Bellarmine Law Society Review

Volume XV — Issue I

BELLARMINE LAW SOCIETY REVIEW
VOLUME XV, ISSUE NO. I

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EDITOR'S NOTE: VOLUME XV NO. I OF THE *BELLARMINE LAW SOCIETY REVIEW*

ISABELLA CALISE

With great pride and bittersweet reflection, we present to you the first edition of Volume XV of the Boston College *Bellarmine Law Society Review*. This issue marks a milestone—not just in our publication's journey, but in ours as editors, contributors, and graduating students. This is the fifth edition Tommy Dee and I have had the privilege of publishing together, and it is also our final one. This past Monday, alongside many of our fellow authors and associate editors, we graduated from Boston College. We are immensely grateful to have ended our time here with the publication of this powerful issue, and we thank our readers for being part of this journey. We owe special thanks to our graduating associate editors—William Dee, Jenna Gilhooly, Kelly Schomber, Alexander Shube, and Therese Sparacio—whose sharp editorial insight, tireless work, and enduring dedication have helped shape the Review into what it is today.

In this edition, our authors tackle some of the most pressing legal and policy challenges of our time. Freshman Ines Hwang argues for stronger, more adaptive legal protections in the wake of COVID-19-era housing instability. Senior Julia Kuhn explores the climate-driven insurance crisis and proposes policy solutions to protect both economic stability and equitable access. Emily Riccardi examines how Airbnb's platform design enables racial discrimination, calling for legal reform to meet the realities of the digital age. John Villa traces the evolution of federal minimum wage policy and advocates for a gradual increase supported by targeted tax credits. Finally, Benjamin Ward dissects the expanding reach of FISA surveillance and proposes a three-pronged strategy to better protect civil liberties.

Each of these works reflects the passion, rigor, and intellectual curiosity that define the Bellarmine Law Society. They represent not only scholarship but a commitment to justice, reform, and progress. We are thrilled to pass the baton to two of our most dedicated associate editors—Simon Hoefling and Jessica Orrell—who will serve as next year's Editor-in-Chief and Managing Editor, respectively.

To our readers, thank you. Whether this is your first issue or your fifteenth, your engagement gives meaning to our efforts. As we turn the page on our time at Boston College, we do so with pride in this publication and confidence in the voices that will carry it forward.

Bellarmine Law Society Review

Volume XV | Issue I Article I

Evaluating COVID-19 Eviction Crisis: Policy Responses in Prolonged Emergencies

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EVALUATING COVID-19 EVICTION CRISIS: POLICY RESPONSES IN PROLONGED EMERGENCIES

INES HWANG [1]

Abstract: COVID-19 was one of the most unexpected and devastating catastrophes of the 21st century. It not only forced tenants out of their homes and into hospital beds, but also onto the streets. In response, the U.S. government implemented short-term measures such as the Centers for Disease Control and Prevention (CDC)'s eviction moratorium and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which yielded equally temporary results. While such short-sighted resolutions could be attributed to the persistent nature of the pandemic, the federal government's failure to adapt, and the inconsistent responses from state governments, ultimately led to a vicious eviction crisis across the country. In this paper, I will evaluate the challenges and shortcomings of the response to the COVID-19 eviction crisis. Through an analysis of Alabama Association of Realtors v. Department of Health and Human Services, as well as state and city policies implemented after July 2021 in Minnesota, California, Seattle, the District of Columbia, and New York, I will show that extensive eviction moratoriums must be in place during national crises to ensure adequate and adaptable legal protections. Ultimately, I will highlight the need for structured and collaborative efforts among federal, state, and local governments to effectively address eviction crises by balancing protections for tenants and landlords during prolonged emergencies.

INTRODUCTION

Eviction is a civil process that allows a landlord to legally remove a tenant from a rental property. State law, local law, leases, federal law, common law, and court rules govern this process. In particular, most states regulate residential renting under laws such as 25 U.S. Code

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§ 4137 – Lease Requirements and Tenant Selection. These laws are often based on the Uniform Residential Landlord and Tenant Act (URLTA) or the Model Residential Landlord-Tenant Code. Federal laws related to eviction address discriminatory practices, including the Civil Rights Act of 1866 and 42 U.S. Code Chapter 45, the Federal Fair Housing Act.[2]

When evicting a tenant in the state of Massachusetts, for instance, the landlord gives a notice to quit, which provides a grace period of 14 days for non-payment of rent or 30 days to vacate the property. While the tenant may attempt to resolve the conflict with the landlord, the landlord can take the tenant to court after the grace period.[3]Once the tenant responds to the Summons and Complaint filed by the landlord, an agreement can be reached by both the landlord and the tenant; if not, the case goes to trial. If the judge decides in favor of the landlord, an "execution" may be issued, during which there are 10 days for the tenant to appeal. After that, the landlord can hire a sheriff or constable to provide a 2-day notice before removing the tenant and the tenant's belongings.[4] As such, the law serves as an equalizer between landlords and tenants. For landlords, eviction is a means to reclaim possession of their property when tenants fail to abide by the terms of the lease. For tenants, it provides legal protection against wrongful termination of their lease by landlords. In other words, the legal process of an eviction is meant to protect both the landlords and the tenants.

In times of emergencies, however, neither the landlords nor the tenants can be protected without active efforts to maximize the function of the law, as was the case during the COVID-19 era. In particular, legal efforts to address the eviction crisis were met with the utterly

[2]"Eviction," LII / Legal Information Institute, n.d., https://www.law.cornell.edu/wex/eviction.
[3]"Tenants' Guide to Eviction," Mass.gov, June 28, 2024, https://www.mass.gov/info-details/tenants-guide-to-eviction.
[4]Commonwealth of Massachusetts, "Landlord's Guide to Evictions," Mass.gov, n.d., https://www.mass.gov/guides/landlords-guide-to-evictions.

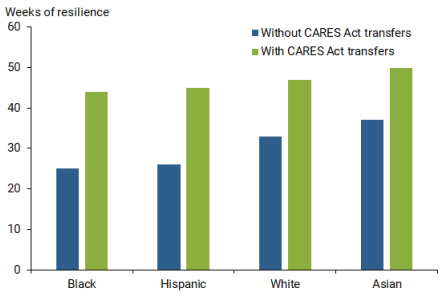
unpredictable nature of the epidemic and ultimately failed, only to leave landlords and tenants helpless. Many households were unable to pay rent, and mortgage lenders tightened lending standards as the Mortgage Credit Availability Index fell to 3.3% in June 2020, the lowest since April 2014.[5] There were attempts made to protect those affected: the Housing and Urban Development (HUD) rental assistance, numerous state funds, and Emergency Rental Assistance Programs that paid for rent, payments, utilities, and certain other expenses related to housing to support both the tenants and the landlords.[6]

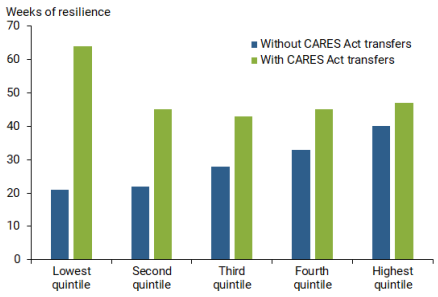
One of the federal government's efforts included the Coronavirus Aid, Relief, and Economic Security (CARES) Act that Congress passed in March 2020, which gave 120 days eviction moratorium.[7] Yet, when this act expired in just three months, the Centers for Disease Control and Prevention (CDC) extended the moratorium through July 2021 with the Coronavirus Response and Consolidated Appropriations Act. In other words, the CDC had found a way to continue maximizing the function of the law to protect households indirectly affected by the epidemic. Yet, when the CDC's order expired, it failed to issue a second moratorium as in *Alabama Association of Realtors v. Department of Health and Human Services.*[8]

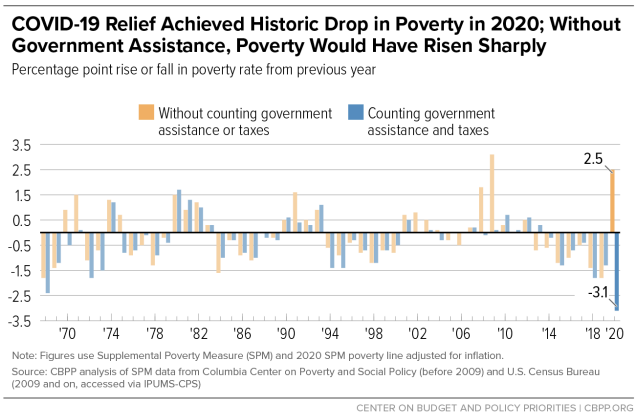
As a result, the CARES Act reduced economic welfare losses by 20% without affecting the number of fatalities. It significantly benefited low-income households, but provided limited

[5]"7 Findings on Covid-19's Impact on Housing," Habitat for Humanity, accessed December 4, 2024, https://www.habitat.org/stories/7-findings-covid-19s-impact-housing.
[6]"Emergency Rental Assistance Program," U.S. Department of The Treasury, February 8, 2025, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program.
[7] "H.R.748 - 116th Congress (2019-2020): Cares Act | Congress.Gov | Library of Congress," Congress.gov, accessed April 29, 2025, https://news.icourban.com/crypto-https-www.congress.gov/bill/116th-congress/house-bill/748.
[8]"Supreme Court Strikes down the CDC's Second Eviction Moratorium," American Bar Association, September 14, 2021, https://www.americanbar.org/groups/business_law/resources/business-law-today/2021-september/supreme-court-strikes-down-the-cdc/.

gains to middle-income households.[9] While the CARES Act increased government debt, it provided non-employment income to help households remain afloat, meaning it increased the median household's ability to sustain its typical consumption expenditures. As study results illustrate, the CARES Act helped lower-income households' resilience significantly more than their higher-income counterparts, which also enabled a decrease in the discrepancy in resilience across racial groups and geographic regions.[10]







As the figures above reveal, the CARES Act made an evident contribution to mitigating poverty, economic instability, and inequality. Some may argue that the CARES Act came at the cost of higher government debt and the failure to provide direct payments to the right individuals

[9]Becker Friedman Institute for Economics at UChicago, "The Impact of the CARES Act on Economic Welfare | Becker Friedman Institute," Becker Friedman Institute, December 12, 2024, https://bfi.uchicago.edu/insight/research-summary/cares-impact-on-welfare/.
[10]Trevor and Trevor, "How Much Did the CARES Act Help Households Stay Afloat? - San Francisco Fed," SF Fed, December 18, 2024, https://www.frbsf.org/research-and-insights/publications/economic-letter/2021/07/how-much-did-cares-act-help-households-stay-afloat/.

in an effort to focus on providing aid to low-income households. Such downfalls of the act, however, do not outweigh the positive effect it had on increasing household resilience, approximately from 31 to 46 weeks.[11]

History of the Correlation Between Natural Disasters and Evictions

Since 1960, the housing crisis in the United States has worsened. Rents in the United States have risen by 61%, while renters' incomes have increased by only 5%. Approximately 10 million low-income households are either homeless or paying unaffordable rent, forcing them to compromise on necessities such as food, transportation, and healthcare. Since 2001, worst-case housing needs—low-income households that pay more than half of their income on rent or live in severely inadequate housing without assistance—have risen by 66%. In 2016, there were 2 million eviction filings, and by 2018, nearly half of all renter households were paying more than 30% of their income on rent, with almost one in five paying over 50% (Joint Center for Housing Studies, 2020).[12]

During and after the pandemic, the situation aggravated. In 2022, a record 22.4 million renter households spent more than 30% of their earnings on rent or utilities, putting them at risk and leaving limited room to save during times of crisis. Among renter households earning less than $30,000 annually, the median residual income dropped to just $310 per month, a 47% decline from 2001. While the pandemic-era protections and financial support systems may have temporarily reduced eviction filings, these resources largely expired or phased out, contributing to a rise in housing instability.[13]

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[11]B. BrandonMaya, "The U.S. CARES Act and Household Resilience," Bureau of Labor Statistics, January 7, 2022, https://www.bls.gov/opub/mlr/2022/beyond-bls/the-us-cares-act-and-household-resilience.htm.
[12]Mel Wilson and National Association of Social Workers, National Eviction Crisis in the era of the Coronavirus Pandemic, accessed December 4, 2024, https://www.socialworkers.org/LinkClick.aspx?fileticket=gmNJzUL1BpM%3D&portalid=0.
[13]Joint Center for Housing Studies of Harvard University, "AMERICA'S RENTAL HOUSING 2024," AMERICA'S RENTAL HOUSING, 2024.

In times of natural or man-made disasters, including public health crises, FEMA provides aid to renters affected by natural or man-made disasters and emergencies. FEMA offers seven types of housing assistance and allows up to 18 months of continued rental support, which can include government-provided homes such as trailers, temporary housing units, or FEMA-constructed housing sites.[14][15]

A specific example of a disaster that has brought about an eviction crisis is Hurricane Michael, a Category 5 hurricane that hit Bay County, Florida, on October 10, 2018. The storm severely damaged local housing stock, leaving small-property landlords with few financial resources to make repairs. At the same time, some landlords of larger properties used the disaster as an opportunity to evict tenants and renovate units to raise rents. In response, displaced renters turned to FEMA for support through its 18-month Continued Rental Assistance program, government housing, HUD rental assistance, and other aid. FEMA's long-term support, which made use of the Stafford Act that allows agencies to support individuals displaced by disasters for up to 18 months, contributed to a measurable decline in evictions two years after the disaster.[16]

In contrast, the housing crisis of the three-year-long COVID-19 era was met with just one year of federal eviction moratorium protection.[17] Even this difference in the government's responses to different crises highlights the inconsistency in the federal government's protocol. In

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[14]"Assistance for Housing and Other Needs," FEMA.gov, February 7, 2025, https://www.fema.gov/assistance/individual/housing.
[15]"FEMA Continued Rental Assistance," FEMA.gov, January 21, 2025, https://www.fema.gov/fact-sheet/fema-continued-rental-assistance.
[16]Tanaya Srini et al., A perfect storm? disasters and evictions, October 13, 2021, https://nlihc.org/sites/default/files/A_Perfect_Storm_Disasters_and_Evictions.pdf.
[17]"Covid-19 Pandemic Timeline," Northwestern Medicine, March 2023, https://www.nm.org/healthbeat/medical-advances/new-therapies-and-drug-trials/covid-19-pandemic-timeline#:~:text=On%20January%2030%2C%202023%2C%20the,that%20continue%20to%20save%20lives.

order to better respond to the next emergency crisis, the government must have scalable, long-term housing policies that extend beyond short-lived emergencies.

Alabama Association of Realtors v. Department of Health and Human Services

This case was brought to the court by the Alabama Association of Realtors, along with other plaintiffs, in opposition to the Department of Health and Human Services, the defendant, specifically challenging the Centers for Disease Control and Prevention (CDC). The plaintiff argues that the CDC's national eviction moratorium during the national pandemic exceeds its statutory authority. The 42 CFR § 70.2, initially passed in 1944, grants the authority to implement interstate regulations, including measures like inspection, fumigation, disinfection, sanitation, and so on.[18] But this provision has rarely been invoked and never before to justify an eviction moratorium. The initial eviction moratorium was implemented by the CARES Act, which expired in July 2020. It was followed by multiple extensions, including the extension challenged in this case.

To the plaintiffs, this extension is a violation of the Constitution because the agency lacked statutory authority and caused irreparable harm to the landlords. They claim that §361(a), the Public Health Service Act, only permits 'direct' public health measures to which the CDC's eviction moratorium is deemed indirectly related to interstate infection. The defendant claims that §361(a) grants broad authority to the agency, the CDC, and is deemed a "necessary" measure to prevent the spread of disease. Thus, using §70.2, the CDC argues that it is "necessary to prevent the introduction, transmission, or spread of communicable diseases" between states and foreign countries. It is a legitimate public health measure in the public interest and funded by

[18]17"42 CFR § 70.2 - Measures in the Event of Inadequate Local Control.," LII / Legal Information Institute, n.d., https://www.law.cornell.edu/cfr/text/42/70.2#:~:text=CFR-,%C2%A7%2070.2%20Measures%20in%20the%20event%20of%20inadequate%20local%20control,to%20be%20sources%20of%20infection.

Congress's $50 billion in emergency rental assistance, which the government determined to be parallel to the approximate damage, mitigating financial burdens on landlords. The legal question of this case is whether the CDC had the statutory authority under 42 CFR §70.2 and §361(a) to impose a nationwide eviction moratorium.

The U.S. District Court for the District of Columbia ruled in favor of the plaintiffs, holding that the CDC lacked the authority to impose the moratorium, yet stayed its decision pending appeal. The stay was upheld, allowing the moratorium to continue, which the Supreme Court ultimately vacated temporarily. This case resulted in a 5-4 decision; the Court ruled that the moratorium exceeded its statutory authority.

The Supreme Court concluded that the CDC overstepped, as § 361(a) does not explicitly grant the agency the power to impose such broad measures without fault to Congress, as they are expected to speak clearly and precisely when authorizing power to agencies. The decision draws from precedents such as *Utility Air Regulatory Group v. EPA (2014)* and *FDA v. Brown & Williamson Tobacco Corp. (2000)*, which hold that when agencies claim vast economic and political power, Congress must provide clear and explicit authorization. Due to the extent of the economic involvement of the moratorium, the Court determined that the CDC's interpretation was beyond its statutory authority. Additionally, the Court summoned the precedent, *Lindsey v. Normet (1972)* to support this decision with the interference of state-level landlord-tenant laws, traditionally regulated by states, and thereby reiterated the necessity of clear and specific language when altering the power balance between federal and state authorities.[19]

The ruling of this case sheds light on the tension between individual rights and public

[19]The Alabama Association of Realtors v. Department of Health and Human Service (Supreme Court of the United States August 26, 2021).

health needs that limits the government's flexibility in responding to such emergencies. It exposes the lack of legislative preparation to grant statutory authority to protect public welfare during a national crisis. In this case, the CDC had no choice but to rely on 42 CFR §70.2 due to the absence of clearer congressional action. While it cannot be disputed that agencies must adhere to statutory limits, the Supreme Court's decision reflects the need for Congress to act more decisively in authorizing emergency measures.

Finally, the case reflects the ethical question of balancing economic interests and public health. Although legally sound, the decision arguably prioritized property rights over human welfare, as the moratorium protected millions of vulnerable tenants from eviction, preventing widespread homelessness and reducing COVID-19 transmission risks. Thus, the ruling reaffirms the importance of statutory limits, but also highlights the challenges of relying on slow-moving legislative bodies and legal disputes during a crisis. The case underscores the need for more explicit public health statutes to empower agencies like the CDC to act decisively in future emergencies without overstepping their legal boundaries.

Further, the Supreme Court's ruling highlights the relationship between individual property rights and the government's responsibility to protect public health. Eviction is both directly and indirectly related to health, as people facing eviction threats are more likely to suffer physical illness, high blood pressure, despair, and anxiety. Eviction often results in housing instability, relocation to subpar housing, crowding, and homelessness, all of which are tied to health threats to both adults and children.[20] Further, homelessness has a direct association with the spread of disease, as known from HIV, tuberculosis, hepatitis C, and COVID-19, as

[20]Abdullahi Tunde Aborode, "Threats of Evictions in the USA: A Public Health Concern," Annals of Medicine and Surgery 82 (September 15, 2022), https://doi.org/10.1016/j.amsu.2022.104681.

homelessness contributes substantially to the population burden of disease.[21] The agencies may be discouraged from implementing necessary measures, and legal disputes like this inhibit the focus on people's lives and prevent the ongoing spread of disease. Justice Breyer's dissent has also presented how there was a downward trend in COVID-19 cases, and the predictions were 'tragically untrue,' and so the court too failed to take into consideration the vicious and changing nature of a pandemic. This decision constrained the future government's authority to implement vital emergency measures and undermined agency authority, leaving public health at significant risk. This sets the precedent for the United States government, which leaves concerns for future pandemic responses and creates a potential chilling effect.

Most importantly, however, the case carries profound implications regarding the government's inability to respond to urgent needs swiftly, flexibly, and effectively during times of crisis. What this case ultimately reveals is not the vagueness of § 361(a), but the inflexible scope of the law that is particularly ill-suited to combat the broad and unpredictable nature of a health crisis. While the statute limits the CDC's authority to a set of interventions, such clarity becomes an obstacle in emergencies that demand fast and unconventional actions, such as halting evictions to prevent mass transmission. Hence, the case demonstrates how legal precision, when outdated, can undermine adequate governance during imminent crises.

Statewide Moratorium Case Studies

Despite the lack of nationwide protection, some states did not remove eviction moratoriums after July 2021. Minnesota, for example, fully ended the eviction moratorium on June 1, 2022, and turned to a gradual transition method. Even after June 1, Brooklyn Center,

[21]Emily Mosites, Laura Hughes, and Jay C Butler, "Homelessness and Infectious Diseases: Understanding the Gaps and Defining a Public Health Approach: Introduction," The Journal of Infectious Diseases 226, no. Supplement_3 (October 7, 2022): S301–3, https://doi.org/10.1093/infdis/jiac352.

Minneapolis, and St. Louis Park legislated their own notice requirements.[22] Minnesota's statewide coalition, The Homes for All Coalition, was instrumental in advocating for the unique "off-ramp" moratorium: a solution that provided a more comprehensive and more precise set of rules to protect both the landlords and the tenants of Minnesota. As stated on July 14, 2021, landlords could file evictions for material lease violations but not for non-payment of rent. As of August 13, 2021, landlords could terminate leases and not renew leases of tenants behind on rent, and who are ineligible for the COVID-19 ERA. From September 12, 2021, landlords could file for evictions for tenants who are behind on rent but are ineligible for COVID-19 Emergency Rental Assistance, for which a landlord must provide a written notice to the tenant 15 days prior based on nonpayment of rent.[23] Most off-ramp protections ended on October 12, 2021, unless eligible for emergency rental assistance. The off-ramp protection is unique as it avoids the binary, all-or-nothing approach, allowing tenants to stay housed with access to aid, while also allowing landlords to recover from the losses and work with the tenants to provide notice and allow time. It was a balanced policy approach that attempted to protect both tenants and the landlord, working off of each other. Similarly, New Jersey continued their eviction moratorium until December 31, 2021, specifically through programs that made all people eligible if they make less than 120% of the area median income in the county.[24] New Mexico continued until October 3, 2021, and New York eviction protection ended on January 15, 2022.[25]

There are unique cases like California and Seattle that had advanced programs that

[22]21HOME Line, "Eviction Moratorium Phaseout Information — HOME Line," June 1, 2022, https://homelinemn.org/phaseout/.
[23]"Minnesota's Eviction Moratorium off-Ramp," National Low Income Housing Coalition, August 30, 2021, https://nlihc.org/resource/minnesotas-eviction-moratorium-ramp.
[24]Ericka Conant, "New Jersey Eviction Moratorium to End in 2022 as Covid-19 Cases Surge," WHYY, December 31, 2021, https://whyy.org/articles/thousands-of-households-set-to-lose-protections-as-n-j-eviction-moratorium-ends-jan-1/.
[25]LawDistrict Team, "Eviction Moratoriums by State," LawDistrict, December 12, 2024, https://www.lawdistrict.com/articles/eviction-moratoriums-by-state.

brought about more positive results compared to other regions. California ended its eviction moratorium on March 31, 2023. California provided nearly three years of protection, which, like New Jersey, included providing monetary aid to tenants who earn less than 80% of the area's median income. AB 832, the COVID-19 Rental Housing Recovery Act, signed by Governor Newsom, enacted a statewide eviction moratorium that expired on September 30, 2021. Nonetheless, it provided additional money to reimburse 100% of the unpaid rent for landlords. Also, the Housing Is Key program allowed landlords and tenants to apply for assistance. It was a unique program that "assisted over 371,000 households with more than $4.7 billion in rent and utility assistance during the COVID-19 pandemic."[26] Through the AB-2179 extension, tenants who had submitted rental assistance applications, Housing is Key, were temporarily protected until June 30, 2022. The application closed on April 1, 2022, and the tenants were not evicted due to non-payment of rent while their application was pending. California also had clear rules and dates for rent payments to protect tenants and landlords. For rent due from March 1, 2020, to August 31, 2020, landlords could not evict tenants for non-payment with the provision of the Declaration of COVID-19-Related Financial Distress. For ones that were due from September 2020 to September 2021, tenants were not evicted if they provided the declaration and paid at least 25% of their rent during that period. Lastly, starting in October 2021, tenants were expected to pay full rent if they did not apply for rental assistance, although local emergency ordinances varied. As a result, California's program has had the largest unified emergency rental assistance program in the nation, which covered about 64% of the state's population, and the remaining residents were covered by the local emergency rental assistance programs.[27] Lourdes

[26]State of California, "Housing Is Key," Housing Is Key, accessed December 4, 2024, https://housing.ca.gov/.
[27] Covid-19 California Eviction Moratoriums (Bans) and Tenant Protections," www.nolo.com, September 6, 2022, https://www.nolo.com/legal-encyclopedia/coronavirus-covid-19-california-eviction-bans-and-tenant-protections.htm l.

