) of this section, the court finds that a golf country club holding a permit to sell alcoholic liquor . . . has violated any of the provisions of this section, it may, in addition to any relief ordered under said subsection (g), order the suspension of such permit until such time as it determines that such club is no longer in violation of this section.

Id. 115 Id. The statute reads in relevant part:

(d) A golf country club that allows the use of its facilities or services by two or more adults per membership, including the use of such facilities or services during restricted times, shall make such use equally available to all adults entitled to use such facilities or services under that membership. The requirements of this subsection concerning equal access to facilities or services of such club shall not apply to adult children included in the membership. Nothing in this subsection shall be construed to affect the assessment by a golf country club of any fees, dues or charges it deems appropriate, including the ability to charge additional fees, dues or charges for access by both adult members during restricted times.

(e) A golf country club that has food or beverage facilities or services shall allow equal access to such facilities and services for all adults in all membership categories at all times. Nothing in this subsection shall be construed to require access to such facilities or services by any person if such access by such person would violate any provision of the general statutes or a municipal ordinance concerning the sale, consumption or regulation of alcoholic beverages.

Id.

These provisions in the Connecticut statute are important because many private country clubs that open their doors to women continue to treat their female members differently than the males. See Charpentier, supra note 1, at 128–89. It is a common practice, for example, to restrict women to specific tee-times during the week and permit men to reserve weekend and holiday morning spots. Id. Another discriminatory custom at these clubs are “men-only grill rooms.” Id. at 129. Grill rooms are dining areas where women and children are forbidden to enter and male members can invite guests to conduct business discussions and network. Id.
the Connecticut legislature enacted the comprehensive law.\textsuperscript{116} The law forbids discrimination in private clubs, creates a private right of action for enforcement, and allows the state to suspend a club’s liquor license.\textsuperscript{117} The law—unlike others “without teeth”—places country clubs on notice that the state will no longer accept discrimination.\textsuperscript{118}

Although the statute goes further than many other states in attempting to eliminate discriminatory practices, the legislators in Connecticut responded with mixed reactions.\textsuperscript{119} Those who voted against the bill argued that a club’s board of directors should have the authority to change club policies, not the legislature.\textsuperscript{120} Others thought the best way to deal with the issue would be for women and minorities to


\textsuperscript{118} See Conn. Gen. Stat. Ann. § 52-571d; Chervin, supra note 18, at 179. Just after the law took effect, more than two dozen members of the Wethersfield Country Club filed a discrimination lawsuit, accusing the club of bias against women. See McEntee & Johnson, supra note 11, at 1; Club Is Sued in Bias Claim, N.Y. Times, June 10, 1998, at B9. Wethersfield became the first private golf club to be sued under the statute. See Club Is Sued in Bias Claim, supra, at B9. Wethersfield opened its doors to women in 1991, at which point, members’ wives who had previously been restricted to limited tee times were allowed to apply for full membership on their own and receive unlimited playing status by paying a reduced initiation fee of $4000. See Colin Poitras, Judge Rules Club Did Not Discriminate, Hartford Courant, Aug. 18, 1998, at A3. The plaintiffs claimed that the requirement to pay the initiation fee discriminated against women and violated the Connecticut statute. Id. The Middletown Superior Court judge concluded that the initiation fee did not circumvent the legislation and that the fees were at or below the level charged by other country clubs for similar memberships. See WCC Members for Fair Play v. Wethersfield Country Club, Inc., 1998 WL 646842, at *5 (Conn. Super. Ct. Aug. 12, 1998) (unpublished per curiam); Poitras, supra, at A3. At the time of the lawsuit, of the 375 resident members, 374 were men. See id.

\textsuperscript{119} See Chervin, supra note 18, at 179–80. Ironically, several powerful women in the state were opposed to the statute, while many males supported it. Id. at 179. The first female president of the Hartford Golf Club, Valerie Bulkeley, was quoted as saying, “I am opposed to discrimination obviously. But when it comes to the internal workings of a club, I think you have to work that out within the club.” Id. (citing Maxine Bernstein, Female Golfers Looking to Strike Discrimination Aim to Eliminate Sex Based Biases at Private Clubs, Hartford Courant, Apr. 1, 1997, at A3). Chervin makes note that Bulkeley’s statement does not take into account the fact that the majority of country clubs’ governing boards are male and will most likely continue to discriminate against women unless they are prohibited from doing so by law. See id.

\textsuperscript{120} See id. at 179–80. Connecticut State Representative Marilyn Hess, a member of the prestigious Greenwich Country Club, voted against the bill, saying, “why the legislature should have anything to do with it is beyond me.” Id. (citing Matthew Daly, Bill Would Give Women Country-Club Equality, Hartford Courant, May 8, 1997, at A3).
join non-discriminatory clubs.\textsuperscript{121} In the end, many legislators fully supported the bill and it was signed into law on January 1, 1998.\textsuperscript{122}

Although Connecticut is not the first state to address the problem of discrimination at country clubs, its approach seems to be one of the most comprehensive in that it “provides specific legal and equitable remedies for a wronged party.”\textsuperscript{123} Other states that have statutes like Connecticut’s may only ban discrimination against clubs’ current members, while the Connecticut law uniquely prohibits a club from discriminating in member selection.\textsuperscript{124} Additionally, instead of simply

\begin{itemize}
\item \textsuperscript{121}See id. at 180. In his testimony before the Connecticut State Assembly, State Representative Michael J. Jarjura questioned why a woman would want to join a discriminatory club. \textit{Id.} at 180 n.52.
\item \textsuperscript{122}See id. at 177, 180. The bill’s sponsor, Representative Ellen Scalettar, asserted that “[p]eople are shocked this goes on in this day and age—but it does.” \textit{See id.} at 180. Connecticut Attorney General Richard Blumenthal lent his support to the bill, stating that, “clubs should be able to establish whatever rules they want,” but that “the state should not be a participant where there is illegal discrimination.” \textit{See id.}
\item A recent case involving the Connecticut statute was decided in July, 2004. \textit{See generally} McNamara v. Tournament Players Club of Conn., Inc., 851 A.2d 1154 (Conn. 2004). In that case, Brian McNamara was a member of a golf club owned by the defendant and his membership was cancelled after he had a verbal dispute with another male member in the club’s locker room. \textit{See id.} at 1156. A few months later, his wife applied for membership in the club, but was denied. \textit{Id.} The plaintiff alleged that the refusal to admit her was “because, and only because, she is a woman who is married to the plaintiff Brian McNamara.” \textit{Id.} The club contended that the denial of her application was based on her status as McNamara’s spouse and had nothing to do with her gender. \textit{Id.} at 1158. The Supreme Court of Connecticut agreed with the defendant and found that the rejection did not constitute gender discrimination in violation of \S\ 52-571d. \textit{See CONN. GEN. STAT. ANN.} \S\ 52-571d; \textit{McNamara}, 851 A.2d at 1164–65. Both plaintiffs testified that the atmosphere at the club was not discriminatory toward women, that she would have been admitted had she been married to someone else and the club had “never refused” an application by a woman. \textit{See McNamara}, 851 A.2d at 1164.
\item \textsuperscript{123}See Chervin, \textit{supra} note 18, at 181.
\item \textsuperscript{124}See CONN. GEN. STAT. ANN. \S\ 52-571d; Chervin, \textit{supra} note 18, at 181–82. For example, New Jersey passed a similar law on August 1, 1997. \textit{See N.J. STAT. ANN.} \S\ 10:5–12(f)(2) (West 2004); Chervin, \textit{supra} note 18, at 181. The New Jersey law states that a private club or association cannot
\begin{quote}
directly or indirectly refuse, withhold from, or deny to any individual who has been accepted as a club member and has contracted for or is otherwise entitled to full club membership any of the accommodations, advantages facilities or privileges thereof, or to discriminate against any member in the furnishing thereof on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, disability or nationality of such person.
\end{quote}
\textit{N.J. STAT. ANN.} \S\ 10:5–12(f)(2). This law’s limited scope has apparently been effective in curbing gender discrimination against existing country club members. \textit{See Rosner, \textit{supra}} note 5, at 166. Nonetheless, the law does not concern discrimination against nonmembers or membership practices. \textit{See id.} Because of this exclusion, “the New Jersey law does not
\end{itemize}
denying a discriminatory club governmental benefits, the Connecticut statute bans discrimination at clubs explicitly and entirely.125

A law like Connecticut’s furthers the KCHR’s goal of eliminating discrimination in its state because it provides a remedy and bans discrimination.126 When comparing Kentucky’s Revenue Code and *Pendennis* to the Connecticut law, it is clear that the Kentucky General Assembly could do more to end discriminatory practices in private clubs.127 Such legislation would not just exempt these clubs from tax benefits, but would aid in the effectiveness of the KCHR and further its goal of eradicating discrimination in the state.128

**B. California**

California has taken a different approach to help eliminate discrimination in private clubs as evidenced by the state’s “public accommodation” statute.129 This law, commonly known as the Unruh Act, states that, “[a]ll persons . . . are free and equal, no matter what their sex, race, color, religion, ancestry, national origin, or disability, or, medical condition [and] are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business es-

125 *See* Conn. Gen. Stat. Ann. § 52-571d (West 2004); Chervin, *supra* note 18, at 182–83. In Iowa, for example, the Attorney General wrote an opinion stating that no personal tax deduction will be allowed “for Iowa income tax purposes, if a club imposes time and/or place limitations or restrictions upon the use of its services or facilities based upon age or sex.” *See* 1992 Op. Iowa Att’y Gen. 126, 1992 WL 470349, at *3 (Iowa A.G.); Chervin, *supra* note 18, at 182–83. The opinion makes clear that discrimination is not actually prohibited, but tax deductions will be denied to those “who patronize private clubs which employ such restrictions.” *See id.* Iowa’s practice is similar to the Kentucky Revenue Code and equally ineffective when compared to Connecticut’s statute. *See* Conn. Gen. Stat. Ann. § 52-571d; Ky. Rev. Stat. Ann. § 141.010(11)(d)(13)(f) (LexisNexis 2003); Op. Iowa Att’y Gen., 1992 WL 470349, at *3.


tablishments of every kind whatsoever.” Since the Unruh Act is very broad, judicial interpretation was needed to determine how the law would affect private clubs. Warfield v. Peninsula Golf and Country Club provided this interpretation and can be looked at in comparison to Pendennis for how it furthers the eradication of discrimination.

In Warfield, the plaintiff, Mary Ann Warfield, claimed that the Peninsula Golf and Country Club’s membership policies violated the Unruh Act because they excluded women from holding full Regular Family Memberships. The plaintiff and her husband initially joined the club in 1970 when he was approved for a Regular Family Membership. Her participation in the club increased over the years as she become a member of the “ladies golf team” and made valuable social and business relationships. Warfield and her husband divorced in 1981, and she requested that the board of directors transfer the Regular Family Membership previously held by her husband into her name. The board of directors refused her request and claimed that they were restricted by the club’s governing bylaws, at which point the


131 See Cal. Civ. Code § 51; Rosner, supra note 5, at 160. Rosner, however, states that where the Civil Rights Act of 1964 is vague as to what defines a private organization, “the Unruh Act is unmistakably clear.” See id.

132 See Pendennis, 153 S.W.3d at 789; Warfield, 896 P.2d at 782.

133 See Warfield, 896 P.2d at 782. In 1981, the relevant time period for the case, the Peninsula Golf and Country Club’s facilities included a golf course, a driving range and putting greens, tennis courts, a swimming pool, a clubhouse and a dining room, several bars, a ballroom, and golf and tennis shops. Id. at 778. At this time, the club had a variety of membership packages, “each carrying its own distinct set of privileges with regard to use of the club’s facilities.” Id. The “Regular Family Membership,” the category at issue in the case, was limited to 350 members of the club. Id. at 780. Under Peninsula’s bylaws, the holders of a Regular Family Membership had the right to vote for the club’s board of directors, serve as a director, or help in the decision-making process as to who can become new members. Id. These members also enjoyed the most privileges in regards to the club’s facilities. See id. In March 1970, the club’s bylaws were amended to limit Regular Family Memberships to “adult male persons” and not to “females or minors.” See id. at 781.

134 See id. The selection process for membership involved an application, sponsorship by existing members, reviews by committees, a credit check and a final approval by the board of directors. Id.

135 See id. at 781–82.

136 See id. at 782. In the plaintiff’s divorce settlement, she was awarded “all right, title and interest in and to the membership of Dr. and Mrs. Warfield in the Peninsula Golf and Country Club.” Id.
plaintiff filed a complaint for damages and injunctive relief.\textsuperscript{137} The issue before the California Supreme Court was whether the club qualified as a “business establishment” under the Unruh Act.\textsuperscript{138}

The plaintiff argued that by looking at the specific attributes of the club, the court could conclude that it was a business establishment and not truly private.\textsuperscript{139} For example, she contended that the size of the membership, “700 members plus their spouses and children” was too large to meet selective standards.\textsuperscript{140} She also argued that since non-members could enjoy the club’s pro-golf and tennis shops as well as “sponsored events,” the club was inherently not exclusive to members.\textsuperscript{141} The Court agreed with the plaintiff and found that the club’s members derived a direct and indirect financial benefit from the club’s business transactions with non-members.\textsuperscript{142} With this reasoning, the Court held that the Peninsula Club was a business establishment, not a private organization, and therefore had to comply with the Unruh Act.\textsuperscript{143}

\textsuperscript{137} See id. at 782. At the time of the lawsuit, the club’s bylaws provided that upon termination of the marriage of a Regular Family Member, “the Husband shall continue to be the Regular Family Member, and all rights, privileges and obligations shall be his.” Id. at 781. The bylaws specify that, “[i]n the event of an award of the Certificate of Regular Family Membership in the final judicial action to the female spouse, and the male spouse does not forthwith thereafter purchase the female spouse’s interest . . . such Membership may, by action of the Board, be terminated.” Id. Interestingly, when the board of directors reviewed the plaintiff’s request in October, 1981, the club’s membership committee recommended to transfer the membership to her. Id. at 782.

\textsuperscript{138} See Cal. Civ. Code § 51; Warfield, 896 P.2d at 783.

\textsuperscript{139} See Warfield, 896 P.2d at 792, Rosner, supra note 5, at 161–62.

\textsuperscript{140} See Warfield, 896 P.2d at 792, Rosner, supra note 5, at 161.

\textsuperscript{141} See Warfield, 896 P.2d at 792, Rosner, supra note 5, at 162. The plaintiff also claimed that the fact that only half of the members governed the club and membership selection showed that her entrance into the club would not affect the governance of the club. See Warfield, 896 P.2d at 792, Rosner, supra note 5, at 161–62. Lastly, she maintained that “the opportunity for obtaining advantageous business contacts” was a vital element of her own membership, which displayed that the purpose could be viewed as business instead of social. Warfield, 896 P.2d at 792, Rosner, supra note 5, at 162.

\textsuperscript{142} See Warfield, 896 P.2d at 779, 793; Kamp, supra note 39, at 103. The Court emphasized that the income derived from nonmembers was a product of “regular and repeated” business transactions. See Warfield, 896 P.2d at 793 n.11. Isolated fundraisers would thus probably not make a private club a business establishment. See id.

\textsuperscript{143} See Warfield, 896 P.2d at 798; Kamp, supra note 39, at 103. Some have argued that all clubs that are used in furtherance of any kind of business opportunity should be categorized as a public accommodation. See Jolly-Ryan, supra note 8, at 517. Jolly-Ryan, for example, contends that by narrowly defining a private club, these clubs will be forced to abide by the nondiscrimination rules for public accommodations and eventually, “the last stronghold of legal segregation” would be eliminated. See id. at 517–18.
While not as comprehensive as Connecticut’s statute, the Unruh Act is written so broadly that many private clubs fall within its reach.\textsuperscript{144} The Warfield Court noted that a private club “is not automatically exempt from the strictures of [the statute] simply because it characterizes itself as a ‘private social club.’”\textsuperscript{145} These words suggest the power of the Unruh Act, and show that such a statute might be a more effective route for a state like Kentucky to combat discrimination.\textsuperscript{146} Private golf clubs are scrutinized under such a law, and if found to be business establishments, are forbidden from using discriminatory membership practices.\textsuperscript{147} This kind of sanction is more meaningful than a prohibition of tax deductions and consequently, may better accomplish the KCHR’s goal.\textsuperscript{148}

\textsuperscript{144} See Cal. Civ. Code § 51; Conn. Gen. Stat. Ann. § 52-571d; Rosner, supra note 5, at 160. Although California’s decision to prohibit discrimination in private country clubs that qualify as business establishments was a courageous step, it has been criticized for not creating a clear rule as to when a private club constitutes a business establishment for the purposes of the Unruh Act. See Warfield, 896 P.2d at 798; Chervin, supra note 18, at 186. The Warfield court did, however, consider several factors to determine whether a club is private or public, and other states could use these factors to make their statutes more specific. See Rosner, supra note 5, at 161. These factors were: (1) the selectivity of the group in the admission of members, (2) the size of the group, (3) the degree of membership control over the governance of the organization, (4) the degree to which club facilities are available for use by nonmembers, and (5) whether the primary purpose served by the club is social or business. See Warfield, 896 P.2d at 791–92.

\textsuperscript{145} Warfield, 896 P.2d at 791.

\textsuperscript{146} See id.; Rosner, supra note 5, at 161. Rosner states that the Warfield Court’s warning that private clubs are not automatically exempt from the Unruh Act is an “important distinction” since “any establishment, no matter what its true purpose, could claim to be a private club in order to escape the legal burden of equal rights.” See Rosner, supra note 5, at 161.

\textsuperscript{147} See Cal. Civ. Code § 51; Warfield, 896 P.2d at 798.

\textsuperscript{148} See Kamp supra note 39, at 106 (see discussion supra note 108); Our Mission, supra note 17. Massachusetts recently dealt with a case similar to Warfield when nine women brought a sex discrimination case against a suburban Boston country club, alleging it engaged in discrimination by offering them limited memberships. See Borne v. Haverhill Golf & Country Club, Inc., No. 966511C, 1999 WL 1411366, at *1 (Mass. Super. Nov. 19, 1999) (unpublished per curiam); Rosner, supra note 5, at 162–63. The women sued under a state statute that prohibits places of public accommodation from discriminating against “persons of any religious sect, creed, class, race, color, denomination, sex, sexual orientation . . . in the full enjoyment of the accommodations . . . offered to the general public by such places of public accommodation, resort or amusement.” Mass. Gen. Laws ch. 272, § 92A (2000). The statute defines a place of public accommodation as a place “which is open to and accepts or solicits the patronage of the general public and, without limiting the generality of this definition, whether or not it be . . . a place of public amusement, recreation, sport, exercise or entertainment.” Id.

The plaintiffs successfully argued that they had suffered gender discrimination at the private club in violation of state law and a unanimous jury awarded them $1.97 million. See Rosner, supra note 5, at 162. The women described the discrimination through a variety of
C. Michigan

Michigan has used a different method to tackle the problem of private club discrimination. While it is not as direct and inclusive as Connecticut’s statute, it has been effective in bringing about equality for minorities in private clubs. Michigan’s law prohibits private clubs from denying individuals equal access to the club’s facilities. Additionally, Michigan’s Elliot-Larson Civil Rights Act (MELCRA) specifically includes private country clubs within the definition of a

evidentiary examples, including the fact that the only package available to women was the limited membership, which meant they were denied tee times on weekend mornings and during predetermined weekday blocks. See Borne, 1999 WL 1411366, at *2; Rosner, supra note 5, at 163. The Club limited the number of primary members, which received unlimited tee time access to 320 members, of which only four were women at the time of the case. See Rosner, supra note 5, at 163. Additionally, if a woman tried to change her membership package, she had to pay an initiation fee, while a man making a similar change did not have to pay. See Borne, 1999 WL 1411366, at *4; Rosner, supra note 5, at 164. Because the club also rented out three function rooms to the public for banquets and meetings, it was found to be a place of public accommodation and subject to state law. See Borne, 1999 WL 1411366, at *3; Rosner, supra note 5, at 162–63.

After many post-trial motions, Judge John Cratsley of the Massachusetts Superior Court issued a permanent injunction prohibiting Haverhill Golf and Country Club from "making any distinction, restriction, or discrimination on the basis of sex in relation to any rights, benefits, services, and/or privilege at the club." See Rosner, supra note 5, at 164. He also demanded that the club provide gender discrimination avoidance training to its board members, keep records of its membership and wait lists, disclose the process of members' rights to prospective applicants and provide the judge with reports of the application process. See id. The Appeals Court of Massachusetts affirmed the trial court’s decision in 2003 and the state’s Supreme Judicial Court refused to review the case. See Borne v. Haverhill Golf & Country Club, Inc., 440 Mass. 1101, 1101 (2003); Borne v. Haverhill Golf & Country Club, Inc., 791 N.E.2d 903, 919 (Mass. App. Ct. 2003).

Interestingly, the women started the case by filing a complaint with the Massachusetts Commission Against Discrimination, the state’s version of the KCHR. See Rosner, supra note 5, at 164; Lynn Rosellini, 'Those women' vs. the 'Neanderthals', Gender Politics at a Massachusetts Golf Club, U.S. News & World Rep., June 12, 2000, at 56. At that time, a bar called the 19th Hole was open only to male members, but after the complaint, women were given equal access to the bar. See id. The plaintiffs claimed in the law suit, however, that they were still discouraged from entering, thus adding to the discrimination. See Rosner, supra note 5, at 164. An article written about the case shortly after the judgment, illustrated that feelings at the club had grown worse. See Rosellini, supra, at 56. One of the litigants described being “shunned” on the golf course and the author noted that “[m]ore than seven months after the court ruling, the atmosphere inside the 19th Hole could ice the Budweiser behind the bar.” Id.

151 See Mich. Comp. Laws Ann. § 37.2302(a). The law states in relevant part that a person shall not “[d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.” Id.
place of public accommodation.\textsuperscript{152} MELCRA was amended in 1992 to ensure that country, yachting and sports clubs were included in places of public accommodation.\textsuperscript{153} The amendment was adopted in order to eliminate exclusionary practices at private clubs, such as golf clubs restricting certain times that spouses, typically wives, of members could use certain facilities.\textsuperscript{154}

On its face, Michigan’s approach appears to be comprehensive in that it specifically states that a country club is a place of public accommodation, but a closer reading reveals that the statute applies to the facilities of private clubs and therefore might not protect against discrimination in membership practices.\textsuperscript{155} The Benevolent and Protective Order of the Elks v. Reynolds exemplifies this idea and suggests the statute’s shortcomings.\textsuperscript{156} In that case, the plaintiff, representing seventy-three Michigan lodges of the Elks Club along with 50,000 members of those lodges, brought suit against the director of Michigan’s Department of Civil Rights, alleging that MELCRA violated the Elks Club’s rights to intimate and expressive association “by prohibiting its gender-based membership requirements and precluding its use of the private club exemption.”\textsuperscript{157}

Although the District Court acknowledged that the state legislature enacted the law to prohibit private clubs from restricting women from certain facilities and found that the law did not violate the Elks’

\textsuperscript{152} See Mich. Comp. Laws Ann. § 37.2301(a)(i). MELCRA reads:

“Place of public accommodation” means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

Place of public accommodation also includes the facilities of the following private clubs: (i) A country or golf club . . . .

\textit{Id.}


\textsuperscript{154} See Benevolent & Protect. Order of Elks v. Reynolds, 863 F.Supp. 529, 531 (W.D. Mich. 1994) (explaining the purpose and history behind the amendment to MELCRA). The statute involves the liquor license laws and provides that if a club does not comply with the provisions, the state can deny renewal of its liquor license. See Mich. Comp. Laws Ann. § 37.2304 (West 2001).

\textsuperscript{155} See Mich. Comp. Laws Ann. § 37.2301(a)(i); Kamp, supra note 39, at 104.

\textsuperscript{156} See Reynolds, 863 F.Supp at 533.

\textsuperscript{157} See Mich. Comp. Laws Ann. §§ 37.2301–2303; Reynolds, 863 F.Supp. at 530. The rules of the Elks Club provided that an applicant for membership must be a male citizen of the United States who is at least 21 years old, a believer in God, “of good character, not affiliated with the Communist Party, and does not advocate the forceful overthrow of the government.” Reynolds, 863 F.Supp. at 530.
right of intimate and expressive association, the court ultimately found that no genuine issue of material fact existed.\textsuperscript{158} The court held that MELCRA did not require the club to admit women as new members because it only applied to individuals who were current members of that private club.\textsuperscript{159} Under Reynolds, the Elks Club was essentially prohibited from providing unequal access of its facilities to its current members or in other words, the club could not discriminate against men.\textsuperscript{160} Reynolds has been criticized as hindering equal rights in private clubs.\textsuperscript{161}

Four years later, however, another case that involved the Elks Club and MELCRA had a very different and more effective result in terms of eliminating discrimination.\textsuperscript{162} \textit{Schellenberg v. Rochester, Michigan Lodge No. 2225, of the Benevolent and Protective Order of the Elks} involved a woman who applied for membership to the Elks Club and was denied because of her gender.\textsuperscript{163} She brought the action, claiming she was denied the full and equal enjoyment of the services of a place of public accommodation on the basis of gender in violation of MELCRA.\textsuperscript{164} The defendant, on the other hand, argued that it was a private club exempt from the act.\textsuperscript{165}

After a decision in favor of the plaintiff and a subsequent appeal, the defendant was ordered to reconsider the plaintiff’s application without consideration of gender.\textsuperscript{166} In 1994, seventy-one members of

\textsuperscript{158} See Reynolds, 863 F.Supp. at 531, 534 (holding that the statute does not affect the clubs’ membership policies and practices because the statute only applies to the facilities of private clubs).

\textsuperscript{159} See id. at 533; Kamp, supra note 39, at 104.

\textsuperscript{160} See Reynolds, 863 F.Supp. at 533.

\textsuperscript{161} See Kamp, supra note 39, at 104. Kamp points out that the case never looked at the issue of whether a liquor license should be denied because it was not found that the Elks Club violated MELCRA. \textit{Id.} She calls the decision “a major set-back for women’s rights” because the District Court discovered this “flaw” in the statute. \textit{Id.}


\textsuperscript{163} See Schellenberg, 577 N.W.2d at 166.

\textsuperscript{164} See Mich. Comp. Laws Ann. § 37.2101; Schellenberg, 577 N.W.2d at 166.

\textsuperscript{165} See Mich. Comp. Laws Ann. § 37.2303; Schellenberg, 577 N.W.2d at 166. This section of the statute states that the “article shall not apply to a private club, or other establishment not in fact open to the public . . . .” Mich. Comp. Laws Ann. § 37.2303. It also makes clear that the particular section does “not apply to a private club that is otherwise defined as a place of public accommodation in this article.” \textit{Id.}

\textsuperscript{166} See Schellenberg, 577 N.W.2d at 166. In 1989, the trial court found the Elks Club’s gender-based rejection of Schellenberg’s application a violation of MELCRA and the defendant appealed. \textit{Id.} The Court of Appeals found the club to be a place of public accommodation and public service and that it “lacked the selectivity necessary to be considered a private club exempt from the act.” See Mich. Comp. Laws Ann. § 37.2302; Schellenberg, 577
the Elks voted on plaintiff’s application for membership and fifty-eight voted against her becoming a member. On the same evening, they voted on seven male applicants and all were approved as new members. A week later, the plaintiff asked the trial court to order the club to accept her membership “with full and equal enjoyment of the services, facilities, privileges, and advantages and that the Elks . . . be permanently enjoined from denying her the full and equal enjoyment of the club as long as she continued to pay her dues.” The court found in favor of the plaintiff, holding that the evidence established her prima facie case that she was treated differently because of her sex.

The Court of Appeals affirmed the trial court’s holding and ordered that the plaintiff be admitted as a member. It found that she was a member of a protected class under the statute and that the Elks had been deemed a place of public accommodation. In establishing the prima facie case, the Court of Appeals held that the defendant was predisposed to discriminate against women because of its rules and that the club acted upon that predisposition when the plaintiff’s application was denied.

Unlike Reynolds, Schellenberg suggests that Michigan’s statute can be extremely effective in eliminating discrimination in private clubs. By specifically including country clubs as a place of public accommodation, these clubs are prohibited from using discriminatory practices. Additionally, cases like Schellenberg are a good warning to these clubs. In light of these facts, Michigan’s route appears to be more effective than denying tax deductions and might better suit Kentucky’s goal of eradicating discrimination throughout the state.

N.W.2d at 166. Since the defendant was to be held to the standards of MELCRA, the trial court’s order that the defendant reconsider her application was affirmed. See Schellenberg, 577 N.W.2d at 166.

167 See Schellenberg, 577 N.W.2d at 166.
169 Id. at 166–67.
170 See id. at 167. The trial court stated that, “men who are otherwise qualified are admitted routinely, [but] [p]laintiff’s application was overwhelmingly rejected by men who did not know her.” Id.
171 See id. at 166.
173 See id. at 166, 169; Reynolds, 863 F.Supp at 534.
174 See Mich. Comp. Laws Ann. § 37.2301(a) (i); Rosner, supra note 5, at 171.
175 See Schellenberg, 577 N.W.2d at 166, 169.
Like many other states, Louisiana mentions the rights of private clubs in its public accommodations statute.\textsuperscript{178} It is the only state, however, that explicitly identifies specific criteria for determining when a club is truly private.\textsuperscript{179} To determine whether an organization is a private club for purposes of the law, the factors to be considered are: (1) selectiveness of the group in adding new members; (2) existence of formal membership procedures; (3) degree of membership control over internal governance; (4) history of organization; (5) use of club facilities by nonmembers; (6) substantiality of dues; (7) whether the organization advertises; and (8) predominance of a profit motive.\textsuperscript{180} By stating specific factors, the Louisiana law provides a successful example of how to deal with country club discrimination, as illustrated by recent case law.\textsuperscript{181}

In \textit{Albright v. Southern Trace Country Club of Shreveport}, female members of the club challenged the club’s policy of restricting the use of a dining area known as the “Men’s Grille” to men only.\textsuperscript{182} The trial court found in favor of the club, but the Court of Appeal reversed and granted the plaintiffs declaratory and injunctive relief.\textsuperscript{183} The Supreme Court of Louisiana looked at the statutory requirements to determine if the club was a place of public accommodation.


