GROVE CITY COLLEGE

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The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 21th edition of *The Bluebook*.

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, the ethical absolutes of the Ten Commandments, and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its inception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

Dear Esteemed Reader,

It has been a little over a year since the global COVID-19 pandemic began. Our lives have all been greatly affected by the immense amount of uncertainty and the new challenges that the pandemic has created. Yet, throughout this unprecedented time, I have been able to rely on Grove City College—its President, Paul J. McNulty '80, its Board of Trustees, its faculty, the rest of its staff, and its students—to make wise decisions to keep our campus safe and to continue to fulfill our educational purpose. The entire college has made great sacrifices to continue its noble mission to promote *faith*, guided by and consonant with reason, and *freedom*, wisely balanced to protect and preserve order and the well-being of society. While the world may be unpredictable and uncertain, Grove City College has been steadfast in its purpose and in meeting these new challenges head on.

The same rings true for the *Grove City College Journal of Law & Public Policy*. In a year of uncertainty and challenge,

the *Journal* has become stronger than ever. I do not use these words lightly, nor do I wish to take all the credit for our strengthened position. The work of the *Journal* staffs from the last two years, especially the efforts of Falco A. Muscante, II ’20, allowed our new team of editors to come into the year with an increased understanding about how to operate the *Journal*, with new and improved processes, and with an example of intellectual and organizational excellence before our minds.

The labor of the *Journal* in the two previous years provided a solid foundation from which our team of editors soundly built upon this year. Our team was able to improve the application process for associate editors; to further streamline and improve the editing process for submitted articles; to increase marketing for the *Journal* on social media and around campus; and to revamp the Editorial Board in order to help further the mission of the *Journal* to empower students interested in writing, editing, public policy, and the law to gain practical experience at the undergraduate level. In

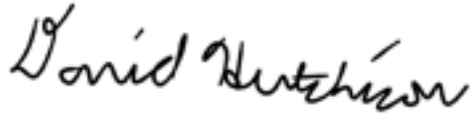
addition to these accomplishments, we were able to create organizational by-laws to help establish consistent practices, to greatly improve upon previous processes for creating a smooth transition of leadership in the *Journal*, and to significantly reorganize our office space. On top of this, I believe we have a very intelligent, active, and interested team of editors who have worked diligently to produce the twelfth volume of the *Journal*, about which I am especially excited—this volume has the most articles of any volume since 2014, and its keynote article is written by the prominent economist Lawrence Reed. I have truly been blessed to work with such an amazing team of editors. In the midst of an uncertain year, I have been able to rely on each and every one of them. Without such a strong team effort, we could never have accomplished what we did this year.

Reflecting on my time as Editor-in-Chief, I cannot help but be thankful. First and foremost, I am thankful for the wonderful team of editors that have worked alongside me. This volume is truly the product of their efforts. The Executive

Board and I are also deeply thankful for the support and wise counsel of President Paul J. McNulty ’80, Dr. Caleb Verbois, and Adam Nowland ’07. There are a host of others to whom we are grateful: to Dan Snyder and others in Print Production & Mail Services for helping to print and mail this volume of the *Journal*, to members of our Editorial Board who have supported and advised us in many aspects of our work, to our authors who not only submitted stimulating articles but also were responsive to the edits of our staff, to those in the Office of Institutional Advancement who assisted with finances and distribution, and especially to our donors and readers. We cannot express how truly thankful we are for each one of you.

The *Grove City College Journal of Law & Public Policy* provides a unique opportunity for students like me and it helps to promote the ideas of faith and freedom around the country. We operate solely based on donations, so please consider making a financial gift—your contributions truly make a difference. If you wish to learn more about the *Journal* or support us by donating,

subscribing to the Journal, requesting print copies of past editions, or submitting an article, please email us at LawJournal@gcc.edu or visit our website at www2.gcc.edu/orgs/GCLawJournal. Electronic copies of all previous editions are archived in the HeinOnline database, which maintains over 2,600 law-related periodicals. Again, thank you for your readership and continued support of the Grove City College Journal of Law & Public Policy.



David S. Hutchison ’21

Editor-in-Chief

FOREWORD

Dear Reader,

In my home office, one of my most treasured possessions is a framed copy of the first issue of the *Grove City College Journal of Law and Public Policy* (Volume 1, Number 1, Spring, 2010). It was signed and presented to me by a number of the students who conceived of the idea of a scholarly, yet readable undergraduate Journal "devoted to the academic discussion of law and public policy." I think often of those student co-founders whose signatures appear on my framed copy—James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12. I remember them bursting into my Dean's office in 2009 and announcing the plan they had to create such a scholarly Journal. As I recall, I told them that editing and publishing such a publication was a formidable task. There would be difficult moments, disappointments, but Grove City College would stand with them and help make this happen. As I predicted, my long-time friend, then President,

Richard G. Jewell ’67, our Provost Dr. Bill Anderson, and our Vice President for Institutional Advancement, Jeff Prokovich ’89, gladly provided their strong support for the undertaking.

I was pleased to serve as first Executive Faculty Editor, but the hard work of the student editorial team made my job one of minimal oversight and often amazement at what the students produced. In that first issue, we were honored to feature a contribution by Attorney David M. Lascell, who argued Grove City College’s case for independence from government intrusion into higher private education before the US Supreme Court in 1983.

As I wrote this Foreword, I had another unexpected blessing. I had the pleasure of looking through the names of the students who made up the Executive Board of that first issue and noting the many who went on to law study. Students responsible for “Volume 1, Number 1,” according to my memory, eventually attended the law

schools of: Columbia, Harvard, University of Virginia, Indiana University, Regent, Akron, Ohio State, New York University, Cleveland Marshall, and Penn State-Dickinson. Others went on to responsible positions in government, the military, financial advising, education and business.

It is a testimony to Grove City College students—their mental acumen, their abiding interest in public policy issues, their diligence despite demanding academic schedules—and to the grace of God that a decade later we find the latest issue still maintaining the quality of submissions that characterized that ground-breaking first issue. Special thanks to Grove City College’s President, Paul J. McNulty ’80, and to Dr. Caleb Verbois for their enthusiasm for yet another issue of the Journal.

This issue’s lead piece is written by a long-time friend of liberty and friend of Grove City College, Mr. Larry Reed ’75. Now retired from the Presidency of FEE (the Foundation for Economic Education),

President Emeritus Reed has been a tireless and effective advocate for the values of the free society. His article focuses on the two Englishmen, Thomas Clarkson and William Wilberforce, who led the antislavery movement, resulting in the abolition of this outrageous kind of human bondage. Both men were Christians as Reed points out, and both had the perseverance that enabled them to uncompromisingly, over three decades, put an end to this cruel institution. The article fits perfectly with Grove City College's unyielding belief in faith and freedom as the foundations of sound law and public policy.

Michael Reese '21 explores the impact of the COVID Pandemic and the shuttering of the US economy. He uses Austrian School Business Cycle theory to predict the effects of these events on economic activity. The magnitude of the CARES Act stimulus was expected to create substantial price inflation. But with the exception of the prices of businesses deemed essential, and

therefore open, consumers chose primarily to save rather than spend the new money. However, once the economy reopens, according to Austrian theory, one can expect a round of substantial inflation. Also, the uncertainty of political changes, which could be significant, will encourage investors to recast and reassess their investments.

Anna Claire Rowlands '22 surveys the unintended consequences of the Supreme Court's 1905 decision in *Lochner v. New York*. She maintains that in the short run, the outcome of the case protected the right of contract and severely restrained regulation of enterprises by state police powers. However, the eventual result of this "judicial activism" was to permit Franklin Roosevelt to create his own set of new economic "rights," such as a right to a job, and support them with New Deal legislation. Rowlands ultimately argues that if the Lochner Court had taken a more moderate view of liberty of contract, protecting it but not making it absolute, state governments

would have been able to regulate the excesses of economic activity within their boundaries, and a federal expansion into the regulatory area would not have been necessary.

Jack Everett ’21 reviews the unseen effects of raising the minimum wage. He first carefully reviews the economic literature and concludes that recent studies which assert that the minimum wage has no disemployment effects have failed to identify other harmful consequences of minimum wage on low-skilled workers. Everett explains and provides evidence that a government-imposed wage hike produces a cutting of hours to workers, reduction in fringe benefits like health care, a reduction in on-the-job training, and a substitution of labor-saving devices for workers. Moreover, employers may refuse to take a chance on a low-skilled worker when the law requires that he be paid minimum wage.

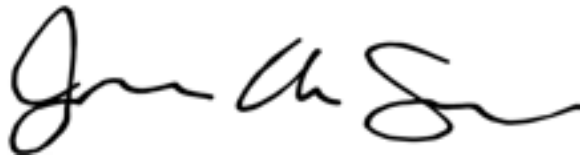
Reese Overholt ’22, argues that legal philosopher

Lon Fuller’s version of natural law, which emphasizes the purposeful, moral content of law, allows for the consideration of contrasting legal philosophies such as feminist jurisprudence and Critical Legal Theory. These legal philosophies are more like Fuller’s because they purport to be based upon certain moral values intended to produce greater fairness for women and minorities. Overholt contends that Legal Positivists such as H.L.A. Hart, by contrast, “do not welcome anyone offering a critique of their assumptions about the legal system...”

Janna Lu ’22 reviews the effectiveness of a 2008 federal program entitled Teacher Education Assistance for College and Higher Education (TEACH). TEACH aimed to increase the number of students who chose careers in teaching by offering federal grants to them if they majored in education. Lu uses a cost-benefit analysis which revealed that a large percentage (63%) of the students in the program failed to serve four years of their first

eight following graduation in certain "high-need" areas as required. Consequently, the grants became unsubsidized loans which had to be paid back. Lu concludes that the small pecuniary benefits offered by TEACH failed to produce the desired results.

In conclusion, this issue challenges the reader to thoughtfully consider law and public policy from a variety of viewpoints and disciplines. As Nobel laureate Frederich von Hayek wisely wrote: "Liberty not only means that the individual has both the opportunity and burden of choice; it also means that he must bear the consequences...Liberty and responsibility are inseparable."



John A. Sparks, '66, J.D.
Former Dean for the Alva J. Calderwood School of Arts & Letters, and Professor of Business, Grove City College

TWO HEROES OF CONSCIENCE WHO CHANGED THE WORLD

Lawrence W. Reed '75

ABSTRACT: *History is full of inspiring stories involving huge, positive changes made possible by people both illustrious and ordinary. One of the best examples comes from Great Britain between 1787 and 1833. Thomas Clarkson and William Wilberforce became deeply convicted Christians who saw human bondage as outrageous and indefensible. While few shared their perspective, the antislavery perspective would soon dominate society and reshape law and policy forever. Clarkson and Wilberforce teach that a worthy goal should inspire informed activism and that even the most entrenched laws and policies can be changed by people of courage, character, and conscience.*

---

* Lawrence W. (Larry) Reed '75 is the Foundation for Economic Education's President Emeritus, Humphreys Family Senior Fellow, and Ron Manners Global Ambassador for Liberty. Reed served as president of FEE after serving previously as chairman of its board of trustees. Prior to becoming FEE's president, he served for 21 years as president of the Mackinac Center for Public Policy. He holds a B.A. in economics from Grove City College, an M.A. degree in history from Slippery Rock University, and two honorary doctorates, one from Central Michigan and one from Northwood University. Reed has authored nearly 2,000 newspaper columns and articles and dozens of articles in magazines and journals in the United States and abroad. His numerous recognitions include the Champion of Freedom award from the Mackinac Center for Public Policy and the Distinguished Alumni award from Grove City College.

Must matters of law and public policy be dull, dry, and esoteric? Should they be the exclusive provinces of lawyers, legislators, lobbyists, economists, and statisticians? Or can they be animated by lofty and exciting moral principles put forward by eloquent crusaders from any walk of life?

If my answers to those three questions were *yes*, *yes*, and *no*, then readers could be forgiven for reading no further. But history is full of inspiring stories involving huge, positive changes made possible by people both illustrious and ordinary. One of the best examples comes from Great Britain between 1787 and 1833.

It is a story of long odds and daunting obstacles—tale of courage, perseverance, and moral vision. It is about much more than changing only laws and public policies. It is about transforming the conscience first of a nation and ultimately of the world. Perhaps we should think of it as the most significant

development in law and public policy of the last 500 years.

The development to which I refer is the abolition of slavery within the vast British Empire. Though many people—black and white, male and female, high-born and commoner—can lay claim to being players, the dynamic duo of the antislavery movement were Englishmen by the names of Thomas Clarkson and William Wilberforce.

Born within a year of each other (Wilberforce in 1759, Clarkson in 1760), these two men forged a life-long association in the late 1780s. By that time, both had become deeply convicted Christians who saw human bondage as outrageous and indefensible. It was a perspective shared by few in those days. A few decades later, however, the antislavery perspective would dominate society and re-shape law and policy forever.

Slavery was an institution with ancient roots in countless cultures on every inhabited continent. Viewed widely in the late 1700s as integral to naval and

commercial success, slavery was big business for British commercial interests. It enjoyed broad political support, as well as widespread (though essentially racist) intellectual justification.

The slave trade was lucrative for British slavers but savagely merciless for its victims—blacks that were captured in Africa. Mortality rates sometimes ran as high as 50 percent during the voyages across the Atlantic.Those who survived the journey faced excruciating toil, with death at an early age on Caribbean plantations.

As a student at the University of Cambridge, Clarkson entered the university's annual Latin essay contest in 1785. Contestants were required to write in Latin. The assigned topic that year was "Anne liceat invitos in servitutem dare?" —*Is it lawful to make slaves of others against their will?*[1]

Clarkson hoped to be a minister, and slavery was not a topic that had previously interested him. Still, he

1 *Papers of Thomas Clarkson, 1787–1996*, St. John's College Library (Jun. 1, 2017), https://archiveshub.jisc.ac.uk/data/gb275-clarkson.

plunged into his research with the vigor, meticulous care, and mounting passion that would come to characterize nearly every day of his next 61 years. Drawing on the vivid testimony of those who had seen the unspeakable cruelty of the slave trade firsthand, Clarkson's essay won first prize.

What Clarkson learned from his research wrenched him to his core. Shortly after claiming the prize and while riding on horseback along a country road, his conscience gripped him. Slavery, he later wrote, "wholly engrossed" his thoughts.[2] He could not complete the ride without frequent stops to dismount and walk, tortured by the awful visions of the traffic in human lives. At one point, falling to the ground in anguish, he determined that if what he had written in his essay were indeed true, it led to only one conclusion: *"It was time*

2 Thomas Clarkson, The History of the Rise, Progress, and Accomplishment of the Abolition of the African Slave Trade by the British Parliament, (2017) (1808) (ebook), http://www.gutenberg.org/cache/epub/12428/pg12428-images.html.

some person should see these calamities to their end."[3]

The significance of those few minutes in time is summed up in a splendid book by Adam Hochschild, *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire's Slaves*:

> If there is a single moment at which the antislavery movement became inevitable, it was the day in 1785 when Thomas Clarkson sat down by the side of the road at Wades Mill.… For his Bible-conscious colleagues, it held echoes of Saul's conversion on the road to Damascus. For us today, it is a landmark on the long, tortuous path to the modern conception of universal human rights.[4]

Thus began Clarkson's all-consuming focus on a moral ideal: No man can rightfully lay claim, moral or otherwise, to owning another. Casting aside his plans for a career as a man of the cloth, he mounted the bully pulpit and risked everything for the single cause of ending the evil of slavery. The poet Samuel

3 *Id.*

4 Adam Hochschild, Bury the Chains: Prophets and Rebels in the Fight to Free an Empire's Slaves 89 (Houghton Mifflin Co. 2005).

Taylor Coleridge would later call Thomas Clarkson a "moral steam engine" and "the Giant with one idea."[5]

At first, he sought out and befriended the one group which had already embraced the issue, the Quakers. They were few in number and written off by British society as an odd,fringe element. Quaker men even refused to remove their hats for any man, including the king, because they believed it offended an even higher authority. Clarkson knew that antislavery would have to become a mainstream educational effort if it were to have any hope of success.

On May 22, 1787, Clarkson brought together 12 men, including a few of the leading Quakers, at a London print shop to plot the course. Alexis de Tocqueville would later describe the results of that meeting as "extraordinary" and "absolutely without precedent" in the history of the world.[6] This tiny group,

5 Earl Leslie Griggs, Thomas Clarkson: Friend of Slaves 26 (Negro Universities Press, 1970).

6 Hochschild, *supra* note 4, at 1.

which named itself the Society for the Abolition of the African Slave Trade, was about to take on a firmly established institution in which a great deal of money was made and on which considerable political power depended.

Powered by an evangelical zeal, Clarkson's committee would become what might be described as the world's first think tank. Noble ideas and unassailable facts would be its weapons.

"Looking back today," writes Hochschild, "what is more astonishing than the pervasiveness of slavery in the late 1700s is how swiftly it died. By the end of the following century, slavery was, at least on paper, outlawed almost everywhere."[7]

Thomas Clarkson was the prime architect of "the first, pioneering wave of that campaign"—the antislavery movement in Britain, which Hochschild properly describes

7 HOCHSCHILD, *supra* note 4, at 3.

as "one of the most ambitious and brilliantly organized citizens' movements of all time."[8]

When Clarkson and his group approached a young member of Parliament, William Wilberforce, to join the cause, their persuasiveness fell on receptive ears. Wilberforce's boyhood pastor had been John Newton, the former slave trader who converted to Christianity, renounced slavery, and wrote the autobiographical hymn, *Amazing Grace*.

Beginning in 1789, Wilberforce introduced a bill to abolish the trade in slaves every year until it finally passed in 1807. Though history gives him the lion's share of credit for abolitionism's success, it was the information Clarkson gathered while crisscrossing the British countryside—logging 35,000 miles on horseback that Wilberforce often used in parliamentary debate. Clarkson was the mobilizer, the

8 HOCHSCHILD, *supra* note 4, at 3.

energizer, the factfinder, and the very conscience of the movement.