Castro Ramirez, Business, Consumer Services, and Housing Agency Secretary, has stated that California worked "in partnership with a local network of 144 culturally competent community-based organizations engaging landlords, legal aid groups, local cities and counties and our federal partners at US Treasury, we collectively helped over one million people in California stay safely and stably housed"[28] Hence, California outperformed other states by implementing a long-term, well-funded, and clearly phased eviction protection plan, especially with its "Housing Is Key" program covering over 64% of the population, with extensive community outreach and administrative cooperation and coordination.

Seattle's eviction moratorium continued until January 15, 2022, through Executive Order 2021-07 by Mayor Jenny A. Durkan. This order not only extends the moratorium but also modifies additional COVID-related relief measures regarding utility assistance. Mayor Durkan has stated that as the first major city impacted by the COVID-19 outbreak, Seattle was able to maintain "the lowest cases, hospitalizations, and deaths of every major city…by establishing and continuing one of the first in the nation moratoriums on evictions to keep families safe."[29] Furthermore, the unexpected rise of the delta variant of this moratorium extension ensures "every level of government can provide rental assistance and housing support to tenants and landlords, which is critical to stabilizing the community as we reopen and recover." Beyond that, Seattle

[28]State of California, "'this Program Was Truly a Blessing': Facts from California's Nation-Leading $4 Billion State Rent Relief Program," Governor of California, June 17, 2024, https://www.gov.ca.gov/2022/07/01/this-program-was-truly-a-blessing-facts-from-californias-nation-leading-4-billion-state-rent-relief-program/#:~:text=California's%20program%20is%20the%20largest,assistance%20programs%20covering%20the%20rest.

[29]Seattle Human Services, "Mayor Durkan Announces January 15, 2022 Extension of Eviction Moratorium and Continuation of Additional COVID-Related Protections - Bottom Line," Bottom Line, December 8, 2022, https://bottomline.seattle.gov/2021/09/21/mayor-durkan-announces-january-15-2022-extension-of-eviction-moratorium-and-continuation-of-additional-covid-related-protections/.

requires landlords to provide payment plans and restricts late charges and interest.[30] Likewise, the Seattle Times has reported that 60,000 Seattle area renters were behind rent, which the city has distributed more than $15 million of the first allocation of American Rescue Plan rent relief, including 100% of funds for United Way King County and income-restricted affordable housing and the rest $6 million for BIPOC communities. The executive order prohibited landlords from initiating evictions and encouraged them to offer flexible payment plans, but the tenants were also legally obligated to pay rent during this period. There was extensive assistance for small businesses and nonprofit organizations. As a result, Ordinance 126075 took effect upon the expiration of the moratorium, which provided an additional 6-month period for tenants to claim a defense against non-payment eviction due to financial hardship caused by COVID-19 through mid-June 2022.[31] Seattle's moratorium exemplified a model for urban crisis solution that strengthens tenant protections and rental assistance access.

The District of Columbia also implemented a permanent eviction ban, going beyond temporary relief, that bars landlords from filing evictions against tenants who owe less than $600. Mel Zahnd, a senior staff attorney in the Housing Law Unit, speaks on how records of eviction cases, even if the tenants do not end up being evicted, "prevent those people from finding new housing in the future."[32] A 2020 report from Georgetown University claimed that in 2018, 12% of households called to D.C. Superior Court owed less than $600.[33] This sets a higher standard for

[30]"Seattle's COVID Eviction Moratorium Extended Into January 2022," The Seattle Times, September 21, 2021, https://www.seattletimes.com/seattle-news/politics/seattles-covid-19-eviction-moratoriums-extended-into-january-2022/.

[31]Kamaria Hightower, "Mayor Durkan Announces January 15, 2022 Extension of Eviction Moratorium and Continuation of Additional COVID-Related Protections," Office of the Mayor, September 21, 2021, https://durkan.seattle.gov/2021/09/mayor-durkan-announces-january-15-2022-extension-of-eviction-moratorium-and-continuation-of-additional-covid-related-protections/.

[32]Amanda Michelle Gomez, "DC Council Passes Major Housing Bill, a Win for Tenants," DCist, March 4, 2022, https://dcist.com/story/22/03/01/dc-bans-evictions-over-unpaid-rent-under-600/.

[33] Samantha Sinutko, "Gu Report Highlights Predatory DC Eviction Practices," The Hoya, October 29, 2020, https://thehoya.com/news/gu-report-highlights-predatory-dc-eviction-practices-2/.

landlord accountability and addresses the lasting harm that the tenants might experience. Moreover, this bill has greater impacts than simply banning evictions for modest sums of unpaid rent. It requires landlords to hold valid rental registration and licensing to file evictions, notify, at least 30 days in advance, a tenant of the plans to file evictions over nonpayment, provide photographic evidence of the court-issued proof of notice, and tell prospective tenants about the screening process prior to requesting fees or information. It also instructs the D.C. Superior Court to dismiss eviction filings if landlords do not follow necessary steps and seal eviction records 30 days after a case ends if the landlord loses or three years if the landlord wins.[34] Thus, D.C.'s approach allows a more transparent and regulated eviction process that takes into consideration the tenants' long-term accessibility of housing.

The eviction moratorium has expired in New York, yet it took a more layered approach. Any renter who has an application for rent relief pending in the state of New York cannot be evicted. On January 15th, 2022, eviction protection for New York City residents ended, including for those who filed a Hardship Declaration. However, protections still apply to New York City residents if their Hardship Declaration is still processing. Housing Justice for All, a statewide coalition of organizations representing low-income tenants and homeless New Yorkers, announced that while the pandemic caused "over one million households to be out of work and behind on rent, [with] over 92,000 New Yorkers are living in shelters or on the streets with no relief in sight"[35], they were able to earn a $2.4 billion rent relief program. Despite these efforts, eviction filings have surged since 2022, after the protection ended.[36] There are measures

[34]Gomez, "DC Council Passes Major Housing Bill, a Win for Tenants."
[35]Cea Weaver, "We Won a Strong Rent Relief Program, but More Must Be Done to Protect Tenants and Homeless New Yorkers: Housing Justice for All Responds to State Budget," Housing Justice for All, May 6, 2021, https://housingjusticeforall.org/we-won-a-strong-rent-relief-program-but-more-must-be-done-to-protect-tenants-and homeless-new-yorkers-housing-justice-for-all-responds-to-state-budget/.
[36]5"Evictions Filings in New York Increase," LawDistrict, July 4, 2023, https://www.lawdistrict.com/articles/new-york-eviction-notice-filings-surge-after-protections-end.

"Eviction Tracking System," Eviction Lab, accessed December 4, 2024, https://evictionlab.org/eviction-tracking/.

such as the Tenant Safe Harbor Act and Emergency Rental Assistance Program, which requires tenants to prove that the pandemic caused financial problems, after the moratorium within the period from March 2020 to January 2022. These specific programs were also targeted at protecting many tenants and further avoiding any malingering. Hence, New York's eviction moratorium was long-term and precise, aiding with rigid standards. Between November 2021 and April 2022, there was approximately a 40% increase in filings, which is highly concerning as 17.6% of renters have rent that is due in the state of New York."[37] Therefore, while New York had a notably long-term and carefully structured support system for tenants in genuine need, the post-moratorium surge in filings underscores the limits of even well-designed protections. This applies to other states as well. Even the most well-designed protections are state-wide, and with the exception of certain states, the national eviction surge reveals the limited support and non-ideal outcomes.

Evaluating Challenges: Consequences of a Disjointed Eviction Response

The most apparent challenge is the strong divide between the state and federal

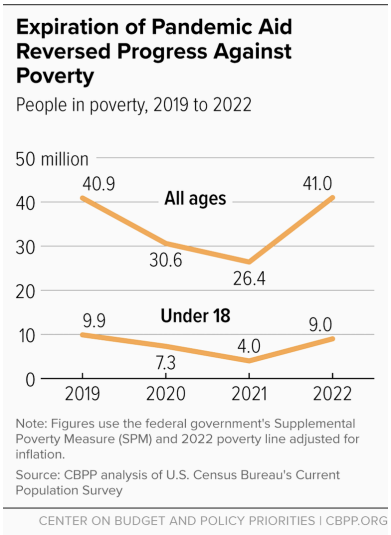
[37] "Eviction Tracking System," Eviction Lab, accessed December 4, 2024, https://evictionlab.org/eviction-tracking/.

governments. The renter-landlord relationship is a power held by the state, although federal agencies are the operators of eviction moratorium policies. As such, the CDC's attempt to extend the nationwide eviction moratorium failed due to the government's decision that the CDC exceeded its authority, and there was a lack of clarity and specificity in the extended moratorium proposed.

Since the federal eviction moratorium ended in 2021, there has been a great rise in eviction filings relative to before the pandemic and when the federal eviction moratorium was still effective. The eviction filings have risen incomprehensibly, peaking in March of 2023, which reveals the long-term damage and continuation of evictions when protective measures are stripped away. Despite the state policies, there were great discrepancies in the state and federal policy operations. A few states took extensive measures after the CDC eviction moratorium ended. California took one of the most supportive measures, as its moratorium lasted three years and cost $4 billion. Minnesota also took a careful approach by using a phase-out method to prevent abrupt expiration for people who need support. Seattle also supported the tenants in the city until January 2022, with extensive collaboration between countless organizations and a focus on specific groups of people and regions. The District of Columbia also implemented thorough eviction bans to protect tenants, as did the state of New York, with $2.4 billion in aid.

Eviction has various adversities that come along with it, as it not only increases homelessness in regions, which is strongly associated with hygienic problems, but also leads to a decline in financial health and credit scores. According to Yale University researchers, it even increases the number of hospital visits. The health concerns begin even before the tenants leave

their homes.[38] According to the Boston University School of Public Health, tenants facing eviction are likely to report poor health: high blood pressure, depression, anxiety, and psychological distress. This eventually leads to physical weakness, as eviction causes people to move into poor-quality housing with overcrowding or simply become homeless, which harms both adults' and children's health.[39] Furthermore, a study by the National Library of Medicine has proven that the expiration of the eviction moratorium has an association with "increased COVID-19 incidence and mortality, supporting the public-health rationale for eviction prevention to limit COVID-19 cases and deaths."[40] A brief from the Robert Wood Johnson Foundation has concluded that the eviction crisis requires a multipronged policy approach in the long term, such as "financial assistance to renters; expanding legal protections for tenants; and increasing the scale of federal affordable housing and rental aid programs."[41]



At the same time, overall poverty peaked in 2022. Notably, the poverty rate had reached a record low of 8.0% in 2021. After the eviction moratorium expired, it rose sharply to 12.4%, suggesting a potential correlation between the end of eviction protections and the increase in poverty. The poverty population, which had declined by 14.5 million between 2019

[38]Winnie van Dijk, "Eviction and Poverty in American Cities," Tobin Center for Economic Policy, February 2024, https://tobin.yale.edu/research/eviction-and-poverty-american-cities#:~:text=Evictions%20increase%20homelessness%2C%20reduce%20tenants,employment%20outcomes%20following%20an%20eviction.
[39]John Kane and Cynthia Gordon, "The Hidden Health Crisis of Eviction.," SPH The Hidden Health Crisis of Eviction Comments, October 5, 2018, https://www.bu.edu/sph/news/articles/2018/the-hidden-health-crisis-of-eviction/.
[40] Kathryn M Leifheit et al., "Expiring Eviction Moratoriums and Covid-19 Incidence and Mortality," American journal of epidemiology, December 1, 2021, https://pmc.ncbi.nlm.nih.gov/articles/PMC8634574/.
[41]Desmond M Himmelstein G, "Eviction and Health: A Vicious Cycle Exacerbated by a Pandemic," RWJF, January 20, 2023, https://www.rwjf.org/en/insights/our-research/2021/04/eviction-and-health-a-vicious-cycle-exacerbated-by-a-pandemic.html.

and 2021, surged by the same amount in 2022. The expiration of pandemic-era relief measures reversed much of the government's progress in supporting vulnerable populations during the crisis. Most strikingly, child poverty saw a historic rise in 2022, with 5 million more children living in poverty compared to the previous year.[42] These poverty measures reveal the importance of an eviction moratorium as a tool to protect people susceptible to growing poverty; as such, low-income households are the most vulnerable population to poverty and homelessness, who need federal protection in times of national emergency.

Conclusion: Proposed Reforms and Solutions

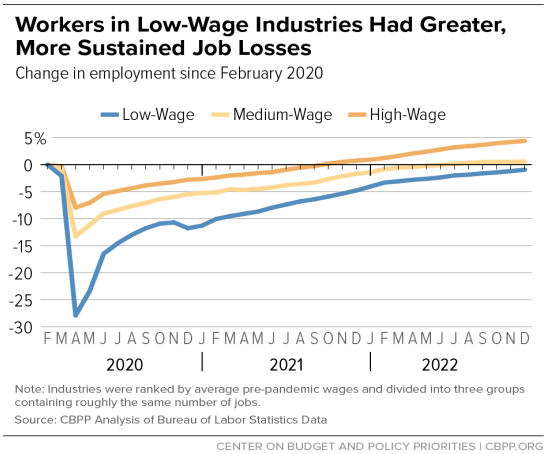
This is not to call for a complete abolition of eviction. In fact, the legal process of eviction serves to protect both landlords and tenants. However, in times of public health crises, alternative legal mechanisms must be in place to adjust the terms of eviction, taking into account both contractual obligations and the evolving status quo. When COVID-19 broke out, the U.S. government's response fell short, primarily because it failed to anticipate the prolonged nature of the crisis. While such disasters occur unpredictably and with varying severity, this shortcoming highlights the need for proactive planning to better support the public in the face of future emergencies.

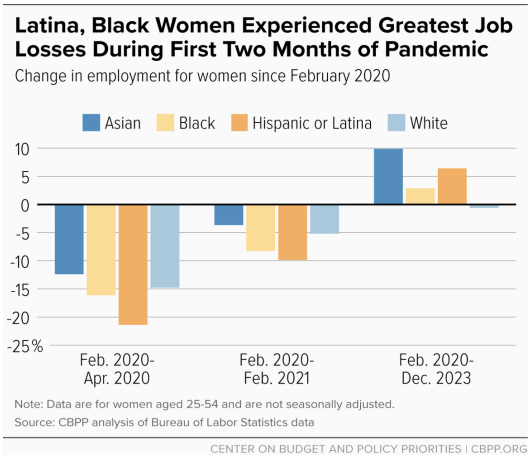
First and foremost, the federal government, particularly Congress, should collaborate with national agencies such as the CDC and FEMA to establish clearer statutory guidelines for eviction moratoriums during emergencies. Rather than operating in silos, government entities must work together to develop comprehensive and adaptable solutions. While regional flexibility

[42]"Tracking the COVID-19 Recession's Effects on Food, Housing, and Employment Hardships," Center on Budget and Policy Priorities, January 8, 2021, https://web.archive.org/web/20210114162754/https:/www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and.

is necessary to address local needs, drastic variations in policies can create inequities, preventing some people from accessing the most effective assistance programs. For instance, the lack of coordinated federal guidance contributed to the legal susceptibility of the CDC's moratorium in Alabama Association of Realtors v. Department of Health and Human Services.

Additionally, expanding funding for similar programs and streamlining application processes can help reduce housing instability. The expansion of funds can not only increase the financial budget but also grant more entities the authority and ability to provide funding. It empowers the right institutions—state housing agencies and government, local governments, and trusted community organizations—to administer aid efficiently and equitably, catering to specific communities. When more entities are appropriately resourced and authorized to help, they can potentially present a viable loss recovery for landlords while also tailoring assistance to reach the more vulnerable and marginalized populations that face disproportionately higher risks during such crises, as shown in the graphical data below.





Both figures reveal that minority groups—specifically Latina and Black women (left) and low-wage earners (right)—struggled to recover from job losses during the COVID-19 era. Data from the Eviction Tracking System by Eviction Lab indicates that the long-term effects of

eviction-related losses for both tenants and landlords can extend beyond three years, underscoring the need for continued support to both parties in order to prevent legal disputes. Additionally, according to the Center on Budget and Policy Priorities, although the economic recovery was stronger and faster than initially projected, it only returned to pre-pandemic levels by the end of 2023. Job creation exceeded expectations, and overall economic activity slightly surpassed pre-pandemic projections.[43]

Last but not least, reformed policies should take into consideration the unpredictable nature of emergencies and ensure flexibility. In the case of COVID-19, the federal Public Health Emergency (PHE) was declared in March 2020 and officially ended on May 11, 2023.[44] However, the eviction moratorium barely extended beyond 2021. This misalignment between the timeline of the crisis and the support policies meant to mitigate its impact reflects a fundamental flaw. While eviction moratoriums should not be indefinite or lacking in clear endpoints, there must be predefined guidelines enabling both individuals and governments to respond swiftly and effectively to emergencies. One solution could be to implement a phased approach: provide eviction protection for a minimum of three years, followed by structured local and state follow-up. Such an approach would help ensure compliance, protect vulnerable tenants, and prevent sudden surges in eviction filings that could destabilize communities and pose public health risks.

In conclusion, natural disasters come and go, leaving scarring aftermaths, one of which is a sudden rise in eviction filings. To protect both the landlords and the tenants during such times, the government must prepare and implement reformed eviction moratorium policies

[43]Center on Budget and Policy Priorities. 2023. "Tracking the Recovery from the Pandemic Recession." Center on Budget and Policy Priorities. April 13, 2023. https://www.cbpp.org/research/economy/tracking-the-recovery-from-the-pandemic-recession.

[44]"End of the Federal COVID-19 Public Health Emergency (PHE) Declaration | CDC." 2024. Archive.cdc.gov. April 5, 2024. https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/your-health/end-of-phe.html.

through collaborative efforts that address both immediate and long-term needs, ensuring an effective and equitable response to future crises. Without a proper reform of the status quo, the next national emergency will bring about yet another vicious cycle of a disaster followed by an eviction crisis.

Bellarmine Law Society Review

Volume XV | Issue I Article II

The Impact of Climate Shocks on Homeowners' Insurance: A Legal, Economic, and Public Policy Analysis

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THE IMPACT OF CLIMATE SHOCKS ON HOMEOWNERS' INSURANCE: A LEGAL, ECONOMIC, AND PUBLIC POLICY ANALYSIS

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Abstract: In the past decade, climate shocks have ravaged the United States at unprecedented levels. This paper addresses one of the first victims: homeowners. Given the increasing frequency and severity of these shocks, insurance companies have begun charging sky-high premiums, or in a rising number of cases, completely dropping policies in high-risk states. Consequently, public policy has shifted, leaving homeowners in certain areas to choose between two options: insurers of last resort, such as California's FAIR Plan, or non-admitted insurance. Adding to this problem are the economic implications, with several experts citing concerns that the cascading effects could prove to be worse than the 2007/2008 financial crisis. Further, there is the legal aspect, with legislation, regulation, and litigation all playing a role. Finally, while a variety of solutions have been proposed to address this crisis, none have proven completely effective. Thus, to prevent additional devastation, the paper offers two recommendations on how society should proceed.

Introduction

Today, severe climate shocks, including wildfires, hurricanes, and tornadoes, are ravaging the United States in unprecedented numbers, with states like California, Florida, and Louisiana bearing the brunt of the effects. According to the National Oceanic & Atmospheric Administration, the United States now averages twenty-three weather and climate disasters that each exceed $1 billion in damages per year.[58] In 2024 alone, there were twenty-seven such events, just one shy of the record-setting twenty-eight events that took place in 2023 (Exhibit 1).[58] Examples from 2024 include Hurricane Helene, which struck Florida, Georgia, South

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Carolina, North Carolina, and Tennessee, and caused approximately $79.6 billion in damages, as well as Hurricane Milton, which made landfall on Florida and resulted in an estimated $34.3 billion in damages.[52,58] Earlier this year, the Los Angeles Wildfires, which include the Palisades Fire and the Eaton Fire, devastated California.[32] Damages are expected to cost between $28 billion and $53.8 billion.[32] This can all be compared to the 1980s, where the United States only averaged three climate disasters that exceeded $1 billion throughout the entire decade.[58]

The Problem

Indeed, one of the most notable effects of these climate shocks can be seen in the market for homeowners' insurance. As of the end of 2024, insured losses from climate-related disasters in the United States hit $112.7 billion, representing an increase of 36% from the year prior.[21] Consequently, in disaster-prone areas of the country, specifically coastal states and/or states at high risk of wildfires, traditional insurers have significantly raised premiums or dropped (i.e., not renewed) policies.[63] In Florida, between 2020 and 2023, average premiums in the state increased by 40% (adjusted for inflation) to $3,300.[12]. During a similar time frame (2018 to 2023), Florida's non-renewal rate increased by 280%.[63] This is not coincidental; according to a report published by the Senate Budget Committee in December 2024, there is a positive correlation between premiums and non-renewal rates (Exhibit 2).[63] In other words, areas with higher premiums are more likely to experience higher non-renewal rates.[63]

It's important to note, however, that such non-renewal rate increases are not limited to Florida. As highlighted in Exhibits 3 and 4, between 2018 and 2023, non-renewal rates skyrocketed in states such as Louisiana, Hawaii, South Carolina, and Oklahoma.[63] These states, perhaps not surprisingly, have higher climate risk, another factor that correlates with higher non-renewal rates.[62] Zooming in on the county level, over 200 saw their non-renewal rate triple

or more between 2018 and 2023, with some experiencing increases larger than 500% (Exhibit 5).[25,63] To highlight specific examples of non-renewals, one can examine the insurance market in California and Louisiana. In 2024, less than one year after State Farm, California's largest property insurer, stopped accepting new applications for homeowners insurance in the state, the company ceased to renew 30,000 policies.[8,53] Nationwide, Trans Pacific, and The Hartford, among others, followed suit. [17] Regarding Louisiana, between 2021 and 2023, at least twenty insurance companies exited the state's market.[63]

All of this taken together highlights a harsh reality: as a result of climate shocks, the market for homeowners' insurance in high-risk areas is breaking down, leaving many in the dust. Unfortunately, however, the effects do not stop here. Instead, they extend more broadly to public policy, the economy, and the legal industry.

History of Homeowners Insurance

Before diving into the effects of premium increases and higher non-renewal rates on public policy, the economy, and the legal industry, it is important to understand the background behind homeowners insurance, including when and why it was created, how it is regulated, and how it has evolved.

Creation

The first homeowners insurance policy was introduced in September of 1950 by the Insurance Company of North America in response to the post-WWII housing boom.[16,31] This policy, unlike previous ones, offered a package that covered homes against losses caused by fire, smoke, lightning, wind, hail, explosions, theft, and vandalism.[31] Such a policy was widely celebrated among homeowners, as it provided comprehensive coverage and "cost 20% less than the combined premiums on separate policies that [they] had to buy for similar coverage."[16,31]

Regulation

Notably, homeowners' insurance is regulated by the states, not the federal government.[24] In fact, even small actions by the Treasury Department, such as attempts to gather data on the market, have received pushback from state regulators.[24] Given this structure, the responsibility of approving or rejecting rate increases ultimately lies with the states.[24]

Present Day

Today, homeowners' insurance policies provide much of the same coverage as the first one did back in 1950. One main difference, however, is the types of policies offered. Currently, there are five to choose from (excluding renters insurance, condo insurance, and mobile home insurance), all with differing amounts of coverage (Exhibit 6).[42] The HO-1 policy offers the least amount of coverage and has limited availability in most states, as mortgages often require higher levels of protection.[42] Next is the HO-2 policy, which builds on HO-1.[42] Nevertheless, it is the HO-3 policy that is most common.[42] This policy provides coverage for a house and personal belongings, in addition to liability, medical payments to others, and supplemental living expenses.[42] Additionally, there is the HO-5 policy, which offers the highest level of protection.[42] In contrast to the HO-3 policy, HO-5 pays out replacement cost value (as opposed to actual cash value).[42] Replacement cost value involves replacing damaged items with new and similar versions, while actual cash value involves receiving the depreciated cash value of damaged items.[42] Also, unlike the HO-3 policy, HO-5 covers personal belongings if they are damaged, stolen, lost, or misplaced (as opposed to just damaged or stolen).[42] Finally, the HO-8 policy applies to historic homes and registered landmarks.[42] While it offers less protection than the HO-3 and HO-5 policies, coverage for personal belongings, liability, medical payments to others, and supplemental living expenses is still included.[42]

Public Policy Analysis

Given the rapid rise of both premiums and non-renewal rates, homeowners in disaster-prone areas have flocked, in record numbers, to insurers of last resort and lightly regulated (i.e., non-admitted) home insurance. Both options present their own issues.