\textsuperscript{179} See \textsc{La. Rev. Stat. Ann.} § 49:146; Finlay, \textit{supra} note 178, at 384. The law states, “[i]n access to public areas, public accommodations, and public facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical or mental disability.” \textsc{See La. Rev. Stat. Ann.} § 49:146 § 49:146.

\textsuperscript{180} See \textsc{La. Rev. Stat. Ann.} § 49:146 (3) (a)–(h).

\textsuperscript{181} \textit{See id.}; Albright v. S. Trace Country Club of Shreveport, Inc., 879 So.2d 121, 138 (La. 2004).

\textsuperscript{182} \textit{See Albright,} 879 So.2d at 123. On March 26, 2000, four female members tried to get food service at the club and the Men’s Grille was the only restaurant facility open on Sundays. \textit{See id.} at 126. The women entered the Men’s Grille and shortly after, they were approached by male employees who informed them they were not allowed in the Grille because they were women. \textit{Id.} They were told they would not be served and were asked to leave the restaurant. \textit{Id.} As the women were leaving, a member of the club yelled, “[d]on’t let the door hit you on the ass on your way out.” \textit{Id.} When the women asked about the policy in the past, a former member of the Board of Directors told them that the Men’s Grille atmosphere would offend “ladies” because “all those men do in there is spit, scratch, and cuss.” \textit{Id.}

\textsuperscript{183} \textit{See id.} at 123. The Supreme Court of Louisiana granted a writ to determine if the court of appeal used the proper standard of review and who had the burden of proof in such a case. \textit{Id.}
and concluded that Southern Trace was a public facility, thus affirming the Court of Appeal decision.\textsuperscript{184} While criticizing the club’s policies, the Court said that the Men’s Grille was “based on an inaccurate, stereotypical depiction of male behavior” and that the state’s laws “espouse certain aspirational goals which limit gender discrimination” and these goals “impose an obligation to avoid arbitrary, capricious, or unreasonable discrimination based on gender.”\textsuperscript{185}

\textit{Albright} is a positive decision in that it recognizes the need to fight discrimination and uses the specific factors in the Louisiana statute to arrive at its conclusion.\textsuperscript{186} The goals mentioned in the case are the same as the KCHR and, once again, reflect another avenue for states like Kentucky to pursue in order to eliminate discrimination.\textsuperscript{187}

\textbf{IV. Recommendations}

The \textit{Pendennis} decision reflected the need to allow equal access to private clubs when it held that the KCHR has the statutory authority to investigate private clubs to determine if they discriminate in their membership practices.\textsuperscript{188} The Kentucky Court made clear, however, that private clubs in the state have the right to “discriminate in affording the benefits of membership without fear of legal liability.”\textsuperscript{189} Instead of prohibiting discrimination in clubs, if such conduct is found by the KCHR, club members will be prohibited from deducting club payments on their state taxes.\textsuperscript{190} At the very least, in order to provide equal access, states should not subsidize the private clubs that discriminate by providing tax exemptions and other government benefits that are in actuality funded by society.\textsuperscript{191} It is questionable, how-

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\textsuperscript{184} See La. Rev. Stat. Ann. § 49:146 (3) (a)–(h); Albright, 879 So.2d at 128. The Court mentioned the eight factors and found that there was no selectiveness in the addition of new members and no evidence of membership requirements other than the ability to pay dues. \textit{See Albright}, 879 So.2d at 128. Additionally, the members did not have a voice in governance of the club, club facilities were consistently used by nonmembers, there was a considerable amount of advertising and there was a profit motive. \textit{Id.}

\textsuperscript{185} See \textit{Albright}, 879 So.2d at 137–38.


\textsuperscript{187} \textit{See Albright}, 879 So.2d at 138; \textit{Our Mission}, \textit{supra} note 17. The Louisiana Supreme Court notes that the provisions of § 49:146 “provide an appropriate guide and analytical tool for the courts’ use in delineating between a public facility and a private club.” \textit{See Albright}, 879 So.2d at 128.

\textsuperscript{188} \textit{See Commonwealth v. Pendennis Club, Inc.}, 153 S.W.3d 784, 789 (Ky. 2004).

\textsuperscript{189} \textit{See id.}, at 785.

\textsuperscript{190} \textit{See Kentucky Supreme}, \textit{supra} note 80, at 1.

\textsuperscript{191} \textit{See Jolly-Ryan}, \textit{supra} note 8, at 528–29. Many states, including Illinois, Maine, New Hampshire, New Jersey, New Mexico, and Utah, mandate holders of liquor licenses to
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ever, if this route in and of itself is the most effective way to end discrimination in private clubs.\textsuperscript{192} The recommendations below suggest alternative ways for states like Kentucky to accomplish the goal of eradicating discrimination.\textsuperscript{193}

A. Following the States

Although a good solution to end country club discrimination would be federal legislation that specifically prohibited the clubs from doing so, the likelihood of such legislation being passed is slim.\textsuperscript{194} While new state legislation might also be difficult to pass for similar reasons, the end result of helping to eradicate discrimination may outweigh the fact that some state legislators are members of country clubs themselves.\textsuperscript{195}

An examination of the ways other states have handled country club discrimination demonstrates that the state of Kentucky can do more to accomplish the KCHR’s goal of eradicating discrimination in the state.\textsuperscript{196} A statute like Connecticut’s would be the most effective in eliminating discrimination since it explicitly forbids country clubs from discriminating against nonmembers as well as current members, creates a private right of action for enforcement, and allows for revocation of a club’s liquor license.\textsuperscript{197} It was a bold step for Connecticut “to take on these exclusive fortresses,” and such a law in Kentucky

\textsuperscript{192} See Kamp, \textit{supra} note 39, at 106.
\textsuperscript{193} See Our Mission, \textit{supra} note 17.
\textsuperscript{194} See Rosner, \textit{supra} note 5, at 170. Rosner contends that since socializing with friends is a benefit of club membership, the loss of alcohol at clubs would likely result in members spending less time at the country club. \textit{Id.} at 174. On the other hand, Kamp argues that denying property tax exemptions is the most preferable of state laws that eliminate government benefits to discriminatory clubs “because it avoids the associational defense which is often brought by private clubs.” \textit{See} Kamp, \textit{supra} note 39, at 107.
\textsuperscript{195} See \textit{id}. at 170–71. Rosner points out that state courts “champion equality at the expense of liberty.” \textit{See} \textit{id}. at 171.
would certainly help end discrimination in the types of clubs challenged in *Pendennis*.198

Instead of enacting an entirely new statute similar to Connecticut’s, Kentucky could amend its public accommodation statute to further the goal of eliminating discrimination.199 Kentucky could adopt a law similar to California’s Unruh Act, which would be effective in ending prejudicial practices since state courts that have applied public accommodations laws to private clubs “have consistently held that the clubs are subject to these laws.”200 A law like the Unruh Act could be broad enough to reach country clubs and therefore help eradicate discrimination.201

Kentucky could also amend its public accommodation statute to be more like Michigan’s, which specifically includes private country clubs within the definition of a place of public accommodation and demands that such clubs allow equal access to the facilities to all its members.202 This law was successful in granting a female plaintiff membership into the all-male Elks Club and could therefore further the KCHR’s goal.203 Alternatively, Kentucky could be the second state, after Louisiana, to amend its statute to add specific factors to consider for determining if a club is private.204 The Louisiana criteria gives courts a helpful guideline and can be interpreted to force country clubs to comply with the nondiscrimination provisions of the statute.205 These options present the opportunity for Kentucky to go further to eliminate discrimination at country clubs and ultimately help accomplish the KCHR’s goal.206

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198 See Commonwealth v. Pendennis Club, Inc., 153 S.W.3d 784, 786 (Ky. 2004); Chervin, supra note 18, at 189–90.
201 See id.
B. Following the Leaders and Internal Change

While litigation and existing or new legislation may lead to the end of discrimination in private country clubs, it is important to consider alternative methods of combating discriminatory policies as well.\textsuperscript{207} In any particular state, for example, local officials and representatives should have the courage not to join exclusive all-white or all-male clubs.\textsuperscript{208} Additionally, professional athletes should be encouraged to be socially responsible when choosing events in which they compete.\textsuperscript{209} Leading by example may effectuate change.\textsuperscript{210}

Perhaps the most effective and simple way to end discriminatory practices in private clubs is through the insistence of the club’s own members.\textsuperscript{211} The members usually have the power and influence to pressure the club to change its policies.\textsuperscript{212} While internal change appears simple in theory, it is actually difficult due to the long tradition of discrimination within country clubs and the personal risks that come along with pushing for new practices.\textsuperscript{213} Looking at these meth-

\textsuperscript{207} See Rosner, supra note 5, at 172. Such “back door” alternatives include “the curtailment of the many government benefits and privileges afforded country clubs.” Id.

\textsuperscript{208} See Jolly-Ryan, supra note 8, at 527. Jolly-Ryan remarks that a candidate running for political office should take into consideration an “exclusive private club membership as a possible skeleton in the closet.” Id.

\textsuperscript{209} See Rosner, supra note 5, at 184. Interestingly, using professional athletes to combat discrimination has been done in the past. Id. Golf legend Tom Watson withdrew his membership at the Kansas City Country Club when it rejected Henry Block because he was Jewish and tennis star Serena Williams refused to play in the 2000 Family Circle Cup in South Carolina during an NAACP-led boycott surrounding the presence of the Confederate flag waving atop the state capitol building. Id. If a player like Tiger Woods threatened to boycott a tournament played at a discriminatory club, the club would either have to change its policies “or host a tournament missing the sport’s biggest drawing card.” See id. at 186.

\textsuperscript{210} See id. Rosner argues that professional golf tours might help end discrimination at the country clubs that host their tournaments by “making their membership requirements more rigorous and then imposing harsh sanctions on clubs that refuse to comply.” Rosner, supra note 5, at 183. The Country Club in Brookline, Massachusetts, for example, of which only two of the 1,300 members are African-American, was awarded the 2005 PGA Championship, but was unable to accommodate the size of the event. Id. at 181–83. If the PGA changed its direction and decided not to consider such a club as a host, the threat would bring negative publicity and might force the club to change its policies. Id. at 183.

\textsuperscript{211} See Jolly-Ryan, supra note 8, at 529.

\textsuperscript{212} See id. at 527–28.

\textsuperscript{213} See Rosner, supra note 5, at 187; Rosellini, supra note 148, at 56. A member who objects to club practices may end up feeling ostracized or lose business from other members as a result. See Rosner, supra note 5, at 187–88. The women who successfully challenged the discrimination at Haverhill Golf and Country Club lost friendships and business contacts after the trial and several of the plaintiffs eventually resigned as members of the club. See
ods collectively in concert with the potential to amend or enact legislation, demonstrates that Kentucky can and should go further to eliminate discrimination at private country clubs.214

Conclusion

Private country clubs are places “where contacts are made, corporate postures are relaxed, and deals are formed.”215 Because of the business connection to these clubs, as well as the fact that there is a long tradition of discrimination in American country clubs against racial minorities and women, litigation and legislation have been launched to help minorities gain the equal advantage that white men have long enjoyed.216 While many private clubs claim that they are private and thus able to operate free from government sanction, this is not always the case, and “the desire to attain equality for all members of society should take priority over the liberty interests of the country club.”217

The Pendennis decision held that the KCHR has the statutory authority to investigate private clubs to determine if they discriminate in their membership practices.218 The Kentucky Court made note, however, that private clubs still have the right to “discriminate in affording the benefits of membership without fear of legal liability.”219 Instead of prohibiting discrimination in clubs, after an investigation by the KCHR, discriminatory club members are prohibited from deducting club payments on their state taxes.220

The goal of the KCHR is to eradicate discrimination in the Commonwealth of Kentucky and although Pendennis is a step toward accomplishing this goal, a look at other state’s reactions to country club discrimination demonstrates that Kentucky could and should do more to further the KCHR’s goal.221 Other states explicitly prohibit


214 See Our Mission, supra note 17.
215 See Kamp, supra note 39, at 107.
216 See id.; Rosner, supra note 5, at 136. Rosner argues that country club discrimination should be given the recognition it deserves and “the legal, economic, and social support that is needed to make true change possible.” Rosner, supra note 5, at 192.

217 See id. at 136, 192.
219 See id. at 785.
220 See Kentucky Supreme, supra note 80, at 1.

discrimination in country clubs, broadly define public accommodation, include country clubs as a place of public accommodation or list factors to take into consideration when determining if a club is truly private. Such statutes, when looked at collectively with other alternative measures, appear to better accomplish the goal of eradicating discrimination. Alternative legislation would demand that “[a]ll private clubs in Kentucky . . . sit up and take notice.”

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223 See Rosner, supra note 5, at 170–92.
224 See Kentucky Supreme, supra note 80, at 2.
WHY HARMFUL TAX PRACTICES WILL CONTINUE AFTER DEVELOPING NATIONS PAY: A CRITIQUE OF THE OECD’S INITIATIVES AGAINST HARMFUL TAX COMPETITION

Richard A. Johnson*


Abstract: Offshore tax havens have recently become the target of international criticism and reform efforts due to their role in eroding foreign tax bases through competitive tax practices. William Brittain-Catlin’s book, Offshore: The Dark Side of the Global Economy, discusses how offshore tax laws have been exploited and explains measures taken by international groups, such as the Organisation for Economic Co-operation and Development (OECD), to counteract harmful tax competition. This Book Review critiques the efforts of the OECD to mitigate offshore tax havens’ contribution to harmful tax competition by expanding on two of Brittain-Catlin’s conclusions. In doing so, the Book Review will demonstrate that the OECD’s actions have not only caused severe economic harm to numerous developing nation economies, but they have failed to elicit sufficient support to successfully curb harmful tax competition.

Introduction

Offshore tax havens and financial centers, many of which are located within small, economically developing island nations,1 have long

1 The term “offshore” tax haven refers to “foreign jurisdictions where the legislative, regulatory, and tax framework is less restrictive compared to an investor’s home-base.” G. Scott Dowling, Comment, Fatal Broadside: The Demise of Caribbean Offshore Financial Confidentiality Post USA PATRIOT Act, 17 Transnat’l. L. 259, 263 (2004). An offshore financial center is essentially a tax haven that is “principally involved in the financial services sector and in [foreign portfolio investment].” William B. Barker, Optimal International Taxation and Tax Competition: Overcoming the Contradictions, 22 Nw. J. Int’l L. & Bus. 161, 177 (2002). Many offshore tax havens are island nations in the Caribbean and Pacific with fewer than 200,000 residents. See id. at 177; Vaughn E. James, Twenty-First Century Pirates of the Caribbean: How the Organization for Economic Cooperation and Development Robbed Fourteen CARICOM
been recognized for providing highly favorable financial advantages to foreign corporations and individuals.\textsuperscript{2} These offshore havens, however, have recently become the center of intense international criticism given their role in eroding foreign tax revenues by offering markedly low tax rates\textsuperscript{3} and facilitating domestic tax evasion and money laundering through strict financial secrecy laws.\textsuperscript{4} In his book, \textit{Offshore: The Dark Side of the Global Economy}, William Brittain-Catlin provides a detailed explanation of the specific abuses of the tax advantages within one of the world’s most used offshore havens, the Cayman Islands.\textsuperscript{5} In particular, Brittain-Catlin describes how multinational companies have been lured to incorporate subsidiaries within the Cayman Islands to take advantage of its strict financial secrecy laws

\textit{Countries of Their Tax and Economic Policy Sovereignty}, 34 U. MIAMI INTER-AM. L. REV. 1, 4 (2002). Given their size, along with several other factors, the majority of these nations are considered “have-not countries that rely on financial services to provide them with much needed employment and tax revenues . . . .” Matt Blackman, \textit{Still in the Line of Fire}, GOLDHAVEN INFO. SYS. (1999), http://www.goldhaven.com/LineofFire.htm (last visited Feb. 24, 2006).


\textsuperscript{3} In May 1996, the Organisation for Economic Co-operation and Development (OECD) was prompted by financial ministers to counter harmful tax competition and its negative effects on national tax bases. \textit{Org. for Econ. Co-operation & Dev., Harmful Tax Competition: An Emerging Global Issue} 3 (1998) [hereinafter \textit{Emerging Global Issue}]. In its 1998 report, the OECD indicated that one of the criteria to be considered a tax haven is to have no or nominal tax rates. \textit{Id.} at 23; see also Alexander Townsend, Jr., Comment, \textit{The Global Schoolyard Bully: The Organisation for Economic Co-operation and Development’s Coercive Efforts to Control Tax Competition}, 25 FORDHAM INT’L L.J. 215, 234 (2001) (noting that the British public interest group Oxfam International estimated the amount of lost revenue by industrialized nations due to tax havens at $50 billion annually).


\textsuperscript{5} See generally \textit{Brittain-Catlin}, \textit{supra} note 2. Brittain-Catlin notes that by harboring offshore financial centers, the Cayman Islands became the fifth-largest banking center in the world. \textit{See id.} at 8; see also Taylor Morgan Hoffman, \textit{The Future of Offshore Tax Havens}, 2 CHI. J. INT’L L. 511, 513 (2001) (indicating that only New York, London, Tokyo, and Hong Kong have larger capital markets than the Cayman Islands).
and non-imposition of taxes, effectively allowing these corporations to avoid paying domestic taxes on millions of dollars in annual income.\textsuperscript{6} In addition, he illustrates how the Cayman Islands’ secrecy laws have allowed corporations to hide debt in various offshore financial instruments to deceive investors with over-inflated financial statements.\textsuperscript{7} In doing so, Brittain-Catlin acknowledges how this deceptive practice contributed greatly to the economic collapses of Venezuela, Argentina, Korea, Thailand, Malaysia, and Russia during the 1990s.\textsuperscript{8} Furthermore, Brittain-Catlin discusses the use of offshore financial secrecy laws as a medium for criminal activities, which has been a growing concern given the role such hidden money has played in funding international terrorist groups such as Al-Qaeda.\textsuperscript{9}

Brittain-Catlin’s book also illustrates how numerous countries and international organizations have taken up arms to protect their tax bases from harmful tax competition and their mainlands from illegal activity and terrorist threats through various unilateral and multilateral measures.\textsuperscript{10} One notable effort he details was that initiated by the Organisation for Economic Co-operation and Development (OECD), an international advocacy group for economic policy comprised of the world’s wealthiest and most politically influential nations.\textsuperscript{11} Alarmed

\begin{itemize}
  \item \textsuperscript{6} Brittain-Catlin, supra note 2, at 55, 91–92. By establishing over seven hundred subsidiaries in Caribbean tax havens, Enron paid U.S. corporate federal income tax only once in a five-year period. \textit{Id.} at 55. Despite having profits near $2 billion, Enron’s tax liabilities totaled just $17 million. \textit{Id.} Similarly, the Stanley Works tool company estimated a reduction from 32% to 24% in domestic taxes, a savings of $30 million annually, by reincorporating in Bermuda. \textit{Id.} at 91–92.
  \item \textsuperscript{7} See \textit{id.} at 72–73 (explaining how Enron used the Cayman Islands’ Limited Partnership setup option to hide $618 million of investment losses offshore, thus allowing it to overstate earnings to investors by $586 million).
  \item \textsuperscript{8} See \textit{id.} at 188. The International Monetary Fund has indicated that various domestic and foreign business ventures within South American and Asian countries similarly hid billions of dollars of losses in offshore financial centers, catalyzing their economic meltdowns. \textit{Id.}
  \item \textsuperscript{9} \textit{Id.} at 207–13 (describing the vast global finances of Osama Bin Laden and the difficulty of ascertaining their whereabouts given suspected holdings in onshore and offshore accounts shielded by strict secrecy laws).
  \item \textsuperscript{10} See \textit{id.} at 195, 204–06. In 2000, the Financial Action Task Force (FATF) produced a list of fifteen nations without sufficient money laundering controls. \textit{Id.} at 195. The OECD created a similar list in 2000 identifying tax havens engaging in harmful tax practices. \textit{Id.}
  \item \textsuperscript{11} Brittain-Catlin also describes the European Union savings tax directive, which sought to coerce the Cayman Islands, a dependent territory of Britain, to engage in open exchange of banking information with its other members. \textit{Id.} at 219.
  \item The OECD was established in 1960 for the stated intentions of: 1) achieving sustainable economic growth in member countries, while contributing to the financial stability of the world economy, 2) continually expanding the economies of member countries and to develop those of non-member countries, and 3) contributing to the expansion of world trade
\end{itemize}
by the international community’s loss of revenue due to the prevalent use of offshore tax havens, the OECD has focused its efforts to minimize the effects of “harmful tax competition.” Specifically, by employing a blacklisting strategy as well as threats of coordinated sanctions against nations engaging in harmful tax practices, the OECD has sought to coerce many offshore tax havens to incorporate its tax-policy recommendations, which are intended to curtail the use of overly competitive tax and financial secrecy laws.

This Book Review critiques the OECD’s measures to curb harmful tax competition by expanding upon two key conclusions reached by Brittain-Catlin. First, he opines that such internationally-coordinated and affirmative actions to mitigate the harms caused by tax havens seriously threaten to dismantle their host-country economies given these nations’ dependence on the competitiveness of their financial centers for economic survival. Second, he argues that multilateral policy ef-

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on a multilateral, non-discriminatory basis in accordance with international obligations. See Emerging Global Issue, supra note 3, at 2. Currently, its membership consists of Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Org. for Econ. Co-operation & Dev., The OECD’s Project on Harmful Tax Practices: The 2001 Progress Report 2 (2001), available at http://www.oecd.org/dataoecd/60/28/2664438.pdf [hereinafter Progress Report]. It is a common declaration that “[t]he OECD is a group of the most industrialized and economically powerful nations in the world.” Townsend, Jr., supra note 3, at 252. This claim is supported by the fact that 19 of the 25 nations boasting the highest world Gross National Products (GNP) in 2003 were OECD members. See Students of the World, Countries of the World: Gross National Product (GNP) Distribution—2003, http://www.studentsoftheworld.info/infopays/rank/PNB2.html (last modified Sept. 25, 2004) [hereinafter GNP List]. Not surprisingly, the OECD has been viewed as a “rich nation’s club arrogantly rewriting the rules of international competition to protect the interest of politicians from high tax nations.” Daniel J. Mitchell, OECD Wants Tax Havens To Tell All, WALL ST. J. EUR., Jan. 22, 2001, at 10.

See generally Emerging Global Issue, supra note 3 (providing a discussion of harmful tax practices and a series of recommendations member and non-member nations should adopt to minimize the effects of harmful tax competition). The term “harmful tax competition” refers to attempts by tax haven regimes to offer no or low effective taxation and other benefits for the sole purpose of attracting tax bases from other countries. Hugh J. Ault, Tax Competition: What (If Anything) to Do About It?, in International and Comparative Taxation: Essays in Honour of Klaus Vogel 1, 3 (2002).

See James, supra note 1, at 18–19; Dowling, supra note 1, at 278; Townsend, Jr., supra note 3, at 215.

See Brittain-Catlin, supra note 2, at 199–225 (detailing several multilateral efforts against tax havens and their specific effect on the Cayman economy). Due to this high dependency on foreign capital, any efforts to punish these tax havens or eliminate the financial advantages they offer “would have a severe impact on government expenditures and long-term growth.” Akiko Hishikawa, Note, The Death of Tax Havens?, 25 B.C. INT’L & COMP. L. REV. 389, 402 (2002). Similarly, Caribbean and Pacific tax havens believe that the OECD’s
forts to minimize the harms of these offshore tax havens, such as the OECD’s campaign against harmful tax competition, cannot succeed unless a cohesive interest exists among member nations on the matter.\textsuperscript{15}

Using these two themes, this Book Review will illustrate the severity of the economic damage and future fiscal threat posed to the offshore tax havens as a result of the OECD’s efforts against harmful tax competition. Furthermore, it will demonstrate how a lack of common interest in tax policy among members as well as the lack of support for the OECD’s campaign from key nations places the effectiveness of the OECD’s measures in doubt. Part I will provide a brief overview of the OECD’s affirmative actions taken to combat the practice of harmful tax competition. Part II will detail the economic threats and current financial devastation experienced by numerous offshore tax havens as a direct result of the OECD’s actions. In doing so, this Book Review will first discuss these tax havens’ status as developing nations and their resulting reliance on the continued competitiveness of their financial centers for economic survival. Part III will illustrate why the OECD’s efforts will be ineffective in combating future harmful tax competition due to a lack of converging interests and support among member nations. In concluding, Part IV will suggest that a multilateral campaign against money laundering would be far more effective and appropriate given the minimal threat such measures pose to these fragile tax haven economies as well as the clear common interest in addressing global terrorism following numerous high-profile terrorist attacks.

I. THE OECD’S EFFORTS TO MINIMIZE HARMFUL TAX COMPETITION

Since its inception in 1961, the OECD has served as an advocate, forum, and advisor to improve the economies of its member coun-

\begin{footnotesize}
\textsuperscript{15} Brittain-Catlin, \textit{supra} note 2, at 202 ("[T]he multilateral hope of a clear-cut legal solution is only sustainable if it is judged to work in the interests of all states concerned.").
\end{footnotesize}
tries, increase global market efficiency, and to facilitate expansion of trade between both industrialized and developing nations.\textsuperscript{16} In pursuit of these goals, it has sought to promote internationally favorable legislation among member and non-member nations so as to reach a “unified global economic system.”\textsuperscript{17} One of its most recent pursuits began in 1996, when the OECD was prompted by the notable decrease in domestic tax revenues among its member nations to address the rising issue of harmful tax competition.\textsuperscript{18} Since then, the OECD has produced various guidelines and aggressive strategies intended to identify and initiate a unified, multilateral offensive against nations engaging in harmful tax practices.\textsuperscript{19}

In 1998, the OECD began its campaign by issuing a report listing those competitive tax practices it deemed strong indicators of harmful tax competition.\textsuperscript{20} Doing so created a standard that allowed the OECD to later reveal those nations considered to be tax havens.\textsuperscript{21} Specifically, the 1998 report held that by imposing no or low effective tax rates, maintaining laws that hinder or prohibit the effective exchange of financial information with other jurisdictions, not requiring investors to engage in substantial investment or transactional activities, and not demonstrating legislative, administrative, or legal transparency concerning issues of foreign investment, a nation would be considered a harmfully competitive tax haven.\textsuperscript{22} The 1998 report also promulgated a list of

\textsuperscript{16} Townsend, Jr., \textit{supra} note 3, at 227–28. The Organisation for European Economic Cooperation (OEEC) was established under the Marshall Plan to aid in post World War II reconstruction. \textit{Id.} at 227 n.73. The OEEC was renamed the Organisation for Economic Co-operation and Development (OECD) in 1961 after granting membership to the United States and Canada. \textit{Id.}

\textsuperscript{17} \textit{Id.} at 228.

\textsuperscript{18} See Brittain-Catlin, \textit{supra} note 2, at 171–72; Emerging Global Issue, \textit{supra} note 3, at 7. The OECD specifically states that “[g]overnments cannot stand back while their tax bases are eroded through the actions of countries which offer taxpayers ways to exploit tax havens and preferential regimes to reduce the tax that would otherwise be payable to them.” \textit{Id.} at 37.


\textsuperscript{20} See Emerging Global Issue, \textit{supra} note 3, at 23.

\textsuperscript{21} See \textit{id.} at 22. Tax havens have also been referred to as “harmful tax regimes,” which have been defined as “preferential, low tax regimes that are primarily tailored to tap into the tax bases of other countries.” Hoffman, \textit{supra} note 5, at 511.

\textsuperscript{22} Emerging Global Issue, \textit{supra} note 3, at 22–25. A nation is non-transparent when it demonstrates an unclear application of laws and administrative rulings that may lead to
policy recommendations to assist offending nations in reforming their practices along with a list of defensive measures that countries could take to protect themselves from the effects of harmful tax competition.\textsuperscript{23} Lastly, the OECD avowed to produce a list of regimes they believed to be tax havens according to the factors provided in the report, unless those nations agreed to comply with the 1998 report’s guidelines in advance.\textsuperscript{24}

The OECD produced that list in its 2000 report entitled \textit{Toward Global Tax Co-operation}, and it identified thirty-five jurisdictions, the vast majority of which were small island nations, as tax havens.\textsuperscript{25} The OECD’s purpose in producing the list was to stigmatize those nations practicing harmful tax competition in an attempt to discourage investors from engaging in further transactions in these now notorious financial centers.\textsuperscript{26} Any country listed as a tax haven would have to

\textsuperscript{23} \textit{Id.}\textsuperscript{ at 40–52}. Reformative policy recommendations for offending nations included the adoption of Controlled Foreign Corporation (CFC) rules that ensure certain CFC income is attributed to and taxed in the hands of its resident shareholder, the implementation of legislation that allowed the reporting of international transactions of foreign operations of foreign taxpayers, and the elimination of double taxation for foreign source income so as to disqualify income benefited by harmful tax practices from an exemption. \textit{See id.}\textsuperscript{ at 40–44}. The OECD’s suggested defensive measures include adopting more aggressive legislation requiring the exchange of financial information from tax havens as well as the restriction of treaty benefits for entities and income derived from harmful tax regimes. \textit{See id.}\textsuperscript{ at 46–48}. 

