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LETTER FROM THE EDITOR-IN-CHIEF

2020 is finally here. A new year. A new decade. And once again, the countdown to another pivotal presidential election. Now more than ever is the time for scholars to be critical of the laws that serve as a hinderance to justice. Legal scholarship that is critical of the justice system can be viewed as a cry for more love. As legal scholars, it is our job to not only study and analyze the law, but to be critical of it as well. Implicit in this call for more love are the assumptions that legal systems can and will adapt to provide more love, and the hope that the love and justice we seek, can be found. In Issue 2 of Volume 63, each submission takes a current presidential issue, and through policy, reason, and law, gives criticism on how it can be reformed and improved, and makes arguments that serve to strengthen our communities both locally and globally. Our hope is that these articles will underscore the importance of these human rights while also serving as a catalyst for progression and change in the future. We have continuously devoted our volumes, issues, and pages to some of the most cutting-edge legal topics, while also staying true to who we are: a beacon of social justice. In this new decade, we remain committed to this legacy. It is our honor to present to you, the Second Issue of Volume 63 of the *Howard Law Journal*.

Professor Catherine Arcabascio opens Issue 2 with a discussion of the link between genetic surveillance and data privacy. In her article, *A Genetic Surveillance State: Are We One Buccal Swab Away From a Total Loss of Genetic Privacy?*, Professor Arcabascio explores issues such as the lack of privacy laws for genetic data and provides suggestions on how to curb the increasing lack of privacy in genetic data, with a focus on law enforcement use. Consumer Genetic testing companies have immensely increased in popularity due to their extensive marketing campaigns. While consumers learn about their ancestry and other familial and medical history, these companies are collecting an extraordinary amount of genetic data that they can use to sell for enormous current and future profits. After providing more background on these genetic research companies, Professor Arcabascio details the general genetic privacy issues that arise when consumers give up their genetic data to these companies and genetic research sites. Professor Arcabascio concludes with more commentary and suggested solutions to the privacy issues raised.

Our second article is Professor John Ip's *The Travel Ban, Judicial Deference, and the Legacy of Korematsu.*, which revisits the landmark Supreme Court case, *Korematsu v. United States*, and discusses the fundamentally differing opinions of two Supreme Court justices. After ex-

ploring both Chief Justice Roberts and Justice Sotomayor's interpretations of *Korematsu*, Professor Ip concludes that Justice Sotomayor's charge that the majority is guilty of repeating the error of *Korematsu* is valid, and that Chief Justice Roberts' attempt to cast *Korematsu* as an odious relic of the benighted past, distant and unrelated to the travel ban litigation, is ultimately unconvincing.

Our last scholarly article comes from Professor Homer La Rue and Alan A. Symonette. Their article grew out of a workshop presented by the authors at the 13th Annual Labor and Employment Law Conference of the American Bar Association Section of Labor and Employment Law. In their article, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, Professor La Rue and Mr. Symonette explore how to achieve diversity and inclusion in arbitrator selection. Their primary focus is the selection of arbitrators of color and women and the problems posed by unconscious bias in that selection process. Moreover, part of their article goes into some detail about the process for becoming an arbitrator of labor-management and employment disputes. Professor La Rue and Mr. Symonette conclude with a call to action. They offer three ingredients as a starting point for the *Ray Corollary Task Force* which will help fix the diversity and inclusion problem arbitration faces.

I would like to thank each author personally and on behalf of the *Howard Law Journal* for entrusting us with their scholarly contributions and for their patience as we published this edition.

An important part of the work the *Journal* does is publishing the work of current *Journal* members. Volume 63, Issue 2, includes three pieces authored by current members of the Volume 63 *Howard Law Journal*: Executive Publications Editor Jonathan Thompson, Senior Solicitations and Submissions Editor Meschelle Noble, and Senior Staff Editor Langston Tolbert.

First, Jonathan Thompson in *Failed Application of Federal Student Aid- Why the Federal Student Aid Program Fails to Provide Aid to the Most at Risk Youth*, argues that the current process of collecting parent financial information in order for the student to complete the FAFSA negative impacts our most vulnerable student communities. Mr. Thompson explores this issue from the perspective of multiple groups of marginalized individuals including students who are in poverty, students in toxic family households, individuals in the LGBTQ community, and first-generation Americans. He calls for the FAFSA to be reformed to provide additional options for students who are unable to provide the financial information from their parents. To assist this reformation, Mr. Thompson offers solutions on how the federal and state governments could remedy this issue so that students may receive assistance for college without needing parental consent to access their financial information.

Continuing the theme of issues with student loans, Meschelle Noble then discusses the complexity of Income Share Agreements in her article, *A Solution to the Student Loan Debt Crisis or a Welcome Mat for Discrimination?* Income Share Agreements are an alternative to traditional student loans, however, Ms. Noble notes that their lack of regulation may be contributing to the student loan debt crisis. She then examines the positive and negative impacts that Income Share Agreements could potentially have on an individual seeking to finance a higher education. As a result, Ms. Noble offers three potential solutions that could resolve the pitfalls of Income Share Agreements and encourages Congress to play a more critical role in creating a functional approach to slowing the ever-increasing student loan debt crisis.

We close Issue 2 with Langston Tolbert's article, *Utilizing Educational Focused Community Funds in the Fight Against Displacement and the Revitalization of Distressed Communities*. Mr. Tolbert advances the idea that gentrification tools should be created to stem the negative effects of gentrification and keep residents in their communities. However, he seeks alternations to most activists' approach. In addition to activists' current approach, Mr. Tolbert offers two additional solutions. With this approach, Tolbert hopes to bridge the gap between the missions of funds of black owned LLCs and those that are educationally focused, while also providing potential stratagem that they may implement.

On behalf of the *Howard Law Journal* and members of Volume 63, I thank you for your support and readership. It is our hope that the scholarship within this issue be thought provoking and that it will contribute to a deeper understanding of the complex issues we face today, inspire you to do your part in improving the community, and push forward the academic discourse around the topics discussed.

PATRICK E. SMITH
EDITOR-IN-CHIEF
VOLUME 63

A Genetic Surveillance State: Are We One Buccal Swab Away From a Total Loss of Genetic Privacy?¹

CATHERINE ARCABASCIO

INTRODUCTION:

To date, over 15 million people have submitted their genetic sample to a Direct-To-Consumer Genetic testing company (“DTC-GTC”).² A person’s genetic data is the most fundamental private information one can possess. That makes it an incredibly powerful tool because an enormous amount of information can be gleaned from a tiny sample of saliva or other bodily secretion. “Genomic data is special, since it encodes not only our blueprint, *but that of our family and children*. The continuing privacy and the security of people’s genetic data, both immediately, and into the long term, is of paramount importance.” (Emphasis added)³ “A genome is not your average piece of data—it is inherently identifiable, it is familial (revealing your genomic data can reveal sensitive information about your family mem-

1. Catherine Arcabascio is a Professor of Law at Nova Southeastern University, Shepard Broad College of Law. She is a former Brooklyn Assistant District Attorney and also served as the Director of the Florida Innocence Project, which she co-founded. A heartfelt thanks to Research Assistants Tonja Vucetic, Yesnela Rodriguez, Elaine Martin, and Bradley Denniston for their assistance.

2. “More than 15 million people have submitted their DNA to companies like FamilyTreeDNA, 23AndMe and Ancestry.com in recent years. While they represent a small fraction of all people, the pool of profiles is large enough to allow 60 percent of white Americans — the primary users of DNA sites in the United States — to be identified through the databases, according to researchers.” Heather Murphy, *Most White Americans’ DNA Can Be Identified Through Genealogy Databases*, N.Y. TIMES (Oct. 11, 2018), <https://www.nytimes.com/2018/10/11/science/science-genetic-genealogy-study.html?module=inline>. These companies have been referred to in articles and other literature as either DTC-GT’s or DTC-GTCs. For consistency, this article will use DTC-GTC. However, direct quotes from other sources that contain DTC-GT will not be changed.

3. Lauren Friend, *Direct-to-Consumer Genetic Testing*, KPMG GLOBAL STRATEGY GROUP 1, 2 (2018), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/08/direct-to-consumer-genetic-testing.pdf>.

bers as well), and its value is long-lasting.”⁴ The privacy concern has even moved the Department of Defense to issue a warning to its employees regarding the use of DTC-GTCs. In December 2019, the Office of the Secretary of Defense issued a memorandum advising its employees not to use such companies. Among other concerns, it stated, “. . .there is increased concern in the scientific community that outside parties are exploiting the use of genetic data for questionable purposes, including mass surveillance and the ability to track individuals without their authority or awareness.”⁵

During the past several years, there has been a steep rise in DTC-GTCs that are utilized by individuals who are curious about their ancestry, possible genetic disease markers, or tracking down unknown living relatives. Some of these individuals have also taken their genetic testing results from the DTC-GTCs and submitted the results to open source genealogical websites like GEDmatch that focus exclusively on genealogical research.⁶ In some consumers, the curiosity about their ancestry seems to be irresistible. Others seek answers to legitimate questions about paternity or genetic markers for disease. In either case, those questions have driven the urge to submit one’s most private, unique genetic sample to a mostly unregulated and ever-growing “private” database industry, one that now contains millions of DNA samples.⁷

By now, the names of these companies are familiar. Ancestry.com and 23andMe are the two most recognizable given the heavy marketing campaigns they continue to conduct to date.⁸ It appears

4. Dana A. Elfin, *DNA Testing? You Might Want to Wait for More Legal Protection*, BLOOMBERG LAW (Jan. 7, 2019, 5:40 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/DNA-testing-you-might-want-to-wait-for-more-legal-protection>.

5. Shawn Snow, *Pentagon advises troops to not use consumer DNA kits, citing security risks*, MILITARY TIMES (Dec. 24, 2019), <https://www.militarytimes.com/2019/12/24/pentagon-advises-troops-to-not-use-consumer-dna-kits-citing-security-risks/>.

6. See Sarah C. Nelson, *Consumer Genetic Testing Customers Stretch Their DNA Data Further With Third-Party Interpretation Websites*, THE CONVERSATION (June 13, 2019, 11:06 AM), <http://theconversation.com/consumer-genetic-testing-customers-stretch-their-DNA-data-further-with-third-party-interpretation-websites-118248>.

7. See generally *23andMe DNA Test Customer Reviews*, AMAZON, https://www.amazon.com/23andMe-DNA-Test-Ancestral-Opt/dp/B01LZ5K87Z/ref=sr_1_3?crd=14B9Q3ZFJPV6A&keywords=23andme+DNA+testing+kit&qid=1564425377&s=gateway&srefix=23and%2Caps%2C154&sr=8-3#customerReviews (last visited July 29, 2019); *AncestryDNA: Genetic Ethnicity Test Customer Reviews*, AMAZON, https://www.amazon.com/AncestryDNA-Genetic-Ethnicity-Test/dp/B00TRLVKW0/ref=sr_1_1_sspa?crd=14B9Q3ZFJPV6A&keywords=23andme+DNA+testing+kit&qid=1564426067&s=gateway&srefix=23and%2Caps%2C154&sr=8-1-spons&psc=1#customerReviews (last visited July 29, 2019).

8. See *23andMe Launches First National TV Campaign*, 23ANDME (Aug. 5, 2013), https://mediacenter.23andme.com/press-releases/poh_ad_campaign/ (23andMe started its television ad-

that DTC-GTCs are spending quite a bit of money marketing their services to those who want to know where their families originated from, who their relatives are, or what kind of genes they carry for certain diseases for a minimal amount of money. As of 2017, 23andMe has been able to market different types of tests that identify genetic markers for illnesses such as Parkinson's, and Alzheimer's to name a few.⁹ The marketing push and the low cost of testing is not surprising because the real value of their business is in the extraordinary amount of genetic data they possess and can sell, thereby translating into enormous current and future profits.¹⁰ Moreover, there are currently hundreds of private DNA testing companies, as well as some other free public genetic-matching companies, that provide services other than actual testing to consumers.¹¹ Additionally, in order to access these sites, consumers must consent to a host of activities by these DTC-GTCs through a lengthy and often muddy set of notices.¹²

Thus, it is of no surprise that the proliferation of DNA samples accumulated by these private, largely unregulated, companies and organizations have caught the eyes of law enforcement. With millions of private citizens using them, law enforcement has seized the ability to obtain genetic information of innocent citizens so that they can create familial trees from that information to create a list of suspects in either existing or cold cases. Once a law enforcement organization is

vertising campaign in 2013); *see also* Tara Goodin, *FDA Allows Marketing of First Direct-to-Consumer Tests That Provide Genetic Risk Information For Certain Conditions*, U.S. FOOD & DRUG ADMINISTRATION (Apr. 6, 2017), <https://www.fda.gov/news-events/press-announcements/fda-allows-marketing-first-direct-consumer-tests-provide-genetic-risk-information-certain-conditions> (in 2017, the FDA allowed 23andMe it to market some of its genetic tests for certain diseases).

9. Tara Goodin, *FDA Allows Marketing of First Direct-to-Consumer Tests That Provide Genetic Risk Information For Certain Conditions*, U.S. FOOD & DRUG ADMINISTRATION (Apr. 6, 2017), <https://www.fda.gov/news-events/press-announcements/fda-allows-marketing-first-direct-consumer-tests-provide-genetic-risk-information-certain-conditions>.

10. *See* Lindsey Jones, *FDA Regulation Defines Business Strategy in Direct-to-Consumer Genetic Testing*, BIOTECH CONNECTION (Oct. 30, 2017), <https://biotechconnectionbay.org/viewpoints/fda-regulation-defines-business-strategy-in-direct-to-consumer-genetic-testing/> (the diversifying reasons for consumer interest in DTC genetic testing are estimated to increase its global market value to \$350 million by 2022).

11. James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL'Y 35, 35 (2018).

12. *See* James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL'Y 35, 39 (2018) (“[w]ith some notable exceptions, these companies provided little or none of the information required for consumers to make informed decisions about their privacy . . . [including the] privacy implications of genetic testing, disclosing health information, and third parties gaining access to an individual's genetic information”).

able to submit their samples to these databases, they can build a DNA family tree that includes family members who are related as far as the 9th degree.¹³ Law enforcement's access to these private databases raise serious privacy concerns not only for those that submit the samples to the DTC-GTCs, but every member of that family, either living or not yet born.

Current privacy laws such as the Health Insurance Portability and Accountability Act ("HIPAA") and the Genetic Information Nondiscrimination Act ("GINA") simply do not offer sufficient protection in the DTC-GTC and genealogy research industries, especially against law-enforcement's uses. The Federal Trade Commission ("FTC"), which is responsible for consumer protection could play a greater role, but not if it merely applies the same regulations to DNA samples and data that it does to online sales of typical consumer products such as clothing and electronics. More importantly, current Fourth Amendment jurisprudence does not offer sufficient protection either. What consumers are left with is a largely unregulated industry that does not, and cannot, robustly guarantee the privacy rights of its users and any other potential stakeholders.

This article will explore these issues and provide suggestions on how to curb the increasing lack of privacy in genetic data, with a focus on law enforcement use. Part II of this article starts by providing background information about the more well-known DTC-GTCs and genetic research companies. Part III of this article sets forth the general genetic privacy issues that arise when consumers use DTC-GTCs and genetic research sites, discusses genetic regulation and genetic management issues, including DTC-GTCs attempts at self-regulation, consent, anonymity and deidentification concerns. Part IV discusses genetic privacy and the Fourth Amendment. Part V concludes with commentary and suggested solutions to the privacy issues raised.

I. DTC-GTCs

The most well-known and largest DTC-GTCs are Ancestry.com and 23andMe.com, but there are over 250 of such companies.¹⁴ Ac-

13. SNAPSHOT DNA ANALYSIS, <https://snapshot.parabon-nanolabs.com/#kinship> (last visited Aug. 31, 2019).

14. Lauren Friend, *Direct-to-Consumer Genetic Testing*, KPMG GLOBAL STRATEGY GROUP (Aug. 2018), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/08/direct-to-consumer-genetic-testing.pdf>; Hazel & Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL'Y 35, 43-44 (2018).