Insurers of Last Resort

Insurers of last resort, such as California's FAIR Plan and Florida's Citizens Property Insurance Corporation, have become an increasingly popular option among homeowners because of their ability to provide coverage in high-risk areas when traditional insurance companies will not.[7,46] Unlike private insurance, they are backed by their respective states and meant to function as a temporary safety net until private insurance coverage becomes available.[1] Despite their temporary nature, homeowners have not been deterred from both enrolling and remaining enrolled in these policies, as such plans are often the only option. In fact, between 2018 and 2023, insurers of last resort plans more than doubled their market share, with Florida's Citizen Plan making its way onto the top ten list of largest homeowner insurers in 2023.[27,35]

To further analyze the market for insurers of last resort, one can turn to California's FAIR Plan. Established by statute in 1968, the FAIR Plan provides "basic fire insurance coverage to high-risk properties that traditional insurance carriers refuse to cover."[1,39] The FAIR Plan is structured as a "pool" of all licensed property insurers in California, each of which contributes to its profits, losses, and expenses in a manner proportional to their market share in the state.[1] The Plan is not a state agency or a public entity, meaning it does not receive public or taxpayer funding.[1] In regard to its current exposure, the statistics are eye-opening. As of March 2025, "the FAIR Plan's total exposure is $599 billion, reflecting a 31% increase since September 2024 and a 259% increase since September 2021" (Exhibit 7).[36] The FAIR Plan's high monetary

exposure highlights the first problem associated with insurers of last resort: they are incredibly risky. In fact, according to a Bloomberg report, "out of 36 [insurers of last resort] that offer coverage for natural catastrophes, 21 don't explicitly detail how they'd pay deficits."[35] This lack of transparency calls into question whether insurers of last resort can remain solvent in the face of additional climate shocks.

It would be remiss not to consider two additional problems with insurers of last resort, that is, their high premiums and basic coverage.[47] To illustrate this issue, one can look no further than Colorado's FAIR Plan, which officially launched in April of 2025 and provides basic property insurance.[18,50] The Plan pays out actual cash value and does not cover liability, content replacement, or additional living expenses in the event a resident is displaced.[18,50] Its website reads, "FAIR Plan policies come with substantially higher premiums and offer more limited coverage…The Colorado FAIR Plan is the most expensive way to insure a property…standard insurance remains the most cost-effective option for property insurance in nearly all cases."[14] As discussed above, however, the "most cost-effective option" remains unavailable for many homeowners. As a result, they are left with higher premiums and insufficient coverage.

Non-Admitted Homeowners Insurance

After accounting for insurers of last resort, there remains one other option for residents in high-risk areas: non-admitted homeowners insurance, also known as lightly regulated insurance.[3] While originally designed to provide coverage for "properties that face unique and relatively rare risks" in the commercial real estate industry, such as a fireworks factory or a nuclear waste project, lightly regulated home insurance has expanded its reach.[3] For instance, the "number of non-admitted homeowners policies in Florida grew 73%, to more than 92,000, in the 14-year period that ended in 2023."[3] In some counties, however, the number of policies grew upwards of

250%, with Okeechobee County experiencing the highest increase at 1,009% (Exhibit 8).[3] Over the same period, California saw transactions in its non-admitted market increase by nearly 200%.[3] By and large, this indicates that "regular homes in some parts of the country are now viewed by the insurance industry as the equivalent of a fireworks factory."[3]

As with insurers of last resort, lightly regulated home insurance has a host of issues, the main one being its extremely high risk. First, non-admitted insurance is not regulated by the states and, thus, not subject to the same quality monitoring and contract review as traditional insurance or insurers of last resort.[3] This gives them "more flexibility to raise prices and tailor coverage."[3] Indeed, this flexibility, if it hasn't already, will lead them to take advantage of policyholders. If such flexibility is left unchecked, it will only grow larger, causing these companies to inflict even greater harm on those that they were meant to help.

Next, perhaps the largest weakness for the non-admitted insurance market, and what distinguishes it from all other options, is its lack of a guaranty fund.[3] This means that if a non-admitted insurance company were to go bankrupt, policyholders would never have their claims paid, ultimately leaving them "on their own to replace everything."[3] Such a possibility becomes even more scary when considering the financial vulnerability of non-admitted insurance companies, which can be analyzed using a metric known as the risk-based capital ratio.[3] This ratio, which is used by regulators to evaluate an insurer's financial health, "demonstrates whether a company has enough money to meet potential financial obligations, like claims after a big storm."[3] A low ratio, which is common among non-admitted insurers, indicates that "the company might not have enough capital on hand considering the risk they've absorbed."[3] Kin, Topa, and Orion180, three non-admitted insurers that were part of an analysis conducted by

Bloomberg in 2023, had risk-based capital ratios of 3.3, 3.1, and 1.5, respectively.[3] For reference, the median risk-based capital ratio of insurance companies in 2023 was 10.97.[3]

Moreover, a handful of companies that issue non-admitted policies have not obtained ratings from the insurance industry's largest and most respected rating agency, AM Best.[3] Instead, these companies rely on ratings from Demotech, an agency whose ratings "are viewed much more skeptically by brokers and insurance experts because they rarely hand out anything other than an A."[3] An A, according to Demotech's website, indicates that the insurer has "exceptional financial stability."[22] As explained above, however, this is not often the case. For example, Kin and Orion180, two non-admitted insurers discussed previously, received an A from Demotech.[3] This came despite their low risk-based capital ratio of 3.3 and 1.5, respectively. Last but not least is a statistic that pertains to Florida. In 2021 and 2022, "seven companies that had A ratings from Demotech went insolvent," a fact which further decreases the rating agency's credibility.[3]

Economic Analysis

Further complicating this matter are its economic implications. According to the Senate Budget Committee report from December 2024, many experts are comparing the "climate-driven insurance crisis" to the 2007/2008 financial crisis, even citing concerns that it may be worse.[63] This is primarily due to its potential effects on the real estate market, household wealth, tax revenues, and ultimately, communities. Add this to its current effects on insurance companies.

As previously discussed, the upsurge in climate shocks has led many insurers to drop homeowner policies. Without homeowners insurance, however, one cannot obtain a mortgage, ordinarily a prerequisite for purchasing and retaining a home.[46] As a result, there will likely be fewer home buyers in the market, causing property values to fall.[46] In fact, one estimate puts the

"potential reduction in unadjusted real estate values over the next 30 years due to climate-related risks" at $1.47 trillion.[19] The resulting ripple effects could be catastrophic.

According to Sean Becketti, the former Chief Economist of Freddie Mac, "A large share of homeowners' wealth is locked up in the equity in their homes."[5] Thus, "if homes become uninsurable and unmarketable, [their values] will plummet," as will household wealth.[5] Becketti previously warned that, "the economic losses and social disruption may happen gradually, but they are likely to be greater in total than those experienced in the [2007/2008 financial crisis]."[63] This is because the current outlook makes an asset value recovery similar to that experienced post-2008 quite unlikely, as a "home too endangered to insure will only become more endangered," causing its value to fall even further.[63]

Indeed, falling property values can also result in smaller property tax revenues.[25] This leaves towns with less money to fund critical resources such as schools, libraries, police and fire departments, and road construction and repairs.[34] Thus, it is only a matter of time before communities begin to feel strained.

Lastly comes the effects on insurance companies. While dropping homeowners insurance coverage in areas susceptible to climate shocks may seem grossly unfair and wrong to some, others argue it is necessary if private insurers want to remain solvent. The impending solvency crisis can be illustrated using State Farm as an example. In February 2025 alone, State Farm had to pay out approximately $1.75 billion to claims related to the Los Angeles wildfires.[47] This came after the company's 2023 warning to California officials that they were struggling financially, evidenced by their rating downgrade the same year.[47] As a result of the wildfires, State Farm estimates its direct losses to be $7.6 billion, $612 million of which will be retained (after accounting for reinsurance and FAIR Plan contribution).[62] The company's surplus, "which

stood at $1.04 billion at the end of 2024," is forecasted to decrease by $400 million.[62] Looking back on the past decade, its surplus has declined by roughly $5 billion.[47] Needless to say, this surplus, given the current outlook, will not last much longer. Consequently, State Farm, in addition to many other insurance companies, is going to be scrambling for funds, with some likely falling into bankruptcy.

Legal Analysis

Adding even more complexity to this issue is the legal perspective, including legislation, regulation, and litigation.

Legislation

The effects of legislation on the insurance industry are significant. Continuing with California as a case for analysis highlights this point. In 1988, California voters passed Proposition 103, also known as the Insurance Rate Reduction and Reform Act.[41] Its purpose was to "protect consumers from arbitrary insurance rates and practices, to encourage a competitive marketplace, and to ensure that insurance is fair, available, and affordable for all Californians."[51]

Although supporters of Proposition 103 call attention to the estimated $150 billion in premiums it has saved Californians over the last 25 years, opponents emphasize the myriad of problems it has created, the first one being the mass exodus of insurers from California's market.[35] Opponents argue that this exodus is due to the limitations that Proposition 103 places on insurers' ability to price their homeowners insurance policies in a way that "appropriately [accounts] for the risks [they] are protecting against."[35] The data speaks for itself: An analysis conducted by the California governor's office in 2024 found that "the average policy for a $300,000 home in California cost $1,405 a year, compared with $3,851 in Texas and $4,419 in Florida" (two states that also face high climate-related risks).[57] It also sits below the national

average of $2,601.[29] Further, when considering the massive losses experienced by insurers, due in large part to the restrictions imposed by Proposition 103, the reason for their exodus becomes even more clear: "In 2017 and 2018 alone, California homeowners insurers posted a combined underwriting loss of $20 billion, more than double the total combined underwriting profit of $10 billion that the state's homeowners insurers had generated from 1991 to 2016."[41]

Undoubtedly, the limits imposed by Proposition 103 also send the wrong signal to both homebuyers and contractors. As a spokesperson for the American Property Casualty Insurance Corporation put it, "Years of restrictions on rate-making created an artificially suppressed market that incentivized continued population growth in areas at high risk for wildfire and then reduced consumer options for insurance."[57] Certainly, without a mechanism to change its course of direction, the market will maintain its troublesome path and continue to mislead its constituents along the way.

Finally, opponents of Proposition 103 cite the problems associated with its "rate-intervenor system."[41] Put simply, this system kicks in for public hearings, which Proposition 103 makes mandatory when insurance companies propose a rate hike of more than 6.9%.[41] Ultimately, it allows public intervenors to "file objections on behalf of consumers, with fees to be paid by the applicant insurance company."[41] As evidenced by the data, the results of this system are far from efficient.[41] Aside from the fact that insurance companies pass on public intervenor fees to policyholders, the intervenor process has a "five-year average filing delay of 236 days for homeowners insurance."[41] Thus, insurers must endure inadequate pricing structures for at least six months, causing losses to grow and making an exit from the state's market all the more favorable.

Regulation

As previously mentioned, traditional homeowners insurance is regulated by a state's insurance commissioner, a figure whose decisions carry lots of weight for policyholders and insurance companies alike. Given the ongoing media coverage of California's insurance market, this state will remain the subject of analysis.

Starting with last year (2024), the California Department of Insurance approved Allstate's request to raise its average home insurance premiums by 34%, a change that affected approximately 350,000 policyholders.[38,48] Currently, State Farm is awaiting approval on its emergency request to raise premiums by 17%, a move they argue is required for them to stay afloat in the wake of the Los Angeles wildfires.[53] Indeed, state officials seem supportive of this move, as remarks from Nikki Kennedy, an attorney for the California Department of Insurance, highlight.[53] In a recent hearing, Kennedy ardently advocated for State Farm, warning the judge presiding over the case that "[California is] on the Titanic, and [sees] the iceberg. Now is not the time to argue about where to put the deck chairs. There is still time, your honor, to turn this ship around. If we don't, over three million Californians are going in the water. And there are not enough lifeboats."[53] While rate hikes do not bode well for the finances of policyholders, they are necessary to keep insurers solvent, as State Farm's case demonstrates.

It must be noted, however, that state regulators must consider the interests of policyholders as well. Raising rates to exorbitant levels, while beneficial for insurance companies, has an adverse impact on policyholders. With this in mind, it is important to gather context on State Farm's current proposed rate increase of 17%. In June 2023, State Farm requested a premium rate hike of 30% for its home insurance policies in California.[53] Nonetheless, after the Los Angeles wildfires, an event that certainly made the company's financial situation worse, State Farm lowered its request to a 22% increase.[53] Then, after state

regulators required the company to justify why such a rate increase was necessary, State Farm lowered its request to 17%.[28,53] Surely, after taking context into account, it appears that state regulators are handling the opposing interests of insurance companies and policyholders in a responsible and equitable manner.

Litigation

Many California policyholders, however, do not support this view. Instead, a vast majority see state regulators in a negative light, an issue that has led to a host of lawsuits. For example, in February, California's insurance commissioner, Ricardo Lara, "approved the FAIR Plan's request to levy an assessment of $1 billion on all its member insurers" so they could continue paying insurance claims related to the Los Angeles wildfires.[55] Yet, two months later, Consumer Watchdog (a nonprofit serving on behalf of the public's interest) sued Ricardo Lara and the California Department of Insurance, alleging their approval of such a request violated the Administrative Procedure Act (APA) and the state's insurance code.[44] The suit alleges that the violation of the APA stems from the absence of public input on Lara's decision.[37] The violation of the state's insurance code, Consumer Watchdog argues, stems from the decision by insurance companies to pass assessment costs onto policyholders.[37] To support their argument, Consumer Watchdog points to the section of the California FAIR Plan that reads, "…all member insurers must participate in the [plan's] expenses, profits, and losses…" in a manner proportional to their market share in the state.[37,40]

By all means, policyholders have not limited their target to state regulators. Rather, they have also begun to go after insurers themselves. For instance, last month (April 2025), California homeowners affected by the Los Angeles wildfires accused over 300 insurance companies, including State Farm, Travelers, and Liberty Mutual, of violating the antitrust

provisions of California's Cartwright Act and Unfair Competition Law.[49] Regarding evidence, property owners point to how insurers "[conspired] to eliminate competition in the marketplace" by "restricting business in certain areas of the state."[49] This conspiracy, the plaintiffs argue, allowed insurers to reduce their risk of losses and "forced [homeowners] to obtain more expensive policies with less coverage through the California [FAIR] Plan."[49] As a remedy, homeowners are seeking "compensatory and treble damages, as well as an injunction preventing the insurers from engaging in anticompetitive behavior."[49]

All in all, while the above examples are constrained to California, they beg the question of how this type of litigation will extend to other states. After all, it is not just California experiencing a homeowners insurance crisis from climate shocks (as previously noted). Thus, it is not a matter of if, but when, litigation in other parts of the country will start to pop up.

Potential Solutions & Their Shortfalls

To address the homeowners' insurance crisis as it relates to climate shocks, several states have tried their hand at different solutions.

First, one of the solutions, which has since been adopted by Louisiana, is to subsidize private insurance companies.[26] Although this keeps insurers from ceasing their operations in high-risk areas, it has a perverse effect on the real estate market. This is because such subsidies "dampen the price signal that potential homebuyers should receive about the true costs of living in harm's way."[27] Thus, without knowing the real price of their investment, people will continue to settle in the most susceptible parts of the country, an aspect that constitutes one of this issue's most pressing problems.

Another potential solution concerns insurance companies offering premium discounts or states offering tax breaks to homeowners who implement protection measures.[15] These measures

could include, but are not limited to, fire-resistant siding, sprinkler systems, wind-resistant roofing, and hail-resistant shingles.[15,27] One example of this solution in action can be seen in Florida. Here, some private insurance companies "are offering discounts to policyholders that fortify their homes against hurricane-force winds by strengthening and securing roofs and shutters and reinforcing garage doors."[15] In terms of tax breaks, the state offers "sales tax exemptions for impact-resistant windows, doors, and garage doors."[15] As for California, the state provides tax credits to "homeowners who make their homes more resistant to fires, wind, rain, and hail."[15]

Undoubtedly, this solution appears to be a win-win: Policyholders get discounts and tax breaks for making their homes more resilient, and insurers reduce their risk of losses. This, however, does not capture the full picture. Importantly, one must consider the expenses associated with such measures. These expenses "may place additional financial burdens on policyholders over and above increasing insurance costs."[55] Therefore, this solution could turn out to be a net negative for homeowners. Adding to this downside is the possibility that a policyholder could receive no benefits in return for protecting their home. For example, take Richard Zimmel, a homeowner in Silver City, New Mexico (an area at risk of wildfires).[25] Despite taking measures to curb his home's forest fire risk, including trimming trees away from his house, covering his yard in gravel to stop flames from rushing onto his property, sheathing his house in fire-resistant stucco, and renovating his roof with noncombustible steel, Zimmel's insurance company, Homesite, dropped coverage of his property in December of 2024.[25] As a result, Zimmel was forced to join the many others across the country searching for homeowners insurance.

A third solution might entail federal government intervention akin to that which took place in the 1960s. In 1968, Congress created the National Flood Insurance Program (NFIP) with the goal of addressing the lack of flood insurance availability in vulnerable areas.[46] This issue arose following the 1927 Mississippi flood, an event that resulted in major insurance companies withdrawing coverage from areas "exposed to frequent and correlated flood risk."[46] Not long after its creation, the NFIP became "the nation's primary, and effectively only, provider of residential flood insurance."[46]

Although the NFIP fills the coverage void for homeowners in flood-prone areas, it has various flaws. First, critics cite the NFIP's role in creating moral hazard.[46] In this case, moral hazard "refers to the risks that someone becomes more inclined to take because they have reason to believe that an insurer will cover the costs of any damages."[46] Put differently, the NFIP improperly incentivizes "development and growth in flood-exposed areas" by protecting in the event of serious water damage.[46] Further, critics highlight the NFIP's financial instability, which can be attributed to its pricing structure.[46] In particular, NFIP's policies charge substantially lower rates than they should, given their risk exposure.[46] Its pricing model even depends on periodic infusions of congressional funding to remain operational.[46] Surely, when these flaws are taken into account, proposals by lawmakers to create an analogous program for homeowners' insurance appear unsuitable.[35]

An additional solution, one which is controlled by the states, involves updating building codes.[27] For example, California has adopted wildfire codes while Florida has implemented hurricane wind codes.[27] Specifically, California's wildfire codes require new homes constructed within a "State Responsibility Area" to be built with fire-resistant materials, such as specific roofing, windows, and eaves.[23] As for Florida, its building codes specify four wind zones

(categorized by speed).[10] The wind zone surrounding a new home determines how it must be designed.[10] While updated building codes reduce the risk of damage, it is important to note that they are only effective when it comes to new construction. Indeed, if society would like to put an end to the homeowners' insurance crisis, new construction in high-risk areas is not the answer.

The final solution to address is catastrophe bonds, a market that has grown to a record $50 billion (as of December 2024).[45] A catastrophe bond, or cat bond, is defined as a "high-yield debt instrument designed to raise money for insurance companies in the event of a natural disaster."[30] Ultimately, cat bonds allow insurers to share the risk of catastrophic weather events, such as earthquakes, hurricanes, and floods, with investors.[30] If a disaster occurs, insurance companies tap into the collateral to help pay out their claims.[30] On the flip side, investors suffer heavy losses.[45] If a disaster does not occur, however, investors can earn double-digit returns.[45] It is this possibility, combined with the portfolio diversification benefits, that attracts investors to catastrophe bonds.[30]

It should be noted that these bonds do not come without risks, most of which fall upon investors. For example, if a predefined disaster occurs before a catastrophe bond matures, investors can lose their principal, and coupon payments could be reduced or ceased.[30,59] Given the increasing frequency of climate shocks (as discussed previously), as well as the growing market for catastrophe bonds, this result is likely to become increasingly common, causing investor losses to multiply.

Conclusion & Recommendations

In light of this information, it is imperative to propose recommendations on how society should move forward.

Education

One of the first steps in addressing this issue is to educate homeowners on climate-related risks associated with their dwellings.[15] This education can be provided by insurance companies and/or state regulators, and may include scientific data that outlines the growing dangers posed by past and future disasters. It may also include ways to mitigate or eliminate a home's vulnerabilities.[15] In terms of gathering education material, state regulators and insurance companies can leverage artificial intelligence. For example, Chubb Climate+, a business unit within Chubb Insurance that supports companies contributing to the transition to a low-carbon economy, "uses artificial intelligence and advanced data analytics to identify vulnerable households and the likely damage."[13,15] Certainly, conveying this information to both current and prospective homeowners can encourage them to act – or, in some cases, consider relocating.

An additional benefit of education is the demand for it. According to a 2024 Deloitte survey of homeowners in U.S. states at high risk of climate-related disasters, 84% of respondents said they want insurance companies to educate them on weather-related risks.[15] Indeed, this shows that homeowners are receptive to education and unlikely to ignore warnings.

Alternatively, there are downsides to education. For instance, education does not address the root cause of this issue, that is, the frequency and intensity of billion-dollar weather and climate disasters. It has the potential, however, to better prepare homeowners for such disasters and influence their settlement decisions (as noted above).

Renewable Energy

The second, more long-term oriented recommendation is to encourage investments in renewable energy, such as solar, wind, geothermal, and hydropower, and 'nudge' society toward reducing its use of fossil fuels.[60,64] This is because fossil fuels, such as coal, oil, and natural gas,

contribute to greenhouse gas emissions.[9] Research has shown that these emissions have "increased the frequency and intensity of extreme weather events."[20]

The strengths of this recommendation are threefold. First, according to a recent report from the International Renewable Energy Agency, 81% of renewables offer cheaper energy than fossil fuels, meaning companies have the potential to experience significant cost savings [43] Regarding homeowners, they too can save money. For example, the Residential Clean Energy Credit offers to reimburse 30% of the costs associated with clean energy improvements to new or existing homes, such as solar panels and solar water heaters.[56] Second, investments in renewable energy are coming off a blockbuster year. For example, "wind and solar generation [reached] a record 17% of U.S. electricity generation" in 2024 and surpassed coal generation for the first time in history.[2] More recently, March 2025 marked an unprecedented month, as "fossil fuels supplied less than half the United States' electricity generation."[54] Without a doubt, this suggests that there are numerous investment opportunities involving renewable energy. As a result, companies and individuals do not have to spend time searching for options and risk investing money in an industry that is not yet established. Third, and possibly the most important, is that investing in renewable energy targets the root cause of this issue (the frequency and intensity of weather and climate disasters) and looks to prevent it from growing even further.