\textsuperscript{24} \textit{See id.}\textsuperscript{ at 71}; Kimberly Carlson, \textit{When Cows Have Wings: An Analysis of the OECD’s Tax Haven Work as It Relates to Globalization, Sovereignty and Privacy}, 35 J. MARSHALL L. REV. 163, 178 (2002).

\textsuperscript{25} \textit{See Towards Global Tax Co-operation, supra note 19, at 17.} The OECD’s 2000 report listed the following jurisdictions as meeting tax haven criteria as previously outlined in its 1998 Report: Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, the British Virgin Islands, the Cook Islands, Dominica, Gibraltar, Grenada, Guernsey/Sark/Alderney, the Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, the Marshall Islands, Monaco, Montserrat, Nauru, the Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St. Lucia, St. Christopher & Nevis, St. Vincent & the Grenadines, Tonga, Turks & Caicos, the U.S. Virgin Islands, and Vanuatu. \textit{Id.} Absent from the list are Bermuda, the Cayman Islands, Cyprus, Malta, Mauritius, and San Marino. \textit{See id.; Progress Report, supra note 11, at 8.} Though these nations met the OECD’s tax haven criteria, they made an advance commitment to adhere to the policy recommendations to avoid being named on the list. \textit{See id.; Towards Global Tax Co-operation, supra note 19, at 16–17.}

\textsuperscript{26} \textit{See Michael J. Graetz, Foundations of International Income Taxation} 501 (2003) (implying that the threat of being named on the OECD list was the loss of current banks and investors); James, \textit{supra note 1, at 33 (“[T]he OECD stated its belief that the blacklisting would have an adverse impact on the economies of jurisdictions thus listed,}
commit to either implement the OECD’s 1998 recommendations or create an acceptable plan to revise their tax laws to be executed by the end of 2005. In addition, the 2000 report provided a list of sanctions and defensive policy measures that it encouraged all countries affected by harmful tax competition to use in order to minimize the detrimental effects caused by offending tax haven nations. All affected nations were to adopt the OECD’s recommended measures in order to pressure tax havens into allowing the free exchange of financial information with foreign tax authorities seeking to subject their residents to domestic taxes. Furthermore, it is argued that the OECD intended the defenses and sanctions as a means to coerce tax haven nations to raise their effective tax rates to harmonize with the much higher ones of the OECD member nations.

The OECD’s affirmative actions taken to combat harmful tax competition have left offshore tax havens in a serious dilemma. Either they can comply with the recommendations and relinquish the competitive advantages of their financial industries or they can choose to remain uncooperative and face multilateral sanctions. Regardless of their decision, they are certain to face serious risks of economic backlash.

essentially because some reputable companies, unwilling to do business in jurisdictions burdened with negative overtones, would relocate their activities to other jurisdictions.”

27 See Towards Global Tax Co-operation, supra note 19, at 19 (“The commitment necessary to avoid inclusion on the list of Uncooperative Tax Havens is a public political commitment by a jurisdiction to adopt a schedule of progressive changes to eliminate its harmful tax practices by 31 December 2005.”).

28 See id. at 25. The OECD proffered eleven recommended sanctions and defensive measures to be taken against harmful tax regimes by affected nations. Id. Included among these tactics are: 1) denying preferential tax treatment for business transactions with uncooperative tax havens or for transactions seeking to take advantage of the harmful tax practices of the uncooperative tax havens, 2) implementing comprehensive laws that require the open exchange of financial information from transactions involving uncooperative tax havens to be backed by substantial penalties for noncompliance, 3) withholding taxes on payments to residents of uncooperative tax havens, and 4) refusing to enter into any tax agreements with uncooperative tax havens as well as the immediate termination of any existing tax conventions with such tax havens. Id.

29 See id. at 24–25.

30 See Carlson, supra note 24, at 176. Carlson argues that the imposition of low or no taxes is a primary factor in determining whether a nation engages in harmful practices. See id. Thus, by advocating defensive measures against tax havens, the OECD is effectively deeming their low tax rates inappropriate. See id.

31 See id. at 179–80.

32 See id.; see also Brittain-Catlin, supra note 2, at 196 (describing how the Cayman Islands had to quickly adopt policy in adherence to multilateral recommendations or face sanctions for non-compliance).

33 See Carlson, supra note 24, at 180; James, supra note 1, at 33.
II. Effect of the OECD’s Measures on Offshore Tax Haven Economies

It is clear from its 2000 list that OECD efforts to minimize harmful tax competition have focused on small offshore tax haven nations. Yet it is the fact that many of these haven nations generally maintain vulnerable and developing economies that raises questions as to the appropriateness of the OECD’s campaign. The reality is that many of these tax haven nations were former European colonies with unstable economies that were rooted in agriculture or other basic industries. Unfortunately, not much has changed with the passage of time as these islands continue to rely heavily upon single-crop agricultural trade and tourism for fiscal preservation. As a result, these nations have generally been unable to catalyze strong, self-sufficient economies due to the high costs of distant trading, volatility of regional climate, a changing global trade market, and frequent complications due to political corruption that significantly affect the agriculture and tourism industries.

34 See Towards Global Tax Co-operation, supra note 19, at 17; GNP List, supra note 11. Many territories recognized as offshore tax havens are considered “small Caribbean and Pacific island nations” as they generally have populations of fewer than 200,000. See Barker, supra note 1, at 177; James, supra note 1, at 4. An example of the size differential between the OECD countries and these island tax havens is that seven of the blacklisted islands in the Pacific have a combined GDP of $1 billion while Australia, an OECD member country, alone has a GDP of $300 billion. Robert Keith-Reid, Tax Haven Clampdown!, Pac. Mag., July 2001, http://www.pacificislands.cc/pm72001/pmdefault.php?urlarticleid=0019 (last visited Feb. 25, 2006). Also, the total combined population of those seven tax havens is just one-eighth that of Sydney. Id.

35 See Towards Global Tax Co-operation, supra note 19, at 17; GNP List, supra note 11. Of the thirty-five jurisdictions listed by the 2000 OECD report, Panama had the highest GNP in 2003, yet was ranked 84th in the world. See Towards Global Tax Co-operation, supra note 19, at 180; GNP List, supra note 11. More compelling is that eleven of the countries reporting the lowest twenty-five world GNPs are listed on the OECD’s 2000 report as harmful tax havens. See Towards Global Tax Co-operation, supra note 19, at 180; GNP List, supra note 11.

36 See James, supra note 1, at 8–9 (discussing how the economies of nations of the current Caribbean Community and Common Market (CARICOM), which include the OECD-recognized tax havens of Antigua, Belize, Dominica, Grenada, St. Lucia, Montserrat, and the Bahamas, among others, were historically dependent upon the production of sugar, coffee, bananas, and citrus); see also Brittain-Catlin, supra note 2, at 17 (explaining that in the 1950s, roughly half of the Cayman Islands’ manpower was working in the shipping industry).

37 Hull, supra note 14 (“For most of these countries, tourism remains the mainstay of their economies.”); Clissold, supra note 14, at 2 (noting how Dominica, Grenada, Saint Lucia, and Saint Vincent and the Grenadines “have historically been dependent upon a succession of single crops”).

38 See Clissold, supra note 14, at 2 (illustrating how shifts in world trade rendered several Caribbean nations’ single crop reliance in bananas uncompetitive); Dowling, supra
Consequently, these island havens have continued to experience poverty, high levels of national debt, and stagnant fiscal growth, which has restrained them from becoming financially independent and competitive in the high-tech global economy.39

These nations’ innovative establishment of competitive offshore financial centers, however, has alleviated many of these financial ills and moved them toward financial independence.40 Following the implementation of strict financial secrecy laws and levying low or no taxes on foreign investors, more than $200 billion dollars of foreign direct investment had entered the Caribbean and South Pacific tax haven nations by 1994, a figure ten times greater than that reported in 1985.41 Other reports suggest that the amount of foreign capital held

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39 See Anoop Singh, Dir., W. Hemisphere Dep’t Int’l Monetary Fund, Address at the Seminar on Developmental Challenges Facing the Caribbean, The Caribbean Economies: Adjusting to the Global Economy, (June 11, 2004), http://www.imf.org/external/np/speeches/2004/061104a.htm; Pacific Island Economies, supra note 38. Because of the region’s low wages for full-time workers, some opine that the resulting poverty within pacific island nations will make it difficult to sufficiently educate their children to become a force in the information age. Id. Continued poverty and unemployment is expected within the Caribbean given that the per capita GDP of the region has increased by less than two percent annually in the past twenty-five years, a growth rate lower than the average of other developing countries. Singh, supra. Furthermore, attempts to increase growth through international borrowing have made Caribbean nations “among the most indebted emerging market countries.” Id.

40 See Hull, supra note 14 (stating that the offshore banking centers stabilized the economy of Nevis and minimized the fiscal damage that Hurricane Lenny caused to the once highly vulnerable economy); Keith-Reid, supra note 34 (noting how the existence of tax haven regimes in the Pacific islands has become a necessary source of jobs, revenue and investment they would not normally have). Hull contends that “the off-shore banking sector helps to generate a measure of self-sufficiency as the country puts the necessary mechanisms in place to declare is full political and economic freedom . . . .” Hull, supra note 14.

41 See, e.g., Emerging Global Issue, supra note 3, at 17; James, supra note 1, at 10; Townsend, Jr., supra note 3, at 234. “Offshore financial centers attract a wealth of business because they have strict confidentiality rules that appeal to individuals and companies who wish to reduce their tax liability and withhold information from competitors, suppliers, creditors and customers for legitimate reasons.” Dowling, supra note 1, at 268. Brittain-Catlin gives an example of such advantages when he notes that in the Cayman Islands, “there has never been income tax, corporation tax, capital gains tax, sales tax, inheritance tax, or death duties.” Brittain-Catlin, supra note 2, at 14. He further describes the pas-
in these island nations is actually around $8 trillion. More recent statistics indicate that the Cayman Islands alone hold over $670 billion in banking assets from investors around the globe.

Because of the vast sums of capital entering their shores, the economies of these tax haven nations have become dependent upon the competitiveness of their financial centers to sustain wealth within the private sector, create work opportunities essential to decrease national unemployment rates, and provide sufficient government revenues to finance public health and education expenditures. For example, the financial centers in the small island of Vanuatu provide between $3 million and $4 million to the nation’s government and 10% of its Gross Domestic Product (GDP), while also creating four hundred jobs in the nation’s banking industry. Similarly, it is estimated that 8% to 10% of the GDP of the offshore tax havens in the Pacific are derived from their competitive financial centers, while the Caribbean island of Nevis alone derives more than 30% of its tax revenues from its offshore financial industry. In addition, from 1992 to 1997, the money generated in the Bahamas due to its activities as a tax haven accounted for 15% of its national income and 20% of its government revenues; while financial centers in Barbados reaped 5% of national income and 22% of government proceeds. Public dependence is so elevated that, currently, the government of Barbados derives as much as one third of its revenue through its competitive

sage of the Confidential Relationships (Preservation) Law that made it “a crime to reveal the details of any financial or banking arrangement made on Cayman.” Id. at 34. Similar advantages are offered by other offshore nations. See id. at 150–51 (discussing how the Bahamas company laws offered “total financial and personal secrecy to shareholders, with no requirement to publish financial accounts”); Hoffman, supra note 5, at 514 (illustrating that Bermuda does not tax foreign investors on profits, dividends, or income whether corporate or personal); Offshore Services, Inc., Dominica IBC, http://dominica-taxhaven.com (last visited Mar. 8, 2006) (boasting that Dominica provides investors “company incorporation, offshore accounts, online banking and asset protection in total secrecy”).

42 Barker, supra note 1, at 177.
43 Hoffman, supra note 5, at 513–14.
45 Keith-Reid, supra note 34.
46 Hishikawa, supra note 14, at 402; Hull, supra note 14.
47 Hishikawa, supra note 14, at 405.
financial institutions.\textsuperscript{48} It is even reported that 80\% of the Isle of Jersey’s income is generated through its financial services industry.\textsuperscript{49}

Given this significant fiscal dependence, any loss of competitiveness in the financial services sector resulting from the OECD’s actions would have catastrophic results.\textsuperscript{50} It is reported that these developing nations could realize as much as a 25\% decrease in GDP should they alter their current tax practices to adhere to OECD guidelines.\textsuperscript{51} Such striking losses would lead to an economic collapse devastating enough to return these offshore tax havens to their total dependence on highly unstable industries.\textsuperscript{52} Consequently, all recent attempts to achieve the economic development, stability, and independence sufficient to control poverty and other social ailments experienced by these nations would be throttled.\textsuperscript{53}

Unfortunately, since the advent of the OECD’s report on harmful tax competition in 1998, these developing nations have already begun to experience devastating losses to their financial sectors.\textsuperscript{54} For example, by adopting legislation to comport with OECD guidelines, Antigua and Barbuda lost fifty-four of the nation’s seventy-two banks while the number of businesses incorporated in the territory dropped from 12,378 to 10,797.\textsuperscript{55} Such losses resulted in a notable decrease in the employment rate and GDP on the twin-island nation.\textsuperscript{56} It is also reported that the nation of St. Vincent and the Grenadines experienced an unemployment rate of 25\% to 40\% due to the closure of various banks and insurance companies on its islands.\textsuperscript{57} Similarly, the pressure from the OECD has forced the Commonwealth of Dominica to shut down one of its banks, while several other banks have fled the island on their own volition to sever association with the nation blacklisted as en-

\textsuperscript{48} James, \textit{supra} note 1, at 33–34; Hoffman, \textit{supra} note 5, at 513.
\textsuperscript{49} See Barker, \textit{supra} note 1, at 177.
\textsuperscript{50} See Hull, \textit{supra} note 14; Hoffman, \textit{supra} note 5, at 513.
\textsuperscript{51} Hull, \textit{supra} note 14; Hoffman, \textit{supra} note 5, at 513.
\textsuperscript{52} Hull, \textit{supra} note 14 ("If . . . the OECD is successful in bullying its way, the economies of low-tax countries . . . will be crippled and sent into a tailspin. We will have been returned to a primitive and backwards agrarian lifestyle.").
\textsuperscript{53} See James, \textit{supra} note 1, at 34 (noting how the collapse of the financial sector in Barbados would lead to serious fiscal consequences as well as corruption and crime); \textit{cf.} Clissold, \textit{supra} note 14, at 20 (discussing the advancements to health, education, and infrastructure in Caribbean nations that have come as a direct result of their thriving financial services sectors).
\textsuperscript{54} See James, \textit{supra} note 1, at 38.
\textsuperscript{55} \textit{See id. at } 34.
\textsuperscript{56} \textit{Id. at } 35.
\textsuperscript{57} \textit{Id. at } 38.
gaging in harmful tax competition. Because of the lost revenue, Dominica was forced to alter its national budget to include increased domestic taxes on fuel, sales, cable, and telecommunications services as well as cuts in the size of its government’s cabinet.

Even nations that avoided being named on the OECD’s 2000 report by granting an advanced commitment to comply with OECD recommendations have experienced similar economic droughts because they have agreed to open financial information exchange and alter taxation policies. For example, since acquiescing to OECD demands, the Cayman Islands have closed several banks, threatened to revoke the charters of companies incorporated within their jurisdiction that had not demonstrated significant domestic transactional activities, and forced its financial services industry not to guarantee absolute financial secrecy to clients. By initiating similar reforms in adherence to the OECD’s principles, many offshore havens stand to harm their domestic economies, which have relied on the competitive advantages of their offshore financial industries for economic survival.

Though the above observations demonstrate the seriously detrimental effects the OECD’s tactics have had on offshore tax havens’ already vulnerable economies, these effects could worsen as the OECD continues to apply pressure on these nations to conform to its tax policy recommendations. The irony, however, is that the elimination of the competitiveness of offshore financial centers and consequent detriment to these developing island nations is not likely to result in the OECD’s elimination of harmful tax competition. In fact, it may be within the OECD itself where the biggest hindrance to the effectiveness of its campaign lies.

58 See id. at 37.
59 Id.
60 See Brittain-Catlin, supra note 2, at 217.
61 See id.
62 See James, supra note 1, 38; Dowling, supra note 1, at 270; Hishikawa, supra note 14, at 402.
63 See Hishikawa, supra note 14, at 417 (asserting that because of the threat of impending sanctions and the agreement of offshore tax havens to comply with the OECD’s recommendations, “the death of tax havens seems to be inevitable”).
64 See Wolfgang Schön, Tax Competition in Europe—General Report, in Tax Competition in Europe 1, 16, 17 (Wolfgang Schön ed., 2003) (noting how high-tax OECD countries have taken steps, such as lowering taxes, to compete in the European tax setting).
III. The Persistence of Harmful Tax Competition Despite the OECD’s Initiative

While the OECD’s actions work to dismantle offshore tax haven economies, they are unlikely to discontinue harmful tax competition in the future for two major reasons. First, tax policies and preferences among the OECD member countries have proven to be so widely divergent that harmful tax competition does and will continue to exist between the member nations even if the OECD’s efforts to eliminate the effects of offshore tax havens succeed.65 Second, key members have refused their support for the OECD’s efforts, which has severely diluted the possibility of maintaining the forceful multilateral campaign needed to deter harmful tax practices.66 Because of these abstentions and the overall lack of common ground on the issue, the OECD’s aggressive efforts will prove ineffective in countering harmful tax competition in the future.

A. The Divergent Interests Among OECD Members Concerning Tax Policy

Despite the OECD’s call for a unified front against harmful tax competition, not all of its member countries are in accord with the campaign, while others continue to engage in tax practices that have the potential to dislocate foreign tax bases.67 This variance of interest in the attack against harmful tax competition is manifested in the OECD’s 2000 report, which acknowledged that a significant number of its member countries continued to harbor “preferential tax regimes” that continue to harbor potentially harmful tax regimes.68 In fact, though

65 See id. at 16 (noting how some OECD members have demanded implementation of measures to limit tax rate competition in Europe).
68 See TOWARDS GLOBAL TAX CO-OPERATION, supra note 19, at 12. The nations mentioned include: Australia, Belgium, Canada, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Korea, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States. Id. at 12–14. A “preferential tax regime” differs from a tax haven according to the OECD’s guidelines in that it is a country that collects significant revenues from its domestic income tax, but whose tax system has features constituting harmful tax competition. See EMERGING GLOBAL ISSUE, supra note 3, at 20. Furthermore, preferential tax regimes include financial industries such as banking, insurance, or mutual funds that may utilize competitive features, but not features, such as strict financial secrecy, that the OECD focused on in its 1998 report. See TOWARDS GLOBAL TAX CO-OPERATION, supra note 19, at 12. Thus, there is not yet a determination as to whether the tax practices are actually harmful. Id.
the OECD was internally prompted to combat the ills of harmful tax competition, it reported that twenty-one out of thirty members still maintained financial sectors engaged in potentially harmful tax practices.69

Another demonstration of conflicting interests within the OECD concerning tax policy is the wide range of corporate tax rates imposed by its members.70 Though the average rate of corporate taxation among OECD nations was 31.39%, several member countries have drastically undercut this level with markedly lower rates.71 For example, Ireland recently imposed an effective tax rate of just 7.6% on foreign-sourced investments from U.S. multinational corporations.72 Although outside pressures compelled Ireland to raise its overall effective corporate tax rate to 16% in 2002, it emplaced the competitively low rate of 12.5% by 2003.73 By boasting a below average corporate tax rate of 18%, Hungary also provides unfairly advantageous alternatives to international investors.74 Yet another OECD country participating in tax competition is the United States, a nation which some consider the world’s largest tax haven.75 In particular, current U.S. tax laws allow multinational corporations to decrease or even eliminate taxes the United States may impose on them.76 Also, incorporation laws in some U.S. states provide corporate tax advantages similar to the offshore tax havens the OECD has blacklisted.77

69 See Towards Global Tax Co-operation, supra note 19, at 12–16 (providing list of countries harboring potentially harmful preferential tax regimes); Progress Report, supra note 11, at 2 (listing the member nations of the OECD).

70 See Tikka, supra note 67, at 219.

71 See id. (noting that European Union (EU) members participate in harmful tax competition). Although the EU is a separate entity from the OECD, eighteen of its twenty-five members are also members of the thirty-country OECD. See EU, The Member States, http://www.eurunion.org/states/offices.htm (last visited Mar. 8, 2006).

72 Graetz, supra note 26, at 509.

73 See id. (indicating that Ireland’s corporate income tax was set at 12.5% in 2003); Robert T. Kudrle & Lorraine Eden, The Campaign Against Tax Havens: Will It Last? Will It Work?, 9 STAN. J.L. BUS. & FIN. 37, 51 (2003) (explaining how the fiscal decentralization of the EU allowed for effective campaigns to address Ireland’s discriminatory corporate tax rate and Belgium’s attempts to attract foreign corporate headquarters); Tikka, supra note 67, at 219 (listing Ireland’s 16% corporate tax rate as the lowest amongst other OECD members in 2002).

74 See Tikka, supra note 67, at 219.

75 See Graetz, supra note 26, at 495.


77 See Brittain-Catlin, supra note 2, at 79. Specifically, Brittain-Catlin notes how Delaware offers corporations numerous advantages including:
Like the offshore tax havens, these low-tax member countries threaten the tax bases of the high taxing welfare states that steered the OECD’s efforts against harmful tax competition. As a result, many prominent welfare state regimes have taken both defensive and offensive measures to minimize the effects of tax competition within the OECD itself. For example, Denmark was forced to lower its corporate tax rates to 30% to compete against its European, OECD peers in generating optimal domestic tax revenue. Similarly, the Netherlands has argued that the low corporate tax rates found in some OECD member nations pose a threat to its domestic tax base. Accordingly, it has demanded that the OECD set a minimum corporate tax rate for member countries to adopt in order to preserve a fixed level of tax revenue.

Yet another area that evidences a lack of cohesion of interests among OECD nations relates to banking secrecy laws, which vary in their degree of rigidity of banking privacy afforded clients. For instance, Switzerland has been long recognized as providing some of the strictest financial secrecy laws in the world. This is explained by the fact that a breach of financial secrecy is deemed an elevated breach of trust under Swiss law, for which a violator is subject to criminal prosecution. Furthermore, there is no exception to this rule when inexpensive same-day company incorporation, low fees, minimal financial filing requirements, protection from hostile takeovers, freedom to operate companies anonymously, no required public disclosure of accounts, shareholder secrecy, no sales or inheritance tax, tax advantages for holding companies, and a court system that is seen as having unequaled expertise in complex cases involving multinational companies.

Id.

78 See Schön, supra note 64, at 16–18. Many countries within Europe, including Denmark, Sweden and Finland, are welfare states that rely on high taxes to maintain their numerous costly public expenditures. See id. at 17–18. Such nations recognize their vulnerability to tax competition, and are thus at the forefront of the fight against tax competition. See id. at 17.

79 See id. at 16–18.

80 See id. at 17, 219.

81 See id. at 16.

82 See id.

83 See generally INTERNATIONAL BANK SECRECY (Dennis Campbell ed., 1992) (illustrating the variance of client protection throughout the world by reviewing international banking secrecy laws).

84 See Lacey & George, supra note 4, at 277 (discussing how Switzerland’s banking secrecy laws are famous for providing clients anonymous numbered bank accounts, yet notorious for having aided dictators in hiding corrupt business proceeds).

85 Hans Bollmann, Switzerland, in INTERNATIONAL BANK SECRECY, supra note 83, at 661, 669. Violations of Swiss banking secrecy laws are on par with breaches of silence in official matters such that violators are prosecuted at the initiative of the court, whereas violators of
information is requested by foreign or domestic tax authorities, even in cases of tax evasion. A similarly strict banking law is found in Luxembourg, where even domestic tax authorities are not permitted to seek information from banks concerning their clients’ finances unless very limited exceptions apply. Even the United States does not require its banks and other financial institutions to freely exchange financial information of clients with foreign tax agencies.

These stringent prohibitions against information exchange are in stark contrast to the policies of other members of the OECD, which require banks to openly share their clients’ financial data with tax authorities. For example, Italian laws have allowed tax agencies to circumvent banking secrecy at will when conducting tax audits. Furthermore, Swedish law requires banks within its jurisdiction to send information annually to tax authorities regarding interest paid to resident clients. Few countries are more cooperative with tax agencies than Sweden, however, whose laws have granted tax authorities such open permission to obtain client information from banks that many question whether any protection of information from tax authorities exists at all. Based on these differences in tax practices among the

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86 See id. at 678. Exceptions to Switzerland’s strict financial secrecy apply only to cases of tax fraud, which entail the “deception of the tax authorities by fraudulent means, especially by false or falsified documents which results in an underpayment of tax.” Id. This high level of secrecy undermines the efforts of the OECD, which recommends that banking laws allow all client information to be shared with any country or tax authority freely and openly. See EMERGING GLOBAL ISSUE, supra note 3, at 29–30, 46–47.

87 Guy Harles, Luxembourg, in INTERNATIONAL BANK Secrecy, supra note 83, at 469, 473. Tax authorities can intrude to garner information for the purposes of assessing inheritance taxes on deceased resident taxpayers. Id. Furthermore, in certain circumstances, domestic tax authorities may make inquiries into registration and mortgage duties as well as assessments of the value-added tax. Id. Nonetheless, the limited scope of these exceptions ensures the overall insulation of banking secrecy from domestic tax authorities in Luxembourg. See id.

88 Hishikawa, supra note 14, at 407.

89 See Olof Wærn & Monica Petersson, Sweden, in INTERNATIONAL BANK Secrecy, supra note 83, at 647, 651; Cesare Vento & Raffaella Betti Berutto, Italy, in INTERNATIONAL BANK Secrecy, supra note 83, at 385, 389.

90 Vento & Berutto, supra note 89, at 389. What further separates Italian laws from those countries with strict financial secrecy provisions is that there is no need for tax auditors to establish any criminal suspicion to intercept a client’s banking records. See id.

91 Wærn & Petersson, supra note 89, at 651. Specifically, Swedish law requires an annual report to tax authorities of: 1) interest accrued on the client’s accounts, 2) interest paid by the client, and 3) the balance and transactions on the account for a given period of time. Id. at 651–52.

92 Id. at 651.
OECD members, it is clear that harmful tax competition continues to thrive and will continue to do so even if the effects of offshore tax havens are neutralized.93

B. The Lack of Support by Key Members of the OECD

Varying interests in tax policy have not only fostered tax competition within the OECD, but they have also caused several key members to abstain from or withdraw their support for measures to combat harmful tax competition.94 When the OECD’s 1998 report was released, both Switzerland and Luxembourg refused to sign the agreement because of their discord with the organization’s harsh stance against banking secrecy.95 Their disapproval of the OECD’s aggressive actions has not faltered, as they have continued to withhold their endorsement of the OECD’s subsequent reports.96 Given the historically strict banking secrecy laws in these two countries, their noncompliance seriously undermined the OECD’s efforts to have its members agree to adopt legislation to open the exchange of financial information with foreign tax agencies.97 Yet Switzerland and Luxembourg were not alone, as several other member countries withdrew their support from the OECD’s campaign as later reports and recommendations were produced.98 For example, both Belgium and Portugal rescinded their approval of the OECD’s efforts against harmful tax competition following its release of a 2001 update of its goals and progress.99 Though Belgium and Portugal agreed with some aspects of the OECD’s plan, the impetus for their withdrawal was their objection to the more onerous demands made upon some member nations to implement changes in tax legislation.100

93 See Schön, supra note 64, at 16 (noting how EU nations dispute the fairness of tax competition within Europe).
94 See, e.g., Graetz, supra note 26, at 511; Hishikawa, supra note 14, at 412–13, 414; Townsend, Jr., supra note 3, at 235.
95 See Emerging Global Issue, supra note 3, at 73–78 (providing statements from both Luxembourg and Sweden announcing their decision not to approve the OECD’s 1998 report).
96 See Hishikawa, supra note 14, at 414.
97 See Bollmann, supra note 85, at 678; Harles, supra note 87, at 472–73.
98 See, e.g., Schön, supra note 64, at 12; Hishikawa, supra note 14, at 415 (noting that Belgium, Portugal, and the United States also withdrew their support of the OECD project).
99 See Schön, supra note 64, at 12.
100 Hishikawa, supra note 14, at 414. Belgium and Portugal had already recognized the practice of ring fencing within their borders and had committed to its elimination. Id. Ring fencing was identified by the OECD as the practice of by a financial center or regime of partially or fully isolating itself from its domestic economy by either excluding resident
Probably the most devastating blow to the OECD’s campaign, however, was the defection of the United States in 2001.\textsuperscript{101} Citing its disinterest in global tax harmonization, efforts to coerce foreign nations to adopt specific tax policy, and aggressive policies against tax evasion, the United States decided that the OECD’s report was overly broad and inconsistent with the country’s tax and economic priorities.\textsuperscript{102} Given the country’s clout as a global economic leader, many member nations felt that inclusion of the United States in the OECD’s efforts was essential to the OECD’s success, and thus the organization was forced to amend its project to ensure U.S. involvement.\textsuperscript{103} Those revisions diluted the overall aggressiveness of the campaign by relaxing measures against tax evasion, lifting sanctions on tax havens practicing ring fencing, and extending the deadlines by which countries had to commit to cooperate with the OECD’s initiatives.\textsuperscript{104}

This lack of support by key member nations has had two major repercussions on the OECD’s efforts against harmful tax competition. First, such defections have weakened the multilateral leverage of the OECD’s efforts, which even the organization itself has admitted is crucial to the overall effectiveness of the project.\textsuperscript{105} Second, noncompliance by member countries has given offshore tax havens a strong arm-taxpayers from taking advantages of its tax benefits or by harboring enterprises that prohibit operation in the domestic market. Emerging Global Issue, supra note 3, at 26–28. Such measures “effectively protect[] the sponsoring country from the harmful effects of its own incentive regime.” Id. at 26.