When Wilberforce rose in the House of Commons to give his first abolition speech in 1789, he did not know that it would take another 18 years before British law would end the slave trade. He addressed his fellow parliamentarians with these stirring words:

> When we think of eternity, and of the future consequences of all human conduct, what is there in this life that should make any man contradict the dictates of his conscience, the principles of justice, the laws of religion, and of God? Sir, the nature and all the circumstances of this trade are now laid open to us; we can no longer plead ignorance, we cannot evade it; it is now an object placed before us, we cannot pass it; we may spurn it, we may kick it out of our way, but we cannot turn aside so as to avoid seeing it; for it is brought now so directly before our eyes that this House must decide, and must justify to all the world, and to their own consciences, the rectitude of the grounds and principles of their decision.[9]

His was a call to conscience, to truth, and to the

9 Kevin Belmonte, Hero for Humanity: A Biography of William Wilberforce 112 (NavPress 2002).

highest standards of character. It is one thing to be indifferent to the cruelties of slavery for lack of knowledge; it is quite another to look askance once one is aware. At the close of another moving discourse in the House of Commons in 1791, he famously raised his voice and declared, "You may choose to look the other way, *but you can never again say you did not know*."[10]

Wilberforce labored relentlessly for the cause in Parliament. In his spare time, he assisted organizations to spread the word about the inhumanity of one man's owning another. Working closely with Clarkson's group, he endured and overcame just about every obstacle imaginable, including ill health, derision from his colleagues, and defeats almost too numerous to count.[11]

Every year he introduced an abolition measure, and

10 Kay Marshall Strom, Once Blind: The Life of John Newton 225 (IVP Books 2008).

11 Belmonte, *supra* note 9.

every time for 18 long years, it went nowhere. At least once, some of his own allies deserted him because the opposition gave them free tickets to attend the theater during a crucial vote. (They were the so-called "moderates" on the issue.)

In the meantime, Clarkson translated his prize-winning essay from Latin into English and supervised its distribution by the tens of thousands. He helped organize boycotts of the West Indian rum and sugar produced with slave labor. He gave lectures and sermons. He wrote many articles and at least two books. He helped British seamen escape from the slave-carrying ships they were pressed into against their will. He filed murder charges in courts to draw attention to the actions of fiendish slave ship captains. He convinced witnesses to speak. He gathered testimony, rustled up petition signatures by the thousands, and smuggled evidence from under the very noses of his adversaries. His life was threatened many times, and once,

surrounded by an angry mob, he very nearly lost it.

The long hours, the often thankless and seemingly fruitless forays to uncover evidence, the risks and the costs that came in every form, the many low points when it looked like the world was against him—all of that went on and on, year after year. No setback ever deterred the iron wills of these two great men.

When Britain went to war with France in 1793, Clarkson and his committee saw their early progress in winning converts evaporate. The opposition in Parliament argued that abandoning the slave trade would only hand a lucrative business to a formidable enemy. And the public saw winning the war as more important than freeing people of another color and another continent. In the House of Commons, Wilberforce was denigrated as a traitor in cahoots with Clarkson the troublemaker.

At Clarkson's instigation, a diagram of a slave ship became a tool in the debate. Depicting hundreds of slaves

crammed like sardines in horrible conditions, it proved to be pivotal in winning over the public.[12]

Clarkson's organization also enlisted the help of famed pottery maker Josiah Wedgwood in producing a famous medallion. It bore the image of a kneeling, chained black man, uttering the words, "Am I not a man and a brother?"

The effort finally paid off. The tide of public opinion swung firmly to the abolitionists in the early 1800s. The trade in slaves was outlawed by act of Parliament when it approved one of Wilberforce's bills in 1807, some 20 years after Clarkson formed his committee. 26 more years of laborious effort were required before Britain passed legislation in 1833 to free all slaves within its realm.

The abolition of slavery within the British Empire took effect in 1834, 49 years after Clarkson's epiphany on a country road. It became a model for

12 Hochschild, *supra* note 4, at 308.

peaceful emancipation everywhere. Wilberforce died shortly afterward, but his friend devoted much of the next 13 years to the movement to end the scourge of slavery and improve the lot of former slaves worldwide.

Clarkson died at the age of 86 in 1846. He had been the last living member of the committee that gathered at that London print shop back in 1787. Hochschild tells us that the throngs of mourners "included many Quakers, and the men among them made an almost unprecedented departure from sacred custom" by removing their hats.

In *Thomas Clarkson: A Biography*, Ellen Gibson Wilson summed up her subject well when she wrote of this man from the little village of Wisbech: "Thomas Clarkson (1760–1846) was almost too good to be true—courageous, visionary, disciplined, self-sacrificing—a man who gave a long life almost entirely to the service of people he never met in lands he never saw."[13]

13 Ellen Gibson White, Thomas Clarkson: A Biography (St. Martin's Press 1990).

The Parliament that once scorned Wilberforce resolved when he died that he should be buried near his friend and ally, Prime Minister William Pitt, in the north transept of London's Westminster Abbey. Beneath a statue of Wilberforce seated in a chair reads this lengthy inscription:

> To the memory of William Wilberforce (born in Hull, August 24th, 1759, died in London July 29th, 1833). For nearly half a century a member of the House of Commons and, for six parliaments during that period, one of the two representatives for Yorkshire. In an age and country fertile in great and good men, he was among the foremost of those who fixed the character of their times; because to high and various talents, to warm benevolence, and to universal candor, he added the abiding eloquence of a Christian life. Eminent as he was in every department of public labor, and a leader in every work of charity, whether to relieve the temporal or the spiritual wants of his fellow-men, his name will ever be specially identified with those exertions which, by the blessing of God, removed from England the guilt of the African slave trade, and prepared the way for the abolition of slavery in every colony of the Empire: In the prosecution of these objects he relied, not in vain, on God. But in the progress he was called to endure great obloquy and great opposition. He outlived, however, all enmity; and in the evening of his days, withdrew from public life and public observation to the bosom of his family. Yet he died not unnoticed or forgotten by his country. The peers and commons of England, with the Lord Chancellor and the Speaker at their head, in solemn procession from their respective houses, carried him to his fitting place among the mighty dead around, here to repose: Till, through the merits of Jesus Christ, his only redeemer and savior (whom, in his life and in his writings he had desired to glorify), he shall rise in the resurrection of the just.[14]

The lessons of the lives of Thomas Clarkson and William Wilberforce reduce to this: a worthy goal should inspire informed activism. Do not let any setback slow you up. Maintain an optimism worthy of the goal itself and do all within your character and power to rally others to the cause. Clarkson and Wilberforce, to their eternal credit, proved that even the most entrenched of laws and policies can be changed by people of courage, character, and conscience.

14 *Memorial to William Wilberforce (Westminster Abbey, London),* The Nat'l Archives https://www.nationalarchives.gov.uk/pathways/blackhistory/journeys/virtual_tour_html/transcripts/wilberforce.htm (last visited Mar. 30, 2021).

SICKENING AND CYCLICAL: COVID-19 AND ITS IMPACT ON THE CURRENT BUSINESS CYCLE

Michael Reese '21

ABSTRACT: *As the COVID-19 pandemic progressed, there were significant government interventions in the market. This paper is concerned with the business cycle and the role of regime uncertainty on investment and will not be addressing the effects on economic growth that may be occurring. The government-mandated shutdown, paired with the CARES Act stimulus of the economy, created unique circumstances for the current business cycle. It affected the way traditional Austrian Business Cycle theory will manifest itself. The shutdown of the economy and severe monetary intervention during the COVID pandemic have not been seen in American history. As the pandemic has continued, unemployment has skyrocketed, and as has the welfare state in taking over the unemployed's support. Although inflation has had its typical effects in the short run during a boom, there is still an apparent manifestation of the business cycle. This business cycle is incredibly unique for this very reason.*

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I. Introduction

The scale of government intervention in the economy has drastically increased following the COVID-19 pandemic. When COVID-19 began its spread, there was much uncertainty about how it could be stopped. Governors of certain states closed the economies in their states with the exclusion of business and industries deemed "essential." During this time, there was economic turmoil and many shortages in those industries that were deemed essential. These industries were ones that the government believed to be vital to the survival of the nation. The shutdown of the economy resulted in significant unemployment, which led to a government increase in the welfare state. The federal government released the Coronavirus Aid Relief and Economic Security Act (CARES) stimulus package in March of 2020. As months went by, there seemed to be improvement in the economy based on what the economic indicators were saying, and towards June, it seemed like

recovery was imminent. However, as the later months of 2020 unfolded, a new wave of COVID cases prompted another intervention into the economy.

As many governors closed down their states' economies in response to surges of new cases, the constitutionality of these actions has come into question. There are many courts that are ruling on these constitutional issues, which will have significant economic implications. When analyzing the effects of policy, the economist must set aside the ethical and constitutional validity of these government practices. This paper is concerned with the business cycle and the role of regime uncertainty on investment. It will not be addressing the effects on economic growth that may be occurring. The government-mandated shutdown paired with the CARES Act stimulus of the economy created unique circumstances for the current business cycle and affected the way traditional Austrian business cycle theory will manifest itself.

II. Reviewing the Literature

The first and most relevant literature to discuss is that literature on business cycle theory. After surveying this literature to establish our theoretical ground for economic analysis, this paper will overview the literature on regime uncertainty as elucidated by the economist Robert Higgs.

A. Austrian Business Cycle Theory

The CARES Act stimulus severely increased the money supply. The massive increase in the money supply will have major effects on consumption habits, interest rates, and many other aspects of the market. Business cycle theory is the field of study economists use to tease out the effects of changes in the money supply. It is one of the most debated aspects of economics due to the vast number of schools of thought. Though it is too daunting a task to address all these schools of thought in this paper, it is essential to establish what school of thought will be used in the present analysis, followed by some of the

literature that is being written by mainstream economists about economic shutdowns.

The Austrian understanding of the business cycle has been developed and furthered by some of the greatest economists, such as Mises, Hayek, Rothbard, Woods, Hazlitt, de Soto, and many others. The Austrian theory's understanding is based fundamentally on human action, which is the foundation on which the rest of the theory relies. Since humans apply means according to their preferences to achieve ends, certain economic laws have been discovered. The law of time preference is the foundation for understanding interest rates.[1] The law of marginal utility is the foundation for the understanding of inflation and its effects. In his book *Human Action*, Mises helps to frame all of this in the context of its intertemporal nature. All the previously listed authors and many others have made significant contributions to the Austrian theory

1 Ludwig von Mises: Human Action: A Treatise on Economics 4449 (Martino 2012) (1949).

of the business cycle. The Austrian theory couples the short and long term, which makes it more applicable and plausible to understand the real world. There are many critiques of the other mainstream schools worth researching, but these critiques will not be discussed outside of the context surrounding COVID-19.[2]

To support the claim that the economic shutdowns have impacted the business cycle, we must first understand the cycle theory this paper is utilizing. To establish an understanding of the business cycle, I will consult Woods, Hazlitt, Mises, Hayek, Rothbard, and de Soto. Tom Woods book *Meltdown* also helps to frame the most relevant parts from their arguments in the 2008 financial crisis context. During a boom, the government causes monetary inflation that will, in turn, lower interest rates and the purchasing power of money.[3] It is important to remember that

2 Henry Hazlitt, Failure of the New Economics: An Analysis of Keynesian Fallacies 98 (Van Nostrand Co 2017) (1959).
3 *Id.* at 98.

interest rates are the price of loanable funds. This price is influenced by changes in demand and supply in the same way as all other commodity prices are. Therefore, there will be signals to the market that come from the lowering of the rate of interest.[4] The government causes monetary inflation when assets are purchased from banks, allowing them to increase their reserves. These purchases allow banks to create the credit which has been generated from the intentional inflation. During credit expansion, lenders give funds to increasingly riskier ventures. The regular and most efficient market lines of production have already been undertaken, thus new market entrants must take less efficient production lines. This credit creation will have incentivized entrepreneurs to take out loans to expand their capital structures because the interest rate has signaled them to do so. The lower the interest rate, the less return individuals receive for their saving and investing.

4 *Id*. at 132.

The purchasing of more specific capital items creates asset price inflation and the lengthening of the production structure.[5] The production structure is lengthened because the profits earned from inflation increase the demand for factors of production higher in the production structure. This brings about the Cantillon Effect, meaning that the first people to spend the new money have an advantage over the rest of the market because the purchasing power has yet to adjust. This means increased profits can be found where there were none before. Durable goods' production increases far past market demand, determined by people's time preferences, creating a cluster of malinvestment and errors.[6] Loans that entrepreneurs have received will be put toward bidding for capital goods and will make false profits occur along the production structure. The inflation and credit expansion will have concentrated profits in

5 Friedrich A. Hayek, Profits. Interest, and Investment 80-81 (Augustus M. Kelly 1969) (1939).

6 Thomas E. Woods, Meltdown: A Free-Market Look At Why The Stock Market Collapses, the Economy Tanked, and Government Bailouts Will Make Things Worse (2009).

specific lines, creating what many refer to as a bubble.[7]

In the crisis phase, when the actual market demand is demonstrated by those who received lines of credit as profit, a crash will occur because these goods far exceeded the market demand. These lines of credit in production form bubbles. This will reduce the supply of credit from the amount generated during the boom. Interest rates will begin to rise according to time preferences. Many investors will start to pull out of their riskier projects when it becomes clear that time preferences are not satisfied. During this part of the crisis, there will be a financial panic. However, those entrepreneurs with superior foresight have already begun the liquidation of their assets in an attempt to not suffer as badly when the asset prices drop. Higher interest rates and lower demand for capital goods will cause the capital value to collapse. Lower capital value leads to losses for those engaged in the lengthening of the

7 Jesus Huerta De Soto, Money, Bank Credit, And Economic Cycles 349 (Melinda A. Stroup trans, Ludwig von Mises Inst. 2006).

production structure while rewarding those who shortened it by either not borrowing during credit expansion or by liquidating before the crisis.[8]

The bust will occur when entrepreneurs who engaged in expansion without superior foresight begin their liquidation, which is known as the reallocation phase. They will sell their assets for significant losses to where the market can use them to satisfy consumer preferences better. The more specific to boom production the capital is, the less value it is going to have when it is reallocated. Banks will also fail during this time due to illiquidity and insolvency created during expansion.[9] Credit will contract, and interest rates will decline because, even though the contraction of available credit increases interest rates, people after the crisis are already inclined to save enough that it makes the interest rate decrease. Purchasing power will rise during this time due to deflation, and this may

8 Mises, *supra* note 1, at 110.
9 De Soto, *supra* note 7, at 366.

lead the government to inflate. Still, the banks will keep the attempted reinflation as reserves after the suspicion due to concerns created by the panic they had just suffered.[10]

The recovery phase comes after reallocation is complete. It can be observed that there is no inflation or deflation, credit expansion or contraction, and that capital values normalize, prompting standard economic progress to resume. This is a simplified version of the Austrian perspective of the business cycle.

B. Regime Uncertainty

During the Great Depression, there was an evident drought of private investment shown by the drop of investment to GDP ratio from 1929 to 1932. In 1929 private investment made up 16% of GDP, and in 1932 it was down to 2% of GDP.[11] There was also a massive increase in government intervention in the economy.

10 *Id*. at 367.
11 Robert Higgs, Regime Uncertainty: Why the Great Depression Lasted So Long and Why Prosperity Resumed after the War, 1 The Independent rev. 561, 565 (1997).

Higgs was not satisfied with the simple Keynesian explanation that the Animal Spirits were simply telling people not to invest. No one had yet put together that the lack of private investment not only exacerbated the Great Depression but also was a rational response to government interventions that business owners had. The significant threat of extreme taxes on income and the state's possible overtaking of production made owners very hesitant to reinvest in companies. Due to the uncertainty created by state intervention, the Great Depression was exacerbated. This theory of uncertainty is based on entrepreneurs' responses to the changing of present institutions.[12] These institutions are best thought of as "rules of the game." The entrepreneurs will adapt their strategy to operate most efficiently within the confines of these rules. However, when the rules change suddenly, so does the entire game. Before the intervention, the best way to "win the game"

12 *Id.*

(achieve one's ends) would have been to provide a good or service more efficiently than a competitor in order to earn a profit. However, if the rules are changed so that the government can take one's profit through taxes, the game's objective has been changed. The ends and the means available to achieve these ends that the entrepreneurs seek are different from before. This may make activities such as lobbying and other seeking of special privilege more profitable. When governments change the institutional structure, it forces entrepreneurs to adapt and make changes.

C. Austrian's CARE(S)

In his writing for the Mises Wire, Douglas French shows that the CARES Act's stimulus is merely "kicking the can" further down the road. He shows that many banks are not receiving cash but are marking debts as being paid due to the intervention's nature. This raises the question: "How is this intervention affecting the business cycle?" French says that the crisis of the business cycle is

still coming but has just been delayed. The banks giving this treatment to their debt will have to recognize losses eventually.[13] This would provide a causal implication that the business cycle will soon be coming into a crisis phase.

The International Journal of Banking recently published an article focused on the modeling of the CARES Act on the unemployment rate and consumption over the next few years. It makes the interesting claim that with or without the CARES stimulus, the economy would eventually end up at the same performance point on economic indicators according to their consumption and unemployment models. However, it seems that their primary contribution to the literature is that they would take standard unemployment models and consumption models but add special sections of data to account for the situation that COVID has provided. They added a "deeply

13 Douglas French, How the CARES Act Is Still Kicking the Can, MISES INSTITUTE (Aug. 20, 2020), https://mises.org/wire/how-cares-act-still-kicking-can.

unemployed" and a negative shock to the marginal propensity to consume to make the scenario more specific to COVID.[14] Hazlitt's critique of the "Marginal Propensity to Consume" makes it clear that there are significant issues with this concept that it should not be used for analysis.[15] Although there is much to critique in this interpretation of data and the methodology, that is not our purpose. This work does not show any causality in the real-world changes that would affect human activity and has no root in microeconomics. For this reason, it seems that this interpretation is not very plausible.