According to a KPMG report, the global DTC-GTC market value is expected to be valued more than one billion dollars by 2020.¹⁵ Ancestry.com started as Ancestry Publishing and has its roots in a genealogy magazine, but it was not until 2002 that Ancestry.com began providing DNA testing to consumers.¹⁶ By 2018, it had over 10 million DNA profiles in its database and, according to its website, became the largest in the world.¹⁷

23andMe was founded in 2006 and according to its website, has “over 5 million genotyped customers.”¹⁸ Ancestry.com’s focus is on the use of DNA for genealogical purposes. On the other hand, 23andMe not only does genealogical testing, but offers a wide variety of genetic testing for disease markers.¹⁹ 23andMe is the only DTC-GTC that has been approved by the FDA to do more advanced genetic testing for certain disease markers.²⁰

Increasingly, “Americans now turn to DTC-GT companies in an attempt to translate their genetic data into insights into their health, ancestry and family relationships, lifestyle, as well as an ever-growing number of additional areas.”²¹ The process is simple. A testing kit can usually be purchased online at either their site or at sites like Amazon.com.²² Testing prices vary, but the average test kit price for 23andMe, ranges from \$99.99-199.00 (depending on where the consumer purchases it and whether there are sales).²³ For example,

15. Lauren Friend, *Direct-to-Consumer Genetic Testing*, KPMG GLOBAL STRATEGY GROUP (Aug. 2018), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/08/direct-to-consumer-genetic-testing.pdf>; see generally KPMG (2019), <https://home.kpmg/xx/en/home.html> (last visited July 29, 2019) (Klynfeld, Peat, Markwick, Goerdeler or KPMG, is a global accounting firm and part of the “big five” of accounting firms).

16. *We Help Unlock New Understanding and Meaningful Connections*, ANCESTRY (2019), <https://www.ancestry.com/corporate/about-ancestry/our-story> (last visited July 29, 2019).

17. *Id.*

18. *23andMe Statistics, Facts & History*, REVIEW CHATTER (Nov. 13, 2018), <https://www.reviewchatter.com/statistics-facts-history/23andme>.

19. See Rebecca Armstrong, *Best DNA Testing Kit 2019: Unravel Your Ancestry*, TOP TEN REVIEWS (July 16, 2019), <https://www.toptenreviews.com/best-DNA-testing-kits>.

20. See *Lists of Direct-To-Consumer Tests with Marketing Authorization*, U.S. FOOD & DRUG ADMINISTRATION (Nov. 1, 2018), <https://www.fda.gov/medical-devices/vitro-diagnostics/direct-consumer-tests#list>.

21. James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL’Y 35, 37 (2018).

22. Zina Kumok, *What to Know Before You Buy a DNA Test*, MAGNIFY MONEY (Apr. 13, 2018), <https://www.magnifymoney.com/blog/news/DNA-tests-23andme-ancestryDNA-helix-1444682914/>.

23. See *Find Out What Your DNA Says About Your Health, Traits and Ancestry*, 23ANDME, https://www.23andme.com/DNA-health-ancestry/?utm_source=google&utm_medium=search_shopping&utm_campaign=US_evergreen_sales_prs_shopping_h+a&gclid=EA1aIQobChMI66n

23andMe ran a Father's Day special that provided ancestry testing for just \$50.²⁴ On average, however, it costs about \$99 to run a DNA sample and get simple ancestry information.²⁵ Other more in depth testing for genetic markers for certain diseases can run about \$199.²⁶

After purchasing the testing kit, it is mailed to the consumer, who then usually provides either a buccal swab or a saliva sample and returns the kit for testing.²⁷ The DTC-GTC will then post the results of the test online.²⁸

Ancestry.com and 23andMe.com run a heavy advertising rotation.²⁹ In 2016, it was reported that Ancestry.com spent \$109 million and 23andMe spent \$21 million in advertising.³⁰ 23andMe in particular has targeted younger audiences. In 2017, it ran an ad campaign in conjunction with the movie, *Despicable Me 3*, where the character Gru, does a 23andMe genetic test and ultimately finds out that he has a brother.³¹

In 2018, 23andMe also ran an aggressive marketing campaign and was the primary sponsor for the Billboard Music Awards.³² During

Ym8254wIVCdbACh0BMAkiEAQYAiABEGKoQ_D_BwE&gclid=aw.ds (last visited July 29, 2019) (sale price of \$199.00); 23andMe Personal Ancestry DNA Test Kit-Lab Fee Included, TARGET, <https://www.target.com/p/23andme-personal-ancestry-DNA-test-kit-lab-fee-included/-/A-53450926> (last visited July 29, 2019) (sale price of \$99.99).

24. Haley Henschel, *23andMe Father's Day Sale: Save \$50 on Amazon*, MASHABLE (June 12, 2019), <https://mashable.com/shopping/deal-june-12-23andme-health-and-ancestry-kits-on-sale-amazon/>.

25. Tina H. Saey, *What I Actually Learned About My Family After Trying 5 DNA Ancestry Tests*, SCIENCE NEWS (June 23, 2018), <https://www.sciencenews.org/article/family-DNA-ancestry-tests-review-comparison>.

26. Lydia Ramsey, *I Revisited My 23andMe Results That Can Now Tell Whether You May Have an Increased Risk of Cancer – Here's What it Was Like*, BUSINESS INSIDER (Nov. 23, 2018, 8:39 AM), <https://www.businessinsider.com/review-of-23andmes-new-genetic-health-risks-reports-2017-4>.

27. *Should You Get a Home Genetic Test?*, HARVARD HEALTH PUBLISHING (Feb. 2019), <https://www.health.harvard.edu/staying-healthy/should-you-get-a-home-genetic-test>.

28. James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL'Y 35, 38 (2018).

29. *See Ancestry TV Commercials*, ISPOT.TV (2019), <https://www.ispot.tv/brands/dhv/ancestry> (last visited July 29, 2019) (for how many Ancestry TV ad campaigns aired in the past 30 days); *see also 23andMe TV Commercials*, ISPOT.TV (2019), <https://www.ispot.tv/brands/Ias/23andme> (last visited July 29, 2019) (for how many 23andMe TV ad campaigns aired in the past 30 days).

30. Antonio Regalado, *2017 Was the Year Consumer DNA Testing Blew Up*, MIT TECH. REV. (Feb. 12, 2018), <https://www.technologyreview.com/s/610233/2017-was-the-year-consumer-DNA-testing-blew-up/>.

31. *See Ace Metrix, 23andMe- "Gru's 23andMe Genetic Journey"*, YOUTUBE (Dec. 8, 2017), <https://www.youtube.com/watch?v=OlaF-b5yQxs>.

32. Ne-Yo, FACEBOOK (May 20, 2018), <https://www.facebook.com/NEYO/videos/teamed-up-with-23andme-the-billboard-music-awards-this-year-awesome-to-share-wit/10156050679657012/>.

the holidays, these marketing campaigns offer even more discounted rates so more people will give the tests as gifts. As of January 2019, more than 26 million people had added their genetic profile to one of four (Ancestry.com, 23andMe, FamilyTreeDNA, MyHeritage) DTC-GTCs.³³ The rapid growth of the use of these DTC-GTCs is driven by the consumer's curiosity and self-empowerment.³⁴ "A sense of empowerment is a key driver of DTC-GT uptake – 80% of early adopters of DTC-GTC services report a sense of empowerment from their results, and claim 'curiosity' as a primary motivation. In response, 90% of DTC-GT companies use the emotional appeal of 'empowerment' in their marketing strategies."³⁵

Other companies, such as GEDmatch are free, but do not offer genetic testing.³⁶ Rather, once consumers get their DNA tested by companies such as Ancestry.com and 23andMe, they can upload their raw DNA data to GEDmatch and do genealogical comparisons.³⁷ GEDmatch users can then potentially connect with other users who may be related. The reverse is not true. A consumer cannot upload data from another source to Ancestry.com or 23andme.

Thus, it should come as no surprise that these large DTC-GTCs have assembled massive databases. Ancestry.com and 23andMe alone contain the genetic data of over five million and two million customers, respectively.³⁸ What that effectively means is that in the near future, if left unregulated, almost every person living in the U.S of European descent ultimately will be identified through the irrelatives using a DTC-GTC or a genealogical website like GEDmatch.³⁹ In

33. Antonio Regalado, *More Than 26 Million People Have Taken an at-Home Ancestry Test*, MIT TECH. REV. (Feb. 11, 2019), <https://www.technologyreview.com/s/612880/more-than-26-million-people-have-taken-an-at-home-ancestry-test/>.

34. Loredana Covolo et al., *Internet-Based Direct-to-Consumer Genetic Testing: A Systematic Review*, 17(12) J. MED. INTERNET RES. (Dec. 14, 2015), <https://www.jmir.org/2015/12/e279/>.

35. Lauren Friend, *Direct-to-Consumer Genetic Testing*, KPMG GLOBAL STRATEGY GROUP (Aug. 2018), <https://assets.kpmg/content/dam/kpmg/xx/pdf/2018/08/direct-to-consumer-genetic-testing.pdf>.

36. See Heather Murphy, *What You're Unwrapping When You Get a DNA Test for Christmas*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/2019/12/22/science/dna-testing-kit-present.html>.

37. *GEDmatch*, YOUR DNA GUIDE, <https://www.yourDNAguide.com/upload-to-gedmatch> (last visited July 29, 2019).

38. James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J.L. & PUB. POL'Y 35, 44 (2018).

39. *Within a Few Years, 90% of Americans of European Descent Will Be Identifiable from DNA Through Genealogy Sites*, KAISER HEALTH NEWS (Oct. 12, 2018), <https://khn.org/morning-breakout/within-a-few-years-90-of-americans-of-european-descent-will-be-identifiable-from-DNA-through-genealogy-sites/>.

2018, Yanic Erlich, former computational geneticist at Columbia University and the chief science officer of MyHeritage, another large DTC-GTC, conducted a research study using the MyHeritage database, which at the time contained 1.28 million DNA profiles, less than either Ancestry.com or 23andMe.⁴⁰ Erlich and his team concluded that if a person lives in the United States and is of European ancestry, there exists a 60% chance that a third cousin or closer relative has a genetic profile in the My Heritage database.⁴¹ Moreover, 40% of individuals having Sub-Saharan or African descent would have a third cousin or closer in the database.⁴² They did the same study using 30 random profiles using the GEDmatch database and their results were similar.⁴³ The geneticists concluded that in two or three years, 90 percent of Americans or European descent would be identifiable.⁴⁴

Considering the number of people that now have used one of these DTC-GTCs,⁴⁵ odds are that there will soon be enough information in one of these databases to basically identify virtually any person in the United States through a distant relative.

II. GENETIC PRIVACY: REGULATION AND MANAGEMENT

a. Self-Regulation by DTC-GTCs

Self-regulation is in the best interest of the DTC-GTCs for numerous reasons. The more these businesses can successfully self-regulate, the less governmental oversight they will require. Self-regulation also apparently is encouraged by the government. “[T]he White House, Congress, and the Federal Trade Commission (“FTC”) have encouraged private sector responses to privacy challenges in lieu of

40. Jocelyn Kaiser, *We Will Find You: DNA Search Used to Nab Golden State Killer Can Home in on About 60% of White Americans*, SCIENCE MAGAZINE (Oct. 11, 2018, 2:00 PM), <https://www.sciencemag.org/news/2018/10/we-will-find-you-DNA-search-used-nab-golden-state-killer-can-home-about-60-white>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Matthew Haag, *FamilyTreeDNA Admits to Sharing Genetic Data With F.B.I.*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/business/family-tree-DNA-fbi.html>; Company Facts, ANCESTRY, <https://www.ancestry.com/corporate/about-ancestry/company-facts> (last visited Aug. 29, 2019) (noting that Ancestry has tested the DNA of over fifteen million people). See also Antonio Regalado, *More Than 26 Million People Have Taken an at-Home Ancestry Test*, MIT TECHNOLOGY REV. (Feb. 11, 2019).

new regulation.”⁴⁶ Additionally, successful self-regulation with respect to privacy issues will gain them more consumer trust.⁴⁷

On July 31, 2018, the Future of Privacy Forum published the Privacy Best Practices for Consumer Genetic Testing Services.⁴⁸ In all, a group of DTC-GTCs (23andMe Inc., Ancestry, Helix, MyHeritage, and Habit) were involved publishing the Best Practices.⁴⁹ “[T]hese Best Practices include: (1) Transparency; (2) Consent; (3) Use and Onward Transfer; (4) Access, Integrity, Retention, and Deletion; (5) Accountability; (6) Security; (7) Privacy By Design; and (8) Consumer Education.”⁵⁰

The Best Practices recognize “that Genetic Data is sensitive information that warrants a high standard of privacy protection because of the following reasons: It may be used to identify predispositions, disease risk, and predict future medical conditions[;] It may reveal information about the individual’s family members, including future children[;] It may contain unexpected information or information of which the full impact may not be understood at the time of collection[; and] It may have cultural significance for groups or individuals.”⁵¹ In addition, the Best Practices sets forth guidelines for dealing with law enforcement requests and states: “Genetic Data may be disclosed to law enforcement entities without Consumer consent when required by valid legal process.”⁵²

46. Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users’ Understanding*, 30 BERKELEY TECH. L.J. 39, 43 (2015), <https://lawcat.berkeley.edu/record/1126239?In=en>.

47. As will be discussed in Section III b. *infra*, HIPAA and GINA already impact some of the services offered by DTC-GTCs and the FDA regulates what tests can be sold to consumers. Barbara J. Evans, *HIPAA’s Individual Right of Access to Genomic Data: Reconciling Safety and Civil Rights*, 102 AM. J. HUM. GENETICS 5, 5–7 (Jan. 4, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5777935/pdf/main.pdf>.

48. *Privacy Best Practices for Consumer Genetic Testing Services*, FUTURE OF PRIVACY FORUM (July 31, 2018), <https://fpf.org/wp-content/uploads/2018/07/Privacy-Best-Practices-for-Consumer-Genetic-Testing-Services-FINAL.pdf>; see *Supporters*, FUTURE OF PRIVACY FORUM, <https://fpf.org/about/supporters/> (last visited July 29, 2019) (Ancestry, 23andMe, and Helix, are listed as corporate supporters of the Future of Privacy Forum. There are many other major companies and law firms listed as well, including Amazon, Apple, Verizon, Uber, Google, Citigroup, Ropes and Gray and Covington and Burling, to name a few).

49. Carson Martinez, *Privacy Best Practices for Consumer Genetic Testing Services*, FUTURE OF PRIVACY FORUM (July 31, 2018), https://fpf.org/2018/07/31/privacy-best-practices-for-consumer-genetic-testing-services/?source=post_elevate_sequence_page.

50. *Privacy Best Practices for Consumer Genetic Testing Services*, FUTURE OF PRIVACY FORUM (July 31, 2018), <https://fpf.org/wp-content/uploads/2018/07/Privacy-Best-Practices-for-Consumer-Genetic-Testing-Services-FINAL.pdf>.