This recommendation, as with most, also has some weaknesses. First, the current administration has endorsed the use of fossil fuels and indicated a desire to step back from renewable energy.[6] For example, in January of 2025, an executive order was issued calling for a temporary withdrawal of new wind projects in federal territory.[61] Also in January of 2025, funding for the 2022 Inflation Reduction Act (the IRA) was frozen.[2] One of the IRA's goals is to "accelerate the deployment of clean energy" using tax incentives, among other things.[33] These

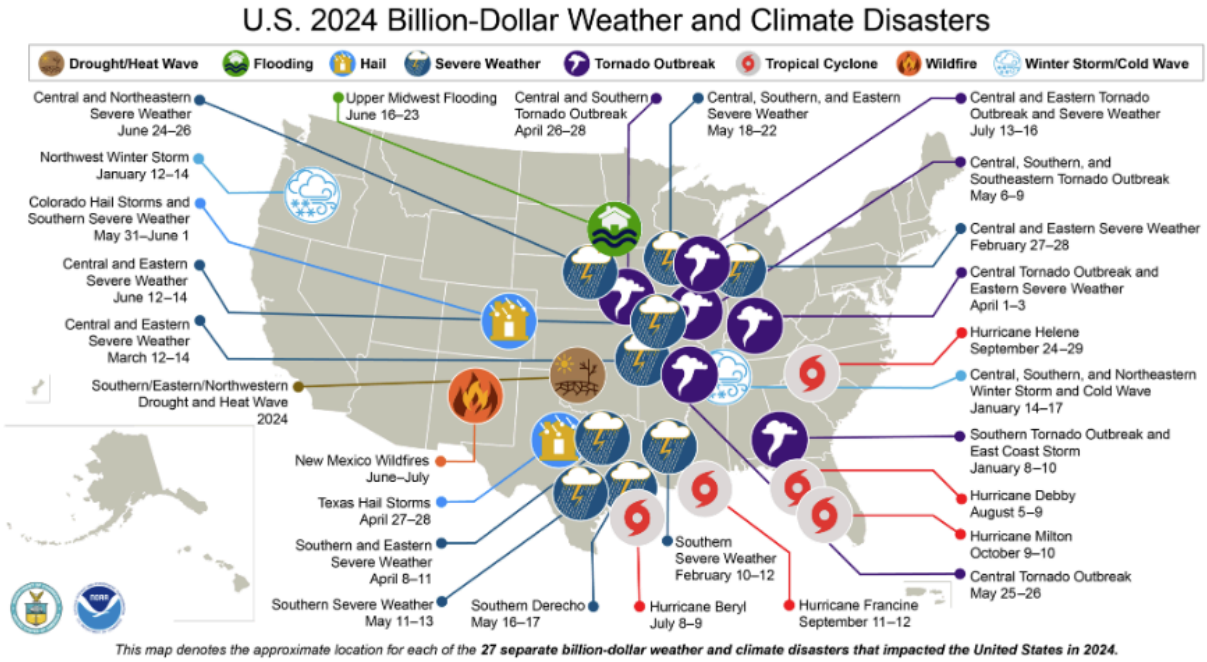
tax incentives, which have since been paused, apply to the production and purchase of domestic clean energy technology.[2] In addition, the newly proposed – but recently delayed – tariffs could pose a headwind for the industry.[2] This is because "the United States has become increasingly reliant on imported components for key clean energy technologies like solar panels, wind turbines, and batteries."[2] As a result, the deployment of renewable energy could become significantly more expensive.[2]

All that said, there are still signs that this recommendation has merit. These orders are temporary. This means that as time passes, the administration's investigation into such matters, which is likely to include discussions with industry experts, may cause them to recognize the effects of certain actions. Consequently, they may alter their course. Finally, the current political environment can overshadow the optimism that remains for the future. As Hortense Bioy, global head of sustainability research at Morningstar, put it, "Despite the short-term uncertainty in the US, the long-term drivers for clean energy remain intact and the outlook for the sector remains positive. History has shown that the energy transition will continue regardless of [the administration]."[4]

To conclude, climate shocks have made a lasting mark on the homeowners' insurance industry. From increasing premiums and non-renewal rates to the rising number of non-admitted and insurer of last resort policies, the consequences have been serious. Expanding on these consequences reveals their economic and legal implications, both of which suggest a grim outlook for the future of the United States. This outlook, however, can be improved by educating the public on climate-related risks and committing to renewable energy. Otherwise, it is only a matter of time before the entirety of America begins to feel the effects.

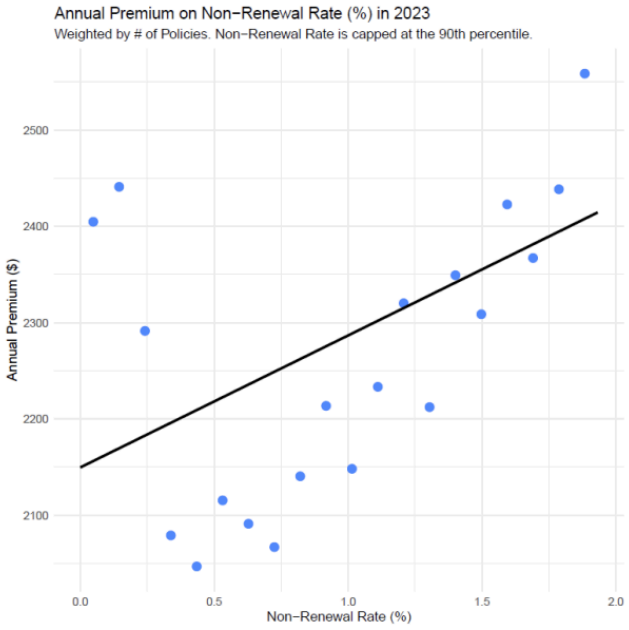
Appendix

Exhibit 1



Source: *NOAA*

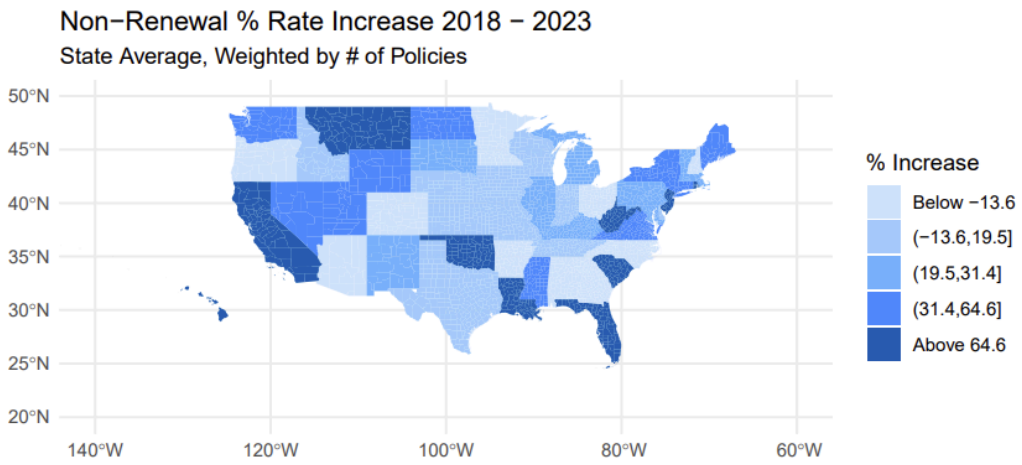
Exhibit 2



Graph 2. Annual Premium on Non-Renewal Rate (%) in 2023

Source: *Senate Budget Committee*

Exhibit 3



Source: *Senate Budget Committee*

Exhibit 4

Table 7: **States by Non-Renewal Rate Percent Change 2018 - 2023**

	State	Non-Renewal % 2018	Non-Renewal % 2023	Non-Renewal Percent Change 2018 - 2023
1	FL	0.79	2.99	279.97
2	LA	0.49	1.8	267.17
3	HI	0.42	1.32	215.83
4	SC	0.52	1.24	136
5	OK	0.72	1.45	102.82
6	RI	0.69	1.37	99.79
7	CA	0.94	1.72	81.99
8	NJ	0.47	0.8	69.54
9	MT	0.61	1.02	67.42
10	WY	0.51	0.84	66.67
11	WV	0.45	0.74	65.06
12	WA	0.42	0.69	64.56
13	CT	0.86	1.34	55.67
14	MS	0.96	1.49	55.63
15	ME	0.4	0.61	51.05
16	UT	0.72	1.06	46.87
17	NY	0.39	0.57	46.84
18	VA	0.7	0.95	35.81
19	ND	0.64	0.86	34.16
20	NV	0.63	0.85	33.77
21	NM	0.97	1.27	31.38
22	PA	0.29	0.37	29.77
23	MD	0.5	0.65	29.7
24	KY	0.6	0.77	29.26
25	MA	1.18	1.51	28.73
26	SD	0.88	1.12	26.74
27	DC	0.98	1.24	26.45
28	MI	0.46	0.58	26.25
29	IL	0.54	0.66	22.91
30	VT	0.7	0.85	20.59
31	NE	0.88	1.05	19.51
32	DE	0.62	0.74	18.13
33	ID	0.77	0.87	13.22
34	IA	0.96	1.06	10.24
35	KS	0.81	0.85	5.42
36	TX	0.81	0.83	1.96
37	IN	1	0.98	-1.81
38	TN	0.98	0.96	-2.48
39	WI	0.81	0.77	-5.13
40	MO	0.99	0.94	-5.76
41	NC	2.07	1.79	-13.6
42	OH	1.03	0.89	-13.77
43	OR	0.83	0.68	-18.13
44	AL	1.01	0.82	-18.98
45	CO	1.1	0.86	-21.5
46	AR	0.94	0.73	-21.86
47	GA	1.16	0.86	-25.5
48	AZ	1.16	0.8	-31.06
49	MN	0.58	0.32	-44.1
50	NH	1.25	0.63	-49.56
51	AK	0.95	0.42	-55.76

Source: *Senate Budget Committee*

Exhibit 5

Table 2: **100 counties with the highest non-renewal rate change 2018 - 2023 and > 10,000 policies**

	County	State	Non-Renewal Change 2018 - 2023	Non-Renewal % 2018	Non-Renewal % 2023	Prem. Change 2018 - 2023
1	LAKE	CA	6.32	1.24	7.56	1041
2	JACKSON	MS	5.23	0.32	5.55	1395
3	HARRISON	MS	4.77	0.35	5.11	911
4	COLLIER	FL	4.39	0.53	4.92	2047
5	NEVADA	CA	4.22	2.3	6.51	1888
6	BEAUFORT	SC	3.89	0.22	4.11	752
7	SHASTA	CA	3.88	1.05	4.92	984
8	BREVARD	FL	3.84	0.64	4.48	1482
9	POLK	FL	3.74	0.58	4.32	NA
10	FLAGLER	FL	3.57	0.55	4.12	1342
11	CHARLESTON	SC	3.52	0.45	3.97	938
12	ORLEANS	LA	3.34	0.44	3.78	1883
13	PINELLAS	FL	3.3	0.4	3.7	1461
14	MENDOCINO	CA	3.25	0.87	4.12	974
15	JEFFERSON	LA	3.23	0.38	3.61	1724
16	TERREBONNE	LA	3.11	0.28	3.39	1522
17	SARASOTA	FL	3.1	0.4	3.5	1372
18	OSCEOLA	FL	2.93	1.03	3.96	1250
19	NEWYORK	NY	2.87	1.25	4.11	6052
20	MANATEE	FL	2.77	0.4	3.16	NA
21	ELDORADO	CA	2.73	2.28	5.01	NA
22	MIAMI-DADE	FL	2.69	1.6	4.29	1976
23	PALMBEACH	FL	2.64	0.8	3.44	2750
24	HERNANDO	FL	2.36	0.58	2.94	1010
25	PITT	NC	2.26	1.94	4.2	434

Source: *Senate Budget Committee*

Exhibit 6

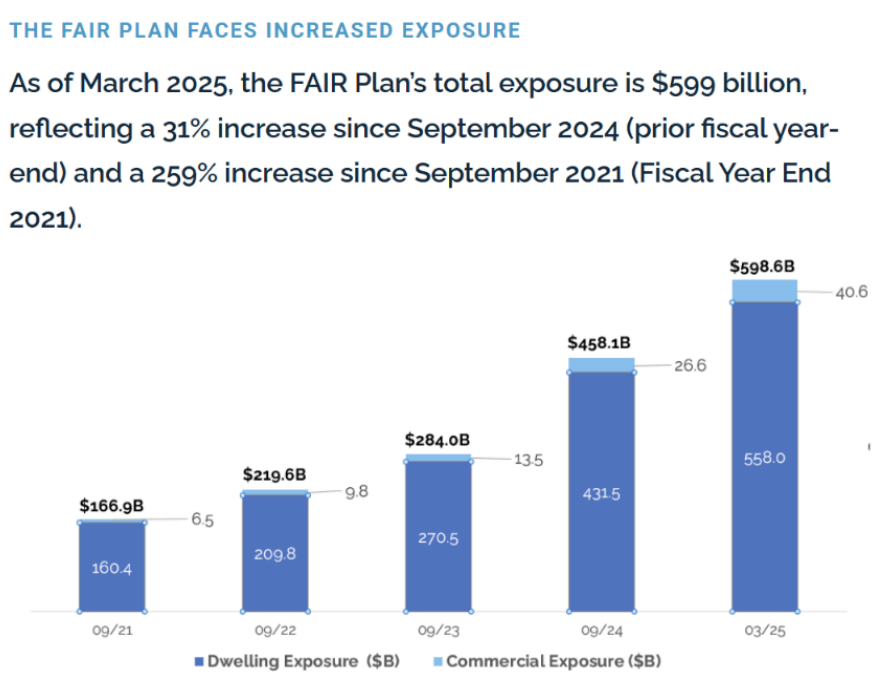
Types of Homeowners Insurance

HO-1	HO-2	HO-3	HO-5	HO-8
Only covers costs for the following types of damage: • Fire • Lightning • Windstorm • Hail • Explosion • Riot or civil commotion • Damage caused by aircraft • Damage caused by vehicles • Smoke damage • Vandalism or malicious mischief • Theft • Volcanic eruptions	HO-1 +: • Weight of snow and ice • Accidental overflow or discharge of water or steam • Freezing of plumbing, air conditioning • Bulging or cracking caused by an accidental event • Falling objects • Accidental damage due to short-circuiting of an electrical current --- Coverage for: • Personal belongings (ACV)* • Personal liability • Medical payments to others • Additional living expenses	Covers all costs as long as damage is not due to these typical exclusions: • Power failure • Industrial pollution or smoke • Earthquake • Flooding • Intentional damage • War/nuclear accidents • Pets and insects • Settling, wear and tear • Negligence • Government actions and legal action due to lack of permits, faulty construction, design, or maintenance actions taken by the government and other associations • Damage or theft in unoccupied homes or those under construction • Deterioration due to weather conditions, that aggravate other excluded causes --- Coverage for: • Personal belongings (ACV)* • Personal liability • Medical payments to others • Additional living expenses	HO-3 but pays out **replacement cost value** instead of ACV* Not offered by all home insurance companies	HO-1 +: Coverage for: • Personal belongings (ACV)* • Personal liability • Medical payments to others • Additional living expenses

*ACV: actual cash value

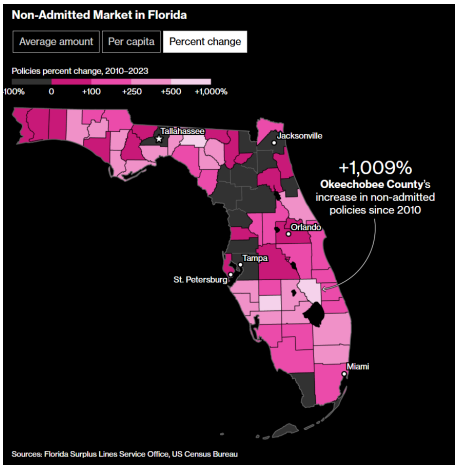
Source: *Forbes*

Exhibit 7



Source: *California FAIR Plan*

Exhibit 8



Source: *Bloomberg*

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Bellarmine Law Society Review

Volume XV | Issue I Article III

A Legal, Ethical, and Public Policy Analysis of Airbnb: How Platform Design and Legal Loopholes Enable Discrimination in the Sharing Economy

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A LEGAL, ETHICAL, AND PUBLIC POLICY ANALYSIS OF AIRBNB: HOW PLATFORM DESIGN AND LEGAL LOOPHOLES ENABLE DISCRIMINATION IN THE SHARING ECONOMY

EMILY RICCARDI [1]

Abstract: This paper analyzes how Airbnb's platform design, legal classification, and economic incentives enable racial discrimination within the sharing economy. Despite public commitments to diversity and inclusion, Airbnb continues to facilitate bias due to loopholes in civil rights legislation and design features such as profile pictures and name visibility. Empirical studies and high-profile incidents underscore persistent racial disparities for both guests and hosts. This paper concludes with policy recommendations, including legislative reforms, design changes, and stronger state-level protections. It advocates for a modernized legal framework that holds digital platforms accountable and ensures equity across the sharing economy.

Introduction

Airbnb's rise as a leader in the sharing economy has not come without a social cost. Racial discrimination persists across the platform due to economic incentives embedded in its design.

Airbnb has become a significant force, disrupting the hotel and travel industry and showing the bargaining power of being an asset-light platform in the sharing economy. The company stands out with its diverse listings, personalized experiences, and community-driven approach. However, Airbnb faces ongoing tensions between maximizing economic incentives and enforcing anti-discrimination policies. Despite the platform's popularity, many users are unaware that its current design enables racial bias. Gaps in current legislation enable the

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company to evade existing anti-discrimination laws, allowing the platform to avoid accountability for its users' actions.

Airbnb's platform design and revenue model, centered on booking volume and guest satisfaction, inadvertently leads to discriminatory behavior by hosts and guests. Features such as displaying guest names and profile pictures have been known to facilitate racial bias. While hosts face tangible economic consequences when engaging in discrimination, including lost revenue, higher vacancy rates, and fewer reviews, implicit bias often outweighs these financial incentives. Airbnb has found loopholes in the "Mrs. Murphy" Exemption and Section 230 of the Communications Decency Act, while its classification outside the definition of a public accommodation allows the company to skirt the laws set by the Civil Rights Act of 1964 and the Fair Housing Act of 1968. These pieces of legislation have collectively shielded the company from liability for discriminatory actions by its users. Although Airbnb has implemented some self-regulating measures, these remain limited in scope, showing that greater action is needed to combat this issue.

This paper begins by outlining Airbnb's emergence as a leader in the travel app industry, followed by the regulatory and legal context that forms the foundation of the paper. It then explores empirical research that has analyzed discrimination on Airbnb's platform. The following section dives into Airbnb's initial responses, the platform's economic model and design, and key legal precedents that shape liability. Next is a comparison to traditional hotels, a look at Airbnb's impact on the New York City housing market, and an overview of patterns of broader discrimination across other platforms in the sharing economy. The paper concludes with policy and design reforms aimed at promoting equity and accountability on the platform.

This paper is directed toward policymakers, legal scholars, platform developers, and members of the sharing economy who seek to address issues related to economic incentives, civil rights, and discrimination on digital platforms.

History

Airbnb's Emergence in the Travel App Industry

Airbnb was founded in 2007 as a peer-to-peer marketplace that allows hosts to rent their properties to travelers for short-term stays. The company was created by Brian Chesky and Joe Gebbia, roommates looking for a quick way to make money. They began by renting out air mattresses and grew the company to include apartment and vacation rentals. Airbnb helps budget-conscious travelers, business professionals, and avid vacationers find communities and create unique travel experiences.

As of 2024, Airbnb has over 5 million hosts with 8 million property listings and 1.5 billion guest check-ins.[2] The company serves over 100,000 cities and 200 countries.[3] In 2024, the company made $11.1 billion in revenue and $2.6 billion in net income.[4] Airbnb is third in market share among travel app providers behind Expedia and Booking.com.[5] Airbnb's strong global brand, network effects, and unique position in the accommodation market make it a dominant player in the travel industry.

Regulatory and Legal Context

Airbnb often perplexes law and policymakers as a housing category due to confusion surrounding whether its properties should be classified as public accommodations. These legal

[2] Statista Research Department, "Airbnb - Statistics & Facts," Statista, last modified February 26, 2025, accessed March 18, 2025, https://www.statista.com/topics/2273/airbnb/#topicOverview.
[3] About Us," Airbnb, accessed March 24, 2025, https://news.airbnb.com/about-us/.
[4] David Curry, "Airbnb Revenue and Usage Statistics (2025)," Business of Apps, last modified February 24, 2025, accessed March 18, 2025, https://www.businessofapps.com/data/airbnb-statistics/.
[5] Curry, "Airbnb Revenue," Business of Apps.

gray areas frequently allow Airbnb to bypass regulations surrounding racism and discrimination. Key legal and regulatory frameworks relevant to this issue include the Civil Rights Act of 1964, the Fair Housing Act of 1968, California's Unruh Civil Rights Act, and Section 230 of the Communications Decency Act.

The Civil Rights Act of 1964 "[prohibits] discrimination in public places, [provides] for the integration of schools and other public facilities, and [makes] employment discrimination illegal."[6] This Act forbids segregation in public places and businesses, such as hotels, theaters, libraries, and public schools. However, since the Act applies to places of public accommodation, Airbnb can bypass these rules since most listings are privately owned, meaning they are not necessarily subject to the same anti-discrimination regulations. Although some jurisdictions have extended anti-discrimination laws to cover short-term rentals like Airbnb, there is still ambiguity over whether the Civil Rights Act applies to the company, leaving room for hosts to engage in discriminatory practices.

The Fair Housing Act of 1968 "prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions and homeowners' insurance companies, whose discriminatory practices make housing unavailable to persons because of race or color, religion, sex, national origin, familial status, or disability."[7] While the Act applies to landlords, brokers, and other housing providers, there is an ongoing debate on whether the FHA applies to Airbnb hosts. The "Mrs. Murphy" Exemption states, "dwellings with four or fewer units (one of which must be

[6] National Archives, "Civil Rights Act (1964)," National Archives, accessed April 2, 2025, https://www.archives.gov/milestone-documents/civil-rights-act#:~:text=President%20Lyndon%20Johnson%20signed%20it,theaters%2C%20restaurants%2C%20and%20hotels.

[7] "The Fair Housing Act," U.S. Department of Justice, last modified 2023, accessed April 2, 2025, https://www.justice.gov/crt/fair-housing-act-1.

occupied by the owner) are exempt from fair housing law."[8] Because most Airbnb listings are single-family homes or private rooms in properties with four or fewer units for rent, many hosts are exempt from liability under the "Mrs. Murphy" Exemption, legally permitting them to discriminate against potential guests.

The historic purposes of the Civil Rights Act andthe FHA were to end systemic discrimination in public spaces while promoting equal rights for people of marginalized groups. However, the legal uncertainties surrounding how Airbnb fits into these regulations raise significant questions about how law and policymakers should apply civil rights protections in a digital age. The tension between Airbnb hosts and the public sphere of the platform has created legal uncertainty that needs to be addressed by reforming these acts. This ambiguity emphasizes the need for updated policies to govern digital platforms.

California's Unruh Civil Rights Act "provides protection from discrimination by all business establishments in California, including housing and public accommodations, because of age, ancestry, color, disability, national origin, race, religion, sex, and sexual orientation."[9] However, because the line between Airbnb as a business establishment or a network of individual hosts is blurred, there are still uncertainties about whether all hosts in California are subject to this legislation.

Section 230 of the CDA protects platforms like Airbnb from being liable for a host's discriminatory behavior. The Act "provides immunity to online platforms from civil liability

[8] "Fair Housing Laws in Massachusetts," Caretaker, last modified April 28, 2020, accessed April 9, 2025, https://caretaker.com/learn/fair-housing/fair-housing-laws-in-massachusetts#:~:text=Murphy%E2%80%9D%20exemption%2C%20which%20states%20that,a%20hypothetical%20elderly%20widow%2C%20Mrs.

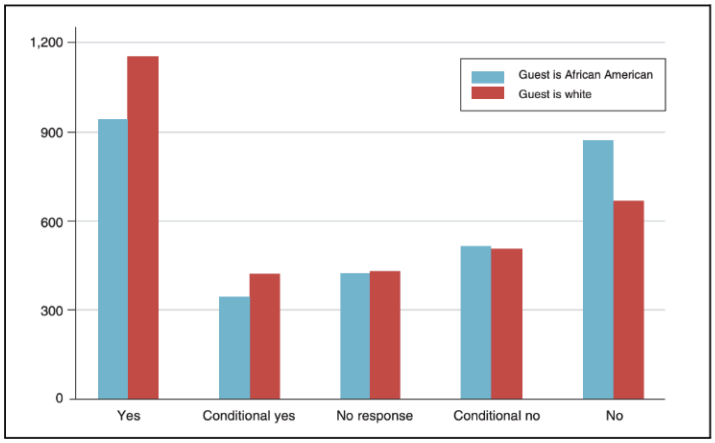
[9] "Unruh Civil Rights Act," Department of Rehabilitation, accessed April 5, 2025, https://www.dor.ca.gov/Home/UnruhCivilRightsAct#:~:text=The%20Unruh%20Civil%20Rights%20Act,religion%2C%20sex%20and%20sexual%20orientatio

based on third-party content and for the removal of content in certain circumstances."[10] If a host refuses to rent to someone because of race, Airbnb legally cannot be held responsible for such discrimination. This creates legal uncertainty, as Airbnb facilitates interactions on its platform but remains shielded from liability since the discriminatory actions are being carried out by individual users, not the company itself.

Discrimination on Airbnb's Platform

While Airbnb has become a leader in the short-term rental market, the company has faced backlash from both hosts and guests who have experienced racial discrimination. Studies conducted by the Harvard Business School and other researchers, as well as guest stories shared through the #AirbnbWhileBlack campaign, have brought to light these issues. This evidence of racial discrimination has prompted widespread criticism of the company and a push for stronger anti-discrimination measures.