\textsuperscript{101} See Brittain-Catlin, supra note 2, at 202–03; Hishikawa, supra note 14, at 412–14.

\textsuperscript{102} Brittain-Catlin, supra note 2, at 203; Terrence R. Chorvat, A Different Perspective on Tax Competition, 35 Geo. Wash. Int’l L. Rev. 501, 504 (2003); Hishikawa, supra note 14, at 412, 413. In describing U.S. reluctance to cooperate with the OECD’s efforts, the Secretary of the Treasury at the time, Paul O’Neill, was quoted as saying, “[w]e have no business telling any nation what their tax rates should be.” Brittain-Catlin, supra note 2, at 203. He further expressed the country’s unwillingness to participate in any initiative to harmonize world taxes. Hishikawa, supra note 14, at 412. In subsequent talks with the OECD, the United States also manifested its opposition to the harsh OECD stance against tax evasion. See id. at 413.

\textsuperscript{103} See Brittain-Catlin, supra note 2, at 203 (noting the outrage of France’s finance minister over the lack of U.S. support for the OECD project in his statement, “[t]he largest power in the world cannot disengage from the planet’s problems”); Hishikawa, supra note 14, at 413–14 (noting how the OECD was forced to weaken its stance against harmful tax practices through several modifications in order to retain U.S. backing of the project); GNP List, supra note 11 (showing that the United States had the largest GDP in 2003, a figure more than double that of the second place nation, Japan).

\textsuperscript{104} See Hishikawa, supra note 14, at 413–14.

\textsuperscript{105} See Emerging Global Issue, supra note 3, at 38 (“[T]hese multilateral responses are essential because . . . co-ordinated action is the most effective way to respond to the pressures created in the new world of global capital mobility.”).
gument in their opposition of the OECD and its recommendations. Essentially, they have noted the injustice of forcing economically vulnerable island nations to conform to the OECD’s recommendations when its own members have refused to do so. Given these serious threats to a unified and widely-supported effort against harmful tax competition, the future effectiveness of the OECD’s project is in doubt.

Because its efforts have focused on coercing offshore tax havens to open financial disclosures and engage in less competitive tax practices, the OECD’s campaign against harmful tax competition has gravely endangered the fiscal stability of emerging tax haven economies. Doing so without unified cooperation or concerted tax policy interests among its own members seriously calls into question the appropriateness of the OECD’s campaign against harmful tax competition. There is, however, another issue concerning offshore tax havens where multilateral efforts may be far more effective and economically equitable—money laundering.

IV. Money Laundering: A More Appropriate Multilateral Focus

Offshore tax havens have long been associated with money laundering because their strict financial secrecy laws allow the creation of anonymous accounts while prohibiting the disclosure of financial information to foreign tax authorities. Recent reports indicate that as much as $600 billion of illegal money is hidden in offshore banks. Furthermore, there is strong evidence indicating that a substantial portion of these funds concealed offshore has been used to sustain terrorist

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106 See James, supra note 1, at 29; Hishikawa, supra note 14, at 415.
107 See James, supra note 1, at 29 (discussing how the CARICOM nations complained that they were being forced to comply with the OECD, although Switzerland and Luxembourg refused); Hishikawa, supra note 14, at 415 (noting Vanuatu’s outrage concerning the OECD’s actions against their financial regimes given that Switzerland, Luxembourg, Belgium, and Portugal had refused to adhere to the organization’s recommendations).
108 See Hishikawa, supra note 14, at 417.
109 See Carlson, supra note 24, at 180, 181; Hishikawa, supra note 14, at 417.
110 See Lacey & George, supra note 4, at 274–75. Money laundering is the “process by which one conceals the existence, illegal source, or illegal application of income and then disguises that income to make it appear legitimate in the open economic market.” Id. at 267.
111 See id. at 274–75, 277; Dowling, supra note 1, at 271.
112 Dowling, supra note 1, at 271.
groups such as Al-Qaeda. Consequently, many countries and international groups have implemented measures to curb the prevalence of international money laundering, though most efforts have proven ineffective. Nevertheless, there is an indication that a new wide-scale, multilateral effort against money laundering would prove successful, ironically because the barriers that the OECD’s campaign against harmful tax competition faces are not present on this particular issue. Specifically, anti-money laundering policies are less invasive to financial secrecy, thus posing only a nominal economic threat to the fragile offshore tax haven economies. In addition, due to the ubiquitous nature of money laundering and recent high-profile terrorist attacks, the current global climate indicates a tremendous convergence of global interests on the matter.

A. The Minimal Economic Threat to Offshore Tax Havens

There are two major reasons why an immediate multilateral campaign to minimize money laundering may pose less grave threats to offshore economies than the OECD’s efforts against harmful tax competi-

113 See Brittain-Catlin, supra note 2, at 207–13 (explaining U.S. concerns that Osama Bin Laden and other terrorist supporters have contributed to Al-Qaeda funds secretly held offshore).

114 See Lacey & George, supra note 4, at 290–345 (providing an overview of various measures that nations and global groups have taken against money laundering). Following the 9/11 attacks, the United States enacted the USA PATRIOT Act, which included the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001 (IMLAAFA). 31 U.S.C. § 5318A (2001); Lacey & George, supra note 4, at 291; The IMLAAFA granted the Secretary of the Treasury the authority to require domestic financial institutions to implement increased record-keeping and reporting procedures or face economic sanctions. Dowling, supra note 1, at 289–90. A prominent multilateral measure against money laundering was initiated by the FATF, which produced a list of policy recommendations for members and non-members to combat money laundering. Lacey & George, supra note 4, at 341–42. Also, the FATF produced a list in 2000 meant to blacklist those nations “whose detrimental practices seriously and unjustifiably hamper the fight against money laundering.” Id. at 343. Unfortunately, many initiatives enacted to minimize global money laundering have been unsuccessful, especially those enacted before 2001. Id. at 289, 349. The reason for this general ineffectiveness is the “lack of uniformity and cooperation in anti-money laundering legislation across nations.” Id. at 349.

115 See Lacey & George, supra note 4, at 349–50 (suggesting that a cohesive multilateral effort against money laundering may currently prove successful if implemented).

116 See id. at 347; Carlson, supra note 24, at 183; Dowling, supra note 1, at 272.

tion. First, the measures needed to uncover criminal funds, such as the “Know Your Customer” (KYC) rules, may be less intrusive than those of the OECD to report financial information of all foreign investors.\textsuperscript{118} Though KYC rules require banks to ascertain information about their clients, they do not necessarily compel the disclosure of that information to other tax agencies or foreign governments unless there is suspicion of criminal transactions.\textsuperscript{119} Therefore, by adopting a lenient KYC provision rather than the strict financial openness required by the OECD, offshore tax havens would only risk the flight of criminal money from their financial centers, while legitimate foreign-sourced income would remain protected by banking secrecy laws.\textsuperscript{120} Given that the amount of criminal money held offshore is less significant than some have speculated, these KYC rules would allow offshore havens to retain the majority of their foreign-sourced income along with the generous tax revenues, elevated employment rates, and overall private wealth it generates.\textsuperscript{121} Thus, unlike the wholly intrusive information exchange required by the OECD, adopting limited KYC provisions would allow tax haven nations the ability to sustain the independent wealth needed to counter the debt and poverty that have plagued them as developing nations.\textsuperscript{122}

Second, while adopting the OECD’s recommendations poses serious economic risks to offshore tax havens, offshore tax havens actually stand to gain fiscally by enacting anti-money laundering legislation.\textsuperscript{123}

\begin{footnotesize}
\textsuperscript{118} Compare Lacey & George, supra note 4, at 306, 347 (KYC rules require financial institutions to keep records of customer identity, account activity, and source of funds as well as seek further information only on “suspicious” accounts), with EMERGING GLOBAL ISSUE, supra note 3, at 46 (stating the OECD’s objective that nations adopt legislation requiring the free exchange of financial information with other countries).

\textsuperscript{119} See Lacey & George, supra note 4, at 347.

\textsuperscript{120} See id.

\textsuperscript{121} See Carlson, supra note 24, at 181 (noting that offshore tax havens risk losing millions of dollars in client investments should they adopt the OECD’s exchange of information recommendations); Dowling, supra note 1, at 272 (asserting that the vast majority of foreign investors with offshore bank accounts are legitimate); cf. Sanders, supra note 44 (noting how Antigua and Barbuda’s adherence to the OECD’s open exchange provisions would lead to losses of government revenues and expenditures, decreased income from private business ventures and the disappearance of numerous high-paying work opportunities).

\textsuperscript{122} See Pacific Island Economies, supra note 38 (noting the stagnant poverty in the Pacific island nations and the need for economic growth to counteract it); Singh, supra note 39 (discussing the high indebtedness of the Caribbean nations and the need for fiscal independence); Hull, supra note 14 (arguing that the existence of competitive financial services industries is crucial for the economic self-sufficiency of Caribbean nations).

\textsuperscript{123} Bachus, supra note 117, at 839–40; see Carlson, supra note 24, at 180, 181; Hoffman, supra note 5, at 513.
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Money laundering has not only sustained organized crime in offshore havens, but the persistence of criminal activity has discouraged legitimate investors from engaging in offshore transactions.\textsuperscript{124} Therefore, by establishing measures against money laundering, offshore tax havens can both increase legal commercial development and ensure the entry of legitimate capital into their financial institutions necessary to catalyze their economic stability and independence.\textsuperscript{125} Because of the fiscal incentives and the minimal economic risks in espousing modest KYC laws, some offshore havens have already evidenced a clear desire to cooperate in the global fight against money laundering.\textsuperscript{126} Though their support is crucial, it is the fact that many nations around the globe also share the same interests that will ensure the success of a multilateral effort to combat international money laundering.\textsuperscript{127}

B. The Convergence of Global Interests Against Money Laundering

Money laundering is truly a global issue because, unlike harmful tax competition, it affects the financial institutions of every country.\textsuperscript{128} Even the world’s most developed countries, including the United Kingdom and the United States, have contributed to the problem.\textsuperscript{129} Furthermore, because money laundering is a criminal matter rather than one of tax policy preference, there has been universal recognition of its impropriety as well as accord in the urgency to address it through unified policy.\textsuperscript{130} However, it is because of major recent terrorist attacks that international interest have converged to such a point as to ensure

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\textsuperscript{124} Bachus, \textit{supra} note 117, at 840; Dowling, \textit{supra} note 1, at 284–85.

\textsuperscript{125} See Hull, \textit{supra} note 14 (discussing the importance of the competitive financial centers for the economic independence of offshore tax haven nations); cf. Bachus, \textit{supra} note 117, at 839–40 (implying that the lack of anti-money laundering measures has impeded commercial development and the influx of legitimate investment capital into developing nations).

\textsuperscript{126} See Dowling, \textit{supra} note 1, at 284–85 (noting how the threat crime poses to the stability of their needed financial centers has led offshore tax havens to respond positively to international concerns over money laundering).

\textsuperscript{127} See Lacey & George, \textit{supra} note 4, at 307, 351; Bachus, \textit{supra} note 117, at 859; Laitner & Parker, \textit{supra} note 117.

\textsuperscript{128} Dowling, \textit{supra} note 1, at 280.

\textsuperscript{129} Brittain-Catlin, \textit{supra} note 2, at 192 (noting that after the fall of the Russian economy in the 1990s, it was discovered that the Bank of New York was used to launder an estimated $7.5 billion of illegal money from Russia); Dowling, \textit{supra} note 1, at 285 (stating that terrorists launder “most of their monies through onshore financial center [sic], such as London”); Hoffman, \textit{supra} note 5, at 513 (discussing how offshore tax havens recognize that financial institutions in both New York and London are used for money laundering).

\textsuperscript{130} See Bachus, \textit{supra} note 117, at 859; Dowling, \textit{supra} note 1, at 284.
\end{footnotesize}
the needed cooperation for an effective multilateral campaign against money laundering.  

Following the 9/11 terrorist attacks, the United States immediately enacted laws to aid in uncovering terrorist funds held in its financial centers. Soon after, numerous developed nations and offshore tax havens were prompted by U.S. initiatives and quickly agreed to adopt measures to combat international money laundering and uncover hidden terrorist financing. Since then, fervor for the search of terrorist funds through anti-money laundering legislation has only intensified, especially following the London bombings on July 21, 2005. What is important, however, is that this zeal is not centralized within a few nations of similar culture or disposition; rather numerous countries of varied background have recently experience the first-hand effects of terrorism including Jordan, Spain, the Philippines, and India. Because this internationally convergent interest indicates the elevated potential for effectiveness, now is the opportune time to initiate a unified, multilateral campaign against money laundering.

Conclusion

The OECD’s campaign against harmful tax competition employs economically inappropriate measures that come at an inopportune time. By coercing offshore tax havens to comply with its recommendations through multilateral defense measures and economic sanctions, the OECD has diluted the strict banking secrecy laws of these offshore nations to allow the open disclosure of financial information with foreign governments. This sudden loss of competitiveness has resulted in the fiscal collapse of numerous developing offshore nations, most of which are highly dependent on the revenues from their financial services industries for economic stability and growth. Regrettably, these consequences do not signify the end of harmful tax competition, as many countries within the OECD itself continue to maintain low cor-

131 See Bachus, supra note 117, at 859; Hishikawa, supra note 14, at 414–15; Laitner & Parker, supra note 117.
132 See Dowling, supra note 1, at 287, 289. The USA PATRIOT Act was passed just weeks after the 9/11 attacks. Id. at 287. This Act contained the IMLAFA, which gave the government special power to require stricter financial record keeping by domestic banks with aggressive sanctions for noncompliance. See id. at 289–90.
133 See Bachus, supra note 117, at 859; Hishikawa, supra note 14, at 414–15.
134 See Laitner & Parker, supra note 117.
136 See Lacey & George, supra note 4, at 351.
porate tax rates and strict banking secrecy provisions to attract foreign-sourced income from high-tax countries. Furthermore, the future effectiveness of the OECD’s efforts is doubtful given that many key nations, such as the United States and Switzerland, have withdrawn or withheld their support for the organization’s aggressive attack against competitive tax practices.

Despite the clear limitations of the OECD’s campaign against harmful tax competition, a similar multilateral movement to address international money laundering would prove more successful and fiscally equitable to nations of all economic conditions. The laws necessary to uncover illegal funds, such as moderate KYC laws, prove less invasive than those in the campaign against harmful tax competition, which require unlimited financial information exchange with tax authorities. Therefore, by adopting the less intrusive KYC rules, offshore tax havens risk deterring illegal investments exclusively, while protecting the revenues from legitimate deposits upon which their economic sustainability depends. In addition, these offshore financial centers actually stand to gain from the suppression of money laundering as it would entice a larger volume of legitimate investors, thus stimulating the economic growth necessary to remove these offshore tax havens from “developing nation” status. Most compelling, however, is that such a campaign would prove effective given the common global interest in eradicating the concealment of illegal funds offshore. Specifically, the ubiquity of offenses and the rising interest in uncovering terrorist finances around the world ensures the pervasive support needed for an effective and globally-unified movement against money laundering.
ELIMINATING CHILD MARRIAGE IN INDIA: A BACKDOOR APPROACH TO ALLEVIATING HUMAN RIGHTS VIOLATIONS

Jacqueline Mercier*


Abstract: Despite its illegality, child marriage occurs throughout the Indian landscape. In her book, Child Marriage in India: Socio-legal and Human Rights Dimensions, Jaya Sagade examines the prevalence of child marriage among India’s various cultures and its impact on the human rights of young women. Sagade asserts that, notwithstanding minimal legislative efforts, the Indian government has not met the obligations set forth in the international human rights conventions that the country has ratified. Sagade asserts that the Indian government must not only work diligently to change the nation’s views on child marriage, but must also legislate more cohesively to prohibit the practice. This Book Review takes Sagade’s human-rights-based proposals a step further and suggests that, in a country reluctant to release longstanding traditions, addressing the Indian tax system and dowry laws will provide a more practical, financial incentive for eliminating the practice of child marriage.

People in [India] take great pleasure in [child] marriage. . . . The little bit of a woman, the [child] bride, clad in red silk. Drums are beating and men, women and children are running in order to have a glimpse of that lovely face. From time to time she breaks forth into little ravishing smiles. She looks like a lovely doll.1


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INTRODUCTION

Child marriage is illegal in India.\(^2\) India’s Child Marriage Restraint Act (CMRA) prescribes the minimum age of marriage as eighteen years for girls and twenty-one years for boys.\(^3\) In various states in the United States, the minimum age of marriage is as low as thirteen years for girls and fourteen years for boys.\(^4\) In Nigeria, the minimum age of marriage is as low as nine years for both girls and boys.\(^5\) In some countries there is no limit on the minimum age of marriage of girls.\(^6\) Despite having, by statute, one of the highest minimum age requirements for legal marriage, child marriage continues to be widespread throughout India.\(^7\) In fact, India has one of the lowest median ages for brides in the world.\(^8\) Recognizing that “[c]hild marriage of girls is a comparatively neglected social problem in India and is seldom given attention by policy makers, law interpreters, law enforce-

\(^{2}\) Jaya Sagade, Child Marriage in India: Socio-legal and Human Rights Dimensions, at xxiv–xxv (2005). In her book, Sagade notes that the term ‘child marriage’ should be understood as contradictory because “[i]f marriage is a formalized relationship with legal standing between an individual man and woman, in which sexual relations are legitimized. . . . [h]ow can a child be party to a marriage, when she is unable to understand the nature and consequences of it.” Id. at xxvi. Despite this contradiction, the term “child marriage” as used here and throughout Sagade’s book, is defined as marriage below the age of eighteen years, the age of majority for civil matters as defined in the Indian Majority Act, 1875. Id. at xxvi–xxvii.

\(^{3}\) Id. at xxiv.

\(^{4}\) Id. at xl.

\(^{5}\) Id.

\(^{6}\) Id. at xxiv. Ghana, for example, has no defined limit on the minimum age of a marriage for girls. Id. Interestingly, the state of Arizona, while prescribing eighteen as the age at and after which parental consent is no longer legally required for marriage, provides no minimum age of marriage as long as the union is approved by the court. Ariz. Rev. Stat. § 25-102(A) (LexisNexis 2005). The statute provides in pertinent part,

[p]ersons under eighteen years of age shall not marry without the consent of the parent or guardian having custody of such person. Persons under sixteen years of age shall not marry without the consent of the parent or guardian having custody of that person and the approval of any superior court judge in the state.

\(^{7}\) Sagade, supra note 2, at 4.

\(^{8}\) Id. (recognizing that the median varies depending on the age and geography of the surveyed group, but noting that one province, Rajasthan, with a median of 15.9 years, has the lowest median age of marriage among women currently aged twenty to twenty-four years in the country). Sagade also notes that although the Singulate Mean Age at Marriage has increased from 15.9 years in 1961 to 19.3 years in 1991, an average of 38.4 % of girls in the age group of 15–19 years get married; this percentage increased to a staggering 44.7 % in rural populations. Id. The data also indicate that 11.8 % of girls are married by the age of thirteen years and 26.1 % by the age of fifteen years. Id.
ment machinery, and academicians,”9 Jaya Sagade, in her book Child Marriage in India: Socio-legal and Human Rights Dimensions, explores this neglect from a “holistic perspective—by examining the social, religious, cultural, and legal barriers in prohibiting the harmful practice of child marriage in India.”10

Adopting a feminist approach, Sagade analyzes the social, legal and human rights dimensions of the problem of child marriage and its effect on young girls.11 The prevalence of child marriage cannot be fully comprehended without a discussion of both the causes for and consequences of the continued practice throughout the Indian landscape.12 Sagade thus introduces the patriarchal structure of Indian society, which places men in a position to define which resources and contributions are highly valued.13 With this patriarchal background, Sagade weaves through an analysis of the legal discourse surrounding child marriage in India, from incomplete legislative attempts at eliminating the practice, to the judiciary’s contradictory and very technical approach to dealing with the practice.14 Sagade points to the numerous human rights that are violated by the practice, and emphasizes that India, which has ratified several international treaties addressing women’s issues and children’s human rights, is under an obligation to ensure that its infrastructure permits the equal and humane treatment of women and children.15 Sagade concludes that facets of the

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9 Id. at xxv.
10 Id. at xxxvii. Sagade goes on to state,

[m]y thesis is that law must have a role in effecting social change. If it is not harnessed in support of progress, it obstructs attempts to redress patriarchy. Unless the law articulates and recognizes the rights of people, redressal of violation of human rights is difficult. From this perspective, law must be seen as empowering . . . . One needs to adopt more realistic appraisal of the limitations of the law. The myths that presently imbue law with its apparent sanctity must be abandoned. I argue therefore, that along with the reforms in the existing laws, a movement creating a legal culture, making the active agents sensitive to the consequences of child marriage, and furnishing meaningful viable alternatives to young girls, is required to be built up. The responsibility for this lies with civil society.

Id. at xxxix (emphasis added).
11 Id. at xiii.
12 See Sagade, supra note 2, at 1–25.
13 Id. at 8 (suggesting that “[t]he collective effect of patriarchy is thus to reinforce subordination of women in the name of care, protection, and welfare, and make them dependent on men throughout their lives”).
14 See id. at 35–64, 73–100.
15 See id. at 111–26, 132–66, 175–202. Sagade emphasizes throughout her discussion that state parties to international human rights conventions are under a legal obligation to
Indian government, from the courts, to the legislature, to law enforcement, need to work in concert to spread awareness of the problems with child marriage and to eliminate the practice for the sake of the nation’s young girls.\textsuperscript{16}

While reading Sagade’s explanation of the problem and her suggestions for future action, it becomes apparent that the practice of child marriage is deeply ingrained in Indian culture and tradition.\textsuperscript{17} Thus, relying on the government and certain professionals\textsuperscript{18} to eliminate the practice through an imposed rule, which seeks to change superficially the culture’s patriarchal perception of women, will likely face widespread and long-term opposition.\textsuperscript{19} In addition to attempts to change the culture’s perspective on women and girls, this Book Review suggests that addressing the Indian tax system and dowry laws would provide a more practical approach to eliminating the practice of child marriage.\textsuperscript{20} Utilizing financial means to compliment the feminist methodology that Sagade lays out could produce more immediate effects as the nation takes time to adjust to the feminist perspective.\textsuperscript{21}

Part I of this Book Review discusses the perspectives from which Sagade addresses the problem of child marriage, namely the feminist and human rights approach to eradicating the problem. Part I also discusses the causes and consequences Sagade illustrates in the first half of her book. Part II outlines and critiques the methods of eradicating child marriage that Sagade suggests the Indian government not only ensure legislative conformity, but also to investigate and remedy the conduct of individuals and institutions that violate these human rights. \textit{Id.}\textsuperscript{16}

\begin{enumerate}
\item \textit{Id.} at 208–15.
\item \textit{See} \textit{Sagade, supra} note 2, at 7–14.
\item \textit{Id.} at 211. Sagade suggests that a “special responsibility could be put on certain professionals. For instance, health professionals, law enforcement officials, people’s representatives, members of the judiciary, and social workers in non-governmental organizations and in the local community could be trained to address the practice of child marriage from [the] human rights perspective.” \textit{Id.}
\item \textit{See id.} at 208–17.
\item \textit{See} Luigi Bernardi & Angela Fraschini, \textit{Tax System and Tax Reforms in India} 2, 13–14 (Univ. of Pavia & Univ. of Eastern Piedmont, Working Paper No. 51, 2005) \textit{available at} http://polis.unipmn.it/pubbl/RePEc/uca/ucapdv/fraschini51.pdf. The Indian tax system is a three-tiered structure made up of the union government, the state governments, and the urban/rural local bodies. \textit{Id.} at 2. The main taxes that the union is empowered to levy are income tax, customs duties, excise duties, sales tax and service tax. \textit{Id.} The income tax includes both tax deductions and tax credits similar to those established by the IRS. \textit{Id.} at 13–14. Spouses are treated separately and generally their income is not combined. \textit{Id.} at 14.
\item \textit{See} \textit{Sagade, supra} note 2, at 229. Sagade concludes by recognizing that “mere passage of any law will not be able to achieve its objectives unless it is meaningfully strengthened by other support mechanisms.” \textit{Id.}
\end{enumerate}
adopt to comport with international human rights standards. Part III begins with a discussion of the Indian practice of dowry, a discussion glossed over in Sagade’s book. Part III then presents the economic perspective and concludes by suggesting that the government could use tax incentives and dowry law amendments to provide more efficient relief to the plight of young girls and women in India.

I. Defining Sagade’s Perspectives

Sagade emerges from an introductory sea of demographic and medical statistics, and charts an investigation of the causes of cultural support for child marriage. She then investigates why the prevalence of child marriage has not diminished despite current legislation that makes contracting a child marriage a criminal offense. Sagade focuses on several reasons for child marriage, including the intensely patriarchal customs in India where the attitude towards women is that they are not to be left independent. Sagade notes that by marrying off young girls at an early age, their “submission and acceptance of the traditional gender roles” becomes almost guaranteed; the young bride herself becomes “the carrier of the patriarchal ideology and unknowingly contributes to the strengthening of patriarchy.”

22 Id. at 1–21. Sagade offers statistics that indicate child marriage levels in different regions of India and how they have changed over time. Id. at 4–5. She also discusses the medical consequences young brides often face from early exposure to sexual intercourse and child birth. Id. at 14–21. As young brides are statistically more likely to be poverty stricken and lacking proper prenatal care, they are more susceptible to risks that can be avoided or lessened through proper pregnancy management; for example, “[g]irls below the age of twenty years are likely to suffer from . . . recto-vaginal fistula (VVF), which is a hole between the vagina and bladder or rectum. This results in continuous involuntary leakage of urine or faeces . . . .” Id. at 14. Sagade also tells the story of Phulmonee, a girl just over eleven years old who “died because of haemorrhage from a rupture of the vagina caused by her husband who had forcible sexual intercourse with her.” Id. at 40–43. Though initially charged with murder, the court later exonerated him as Phulmonee was above ten years old. Id. at 40. In 1860, at the time of Phulmonee’s death, the age of consent for sexual intercourse was ten years and “[s]exual intercourse without the consent or against the will of a woman is not rape when committed by a man with his wife” provided she was not below ten years of age. Id. at 38.

23 Id. at 1–14. Persons that can be held criminally liable for contracting child marriage are the groom, individuals who perform or conduct the child marriage, guardians or persons in charge of a minor who promote, permit, or negligently fail to prevent child marriage, and persons who violate an injunction issued to prohibit a proposed child marriage. Id. at 48–49. The punishment for contracting a child marriage is imprisonment for three months and/or a fine. Id. at 49. The CMRA is silent on whether a child marriage, once performed, is legally valid. Id. at 52.

24 Id. at 8.

25 Id. at 10.
In addition, Sagade offers several economic reasons for perpetuation of the practice. In India, dowry is still a practiced custom where the parents of a girl are required to give cash gifts to the groom and his family; the longer the marriage arrangement is delayed, the more the dowry increases. Economics further sustain the practice of child marriage as it lessens the financial burden of supporting daughters as a married girl joins the family of her husband. Also, because women are “out-marriers,” daughters are not expected to support their parents in any way. Thus, “it becomes a straight economic, utilitarian calculation of gains and losses in marrying daughters off young.” These economic reasons fade from Sagade’s analysis when she discusses the methods by which the government should legislate, implement, and enforce rules to eradicate the practice of child marriage.

26 Sagade, supra note 2, at 7–14. In addition to, but not completely isolated from the patriarchal and economic reasons for child marriage, Sagade offers several other causes for the continued practice. Id. These causes include the community’s desire for control over sexuality where culturally embedded concepts of virginity and chastity are often symbols of honor and status. Id. at 9. With these values, concerns over purity are eased if girls are married at a younger age. Id. at 9–10. Sagade also points to a lack of awareness about the adverse health consequences and the law as reasons for the continued practice. Id. at 12. The lack of political commitment is also discussed, where Sagade alleges that no serious efforts have been made by the Indian government to curb child marriage despite an at least superficial attempt to respond to the demands of the international community. Id. at xxxiv, 13.

27 See id. at 10–11. “[A]s the girl gets older . . . she needs an older bridegroom. An older bridegroom is likely to be more educated. And the more education the more dowry is an established trend. To avoid more expenditure by marrying her at a later age, parent prefers to marry her off at an early age.” Id.; see also Barbara R. Hauser, Born a Eunuch? Harmful Inheritance Practices and Human Rights, 21 Law & Ineq. 1, 32–33 (2003) (defining dowry as the practice of a bride’s family giving money and property either to the bride or to the new family she joins; thus dowry is understood as giving the daughter her inheritance at the time of marriage).

28 Sagade, supra note 2, at 11.

29 Id. at 11, 30 n.61. Sagade explains that “[o]ut-marriers means women leave their parent’s [sic] house and join the husband at his house.” Id. at 30 n.61.