51. *Id.*

52. *Id.*

Despite these articulated best practices, allowing DTC-GTCs to self-regulate simply may not be in the best interest of the consumer. Self-regulation certainly does not guarantee any consumer privacy. That became quite evident when FamilyTreeDNA entered into an agreement with the FBI to allow the government agency to test DNA samples in their database to obtain familial matches.⁵³ Even worse, by the time the company made the announcement, FamilyTreeDNA already had been sharing this information without prior notice to its customers.⁵⁴ Ironically, FamilyTreeDNA was an original signatory to the Privacy Best Practices for Consumer Genetic Testing Services, but after its announcement, was removed as a supporter.⁵⁵ It was the first time a DTC-GTC had voluntarily given “routine access to customer’s data.”⁵⁶ According to an op-ed piece published on The Future of Privacy Forum, “unfettered law enforcement access to genetic information on commercial services presents substantial privacy risks.”⁵⁷

FamilyTreeDNA’s agreement is out of step with consumer expectations. Leading genetic testing companies understand that when users send in their DNA to learn more about their health or heritage, they do not expect their genetic data to become part of an FBI genetic lineup. FamilyTreeDNA users have not received a meaningful notice or opportunity to opt-in or opt-out of these searches. If this agreement remains in place and valid legal process is not obtained before access to genetic data is provided to the FBI, individuals may be erroneously swept up in investigations simply because their DNA was found near a crime scene or at a location where a victim or suspect lived or worked. Genetic profiles turned over to the FBI may also be covertly reused by the FBI on other commercial sites.⁵⁸

This situation highlights the very reason why self-regulation alone, unfortunately, is not the solution. The reality is that there is

53. Kristen V. Brown & Bloomberg, *A Major DNA-Testing Company Is Sharing Some of Its Data With the FBI. Here’s Where it Draws the Line*, FORTUNE (Feb. 1, 2019), <https://fortune.com/2019/02/01/genetic-testing-consumer-DNA-familytreeDNA-fbi/>.

54. Matthew Haag, *FamilyTreeDNA Admits to Sharing Genetic Data With F.B.I.*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/business/family-tree-DNA-fbi.html>; John Verdi & Carson Martinez, *FamilyTreeDNA Agreement with FBI Creates Privacy Risks*, FUTURE OF PRIVACY FORUM (Feb. 6, 2019), <https://fpf.org/2019/02/06/familytreeDNA-agreement-with-fbi-creates-privacy-risks/>.

55. John Verdi & Carson Martinez, *FamilyTreeDNA Agreement with FBI Creates Privacy Risks*, FUTURE OF PRIVACY FORUM (Feb. 6, 2019), <https://fpf.org/2019/02/06/familytreeDNA-agreement-with-fbi-creates-privacy-risks/>.

56. *Id.*

57. *Id.*

58. *Id.*

nothing to prevent a DTC-GTC or a genealogy research cite from doing the exact same thing that FamilyTreeDNA did with its database. The current Privacy Best Practices also provides absolutely no real consumer protection from other companies that may obtain this information by, for example, a direct purchase of the DTC-GTC or a fourth party that is assisting in a law enforcement investigation. In 2018, pharmaceutical giant GlaxoSmithKline purchased a 300-million-dollar equity stake in 23andMe.⁵⁹

Had they purchased 23andMe rather than just a share, there would be nothing binding them to adhere to the Privacy Best Practices as they relate to law enforcement uses. Disclosures by a pharmaceutical company like Glaxo would perhaps be under heavier scrutiny because of laws like GINA and HIPAA, but the same is not true for a non-pharmaceutical entity either in the United States or elsewhere. In addition, even though the European Union, through the General Data Protection Regulation (“the GDPR”) has taken steps to protect the privacy of its citizens, the same is not true of companies in other countries where individual privacy is not paramount. Thus, while there surely may exist incentives for DTC-GTCs to protect the privacy of their consumers, other more compelling considerations, financial or otherwise, may prevail while a consumer’s privacy takes a back seat.

b. Existing Governmental Regulations

Genetic privacy does have protection in certain situations related to the healthcare and insurance industries. There are three main areas that current laws, both state and federal, protect: (1) discrimination; (2) data security; and (3) regulation of genetic testing.⁶⁰ GINA and its state counterparts, protect individuals from discrimination by employers and insurance companies.⁶¹ HIPAA protects genetic information in research and clinical settings, but it focuses on data security.⁶²

59. Jamie Ducharme, *A Major Drug Company Now Has Access to 23andMe’s Genetic Data. Should You Be Concerned?*, TIME (July 26, 2018), <https://time.com/5349896/23andme-glaxo-smith-kline/>.

60. Rhys Dipshan, *Giving Away Your Genes: US Laws’ Blind Spot With DNA Data*, LAW.COM (Aug. 2, 2018), <https://advance.lexis.com/search?crd=C6873221-0efe-4b44-90fb-a0ccf1997e26&pdsearchterms=LNSDUID-ALM-AMLAWR-gmk45edgdi&pdbypasscitatordocs=False&pdmfid=1000516&pdisurlapi=true>.

61. *Id.*

62. James W. Hazel & Christopher Slobogin, *Who Knows What, and When?: A Survey of the Privacy Policies Proffered by U.S. Direct-to-Consumer Genetic Testing Companies*, 28 CORNELL J. L. & PUB. POL’Y 35, 40 (2018); Dipshan, *supra* note 60.

HIPAA, however, only applies to certain entities and DTC-GTCs do not usually qualify.⁶³ If DTC-GTCs do not qualify, research sites like GEDmatch certainly do not either. The third and last category, regulations of genetic testing, are usually found in state laws.⁶⁴ Like GINA and HIPAA, these are laws that mostly govern in cases of insurance, employment and health care organizations.⁶⁵ For example, genetic testing laws in Alaska, Arizona, California, Delaware, Georgia, Iowa, Illinois, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma and Rhode Island and South Carolina require a person's consent before their genetic data is disclosed.⁶⁶

From the consumer protection perspective the Federal Trade Commission ("FTC") has the authority to investigate and prosecute DTC-GTCs for deceptive or unfair privacy policies or terms of use.⁶⁷ That being said, any deceptive or unfair privacy practices or terms of use have not been effectively used to protect users from law enforcement searches. When it comes to consumers using DTC-GTCs, none of these laws have provided protection to the innocent consumer from law enforcement's use of their genetic data to conduct familial DNA testing, particularly for those who purely are using the DTC-GTCs for ancestry purposes. Thus, there is no comprehensive regulation that protects the general privacy rights of consumers who use DTC-GTC or genetic ancestry research websites.⁶⁸

c. Self-Management: A Heavy Burden Is On The Consumer

One of the arguments that can be made against exercising any sort of government control over privacy is the notion of "self-management." Self-management is defined as the privacy management of data by individuals and places the burden of navigating the complex world of online disclosure and consent squarely on the consumer.⁶⁹ Indeed it might be preferable to have individuals effectively self-man-

63. Hazel & Slobogin, *supra* note 62, at 40.

64. Dipshan, *supra* note 60.

65. *Id.*

66. *Id.*

67. *Id.*; see Hazel & Slobogin, *supra* note 62 at 41 ("The FDA has relatively broad authority to regulate DTC-GTCs but has thus far exercised "enforcement discretion," limiting its regulation to companies offering certain "health-related" genetic tests").

68. *Id.* at 40-41.

69. See Tuukka Lehtiniemi & Yki Kortensniemi, *Can the Obstacles to Privacy Self-Management be Overcome? Exploring the Consent Intermediary Approach*, *BIG DATA & SOC'Y* 1, 2 (July 2017), <https://journals.sagepub.com/doi/pdf/10.1177/2053951717721935>.

age their data. As with other areas of the law, over-regulation is not always the best way to solve a problem. There also are individuals who do not want the government trumping their ability to choose or decide issues that they may view as private. Still, in the world of on-line notices, consent and waivers, itself complex enough, the failure to understand the genetic privacy rights they are giving away may cause damage beyond what is superficially apparent.

The concept of self-management of data is not a new one. In an article entitled, “Privacy Self-Management and the Consent Dilemma,” Daniel Solove discusses the origins of the term “self-management” as it relates to data privacy.⁷⁰ Solove addresses the issue of “paternalistic” law making to protect privacy versus the more hands off “libertarian” view and comes to the conclusion that a solution to the self-management dilemma should be a combination of the two.⁷¹ That article, however, did not specifically address genetic privacy.⁷²

While the privacy of all data is important, one’s genetic data derived from testing merit additional protections that self-regulation using a hands-off approach simply may not be able to address. Moreover, the privacy of one’s own genetic information is not the only privacy concern at stake. The privacy concern also belongs to the family members of that individual.

Given the muddy and sometimes convoluted notice provided to consumers on DTC-GTC websites, individuals may not consider the possibility that their genetic data may be used by law enforcement, could be sold to another company, or that a DTC-GTC could go bankrupt and have its assets and information sold, or that the company itself might change its rules and decide to sell the information they told the consumer it would not sell. Additionally, no one can predict what will happen in the future when it comes to scientific and technological breakthroughs and what scientists will be able to do or discover using someone’s genetic code.

Can that information one day be used against you by a future employer? By a future insurer? By a genetics company? By a law enforcement agency?⁷³ Compounding this issue is the concern that,

70. See Daniel J. Solove, *Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880, 1882 (2013), <https://pdfs.semanticscholar.org/809c/bef85855e4c5333af40740fe532ac4b496d2.pdf>.

71. *Id.* at 1901.

72. See *id.* at 1883.

73. See *GEDmatch.Com Terms of Service and Privacy Policy*, GEDMATCH (Dec. 9, 2019), <https://www.gedmatch.com/tos.htm> (“We cannot predict what the future holds for DNA or gene-

“[f]or their part, direct-to-consumer testing companies have been less than forthright about these dangers, usually burying privacy disclaimers deep in their contracts and refusing to disclose how long they keep customer data or how it can be used.”⁷⁴ Research published by *Nature* found that DTC-GTCs “frequently fail to meet even basic international transparency standards.”⁷⁵ Yet, consumers still are expected to “manage their privacy by weighing the subjective costs and benefits of data collection. In practice, however, many are neither well informed on the issues of their personal data or feel in control of it.” Additionally, “[p]rivacy self-management has to take into account the highly divergent preferences people have on the desirable position along the secrecy-transparency spectrum.”⁷⁶ There are “privacy *fundamentalists*, who have high privacy concerns, *pragmatists*, who have some concerns but favour individual choice, and the *unconcerned*, who have low concerns and tend to trust data collectors.”⁷⁷ Additionally, a consumer’s privacy is not static, and privacy decisions are dependent on context.⁷⁸

In order to use a DTC-GTC, consumers make the privacy decision at the start of the process when they decide that they want to use the DTC-GTC, and this is when they are preliminarily expected to assess the “future harms and benefits.”⁷⁹ The focus is on the immediate benefit of obtaining the testing.⁸⁰ Thus, “while immediate harms may be insignificant, long-term harms can develop gradually over time. Having to make the decision before the outcomes arise is arguably a feature of most human decision-making. However, with personal data, the timing poses particular difficulties due to the inherent dynamics arising from the data analysis technologies. As harms and benefits may arise by mechanisms which are not discernable, or do not yet even exist, the consequences of a disclosure are a moving target. Yet a consent, once given, is typically in effect indefinitely.”⁸¹ Addi-

alogy research. We cannot predict what the future will be for GEDmatch. It is possible that, in the future, GEDmatch will merge with, or operations will be transferred to other individuals or entities.”).

74. Peter Pitts, *The Privacy Delusions of Genetic Testing*, FORBES (Feb. 15, 2017, 1:26 PM), <https://www.forbes.com/sites/realspin/2017/02/15/the-privacy-delusions-of-genetic-testing/#3277de641bba>.

75. Lehtiniemi & Kortensniemi, *supra* note 69, at 2.

76. *Id.*

77. *Id.*

78. *Id.*

79. See Solove, *supra* note 70, at 1890.

80. *Id.* at 1891

81. See Lehtiniemi & Kortensniemi, *supra* note 69, at 3.

tionally, research shows that there exist cognitive problems that hinder a person's ability to make informed choices about their data.⁸² According to Solove, "people's actual ability to make such informed and rational decisions does not even come close to the vision contemplated by privacy self-management."⁸³

One of the issues relates to the fact that consumers are not well-informed with the current click-wrap, "notice and choice" model that almost all online companies use. DTC-GTCs, much like every other internet company, uses the "notice and choice" model for disclosures.⁸⁴ According to the Notice and Choice Framework, notice must be provided so that the consumer can make a "Choice." The word "Choice" translates to the consumer consenting to whatever has been set forth in the Notice. "[A]t its simplest, choice means giving consumers options as to how any personal information collected from them may be used. Specifically, choice relates to secondary uses of information—i.e., uses beyond those necessary to complete the contemplated transaction."⁸⁵

There does not appear to be much difference between the Notice and Choice Framework used by DTC-GTCs and the Notice and Choice Framework used by other online providers of services. While the method is the same, the information it pertains to is not. The privacy of information such as date of birth, address, or gender, for example, cannot be compared to genetic information. Nonetheless, whether it is the purchase of software or providing DNA for a genetic test, the burden rests with the consumer either to accept the terms and notices, to walk away from the purchase or not use the service, or to purchase the item.⁸⁶ Thus, at the moment when consumers have psychologically committed to the purchase, they must either click through very lengthy notices or simply hit "I accept."⁸⁷ If the consumer does not accept all the terms and conditions, the consumer will not be able to complete the purchase of the test kit.

82. See Solove, *supra* note 70, at 1883.

83. *Id.*

84. See Reidenberg et al., *supra* note 46, at 43.

85. *Id.* at 44.

86. See Solove, *supra* note 70, at 1884.

87. It is no wonder that in one 2015 European poll, 18% of respondents said they read privacy policies fully and 49% only partially read them. https://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_431_sum_en.pdf.

d. Consent

The biggest privacy issue with the self-management of DTC-GTCs is therefore that of consent. The notion is that by agreeing to the terms and conditions of the DTC-GTCs, the consumers have provided consent, which may waive a variety of rights they may have had regarding the privacy of their genetic data. The problem with consent given in the typical click-wrap form is that genetic testing is not like other consumer products. If, for example, a consumer wants to add specialized testing, which is provided by 23andMe to test for Parkinson's, Alzheimer's, or BRCA1 and/or BRCA2, they must agree to *all* the terms at the commencement of the process or forego testing on that site. If someone else would like to use, for example, Ancestry.com to track down a long-lost relative, they too must do the same. That includes the acknowledgment that the police can access their genetic information.

Moreover, the problem is not just that consent is buried in the full panoply of disclosures. There is no consistency in how one consents to particular situations. For example, in the case of notice that law enforcement may have access to a consumer's genetic information, FamilyTreeDNA users are automatically opted in to allow law enforcement to see their profile.⁸⁸ Should they wish to not expose themselves to a law enforcement search, they would have to know to go to settings and opt out.⁸⁹ On the other hand, in May 2019, GEDmatch changed its policy, which was the same as FamilyTreeDNA's, and currently consumers must opt in to allow law enforcement to use their genetic profile.⁹⁰

In the European Union, the GDPR has provided rules regarding valid consent. Article 7 states:

“1. Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.

2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable

88. *Law Enforcement Matching – Frequently Asked Questions*, FAMILY TREE DNA, <https://www.familytreeDNA.com/learn/ftDNA/law-enforcement-faq/> (last visited Aug. 3, 2019).

89. *Id.*

90. Amy Docker Marcus, *Customers Handed Over Their DNA. The Company Let the FBI Take a Look*, WALL ST. J., Aug. 22, 2019, available at <https://www.wsj.com/articles/customers-handed-over-their-dna-the-company-let-the-fbi-take-a-look-11566491162>.

ble from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.

4. When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.”⁹¹

The GDPR does not directly address the law enforcement notice issues, but it does give guidance on how better to provide notice and obtain consent from DTC-GTC consumers. Its requirement in section 2 that consent must be clearly distinguishable when it pertains to different matters is a step in the right direction for making consent issues clearer to the consumer. For example, it also provides for a right to withdraw consent. Finally, section 4 addresses the problem of making services conditional on consent, something that occurs in DTC-GTCs, thereby calling into question the validity of the consent. Nonetheless, the GDPR still puts most of the burden on the consumer and does not address the impact to family members of the consumer.⁹²

On the state level, some legislators also have begun to tackle the confusing consent notices used by DTC-GTCs. In early 2020, several representatives in the state of Washington introduced a bill that contains, *inter alia*, the following language:

Sec. 2. (1) To safeguard the privacy, confidentiality, security, and integrity of a consumer’s genetic data, a direct-to-consumer genetic testing company shall: (a) Provide clear and complete information regarding the company’s policies and procedures for collection, use, or disclosure of genetic data by making available to a consumer: (i) *A high-level privacy policy overview* that includes basic, essential information about the company’s collection, use, or disclosure of genetic data; and (ii) *A prominent, publicly available, and easy to*

91. *Art. 7 GDPR Conditions for Consent*, INTERSOFT CONSULTING, <https://gdpr-info.eu/art-7-gdpr/> (last visited Aug. 3, 2019) (emphasis added).