To test for discrimination, researchers at Harvard conducted a 2015 field experiment analyzing 6,400 Airbnb listings across five U.S. cities: Baltimore, Dallas, Los Angeles, St. Louis, and Washington, D.C.[11] They created guest profiles that were identical in every way except for gender and racially distinctive names- specifically representing White males,



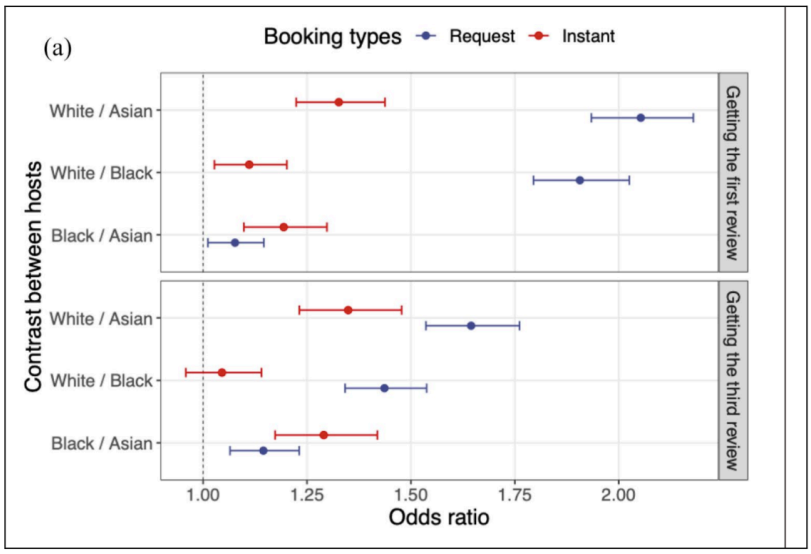
Host Responses By Race, Edelman et al. 8

[10] "Department of Justice's Review of Section 230 of the Communications Decency Act of 1996," U.S. Department of Justice, accessed April 5, 2025, https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996.

[11] Benjamin Edelman, Michael Luca, and Dan Svirsky, "Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment," *American Economic Journal: Applied Economics* 9, no. 2 (2017): 4, accessed April 5, 2025, https://doi.org/10.1257/app.20160213.

White females, African American males, and African American females. The researchers then tracked how hosts responded to messages from these accounts, noting whether they accepted, declined, requested more information, or gave no response. A graph of these response patterns by guest race is shown above.[12] White guests have significantly higher acceptance rates, with more "Yes" responses than African American guests. In comparison, African American guests experience higher rejection rates.

A key finding from the study revealed that "distinctively African American names are 16 percent less likely to be accepted relative to identical guests with distinctively White names."[13] Instances of racial discrimination persisted regardless of the host's gender, race, and experience level. They were also consistent across various property types, locations, price ranges, and neighborhood demographics. The study concluded that Airbnb's platform design enables racial discrimination, particularly regarding the visibility of guest names and profile pictures. Airbnb is responsible for balancing information transparency with equitable treatment, ensuring that the platform does not inadvertently reinforce racial bias.



Odds Ratio Between Host Race and Booking Types For Getting The First Review (Upper Panel) and Third Review (Lower Panel), Yu and Margolin 1640

An observational study of over 16,000 Airbnb listings in New York City, conducted using data collected between 2009 and 2018, found that hosts of color face significant

[12] Edelman, Luca, and Svirsky, "Racial Discrimination," 8.
[13] Edelman, Luca, and Svirsky, "Racial Discrimination," 1.

discrimination when acquiring early reviews, an essential factor for visibility, trust, and reputation.[14] The study used facial recognition software to determine the perceived race of hosts based on their profile pictures and measured how long it took hosts of different races to receive their first and third reviews. The first review provides initial feedback to hosts and is critical for establishing early trust with potential guests. The third review triggers the display of the host's aggregate rating (star score), which is important in building credibility and future revenue. Significant racial disparities remained even when controlling for price, room type, and booking type. The graph above highlights the odds ratios of Airbnb hosts of different races in receiving their first and third reviews, depending on the booking type.[15] Request means that a host's approval is needed before booking, while Instant signifies that guests can book the property automatically without being vetted. The odds ratio measures how likely one group is to obtain a review compared to the other. Values greater than one mean that the group is more likely to get a review, whereas a value equal to one indicates no significant difference. The graph shows that White hosts are more likely to receive their first and third reviews faster than Black or Asian hosts. The "White/Asian" odds ratio being close to 2.0 means that White hosts are twice as likely to get their first review under a request booking before an Asian host. The "Black/Asian" odds ratio for both reviews suggests no significant difference between the two races. This study highlights structural flaws in Airbnb's platform design, which will be explored further in later sections.

Although these studies draw on data from earlier years, their findings remain relevant as discrimination on Airbnb's platform remains an issue today. These studies uncovered information

[14] Chao Yu and Drew Margolin, "Sharing Inequalities: Racial Discrimination in Review Acquisition on Airbnb," *Sage Journals* 26, no. 3 (2024): 1634, accessed April 20, 2025, https://www.researchgate.net/publication/358452529_Sharing_inequalities_Racial_discrimination_in_review_acquisition_on_Airbnb#fullTextFileContent.
[15] Yu and Margolin, "Sharing Inequalities," 1640.

about how the platform's design enables discrimination, yet Airbnb has not updated these features. As Airbnb continues to prosper in the travel industry, discriminatory practices have turned this issue into a pressing policy concern demanding systemic solutions.

Social media campaigns using the hashtag #AirbnbWhileBlack have brought widespread attention to the experiences of African American guests who have been rejected because of racial bias. This compilation of discrimination claims provides an accountability mechanism for Airbnb, highlighting a crisis that needs to be addressed. The limitations of existing anti-discrimination laws described above further allow hosts to engage in discriminatory behavior when choosing guests. Media coverage from campaigns, lawsuits, and public backlash has brought this issue to policymakers' attention.

Analysis

Airbnb's Initial Response

Airbnb has taken action to address ways to reduce racial discrimination on its platform. The Airbnb Community Commitment affirms that all individuals belong in the Airbnb community regardless of their background or identity.[16] All users must sign it before engaging with the platform. The company also "assembled a permanent team of engineers, data scientists, researchers, and designers whose sole purpose is to advance belonging and inclusion and to root out bias."[17] This product team helps alleviate the issues discussed in the Harvard field experiment. Other features include Instant Book, which allows guests to book some properties without host approval, and Open Doors, which makes sure that "if a guest is not able to book a listing because they have been discriminated against, Airbnb will ensure the guest finds a place

[16] Brenna R. McLaughlin, "#AirbnbWhileBlack: Repealing the Fair Housing Act's Mrs. Murphy Exemption to Combat Racism on Airbnb," editorial, *Wisconsin Law Review*, 171, accessed April 5, 2025, https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2018/04/McLaughlin-Camera-Ready.pdf.
[17] Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion* (2016), 11, accessed April 5, 2025, https://news.airbnb.com/wp-content/uploads/sites/4/2023/06/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf.

to stay."[18] Airbnb has also implemented Project Lighthouse "to uncover and address disparities in how people of color experience [Airbnb], and how [the company] is using these findings to guide [its] work to fight discrimination and make Airbnb more open and inclusive."[19] Through Project Lighthouse, Airbnb has suspended 4,000 accounts for violating the Airbnb Community Commitment.[20] Project Lighthouse is an essential first step in Airbnb's commitment to monitoring and intervening. While future work is still required to combat racism on the platform, Airbnb has taken steps in the right direction in adopting new rules and policy changes to fight discrimination.

According to Airbnb's 2024 update, the company reports that "the largest booking success rate disparity in 2021, between guests perceived to be Black and guests perceived to be White, was cut almost in half [in 2024]."[21] However, a fully equal system has yet to be designed, as African American guests are still not booked at the same rate as White guests, and hosts of color continue to receive lower booking rates than White hosts.

Airbnb's Economic Structure and Incentives

Airbnb's profitability depends on the volume of bookings and guest satisfaction. The company generates revenue through service fees charged to both hosts and guests. Hosts typically pay a fee of 3-5% of the reservation value back to Airbnb, while guests are charged a fee between 0-20%.[22] Positive guest experiences lead to favorable reviews, repeat bookings, and

[18] Murphy, *Airbnb's Work*, 11.
[19] Airbnb, "A Six-Year Update on Airbnb's Work to Fight Discrimination," Airbnb, last modified December 13, 2022, accessed April 5, 2025, https://news.airbnb.com/sixyearadupdate/.
[20] Sarah Jackson, "Airbnb Suspended Almost 4,000 Hosts and Guests This Year for Violating Its Policy against Discrimination," Business Insider, last modified December 14, 2022, accessed April 5, 2025, https://www.businessinsider.com/airbnb-suspends-4000-hosts-guests-violating-non-discrimination-policy-2022-12.
[21] Airbnb, "A Six-Year," Airbnb.
[22] Daniel Pereira, "Airbnb Business Model," The Business Model Analyst, last modified May 10, 2024, accessed April 8, 2025, https://businessmodelanalyst.com/airbnb-business-model/?srsltid=AfmBOorCauAwAwdpZlw80QeO7qoTHhAiIlyPAL71kYpK84vJOcsEbw8S.

platform growth. Hosts are motivated to maintain guest satisfaction to maximize their income, receive high ratings, and improve their visibility in search results. However, this incentive structure can influence host behavior in subtle but significant ways through whom they choose to rent to or how much they charge.

Research shows that hosts face immediate consequences when rejecting guests of color. Each rejection results in the loss of roughly $65 to $100 in net revenue for hosts.[23] Listings remain vacant 25.9% of the time following such rejections.[24] Beyond these financial impacts, turning away potential guests reduces the number of positive reviews left by guests, lowering the host's credibility and limiting their future bookings.

Hosts of color similarly experience economic disadvantages due to racial bias. Statistically, guests are less likely to book with hosts of color than White hosts, leading hosts of color to charge 8-10% less on their listings to increase booking rates and accumulate reviews quicker.[25] Hosts are willing to lose out financially to help their visibility on the platform. As past reviews help hosts gain credibility for guest decisions, hosts without them appear riskier, so they reduce their prices to establish initial trust.

Platform Design and Market Incentives

Airbnb's platform design creates an information asymmetry that only perpetuates discrimination. By allowing hosts to see a guest's name and their race, ethnicity, and gender through their profile picture, Airbnb enables hosts to choose their guests based on those perceived characteristics. Although Airbnb does not intentionally promote racism, these design flaws create ways in which racial prejudice can be expressed.

[23] Edelman, Luca, and Svirsky, "Racial Discrimination," 3.
[24] Edelman, Luca, and Svirsky, "Racial Discrimination," 16.
[25] Yu and Margolin, "Sharing Inequalities," 1628.

In response to these concerns, Airbnb launched a two-year experiment in Oregon in 2022 where hosts could only view guests' initials during the booking process. This began after three African American women filed a lawsuit alleging that Airbnb's requirement of listing full names and profile pictures allowed guests to discriminate, violating Oregon's public accommodation laws."[26] However, Airbnb has not published any formal findings on the impact of this policy.

Airbnb's Instant Book feature was developed to limit hosts' ability to discriminate. Black and Asian hosts benefit when Instant Book is enabled, as it narrows the time gap in their review acquisition and limits the opportunity for guest bias.[27] Approximately 60% of users book through this feature.[28] However, hosts tend to underutilize it due to the risks of being unable to vet guests. The reluctance of Airbnb to anonymize all bookings reflects the company's economic incentives for maximizing transaction volume and overall profitability.

Airbnb's Impact on Rent and Housing Supply in New York City

Lawmakers in cities like New York have criticized Airbnb for operating as "illegal hotels."[29] Disputes have arisen in New York over unpaid sales taxes and the lengths of rentals without a host present. The Attorney General of

	Frequently rented entire-home listings	Very frequently rented entire-home listings	Rental units converted to ghost hotels	Plausible range for housing lost to Airbnb
New York City	12,200	5,600	1,400	7,000 - 13,500
Manhattan	7,000	3,100	500	3,600 - 7,500
Brooklyn	4,200	2,000	600	2,600 - 4,800
Midtown Manhattan	2,000	900	90	1,000 - 2,000
Downtown Manhattan and Williamsburg	2,700	1,200	150	1,300 - 2,900
Eastside Manhattan	900	400	60	500 - 600
North-Central Brooklyn	1,700	900	270	1,200 - 2,000

Combined Estimate of Housing Lost to Airbnb, Wachsmuth 32

[26] Elliot Njus, "Airbnb Settles Oregon Discrimination Suit," The Oregonian/OregonLive, last modified August 13, 2019, https://www.oregonlive.com/business/2019/08/airbnb-settles-oregon-discrimination-suit.html.
[27] Yu and Margolin, "Sharing Inequalities," 1636.
[28] Jeff Brown, "Increase Your Airbnb Bookings by 20% – by Accepting Instant Bookings," IntelliHost, last modified December 19, 2022, accessed April 22, 2025, https://intellihost.co/increase-airbnb-bookings-instant-booking-policy/.
[29] Rebecca Jarvis, "Hotel Industry Fighting Back against Airbnb," ABC News, last modified April 22, 2014, accessed April 22, 2025, https://abcnews.go.com/blogs/business/2014/04/hotel-industry-fighting-back-against-sites-like-airbnb.

New York has engaged in legal battles over Airbnb's impact on "available housing stock, lost revenue for the city, and potential job losses for the tourism industry."[30] Moreover, Airbnb in large cities has led to declines in long-term rental units, which are already experiencing housing shortages. For example, "Airbnb has removed between 7,000 and 13,500 units of housing from New York City's long-term rental market," exacerbating housing shortages, raising rents, and displacing low-income residents.[31] The table above demonstrates the loss of housing to Airbnb broken down by different areas of New York City.

Wachsmuth's report also expands on Airbnb being a "Racial Gentrification Tool," stating that in March of 2017, "White Airbnb hosts in Black neighborhoods earned an estimated $160 million, compared to only $48 million for Black hosts—a 530% disparity. The loss of housing and neighborhood disruption due to Airbnb is 6 times more likely to affect Black residents, based on their majority presence in Black neighborhoods, as residents in these neighborhoods are 14% White and 80% Black."[32] These findings illustrate that Airbnb's expansion into large cities catalyzes deeper economic and racial inequities. While Airbnb markets itself as a community-centered platform, the company inadvertently causes housing loss, market disruption, and racialized gentrification.

Past Precedents

Legal cases and past precedents that set key context for Airbnb's discrimination issues include *Jones v. Alfred H. Mayer Co.*, *Shelley v. Kraemer*, and *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*.

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[30] Jarvis, "Hotel Industry," ABC News.
[31] David Wachsmuth, *The High Cost of Short-Term Rentals in New York City* (2018), 32, accessed April 22, 2025, https://www.mcgill.ca/newsroom/channels/news/high-cost-short-term-rentals-new-york-city-284310.

[32] Wachsmuth, *The High*, 8.

Jones v. Alfred H. Mayer Co. (1968) established critical standards for addressing racial discrimination in property transactions. Joseph Lee Jones, a Black man, was denied from purchase a home from Alfred H. Mayer Co., a housing developer in Missouri, because of his race. Jones sued under 42 U.S.C. § 1982, which guarantees that all citizens have the same property rights as White citizens.[33] The Supreme Court ruled in favor of Jones, holding that Congress has the authority under the Thirteenth Amendment to ban racial discrimination in private real estate sales. Although the case predates digital platforms like Airbnb, the case established that racial discrimination is unlawful in both public and private property transactions.

Shelley v. Kraemer (1948) involved racially restrictive covenants that barred African American and Asian families from buying homes in St. Louis. When the Shelleys, an African American family, attempted to purchase a home, a White neighbor sued to enforce the covenant. The Supreme Court ruled that private parties may enter into racially restrictive covenants and honor them without state involvement under the Fourteenth Amendment. However, "they may not seek judicial enforcement of such a covenant [as this violates] the Equal Protection Clause of the Fourteenth Amendment."[34] Although Airbnb does not directly deal with racially restrictive covenants, Shelley set the necessary groundwork for modern discrimination laws.

Furthermore, *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC* (2012) addressed how anti-discrimination laws apply to shared living spaces. Roommate.com, an online platform that matched individuals seeking roommates, required users to disclose their sex, sexual orientation, and familial status to allow for filtering based on these traits. The Fair Housing Councils of San Fernando Valley and San Diego sued, alleging violations of the FHA and California's Fair Employment and Housing Act (FEHA). The Ninth Circuit ruled that the

[33] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)," Justia, accessed April 28, 2025, https://supreme.justia.com/cases/federal/us/392/409/.
[34] "Shelley v. Kraemer," Oyez, accessed April 28, 2025, http://www.oyez.org/cases/1940-1955/334us1.

FHA and FEHA do not apply to the selection of roommates, as these acts only prohibit discrimination based on the "sale or rental of a dwelling."[35] This case creates ambiguity for Airbnb, suggesting that if hosts only rent out part of their home, they may not be subject to the same anti-discrimination laws as hosts who rent out entire properties, since their guests can be considered roommates.

These cases reveal the legal ambiguities surrounding their application to Airbnb since its presence as a digital platform is unexplored compared to traditional real estate markets.

Recent Legal Cases

Recent lawsuits and incidents involving Airbnb include Gregory Selden v. Airbnb, the Oregon Discrimination Settlement mentioned above under Platform Design and Market Incentives, and the Dyne Suh Incident.

In *Gregory Selden v. Airbnb*, Selden, an African American man, sued Airbnb after a host denied his booking request, which he believed was racially motivated due to his profile picture displaying his race. Selden later made a second account with the same background information but instead used a profile picture of a White individual, which the same host then accepted. However, when Selden brought the issue to court, the court ruled that because Selden agreed to Airbnb's Terms of Service, which included a binding arbitration clause, his discrimination claims had to be resolved through arbitration rather than a regular court. In arbitration, Selden lost as the host's property was a private, owner-occupied residence, which was exempted under the FHA. The court stated that, "as a condition of simply participating in today's digital economy, the applicable law is clear: Mutual arbitration provisions in electronic contracts—so long as their existence is made reasonably known to consumers—are enforceable, in commercial disputes and

[35] Fair Housing Council of San Fernando Valley v. Roommate.com, LLC (9th Cir.). Accessed April 28, 2025. https://cdn.ca9.uscourts.gov/datastore/opinions/2012/02/02/09-55272.pdf.

discrimination cases alike."[36] This case further highlights the complexities and limited legal protections surrounding discrimination on Airbnb.

Airbnb has also had instances of discrimination that traditional statutes do not address. In 2017, Dyne Suh's Airbnb reservation was abruptly canceled after the host texted, "I wouldn't rent to u if u were the last person on earth. One word says it all. Asian."[37] Suh filed complaints to Airbnb and the California Department of Fair Employment and Housing. Under California's Unruh Civil Rights Act, the host was fined $5,000 in damages and required to undergo restorative measures, including civil rights training, completing a college-level course on Asian American studies, and volunteering at a civil rights organization.[38] This incident highlights the limitations of existing federal laws and past court cases in addressing discrimination on Airbnb's platform.

Economic and Legal Contrasts with Traditional Hotels

Unlike traditional hotels, Airbnb's platform design enables individual hosts to discriminate against potential guests, which is something hotel booking systems are structured to prevent. As public accommodations, hotels must comply with laws such as the Civil Rights Act of 1964, which prohibits discrimination based on race and other characteristics. In contrast, Airbnb hosts can circumvent this, as most properties are privately owned, allowing bias to be a factor in booking decisions.

Despite this, Airbnb has overtaken the hospitality industry due to its ability to offer travelers a budget-friendly, personalized experience. Travelers tend to favor Airbnb because of its lower prices and home-like atmosphere. In 2022, "hotels reported an average daily rate

[36] "Selden v. Airbnb, Inc.," Justia, accessed April 30, 2025, https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2016cv00933/179136/19/.
[37] Madison Park, "Former Airbnb Host Fined $5,000 for Refusing Asian American Guest," CNN, last modified July 14, 2017, accessed April 28, 2025, https://www.cnn.com/2017/07/14/us/airbnb-host-fine-asian-comment/index.html.
[38] Park, "Former Airbnb," CNN.

(ADR) 26.6% higher than short-term rentals."[39] This has caused hotels to lose approximately $450 million annually in direct revenue.[40] Airbnb has also caused a "2-3% decrease in hotel revenue for every 10% increase in Airbnb market share."[41]

While traditional hotels are held liable for discriminatory practices under the Civil Rights Act and the FHA, Airbnb's model operates in a legal gray area where many hosts can bypass these protections from statutes like the "Mrs. Murphy" Exemption. Airbnb's decentralized system makes it harder to regulate, thus pushing away potential customers who might find challenges when booking.

Broader Discrimination Across the Sharing Economy

In a similar way, there have been numerous instances of discrimination across the sharing economy on platforms such as Uber, Lyft, TaskRabbit, and Fiverr.

Cases of racial bias have been documented on ridesharing platforms such as Uber and Lyft. In 2018, the National Bureau of Economic Research found that in Boston, Los Angeles, and Seattle, "Uber drivers are two times more likely to cancel a ride if the passenger's name is one used predominantly by African Americans."[42] African Americans also face longer wait times and higher cancellation rates. The design of these platforms, which has visibility of the rider's name and profile picture, enables opportunities for bias. For example, "African American riders

[39] Scott Sage, "Airbnb vs. Hotels: How Guests Choose & Why It Matters," AirDNA, last modified March 3, 2024, accessed April 22, 2025, https://www.airdna.co/blog/3-things-airbnb-hosts-need-to-know-about-hotels.
[40] Andrea Galvan, "How Airbnb Disrupts the Hotel Industry," globalEDGE, last modified March 5, 2024, accessed April 22, 2025, https://globaledge.msu.edu/blog/post/57383/how-airbnb-disrupts-the-hotel-industry#:~:text=Beyond%20revenue%2C%20hotels%20are%20also,increase%20in%20Airbnb%20market%20share.
[41] Galvan, "How Airbnb," globalEDGE.
[42] Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* (National Bureau of Economic Research, 2016), 2, accessed April 26, 2025, https://doi.org/10.3386/w22776.

[wait] between 29 and 35 percent longer for a [UberX]."[43] Specifically, male riders with African American-sounding names in areas with few taxis are the most targeted.[44]

Discrimination within Uber has been identified in two forms: "direct, like when a driver cancels on a rider because of their race, and systemic, where history has informed patterns in where people live."[45] In cities like Chicago, historical practices such as redlining and other racially segregated housing patterns have shaped neighborhoods in ways that impact rideshare wait times today. In South Chicago, where many Black residents reside, longer wait times remain because the area is further from downtown, deterring drivers from accepting trips there.

In response, Uber and Lyft have taken steps to combat discrimination. Both companies have adopted similar anti-discrimination policies and community guidelines while investing in DEI initiatives and working towards inclusive hiring practices. However, ongoing challenges remain, with continued reports of ride cancellations and service refusals based on demographic characteristics.

Similarly, TaskRabbit and Fiverr, platforms that connect freelancers to individuals and businesses for services, have faced issues of discrimination. A study examining 13,500 worker profiles found that user bias impacts task selection, hiring, and work evaluations, with workers favored based on race, gender, and ethnicity.[46] Platform design again plays a role, as the visibility of workers' names and profile pictures allows users to act on personal biases.

Both platforms have attempted to mitigate bias. TaskRabbit has implemented "a 'Quick Assign' feature where customers can simply request that a task be completed within a given

[43] Ge et al., *Racial and Gender*, 2.
[44] Ge et al., *Racial and Gender*, 4.
[45] Abby Verret, "Uber and Lyft Are Dramatically Reducing Wait-Time Disparities for Black Riders, but the Impact of Systemic Segregation Persists," Carnegie Mellon University College of Engineering, last modified September 30, 2024, accessed April 26, 2025, https://engineering.cmu.edu/news-events/news/2024/09/30-ride-sharing-equity.html.
[46] Anikó Hannák et al., "Bias in Online Freelance Marketplaces: Evidence from TaskRabbit and Fiverr" (conference session at 2017 ACM Conference on Computer Supported Cooperative Work and Social Computing), 2, accessed April 26, 2025, https://dl.acm.org/doi/10.1145/2998181.2998327.

timeframe, at a given price, by any available worker."[47] Fiverr has introduced greater anonymity options that include not requiring profile pictures, helping to limit bias in hiring decisions.[48]

There remains uncertainty surrounding whether the Civil Rights Act of 1964 applies to Uber and Lyft. Drivers are technically "independent contractors who aren't covered by the workplace protections of the Civil Rights Act."[49] Uber has faced lawsuits for alleged Civil Rights Act violations, including claims of "firing minority drivers based on how customers rate them."[50] A former driver has stated that "Uber is aware that passengers are prone to discrimination in their evaluation of drivers, but Uber has continued to use this system, thus making it liable for intentional race discrimination."[51] Meanwhile, taxis and buses are considered "public accommodations" and must comply with the Act. However, the classification of Uber and Lyft remains unclear. Similarly, TaskRabbit and Fiverr are not public accommodations, so they avoid regulation under the Act.