30 Id. at 11 (emphasis added). Because daughters typically become extensions of the bridegroom’s natal family, they cease to be members of their own natal family and thus daughters are spared the responsibility of supporting their parents or siblings. Id. Thus, in financial terms, daughters are a perpetual expense and their parents can expect no future return on their investment. See id.

31 See id. at 208–17. In her introduction, Sagade discusses the economic reasons that contribute to the continued practice of child marriage, including the practice of dowry and the cultural understanding that women do not contribute monetarily to the income of the family and are therefore burdens to be married off as soon as possible. Id. at 10–11. These economic reasons are not discussed in depth again in her analysis, nor are they mentioned in her suggestions for future action. See id. at 208–17. The only time economically based laws are discussed as needing reform is when Sagade briefly notes that, “all other laws that devalue women need to be amended. For example, laws relating to inheri-
The tension between a sometimes progressive government and a people entrenched in tradition surfaces as legislative and judicial attempts to curb child marriage stall at the feet of cultures and religions more concerned with historical customs than the dictates of an ideologically distant administration. Sagade next uncovers several gaps in India’s legislation and case law, and in doing so uncovers the divergence of cultural norms from governmental goals. While Sagade is quick to allege that these lacunae indicate that the Indian government is merely “pay[ing] lip service to the cause of preventing child marriage,” she seems to have forgotten that this is a government seeking to create rules that conflict with the deeply imbedded patriarchal traditions of Indian society.

This conflict becomes evident as the government’s attempts to legislate and the judiciary’s attempts to adjudicate historically have been confronted with community disregard or outrage. Even within the last decade, public outrage at attempts to discourage child marriage has lead to uproar and violence not just against the government,
but against those working for reform. In light of such resistance, Sagade places too much weight on the need for the government to perfect the black letter law preventing child marriage; even laws that on paper completely prevent child marriage will likely have little effect in a society resistant to change. While “one has to appreciate that the law has a definite role to play in bringing about social reforms,” the behavior of people might be more easily changed through laws that seek to do more than change the traditional perception of women.

For example, if India implements legislation that will provide some economic incentive to comply with marital laws, either by reforming property and dowry laws or by offering tax incentives to register marriages, people will be more likely to abide by the marriage laws even if motivated by economics rather than women’s rights.

With the reasons for child marriage and the problems with the current law explored, Sagade investigates the barriers to prohibiting child marriage. As her title indicates, Sagade investigates the issue of child marriage not only from a human rights approach, but also by

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37 See Sagade, supra note 2, at 128 n.22.
38 Id. at 74. Sagade herself suggests, in the introduction to her legal reform argument, that “[n]o one can guarantee, particularly in the area of personal relations, that legislation will succeed in changing the behaviour of people.” Id.; cf. Rohit Barot et al, South Asians and the Dowry Problem 76 (Werner Menski ed., 1998) (discussing the existence of dowry and how “[a]ttempting to eliminate the custom exogenously rather than investigating and removing its root causes is a classic case of treating the symptoms rather than the disease”). Despite her recognition that perfect legislation alone would be insufficient, Sagade dedicates many pages to recommendations for legislative reform. See Sagade, supra note 2, at 52–55, 57–60, 85–91, 99–100, 138–66, 188–92, 208–10, 213–17.
39 Id. at 74. Calling it one of the easiest and most effective methods to control child marriage, Sagade suggests that making the registration of marriage compulsory would ensure that the minimum age condition is met. Id. She also believes that it would assure the free consent of the parties to the marriage. Id. Making registration compulsory in the CMRA would be beneficial, but as Parliament’s legislative declaration asserts, “it is not practical in a vast country like India with its variety of customs, religions, and level of literacy.” Id. at 59 (citing the Convention on the Elimination of All Forms of Discrimination against Women, Declarations and Reservations, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13, available at http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm).
40 See Deborah M. Weissman, The Human Rights Dilemma: Rethinking the Humanitarian Project, 35 Colum. Hum. Rts L. Rev. 259, 333–36 (2004) (discussing how human rights are best considered with “ideological dispositions that recognize that diverse cultures possess their own methods of resolution”); see also Nyamu, supra note 32, at 409 (recognizing that in a plural settling like India “proponents of gender equality must balance idealistic aspirations with a pragmatic realization that different contexts may call for diverse sets of tools to challenge unequal power relations”).
41 See Sagade, supra note 2, at 7–14, 74–92. Sagade will later use this investigation as a backdrop for her concluding discussion of how the Indian government should operate beyond mere legislation to overcome cultural hurdles. See id.
asking the woman question.42 These two perspectives, Sagade pur-
ports, are necessary to understand the barriers in prohibiting child
marriage and the methodology that should be implemented to over-
come these barriers.43 Sagade suggests that the practice of child mar-
riage can be challenged from the human rights perspective because
marriage is a state sanctioned institution and failure on the part of
India to address the prevention of child marriages of young girls is an
indication of social injustice.44

I. DIVERGING FROM THE PRACTICAL

Because India has ratified several international conventions sup-
porting women’s rights and the prevention of child marriage, it is
“under an obligation as a matter of international law to respect, pro-
tect, and fulfill human rights of the girls referred to [in the various
conventions].”45 India is obligated to not only protect those rights,
but to fulfill them.46 Sagade recognizes that internal bodies monitor-
ing India’s fulfillment of these obligations are making serious efforts
to “bring in the gender perspective,” but she argues that “these bodies
need to confront the practice of child marriage more seriously and
effectively by asking the woman question.”47 The woman question is
necessary because cultural traditions pose a significant barrier to pro-
hibiting child marriage.48 Those who defend child marriage suggest
that the practice is so ingrained in Indian culture that eradicating the

42 Id. at xxx. Sagade explains that, “[i]n the context of child marriage, asking the
woman question requires an examination of the gendered conditions that facilitate or
enable child marriage, and the laws intended to regulate it. It requires attention to the
ways in which women’s experiences and interests have been overlooked.” Id. The woman
question means examining shortcomings in the law in failing to consider the experiences
and values that are more typical of women than of men. Id. The purpose of the woman
question is not only to uncover male infused features of the law and how they operate, but
also to approach the law with a conception of how these features might be corrected. Id.
43 Id. at xxviii–xxx, xxxv–xxxvi.
44 Id. at 125. Sagade argues that child marriage infringes on several human rights of
the young bride including her autonomy in choosing a life partner. Id. Furthermore, as a
young bride forced into the role of wife, the child’s right to an education is taken away,
which in turn denies her the opportunity to become economically independent and a-
flicts her overall well-being. Id. at 125–26.
45 Id. at 115.
46 SAGADE, supra note 2, at 115–16. By ratifying the international conventions, India
adopted the direct, positive duty to enact appropriate legislation and provide administra-
tive, budgetary, and economic measures for the full realization of human rights. Id.
47 Id. at xxxvii.
48 Id. at 140.
practice would be equivalent to eradicating a piece of Indian tradition.\textsuperscript{49} In reaction to such arguments, Sagade emphasizes that,

\textit{[n]}o social group has suffered greater violation of its human rights in the name of culture than women. A cultural explanation of the gendered social practice of child marriage has to be challenged by asking ‘the woman question’ [because] \textit{only} when women are kept at the centre of the discussion can the gender complexity of the cultural argument be exposed.\textsuperscript{50}

Casting tradition aside, India is legally bound to bring its legislation and policies in line with international standards.\textsuperscript{51} Sagade lists the measures India would have to take to comply with the international treaties it ratified,\textsuperscript{52} but India’s lack of complete compliance is not out of ignorance, but out of purposeful non-compliance.\textsuperscript{53} While


\textsuperscript{50} \textsc{Sagade, supra note 2, at 140.}

\textsuperscript{51} \textit{Id.} at 115.


\textsuperscript{53} \textit{Id.} at 144. For example, India has filed a declaration to an article of the Women’s Convention which reads:

(i) With regard to Articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent.

\textit{Id.} Because marriage is a matter that falls within the purview of religion-based personal laws, India has excused herself from needing to eliminate discrimination based on sex, gender, and religion in the field of personal laws. \textit{Id.} Article 5(a) states that state parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

India’s non-compliance lends support to Sagade’s earlier suggestion that the government’s attempts to prohibit child marriage have been insufficient, it also implies that the government is aware of, but has not fully embraced, the woman question.\textsuperscript{54} The community and the government would likely be more amenable to a dialogue on how prohibiting child marriage will benefit society as whole.\textsuperscript{55} Although it is important and necessary that India understand human rights legislation under the woman question umbrella, the government’s apathy toward the impact of child marriage might nonetheless be more easily extinguished if the gender neutral question was also asked.\textsuperscript{56} Sagade considers only the woman question even when she discusses the effects of child marriage on the health of young women; she does not discuss the financial impact that treating preventable ailments have on the national economy.\textsuperscript{57} After briefly acknowledging that “[s]ociety bears a phenomenal cost by allowing the continuation of the practice of child marriage,”\textsuperscript{58} Sagade provides no further discussion of the reduction in socio-economic advancement of women, the increased costs of providing non-preventative health care, or the more

\begin{quote}
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure [that men and women enjoy):
\begin{enumerate}
\item The same right to enter into marriage;
\item The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
\item The same rights and responsibilities during marriage and at its dissolution;
\item The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
\item The same rights . . . in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
\end{enumerate}
\textit{Id.} at art. 16(1).
\end{quote}

\textsuperscript{54} See \textit{Sagade}, supra note 2, at 144.
\textsuperscript{55} See \textit{id.}
\textsuperscript{56} See generally Nyamu, \textit{supra} note 32, at 409–11.
\textsuperscript{57} \textit{Sagade}, \textit{supra} note 2, at 14–22, 175–92. Because adolescent girls experience pregnancy before they are physically fully developed, they are more like to suffer from several conditions, including maternal mortality, severe damage to the reproductive tract, and pre-eclampsia and eclampsia, a condition involving high blood pressure, iron deficiency anemia, and convulsions. \textit{Id.} at 14.
\textsuperscript{58} \textit{Id.} at 22.
peripheral financial impacts including decreased tourism from westerners who view India as hostile towards women.\textsuperscript{59}

Sagade’s human rights approach further wanders from the realm of the practical when she discusses the strategies and future action that the Indian government, and the Indian people, should adopt to eliminate child marriage.\textsuperscript{60} Sagade suggests that national publicity aimed at creating awareness about international human rights jurisprudence should be at the forefront of the nation’s aims.\textsuperscript{61} Through such publicity, the state can better be held accountable for its seeming apathy and negligence in enforcing the rights of young girls.\textsuperscript{62} While this suggestion seems sound and effective, Sagade goes on to assert that it should be the “special responsibility” of certain professionals including law enforcement, people’s representatives, and members of the judiciary.\textsuperscript{63} Has she forgotten that these are the same individuals that she alleges fall short when enforcing, legislating, and adjudicating against support for child marriage?\textsuperscript{64}

Sagade further involves the court in methods that may alleviate the problem of child marriage. She suggests that,

\[
\text{a petition could be filed before the Supreme Court challenging the practice of child marriage. The foundation of such a petition could be a claim that child marriage violates various human rights and, therefore, needs to be stopped. The government could be asked to submit a time-bound action plan covering legal and extra-legal measures to control child marriage.}\textsuperscript{65}
\]

Again, Sagade is calling on the judiciary and the government, both of whom she has criticized for failing to act sufficiently in the past, to implement a plan that requires changing cultural norms and perspectives on the role of women in Indian society.\textsuperscript{66}

\textsuperscript{59} See id. at 7–22 (suggesting that the societal costs are high, but that much of the costs are hidden because statistical information is scarce).

\textsuperscript{60} Id. at 208–18.

\textsuperscript{61} Id. at 211.

\textsuperscript{62} SAGADE, supra note 2, at 211.

\textsuperscript{63} Id.

\textsuperscript{64} See id. at xxxiv, 85–89, 208–15.

\textsuperscript{65} Id. at 180.

\textsuperscript{66} See id.
III. Adding the Pragmatic

Thus, Sagade succeeds in weaving a holistic perspective, but hers is a narrow holistic perspective, limiting its purview to the human rights dimension and the woman question, while ignoring the potentially more practical economic aspect that might more readily succeed in diminishing the practice of child marriage. Further, Sagade’s suggestions as to legal and extra-legal steps that must be taken are necessary, but she focuses only on improving the means that already exist. These means have thus far not succeeded in reaching the desired end, namely an end in which the proper legislation and enforcement of marriage laws buttress a reformed ideology that places women alongside men in all forms of discourse. Missing from Sagade’s discussion is any investigation into how reforming laws once-removed from child marriage, such as property and tax laws, might eliminate some of the named causes of child marriage.

A. The Dowry System

If dowry practices decrease, occurrences of child marriage will decrease. Sagade recognizes the practice of dowry as a financial reason why child marriage is still widely practiced, yet she makes no mention that the practice of dowry has been prohibited by law in India since 1961. The two problems are similar in scope and effect; much

67 See Nyamu, supra note 32, at 409–10. Sagade’s discussion of India’s responsibility to the women in its communities, and to the international arena at large is an important, tangible tale of the work that needs to be done by the legislature and the judiciary. See generally SAGADE, supra note 2, at 208–20. For an interesting discussion on “critical pragmatism,” see Nyamu, supra note 32, at 409–410. In her article, Nyamu, a fellow at the Institute of Development Studies at the University of Sussex, recognizes that “proponents of gender equality must balance idealistic aspirations with a pragmatic realization that different contexts may call for diverse sets of tools to challenge unequal power relations.” Id. at 409. Nyamu also notes that “[h]uman rights principles embodied in constitutions and international instruments may provide a basis for such questioning, but concrete engagement with the politics of culture creates a much more productive challenge.” Id. at 410.

68 See SAGADE, supra note 2, at 208–20.

69 See generally id. See also Louise Harmon & Eileen Kaufman, Dazzling the World: A Study of India’s Constitutional Amendment Mandating Reservations for Women on Rural Panchayats, 19 BERKELEY WOMEN’S L.J. 32, 45–44 (2004) (stating that efforts to legislate against child marriage were made even pre-Independence from Britain, and that such efforts have historically had little effect).

70 See SAGADE, supra note 2, at 208–20.

71 Id. at 10–11.

72 The Dowry Prohibition Act, No. 28 of 1961, 21 India A.I.R. Manual 127 (5th ed. 1989); see also Hauser, supra note 27, at 31–32. In her discussion of how the practice of dowry in India is a chief reason for the murdering of women in the upper caste’s families,
like child marriage, the practice of dowry continues despite legislative efforts to prohibit it. The Dowry Prohibition Act of 1961 makes it a crime to give, take, or demand dowry, punishable by prison terms and substantial fines. Because both the givers and takers of dowry are held guilty of the offense, the act works as a disincentive for the bride or her family to report dowry cases. Furthermore, it is almost impossible to distinguish property or money given in dowry from a purely voluntary gift, thus making evidence of dowry difficult to ascertain. Also like child marriage, the practice of dowry exists as a result of India’s patriarchal structure.

The conundrum then is that treating either one of these ill practices will likely help to cure the other, but attempts to cure each have

Hauser, a practicing attorney and the Representative to the United Nations from the Union Internationale des Avocats for issues affecting women, writes:

> [t]he tradition of “dowries” has been linked with a particular kind of murder: “bride-burning,” where a young wife living with her husband’s family burns to death from an “accidental” kitchen fire. A recent study estimates that more than 25,000 young married women in India die or are maimed each year from dowry and bride burning.

Hauser, supra note 27, at 31–32. Himendra Thakur, in his preface to South Asians and the Dowry Problem, writes, “[t]he most likely cause [of bride-burning] is that the father of the bride has been unable to meet demands of dowry . . . which kept on increasing after the wedding.” Barot, supra note 38, at xiii.

73 Barot, supra note 38, at 75. Curious is the fact that Sagade makes no suggestion that the legislature or law enforcement make any advances in curbing this prohibited practice. See Sagade, supra note 2, at 10–11, 208–20.

74 The Dowry Prohibition Act, No.28 of 1961, §§ 3–4; India Code (1961). The penalty for giving, taking, or aiding in the giving or taking of dowry shall be imprisonment for no less than five years with a fine of no less than fifteen thousand rupees or the amount of the value of the dowry, whichever is more. Id. § 3. The penalty for demanding dowry shall be imprisonment for no less than six months but no more than two years, with a fine that may not exceed ten thousand rupees. Id. § 4. The Act defines dowry as,

> any property or valuable security given or agreed to be given either directly or indirectly—
> (a) by one party to a marriage to the other party to the marriage; or
> (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person.

Id. § 2.

75 Barot, supra note 38, at 75.

76 Id. at 75–76.

77 See id. at xvi. Himendra Thakur, an engineer who serves as the Chair of the Board of Directors for the International Society Against Dowry and Bride-Burning in India, notes that the patriarchal structure of the culture creates social norms where the girl’s family is “mainly responsible for the ‘giving away’ of the daughter and has to bear the bulk of the marriage expenses.” Id.
thus far been unsuccessful. The problem of dowry and its perpetra-
tion of child marriage could be addressed in several ways that do not
necessarily eradicate either problem, but at least introduce short term
methods that can begin to attack the practices from within the confines
of dowry and property law. For example, the Dowry Prohibition Act of
1961 could be amended to make only takers (or those aiding in taking
dowry) liable, thereby making the dowry giver exempt from punish-
ment. Making the giver exempt would allow for the bride or her fam-
ily to report circumstances in which dowry was demanded without fear
of punishment themselves for being a party to the transaction.

The bride’s family often agrees to give dowry because they un-
derstand it as buying assurance that their daughter will be treated well
and cared for within marriage; thus, it may be better to make dowry
legal but highly regulated. If dowry, or any gift at the time of regis-
tered marriage, becomes marital property, revocable upon divorce or
unnatural death of the bride within some defined length of time, then
parents of young girls would be more likely to wait until their daugh-
ters were of legal marrying age before contracting their marriage so
as to benefit from the protections of marital property. If parents, at
the time of registering the marriage, also registered the dowry given
to the couple, parents of the bride would feel some comfort in know-
ing that if the groom is marrying their daughter for the dowry, they
would have some recourse if the marriage fails or if their daughter
dies. Even in light of the current Dowry Prohibition Act of 1961, the

78 See id. at 75–76; Sagade, supra note 2, at xxxvii-xl.
79 See Nyamu, supra note 32, at 410.
80 Barot, supra note 38, at 219.
81 See id.
82 See id.
83 See id. at 94, 219. Bisakha Sen, a researcher and Ph.D. in Economics, suggests that
making all gifts given at the time of marriage property of the bride will ensure that the
husband cannot benefit from the dowry, but Sen also suggests that such a measure would
likely lead to resistance because an unconditional transfer of the full amount of dowry to
the bride would make it pointless from the point of view of the groom’s family to demand
property. Id. at 94.
84 Id. Similarly, Sen notes that,

it would be more palatable to all if the groom’s claim over the dowry were
recognized as being conditional on the marriage contract being upheld, the
dowry being reversion [sic] by law to the bride or her family upon the mar-
niage contract being terminated by divorce or unnatural death. This would
also encourage the bride’s family to document the items given in dowry
officially, and leave the groom and his family fewer reasons to protest against
such documentation.
practice of dowry could fall into further disfavor if the couple themselves were given an incentive to register property given in dowry through a tax credit for jointly held property.\textsuperscript{85}

B. Incentives to Register Marriage

One of Sagade strongest criticisms of the CMRA is its failure to make registration of marriage compulsory.\textsuperscript{86} She suggests that mandating registration would assure the fulfillment of the condition as to the age of the parties, as well as their free consent to the marriage.\textsuperscript{87} Sagade suggests that the various states use the existing infrastructure for registering births and deaths for registering marriages. She further suggests that,

\begin{quote}
[a] step towards implementation could be to establish a pilot project for registration of marriage in one state . . . . Analysis could be done of the situation whether the registration of marriages makes any difference in reducing the number of child marriages. Based on that experience, the governments of other states could be convinced to introduce the compulsory registration of marriages.\textsuperscript{88}
\end{quote}

While this prototype and spread-by-example suggestion could help to increase the registration of marriages, especially in the more developed states and regions of the country, the government’s whole reasoning behind not making the registration of marriage compulsory is because “it is not practical in a vast country like India with its variety of customs [and] religions.”\textsuperscript{89} And while she does suggest methods for making the registration compulsory, what Sagade does not proffer is any suggestion on how to enforce such provisions.\textsuperscript{90} In a nation where the practice of child marriage is illegal yet prevalent, a provision making registration of marriages compulsory would likely encounter similar disregard amongst various cultures.\textsuperscript{91}

\textit{Id.}

\textsuperscript{85} See Barot, \textit{supra} note 38, at 94, 219.
\textsuperscript{86} Sagade, \textit{supra} note 2, at 89.
\textsuperscript{87} \textit{Id.} Sagade also emphasizes that the international treaties that India has ratified obligates India to make the registration of marriages compulsory. \textit{Id.} at 146.
\textsuperscript{88} \textit{Id.} at 60.
\textsuperscript{89} \textit{Id.} at 59 (quoting India’s filed declaration to Article 16(2) of the Women’s Convention which calls for adoption of a law for compulsory registration of marriages).
\textsuperscript{90} \textit{Id.} at 89.
\textsuperscript{91} See Nyamu, \textit{supra} note 32, at 410.
Sagade’s socio-legal human rights approach to decreasing the occurrences of child marriage would thus benefit from the introduction of a critical pragmatism into the struggle for gender equality.\textsuperscript{92} A pragmatic approach could co-mingle property and tax laws to create a means by which the benefits of dowry are decreased and the benefits of marriage registration are increased.\textsuperscript{93} Because female children are typically not given a share in parental property, dowry becomes the closest substitute for inheritance.\textsuperscript{94} While the task of ensuring that daughters get their due share in parental property may prove difficult, if not impossible, perhaps there is a tax-based way to encourage a generation of wives to get their due share in nuptial property. This initial due share could then begin a cycle where wives, as property owners and mothers, would ensure their daughters receive a share in parental property that they then could bring to the nuptial table.\textsuperscript{95}

For example, an immediate tax credit upon registration of marriage would encourage families to register in accordance with local laws.\textsuperscript{96} If, as part of the marriage registration, the couple also registered title in property jointly, the couple could receive tax credits on liabilities incurred for personal property that would be taxed at a higher rate if held individually.\textsuperscript{97} Such a practice would convert property given in dowry to property jointly owned by the married couple.\textsuperscript{98} A bride and groom, if blessed with a daughter, may not be enticed to marry her off at a young age to avoid an increasing dowry if they were

\textsuperscript{92} See id. at 409.
\textsuperscript{93} Id. at 410–11; see also Bernardi & Fraschini, supra note 20, at 13–14.
\textsuperscript{94} Hauser, supra note 27, at 33.
\textsuperscript{95} See id.
\textsuperscript{96} See generally Nyamu, supra note 32, at 410–11.
\textsuperscript{97} Id. at 410 (recognizing that “[m]arriage, divorce and death are key events for defining and reconstituting property rights of women and children, whose access to economic resources heavily depends on relationships to fathers or husbands”). Nyamu further notes that the lack of women’s property interests results from “contemporary perceptions of cultural norms” and that a pragmatic solution would “seek greater inclusiveness in the registration of title, by promoting joint registration of spouses and official disclosure that a title holder is a trustee for other socially recognized, but unregistered, property interests.” Id. at 411; see also Hauser, supra note 27, at 42. Methods to increase women’s equality by restructuring property laws have recently been proposed, including a provision in the Hindu Succession (Amendment) Bill 2000 that would call for equal rights for daughters in coparcenary property, thus granting a Hindu daughter the same property rights as a son and allowing for the property to be divided equally. Id. A more recently drafted amendment, providing the same property rights to sons and daughters, was adopted on August 29, 2005 as the Hindu Succession (Amendment) Bill 2005. Parliament Passes Hindu Succession and Immigration (Carriers’ Liability) Amendment Bills, 2005, OnlyPunjab.com, Aug. 29, 2005. http://onlypunjab.com/fullstory2k5-insight-news-status-21-newsID-29136.html.
\textsuperscript{98} See Nyamu, supra note 32, at 409–11.
receiving continued tax incentives from their jointly held property.\textsuperscript{99} The daughter’s potential groom may not want to marry her at a young age because he will be unable to receive the marriage tax credit if she is below the legal age.\textsuperscript{100}

A tax incentive approach would allow individuals to choose to have both spouses share the same rights in the ownership, acquisition, management, administration, enjoyment, and disposition of property.\textsuperscript{101} The Indian government thereby would be closer to complying with Article 16(h) of the Women’s Convention in a manner that comports with the government’s desire not interfere in personal matters without the community’s own initiative and consent.\textsuperscript{102} While perhaps overly simplistic and discussed without reference to social implications, a discussion of a practical, albeit backdoor, method to diminish child marriages should not be ignored when legislative and judicial attempts to do the same have been shunned by the Indian culture.\textsuperscript{103}

While it may appear that a sweeping tax incentive to restructure the property imbalance between men and women would be costly to implement, the result can be cost saving in other areas.\textsuperscript{104} As women become more financially independent through property rights, the financial burden the economy faces in caring for widows will be decreased; as fewer young girls are married off at ages unsafe for intercourse and child-bearing, the health-care costs of caring for ailing adolescents will also decrease.\textsuperscript{105} Fortunately, the Indian government has seen an impressive strengthening in its economy and gross domestic product over the last two decades, two decades that have undergone considerable tax reform as well.\textsuperscript{106} Major changes have seen

\textsuperscript{99} See id.
\textsuperscript{100} See id.
\textsuperscript{101} Id. at 410–11.
\textsuperscript{102} See \textsc{sagade}, supra note 2, at 144 (discussing India’s filed declaration to Articles 5 and 16 of the Women’s Convention which states that the convention will be enforced only to the extent that it does not interfere in the personal affairs of any community “without its initiative and consent”) (emphasis added); supra notes 52–53 and accompanying text.
\textsuperscript{103} Harmon & Kaufman, supra note 69, at 44 (recognizing how in the early 20th Century, “[t]he thought of altering legal relationships within the family was seen as fundamentally threatening to the most basic institutional unit in society”). Professors Harmon and Kaufman go on to discuss how “[d]emands for inheritance rights for daughters, or women’s equal rights regarding divorce, and an insistence on monogamy were viewed as endangering the joint family and ultimately challenging the dominant patriarchy.” Id.
\textsuperscript{104} See id. at 40–43.
\textsuperscript{105} \textsc{sagade}, supra note 2, at 14–22; Harmon & Kaufman, supra note 69, at 40–43.
a boost in spending on primary schools and health care in the hopes of benefiting the ordinary citizen.\textsuperscript{107} As Sagade notes, education is central to any success in elevating the status of young girls and eliminating child marriage.\textsuperscript{108} Spending increased revenue on education and decreasing taxes on spousal property will not only be offset by decreased expenditures on healthcare and welfare, but also by the increased productivity and tax paying status of educated, property-owning women.\textsuperscript{109}

Child marriage is not the only Indian practice affecting women and girls that will benefit from a restructuring of the property tax laws.\textsuperscript{110} Because females are culturally viewed as a financial burden, their status as daughters and widows are considered an economic encumbrance upon the parents and in-laws.\textsuperscript{111} The Indian practices of female infanticide and sati, though diminishing in modern times, exemplify women’s inferiority; the eradication of child marriage through more equitable property distribution will lead to women being more financially independent.\textsuperscript{112}

**CONCLUSION**

In *Child Marriage in India: Socio-legal and Human Rights Dimensions*, Jaya Sagade argues that the Indian government must orchestrate a


\textsuperscript{108}SAGADE, supra note 2, at 56.

\textsuperscript{109}See id.

\textsuperscript{110}See Harmon & Kaufman, supra note 69, at 41–42, 53.

\textsuperscript{111}Id.

\textsuperscript{112}See id. Sati is the custom of a wife voluntarily sacrificing herself on her husband’s funeral pyre. Id. at 41. In a discussion about the perception of women as financially burdensome, Harmon and Kaufman point to the Indian proverb that “raising a daughter is like watering a neighbor’s plant.” Id. at 53. Despite this seemingly light-hearted saying, they also note that the widespread availability of sex-selective sonograms results in an estimated three to five million abortions of female fetuses every year. Harmon & Kaufman, supra note 69, at 53. In addition, in Bihar, India’s poorest state,

[m]idwives are paid fifty cents and a sack of grain for delivering a girl, more than twice that amount for delivering a boy, and as much as five dollars for getting rid of a girl. . . . [I]n some parts of Bihar, each midwife killed five newborn girls each month, using techniques including snapping the baby’s spine, forcing rock salt down the baby’s throat, or sealing the baby in a clay pot.