92. Mark MacCarthy, *It’s Time for a Uniform National Privacy Law*, CIO (Aug. 23, 2018, 11:49 AM), <https://www.cio.com/article/3300106/it-s-time-for-a-uniform-national-privacy-law.html>.

read privacy notice that includes, at a minimum, information about the company's data collection, consent, use, access, disclosure, transfer, security, and retention and deletion practices; (emphasis added)⁹³

Should this become law, it certainly would be a step in the right direction, but without more states following suit, there is little protection for the millions of other users.

e. Anonymity, Deidentification and Privacy

Contrary to what consumers may think, using DTC-GTC companies does not ensure anonymity. According to a 23andMe cofounder, Linda Avey, "it's a fallacy to think that genomic data can be fully anonymized."⁹⁴

Even though DTC-GTCs say that they maintain anonymity of individuals and that they scrub the data so that it is "deidentified," the fact is that even the Privacy Guidelines themselves state that the deidentified information of individuals does not "strongly protect" them from reidentification: "Deidentification and Genetic Data: Deidentified information is not subject to the restrictions in this policy, provided that the deidentification measures taken establish strong assurance that the data is not identifiable. "We note that currently, *Genetic Data held at the individual-level that has been de-identified cannot be represented as strongly protecting individuals from re-identification, based upon existing deidentification tools and standards.* Such data may be protected in other ways and used for research with appropriate consent and security controls"⁹⁵

Even if consumers do take the time to delve a little deeper into the methods used for de-identification or what that actually means for privacy, doing so would unlikely clarify the situation for them. In a footnote, the Privacy Guidelines cite the U.S. Department of Health & Human Services Guidance on Methods of Deidentification for HIPAA, which provides a rather complex set of procedures for any person to completely understand.⁹⁶ Thus, assuming that a consumer

93. 2020 Wash. Sess. Laws HB 2485.

94. See Pitts, *supra* note 74.

95. See Future Of Privacy Forum, *supra* note 48, at 5 (emphasis added).

96. *Id.* at n. 18; see *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, <https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/index.html> (last visited Aug. 3, 2019) (presenting guidance for the HIPAA Safe Harbor Method).

has even gone this far, without a genetics background, the U.S. Department of Health & Human Services Guidance is unlikely to shed any light on the issue. Providing the consumer with information about their efforts to maintain anonymity, if anything, gives consumers a false sense of security. Other sections of the notices in some DTC-GTCs support that idea.

For example, Paragraph 6 of 23andMe's Privacy Policy, entitled Security Measures, states: De-identification/Pseudonymization. Registration Information is stripped from Sensitive Information, including Genetic and Self-Reported Information. This data is then assigned a randomly generated ID so an individual cannot reasonably be identified.⁹⁷

However, what is readily apparent is that law enforcement can and does get information that can be reidentified by someone, either within the DTC-GTCs or by some other party. For example, 23andMe's Privacy Statement states:

As required by law: Under certain circumstances your Personal Information may be subject to processing pursuant to laws, regulations, judicial or other government subpoenas, warrants, or orders. For example, we may be required to disclose Personal Information in coordination with regulatory authorities in response to lawful requests by public authorities, including to meet national security or law enforcement requirements. *23andMe will preserve and disclose any and all information to law enforcement agencies or others if required to do so by law or in the good faith belief that such preservation or disclosure is reasonably necessary to: (a) comply with legal or regulatory process (such as a judicial proceeding, court order, or government inquiry) or obligations that 23andMe may owe pursuant to ethical and other professional rules, laws, and regulations; (b) enforce the 23andMe Terms of Service and other policies; (c) respond to claims that any content violates the rights of third parties; or (d) protect the rights, property, or personal safety of 23andMe, its employees, its users, its clients, and the public. View our Transparency Report for more information.*⁹⁸

Much like the other large DTC-GTCs, 23andMe's Privacy Policy makes clear that 23andMe will abide by a subpoena, warrant, judicial proceeding, court order, or government inquiry and turn over information about the consumer if required to do so by law.

97. *Privacy Highlights*, 23ANDME (July 17, 2018), <https://www.23andme.com/about/privacy/> (last visited September 9, 2019).

98. *Id.*

It also goes on to say, somewhat vaguely, that it will also turn the consumer's information over due to "obligations that 23andMe may owe pursuant to ethical and other professional rules, laws, and regulations."⁹⁹ It is unclear how broadly this part of the policy is applied by the DTC-GTC or what exact information they will provide.

Thus, de-identification of data does not mean that consumers have true anonymity when the data can be re-identified. Recent high publicity criminal cases prove that anonymity is not even a bump in the road when the police use third party familial DNA testing to find a suspect. The samples and results can be re-identified quite easily. More worrisome is the fact that with open source sites like GEDmatch they are an ". . . open source trove of potential leads, which, unlike forensic databases, contains genetic bits of code that can be tied to health data and other personally identifiable information."¹⁰⁰

Additionally, GEDmatch's Terms of Service and Privacy Policy states, "GEDmatch exists to provide DNA and genealogy tools for comparison and research purposes. It is supported entirely by users, volunteers, and researchers. DNA and Genealogical research, by its very nature, requires the sharing of information. Because of that, users participating in this Site agree that their information will be shared with other users."¹⁰¹

Of course, it is fair to assume that to the average reader using this site, the other users are people like them, who are attempting to conduct DNA or genealogical research. It also is not clear what information is being shared.

Moreover, a consumer can upload not only their own raw DNA data, but they can upload the DNA of a person for whom they serve as guardian, the DNA of a person who has given the user authority to upload their data to GEDmatch, the DNA of a deceased person, [and] DNA that is "obtained and authorized by law enforcement to identify a perpetrator of a violent crime against another individual, where 'violent crime is defined as murder, nonnegligent manslaughter, aggravated rape, robbery, or aggravated assault."¹⁰² Interestingly, by their

99. *Id.*

100. Megan Molteni, *The Future of Crime-Fighting is Family Tree Forensics*, WIRED (Dec. 26, 2018, 8:00 AM), <https://www.wired.com/story/the-future-of-crime-fighting-is-family-tree-forensics/>.

101. See GEDmatch, *supra* note 73.

102. *Id.*

own definition, DNA from a “non-aggravated” rape case would not be authorized as raw data that can be submitted. How GEDmatch defines an aggravated rape is not stated.¹⁰³

Their sentence construction also makes it appear that a robbery need not be “aggravated.”¹⁰⁴ Perhaps it is using definitions from the company’s state of incorporation or location, but given that it presumably works with law enforcement from around the country, such vague word usage merely adds to consumer confusion.

III. LAW ENFORCEMENT USE OF GENETIC DATA AND THE FOURTH AMENDMENT

a. Putting Away the “Bad Guys”

At the beginning of any genetic privacy discussion in the DTC-GTC and genealogical research arenas, it bears mentioning that there may be multiple stakeholders of that right. Among them are: (1) the consumer; (2) all of the members of the consumer’s immediate and extended family, alive or not yet born who share the consumer’s DNA profile (including the target of a law enforcement who may ultimately be charged with a crime); (3) the DTC-GTC company itself that may claim ownership rights as a result of their agreement with the consumer; (4) and any other company who may claim ownership rights, for example, via a purchase of any or all of the Data the DTC-GTC has.

At the heart of this discussion, however, is the original consumer and, for purposes of this article, the focus largely remains there. As in so many situations in which an individual’s privacy right has been balanced against a concern for “safety,” privacy rights sometimes have been ceded for the “greater good.” In the world of criminal justice, unfortunately, it sometimes seems no price is too high for some as long as we “put away the bad guys,” especially when the “bad guy” is someone who has committed numerous, heinous crimes like the Golden State Killer.

Those arguments might work better with something less intrusive, like fingerprints, but not one’s genetic code. DNA is different. The genome that makes an individual unique and carries with it such private information is not like a fingerprint. As Supreme Court Justice Antonin Scalia astutely noted in *Arizona v. Hicks*, “there is nothing

103. See GEDmatch, *supra* note 73.

104. *Id.*

new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”¹⁰⁵

Of course, the compelling “greater good” arguments are not just restricted to “putting bad guys away.” Some might argue that a future where everyone’s genetic profile is in a centralized database would be safer for society. Others may argue that having everyone’s DNA in one database would be more racially diverse than the existing CODIS database is.¹⁰⁶ Or, for example, when balancing privacy with the “greater good” of finding a cure for Alzheimer’s, Parkinson’s, or cancer, some would argue that individual genetic privacy should cede to medical advancements or cures for these diseases, and that genetic codes, even in DTC-GTC databases, should be used in that research.¹⁰⁷

The arguments are no doubt compelling, but they do not overcome the magnitude of the societal invasion of privacy. No one can argue that catching criminals, especially those who have committed the most heinous of crimes, is not a valid interest. Moreover, no one would argue against finding a cure for deadly diseases. And indeed, a universal database may make society safer and it may be less racially biased than the CODIS database. However, a universal database would require the permanent relinquishment of every single person’s most private information.

b. Law Enforcement’s Use of DTC-GTCs

The serious nature of the relinquishment of genetic privacy cannot be overstated or, for that matter, easily understood by non-geneticists. Moreover, those genetic data privacy rights are that of not only the consumer, but the consumer’s entire family. What is particularly concerning about genetic privacy is what we do not know about DNA and its future uses. The average person who has used these DTC-GTCs or genealogy websites most likely is not an expert on genetics. Even non-geneticists who happen to know a bit more about genetics than the average person cannot predict what the magnitude of their privacy violation may be in an evolving genetics world. Its potential uses, both for good and bad, and the permanent privacy concerns

105. *Arizona v. Hicks*, 107 S. Ct. 1149, 1155 (1987).

106. Kirsten Dedrickson, *Universal DNA Databases: A Way to Improve Privacy?*, 4 *J.L. & BIOSCIENCES* 637, 647 (2018).

107. This genetic data used in research may have more protections under GINA and HIPAA than other types of genetic data.

DNA and its data have are not easily graspable. The only certain thing we do know about DNA and genetic data is that we cannot comprehend or predict what advances in DNA we will be able to accomplish in the future. Thus, it makes sense that the average consumer may not have immediate concerns about something they cannot even fathom may occur. Herein lies the problem: consumers cannot fear what they cannot even foresee to be a danger or a threat.¹⁰⁸

Familial DNA testing through DTC-GTCs is being used more and more by law enforcement, although it is unclear how many times they have done so.¹⁰⁹ Familial DNA testing is when a genetic profile is created from the DNA sample from a crime scene and then run through a database to determine whether another genetic profile or profiles in that database are similar to it. That match will then provide an investigative lead into determining who might be a relative of the potential suspect.

According to its Transparency Report, current as of February 14, 2020 23andMe has had 7 law enforcement requests for the data of 10 users and has not provided any data without the “prior explicit consent of the users.”¹¹⁰ Ancestry.com’s 2019 Transparency Report states that in 2019 it received nine “valid” law enforcement requests for information and it provided information in six out of the nine.¹¹¹ Eight of the nine were requests for investigations for credit card misuse, fraud, and identity theft.¹¹² However, one request was for access to Ancestry’s DNA database pursuant to a warrant. According to its Transparency report, Ancestry challenged the validity of that request on “jurisdictional grounds” and did not provide any information to the police.¹¹³ In 2018 Ancestry.com received 10 requests, complied

108. During the writing of this article, I had more than a dozen informal conversations with friends, family and acquaintances curious about the topic of my article. Interestingly, nearly all of them had done some sort of DTC-GTC testing or were thinking about doing it. When I asked about whether they had concerns about privacy, each of them gave me similar responses. They all told me it was anonymous so they were not worried. None of them had read the entire notice and consent sections of the websites. One person told me she had nothing to hide. However, when asked about whether they had not given any thought to the potential future uses of their (and their family members’ DNA) by some unknown third party, they had not.

109. Some DTC-GTCs publish transparency reports, but not all do. This is an entirely self-regulated reporting decision by a DTC-GTC. Additionally, it is unknown how many times, for example, a law enforcement agency has used a service like GEDmatch surreptitiously.

110. See *Transparency Report*, 23ANDME, <https://www.23andme.com/transparency-report/> (last visited February 24, 2020).

111. *Id.*

112. *Ancestry 2019 Transparency Report*, ANCESTRY, <https://www.ancestry.com/cs/transparency> (Aug. 3, 2019).

113. *Id.*

with 7, and that all the requests were for investigations for credit card misuse, fraud, and identity theft.¹¹⁴ It also states that it received no “valid” requests for genetic information and did not provide any genetic information to law enforcement in 2018.¹¹⁵

After much searching on FamilyTreeDNA’s website for a Transparency Report, this statement was found in the seventh and final section of the FamilyTreeDNA Law Enforcement Guide: “FamilyTreeDNA is working on publishing an updated Transparency Report that contains details on all law enforcement requests for user information that we receive. This report will also be updated to include the number of forensic samples and files we have received.”¹¹⁶ It also states, “Unless we are legally barred from doing so, our policy for any request of additional user information is to notify users of the request and supply a copy of the request prior to disclosure. In the U.S., law enforcement officials may prohibit this disclosure by submitting a court order pursuant to 18 U.S.C. § 2705(b) or state statute signed by a judge. We will assess requests not to notify users from law enforcement outside the U.S. under applicable law. For all requests, we may also elect, in our sole discretion, not to notify the user if doing so would be considered counterproductive and if we are not legally permitted to do so.”¹¹⁷

GEDmatch has publicly stated that approximately 50 law enforcement agencies or their representatives have submitted samples to GEDmatch and that approximately 150 cases have been submitted.¹¹⁸ Another genetics laboratory that routinely works with law enforcement, Parabon Nanolabs, has stated that its work has yielded almost 36 arrests.¹¹⁹ Whether or not there is overlap between these figures is unclear. The methodology used by law enforcement to generate leads through familial DNA testing and the creation of a genetic tree of suspects can vary. In some instances, investigators take DNA from a crime scene and send it to a genetic laboratory, like Parabon Nano-

114. *Id.*

115. *Id.*

116. *FamilyTreeDNA Law Enforcement Guide*, FAMILYTREE DNA, <https://www.familytreeDNA.com/legal/law-enforcement-guide> (last visited Aug. 3, 2019).

117. *Id.*

118. Amy Docker Marcus, *The FBI Came Calling. The DNA Firm Answered.*, WALL ST. J., Aug. 22, 2019.

119. Madison Pauly, *Police Are Increasingly Taking Advantage of Home DNA Tests. There Aren’t Any Regulations to Stop It*, MOTHER JONES (Mar. 12, 2019), <https://www.motherjones.com/crime-justice/2019/03/genetic-genealogy-law-enforcement-golden-state-killer-cece-moore/>.

labs. They then create a DNA profile that is like one a consumer would get from a DTC-GTC like 23andMe or Ancestry. That profile can be uploaded to GEDmatch to see if there are matches.