The application of California's Unruh Civil Rights Act also remains ambiguous. Although all four platforms are businesses, their workers are considered independent contractors, complicating whether the companies fall under the Act's definition of a business establishment.

Lastly, all four platforms are protected under Section 230 of the CDA. Since the platforms act as neutral intermediaries to the discriminatory acts, they are shielded from liability for biased behavior carried out by users and workers

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[47] Hannák et al., "Bias in Online," 14.
[48] "Fiverr Enterprise's Privacy Policy," Fiverr, last modified January 2024, accessed April 26, 2025, https://www.fiverr.com/legal-portal/legal-terms/fiverr-enterprise-privacy-policy#:~:text=In%20certain%20cases%2C%20we%20may,e.g.%20fraud%20prevention);%20or.
[49] Bloomberg, "Uber's Rating System Violates Civil Rights, Says Class Action," Los Angeles Times, last modified October 26, 2020, accessed April 26, 2025, https://www.latimes.com/business/technology/story/2020-10-26/ubers-rating-system-violates-civil-rights-says-class-action.
[50] Bloomberg, "Uber's Rating," Los Angeles Times.
[51] Bloomberg, "Uber's Rating," Los Angeles Times.

The four platforms, like Airbnb, all demonstrate similar information asymmetries stemming from their platform design choices. By displaying guest names and profile pictures, these platforms enable users to make decisions based on visible traits, perpetuating discrimination. Rather than minimizing bias and promoting broader participation, companies have actively chosen to keep these design features to enhance transparency and user trust rather than prioritize the inclusion of all users.

Conclusion & Implications

Policy Recommendations and Proposed Reforms

Policy recommendations to help combat issues of discrimination on Airbnb include updating legislation, reforming Section 230 of the CDA, encouraging state-level action, and revising platform-specific mandates enforced by companies.

Congress must amend the FHA by eliminating the "Mrs. Murphy" Exemption for short-term rentals and temporary housing stays. This would extend anti-discrimination measures to all dwelling types, including single-family homes and private rooms on platforms like Airbnb. By closing this loophole, the law will strengthen tenant protections and prevent landlords from discriminating against guests.

Similarly, reforming Section 230 of the CDA to enforce the liability of platforms for third-party content involving discrimination is critical in addressing user bias. Platforms like Airbnb should be held responsible for the actions of their users. Through more rigorous screening of hosts and guests before granting them access to the platform and ongoing surveillance to detect and prevent discriminatory behavior, these platforms can tackle these problems before they even begin. While such actions would encourage greater auditing and

platform-level reform, they may also raise concerns about the overreach of executive control and potential user resistance.

Stronger state-level approaches, like California's Unruh Civil Rights Act, should be implemented to offer broader protections against discrimination in business establishments. By expanding similar laws to those in other states, Airbnb users can comfortably use the app without fear of discrimination. However, to ensure the application of the Act, Airbnb must legally be classified as a business establishment, so it is subject to all anti-discrimination standards. The Unruh Civil Rights Act played an essential role in the Dyne Suh incident after a host canceled on her because of her race. Similar protections would help users nationwide if adopted. However, this needs to be done in a manner that is not fragmented across different states to ensure consistency and equal enforcement.

Lastly, platform-wide mandates, such as the implementation of anonymized booking features, will help reduce discrimination by limiting the visibility of user information that can lead to biased decision-making. Potential changes include adopting Oregon's policy of displaying guests' initials during the booking process and hiding profile pictures until after the reservation is confirmed. While these actions address the root cause of the problem, they may also decrease user trust and reduce willingness to use the platform for travel needs. Another potential reform is expanding the Instant Book feature to cover more listings or making it the default option to reduce discriminatory practices. However, this limits host control, which may cause pushback from those who want the ability to choose who they rent to. Additional mandates should include increased penalties for discriminatory behavior, such as suspending hosts and banning repeat offenders, alongside regular audits to collect data and monitor ongoing discrimination issues.

Predictive Outlook and Final Recommendations

In the short term, tensions will likely remain as Airbnb's classification remains ambiguous, as it straddles the line between a public accommodation and a network of private properties. Until this is clarified, regulatory approaches will continue to vary across cities and states, causing nonuniform action and penalties for users participating in discriminatory actions. Similarly, technological advancements, such as AI and anonymized profiles, may help reduce bias, but only if platforms update their designs. Additionally, public relations risks related to Section 230 of the CDA and the "Mrs. Murphy" Exemption may pressure companies to self-regulate to maintain user trust and brand integrity. Consistency is needed to gain loyalty from users.

In the medium term, more states may adopt anti-discrimination laws similar to California's Unruh Civil Rights Act. However, progress will depend on continued pressure from civil rights organizations, racial justice advocates, and public awareness campaigns. Viral movements, such as the #AirbnbWhileBlack campaign, and high-profile incidents, like the Dyne Suh example, can potentially spur greater state reform. Similarly, reframing discrimination as a barrier to economic access and fairness within the sharing economy might help attract support. Highlighting how discrimination reduces transaction volume, hurts platform profitability, and inhibits growth might prompt market-driven stakeholders to advocate for change. Additionally, pressure from the tech and business sectors to improve consumer trust and legal clarity may also drive legislative change.

In the long term, federal updates to laws such as the FHA, CDA, and the Civil Rights Act could provide legal clarity on platform liability and anti-discrimination policies. This would require congressional action, including committee hearings, expert testimony, legislative debates,

and reconciliation of proposals. New digital civil rights legislation will be needed to address and update platform duties in this modern marketplace. This includes mandatory reporting on bias and improved mitigation strategies to strengthen accountability. Growing demand for digital equity, especially among millennials and Gen Z consumers, may further influence state-level and federal action.

Ultimately, discrimination will persist with weak enforcement of policies. Platforms like Airbnb must find a balance between profitability and user trust. With rising public pressure, evolving regulation, and technological innovations, the sharing economy needs to learn how to adapt to prioritize fairness for its users and close the liability gap. Airbnb's long-term success depends on its commitment to equity and transparent practices in an increasingly digital world. Policymakers must take swift action to hold platforms accountable and foster greater fairness across the sharing economy.

Bellarmine Law Society Review

Volume XV | Issue I Article IV

An Analysis of the Legal History and Economic Impact of Federal Minimum Wage Policy in the United States

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AN ANALYSIS OF THE LEGAL HISTORY AND ECONOMIC IMPACT OF FEDERAL MINIMUM WAGE POLICY IN THE UNITED STATES

JOHN VILLA [1]

Abstract: This paper examines the evolution of the political and economic dynamics behind federal minimum wage policy by describing its history in detail. From judicial decisions about the role of the federal government in wage regulation, to the expansive policies of the New Deal Era, to the Reagan era's rejection of such a vast role of the federal government, the history of federal minimum wage policy is far from linear. Evolving political dynamics, jurisprudence, and economic theories have prevented a clear opinion on the legitimacy of a federal minimum wage from emerging. Today, advocates for free market purity dominate the federal government's approach to wage regulation, with meager increases - or no increases at all - becoming commonplace for Congress. As the paper demonstrates, the wage of $7.25 an hour is no longer able to ensure a decent quality of life for Americans. Its proposal to slowly raise the wage to $17 is complemented by two tax credits aimed at minimizing the increased labor costs that small businesses will face, while also recognizing the need for increased buying and saving power for low-wage Americans.

Problem

Federal minimum wage policy impacts a more significant portion of the economy than is commonly understood. Today, most Americans support a strong minimum wage and increasing wages for the poorest Americans, but assume that the minimum wage concerns only the lowest earners in select industries. This reduces the conversation to a matter of principle rather than of practical urgency. And when facing the legitimate possibility of an increase to the minimum wage, both policymakers and the average American are either apathetic or outright antagonistic. When translated to policy, concerns about potential negative impacts on the wealthy often

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outweigh the benefits of increased economic mobility for low-wage service workers. Business owners feel threatened by the possibility of losing bargaining power and having to dedicate more of their budget to their workers. Consumers feel uneasy at the prospect of increased wages translating into increased prices for essential items. This spirit of distaste has largely dominated the discussion of minimum wage policy in the United States in the 21st century.

The impacts of minimum wage policy and potential increases of the minimum wage affect the entire economy, not just the lowest earners. Workers making just above federal or state minimum wage would likely see their wages increase with minimum wage increases due to a "ripple effect."[2] And despite the common belief that minimum wage workers are mostly teenagers from financially secure families, an analysis by Arin Dube, economist at the University of Massachusetts at Amherst, revealed that only about 25% of those earning the federal minimum wage — and just 12% of those earning $10 an hour or less — are actually teenagers.[3] That means that tens of millions of working adults will have more money to spend, returning it back into the economy, and to save, allowing them to eventually afford to buy a house and retire.

Evidence suggests that an increase in purchasing and saving power for America's poorest workers is overdue. The minimum wage has not kept pace with the rising cost of living caused by inflation. The federal minimum wage of $7.25 an hour has not changed since 2009 despite higher costs of living. According to Ben Zipperer at the Economic Policy Institute, the 2021 minimum wage was worth 21% less than it was in 2009.[4] An individual who worked 40 hours a week, every week, and earned the federal minimum wage made $20 more than the federal

[2] Ben Harris and Melissa S. Kearney. "The 'Ripple Effect' of a Minimum Wage Increase on American Workers." Brookings. January 10, 2014. https://www.brookings.edu/articles/the-ripple-effect-of-a-minimum-wage-increase-on-american-workers/.
[3] Harris & Kearney, "The 'Ripple Effect' of a Minimum Wage Increase on American Workers."
[4] Ben Zipperer, "The Minimum Wage Has Lost 21% of Its Value since Congress Last Raised the Wage." July 22, 2021. Economic Policy Institute. 2021. Link.

government's annual poverty line.[5] When factoring in the increasing cost of living, the unsustainable expectation of working 40 hours a week every week, and unexpected expenses like medical emergencies, minimum and low-wage workers are struggling to keep themselves out of poverty. As a result, intergenerational economic mobility has fallen (as shown in Figure 1), meaning American workers are becoming less likely to make more money than their parents.

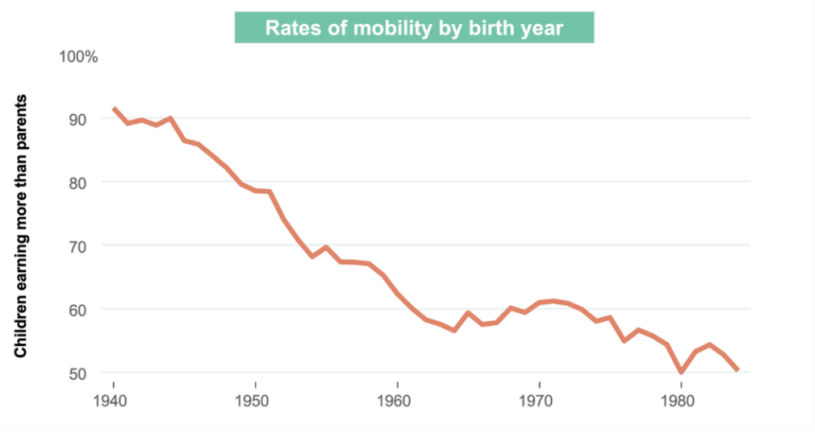

Figure One: Rates of mobility by birth year (1940-1985)[6]

Though the benefits to workers are both valid and impactful, so is the rise in production costs that deeply concerns business owners. When analyzing a potential increase from $8 to $15, Professor Thomas Winberry of the Wharton School of Business at the University of Pennsylvania found that while short-term effects on workers are positive, eventually firms either reduce their number of workers or suffer from increased production costs.[7] This puts the employer in a difficult position and, according to Winberry, will likely harm the worker whom the increase was hoped to benefit. He believes that "the minimum wage is too blunt a redistributive instrument to support the labor income of workers earning the lowest wages" and

[5] Bonitatibus, Steve. "The Minimum Wage Is a Poverty Wage." Center for American Progress. July 24, 2024. https://www.americanprogress.org/article/the-minimum-wage-is-a-poverty-wage/.
[6] Raj Chetty. "Measuring Intergenerational Mobility" Opportunity Insights. 2018. https://opportunityinsights.org/
[7] Shankar Parameshwaran. "Why Raising the Minimum Wage Has Short-Term Benefits but Long-Term Costs." Knowledge at Wharton. June 20, 2023. Link.

that tax reform and direct-transfer programs are much more effective at benefiting these workers.[8]

The price increases that follow from the rise in production costs, referred to as the "pass-through effect" of wage increases, are another concern for both producers and consumers. In the month following an increase to the minimum wage, prices often increase and then stabilize as the market re-adjusts. This increase in elasticity of prices relative to small minimum wage changes is 0.036, which is almost half of the 0.07 increase in elasticity that has been commonly accepted in earlier literature.[9] This change, though unlikely to significantly disrupt consumer spending and contribute to inflation in the long term, remains a factor in the discussion of minimum wage increases due to the increased economic costs perceived by consumers. Both Zipperer and Winberry conclude that while a small increase to the minimum wage has a negligible impact on production costs and employment, a large increase is likely to result in either increases in production costs or a shrinking of the workforce.[10]

While opinions vary on how to address minimum wage policy, it is clear that such increases have economic impacts that reach far beyond just those who receive such wage increases. Minimum wage policy establishes the framework within which employers and workers structure modes of production, define work conditions, and strive to remain competitive. Its complex legal history, effects on the overall economy, and ideology informing the role of government in regulating the free market must be acknowledged by any attempt at reform to the federal minimum wage.

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[8] Parameshwaran. "Why Raising the Minimum Wage Has Short-Term Benefits but Long-Term Costs."
[9] Daniel Macdonald, Erik Nilsson. "The Effects of Increasing the Minimum Wage on Prices: Analyzing the Incidence of Policy Design and Context." The Political Economy Research Institute at The University of Massachusetts Amherst. 2016. https://doi.org/10.7275/28277246.
[10] Macdonald & Nilsson, "The Effects of Increasing the Minimum Wage on Prices: Analyzing the Incidence of Policy Design and Context."

Legal History

The legal history of the American minimum wage begins at the state level, with Massachusetts passing the first such law in 1912. The law did not impose an actual minimum wage, but instead established regulatory boards which set a minimum wage for female workers based on the cost of living.[11] Women were the initial focus due to their limited bargaining power, frequent underpayment, and employment in exploitative industries like textile manufacturing. Within a year, eight additional states adopted similar legislation, empowering regulatory boards and protecting female laborers. In 1914, Oregon became the first state to implement an actual minimum wage, setting it at $8.25 per week for women. This law was challenged in 1917 in *Stettler v. O'Hara*, where opponents argued it constituted an overreach of the state's "police power," its authority to regulate for public welfare. The district court upheld the law, and in a 4–4 decision, the Supreme Court stayed the ruling of the district court, affirming the constitutionality of minimum wage legislation and recognizing it as a legitimate exercise of state police power.

However, in 1923, the government's newfound authority to impose a minimum wage came under threat. *Adkins v. Children's Hospital of D.C.* was filed in response to a 1918 law passed by Congress (which then governed D.C.) that guaranteed a minimum wage to women and children working in D.C.[12] The Children's Hospital of D.C., which employed many women, sought an injunction against this law, which was denied by the trial court then granted by the appellate court. The case reached the U.S. Supreme Court, which ruled for the Hospital on the basis that the Due Process Clause of the Fifth Amendment guaranteed the right to "freedom of contract." The holding was inspired by the 1905 ruling of *Lochner v. New York,* in which the

[11] Clifford F. Thies. "The First Minimum Wage Laws." Cato Journal Vol. 10, No. 3 (Winter 1991). Cato Institute. https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1991/1/cj10n3-7.pdf
[12] "Adkins v. Children's Hospital of D. C." Oyez. Link.

ability of the state to limit a baker's working hours was deemed unconstitutional under the same statute. According to the majority, the government-mandated minimum wage impaired the ability of employer and employee to freely agree to a contract.[13] Though the Court recognized the legitimacy of Congress to impose regulations "suitable to protect health and safety and designed to insure wholesome conditions of work and freedom from oppression," a minimum wage did not fall within this authority.[14] This ruling contradicted the precedent established by *Stettler* and enshrined the "freedom of contract" from *Lochner* as the rationale by which minimum wage mandates were deemed to be beyond the government's policing power.

A decade later, the Franklin D. Roosevelt administration ushered in an unprecedented series of legislation and judicial decisions that transformed the federal government's role in regulating labor and wages. In response to the Great Depression, President Franklin D. Roosevelt's New Deal Coalition passed major pieces of legislation to revitalize the economy through worker-focused reform. Laws like the National Industrial Recovery Act of 1933 and the National Labor Relations Act of 1935 established laws and regulations to protect workers from industrial collusion and malpractice and give workers the right to unionize and collectively bargain. Roosevelt strongly believed that the well-being of the worker was within the federal government's policing power and necessary to reconstruct the failing American economy.

The 1937 case of *West Coast Hotel Co. v. Parrish* was the key in affirming the federal government's role in wage regulation. The case concerned Elsie Parrish, who worked for the West Coast Hotel Company and, according to Washington state law, was entitled to $14.50 for each work week of 48 hours. Parrish was receiving less than this amount and sued in order to be paid her lost earnings.[15] The lower court ruled against her, using *Adkins* as justification, and upon

[13] "Adkins v. Children's Hospital of D. C." Oyez.
[14] "Liberty of Contract and Lochner v. New York." Constitution Annotated - Library of Congress. Link.
[15] "West Coast Hotel Company v. Parrish." Oyez. Link.

appeal, the case made its way to the Supreme Court. Justice Owen Josephus Roberts, recognizing the achievements and moral conviction of Roosevelt and his New Deal Coalition, felt compelled to shift his stance on the *Lochner* precedent. Going against his history of conservative decisions, Roberts changed sides and voted for Parrish.[16] In a 5-4 ruling, the majority ruled that the "freedom of contract" within the Due Process Clause only called for the state of Washington to comply with due process in the process and enforcement of the contract and did not rule out reasonable regulation of business.[17] Due process was followed in their enforcement of $14.50 a week, and thus, Washington's minimum wage mandate was deemed reasonable, and West Coast Hotel Co. was mandated to pay Parrish her lost wages. Government at all levels was finally able to use its policing power to regulate business and enact protections for workers.

Finally free from the restraints of the *Lochner* era, the New Deal Coalition passed the Fair Labor Standards Act (FLSA) in 1938. The FLSA established standards for overtime pay, limited child labor, instituted a standard work week of 44 hours, and established a federal minimum wage of $0.25 an hour.[18] States were free to establish their own minimum wages, provided that they were above this value. The vast majority of the country's workers were covered by the FLSA, but white-collar workers and workers covered by collective bargaining protections (at the request of union leaders) were exempt from the initial FLSA. Justified by the Commerce Clause in Article One of the Constitution, the FLSA prohibits the "shipping goods in interstate commerce that were manufactured by workmen whose employment did not comply with prescribed wages and hours."[19] This language and the FLSA are still the foundation of federal wage regulation. Its importance in the evolution of minimum wage policy cannot be

[16] "West Coast Hotel Company v. Parrish." Oyez. Link.
[17] "West Coast Hotel Company v. Parrish." Oyez. Link.
[18] "The Fair Labor Standards Act (FLSA): An Overview." Congress.gov. Link.
[19] The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 *et seq.*

understated; it gives nearly all workers the right to make claims on their employers for fair wages and has been the basis upon which fights for expanded rights have been grounded.

Major updates to federal minimum wage policy since the passage of the FLSA have largely come through amendments to the original law and appeals against them. Throughout World War II and the post-war economic boom that followed, few political or judicial fights disrupted the continued and substantive increase in the minimum wage. In addition to these increases, amendments to the FLSA have expanded its reach to include workers in previously neglected sectors, such as the retail and service industries, and the previously exempt union jobs.

Maryland v. Wirtz was the first notable resistance to such expansions. Maryland, along with 27 other states, sued Secretary of Labor W. Willard Wirtz over a 1961 amendment that removed state governments, their political subdivisions, and schools and hospitals run by state and local governments from the list of exempt enterprises.[20] The states argued that this expansion violated the Commerce Clause and interfered with the states' sovereign immunity, as established by the Eleventh Amendment. A district court upheld the expansion of the FLSA, finding that the newly included commercial enterprises and state institutions fell within Congress's authority under the Commerce Clause, but declined to address the claim of interference with states' sovereign immunity. *Maryland* appealed directly to the Supreme Court, which sided with the district court's finding regarding the Commerce Clause.[21] The Court reasoned that the exempted status for these commercial enterprises was necessary to prevent the abuse of substandard wages and working conditions for the sake of a competitive advantage. The Court also rejected the states' argument that their sovereign immunity was violated by arguing that the states maintained their sovereignty insofar as they were allowed to perform medical and educational functions as

[20] E. John Raasch. "Constitutional Law Review: Fair Labor Standards Act: Maryland v. Wirtz." Marquette Law Review Vol. 52, Issue 4 (Winter 1969). Link.
[21] Raasch. "Constitutional Law Review: Fair Labor Standards Act: Maryland v. Wirtz."

they pleased. The federal government was simply requiring the states to treat the workers executing these functions the same as other employers whose activities similarly affect commerce.[22]

A similar case emerged in response to the 1974 FLSA expansions aimed at regulating minimum wage and overtime pay for state and local government workers, this time claiming a violation of the states' Tenth Amendment rights. In *National League of Cities v. Usery*, the Supreme Court actually ruled on behalf of the National League of Cities, holding that Congress' expansion of the FLSA did violate the states' "freedom to structure integral operations in areas of traditional government functions."[23] But in the 1985 case of *Garcia v. San Antonio Metro. Transit Authority*, the Court overturned this limitation to the FLSA, arguing that the language used to justify the ruling was too vague in its protection of state sovereignty and thus unworkable.[24]

Following the challenges in the *Maryland* and *Usery* cases, no major obstacles have impeded the implementation of the federal minimum wage policy. Nonetheless, Congress has failed to continue making material increases in the federal minimum wage. Though raises continued, they were fewer and less substantial than in previous decades. Without a mechanism to automatically adjust the federal minimum wage to inflation, the lack of attention to this issue in Congress has led to stagnated wages despite rising costs.[25] The last increase to $7.25 an hour was finalized in 2009, and in the 16 years since, many people have strongly advocated for an increase. Thirty-four states, territories, and districts have implemented minimum wages above $7.25 in response to federal inaction. Though the Raise the Wage Act, which envisions an

[22] Raasch. "Constitutional Law Review: Fair Labor Standards Act: Maryland v. Wirtz."
[23] "National League of Cities v. Usery." Oyez. https://www.oyez.org/cases/1974/74-878.
[24] "Garcia v. San Antonio Metro. Transit Authority." Oyez. Accessed May 2, 2025. Link.
[25] Payne-Patterson, Maye, & Zipperer. "A History of the Federal Minimum Wage."

increase to $15 an hour, has been proposed in the House in 2019, 2021, 2023, and 2025 and even passed the House in 2019, it has failed to pass both chambers of Congress.[26]

Analysis

At its core, the initial debate over government-mandated minimum wages concerned the scope of government and its role in economic affairs. The "freedom of contract" principle that defined the Lochner era was consistent with the libertarian, laissez-faire style of governance toward economic activity. The *Lochner* case established the precedent that any regulation of the affairs between employers and workers was a violation of "economic substantive due process" and therefore unconstitutional.[27] The "substantive due process" jurisprudence has aged poorly and is seen as having allowed the Supreme Court to use the Due Process Clause to protect unenumerated rights and effectively legislate from the bench.[28] The "freedom of contract" was never explicitly guaranteed in the Constitution, yet the small-government approach to economic regulation that controlled the Supreme Court effectively guaranteed it as such.[29] Without a firm constitutional basis, the Court kept the scope of government policing power in regards to labor regulation narrow at all levels, invalidating any legislation that went beyond guaranteeing the health and safety of workers.[30] Case law in the following decades would continually affirm this narrow scope and the validity of "substantive due process" jurisprudence.[31]

The Progressive Era and the Women's Suffrage Movement played the biggest role in advocating for government involvement in determining minimum wages for workers prior to the New Deal Era. In many cases, the fight for state and federal minimum wage laws came as a

[26] Payne-Patterson, Maye, & Zipperer. "A History of the Federal Minimum Wage."
[27] Nathan S. Chapman & Kenji Yoshino. "Interpretation: The Fourteenth Amendment - Due Process Clause." 2015. National Constitution Center. 2015. Link.
[28] Chapman & Yoshino. "Interpretation: The Fourteenth Amendment - Due Process Clause."
[29] Chapman & Yoshino. "Interpretation: The Fourteenth Amendment - Due Process Clause."
[30] "Liberty of Contract and Lochner v. New York." Constitution Annotated - Library of Congress. Link.
[31] Margaret Murphy. "The Constitutionality of Minimum Wage: The Legal Battles of Elsie Parrish and Frances Perkins for a Fair Day's Pay." Princeton Historical Review. 2023. Link.

result of persistent Suffragette advocacy and Progressive politicians.[32] The early minimum wage laws of the 1910s-1920s that survived in spite of *Lochner* did so because the women they applied to were seen as weak and in need of protection. While the laws were helpful, the paternalistic intent behind them not only validated the socially-constructed dependency of women on men but characterized all minimum wage policy as for those deserving of assistance rather than for those deserving of fair compensation. Recognizing the fragility of the *Lochner* precedent, the need for sufficient worker protections, and the paternalistic intent behind existing minimum wage laws, Progressives and Suffragettes sought to correct the perceived imbalance between the defense of the rights of businesses and the defense of the rights of workers. In their view, the "freedom of contract" was inherently unequal, favoring business owners and leaving workers with little bargaining power. Taking from then-Justice Louis Brandeis, who had argued in favor of the minimum wage law in the 1917 *Stettler* case, the Progressives and Suffragettes adopted the rationale that minimum wage laws were in the legitimate interest of the state because "socially, economically, and physically, the limitation of working hours was a good thing."[33] Their momentum continued with the ratification of the Nineteenth Amendment in 1920, but was stalled by the *Adkins* ruling in 1923. Despite this, Suffragettes and Progressives managed to reframe the conversation surrounding the minimum wage from a wage of condescension to a wage of merit.