*Id.*
movement involving the legislature, the judiciary, law enforcement, educators, and the people as a whole.\textsuperscript{113} Her recommendations are broad and inspiring, and certainly aim to cure child marriage and its consequences on the health, education, and overall value of girls.\textsuperscript{114} Sagade recognizes that legal reforms involve changing long standing habits and behavior of humans, and that these reforms are often in opposition to personal and vested interests.\textsuperscript{115} She further recognizes that it is not an easy task to achieve such a behavioral change merely through legal reforms.\textsuperscript{116} The methods that Sagade suggests in addition to the requisite legal reforms would undoubtedly change India’s patriarchal perspective, but these methods could encounter resistance, because they, like the legal reforms themselves, involve changing long standing habits and behavior of humans.\textsuperscript{117}

In an effort to find a more effective method to erase the practice of child marriage from India’s culture, this Book Review proposes several more pragmatic options. The national government, through tax incentives involving the registration of marriages and the property and inheritance laws, should create financial incentives for the people of India to change their habits and behavior. If all parties to a marriage, including the bride’s parents, will enjoy a tax benefit and property protection from registering marriage and dowry gifts, then the parties to a marriage will be more inclined to wait and marry at the legal, financially beneficial marrying age. Pragmatic, economically induced behavioral changes should be made in such a way as to compliment the human rights and feminist approach that Sagade proposes. The combination of the practical and the ideal will hopefully converge so that not only is the effect equal footing and protected human rights for women, but also that the aim is an India that exemplifies an explicit commitment to gender justice.\textsuperscript{118}

\textsuperscript{113} See Sagade, supra note 2, at 221–22.
\textsuperscript{114} See id. at 208–17.
\textsuperscript{115} Id. at 225.
\textsuperscript{116} Id.
\textsuperscript{117} See Nyamu, supra note 32, at 409–10.
\textsuperscript{118} See Harmon & Kaufman, supra note 69, at 46.
FEDERAL TRADE ADJUSTMENT
ASSISTANCE FOR WORKERS:
BROKEN EQUIPMENT

JESSICA SCHAUER*


Abstract: In The World Is Flat, Thomas Friedman argues that the convergence of various events and technologies over the past few decades have created a greater interconnectedness among individuals across the globe. One of the hallmarks of this latest wave of globalization has been the outsourcing of American jobs to foreign countries such as India. Friedman suggests that, in light of this trend, a comprehensive plan is needed to help Americans prepare for competition in the global economy. This Book Review analyzes whether the Federal Trade Adjustment Assistance program (TAA), part of the Trade Act of 1974, is a viable means for providing job training and assistance to Americans who have lost jobs due to offshore outsourcing. It concludes that the TAA program is largely ineffective and suggests various modifications.

Introduction

According to Thomas Friedman, globalization has occurred in three stages.1 “Globalization 1.0” began in 1492, when exploration of the New World caused states to become interconnected.2 “Globalization 2.0” was spurred on by the industrial revolution, as multinational companies became interconnected and created a global economy.3 The third stage, “Globalization 3.0,” is the focus of Friedman’s new book, The World is Flat.4 Friedman asserts that Globalization 3.0 arose through the convergence of various events and technologies that together have lowered barriers to interacting on a global scale,
“flattening” the world such that individuals are now interconnected.\(^5\)
One visible aspect of this new interconnected or “flat” world is the outsourcing of American jobs, particularly high-tech and service sector jobs, to foreign countries like India.\(^6\) While Friedman contends that the newest wave of globalization will prove to be a positive force in the long run, he acknowledges that it can also have a devastating impact on individuals whose jobs have been outsourced.\(^7\) In order to temper the impact of globalization on individual American workers and to prepare them for competition in the global economy, Friedman outlines a plan that he calls “Compassionate Flatism.”\(^8\) One element of Compassionate

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\(^5\) Id.

\(^6\) See Friedman, supra note 1, at 24, 103–13. The term “outsourcing” technically applies any time a business contracts out work previously done in-house, whether or not that work is performed overseas. See Daniel W. Drezner, The Outsourcing Bogeyman, FOREIGN AFF., May/June 2004, at 22, 24; C. Alan Garner, Offshoring in the Service Sector: Economic Impact and Policy Issues, ECON. REV., Third Quarter 2004, at 5, 6, available at http://www.kc.frb.org/Publicat/ECONREV/Pdf/3Q04garn.pdf. Meanwhile, “offshoring” refers to the transfer of work to a foreign country, whether it is performed by another office of the same company or a separate company. Id. at 5. Because of the prevalence of “offshore outsourcing,” however, the two are often used interchangeably. See, e.g., Drezner, supra at 22. Offshore outsourcing has become a salient political topic and was frequently discussed during the 2004 Presidential election. See Robert Atkinson, Meeting the Offshoring Challenge, 2004 Progressive Pol’y Inst. 1, available at http://www.ppionline.org/documents/offshoring2-0704.pdf; Carolyn Lochhead, Outsourcing: Fed Chairman Warns U.S. Against Protectionist Cures, S.F. CHRON., Feb. 21, 2004, at A1; U.S. Election 2004: Grappling with Globalisation, ECONOMIST, Oct. 9, 2004, at 14, 15 [hereinafter Grappling with Globalisation]. Both major candidates, Republican George W. Bush and Democrat John Kerry, announced plans to decrease the number of jobs going overseas. See id. The centerpiece of Kerry’s plan was the elimination of “tax loopholes,” or deferment options that increase the profitability of hiring overseas workers, whereas President Bush focused upon lowering corporate taxes to “make America a better place to do business.” Atkinson, supra at 1; Grappling with Globalisation, supra at 15. The two candidates also sparred over the issue during the televised presidential debates. See President George W. Bush & Sen. John Kerry, The Third Bush-Kerry Presidential Debate (Oct. 13, 2004), http://www.debates.org/pages/trans2004d_p.html [hereinafter Debates].

\(^7\) Friedman, supra note 1, at 276; Thomas J. Manley & Scott M. Hobby, Globalization of Work: Offshore Outsourcing in the IT Age, 18 Emory Int’l L. Rev. 401, 406 (2004) (“Economists defend job offshoring as just one more element of free trade that, in the long run, works to the benefit of all parties involved. They are equally ready, however, to acknowledge the severe economic, political, and social dislocation that job offshoring can cause in the short run.”) (footnotes omitted)).

\(^8\) Friedman, supra note 1, at 280. Compassionate Flatism, in Friedman’s description, “is a policy blend built around five broad categories of action for the age of flat: leadership, muscle building, cushioning, social activism, and parenting.” Id. Regarding the “leadership” prong of this plan, Friedman states that globalization requires leaders who will support policies aimed at large-scale advancement of science and technology. Id. at 283. In particular, Friedman suggests a presidential push for alternative energy and energy conservation modeled on the “moon race” of the 1960s. Id. The “cushioning” portion, according to Friedman, would consist of a wage insurance program, so that workers who
Flatism, what Friedman terms “muscle building,” involves creation of a workforce with “lifetime employability.” Friedman states that lifetime employment with a single employer will become increasingly rare as globalization accelerates, and thus American workers must be prepared properly for frequent career changes. The measures Friedman proposes to achieve this goal are twofold: creation of portable benefits that employees can take from job to job, and lifelong learning opportunities so that workers can sharpen their skills and attain higher value-added work if their jobs are sent overseas.

This Book Review will focus on the second measure, lifetime learning, and will assess whether federal Trade Adjustment Assistance (TAA), part of the Trade Act of 1974, is an effective route for providing education and training to those who have already lost jobs to outsourcing. Part I discusses the problems faced by individuals and families affected by offshore outsourcing. Part II provides an overview of the TAA program, including amendments made in 2002 as part of the Trade Act of 2002. Part III addresses three problem areas in the TAA program. First, it is insufficient in its scope, as it fails to reach the high-tech and service-sector jobs that are now being lost to foreign outsourcing. Second, it is poorly administered and under-funded, and as a result many displaced workers currently eligible for assistance have difficulty obtaining it. Third, the training provided by the program is largely ineffective.

This Book Review concludes that, although the changes made in 2002 significantly improved the TAA program, TAA as it currently exists fails as an effective provider of education and job training to those who have lost their jobs to foreign outsourcing. Insofar as advanced training and education are “muscle build-

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9 Id. at 284.
10 Id.
11 See id.
ing,” Trade Adjustment Assistance is the broken exercise equipment gathering dust in the corner of the American economy.

I. THE EFFECTS OF OFFSHORE OUTSOURCING

Joan Pounds is a single mother and former information technology (IT) representative for Agilent Technologies. Discussing her job at Agilent, Pounds stated, “I walked to work when I was seven months’ [sic] pregnant in a blizzard and stayed for three more shifts . . . . I did that because I cared about the company.” Despite that show of dedication, Pounds was laid off in July of 2003, after her employer contracted with a firm in India to do her job. She had to train her own replacements via teleconference. After being laid off, Pounds sent out twenty-five resumes a week but was unable to find full-time employment, forcing her to take a part-time job as a senior citizen caregiver at seven dollars an hour. Since then, it has been hard just to get by. With no medical benefits, she must pay the costs of treatment for her son’s bipolar disorder out of pocket, and in 2004 she sold her house at a loss two days before it was to be foreclosed.

Unfortunately, stories like Pounds’s are becoming increasingly common. U.S. job losses due to offshoring doubled between 2001 and 2004, and various research institutes have predicted that offshore outsourcing will continue to increase. McKinsey Global Institute es-
estimates a 30% to 40% increase in the volume of offshore outsourcing per year for the next five years. Forrester Research predicts that 3.3 million white collar jobs will be sent overseas by 2015. Deloitte Research predicts that by 2009 two million financial-sector jobs will have been outsourced. In one scenario, research firm Gartner predicts that as many as 25% of all IT jobs could be outsourced to other countries by 2008. For those whose jobs are sent overseas, it is notoriously difficult to find new work. As of 2000, the U.S. General Accounting Office reported that only 75% of dislocated workers found new employment and those who did made less than 80% of their previous wage. Hardest hit are older workers who have become established in their careers. For example, Doug Hill worked as a automotive design contractor for Lear Seating for years before his job was sent overseas; because he had been unable to find full-time work, he worked part-time at a veterans’ benefits office. Asked about his prospects in April of 2004, Hill stated, “I’m done . . . I know that. Who’s going to hire me? I’m 60. I’m just living one day at a time, and I do a lot of praying.”

II. Trade Adjustment Assistance: Background

Theoretically, the Trade Adjustment Assistance program should be available to help people like Pounds and Hill who have lost jobs due to the phenomenon, the structural changes it is likely to cause, and the likelihood that it will be affected by political events. See Garner, supra note 6, at 11.

25 See Garner, supra note 6, at 11.
26 Drezner, supra note 6, at 24. The jobs most likely to go overseas are those that are labor intensive, information-based, can be reduced to a routine set of instructions, and can be monitored from a distance. Garner, supra note 6, at 17. Nonetheless, the range of activities that can be outsourced is vast—the New York Times even reported in December, 2005 that computer game enthusiasts have begun outsourcing the early rounds of their games to Chinese players. See David Barboza, Ogre to Slay? Outsource it to the Chinese, N.Y. Times, Dec. 9, 2005, at A1.

27 Drezner, supra note 6, at 24.
28 Reingold, supra note 16, at 78.
30 Id.
31 See Reingold, supra note 16, at 79–80; see also Garner, supra note 6, at 15 (citing a study of displaced manufacturing workers that found that, “[o]lder, less educated workers with long tenures in their job were unemployed longer or, if reemployed, were more likely to experience earnings losses exceeding 30 percent.”).
32 Reingold, supra note 16, at 79.
33 Id. at 80.
international trade. Trade Adjustment Assistance was first included in the Trade Expansion Act of 1962, a bill regulating foreign trade, as an alternative to traditional, protectionist forms of import relief such as tariffs. The 1962 Act, however, contained stringent standards regarding the conditions under which aid could be received, and as a result the assistance provisions were under-utilized. The Trade Act of 1974 modified the earlier provisions, loosening the eligibility criteria and placing oversight of the program with the Department of Labor, rather than the U.S. Tariff Commission. In 2002, Congress once again significantly revised the program and combined it with the adjustment assistance program provided under the North American Free Trade Agreement implementing legislation (NAFTA-TAA).

To receive benefits under the program, workers must satisfy both group and individual qualifications. To achieve group certification, a group of three or more workers must first file a petition with the Department of Labor (DOL). The group of workers must show that they have been laid off and that either sales of articles produced by the workers’ firm have decreased while imports of competitive articles have increased or that the firm has shifted production to a foreign country with which the United States is a partner in certain trade agreements.

34 See Atkinson, supra note 6, at 11.
36 See Smith, supra note 35, at 950.
41 DOL Fact Sheet, supra note 40. The group eligibility requirements under the Trade Act of 2002 state in relevant part that a group of laid-off workers can be certified for assistance if:

(2)(A)(i) sales or production, or both, of [the workers’] firm or subdivision have decreased absolutely
(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and
(iii) the increase in imports described in clause (ii) contributed importantly to such workers’ separation or threat of separation and to the decline in sales or production of such firm of subdivision; or
(B)(i) there has been a shift in production by such workers’ firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and
Once the group of workers is certified, individual workers must then file applications individually to determine eligibility for adjustment assistance.\textsuperscript{42} Individual workers are eligible if they were terminated within two years of the group certification, had worked for at least twenty-six weeks at a rate of at least $30 per week during the year prior to termination, have exhausted all rights to state unemployment insurance, and have either enrolled in a training program or received a waiver of the training requirement from DOL.\textsuperscript{43} Under the program, eligible workers can receive income support for an additional fifty-two weeks following termination of state unemployment benefits, tax credits for health insurance, job search and relocation allowances, as well as “104 weeks of approved training in occupational skills, basic or remedial education, or training in literacy or English as a second language.”\textsuperscript{44}

Trade Adjustment Assistance was unquestionably improved by the 2002 amendments. The most fundamental changes were the creation of health insurance tax credits and merger of the program with NAFTA-TAA, but the program was improved in more subtle ways as well.\textsuperscript{45} For example, structural problems regarding the provision of training were addressed.\textsuperscript{46} Nonetheless, even with these changes in place, the program still suffers from serious deficiencies.

\textsuperscript{(ii)(I)} the country to which the workers’ firm has shifted production of the articles is a party to a free trade agreement with the United States;

\textsuperscript{(II)} the country to which the workers’ firm has shifted production of the articles is a beneficiary country under the Andean Trade Preferences Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act

\textsuperscript{(III)} there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision[.]

19 U.S.C. § 2272(a). Note that these requirements exclude individuals in service industries from coverage. \textit{See id.}


\textsuperscript{43} 19 U.S.C §§ 2273(a), 2273(c) (Supp. I 2002).

\textsuperscript{44} 19 U.S.C. §§ 2293, 2296–2298 (Supp. I 2002); 26 U.S.C. § 35 (2004); DOL Fact Sheet, \textit{supra} note 40. Workers requiring remedial training may receive an additional twenty-six weeks of training benefits and income support. 19 U.S.C. § 2296(a)(2). The TAA statute also theoretically provides wage insurance to older workers, but due to vague drafting and restrictive regulations promulgated by DOL, the provision was “effectively stillborn.” 19 U.S.C. § 2315 (Supp. I 2002); Roger Lowenstein, \textit{Jobs}, N.Y. Times, Sept. 5, 2004 § 6 (Magazine), at 54.

\textsuperscript{45} \textit{See} Trade Act of 2002 §§ 111–125, 201. The amendments also made the program moderately more inclusive by allowing some secondary workers to receive benefits. \textit{See} Trade Act of 2002 § 113(a).

\textsuperscript{46} Trade Act of 2002 § 116. Under prior versions of the act, training was provided for up to twenty-four months but income support ended after only eighteen. U.S. G\textit{EN. AC-
III. Trade Adjustment Assistance: Assessment

A. Scope

TAA currently only extends to a small subset of those whose jobs are offshored.47 Because the Act is phrased such that it covers only workers involved in production of an “article,” workers in service-sector jobs are excluded from its scope.48 Furthermore, in practice, DOL has interpreted the word “article” very narrowly, excluding software that is not embodied in tangible form such as a CD-ROM or diskette.49 This limits the types of workers able to receive benefits under the Act.50 These limitations on the types of workers who can receive benefits through the program have been widely criticized for a number of reasons.51 First, the number of IT and service sector jobs moving overseas is rapidly rising.52 According to the survey-based predictions of Cambridge, Massachusetts firm Forrester Research, 3.4 million U.S. service jobs, or 6.4% of the jobs in affected categories, will go overseas by 2015.53 The fact that this trend has developed rather quickly and has affected a group of workers not previously touched by offshore outsourcing has caused “a very large proportion

47 19 U.S.C. § 2272; see also Lee, supra note 24, at D1 (stating that only 31% of unemployed workers applied for TAA, partly because it does not extend to white-collar workers).
48 See Lee, supra note 24, at D1.
50 See id.
51 See Lowenstein, supra note 44, at 54; William J. Holstein, Cutting the Losses from Outsourcing, N.Y. Times, July 3, 2005, § 3, at 8.
52 Manley & Hobby, supra note 7, at 404.
53 Id.
of the labor force [to] feel very vulnerable.”

Moreover, due to the fact that these workers’ pre- layoff salaries are generally higher than salaries for manufacturing workers who have been in the workforce a comparable numbers of years, they receive relatively less from unemployment insurance, and have a more difficult time securing scholarships to help pay for retraining.

Also, limits on access to the program are imposed based on the foreign country to which one’s job has been sent. TAA is only available to workers whose jobs have been sent to countries that are partners to free trade agreements or beneficiaries under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act. These restrictions mean that those whose jobs are outsourced to China and India—by far the most popular destinations for offshoring among U.S. companies—are not eligible for TAA.

Although there is some hope of change, it is slow in coming. Democratic Senator Max Baucus of Montana has, for at least the fourth time in as many years, introduced legislation that would amend


57 Id. According to DOL, the nations to which the TAA applies are: Canada, Mexico, Chile, Israel, Singapore, Hashemite Kingdom of Jordan, Bolivia, Columbia, Ecuador, Peru, Benin, Botswana, Cameroon, Cape Verde, Central African Republic, Chad, Republic of Congo, Cote d’Ivoire, Djibouti, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, San Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, Zambia, Antigua and Barbuda, Aruba, the Bahamas, Belize, British Virgin Islands, Costa Rica, Montserrat, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, the Dominican Republic, Nicaragua, Panama, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Dominica, and Netherlands Antilles. U.S. Dep’t of Labor, Free Trade Agreement & Beneficiary Countries, http://www.doleta.gov/tradeact/2002act_freetradeagreements.cfm (last visited Feb. 23, 2006) [hereinafter DOL Countries].

58 See DOL Countries, supra note 57; Manley & Hobby, supra note 7, at 405. Eighty-four percent of companies engaged in offshore outsourcing have sent jobs to India and forty-five percent have sent jobs to China. Manley & Hobby, supra note 7, at 405.

the Trade Act of 1974 to eliminate both the “article” and “trade agreement” limitations. Republicans in Congress have been wary of the bill, however, citing concerns regarding the expense of providing health benefits to an enlarged group of recipients. In 2002, Baucus introduced the proposal along with other amendments to the Act. Although many of the proposed TAA amendments were signed into law, including a substantial increase in the program budget, the provision to extend assistance to service workers was struck from the final version of the bill. Baucus again proposed the legislation extending TAA to include service workers in the Trade Adjustment Assistance Equality for Service Workers Act of 2004. The bill again was defeated, despite a solid majority in favor of the proposal, this time by a procedural measure. In 2005, Baucus proposed the legislation a third time as an amendment to the U.S.-Central America-Dominican Republic Free Trade Agreement (CAFTA). The Finance committee adopted the language, but the amendment was stripped out of the final implementing bill sent back by the Bush Administration. A week later, Baucus again introduced the legislation stating, “[f]rankly, I am disappointed to have to introduce this bill yet again.” Given the amendment’s history, its passage this time seems uncertain at best.

It is similarly uncertain whether the Department of Labor will loosen its definition of “article” so as to include more high-tech workers. In 2003, a group of laid-off software programmers from IBM petitioned for TAA benefits. The Department of Labor denied them

60 Baucus, supra note 59; see S. 1309.
61 See Emily Johns, Coleman Amendment to Aid Jobless Fails in Senate, STAR TRIB. (Minneapolis), May 5, 2004, at 1D. Republican Senator Don Nickles, who helped defeat the amendment in 2004, objected to the cost of the bill and asked, “how socialistic do you have to get?” Id.
62 Baucus, supra note 59.
63 Paul Blustein, White House Warms Up to Worker Aid, WASH. POST, Mar. 13, 2004, at E01.
64 Baucus, supra note 59; see S. 2157, 108th Cong. (2004).
65 Johns, supra note 61, at 1D.
66 Baucus, supra note 59; see S. 1309.
67 Baucus, supra note 59; see S. 1309. President Bush has been intermittently supportive of TAA. See Debates, supra note 6; Blustein, supra note 63, at E01. Despite cutting the proposal from the CAFTA implementing legislation, he cited the 2002 amendments, particularly the increase in the program’s budget, with approval during the presidential debates, and hinted in March of 2004 that he would support expansion of the program to cover service workers. Debates, supra note 6; Blustein, supra note 63, at E01.
68 Baucus, supra note 59.
certification, stating that the software they produced was not an “article” for purposes of the TAA. The programmers challenged their denial in the U.S. Court of International Trade (CIT), which has oversight of the process. CIT remanded the petition to Labor based on the fact that the department had not sufficiently investigated whether the software produced by the plaintiffs was embodied in tangible form on a CD-ROM or diskette, and thus was an “article” under DOL’s traditional definition. CIT also urged DOL to reconsider its practice of distinguishing between production of software embodied in tangible form and software transmitted electronically. The court stated that the U.S. International Trade Commission (USITC), upon whose guidelines Labor had relied in creating that distinction, had since done away with it. Some observers are skeptical of DOL’s willingness to change this standard, citing concerns with funding within the department. Nonetheless, it is clear that if TAA is to be an effective provider of training to those affected by offshore outsourcing, the scope of the program must be expanded.

70 Id.
71 See id.
72 Id. at 1353.
73 Id.

a cease and desist order that did not prohibit electronic transmission would be meaningless as to the software since respondents would be free simply to transmit the software electronically to a U.S. customer, who could then copy it onto a diskette or other tangible medium for use with an infringing emulation system . . . it would be anomalous for the Commission to be able to stop the transfer of a CD-ROM or diskette containing respondents’ software, but not be able to stop the transfer of the very same software when transmitted in machine readable form by electronic means.

75 See Blustein, supra note 63, at E01 (quoting former congressional aide Howard Rosen, who helped draft the 2002 legislation amending the TAA and commented that DOL will not ease this restriction because the department is “nickeling and diming”). In November 2005, DOL again rejected the IBM workers petition, this time making no comment regarding the “article” requirement but instead finding that the workers had not met the requirement for “employment decline,” or that an insufficient number of workers in their division had been laid off. See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 70 Fed. Reg. 68,098, 86,099 (Nov. 9, 2005).
B. Administration and Funding

Although administration of TAA was simplified in 2002 when it was combined with NAFTA-TAA, the DOL certification process remains, by all accounts, nightmarish.\(^{76}\) From 2001 through 2004, the Court of International Trade upheld only 12.5% of DOL’s denials of group certification.\(^{77}\) The CIT’s Judge Ridgway, in Former Employees of Chevron v. U.S. Secretary of Labor, expressed her frustration with DOL’s handling of the TAA certification process,

this case stands as a monument to the flaws and dysfunctions in the Labor Department’s administration of the nation’s trade adjustment assistance laws . . . [this case is part of] the growing line of precedent involving court-ordered certifications of workers, evidencing the bench’s mounting frustration with the Labor Department’s handling of these cases. Clearly, there is a message here. Only time will tell whether the Labor Department, and Congress, are listening.\(^{78}\)

The DOL is supposed to investigate the facts surrounding petitioning workers’ separation from employment, but the department’s process for doing this has been described as “perfunctory,” “sloppy and inadequate” and “dereliction of duty.”\(^{79}\) The DOL’s general practice is to ask a human resources employee at the firm from which the petitioning workers have been laid off the reasons for the separation.\(^{80}\) Due to public perceptions of offshore outsourcing, employers have a strong incentive not to admit that their former employees’ jobs were lost due to overseas transactions.\(^{81}\) As a result, the information from which DOL works is less than accurate.\(^{82}\)

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76 See Brooks-Rubin, supra note 14, at 797.
77 Id. at 806.
80 See Brooks-Rubin, supra note 14, at 804.
81 Id. at 822; Reingold, supra note 16, at 79. A Zogby International poll conducted in 2004 found that 62% of Americans felt that the government should tax or legislate against companies that engage in outsourcing, and 71% felt outsourcing was bad for the economy. Zogby International, News Item Regarding Views on Offshore Outsourcing, http://www.zogby.com/news/ReadNews.dbm?ID=870 (released Sept. 22, 2004). Feeding off of that public sentiment, 2004 presidential candidate John Kerry referred in his stump speeches
Brad Brooks-Rubin, author of a comprehensive critique of the certification process, offers several suggestions to address these administrative problems, including improvement of the TAA petition used by workers and a requirement that DOL speak to third parties in their investigations. \(^{83}\) Brooks-Rubin also asserts that much of DOL’s difficulty in handling the certification process stems from poor definition of the requirement that workers be engaged in “production.” \(^{84}\) In other words, the standard used by DOL to distinguish between manufacturing and service-sector jobs is unclear. \(^{85}\) He suggests that a clearer standard should be drafted, and that petitions from certain industries for which the “production” standard is a persistent problem should be analyzed using separate, industry-specific criteria. \(^{86}\) A much simpler solution, however, would be to eliminate the “production” requirement altogether by extending TAA to cover service workers. \(^{87}\) If the need to distinguish between manufacturing and service workers were eliminated, any confusion arising from the “production” standard would become moot.

In addition to being poorly administered, TAA training programs are insufficiently funded. \(^{88}\) Training programs are administered through each individual state, and some states have reported major funding shortfalls. \(^{89}\) For example, in 2000 New Jersey reported having to temporarily shut down the training program at the end of several quarters and wait for new funding to arrive. \(^{90}\) Four states have had waiting lists for training. \(^{91}\) Funding for training was increased from $80,000,000 to $220,000,000 as part of the 2002 amendments, but states continue to exhaust their TAA funds, partly because the demand for training increased substantially in 2002. \(^{92}\) The U.S. General Accounting Office re-
ports that in 2004, thirty-five states expected that available training funds would not cover the amount they would obligate and spend. 93 Eighteen states estimated that these funds would fall short by more than a million dollars. 94 These funding problems have forced some states to reduce the quality of benefits available to recipients by imposing or lowering caps on the amount spent per TAA participant. 95 Until these serious funding and administrative problems are addressed, TAA will continue to fail to provide adequate assistance to displaced workers.

C. Training Benefits

Empirical studies demonstrate that the training currently provided to TAA recipients does not actually afford them any measurable benefit in terms of earnings. 96 The vast majority of those who receive training benefits under TAA seek specific job-related training in new occupations, and the majority of this training is provided by vocational centers and community colleges. 97 This type of training program has influential supporters, but research shows that it is actually ineffective in terms of increasing either the probability that a trainee will find work or the wages earned once a new job is found. 98

A comprehensive assessment of the effect of TAA-sponsored training on the wages of trainees was completed ten years ago by Mathematica Policy Research. 99 The study concluded that, while the wages of those who had completed training under the TAA exceeded those of nontrainees in absolute numbers, that wage differential was attributable
decrease in manufacturing employment over the past several years. Id. at 30. The General Accounting Office states the number of manufacturing jobs in the U.S. decreased by 1.3 million between 2001 and 2002, a drop of almost 8%. Id. Competition from imports is at least partially responsible for this decline. Id.

94 Id.
95 Id. at 34.
96 See Decker & Corson, supra note 15, at 773.
99 Decker & Corson, supra note 15, at 758. Due to amendments made in 2002, the TAA program has undergone significant changes since the Mathematica study was completed. See Trade Act of 2002, Pub. L. No. 107-210, §§ 111–125, 116 Stat. 933, 936–946 (2002). Nonetheless, the amendments did not significantly change the types of training provided under the act, and thus the findings of that study remain applicable to the program in its current iteration. See id.
entirely to personal differences between the two groups rather than the receipt of training itself. ¹⁰⁰ Those who received training tended to be younger and better educated. ¹⁰¹ When those differences were taken into account through regression analysis, there was no statistically significant difference between the earnings of the two groups. ¹⁰² These findings are consistent with those from studies of other government-sponsored job retraining programs as well, especially those associated with welfare-to-work programs. ¹⁰³

Nonetheless, the importance of education and training should not be downsplayed. The Educational Testing Service reports that adults who lack formal schooling and a solid base of literacy skills are at a significantly higher risk of poverty. ¹⁰⁴ In addition, retraining programs have been shown to have a major effect on workers’ confidence and productivity. ¹⁰⁵ The same researchers who reported in 1995 that the training provided under TAA did not affect trainees’ wages reported that a majority of trainees felt that their training helped them both to find a new job and succeed at that job once they found it. ¹⁰⁶ Furthermore, there is a growing “numbers gap” in terms of educational achievement in America which has exacerbated the offshoring problem. ¹⁰⁷ The International Adult Literacy Survey (IALS), completed in 1998, found that the United States ranked only twelfth among the twenty high-income countries surveyed in terms of the literacy proficiency of its adult population. ¹⁰⁸ This comes as lower income countries like China are turning out more and more workers with advanced degrees. ¹⁰⁹

According to economists James J. Heckman and Lance Lochner, the problem with government retraining programs is a fundamental misunderstanding in policy circles as to the sources of skill founda-

¹⁰¹ Id. at 772.
¹⁰² Id.
¹⁰³ See James J. Heckman & Lance Lochner, Rethinking Education and Training Policy: Understanding the Sources of Skill Formation in a Modern Economy, in Securing the Future 47, 72 (Sheldon Danzinger & Jane Waldfogel eds., 2000) (stating that welfare-to-work programs also had little effect on participants pay rates and employment rates).
¹⁰⁵ See Decker & Corson, supra note 15, at 763.
¹⁰⁶ Id.
¹⁰⁷ See Friedman, supra note 1, at 271; Sum, supra note 104.
¹⁰⁸ Sum, supra note 104, at 9.
¹⁰⁹ Friedman, supra note 1, at 271.
tion. Though public policy tends to focus upon formal schooling as the primary source of skills and knowledge, as much as one-third to one-half of all skill formation occurs on the job, but this training is often neglected because it is difficult to measure. Heckman and Lochner suggest shifting the emphasis of the TAA education and training programs from formal, classroom-based models to employer-based, on-the-job programs.

