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MISSION STATEMENT

The University of Southern California Journal of Law and Society is a student-run, interdisciplinary Journal that promotes outstanding undergraduate scholarship. The Journal provides a print and online forum to publish exceptional undergraduate papers by students at the University of Southern California and around the world. The Journal seeks to publish papers from a wide range of disciplines that reflect diverse viewpoints. Guided by top faculty members at the University of Southern California, papers selected for publication undergo a rigorous editing process by undergraduate students at USC to ensure that each paper is of the highest quality. The USC Journal of Law and Society strives to promote greater awareness and understanding of the legal field and aims to become the preeminent journal of its kind.

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LETTER FROM THE EDITOR

Madeline Goossen
Editor-in-Chief

The USC Journal of Law and Society is pleased to continue its tradition of publishing outstanding undergraduate papers with the Spring 2019 Edition of the Journal. The 2018-2019 school year has been an exceptional year for the Journal as our Editing and Executive Boards have grown and our foundations at USC continue to strengthen.

Many people have dedicated their time and energy to ensuring the Journal's success this year. I would first like to thank our outstanding Lead Editors - Emily Liu, Rex Alley, Sebastian John Walter Young, Serena Jarwala, and Srividya Dasaraju - who were instrumental to staff training and the editing process. I would also like to thank our other members of the Executive Board - Adriana Bernal Martinez, Kate Hwang, and Ryan Kazemaini - whose dedication and hard work have helped to expand the publication and the Journal's presence on campus, online, and throughout undergraduate communities. Without the committed work of those on the Executive Board, the Journal would not be possible. Finally, I would like to extent my gratitude to our faculty advisor, Professor Alison Renteln, for her continued support. She has been an invaluable source of encouragement and counsel.

We were fortunate to receive many more qualified submissions than we were capable of publishing. The following papers were carefully selected on the basis of their content, quality, and subject matter. Volume XI features the work of students from the University of California, Berkeley, Vanderbilt University, and the University of Southern California. The papers cover a variety of topics, ranging from issues of liability regarding California's recent wildfires to the concept of laïcité in French culture. Reading Volume XI from cover to cover is sure to provide a diverse array of viewpoints on broad subject matters related to law and society.

It has been a pleasure to work with these talented authors throughout the editing process. The Journal is especially grateful to them for contributing their scholarship. As you will see, our Associate Editors did an exemplary job preparing the following papers for publication. We thank all of our staff for their participation in the Journal this year.

Enjoy!

ADDING FUEL TO THE FIRE: CALIFORNIA SENATE BILL 901'S INCENTIVIZATION OF UTILITY PROVIDER NEGLIGENCE

Norma Jazmin Gudiño Mendoza
University of California, Berkeley
Class of 2020

After California's 2017 fire season, disaster victims took up litigation blaming PG&E for the fires. Aiming to protect itself from property liabilities, PG&E set off lobbying efforts, which resulted in the passing of Senate Bill 901, a law that enables utility companies to raise energy rates to recover costs incurred through judgements of legal liability. This paper argues that SB 901 hurts ordinary Californians by permitting utility companies to shift financial burdens of their mismanagement on to consumers. To explore this argument, this paper reviews the law's text in conjunction with testimonies from PG&E executives, shareholders, legislators, and ratepayer advocates, while also considering PG&E's recent filing for bankruptcy. Through this analysis, the paper finds that SB 901 has the potential to transfer financial burdens, resulting from 2017 fires, from utility companies on to consumers. The paper also finds that the law facilitates utility companies to pass on to ratepayers costs incurred from future fires. Therefore this paper concludes that benefits extended to utility companies under SB 901 will likely harm consumers through increased energy prices and a failure hold utility companies accountable for prioritizing fire safety.

I. OVERVIEW

After 2017's historically destructive California fires, thousands of victims who lost their homes and businesses to the disasters filed lawsuits against Pacific Gas and Electric Company (PG&E) for alleged culpability.[1] The lawsuits filed against the company alleged that PG&E's failure to maintain electrical power lines created a high risk of wildfires. From the 2017 fires alone, the utility company faces at least $15 billion in liabilities, according to stock estimates.[2]

Following the suits, PG&E spent nearly $1 million in lobbying efforts petitioning California lawmakers to reduce its property damage liability.[3] In turn, the California State Legislature passed SB 901, which allows utility companies to raise commercial and household utility prices as a means of recovering costs incurred through judgments of legal liability for wildfires.[4] Ratepayer advocates criticized SB 901 as a major "bailout for PGE."[5]

This paper argues that SB 901 helps PG&E and utility companies more generally while negatively affecting Californians by punishing businesses and consumers in facilitating liability cost recovery through utility rate increases. This paper also argues that, by passing mismanagement costs to consumers, SB 901 incentivizes negligent behavior by utility companies and thus increases risks of wildfires and the scope of potential damages by those disasters.

II. METHODOLOGY

To contextualize PG&E's behavior and the impacts of its mismanagement of electrical equipment on California, I will first conduct a historical analysis of fires caused by PG&E's negligence and resulting legal actions. Sources for this timeline consist of testimonials from attorneys, as well as news pieces covering the fires and subsequent legal proceedings. I will then review the scope of destruction of the 2017 California Wildfire season and PG&E's role in causing the disaster, using reports from the California Department of Forestry and Fire Protection (and supporting sources).

This paper will then illustrate how SB 901 came about as a response to the liability judgments incurred by PG&E. To do so, I will examine the relationship between PG&E's potential losses at the time of the 2017 fires and a coinciding decision by the California Public Utilities Commission (CPUC). This decision denied a San Diego utility company its claim for liability reduction through utility rate increases after the CPUC found that negligence (similar to the behavior of PG&E in 2017 fires) by the San Diego company caused a fire in 2010. The paper will look at California liability laws and announcements from PG&E executives to show how the CPUC's decision threatened PG&E financially, thereby setting off lobbying efforts in the California legislature. The paper will then use

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[1] Noreen Evans, Esq., in discussion with the author, November 2, 2018.

[2] David R. Baker, "PG&E: Fire investigation could show utility violated San Bruno probation," *Bloomberg*, last accessed January 15, 2019, https://www.bloomberg.com/news/articles/2019-01-15/the-california-rule-that-doomed-pg-e-inverse-condemnation. PG&E's potential wildfire liabilities have risen to $30 billion after suspicions that the company's power lines sparked the 2018 "Camp Fire," the deadliest in California's history.

[3] Wes Venteicher and Sophia Bollag, "As Fall Wildfires Grew, So Did PG&E Lobbying," *Sacramento Bee*, last accessed February 2, 2019, http://digital.olivesoftware.com/Olive/ODN/sacbee/default.aspx.
PG&E spent $11.8 million on lobbying efforts during the 2017-2018 legislative session, compared to $2.5 million for the 2015-2016 session, according to a public filing.

[4] "Senate Floor Analyses: Hearings on SB 901 before the Senate Rules Committee," California Legislative Information, last modified August 28, 2018, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB901.

[5] Noreen Evans, Esq., in discussion with the author, November 2, 2018.

testimony from PG&E executives and SB 901's sponsor to highlight that the purpose in passing the bill was to protect PG&E from liabilities resulting from the 2017 fires, while also extending this safeguard to utility companies in future cost-recovery claims.

To examine how SB 901 benefits utility companies, this paper will review in detail SB 901's text and corresponding legislative analyses. The paper will outline SB 901's changes to CPUC's standards for liability cost-recovery claims, and use direct text from SB 901 and Senate hearings to detail how changes to the CPUC standards will apply to losses incurred in 2017. Additionally, the paper will include estimations from PG&E executives and ratepayer advocates to illustrate SB 901's economic impacts on consumers and to argue that the bill negatively and disproportionately affects ratepayers through utility cost recovery. This paper will also address potential counterarguments that cite PG&E's recent decision to file for bankruptcy, as evidence of SB 901's necessity, given that PG&E decided to file for bankruptcy after incurring additional liabilities in 2018, which SB 901 does not cover. To address these arguments, I will present open letters from PG&E's shareholders which, supported by financial statements, claim that the utility company is solvent and able to fulfil its fiduciary duties and respond to liability judgements. Additionally, I will cite expert analyses that suggest bankruptcy will further exacerbate consumer rate increases permitted by SB 901.

I will not review the sections of SB 901 that set new standards for forest management and wildfire prevention, as they are not pertinent to the analysis of liability cost recovery. It is also important to point out that this paper includes testimony criticizing SB 901, from attorneys who are working on the lawsuits against PG&E. It is therefore possible that these attorneys may express bias against PG&E. However, the testimonies of the attorneys provide a counterbalance to the testimonies of the sponsors of the bill, who may have biases of their own. In addition, testimonies from attorneys litigating against PG&E also supply a counterbalance to the testimonies of PG&E executives, who may potentially speak on behalf of the interest of the company for which they work.

III. PRESENTATION OF FINDINGS AND ANALYSIS

History of PG&E and Wildfires in California

To understand why a SB 901's protections for PG&E and utility companies work against the interests of the Golden State and its inhabitants, it is essential to consider the historical underpinnings of the corporation's recent mismanagement, which caused the 2017 California Wildfires. In the past several decades, PG&E, the largest utility provider in the state, has repeatedly caused fires by failing to maintain its electrical equipment and violating federal and state utility codes, laws and safety regulations. As a consequence of inflicting multiple catastrophic disasters in California, both the federal and state governments have prosecuted PG&E.

In 1997, PG&E was convicted of 739 counts of criminal negligence for failing to trim trees near its power lines after the corporation diverted $80 million from maintenance programs into shareholder profits.[6] During the proceedings, investigators found that PG&E's tree-trimming violations caused not only the 1994 Sierra Blaze in Nevada, but also the 1996 wildfire in Sonoma County, the 1990 Campbell fire in Tehama County (which burned over 100,000 acres and cost $10

[6] Jim Doyle, "PG&E Guilty in 1994 Sierra Blaze / 739 counts of negligence for not trimming trees", *SFGate*, last revised June 20, 1997, https://www.sfgate.com/news/article/PG-E-Guilty-In-1994-Sierra-Blaze-739-counts-of-2821364.php.

million to extinguish), and the 1992 Fawn Hill Fire in Placer County.[7] PG&E was convicted and fined $2 million by state regulators from the CPUC.

These convictions and fines did not change PG&E's behavior. In 2010, PG&E's poor maintenance of a pipeline caused a deadly fire that killed eight people in San Bruno, California. While still in legal proceedings for the 2010 disaster in San Bruno, PG&E failed to maintain a power line that brushed against surrounding vegetation and sparked a fire in Northern California's Amador County in 2015. The 2015 fire killed two people and destroyed nearly 1,000 structure.[8] In reference to the 2015 Amador County fire, the California Department of Forestry and Fire Protection (CAL FIRE) reported that PG&E violated California law that mandates power lines to remain at least four feet away from branches, and that the corporation that "overlooked dangerous trees in its 2014 and 2015 inspections."[9] After fighting the Amador County blaze, CAL FIRE seeks to recover $90 million in costs from PG&E. Over 1,000 lawsuits pertaining to the same disaster remain unsettled.[10]

In January of 2017, legal proceedings for the 2010 San Bruno incident concluded. United States District Court Judge Thelton Henderson found PG&E guilty of six charges of safety violations, imposed $3 million in fines, and ordered PG&E to serve five years of corporate probation.[11] Conditions of the probation included a television and newsprint campaign to inform the public of PG&E's wrongdoing, 10,000 community service hours, and a restructuring of the company's bonus program to incentivize safe practices among employees. In addition, the Judge assigned court-ordered supervision of PG&E's operations to ensure the utility company's future compliance with rules and regulations that prioritize fire safety.[12] While responsibility of monitoring PG&E's safety practices belongs to the CPUC, federal officials accused the agency of "nurturing a cozy relationship with PG&E that led to lax supervision of the utility."[13] Therefore, Judge Henderson assigned a court-appointed monitor to ensure proper oversight.

The 2017 Fires and SB 901

In 2017, the same year that PG&E was criminally charged in Federal Court for the 2010 San Bruno fire, PG&E's poorly maintained electrical equipment caused disastrous fires throughout California. According to the California Department of Forestry and Fire Protection (CAL FIRE), the 2017 California wildfires burned over 500,000 acres of land and more than doubled the average number of acres burned by wildfires in the state per year in the last five years.[14] The most destructive fires of the season and in the history of the state (Thomas, Nuns and Tubbs) killed 44 people and,

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[7] Doyle, "PG&E Guilty in 1994 Sierra Blaze."
[8] Kelly Weill, "Utility Company PG&E Under Investigation for California Wildfire," The Daily Beast, last modified October 15, 2017, https://www.thedailybeast.com/utility-company-pgande-under-investigation-for-california-wildfire?ref=scroll.
[9] Weill, "Utility Company PG&E Under Investigation."
[10] Weill, "Utility Company PG&E Under Investigation."
[11] George Avalos, "PG&E gets maximum sentence for San Bruno crimes," *The Mercury News*, last modified January 27, 2017, https://www.mercurynews.com/2017/01/26/pge-gets-maximum-sentence-for-san-bruno-crimes/.
[12] L.A. Paterson, "905 United States Sentencing Memo 1-09-17", SCRIBD, last modified January 9, 2017, https://www.scribd.com/document/336569584/905-United-States-Sentencing-Memo-1-09-17#from_embed.
[13] Avalos, "PG&E gets maximum sentence for San Bruno crimes."
[14] "Incident Information," CAL FIRE, last modified January 24, 2018, http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2017.

combined, destroyed a total of 8,061 structures in Sonoma, Napa, Ventura, and Santa Barbara Counties.[15] At the time this paper was written, CAL FIRE investigators found that electrical equipment incidents (such as a power line coming into contact with a tree) stood as the primary causes of seventeen California wildfires in 2017.[16]

By the end of 2017, PG&E faced hundreds of lawsuits from victims of the disasters that occurred that year. Simultaneously, the CPUC published a decision that worked against the interests of utility companies facing liabilities from fires. On November 30, 2017, the CPUC ruled against an application from San Diego Gas & Electric (SDG&E) to "pass onto ratepayers $379 million in costs related to three deadly wildfires" that scorched Southern California in 2007.[17] This decision broke a tradition of harmony between utility companies and the CPUC, and threatened PG&E's ability to pass on its own liability costs to its ratepayers. As a result, a month after the CPUC's decision, PG&E filed documents with the Securities and Exchange Commission announcing the suspension of quarterly dividends to stockholders due to expected liability costs for the damages caused by the 2017 California fires.[18]

In California, utility companies are normally held liable for compensating homeowners when electrical equipment causes damages to private property, regardless of whether the company acted negligently. This is due to a state law that calls for "inverse condemnation," based upon the Fifth Amendment to the United States Constitution, which prohibits "taking" of private property without just compensation.[19] Because utility companies "seize" private property to install and manage their infrastructure, the corporations are bound to compensate property owners for any damage utility equipment causes, including ignition of fires. Generally, if the utility company could prove it acted lawfully and managed its equipment responsibly, the CPUC has permitted corporations to raise rates on consumers to recover liability costs.[20] However, the CPUC's denial of SDG&E's claim posed new and significant concerns for PG&E, which faces at least $15 billion in liabilities from damages caused by the 2017 California fires.[21]

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[15] *The Most Destructive Fires in California History*, directed by Sharon Okada (2018, Sacramento, CA: *The Sacramento Bee*).
[16] Scott McLean, "CAL FIRE Investigators Determine Cause of Four Wildfires in Butte and Nevada Counties," *CAL FIRE*, last modified May 25, 2018, http://calfire.ca.gov/communications/downloads/newsreleases/2018/2017_WildfireSiege_Cause%20v2%20AB%20(002).pdf.; Michael Mohler, "CAL FIRE Investigators Determine Causes of 12 Wildfires in Mendocino, Humboldt, Butte, Sonoma, Lake, and Napa Counties," *CAL FIRE,* last modified June 8, 2018, http://calfire.ca.gov/communications/downloads/newsreleases/2018/2017_WildfireSiege_Cause.pdf.; Michael Mohler, "CAL FIRE Investigators Determine the Cause of the Cascade Fire," *CAL FIRE,* http://calfire.ca.gov/communications/downloads/newsreleases/2018/Cascade%20Fire%20Cause%20Release.pdf.
[17] Rob Nikolewski, "CPUC rules against SDG&E in 2007 wildfire case," *The San Diego Union-Tribune*, last modified November 30, 2017, https://www.sandiegouniontribune.com/business/energy-green/sd-fi-sdge-wildfirecaseruling-20171130-story.html.
[18] James Dunn, "PG&E suspends dividends on stock in 2017 Q4," *Sonoma Index Tribune*, last modified December 21, 2017, https://www.sonomanews.com/business/7792596-181/pge-suspends-dividends-on-stock?sba=AAS.
[19] Lawrence Watters, "The Taking Issue in the Ninth Circuit after Lucas," *Environmental Law* 3, no. 24 (July 1994): 1325-1349.
[20] Alexei Kosef, "Your utility bill could reflect fire costs under new California law," *The Sacramento Bee*, last modified September 21, 2018, https://www.sacbee.com/news/politics-government/capitol-alert/article218803990.html.
[21] PG&E's potential wildfire liabilities have risen to $30 billion after suspicions that the company's power lines sparked the 2018 Camp Fire, the deadliest in California's history. *Bloomberg*, "PG&E: Fire investigation could show utility violated San Bruno probation."; Taryn Luna, "Wildfire bill to aid PG&E clears Legislature despite ratepayer concerns," *The*

It is clear, then, that the CPUC's controversial decision to deny SDG&E's claim for cost recovery prompted PG&E to suspend dividends for their stockholders. On December 20, 2017, Richard Kelly, the chairman for PG&E's board of directors, announced, "In light of the uncertainty associated with the causes and potential liabilities associated with these wildfires, as well as state policy uncertainties, the PG&E boards determined that suspending dividends is prudent with respect to cash conservation."[22] The CPUC's decision also prompted PG&E to spend $1.7 million on lobbying efforts in an attempt to rid California of the "inverse condemnation" laws.[23] While the utility company was unsuccessful in eliminating inverse condemnation laws, their lobbying efforts did eventually result in the passing of SB 901. The bill's sponsor, Senator Bill Dodd of California's 3rd District (which includes Sonoma and Napa counties), expressed that he and other legislators "felt they needed to take action to prevent PG&E from going bankrupt" and therefore after weeks of hearings crafted and supported SB 901, which allows the CPUC for the first time to "split [liability] costs between ratepayers and utility shareholders based on its findings."[24]

SB 901 and Liability Cost Recovery

Under Senate Bill 901, the CPUC may approve applications by electrical corporations to recover "costs and expenses arising from a catastrophic wildfire, if the costs and expenses are just and reasonable."[25] To evaluate the justness and reasonableness of expenses, Section 451.1 of SB 901 instructs the CPUC to consider twelve factors and then decide "whether the expenses are allowed or disallowed for recovery for wildfires occurring after December 31, 2018."[26] These twelve factors upon which the CPUC is to base its decision include the conduct of the electrical corporation, extreme climate conditions, and the electrical corporation's compliance with regulations, laws, and commission orders.[27]

While the twelve factors in Section 451.1 of SB 901 may seem like an effective way to hold utility companies accountable for following fire safety laws, Section 451.2 provides a key exemption that changes the rules for fires that blazed in 2017. According to the last Senate Floor Reading of SB 901, "for applications to recover costs arising from catastrophic wildfires ignited in 2017, the CPUC is required to determine justness and reasonableness without specifying the 12 enumerated factors identified for fires in 2019 and beyond."[28] In other words, unlike for disasters which occur in 2019 and beyond, the CPUC is to approve or deny a claim for losses incurred in 2017 based only on the

Sacramento Bee, last modified August 31, 2018, https://www.sacbee.com/latest-news/article217633560.html

[22] Dunn, "PG&E suspends dividends on stock."

[23] Guy Kovner, "Lawmakers approve bill that makes PG&E, ratepayers share wildfire costs," *The Press Democrat*, last modified September 1, 2018, https://www.pressdemocrat.com/news/8692377-181/lawmakers-approve-bill-that-makes?sba=AAS.

[24] Luna, "Wildfire bill to aid PG&E clears Legislature."

[25] "Senate Bill 901," California Legislative Information, last modified September 21, 2018, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB901.

[26] "Senate Floor Analyses: Hearings on SB 901 before the Senate Rules Committee, 2018 Leg," last modified August 28, 2018, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB901.

[27] "Senate Bill 901," California Legislative Information, last modified September 21, 2018, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB901.

[28] "Senate Floor Analyses: Hearings on SB 901 before the Senate Rules Committee, 2018 Leg," last modified August 28, 2018, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB901.

financial health of the utility company, without taking into account the utility's practices.[29]

SB 901 mandates that regulators perform a financial stress test, which consists of assessing the financial status of the utility company and capping liability costs from the 2017 wildfires at "the maximum amount the utility can pay without harming customers or affecting its ability to provide service."[30] Additional costs to cover damages from the 2017 fires, which would normally fall on shareholders, could be tied into bonds that ratepayers pay over a period of time.[31] That means that even if negligence or failure to follow laws and regulations caused the 2017 California Wildfires, SB 901 will nevertheless permit utility companies to raise consumer rates in order to cover potential liability judgements that come as a result of equipment mismanagement.

Costs to Consumers

PG&E analysts claim that, should their application to recover 2017 fire costs be approved by the CPUC, "the average residential customer would pay about $5 a year for every billion dollars in financing over the life of the bond."[32] This estimate does not clarify whether it considers only the losses produced by seventeen of the eighteen total 2017 fires, which CAL FIRE determined to have been caused by PG&E's equipment (see footnote 16) or whether the estimate encompasses additional liability judgments.