There can be more than one match of relatives to the 9th degree.¹²⁰ Another example of how law enforcement can build a genetic family tree of suspects is illustrated by their collaboration with FamilyTreeDNA. In 2018, FamilyTreeDNA made headlines when it shared its DNA database with federal investigators without having notified its users.¹²¹ Apparently, FamilyTreeDNA had allowed the FBI to search its database of consumer genetic profiles to solve cold murder and rape cases.¹²² The arrangement between FamilyTreeDNA appears to have been the first DTC-GTC to provide information knowingly to the government without a subpoena or warrant.¹²³ When it finally did notify its customers, it informed them that the FBI would be able to access their database like any other user would.¹²⁴ However, the arrangement between the FBI and FamilyTreeDNA goes further than allowing the FBI full access to its database. Pursuant to the agreement, FamilyTreeDNA's genetic testing laboratory also creates data profiles from the FBI's DNA samples, which will then allow the FBI to use them to search other genealogy websites.¹²⁵ "The method is being used more and more by police departments around the country. In the process, they have called upon geneticists to assist them in creating forensic family trees in order to solve cases."¹²⁶

Familial DNA testing is prohibited by the FBI and the Agency cannot run those searches through the Combined DNA Index System ("CODIS") or the National Combined DNA Index System ("NDIS"), which is part of CODIS, although familial DNA testing is allowed in certain states.¹²⁷ In Arkansas, California, Colorado, Florida, Michi-

120. See Megan Molteni, *The Future of Crime-Fighting is Family Tree Forensics*, WIRED (Dec. 26, 2018, 8:00 AM), <https://www.wired.com/story/the-future-of-crime-fighting-is-family-tree-forensics/>.

121. Matthew Haag, *FamilyTreeDNA Admits to Sharing Genetic Data with F.B.I.*, N.Y. TIMES (Feb. 4, 2019), <https://www.nytimes.com/2019/02/04/business/family-tree-DNA-fbi.html>.

122. *Id.*

123. *Id.*

124. Press Release: Connecting Families and Saving Lives, FAMILYTREEDNA (Feb. 1, 2019), <https://blog.familytreeDNA.com/press-release-connecting-families-and-saving-lives/>.

125. *Id.*

126. See MOLTENI, *supra* note 120.

127. See *Frequently Asked Questions on CODIS and NDIS*, FBI, <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Aug. 8, 2019) ("Are familial searches performed at NDIS? No, familial searching is not currently performed at NDIS"); see also 73 Fed.Reg. 74937 (Dec.10, 2008); see also Lauren Keiper, *More U.S. States Use Familial DNA as Forensic Tool*, REUTERS (Mar. 30, 2011, 8:38 PM), <https://www.reuters.com/>

gan, Texas, Utah, Virginia, Wisconsin, and Wyoming, familial DNA testing is legal and authorized for searches in CODIS/NDIS.¹²⁸ Maryland and Washington DC expressly prohibit familial searches done in CODIS/NDIS.¹²⁹ Additionally, on January 22, 2019, Maryland's House Judiciary Committee held a hearing on House Bill 30, introduced by Maryland State Senator Charles Sydnor III. House Bill 30 sought to amend Maryland's statute prohibiting familial DNA testing in the CODIS/NDIS database. The amendment to the statute would read: "A person may not perform a search of the statewide DNA database *OR ANY OTHER DNA OR GENEALOGICAL DATA BASE* for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired." (caps original, emphasis added). That bill failed, and in February 2020, another bill was introduced again attempting to regulate various types of genetic database searches¹³⁰

Other state legislators have been attempting to address the concerns about familial DNA testing. A Utah State Representative has introduced a bill that would limit the use by police of genetic databases for familial matches and the submission of genetic information to a genetic genealogy service. The Bill also would prohibit the police from entering false information or making a false representation to a genetic testing company or a genetic genealogy company.¹³¹

The familial DNA matching process has been done through CODIS and its related databases. The samples in those databases are samples that have been submitted of individuals processed through either a state or federal criminal justice system. That stands in stark contrast to law enforcement's use of GEDmatch, an open source gen-

article/us-crime-DNA-familial-idUSTRE72T2QS20110331 (allowed in Colorado, California, and Virginia, and under consideration in Pennsylvania).

128. FBI, *supra* note 124.¹²⁵ <https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>

129. See Avi Selk, *The Ingenious and 'Dystopian' DNA Technique Police Used to Hunt the 'Golden State Killer' Suspect*, THE SALT LAKE TRIBUNE (Apr. 28, 2018), <https://www.sltrib.com/news/nation-world/2018/04/28/the-ingenious-and-dystopian-dna-technique-police-used-to-hunt-the-golden-state-killer-suspect/> ("Familial DNA searches, in fact, had an 83 percent failure rate in a 2014 British study, Wired wrote. This is part of the reason that many warn against the practice, even as law enforcement agencies master its uses.").

130. DNA Databases Are Boon to Police But Menace to Privacy, Critics Say, THE PEW CHARITABLE TRUSTS, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/02/20/dna-databases-are-boon-to-police-but-menace-to-privacy-critics-say> (last visited Feb. 26, 2020)., <http://mgaleg.maryland.gov/2020RS/bills/sb/sb0848F.pdf>

131. *Id.*

ealogical research website, MyHeritage.com, 23andMe, Ancestry.com, and other DTC-GTCs like them where *innocent* citizens are submitting their DNA for reasons entirely personal to them. Thus, the important difference between familial DNA testing in the CODIS database and the use of DTC-GTCs is that the collection of samples submitted through CODIS are not only regulated and restricted, but they are of individuals who have been arrested and/or convicted of crimes. In stark contrast, law enforcement is now able to scour private DNA databases that contain the DNA of entirely innocent individuals. With the introduction of DTC-GTCs without any effective controls on the use of that DNA, the threat of use by law enforcement raises even more concerns. With their ever-growing database of DNA profiles, DTC-GTCs and “open source” genealogy websites like GEDmatch have become of great interest and use to law enforcement agencies, with or without the permission of the customers.¹³²

The big-picture view of the future of DNA and its uses is a complex one. The use of DNA testing in criminal cases always has been a double-edged sword. DNA testing has proven to be an extraordinary tool in proving people’s innocence. The strides made in the Innocence Movement would not have been possible without DNA testing. Moreover, as more samples are obtained from those arrested, the CODIS database grows and allows law enforcement to use those samples for comparison. Thus, there exists an uncomfortable relationship between the increase in exonerations through DNA testing and the growth and growing use of databases. One could not exist without the other. However, the CODIS database apparently has not sufficed. Law enforcement has, with increasing frequency, turned to DTC-GTC and other genealogy databases to solve cases. It is important to note that the CODIS database and the private genealogy databases differ in that, “[g]enetic genealogy . . . is drawn from hundreds of thousands of genetic variants called SNPs (for single nucleotide polymorphisms). The technique can give away details about a person’s appearance, medical conditions and possibly even predisposition to mental health problems.”¹³³ At least one journalist has referred to the ever-growing

132. MOLteni *supra* note 120. The use of websites like GEDmatch currently do not require court orders

133. Tina Hesman Saey, *Genealogy Companies Could Struggle to Keep Clients’ Data from Police*, SCIENCE NEWS (June 10, 2019, 12:00 pm), <https://www.sciencenews.org/article/forensic-genetic-genealogy-companies-police-privacy>

private genetic databases as the soon-to-be *de facto* national database¹³⁴

Recently, the Golden State Killer of California was identified as Joseph DeAngelo and captured using familial DNA testing through GEDmatch.¹³⁵ The police uploaded a fake profile using the DNA from the case.¹³⁶ Between 1976 and 1986, the Golden State killer had killed 12 people and raped 45 women.¹³⁷ One of DeAngelo's distant relatives had uploaded their profile into the GEDmatch database and police were able to get a partial match to the genetic evidence they had uploaded with the fake profile they created.¹³⁸ Law enforcement does not actually need court approval to use GEDmatch or, for that matter, any other genetic database.¹³⁹ Moreover, there is very little that currently can be done to prevent them from creating false profiles and submitting samples in that manner.

In 2019, GEDmatch violated its own policy by restricting exactly which types of cases it would grant police permission to search its database for when it allowed Utah police to search its database in an aggravated assault and burglary case. Police submitted the DNA profile and matched it to a 17- year-old's great uncle. The 17- year- old was subsequently arrested and charged with aggravated assault and burglary.¹⁴⁰

c. The Fourth Amendment and the Innocent Citizen

Privacy is at the heart of the Fourth Amendment. The Founding Fathers went to great lengths to protect citizens from governmental intrusion and Fourth Amendment jurisprudence has been evolving for

134. Natalie Ram, *The U.S. May Soon Have a De Facto National DNA Database*, SLATE (Mar. 19, 2019), <https://slate.com/technology/2019/03/national-DNA-database-law-enforcement-genetic-genealogy.html>.

135. SELK, *supra* note 129.

136. Sarah Zhang, *How a Tiny Website Became the Police's Go-To Genealogy Database*, THE ATLANTIC (June 1, 2018), <https://www.theatlantic.com/science/archive/2018/06/gedmatch-police-genealogy-database/561695/>.

137. Avi Selk, *The ingenious and 'dystopian' DNA Technique Police Used to Hunt the 'Golden State Killer' suspect*, THE SALT LAKE TRIBUNE (Apr. 28, 2018), <https://www.sltrib.com/news/nation-world/2018/04/28/the-ingenious-and-dystopian-dna-technique-police-used-to-hunt-the-golden-state-killer-suspect/>.

138. *Id.*

139. Megan Molteni, *The Future of Crime-Fighting is Family Tree Forensics*, WIRED (Dec. 26, 2018, 8:00 AM), <https://www.wired.com/story/the-future-of-crime-fighting-is-family-tree-forensics/>.

140. Terry Spencer, *Use of Online DNA Databases by Law Enforcement Leads to Backlash and Website Changes*, PBS (June 7, 2019), <https://www.pbs.org/newshour/nation/use-of-online-dna-databases-by-law-enforcement-leads-to-backlash-and-website-changes>.

hundreds of years since then. In the context of law enforcement's use of DTC-GTCs, modern Fourth Amendment jurisprudence must grapple with a very basic question: does the Fourth Amendment offer any protection to the millions of innocent individuals who use these genetic databases?¹⁴¹ In the past, scholars have argued for an Innocence Model of Fourth Amendment jurisprudence.¹⁴² Others have maintained that the innocent are irrelevant to Fourth Amendment jurisprudence. And while remedies for privacy violations exist in tort and civil rights actions,¹⁴³ those remedies, when offered for a violation of the privacy right stemming from genetic material, submitted for one's own personal use, do not, and cannot, undo the irrevocable damage that occurs when a person's genetic information is obtained and used by law enforcement and other entities merely to create a potential suspect family tree.

Historically, Fourth Amendment concerns were not exclusively about criminal cases and exclusion of evidence at criminal trials, but also were about civil actions brought by citizens.¹⁴⁴ According to Professor Akil Reed Amar, the Fourth Amendment did not at the onset require exclusion of evidence in criminal cases, but rather it presupposed civil trespass suits.¹⁴⁵ "The 'right of the people to be secure in their persons, houses, papers, and effects' presupposes and conjures up tort law, which protects persons and property from unreasonable invasions. Here too, textual analysis is strongly supported by history—no framer ever argued for exclusion, nor did any early commentator, or judge—and by common sense: unlike tort law, exclusion rewards the guilty but gives absolutely zilch to the innocent citizen, whom the government seeks to hassle."¹⁴⁶ Thus, Amar argued, warrants were

141. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1457, 1461 (1996) <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1813&context=facpub>. See also Tonja Jacobi and Ross Berlin, *Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence*, 51 UNIV. OF CAL. DAVIS 2033, 2038 (2018).

142. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1457, 1463 (1996) <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1813&context=facpub>.

143. Peter Swire, *Professor Peter Swire Testimony in Irish High Court Case—Chapter 7: Individual Remedies in US Privacy Law*, ALSTON & BIRD (last visited Aug. 3, 2019), <https://www.alston.com/-/media/files/insights/peter-swire-testimony-documents/chapter-7—individual-remedies-in-us-privacy-law.pdf?la=en>.

144. Akhil R. Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 64 (1996–97), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1950&context=fss_papers.

145. *Id.*

146. *Id.*

meant to immunize the government from tort claims.¹⁴⁷ Nonetheless, the trajectory of Fourth Amendment jurisprudence moved from the more general privacy focus over the course of several hundred years to one that is almost purely focused on exclusion of evidence at trial.¹⁴⁸

Thus, modern Fourth Amendment jurisprudence seems ill-prepared to handle the collapse of genetic privacy rights that may come with an unregulated genetic information world. It is fair to assume that as private genetic databases grow, law enforcement will turn to those databases with much greater frequency to solve crimes. On many of these sites, innocent citizens who would like to obtain genetic testing or to do genealogy research are left without a choice but to “consent” to allowing law enforcement to rummage through, and possibly use, their genetic data or they must forgo testing altogether on the vast majority of DTC-GTCs.

Many legal arguments made in support of allowing law enforcement to obtain and test these genetic samples have focused upon that Third-Party Doctrine, which is premised on the notion that information voluntarily provided to a third party vitiates any privacy claim one may have and that no warrant is needed by the police in order to obtain that information.¹⁴⁹ In *Carpenter v. United States*, however, the Supreme Court restricted the use of the Third Party Doctrine and held that the police need warrants to obtain historical cell-site location information about a person’s whereabouts from a third party.¹⁵⁰ Justice Roberts, writing for the majority, observed that there have been “seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.”¹⁵¹ Part of the reasoning included consideration of the fact that these records provide so much information about their users for so long.¹⁵²

The rationale in *Carpenter* can be applied to genetic data because of its nature and because it belongs not only to the consumer, but to everyone who shares that consumer’s genetic information. Genetic

147. *Id.* at 60.

148. *Id.* at 64.

149. John Villasenor, *What You Need to Know About the Third-Party Doctrine*, THE ATLANTIC (Dec. 30, 2013), <https://www.theatlantic.com/technology/archive/2013/12/what-you-need-to-know-about-the-third-party-doctrine/282721/>.

150. *Carpenter v. United States*, 138 S. Ct. 2206, 2207 (2018).

151. *Id.* at 2219.

152. *Id.* at 2217.

data is not like a bank record, a telephone record, or even cell-site location data.¹⁵³ The content of those records does not reveal such personal information to the same extent. Genetic data can provide information about genetic familial markers, conditions, and other incredibly private details about an individual and their family members.

Additionally, there is support for the argument for greater genetic privacy protection in *Carpenter's* dissenting opinions. Justice Kennedy dissented in *Carpenter* because he determined that Carpenter did not have ownership rights or control over the cell-site locations records and therefore had no expectation of privacy at all. Justice Gorsuch dissented stating that he would do away with the reasonable expectation of privacy test (as would Justice Thomas) and the third-party doctrine in favor of focusing on whether someone has some sort of property rights in the information. In contrast to the *Carpenter* facts, consumers who use DTC-GTCs do maintain some property rights. If consumers have the right to request that their information be deleted and that their samples be destroyed, they maintain control and ownership to some degree of their genetic data.

The genetic data housed at DTC-GTCs or other genealogy websites ought to be protected by the Fourth Amendment. Law enforcement should be prohibited from conducting the genetic, modern-day equivalent of a search pursuant to a writ of assistance.¹⁵⁴ These are nothing more than genetic dragnet searches when the sole purpose of going through these databases is to find possible familial DNA matches in a case where there is no other clue as to who the suspect is. Without such a prohibition, there is no protection. Justice Scalia said, “Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.”¹⁵⁵

While concerns of genetic privacy pervade other areas such as health care and consumer protection, the constitutional privacy right against unreasonable searches and seizures is of the utmost concern, particularly because the intrusion also affects unknowing family mem-

153. See *United States v. Miller*, 425 U.S. 435 (1976) (holding no expectation of privacy for bank records); see also *Smith v. Maryland*, 442 U.S. 735 (1979) (holding records of telephone calls have no expectation of privacy).

154. See Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 501–512 (1995) (detailing history of American search and seizure case law).

155. *Id.*

bers separated by as many as nine degrees.¹⁵⁶ These privacy infractions are a world apart from those the courts historically were accustomed to dealing with during searches by the government. Such searches usually occurred at a moment in time. If there is an unlawful search of a home, it may be intrusive at that time, but it also is somewhat final and finite. In contrast, the privacy concern with genetic materials is more permanent and irreversible and as such cannot be viewed through the same lens. This rings especially true when the net is cast so wide as to include the genetic information of millions of completely innocent individuals use DTC-GTCs or genealogy research websites, which information may then be shared with 4th party providers in order to build a genetic family suspect tree.