An on-the-job training model also comports well with Friedman’s vision of lifetime learning. Friedman describes a training program used by the credit card company CapitalOne. When CapitalOne began to outsource computer-related jobs to India it also developed a cross-training program for the workers most likely to be affected. The cross-training program took workers that have specialized in a particular aspect of the company’s computer systems or business and trained them in a variety of related areas. Programs like this benefit both the employer and employee: cross-trained workers are in a better position to find new work if they are laid off, and are more valuable to CapitalOne if retained. Compared to the type of training provided by TAA, programs like CapitalOne’s are superior in another important respect: they are proactive rather than reactive. The program assists workers before they are actually laid off, thereby getting them back to work faster.

Hindering a move to employer-based training programs is the fact that, partly due to the increase in offshoring, the overall rate at which workers move from job to job has increased. As a result, employers may be less willing to invest in the training of employees whose skills have become obsolete—when an employee’s average tenure is only a

110 Heckman & Lochner, supra note 103, at 48.
111 Id. at 49.
112 Id. at 79. The state officials actually running these programs seem to agree that the TAA program would benefit from stronger ties to the businesses that will ultimately hire trainees. GAO 2001, supra note 46, at 4.
113 See Friedman, supra note 1, at 290.
114 Id.
115 Id.
116 Id.
117 Id.
118 See Friedman, supra note 1, at 290.
119 See id.
few years, the return is simply not worth the investment. New incentives need to be created. TAA allows training subsidies to be used for employer-based training, but these provisions are rarely used and only available after displacement has occurred. A dialogue with employers needs to be opened, and the program’s structure needs to be adjusted so as to allow effective, proactive, employer-based programs to flourish.

Conclusion

When economists speak of globalization, they often note that it creates “short-term losses” but “long-term gains.” The reality, however, is that those who now bear the burden of the losses will likely never themselves see the gains. As a matter of simple justice, we owe aid to those who have been affected by the landslide of globalization. Furthermore, if these displaced workers are ignored, a political backlash is inevitable. No doubt, aid for displaced workers is expensive. The cost, however, is more than offset by the potential gains to be made through globalization, and increasing the education and training levels of American workers has the potential to create a more productive economy in and of itself. Trade Adjustment Assistance deserves more serious contemplation and administration. It is well worth the cost of getting it right.

121 Id. at 848.
122 See id.
124 See, e.g., Garner, supra note 6, at 20.
125 FRIEDMAN, supra note 1, at 296–97 (“If you are not a compassionate flatist—if you are just a let ’er rip free-market capitalist—you are not only cruel, you are a fool. You are courting a political backlash by those who can and will get churned up by this flattening process, and that backlash could become ferocious if we hit any kind of prolonged recession.”).
126 See Garner, supra note 6, at 20; FRIEDMAN, supra note 1, at 284.
SWEATY SUBURBS: CAN STATES AND WORKER CENTERS WASH THEM CLEAN?

KATE S. WOODALL*


Abstract: In Suburban Sweatshops, Jennifer Gordon paints a bleak picture of the current state of undocumented workers’ rights in suburban America’s service industry. As immigration law is increasingly interpreted to limit the rights of undocumented workers, undocumented immigrants are having a harder time organizing to demand workplace rights. In the face of this increasing exploitation, however, Gordon finds hope in alternatives to the traditional union structure. She focuses on the efforts of the Workplace Project, a Long Island worker center, to advocate for immigrant workers through participation in the political process and geographic organization. This Book Review examines the legal framework in which suburban sweatshops thrive and explores the effectiveness of alternative organizing groups, such as the Workplace Project, in effecting change for undocumented workers. Through the political process and geographic organization, worker centers around the nation have met with limited success in combating the abuse of undocumented immigrant workers.

Introduction

Jorge Bonilla was hospitalized with pneumonia after sleeping all winter on tablecloths mounded on the floor of the Long Island restaurant where we worked, the heat capped at 50°. He had been evicted from the room where he had been living because his wage of 30¢ an hour was so low that he could not pay his rent, even working 80 hours a week.

As a live-in domestic worker, Yanira Juarez cared for two children and cleaned house in Suffolk County. Duped by her employer’s claim that her wages were being paid “into a savings account,” she worked for 6 months with no pay, and then was fired without seeing a penny.1


1 JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 2 (2005). “This book has its roots in grim sweatshop stories like these. But it also has an unexpected tale to tell.” Id. at 3.
In *Suburban Sweatshops: The Fight for Immigrant Rights*, Jennifer Gordon examines the pervasive problem of sweatshop working conditions in the service industries of America’s suburbs. Employers of restaurant workers, domestic workers, janitors, and day laborers routinely cheat employees out of their wages, require workers to work long hours, fail to pay employees overtime, and pay workers well below the minimum wage. Complicating matters, most of the workers in current suburban sweatshops throughout the United States are immigrants who face obstacles such as their undocumented or non-citizen status, language and cultural barriers, and an increasingly hostile government stance on immigration. Many undocumented immigrants are unaware of their rights and are afraid to learn about them for fear of being deported. Thus, they do not demand the legal protections to which they are entitled.

The meager protections offered to undocumented workers by federal law create a fertile soil for exploitation. First, the Immigration Reform and Control Act of 1986 (IRCA) used employment restrictions as a way to enforce stricter immigration control. The IRCA

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2 See id. at 13–14 (discussing new kinds of emerging sweatshops).


4 See Gordon, supra note 1, at 46, 51 (referring to the Supreme Court’s interpretation of the National Labor Relations Act in *Hoffman Plastics v. NLRB* as a major setback for immigrant workers); Rebecca Smith & Amy Sugimori, *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights* 8 (2003), available at http://www.nelp.org/iwp/reform/state/low_pay_high_risk.cfm (arguing that immigrant workers are “under attack from many fronts,” including recent Supreme Court decisions interpreting federal law); Tallman, supra note 3, at 872–73 (remarking that “[c]urrent U.S. immigration policy is broken” because it punishes immigrant workers).

5 Gordon, supra note 1, at 6–7; see Wishnie, supra note 3, at 398 (“[E]mployers frequently seek to control their non-citizen workers by threatening them with deportation.”).

6 See Gordon, supra note 1, at 6–7 (stating that many undocumented workers submit to illegal working conditions out of fear of losing their jobs).

7 Janice Fine, Neighborhood Funders Group, *Worker Centers: Organizing Communities at the Edge of the Dream* 8 (2005), available at http://www.nfg.org/publications/worker_centers_with_cover.pdf. In an effort to explain the exploitation faced by low-wage immigrant workers, Dr. Fine describes their condition as the result of “a ‘perfect storm.’ It is a storm resulting from labor laws that have ceased to protect workers, little effective labor market regulation of new economic structures and a national immigration policy that has created a permanent underclass of low-wage workers.” Id.

aimed to decrease the number of undocumented aliens in the United States by making it illegal for employers to knowingly employ undocumented immigrants. This focus on reducing the number of undocumented immigrants in the American work force has created an atmosphere of fear of deportation that makes it difficult for undocumented immigrants to demand their rights.

Second, the National Labor Relations Act (NLRA), which protects workers’ rights to organize, does not adequately protect undocumented workers. While undocumented workers are considered “employees” for the purposes of

Barrera explains that Congress tried to decrease the demand for undocumented workers by punishing employers who hired undocumented immigrants. Calderon-Barrera, supra, at 120. In decreasing the undocumented immigrant labor market, they hoped to simultaneously diminish the attractiveness of immigrating to the United States to work. 

9 8 U.S.C. § 1324a(a)(1)–(2) (“(a)(1) In general—It is unlawful for a person or other entity— (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment.”); Lori A. Nessel, Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform, 36 Harv. C.R.-C.L. L. Rev. 345, 355–56 (2001). President Ronald Reagan noted that:

[I]n the past 35 years our nation has been increasingly affected by illegal immigration. This legislation takes a major step toward meeting this challenge to our sovereignty. . . . The employer sanctions program is the keystone and major element. It will remove the incentive for illegal immigration by eliminating the job opportunities which draw illegal aliens here.


10 See Gordon, supra note 1, at 113 (explaining that workers who wished to be involved with the Workplace project had to first conquer their fear of being deported if they demanded their rights from an employer); Michael J. Wishnie, Emerging Issues for Undocumented Workers, 6 U. Pa. J. Lab. & Emp. L. 497, 500 (2004) (explaining that the IRCA “deputized” employers in the efforts to control immigration by requiring them to inquire regarding their employees immigration status).

11 National Labor Relations Act, 29 U.S.C. § 157 (2005); see, e.g., Gordon, supra note 1, at 51 (“[A]lthough the NLRA still technically covers undocumented workers, the usual remedies of reinstatement and back pay do not apply when employers retaliate against undocumented immigrants for their union support.”). The NLRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

the NLRA, the U.S. Supreme Court has severely restricted their ability to receive remedies for their employers’ labor violations.\(^\text{12}\)

Finally, the new emphasis in the American economy on service industry occupations calls into question the relevancy of the NLRA in the bulk of current workplaces.\(^\text{13}\) Typical unions base their strategies around a group of employees collectively bargaining with one large employer, such as a large manufacturer.\(^\text{14}\) This traditional method of protecting workers’ rights fails when applied to the smaller employers and diffused workplaces of the suburban service industry.\(^\text{15}\)

Against this bleak legal landscape, Gordon paints a surprisingly hopeful portrait of the efforts of the Workplace Project, a Long Island organization that she founded, as an example of how to address the problem of immigrants’ rights in the workplace.\(^\text{16}\) The Workplace Project is now comprised of and run by members from Central and South America who live and work on Long Island.\(^\text{17}\) The Workplace Project is a community-based organization that implements creative strategies to help employees, organized in small groups, improve their working conditions.\(^\text{18}\) The organization is dedicated to informing

\(^{12}\) 29 U.S.C. § 152(3); Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 140 (2002) (holding that undocumented workers are entitled to the unionizing protections under the NLRA, yet their remedies for adverse employment actions are limited).

\(^{13}\) See, e.g., Gordon, supra note 1, at 53 (arguing that service work is a major aspect of the U.S. economy, yet is resistant to unionization). Due to the shift in the U.S. economy, from manufacturing to service, unions need to reach out to the service industry in order to survive. Id. Gordon notes that, “[n]onmanufacturing—mostly service—work accounts for 67.8 percent of all work in the United States but only 38.8 percent of union membership. Only 5.7 percent of service workers and a mere 4.4 percent of retail workers belong to a union.” Id. The service industry is difficult to organize because of the lack of a clear employer with which to bargain, and the reality of the dominance of small employers in the service industry. Id. at 54.

\(^{14}\) Katherine V. W. Stone, Employee Representation in the Boundaryless Workplace, 77 Chi.-Kent L. Rev. 773, 797–98 (2002). Stone contends that the rights created by the NLRA no longer apply to current workplace conditions, since employees do not stay with one employer for their entire career, but rather move from job to job. Id. Under the NLRA, unions exist only to represent employees when bargaining with a single employer. Id. Since employees today do not often have such long-term relationships with one employer, the function of the union under the NLRA is somewhat outdated. Id.


\(^{16}\) See Gordon, supra note 1, at 68–69 (listing accomplishments that surpassed the worker’s expectations). “The Workplace Project refuses to accept that the newest and worst off immigrants are unorganizable.” Id. at 3.

\(^{17}\) Id. at 70, 82.

\(^{18}\) Id. at 81–82. The Workplace Project educates, provides legal services, and organizes Long Island immigrant workers, mostly Latinos, across many industries. Id. at 82. It took
immigrant workers about their rights as workers in the United States, and employs flexible, experimental methods to address the needs of their working immigrant community through self-organizing, legal services and leadership training.\textsuperscript{19}

One of the ways in which the Workplace Project was able to better the lives of its members was by changing state law.\textsuperscript{20} Through their educational and organizing efforts, the Workplace Project realized the need to address the problem of employers cheating employees out of their wages, paying employees less than the minimum wage, and other violations of the Fair Labor Standards Act (FLSA).\textsuperscript{21} The FLSA sets minimum wage requirements, provides for mandatory premium payments for overtime work, and prohibits various forms of child labor.\textsuperscript{22} In the mid-1990s, however, the federal Department of Labor (DOL) had a policy of cooperating with immigration officials who could deport workers.\textsuperscript{23} This made it risky for immigrant workers to even report their employers to the federal DOL.\textsuperscript{24} Since most undocumented immigrants were unable to gain the protections afforded them by federal law, they were left with only state laws and, in New York, the New York

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\textsuperscript{19} Gordon, supra note 1, at 68, 82. Some of these strategies include organizing day laborers; workers who are employed for the day to perform landscaping jobs and domestic workers. Id. at 69.

In its first five years, the Workplace Project and its immigrant leaders raised wages on Long Island day labor streetcorners by over 30 percent . . . created a domestic worker bill of rights and a model contract for domestic employers, and forced payment agencies to promise to adhere to them — a promise they sometimes kept. They founded a very small but successful worker-owned landscaping cooperative, and were planning for what would become a much larger housecleaning cooperative.

\textsuperscript{20} Gordon, supra note 1, at 241–42.

\textsuperscript{21} Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206, 207, 212 (2005) (setting federal minimum wage and maximum hours for covered employees and employers); see Gordon, supra note 1, at 240–41 (providing anecdotal examples of wage violations and the Department of Labor’s slow response). Gordon explains that “the usual” problems that the Workplace Project saw were “scores of day laborers unpaid for a few days’ work, the dozens of domestic workers earning less than half the minimum wage, the array of injuries in landscaping and factories from speed-ups and lack of training.” Id. at 123.

\textsuperscript{22} 29 U.S.C. §§ 206, 207. Undocumented workers are not excluded from the definition of “employees” under the FLSA. 29 U.S.C. § 203(e)(1).

\textsuperscript{23} Jennifer Gordon, We Make the Road by Walking: Immigrant Workers, the Workplace Project, & the Struggle for Social Change, 30 Harv. C.R.-C.L. L. Rev. 407, 419 (1995).

\textsuperscript{24} Id.
State Department of Labor (NYDOL) to protect them from subminimum wages.25 The Workplace Project found, however, that the NYDOL was inadequate in responding to the needs of immigrant workers.26 Therefore, the members of the Workplace Project decided to focus on enabling better enforcement of state laws through legislation.27

Despite the fact that many of its members were not citizens, the Workplace Project effectively drafted and lobbied for a bill in the New York state legislature, the Unpaid Wages Prohibition Act (UWPA).28 The UWPA deterred employers from taking advantage of low-wage workers through increased penalties for employers engaged in unlawful practices and more stringent enforcement measures to facilitate a more effective response to immigrant workers.29 The toughest law of its kind in the nation, it provides for up to $20,000 in fines for employers who withhold wages from their employees and finds repeat offenders guilty of a felony, not just a misdemeanor offense.30

Part I of this Book Review surveys the complex legal and societal landscape in which suburban sweatshops flourish. Part II explores the organizing efforts of the Workplace Project to improve working conditions for suburban sweatshop workers through the political process. Specifically, Part II will look at the Workplace Project’s role in drafting and lobbying for the Unpaid Wages Prohibition Act, a New York law that strengthened enforcement measures for unpaid wages. Part III analyzes the effectiveness of solving the suburban sweatshop crisis on the state level by looking at the UWPA’s impact on New York working conditions. Finally, this Book Review concludes there is hope for suburban sweatshop workers since worker centers, which offer an alterna-

25 GORDON, supra note 1, at 241 (describing New York state law regarding failure to pay wages as “weak — the maximum penalty for an employer who repeatedly or willfully failed to pay legal wages was a mere twenty-five percent on top of the total the employer owed; the crime of repeated nonpayment of wages was only a misdemeanor.”).
26 Id. at 243.
27 Id. at 241–42.
28 Id. at 245, 260.
29 Unpaid Wages Prohibition Act, N.Y. LAB. LAW § 198-a (1)–(3) (Consol. 1998); GORDON, supra note 1, at 107. The law increased civil fines for employers who do not pay their employees. Id. Under the former law, employers could be fined up to twenty-five percent of what they owed their employees, while the UWPA allowed the DOL to fine employers up to two-hundred percent of the withheld wages. Id. Additionally, the former law held that repeat offenders were guilty of a misdemeanor offense with a maximum penalty of $10,000. Id. The UWPA made repeat offenders guilty of a felony with a maximum $20,000 penalty. Id.
30 N.Y. LAB. LAW § 198-a (1); FINE, supra note 7, at 5.
tive to formal unions and collective bargaining, yield effective results on the state level.

I. Obstacles to Organization

The United States’ laws present a number of barriers to immigrant workers striving to organize in today’s suburban sweatshops. The federal government’s policy, as articulated by the Congress and by the U.S. Supreme Court, effectively blocks undocumented immigrants from organizing to demand rights. Additionally, the structures of the industries in which many suburban immigrant workers are employed make using typical unionizing strategies difficult or impossible.

A. Legislation

Undocumented workers are not adequately protected by United States labor law. The National Labor Relations Act protects workers’ rights to engage in collective bargaining with their employers. The policy behind the NLRA was to deter unfair labor practices. Collective bargaining units, or unions, represent employees and negotiate with employers to gain better working conditions. Undocumented immigrants’ rights to collectively bargain are protected, since they are included as “employees” under the NLRA. Nonetheless, undocumented

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31 See, e.g., Fine, supra note 7, at 8 (stating both labor laws and immigration policy fail to protect low-wage immigrant workers); Gordon, supra note 1, at 51–57 (noting the inadequacies in the legal system and the difficulties of organizing in the service industry); Rivchin, supra note 15, at 400 (describing a historic union inability to organize immigrants).

32 See, e.g., Gordon, supra note 1, at 65 (referring to Hoffman Plastics and the NLRA’s detrimental impact on undocumented immigrants’ right to organize).

33 Howard Wial, The Emerging Organizational Structure of Unionism in Low-Wage Services, 45 Rutgers L. Rev. 671, 672 (1993); Rivchin, supra note 15, at 411–12.

34 Gordon, supra note 1, at 318 n.66.


36 See, e.g., Michael Weiner, Comment, Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement, 52 UCLA L. Rev. 1579, 1619 (2005) (“President Franklin Roosevelt noted: ‘By preventing practices which tend to destroy the independence of labor, [the Act] seeks, for every worker within its scope, that freedom of choice and action which is justly his.’”).

37 See, e.g., Stone, supra note 14, at 797–98 (discussing that once a union is certified by the National Labor Relations Board, they become obligated to fairly represent all employees in bargaining with the employer to form an agreement that will govern the terms and conditions of employment).

38 29 U.S.C. § 152(3). Under the NLRA, undocumented immigrants have been deemed “employees” for statutory purposes. Id; see Wishnie, supra note 10, at 501 (indicat-
immigrants are inadequately protected under the law since the NLRA’s definition of “employee” does not cover those employees in many of the key industries in which immigrant workers labor. These forms of employment include agricultural workers, persons employed in domestic service in a home, and independent contractors, including day laborers and janitors.

Compounding the problem of the lack of protection under labor law is the hostile posture of United States immigration law towards undocumented workers. The Immigration Reform and Control Act of 1986 departed from previous immigration legislation and emphasized restricting employment of undocumented workers. Before the IRCA, American immigration policy, as established in the Immigration and Nationality Act of 1952, focused on the movement of immigrants across the border, the admission, entry, harboring and transportation of illegal immigrants, and was silent on issues of employment. The drafters of the IRCA believed that immigrants were entering this country illegally because the immigrants thought it would be easy to obtain em-

39 29 U.S.C. § 152(3); see Rivchin, supra note 15, at 411 (remarking that the exclusion of these occupations is of concern to worker centers).

40 29 U.S.C. § 152(3). Some legal scholars contend these exemptions are due to “racial biases” in the law. Rivchin, supra note 15, at 400–01. According to Rivchin, “[t]he NLRA excluded from its protections workers in occupations dominated at the time by African-Americans in a political compromise orchestrated to appease Southern politicians and maintain the racial dynamics of Southern socio-economic structures.” Id.

41 Gordon, supra note 1, at 46, 51; Smith & Sugamori, supra note 4, at 8; Tallman, supra note 3, at 872–73.


43 Immigration and Nationality Act of 1952 (INA), 8 U.S.C. §§ 1181–1182, 1225 (1952); Calderon-Barrera, supra note 8, at 120.
ployment. Therefore, if employers ceased to hire undocumented workers, undocumented immigrants would not come to the United States, since there would be no demand for them in the labor market. The intent of Congress was not to decrease the rights of undocumented workers in the labor force, but rather to destroy the incentive for undocumented immigrants to come to the United States. Congress understood that if they took the protections of the NLRA away from undocumented workers, they would be creating a class of workers who would be more attractive to employers since they would be unable to collectively bargain for their rights. This would depress the labor market for workers who did have the protections of the NLRA. Instead, Congress continued to afford undocumented immigrants protection from unscrupulous employers while furthering the employment policy of keeping undocumented workers out of the tight labor market. Unfortunately, the resulting effect of the law has been to punish the employee more than the employer, realizing the fears of the law’s critics.

44 H.R. Rep. No. 99–682, pt. 1, at 46 (1986) (“Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.”).

45 See id. at 47 (“Since most undocumented aliens enter this country to find jobs, the [House Judiciary] Committee believes it is essential to require employers to share responsibility to address this serious problem.”).

46 See id. at 58 (“The employer sanctions provisions are not intended to limit in any way the scope of the term ‘employee’ in Section 2(3) of the National Labor Relations Act (NLRA) . . . application of the NLRA ‘helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.’”).

47 Id.

48 Id.

49 Id.

50 See Nessel, supra note 9, at 361–62 (arguing that undocumented immigrants bear the brunt of the IRCA’s enforcement measures); Tallman, supra note 3, at 886 (stating that employer sanctions harm employees). For example, in Operation Vanguard, an attempt by the Immigration and Naturalization Service (INS) to enforce the IRCA, the INS cooperated with employers during reviews of their workplaces. Nessel, supra note 9, at 359–60. If the employers agreed to fire the undocumented employees the INS found in their workforce, no further action would be taken against the employer to punish them for violating the IRCA by employing undocumented workers. Id. This has the effect of further pushing undocumented immigrants into the underground economy where they are exploited. Id. at 60. Additionally, the INS had a policy of not conducting raids at employment sites where there are ongoing labor disputes. Wishnie, supra note 3, at 390. Nonetheless, “fifty-five percent of the workplaces raided by the INS in the sample were the subject of at least one formal complaint to or investigation by a labor agency.” Id. at 392.
The IRCA’s focus on labor issues wedds employment and immigration laws in complex ways. The immigration agenda of the IRCA strives to protect American workers from competition with undocumented workers by making it illegal for them to work in the United States. The status of undocumented immigrants as illegal workers raises questions about the extent to which the NLRA covers undocumented workers. The judiciary is only now beginning to address these questions.

B. Judicial Decisions

There have been only two U.S. Supreme Court cases that have addressed the status of undocumented immigrants under American labor laws: Sure-Tan, Inc. v. N.L.R.B. and Hoffman Plastic Compounds, Inc., v. N.L.R.B. Both cases involved the remedies available to undocumented workers for violations of the National Labor Relations Act. The court held that there was no question that undocumented workers are protected as “employees” under the NLRA. Nonetheless, these two cases reveal limitations when undocumented employees try to enforce these rights and obtain remedies for employer violations.

In Sure-Tan, the Supreme Court held that undocumented workers were not eligible for back pay under the NLRA, which is one of the primary remedies available for workers. This case involved an em-
ployer at Sure-Tan, a leather tanning operation, who knowingly hired several illegal immigrants.\textsuperscript{60} When the workers attempted to unionize and were certified as a union by the NLRB, their employer reported them to the INS.\textsuperscript{61} The employees were deported as a result of the employer’s communications with immigration officials.\textsuperscript{62} The Court reasoned that since the employee who brought the suit returned to Mexico after losing his job at Sure-Tan, a back pay award for six months after the employee was fired was speculative and not limited to the actual consequences of the employer’s actions.\textsuperscript{63} Additionally, the Court held that employees are unavailable for work and therefore are not entitled to back pay, if they are not lawfully working in the United States.\textsuperscript{64} Until the court decided \textit{Hoffman}, it was unclear if this holding was to be interpreted broadly, or if it was a fact-specific ruling.\textsuperscript{65}

The Supreme Court’s ruling in \textit{Hoffman} provided guidance in answering this question, when a divided court ruled 5-4 that undocumented workers were not eligible for back pay under the combined statutory scheme of the NLRA and IRCA.\textsuperscript{66} The Court held that undocumented immigrant employees who had used fraudulent documents to obtain employment were not entitled to back pay under the terms of the IRA if their employers violated the NLRA.\textsuperscript{67} The Court’s analysis rested on an interpretation of how the policy goals of the IRA should interact with those of the NLRA.\textsuperscript{68} The majority reasoned that the employee’s use of fraudulent documents violated the

\begin{flushleft}
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} \textit{Id.} at 900 (stating that “a backpay remedy must be sufficiently tailored to expunge only the \textit{actual}, and not merely \textit{speculative}, consequences of the unfair labor practice.”).
\textsuperscript{64} \textit{Id.} at 903.
\textsuperscript{65} Calderon-Barrera, supra note 8, at 125. Calderon-Barrera notes that the Court’s decision leaves open the question of whether an undocumented worker who remains in the United States after being fired in violation of the NLRA is considered available for work, and subsequently, eligible for back pay. \textit{Id.}
\textsuperscript{66} Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 140 (2002). In this case workers who were involved in organizing a union were fired by their employer. \textit{Id.} After firing one employee, Jose Castro, the employer learned at the NLRB proceedings that Castro was not authorized to work in the United States and had used false documents to obtain the job at Hoffman Plastic Compounds. \textit{Id.} at 141.
\textsuperscript{67} \textit{Id.} at 149.
\textsuperscript{68} \textit{Id.} at 151–52; Calderon-Barrera, supra note 8, at 133.
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express provisions of the IRCA.\textsuperscript{69} If the employee were to mitigate damages by finding new employment, as required under the NLRA, he or she would violate the IRCA by working in the U.S. through the use of forged documents, or would work for an employer who hired him or her illegally.\textsuperscript{70} Since it is impossible for an undocumented immigrant to obtain employment without acting against the IRCA, the court held that awarding back pay to undocumented workers for their employers’ NLRA violations runs counter to the IRCA.\textsuperscript{71}

The dissent by Justice Breyer, however, argued persuasively that the two policies must be viewed as interdependent.\textsuperscript{72} Breyer highlighted that in enforcing the NLRA’s policy of worker’s rights and awarding back pay to undocumented workers, the Court would further immigration policy by removing the incentive for employers to hire undocumented workers.\textsuperscript{73}

The Court’s decision in\textit{ Hoffman} has been widely criticized.\textsuperscript{74} Most critics are concerned that the \textit{Hoffman} decision set a dangerous precedent of downsizing undocumented immigrants’ rights.\textsuperscript{75} There is some

\textsuperscript{69} 8 U.S.C. § 1324c(a)(1)–(4) (1986) (making it a crime to used a forged, counterfeit, altered, falsely made document or a document lawfully issued to a person other than the possessor to get a job in the U.S.); \textit{Hoffman}, 535 U.S. at 148.

\textsuperscript{70} \textit{Hoffman}, 535 U.S. at 150–51.

\textsuperscript{71} \textit{Id.} at 151.

\textsuperscript{72} \textit{See} Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 153 (2002) (Breyer, J., dissenting) (arguing that “the National Labor Relations Board’s limited backpay order will not interfere with the implementation of immigration policy. Rather, it reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent”).

\textsuperscript{73} \textit{Id.} at 155 (Breyer, J., dissenting). Justice Breyer notes that denying the National Labor Relations Board the authority to award backpay to illegal aliens could have the effect of lowering the cost to the employer of labor law violations. \textit{Id.} This, in turn, would increase the employer’s incentive to hire undocumented immigrant workers and therefore increase the flow of undocumented workers into the United States. \textit{Id.} He also noted the danger of losing the deterrent power of the NLRA if the Board was unable to issue back pay to undocumented workers. \textit{Id.} at 153–54.

\textsuperscript{74} \textit{See}, e.g., \textit{Developments in the Law}, supra note 53, at 2228–29 (noting that legal scholars argue that the Court did not properly balance the need to enforce immigration law and the need to protect immigrant workers, leaving open the possibility of further erosion of workers’ protections.); Wishnie, \textit{ supra} note 3, at 394 (“The \textit{Hoffman} Plastic decision was wrongly decided. It will no doubt cause further exploitation of already-vulnerable immigrant workers, as well as an erosion of the terms and conditions of employment for those who compete with them in the labor market.”).