While CAL FIRE has determined that PG&E was not at fault for the 2017 Tubbs fire (the most destructive in California history), thousands of lawsuits by property owners and insurance companies remain unresolved. Should courts find PG&E at fault, the estimated losses are likely to increase significantly. Additionally, PG&E analysts did not provide the estimated increase of energy prices for its industrial customers. An increase for industrial energy prices affects households as well, since production costs tend to increase prices for goods and services in a market economy. Therefore, the estimated increase in industrial energy rates is necessary to accurately determine economic impacts on household consumers. While we do not have sufficient information to grasp the exact effects of PG&E's liability costs on the average Californian, we can deduce that increases in prices for energy and other goods are an imminent reality under SB 901's allowance for rate recovery of losses from 2017 California wildfires.

Opponents of SB 901, which included attorneys for fire victims, ratepayer advocates, Democratic senators voting against the bill, and environmental groups, all spoke out against the financial burden PG&E's mismanagement exerts on ratepayers. "'Our biggest concern is that manufacturers already pay industrial electricity rates that are more than 80 percent higher than the rest of country,' said Gino DiCaro, a spokesman for the California Manufacturers and Technology Association. 'The fact that ratepayers would be on the hook for billions of dollars would be a problem for growth going forward.'"[33] Noreen Evans, an attorney and former California legislator, represents

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[29] "Senate Bill 901," California Legislative Information, last modified September 21, 2018, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB901.
[30] *The Sacramento Bee*, "Your utility bill could reflect fire costs."
[31] Senate Floor Analyses: Hearings on SB 901 before the Senate Rules Committee, 2018 Leg," last modified August 28, 2018, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB901.
[32] Kovner, "Lawmakers approve bill."
[33] Luna, "Wildfire bill to aid PG&E clears Legislature."

over 2,000 fire survivors in a lawsuit against PG&E. She denounced SB 901, arguing that "ratepayers will be paying for their own loss" and criticizing the bill for having "no requirement that PG&E compensate victims."[34]

In addition to consumer and fire victim advocates, California legislators also agreed that SB 901 places a heavy cost burden on ratepayers. They regard the bill as a disservice to ordinary Californians because it furthers PG&E's economic interest while allowing the utility company to avert responsibility for its wrongdoings. Senator Jerry Hill, D-San Mateo, lamented that "The tragedy of our response is that it's focused more on Wall Street profits and utility shareholders instead of what's right for Californians."[35] Similarly, Marc Levine, D-San Rafael, criticized SB 901's prioritization of PG&E's financial solvency over keeping the utility company accountable for maintaining legal safety standards. Levine disavowed SB 901's section 451.2, because it "leaves utility ratepayers on the hook for huge costs due largely to utility negligence."[36] Additionally, Levine showed concern for the process through which cost recovery would be determined under SB 901. The lawmaker argued that the new law's stress test (which mandates the CPUC to consider only PG&E's financial health when deciding on 2017 fire cost recovery) puts a limit on PG&E's liability, "that could well turn out to be a disproportionately low one that allows [the company] to pass on major costs to ratepayers."[37]

In defending SB 901, proponents of the law argued that passing on liability costs to consumers would prevent PG&E from going bankrupt.[38] Yet on January 29th of this year, the company announced it would file for Chapter 11 bankruptcy anyway.[39] SB 901 supporters may cite PG&E's bankruptcy as proof of SB 901's necessity, given that the company filed bankruptcy after incurring new liability judgement costs, in 2018, that SB 901 would not cover.[40] Still, PG&E investors, supported by financial reports, maintain that the utility company's decision to file for bankruptcy is "unnecessary, avoidable and damaging" to all stakeholders.[41] After PG&E's announcement of intention to file for bankruptcy, Blue Mountain Capital Management, an investment firm managing over 11 million shares of PG&E's common stock, delivered a series of open letters urging PG&E to reconsider its decision.[42] In their correspondence, the investment firm contended that PG&E remains solvent enough to continue business operations, fulfill its obligations to creditors and respond responsibly to potential judgements of legal liability. To support these claims, Blue Mountain cited the reports of eighteen

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[34] Kovner, "Lawmakers approve bill."
[35] Luna, "Wildfire bill to aid PG&E clears Legislature."
[36] Kovner, "Lawmakers approve bill."
[37] Kovner, "Lawmakers approve bill."
[38] Luna, "Wildfire bill to aid PG&E clears Legislature."
[39] Dave Kasler and Tony Bizjak, "Amid Fire Woes, PG&E Could Sell Gas Division or Seek Bankruptcy," *The Sacramento Bee*, last modified January 5, 2019, http://digital.olivesoftware.com/Olive/ODN/sacbee/default.aspx.
[40] Senate Floor Analyses: Hearings on SB 901 before the Senate Rules Committee, 2018 Leg. SB 901's provision of liability cost recovery takes effect after December 31st, 2018, with the exception of losses incurred in 2017
[41] Capital Management, B. M., LLC,"Letter to Board of Directors of PG&E Corporation," *Blue Mountain Capital*, Last modified January 17, 2019. https://www.bluemountaincapital.com/wp-content/uploads/2019/01/BlueMountain-letter-to-PGE-dated-1.17.19.pdf.
[42] Capital Management, B. M., LLC, "Letter to Board of Directors of PG&E Corporation," *Blue Mountain Capital*, last modified January 17, 2019, https://www.bluemountaincapital.com/wp-content/uploads/2019/01/BlueMountain-letter-to-PGE-dated-1.17.19.pdf; Capital Management, B. M., LLC, "Letter to Board of Directors of PG&E Corporation," Blue Mountain Capital. Last modified January 22, 2019, https://www.bluemountaincapital.com/wp-content/uploads/2019/01/BlueMountain-letter-to-PGE-dated-1.22.19.pdf

different Wall Street analysts, all which agreed on PG&E's solvency, and concurred on a $20 billion equity valuation of the utility company. Despite potential liability judgements exceeding $30 billion, Blue Mountain asserts that a nuanced solvency analysis, that accounts for "tax assets, insurance assets, and return increases," could reveal the ability to offset remaining cash payments through retention of earnings for a period of time. Blue Mountain insists that such analysis would allow PG&E to comfortably manage its debt while foregoing Chapter 11 bankruptcy.[43] PG&E's financial statements revealing an annual revenue of $17 billion in 2017 seem to support Blue Mountain's claims.[44]

Regardless of whether or not filing bankruptcy was financially necessary, the cost of PG&E's decision will ultimately fall on energy consumers. According to a California Energy Commission report, PG&E raised consumer rates by over 10% during its 2001-2004 Chapter 11 bankruptcy proceedings.[45] This time around, PG&E has already sought permission from regulatory agencies to increase energy rates by $1 billion beginning in 2020, which translates to an average rate hike of $8.73 a month for residential electric bills and $1.84 for residential natural gas bills; rates are likely to jump further to cover legal expenses incurred throughout the bankruptcy process.[46] Additionally, these increases are not intended to cover potential liability judgements from fires, and will pile on top of rate hikes allowed by SB 901, if PG&E survives bankruptcy and pursues a cost recovery claim for the 2017 disasters.[47]

IV. CONCLUSION

In conclusion, PG&E has been legally permitted to continue operating despite its repeated violations of state and federal fire prevention regulations. If the utility company remains whole after bankruptcy proceedings conclude, Senate Bill 901 will protect the company from bearing the costs of the 2017 fires as a consequence of its mismanagement. Even if PG&E does not survive its second bankruptcy, SB 901 will hurt ratepayers in the long run. This is because the law loosens restrictions on CPUC standards to allow utility companies to increase consumer rates as a means of recovering costs from liability judgments in the future.

In addition to its monetary impacts on consumers, SB 901 puts Californians at risk of future wildfires by withholding financial punishment as a consequence for mismanagement of electrical equipment, which caused the 2017 fires. If SB 901 allows utility companies to forgo economic consequences by facilitating the transfer of liability costs to consumers, companies may continue to behave negligently. Therefore, even if bankruptcy prompts PG&E to be reorganized into different corporate entities, the new utilities will be incentivized not to prioritize safety because SB 901 provides a possible financial buffer in the case that mismanagement causes disasters resulting in liability judgments.

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[43] Capital Management, B. M., LLC, "Letter to Board of Directors of PG&E Corporation," *Blue Mountain Capital*, last modified January 17, 2019, https://www.bluemountaincapital.com/wp-content/uploads/2019/01/BlueMountain-letter-to-PGE-dated-1.17.19.pdf.
[44] Kasler and Bizjak, "PG&E Could Sell Gas Division or Seek Bankruptcy."
[45] "California's Residential Electricity Consumption, Prices, and Bills, 1980-2005," California Energy Commission, last modified September 2007, https://www.energy.ca.gov/2007publications/CEC-200-2007-018/CEC-200-2007-018.PDF.
[46] Kasler and Bizjak, "PG&E Could Sell Gas Division or Seek Bankruptcy."
[47] Kasler and Bizjak, "PG&E Could Sell Gas Division or Seek Bankruptcy."

This is especially dangerous, considering exacerbated hazards brought on by the acceleration of climate change. Bill Stewart, Co-director of the University of California Berkeley Center for Forestry, predicts that climate change will prompt in California "a continuing increase in wildfire probability and more people moving into harm's way."[48] Higher temperatures, prolonged droughts and stronger winds reinforce the necessity of proper fire safety measures by utility companies.[49] Should the state allow utility companies, as it has permitted PG&E, to operate in violation of fire safety laws and regulations with impunity, California could face a hard new levels of destruction and fatalities as we saw again in 2018 with the Butte County Camp Fire.

Lastly, SB 901's failure to keep utility companies accountable for negligent and reckless behavior endangers California's economy. The state's total fire prevention budget for the last fiscal year consisted of $201 billion, with $2.5 billion allocated to CAL FIRE.[50] By September of 2018, CAL FIRE requested $234 million more to continue extinguishing fires throughout the state.[51] While these costs were covered with state emergency funds, continuing to dismiss utility companies' fire prevention responsibilities will require exorbitant state spending and potentially reduce the state's capacity to provide other public programs and services.

[48] Elena Leander, "As California Burns, Experts Anticipate a 'New Normal'," *California Magazine*, last modified November 9, 2018, https://alumni.berkeley.edu/california-magazine/just-in/2018-11-09/california-burns-experts-anticipate-new-normal.
[49] George Skelton, "California's 'New Normal' for Wildfires is Unacceptable," *Los Angeles Times*, last modified August 9, 2018, https://www.latimes.com/politics/la-pol-sac-skelton-new-normal-wildfires-unacceptable-20180809-story.html.
[50] Skelton, "California's 'New Normal' for Wildfires is Unacceptable."
[51] Leander, "Experts Anticipate a 'New Normal'."

WORKS CITED

Avalos, George. "PG&E gets maximum sentence for San Bruno crimes." *Mercury News*. Last modified January 27, 2017. https://www.mercurynews.com/2017/01/26/pge-gets-maximum-sentence-for-san-bruno-crimes/

Baker, David R. "PG&E: Fire investigation could show utility violated San Bruno probation." *Bloomberg*. Last modified January 15, 2019. https://www.bloomberg.com/news/articles/2019-01-15/the-california-rule-that-doomed-pg-e-inverse-condemnation.

"California's Residential Electricity Consumption, Prices, and Bills, 1980-2005." California Energy Commission. Last modified September 2007. https://www.energy.ca.gov/2007publications/CEC-200-2007-018/CEC-200-2007-018.PDF.

Capital Management, B. M., LLC. "Letter to Board of Directors PG&E Corporation". Blue Mountain Capital. Last modified January 17, 2019. https://www.bluemountaincapital.com/wp-content/uploads/2019/01/BlueMountain-letter-to-PGE-dated-1.17.19.pdf.

Capital Management, B. M., LLC. "Letter to Board of Directors PG&E Corporation." Blue Mountain Capital. Last modified January 22, 2019. https://www.bluemountaincapital.com/wp-content/uploads/2019/01/BlueMountain-letter-to-PGE-dated-1.22.19.pdf.

Doyle, Jim. "PG&E Guilty In 1994 Sierra Blaze / 739 counts of negligence for not trimming trees." SFGate. Last modified June 20, 1997. https://www.sfgate.com/news/article/PG-E-Guilty-In-1994-Sierra-Blaze-739-counts-of-2821364.php

Dunn, James. "PG&E suspends dividends on stock in 2017 Q4," *Sonoma Index Tribune*. Last modified December 21, 2017. https://www.sonomanews.com/business/7792596-181/pge-suspends-dividends-on-stock?sba=AAS.

Kasler, Dave and Tony Bizjak. "Amid Fire Woes, PG&E Could Sell Gas Division or Seek Bankruptcy." *Sacramento Bee*. Last modified January 5, 2019. http://digital.olivesoftware.com/Olive/ODN/sacbee/default.aspx.

Kosef, Alexei. "Your utility bill could reflect fire costs under new California law." *The Sacramento Bee*. Last modified September 21, 2018. https://www.sacbee.com/news/politics-government/capitol-alert/article218803990.html.

Kovner, Guy. "Lawmakers approve bill that makes PG&E, ratepayers share wildfire costs." *The Press Democrat*. Last modified September 1, 2018. https://www.pressdemocrat.com/news/8692377-181/lawmakers-approve-bill-that-makes?sba=AAS.

Leander, Elena. "As California Burns, Experts Anticipate a 'New Normal'." *California Magazine*. Last modified November 9, 2018. https://alumni.berkeley.edu/california-magazine/just-in/2018-11-09/california-burns-experts-anticipate-new-normal.

Luna, Taryn. "Wildfire bill to aid PG&E clears Legislature despite ratepayer concerns." *The Sacramento Bee*. Last modified August 31, 2018. https://www.sacbee.com/latest-news/article217633560.html.

McLean, Scott "CAL FIRE Investigators Determine Cause of Four Wildfires in Butte and Nevada Counties," CAL FIRE, last modified May 25, 2018 http://calfire.ca.gov/communications/downloads/newsreleases/2018/2017_WildfireSiege_Cause%20v2%20AB%20(002).pdf.

Mohler, Michael. "CAL FIRE Investigators Determine Causes of 12 Wildfires in Mendocino, Humboldt, Butte, Sonoma, Lake, and Napa Counties." CAL FIRE. Last modified June 8, 2018.http://calfire.ca.gov/communications/downloads/newsreleases/2018/2017_WildfireSiege_Cause.pdf.

Mohler, Michael. "CAL FIRE Investigators Determine the Cause of the Cascade Fire," CAL FIRE. Last modified October 9, 2018. http://calfire.ca.gov/communications/downloads/newsreleases/2018/Cascade%20Fire%20Cause%20Release.pdf.

Nikolewski, Rob. "CPUC rules against SDG&E in 2007 wildfire case." *The San Diego Union-Tribune*. Last modified November 30, 2017. https://www.sandiegouniontribune.com/business/energy-green/sd-fi-sdge-wildfirecaseruling-20171130-story.html.

Okada, Sharon, dir. *The Most Destructive Fires in California History*. Sacramento, CA: *The Sacramento Bee*, 2018.

Paterson, L.A. "905 United States' Sentencing Memo 1-09-17." SCRIBD. Last modified January 9, 2017. https://www.scribd.com/document/336569584/905-United-States-Sentencing-Memo-1-09-17#from_embed.

"Senate Bill 901." California Legislative Information. Last modified September 21, 2018. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB901.

"Senate Floor Analyses: Hearings on SB 901 before the Senate Rules Committee." California Legislative Information. Last modified August 28, 2018. http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB901

Skelton, George. "California's 'New Normal' for Wildfires is Unacceptable." *Los Angeles Times*. Last modified August 9, 2018. https://www.latimes.com/politics/la-pol-sac-skelton-new-normal-wildfires-unacceptable-20180809-story.html.

"Incident Information." CAL FIRE. Last modified January 24, 2018. http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2017.

Venteicher, Wes, and Sophia Bollag. "As Fall Wildfires Grew, So Did PG&E Lobbying." *The Sacramento Bee*. Last modified February 2, 2019. http://digital.olivesoftware.com/Olive/ODN/sacbee/default.aspx

Watters, Lawrence. "The Taking Issue in the Ninth Circuit after Lucas," *Environmental Law* 3, no. 24 (July 1994): 1325-1349.

Weill, Kelly. "Utility Company PG&E Under Investigation for California Wildfire." Daily Beast. Last modified October 15, 2017. https://www.thedailybeast.com/utility-company-pgande-under-investigation-for-california-wildfire?ref=scroll.

LE TROUBLEMENT DE L'ORDRE PUBLIC: A COMPARATIVE STUDY OF THE PRINCIPLE OF LAÏCITÉ IN FRANCE, SENEGAL, AND ALGERIA

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Laïcité, a thoroughly French concept that is integral to French identity and a current force for integration of Muslim immigrants and new Muslim citizens, is at the center of heated debate surrounding Islam, pluriculturalism, and integration. There is a lot of unrest and violence in France surrounding laïcité and Islam, but in certain Islamic former French colonies, laïcité is embraced peacefully in some capacity or another. Theoretical research conducted on the compatibility of laïcité and Islam, laïcité and pluriculturalism, and laïcité and the Maghreb, comparing the interpretations of laïcité of France, Senegal, and Algeria revealed that there is no one way to interpret laïcité. Rather, many different countries and cultures can and will come up with a variety of types of laïcité based on their own histories and contexts. Therefore, Islam is compatible with laïcité, and it is possible for Maghrebin countries to be laïque. Furthermore, while it seems that laïcité in Senegal and Algeria is more or less successful, it is unfair and likely impossible to accurately compare the success of a concept such as laïcité between countries as different as France, Senegal, and Algeria. As for France, in order to successfully integrate Muslims peacefully into French society, the French understanding of laïcité has to adapt, evolve, and enlarge itself to allow for public expressions of faith. While French Muslims are beholden to the law as the only authority on laïcité, the law can be made to allow for a more peaceful pluricultural society.

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I. INTRODUCTION

Theoretical Framework of Analysis

Problem

The term "laïcité" was not coined in France until the end of the nineteenth century, but by then the concept had already ingrained itself in French society and politics. The term refers to the separation of church and state, the freedom of belief, and the freedom from religion—that is, the freedom to believe nothing at all.[1] Laïcité governs French secular society, but it represents more than just secularism.

According to Kader Abderrahim, an expert on Islam in France at L'Institut de la science politique, laïcité is about protection-both within the exercise of religion within certain guidelines, and in the choice to abstain free of pressure.[2] However, the idea of laïcité as Abderrahim defines it is being challenged. The religion of Islam is growing more multicultural by the year due to intercontinental migration, particularly in France, where many Muslims descended from former French colonies have migrated in recent decades. Currently, Islam is the second-largest religion in the hexagonal country. From Abderrahim's point of view, this growing population of Muslims in France causes problems in relation to laïcité because they do not recognize that principle, or even the idea that a person could not believe in any religion. Valérie Boyer, a former French mayor, expanded on that idea in a 2017 tweet which said, "la laïcité n'existe que dans les pays aux racines chrétiennes,"[3] implying that there is a fundamental, perhaps irreconcilable divide between Islam and laïcité.[4]

However, as *Le Monde* journalist Anne-Sophie Faivre points out in an article about laicite in countries that were not historically Christian, several majority-Muslim countries such as Mali, Senegal, Guinea, and the Ivory Coast inscribe the principle of laïcité in their constitutions. France's interpretation of laïcité has been banning the veil and the burkini and guaranteeing pork in schools in an effort to keep the government and public spaces free of any visible religious practices.[5] On the other hand, in majority-Muslim, laïque countries like Senegal, Muslim garments and halal food are common. Laïcité exists in a certain capacity, not just as a symbol of "la stabilité et la paix"[6] but also "combattre d'une occidentalisation corruptrice"[7]. Indeed, while Abderrahim suggests that French Muslims do not feel French or understand the principle of laïcité, research published by *Le Figaro* indicates that fourteen percent of French Muslims feel French above all, sixty percent feel that their French and Muslim identities have equal weight, and seventy-five percent support the principle of

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[1] Kadar A. Abderrahim, Lecture, October 4, 2018.
[2] Abderrahim, Lecture.
[3] "Laïcité exists only in countries with Christian roots."
[4] Anne-Sophie Faivre, "Non, la laïcité n'existe que dans les pays aux racines chrétiennes," Le Monde, last accessed November 6, 2017, https://www.lemonde.fr/les-decodeurs/article/2017/11/06/non-la-laicite-n-existe-pas-que-dans-les-pays-aux-racines-chretiennes_5210979_4355770.html.
[5] Abderrahim, Lecture.
[6] "Stability and peace."
[7] "To combat a corrupting Westernalization"; Marie Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal: La Redéfinition De La Laïcité Comme Enjeu Du Processus De Démocratisation," (Master's thesis, 2004)

laïcité.[8] Of these same French Muslims surveyed, seventy percent support wearing the veil.[9] Herein lies a contradiction: is the French social construct of laïcité in direct conflict with an individual's right to publicly practice their religion's customs and requirements, and can French understanding of laïcité evolve to allow signals of Muslim faith in public?

One might argue, if one accepts the views that Muslims generally reject laïcité and that the French application of laïcité is centered around modernization, that countries like Senegal and Algeria should relinquish much of their freedom to display Muslim culture in order to become truly laïque.[10] Such sweeping claims of the superiority of one culture's values over the values of another should always be challenged.