III. Theory Applied to COVID-19

A. The Theoretical Economic Shutdown

To best understand the significant changes that occur to the business cycle when an economy is shut down, it helps to think of a hypothetical case where only one area

14 Christopher D. Carroll, Edmund Crawley, Jiri Slacalek, and Matthew N. White, Modeling the Consumption Response to the CARES Act, in FIN. AND ECON. DISCUSSION SERIES 2020-077. (Board of Governors of the Federal Reserve System, 2020), https://doi.org/10.17016/feds.2020.077.
15 HAZLITT, *supra* note 2, at 98-131.

of the market can be open. If a single sector of the market is open and a group of people is given a stimulus package that will be perceived as an increase in their real income, they will either spend the new income in the open market or save/invest their money. There is a difference in incentives for each option and a difference in the implications of these decisions. If the people choose to save, this means that they prefer to retain their money to deal with future uncertainty. If people spend their money in this sector because they perceive the stimulus as extra income, then the new money will affect the open market by increasing market prices. It is important to note that these two options are not mutually exclusive and could overlap, even within each person's decisions. The open market will see an increase in the demand for the open market's product due to the increased spending in their market. The incentive for this industry is to spend new profits on expanding their production process and capital goods. However, they will

not be able to do this since these capital-producing parts of the economy are shut down. The inability to exchange means that the price inflation will not affect the capital assets until the market production sectors open again. This means that price inflation will not create a bubble in these markets. However, there will be a change that occurs when the full market reopens. People will now have more options to spend their money. The producers that were able to operate and earn profits during the shutdown can finally buy assets. If this occurs, there will be asset price inflation.[16] When people begin spending money in other places in the market, the open industries during the shutdown may also see a decrease in profits. In this case, the price inflation seen during the lockdown will likely return to average proportion with the rest of the price inflation throughout the economy. This inflation will be

16 Murray N. Rothbard, Man, Economy, and State: A Treatist on Economic Principles with Power and Market: Government and the Economy, 869 (2nd ed. Ludwig von Mises Institute 2009).

distributed as it usually would be in the market and cause asset price inflation.

B. Business Cycle Specific to the Shutdown and CARES Act

The CARES Act authorized the spending of $2.2 trillion on stimulus. The government gave part of this stimulus directly to households and individuals. Many different parts of this act allotted this money to the individual. Persons whose incomes were $99,000 per year or less were given $1,200. There were differences in the allocation of these grants based on dependents and household size. There were also significant increases in the government unemployment compensation for those who lost their job during the pandemic. The other part of this stimulus was given to businesses to aid them in paying off debts and rents. This act was a more substantially significant increase in spending than what has ever been seen before, even outdoing the stimulus of the "Great Recession" of

2009 that was only a mere $831 billion (unadjusted to inflation). With such a substantial increase, the economist could have a small heart attack as they watch the monetary base increased by $1.5 trillion over the course of a few months. It rose from around $3.5 trillion to over $5 trillion between January and March of 2020.[17] Thus, the question now becomes: "Does the Austrian theory previously developed earlier in the paper hold to the real world?"

As one would guess, I believe the theory does hold. The first economic indicator worth considering is the prices for certain goods in industries that are deemed essential. The food industry was one of the parts of the market that remained open throughout the country, as it was deemed essential. After the stimulus was distributed, the Consumer Price Index jumped from 262 in March to 269 in June of 2020. This is significant inflation for a single industry to have in such a short time. It is almost half of

17 United States Money Supply M0 2019, TRADING ECONOMICS (May 11, 2019), https://tradingeconomics.com/united-states/money-supply-m0.

the price inflation seen in the entire year of 2008 when the last major stimulus bill was distributed, yet this was only a three-month period.[18] However, when the market economy began to reopen in June in many conservative states, the CPI for the food industry stopped inflating, decreased slightly, and then held steady. This is consistent with the theory that when the market is allowed to reopen, people will no longer spend their stimulus in the same ways that they did before. It means that the open industries will not have the same demand that was being shown for their products as they did during the initial shutdown. Prices at this point should inflate throughout the market.

Another sector of the market that was significantly affected was industrial gas manufacturing. Although this industry itself was allowed to stay open, it nonetheless suffered from operating at a reduced capacity. However,

18 Consumer Price Index for All Urban Consumers: Food and Beverages in U.S. City Average, Fed. Res. Econ. Data, https://fred.stlouisfed.org/series/CPIFABSL (last visited Mar. 25, 2021).

many of the industries that use this gas saw a great reduction in their demand. Most likely this was due to the massive travel restrictions that were being enforced throughout the United States. The industrial gas manufacturing industry saw price deflation dropping nearly 17 points on the Consumer Price Index.[19] The massive inflation could not circulate according to the demands of a normal open market and sectors of the economy that were shut down saw none of the profits from the stimulus.

Another industry that was hit particularly hard by government regulation and a subsequent drop in demand was the airline industry. This industry dropped on the CPI from 294.6 to 248.8. Early in the pandemic, almost all domestic flights were being canceled, and international travel was nearly impossible. Along with government intervention, there was also the perception that flying was not safe due to the pandemic's contagious nature.

19 *Id.*

Similar falls were seen in industries that produced apparel and other goods deemed non-essential.[20] Such relative deflations in the more COVID-19 regulated industries and inflations in the less COVID-19 regulated industries support the theory that inflation will manifest itself into the open sectors of the economy.

C. Show Me the Money

It is also important to acknowledge the other areas where the new money from the CARES Act was allocated. A significant amount of this money was used to relieve debt. Many businesses received loans and aid from the government. There were a significant number of businesses that used this aid to pay their rent. The companies that were not profitable and on the verge of closing down received bailouts from the government. The bank excess reserves represent an indicator of how companies operated during

20 Table 7. Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, by Expenditure Category, 12-Month Analysis Table, U.S. Bureau of Lab. Stat. (Mar. 10, 2021), https://www.bls.gov/news.release/cpi.t07.htm#cpipress7.f.4.

this time. Such reserves saw increases of $1.4 trillion. This indicates that banks received the subsidies and inflation during the crisis instead of the usual rent and interest owed by borrowers. This was a way in which the debt was being dealt with. This gives banks the option to lend more later on.

The S&P 500 took a significant drop at the beginning of the pandemic, losing approximately 1,000 points in March, dropping from around 3,000 points at the beginning of March. As the bailouts were given to companies, there was a significant increase in the stock market that trended upward until June. These bailouts mitigated investors' negative expectations and allowed for a temporary rise in stock prices despite companies' inability to produce.[21] Bond prices saw a similar trend, dropping around 300 points in March, then rising through June.[22] The mainstream

21 S&P 500, FED. RES. ECON. DATA (Apr. 20, 2020), https://fred.stlouisfed.org/series/SP500.

22 ICE BofA US High Yield Index Total Return Index Value, FED. RES. ECON. DATA (Nov. 26, 2020), https://fred.stlouisfed.org/series/BAMLHYH0A0HYM2TRIV.

analysis of this data is that the faith in the government's ability to pay back bonds was restored quickly. These indicators also show that the government bailouts and subsidized rent payments allowed businesses to survive while not being productive. The short-term problem is in what inflation is doing to the rest of the economy and its resource allocation. However, the financial market seems to give a clear indication of the consumers' preferences. There were significant stock and bond price increases after the stimulus was distributed. This came from the understanding that individuals also have a propensity to save in the face of uncertainty. Rather than spending all their money in the open market, many chose to invest it or save it. This saving will be part of the increase in bank reserves by over a trillion dollars, as shown by the data from the St. Louis Fed in the discussion of debt payments.[23] These options can provide a better understanding of what

23 Excess Reserves of Depository Institutions, FED. RES. ECON. DATA (Sep. 10, 2020), https://fred.stlouisfed.org/series/EXCSRESNS.

these preferences are.

Another factor influencing individual's decisions was the interest rates during March that were artificially pushed down to zero. The rates for stocks and bonds continued upward as the stimulus was distributed. The artificially lowered interest rate disincentivized saving. This is shown in the Austrian understanding of the business cycle when the Federal Reserve inflates again during the bust phase. If this inflation achieves its ends, it creates another boom.

Many banks were being helped through the bailouts given to businesses. These banks were able to simply mark that the debts that were owed to them were being paid. Banks also saw their reserves increase exponentially. According to the St. Louis Federal Reserve, the excess reserves of banks from February to April increased from $1.5 trillion to $2.9 trillion. This is significant because the bank's excess reserves will allow for greater ability to lend

later in the business cycle after the lockdowns have lifted enough for allocation to occur.[24] Robert Murphy also points out that the excess reserves also lend themselves to the possibility that these financial institutions will start buying treasury debt. This is concerning because it will also allow the money to be spent in the economy by the government. This spending will be in the hopes of stimulating the economy to an even greater extent than that of what was previously done.[25]

IV. A Comparative Case

A. The United States versus Sweden

In studying comparisons that had to do with the COVID-19 pandemic and the effects of an economic shutdown, one country stood out as a good model for comparison with the United States. Sweden had a minimal amount of regulation that was implemented in their

24 Excess Reserves of Depository Institutions, FED. RES. ECON. DATA (Sep. 10, 2020), https://fred.stlouisfed.org/series/EXCSRESNS.
25 Robert P. Murphy, Are the Excess Reserves Finally Leaking Out?, MISES INSTITUTE (Apr. 22, 2010), https://mises.org/wire/are-excess-reserves-finally-leaking-out.

response to the pandemic. As could be predicted, many pro-interventionist sources have heavily criticized the Swedish government response. However, for this paper, it serves as a great benchmark.

The United States saw significant inflation in the prices of industries not locked down, as discussed earlier. Food prices in U.S. cities increased by 9 points on the CPI from March to June. Those industries that were closed or heavily affected by intervention saw deflation during these months.[26] As the theory would indicate, without the closing of the economy, there would not have been such massive price changes in these specific industries.

The Swedish food prices are an excellent example of the consumer preferences being manifested without government intervention limitations. Their price inflation in 2020 was not outside the usual amount from the previous years.[27] Actual food prices saw a decrease in comparison

26 Consumer Price Index, *supra* note 18.
27 Consumer Price Index (CPI). STATISTISKA CENTRALBYRÅN (2019),

to both 2019 and 2018. Another interesting point is that the prices of gasoline showed increases in comparison with other years. As stated previously, the United States saw the opposite effect with its price inflation.[28] Sweden also saw price inflation in its clothing prices. This was an area of the American economy that was heavily impacted by COVID preventative interventions. The American economy witnessed a drop in clothing prices by 3 points according to the CPI.[29] In contrast, the Swedish citizens saw their clothing prices rise around 7 points.[30] These are not perfect comparisons, but they show that prices will increase in the open or "essential" sectors of an economy.

A possible criticism might be that since Sweden did not inflate their currency in the way the United States did,

https://www.scb.se/en/finding-statistics/statistics-by-subject-area/prices-and-consumption/consumer-price-index/consumer-price-index-cpi/.

28 Inflation Rate Dropped to 0.3 Percent in September 2020, STATISTISKA CENTRALBYRÅN (October 13, 2020), https://www.scb.se/en/finding-statistics/statistics-by-subject-area/prices-and-consumption/consumer-price-index/consumer-price-index-cpi/pong/statistical-news/consumer-price-index-cpi-september-2020/.

29 Consumer Price Index, *supra* note 18.

30 Inflation Rate Dropped, *supra* note 28.

but this comparison is irrelevant because inflation impacts the way consumers act. Although this is true, the point of the comparison is to show that despite the inflationary monetary policy, when an economy is closed down, people's ability to express their preferences is dulled. This comparison also helped further illustrate that there were lines of price inflation in those industries that could remain open during the mandatory shutdown in the United States. Those same industries in Sweden saw opposite results. The best critique of this comparison is that Swedish and American people's preferences are too dissimilar for any comparison to be made. However, the food market could be an accurate measurement because all humans have a large preference for food and other life-sustaining commodities.

B. Florida versus New York

Within the United States, there were varying degrees of economic shutdowns. The state of Florida had almost no shutdowns, even during the pandemic's peak. In contrast,

New York had significant shutdowns, and New York City itself was one of the most heavily intervened in areas in the country. Theory tells us that in states with significant lockdowns, the industries that remain open will see price inflation but no asset price inflation. This is due to the inability to purchase capital goods and services during this shutdown. Understanding the business cycle tells us that there will be significant asset price inflation if there is no shutdown, and the market is operating normally. Does the data of these two states support this?

To answer this question, the housing prices for the City of Tampa and New York City must be examined. Housing prices are useful for determining asset price inflation because they are immovable assets and land prices contribute to their value. Land is an original factor of production, and therefore its increase in value is indicative of what asset prices are. The increase in land prices gives light to the extent to which the new money is causing asset

price inflation. Housing prices for New York City saw almost no change during March, April, May, and June. They did not even vary a point on the CPI.[31] However, after this, when the city began to reopen in June, there was a significant spike in these prices that has continued into October. From March until October the prices moved from 203 to 215 on their index value. The previous year only saw approximately a one-point increase.[32] The City of Tampa saw a rise of 3 points during this time.[33] This is a significant difference in comparing these two cities, and the previous trends before any shutdowns were enforced. It confirms that the shutdown economies did not experience asset price inflation until they were reopened and allowed to continue with their business.

This means that after the closed industries are opened, there is bidding for production factors that will

31 Case Shiller Home Price Index 2020, STATISTA (November 5, 2020).
32 *Id*.
33 *Id*.

allow for inflation to spread throughout the production structure. This causes the asset price inflation that is theorized about by Austrian economists during the boom phase of the business cycle.

V. Regime Uncertainty

A. Application to COVID Interventions

It is no secret that government intervention exercised during this year has been completely unprecedented in this country's history. In a new and unique way, it has been called into question whether there is a constitutional right to work. Parties have taken to the courts to stop the forced closure of economic activity. There is no way to tell exactly what is going to happen in any of these court cases. Shutdowns of the economy changed many of the incentive structures businesses had. There are many cases of small businesses that were not able to sustain the closure and had to go out of business. On the other hand, many of the marginal firms that were on the brink of having

to close were able to receive financial support from the CARES Act and remain open. This again changed how the entrepreneur is incentivized.

As Higgs has shown earlier, when government intervenes in unprecedented ways, it creates much uncertainty for the entrepreneur. There is now the question of if and when this power will be used again. Entrepreneurs can have their entire business closed if the government deems it necessary. This makes reinvestment into their business significantly more costly than it was before. This means that they are much more likely to want to save their money. It could even result in a shift into industries that were deemed "essential" to minimize the cost of uncertainty. There are extreme similarities between the uncertainty of the Great Depression of the 1930s and the uncertainty faced now due to the massive government interference hindering many capitalists' ability to reap the profits from their business endeavors. The theory of

regime uncertainty indicates that entrepreneurs will not be investing back into their companies due to the heightened ambiguity surrounding the possible future returns.

B. Court Cases

After months of suffering from the results of a strict shutdown, the Michigan Supreme Court has ruled that their statewide lockdown was unconstitutional. During the time that preceded this ruling, there was extreme uncertainty about whether the government would allow many industries to reopen. This court decision should finally bring peace into the minds of the entrepreneur. However, the state's citizens once again run into the problem that the government has no restrictions to make it keep its word. The governor declared a brand-new set of restrictions only a month after this ruling that will again significantly affect businesses. The newest edict states that almost all businesses must function at 30% capacity. It also closed many indoor facilities that were not deemed

essential.

In the mind of the entrepreneur, this calls into question if the constitution is a reasonable restraint on the government. This raises uncertainty again for entrepreneurs. In many states, it seems that there is no safety from governmental intervention until this pandemic is over. Even after the pandemic is finished, the question will remain as to whether the government will use this power again for the next problem that it deems to be a crisis.

C. Great Depression, WWII, and the Pandemic

As Higgs writes on regime uncertainty, he illustrates that there are costs to the threat of imposition. Higgs claims that the lack of private investment was the cause of the length of the Great Depression. He also demonstrates that government imposition and spending cannot compensate for private investment. Standards of living are significantly lower when there is a significant

lack of private investment. And, as he points out, in World War II, even when the GDP increased, it did not reflect the standard of living or private investment. However, he is the first person to make the causal link that government intervention exacerbates the dearth of private investment. In the aftermath of the lockdowns, there will be severe uncertainty about government interventions and their use. As business cycle theory has told us, there will soon be a bust and reallocation since there have been massive amounts of inflation. However, if there is still such unprecedented uncertainty in entrepreneurs' minds, this may result in a situation where there is a long period in which there is little to no private investment.

D. Harm to Economic Calculation

To pair with the general uncertainty regarding intervention, there is also significant dilution of economic calculation. Industries that might earn profits during the shutdown will be unsure whether this is the actual

manifestation of preferences. Industries that suffered heavy losses will also be unsure what the actual demand for their product is. The firms that would have been profitable but were shut down are also at a disadvantage because they have less money to bid for scarce resources. The firms that remained open also had the advantage of the Cantillon Effect. Their money's purchasing power was significantly higher than those who receive the money last or not at all. There is also the concern that since the money supply was inflated it is now unclear how much people's savings are worth. The conclusion of all this will result in a dramatic increase in the uncertainty all people within society face.

E. The Tension

Many recognize that there seems to be a tension between applying the business cycle theory regarding asset price inflation advanced in this paper and the theory of regime uncertainty. Asset price inflation relies on the notion that entrepreneurs will reinvest in their businesses

with the new money created in inflation. However, both are merely examples of the incentives that entrepreneurs are currently facing. The fact that the inflation in consumer prices has not increased to the scale of the stimulus is a sign that there is heightened uncertainty in the mind of the entrepreneur. Even in areas where the state had minimal intervention, asset prices did not rise to scale with the stimulus, even though they did rise. The point of this is that there are two incentives to do different things with one's money. It is likely that some will choose to reinvest in their company with the inflationary money that they received as income, and those who are more cautious will not reinvest in their endeavors. Which incentive is stronger, however, depends on how one chooses to interpret the data.