If and when the police do seek a warrant, courts also must act as vigilant gatekeepers of our privacy rights in these types of cases.¹⁵⁷ There exist serious issues regarding whether or not search warrants affecting the privacy rights of millions of people ought to be issued for these types of database searches when the sole purpose is to obtain a familial match using the DNA of an innocent citizen. A search warrant requires probable cause, i.e. a fair probability that a search will result in evidence of a crime being discovered.¹⁵⁸ Search warrants also require specificity and particularity. For these reasons, the validity of these search warrant applications should not be a foregone conclusion. A warrant application for a search of a DTC-GTC or a genealogy research database is no more than a fishing expedition that also engages in a fair amount of bootstrapping. The only information law enforcement might possibly obtain is that of an innocent distant relative of an unknown suspect, assuming of course that the police have not established with probable cause that the suspect's own genetic profile is in the database. Depending on when in the process the police seek a warrant, it is only a possibility that an unknown suspect's family member will have submitted a sample to that database. It is entirely speculative. Even if the application for a search warrant occurs at some point after they have submitted a sample to the database, the sample matched in the DTC-GTC alone will not directly identify the suspect. It is only by bootstrapping the information derived from

156. See Megan Molteni, *The Future of Crime-Fighting is Family Tree Forensics*, WIRED (Dec. 26, 2018, 8:00 AM), <https://www.wired.com/story/the-future-of-crime-fighting-is-family-tree-forensics/>.

157. Nothing short of a search warrant should be utilized to obtain evidence from DTC-GTCs or a genealogical website.

158. *Illinois v. Gates*, 103 S. Ct. 2317, 2320 (1983).

the DTC-GTC to a second, yet-to-be done testing process, like the service provided by fourth party providers such as Parabon Nano-Labs, genealogy researchers, or hobbyists, that police can link any possible family members with an actual suspect. Even then, law enforcement only can build a genetic family tree of suspects. Thus, it is too attenuated, should not establish probable cause, and the judiciary should exercise extreme caution and restraint in issuing such search warrants for these types of cases.

At least one court has not taken this cautious approach. In December 2019, the New York Times reported that a Florida detective announced at a police convention that he had obtained a warrant from a Florida judge to search the entire GedMatch database containing 1.2 million genetic profiles. What is especially troubling about the warrant is that the judge's order allowed the detective to override the privacy settings that were selected by users on Gedmatch. Of the 1.2 million Gedmatch users, in fact only 185,000 of the 1.2 million of the users, roughly 15%, had opted-in to allow law enforcement to view their genetic profiles.¹⁵⁹ Thus, approximately 1,015,000 people were subjected to non-consensual searches. Interestingly, that very same month that the court approved the Gedmatch search, Gedmatch was acquired by Verogen, Inc., a company that according to its website, was created exclusively to be a forensics genomic lab. It states, "Working in partnership with the community, we can elevate the forensic genomics lab's role in preserving public safety—and improve global justice for all."¹⁶⁰ Verogen is a company that already has ties to law enforcement in that Verogen's next-gen DNA technology has been approved by the FBI for upload to the National DNA Index System or NDIS. NDIS allows for DNA comparison of profiles submitted by both federal, state laboratories.¹⁶¹

CONCLUSION

Until there is consensus about the unique nature of genetic samples and data and its potential for revealing the most private confidential information about an individual, there can be no easy solution to

159. Kashmir Hill & Heather Murphy, *Your DNA Profile is Private? A Florida Judge Just Said Otherwise*, N.Y. TIMES (2019), <https://www.nytimes.com/2019/11/05/business/dna-database-search-warrant.html> (last visited Feb. 28, 2020).

160. Company, VEROGEN, <https://verogen.com/company/> (last visited Feb 28, 2020).

161. FBI Approves Verogen's Next-Gen Forensic DNA Technology for National DNA Index System (NDIS), VEROGEN (2019), <https://verogen.com/ndis-approval-of-miseq-fgx/> (last visited Feb 28, 2020).

genetic privacy. The genetic privacy of consumers who use DTC-GTCs should not be treated like other consumer data privacy. Because of the extremely sensitive and unique information about a person's genome, genetic data simply cannot be viewed in the same light as other data, digital or otherwise.

Nothing short of a complete ban by Congress on law enforcement's use of DTC-GTCs or ban on DTC-GTCs and other genealogical databases sharing such information with law enforcement will protect consumers, and society in general. Congress could create a national data privacy law, much like EU has done with the GDPR, or a free-standing genetic privacy law that prohibits familial DNA searches of any genealogical database. The same can be said of state legislatures. A hard and clear line must be drawn on the privacy of an *innocent* individual's DNA information that is contained in a DTC-GTC or genealogical database. To do less would be to take another step on the already slippery slope, which will inevitably lead to a complete loss of privacy for not only the person who used the DTC-GTC, but for that person's entire family.

If federal law enforcement agencies such as the FBI cannot, and do not, employ familial DNA testing using CODIS, which only houses the DNA of certain arrestees and convicted criminals, it makes absolutely no sense to allow them and other state or local law enforcement agencies to conduct those very same searches of innocent citizens through a back door.¹⁶² Current use of DTC-GTCs amounts to a genetic fishing expedition, especially now as consumers play catch-up on the importance of protecting their genetic privacy. Such fishing expeditions violate the constitutional privacy rights of innocent citizens and their families. As DTC-GTCs databases grow larger, law-enforcement's appetite for using DTC-GTCs will grow along with them and could lead to an unregulated genetic surveillance state. What may have started as an interest in solving serious homicide cold cases, like that of the Golden State Killer, has already pivoted into a first line of defense for solving any and all crimes.¹⁶³

162. Natalie Ram, *The U.S. May Soon Have a De Facto National DNA Database*, SLATE (Mar. 19, 2019), <https://slate.com/technology/2019/03/national-dna-database-law-enforcement-genetic-genealogy.html>.

163. See Natalie Ram, *The Genealogy Site That Helped Catch the Golden State Killer is Grappling With Privacy*, SLATE (May 29, 2019), <https://slate.com/technology/2019/05/gedmatch-dna-privacy-update-law-enforcement-genetic-genealogy-searches.html>.

At the moment, there really is nothing in the way of DTC-GTCs deciding to allow the government to utilize their databases to conduct DNA searches for any and all crimes. For this reason, a genetic privacy law considered by Congress or the states should include a ban on the use of DTC-GTCs by law enforcement to conduct familial DNA testing. Whether or not they are inclined to do so remains to be seen. Perhaps the GEDmatch already has violated its own Terms and Policies when it permitted law enforcement to investigate an aggravated assault instead of the stated policy that is restricted to homicides, sexual assaults and abductions.

Passing such a blanket law seems unlikely, despite the necessity for such a hard line. Congress did not act when law enforcement continued to collect historical cell-site data. Rather, it took a decision from the Supreme Court in *Carpenter* to hold such warrantless searches unconstitutional. Given that congressional leaders may not want to appear “soft” on crime, it does not seem likely that they will want to ban familial DNA testing completely.

Absent Congressional or state action, there are other measures, admittedly only stop-gap in nature, that can be taken. First, all courts should acknowledge and consider the serious consequences of allowing such practices to continue absent strict limits. The Fourth Amendment’s privacy right must be jealously guarded in order to insure the privacy of innocent citizens. The Third- Party Doctrine should not be applied and nothing short of a search warrant should be used to gain access to genetic information from a DTC-GTC or any other genealogical database. In that regard, courts should strictly adhere to the probable cause and specificity and particularity requirements, and not issue search warrants in cases such as these where law enforcement merely seeks to conduct a fishing expedition in a genetic database in the hopes of building their genetic suspect tree.

Additionally, even though at least one court was willing to completely ignore the privacy of over a million consumers, all genetic databases should be required to adopt an express opt-in model like the one adopted by GEDmatch. Otherwise, consumers have no choice, but to accept the Notice and Choice model generally used on DTC-GTCs websites if they seek to use the genetic testing company. These notices and terms are unnecessarily complex and convoluted and as such, any blanket type of user consent should not be construed as a voluntary waiver of any rights to be free of searches by law enforcement. Further, innocent citizens should not have to automati-

cally consent to the possibility of the police using their DNA in order to use a DTC-GTC, thus any notice of consent without more should not be deemed a waiver that allows police use. That consent also should not be part of a long laundry list of notices, buried in a myriad of other notices, but rather in a separate and distinct format. In that opt-in notice, transparency about the process and consequences of their consent should be required as well. Thus, the opt-in notice should explain, among other things, that by consenting to this use, their genetic profile and that of their immediate and extended family members, including the unborn, may be shared with additional parties other than law enforcement, such as third party geneticists, or ancestry volunteers and that their DNA data may possibly be entered into other unregulated websites and databases. It also should inform the consumer that while the use of their DNA may assist in catching a perpetrator of a crime, it also may implicate other family members who are innocent. It should state that any privacy rights that the consumer may have had with the DTC-GTC may not apply. Finally, it should inform the consumer that future unforeseen and unknown use of their genetic data by unknown companies or individuals is possible.

In conclusion, we, as a society, are at a crossroads. Congress, State legislatures, and all courts are at a crossroads. The concern about genetic privacy goes beyond the already significant general data privacy rights of the consumer. Do citizens want to live in a genetic surveillance state? Our Founding Fathers could not have imagined a world where the advances of science could identify a person on the genetic level. Justice Scalia, in his scathing dissent in *Maryland v. King*, aptly warned of a genetic panopticon. His warning applies even more to the government's use of the genetic information of private citizens and the concern that we are becoming a genetic surveillance state. Privacy is something that was then, and is now, recognized as a fundamental right in the United States. And genetic privacy ought to be considered sacred.

The Travel Ban, Judicial Deference, and the Legacy of *Korematsu*

JOHN IP*

I. INTRODUCTION

One week into the start of his administration, President Donald Trump issued an executive order that would become known as the travel ban.¹ This executive order, and the two others that would eventually succeed it, suspended the entry into the United States of nationals from specified Muslim-majority countries. Legal challenges were brought against all the orders, and various district and circuit courts would enjoin the implementation of the various iterations of the travel ban. In mid-2018, the legal challenge to the third iteration of the travel ban finally reached the Supreme Court. In its decision in *Trump v. Hawaii*, a majority of the Court ruled in the government's favor, upholding the travel ban largely on the basis that deference was owed by the courts to the executive concerning matters of national security.² In dissent, Justice Sotomayor likened the majority opinion to the World War II-era decision of *Korematsu v. United States*³ — one of the Supreme Court's most egregious failures, and a decision

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1. I use the term “travel ban” because it is the most common description used, even though it is in many ways inaccurate. See Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475, 1483 (2018) (stating that “The bans the President signed do not merely restrict travel (e.g., a long weekend to Disneyworld) but in fact prevent the ability for people to enter the United States period. In my view, ‘Muslim ban’ is an accurate description of the first three bans the President signed; two as executive orders and one as a presidential proclamation. In all three versions, the bulk of nations targeted have Muslim populations of more than 90%, and the bans have had devastating impacts on nationals from these countries.”).

2. *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018).

3. *Korematsu v. United States*, 323 U.S. 214 (1944).

widely regarded as anti-canonical.⁴ Chief Justice Roberts forcefully denied the relevance of *Korematsu* to the travel ban case, and also took the opportunity to overrule it.⁵

In this article, I argue that the disagreement over the relevance of *Korematsu* evident in the conflicting opinions of Chief Justice Roberts and Justice Sotomayor reflects their fundamentally differing conceptions of what *Korematsu* means. I begin Part II by outlining the background to the various versions of the travel ban and the earlier litigation. In Part III, I describe the Supreme Court's decision concerning the third iteration of the ban, focusing particularly on the Chief Justice's majority opinion and Justice Sotomayor's dissent. In Part IV, I turn to the prime point of contention between Chief Justice Roberts and Justice Sotomayor, namely the parallels, or lack thereof, between the travel ban decision and *Korematsu*. Because of its anti-canonical status, *Korematsu*'s wrongness is so widely accepted as to not require explanation. But this consensus is a shallow one, and obscures uncertainty and disagreement about what the main wrong of *Korematsu* is. As I argue, for Chief Justice Roberts, the wrong is that the Court endorsed a truly odious government policy — on his account, an explicitly race-based system of internment that burdened a large number of citizens. As a result, *Korematsu* has no relevance to *Hawaii*, a case concerning a facially neutral policy that merely denied the privilege of admission to non-citizens. For Justice Sotomayor, however, the wrong of *Korematsu* is different: it is the judicial endorsement of a sweeping and discriminatory policy targeting a disfavored outgroup on the basis of a nebulous claim of national security.

In attempting to deny *Korematsu*'s relevance to the travel ban case, however, Chief Justice Roberts necessarily constructs a highly stylized version of what the case concerned. Indeed, I contend that Chief Justice Roberts' construction of *Korematsu* is so circumscribed as to be ahistorical. And his narrow construction of the case should also affect how we view *Hawaii*'s overruling of *Korematsu*; this aspect of *Hawaii*, I suggest, flatters to deceive.

By contrast, if we adopt Justice Sotomayor's more general take on *Korematsu*, the parallels between the two cases come into clearer focus. These include how nativist anxieties directed at outgroups per-

4. *Hawaii*, 138 S. Ct. at 2447–48 (Sotomayor, J., dissenting). See text accompanying *infra* notes 126–133. See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 422–27 (2011).

5. *Hawaii*, 138 S. Ct. at 2423.

ceived as unassimilable can creep into policy ostensibly concerned with national security, and above all, the critical role of judicial deference, which operates to powerfully inhibit the robustness of judicial scrutiny once the government has invoked the mantra of national security. Just as Justice Black's majority opinion in *Korematsu* credulously accepted the government's claim that military necessity required the wholesale internment of Japanese persons living in the West Coast of the United States, Chief Justice Roberts' opinion in *Hawaii* credulously accepts the national security justification for the travel ban — despite strong signs that it was little more than a pretextual rationalization added after the fact to obscure a more nefarious motivation.

Moreover, the deferential approach adopted by the *Hawaii* majority would not have changed the outcome of *Korematsu*, and, at the same time, is inconsistent with the rationale for deference on which the majority purports to rely. Consequently, I conclude that Justice Sotomayor's charge that the majority is guilty of repeating the error of *Korematsu* is valid, and that Chief Justice Roberts' attempt to cast *Korematsu* as an odious relic of the benighted past, distant and unrelated to the travel ban litigation, is ultimately unconvincing.

II. THE TRAVEL BAN TRILOGY

A. Executive Order 1

On January 27, 2017, President Trump signed Executive Order 13769, entitled Protecting the Nation from Foreign Terrorist Entry into the United States (EO-1).⁶ EO-1 suspended the entry into the United States of foreign nationals from seven countries (Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen) for 90 days, directed government officials to review existing visa processes during this period,⁷ suspended all refugee admissions for 120 days,⁸ and suspended the admission of refugees from Syria indefinitely.⁹ EO-1 further provided that, upon resumption of refugee admissions, priority ought to be given to refugees who were fleeing persecution and who were members of a minority religion in their homeland.¹⁰

6. Exec. Order No. 13769/137691376913,769, 82 Fed. Reg. 89778/897789778,977 (Jan. 27, 2017) [hereinafter EO-1].

7. EO-1, §3(c), 82 Fed. Reg. at 8,978.

8. EO-1, §5(a), 82 Fed. Reg. at 8,979.

9. EO-1, §5(c), 82 Fed. Reg. at 8,979.

10. EO-1, §5(b), 82 Fed. Reg. at 8,979.

EO-1 took effect immediately. Both immigrant and non-immigrant visas of nationals of the seven affected countries were revoked, meaning that none of the affected individuals were able to lawfully enter or remain in the United States. Scenes of chaos ensued at various international airports, where distraught family members were soon joined by protesters and volunteer lawyers.¹¹ On January 28, the first legal proceedings were filed, and courts soon began issuing orders preventing the government from removing affected visa holders.¹² On January 30, a new strand of litigation began. The state of Washington, later joined by Minnesota, sought a temporary restraining order (TRO) in relation to EO-1, that was granted by Judge Robart on February 3.¹³ This order, applying nationwide, prevented the government from implementing the ban on the entry of nationals from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen, and the ban on the entry of refugees.¹⁴

The government promptly sought a stay from the Ninth Circuit. On February 9, a three-judge panel denied the government's emergency motion for a stay.¹⁵ In doing so, the panel expressed tentative doubts about the constitutionality of EO-1 on the grounds that there were strong arguments that it infringed upon the due process rights of visa-holders, and whether it amounted to a breach of the Establishment Clause of the First Amendment.¹⁶ At the request of one of its judges (via a sua sponte en banc call), the Ninth Circuit considered whether the judgment of the three-judge panel ought to be reheard by the en banc court.¹⁷ The Ninth Circuit ultimately declined to hear the case en banc, with five judges dissenting.¹⁸ In the meantime, however, the Trump administration, having initially signalled that an appeal to the Supreme Court was likely, instead issued a revised executive order.