The Great Depression required a radical change in governance. The laissez-faire economic system that caused mass unemployment, inflation, and distrust of economic institutions was under increased scrutiny. Many sought to change this by revitalizing the regulatory attitude advocated for by Progressives and Suffragettes. Chief among these advocates

[32] Murphy. "The Constitutionality of Minimum Wage: The Legal Battles of Elsie Parrish and Frances Perkins for a Fair Day's Pay."
[33] Murphy. "The Constitutionality of Minimum Wage: The Legal Battles of Elsie Parrish and Frances Perkins for a Fair Day's Pay."

was President Roosevelt's Secretary of Labor, Frances Perkins. Perkins, a suffrage advocate, longtime close advisor to Roosevelt, and the first female cabinet member, was key in convincing Roosevelt that a federal minimum wage was needed to revitalize the American economy.[34] However, the Roosevelt administration needed to overcome the legal precedent that prohibited such expansions. Their wish was granted with the *Parrish* ruling, which was largely due to the success of the economic reforms he had passed during his first term and rumors of his future attempt to pack the Court with progressive Justices.[35] With the *Lochner* precedent overturned, the Roosevelt administration was able to permanently enshrine a minimum wage within the federal government's policing power and embolden states to pass similar legislation. Within a year of *Lochner's* reversal, the Fair Labor Standards Act was signed into law and marked the beginning of a new era for wage regulation. Though business leaders, such as the National Association for Manufacturers, decried a minimum wage as "a step in the direction of communism, bolshevism, fascism, and Nazism" and a direct attack on the economic flexibility of business owners, the economic boom that followed the FLSA's passage silenced their criticisms for decades.[36]

Led by Roosevelt and Secretary Perkins, the debate over the scope of government had been settled: it was now officially within the federal government's policing power to impose a minimum wage for nearly all American workers. This expansion of federal authority was a rejection of the free market philosophy that had undergirded the federal government's approach to labor regulation since the country's inception.[37] This rejection was an acknowledgement of the unfavorable conditions in which workers had to sell their labor and the necessity of a corrective force to rectify this imbalance. The devastation of the Great Depression had proved that the

[34] Murphy. "The Constitutionality of Minimum Wage: The Legal Battles of Elsie Parrish and Frances Perkins for a Fair Day's Pay."
[35] "West Coast Hotel Company v. Parrish." Oyez. Link.
[36] Peter Cole."The Law That Changed the American Workplace." TIME. June 24, 2016. Link.
[37] Otto Nathan. "Favorable Economic Implications of the Fair Labor Standards Act." *Law and Contemporary Problems* 6 (3): 416-421. 1939. https://doi.org/10.2307/1189602.

system of free competition for labor was unable to salvage itself in times of economic crisis. The free market philosophy had been amended to a philosophy inspired by economist John Maynard Keynes, which gave the federal government the responsibility of regulating and rectifying the market at the margins in order to ensure consistent growth and a reliable workforce.[38]

With a Keynesian philosophy now guiding the federal government's involvement in the labor market, the core legal issue shifted from one of the scope of government authority to one of delineation between federal and state authority. States viewed amendments that removed state and locally-run and funded institutions from the list of exempt employers as an attack on their ability to regulate their own economic affairs. In rejecting the states' arguments that their Tenth Amendment, Eleventh Amendment, and Commerce Clause rights were violated, the Supreme Court kept with the trend of centralizing power that had captured nearly every aspect of governance. Like the economy as a whole, the impact of the commerce of state-funded hospitals, schools, and other facilities was rarely contained within state lines or negatively affected other commercial entities bound by the federal minimum wage.[39] Thus, the competition between these state-funded commercial entities was no different than that of other commercial entities, and their activities were subject to federal law.

With the major issues concerning the scope and delineation of governmental policing power settled, the debate surrounding the minimum wage has shifted to a discussion of its limitations on economic freedom. In response to the stagflation of the 1970s and the recessions of 1961, 1970, and 1974 (as shown in Figure Two), many were growing skeptical of the ability of the federal minimum wage to coexist with consistently high economic growth and employment. President Ronald Reagan's new-era conservative movement had the opportunity to

[38] Nathan. "Favorable Economic Implications of the Fair Labor Standards Act."
[39] Raasch. "Constitutional Law Review: Fair Labor Standards Act: Maryland v. Wirtz."

revitalize the movement against the minimum wage. It did so by focusing on the harm done to workers, not businesses, by the minimum wage and increases to it.

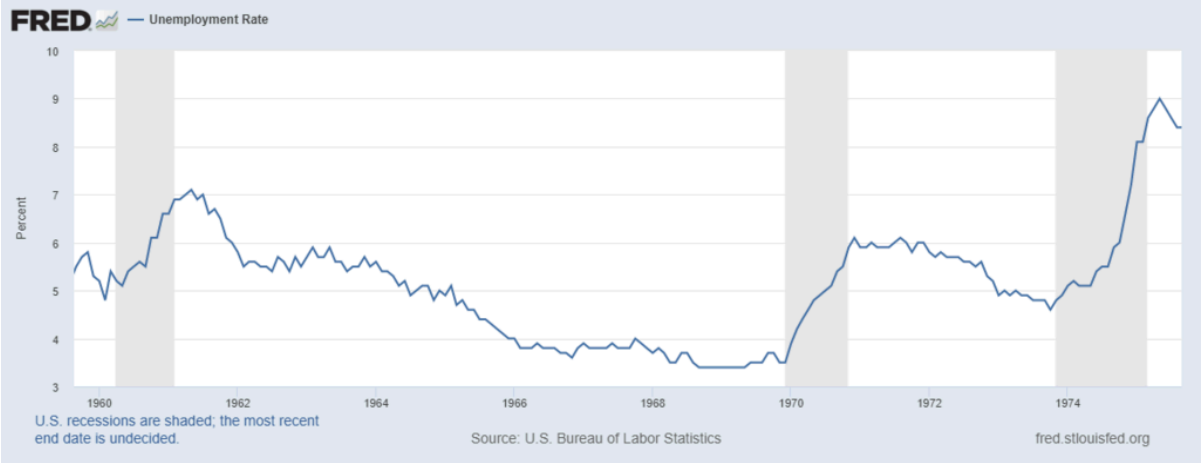

Figure Two: Unemployment Rate from September 1959 to August 1975[40]

Using the insights of economists Milton Friedman, his wife Rose Friedman, and their 1980 book *Free to Choose*, conservatives argued that fewer low-skill workers are hired when employers are forced to pay them above the market rate.[41] This creates significant barriers to entry for the poorest and least skilled workers and prevents them from gaining the initial experience needed to start on the path of upward mobility.[42] At a time when low-skill workers were being put out of work in favor of cheaper production costs overseas, this new argument against the minimum wage became incredibly popular.[43] It made sense that the rapid increase in unemployment during the recessions of 1961, 1970, and 1974 and the stagflation of the 1970s was caused by artificially high production costs caused by an unfairly high minimum wage.[44] Republicans capitalized on this popularity, and the Friedmans' views on the minimum wage became the dogma of Reagan's revamped Republican Party.

[40] U.S. Bureau of Labor Statistics, Unemployment Rate [UNRATE], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/UNRATE
[41] Jennifer Graham."From Reagan to Romney, a Brief History of Republican Thinking on the Minimum Wage." Deseret News. February 26, 2021. Link.
[42] Graham."From Reagan to Romney, a Brief History of Republican Thinking on the Minimum Wage."
[43] Cole."The Law That Changed the American Workplace."
[44] Graham."From Reagan to Romney, a Brief History of Republican Thinking on the Minimum Wage."

Under Reagan, the federal government returned to viewing the minimum wage not as a tool for promoting economic mobility, but instead as an obstacle. The economic crises of the 1960s and 1970s convinced the public and policymakers that the minimum wage and the increase in production costs it caused were to blame for the loss of domestic manufacturing jobs and increased unemployment. As a result, the free market approach that Roosevelt had stifled was reintroduced as the dominant approach to the labor market. Though unable to repeal the FLSA, Reagan's Republican Party had effectively demonstrated the negative effects of increasing the minimum wage on the employment of low-skill Americans. Consequently, a minimum wage increase was not approved during the eight years of his administration. Under both Republican and Democratic Presidents since Reagan, the pace and value at which the federal minimum wage has been raised have decreased dramatically. As Table One shows, minimum wage increases have become less frequent since the Reagan era, and the size of those increases has also diminished.[45]

Despite the enduring legacy of the Reagan administration's sluggish approach to federal minimum wage policy, momentum for increasing the minimum wage has resurged in the 21st century. The failure of the current federal rate to keep pace with inflation and the rising cost of living has sparked concerns about economic mobility, wage stagnation, and justice for low-income workers. Compounding these pressures are the ongoing effects of globalization, which have continued to displace low-wage

Year Effective	Minimum Wage (nominal)	Inflation-Adjusted Value of Minimum Wage (2023$)
1938	$0.25	$4.74
1939	$0.30	$5.69
1945	$0.40	$5.84
1950	$0.75	$8.47
1956	$1.00	$9.88
1961	$1.15	$10.19
1963	$1.25	$10.81
1967	$1.40	$11.27
1968	$1.60	$12.50
1974	$2.00	$11.30
1975	$2.10	$11.13
1976	$2.30	$11.45
1978	$2.65	$11.79
1979	$2.90	$11.94
1980	$3.10	$11.49
1981	$3.35	$11.23
1990	$3.80	$8.74
1991	$4.25	$9.38

[45] Payne-Patterson, Maye, & Zipperer. "A History of 2025. Link.

jobs and erode domestic labor standards. As a result, advocates now face a renewed, though still contested, opportunity to reassert the government's role in ensuring fair wage standards through actively and substantially increasing the federal minimum wage.

Analysis of the central legal and economic issues in the discussion of the federal minimum wage illustrates the federal government's conflict over the level of involvement that it ought to have in the labor market. The shifts from a laissez-faire market philosophy to Keynesian interventionism and back again occurred because of shifts in political leadership but, more importantly, in response to changing economic conditions. The Great Depression, postwar growth, stagflation, and neoliberal globalization have continually reshaped the perceived costs and benefits of wage regulation and the federal government's response to them. Ultimately, the story of the minimum wage is a legal and political poll of how the federal government conceives of its responsibility to balance market freedom with economic stability.

Policy Recommendations

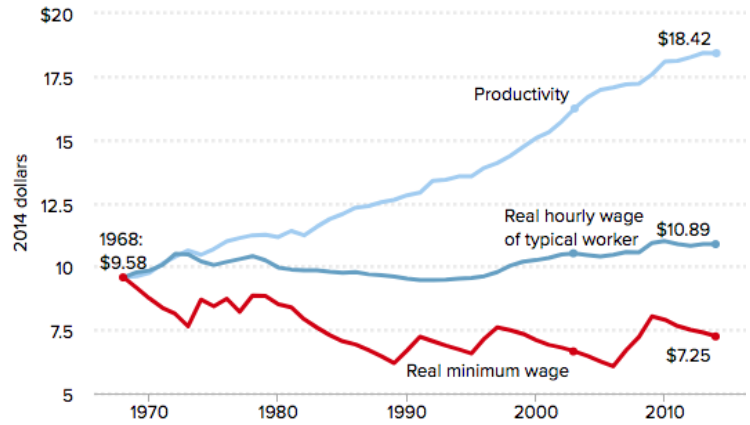

Figure Three: Real value of the federal minimum wage and real hourly wage of the typical worker compared with the value of the minimum wage had it grown at the rate of productivity, 1968–2014.[46]

The minimum wage must be raised if policymakers hope to combat increasing economic inequality and decreasing social mobility. A wage of $7.25 an hour is outdated and fails to

[46] Lawrence Mishel, Elise Gould, & Josh Bivens."Wage Stagnation in Nine Charts." January 6, 2015. Economic Policy Institute. https://www.epi.org/publication/charting-wage-stagnation/.

accurately present the minimum income needed to avoid poverty. Figure Three shows how the real value of the minimum wage has failed to keep pace with productivity and how workers are not only undervalued, but also unable to climb the socioeconomic ladder at increasingly higher rates.[47] To enhance the economic mobility of the American working class, Congress must end the longest period without a federal minimum wage increase in American history.

To address the growing concerns of low-wage American workers, policymakers must introduce an amended version of the Raise the Wage Act that was proposed to the 119th Congress in April 2025. The Raise the Wage Act has changed throughout its several iterations; the most recent proposal of the Raise the Wage Act, H.R. 2743 in the House and S. 1332 in the Senate, is not only most reflective of the wage generated by the median levels of production shown in Figure Three, but also provides the most detailed description of how wages will change. The Act will raise the minimum wage in the FLSA to $17 an hour for non-tipped and tipped workers over the course of six and seven years, respectively.[48] The Act also raises the minimum wage for underage workers and 14(c) workers – those with disabilities – to $16.50 and $15.50, respectively.[49] Eventually, these subminimum wages will be phased out, and all workers covered by the FLSA will be paid $17 an hour.[50] Once raised to the levels set forth in the Act, wages will be indexed to median wages annually to ensure that the wage of low-income Americans increases with rising costs, regardless of the salience of the matter in Congress. Table Two shows the rates at which these sets of wages will increase annually.

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[47] Jimmy Narang, et al. “The Fading American Dream: Trends in Absolute Income Mobility since 1940.” 2017. CEPR. May 5, 2017. https://cepr.org/voxeu/columns/fading-american-dream-trends-absolute-income-mobility-1940.
[48] Congress.gov. "Text - H.R.2743 - 119th Congress (2025-2026): Raise the Wage Act of 2025." Sec. 2 (a) & Sec 3 (a). April 8, 2025. https://www.congress.gov/bill/119th-congress/house-bill/2743/text.
[49] Congress.gov. "Text - H.R.2743 - 119th Congress (2025-2026): Raise the Wage Act of 2025." Sec. 4 (a). April 8, 2025. https://www.congress.gov/bill/119th-congress/house-bill/2743/text.
[50] Congress.gov. "Text - H.R.2743 - 119th Congress (2025-2026): Raise the Wage Act of 2025." Sec. 6 (a). April 8, 2025. https://www.congress.gov/bill/119th-congress/house-bill/2743/text.

Scheduled Minimum Wages Increases Under the *Raise the Wage Act of 2025*				
Year	***Minimum Wage***	***Tipped Wage***	***Youth Wage***	***14(c) Wage***
Current	$7.25	$2.13	$4.25	Subminimum Wages
2025	$9.50	$6.00	$6.00	$5.00
2026	$11.00	$8.00	$7.75	$7.50
2027	$12.50	$10.00	$9.50	$10.00
2028	$14.00	$12.00	$11.25	$12.50
2029	$15.50	$13.50	$13.00	$15.50
2030	$17.00	$15.00	$14.75	Standard Minimum Wage & Index Moving Forward
2031	Index to Median Wages	$17.00	$16.50	
2032		Standard Minimum Wage & Index Moving Forward	Standard Minimum Wage & Index Moving Forward	
2033				

Table Two: Scheduled minimum wage increases under the Raise the Wage Act of 2025[51]

According to analysis from the Economic Policy Institute, this act would increase the wages of over 22 million workers (15% of the American workforce), add $70 billion in wages annually, and increase the average worker's income by $3,200.[52] 10.3 million minimum workers would be directly affected by this increase while nearly 12 million low but not minimum wage workers would see their wages rise as a result of the "ripple effect" of the wage floor being elevated.[53] Among those most benefiting from this increase would be workers earning less than $25,000 (20.5% of total group positively affected), those earning between $25,000 and $50,000 (21.6%), and those with a high school degree or less than a high school education (35.2% and 17.2% respectively).[54] The sectors with the most positively affected workforce are the retail trade sector (17.2%), the restaurant sector (19.5%), and the healthcare and social assistance sector (12.2%)[55]

Group	Total workforce	Directly affected	Share directly affected	Indirectly affected	Share indirectly affected	Total affected	Share of group who are affected	Group's share of total affected

[51] "Raise the Wage Act Fact Sheet." Democrats of the Committee on Education & the Workforce. Link.
[52] Zipperer, "The Impact of the Raise the Wage Act of 2025." Economic Policy Institute. April 8, 2025. Link.
[53]Ben Harris and Melissa S. Kearney. "The 'Ripple Effect' of a Minimum Wage Increase on American Workers."
[54] Zipperer, "The Impact of the Raise the Wage Act of 2025."
[55] Zipperer, "The Impact of the Raise the Wage Act of 2025."

Family income-to-poverty ratio								
In Poverty	8,220,000	2,764,000	33.6%	1,470,000	17.9%	4,235,000	51.5%	19.0%
100 – 199% poverty	16,355,000	2,482,000	15.2%	3,123,000	19.1%	5,604,000	34.3%	25.2%
200-399% poverty	44,863,000	3,070,000	6.8%	4,274,000	9.5%	7,344,000	16.4%	33.0%
400%+ poverty	79,755,000	2,023,000	2.5%	3,041,000	3.8%	5,064,000	6.4%	22.8%

Table Three: Family income-to-poverty ratio of United States workers who would benefit if the federal minimum wage was raised to $17 by 2030[56]

Most importantly, however, is the Act's impact on economic mobility for low-income workers. As Table Three shows, the Act most benefits workers earning just above the poverty line, but it least benefits workers currently below the poverty line. Such a substantial change to federal minimum wage policy must not result in the lowest-earning workers seeing the least direct benefits. To help generate a direct benefit for the lowest earners, the Work Opportunity Tax Credit (WOTC) will be expanded to cover more workers. The WOTC, available to employers of all sizes, credits employers who employ individuals from certain "targeted groups" that face significant barriers to employment.[57] The process of the WOTC itself will not change, but a new targeted group – citizens earning under the poverty line as of their last tax filing – will be created to direct the positive benefits of the increased federal minimum wage towards Americans working to lift themselves out of poverty.

A major issue with the current iteration of the Raise the Wage Act is its minimal impact on sectors that employ huge numbers of poor and working-class Americans. Construction, manufacturing, and educational services employ a combined 39.8 million Americans yet an average of 6.6% of the workers across these three sectors will see a positive impact from this new federal minimum wage. To increase the number of workers in these industries benefiting from the increased federal minimum wage, employers within these industries will be allowed to file for the WOTC under an expanded definition of the new targeted group. Instead of only

[56] Zipperer, "The Impact of the Raise the Wage Act of 2025."
[57] "Work Opportunity Tax Credit" The Internal Revenue Service. Last Reviewed November 11, 2024. Link.

including workers living under the poverty line, employers with North American Industry Classification System (NAICS) numbers beginning with 23 (construction), 31-33 (manufacturing), and 61 (educational services) will be able to include workers making up to 300% of the minimum wage. This will drastically expand their ability to pay low-wage workers by allowing them to receive a greater tax credit in exchange for increased wages.[58]

Finally, a new Wage Assistance Tax Credit (WATC) should be created to assist small businesses most negatively impacted by the increase in labor costs. Small businesses – as defined by the Small Business Administration in Title 13, Part 121 of the Code of Federal Regulations – will be given the opportunity to apply for the WATC in order to refrain from firing workers because of an increasing federal minimum wage.[59] This tax credit will reimburse small businesses with half of the additional labor costs that arise as a result of the increased minimum wage. The WATC will last through 2031 and will not apply for the minimum wage increases due to annual indexing relative to median wages. Preference will be given to employers in states whose minimum wage as of 2025 is at the federal rate or up to two dollars above it. Only employers who employ workers full-time can qualify for the new WATC. Protecting the small businesses that drive the American economy is just as essential as protecting American workers. By utilizing these two tax credits, the federal government can work to reduce inequalities in the distribution of wages for both employers and workers without having to appropriate funds from the federal budget.

It is hard to ignore the increasingly visible reality that those at or near a minimum wage income are struggling to sustain a decent quality of life. In recent decades, wealth inequality has increased and economic mobility has decreased at alarming rates, giving rise to a growing

[58] "Industries at a Glance: NAICS Code Index." Bureau of Labor Statistics. October 5, 2022. Link.
[59] 13 CFR Part 121. https://www.ecfr.gov/current/title-13/chapter-I/part-121

movement dedicated to economic justice for low and working-class Americans.[60] At the same time, policymakers cannot force businesses to adopt a policy that will impede growth, especially if small businesses are those most obstructed by the increase in labor costs. This combination of the Raise the Wage Act, an expanded WOTC, and the new WATC will "nudge" businesses to accept these changes in wage regulation so that market freedom, as much as is currently allowed, is maintained while enhancements to workers' wages are enacted.[61] By softening the impact of the increase for America's most vulnerable businesses, these policies will feel like a smaller shift in behavior rather than a forceful suppression of economic freedom. If a substantive increase in the federal minimum wage is not agreed to in the coming years, policymakers can expect trends of inequality to continue, for workers to be left behind, and economic justice advocates to become increasingly disillusioned with the federal government's ability to aid its citizens.

[60] Mishel, Gould, & Bivens."Wage Stagnation in Nine Charts."
[61] Richard H. Thaler, Cass R. Sunstein. "The Cafeteria." *Nudge, Improving Decisions about Health, Wealth, and Happiness.* Revised & Expanded Edition. Penguin Random House Publishing. 2009.

Bellarmine Law Society Review

Volume XV | Issue I Article V

Foreign Surveillance Turned Domestic: The Foreign Intelligence Surveillance Act (FISA) On Trial

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FOREIGN SURVEILLANCE TURNED DOMESTIC: THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) ON TRIAL

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Abstract: This review first contextualizes the history of the Foreign Intelligence Surveillance Act (FISA) and explores the ways that its scope has expanded through amendments such as Section 702. In addition, this review considers the procedures used in FISA surveillance, with a focus on the practices of minimization and querying. With this grounding, the review then investigates a recent case (United States v. Hasbajrami) where the defendant, a U.S. person, challenged the use of FISA and Section 702 against him. The court ruled that warrantless Section 702 surveillance, as it was carried out against Hasbajrami, violated his Fourth Amendment protections. However, the court ultimately ruled in favor of the government, pursuant to the good faith exception. After analyzing the logic of the ruling, the review assesses the impact for future investigations. Finally, the review offers a three-tiered approach to limiting FISA overreach in the future, looking at legislative, corporate, and individual steps.