This topic is relevant today because the increasingly multicultural makeup of France and the apparent incompatibility between Islam and laïcité has caused divisiveness, violence, and the passing of ill-equipped legislation. Scholars of laicite and Islam in France such as Soheib Bencheikh, Marie-Claude Lutrand, and Behdjat Yazdekhasti address the shortcomings in the French laïque mindset and the potential for fully integrated Islamic, laïque societies, but I would like to investigate whether the racial and cultural repercussions of France's colonial past have contributed to the revival of the laïc debate, and could fuel the fires of hostility towards the French Muslim population and the francophone idea of laïcité. I expect that colonialist history and racial bias will be shown to have an effect on this issue, but the hardline attitudes can be traced back all the way to the third French republic, prior to the recent debate regarding Muslims and the principle of laïcité. Furthermore, the definition of laïcité could be compatible with Islam if the societies in question could be persuaded to keep open minds.

Focus of Study

I conducted research on the history and understanding of laïcité in France, including all the historical and cultural factors that may have rendered its application less neutral than desired. I also researched its effect on French Muslims and compared that to the history and practice of laïcité in the former French colony of Senegal. Afterwards, I compared laïcité in both of these countries to that in Algeria, a Muslim country in the midst of transitioning to becoming laïque whose bloody colonial history with France and own culture have influenced its attitude towards laïcité.[11] I researched the history, understanding, and application of the principle of laïcité in these three countries and its impact on Muslims, with an emphasis on the global movement toward multiculturalism and the need of laïcité to adapt to such a diverse future.

My research questions, therefore, are: is Islam compatible with laïcité? Why has France struggled with maintaining a peaceful multicultural, laïque country while there are majority Muslim

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[8] Abderrahim, Lecture; AFP, "L'Islam de France bien intégré (sondage)," Le Figaro, last accessed September 9 2008, http://www.lefigaro.fr/flash-actu/2008/10/29/01011-20081029FILWWW00603-l-islam-de-france-bien-integre-sondage.php.

[9] Le Figaro, "L'Islam de France bien intégré (sondage)."

[10] Abderrahim, Lecture.

[11] Constitution de la république algérienne démocratique et populaire (November 16, 2008); Nedjib Sidi Moussa, "Liberté de conscience, athéisme et laïcité en Algérie," *L'Enjeu mondial. Sciences politiques* (2018).; Henri Sanson, "La laïcité dans l'Algérie d'aujourd'hui," *Revue des mondes musulmans et de la Méditerranée,* 29, (1980: 55-68).

countries that are seemingly laïque? I will answer these questions while maintaining a focus on Muslim migration to France from its former colonies and laïcité as a potentially failing force for integration.

Literature Review

Several academic papers and projects address this issue from legal, historical, theoretical, and philosophical angles. Jean Baubérot, in "Introduction : La Laïcité en France entre mémoire et histoire" from his book *Histoire de la laïcité en France*,[12] takes a historical approach to understanding laïcité in France, detailing how its origins and importance to French identity. Bencheikh's "L'Islam face à la laïcité française"[13] and Marième N'Diaye's "Ambiguïtés de la laïcité sénégalaise : la référence au droit islamique"[14] from the book *La Charia aujourd'hui*[15] both offer a more legal approach to understanding whether Islam is compatible with laïcité and ideas on how a more peaceful implementation of laïque law can be achieved in France and Senegal, respectively.

Four authors employ political theory. Lutrand and Yazdekhasti do so in "Laïcité et présence musulmane en France : des dynamiques d'influence réciproque"[16] in order to postulate which changes laïcité must undergo in order to adapt to a pluricultural future; Marie Brossier does so in "Les Débats sur la réforme du code de la famille au Sénégal : La Redéfinition de la laïcité comme enjeu du processus de démocratisation"[17] in order to explain the reasons for differences in the interpretation of laïcité between Senegal and France; Mountaga Diagne does so in "Pouvoir politique et espaces religieux au Sénégal : La Gouvernance locale à Touba, Cambérène, et Médina Baye"[18] in order to prove that religious spaces in Senegal do control some socio-political capital.

Finally, Bérengère Massignon in "Jean Baudouin, Philippe Portier (éds.), La Laïcité. Une valeur d'aujourd'hui ? Contestations et renégociations du modèle français"[19] and Henri Sanson in "La Laïcité dans l'Algérie aujourd'hui"[20] use philosophical approaches to determine whether modern French laïcité is even necessary or beneficial in today's world and to argue that Algeria is in its own way laïque.[21]

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[12] "Laïcité in France Between Memory and History;" Jean Baubérot, "Introduction: La Laïcité en France entre mémoire et histoire," in *Histoire de la laïcité en France* (Paris: *Presses Universitaires de France*, 2013), 3-4.

[13] "Islam Faced with French Laïcité;" Soheib Bencheikh, "L'Islam face à la laïcité française," *Confluence Méditerranée*, no. 32 (2000: 73-82).

[14] "Ambiguities of Senegalese Laïcité: The Reference to Islamic Law;" Marième N'Diaye, "Ambiguïtés de la laïcité sénégalaise : la référence au droit islamique," *La Découverte* (2012: 209-222).

[15] "*Sharia Today."*

[16] Laïcité and Muslim presence in France: Some Dynamics of Reciprocal Influence;" Marie-Claude Lutrand and Behdjat Yazdekhasti, "Laïcité et présence musulmane en France : des dynamiques d'influence réciproque," *Cahiers de la Méditerranée*, no. 83 (2011: 327-335).

[17] "Debates on Senegal's Family Code Reform: The Redefinition of Laïcité as a Challenge of the Process of Democratization;" Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal."

[18] "Political Power and Religious Spaces in Senegal: Local Governance in Touba, Cambérène, and Médina Baye;" Mountaga Diagne, "Pouvoir Politique Et Espaces Religieux Au Sénégal : La Gouvernance Locale à Touba, Cambérène Et Médina Baye," (December, 2011).

[19] "Laïcité. A Value of Today? Objections to and Renegotiations of the French Model;" Bérengère Massignon in "La Laïcité, Une valeur d'aujourd'hui? Contestations et renégociations du modèle français," edited by Jean Baudouin and Philippe Portier, *Presses Universitaires de Rennes*, (2001).

[20] "Laïcité in Algeria Today."

[21] Sanson, "La Laïcité dans l'Algérie aujourd'hui," 55-68.

These sources are very comprehensive, but they do not address potential societal reasons for the targeting of Islam in French society, such as racism or Islamophobia. My research shows that the majority of people who talk about this subject are averse to addressing such sensitive possibilities, perhaps out of pride or shame because many are French. I will address this sensitivity as a possibility, and not make any assumptions about the presented factors.

Definitions and Analytical/Theoretical Framework

Certain concepts contribute to the understanding of laïcité, such as the values of the French identity, which can be split into republicanism, exceptionalism, and uniformity. French historical memory, including French revolutions, republics, and African colonization, also contribute to existing patterns and policies regarding legal laïcité. Immigration, which can be further dissected to integration and coexistence and connected to colonial history, also frames the discussion. Finally, human rights, specifically laws governing religious freedom, govern all policy on the subject.

Framing laïcité as a republican ideal, which breeds French exceptionalism and the push for public uniformity, helps contextualize the conflicts between Islam and French laïque society. History and memory inform the need for laïcité in its birth, its existence in the Maghreb, and the reasons for its vehement resurgence in France. Immigration is an important contextual factor because it coincides with anticlerical attitudes in France and France's post-colonial period, and, just like laïcité, it is intricately tied to integration and coexistence. Finally, the right to religious freedom is both the rallying cry of laïque France and French Muslims, and laïque law plays a large role in integration.

Using these concepts, I will attempt to define and understand modern French laïcité, the role of Islam in France, whether France is the sole possessor of laïcité or if other countries can determine its interpretation, and I will propose solutions that thoughtfully intertwine these factors.

II. ANALYSIS

Discussion - History of Laïcité

Laïcité has a multilayered history in France: although the term was not used until the 1880s, the roots of laïcité are thought to have come from Article 10 of the *Déclaration des droits de l'homme et du citoyen.*[22] This article states that "nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par loi," which means "no one must be disturbed for his opinions, even religious opinions, provided that the manifestation of those opinions do not trouble the public order established by law."[23] This phrasing, though originally intended to solve the problem of corruption in the catholic church, has paved the way for the burqa ban, the veil controversy, and the burkini debate, among other red-hot issues in France today. Gorce and Hoffner identify the ban against religious signs in schools as an example of discrimination justified by a push for control of the public domain.[24]

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[22] "'Déclaration des droits de l'homme et du citoyen," Conseil Constitutionnel, (August 26th, 1789); Bernard Gorce and Anne-Bénédicte Hoffner, "Islam, laïcité, le difficile dialogue," La Croix, last modified October 10th, 2017, https://www.la-croix.com/Religion/Islam/Islam-laicite-difficile-dialogue-2017-10-10-1200883190.

[23] Article 10, Conseil Constitutionnel.

[24] La Croix, "Islam, laïcité, le difficile dialogue."

By prohibiting the expression of religious beliefs if such manifestations trouble the public order, the *Déclaration* allows for anticlericalism, then-unprecedented in other Western countries.[25] What constitutes "troubling the public order?" Under such a vague definition, all expressions of religion that are not seen in Catholicism can be arbitrarily defined this way. Whereas many other religions have more visible manifestations of faith, such as clothing that identifies adherence or zealousness, there is no discernible outward expression of faith on a day-to-day basis in Catholic Christianity, which dominated and still dominates French demographics.[26] With religions such as Judaism and Islam, the opposite is true. This cultural difference, it seems, throws a wrench into the cogs of French laïque society.

The French laïque awakening wasn't until 1880, after a vicious conflict between the republicans and the Catholic Church.[27] It is interesting to note that the Catholic Church was the first enemy of laïcité.[28] The laïcisation of the French state began with public schools, where the battle against religious influence continues today in the form of debates over wearing the veil.[29] In fact, a historian called Islam "la nouvelle Église catholique," or the new enemy of laïcité, and the new focus of passionate verbal and legal attacks in the present day in an effort to re-laïcise French society.[30] These modern efforts against Islamic influence are so aggressive and targeted that Samuel Gryzbowski of Coexister has compared them to McCarthyism.[31]

Gorce and Hoffner detail several such impassioned stances against Islam in the public sphere as many French citizens have called for a "réarmement républicain."[32] Alain Jakubowicz, President of Licra, went as far as to say that "la montée des appartenances identitaires, raciales, religieuses, est un cancer pour la société"[33] to enforce his assertion that identification with identity groups other than French citizenship can cause radicalization.[34] However, he does not consider whether suppressing the identification of first-, second-, and third-generation immigrants with minority identity groups while simultaneously exposing them to societal intolerance and discrimination could push them toward unrest and even violence, preventing successful integration.[35]

These vitriolic sentiments towards Islam have not resurged rather than emerged for the first time as a result of the terrorist attacks of recent years, such as the 2015 attack on *Charlie Hebdo* in Paris.[36] So, why have French citizens decided that public displays of Muslim faith are enough to trouble

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[25] Article 10, Conseil Constitutionnel.
[26] Babel, "Laïcité française : histoire d'une séparation," Radio Télévision Suisse, last modified April 8th, 2018, https://www.rts.ch/play/radio/babel/audio/lacite-franaise--histoire-dune-separation?id=8492402.
[27] Christophe Gracieux and L'Institut national de l'audiovisuel, "L'Histoire de la laïcité en France," Jalons : Version Découverte, last modified January 29th, 2015, https://fresques.ina.fr/jalons/fiche-media/InaEdu06607/l-histoire-de-la-laicite-en-france.html.
[28] Radio Télévision Suisse, "Laïcité française."
[29] La Croix, "Islam, laïcité, le difficile dialogue."
[30] Radio Télévision Suisse, "Laïcité française."
[31] La Croix, "Islam, laïcité, le difficile dialogue."
[32] "Republican rearmement;" La Croix, "Islam, laïcité, le difficile dialogue."
[33] "The display of identity-related, racial, or religious affiliations is a cancer for society;" La Croix, "Islam, laïcité, le difficile dialogue."
[34] La Croix, "Islam, laïcité, le difficile dialogue."
[35] La Croix, "Islam, laïcité, le difficile dialogue."
[36] "Paris Attacks: What Happened on the Night," BBC News, last modified December 9th, 2015, https://www.bbc.com/news/world-europe-34818994

the public order?[37] Experts like Lutrand, Yazdekhasti, and Baubérot characterize Islamophobic attitudes as a resurgence, but do not talk about their roots.[38] Yet, it is common knowledge that most of the Muslim immigrants to France in the past few decades have migrated from former French colonies, which have all since gained their independence. Could it be that the colonialist attitudes that spurred colonization of the Maghreb and infiltrated Muslim societies with French language and culture still persist in the minds of some French citizens? Or, could it be that the influx of Magrébin immigrants reminds French people of their colonial history and causes them to want to remove the source of their discomfort from the public sphere? It is certainly no secret that many people believe that the resurging efforts to laïcise French Muslims is rooted in racial and religious discrimination, such as Bencheikh, who claims that "le désir de débattre exceptionnellement avec l'islam avant de lui appliquer la laïcité, même par égard et au nom d'un quelconque aménagement, s'apparente à une sorte de discrimination."[39] It would thus be unintuitive to completely disregard that theory as a possible factor.

However, attributing the new laïque resurgence to Islamophobia, alone, does not take into account the full, complex history of laïcité in France and could inaccurately paint French people as intolerant. The rationalization for banning garments such as the veil or the burqa traces back to Article 10 of *Déclaration*, allowing for such displays to be characterized as troubling.[40] Yet at the time it was penned, that stipulation must have seemed perfectly reasonable. There are no easily identifiable garments attributed to Catholicism, and one can imagine that it is relatively easy for the average Catholic and the average atheist to appear indistinguishable in public, allowing for the preservation of the anonymity of one's religion. There is no way that the authors of that document could have predicted France's colonization of Muslim countries in northern Africa, and the consequences of colonizing the territory.[41] As Bencheikh succinctly states, "la présence de l'islam en France est postérieure à la proclamation de la loi de séparation qui est en réalité un divorce à l'amiable entre l'Etat et les religions."[42] The instrument that is used to legislate Islam out of the French public sphere was most likely never intended for that purpose, a fact which does not excuse contemporary discrimination but rather provides a compelling argument for those who argue that there is a non-discriminatory purpose for it.

Furthermore, the Muslim faith is not always the target of French anger during periods of laïcisation. The fervor with which laïque activists attack public displays of Muslim faith is reminiscent of the bloody dispute during the Third Republic in 1880, in which the Catholic Church was the target.[43] Despite the new era, some people believe that violence is an inevitable part of the process of

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[37] La Croix, "Islam, laïcité, le difficile dialogue."
[38] Lutrand and Yazdekhasti, "Laïcité et présence musulmane en France," *Cahiers de la Méditerranée*, 327-335; Baubérot, "Introduction," 3-4.
[39] "The desire to debate exceptionally with Islam before applying laïcité to them, even with respect and in the name of the least arrangement, connects to a sort of discrimination;" Bencheikh, "L'Islam face à la laïcité française," 73-82.
[40] Jalons : Version Découverte, "L'Histoire de la laïcité en France;" Article 10, 26 août 1789.
[41] Abderrahim, Lecture.
[42] "The presence of Islam in France came after the legal proclamation of separation, which is in reality an amicable divorce between the State and its religions;" Bencheikh, "L'Islam face à la laïcité française," 75.
[43] Jalons : Version Découverte, "L'Histoire de la laïcité en France."

laïcisation.[44] One such person is Baubérot, who described the paradox that "la laïcisation ne va pas sans conflit, l'objectif doit permettre un vivre-ensemble pacifié."[45] Yet all of this history still does not explain why French citizens find it necessary to laïcise Islam in France at all.

The answer may lie in the roots of French identity itself. According to Baubérot and Cabanel, laïcité contributes to and is in fact an essential aspect of French exceptionalism. As Nicolas Cadène of the Observatoire de la laïcité described, the important role of laïcité in the early impulse to make French citizenship and republican values more important than religion has made it an integral component of French national identity.[46] Laïcité was also meant to foster unity as French citizens by not prioritizing one religion over another but establishing "liberté de conscience"[47] and equality of all citizens under the law, regardless of personal conviction.[48] As Cadène firmly stated, "nous sommes avant tout citoyens français."[49]

Indeed, Mostafa Brahami of the Union Vaudoise des Associations Musulmanes affirms this notion, but from a far more cautious point of view. In an interview, he described modern French laïcité as fundamentally "intégriste"—modern French laïcité is at its core a force for complete integration and assimilation into established French society; uniformity of appearance, identity, and public presentation among French citizens are enforced by adhering to one of the most fiercely French ideals that exists.[50] Unfortunately, that force for complete integration is unforgiving and unyielding, and seems to be unwilling to make any compromises with its second-largest demographic.[51]

Modernism and Pluriculturalism in France

Abderrahim associated laïcité with modernism, the next natural step from the quasi-religious political regimes of old.[52] However, his assertion begs the question: what is modernism? Words like modernization often evoke Euro-centric societal and political standards that do not necessarily represent the best alternative for every country.[53] One could categorize modern societies as secular, even areligious, industrialized, and liberal, but it would be more relevant to define modernization as the processes that are currently affecting the entire globe. Globalization has touched every corner of the world, and can be defined as the free movement of people, ideas, communication, and culture. Thus, one could say that modernization is interconnected with globalization, and that both are irreversibly linked with pluriculturalism. In the face of waves of immigration, bringing cultures that have never called France home before, it is necessary to assess France's adaptability to a pluricultural future, and with it, the adaptability of the concept of laïcité itself.

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[44] Jalons : Version Découverte, "L'Histoire de la laïcité en France."
[45] "The process of achieving laïcité does not happen without conflict, yet the goal must permit a peaceful togetherness in which citizens can live;" Baubérot, "Introduction," 3.
[46] Nicolas Cadène, interview by Sarah Anne McKenzie, November 21, 2018.
[47] "Freedom of moral thought, awareness"
[48] Cadène, interview.
[49] "We are above all French citizens;" Cadène, interview.
[50] Mostafa Brahami, interview by Sarah Anne McKenzie, November 26, 2018.
[51] Brahami, interview.
[52] Abderrahim, Lecture.
[53] Brahami, interview.

The foundation of laïcité in *Déclaration* made sense in the context upon which it was founded, but is clearly outdated in today's diverse France.[54] In their essay, Lutrand and Yazdekhasti assert that Islam in France and all of Europe today has been influenced and shaped by the context of an evolving Europe and is "un islam à penser en référence à la modernité."[55] They therefore postulate that "en raison de la présence de citoyens français musulmans, la laïcité—valeur fondatrice et principe essentiel de la République française—est invitée à élargir sa conception du pluralisme"[56] and adjust "à l'âge ultra-moderne et au cadre européen."[57] Baubérot, who writes of the possibility of a "laïcité interculturelle," or an intercultural laïcité, supports them.[58] He highlights the difference between the context surrounding laïcité in the past and present, remarking that "si le combat laïque d'hier a revendiqué les libertés, celui d'aujourd'hui revendique l'égalité des citoyens."[59] However, he guards against "une laïcité qui deviendrait une religion civile,"[60] and he is not alone in feeling that laïcité has become or has made atheism the "religion d'Etat" of France, so to speak.[61]

Massignon also waxes philosophy as he speaks of Jean Baudouin and Philippe Portier's take on the outdatedness of French laïcité:

> Ce modèle a été progressivement frappé d'obsolescence par des évolutions de fond affectant l'ensemble des démocraties modernes et plus fortement le modèle républicain français : le 'sacre de la société civile' (Marcel Gauchet), la multiculturalisation de la société, l'expansion du relativisme moral et des valeurs postmodernes et la concurrence des modèles étrangers.[62]

Immigration is the key factor that Massignon identifies as contributing to the outdatedness of modern French laïcité, as "la pluralisation religieuse et ethnique de la société française, par sédentarisation des immigrés, a ouvert la voie à de nouvelles revendications, en termes de droit à la différence, remettant en cause le modèle moniste républicain qui établissait une hiérarchie entre appartenance nationale et identités particulières."[63] The method by which France can modernize their conception of laïcité is by doing the supposedly unspeakable: tolerating public expressions of faith, which has long been

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[54] Article 10, Conseil Constitutionnel.
[55] "An Islam of thinking in reference to modernity;" Lutrand and Yazdekhasti, "Laïcité et présence musulmane en France," 327.
[56] "Due to the presence of French Muslim citizens, laïcité--a founding value and essential principle of the French republic--is invited to enlarge its conception of pluralism,"
[57] "to the ultra-modern age and the European setting;" Lutrand and Yazdekhasti, "Laïcité et présence musulmane en France," 328.
[58] Baubérot, "Introduction," 3-4.
[59] "If the laïque combat of yesterday claimed freedoms, the laïque combat of today claims the equality of the citizens;" Baubérot, "Introduction," 3-4,
[60] "A laïcité that would become a civil religion."
[61] Baubérot, "Introduction," 3-4; N'Diaye, "Ambiguïtés de la laïcité sénégalaise," 210.
[62] "This model had been progressively struck with obsolescence by base evolutions affecting the gathering of modern democracies and most strongly, the French republican model. These evolutions include the 'consecration of civil society' (Marcel Gauchet), the multiculturalization of society, and the expansion of moral relativism, postmodern values, and the concurrence of strange models;" Massignon, "La Laïcité," 68.
[63] "The religious and ethnic pluralization of French society, by the sedentarization of immigrants, opened the door to new demands, in terms of law of difference, questioning the republican monist model that was establishing a hierarchy between national affiliation and particular identities;" Massignon, "La Laïcité," 68-69.

touted by the Mouvement des musulmans laïcs de France.[64] As Massignon puts it, "le modèle laïque français évolue vers une plus grande reconnaissance de la présence des religions dans la sphère publique sans qu'on puisse l'analyser comme un retour du cléricalisme."[65]

Bencheikh also contributes to the conversation by positing that the acceptance of Islam in French society is of paramount concern, and that can and should be brought about by legal integration.[66] He argues against the incessant nitpicking of French society over Islam and their refusal to accept Islam into the folds of laïque society by asking, "est-il logique que nous demandions à une religion de se moderniser lorsque l'objectif est de nous séparer d'elle."[67] He indicates that he does not believe that Islam has to "modernize" to appease French standards of modernity, noting that "tout travail qui vise la modernisation de l'islam n'est pas un préalable à sa reconnaissance en France ou une condition pour son intégration dans le champ laïque,"[68] and that "la seule laïcité à laquelle l'islam en France est obligé de se conformer est la laïcité juridique."[69] In fact, Bencheikh asserts that "même la plus archaïque" "version théologique de l'islam en France…ne cause pas la moindre gêne à une laïcité juridique,"[70] arguing for its ability to seamlessly integrate into French culture, should it be accepted by the public.[71] After studying these sources, it seems that the only path to peaceful integration of Islam in France is the tolerance of public displays of faith, and preventing the public practice of Islam troubles the public order more than the practice itself. One could say that the previous attitude about relegating religion solely to private life is no longer appropriate in France. Antiquated attitudes about religion could be preventing the peaceful integration of Muslim immigrants in French society.