VI. Conclusion

The shutdown of the economy and severe monetary intervention which occurred during the COVID pandemic has not been seen before in American history. As the

pandemic has continued, unemployment has skyrocketed and so has the welfare state in taking over the support of the unemployed. Although inflation has had its typical effects in the short run during a boom, there is still an apparent manifestation of the business cycle. This business cycle is incredibly unique for this very reason.

The Consumer Price Index tells us that some regions of the economy experienced inflation. Such inflation, however, was not to the scale of the stimulus. This is due to society's preference to save and the lack of possible exchange created by the shutdown. The lines of production that saw this inflation will have a reallocation that occurs during the reopening of closed sectors of the market, during which time consumer demands will be able to be better expressed. The resulting inflation of the CARES Act will then be able to fully circulate through the economy. Typical price inflation and the continuation of the boom phase of the business cycle will be seen until it

reaches its crisis. The uncertainty of institutional change will be expressed in the reinvestment by entrepreneurs into their endeavors. It is also currently being expressed by the increased savings that Americans are participating in to better adapt for future uncertainty.

THE LOCHNER COURT AND THE NEW DEAL

Anna Claire Rowlands '22

ABSTRACT: *The New Deal era was one of the most politically charged and transformative times in American history. Most of the attention is rightly focused on the vast array of new social programs forged during that time; however many critics of the New Deal place blame at the feet of the Supreme Court. The narrative goes that the Supreme court, abandoning the good judicial interpretation of previous generations, allowed Franklin Roosevelt to have his way due to political pressure. The strong implication of this critique is that the Court did something fundamentally new when it judged cases based on popular economic policies rather than an originalist understanding of the Constitution. The irony of this position is that the New Deal era Court was mimicking the tactics of the previous Court in the legacy of the Republican era. The previous Court actively promoted laissez-faire economic policies through their rulings, most notably in the infamous* Lochner v. New York *decision. It was actually due to this precedent of Lochner era court that laid the groundwork for the judicial activism prevalent in the New Deal era court.*

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One of the biggest debates throughout constitutional history has been whether judges' political beliefs should be guides in their rulings. In our modern context, left-leaning political figures tend to argue that the Supreme Court should judge based on their personal views on rights while conservatives insist that judges should stick to an originalist interpretation of the Constitution. When judges opt to push personal agendas through their decisions, they mean well. They think that the ends justify the means and that by stretching the literal interpretation of the law, they can promote something they deem good for society. There may be situations where this is the case. However, not all judicial activism ultimately pays off. When judges separate the ideas they are trying to promote from any legitimate grounding in previous law, they run the risk of having such ideas quickly removed as soon as they lose power. One of the best examples of judicial activism gone awry is not from a left-leaning court but from politically

conservative judges during the early twentieth century. In *Lochner v. New York 1905,* the Court majority abandoned the traditional view of contracts to promote a new absolute right of contract born out of laissez-faire economics instead of constitutional analysis. The beginnings of this theory began to take root right after the Civil War and the passage of the Fourteenth Amendment. The ideas promoted in *Lochner* were originally presented in the dissent of the *Slaughter-House Cases* in 1873, but it was not until 1905, after years of development during the Industrial Revolution, that the Supreme Court codified the concept of a right of contract into law. By introducing the notion of absolute economic rights, creating an authority vacuum for police powers, and associating their position with bold faced agenda, the *Lochner* court undermined their own position and helped open the door for the New Deal.

In order to make sense of the *Lochner* decision, it is important to realize that the absolute right of contract was

not upheld by the Court before this case. Even as early as the Marshall court, protecting contracts was held as a "high and solemn duty." At that time, however, contracts were being discussed and defined in completely different terms.[1] In *Trustees of Dartmouth College v. Woodward*, when John Marshall was ruling on an issue of constitutional protections of contract, he did not start with general precepts of justice or fundamental rights of citizenship.[2] Instead, he started by examining the Contracts Clause of the Constitution, which bans states from passing any "law impairing the Obligation of Contracts."[3] In addition, he established that the Court was required to uphold only "those contracts which the Constitution of our country has placed beyond legislative control."[4] This meant he was asserting that the Constitution did not assume all contracts were automatically protected just by nature of being contracts. Rather, the intention

1 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819).
2 Slaughter-House Cases, 83 US 36 (1873).
3 U.S. Const. art. I, §10, cl. 1.
4 *Woodward*, 17 U.S. at 625.

of the law provided for specific protections for specific contracts. The only reason Marshall ruled to uphold the contract in *Trustees of Dartmouth College v. Woodward* was because he examined the details of the case and found the specific contract to qualify for protected status under the Contracts Clause. It was not until after the Civil War that a new vision for contracts started to take shape. In fact, the very first case to be heard under the Fourteenth Amendment, the *Slaughter-House Cases,* was one of the first times that members of the Supreme Court presented a fully formed doctrine of a right of contract. Even though the *Slaughter-House Cases* majority ruled in favor of the traditional priority of police powers over contract rights, the dissents presented all the essential pieces of the right of contract that were later established in *Lochner v. New York.*

The two most important things the *Slaughter-House* dissent presented were that the right of contract is

fundamental—meaning it is one of the most basic rights guaranteed in a free republic—and that it took priority over police powers. The *Slaughter-House Cases'* dissent broke away from the view of contracts presented in the Marshall court mostly by separating it from the text of the Constitution. While Marshall in *Dartmouth* is very careful to trace the exact textual basis for protection of contract in the Constitution and only reached the conclusion that the specific contract was legitimate after doing this analysis, the *Slaughter-House* dissent flipped this process on its head. Justice Field claimed that "even if the Constitution were silent, the fundamental privileges…would be no less real and no less inviolable than they are now," or, in other words, right of contract is something so sacred that it does not even need to be based in the Constitution to demand being supported by the Supreme Court.[5] This idea was codified in *Lochner v. New York.* Aligning with the

5 *Slaughter-House*, 83 US at 119.

majority opinion, Justice Peckham doubled down on the right of contract as fundamental, saying "the general right to make a contract…is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[6] In doing so, he moved from Marshall's view that specific types of contracts were protected to claiming that the very act of making a contract is a sacred right of all Americans and must always be protected.

Lochner then broke even farther away from precedent by directly challenging police powers. The Court needed to put a strong barrier between state power and their newly created right of contract, so they limited state police power to situations when state legislation has a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power

6 Lochner v. New York, 198 U.S. 45, 53 (1905).

to contract in relation to his own labor.[7]

This extra stipulation was critical because it reversed which right was assumed as the default. Justice Peckham established this shift in the *Lochner* majority when he tried to distinguish between the professions of a baker and that of a miner or any other profession whose work hours were already being regulated for safety reasons. He reasoned that the only grounds that states had to limit working hours in these professions was that overworking miners could directly lead to their death.[8] In effect, he meant that unless there was a strong correlation between a provision and the prevention of death, then the limit was illegitimate. The implication of this was that states could only use their police powers if they could prove that it would directly preserve human life. By the time the *Lochner* court had finished creating their new understanding of contract rights, they had changed them from conditional to absolute while also

7 *Id*. at 57.
8 *Id*. at 62.

reducing states' police powers to only true emergencies.

The problem with the reasoning of the *Lochner* majority is that the absolute right of contract is simply not in the Constitution. Justice Hughes pointed out this fact in 1937 in *West Coast Hotel Co. v. Parrish,* when he overturned the precedent of *Lochner.* He wrote, "the Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty."[9] This analysis is exactly right. The reason no court until *Lochner* had upheld anything looking like a right of contract was that the Constitution, by itself, does not lead to an absolute right of the individual to contract himself without any regulation.

The question, then, is why did the *Lochner* court abandon the old interpretation for such an extreme

9 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

position? The answer appears to be exactly what the Court was accused of in the case's own dissent: the judges were pursuing a political agenda. In his majority opinion, Justice Peckham showed his hand by asking fearfully if "[we are] all, on that account, at the mercy of legislative majorities?" and insisting that if we do not enforce the absolute right of contract, then "no trade, no occupation, no mode of earning one's living could escape this all-pervading power." In short, the Court had to take a no-compromise stand on the right of contract because otherwise "the acts of the legislature in limiting the hours of labor in all employments would be valid, even if such limitation might seriously cripple the ability of the laborer to support himself and his family."[10] The true motivation behind the Court's decision was the fear of state power encroaching on the power of individual, not an accurate reading of constitutional protection of the right of contract. *Lochner*

10 *Lochner*, 198 U.S. at 59.

argued backwards—looking to the potential legislative consequences of ruling in favor of police powers rather than starting with the Constitution and court precedent.

With the arrival of the Great Depression, the decision to abandon good legal interpretation in favor of pushing laissez-faire economics created opportunities for progressives to more effectively undermine the conservative agenda. One way this happened was that framing contracts as a fundamental right gave President Franklin Roosevelt (FDR) the opportunity to make a similar argument for his own vision. Like the *Lochner* court, FDR believed that individuals had certain absolute economic rights. The real difference was that the *Lochner* court believed individuals had a negative right to not have their contracts tampered with, while FDR believed that individuals had a positive right to have certain economic goods, such as a job, given to them. In a speech to Congress, FDR was very intentional about using the

language of rights, especially economic rights, to describe the plan that would eventually morph into the New Deal. He claimed that "in our day these economic truths have become accepted as self-evident," drawing on the language of the Declaration of Independence.[11] However, the way he described his new economic bill of rights also drew on more recent rhetoric of the right of contract decisions. Throughout his speeches and writings, FDR insisted that these rights were "essential" and that without them there could be no free democracy.[12] Both of these strongly parallel the language used in cases like *Lochner* and the *Slaughter-House* dissent, which referred to the right of contract as "fundamental" and insisted that without them there could be no free citizens.[13] While there is little reason to think that FDR was making this link intentionally, and

11 Gerhard Peters and John T. Woolley, *Franklin D. Roosevelt, State of the Union Message to Congress,* The American Presidency Project, https://www.presidency.ucsb.edu/node/210825 (last visited Mar. 4, 2021) (1944).
12 Gerhard Peters and John T. Woolley, *Franklin D. Roosevelt, Annual Message to Congress on the State of the Union,* The American Presidency Project, https://www.presidency.ucsb.edu/node/209473 (last visited Mar. 4, 2021) (1941).
13 *Slaughter-House*, 83 US.

he probably would have tried to make this transition even without the existence of the *Lochner* case, the ideas that were drafted in the *Lochner* court helped prepare the intellectual groundwork for FDR. This introduced the idea of absolute economic rights and started weaving it into the mindset of the Court. FDR may have introduced an entirely new economic plan, but the concept that individuals were entitled to some type of absolute economic rights was already in the air thanks to the *Lochner* court.

Another unforeseen consequence of the *Lochner* decision was the way it helped to start a shift in federalism that took off during the New Deal. Specifically, the New Deal era redefined the relationship between state and federal power by giving the federal government such vast powers to implement the New Deal. One of the biggest impacts of New Deal legislation was that several key court cases gave unprecedented power to the federal government at the expense of state governments. Over the course of

a few decades, states went from having their own clear sphere of influence to cases such as *Wickard v. Filburn,* granting the federal government such broad commerce power that it could control every aspect of activity within a state.[14]

This shift, much like the origination of fundamental economic rights, was started during the era of the *Lochner* court. For most of the Court's history, the states were allotted broad powers to regulate activity within their own state. The Court upheld this "traditional" scope of power as late as the *Slaughter-House Cases*.[15] However, in *Lochner*, the power of the state to regulate the wellbeing of citizens was limited in cases considering the right of contract to only instances where the law could trace a direct link between an act and loss of life. This was held to such a degree that in the dissent in *West Coast Hotel Co. v. Parrish,* conservative-leaning judges were still arguing that police

14 Wickard v. Filburn, 317 US 111 (1942).
15 *Slaughter-House*, 83 US.

powers were the "exception and had to be proven that there were exception circumstances."[16] Debasing police powers in this way was dangerous because it endangered limits on commerce power. Part of the reason why *United States v. E.C. Knight Co.* supported strong state police powers was that "it is vital that the independence of the commercial power and of the police power, and the delimitation 'between them, however sometimes perplexing, should always be recognized and observed.'"[17] By damaging this vital delimitation for the sake of the right of contract, the *Lochner* era rulings effectively hamstrung the states' ability to regulate trade and employment for their citizens, consistently having such regulations struck down by the Supreme Court.

However, just because the states were blocked from regulating trade within their own borders did not mean that the problems with trade disappeared. All these legal battles

16 West Coast Hotel Company v. Parrish, 300 US 406 (1973).
17 United States v. E.C. Knight Co., 156 US 1, 13 (1895).

were happening against the backdrop of the Industrial Revolution, and the fact that so many court cases from this era were about regulating monopolies or imposing limits on work hours reflects the upheaval surrounding labor policy in this era. The Court's efforts to hamper states in their traditional prerogative to step in and regulate these situations did not take away from the people's desire for someone or something to intervene. This desire was only heightened by the very real catastrophe of the Great Depression, which left millions of Americans without jobs. Amid the power vacuum created by the Court's attack on police powers, FDR presented his plan for a New Deal. The New Deal became a type of federal police power to replace the missing role of the old, full-fledged state police powers, providing for the health and wellbeing of the citizens of the United States in a way the states had traditionally been tasked with doing, maybe even to a further extent.[18]

18 Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483, 495 (1997).

While there is no way to evaluate the counterfactual of what would have happened if the *Lochner* decision had never happened, it is quite possible that states would have increasingly used their police powers to counter the imbalances of the Industrial Revolution. Then, perhaps, there would not have been such a gaping power vacuum for the New Deal to step into. At the very least, *Lochner* left the door wide open for progressive reformers who had long wanted to increase federal power.

Yet another way that the efforts of *Lochner* actually worked against that court's goals was through their obvious association with political agendas. This critique was brought up even in the *Lochner* dissent and was a rallying point for progressive opposition that saw the Court's ruling as a thinly veiled attempt to use the Constitution to prop up laissez-faire economics. This position was first presented in the dissent of *Lochner*, with Justice Holmes leading his dissent by claiming that "this case is decided

upon an economic theory which a large part of the country does not entertain."[19] The fact that there was vocal critique of *Lochner's* motives from within the Supreme Court itself was capitalized on by progressives of the time, who then used this as the main line of attack for the next several decades.

FDR simply followed in this tradition by also accusing the Court of his time, still mostly controlled by the same sorts of judges as during the *Lochner* era, of pushing laissez-faire agendas.[20] In his "Fireside Chat on Court Packing Plan," he was able to credibly assert that "the Court has not been acting as a judicial body, but as a policymaking body."[21] He supported this assertion by pointing to the opinions of other judges, saying, "That is not only my accusation. It is the accusation of most

19 Lochner v. New York, 198 US 45, 75 (1905).
20 David Strauss, *Why Was Lochner Wrong*, 70 U. Chi. L. Rev. 373 (2003).
21 Franklin D. Roosevelt, *Fireside Chat on Court-Packing Plan, in* American Constitutionalism Vol I 434 (Howard Gillman, Mark Graber, & Keith Whittington, eds., Oxford U. Press 1st ed., 2013) (1937).

distinguished justices of the present Supreme Court."[22] FDR's opinion was further underscored by his appointment of Justice Hugo Black to the Supreme Court, who was one of the strongest critics of the motives behind the *Lochner* decision and was heavily influential in undoing its legacy.[23] By choosing to abandon good lawmaking in favor of pushing a specific favored political agenda, the judges of the *Lochner* era delegitimized their own position. Instead of presenting a more moderate version of the right of contract, rooted in constitutional analysis and linked to precedent, they opted to completely disconnect their argument from precedent and the Constitution, making it that much easier for their successors to immediately discard the entire concept.

In addition, by making the right of contract so strong, the Court alienated the American people. At the time that Franklin Roosevelt was proposing his radical New Deal,

22 *Id.* at 435.
23 Strauss, *supra* note 20.

there were "industrial workers with low wages, dangerous working conditions, and eroded bargaining power. Massive agricultural surpluses meant that farmers could not sell enough crops to make a living. Millions were laid off. The country starved."[24] This situation has traditionally been attributed to the years of laissez-faire policies encouraged by the *Lochner* precedent.[25] Since public polling was a new and notoriously inaccurate tool at that point in US history, it was difficult to accurately gauge the exact response the average American had to the *Lochner* case specifically. But their frustration rang loud and clear through the election of FDR and the general approval of his policy reforms in the first one hundred days of his term.[26] By refusing to compromise even remotely on the right of contract, the *Lochner* court managed to frustrate the people until their

24 Matthew Ding, *The Switch in Time that Saved Nine: The Supreme Court's Conflict and Compromise on New Deal Legislation*, Iowa Department of Cultural Affairs, https://iowaculture.gov/sites/default/files/history-education-nhd-projects-categories-sample-switch-paper.pdf (last visited Mar. 4, 2021).
25 *Id.*
26 *Id.* For a good example of this, see the 1936 Literary Digest Poll that predicted that FDR would lose the election.

elected leader could easily convince them to support him in overturning their efforts.

If this was not damaging enough, the *Lochner* court's own dabbling in judicial activism made it much harder for them to protest when the progressives used the Court to support the New Deal. The right of contract precedent connected the idea of absolute economic rights with the federal government, directly ensuring that such economic rights were provided to Americans. Since the right of contract was a negative right, the only action the government needed in order to ensure it was to prevent anything from encroaching on individuals contracting amongst themselves. However, FDR and the New Deal were proposing positive economic rights, like a guarantee to quality education. In order to provide those absolute economic rights, the federal government would have to be significantly larger and more powerful. So, even though *Lochner* and the New Deal had diametrically

opposed stances on the size and scope of the government, they both reached their conclusions from the premise of absolute economic rights for the individual American. This idea was not originally proposed by the New Deal but by the *Lochner* decision. Since the government had to actively support legislation that guaranteed Americans were getting their economic rights, the progressives used cases like *Wickard v. Filburn* to shamelessly stretch the meaning of the Commerce Clause as far as it took for FDR to provide Americans with such economic rights.[27] Like the old story of the oak that snapped in the thunderstorm because it did not know how to bend, the uncompromising nature of *Lochner's* vision of contract rights made it easier to completely discard them when a genuine economic crisis arose.