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Introduction

In this article, I begin with a review of the Foreign Intelligence Surveillance Act (FISA) and its evolution to contextualize the current discussion about balancing national security and individual privacy. I then turn to a recent ruling where FISA evidence factored into the arrest and conviction of a U.S. person. This case illustrates how FISA impacts the lives and privacy of U.S. persons, despite the statute's stated foreign scope. After discussing why the ruling is worth our attention, I will work through how this ruling is a good starting point for a broader discussion of how to limit government overreach while also protecting national security. I offer three levels of limitations in this discussion: legislative, corporate, and individual. Striking the balance between individual privacy and national security is deeply complex, so I intend for this article to be a starting point to grapple with these questions and consider the different roles of societal actors.

Overview

History of the Foreign Intelligence Surveillance Act (FISA)

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA) to enable law enforcement agencies to work around Fourth Amendment protections in foreign intelligence investigations and "get court orders for wiretaps and searches with a much lower standard of proof than required in a criminal investigation."[2] FISA warrants are issued by the Foreign Intelligence Surveillance Court (FISC), whose proceedings "are sealed and remain secret to even the subject of the warrant."[3] The powers of surveillance granted by FISA were enhanced by the USA Patriot Act (2001), most notably by expanding circumstances where surveillance is

[2] Paul T. Jaeger, John Carlo Bertot, and Charles R. McClure, "The Impact of the USA Patriot Act on Collection and Analysis of Personal Information Under the Foreign Intelligence Surveillance Act," *Government Information Quarterly* 20, no. 3 (July 2003): 297, https://doi.org/10.1016/S0740-624X(03)00057-1.

[3] Jaeger, Bertot, and McClure, "The Impact of the USA Patriot Act," 298.

acceptable, adding a bolstered secrecy clause that further limits disclosures about FISA investigations, and broadening the power to surveil electronic communications.[4] It is important to note, however, that the USA Patriot Act did not alter the exclusively foreign scope of FISA. While these laws were passed to promote national security, particularly against the threat of terrorism, they have the potential to undermine Americans' civil liberties.

Section 702

FISA was amended in 2008 by the FISA Amendments Act (FAA) to include Section 702, which allows for the Attorney General (AG) and the Director of National Intelligence (DNI) to jointly authorize the surveillance of non-U.S. persons, circumventing even the streamlined, secretive FISC warrant process.[5] A U.S. person is defined as a "citizen of the United States or an alien lawfully admitted for permanent residence."[6] The goal of Section 702 is to empower national security agencies to adapt to modern forms of electronic surveillance to collect foreign intelligence information. In practice, the AG and DNI authorize the surveillance of certain categories of people, allowing intelligence agencies to determine the particular individuals to target.[7] Section 702 allows for surveillance to proceed without a court order/warrant, which, according to the Office of the DNI, is critical to national security because security services "couldn't always meet the probable cause standard."[8] One key aspect of Section 702 is that the

[4] Jaeger, Bertot, and McClure, "The Impact of the USA Patriot Act," 299-300.
[5] The Privacy and Civil Liberties Oversight Board, "Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act," September 28, 2023, 2, https://documents.pclob.gov/prod/Documents/OversightReport/d21d1c6b-6de3-4bc4-b018-6c9151a0497d/2023%20PCLOB%20702%20Report,%20508%20Completed,%20Dec%203,%202024.pdf. ("PCLOB")
[6] *Foreign Intelligence Surveillance Act (FISA)*, 50 U.S. Code § 1801(i)
[7] PCLOB, 35.
[8] Office of the Director of National Intelligence, "Section 702 Overview," n.d., 2, https://www.dni.gov/files/icotr/Section702-Basics-Infographic.pdf.

target of surveillance must be reasonably believed to be located outside of the United States, and any targeting must not intentionally intercept data which was sent or received by a U.S. person.[9]

Given the wider surveillance powers granted by FISA Section 702, the risk of "reverse targeting" must be considered. Reverse targeting refers to the practice of intentionally targeting someone outside the country to obtain communications with a person within the United States.[10] Using Section 702 to intentionally target U.S. persons and circumvent the Fourth Amendment is plainly unlawful. However, the incidental collection of data on U.S. persons does occur and creates questions of how Fourth Amendment protections apply. To better understand how incidental collection occurs, a brief overview of Section 702 procedure is necessary.

Surveillance Procedure

First, the government identifies a specific "selector" for surveillance, which may include a target's email address or telephone number.[11] With the compelled assistance of communication service providers, the government collects data on targets (those who are reasonably believed *not to* be U.S. persons).[12] Despite procedures to reduce instances of incidental collection of data on U.S. persons, the reality is that U.S. persons are inadvertently swept up in these surveillance operations. This occurs when a selector email/phone has had contact with a U.S. person, meaning that any contact between the target and the U.S. person also gets intercepted. For example, if a target exchanges emails with a U.S. person, both sides of the exchange are collected, sweeping data on the U.S. person into the surveillance. This incidental collection of data from U.S. persons without a warrant raises Fourth Amendment concerns.

Minimization & Querying

[9] *FISA*, §1802(a)(1)(b)
[10] PCLOB, 36.
[11] PCLOB, 59.
[12] PCLOB, 67.

Government agencies each have their own "minimization" procedures to "reduce the privacy and civil liberties impact of the acquisition, retention, and dissemination of incidentally collected U.S. person information."[13] According to the U.S. Code, surveillance data on U.S. persons must be minimized within 72 hours *unless* the data is useful in understanding foreign intelligence, is evidence of a crime that has occurred, or is authorized for retention by the Attorney General under the belief that the data indicates bodily harm/death to any person.[14] These exceptions to minimization procedures are vague, based on subjective evaluations of what might be useful, giving wide latitude to security services to retain data on U.S. persons.

As a result, not all data is minimized, and troves of unminimized data are stored in massive agency databases.[15] These databases have not been purged of data from U.S. persons. An agent can search through these databases through a process called "querying."[16] The data resulting from a query is presumed to have already been lawfully obtained through a FISA Section 702 surveillance operation.[17] Through querying these massive, unminimized databases, the government can gain access to communications data of U.S. persons, incidentally collected through a prior Section 702 surveillance operation targeting a non-U.S. person for foreign intelligence purposes. Some refer to this procedure as "backdoor searching," which is a circuitous loophole that creates an opportunity for security services to collect sensitive, personal data from U.S. persons without a warrant.[18] Evidence resulting from an alleged "backdoor search" was the primary issue in *United States v. Hasbajrami,* 2016 U.S. Dist. LEXIS 30613 (United States District Court for the Eastern District of New York, March 8, 2016, Filed).

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[13] *FISA,* §1801(h)
[14] *FISA*, §1801(h)(1–4)
[15] PCLOB, 155.
[16] PCLOB, 88.
[17] PCLOB, 88.
[18] PCLOB, 185.

Section 702 On Trial: Hasbajrami

Facts

The defendant, Hasbajrami, was subject to an investigation by the Federal Bureau of Investigation's Joint Terrorism Task Force (JTTF).[19] In 2011, JTTF agents arrested Hasbajrami and charged him with attempting to provide material support to a terrorist organization.[20] Hasbajrami was a legal permanent resident located within the United States, making him a U.S. person. The defendant was arrested while traveling to Pakistan, where he allegedly planned to join a terrorist organization and later fight against U.S. forces. The government disclosed that some of the evidence used in the case against Hasbajrami was obtained through FISA collection, and the defendant was convicted after he pleaded guilty. After Hasbajrami was already serving his sentence, the government made a further disclosure that some of the evidence against him originated from a warrantless FISA Section 702 query. The absence of the warrant for the Section 702 surveillance was significant because it may have violated Hasbajrami's constitutional rights as a U.S. person. Based on this disclosure, the court permitted Hasbajrami to withdraw his initial guilty plea and filed a motion to exclude the Section 702 evidence.[21]

Procedural History

In 2015, the United States District Court for the Eastern District of New York ruled on Hasbajrami's motion to exclude the Section 702 evidence, and the court released a memorandum

[19] *United States v. Hasbajrami,* 2016 U.S. Dist. LEXIS 30613 (United States District Court for the Eastern District of New York, March 8, 2016, Filed).
[20] *United States v. Hasbajrami,* 2024 U.S. Dist. LEXIS 239431, 2025 WL 447498 (United States District Court for the Eastern District of New York, February 10, 2025, Filed). Substantial portions of this decision remain redacted. Specific details of the investigation are omitted. However, the general facts of the case are well defined. This analysis is limited to the unredacted opinion issued in February 2025.
[21] *United States v. Hasbajrami,* 2024.

explaining the opinion in 2016.[22] In the opinion, Judge John Gleeson denied the motion to suppress on the grounds that even though the surveillance constituted a search without a warrant on a U.S. person, the search met the reasonableness standard.[23] The initial target of surveillance was a legitimate, non-U.S. target, and thus, the warrantless Section 702 surveillance is unproblematic. The court ruled that the incidental interception of Hasbajrami's data, despite being a U.S. person, did not require a warrant because the initial surveillance was legitimate. Gleeson wrote: "When surveillance is lawful in the first place—whether it is the domestic surveillance of U.S. persons pursuant to a warrant, or the warrantless surveillance of non-U.S. persons who are abroad—the incidental interception of non-targeted U.S. persons' communications with the targeted persons is also lawful."[24]

Hasbajrami appealed this ruling, and the United States Court of Appeals for the Second Circuit issued a ruling in 2019. The Circuit Court ruled in agreement with the District Court that the incidental surveillance of the defendant was not in itself a violation of the Fourth Amendment. However, the Circuit Court took issue with the procedures used to store and query the data on the defendant. The Court stated that "the storage and querying of information raises challenging constitutional questions, to which there are few clear answers in the case law."[25]

The Circuit Court acknowledged that there was some precedent on how to treat querying, citing an earlier Oregon District Court ruling that "subsequent querying of a § 702 collection, even if U.S. person identifiers are used, is not a separate search and does not make § 702

[22] *United States v. Hasbajrami,* 2016.
[23] *United States v. Hasbajrami,* 2016.
[24] *United States v. Hasbajrami,* 2016; citing *United States v. Mohamud,* 2014 U.S. Dist. LEXIS 85452, 2014 WL 2866749 (United States District Court for the District of Oregon, Portland Division June 24, 2014, Filed).
[25] *United States v. Hasbajrami,* 945 F.3d 641, 2019 U.S. App. LEXIS 37583, 2019 WL 6888567 (United States Court of Appeals for the Second Circuit December 18, 2019, Decided).

surveillance unreasonable under the Fourth Amendment."[26] The Circuit Court stated, however, that it did not find the logic of that ruling to be persuasive. Due to a lack of information on the specific nature of the storage and querying of Hasbajrami's data, the Circuit Court remanded the case back to the District Court, directing the District Court to specifically analyze the constitutionality of querying and whether it constituted a separate Fourth Amendment event. If deemed a separate Fourth Amendment event, the querying would require a warrant.

The United States District Court for the Eastern District of New York ruled again on this case in 2024 and released the first opinion in January 2025.[27] The District Court's opinion, which focused on querying, is detailed below.

Fourth Amendment Violation

The District Court in *Hasbajrami* ruled that the government's query into Section 702-obtained communications from the defendant constituted a separate Fourth Amendment event. Judge DeArcy Hall affirmed that "a search that relies on an initial warrant or exception to the warrant requirement is limited by its original justification, and to intrude further on lawfully acquired items requires new and independent approval."[28] Therefore, the government's querying implicated Hasbajrami's Fourth Amendment rights and required independent justification for the fruits of the query to be lawfully introduced as evidence at trial. The collection of data on the defendant was not, in itself, problematic (as established by the Circuit Court).

The issue arises in that the data on Hasbajrami was stored, and then *later queried* from an agency database.[29] Even though the data was in the possession of the government (in a database), the court ruled that the government needed a separate warrant to query this data. The opinion

[26] *United States v. Hasbajrami,* 2019; citing *United States v. Mohamud,* 2014.
[27] An updated version of the opinion was released in February 2025, with no significant changes. The February decision is cited in this review.
[28] *United States v. Hasbajrami,* 2024.
[29] *Hasbajrami v. United States*, 2024.

relied on the Supreme Court decision in *Riley v. California*, which held that law enforcement officers could not, without a warrant, search the digital contents of a cell phone lawfully seized during an arrest.[30] This precedent has been applied to computers as well: the government "should not be able to comb through…computers plucking out new forms of evidence that the investigating agents have decided may be useful, at least not without obtaining a new warrant."[31] The District Court in Hasbajrami (2024) applied this precedent to the context of stored surveillance data, departing from the Oregon District Court's reasoning in *United States v. Mohamud*. Judge Hall concluded that "just as the officers in Riley were required to obtain a warrant to search the seized cell phone, so too was the government required to obtain a warrant to view Defendant's communications that were lawfully intercepted" pursuant to Section 702.[32]

Exclusion of Evidence: Good Faith Exception

Evidence that is acquired in violation of the Fourth Amendment is, as a general rule, inadmissible in court.[33] Courts apply the exclusionary rule to exclude unlawfully seized evidence and any fruits of this evidence.[34] The exclusionary rule functions by serving as a deterrent against law enforcement agencies using unlawful tactics, but is not without exception. Where the benefit of deterrence is outweighed by substantial social costs, for example, courts have ruled it is inappropriate to apply the exclusionary rule.[35]

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[30] *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430, 2014 U.S. LEXIS 4497, 82 U.S.L.W. 4558, 42 Media L. Rep. 1925, 24 Fla. L. Weekly Fed. S 921, 60 Comm. Reg. (P & F) 1175, 2014 WL 2864483 (Supreme Court of the United States June 25, 2014, Decided).
[31] *United States v. Sedaghaty,* 728 F.3d 885, 2013 U.S. App. LEXIS 22234, 2013-2 U.S. Tax Cas. (CCH) P50,492, 112 A.F.T.R.2d (RIA) 2013-5864 (United States Court of Appeals for the Ninth Circuit August 23, 2013, Decided).
[32] *United States v. Hasbajrami,* 2024.
[33] *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 1961 U.S. LEXIS 812, 84 A.L.R.2d 933, 86 Ohio L. Abs. 513, 16 Ohio Op. 2d 384 (Supreme Court of the United States June 19, 1961, Decided).
[34] *Segura v. United States,* 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599, 1984 U.S. LEXIS 150, 52 U.S.L.W. 5128 (Supreme Court of the United States July 5, 1984, Decided)
[35] *Utah v. Strieff,* 579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400, 2016 U.S. LEXIS 3926, 84 U.S.L.W. 4430, 26 Fla. L. Weekly Fed. S 288 (Supreme Court of the United States June 20, 2016, Decided)

Despite the ruling that the querying of Hasbajrami's data was unconstitutional, the District Court rejected exclusion as a remedy. There are various exceptions to exclusion that may apply, and the District Court worked through the relevant exceptions in its discussion. The court determined that the Foreign Intelligence exception did not apply, nor did other factors (e.g. exigency) that would have made the warrantless search reasonable. Rather, the court determined that exclusion of Section 702 evidence was inappropriate because the good faith exception applied.[36]

The good faith exception applies when an agent of the state acts with "an objectively reasonable good-faith belief that their conduct is lawful."[37, 38] The District Court contends that when agents act in good faith, the deterrent rationale of the exclusionary rule loses its force.[39] In this case, the court ruled that the good faith exception applied because the surveillance agents did not (and could not) have known that the court would rule that querying required a separate warrant. In fact, the 2014 *United States v. Mohamud* ruling had indicated the opposite.

Impact of Ruling

The ruling by the District Court in *Hasbajrami* has now made it clear that querying requires a warrant, which means that a court must approve a query search of data, even if that data was initially acquired and stored lawfully under FISA Section 702. Therefore, it logically follows that a good-faith exception *could not* apply again to an agent who queries without a warrant. In the case of Hasbajrami, the court ruled that the good faith exception applied, even

[36] *United States v. Hasbajrami,* 2024.
[37] *Davis v. United States,* 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285, 2011 U.S. LEXIS 4560, 79 U.S.L.W. 4495, 68 A.L.R. Fed. 2d 665, 22 Fla. L. Weekly Fed. S 1144 (Supreme Court of the United States June 16, 2011, Decided)
[38] See also, *Herring v. United States,* 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496, 2009 U.S. LEXIS 581, 77 U.S.L.W. 4047, 21 Fla. L. Weekly Fed. S 582 (Supreme Court of the United States January 14, 2009, Decided).
[39] See this argument made in *Davis*.

though Hasbajrami correctly advanced the argument that his Fourth Amendment rights had been violated.

Limiting Government Overreach

Balancing National Security and Civil Liberties

Laws like FISA and Section 702 enable important efforts that mitigate risk to Americans and American assets. However, unbridled access to surveil U.S. persons is a level of overreach that is unacceptable. The suggestions for restricting Section 702 that I advance below are aimed at both empowering security services to do their job while also protecting personal privacy. To do this, I propose legislative, corporate, and individual steps to establish a middle ground that keeps government surveillance accountable to judicial review.

Legislative: Amending Section 702

Section 702 of the FISA Amendments Act (FAA) is codified in 50 USC § 1881a. Currently, the statute outlines the following requirement for querying unminimized data on a U.S. person:

> Federal Bureau of Investigation personnel must obtain prior approval from a Federal Bureau of Investigation supervisor (or employee of equivalent or greater rank) or attorney who is authorized to access unminimized contents or noncontents obtained through acquisitions authorized under subsection (a) for any query of such unminimized contents or noncontents made using a United States person query term.[40]

This requirement can be circumvented, however, if the agent has "a reasonable belief that conducting the query could assist in mitigating or eliminating a threat to life or serious bodily harm."[41] Other than the requirement of a supervisor's approval, the statute does not require a

[40] *FISA,* §1881a (f)(3)(a)(i)
[41] *FISA*, §1881a (f)(3)(a)(ii)

warrant or court order to run a query. To better reflect the District Court decision in *United States v. Hasbajrami (2024)*, I propose a legislative amendment to 50 USC §1881a.

Specifically, the statute should reflect that running a query requires a warrant from the FISC. Due to the sensitive nature of national security investigations, there must be exceptions to this warrant requirement, such as exigent circumstances.[42] These exceptions rely on the standard of reasonableness, meaning that security services would have latitude to run queries without a warrant, but must then be prepared to defend those actions as reasonable in court. By amending 50 USC §1881a to include a warrant requirement for queries, Congress would add a measure of protection for U.S. persons in the form of judicial oversight, while still preserving the power of security services to run such queries.

Corporate: The Role of Telecommunication Companies

A key element of the FISA telecommunications surveillance process is the compelled assistance of electronic communication service providers (ECSPs). FISA requires that, if an ECSP receives a surveillance request from the government, it must "immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition."[43] An intelligence agency on its own does not have access to a person's email correspondence. Rather, the agency requests that the relevant email service provider share that user's data. The government compensates the company "at the prevailing rate" for the requested information.[44] Given the critical role that ECSPs play in government investigations, they are

[42] *United States v. McConney,* 728 F.2d 1195, 1984 U.S. App. LEXIS 25576 (United States Court of Appeals for the Ninth Circuit February 10, 1984, Decided); exigency defined as "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."
[43] *FISA*, §1881a (i)(1)
[44] *FISA*, §1881a (i)(2)

sometimes referred to as "surveillance intermediaries."[45] While the government wields significant power of compulsion over these surveillance intermediaries, there are legal steps that an ECSP can take to resist transferring user information.

An ECSP may challenge a request from the government by filing a petition to the Foreign Intelligence Surveillance Court (FISC) and following appeal procedures up to the Supreme Court.[46] Given ECSP's crucial role in the Section 702 process, some commentators argue that these companies have the power to shape and negotiate surveillance practices in a more meaningful way than even the courts.[47] When an ECSP resists a data request from the government, it forces the surveillance agency to justify its request in court. Therefore, ECSPs have the power to force surveillance agencies to undergo a more thorough process of judicial review. Along with this logic, some argue that the ECSPs are best equipped to pursue surveillance-related litigation (rather than individuals), given the experience these companies have with surveillance requests and the legal resources at their disposal.[48] Therefore, I argue that in addition to a legislative amendment to FISA Section 702, ECSPs ought to take a more active role in protecting users' privacy from government oversight.

There are competing incentives for an ECSP to assist or resist government surveillance. The obvious incentive to assist is that doing so puts the company in good graces with its regulators. Telecommunication companies also are (or should be) driven by profit-maximization, and therefore, there remains a strong incentive to protect their public reputation. Current events play a large role in this incentive matrix. For example, in the wake of the 9/11 attacks, ECSPs,

[45] "Developments in the Law: More Data, More Problems," *Harvard Law Review* 131, no. 6 (2018): 1722, https://www.jstor.org/stable/pdf/44865881.pdf.
[46] *FISA*, §1881a (i)(4)
[47] "More Data, More Problems," 1722.
[48] "More Data, More Problems," 1739.

without precedent, yielded almost entirely to the needs of security services.[49] Here, the companies perhaps acted out of patriotism, a sentiment shared by consumers at the time. In contrast, after the Snowden disclosures, many ECSPs began to challenge national security-compelled assistance requests.[50] This behavior reflected consumer aversion to the perception of "big brother" surveillance. These examples demonstrate the key role ECSPs play in the surveillance process and provide a precedent for resisting government overreach, particularly when doing so aligns with consumer sentiment.

Individual: The Role of Consumers

Compared to courts and corporations, the individual holds relatively little power in the process of resisting government surveillance. Nonetheless, there are important steps for individuals to take to counter government overreach in the realm of surveillance. One commentator summarizes some of the methods of individual resistance as the following: "voting, litigating, hiding, and buying."[51] The first method, voting, involves electing privacy-minded officials. It remains uncertain, however, the degree to which individually elected officials can influence the massive structure of the national security apparatus. Litigating refers to individuals suing the government for privacy infractions. The issues of harm and standing make litigating at the individual level quite challenging, especially given that most surveillance occurs in secret (i.e., a person would generally never know that surveillance occurred).[52] Hiding refers to individual efforts to protect data, such as encrypting communications. There is value in this step, but the reality is that the government can often still interpret or break encryptions.[53] While these

[49] "More Data, More Problems," 1725.
[50] "More Data, More Problems," 1726.
[51] Ryan Calo, "Can Americans Resist Surveillance?" *The University of Chicago Law Review* 83, no. 23 (2016): 30.
[52] Calo, "Can Americans Resist Surveillance?" 34.
[53] Calo, "Can Americans Resist Surveillance?" 38.

individual tactics should certainly not be written off, there is most value in the method of 'buying,' or using market pressure to influence ECSPs to take steps to protect their consumers' privacy.

In the previous section, I argued that ECSPs have immense power to protect individual privacy if properly incentivized to do so. Therefore, the most effective individual strategy to resist surveillance may be to give telecommunication companies the incentive they need to resist compelled assistance and force judicial review. To be sure, there are challenges to this tactic. For example, promises of privacy by a company are relatively unenforceable, leaving the consumer with few resources in the event of surveillance cooperation. One commentator highlights that it is extremely unlikely that the Federal Trade Commission (FTC) would penalize an ECSP for deceptive statements if that company is cooperating with *another* government enforcement agency, as would be the case in a surveillance collection.[54]

I argue, however, that the risk of large-scale consumer mistrust is incentive enough for ECSPs to at least make efforts to respect privacy. If not, more privacy-minded companies will win over consumer bases. Therefore, an individual can resist surveillance overreach by being informed about the policies of the telecommunication companies they use and selecting ECSPs that best align with the level of privacy that they desire. This market pressure, at least on a large scale, has the potential to encourage ECSPs to add more hurdles to the practice of compelled assistance.

Conclusion

The Foreign Intelligence Surveillance Act, including the more recent Section 702, empowers the government to perform critical national security functions. Through its use, FISA

[54] Calo, "Can Americans Resist Surveillance?" 41.

Section 702 has grown into a pathway to deploy intelligence resources against U.S. persons, a reality that deeply contravenes the stated scope of FISA. Through a series of highly secretive procedures, and despite policies of minimization, data on U.S. persons is stored and used in investigations and trials, as seen in the case against Hasbajrami. The recent ruling in *United States v. Hasbajrami (2024)* has set an important precedent that querying data is its own Fourth Amendment event and thus requires a court-issued warrant. Building off this important ruling, I propose a three-level approach to resisting government overreach in surveillance. On the legislative level, I urge amending Section 702 to reflect the *Hasbajrami* reasoning and require a warrant for any querying of FISA data. On the corporate level, I argue that electronic communication service providers have a role to play in resisting (not flatly rejecting) compelled assistance requests to require some degree of judicial review. Finally, at the individual level, I argue that individual consumers have a role to play in shaping market pressures to encourage ECSPs to keep government surveillance in check.