In the Maghreb

How has laïcité fared in former French colonies, and how has their interpretation of the concept differed from France's interpretation? Before diving into that question, one must examine the hotly debated issue of whether Islam is compatible with laïcité. N'Diaye, Brossier, Diagne, and Sanson find in Senegal and Algeria both a desire to be laïque and a distrust of the remnants of their "héritage colonial."[72] According to Bencheikh, "l'islam politique rêve de voir bientôt des républiques islamiques dans les pays musulmans. Il voit dans la laïcité en France un cheval de Troie."[73] However, research

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[64] Mohamed El Khamlichi, "La Laïcité des musulmans," Réseau International, last modified September 9th, 2017, https://reseauinternational.net/la-laicite-des-musulmans/.

[65] "The French laïque model is evolving towards a bigger recognition of the presence of religions in the public sphere without on having to analyze it as a return to clericalism;" Massignon, "La Laïcité," 70.

[66] Bencheikh, "L'Islam face à la laïcité française," 73-82.

[67] "Is it logical that we were asking a religion to modernize when the objective was to separate ourselves from it?" Bencheikh, "L'Islam face à la laïcité française," *74*.

[68] "All of the work which aims at the modernization of Islam is not a prelude to its recognition in France or a condition for its recognition in the laïque sphere."

[69] "The only laïcité to which Islam is obliged to conform is judicial laïcité;" Bencheikh, "L'Islam face à la laïcité française," 73, 79.

[70] "Even the most archaic" "theological version of Islam in France does not pose the least barrier to judicial laïcité."

[71] Bencheikh, "L'Islam face à la laïcité française," 79.

[72] N'Diaye, "Ambiguïtés de la laïcité sénégalaise," 209-222; Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal;" Diagne, "Pouvoir Politique Et Espaces Religieux Au Sénégal;" Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 55-68.

[73] "Political Islam dreams to soon see Islamic republics in Muslim countries. It seems in laïcité in France a Trojan horse;" Bencheikh, "L'Islam face à la laïcité française," 77-78.

from Brosser, Diagne, and Sanson suggests that political Islam also longs for their countries to be laïque on their own terms.[74]

According to authorities such as Cadène and Brahami, Islam is "bien sûr" compatible with laïcité, and Islamic countries have the ability to be laïque—it is only a matter of each country's history and the process by which laïcité emerged in each country.[75] In the case of Senegal and Algeria, laïcité was introduced to their cultures through colonization, violence, and slavery, which could put a sour taste in the mouths of opponents to laïcité and westernization.[76] Yet laïcité persists politically and socially in some form in those countries.[77] As Brahami stated, "l'islam ne pose aucun problème dans tous les pays européens qui sont globalement laïcs, dans le sens que la religion n'intervient pas dans les affaires de l'État."[78] Contrastingly, Bencheikh writes that "la recherche de la compatibilité de l'islam avec la laïcité est inutile,"[79] but perhaps that simply means that the issue at hand is an invented one, and that there is no religion which is incompatible with laïcité.[80] As Brahami points out, the issue seems to come from entrenched French colonial culture.[81]

In Senegal

If Maghrebin countries can be—and some are—laïque, then one must ask what their interpretation of laïcité looks like for their needs. Senegal has been laïque since 1994.[82] Legally, Senegal has embraced this development, and according to N'Diaye, "l'Etat laïc du Sénégal a largement exclu la référence au droit musulman de son arsenal juridique."[83] In fact, according to Brossier, Senegal does not fear but rather welcomes the acknowledgment of its colonial past, in the sense that "l'importance de l'expérience française est d'autant plus grande qu'elle fait partie intégrante de cet héritage colonial."[84]

Laïcité in Senegal is not about uniformity but rather unity.[85] Not only will laïcité "permettre de devenir une 'vertu' sénégalaise,"[86] writes Brossier, but also it has proven itself to be Senegal's "principe unificateur."[87] This sense of unity is achieved in a rather contradictory way, if one looks from a French person's point of view; Brossier describes that "dans le contexte sénégalais, la laïcité est exprimée comme la liberté offerte à toutes les croyances de s'exprimer sur la scène publique."[88]

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[74] Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal;" Diagne, "Pouvoir Politique Et Espaces Religieux Au Sénégal;" Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 55-68.
[75] Cadène, interview; Brahami, interview.
[76] Cadène, interview; Brahami, interview.
[77] Michel Oris, interview, November 16th, 2018.
[78] "Islam poses no problem in all of the European countries which are globally laïc, in the sense that religion does not intervene in the business of the State;" Brahami, interview.
[79] "Research on the compatibility of Islam with laïcité is useless."
[80] Bencheikh, "L'Islam face à la laïcité française," 73.
[81] Brahami, interview.
[82] Article 10, Conseil Constitutionnel.
[83] "The laïc state of Senegal has largely excluded reference to Islamic law in its judicial arsenal;" N'Diaye, "Ambiguïtés de la laïcité sénégalaise," 220.
[84] "The importance of the French experience is so much greater that it plays an integral part of this colonial heritage;" Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal," 26.
[85] Brossier.
[86] "Permit to become a Senegalese 'virtue'"
[87] "Principal unifier;" Brossier, 28.
[88] "In the Senegalese context, laïcité is explained as the freedom offered to all beliefs to express themselves in the public

Rather than give no one the opportunity to express his or her faith in public, Senegalese society gives everyone equal opportunity to do so. Nevertheless, with ninety-five percent of the Senegalese population being Muslim, is this really fair and equal, or is it disproportionate?[89] According to Brossier, different religions intermingle in Senegal without terrorist attacks committed by minority groups such as those that have taken place in France, lending to the notion that all religions cohabitate relatively peacefully in Senegal. Brossier stipulates that this is because "la laïcité prend au Sénégal source dans la religion même, faisant de l'Etat un instrument de garantie de la liberté de culte,"[90] and this instrumentalization of the State means that, unlike France, the State cannot pretend that religions do not exist under its influence.[91] The key distinguisher between Senegalese and French interpretations of laïcité is the values that each believes will hold together their respective societies: unity in Senegal or uniformity in France. Where national identity is built upon sameness, a country's principles will encourage conformity, and where national identity is built upon oneness, a country's principles will encourage cohabitation. These different values lend understanding to the different approaches taken by France and Senegal to interpret laïcité.

However, history does play a role in the implementation of Senegalese laïcité as well, and their approach is not without its faults. Diagne found that the "implantation historique des confréries religieuses dans les espaces locaux y a permis une construction socio-politique du pouvoir politique, exprimée dans l'appartenance religieuse."[92] It seems that religion still holds some political influence in Senegalese public spaces at the local level, although Diagne indicated that, until the present, this phenomenon had not risen above the local level.[93] This affirms that Senegalese laïcité, while successful in providing integration and coexistence, has not completely severed all ties between the political and the religious.

In Algeria

Algeria, on the other hand, despite its history as an oppressed colony of France, was eager to adopt the idea of laïcité in order to protect the exercise of religion when, "durant la période coloniale, cheikh Ben Badis avait demandé l'application de la laïcité en Algérie, car le pouvoir français voulait instrumentaliser l'islam en nommant ses propres fonctionnaires pour diriger l'islam."[94] Algeria's history with France is more complicated than that of Senegal; Algeria was considered a much more important colony than the others, and the French thus tried to quash political Islam there through legal acts such as the Native Code, instituting bureaucracy to hinder religious practice.[95]

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arena"; Brossier, 28.

[89] N'Diaye, "Ambiguïtés de la laïcité sénégalaise."

[90] "Laïcité in Algeria takes its source from the same religion, acting for the state as an instrument to guarantee the freedom of religion."

[91] Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal," 28.

[92] "Historic implantation of religious associations in public spaces has allowed in those spaces a socio-political construction of political power, explained in religious affiliation," Diagne, "Pouvoir Politique Et Espaces Religieux Au Sénégal," 232.

[93] Diagne.

[94] "During the colonial period, Sheikh Ben Badis had asked for the application of laïcité in Algeria, for the French power wanted to instrumentalise Islam for naming its own public officials for directing Islam;" Brahami, interview.

[95] Colleen Nugent, "Unveiling Laïcité: Secularism Algerian Muslims and the Headscarf Affair in Modern France" (Honors Thesis, Union College, 2016).

Understandably, Algeria's relationship with laicite post-independence has been more unstable than Senegal's.

Algeria is not legally laïque, as Islam is identified as the state religion in the Constitution de la république algérienne démocratique et populaire. However, Sanson describes the unique type of laïcité that was employed in Algeria in the 1980s—a "*laïcité du dedans*,"[96] rather than a "*laïcité du dehors*."[97] While Algeria is only a confessional and not a multiconfessional society, Sanson explains that "le statut de l'Islam est un statut, non pas de séparation, mais d'intégration"[98]— in sum, that it is a confessional but not a uniconfessional society, and that it is in fact in the process of becoming multiconfessional.[99] Furthermore, citizenship is not tied to Muslim faith; Christians and Jews are recognized by the state, and Algerian Islam is non-clerical and even anticlerical.[100] In addition, rationalism, a pillar of laïcité in France, is embraced more or less in Algerian society as "servante," "intégrante," "inventive," and "combattante."[101]

However, any government that declares a state religion could reasonably be expected to favor that religion in its laws and policies. Algeria therefore appears to exhibit a non-laïque favoritism merely by designating Islam as the state religion. After all, there is a push for Algeria to become laïque from the Parti pour la laïcité et la démocratie (PLD).[102] In addition, there were civil conflicts in the 1990s in Algeria over the government's control of religious spaces, which indicates the same problems that France experiences.[103] However, Vish Sakthivel of the Foreign Policy Research Institute regards this conflict during what came to be known in Algeria as the "Black Decade" as a learning experience for the country's government and posits that the emerging era of religious policy is marked by cooperation and a pattern of rejection of religious discourse in political parties.[104] In the end, Sanson asserts that the real test of laïcité is freedom and that Algerian society is truly religiously free.[105] It is not necessarily perfect laïcité by French standards, but it is what fits well into Algerian culture, and Algerian religious policy is well on its way toward religious equality and stability, according to Sakthivel.[106]

Different Points of View: Can and Should Muslim-Majority Countries Laïcize?

Are countries like Senegal and Algeria truly laïque, or capable of becoming so? According to Cadène, the answer is yes, but that does not mean that they must become carbon copies of France in order to do so.[107] Brahami takes the question a step further and asks, "why should they?"[108] Brahami questions why Maghrebin countries should adopt the modern virus of laïcité with which he claims

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96 "Laïcité of within."
97 "External laïcité;" Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 55.
98 "The position of Islam is a position, not of separation, but of integration."
99 Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 57.
100 Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 55-68.
101 Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 64-65.
102 "La Charte du PLD," Parti pour la laicite et la democratie, last accessed March 10th, 2019, https://pldexmdsl.fr.gd/.
103 Vish Sakthivel, "Algeria's Religious Landscape: 'A Balancing Act,'" Foreign Policy Research Institute, last modified September 14th, 2018, https://www.fpri.org/article/2018/09/algerias-religious-landscape-a-balancing-act/.
104 Foreign Policy Research Institute, "Algeria's Religious Landscape."
105 Foreign Policy Research Institute, "Algeria's Religious Landscape."
106 Foreign Policy Research Institute, "Algeria's Religious Landscape."
107 Cadène, interview.
108 Brahami, interview.

France is polluted.[109] He describes the context during which laïcité was born in France, referring of course to the Catholic Church and the struggle that the Republic went through to free themselves from the Church's dominion.[110] As Brahami points out, that same power dynamic and struggle against a dominant religion is not present in other cultures and religions, and therefore other countries do not necessarily need to adopt the same approach to religious freedom.[111] He calls such a belief, that Maghrébin countries must laïcise, "le propre de l'européocentrisme, et du francocentrisme en particulier."[112]

There are others, such as Michel Oris, who believe that the laïcité currently espoused by countries like Senegal is not real laïcité.[113] However, Cadène believes instead that there are other types of laïcité—other ways to interpret and implement it—than the French model.[114] The works of N'Diaye, Brossier, Diagne, and Sanson, and the previously described ways in which Senegal and Algeria have made laïcité their own support this claim.[115]

Moreover, what are countries like Senegal and Algeria doing right where laïcité is concerned that France is not? It seems that, while Senegal and Algeria both have ways to go before calling their religious integration truly successful, they have found interpretations of laïcité that work for them, with or without violence. Some, like Brahami, attribute this discrepancy to French Islamophobia, saying, "il n'y a que la France qui veut poser problème avec l'islam….Aujourd'hui, la France veut toujours faire cela : instrumentaliser l'islam à ses propres fins"[116]— that is, to say, to use Islam to demonize Muslims within their borders and push them away.[117] "Le problème," according to Brahami, "est qu'une bonne partie de la société civile va dans le même sens, car c'est toute la culture française qui est polluée par cet intégrisme laïc,"[118] causing French Muslims to feel ostracized and unwelcome, less likely to integrate successfully in French culture and politics.[119] Along the same vein, minority Islamic denominations such as Salafists have not historically felt equal in Algerian society, but in contrast, there is a largely successful push in twenty-first century Algeria to work towards religious equilibrium.[120] Furthermore, Sakthivel indicates that the unequal treatment of Sufists and Salafists in Algeria may stem from their unequal treatment at the hands of the French during their colonial rule, drawing the conversation back to French colonial history.[121]

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[109] Brahami, interview.
[110] Brahami, interview.
[111] Brahami, interview.
[112] "the property of eurocentrism, and franco-centrism in particular;" Brahami, interview.
[113] Oris, interview.
[114] Cadène, interview.
[115] N'Diaye, "Ambiguïtés de la laïcité sénégalaise;" Brossier, "Les Débats Sur La Réforme Du Code De La Famille Au Sénégal;" Diagne, "Pouvoir Politique Et Espaces Religieux Au Sénégal;" Sanson, "La laïcité dans l'Algérie d'aujourd'hui," 55-68.
[116] "Only France wants to pose a problem with Islam…. Today, France still wants to do this--instrumentalize Islam for its own ends."
[117] Brahami, interview.
[118] "The problem is that a good part of civil society agrees with the same logic, for the entire French culture is polluted with this laïc integrism."
[119] Brahami, interview.
[120] Foreign Policy Research Institute, "Algeria's Religious Landscape."
[121] Foreign Policy Research Institute, "Algeria's Religious Landscape."

However, it is unfair to demonize modern French citizens for a mindset that has been deeply ingrained in their culture for over a century and that has been passed down as a pillar of French identity long before its shores were flooded with Muslim immigrants. Furthermore, it is unfair to compare the successes and failures of two different countries like France and its former colonies because, as previously established, laïcité can be interpreted and exercised differently depending on different contexts.

III. CONCLUSIONS

Main Outcomes - Findings

From this research I have found that Islam is compatible with laïcité but that French laïcité must adapt and broaden to allow public expressions of religion, much in the way that Senegal and Algeria's interpretations do. Senegal allows religion to exist visibly in the public sphere, whereas Algeria employs a more internal form of laïcité that is perhaps not necessarily laïcité at all, but something new that nevertheless is well on its way toward accomplishing its purpose in Algeria. Laïcité is not always interpreted in the way that the French imagine it, but it is possible to exercise laïcité in Maghrebin countries. Furthermore, it is clear that modernization in today's world is juxtaposed with globalization and the free movement of people, constituting multiculturalism, a growing trend that conflicts with France's current interpretation and application of laïcité. The concept of laïcité must adapt for each country's history and culture, and it is not necessary for every single country and culture to adopt legal laïcité. Overall, modern French laïcité must evolve to make room for diversity and religions of historically oppressed peoples in order to adapt to the new standard of French multiculturalism.

Limitations of Study

I was not able to spend much time in France to get more information firsthand, nor was I able at all to go to Senegal or Algeria or speak to citizens of those countries. Some of the Swiss experts with whom I spoke were not close enough to the situation to have all the answers, but perhaps that made them less biased. I also was limited to a handful of months to explore, conduct research, and find interviews. I feel that a more in-depth project on this topic could easily take a year, or more.

Recommendations for Future Study

A future study involving the same research questions could be conducted over a much longer period of time, be much more in-depth, include countries that only recently became laïque, such as Tunisia, and take into account the Arab Spring and its effect on religious freedom and secularization in the Maghreb.

Ideas for future research questions include a philosophical approach, asking whether religious freedom necessarily requires separation of Church and State. Alternatively, one could conduct another comparative study between France and Canada, another pluricultural country, asking whether Canada's religious integration is more successful than that of France and why.

WORKS CITED

Abderrahim, Kader A. Lecture. October 4th, 2018.

AFP. "L'Islam de France bien intégré (sondage)." Le Figaro. Last accessed September 9, 2008. http://www.lefigaro.fr/flash-actu/2008/10/29/01011-20081029FILWWW00603-l-islam-de-france-bien-integre-sondage.php.

Article 10. In *Déclaration des droits de l'homme et du citoyen*. *Conseil Constitutionnel*. August 26, 1789.

Babel. "Laïcité française : histoire d'une séparation." Radio Télévision Suisse. Last modified April 8th, 2018. https://www.rts.ch/play/radio/babel/audio/lacite-franaise--histoire-dune-separation?id=8492402.

Baubérot, Jean. "Introduction : La Laïcité en France entre mémoire et histoire." In *Histoire de la laïcité en France*, 3-4. Paris: Presses universitaires de France, 2013.

Baudouin, Jean and Philippe Portier. *La Laïcité, Une valeur d'aujourd'hui? Contestations et renégociations du modèle français*." Rennes: Presses Universitaires de Rennes, 2001.

Bencheikh, Soheib. "L'Islam face à la laïcité française." *Confluence Méditerranée*, no. 32 (2000): 73-82.

Brahami, Mostafa. Interview by Sarah Anne McKenzie. November 26th, 2018

Brossier, Marie. "Les Débats sur la réforme du code de la famille au Sénégal : La Redéfinition de la laïcité comme enjeu du processus de démocratisation." Master's thesis, 2004. *DEA Études Africaines*.

Cadène, Nicolas. Interview by Sarah Anne McKenzie. November 21st, 2018.

Constitution de la république algérienne démocratique et populaire. November, 2008.

Constitution du Sénégal. June, 1994.

Diagne, Mountaga. "Pouvoir politique et espaces religieux au Sénégal : La Gouvernance locale à Touba, Cambérène et Médina Baye." *Université du Québec à Montréal* (2011).

Dupret, Baudouin. *La Charia aujourd'hui*. Paris: La Découverte, 2012.

El Khamlichi, Mohamed. "La Laïcité des musulmans." Réseau International. Last modified September 9th, 2017. https://reseauinternational.net/la-laicite-des-musulmans/.

Faivre, Anne-Sophie. "Non, la laïcité n'existe que dans les pays aux racines chrétiennes." Le Monde. Last accessed November 6th, 2017. https://www.lemonde.fr/les-decodeurs/article/2017/11/06/non-la-laicite-n-existe-pas-que-dans-les-pays-aux-racines-chretiennes_5210979_4355770.html.

Gorce, Bernard and Anne-Bénédicte Hoffner. "Islam, laïcité, le difficile dialogue." La Croix. Last modified October 10th, 2017. https://www.la-croix.com/Religion/Islam/Islam-laicite-difficile-dialogue-2017-10-10-1200883190.

Gracieux, Christophe. "L'Histoire de la laïcité en France." Jalons : Version Découverte. From L'Institut national de l'audiovisuel. Last modified January 29th, 2015. https://fresques.ina.fr/jalons/fiche-media/InaEdu06607/l-histoire-de-la-laicite-en-france.html.

L'Institut Montaigne. "Qui sont les musulmans de France? Les biais et bonnes intentions de l'Institut Montaigne et du JDD." MediaPicking. Last modified October 24th, 2017. https://www.mediapicking.com/news/115-sont-musulmans-france-biais-bonnes-intentions-institut-montaigne-jdd.