After all the work the *Lochner* era court put into creating and defending right of contract, it was their own

27 Wickard v. Filburn, 317 US 111 (1942).

poor decision that ensured it would never last. By trying to make right of contract absolute and utterly inviolable, they ensured that people discarded the entire laissez-faire economic philosophy. The reality of the Court is that a particular legal philosophy can be quickly removed as soon as new judges are in place, and new judges can be put in place as soon as the people lose faith in the Court's legal philosophy and support a president who changes the makeup of the Court. The first of these consequences for the *Lochner* court was that all the precedent they had designed to establish the right of contract was overturned in a single court case decision with very little pushback from the American people.[28] While there were undoubtedly attempts from *Lochner* critics to undermine the case politically, the legal precedent remained solid until being completely overturned in one fell stroke. A more detrimental consequence was that they created

28 West Coast Hotel Company v. Parrish, 300 US 379 (1973).

the very legal philosophies the New Deal appropriated to take root. They introduced the idea that individuals had absolute economic rights and that these rights were absolutely guaranteed by the federal government. By limiting the state's ability to take care of its citizens during the Industrial Revolution, they helped create a case for why the New Deal was needed as millions of Americans felt exploited by unregulated trade. The great irony of the *Lochner* case is that, by being so resolute in supporting laissez-faire economics, they straw-manned their own position and subsequently made it easier to discard it once it became inconvenient. The *Lochner* case is a stark reminder that chasing after immediate political goals can have disastrous, unintended consequences in the long term. It is also a reminder that judicial activism is only as effective as the judge's control on the court is strong.

KILLING THEM SOFTLY: THE UNINTENDED CONSEQUENCES OF MINIMUM WAGE POLICY

Jack Everett '21

ABSTRACT: *In 1995 Card and Kreuger wrote* Myth and Measurement: The New Economics of the Minimum Wage*. This book challenged the long-held consensus among the economics profession that minimum wages had necessarily negative employment effects. It spawned hundreds of papers in response. However, the profession has been so preoccupied with employment effects that it has neglected other adjustments made after minimum wage hikes. This paper sets employment effects aside, exploring and assessing other consequences of minimum wage hikes that affect both worker compensation and worker composition. I explore the theoretical and empirical evidence for reductions in working hours, health insurance, on-the-job training, and poorer working conditions. Looking at composition, the paper displays the logical progression of a surplus of labor leading to discrimination in hiring based on personal preferences and skill level. Ultimately, this paper challenges the notion that minimum wages are an effective way of accomplishing their stated goals and asserts that the many other channels of adjustment must examined by policymakers.*

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I. Introduction

Weeks after entering the Oval Office, President Biden made it clear that increasing the federal minimum wage is a priority for his administration. Though not surprising given the Obama administration's long-held favor of higher wages, Biden's explicit support for a $15 minimum wage reignited the heated debate over minimum wage policy. Many states have already bought in, passing substantial minimum wage hikes in the past decade. Yet, as with every policy, the question must be asked: is it really that simple? Economics papers on the employment effects of minimum wage are abundant. Policymakers can choose from hundreds of papers with conflicting findings to support whichever outcome they desire. Evidence in favor of minimum wages based on their positive or neutral employment effects is easily accessible.[1] However, in

1 See David Card & Alan B. Krueger, Myth and Measurement: The New Economics of the Minimum Wage (Princeton University Press 1995); and Dube, Lester, and Reich, *Minimum Wage Effects Across State Borders: Estimates Using Contiguous Counties,* THE REVIEW OF ECONOMICS & STATISTICS, 92, 945-964 (2010).

the past three decades, employment effects of minimum wages have been the sole focus. Other than Ippolata 2003 and Hirsch, Kaufman, and Zelenska 2011, the economics profession has largely ignored other notable consequences to minimum wage laws. This paper sets employment effects aside, important as they may be, focusing on equally important and grievously underexamined compensation and employee composition effects. This paper also sets aside minimum wage-induced firm adjustments that do not affect employees, such as product price adjustment. Understanding that firms adjust differently based on various constraints, this paper aims to provide a more holistic and nuanced analysis of minimum wage consequences to individual employees. This analysis yields an unavoidable conclusion: minimum wages carry numerous negative consequences that must be weighed whenever the policy is considered.

While the minimum wage debate has been ongoing

in economics for centuries, its intensity has increased markedly in recent decades. Before examining the nuances of this debate, it is important to examine the history of these laws. Minimum wages were first called for in 19th century Britain as unions lobbied for improved working conditions and sought to 'democratize' unregulated industries. Australia beat them to the punch, however, enacting the first minimum wage law in 1894. The United Kingdom followed suit in 1909 with the minimum wage applying only to industries such as chain making and paper-box making. In the United States, the minimum wage was viewed as a moral obligation by some companies. Before the government mandated minimum wages, many companies used it as a marketing tool hoping to appeal to the ethical sensibilities of consumers. Massachusetts became the first state to require a minimum wage in the United States in 1914. In 1938, in a flurry of legislation motivated by the Great Depression, a federal minimum

wage law was passed as part of the Fair Labor Standards Act. From the outset, minimum wages have been called for to improve the conditions of the poor and to help them reach self-sufficiency.[2] Whether minimum wage policy is effective in achieving these goals is rarely evaluated.

As stated previously, the most recent economic debate on minimum wage laws has centered around employment effects. Statements on "wage fixing laws" can be traced back to Adam Smith's premise that the market for men is like the market for goods, arguing for a "labor market" in which wages are determined as prices are in other markets.[3] John Stuart Mill held a similar position in 1848, writing "If law or opinion succeeds in fixing wages above this [competitive] rate, some laborers are kept out of employment."[4] In 1897, Alfred Marshall

2 DAVID NEUMARK & WILLIAM L. WASCHER, MINIMUM WAGES (The Massachusets Institute of Technology Press 2008).
3 Paul J. McNulty, *Adam Smith's Concept of Labor,* THE J. OF THE HIST. OF IDEAS 352, 345-366 (1973).
4 John Stuart Mill, *Principles of Political Economy, in* THE COLLECTED WORKS OF JOHN STUART MILL 195 (PergamonMedia, 2015) (1848).

encouraged economists to "fight conventional wisdom on minimum wages, not because one disagrees with the goal of alleviating poverty among the working poor, but because minimum wages do more harm than good."[5] This brief survey of statements from major economists shows that employment effects of wage fixing laws were largely agreed upon in the profession.

II. A Review of Minimum Wage Literature

This consensus underwent its first major assault with the publishing of Card and Krueger's *Myth and Measurement: The New Economics of the Minimum Wage.* This groundbreaking exploration of employment effects cast a century of consensus into doubt. In the introduction of the book, Card and Krueger write, "Such a high degree of consensus is remarkable in a profession renowned for its bitter disagreements. But there is one problem: the evidence is not singularly agreed that increases in the minimum

5 Alfred Marshall, *The Old Generation of Economists and the New,* Quarterly Journal of Economics (1897).

wage reduce employment."[6] *Myth and Measurement* boils down to four key findings. First, empirical research conducted by Card and Kreuger finds positive or neutral employment effects of a minimum wage hike. Second, they find no adverse effect on teenage employment. Third, they do not see a reduction of "fringe benefits" in lieu of job cuts. Finally, they argue that minimum wages reduce wage dispersion and help tackle wage inequality. These findings have been controversial, with hundreds of papers written in support of and criticizing them. To Card's and Kreuger's credit, they were able to identify certain situations where a higher minimum wage boosted employment, even briefly exploring certain "fringe benefits" that might have been reduced in order to accommodate the higher cost of labor. Only partial credit can be awarded, however, because Card and Krueger fail to consider many common adjustment channels (benefits, working hours, on-the-job

6 David Card & Alan B. Krueger, Myth and Measurement: The New Economics of the Minimum Wage (Princeton University Press 1995).

training). It is worth noting that it is because the book is flawed that it has garnered so much popularity. Its flaws had economists rushing to defend it with more studies as well as economists rushing to destroy it. Had it been a bullet-proof dismantling of conventional wisdom there would be nothing to do other than to modify our textbooks. Had it been blatantly misleading, faulty, or fallacious, it would have been ignored. The book is somewhat of an enigma, walking the line between breakthrough and simply anomalous data sets. Its importance to this paper is twofold. First, it cast doubt on employment effects: how else do firms adjust to a higher cost of labor? Secondly, its generation of continual preoccupation with employment effects has resulted in a major hole in economic literature.

The second economic work that must be addressed here is Neumark and Wascher's *Minimum Wages*. This 2008 book surveys over two decades of research conducted on minimum wage laws (including *Myth*

and Measurement) and offers a few studies of its own. In this incredibly thorough adjudication of nearly 35 research papers, Neumark and Wascher explore the history of minimum wages, their effects on employment, distributional effects on both wages and family incomes, the possible effects on training and skill acquisition, and the broader economic effects. In the end, they find "quite clearly" that minimum wage hikes lead to "a reduction in employment opportunities for low-skilled and directly affected workers."[7] They also find no evidence for positive distribution effects for families at or below the poverty line which is extremely important considering the policies' often stated goals. Finally, they find negative effects on skill acquisition by "reducing educational attainment and perhaps training."[8] Along with Card and Kreuger, to their credit, Neumark and Wascher also consider adjustments other than employment. Their chapter on skill acquisition

7 NEUMARK & WASCHER, *supra* note 1.
8 *Id.*

and training adds another piece to the puzzle, but it is not a complete analysis. The findings of the book are a direct refutation of *Myth and Measurement*, and its diligent reiteration of all available literature is quite compelling. *Minimum Wages* comfortably reasserts the consensus view of negative employment effects, but that has not stopped policy makers from continuing to reference the numerous studies displaying positive employment effects. In their concluding statements, Neumark and Wascher acknowledge "the existing body of minimum wage research has tended to overemphasize the effects of minimum wages on employment…such analysis represents only one piece of what is needed to assess whether minimum wages are a useful policy tool."[9]

The final economic work that warrants attention is Hirsch, Kaufman, and Zelenska's "Minimum Wage Channels of Adjustment." This 2011 paper analyzes

9 *Id.*

the federal minimum wage increases of 2007-2009 by tracking the "adjustment channels" of fast-food restaurants in Georgia and Alabama. They "recast analysis of the minimum wage into a broad 'channels of adjustment framework,' moving well beyond the conventional emphasis on employment/hours effects."[10] Hirsch, Kaufman, and Zelenska assert correctly that the economic literature for the past few decades has had tunnel vision, focusing almost solely on employment effects. They broaden that scope of assessment to hours, prices, turnover, training, performance standards, and non-labor costs. They ultimately find no significant effect on employment or hours, attributing that to adjustment by firms "including higher prices, lower profit margins, wage compression, reduced turnover, and higher performance standards."[11] This paper is on the right track; it is the first step in filling

10 Barry T. Hirsch, Bruce E. Kaufman, and Tetyana Zelenska, Minimum Wage Channels of Adjustment (Institute for the Study of Labor 2011), http://ftp.iza.org/dp6132.pdf.
11 *Id.*

a serious hole in the literature. However, the paper finds the major adjustments caused by minimum wage policy to be the firm's pricing behavior and profit margins. They find little or no effects on employment, hours, or training: all adjustments affect the employee directly.

Before moving on from the literature review, a brief critique of minimum wage literature that shows positive or neutral employment effects is necessary. Most, if not all papers in this vein of research study specific industries that are "bound" by minimum wage laws. Most often, that means these studies look at fast food restaurants because this industry employs more minimum wage workers than any other. By basing conclusions on the data sets collected for a certain industry in a certain location, economists open themselves up to missing employment effects elsewhere. For example, if a minimum wage law is passed and a firm is unable to cut employees because they are already operating at minimum manpower, they will

undoubtedly cut costs elsewhere to maintain profit levels. These cost cuts come in a variety of ways, but perhaps a particular firm chooses to significantly reduce its delivery and catering capabilities. In doing so, it reduces the wear and tear on its delivery fleet, and the mechanic who is contracted to repair the fleet loses monthly business. This loss of business forces the mechanic to let go an employee. Furthermore, the auto-detailing company that cleaned the fleet after every week loses business forcing them to let go two new hires. The minimum wage law did not cause unemployment for the fast-food company, but it did cause workers in other industries to become unemployed. This hypothetical situation shows the flaw in any study that only tracks employment in the exact industry and location that they choose. The unemployment effects may look to be zero, but this is not an accurate reflection of the consequences of the law. Unemployment still takes place, but it is distributed among other businesses and industries.

To summarize the current situation, wage policy is hotly contested. The literature focuses primarily on employment effects to the detriment of those affected by these laws. Thorough investigation and evaluation of every major minimum wage work by Neumark and Wascher's *Minimum Wages* shows decidedly negative employment effects of minimum wages, despite papers saying otherwise. Furthermore, these papers showing positive or neutral employment effects are ignoring unemployment elsewhere in the economy. The Hirsch, Kaufman, and Zelenska paper puts us on the right track in examining numerous other "channels of adjustment" firms utilize in order accommodate the higher cost of labor that minimum wage laws impose, but the paper finds some counter-intuitive results which warrant a continued look at these adjustments. All in all, a comprehensive look at negative consequences of minimum wage laws is missing from the literature and is provided here.

III. Unintended Consequences of Minimum Wage Policy Affecting Compensation

Minimum wage induced adjustments that affect employees fall into two categories: compensation adjustments and composition adjustments. In both types of adjustments, the incidence of the change falls upon the employees of the firm. In other words, the employees bear the cost when these adjustments are made. After a minimum wage hike is passed, firms adapt by cutting costs in a variety of ways: cutting hours, reducing health insurance coverage, reducing on-the-job training, and diminishing working conditions. Each of these will be examined in this paper.

A. Reduction of Working Hours

Other than cutting jobs, the simplest way to accommodate the mandate for higher wages is to reduce hours for employees. A survey of 324 New York City full-service dining establishments conducted after the

$15-dollar minimum wage was passed found that "75 percent plan to cut hours and 47 percent forecast eliminating some positions entirely in response to the minimum wage increase."[12] Policymakers should expect firms to adjust along these lines post-hike. Card and Krueger famously fail to include total hours worked in their New Jersey, Pennsylvania fast food data. This is one of the many criticisms of their paper. Neumark and Wascher, in a separate response paper looking at the same industry and locations used by Card and Krueger, find that "in broad terms the evidence in this paper suggests strongly that the introduction of the minimum wage led to a reduction in the paid working hours of both male and female low wage workers."[13] This adjustment diminishes the power behind any minimum wage hike. If I make more per hour but my

12 *Misleading Restaurant Employment Study,* NYC Hospitality Alliance (2018), https://www.thenycalliance.org/information/misleading-restaurant-employment-study.
13 Mark B. Stewart & Joanna K. Swaffield, *The Other Margin: Do Minimum Wages Cause Working Hours Adjustments for Low-Wage Workers?,* 75 Economica, 148-167 (2008).

labor hours are cut to adjust to that, then I am no better off. That being said, many recent papers have included "total hours worked" in their data. Using state-level panel data, Zavodny finds a significant negative effect on employment, but insignificant reductions in average hours per worker.[14] Couch and Wittenburg, on the other hand, find total hour elasticities that were negative and 25 to 30 percent larger than those for employment.[15] Furthermore, after a minimum wage hike in Seattle, a team of researchers from the University of Washington discovered the following: "Our preferred estimates suggest that the Seattle Minimum Wage Ordinance caused hours worked by low-skilled workers (i.e., those earning under $19 per hour) to fall by 9.4 percent during the three quarters when the minimum wage was $13 per hour, resulting in a loss of 3.5 million hours worked per calendar quarter. Alternative estimates

14 Madeline Zavodny, *The effect of the Minimum Wage on Employment and Hours,* 7 Labor Economics, 729-750 (2000).
15 Kenneth Couch & David Wittenburg, *The Response of Hours of Work to Increases in the Minimum Wage,* 68 Southern Economic Journal, 171-177 (2001).

show the number of low-wage jobs declined by 6.8 percent, which represents a loss of more than 5,000 jobs."[16] This higher minimum wage resulted in a massive loss of hours worked per quarter and resulted in a sizeable 6.8 percent loss in low-wage jobs. More work is required in this area of research, but one can confidently name hour reduction as one of the channels through which firms cut costs given a minimum wage hike. Furthermore, it can simply be said that if a firm does not reduce hours or employees, then it has adjusted in one of the other channels.

B. Reduction of Health Insurance

Another way that firms adjust compensation is through a reduction in "fringe benefits." One would expect to see less health insurance coverage and less on-the-job training. Workers receive compensation in two ways: cash and non-cash. Minimum wage hikes force employers

16 Ekaterina Jardim et al., Minimum Wage Increases, Wages, and Low-Wage Employment: Evidence from Seattle (National Bureau of Economic Research 2018), https://www.nber.org/papers/w23532.

towards higher cash compensation which often leads to a reduction in the non-cash. With non-wage compensation accounting for 25 percent of total compensation[17], policy affecting this area is not trivial. This non-cash reduction is often expressed in a loss of health care coverage. In search of empirical evidence for this expectation, a 2003 paper by Simon and Kaestner used CPS data from 1979-2000 and found no discernable effects of minimum wage laws on "fringe benefits" including health insurance.[18] However, a 2018 study conducted by Clemens, Kahn, and Meer finds "robust evidence that state level minimum wage changes decreased the likelihood that individuals report having employer-sponsored health insurance. Effects are largest among workers in very low-paying occupations."[19]

17 Brooks Pierce, *Compensation Inequality,* 116 Quarterly Journal of Economics, 1493-1525 (2001).

18 Kosali Ilayperuma Simon & Robert Kaestner, Do Minimum Wages Affect Non-Wage Job Attributes? Evidence on Fringe Benefits and Working Conditions (National Bureau of Economic Research 2003), https://www.nber.org/papers/w9688.