\textsuperscript{75} \textit{See} Office of General Counsel, National Labor Relations Board, Memorandum GC 02-06 C.1. (2002) (confirming critics’ fears and reading \textit{Hoffman} broadly). On the administrative level, the NLRB’s \textit{Office of General Counsel Memorandum 02-06}, takes a broad view of the \textit{Hoffman} decision and says that regardless of the circumstances of their hire, undocumented immigrants are not eligible for back pay under the NLRA. \textit{Id.} In federal courts, Florida and Kansas have used \textit{Hoffman} to limit the protections available to undocumented workers. \textit{See} Egbuta v. Time-Life Libraries, Inc., 153 F.3d 184, 188 (4th Cir. 1998) (holding undocumented immigrants are not covered by Title VII of the Civil Rights Act).
room for optimism, however, since some federal district courts have declined to extend *Hoffman* to cases involving employer violations of the FLSA.\textsuperscript{76} Additionally, growing numbers of the immigrant population are finding employment outside of traditionally unionized fields, which lends hope to the prospect that there may be ways to circumvent the *Hoffman* ruling.\textsuperscript{77} Through tactics employed by organizations such as the Workplace Project, worker centers may be able to prevent the further erosion of rights for undocumented immigrant workers in today’s suburban sweatshops.\textsuperscript{78}

\section*{C. Structural Challenges}

In addition to the harsh policies of the federal government regarding undocumented immigrant workers, these vulnerable workers must also deal with a breakdown in the effectiveness of typical unionizing strategies.\textsuperscript{79} The worker protections of the NLRA are predicated on a model of collective bargaining that is not a realistic tool for many immigrant workers in the service industry.\textsuperscript{80} Gordon argues that most undocumented immigrant workers labor in the service industry, which

\begin{itemize}
  \item See *Flores v. Amigon*, 233 F. Supp. 2d 462, 464–65 (E.D.N.Y. 2002) (holding discovery of plaintiff’s immigration status was not relevant to her claim for back pay for unpaid wages under the FLSA, since the risk to the plaintiff was higher than the probative value); *Zeng Liu v. Donna Karon Int’l*, Inc., 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002) (holding discovery of plaintiff’s immigration status was not relevant for claims to recover lost wages under the FLSA); *Smith & Sugimori*, *supra* note 4, at 45–46 (noting the FLSA defines back pay as the payment of wages the employee earned, yet was not paid).

  \item *Gordon*, *supra* note 1, at 82.

  \item See *id.* (noting various tactics that the Workplace Project employed to help immigrant workers).

  \item Rivchin, *supra* note 15, at 411–12; *Stone*, *supra* note 14, at 798. Professor Stone notes that there has been a decline in union representation, which will exacerbate the problems of “income inequality and employment discrimination.” *Id.* at 788.

  \item *Stone*, *supra* note 14, at 786; *Wial*, *supra* note 33, at 678–79 (“Low-wage service jobs are characterized by high labor turnover, many temporary and part-time workers, and the absence of firm-specific internal labor markets. The absence of long-term attachments between low-wage service workers and particular employers makes the organization of these workers on an employer-specific basis . . . difficult to begin and difficult to sustain.”).
\end{itemize}
in many suburbs has become an underground economy.\textsuperscript{81} The underground economy is marked by the mobile capital of small businesses, subcontractors, and factories, which can easily change names to evade the law, or are not covered under the laws.\textsuperscript{82} This business structure results in workplaces that are smaller, dispersed over broad geographic areas, marked by high labor turnover and temporary and part-time workers, which makes collective bargaining with one employer difficult.\textsuperscript{83} Additionally, the high number of recent immigrants in low-wage service jobs make it crucial that organizers be sensitive to the varied needs of their workers.\textsuperscript{84}

Organized labor’s next move needs to be the formulation of groups that can organize employees from various employers and across localities or even regions.\textsuperscript{85} Labor organizers’ newest challenge exists in organizing service-industry workers in a way that allows them to work outside of the legal framework of anti-immigrant policies such as those established in Hoffman.\textsuperscript{86} The Workplace Project is one of the few groups successful in overcoming these obstacles.\textsuperscript{87} One of their major achievements was the drafting and passage of the Unpaid Wages Prohibition Act, which helped suburban sweatshop workers

\textsuperscript{81} Gordon, \textit{supra} note 23, at 412–13 (1995) (explaining that employers do not register with the proper authorities, do not comply with labor or tax laws, and often fail to participate in mandatory programs such as workers’ compensation and disability benefits).

\textsuperscript{82} \textit{Gordon, supra} note 1, at 24, 48 (“It’s hard to organize someone who for all formal appearances doesn’t exist.”); Rivchin, \textit{supra} note 15, at 411–12; Wial, \textit{supra} note 33, at 678 (“Service workers are employed at smaller and more geographically decentralized worksites than workers in manufacturing industries.”).

\textsuperscript{83} Wial, \textit{supra} note 33, at 678–79.

\textsuperscript{84} \textit{Gordon, supra} note 1, at 70 (some workers cannot speak English, fear deportation, see organizing as risky, and are from widely varying backgrounds); Wial, \textit{supra} note 33, at 677–78.

\textsuperscript{85} \textit{Gordon, supra} note 1, at 55; Wial, \textit{supra} note 33, at 692; \textit{see Stone, supra} note 14, at 802 (arguing that in the new “boundaryless workplace,” the focus of organizing employees needs to be on factors other than a common employer).

\textsuperscript{86} Wial, \textit{supra} note 33, at 671; \textit{see Rivchin, supra} note 15, at 416 (explaining that groups of workers excluded by the NLRA have been successful in organizing outside of the NLRA structure).

\textsuperscript{87} \textit{See Gordon, supra} note 1, at 61–66 (discussing various other successful low-wage immigrant advocacy organizations). Along with the Workplace Project, the Service Employees International Union’s (SEIU) Justice for Janitor’s campaign, was able to effectively work around the NLRA’s restrictions on secondary boycotts and gain support for undocumented workers. \textit{Id.} at 61–62. Bans on secondary boycotts make it difficult to exert pressure on companies whose subcontractors do not comply with labor laws. \textit{Id.} Since picketing these secondary employers is illegal, the SEIU has gained support from religious leaders, students, community organizations, and public officials to make worker’s rights an issue in the community. \textit{Id.} at 62.
receive the pay they earned.\textsuperscript{88} The Workplace Project’s flexible and creative strategies were vital in changing a hostile legal climate for the benefit of undocumented workers.\textsuperscript{89}

\section*{II. IMMIGRANTS CIRCUMVENT \textit{HOFFMAN}}

After surveying the legislation, court decisions, and structural challenges undocumented workers face, it is clear that creative solutions are required to address the problem of undocumented workers’ rights.\textsuperscript{90} Professor Katherine V.W. Stone exhorts labor organizations to “expand their focus upward into the political domain and outward into the community,” which is exactly how the Workplace Project became successful.\textsuperscript{91} In 1995, the members of the Workplace Project, frustrated by the lack of enforcement of the New York state minimum wage laws, triumphed over employers who withheld workers’ wages by changing state law.\textsuperscript{92} The passage of the UWPA is an instructive example of how a group of mainly immigrant workers—including undocumented workers—effectuated change outside of the traditional union framework on the state level.\textsuperscript{93} The Workplace Project was able to improve working conditions for low-wage workers through active participation in the political process.\textsuperscript{94}

\subsection*{A. Organizing for Political Change}

In 1995, members and staff of the Workplace Project were upset by the New York Department of Labor’s (NYDOL) slow processing of low-wage workers’ claims for unpaid wages.\textsuperscript{95} They saw how the low penalties for cheating employees out of their wages provided no deterrent to dishonest employers.\textsuperscript{96} They also realized a need for reform on the

\begin{thebibliography}{99}
\item \textsuperscript{88} See id. at 3 (the Workplace Project’s victories are the result of a “resourceful combination of collective action and legal advocacy”).
\item \textsuperscript{89} Id.
\item \textsuperscript{90} See id. at 69 (describing the many and varied experimental attempts made by the Workplace Project, other worker centers, and Unions in an effort to combat the problem of exploitation of undocumented workers).
\item \textsuperscript{91} Stone, \textit{supra} note 14, at 802.
\item \textsuperscript{93} Gordon, \textit{supra} note 1, at 238; Stone, \textit{supra} note 14, at 815.
\item \textsuperscript{94} Gordon, \textit{supra} note 92, at 7.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id. at 4.
\end{thebibliography}
agency level, since the NYDOL’s efforts were stymied by both under funding and prejudice against undocumented immigrants. Armed with firsthand knowledge, field research, and a passion for change, the immigrants—including those without permission to work in the United States—committed to drafting and lobbying for a bill that would address some of the problems with minimum wage law enforcement.

One reason for the Workplace Project’s success is their status as a worker center, and not a NLRB certified union. Worker centers are “organizing laboratories,” since one of their characteristics is a unique ability to brainstorm and implement new options for organizing. Worker centers flexibly address the needs of their members, and engage in organizing efforts, such as the campaign for the UWPA, which fall outside of the collective bargaining model. Worker centers are valuable in providing an alternative to unions, since they can address issues of workplace rights on a larger scale than collectively bargaining with just one employer. This emphasis on broader change in labor law allows them to attract workers who are hard to organize, and workers for whom traditional unions do not meet their needs. Even in a post-Hoffman climate, there is hope for organizing undocumented workers into effective groups that can advocate for stronger worker protections.

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97 Id. at 3, 5–6. Gordon argues that one major problem with wage law enforcement is the under funding of the state and federal agencies meant to uphold the law. Id. at 3. This means that there are not enough inspectors to adequately monitor legitimate, registered businesses. Id. On Long Island, the Workplace Project gathered statistics that out of the seventy two claims they filed with the NYDOL only three resulted in even partial payment to the employee. Id. at 5. Furthermore, NYDOL workers show their bias against advocating for undocumented workers with statements such as: “I don’t even take claims for housekeepers for overtime . . . it’s a waste of time,” and “I don’t like to take claims for domestic workers and restaurant workers.” Id.

98 See id. at 7 (discussing how the UWPA was initiated); Gordon, supra note 1, at 244–45 (“Given that so many immigrant workers were paid less than the minimum, giving the law teeth would be an important victory.”).

99 See Rivchin, supra note 15, at 415 (noting the advantage of worker centers over unions). Rivchin notes that although the NLRA confers rights to groups of organized workers, it also places restrictions on organizing activities, such as prohibiting secondary boycotts. Id. at 410–13. Secondary boycotts are key in organizing heavily subcontracted industries and regulating picket activities. Id.

100 Fine, supra note 7, at 9.

101 See id. (discussing innovative strategies that worker centers developed and used).

102 Rivchin, supra note 15, at 401.

103 Fine, supra note 7, at 9.

104 See Gordon, supra note 1, at 245–46 (noting that the members of the Workplace Project first felt that their status as non-citizens would render them ineffectual in the political process, but soon learned that they could muster a strong political voice if they presented their bill in the correct light).
B. Mobilizing Undocumented Workers

Having undocumented immigrants lobby for the bill was a strategic feat for the members of the Workplace Project. In May 1996, the Workplace Project had 420 members, approximately two percent were citizens, sixty-eight percent were noncitizen legal immigrants, and thirty percent were undocumented immigrants. Despite the risks, the Workplace Project decided to combine the forces of documented and undocumented workers. The Workplace Project members were able to do this because there was some protection in participating as a member of a large group.

In campaigning for the UWPA, Workplace Project members met with legislators and persuaded them that unpaid wages was a problem of epidemic proportions on Long Island, which harmed not only undocumented workers but also the public. In the anti-immigrant political climate of 1995 Long Island, the drafters of the UWPA made strategic alliances with businesses, community organizations, the media, and key politicians in order to pass their bill through the Republican Senate and the Democratic controlled Assembly. The workers framed their legislation to win Republican legislators' votes by emphasizing key features. The campaigning members of the Workplace Project told Republican legislators that the UWPA focused on pre-

105 See id. at 246 (describing the reluctance of many undocumented members of the Workplace Project to campaign for the UWPA); Gordon, supra note 92, at 22 (attributing the campaign's success, in part, to the participation of undocumented workers who spoke directly with legislators).

106 Gordon, supra note 1, at 245.

107 Id. at 245–46. Undocumented members of the Workplace Project were fearful that engaging in a political campaign would expose their immigration status and make them easy targets for discriminatory firing or even deportation. Id. Additionally, Workplace Project member Juan Calderon highlights another reason workers were hesitant to campaign, “[i]f you’re not a citizen, how can you make demands? If I can’t vote, I’m no one. I’m invisible. How can I protest?” Id.

108 See id. (stating “the sense that there will be some protection in doing this as a group, under the umbrella of the Workplace Project.”).

109 Id. at 256; Gordon, supra note 92, at 26–27. Members of the Workplace Project campaign rehearsed what to emphasize to different legislators to showcase the most persuasive elements of the bill, and brainstormed answers to questions the legislators might ask. Id. at 26. The meetings took place in Spanish, and the legislators wore headphones that instantaneously translated the lobbyists’ words into English. Id. at 26–27.

110 See Gordon, supra note 1, at 248, 256–68 (noting that Suffolk County, Long Island was in a heated “English-only” debate and describing the Workplace Project’s strategy: the process of lobbying, gathering public support for the bill, and the eventual passage of the bill in the New York legislature); Gordon, supra note 92, at 9–22 (detailing the political actions of the Workplace Project, and propounding four theories for why the legislators passed the bill into law).

111 Gordon, supra note 1, at 251; Gordon, supra note 92, at 8.
venting unfair competition by punishing employers who violate minimum wage laws, paying people the money they were owed as a way to keep them off of public benefits, increasing state revenue by increasing fines, and funding the additional responsibilities the bill gives to the NYDOL through the fines it implements.112 Throughout the lobbying process, the members of the Workplace Project prepared how they would answer the legislator’s questions about immigration status, since even many documented workers were not citizens, and therefore were not part of the constituent group to which the legislators answered.113 Immigration status, however, never arose in the meetings with legislators.114

One interesting limitation that the campaign illuminates is that it may not have been possible for a group of exclusively undocumented immigrants to pass this legislation on their own.115 This suggests that it is crucial for undocumented workers to organize in a way that combines their forces with other low-wage workers in order to gain more protections under the law.116 This possible limitation, however, has not stopped immigrant groups from organizing to gain more worker protections for all immigrants.117

C. Successful Post-Hoffman Political Activism

Other examples of successful political campaigns organized by worker centers demonstrate how the principles motivating the Workplace Project have been applied in a post-Hoffman political climate.118 For example, Rhode Island’s United Workers Committee of Progreso Latino combined forces with religious, labor, and immigrant groups in Rhode Island to pass the Temporary Employment Protection Act.119

112 Gordon, supra note 92, at 8.
113 Id. at 26.
114 Id.
115 See id. at 13 (explaining that if immigration status had become an issue in the campaign, it may have been harder to gain support from legislators concerned with being seen pro-illegal alien).
116 See id. (having a mixture of documented and undocumented immigrants may take the focus off of immigration status, and therefore help issues from becoming about helping “illegal aliens”).
117 See Wishnie, supra note 10, at 508 (remarking that many of the biggest issues of low-wage immigrant workers are not exclusive to undocumented workers); supra text accompanying note 87 (citing the SEIU as another example of creatively organizing around the NLRA); infra notes 119, 121, 122 (discussing examples of successful organizing campaigns).
118 See infra notes 119, 121, 122 (providing descriptions of immigrant groups who made positive changes in the law for undocumented immigrant workers).
119 R.I. GEN. LAWS § 28-6.10 (2005); MAURICE EMSELLEM & CATHERINE RUCKELSHAUS, NAT’L EMPLOYMENT LAW PROJECT, ORGANIZING FOR WORKPLACE EQUITY: MODEL STATE
The new law requires temporary agencies to give employees written notice of job descriptions, work schedules, and pay rates, so these employees are not abused by the temporary agency’s clients.\textsuperscript{120} Additionally, worker centers have successfully used the political process to lead local minimum and living wage campaigns across the nation.\textsuperscript{121} Not all worker centers have focused their efforts on gaining rights for the undocumented population, but the success of these other worker centers combined with the success of the Workplace Project suggests that political advocacy through worker centers may be a powerful tool for advancing the rights of undocumented workers.\textsuperscript{122}

The success of worker centers in becoming effective political participants lends optimism to the discussion of the downsizing of undocumented workers’ rights.\textsuperscript{123} Despite the Workplace Project members’ status as disenfranchised and undocumented they were able to make positive changes for low-wage undocumented workers.\textsuperscript{124} The success of passing the law is an important one, yet the next section will examine the UWPA’s impact on the daily lives of undocumented workers after it became New York state law.\textsuperscript{125}

\section*{III. States \textquotedblright Step into the Breach\textquotedblright \textsuperscript{126}}

With the federal government taking a decidedly anti-immigrant stance, those who advocate for undocumented workers’ rights argue that change must be effected on a state level.\textsuperscript{127} Not all workers are cov-

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\textsuperscript{121} See Fine, supra note 7, at 16 (highlighting organizations such as the Baltimoreans United in Leadership Development (BUILD), which helped pass the first living wage law in the nation).

\textsuperscript{122} See id. at 9 (indicating that worker centers have “unprecedented success” in organizing low-wage immigrant workers, including large numbers of undocumented workers and provide a “central vehicle” for these employees to gain services, education, participate in civil society, and affect economic and political change).

\textsuperscript{123} Id. at 25 (characterizing worker centers as “hopeful,” and “helping to set the political agenda”); Gordon, supra note 92, at 37–38 (concluding that the campaign for the UWPA “contradicts our instinct that an effort to pass legislation led by noncitizen immigrants . . . would be a recipe for disaster”).

\textsuperscript{124} See infra note 132 (describing the UWPA’s provisions regarding enforcement of minimum wage laws in New York state).

\textsuperscript{125} See infra Part III.A.

\textsuperscript{126} Smith & Sugimori, supra note 4, at 12.

\textsuperscript{127} See id. (suggesting that state level authorities have a deeper understanding of what immigrant workers mean to their economy, a better awareness of the abuses immigrants
ered on the federal level, and states tend to provide more protections to undocumented workers. Additionally, local government may be in a better position to see the problems that the lack of protections for undocumented workers have on the entire community. This section will evaluate the Unpaid Wages Prohibition Act (UWPA) and determine the effectiveness of organizing on the state level.

A. Thinking Locally—The Burdens and Benefits of State Changes

On the state level, advocates can help all workers, including undocumented workers, by pressuring state agencies to adopt pro-worker policies for enforcing current laws. For example, after the legislature passed the UWPA, unpaid low-wage workers, including undocumented workers, found benefits to the new law. The legislation the Workplace Project drafted focused on increasing penalties to deter employers from violating minimum wage law, and fixing the slow turn around for NYDOL managed employee claims. The bill also shifted the burden of proof to the employer to show payment of wages when the employer did not keep adequate records, required workers to be informed of the process of their claim periodically, and allowed labor unions to file wage claims on behalf of their members.

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128 Gordon, supra note 92, at 39 n.8 (noting that employees that do not put goods into the stream of interstate commerce and have less than five hundred thousand dollars in gross revenues a year are not covered by the FLSA).

129 Smith & Sugimori, supra note 4, at 12.

130 Id. at 47–48 (noting that such policies are needed to make states reaffirm their commitment to enforcing all laws, without taking into account workers’ immigration status). After Hoffman, California and Washington have adopted policies that protect undocumented workers’ rights to back pay and workers compensation, respectively. Id.

131 Gordon, supra note 92, at 31.

132 Unpaid Wages Prohibition Act, § 198-a (1) (1998) (increasing penalties for employers who fail to pay their workers). Specifically, the final version of the Act included provisions increasing the civil penalty for repeatedly or willfully not paying wages from twenty-five to two hundred percent of the amount owed, turning nonpayment into a felony offense, requiring the NYDOL to go back the full six years permitted by law in their investigations of employer conduct, and not allowing settlements of less than one hundred percent without the employee’s permission. Gordon, supra note 92, at 7.

133 §§ 196-a, 199-a; Gordon supra note 92, at 7–8.
Although difficult to quantify, the UWPA furthered the Workplace Project’s goal of deterring employers from violating existing minimum wage laws. After passage, the Workplace Project alone worked with forty-four percent more workers than the previous year, and recovered a record amount of unpaid wages. Gordon notes that employers were spurred to settle by simply receiving a letter informing them that they could face a fine of up to two-hundred percent of what they owed. Other advocacy groups used the UWPA as a tool to gain unpaid wages for workers of all types in New York. Additionally, a low-wage worker successfully brought a claim for unpaid wages under the burden shifting provision of the law when his employer failed to keep adequate payment records.

By some measures, however, the UWPA was not successful. Although there were a number of positive changes resulting from the new law, these changes have not led to a substantial increase in the amount of wages the NYDOL recovers for low-wage workers. Gordon attributes the problems with the Act’s use at the NYDOL to a number of factors, including a lack of funds generated by the Act, no provisions to force the NYDOL to change their tactics, and the Workplace Project’s decreased organizing and advocacy work for the law’s implementation. Despite the problems of the UWPA, it is vital to enforce the state minimum wage laws, and judging by the number of other states who have passed similar legislation, it was persuasive in effecting change nationally.

135 Id. at 30–31.
136 Id. at 30.
137 Id. at 31 (explaining the Local 802 of the American Federation of Musicians’ use of the Act to recover unpaid wages).
138 Angello v. Nat’l Fin. Corp., 769 N.Y.S.2d 66, 69–70 (App. Div. 2003). In Angello, the plaintiffs alleged that their employer, the National Finance Corporation, failed to pay them their earned wages and certain wage supplements. Id. at 67. The employer failed to keep adequate records of the wages paid to the plaintiffs. Id. The court held that, in wage claims cases, where the employer did not submit proof contradicting the claims made by employees, the burden of proof shifts to the employer to show payment of wages. Id. at 69–70.
139 Gordon, supra note 92, at 31.
140 Id. The NYDOL hired a full-time Spanish-speaking investigator for their Hempstead, New York office, developed Spanish versions of forms, and began to process cases more quickly through the use of a new, more efficient docketing system. Id. Nonetheless, once the DOL was “out of the spotlight” their efforts to punish employees to the full extent of the law decreased markedly. Id.
141 Id. at 32. Ironically, these measures were some of the very measures that helped the bill pass the legislature. Id.
One way to affect more sweeping changes may be to focus energy on addressing the problem at a national level. There are some fledgling national efforts for immigration and employment law reform, but most of the campaigns of worker centers focus on changing conditions within their states. These national efforts to unite worker centers and create political change on a federal level are promising yet underfunded organizations. Many advocates still think the efforts of groups with little political power and a lack of funding are better focused on the state level. Working to affect change at the state level can have a big impact on all workers, since state laws apply to more workers than federal laws. Additionally, there may be more opportunity to affect change on the state level for groups like the Workplace Project, who lack the political power and membership base to advocate for change on a national level. Once one state makes a change, and other states see that it works, they may be more willing to follow suit. Finally, there is the idea that the states are laboratories for justice, and if a number of states adopt policies that enforce current laws or expand rights for undocumented workers, the federal government may be more willing to follow their

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\footnote{143}{FINE, supra note 7, at 11.}

\footnote{144}{Id. at 16 (citing the Immigrant Workers Freedom Ride as a national rally for immigrant rights that resulted in the Fair Immigration Reform Movement as one example of a national movement gaining momentum).}

\footnote{145}{See id. at 11 (discussing the isolation and difficulty in building coalitions to affect political change on state and national levels as a weakness of worker centers).}

\footnote{146}{SMITH & SUGIMORI, supra note 4, at 47.}

\footnote{147}{See id. at 12 (stating that state laws provide stronger protections for undocumented workers than federal law).}

\footnote{148}{FINE, supra note 7, at 11 (noting that the small and isolated status of worker centers does not foster networking between centers which would help aggregate power and apply more persuasive pressure to opponents of low-wage workers’ rights).}

\footnote{149}{See generally State Criminal Penalties, supra note 142 (listing the various state laws regarding failure to pay wages). After the Workplace Project passed the UWPA, other states increased their enforcement measures for employees who did not pay their workers. FINE, supra note 7, at 11. After the BUILD campaign for a living wage, seventy other localities passed living wage ordinances. Living Wage Facts at a Glance, Economic Policy Institute, http://www.epi.org/content.cfm/issueguides_livingwage_livingwagefacts (last visited Mar. 10, 2006).}
Overall, state legislation is an important and rewarding avenue for protecting undocumented workers’ rights.151

C. Looking Beyond Long Island

While the Workplace Project provides a successful example of advocating for legislative change on behalf of undocumented low-wage workers in New York, it was the result of a unique set of circumstances that may prove difficult to replicate.152 First, the bill was self-funding and thus, did not require increased state funding.153 The second factor was unique to the political climate of New York in 1995.154 Republicans in the Senate recognized a need to send bills to Governor Pataki, a fellow Republican, which would make him look sympathetic to the working class.155 Additionally, the large numbers of Latino immigrants were more of a political force on Long Island than they may be in many communities.156 While some of these factors are easier than others to duplicate, the confluence of all of them greatly aided the passage of the UWPA, and give reason to question the chances for other immigrant worker groups to succeed.157

150 See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

151 Id.; see Fine, supra note 7, at 16 (while there are a few national efforts to organize workers, worker centers have found state level action to be a more rewarding avenue for advocacy).

152 See Gordon, supra note 92, at 11 (listing the factors Gordon attributes to the success of the campaign for the UWPA). Gordon explains that “power in the legislative system is seen to come from two sources: either votes or money. And conventionally, immigrant workers are thought to wield neither.” Id.

153 Id.

154 Id.

155 Id. Gordon suggests four factors which may have prevented the traditionally anti-immigrant and anti-worker Republican party in New York from viewing the UWPA as a threat. Id. First, the Republicans were looking to gain support from the growing Latino population in upcoming elections. Id. Second, the powerful political allies in the business world that the campaign attracted shifted the focus away from the “immigrant question.” Id. Third, the Workplace Project’s message and effective use of the media made it difficult for legislators to oppose the UWPA without looking like they supported “bad employers.” Id. Finally, Gordon suggests that the moral strength of the arguments and personal stories of the immigrant lobbyists persuaded the legislature. Id.

156 See id. (noting the possibility that Republicans supported the UWPA because of the growing political influence of Latinos on Long Island).

157 Gordon, supra note 92, at 37. Gordon explains that the legislation’s message of “hard work and the right to be paid for it” was beneficial, since it emphasized the immigrant workers’ role as exploited workers. Id. This message is not easy to duplicate in cam-
Despite this possibly unique set of circumstances, the UWPA demonstrates that efforts to pass legislation by noncitizens are not always doomed for failure.\textsuperscript{158} A number of other immigrant organizations have achieved state and local political change.\textsuperscript{159} Omaha Together One Community, for example, successfully campaigned for the adoption of a “Workers Bill of Rights” for mostly Mexican exploited workers in the meatpacking industry, which guaranteed the right to organize.\textsuperscript{160} The Service Employees International Union (SEIU) has met with success in organizing home health aides in southern California, despite the fact that these workers were spread out among thousands of private homes.\textsuperscript{161} The SEIU advanced workers’ rights by not only organizing workers, but by also effecting a change in the law.\textsuperscript{162} The law created public authorities as the employer of record, with whom the union could bargain.\textsuperscript{163} These successes suggest that organizing for state and local change is a viable option for immigrant groups who are working in a post-\textit{Hoffman} political landscape and are looking to increase undocumented worker protections.\textsuperscript{164} The applicability of strategies similar to that of the Workplace Project lends hope to the picture of the future of undocumented immigrants in the United States.\textsuperscript{165}
CONCLUSION

The failure of unions to formulate successful strategies for organizing low-wage immigrant workers combined with the Supreme Court’s decision in *Hoffman*, which severely limited undocumented workers’ right to remedies, seems like an insurmountable obstacle for suburban sweatshop workers.\(^\text{166}\) The Workplace Project’s successful campaign to improve the lives of suburban sweatshop workers through state legislation, however, provides a glimmer of hope in an altogether bleak legal and social landscape.\(^\text{167}\) While the Workplace Project is conscious of their limitations, they understand that they have found successful strategies in the model of the worker center and in political activism on the state level.\(^\text{168}\) Despite the fact that suburban sweatshop workers face an uphill battle to improve their working conditions, the opportunity for undocumented immigrants to organize and engage in the political process is empowering for laborers in suburban sweatshops.\(^\text{169}\) If tactics of geographic organization and state level political activism are pursued, this may provide a way for undocumented immigrants to organize outside of the typical union framework and around the Supreme Court’s decision in *Hoffman*.\(^\text{170}\)

\(^{166}\) See supra Part I.A.–B. (explaining the legislative and judicial factors which limit suburban sweatshop workers’ rights).

\(^{167}\) See Gordon, supra note 88, at 38 (concluding that the UWPA’s passage sends a message of strength and optimism to other worker centers).

\(^{168}\) See Gordon, supra note 1, at 108 (noting that the Workplace Project has not been effective in permanently raising the wages of low-wage workers). As member and organizer Carlos Canales said, “I feel like right now we are on the tip of an iceberg. The Workplace Project is a tiny ant, with a tiny ant’s needle, trying to break that iceberg down.” *Id.* at 302. Yet, Gordon notes, “[w]ith such small victories, the omnipresent and overwhelming sense of powerlessness . . . may begin—just begin—to dissolve.” *Id.*

\(^{169}\) *Id.* at 302. In the words of Workplace Project member Zoila Rodriguez, “[p]erhaps they will fire me for raising my voice or demanding something, but they won’t have fired me with my mouth closed. I will have stood up for myself.” *Id.* at 80.

\(^{170}\) See Rivchin, supra note 15, at 430.

*Hoffman Plastic* may be seen as a setback to organizing immigrant workers and to the labor movement as a whole; yet, it can also be viewed as a call to action to galvanize organizing efforts. While viewing *Hoffman*’s restrictions on remedies for labor violations as a potential obstacle to organizing, we should also consider that organizing under labor law has always faced multiple constraints. . . . The examples of workers who have organized outside of the NLRB model pose alternatives to traditional union organizing and in turn may suggest the limitations of Hoffman’s impact.

*Id.*