"Le Multiculturalisme réussi du Canada contraste avec les difficultés françaises." Radio Télévision Suisse. Last modified August 23rd, 2018. https://www.rts.ch/play/radio/forum/audio/le-multiculturalisme-reussi-du-canada-contraste-avec-les-difficultes-franaises?id=7962469

Le Gac, Julie. "La Laïcité, principe constitutionnel républicain." Jalons : Version Découverte. Last modified December 11th, 2003. https://fresques.ina.fr/jalons/fiche-media/InaEdu01861/la-laicite-principe-constitutionnel-republicain.html

Lutrand, Marie-Claude and Behdjat Yazdekhasti. "Laïcité et présence musulmane en France : des dynamiques d'influence réciproque." *Cahiers de la Méditerranée*, no. 83, (2011): 327-335.

Maréchal, Brigitte. Lecture. October 2nd, 2018.

Mbacké, Abdoul Aziz. *Khidma, la vision politique de Cheikh Ahmadou Bamba : essai sur les relations entre les mourides et le pouvoir politique au Sénégal*. Senegal: Projet Majalis, 2010.

Moussa, Nedjib Sidi. "Liberté de conscience, athéisme et laïcité en Algérie." Sciences politiques à Paris. Last accessed February, 2018. https://www.sciencespo.fr/enjeumondial/fr/odr/liberte-de-conscience-atheisme-et-laicite-en-algerie.

Nugent, Colleen. "Unveiling Laïcité: Secularism Algerian Muslims and the Headscarf Affair in Modern France." Honors thesis, Union College, 2016.

Oris, Michel. Interview by Sarah Anne McKenzie. November 16th, 2018.

"Paris Attacks: What Happened on the Night." BBC News. Last modified December 9th, 2015. https://www.bbc.com/news/world-europe-34818994

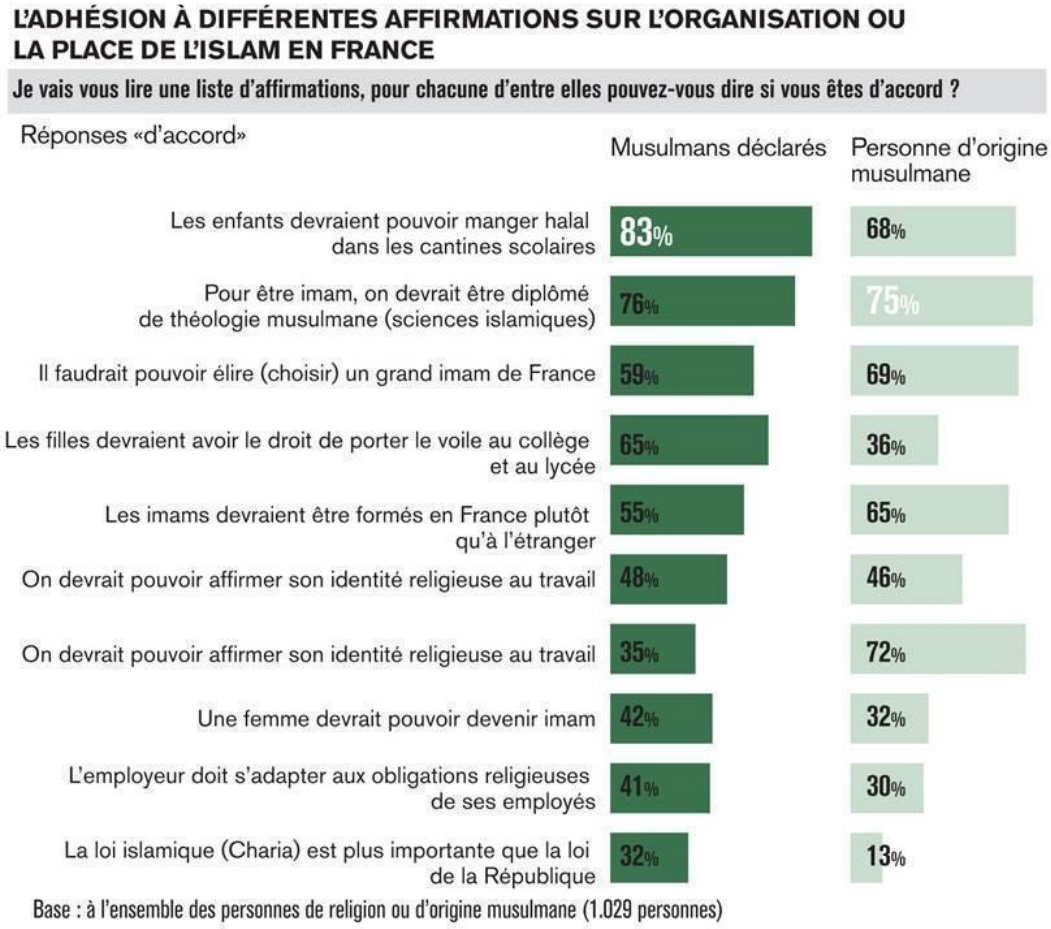
PLD. La Charte du PLD. Parti pour la laicite et la democratie. Last accessed March 10th, 2019. https://pldexmdsl.fr.gd/.

Sanson, Henri. "La laïcité dans l'Algérie d'aujourd'hui." *Revue des mondes musulmans et de la Méditerranée*, no. 29 (1980): 55-68.

Sakthivel, Vish. "Algeria's Religious Landscape: 'A Balancing Act.'" Foreign Policy Research Institute. Last modified September 14th, 2018. https://www.fpri.org/article/2018/09/algerias-religious-landscape-a-balancing-act/.

APPENDIX

Appendix A



Source: L'Institut Montaigne. Chart: L'Adhésion à différentes affirmations sur l'organisation ou la place de l'islam en Fran

CONDEMNING CONDEMNATION: THE RAMIFICATIONS OF TALLAHASSEE'S EMINENT DOMAIN REFORM

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Following the 2005 Supreme Court Case of Kelo v. City of New London, the Court held that under the takings clause of the Fifth Amendment the government could engage in the confiscation of private property and transfer such titles to other private entities to further economic development. This prompted the Bush Administration to condemn the outcome of the case. Many states responded by passing legislation restricting the usage of eminent domain in their states. Some of the most restrictive constraints occurred in the state of Florida. This article examines multiple drawbacks that have occurred because of the limits on Eminent Domain. Most notably are the restrictions placed upon beneficial takings, impeding projects which bring significant improvements to the community. Such beneficial takings include historical properties to be preserved by private trusts and the development of private hospitals, among other projects.

I. INTRODUCTION

Eminent domain has long been a contentious issue in American politics, as it pits the rights of property owners against the government's exercise of power. Following the Supreme Court decision in *Kelo v. City of New London,*[1] forty-one US states approved new legislation or amended existing statutes reforming eminent domain laws[2] to institute further protections for property owners. The state of Florida initiated major reforms amending its constitution to limit the use of eminent domain.[3] The reform was praised by the Institute for Justice (IJ) — a legal organization that specializes in eminent domain litigation. The IJ produced a report under its project *The Castle Coalition* entitled "*50 State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo*."[4] In this report, the IJ praised Florida's reforms for its removal of condemnation on the grounds of slum and blight; the IJ also gave Florida the highest possible rating of an A for eminent domain protections, tied in first with North Dakota and South Dakota.[5] While Florida's efforts to protect property owners are laudable, a variety of negative externalities arose as a result of the state's eminent domain reform. The reforms do not protect property owners from takings, and they limit effective governance as they prevent the exercise of "advantageous takings" or takings for non-public usage that benefit communities.

II. BACKGROUND

Kelo brought into question the legality of transferring titles of private real property to another private entity through condemnation.[6] The private developers who were set to inherit the land promised that a comprehensive redevelopment plan would create jobs, strengthen the city's tax base, and revitalize the city's economically distressed areas. The court held under the takings clause of the Fifth Amendment that the transfer of title for economic development was constitutional, as it qualified for valid public use under both the Federal and Connecticut constitutions.[7] Fears subsequently erupted at the national level that the wealthy and powerful could take from the poor without repercussions and with vague promises of economic development.[8] The backlash prompted a response from then-president George W. Bush, who issued Executive Order 13406 (Protecting the Property Rights of the American People) - to curtail the federal government's use of eminent domain.[9]

The case created uncertainty in Florida where there had been instances of highly publicized eminent domain abuse. The first case that received major media attention occurred in 1987, when Palm Beach County sought to acquire 385 parcels of land to build a private golf course, despite the

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[1] Kelo v. New London, 545 U.S. 469, (2005).
[2] Edward J. Lopez, Todd Jewell, et al., "Pass a law, any law, fast! State legislative responses to the Kelo backlash." *Review of Law & Economics* 5, no. 1 (2009), 109.
[3] Fla. Const. art. X, § 6(c). "Private property taken by eminent domain [...] may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature." Am. H.J.R. 1569, 2006; adopted 2006.
[4] "State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo," Castle Coalition, accessed December 6, 2018, http://www.castlecoalition.org.
[5] "State Report Card."
[6] *Kelo,* 545 U.S. at 469.
[7] *Kelo,* 545 U.S. at 493.
[8] *Kelo,* 545 U.S. at 494; 523.
[9] Exec. Order. No. 13,406, 71 Fed. Reg. 36,973 (June 28, 2006), 1-5.

fact that there already were over 170 operational golf courses in the county.[10] The county condemned the individuals who stayed put;[11] however, the planned golf course never materialized because of a lack of financing, and the land was sold at a loss.[12] The second highly publicized case was *Corie v. City of Riviera Beach* involving the Riviera Beach redevelopment plan. The Riviera Beach City Council unanimously voted for a redevelopment plan that would entail one of the largest eminent domain projects in the nation, condemning over 1,700 units and displacing nearly 5,100 residents to build a waterfront marina. Litigation was brought forth;[13] however, the plan was eventually abandoned due to its unpopularity.[14]

As a result of these highly publicized instances of eminent domain abuse in the state and fears sparked by *Kelo*, the state legislature acted swiftly, passing House Bill 1567 and House Joint Resolution 1569 a constitutional amendment. This was approved by 69.05% of the voting public when it was put forward by the Legislature on November 07, 2006.[15] HB 1567 requires localities to wait for a period of ten years before the title of land taken by eminent domain can be transferred to a different owner. This prevents private entities from accessing property until a decade after it has been taken by the federal government.[16] The Florida constitutional amendment requires a three-fifths majority in both legislative houses to grant exceptions to the prohibition set forth in HB 1567, allowing the usage of eminent domain for private use.

III. NEW STATUTES DO NOT PROTECT PROPERTY OWNERS FROM TAKINGS

The reforms instituted by the state do little to protect property owners. If the state or its subdivisions have a legitimate interest in acquiring a property and transferring the title to another private party, the government can continue takings while foregoing just compensation, even without eminent domain.

Private property owners in Florida are not protected from takings, as the state can still employ condemnation for traditional public uses (roads, bridges, and canals). The state of Florida is still in the process of securing land following the 1989 expansion of Everglades National Park and the approval of the 2000 Comprehensive Everglades Restoration Plan (CERP), which allocated $7.8 billion in federal dollars to the Everglades restoration.[17] A portion of these funds was earmarked to obtain

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[10] Maria M. Maciá, "Pinning Down Subjective Valuations: A Well-Being-Analysis Approach to Eminent Domain," *The University of Chicago Law Review* (2016): 945.

[11] Zamecnik v. Palm Beach County, 768 So. 2d 1217 (Fla. Dist. Ct. App. 2000)

[12] Maciá, *supranote* 5&6, 946.

[13] Corie v. City of Riviera Beach, 954 So. 2d 68 (Fla. 4th Dist. Ct. App. 2007). See also Wells v. City of Riviera Beach, Institute for Justice.

[14] John Kramer, "Riviera Beach Homeowners Celebrate Victory Over Eminent Domain Abuse," *Institute for Justice,* last modified May 10, 2007, accessed December 14, 2017, http://ij.org/press-release/riviera-beach-florida-eminent-domain-latest-release/.

[15] Eminent Domain, HB 1567, Florida House of Representatives (2006), accessed on February 27, 2019, https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=33829; Eminent Domain, HJR 1569, Florida House of Representatives (2006), accessed on February 13, 2019, https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=33830&; *Florida. Constitution article. X, § 6(c);* Les Christie. "Kelo's Revenge: Voters restrict eminent domain." CNNMoney, last modified November 8, 2016, accessed December 14, 2017. http://money.cnn.com/2006/11/08/real_estate/kelos_revenge/.

[16] Eminent Domain, HB 1567.

[17] 16 U.S.C. § 410r-5 et seq. (The Everglades National Park Protection and Expansion Act of 1989) Expansion was not

residences and properties which were in the expanded conservation areas. This was widely seen as a legitimate use of eminent domain set forth by prior cases.[18] The issue that remains controversial is that the reforms fail to protect landowners from the government acting to intentionally drive down the value of a property they seek to acquire. Cash-strapped governments still have the power to obtain properties at a lower rate than market value.

The government's most powerful tool for lowering a property's value is the alteration of zoning regulations. In one case, Palm Beach County adopted a thoroughfare map which forbade land use that would impede the future construction of a roadway. The map was regularly revised, and the changes were not available for the public to see. As a result of the frequent amendments, roadways could be altered to forbid future land development and effectively depress land values.[19] Florida's Supreme Court upheld the validity of such a practice as an appropriate extension of the county's power in *Palm Beach County v. Wright*, on the grounds that such maps were important for effective city planning.[20] The government does not have to provide just compensation if its actions unintentionally depress the market value of real property it seeks to acquire.[21] Other states, such as California, protect against this by valuing the purchase price independently of government actions and project-related impacts.[22]

The Florida government, conversely, can take property for public use before it even determines whether it needs the property for a specific project.[23] Florida's post-*Kelo* reforms protect property owners from eminent domain abuse where the government lowers the value of real or private property it hopes to obtain in future condemnation.

IV. POLICE POWERS STILL ALLOW FOR SEIZURES TO OCCUR

Without the use of eminent domain, the state and its municipalities may resort to despotic measures that will result in property owners relinquishing title. The most potent weapon in the government's arsenal is its unrestrained power to tax and regulate. The Supreme Court has held that taxation for a public purpose, no matter how great, does not constitute a taking.[24] As a result, local governments who hold the power to assess real estate taxes can impose exorbitantly high property tax rates on owners or target small groups of real property owners with a special assessment tax. There is currently no judicial doctrine that dictates when a landowner is to be compensated for extravagant taxation.[25] In 2019 the Supreme Court unanimously incorporated the Eighth Amendment's excessive

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fully funded until 1999. Beginning in 2000, the U.S. Department of the Interior filed 2,700 condemnation cases with the U.S. District Court for the Southern District of Florida.

[18] Shoemaker v. United States, 147 U.S. 282, (1893). See also United States v. Gettysburg Electric R. Co., 160 U.S. 668, (1896).

[19] Palm Beach County v. Wright, 641 So. 2d 50 (Fla. 1994).

[20] *Palm Beach,* 641 So. 2d at 52 (Fla. 1994).

[21] United States v. 480.00 Acres of Land, 557 F.3d 1297 (11th Cir. 2009); City of Jacksonville v. Smith, 159 So. 3d 888, 892-93 (Fla. Dist. Ct. App.), reh'g denied (March 18, 2015), rev. granted, 173 So. 3d 965 (Fla. 2015).

[22] Cal. Civ. Proc., § 1263.330 (West 1975).

[23]City of St. Petersburg v. Vinoy Park Hotel Co., 352 So. 2d 149 (Fla. Dist. Ct. App. 1977).

[24] County of Mobile v. Kimball, 102 U.S. 691, 703 (1880). Court held that taxation for a public purpose, no matter how great, does not constitute a taking.

[25] Eduardo Moisés Peñalver. "Regulatory Taxings." *Columbia Law Review,* no. 32, (2004): 2199. no(2004): *Supra* Note 125, at 2199. The Supreme Court has regularly rejected the contestation of taxes deemed to be excessive.

fine clause to the state and its political subdivisions in *Timbs v. Indiana.*[26] Such a ruling expands the holding of *Austin v. United States* to the states that considers civil forfeiture to be an excessive fine when actions are at least partially punitive.[27] This holding may have the ability to enjoin special assessments or taxes imposed as a castigatory response. However, this is unlikely as the imposition of high special assessment taxes has been routinely upheld in Florida under the condition that they confer a unique benefit to the government.[28] Such tax increases apply pressure on property owners, providing a financial burden which may compel them to sell their holdings.

The most insidious aspect of the special assessment tax is that it can be applied arbitrarily: the project funded by the tax does not need to confer a unique benefit to the property in question.[29] If real property owners are delinquent on property taxes, the unpaid taxes become a lien on the property. This in turn allows the municipality or state the ability to take possession of the property belonging to another individual until the debt owed by an individual is discharged. The tax certificates are then auctioned to the highest bidder. This will often be a private entity that can apply a flexible interest rate on the unpaid debt.[30] If the tax certificate is not purchased at auction, the delinquent payment will be "struck off" to the county at the maximum rate of interest,[31] which currently stands at eighteen percent per annum.[32] The greater financial burden on owners not only entices them to sell, but also allows for a more sinister type of taking to occur. If a seller is delinquent on payment, the government may foreclose upon the property,[33] and the title can be transferred to another private entity immediately. If the title is seized in this way, the owner does not receive any just compensation for his or her loss.

An additional police power the state and its subdivisions can use to perform takings is their ability to abate or eliminate public nuisances. In *Keshbro, Inc. v. City of Miami*[34] the Florida Supreme Court determined that the plaintiff was ineligible to seek financial compensation from the City of Miami, who brought multiple closures to the plaintiff's motel for extended periods of time. Despite the city's actions denying the plaintiff of all economic use of his property, the Florida Supreme Court held that closures did not constitute a taking since they were imposed to abate the public nuisances of prostitution and drug dealing that were "inextricably intertwined" with the operations of the motel.[35]

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[26] Timbs v. Indiana, 138 S. Ct. 2650 (U.S. 2019).
[27] Austin v. United States, 509 U.S. 607, (1993).
[28] Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997); Scott J. Kennelly. "In Honor of Walter O. Weyrach: Florida's Eminent Domain Overhaul: Creating More Problems Than It Solved." *Fla. L. Rev.* no. 60 (2008): { } *Supra* see notes 130-134, at 487.
[29] *Lake County*, 695 S. 2nd at 671-672 (Fla. 1997).
[30] Fla. Stat. § 197.432
[31] Fla. Stat. § 197.432
[32] Fla. Stat. § 687.02. Interest rate higher than 18 % per annum simple interest is declared usurious unless the rate exceeds the rates laid out in Fla. Stat. § 687.01(2) (rates for an extension of credit may not surpass 25% per annum or the lender commits a misdemeanor of the second degree.)
[33]Fla. Stat. § 170.10 (procedure for legal proceedings against real property owner[s] who fails to pay special assessment taxes and for the foreclosure of property in cases of nonpayment.); *id.* Fla. Stat. § 173.01 (the allowance of municipalities to foreclose on special assessment liens when local government approves special assessment resolutions.)
[34] Keshbro, Inc. v. City of Miami, 801 So. 2d 864 (Fla. 2001). See also Bauknight v. Monroe County, Fla., 446 F3d. 1327 (11th Cir. 2006). Owners were not entitled to compensation for a temporary taking after the county approved building permits in 1996 but then failed to deliver them until 2002. This prevented appellants from developing land on Big Pine Key, FL.
[35] Kennelly, 493.

The interpretation of the law behind public nuisances is subjective. Florida state government can deny permitting necessary for property improvement under the guise of public nuisance and can also order a provisional closure against the property if the owner fails to abate the nuisance.[36] Property owners are sanctioned even in circumstances where the owner cannot combat the nuisances alone. In the case of *Keshbro*, for example, the nuisances of prostitution and drug dealing were symptomatic of other problems in the area, such as an underserved community lacking an adequate response by law enforcement officials. The ambiguity of laws pertaining to public nuisance allows the government to place burdensome restrictions on property owners; such actions may effectively deny the owner's existing use of the property and the economic benefit such property provides.