19 Jeffrey Clemens, Lisa B. Kahn, and Jonathan Meer, Dropouts Need Not Apply: The Minimum Wage and Skill Upgrading (National Bureau of Economic Research 2018), https://www.nber.org/papers/w24635.

Clemens, Kahn, and Meer's study is not only more recent, they also use insurance data which samples "roughly 20 times that of the March supplements of the CPS." While past results have been mixed, one can confidently say that this channel of adjustment is not only theoretically sound, but empirically supported.

C. Reduction of On-the-Job Training

Another unintended consequence of minimum wage laws is a loss of human capital accumulation. One typically thinks of human capital formation happening in schools (reading, writing, problem solving, etc.). However, human capital formation also takes place at the workplace in the form of on-the-job training. This on-the-job training also falls under the umbrella of "fringe benefits." When a minimum wage law is passed, this on-the-job training is a common channel of adjustment, and it is easy to illustrate. Training programs, whether for manager positions, or certifications cost money. Businesses not only pay for

these programs but typically pay the employee to take them. When labor costs rise, companies cut the frequency or total amount of these programs. Mincer and Leighton, in their paper 1980 entitled, "Effect of Minimum Wages on Human Capital Formation," showcase data showing that "minimum wages tend to discourage on-the-job training… Direct effects on job training and the corollary effects on wage growth as estimated are consistently negative and stronger at lower education levels."[20] Hashimoto's 1982 paper also suggests that young workers who manage to remain employed after a minimum wage hike may experience a reduction in training.[21] On-the-job training is an important avenue for minimum wage workers to move beyond the minimum wage, and it is reduced by minimum wage hikes. The negative effects of this reduction are compounded when one examines human capital

20 Jacob Mincer & Lina Leighton, Effect of Minimum Wages on Human Capital Formation (National Bureau of Economic Research 1980), https://www.nber.org/papers/w0441.

21 Masanori Hashimoto, *Minimum Wage Effects on Training on the Job,* 72 Am. Econ. Rev., 1070-1087 (1982).

accumulation's effect on long term earnings. Neumark and Wascher find that "recent research that studies the question more indirectly finds that teens and youths exposed to higher minimum wages have lower wages and earnings when they are in their late twenties, consistent with reduced skill acquisition."[22] When a minimum wage is higher, a young worker is less likely to receive on-the-job training, which reduces his or her ability to gain valuable skills. This lack of training leads to less long-term earnings. The policy does bump up earnings in the short-term for those who keep their jobs, but in the long term these earnings increases may simply be offset by the lost potential earnings of human capital formation.

D. Poorer Working Conditions

One can also expect working conditions to worsen as a result of an increased minimum wage. The rationale is simple, firms must cut costs to remain profitable after

22 Neumark & Wascher, *supra* note 1.

the higher labor costs are imposed, and they do so in ways that affect the working environment. Again, in this case, the incidence of the law is falling on the worker, it is simply in a different form. The cost is to their comfort while at work, and the trade-off is a dollar or two more per hour. Simon and Kaestner tackle this area of adjustment as well in their 2003 paper.[23] They find no evidence of lower quality working conditions in industries where the minimum wage was most binding. This is unsurprising for two reasons. First, they approximate working conditions by tracking on-the-job accidents. There are certainly many ways to make working conditions worse without causing a hospital visit. Less people on each shift could make work much more physically and mentally taxing without making it dangerous. Less climate control to save on energy costs could make work a more difficult place to be. Delayed upgrades in machinery, technology, and sanitation would

23 Simon & Kaestner, *supra* note 17.

also not necessarily show in this data set. The second reason it is unsurprising that Simon and Kaestner did not find negative effects on working conditions is because of the regulatory environment of the United States. The Occupational Safety and Health Administration and their vast array of regulation prevent firms from adjusting in this area. Internationally, however, one would expect to see much more adjustment along these lines. Without the oversight businesses face in the United States, minimum wage laws incentivize dangerous cost-cutting measure in less regulated countries. This is something that developing countries ought to be mindful of when examining minimum wage legislation. Regardless, more research could be very helpful in determining the severity of this affect both in the United States and abroad.

This concludes the section on the compensation effects of minimum wages. Minimum wage policy forces firms to adjust in a variety of ways that hurt the cash and non-

cash compensation of minimum wage workers. Whether it be less hours, lack of health insurance coverage, less on-the-job training, or worse working conditions, workers often bear significant costs of minimum wage policies. This fact is too often missed by lawmakers and advocates. The purported lack of employment effects is not a green light for this legislation. These other consequences must be weighed.

IV. Unintended Consequences of Minimum Wage Policy on Worker Composition

The next section of the paper deals with changes in worker composition. Even if one grants a complete lack of unemployment effects, or that the number of employed even increases, minimum wage laws still change who is employed through a labor to capital goods transition or discrimination in hiring, and this should not be overlooked. This is an underemphasized and exceptionally important consequence of minimum wage laws. The composition effects are the type of unintended consequences that every

lawmaker hopes to avoid and which every economist ought to bring to light.

A. Labor to Capital Goods Transition Accelerated

A more common but still under-analyzed consequence of minimum wage laws is the acceleration of the transition away from labor and towards capital goods. This transition is certainly at the academic forefront of economics and policy. These transitions are natural and have been taking place since the beginning of time. However, minimum wages unnecessarily accelerate the automation of certain roles, ultimately hurting those that the policy aims to help, and shrinking the number of workers earning the minimum wage. A 2018 Forbes article reports that the push for higher wages is the central reason why McDonald's is automating at an accelerated rate.[24] Cashiers will increasingly be replaced by the robots who

24 Michael Speer, *Why Is McDonald's Moving Toward Kiosks?*, Forbes (Aug. 9, 2018), https://www.forbes.com/sites/quora/2018/08/09/why-is-mcdonalds-moving-toward-kiosks/.

do not have to be paid. A 2018 Lordon and Neumark study finds that,

> Based on CPS data from 1980-2015, we find that increasing the minimum wage decreases significantly the share of automatable employment held by low-skilled workers, and increases the likelihood that lowskilled workers in automatable jobs become nonemployed or employed in worse jobs. The average effects mask significant heterogeneity by industry and demographic group, including substantive adverse effects for older, low-skilled workers in manufacturing.[25]

Lordon and Nuemark point out the negative and destructive side of the labor to capital transition. Certainly, this transition is one that will always take place, but accelerating the transition through government intervention has led to the displacement and underemployment of low-skilled workers. It is worth noting that this transition is much less viable for small businesses. Big firms like McDonald's can bear the high initial cost of purchasing and implementing

25 Grace Lordan & David Neumark, People Versus Machines: The Impact of Minimum Wages on Automatable Jobs (The National Bureau of Economic Research 2018), https://www.nber.org/papers/w23667.

kiosks and other automated technology. Smaller businesses do not have that kind of available capital and will not be able to transition in this way.

The bigger the firm, the more avenues of adjustment available to them. Small businesses have a much more limited array of available channels of adjustment, meaning the consequences of a minimum wage hike on small businesses is more severe. Small businesses cannot automate as easily, cannot reduce benefits or training (because most do not offer it in the first place), and bear a higher social cost of letting employees go. Less channels of adjustment means a higher likelihood that small businesses must simply take a profitability hit. With many minimum wage employers (like restaurants) already operating at razor thin profit margins, a minimum wage hike could mean the end of the business. Luca and Luca 2018 find that an increase in the minimum wage increases the likelihood of non-5-star restaurants going out of business. Their data

shows, "a one dollar increase in the minimum wage leads to a 14 percent increase in the likelihood of exit for a 3.5-star restaurant (which is the median rating on Yelp)."[26] Essentially, business that are unable to utilize these channels of adjustment (which are harmful in themselves) are forced to bankruptcy, dismissing more than just those at the business earning the minimum wage. Again, these consequences are neglected by the literature and warrant a more serious examination.

B. Surplus of Labor Leads to Discrimination

In the same way that neoclassical theory predicts unemployment effects of minimum wages, textbook theory also indicates that an increase in wages would cause an increase in demand for those jobs. In other words, if the reward is higher for the same work, more workers will demand that job than in the absence of the

26 Dara Lee Luca & Michael Luca, Survival of the Fittest: The Impact of the Minimum Wage on Firm Exit (Harvard Business School 2018), https://dx.doi.org/10.2139/ssrn.2951110.

increase in wage. This causes a surplus of labor which gives employers more options in their hiring process. This is not inherently harmful, but unfortunately, the surplus increases unemployment, allows for discrimination on characteristics other than productivity, and forces employers to discriminate based on skill and productivity.

The result of an increase in the minimum wage is an increase in those who want to find a job but are unable. An increase in the minimum wage entices those who were outside of the labor market to enter into it. This includes people on welfare who formerly found no reason to work. *Ceteris paribus,* the minimum wage broadens and increases the pool of applicants for each job. While this may be appealing to employers, it increases the number of frustrated applicants. The social and psychological cost of this is difficult to gauge. However, one can expect that a rise in minimum wage might cause an increase in discouraged workers. Discouraged workers are those who have not

looked for a job in the previous four weeks. Surprisingly, discouraged workers do not get counted in federal or state unemployment numbers. There are millions that fall into this category. These are people who have simply given up on finding a job; they have stopped applying. A surplus of labor would increase the number of frustrated workers who simply cannot land a job. Unemployment and crime are soundly linked, so advocates of the minimum wage must consider the trickledown effect of a rise in unemployment and discouraged workers.

C. Discrimination Based on Characteristics Unrelated to Productivity

This surplus of labor also allows businesses to engage in discriminatory hiring practices based on characteristics other than productivity. In a tight labor market where businesses are competing for productive workers, a hiring manager cannot afford to bring his own personal preferences into his hiring considerations. The

hiring manager is disincentivized from doing this because he or she will lose a productive worker, making the business less profitable. In a labor market where there is a surplus, there are plenty of equally productive workers to choose from. If that is the case, the manager can express racist, sexist, or any other preferences in his hiring process. In a world without minimum wage policy, with less demand for minimum wage jobs, this racist or sexist preference might cost the company the most productive worker. In a surplus of labor situation caused by minimum wage laws, the manager can engage in this discrimination without cost because he or she has more options.

D. Discrimination Against Low-Skill Workers

In order to understand the impact of the following composition effects, one must understand the goals of minimum wage policy. These stated goals of minimum wage laws in the United States for the past few decades have been clear: reduce poverty, aid minorities and

low-skill workers, increase the earnings of the poorest members of society. Lawmakers hope to distribute more earning power to those at the lower end of the economic spectrum. As seen above, theoretically at least, minimum wage laws seem to be acting counter-productively to these goals. They increase the likelihood that businesses reject workers based on racist, sexist, or other preferences. But this discrimination goes beyond preferences of race or gender. The discrimination caused by minimum wage laws is especially felt by low-skill workers. When a minimum wage law is passed, employers not only fire people, but they also tend to move towards higher-skill, older, more qualified workers. This is a reasonable response by employers, and the surplus of labor allows them to do so. Employers cannot be blamed for this. The government has made it illegal to hire someone for $5 an hour when that is perhaps all a certain person's labor is worth. This gets to the heart of a major issue with minimum wage laws.

The fact is many workers do not produce $15 worth of value in an hour. Their work is worth $12, or even $5 an hour. In a world with a lower minimum wage, a business could comfortably hire young, less dependable, less-skilled workers and teach them the value of hard work and responsibility. In a world with a higher minimum wage, businesses cannot afford to take that kind of risk, or bear the cost of a worker who cannot produce work that is worth the artificially high wage. This forces firms to shift towards more skilled, more experienced workers. Jonathan Meer adds more detail to this line of thinking when he asks,

> When wages are set at an artificially high rate, why should an employer take a risk on the single mother who needs the occasional shift off to take her kids to the doctor? The kid from a disadvantaged background who needs some direction on how to treat customers appropriately? Or the recently released felon trying to work his way back into the community? Why should employers bother with them when there are plenty of lower-risk people who are willing to work at those artificially high wages?[27]

Meer points out the theoretical argument for why one would expect to see a shift towards higher-skill, more qualified workers filling jobs post-hike. This argument is borne out in the data as well. Neumark and Wascher find that,

> Some of the more recent literature has attempted to identify these substitution effects more directly or has focused more specifically on those individuals whose wage and employment opportunities are most likely to be affected by the minimum wage, and the estimates from this line of research tend to support the notion that employers replace their lowest-skilled labor with close substitutes in response to an increase in the wage floor. As a result, minimum wages may harm the least skilled workers more than is suggested by the net disemployment effects estimated in many studies.[28]

Consistent with these empirical findings, Clemens Kahn and Meer discover that "job ads in low-wage occupations are more likely to require a high school

27 Jonathan Meer, *Hidden Costs of the Minimum Wage*, ECONLIB.ORG (April 2019), https://www.econlib.org/hidden-costs-of-the-minimum-wage/ (last visited Oct. 8, 2020).
28 NEUMARK & WASCHER, *supra* note 1.

diploma following a minimum wage hike, consistent with the evidence of employed workers."[29] In Seattle, this shift away from less-skilled workers is also evidenced in the earnings data. The same University of Washington study mentioned earlier found that "earnings gains were concentrated among more experienced workers, with the less-experienced half of Seattle's baseline low wage workforce showing no significant change."[30] While not the fault of employers, this move away from less skilled, less qualified workers has dire consequences for minorities. The Economic Policy Institute reports that, "Minimum wage workers, and low-wage workers generally, are mostly adults and are also disproportionately women and people of color."[31] This reality is problematic for two reasons. First, unemployment will affect minorities disproportionately.

29 Clemens, Kahn, and Meer, *supra* note 18.
30 Jardim et al., *supra* note 15.
31 Ben Zipperer, *Gradually raising the minimum wage to $15 would be good for workers, good for businesses, and good for the economy*, Econ. Pol'y Inst. (Feb. 7, 2019), https://www.epi.org/publication/minimum-wage-testimony-feb-2019/.

The wealthy white teenager who can show up to work every day and has his high school diploma will not be the first to go when jobs cuts are taking place. Unfortunately, the first to be let go will be the black single mom who misses shifts occasionally, or the young Hispanic girl who has trouble with English. This consequence of minimum wages must be acknowledged. Second, the move towards more highly qualified candidates favors white youths to black youths. John Smith reports in his 2013 paper that,

> When faced with legislated wages that exceed the productivity of some workers, firms will make adjustments in their use of labor. One adjustment is not only to hire fewer youths but also to seek among them the more highly qualified candidates. It turns out for a number of socioeconomic reasons that white youths, more often than their black counterparts, have higher levels of educational attainment and training. Therefore, a law that discriminates against low-skilled workers can be expected to place a heavier burden on black youths than on white ones.[32]

32 John Smith, Why Does the Minimum Wage Have No Discernable Effect on Employment (Center for Economic Policy and Research 2013), https://cepr.net/documents/publications/min-wage-2013-02.pdf.

Deere, Murphy, and Welch, as well as Sabia, Burkhauser, and Hansen come to similar conclusions in their papers. Again, these consequences are born by those this policy directly aims to help. That is not simply ironic; it is tragic.

E. Delayed Entrance into the Workforce

This minimum wage generated discrimination against low-skill workers in the labor market has long-term consequences. When employers move away from the young and inexperienced to the more qualified, more experienced workers they delay the entrance into the workforce for young people. In doing so, they reduce lifetime incomes for young people and increase the number of discouraged workers. Charlene Kalenkoski published a 2016 paper that concluded: "While some working youth will benefit from increased current earnings, others will suffer from reduced opportunities and lower lifetime earnings. Delays in labor market entry and work experience

will reduce lifetime incomes for youths who are unable to find employment because of the minimum wage."[33] Reduced opportunities for entry for youths, brought about by a surplus of labor, job cuts by firms, and a move to more experienced labor will cost young people greatly in the long run. The quicker you can enter the workforce, the higher your earning potential will be. By making it more difficult for young people to attain employment, minimum wage laws could very well be doing more harm than good when one compares reduced life-long incomes and the short term earnings boost for those who were able to find a job. Furthermore, the surplus of labor, and an inability for youth to find employment will lead to an increase in discouraged workers.

V. Conclusion

In his famous book, *Economics in One Lesson*,

33 Charlene Marie Kalenkoski, The effects of minimum wages on youth employment and income (Institute for the Study of Labor 2016), https://www.econstor.eu/bitstream/10419/148468/1/iza-wol-243.pdf.

Henry Hazlitt outlines the task of the good economist: "The bad economist sees only what immediately strikes the eye; the good economist also looks beyond. The bad economist sees only the direct consequences of a proposed course; the good economist looks also at the longer and indirect consequences."[34] This principle is the driving force behind this paper. Economists and lawmakers alike have fallen into the trap of looking only at the short-term, direct effects of minimum wage policies. Much of the motivation for the writing of this paper was observing so many advocates of these policies only cite employment effects as justification. There is much more to the story. This paper attempted to pull back the curtain and fully display the consequences of minimum wage laws for the workers earning them. Those consequences manifested in two ways: workers compensation and the composition of those employed. The paper brought forward the theoretical

34 Henry Hazlitt, Economics in One Lesson: The Shortest and Surest Way to Understand Basic Economics (Three Rivers Press 1946).

and empirical evidence for reductions in working hours, health insurance, on-the-job training, and poorer working conditions. Looking at composition, the paper displayed the logical progression of a surplus of labor leading to discrimination in hiring based on personal preferences and skill level. This discrimination disproportionately affects minorities, and ultimately delays entrance into the workforce for many, culminating in lower lifetime earnings. These underexamined negative consequences must be a part of the decisions made in local, state, and federal governments. The urgency of that statement is increased by these affects often directly harming those who the policy aims to help. As previously stated, minimum wage laws have been touted as an income redistributor, a lifeline for those in poverty, and helpful for the marginalized of our society. Unfortunately, the evidence points toward the policy harming and working counter to those very goals. The literature's preoccupation with employment effects

must end if a sound conclusion is to be drawn regarding the efficacy of minimum wage policies. This paper is a step in that direction, but many more must follow.