Property owners remain unprotected from predatory state or municipal practices that result in the loss of property title. In 1995, the state of Florida passed the Bert J. Harris, Jr., Private Property Rights Protection Act[37] to provide an avenue of recourse for private landowners when government activity inordinately encroaches upon their private property. But in practice, the Harris Act has been unsuccessful in achieving remedy for property owners.[38] As a result, the government can limit the economic potential of a property, thus creating burdensome restrictions that can ultimately result in a foreclosure.[39] If foreclosure does occur because of burdensome government activity (e.g. levying of excessive special assessment taxes, denial of permits for proper maintenance, or imposition of fines on property owners who fail to abate or eliminate public nuisances), it does not constitute a taking. Private entities are then able to acquire foreclosed titles from the government, foregoing wait periods detailed under Fla. Stat. §73.013.[40]

V. REFORMS PREVENT THE STATE AND ITS SUBDIVISIONS FROM GOVERNING EFFECTIVELY

However, despite evidence that suggests otherwise, the government's power to use eminent domain in a beneficial way is very restricted.[41] Proponents of reforms, such as the IJ, believed the government's right to authorize condemnation for properties it termed slums, nuisances, and blighted was problematic.[42] Such power gave the government a blank check to acquire any property it sought by a mere declaration of the property as blighted or as meeting slum conditions. While this was a concern, the success of HB 1567 and HJR 1569, which prevented these types of acquisitions, has been even more problematic. The limiting of these powers has largely removed the government's ability to engage in advantageous taking by restricting its authority when it comes to issues concerning historic preservation, the environment, health and safety issues, and climate change response.[43]

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[36] Kennelly, 492 & 493; Fla. Stat. § 60.05(2).
[37] Fla. Stat. §70.001, *et seq*., Bert J. Harris, Jr., Private Property Rights Protection Act.
[38] Palm Beach Polo, Inc. v. Village of Wellington, 7 So. 3d 1115 (Fla. Dist. Ct. App. 2009). Court denied developer's suit for recourse under Harris Act as land was subject to developmental restrictions at the time of purchase. See also, Osceola County v. Best Diversified, Inc., 936 So. 2d 55 (Fla. Dist. Ct. App. 2006). Appellate Court denied recourse under the Harris Act, as a result of the county refusing to issue a conditional permit to operate a landfill.
[39] Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 94 S. Ct. 2291, 41 L. Ed. 2d 132 (1974), The Court upheld a 20% tax on all gross receipts involving the storage or parking of motor vehicles even though the tax endangered the businesses' profitability and sustainability.
[40] Fla. Stat. §73.013. Allows for transfer of title to a private entity only after a time period of 10 years has elapsed.
[41] Fla. Stat. §163.335 (7).
[42] Castle Coalition, State Report Card
[43] Benjamin R. Lingle. "Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation." *Fla. L.*

Advantageous takings involve the use of eminent domain to transfer private land to another private or mostly private entity that fulfills a significant and invaluable public purpose. The overbroad nature of Florida's eminent domain reform had the intent of reducing profit-driven speculative development projects but, in the process, encumbered the government's ability to engage with projects that actually produce public benefits and serve the community.[44] Advantageous takings that reside outside of public traditional uses (roads, bridges, public infrastructure)[45] would include using eminent domain to build hospitals, parking garages, performing arts centers, private water treatment facilities, and infrastructure for private energy generation services. The current reforms create a significant impediment for the development of these projects which typically involve the transfer of property title from a private party to another non-public entity. Prior to the reforms, the government had the power to transfer private property title to another private entity to pursue an advantageous project. Now there is a ten-year waiting period[46] following condemnation proceedings only after which the land formerly owned by a private party can revert to another private party. This creates significant inefficiencies as a municipality may have to wait for extensive periods of time to pursue a project that works in favor of the community. This is detrimental to both parties as the municipality would not receive tax revenue from the vacant land and furthermore the idle property would not serve either the community or the former owner. In this time frame, a project can lose funding or harm a community that needs an amenity, such as private ambulance or emergency services, immediately.

The state attempted to institute a safety valve to allow for private transfers in the event of an emergency and for advantageous projects. This outlet allows for private-to-private party title transfers if three-fifths of both houses in the Florida Legislature support the project.[47] This provision merely shifts the burden of corruption and responsibility from local governments to the state government. The state government is not any more or less inclined to corruption than local governments. This provision may ultimately not lead to the approval of projects that benefit a community but instead to a furthering of political patronage. Projects that garner representatives' and the governor's favor will succeed. This provision delegates responsibility to legislatures in Tallahassee and presumes that they can determine what is appropriate for the local community better than the community itself. In turn, local governments are stripped of their ability to use eminent domain. Furthermore, the delegation of authority to the state legislature reduces the likelihood that a beneficial project being completed. An attempted seizure must progress through the proper bureaucratic channels for the legislature to consider the action. It is not guaranteed that issue will be heard, and many politicians shy away from the use of eminent domain due to its controversial nature and the risk of harming re-election bids. In this case, local communities are at a loss and must either forgo beneficial project opportunities or resort to coercive measures in order to obtain title.

The current reforms present a problem for the government and private developers as they encourage individuals to delay the process of project development. This is an issue as projects that

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Rev. 63 (2011): 998-1000.

[44] Charles E. Cohen. "Eminent domain after Kelo v. City of New London: An argument for banning economic development takings." *Harv. JL & Pub. Pol'y* 29 (2005). *Supra* note 438 at 565.

[45] Fla. Stat. §73.013.

[46] Fla. Stat. §73.013(f).

[47] Fla. Const. art. X, § 6(c)

will provide new taxes and revenue to a municipality can be slowed or halted from the actions of an individual. In this case, if a private developer is seeking to build a parkway or pipeline, he or she can purchase the necessary easements. However, if a single landowner objects, the project is worthless as it cannot be completed without all the easements.[48] Real property owners have an incentive to hold out and delay a project to accrue the highest possible price for their property as the project will be incomplete without their cooperation. If individuals make unreasonable demands, these projects will inevitably be delayed, or even fail. In this scenario, Florida would see greater instances of failed ventures with high private investments but little to no returns. This harms the future growth of the state, as potential revenue would be lost from missed opportunities such as through taxes, tourism, consumption, and private investment. Firms that would have otherwise located to Florida may look to invest elsewhere as the opportunity cost of landowners preventing or delaying project development is too great.

VI. THE USE OF EMINENT DOMAIN AS AN EFFECTIVE TOOL FOR THE GOVERNMENT

The use of eminent domain to transfer title from a private party to another private entity through blight and slum clearance was a beneficial tool for local government, notably in the case of historic preservation where a government does not have the fiscal resources to accommodate the high costs of title transfer. This is an ideal scenario for the government because the private party can bear the risk and costs associated with both preservation and maintenance.[49] Under the post-*Kelo* reforms historic preservation is not considered a valid public use. Local governments still have the authority to demand that landowners fix dilapidated structures, but now they cannot use condemnation to obtain the structure and repair it due to 'blight.' Prior to the *Kelo* reforms, if a landowner refused to maintain a structure, eminent domain allowed the municipality or private party to acquire and manage the structure. In the years preceding the *Kelo* case, Florida's government used eminent domain as a method of last resort as many times it was easier, more practical, and more cost effective than settling directly with an owner.[50] After *Kelo, s*ettling was the preferred method of the government as the use of eminent domain requires the government to abide by elaborate bureaucratic statutory processes.[51] The provisions that eliminated the use of condemnation for slum and blight clearance were intended to prevent abuse by municipalities; however, as a consequence it has erected impediments precluding local governments from preserving their history and unique cultural heritage and from pursuing private projects that serve the community.[52] Within the Florida statutes there are provisions which allow for beneficial takings to occur including the development of jails, hospitals, and airports among other projects;[53] however, this authorization is hampered by the fact that property obtained for such purposes cannot be conveyed to a private entity.[54]

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[48] Kennelly, 497.
[49] Benjamin R. Lingle. "Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation." *Fla. L. Rev.* 63 (2011): 989.
[50] Kennelly *Supra* note 112, 485.
[51] Kennelly *Supra* note 112, 485.
[52] Lingle, 1001-1002.
[53] Fla. Stat. § 166.411 (authorizes the usage of eminent domain to accomplish provisions defined in § 180.06.)
[54] Despite Fla. Stat. § 180.06 authorization of the development of municipal works by both municipalities and private companies, the title transfer from a private entity to another private entity cannot occur under Fla. Const. art. X, § 6(c)

The greatest harm that the reforms pose is their reduction of Florida's ability to mitigate climate change and address issues of health, safety, and the environment using private stakeholders. In the United States, Florida will face the greatest impacts from climate change through rising sea levels.[55] Florida's current strategy is to engineer its way out of the issue with expensive projects including Miami Beach's new stormwater management program, [56]which is estimated to cost around $400- $500 million over the next five years.[57] Climate change mitigation funding has been concentrated on wealthy enclaves such as Miami Beach. However, if the state is to have an effective response to sea-level rise, investment needs to occur in more diverse communities throughout the state. Implementing this while reducing the fiscal burden of the state would require the government to seek out public-private partnerships. These partnerships enabled the completion of the Dutch Delta Works,[58] which currently protects much of the Netherlands from rising sea levels. The law regarding these partnerships is ambiguous, as evidenced by the contradictory language in the reforms. Public-private partnerships are permitted under Florida Statutes § 73.013[59] but would be superseded by the subsequently passed constitutional amendment Article X § 6, which prohibits the conveyance of private real property acquired through eminent domain "to a natural person or private entity."[60] This ambiguity blocks even simple transfers, preventing private parties from acquiring easements that are complementary to a public service (such as an electric company conveying easements to a private broadband company) without the approval of three-fifths of the Florida Legislature.[61]

To pursue beneficial projects with private stakeholders, the state can still invoke its three-fifths legislature exception. However, this is not without pitfalls. At the state level, community needs take a backseat to political football in the legislature. For instance, Florida's state government has banned the term 'climate change' among public officials and often refuses to back climate change mitigation plans.[62] On the opposite end of the spectrum, there has been a secession movement by local governments to create the fifty-first state of South Florida in order to secure federal funding and combat climate change.[63] This political contestation has diverted the central and south Florida governments' attention from remedying the issue of polluted runoff from entering Florida's watershed. This runoff, which is high in phosphorus, is causing toxic algae blooms in Florida's rivers,

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without State Legislature approval.

[55] Brad Plumer and Nadja Popovich. "As Climate Changes, Southern States Will Suffer More Than Others." *The New York Times*. June 29, 2017. Accessed January 03, 2019. https://www.nytimes.com/interactive/2017/06/29/climate/southern-states-worse-climate-effects.html.

[56] Shimon Wdowinski, Ronald Bray, et al. "Increasing flooding hazard in coastal communities due to rising sea level: Case study of Miami Beach, Florida." *Ocean & Coastal Management* 126 (2016): 2.

[57] Jenny Staletovich and Joey Flechas. "Miami Beach's battle to stem rising tides." *Miami Herald*. October 23, 2015. Accessed December 14, 2018. http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article41141856.html.

[58] Sanne Grotenbreg and Mónica Altamirano. "Government facilitation of external initiatives: how Dutch water authorities cope with value dilemmas." *International Journal of Water Resources Development* (2017): 15-19.

[59] Fla. Stat. §73.013 (*a-f*)

[60] See *supra* note 3

[61] Kennelly, "In Honor of Walter O. Weyrach: Florida's Eminent Domain Overhaul: Creating More Problems Than It Solved," 484-485.

[62] Tristram Korten, "In Florida, Officials Ban Term 'Climate Change'," *Florida Center for Investigative Reporting*, March 08, 2015, https://fcir.org/2015/03/08/in-florida-officials-ban-term-climate-change/.

[63] United States of America, City of South Miami, Mayor and City Commission. (2014). Resolution No. 203-14-14297.

estuaries, and coastal cities due to cattle ranching and sugar cane farming near Lake Okeechobee.[64] With the current limitations on eminent domain, local governments have little authority to manage the issue. Additionally, the sugar industry has a powerful lobby[65] in Florida, the legislatures chose not to interfere with their business for fear of reprisal or losing future campaign support. Under the framework prior to *Kelo*, local governments would have been able to obtain title and allow for a water treatment project with private stakeholders, protecting the health, safety, and environment of their communities. The current statutes allow for inaction and hinder local municipalities' ability to aid in public health and safety, decrease the effects of climate change, and pursue projects with private stakeholders.

The ability for governments to transfer the title of land attained by eminent domain to private entities has tremendous value. Often, private entities have greater fiscal capacity and more resources available at their disposal, allowing them to achieve better outcomes than the government. Current laws only encourage only encourage beneficial takings for government-run enterprises. There is an opportunity for privately-run beneficial takings in the Florida Constitution to occur with the support of three-fifths of both houses in the Florida Legislature.[66] However, two problems persisted with this approach: first, the state legislature is no less predisposed to corruption than the local government. Second, the state legislatures may not vote for the approval of a socially worthwhile project for a fear of undesirable publicity, especially if such a project does not benefit the legislators' constituencies.[67] As a result, future revisions to Florida's constitution should contain a provision to allow for the transfer of title to private entities in cases involving beneficial takings. In fact, Charles Cohen, writing in the *Harvard Law Review,* suggested a constitutional amendment in which the legislature details the types of projects that qualify for advantageous takings, such as cultural venues, zoos, sporting arenas, and hospitals.[68] Furthermore, the proposed amendment provides stipulations which safeguard against abuses such as requiring projects to be not-for-profit or local voter approval for projects that are transferred to a private entity.[69]

VII. CONCLUSION

The state of Florida instituted reforms following the case of *Kelo v. City of New London* with the intent to protect Floridian residents from what the state saw as unfair condemnation proceedings. Prior to the reforms, Florida case law offered a degree of protection from callous eminent domain abuse. It permitted the government only to take for a clear public purpose,[70] precluding the government from taking public property for a predominately private use.[71] The reforms have had

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[64] Andy Reid, "Lake Okeechobee reservoir faces political hurdles, sugar industry pushback," *Sun-Sentinel*, September 17, 2016, http://www.sun-sentinel.com/local/palm-beach/fl-lake-okeechobee-reservoir-opposition-20160917-story.html.
[65] Mary Ellen Klas, "Sugar's decades-long hold over Everglades came with a price," *Miami Herald*, July 11, 2016, http://www.miamiherald.com/news/local/environment/article88992067.html.
[66] Fla. Const. art. X, § 6(c).
[67] Kennelly, "In Honor of Walter O. Weyrach: Florida's Eminent Domain Overhaul: Creating More Problems Than It Solved," 483.
[68] Charles E Cohen. "Eminent domain after Kelo v. City of New London: An argument for banning economic development takings." *Harv. JL & Pub. Pol'y* 29 (2005): 566-567.
[69] Cohen, 566-567.
[70] Grubstein v. Urban Renewal Agency of City of Tampa, 115 So. 2d 745 (Fla. 1959).
[71] Baycol, Inc. v. Downtown Development Authority, 315 So. 2d 451 (Fla. 1975).

some positive benefits for property owners, notably tempering the transfer of private titles to other private entities for projects that do not fall under the umbrella of public purpose. This was the intent of reforms as *Kelo*'s holding qualified the acquisition of land for private development as "public use."[72] Florida's reforms protect homeowners from future egregious takings that favor predominantly private usage and do not benefit the people of the community at large. This prevents scenarios from emerging such as the one in Palm Beach County in 1987 and what may have occurred in Riviera Beach in 2006. However, the reforms only protect property owners against condemnation proceedings which transfer title to other private entities. Local governments who have a vested interest in obtaining a property for private usage can pressure owners to sell their property or foreclose upon an individual's property by applying special assessment taxes or burdensome regulations on the owner.[73] Owners who face the prospect of costly litigation may concede to the government's whims and sell their property. In these cases, the public is not protected and is in fact worse off as they forgo the just compensation that follows eminent domain proceedings. In this sense, eminent domain is the least inimical of the two options.

Despite some of the positive benefits the reforms conferred on property owners in Florida, a host of unintended consequences has emerged. Contrary to the popular belief that condemnation is a tool to display contumelious disregard towards residents, the tool in fact has historically been used to help the government further a public purpose. The post-*Kelo* reforms limit governmental capability for historical preservation, prevent beneficial projects from taking hold, and increase the incentives for property owners to hold out against private developers seeking to pursue advantageous projects. Most notably, the reforms instituted serve as a detriment to local government as they are less able to respond to issues of health, safety, and climate change.

In the future, there are steps the government can take to mitigate the shortcomings brought forth by the reforms. First, the state may consider a constitutional amendment as suggested by Charles Cohen, which would enumerate allowable advantageous projects in which it is acceptable to engage in condemnation and transfer title between private parties.[74] Such an amendment would allow local governments flexibility to act in the best interest of the community and state. In addition, in an effort to provide greater protection to Florida property owners, the state could institute clearer guidelines to prevent against abuses from despotic government actions – notably limits on county and municipality

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[72] *Kelo*, 545 U.S. 480, (2005). Majority arguing takings as per the Fifth Amendment did not require literal public use but rather "it embraced the broader and more natural interpretation of public use as 'public purpose.'"

[73] Fla. Stat. § 170.10 (2007). (provides for instituting legal proceedings against a property owner who fails to pay special assessments in a timely manner, and for foreclosing on real property or real estate for delinquent payment); Fla. Stat. § 173.01 (allows for municipalities to foreclose on special assessment liens). Taxes imposed can be arbitrary, see Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 184 (Fla. 1995); Quietwater Entertainment, Inc., et al., v. Escambia County, SC05-215 (Fla. 2005). (Judge Paul Hawkes dissented that according to Florida Supreme Court, fire services have a direct benefit to real property and special assessments can be opposed, but services such as enhanced law enforcement and mosquito control that do not confer a direct benefit to the properties in question and are in fact arbitrary.) See also Lane County v. Oregon, 74 U.S. 71, 19 L. Ed. 101, 25 S. Ct. 289 (1869). (According to the precedent set forth state governments can demand taxes in the form of real property as both state and local governments can demand payment in taxes in any form it chooses. States and their subdivisions are free to demand "collection of taxes in kind, that is to say, *by the delivery of a certain proportion of products,* or in gold or silver bullion, or in gold and silver coin"); *Lane County,* 74 U.S. 71, at 77.

[74] Cohen, "Eminent domain after Kelo v. City of New London: An argument for banning economic development takings," 565.

authority to exercise police power. For instance, the state should prohibit arbitrary taxes and regulations that have the malicious intent of coercing an owner to sell or vacate. Such guidelines would protect against other forms of government seizure and provide a framework for private property protection. These improvements would restore eminent domain to its intended use as an instrument of effective governance and a tool intended as a last resort.

WORKS CITED

Austin v. United States, 509 U.S. 602, (1993).

Bauknight v. Monroe County, Fla., 446 F3d. 1327 (11th Cir. 2006).

Baycol, Inc. v. Downtown Development Authority, 315 So. 2d 451 (Fla. 1975).

City of Jacksonville v. Smith, 159 So. 3d 888, 892-93 (Fla. Dist. Ct. App.), reh'g denied (March 18, 2015), rev. granted, 173 So. 3d 965 (Fla. 2015).

Castle Coalition. "State Report Card: Tracking Eminent Domain Reform Legislation Since Kelo." Accessed December 6, 2018. http://www.castlecoalition.org.

Cohen, Charles E. "Eminent domain after Kelo v. City of New London: An argument for banning economic development takings." *Harv. J.L. & Pub. Pol'y* 29, (2005): 491-568.

Corie v. City of Riviera Beach, 954 So. 2d 68 (Fla. 4th Dist. Ct. App. 2007).

County of Mobile v. Kimball, 102 U.S. 691, 703 (1880).

Fla. Const. art. X. § 6(c).

Grotenbreg, Sanne, and Mónica Altamirano. "Government facilitation of external initiatives: how Dutch water authorities cope with value dilemmas." *International Journal of Water Resources Development* (2017): 1-26.

Grubstein v. Urban Renewal Agency of City of Tampa, 115 So. 2d 745 (Fla. 1959).

Kelo v. New London, 545 U.S. 469, (2005).

Kennelly, Scott J. " In Honor of Walter O. Weyrach: Florida's Eminent Domain Overhaul: Creating More Problems Than It Solved." *Fla. L. Rev,* no. 60 (2008): 471-505.

Keshbro, Inc. v. City of Miami, 801 So. 2d 864 (Fla. 2001).

Klas, Mary Ellen. "Sugar's decades-long hold over Everglades came with a price." *Miami Herald*, July 11, 2016. http://www.miamiherald.com/news/local/environment/article88992067.html.

Korten, Tristram. "In Florida, Officials Ban Term 'Climate Change'." *Florida Center for Investigative Reporting*, March 8, 2015. https://fcir.org/2015/03/08/in-florida-officials-ban-term-climate-change/.

Kramer, John. "Riviera Beach Homeowners Celebrate Victory Over Eminent Domain Abuse." *Institute for Justice*. Last modified May 10, 2007. Accessed December 14, 2017. http://ij.org/press-release/riviera-beach-florida-eminent-domain-latest-release/.

Lake County v. Water Oak Management Corp., 695 So. 2d 667 (Fla. 1997).

Lane County v. Oregon, 74 U.S. 71, (1869).

Lingle, R. Benjamin. "Post-Kelo Eminent Domain Reform: A Double-Edged Sword for Historic Preservation." *Fla. L. Rev.* 63 (2011): 985-1008.

Lopez, Edward J., R. Todd Jewell, and Noel D. Campbell. "Pass a law, any law, fast! State legislative responses to the Kelo backlash." *Review of Law & Economics* 5, no. 1 (2009): 101-135.

Maciá, Maria M. "Pinning Down Subjective Valuations: A Well-Being-Analysis Approach to Eminent Domain." *The University of Chicago Law Review* (2016): 945-999.

Palm Beach County v. Wright, 641 So. 2d 50 (Fla. 1994).

Palm Beach Polo, Inc. v. Village of Wellington, 7 So. 3d 1115 (Fla. Dist. Ct. App. 2009).

Pittsburgh v. Alco Parking Corp., 417 U.S. 369, (1974).

Quietwater Entertainment, Inc., et al., v. Escambia County, SC05-215 (Fla. 2005).

Reid, Andy. "Lake Okeechobee reservoir faces political hurdles, sugar industry pushback." *Sun-Sentinel*, September 17, 2016. https://www.sun-sentinel.com/local/palm-beach/fl-lake-okeechobee-reservoir-opposition-20160917-story.html.

Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180, 184 (Fla. 1995).

Shoemaker v. United States, 147 U.S. 282, (1893).

Somin, Ilya. "The limits of backlash: Assessing the political response to Kelo." *Minn. L. Rev.* 93 (2008): 2107-2179.

Timbs v. Indiana, 138 S. Ct. 2650 (U.S. 2019).