PROCEDURAL NATURAL LAW AS AN ENCOMPASSING INTERPRETIVE APPROACH

Reese Overholt '22

ABSTRACT: *This paper seeks to reconcile Lon Fuller's procedural natural law with more specific, critical subdisciplines of legal philosophy, like Critical Race Theory, feminist jurisprudence, legal pluralism, and international law. Fuller articulates his philosophy of law called procedural natural law in* The Morality of Law, *which defends both an externally driving force of a legal system, its external morality, and internal structures of law, its internal morality. Several subdisciplines exist within legal philosophy that seek to critique such broad and expansive philosophies as excluding the truly important debates regarding legal systems, and these subdisciplines attempt to offer criticisms of legal systems as philosophical outsiders. However, the notion of an externally driving moral force in Fuller's procedural natural law provides a comprehensive philosophy that actually provides appropriate, even necessary, ideological grounds upon which the critical subdisciplines can articulate their criticisms most effectively.*

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The discipline of legal philosophy is marked by several ideological schools of thought. These legal philosophy approaches are intended to define and describe entire legal systems, explain the function of law, and make assertions regarding the purpose of law. H. L. A. Hart's legal positivism, Oliver Wendell Holmes, Jr.'s legal realism, and natural law theory are all legal philosophies articulated for these purposes. These foundational philosophies have the tendency, however, to become an almost internal dialogue. While they are useful in addressing each other and engaging in a shared discussion, they do not welcome anyone offering a critique of their assumptions about the legal system as a whole. Those legal philosophers who articulate a new approach with distinct concerns, objectives, or considerations of law are not equipped to join their discussion. This is argued by Patricia Smith, as she describes the internal debate of scholars like H. L. A. Hart and Lon Fuller as not accessible

to other interpretative approaches. Philosophers of these alternative approaches to interpretation, including Critical Race Theory, feminist jurisprudence, legal pluralism, or international law, must critique the legal systems from the outside.[1] Smith is arguing that Hart, Fuller, Holmes, and others are making basic assumptions about the law that are invalid. Alternative legal interpretations seek to critique these assumptions. However, the legal philosophy of procedural natural law, outlined by Fuller in his *The Morality of Law*, articulates a vision of law that accounts for and allows for the incorporation of outside legal approaches, including feminist jurisprudence, Critical Race Theory, legal pluralism, and international law, as effective critiques of the fundamental morality of legal systems.

Procedural natural law fundamentally claims that

1 Patricia Smith, *Feminist Jurisprudence and the Nature of Law*, *in* READINGS IN THE PHILOSOPHY OF LAW 224-25 (Keith C. Culver & Michael Giudice eds., Broadview Press 3rd ed., 2017), (1993).

law is inherently moral, which is essential for creating the space to articulate oppositional critiques to the overarching purposes of a legal system. Human legal institutions reflect what Lon Fuller calls the morality of duty, according to which the law is designed as rules that protect and preserve society.[2] It is not the duty of law to make humans the best they can be but rather to ensure society is protected.[3] Fuller dedicates a chapter of his *The Morality of Law* to a discussion of the eight fundamental conditions of law, including intelligibility, consistency in application, and ability to be obeyed, and without any one of which no legal system can exist. These conditions are all practical requirements for a legal system, and Fuller justifies them in this chapter based on their practical and logical natures. He refers to these eight conditions as the "internal morality of law," and he claims that each of the

2 Lon L. Fuller, The Morality of Law, 6, 15, (Yale U. Press, rev. ed.1969).
3 *Id.* at 17-19.

seemingly practical conditions is predicated on morality.[4]

The institutions that comprise a legal system must necessarily be moral because legal institutions are purposive. Just as individual laws are enacted for a specific purpose, so legal systems and the institutions that comprise them must be enacted for a specific purpose. But what is that purpose?[5] Law cannot simply be an expression of authority, because then any internal structures would be secondary to the use of force by the given authority. The primary feature of legal systems that demonstrates this argument is that they are held together by an external force. Legal systems cannot, by their own authority, bind citizens to submit to them, and this general acceptance of the legal system cannot be enacted through rules or legislation. Legal systems are held together by a moral or purposive value that exists apart from the rules of the legal system. All the laws in a legal system are aimed at creating a functioning

4 *Id.* at 39-91.
5 *Id.* at 145-47.

set of rules that will achieve a specific purpose, and this purpose is the externally binding force that unites the legal system and compels citizens to adhere to it. Without this externally binding force, the laws provide no obligation to be obeyed and no compelling reason to be instantiated. This is comparable to knowing how to take a trick in a game of Hearts without knowing why one might want to do so, without being given a compelling reason to acknowledge the rules of the game. It is a feature of all legal systems that human conduct is regulated for societal benefit. Definitions of societal benefit, however, may vary. Thus, the purposive nature of law requires internal structures that, by Fuller's argument that law is intended to regulate society by means of internal structures,provide a teleological aspect of law distinct from existing laws, which allows for changes to the whole basis of law that come through alternative legal philosophies.[6]

6 *Id.* at 147-51.

The field of legal philosophy is home to several broad analyses and conceptions of law, of which procedural natural law has been explained in depth above, but it has also yielded several more specific, narrow disciplines. These subdisciplines, including feminist jurisprudence, Critical Race Theory, legal pluralism, and international law, do not seek to address overall questions of what makes a legal system or what law is. Instead, they all strive to analyze a specific subset of a legal system, expose a flaw or defect of it, and correct it. At first, these enterprises may seem to be incompatible with systematic articulations of law like Hart or Holmes's philosophies. Some philosophers in these subdisciplines, such as Patricia Smith, often feel this way. Many of these broad legal philosophies offer very little room to hear and engage with outside critiques, forming a kind of association among them as critiques that are not appropriate for legal-philosophical discussions. Fuller's procedural natural law, however, analyzes both

the internal and external elements of law, allowing for outside critiques to be heard.

The field of feminist jurisprudence is a unique approach to the law that seeks to analyze gender power structures that have been institutionalized in the law. Patricia Smith articulates the common view of all branches of radical feminism as recognizing male dominance through social constructions and legal institutions. The goal of feminism is to "reverse the institutional structures of domination."[7] Feminism is not merely intended to enact reforms and change but to deconstruct and reconstruct societal values, especially as seen in legal institutions. In Hart's legal positivist view, no justification exists for this course of action. Only the legal rules for creating a law matter in determining the legitimacy of a law.[8] Procedural natural law, however, recognizes a moral force outside of

7 Smith, *supra* note 1, at 220.
8 H. L. A. Hart, The Concept of Law¸ 110 (Paul Craig ed., Oxford U. Press 2012).

the legal institutions themselves. It is with this notion of law as a purposeful enterprise that feminist jurisprudence interacts, perhaps without even being aware of it. Catharine A. MacKinnon argues that the law "institutionalizes the power of men over women" and that "male supremacist jurisprudence erects qualities valued from the male point of view."[9] Males, as the ones who shaped and designed the legal institutions of society, are the ones who held civil power and decided social norms. The laws themselves are not necessarily unjust on their own; rather, the whole legal system is founded in male dominance and reflects the results of that. Through the feminist jurisprudential approach, legal philosophers demonstrate that something is fundamentally wrong with the morality and intention of law. The feminist jurisprudential argument of Smith and MacKinnon, which is that law is fundamentally unjust, engages with the legal theories of procedural natural law. In language familiar to Fuller's context, feminist legal

philosophers argue the moral enterprise of constructing civil society has gone awry. The claim that action must be taken to rectify the imbalance of power toward male domination is, in effect, a claim that the purpose of the legal system by which law takes its moral character has been founded wrongly. The external force binding law together, recognized uniquely in procedural natural law, currently reflects male domination and ought to be rectified by immediate action at an institutional level. This fundamental claim provides an internal impetus for change, by means of the necessary conditions of a legal system, to construct a legal system that adequately achieves its purposeful enterprise. Only in the procedural natural law system can a systemic change be undertaken, not to solve for a lack in any of the structural conditions of law but for the morality of the system itself.

The approach of Critical Race Theory shares some of the fundamental claims of feminist jurisprudence,

and, likewise, its claims about justice and morality find ideological space in Fuller's explanation of procedural natural law. As with feminism, Critical Race Theory argues that the law itself is inherently unjust, specifically by failing to protect equality of rights for all races. Richard Delgado articulates this position clearly, arguing that "civil rights and minority interests are thus worthy of protection but only insofar as they do no limit speech."[10] Delgado demonstrates that despite the stated intentions of the American judicial system, the reality is that racial justice is always a secondary concern in the legal system to more general rights like free speech.

In making this claim about a fundamentally unequal legal system, the assumption of Critical Race scholars is that there exists a more fundamental source of justice and law than merely the legislation and policies that comprise the

10 Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, in READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 239.

legal code. Delgado also expresses this distinction when he argues that there exists in the law a "disjunction between a public law full of lofty democratic precepts and aspirations, and a system of moneymaking…[which is] governed by the acquisition impulse."[11] The American democratic principles of justice and equality are demonstrated as not being upheld in the American legal system. This manifests itself not as a violation of one of the eight conditions of the internal morality of law—that of congruence between rule and action—but as an unjustly institutionalized foundation of law. To Delgado and other Critical Race philosophers, the problem is not that the system has actively racist laws but that the system enshrines a disparity between principles and enactments of justice. This is not a conflict between legitimate and illegitimate laws; rather, it is a conflict between two underlying principles of democracy—liberty and equality.[12]

11 *Id.* at 242.
12 *Id.* at 243.

Delgado's fundamental assumption is based on the underlying principles of democracy, which claim that the legal system has a morality outside itself. This assumption recognizes what Fuller asserts in his articulation of procedural natural law—the legal system is held together by some outside force connected to the moral purposiveness of law. Delgado and other Critical Race theorists, as with feminist jurisprudence theorists, critique this outside moral force. The critique made on this ground is more effective at advocating for systemic change, operating outside the legal system to address the underlying moral claims of the legal system. As Khiara Bridges points out, the goal of Critical Race Theory is ultimately to see a change in policies and institutions.[13] Fuller's conception of law as moral allows for an internal impetus for institutional change. If the legal system inherently serves a moral purpose, as Fuller

13 OLLI @Berkeley, *America's Unfinished Work: Khiara Bridges on Critical Race Theory and Current Issues*, YouTube (October 9, 2020), https://youtu.be/RmBDOeWINMs.

asserts, then claims about the justice and morality of the law's purpose should be taken seriously.

Bridges, Delgado, and others have a solid basis in arguing that, since law serves a moral purpose, we ought to ensure that morality is just and equitable. Legal systems cannot exist without that external force rooted in the law's moral, purposive enterprise. It provides clear grounds for argumentation to debate what exactly that enterprise ought to reflect, which has the likely result of bringing about practical changes in the law as it adjusts to the more just and moral foundation. Arguing on these grounds ensures changes in the law, and it also provides for the whole legal system to be evaluated on its moral basis and purposes.

The final alternative approaches to legal philosophy that can be articulated within a framework of procedural natural law are the philosophies of legal pluralism and international law. While separate disciplines, the arguments they make fall on similar grounds, especially

with respect to the way procedural natural law accounts for their arguments and assumptions.

Brian Tamanaha presents an analysis of legal pluralism that demonstrates several key elements of Fuller's argument. Tamanaha develops the idea of legal pluralism, exploring the problem of conflicting legal systems and local customs resulting especially from imperialistic and colonial history. In one case study, he discusses the situation of a judge in the Micronesian state of Yap who refuses to give up his judicial authority and, with the support of the entire Yapese legal and judicial system, continues to act as the Chief Judge despite being removed from office by the Legislature. Tamanaha proposes the explanation that the legal system imposed on Yap, as well as the rest of Micronesia, was externally applied by the United States during a colonial administrative period. The legal system of Micronesia was thus transplanted from the US and imposed on a culture that had previously been

established and was deeply rooted in Yapese society. The result of that disparity between legal system and culture is different "organizing stories," which direct people to recognize legal institutions and obey legal authorities. The two positions "didn't know or tell themselves the same story about the law and legal system."[14]

The issue of these two conflicting authorities with overlapping jurisdiction is one of moral authority. The American legal system works in the United States because it is the manifestation of the moral enterprise of American society. Likewise, Yapese society has a purposive enterprise. Society exists for some reason and has some justifying force. It is founded on some principles, and it has some shared, collective values. All of those concepts are encapsulated in the term "organizing stories" that Tamanaha utilizes. These reasons, principles, and values

14 Brian Z. Tamanaha, *Looking at Micronesia for Insights about the Nature of Law and Legal Thinking, in* Readings in the Philosophy of Law, *supra* note 1, at 246-47.

are the justifying force that enacts law. They make the force external to a legal system that justifies the legal system and authorizes its power. However, in Yap, the external force that ought to hold the legal system together exists separate from the legal system, as the legal system is an artificial addition to Yapese society. The moral enterprise of law and the institutions seeking to carry out moral enterprise do not match; they tell different organizing stories.[15]

In addition to the initial problem of the disparity in organizing stories, which can be expressed in procedural natural law, several consequences of that disparity between culture and law fit under the framework of Fuller's internal morality of law. Tamanaha writes that the lack of enforcement of the legislative decision is a result of "power wielded by the persons in the initial group" and "discourse barriers…operat[ing] to disable those outside this initial group(s) from challenging the power."[16] The legal

15 *Id.* at 253.
16 *Id.* at 250.

institutions are not upheld fully because of breakdowns in the internal morality of the law. When those with culturally given authority to make the legal system fail to enforce the law as given or when the society does not understand what the legal system says in the places it diverges from cultural traditions, two of Fuller's necessary conditions for a legal system—those of consistent administration and of intelligibility—are not met. The lack of external unifying force translates to even further institutional breakdowns in the legal authority.[17] The issues brought up by Tamanaha that explore and emphasize the conflict between legal systems and cultural authority, while a unique field of legal study, fit in the framework of procedural natural law.

International law scholars address similar legal questions as legal pluralists, focusing on the relationships between principles and law in international communities. H.L.A. Hart critiques the notion of international law as

17 Fuller, *supra* note 2, at 46-49, 63, 81.

existing without secondary rules that guide how the primary rules of law operate. Without them, he argues, international law will never be binding on sovereign nations.[18] Roger Cotterrell agrees that international law does not fit into traditional legal theories, but he does not blame this on the lack of an external force that authorizes legal systems. The limitation with traditional legal philosophy in describing international law is that international law transcends state boundaries and their individual legal systems. International law does not derive its authority exclusively from individual states, begging the question of what, if any, source of international law's authority could be binding on separate sovereign states.[19]

The answer to this question, whether Cotterrell acknowledges it or not, is also the fundamental morality of law that Fuller describes in his description of procedural

18 Hart, *supra* note 8, at 213-16.
19 Roger Cotterrell, *Transnational Communities and the Concept of Law*, *in* READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 477, 480.

natural law. In effect, Cotterrell is arguing that something holds together international law, and it is not merely individual state authority. The individual states that make treaties or agreements and engage in transnational activity are not the source of the binding nature of the whole body of international law. The binding force has to be something external to the body of law.[20]

Martti Koskenniemi seeks to explain what that binding force that compels international law is. He argues that international law is the result of political realities and choices and of normative principles. Both are necessary for a proper understanding of how international law operates and has any authority. The two aspects, the pragmatic and the idealistic, support each other in giving credence and legitimacy to the functioning of international law as a body.[21] This claim of Koskenniemi operates on procedural

20 Fuller, *supra* note 2, at 148.
21 Martti Koskenniemi, *The Politics of International Law*, *in* Readings in the Philosophy of Law, *supra* note 1, at 456-59, 468.

natural law grounds. His argument for the source of law's authority and legitimacy is that there exists an external aspect of law that makes it binding. It is held together by some purposive enterprise that guides law, varied as its sources may be. Because the external, binding, and driving condition of political reality and principled idealism are met in international law, disputes can arise among nation-states who engage in international law about whether law is generalized or fair or administered evenly. Disputes about what international law should look like indicate a general assent to the overarching principles that establish international law as a body of law, tacitly agreeing to the binding notion of the legal system to argue about the specifics of what the binding force created.

One of the biggest questions of international law philosophy deals with a fundamental aspect of law under procedural natural law. While international legal theorists do not acknowledge procedural natural law as a common legal

philosophy that shares analytical tools with their approach, they do reject, as with Cotterrell and Koskenniemi, notions of law as being completely self-contained criteria.[22] In this respect, they join with Critical Legal theorists, like Smith and Delgado, whose arguments demand legal theories that have a principle or force that transcends criteria within the system itself. It does no good to argue about whether a law was properly enacted by Congress, for instance, if the whole system by which legislation is enacted depends on a system that subordinates one race to another. The legal theories of feminist jurisprudence, Critical Race Theory, legal pluralism, and international law alike necessitate something that is lacking in legal philosophies like realism or positivism.

That binding force, that purposive enterprise of the whole legal system that is denied by other legal philosophies, is articulated as a major tenet of procedural

22 Cotterrell, *Transnational Communities*, *in* READINGS IN THE PHILOSOPHY OF LAW, *supra* note 1, at 478.

natural law, especially in Lon Fuller's *The Morality of Law*. Procedural natural law, then, becomes the most comprehensive of the broad philosophical approaches. It provides argumentative grounds on which many other seemingly outsider legal approaches of feminist jurisprudence, Critical Race Theory, legal pluralism, and international law can articulate critiques and analyses of law and legal systems. While they may not acknowledge the grounds on which they are arguing, procedural natural law provides an ideological link between many disparate legal philosophies. Many assumptions are shared between these approaches and procedural natural law. More importantly, however, these approaches advocate alone of all the major philosophies for the crucial element of law that is its externally binding moral purpose, which makes these approaches viable.

EFFECTS OF PARTIAL SCHOLARSHIPS FOR EDUCATION MAJORS

Janna Lu '22

ABSTRACT: *Research shows that the quality of education, proxied by international student achievement tests, positively correlates with a society's economic growth. For a society to have high quality education, it needs well-prepared teachers. In the last decade, teacher enrollment levels have decreased relative to overall undergraduate students. To combat this problem, the U.S. Department of Education created the Teacher Education Assistance for College and Higher Education (TEACH) grant in 2008 to draw more students into the teaching profession. This grant disburses $16,000 over four years to undergraduate students but converts into a loan if the recipients do not fulfill the service obligations within eight years of graduation. This paper examines the effects of grants as a representative of partial scholarships and describes the ineffectiveness of the grant, providing further evidence that slight monetary incentives up front prove insufficient in nudging high schoolers towards certain careers.*

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I. Introduction

All countries want positive economic growth, and average years of education correlate positively with expansion. As education increases the skills of the general population, productivity levels increase. In 2010, Hanushek and Wobmann, professors at Stanford University and the University of Munich respectively, found that the quality of education, measured by average scores in an aggregate of international student achievement tests, is the most important component in education's impact on economic growth, consistent with Darling-Hammond and Harris and Sass's findings.[1]These researchers also described a strong link between the preparedness of teachers and students' academic outcomes. According to these research conclusions, the United States needs to invest in education if it wants to continue its economic growth. Moreover,

1 Linda Darling-Hammond, Teacher Quality and Student Achievement: A Review of State Policy Evidence, 8 Educ Pol'y Analyst Archives 1, 1-44 (2000); Douglas N. Harris & Tim R. Sass, Teacher Training, Teacher Quality, and Student Achievement, 95 J. of Pub. Econ 798, 798-812 (2011).

well-prepared teachers who have sufficient education and training in the field could be "stronger than influences of student background factors," such as poverty, language, and minority status.[2]

In the face of these findings, activists and parents called for the U.S. government to pour more funds into the education system, expecting better teachers to appear when offered higher monetary incentives, such as scholarships for education majors. Policy makers expected that more high school students would be attracted to the teaching profession if the students had stronger incentives, such as a sum of money. Thus, in 2008, the U.S. Department of Education implemented a partial scholarship for future teachers, the Teacher Education Assistance for College and Higher Education (TEACH) grant. Over a span of four years, undergraduate students receive up to $16,000 and graduate students up to $8,000. This amount has gone

2 Darling-Hammond, *supra* note 1, at 33.

down by 6% since 2018, amounting to only a little over $3,700 each year due to budget reforms. To receive and keep this grant, however, recipients must meet certain criteria and obligations. Within eight years of graduation, these students need to teach in a high-need area in an eligible school for four years. In addition, the TEACH grant recipients must show that they intend to fulfill this requirement or are currently fulfilling it annually.

This paper will analyze the effectiveness of the TEACH grant and give some insight on monetary incentives and long-term teacher quality. TEACH is the only grant administered by the U.S. Department of Education specific to the teaching profession and costs taxpayers around $100 million a year.[3] The grant affects over thirty thousand students, underscoring its impact and effectiveness.[4] The next few pages will conduct a means-

3 U.S. DEPT. OF ED., FISCAL YEAR 2019 BUDGET SUMMARY AND BACKGROUND INFORMATION (2019), https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf

4 Elizabeth Barkowski et al., Study of the Teacher Education Assistance for College and Higher Education (TEACH) Grant Program, U.S. DEPT. OF ED.

end analysis, evaluate the failing outcome of TEACH, and explain the reasons for the outcome. Instead of saving students' money, TEACH increases their debt and proves ineffective in getting them to the classroom, costing the Department of Education millions each year at the same time.

II. Means Used to Disburse Grants

TEACH grants come directly from an eligible college's financial office, but the recipient must meet certain criteria, both before entering college and after graduation. Generally, the recipient must have a high school GPA above 3.25 and/or a score above the 75th percentile in standardized tests. Stipulations on academic performance in college are not given, only that the recipients must remain as an education major. After graduation, they must spend at least four years in their first eight years of teaching at a school on the Teacher Shortage Area Nationwide List.

(2018), https://www2.ed.gov/rschstat/eval/highered/teach-grant/final-report.pdf.

In addition, they must certify every year that they have the intention to complete this requirement, even if they are currently teaching in one of the eligible schools. If the grant recipient does not teach for four years out of eight at one of the high-need schools or fails to certify their intention to complete the requirement, the grant converts into an unsubsidized federal loan, accruing interest from the years it was a grant.

Adding more complexity to paperwork, the disclosure document that describes the obligations of the recipient is thirty pages long, filled with legalese, government abbreviations, and terms, thereby creating an opportunity cost.[5] Even though figuring out what information does not impose financial costs, a student would still need to allocate from their scarce store of time and resources to read the documents. After all, many adults

5 Teacher Education Assistance for College and Higher Education Grant, FEDERAL STUDENT AID, https://studentaid.gov/app-static/images/teachCounselingGuide.pdf.

hire tax accountants to file taxes for them to avoid poring over pages of IRS documents. Students at risk of losing their grants often switch majors. Even if education students stick with their major, they might be bewildered by the terms and conditions of the TEACH grant and possibly discard the pamphlet, which increases their chance of the grant turning into a loan.

In addition, different colleges have different eligibility criteria after ensuring that the students met the federal requirements, making information hard to find. Some institutions stipulate that freshmen or sophomores are not eligible and others only give these scholarships to students who declared a specialized major or minor in the high-need fields. For example, 55 percent of the institutions required students to have a major or minor in high-need fields, 48 percent required students to "be admitted into a teacher preparation program," and 22 percent required

students to be at least a sophomore.[6] Increased information costs causes confusion and deters prospective students from declaring an education major. Copious amounts of paperwork before matriculation could signal a bloated bureaucracy that a student must contend with during their four years at college. On the other hand, education students on the margin might not even consider the major because they do not know about the TEACH grant and whether they qualify. With higher costs of acquiring relevant information and more information asymmetry, fewer students will declare an education major.

III. Goal of TEACH

The government's stated goal of TEACH is to "increase the number of teachers in high-need fields and schools by providing up to $4,000 per year to undergraduate and graduate students" who are studying to become teachers.[7] The Government Accountability Office

6 Barkowski, *supra* note 5, at 35.
7 Barkowski, *supra* note 5, at xiii.

documents high-need fields as "math, science, bilingual education, English language acquisition, special education, reading specialist," or any other field that various states list as high-need on the Teacher Shortage Area Nationwide List.[8]

IV. Incentives Generated with the Grant

For prospective college students thinking about an education major, the TEACH scholarship influences their decision. Instead of choosing to teach because they thought that they would be good teachers, the students now have a marginal monetary incentive to become teachers. Prospective teachers who could not afford college could now attend with the grant. As many as 44% of current education majors said that the TEACH scholarship played a large role in their decision to pursue a teaching career. Out of the students that received the TEACH grant, 58% said

8 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-314, HIGHER EDUCATION: BETTER MANAGEMENT OF FEDERAL GRANT AND LOAN FORGIVENESS PROGRAMS FOR TEACHERS NEEDED TO IMPROVE PARTICIPANT OUTCOMES 8 (2015), https://www.gao.gov/assets/gao-15-314.pdf.

that the scholarship was "somewhat or very influential" in their decisions to teach at a high-need school.[9] This grant also incentivizes students on the margin to declare an education major or teach in a high-need area. This survey shows that the partial scholarship changes the incentives for high schoolers thinking about getting an education degree, even though demonstrated preference is not the same as a questionnaire.

For financial aid offices, this grant helps students "fund their education" and may even help struggling schools with teaching programs attract students.[10] An overwhelming 92% of responses from a survey sent out to financial aid officers reflected reasoning along those lines, which is not one of the stated ends of the U.S. Department of Education. Only 49% said that they gave the grant to incentivize teaching at a high-need field in a high-need school, illustrating the disconnect between the Education

9 Barkowski, *supra* note 5.
10 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 20.

Department and the individual colleges.[11]

For politicians, this grant shows they are doing something to try to help the teacher shortage. Even if the policy does not succeed, the efforts demonstrate their attempt to fix the problem. Since students usually take four years to graduate and TEACH allows them another eight years to fulfill the four-year teaching requirement, most politicians do not need to take responsibility if the grant fails. It would take twelve years for finalized data on the first cohort of students to emerge and a minimum of five or six for preliminary data that show trends, and it has been twelve years since the program was implemented in 2008. Most political offices only last five to ten years, so the politicians that implemented the program will not be in office to answer to the public when data shows the failure of the TEACH grant. Thus, they do not have an incentive to make sure the grant works as they only need

11 Barkowski, *supra* note 5.

to demonstrate that they did something to help with the shortage of teachers.

V. Means-End Analysis of TEACH

The TEACH grant does not achieve the government's lofty goal of increasing the number of teachers in the system. More than 33% fewer students enrolled in teacher preparation programs in 2013 than in 2008, while universities across the nation experienced a slight increase in enrollment, even though students stated that the scholarship influenced their decision.[12] After all, demonstrated preference, which is declaring the education major, is a better measurement than questionnaires. Between 2010 and 2018, there was a 35% drop nationwide in teacher enrollment. Nearly all states have had a decline in teacher enrollment, with some more than 50%.[13] Oklahoma

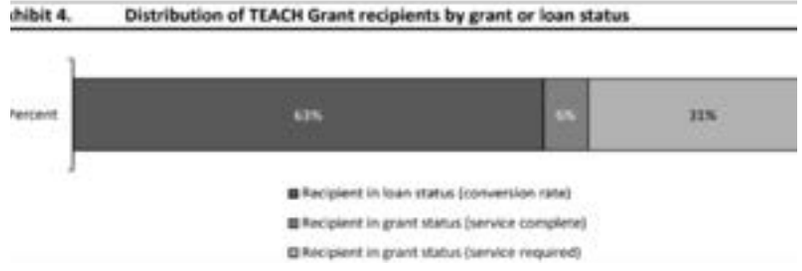
12 U.S. DEPT. OF ED., ENROLLMENT IN TEACHER PREPARATION PROGRAMS (2015), https://title2.ed.gov/public/44077_Title_II_Issue_Brief_Enrollment_V4a.pdf.

13 Lisette Partelow, What To Make of Declining Enrollment in Teacher Preparation Programs, CTR. FOR AM. PROGRESS (2019), https://www.americanprogress.org/issues/education-k-12/reports/2019/12/03/477311/make-declining-enrollment-teacher-preparation-programs/.

saw a drastic drop of 80% with Michigan trailing at 67%. At the same time, most schools saw a drastic increase in undergraduate enrollment. Clearly, TEACH grants did not increase the number of students studying to become teachers.

VI. Unintended Consequences from TEACH

In a survey conducted in 2016 by American Institutes for Research, researchers found that more than 89% of the grant recipients thought that they were likely or very likely to fulfill the service requirements of the loan when they first received it.



A Government Accountability Office (GAO) report, however, states that 63% of the recipients who had begun their service obligations before June 2014 had converted

a TEACH grant to an "unsubsidized loan," for which interest is calculated from the date the TEACH grant was disbursed.[14] For many students, the sum of their TEACH Grants and federal loans exceed their federal annual loan limit, meaning they will go over the limit if the grants turn into loans, which is normally illegal. In the 2013-14 academic year, close to half of the grant recipients will be "borrowing over their federal annual loan limit" if all recipients from that year converted the grants into loans.[15]

Out of the 63% of grant recipients that converted the grant into a loan, one third were not teaching in high-need areas. Another third did not complete the teaching degree or certificate, and others did not understand the requirements of the grant. 41% of the recipients ran into complications or forgot to certify their intention to fulfill the service obligation.[16] Instead of lowering the cost of

14 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9, at 6
15 Barkowski, *supra* note 5, at 36.
16 Barkowski, *supra* note 5.

acquiring an education major, the TEACH grant raises the cost of teaching. When the grant converts into a loan, the teachers have more debt than if they had chosen another major because the grant accrues interest from the time that the student receives the loan. In this way, TEACH significantly raises the opportunity costs of becoming a teacher when it supposedly does the opposite.

To decrease the percentage of students who did not understand the terms and conditions of the grant, some schools provided counseling about the requirements of the loan. The counseling, however, did not impact the grant-to-loan conversion rate.[17] Most of the time, counseling involves meeting one-on-one, which incurs an opportunity cost for both the student and the administrator. Instead of studying or working, the student must sit down with an administrator from the financial aid office, and the administrator must give up their time from doing administrative work to meet

17 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 9.

with the student.

As colleges usually provide placement services to graduating education majors, colleges should have updated lists of eligible positions available to students. Unfortunately, this is not the case. Only a little over half of the colleges told students about teaching positions that satisfied the grant requirements, and less than half possessed updated lists. In the group of students that were teaching in ineligible positions, 15% of the students could not find an eligible position even though they tried.[18] In addition, the TEACH grant is administered by the universities' financial office, with only 7% of the respondents saying that other departments, such as the college's education department, "led oversight."[19] Having more experience, faculty in the education department would have a better idea of which students would make good teachers, knowledge that would possibly lower the percentage of students who converted

18 Barkowski, *supra* note 5.
19 *Id*. at 26.

the grant into a loan because they did not teach in an eligible field or dropped out of the education major.

In addition, TEACH may also contribute to the high rates of teacher attrition. More than 15% of teachers left the teaching profession within five years, with higher rates in low-income schools. [20]Around 7-8% of teachers leave the profession each year, although some return later. [21]Turnover costs money for states and districts, which must train new teachers. Students need to withstand teachers who are still learning the ropes, which could mean that they receive a lower-quality education. High-need areas, such as special education, math, and science, also have the highest rates of teacher attrition.[22] Most teachers who

20 Lucinda Gray et al. Public School Teacher Attrition and Mobility in the First Five Years, U.S. DEPT. OF ED. (2015), https://nces.ed.gov/pubs2015/2015337.pdf.
21 John Marvel et al., Teacher Attrition and Mobility, U.S. DEPT. OF ED. (2007), https://nces.ed.gov/pubs2007/2007307.pdf.
22 Erling Boe, Whither Didst Thou Go? Retention, Reassignment, Migration and Attrition of Special and General Education Teachers From a National Perspective, J. OF SPECIAL EDUC. (1997); Russel Rumburger, The Impact of Salary Differential on Teacher Stortages and Turnover: The case of mathematics and science teachers, 6 ECON. OF EDUC. REV. 389, 389-399 (1987).

left cite personal reasons or dissatisfaction.[23] Teacher turnover continuously fluctuates two to three percentage points, and the number of TEACH grant recipients only makes up less than 1% of the total teacher population, so the magnitude of the effect of TEACH does not show up in the aggregate.[24] Since TEACH nudges students who may not actually want to teach into these high-need and difficult areas, TEACH could have increased the rate of teacher turnover on the margin, but the data does not show either way.

For teachers in the profession, their pay is determined by a step and lane system set by the state. Their level of education puts them into a lane, where they can earn preset incremental bonuses. Instead of getting a much larger bonus for performing well, the teacher gets the same raise. This, in turn, disincentivizes teachers to go above and beyond. As long as a teacher meets the minimum, they

23 Gray, *supra* note 21.
24 U.S. DEPT. OF ED., *supra* note 4.

will get a raise. Right out of college, a biologist's pay and a biology teacher's pay are roughly equivalent, but the pay widens to $30-40,000 after five to ten years in either profession. In addition, schools cannot bid up the price of teachers, which impedes the effective allocation of teacher abilities. Thus, the TEACH grant is just another branch of governmental bureaucracy that does not help the situation.

VII. Conclusions & Further Research

TEACH may initially draw students into the education major, but it does not effectively achieve the end of supplying more teachers. Instead, students end up changing majors or even more likely, changing jobs post-graduation. Amid a general increase in college attendance, teacher enrollment rates have declined in real numbers. In addition, 63% of the students who received the grant lose it after graduating because of failure to fulfill the service requirements or ignorance about certification requirements. Instead of the university education departments providing

oversight in how the loan is administered, most of it falls to the financial aid offices, which present the loan as a means of making education more affordable. In the end, however, TEACH makes education more expensive because the grant needs to be paid back with unsubsidized interest. Thus, partial scholarships do not seem effective in incentivizing students to choose to teach in high-need schools and areas.

The conclusion of this paper also aligns with previous research focused on the correlation between wage outcomes and major choices.[25] Pecuniary factors do not affect students' choice of major, but the "consumption value of schooling," which refers to a student's preferences and abilities, plays a key role.[26] As a whole, students in the West do not choose a major because it pays more, but because they enjoy what they study and learn. People love

25 James A. Freeman & Barry T. Hirsch, College Majors and the Knowledge Content of Jobs, 27 ECON. OF EDUC. REV., 517–535 (2008).
26 Magali Beffy, Denis Fougère, & Arnaud Maurel, Choosing the Field of Study in Postsecondary Education: Do Expected Earnings Matter?, 94 REV. OF ECON. AND STAT., 334–347 (2012).

doing things for which they have a natural aptitude, so prospective college students major in something in which they deem themselves as skilled.

Concerning possible improvements, the terms and conditions of the grant could be made simpler, and graduates who are currently teaching in a high-need area need not file. Instead, the U.S. Department of Education could rely on public schools notating it in their paperwork to streamline and simplify the certification process.

Further research could compare the amount of red tape involved in the maintenance of TEACH and other grants for different majors provided by the federal government. Since 41% of the loan-converters stated complications with the annual certification, this study would show if convoluted paperwork really affected the grant-to-loan conversion rate. Since this grant costs the Department of Education close to $100 million a year, researchers should take a longer look at this program,

making sure that this grant helps future teachers.[27]

In its current form, TEACH fails abysmally in its attempt to garner more students who want to become teachers, since teacher enrollment levels dropped while overall undergraduate enrollment had a slight increase. Perhaps TEACH could achieve its aims with reforms and further research. [28]

27 U.S. DEPT. OF ED., *supra* note 4.

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