City of St. Petersburg v. Vinoy Park Hotel Co., 352 So. 2d 149 (Fla. Dist. Ct. App. 1977).

United States of America, City of South Miami, Mayor and City Commission. (2014). Resolution No. 203-14-14297.

United States v. Gettysburg Electric R. Co., 160 U.S. 668, (1896).

United States v. 480.00 Acres of Land, 557 F.3d 1297 (11th Cir. 2009).

Wells v. City of Riviera Beach, Institute for Justice, http://www.ij.org/index.php?option=com_content&task=view&id=964&Itemid=165 (Accessed December 07, 2017).

Wdowinski, Shimon, Ronald Bray, Ben P. Kirtman, and Zhaohua Wu. "Increasing flooding hazard in coastal communities due to rising sea level: Case study of Miami Beach, Florida." *Ocean & Coastal Management* 126 (2016): 1-8.

Zamecnik v. Palm Beach County, 768 So. 2d 1217 (Fla. Dist. Ct. App. 2000)

CULINARY MISCON(DUCK)T: AN INTERSECTIONAL ANALYSIS OF CALIFORNIA'S FOIE GRAS BAN

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In this intersectional consideration, the author first sketches the longue durée of foie gras to highlight its centrality to French culture. Then, utilizing anthropological theories from Frederik Barth's Ethnic Groups and Boundaries, he works toward a conceptualization of foie gras as a foodway, one which maintains what Barth calls "ethnic group boundaries," particularly those of the French diasporas in California. Next, the author considers select legal and ethical concerns that surround foie gras and its production, taking up California Senate Bill 1520 (S.B. 1520, or the California "Forced Fed Birds" Law) and the California Canards cases as his primary nodes of analysis. The condemnation of the foodway in America, he contends, has restricted the ability of the French diaspora in California to preserve its longstanding culinary traditions. Finally, by examining law review articles and other court decisions relevant to foie gras, the author argues that S.B. 1520 is not only ineffective in promoting of animal rights and unjust in its targeting of foie gras, but also harmful to the persistence of French group identity in the United States, namely in California.

"I'm sorry for the ducks; I love foie gras."
José Andrés, chef

"Foie gras is sold as an expensive delicacy in some restaurants and shops. But no one pays a higher price for foie gras than the ducks and geese who are abused and killed to make it."
Kate Winslet, actress

PREFACE

My initial fascination with foie gras began during the summer of 2018, at a family dinner party in Parc de Sceaux, France. It was there that my aunt Marlene insisted that I try foie gras, what was then an unknown food to me. As she leveled a spoon of the unidentifiable substance to my face, she added, "You can't have this back home—it's forbidden."

Marlene's intimation of the food's rarity succeeded in persuading me, quashing any hesitation I initially had, and quickly I accepted her offering. I lathered the substance on a piece of baguette and downed it whole, yet I continued to be puzzled by what it was that I had just consumed. The food's texture was unusual, resembling that of pâte or some other spread, and its flavor, though certainly meaty, remained beyond the range of what I had ever tasted. What was this murky-colored food I had just consumed? Was it a French food? An American food? Why was it allowed here, in France, but forbidden back home, in California?

Only after sampling the item would my family members reveal to me what the food was: foie gras, a staple in French gastronomy, and a rather coveted item amongst French people and food connoisseurs alike, or so I have come to learn. What this soirèe ultimately set into motion were weeks and then months during which I would begin to investigate foie gras, to try and determine what precisely the food is and why it is prohibited in California. This essay, then, is my attempt to uncover how foie gras has become not only quintessential to French culture, but also a point of cultural and legal discourse between peoples.

I. OUTLINE

To establish the centrality of foie gras to French gastronomy,[1] I will first provide a brief overview of the food's history, relying upon American food journalist Mark Caro's 2009 book *The Foie Gras Wars,* and American sociologist Michaela DeSoucey's 2016 book *Contested Tastes*. I will simultaneously mobilize anthropological theories from Frederik Barth's 1968 monograph *Ethnic Groups and Boundaries* to posit that foie gras, as a foodway, is crucial to the maintenance of French group identity, or French "national character," as it was formerly referred to in the field of anthropological studies. Then, I will consider legal disputes that concern foie gras, focusing on issues surrounding California Senate Bill 1520 (S.B. 1520, or the California "Forced Fed Birds" Law). Using the California *Canard* cases[2] as examples, I will illustrate select ethical and legal concerns that surround the production and consumption of foie gras. The critical reception of this foodway, I will contend, has restricted the ability of the French diaspora in California to preserve its longstanding culinary traditions. By examining law review articles and other court decisions relevant to foie gras, I will finally argue that S.B. 1520 is not only ineffective in promoting of animal rights—which the statute purports to do—and unjust in its targeting of foie gras, but also harmful to the persistence of French group identity in the United States, namely in California.

II. WHAT IS FOIE GRAS?

Foie gras is a luxury food made from the fattened liver of a duck or goose. It cropped up in French cuisine sometime during the sixteenth century,[3] though at the time it was only a regional novelty.[4] In order to enlarge the livers of ducks and geese, and thereby maximize the output of foie gras, producers would often shove tubes down the birds' throats, then systematically feed them over a period of roughly ten to twelve days.[5] Historically, force-feeding has been the predominant method of foie gras production, though other methods allow for the production of foie gras without artificially and forcefully enlarging the liver.

While the practice of harming animals as a means of food preparation was hardly new in France at the time – the Italian scholar Giambattista della Porta wrote, during his late sixteenth-century travels to France, of seeing "geese roasted alive" – the rise of foie gras brought with it this new culinary

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[1] I use the term "gastronomy" to indicate not merely the craft of cooking and preparing food, but, more specifically, the cuisine and culinary practices of a particular region (in this paper: France).

[2] By the "*Canards* cases," I am referring to the consolidation of two California legal disputes: *Association des Éleveurs de Canards et D'Oies du Québec, et al. v. Kamala Harris, et al.*, in 2013, and *Association des Éleveurs de Canards et D'Oies du Québec, et al. v. Xavier Beccera*, in 2017. The cases revolved around California's Senate Bill 1520, which, after its enactment in 2014, outlawed the production and sale of foie gras as a purported means of championing animal rights and environmental ethics.

[3] Although the origin of foie gras dates back to at least around 3100 B.C.—when Ancient Egyptians domesticated wild geese as they migrated to the Nile region (Caro, 2009, p. 24)—for the extent of this paper, I will focus specifically on foie gras as it has figured in French and American history.

[4] Mark Caro, *The Foie Gras Wars: How a 5,000-year-old Delicacy Inspired the World's Fiercest Food Fight* (New York: Simon & Schuster, 2009), 29.

[5] Lisa Abend, "Can Ethical Foie Gras Happen in America?" Time Magazine, Last modified August 12, 2009, http://content.time.com/time/magazine/article/0,9171,1919163,00.html; Caro, The Foie Gras Wars, 29-30; Kristin Cook, "The Inhumanity of Foie Gras Production—Perhaps California and Chicago Have the Right Idea," Journal of Animal Law and Ethics, No. 2 (2007): 264.

tradition of force-feeding.[6] The earliest accounts of French goose fattening are in Charles Estienne's 1564 book *L'Agriculture et la maison rustique,* which details the confinement of birds, the plucking of their eyes, and the enlargement of their stomachs by way of force-feeding, among other methods.[7] To sum up the practices, Estienne comments, "We kill and eat them, and regard not their cries and strugglings when the knife is thrust to their very hearts."[8] (Though such treatment of animals may be construed as abuse, I will later discuss how conceptions of abuse and unethical treatment of animals are inherently underlined by ethnocentric presumptions.)

It was not until the notorious reign of Louis XIV, from the mid-seventeenth century to the early eighteenth century, that food and gastronomy came to be viewed, by the French and the world, as a cornerstone of French culture.[9] In his book *The Foie Gras Wars*, American food journalist Mark Caro remarks, "Louis XIV, who ruled France from 1661 to 1715, was a notorious gourmand whose banquets were huge choreographed affairs. The morally challenged Louis XV," who reigned until 1774, "continued the tradition of wildly ostentatious dinners."[10] Thus began the French obsession with food and, in particular, copious eating. Royal banquets and their grandiosity reflected the importance the French placed on food, including luxurious items like foie gras.[11] However, whereas foie gras was marketed primarily to the elite in the eighteenth century – it was served to impress a bourgeois clientele, mostly in high-end restaurants and extravagant palaces – the beginning of the nineteenth century saw the food's democratization. With the Industrial Revolution came kitchen machinery and the advent of mass food production; as a result, foie gras entered such domains as grocers, home-style restaurants, and even the kitchens of middle-class Frenchmen.[12]

The introduction of foie gras in France marked a decisive shift in French culinary attitudes, insofar as it heightened the sentiment that "Animals…often were expected to suffer for the culinary arts."[13] Sharing a belief such as this culinary worldview allows for the maintenance of what Norwegian anthropologist Frederik Barth calls "ethnic group boundaries." He notes that in order to maintain such boundaries, groups must establish "ways of signalling membership and exclusion…The identification of another person as a fellow member of an ethnic group implies a sharing of criteria for evaluation and judgement."[14] It is evident, therefore, when applying Barth's definition of ethnic groups, that foie gras preserves the boundaries of French national identity. Not only were the methods of producing foie gras understood, but so were the values underlying the process: the regarding of animals as a means to a culinary end.

"In the late 1990s, duck foie gras from Southwest France was added to the country's array of specialty food products that have a European Union-designated label of 'protected geographical

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[6] Caro, 29; Michaela DeSoucey, *Contested Tastes: Foie Gras and the Politics of Food* (Princeton: Princeton University Press, 2016) 16-18; Timothy Morton, *Cultures of Taste/Theories of Appetite: Eating Romanticism* (New York: Palgrave Macmillan, 2004) 43.
[7] Caro, 29.
[8] Estienne Charles, *L'Agriculture et maison rustique* (Paris: Chez Laurens Maury, 1564) 43.
[9] Caro, *The Foie Gras Wars*, 29-30.
[10] Caro, 30.
[11] Brulotte and Di Giovine, *Edible Identities*, 24; Caro, 49-50; Morton, *Cultures of Taste/Theories of Appetite,* 75-78.
[12] Caro, 31; DeSoucey, *Contested Tastes,* 85.
[13] Caro, 29.
[14] Caro, 15.

indication.' In 2005, the French National Assembly and Senate voted to protect foie gras legally as part of the country's 'official gastronomic heritage.'"[15] The values that underlie the making of foie gras—that is, the privileging of the actual food over the lives of the ducks and geese from which the food comes—reveal how the French, in large part, share "fundamental cultural values, realized in overt unity in cultural forms."[16] In the case of the French, overt unity exists in the cultural form of gastronomy, especially the national fascination with perfecting cuisine.

Beginning in the 1960s, the increased production of foie gras heightened the exportation of the item, which entered the American market and globalized even further. Advancements in gavage techniques allowed for the production of foie gras not only from geese, but also from ducks, which were, and continue to be, much more abundant around the world.[17] As French people increasingly immigrated to Louisiana, Illinois, and California during the twentieth century, notable diasporas emerged, effecting the dissemination of foie gras and the popularization of French restaurants.[18] As the foie gras industry grew in the U.S., French diasporic communities across the country could more easily access the food item, just as others could do in France.[19] Ergo, French group identity persisted in the U.S, a phenomenon which is perhaps most lucidly articulated by Barth. On the concept of ethnic identity as an amorphous status, one that is constantly (re)shaped by changing economic, environmental, and other cultural factors, Barth writes, "performance in the status, the adequate acting out of the roles required to realize the identity, in many systems does require such assets."[20] For those who migrate from France to the U.S., much of their ability to perform and realize their "Frenchness" hinges upon their access to various "assets": the cuisine, customs, and normative cultural practices that are central to the French. Among these cultural norms are the creation and/or consumption of foie gras, practices which were once permitted in the U.S. and were preservative of French identity.

III. FOIE GRAS AND CALIFORNIAN LAW

In 2004, California enacted Senate Bill 1520 (or S.B. 1520), otherwise known as the "California Foie Gras" law or the "Forced Fed Birds" law.[21] According to California Health and Safety Codes

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[15] DeSoucey, *Contested Tastes*, 5.

[16] Frederik Barth, *Ethnic Groups and Boundaries: The Social Organization of Culture Difference* (Long Grove: Waveland Press, 1969) 11.

[17] Caro, *The Foie Gras Wars*, 40.

[18] Patricia Leigh Brown, "Is Luxury Cruel? The Foie Gras Divide," *The New York Times*, October 6, 2004, https://www.nytimes.com/2004/10/06/dining/is-luxury-cruel-the-foie-gras-divide.html.; DeSoucey, *Contested Tastes,* 69; Claire Heald and Diarmuid Mitchell, "The Holy Grail of foie gras?" *BBC News*, January 26, 2007, http://news.bbc.co.uk/2/hi/uk_news/magazine/6301715.stm.

[19] DeSoucey, 69.

[20] Barth, *Ethnic Groups and Boundaries*, 28.

[21] Though beyond the scope of this paper, it is important to note that ethical concerns pertaining to foie gras production have also been the center of legal debate in various countries. In 2003, the Israeli High Court of Justice saw the case of *Noah v. Attorney General*. The plaintiff Noah, which is an umbrella organization of animal protection organizations in Israel, asked for the banning of geese force-feeding under Israeli law. More specifically, Noah sought the annulment of Animal Welfare (Protection of Animals) (Geese Force-Feeding) Regulations of 2001, which allowed for force-feeding under specific regulations, as well as the stricter enforcement of the Protection of Animals Law (1994), which outlines: "A person will not torture an animal, will not be cruel toward it, or abuse it in any way." In an opinion co-authored by Supreme Court Justices Asher Grunis, Tova Strasberg-Cohen, and Eliezer Rivlin, the court nullified the Animal Welfare Regulations of 2001 and banned the force-feeding of gas, citing how the practice directly violates Section 2(a) of the Protection of Animals Law. The court also considered how "The prohibition of *tza'ar ba'alei chayim* ('cruelty to animals'

(H.S.C.) §25981 and §25982, which are subsumed under S.B. 1520, individuals are prohibited, respectively, from 1) feeding a bird for the "purpose of enlarging the bird's liver beyond normal size," and 2) selling the products that result from these practices. The legislative push to enact S.B. 1520 was spearheaded by John Burton, then-president pro tempore of the California State Senate, as well as four animal rights groups—Viva!USA, Farm Sanctuary, Los Angeles Lawyers for Animals, and Association of Veterinarians for Animal Rights—that drafted the statute itself.[22]

Despite its passage in 2004, the bill did not go into effect until 2012—the stalling of the bill being an attempt, as Governor Arnold Schwarzenegger put it, to allow "for animal husbandry practices to evolve," and for foie-gras-producers to "perfect a humane way for a duck to consume grain to increase the size of the liver through natural processes."[23] Yet, the seven-and-a-half-year transitional period between the passage and implementation of S.B. 1520 resulted in continued, undisturbed activity by foie-gras-makers, most notably Laurent Manrique, the executive chef of Aqua Restaurant Group in San Francisco, and Guillermo Gonzales, owner of Sonoma Foie Gras.[24] Consequently, animal rights activists protested outside of restaurants serving foie gras, and some even went so far as to vandalize these establishments.[25]

When S.B. 1520 finally took effect in 2012, non-California foie gras distributors[26] Association des Éleveurs des Canards et d'Oies du Québec and HVFG LLC joined California restaurant Hot's Restaurant Group, Inc. in suing Attorney General Kamala Harris, Governor Edmund Brown, and the State of California.[27] The plaintiffs called for the enforcement of S.B. 1520 to be enjoined, arguing that the statute violated the U.S. Constitution's Due Process Clause – because it is unconstitutionally vague and does not indicate what conduct is prohibited – and Commerce Clause – because it forbids the interstate and intrastate travel of foie gras. Furthermore, the plaintiffs requested a preliminary injunction to forestall the effects of S.B. 1520, a motion which the U.S. District Court for the Central District of California denied. Upon appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's decision, and in the 2013 opinion for *Association des Éleveurs de Canards et D'Oies du Québec, et al. v. Kamala Harris, et al.* (*Canards I*), Judge Harry Pregerson struck down the plaintiffs' aforementioned counts The court found the definition of force-feeding in S.B. 1520 not to be so unconstitutionally vague as to violate the Due Process Clause; nor did the court find the law to

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in Hebrew) is rooted in Jewish religious law and cemented in Israeli civil law." (See Caro, 2009, p. 172).

[22] DeSoucey, *Contested Tastes,* 69; Martha T. Moore, "Foes See Foie Gras as a Fat Target," USA Today, June 5th, 2006, https://usatoday30.usatoday.com/news/nation/2006-06-01-foie-gras_x.htm; Erica Williams Morris, "Foie Gras Ban in California," *Golden Gate University Law Review* 45, No. 5 (December 2014): 7-9.

[23] Jim Wasserman, "Foie gras foes win a round," CBS News, September 30th, 2004, https://www.cbsnews.com/news/foie-gras-foes-win-a-round/

[24] Caro, *The Foie Gras Wars*, 45; DeSoucey, *Contested Tastes*, 69; Dan Noyes, "Restaurants still selling banned foie gras," ABC 7 News, 2013, https://abc7news.com/archive/9092775/

[25] In 2003, animal rights advocates vandalized the home of Laurent Manrique, located in Marin county, and flooded the adobe establishment which served as the headquarters of Sonoma Saveurs, a foie gras distributor: Marcelo Rodriguez, "Foie Gras Flap Leads to Vandalism," Los Angeles Times, August 25th, 2003, http://articles.latimes.com/2003/aug/25/local/me-foiegras25; DeSoucey, 3-6.

[26] Non-California foie gras companies likely joined this case in response to the increasing number of states that were passing anti-foie gras legislation. *See generally Massachusetts Senate Bills 2397 and 498,* which attempts to ban the interstate transportation of foie gras.

[27] DeSoucey, *Contested Tastes*, 133-135.

discriminate or regulate interstate commerce, which would violate the Commerce Clause.[28]

After the dismissal of their complaints, the plaintiffs amended their argument. They claimed instead that Section § 467e of Poultry Products Inspection Act of 1957 (the "PPIA") preempts the enforcement of California H.S.C. Section § 25982. The PPIA prohibited the imposition of "ingredient requirements" that are different from federal laws and regulations. Section § 25982, which forbids the sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size" (i.e., foie gras), could constitute an additional ingredient requirement not required by federal law. The same district court as in *Canard I* ruled that the PPIA did, indeed, preempt California H.S.C. Section § 25982, and granted the plaintiffs summary judgement; the court ruled that foie gras could legally be produced and served in-state. However, in the 2017 case *Association des Éleveurs de Canards et D'Oies du Québec, et al. v. Xavier Beccera* (*Canards II*), the U.S. Court of Appeals for the Ninth Circuit found, in an opinion written by Judge Jacqueline Nguyen, that California H.S.C. Section § 25982 is not expressly preempted by the PPIA.[29] Judge Nguyen specified that "the ordinary meaning of "ingredient" and the purpose and scope of the PPIA made clear that 'ingredient requirements' pertain to the physical components that comprise a poultry product, not animal husbandry or feeding practices." Consequently, the court reversed the lower court's decision—vacating the injunction on S.B. 1520—and remanded for further proceedings. For now, the state of foie gras production remains in limbo, for while force-feeding is outlawed by S.B. 1520, it is still unclear as to whether food-production methods are a category that is protected under the PPIA.

IV. IMPLICATIONS OF REGULATING FOIE GRAS

On Legal Rights

In an article for the *Golden Gate University Law Review,* food law scholar Erica Williams Morris analyzes *Canards I* and *II* and notes: "The plaintiffs brought two unsuccessful due process claims: '(1) the statute's definition of force feeding is vague; and (2) the statute fails to give persons fair notice of what conduct is prohibited.' The Ninth Circuit disagreed with the plaintiffs (and rightly so)".[30] What the plaintiffs should have argued, Morris suggests, is that S.B. 1520 is underinclusive and ineffective in its attempts to safeguard animal rights.[31]

As stated earlier in this paper, California H.S.C. Section § 25982 forbids the selling of products that result from the force-feeding of birds for the purpose of enlarging the liver; in plain terms, this equates to foie gras. Effectually, then, California H.S.C. Section § 25982 prohibits only the sale of livers from force-fed birds, yet it allows for the sale of other parts—breast meat, other organs, etc.—that are derived from the same force-fed animals. If the intent of the California state legislature is to promote animal rights and ethical husbandry practices, then why does S.B. 1520 not forbid the sale of all foods and body parts that are the result of force-feeding animals? As Morris noted in her law review article, "This is where the statute [S.B. 1520] is irrationally underinclusive"; according to precedent set

[28] Association des Éleveurs de Canards et d'Oies du Québec, et al. v. Kamala Harris, et al. (9th Cir. 2012).
[29] Association des Éleveurs de Canards et D'Oies du Québec, et al. v. Xavier Beccera (9th Cir. 2017).
[30] Williams Morris, "Foie Gras Ban in California," 13.
[31] Williams Morris, 7.

in *Bussey v. Harris*, Morris adds, "A statute that is both underinclusive and irrational violates the U.S. Constitution."[32]

I am not suggesting that the production and sale of foie gras are, by any means, compliant with the animal ethics that are championed, or purported to be championed, by California state statutes. What I do mean to unveil is the specific, unsettling target that S.B. 1520 has placed on foie gras. Despite the passage of seven and a half years between the enactment and actual implementation of S.B. 1520, the California government made no efforts to assist in the development of more humane foie gras production methods. Not only does the bill detrimentally affect the livelihood of foie gras producers, but it also limits their legal ability to conduct commerce, both through the selling and importation of the luxury food item.[33] On the constitutionality of S.B. 1520, University of Albany School of Law Professor Alexandra R. Harrington writes, for *Drake Journal of Agricultural Law*: "[T]he Commerce Clause bars any attempts at regulation of this industry by states or cities in the United States," unless such attempts are "within the zone of Congress' powers to legitimately regulate some aspect of interstate commerce or instrumentalities of interstate commerce, or concern the overall public health, safety, and morals."[34] Explicitly, S.B. 1520 does not advance any human public health or safety reason, and thus the enforcement of the foie gras ban is facially unconstitutional.

It is necessary to recognize that, while S.B. 1520 outlaws abusive practices involved in making foie gras, there exist no California statutes which forbid the practices of, say, castrating cows for beef production, or forcefully impregnating pigs for pork production.35 Definitions of animal abuse, henceforth, must be called into question, for it is unclear what legally renders geese and duck force-feeding as abusive, while other seemingly abusive animal husbandry practices are not considered to be so.

On Group Identity and American Perceptions of the French

The late, great American chef and author Anthony Bourdain referred to foie gras, during a 2007 episode of his show *No Reservations*, as "one of the most delicious things on Earth, and one of the ten most important flavors in gastronomy."[36] When conceptualizing gastronomy as the culinary practices that are uniquely characteristic to a region or a people, it is perhaps recognizable that foie gras is one foodway which is central to, and even inextricable from, French culture. The extensive history of foie gras in France likely makes it difficult for one to separate the food from France, and vice versa.[37]

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[32] Williams Morris, 7.
[33] Kathryn Bowen, "The Poultry Products Inspection Act and California's Foie Gras Ban: An Analysis of the Canards Decision and Its Implications for California's Animal Agriculture Industry," *California Law Review* 104, no. 5 (2016): 1041; Shayna Posses, "Full 9th Circ. Asked to Rethink Calif. Foie Gras Ban," *Law360*, October 12, 2017, https://www.law360.com/articles/973263/full-9th-circ-asked-to-rethink-calif-foie-gras-ban.
[34] Alexandra R. Harrington, "Not All It's Quacked Up to Be: Why Chicago's Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Lawyers," *Journal of Animal Law and Policy* 2, No. 12, (2007): 314.
[35] Harrington, "Not All It's Quacked Up to Be," 303-324; Ernesto Hernández-Lopez, "Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs," *UC Irvine Law Review*, No. 7, (2017): 347-348.
[36]Bourdain, Anthony, "Anthony Bourdain on No Reservations, Foie Gras Not Cruel," YouTube video, 4:51, posted by "GoodDuckFarmer," September 19, 2013, https://www.youtube.com/watch?v=Gc73t0_0E_w.
[37] Caro, *The Foie Gras Wars*, 22-23; DeSoucey, *Contested Tastes*, 165, 432-455

Though the American foie gras industry pales in comparison to that of France, French diasporas in the United States—though they are minority communities—have used the food as a means of preserving national identity. Group identity, Barth notes, is not wholly contingent upon geography: "The process whereby ethnic units maintain themselves are clearly affected, but not fundamentally changed, by the variable of regional security."[38] Rather, the security of ethnic identity rests, in part, on access to cultural assets. For Laurent Manrique of Aqua Restaurant Group, Guillermo Gonzalez of Sonoma Foie Gras, and the plaintiffs of the *Canards* cases, foie gras served as a cultural asset that allowed for the retention of Frenchness in the United States.[39]

The challenges made against S.B. 1520 in the *Canards* cases represent attempts, albeit failed ones, to protect a French way of life. Support for the foie gras industry was weak – its market in the United States was already dwindling – hence the food served as an easy target for animal rights activists.[40] "[T]he very idea of an animal being forced to eat through a metal tube put down its throat elicits squeamishness, even among committed meat-eaters. For groups interested in vilifying animal agriculture and setting the agenda on the ethical rights of animals in the public and political imaginations, these facts make foie gras a pragmatic target".[41] By imbuing the media with gavage imagery, groups have been able to enact a sort of symbolism that has distorted the foie gras industry itself.

Shortly before the passage of S.B. 1520, animal rights activists rallied behind campaigns that attacked the morality of foods like foie gras, an attempt motivated by what DeSoucey refers to as "gastropolitics."[42] Animal rights organizations, for instance, sought to condemn foie gras by evoking an ethos of morality, an effort most clearly reflected by media that was produced by People for the Ethical Treatment for Animals, or "PETA."[43] One PETA commercial featured somber music and utilized the celebrity of Kate Winslet, who verbally detailed the steps in the foie-gras-making process.[44] Another PETA commercial actually depicted the shoving of metal tubes down ducks' and geese's throats, followed by the hydraulic pumping of feed into their stomachs.[45] Certainly, these rhetorical devices were intended to stir up emotion in, and incite action from, everyday viewers, and, in 2004, these efforts crystallized into the successful passage of S.B. 1520.46

Again, my intention with this paper is not to deny the abuse of practices sometimes involved in foie-gras-making – the force-feeding of birds is, in my view, constitutive of abuse – but rather to

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[38] Barth, *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*, 37.
[39] Caro, *The Foie Gras Wars,* 22-23; DeSoucey, *Contested Tastes*, 84.
[40] DeSoucey, *Contested Tastes*, 158-159.
[41] DeSoucey, 159.
[42] DeSoucey, Michaela, "Gastronationalism: Food Traditions and Authenticity Politics in the European Union," *American Sociological Review* 75, no. 3 (2010): 432-455.
[43] DeSoucey, *Contested Tastes*, 69; Heald and Mitchell, "The Holy Grail of foie gras?"; Lowe, Brian M, "Spectacular Animal Law: Imagery, Morality, and Narratives Impacting Legal Outcomes for Nonhuman Animals," *Albany Government Law Review*, No. 9 (2016): 72-74; Shapiro, Max, "A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product," *Loyola of Los Angeles International and Comparative Law Review*, No. 35 (2012): 27.
[44] PETA, "Kate Winslet Exposes Foie Gras Cruelty," YouTube Video, 2:17, March 15, 2015, https://www.youtube.com/watch?v=DyOu-GVtgPQ&t=52s.
[45] PETA, "Ducks Cruelly Force-Fed for Foie Gras," YouTube Video, 3:13, May 8, 2013, https://www.youtube.com/watch?v=uW2uiw-p_js.
[46] DeSoucey, *Contested Tastes*, 124; Lowe, "Spectacular Animal Law," 72-74; Shapiro, "A Wild Goose Chase," 27.

draw attention to how a specific culinary tradition has been pinpointed and how, as a result, the identity of a minority subgroup has been negatively affected. As food scholars have noted, the vilification of foie gras in the U.S. has occurred largely through the media of animal rights groups.[47] But much like their lack of engagement with other meat producers, most Americans have never directly engaged with the production of foie gras, and this "remoteness, both geographically and cognitively, from contemporary livestock facilities makes them reliant on translators, whether they explicitly recognize it or not. PETA and other animal rights groups wish to be those translators."[48] When Americans are offered, second-handedly through the media, American imaginings of foie gras and its production, they are receiving misinformation which seeks to demonize a foodway that is central to French group identity itself. Many foie gras facilities, DeSoucey notes, do not force-feed their birds, and although this fact does not negate the abusiveness of foie gras facilities which do, it does reveal the injustice of S.B. 1520 for its targeting of all foie gras. Even those facilities which produce foie gras by ethical means (i.e., those not outlawed by S.B. 1520) are prohibited from transporting their food items.

What S.B. 1520 and the *Canards* cases illustrate, ultimately, is how the foreign tradition of a minority group can be misrepresented and policed by a majority. Few scholars have taken cross-cultural approaches to examine the ways in which legal regimes regulate culinary customs, yet the work of Alison Dundes Renteln provides the clearest articulations of how aversions to foreign or otherwise unfamiliar foodways are underpinned by ethnocentrism. In her monograph *The Cultural Defense,* she troubles the idea that certain foods are intrinsically acceptable for consumption, while others are not. Renteln notes, "If it is arbitrary which animals are eaten, then this raises the question as to whether individuals from other places should be punished for their behavior. In some places a creature is eaten, whereas in others that would be unthinkable."[49] Building off of Renteln's formulation, one must then consider whether the means of producing a certain foodway—in this case, the French's gavage techniques to produce foie gras—should be outlawed without first considering if the practice is normative within a given culture. S.B. 1520 has not given such cross-cultural consideration to foie gras and its production methods.

This generalized condemnation of foie gras likely stemmed from burgeoning environmentalist and animal rights concerns in the United States; regardless of how it was produced, foie gras was branded by groups, like PETA, as inherently unethical, the product of abuse.[50] This branding culminated in S.B. 1520 and the *Canards* cases, manifestations of anti-French sentiment which aligned Frenchness with disregard for animal rights.[51] Indeed, force-feeding is one clear example of disregard for animal rights which pervades foie-gras-production, yet it is not characteristic of the *entire* industry or the culture that underlies it.[52] When it comes to the rejection of foreign foodways, Renteln maintains, "It shows how the reaction of the majority to a single incident can lead to the passage of

[47] DeSoucey, 182.
[48] DeSoucey, 182.
[49] Alison Dundes Renteln, *The Cultural Defense* (Oxford, England: Oxford University Press, 2004), 103.
[50] "The Pain Behind Foie Gras," PETA, February 25, 2019. https://www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/pain-behind-foie-gras/.
[51] Lowe, "Spectacular Animal Law" 72-74; Shapiro, "A Wild Goose Chase," 27.
[52] DeSoucey, *Contested Tastes*, 69.

anti-minority policy. It also demonstrates the tremendous pressure on ethnic groups to become assimilated."[53]

For the plaintiffs of the *Canards* case, the making of foie gras symbolized a shared "criteria for evaluation and judgement" with which "the identification of another person as a fellow member of an ethnic group" was possible.[54] In other words, the performance and mutual recognition of French ethnic identity was, for the plaintiffs of *Canards I* and *II*, made possible by the shared appreciation for foie gras. According to Barth's formulations, this is one criterion that allows for the construction of ethnic boundaries, yet "the persistence of ethnic groups in contact implies not only criteria and signals for identification, but also a structuring of interaction which allows the persistence of cultural differences."[55] The total maintenance of French group identity in the U.S. would require American recognition, at least to some degree, of the complexities of foie gras—how it is not inherently an unethical food, and how it is so key to French gastronomy. S.B. 1520 and the *Canards* cases did just the opposite: they reduced the enterprise of foie gras to one of abuse, thereby threatening the ability of some French-Americans to secure their livelihoods, find economic stability, and continue the traditions so deeply embedded in their French heritage.

V. CONCLUSION

After American animal rights activists vandalized Laurent Manrique's Marin County home in 2003, the San Francisco chef asked, "What are they going to do next? Are they going to go after me?"[56] Though Manrique experienced no physical assaults against himself, opponents of foie gras went as far as to destroy his vehicle and send him and his family threatening messages. Manrique, however, was aware of the opposition many Americans had to his practices; he understood the motives behind the attacks made on the foie gras industry, the industry through which he made a living in America. Nevertheless, in spite of the threats and crimes aimed at him, Manrique maintained, "We are going to keep going… These people, they have a cause, of course. We don't deny this. But we are very disturbed by the way they are acting and the methods they are using. We don't think this is acceptable."[57] The resilience of Manrique and other foie gras supporters in America—especially against such fierce opponents—signifies how truly important the food is to the French. However, because American opponents of foie gras have represented foie gras, in media and elsewhere, as merely a luxury food, they have been able to strengthen the notion that the food item is a minor facet of French culture, one that surely does not warrant the maltreatment of animals. But foie gras is more than *just* a luxury food.

Beyond the resistance to foie gras by animal rights groups, it is evident that moral attacks on French cuisine, and French culture, for that matter, have been committed through the targeting of the foodway. S.B. 1520 and the *Canards* cases symbolize efforts to both police foie gras and legally

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[53] Renteln, *The Cultural Defense*, 104.
[54] Barth, *Ethnic Groups and Boundaries,* 15.
[55] Barth, 16.
[56] Kim Severson, "Animal-rights vandals hit chef's home, shop / Activists call French-style foie gras cruel to birds," *SFGATE*, last modified August 19, 2003, https://www.sfgate.com/restaurants/article/Animal-rights-vandals-hit-chef-s-home-shop-2560809.php.
[57] Severson, "Animal-rights vandals hit chef's home, shop / Activists call French-style foie gras cruel to birds."

condemn the traditions that are central to a people; this is especially troubling when equally questionable practices exist in American culture. As the example of Manrique shows, the persistence of French identity can be difficult when laws and other forces seek to restrict your culinary traditions, your way of life, your very life itself. Over the span of centuries, foie gras has established itself as essential to the idea of Frenchness—and while Manrique and others have tried to continue the legacy of foie gras and maintain a sense of Frenchness in California, these efforts have proven to be rather unsuccessful. If S.B. 1520 and the *Canards* cases indicate anything, it is that the future of foie gras in California is bleak, and that any non-normative food can be pinpointed for its unfamiliarity. For now, the so-called "American melting pot" does not welcome foie gras and its proponents. Prospects for the existence of other foreign foods and cultures in the U.S. appear equally dim.

WORKS CITED

Abend, Lisa. "Can Ethical Foie Gras Happen in America?" Time Magazine. Last modified August 12, 2009. http://content.time.com/time/magazine/article/0,9171,1919163,00.html.

Association des Eleveurs de Canards et d'Oies du Quebec, et al. v. Xavier Becerra, Attorney General of California, No. 17-1285 (9th Cir. 2017) https://www.supremecourt.gov/docket/docketfiles/html/public/17-1285.html

Association Des Eleveurs De Canards Et D'oies Du Quebec v. Kamala D. Harris, Attorney General, 729 F.3d 937 (9th Cir. 2013) https://h2o.law.harvard.edu/cases/5030

Barth, Frederik. *Ethnic Groups and Boundaries: The Social Organization of Culture Difference*. Long Grove: Waveland Press, 1969.

Bourdain, Anthony. "Anthony Bourdain on No Reservations, Foie Gras Not Cruel." YouTube video, 4:51. Posted by "GoodDuckFarmer," September 19, 2013. https://www.youtube.com/watch?v=Gc73t0_0E_w.

Bowen, Kathryn. "The Poultry Products Inspection Act and California's Foie Gras Ban: An Analysis of the *Canards* Decision and Its Implications for California's Animal Agriculture Industry." *California Law Review* 104, No. 5 (2016): 1009-1041.

Brown, Patricia Leigh. "Is Luxury Cruel? The Foie Gras Divide." *The New York Times*, October 6, 2004. https://www.nytimes.com/2004/10/06/dining/is-luxury-cruel-the-foie-gras-divide.html.

Brulotte, Ronda L. and Michael A. Di Giovine. *Edible Identities: Food as Cultural Heritage*. Burlington: Ashgate Publishing, 2014.

Bryant, Taimie L. "Trauma, Law, and Advocacy for Animals." *Journal of Animal Law and Ethics*, No. 1 (2006): 63-138.

Caro, Mark. *The Foie Gras Wars: How a 5,000-year-old Delicacy Inspired the World's Fiercest Food Fight*. New York: Simon & Schuster, 2009.

Cook, Kristin. "The Inhumanity of Foie Gras Production—Perhaps California and Chicago Have the Right Idea." *Journal of Animal Law and Ethics*, No. 2(2007): 263-273.

DeSoucey, Michaela. *Contested Tastes: Foie Gras and the Politics of Food*. Princeton: Princeton University Press, 2016.

DeSoucey, Michaela. "Gastronationalism: Food Traditions and Authenticity Politics in the European Union." *American Sociological Review* 75, no. 3 (2010): 432-455.

Charles, Estienne. *L'Agriculture et maison rustique*. Paris: Chez Laurens Maury, 1564.

Finz, Stacy and Paolo Lucchesi. "Foie gras ban triggers California lawsuit." *SFGATE*, July 3, 2012.

https://www.sfgate.com/news/article/Foie-gras-ban-triggers-California-lawsuit-3682531.php

Grant, Joshua I. "Hell to the Sound of Trumpets: Why Chicago's Ban on Foie Gras Was Constitutional and What It Means for the Future of Animal Welfare Lawyers." *Journal of Animal Law and Policy*, No. 2 (2009): 54-109.

Harrington, Alexandra R. "Not All It's Quacked Up to Be: Why State and Local Efforts to Ban Foie Gras Violate Constitutional Law." *Drake Journal of Agricultural Law*, No. 12 (2007): 303-324.

Heald, Claire and Diarmuid Mitchell. "The Holy Grail of foie gras?" *BBC News*, January 26, 2007. http://news.bbc.co.uk/2/hi/uk_news/magazine/6301715.stm.

Hernández-Lopez, Ernesto. "Food, Animals, and the Constitution: California Bans on Pork, Foie Gras, Shark Fins, and Eggs." *UC Irvine Law Review*, No. 7(2017): 347-400.

Hsu, Tiffany. "Judge denies effort to stop California foie gras ban." *Los Angeles Times*, July 18, 2012. https://www.latimes.com/business/la-fi-mo-foie-gras-20120718- story.html.

Lifsher, Marc. "Judge denies block of California's foie gras ban." *Los Angeles Times*, September 19, 2012. http://articles.latimes.com/2012/sep/19/business/la-fi-mo-judge-foie-gras-ban-20120919.

Linnekin, Baylen J. "The "California Effect" and the Future of American Food: How California's Growing Crackdown on Food & Agriculture Harms the State & the Nation." *Chapman Law Review,* No. 13 (2010): 357-390.

Lowe, Brian M. "Spectacular Animal Law: Imagery, Morality, and Narratives Impacting Legal Outcomes for Nonhuman Animals." *Albany Government Law Review*, No. 9 (2016): 48-106.

Moore, Martha T. "Foes See Foie Gras as a Fat Target." *USA Today*, June 5, 2006. https://usatoday30.usatoday.com/news/nation/2006-06-01-foie-gras_x.htm.

Morton, Timothy. *Cultures of Taste/Theories of Appetite: Eating Romanticism*. New York: Palgrave Macmillan, 2004.

Noyes, Dan."Bay Area restaurants still selling banned foie gras." *ABC 7 News*, May 6, 2013. https://abc7news.com/archive/9092775/.

Parsons, Russ. "Foie gras can go back on California menus, judge rules." *Los Angeles Times*, January 7, 2015. https://www.latimes.com/food/dailydish/la-dd-foie-gras-can-go-back-on-the-menu-judge-rules-20150107-story.html.

PETA. "Ducks Cruelly Force-Fed for Foie Gras." YouTube Video. 3:13. May 8, 2013. https://www.youtube.com/watch?v=uW2uiw-p_js.

PETA. "Kate Winslet Exposes Foie Gras Cruelty." YouTube Video. 2:17. March 15, 2015.

https://www.youtube.com/watch?v=DyOu-GVtgPQ&t=52s.

Pettersson, Edvard. "California Foie Gras Ban to Remain in Force, Judge Says." *Bloomberg*, July 18, 2012. https://www.bloomberg.com/news/articles/2012-07-18/california-foie-gras-ban-stays-in-force-for-now-judge-says-1-

Phillips, Justin. "Judges reinstate California foie gras ban." *San Francisco Chronicle*, Septemeber 18, 2017. https://www.sfchronicle.com/food/article/Judges-reinstate-California-foie-gras-ban-12201055.php

Pierson, David. "California attorney general to appeal reversal of foie gras ban." *Los Angeles Times*, February 4, 2015. https://www.latimes.com/business/la-fi-foie-gras-appeal-20150204-story.html

Posses, Shayna. "Full 9th Circ. Asked To Rethink Calif. Foie Gras Ban." *Law360*, October 12, 2017. https://www.law360.com/articles/973263/full-9th-circ-asked-to-rethink-calif-foie-gras-ban.

Renteln, Alison Dundes. *The Cultural Defense*. Oxford, England: Oxford University Press, 2004.

Rodriguez, Marcelo. "Foie Gras Flap Leads to Vandalism," Los Angeles Times, August 25th, 2003, http://articles.latimes.com/2003/aug/25/local/me-foiegras25

Schapiro, Randall. "A Shmuz about Schmalz—A Case Study: Jewish Law and Foie Gras." *Journal of Animal Law,* No. 7 (2011): 119-145.

Severson, Kim. "Animal-rights vandals hit chef's home, shop / Activists call French-style foie gras cruel to birds." *SFGATE*, January 16, 2012. https://www.sfgate.com/restaurants/article/Animal-rights-vandals-hit-chef-s-home-shop- 2560809.php.

Shapiro, Max. "A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product." *Loyola of Los Angeles International and Comparative Law Review,* No. 35 (2012): 27-53.

Sullivan, Mariann and David J. Wolfson. "What's Good for the Goose... The Israeli supreme Court, Foie Gras, and the Future of Farmed Animals in the United States." *Law and Contemporary Problems* 70, no. 1 (2007): 139–173.

"The Pain Behind Foie Gras." PETA. February 25, 2019. https://www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/pain-behind-foie-gras/.

Wasserman, Jim. "Foie gras foes win a round," CBS News, September 30th, 2004 https://www.cbsnews.com/news/foie-gras-foes-win-a-round/

Williams Morris, Erica. "Foie Gras Ban in California." *Golden Gate University Law Review*. No. 45 (2014): 5-20.

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