11. Maryellen Fullerton, *Trump, Turmoil, and Terrorism: The US Immigration and Refugee Ban*, 29 INT'L J. REFUGEE L. 327, 329 (2017).

12. *Id.*

13. *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012, at *2-3 (W.D. Wash. Feb. 3, 2017).

14. *Id.* at *7-8.

15. *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017).

16. *Id.* at 1167-68.

17. *Washington v. Trump*, 858 F.3d 1168, 1168 (9th Cir. 2017).

18. *Id.*

B. Executive Order 2

Executive Order 13780 (EO-2) made some changes to EO-1, while keeping its basic contours intact.¹⁹ The Secretary for Homeland Security was tasked with reviewing and reporting on whether foreign governments worldwide provided adequate information about their nationals applying for United States visas.²⁰ The ninety-day suspension of entry of foreign nationals from certain countries was maintained, but Iraq was dropped from the list.²¹ The suspension of all refugee admissions for 120 days remained,²² but the singling out of Syrian refugees was removed. EO-2 also capped the number of refugees entering the United States in the 2017 fiscal year at 50,000.²³

Although stated to rescind EO-1, EO-2 went out of its way to defend its predecessor — it notably spends a paragraph refuting the claim that animus against Muslims motivated EO-1.²⁴ At the same time, certain changes to EO-2 were likely shaped by the litigation regarding EO-1. Gone was EO-1's provision affording priority to refugees fleeing religious persecution, which had been a focal point for claims of religious discrimination.²⁵ To nullify the sting of arguments based on due process, the ban on nationals of the six remaining countries exempted lawful permanent residents in the United States, non-immigrant visa holders already in the United States, and people outside the United States who held valid non-immigrant entry visas.²⁶ Finally, EO-2 made provisions for discretionary, case-by-case waivers to allow the entry of non-exempt individuals from the six banned countries on the basis of undue hardship.²⁷

Nonetheless, litigation quickly ensued in relation to EO-2. Various plaintiffs, notably the state of Hawaii and the International Refugee Assistance Project, which brought a case in Maryland, sought to halt EO-2 before it could enter into effect on March 16, 2017. On March 15, Judge Derrick Watson of the Federal District Court of Hawaii, finding that the Establishment Clause claim was likely to suc-

19. Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209132091320913,209 (Mar. 6, 2017) [hereinafter EO-2].

20. EO-2, §2(a)–(b), 82 Fed. Reg. at 13,212–13.

21. EO-2, §2(c), 82 Fed. Reg. at 13,213.

22. EO-2, §6(a), 82 Fed. Reg. at 13,215.

23. EO-2, §6(b), 82 Fed. Reg. at 13,216.

24. Fullerton, *supra* note ,11, at 334.

25. *See* Washington v. Trump, 847 F.3d 1151, 1167 (9th Cir. 2017).

26. EO-2, 82 Fed. Reg. at 13,213–14.

27. EO-2, §3(c), 82 Fed. Reg. at 13,214.

ceed, enjoined all of section 2 — including the ninety-day suspension of entry of nationals from the six affected countries, as well as provisions related to the government’s internal review of visa processes — and all of section 6 — including the 120-day suspension of refugee admissions, the reduction of the refugee cap to 50,000 and internal review provisions.²⁸ On the same day, Judge Theodore Chuang in the Federal District Court of Maryland, who also concluded that the Establishment Clause claim was likely to succeed, issued a narrower order enjoining section 2(c)’s 90-day suspension of entry of nationals from the six affected countries.²⁹ These decisions were appealed to the Ninth and Fourth Circuits respectively.

The Fourth Circuit issued its decision on May 25, 2017. An en banc court upheld Judge Chuang’s decision, with three dissenters.³⁰ The majority’s decision was based on the Establishment Clause. Specifically, the majority concluded that the primary purpose of section 2(c)’s ninety-day suspension on entry was religious in that a reasonable observer would conclude — based particularly on the affected countries all being predominantly Muslim,³¹ and on statements made by Trump and his surrogates during the campaign and around the time of the executive orders themselves — that section 2(c) was motivated by an anti-Muslim animus, or a desire to exclude Muslims from the United States.³²

On June 12, 2017, a unanimous three-judge panel of the Ninth Circuit largely upheld Judge Watson’s decision, but not on the basis of the Establishment Clause claim underlying his decision.³³ Rather, like several of the concurring judges in the Fourth Circuit,³⁴ the Ninth Circuit based its decision on the Immigration and Nationality Act (“INA”), finding that the plaintiffs had shown that they were likely to succeed in their claims that EO-2 violated provisions of the INA.³⁵

28. *Hawaii v. Trump*, 241 F. Supp. 3d 1119, 1140 (D. Haw. 2017).

29. *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 566 (D. Md. 2017).

30. *See Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 638–39 (4th Cir. 2017), *vacated and remanded*, 138 S. Ct. 353 (2017).

31. *Id.* at 572. The populations of the affected countries range between 92.8% to 99.5% Muslim.

32. *Id.* at 603–04.

33. *See Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017).

34. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 610–11 (4th Cir. 2017) (Kennan, J., concurring); *id.* at 612–13 (Wynn, J., concurring); *id.* at 638 (Thacker, J., concurring). The concurring judges all agreed with the majority’s ruling that EO-2 likely violated the Establishment Clause.

35. *Hawaii v. Trump*, 859 F.3d 741, 782 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017).

The Court accordingly upheld the injunction, except in relation to the provisions governing the government's internal review.³⁶

The government filed petitions for certiorari in relation to both decisions. In late June, the Supreme Court declared that it would review the Fourth and Ninth Circuits' decisions, and, by majority narrowed the scope of the injunctions in the interim.³⁷ This allowed the ninety-day suspension of the entry of nationals from the six affected countries and the suspension on refugee entry to go into effect, except in relation to persons with a credible claim of a bona fide relationship with a person or entity in the United States.³⁸

The timing of the Supreme Court's intervention was such that, by the time the Court's term began in October, the time periods for both the entry and refugee bans (of ninety days and 120 days respectively) were close to expiring.³⁹ The Supreme Court therefore did not in the end hear the appeals in relation to EO-2. Instead, it vacated both judgments, and remanded them to the lower courts with instructions to dismiss the challenges to EO-2 as moot.⁴⁰

C. Executive Order 3

On September 24, 2017, President Trump issued a third set of entry restrictions by way of a Presidential proclamation (for convenience, "EO-3").⁴¹ EO-3 continues to restrict the entry of foreign nationals from specified countries, but this time indefinitely. EO-3, stated to be informed by the result of the review of the procedures and practices of governments worldwide, indefinitely bans nationals of seven countries (Iran, Libya, Syria, Yemen, Somalia, Chad, and North Korea) from entry to the United States as immigrants.⁴² It also bans

36. *Id.* at 788–89.

37. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

38. *Id.* at 2088–89.

39. The third set of restrictions is discussed below. The refugee ban was replaced with a system allowing resumption of admissions with stricter security screening for refugees from eleven countries. *See* Exec. Order No. 13815, Presidential Executive Order on Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities, 82 Fed. Reg. 50,055 (Oct. 24, 2017). The eleven countries are Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen. *See* Tally Kritzman-Amir & Jaya Ramji-Nogales, *Nationality Bans*, 2019 U. ILL. L. REV. 563, 592 (2019).

40. *International Refugee Assistance Project v. Trump*, 138 S. Ct. 353; *Trump v. Hawaii*, 138 S. Ct. 377 (2017).

41. *See generally* Proclamation No. 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, 82 Fed. Reg. 45,161 (Sept. 24 2017) [hereinafter *EO-3*].

42. EO-3, §2, 82 Fed. Reg. at 45,165–67.

or restricts entry to the United States of certain persons as non-immigrants. Nationals of North Korea and Syria are categorically barred; nationals of Iran may only enter on student or exchange visitor visas, and are subject to extra screening; and nationals of Chad, Libya and Yemen, together with a small group of nationals of Venezuela (officials of particular government agencies and their immediate family) may enter, but not on business, tourist or business/tourist visas, and Somali nationals are permitted to enter as non-immigrants, but are subject to additional scrutiny.⁴³

Once again, litigation followed. Judge Watson in the Federal District Court of Hawaii granted a nationwide TRO in relation to most of §2 of EO-3.⁴⁴ On appeal, the Ninth Circuit upheld the decision based on the statutory arguments concerning the INA, while narrowing the scope of the injunction.⁴⁵ Judge Chuang in the Federal District Court of Maryland, having found that the plaintiffs were likely to succeed on one of the statutory arguments based on the INA and the Establishment Clause, granted a similar TRO,⁴⁶ which a majority of the Fourth Circuit upheld.⁴⁷ The Supreme Court granted certiorari in respect of the Hawaii litigation.

III. THE SUPREME COURT WEIGHS IN

On June 26, 2018, the Supreme Court issued its decision in *Trump v. Hawaii*, in which a majority of the Court upheld EO-3.⁴⁸ Chief Justice Roberts wrote the opinion of the Court.⁴⁹ There were two concurring opinions: Justice Kennedy's resigned concurrence, which seemed directed to reassuring the world that the United States government is obliged to respect the Constitution, even if the Court was unwilling to enforce compliance in this case;⁵⁰ and Justice Thomas' concurrence, which expressed skepticism about whether district courts have the authority to issue universal injunctions like those that oc-

43. *Id.* Restrictions on Chad were later lifted: *See* Proclamation No. 9723, Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, 83 Fed. Reg. 15937159371593715,937 (Apr. 10, 2018).

44. *State v. Trump*, 265 F. Supp. 3d 1140, 1160–61 (D. Haw. 2017).

45. *Hawaii v. Trump*, 878 F.3d 662, 683–84, 702 (9th Cir. 2017).

46. *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017).

47. *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2018).

48. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

49. *Id.* at 2403–23.

50. *Id.* at 2423–24.

curred in the travel ban litigation.⁵¹ There were two dissenting opinions. Justice Breyer's dissent, which was joined by Justice Kagan, honed in on EO-3's system of exemptions and waivers, suggesting that evidence as to how EO-3 was being applied bolstered the claim that it was motivated by religious animus rather than security considerations.⁵² Justice Sotomayor's more forceful dissent, which was joined by Justice Ginsburg, addressed Chief Justice Roberts' opinion more directly.⁵³ Given the object of this article is to explore the disagreement over the meaning of *Korematsu* evident in the *Hawaii* decision, the discussion will focus on the opinions of Chief Justice Roberts and Justice Sotomayor.

A. Chief Justice Roberts' opinion for the Court

Chief Justice Roberts described EO-3 in the most anodyne terms possible, and places great emphasis on the ostensibly careful tailoring of EO-3 and the detailed administrative process involving the input of the national security bureaucracy that led up to it. In particular, his opinion observes that the restrictions imposed on the affected countries were calibrated to the circumstances.⁵⁴ The opinion also highlighted the various limits on the scope EO-3: its exemption for lawful permanent residents and those granted asylum, its provisions for case-by-case waivers, and its requirement that the Department of Homeland Security (DHS) monitor and report on the need for the restrictions every 180 days. Furthermore, after the first review period, restrictions on nationals of Chad were lifted in accordance with the recommendation of the Secretary of Homeland Security.⁵⁵

Chief Justice Roberts then addressed the plaintiffs' two challenges to EO-3: the statutory argument that EO-3 violated provisions in the Immigration and Nationality Act (INA), and the constitutional argument that EO-3 violated the Establishment Clause.⁵⁶

51. *Id.* at 2424–29.

52. *Id.* at 2429–33. *See also* Michael Price & Peter Keffer, *The Empty Promise of “Waivers” from Trump’s Muslim Ban*, JUST SECURITY (Mar. 8, 2018), <https://www.justsecurity.org/53484/empty-promise-waivers-trumps-muslim-ban/>.

53. *Hawaii*, 138 S. Ct. at 2433–48.

54. *Id.* at 2405.

55. *Id.* at 2406.

56. *Id.*

1. The statutory argument

As with the legal challenges to the earlier iterations of the travel ban,⁵⁷ the two statutory provisions at issue were section 1182(f) and section 1152(a) of the INA. The first provides that the President may suspend the entry of any aliens or of any class of aliens into the United States where the President finds that the entry of such persons “would be detrimental to the interests of the United States.”⁵⁸ The second prohibits discrimination on grounds including nationality in the issuing of immigrant visas.⁵⁹

Chief Justice Roberts rejected the plaintiffs’ claims that the President’s actions fell outside the scope of the authorization provided for by section 1182(f), reading the language of the provision as providing a broad grant of authority. According to Chief Justice Roberts, the President had “undoubtedly fulfilled” the requirement of finding that the entry of certain non-nationals would be detrimental to the national interest.⁶⁰ Further, even assuming that the President’s finding had to include a sufficiently detailed explanatory justification to enable judicial review, the plaintiffs’ claim could not be sustained given the detailed account of the worldwide review process provided in EO-3.⁶¹

Chief Justice Roberts also gave short shrift to the argument that a broad reading of section 1182(f) would effectively override various Congressional judgments about admissibility reflected in other provisions of the INA. To the contrary, Chief Justice Roberts construed EO-3 as complementary to those provisions, as “support[ing] Congress’s individualized approach for determining admissibility.”⁶² Chief Justice Roberts also rejected arguments inferring other limitations on the scope of section 1182(f) from legislative history or prior executive practice.⁶³

As for the argument based on section 1152(a), Chief Justice Roberts was similarly unmoved, noting first that the provision applies only to the narrower category of immigrant visas, and second that, in any case, section 1152(a) operates in a different domain from section

57. *See, e.g.*, *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

58. 8 U.S.C. § 1182(f).

59. 8 U.S.C. § 1152(a)(1)(A).

60. *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

61. *Id.* at 2409.

62. *Id.* at 2411.

63. *Id.* at 2412–13.

1182(f). The former is concerned with entitlement to a visa, while the latter is concerned with admissibility; the holder of a valid United States visa can still be determined to be inadmissible. On this view, section 1152(a) did not constrain the President's authority to act under section 1182(f).⁶⁴

2. The constitutional argument

Chief Justice Roberts then turned to the plaintiffs' claim that EO-3 violated the Establishment Clause in that it, like its predecessors, "singl[ed] out Muslims for disfavored treatment."⁶⁵ In other words, the claim was that EO-3 was motivated by religious animus and the stated concerns about security and immigration vetting were mere pretext.⁶⁶ This claim relied on a series of statements made by then-candidate Trump promoting a "total and complete shutdown of Muslims entering the United States," and subsequent statements by President Trump and his cohorts concerning EO-1 and EO-2.⁶⁷ While at pains not to express approval of the content of the statements themselves, instead contrasting them with the more inclusive statements made by Presidents George Washington, Dwight D. Eisenhower and George W. Bush, Chief Justice Roberts emphasized that whether the statements deserved opprobrium was not the issue: "It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility."⁶⁸

The Chief Justice further noted the novelty of applying the Establishment Clause to the facts presented—very different subject matter from religious displays or school prayer, which are the more typical facts of Establishment Clauses cases.⁶⁹ Rather, the case concerned the entry of foreign nationals into the United States. In seeking to "invalidate a national security directive regulating the entry of aliens

64. *Id.* at 2413–15. For a contrary view about the statutory argument, see, Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 *GEO. IMMIGR. L.J.* 159 (2019) [hereinafter Margulies, *The Travel Ban Decision*]; Peter Margulies, *Bans, Borders, and Sovereignty: Judicial Review of Immigration Law in the Trump Administration*, 2018 *MICH. ST. L. REV.* 1 (2018) [hereinafter Margulies, *Bans, Borders, and Sovereignty*].

65. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

66. *Id.*

67. *Id.*

68. *Id.* at 2418.

69. *Id.*

abroad,”⁷⁰ the plaintiffs ran headlong into the Supreme Court precedents concerning the plenary power doctrine, whereby the area of immigration is understood to be a function of sovereign power that is essentially immune from judicial oversight.⁷¹ Even so, Chief Justice Roberts observed that in cases where foreign nationals sought admission to the United States, the courts engaged in “a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen.”⁷² Case in point was *Kleindienst v. Mandel*,⁷³ where American scholars contested on First Amendment free speech grounds the decision to deny a visa to Mandel, a foreign national. In *Mandel*, the Court limited its scrutiny to considering whether the executive had a “facially legitimate and bona fide” reason for its actions.⁷⁴

The Court subsequently employed the test from *Mandel*—whether the decision was “facially legitimate and bona fide”—in other cases concerning individuals denied visas.⁷⁵ Were it applied to EO-3, it would, according to Chief Justice Roberts, have been fatal to the plaintiffs’ claim. However, Chief Justice Roberts instead stated he was applying a more lenient standard, rational basis review:

For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes. . . . As a result, we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.⁷⁶

Having recited the truism that the Court rarely invalidates a policy when applying the deferential standard of rational basis scrutiny, Chief Justice Roberts observed that EO-3 was legitimately based on this standard:

It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue

70. *Id.*

71. *Id.*

72. *Id.* at 2419.

73. 408 U.S. 753 (1972). See also Peter Schuck, *Kleindienst v. Mandel: Plenary Power v. the Professors*, in *IMMIGRATION LAW STORIES* 169 (David A. Martin & Peter Schuck eds., 2005).

74. *Kleindienst*, 408 U.S. at 770.

75. See, e.g., *Kerry v. Din*, 135 S. Ct. 2128 (2015).

76. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

otherwise by refusing to apply anything resembling rational basis review. Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.⁷⁷

Chief Justice Roberts emphasized that EO-3's text contained no specific reference to religion, that EO-3 only affected a small percentage of the world's Muslim population and focused on countries previously identified as security risks.⁷⁸ And, once again, Chief Justice Roberts highlighted that EO-3 resulted from a "worldwide review process undertaken by multiple Cabinet officials and their agencies".⁷⁹ Additionally, for Chief Justice Roberts, there were three further characteristics of EO-3 that bolstered its genuine national security credentials. First, since January 2017, restrictions on three Muslim-majority countries (Iraq, Sudan and Chad) had been lifted, suggesting that the ongoing review process regarding entry restrictions was not a dead letter. Second, EO-3 included significant exceptions for certain categories of foreign nationals from the affected states, particularly in relation to non-immigrant visas. Third, EO-3 also made provision for a system of individual waivers, applicable on a case-by-case basis.⁸⁰ To conclude, Chief Justice Roberts stated:

The Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.⁸¹

B. Justice Sotomayor's dissent

Justice Sotomayor expressed her view of EO-3 at the outset of her opinion unequivocal fashion:

The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amend-

77. *Id.* at 2420–21.

78. *Id.* at 2421. Aziz Huq observes that only some Muslims are affected by the travel ban hardly demonstrates the absence of a discriminatory animus. See Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 75 (2019).

79. *Hawaii*, 138 S. Ct. at 2421.

80. *Id.* at 2422–23.

81. *Id.* at 2423.

ment. The Court’s decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a “total and complete shutdown of Muslims entering the United States” because the policy now masquerades behind a façade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President’s words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.⁸²

Her opinion expressed no view about the statutory argument, and instead dealt only with the constitutional argument. Recalling the basic injunction of the Establishment Clause, namely that government may not prefer one religion over another, Justice Sotomayor applied the conventional approach developed in the case law concerned with religious displays:

To determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion. . . . In answering that question, this Court has generally considered the text of the government policy, its operation, and any available evidence regarding “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by” the decisionmaker.⁸³

Justice Sotomayor’s dissent then set out a lengthier and less sanitized account of the factual context underlying the constitutional argument. It began with then-candidate Trump’s December 2015 statement calling for a “total and complete shutdown of Muslims entering the United States”, which was justified at the time by the candidate by reference to the Japanese-American internment during World War II.⁸⁴ The dissent then traversed statements by the President and his advisers about the travel ban and the related litigation, together with other comments hitting the familiar beats of Islamophobic anxieties—the need for surveillance of mosques in the United States, the failure

82. *Id.* at 2433.

83. *Id.* at 2434–35.

84. *Hawaii*, 138 S. Ct. at 2435.

of Muslims to assimilate, their commitment to Sharia law, and the threat of radical Islamic terrorism.⁸⁵

Unsurprisingly, Justice Sotomayor held that a reasonable observer, when confronted with this factual context leading up to EO-3, “would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications”.⁸⁶ She further observed that the President “had never disavowed any of his prior statements about Islam”,⁸⁷ and that in another case in the same term, conspicuous by its absence from the majority opinion, the Court had found a much more equivocal expression of hostility towards a religion by an official to be of constitutional significance.⁸⁸

Justice Sotomayor assailed the majority for applying what she saw as a watered-down standard of review given that the claim was based on the Establishment Clause.⁸⁹ She further contended that EO-3 would fail even under the more lenient standard of rational basis review applied by the majority because of the serious doubts about EO-3’s legitimate basis and scope, all of which suggested that the claimed national security rationale was a smokescreen for an action motivated by hostility towards Muslims.⁹⁰

She also disputed the majority’s various claims about EO-3. While EO-3 did not expressly target Islam, it remained the case that EO-3, notwithstanding the removal of a few Muslim-majority countries and the addition of two non-Muslim-majority countries, “overwhelmingly target[ed] Muslim-majority nations”.⁹¹ In particular, the addition of two non-Muslim-majority countries, North Korea and Venezuela, to EO-3’s list of banned countries was little more than window-dressing given that the entry of North Korean nationals was already restricted⁹² and given that EO-3 only covers a few Venezuelan officials and their families.⁹³

85. *Id.* at 2435–38.

86. *Id.* at 2438.

87. *Id.* at 2439.

88. *Id.* (referring to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2018)). See also Leah Litman, *What Masterpiece Cakeshop Tells Us About the Travel Ban*, NAT’L L.J. (June 5, 2018), <https://www.law.com/nationallawjournal/2018/06/05/what-masterpiece-cakeshop-tells-us-about-the-travel-ban/>.

89. *Hawaii*, 138 S. Ct. at 2441.

90. *Id.* at 2441–42.

91. *Id.* at 2442.

92. *Int’l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 623 (D. Md. 2017).

93. *Hawaii*, 138 S. Ct. at 2442.

Justice Sotomayor was also less convinced by the worldwide review process that so enamoured the majority. She noted that the product of that review process, which the government refused to disclose, was revealed by Freedom of Information Act litigation to be a paltry seventeen pages in length.⁹⁴ Further, Justice Sotomayor observed that the government had been unable to identify any gap that EO-3 could be said to be responding to—that is, what national-security need there was for EO-3 given that the INA already set out a comprehensive scheme regulating the admission of persons to the United States, and given the extant vetting procedures employed by the government.⁹⁵ Finally, like Justice Breyer, Justice Sotomayor expressed skepticism about the reality of EO-3's system of waivers, a point that was formalistically relied upon by the majority to demonstrate the proclamation's careful calibration.⁹⁶ In sum, Justice Sotomayor concluded in no uncertain terms that the plaintiffs were likely to succeed in their constitutional claim:

[N]one of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.⁹⁷

IV. THE LONG SHADOW OF *KOREMATSU*

As noted earlier, the relevance of *Korematsu* to the travel ban litigation is the subject of a dispute between Chief Justice Roberts and Justice Sotomayor. In both of their opinions, reference to *Korematsu* is made towards the very end, with Justice Sotomayor highlighting the parallels and echoes and Chief Justice Roberts accentuating the differences. Justice Sotomayor's dissent invokes *Korematsu* in the following way:

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United*

94. *Id.* at 2442–43.

95. *Id.* at 2443–44.

96. *Id.* at 2445. The dissenters' skepticism has proven justified: see Joshua A. Geltzer & Neal K. Katyal, *The Travel Ban Shows What Happens When the Supreme Court Trusts Trump*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/opinion/supreme-court-travel-ban-trump.html>.

97. *Hawaii*, 138 S. Ct. at 2445.

States, 323 U.S. 214 (1944). . . . In *Korematsu*, the Court gave “a pass [to] an odious, gravely injurious racial classification” authorized by an executive order. . . . As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group’s supposed inability to assimilate and desire to harm the United States. . . . As here, the Government was unwilling to reveal its own intelligence agencies’ views of the alleged security concerns to the very citizens it purported to protect. . . . And as here, there was strong evidence that impermissible hostility and animus motivated the Government’s policy.⁹⁸

Chief Justice Roberts’ opinion refers to *Korematsu* in this way:

Finally, the dissent invokes *Korematsu v. United States*, 323 U.S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. . . . The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating another wise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.”⁹⁹

The likely sequence of events is that the Chief Justice saw the reference to *Korematsu* in Justice Sotomayor’s draft dissent and responded by overruling the decision as a way of removing the sting of the dissent’s argument.

The majority opinion’s overruling of *Korematsu* attracted a range of responses, with commentators referring to it as unexpected,¹⁰⁰ a

98. *Id.* at 2447 (Sotomayor, J., dissenting).

99. *Id.* at 2423. For discussion of the use of the anti-cannon as a “rhetorical trump”, see Greene, *supra* note 4, at 474–75.

100. Quinta Jurecic, *The Travel Ban Decision and the Ghost of Korematsu*, *LAWFARE* (June 28, 2018), <https://www.lawfareblog.com/travel-ban-decision-and-ghost-korematsu>.

good thing,¹⁰¹ a distraction,¹⁰² a “desperate attempt to change the subject”,¹⁰³ or a cheap trick.¹⁰⁴ Jamal Greene’s assessment is particularly damning, describing the “overruling” as “empty but also grotesque.”¹⁰⁵ In order to make some sense of these differing assessments, I provide an account of what was overruled—the Supreme Court’s *Korematsu* decision from 1944—as well as the historical circumstances surrounding the decision, and the subsequent events that shaped the decision’s social meaning. The protean nature of invocations and discussions of *Korematsu* suggest an unexamined prior question about what is actually wrong with the decision, and, hence, how the decision’s repudiation ought to be viewed. Clarifying this initial premise goes a long way towards explaining the divergent views about the overruling of a near-universally discredited precedent, and addressing whether the majority opinion was right to claim that “*Korematsu* has nothing to do with this case.”¹⁰⁶ Contrary to the majority opinion in *Hawaii*, I argue that there are several clear parallels between the two cases, perhaps most crucially in how the respective majorities responded to the government’s national security-based justifications for its actions.

A. The Japanese American internment and the legacy of *Korematsu*

The basic facts of the Japanese American internment are well known.¹⁰⁷ On 19 February 1942, some three months after the attack on Pearl Harbor, President Roosevelt signed Executive Order 9066,¹⁰⁸

101. Amy Davidson Sorokin, *One Really Good Thing in the Supreme Court’s Travel-Ban Ruling: Korematsu Is Gone*, THE NEW YORKER (June 26, 2018), <https://www.newyorker.com/news/daily-comment/one-really-good-thing-in-the-supreme-courts-travel-ban-ruling-korematsu-is-gone>.

102. Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018), <https://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext>.

103. Noah Feldman, *A Decision That Will Live in Infamy*, BLOOMBERG (June 27, 2018), <https://www.bloomberg.com/opinion/articles/2018-06-26/supreme-court-s-travel-ban-decision-is-a-historic-mistake>.

104. Anil Kalhan, *Trump v. Hawaii and Chief Justice Roberts’ “Korematsu Overruled” Parlor Trick*, ACS BLOG (June 29, 2018), <https://www.acslaw.org/expertforum/trump-v-hawaii-and-chief-justice-robertss-korematsu-overruled-parlor-trick/>.

105. Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J.F. 629, 629 (2019).

106. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

107. See generally PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 1–16 (1982) [hereinafter CWRIC]; GREG ROBINSON, A TRAGEDY OF DEMOCRACY 92–132 (2009).

108. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

which granted the Secretary of War, and the military, the power to create zones subject to military control. Although not apparent from the text, the order was intended to authorize, and was understood by relevant government officials to authorize, the removal of all Japanese persons living on the West Coast, a group that included both migrants from Japan (the Issei) and their native-born citizen children (the Nisei).¹⁰⁹ In March 1942, General John DeWitt, the commander of the Western Defense Command, announced the creation of the military zones,¹¹⁰ and Congress enacted a law making it an offense to “enter, remain in, leave, or commit any act in any military area or military zone . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander[.]”¹¹¹

With this legal framework in place, the Issei and Nisei were subject to restrictions, such as curfew, before eventually being removed from their homes on the West Coast and held in internment camps located in remote areas of the United States. Some 120,000 Issei and Nisei spent on average three years in internment. There were no individual hearings beforehand, nor was there ever a documented case of disloyal activity on the part of the Issei or Nisei on the West Coast.¹¹²

Several Nisei brought legal challenges.¹¹³ Among them was Fred Korematsu, who had been convicted of remaining in a military area in contravention of Civilian Exclusion Order No. 34.¹¹⁴ He argued that his conviction was in violation of the Constitution. The Supreme Court rejected this claim, instead accepting the government’s argument, which was substantially based on assertions made in General DeWitt’s Final Report,¹¹⁵ that the internment was justified by military necessity.¹¹⁶

109. CWRIC, *supra* note 107, at 49.

110. *Id.* at 100–01.

111. Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942). The legislation was necessary to ensure clear legal authority to impose sanctions for failure to comply with the military’s orders. See CWRIC, *supra* note 107, at 95.

112. CWRIC, *supra* note 107, at 3; GEOFFREY R. STONE, *PERILOUS TIMES* 287 (2004).

113. See *Hirabayashi v. United States*, 320 U.S. 81 (1943); see also, *Yasui v. United States*, 320 U.S. 115 (1943); see also, *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Ex parte Endo*, 323 U.S. 283 (1944). These were but a small subset of cases concerning the Japanese American internment. See Eric L. Muller, *The Japanese American Cases - A Bigger Disaster than We Realized*, 49 HOWARD L.J. 417 (2006).

114. *Korematsu*, 323 U.S. at 215–16.

115. U.S. GOV’T PRINTING OFFICE, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 vii (1943) [hereinafter FINAL REPORT].

116. See *Korematsu*, 323 U.S. at 223–24.

In 1980, as a result of a decades-long grassroots campaign pushing for redress, Congress established the Commission on Wartime Relocation and Internment of Civilians (CWRIC) to look into the circumstances of Executive Order 9066 and the impact of the internment.¹¹⁷ The judgment subsequently rendered by CWRIC was that the internment was not justified by military necessity, but was rather the product of “race prejudice, war hysteria and a failure of political leadership”.¹¹⁸ CWRIC recommended, among other things, a public apology and compensation for those wronged.¹¹⁹

Around the same time, researchers uncovered evidence of government misconduct during the litigation regarding Korematsu and other Nisei internees.¹²⁰ It came to light that the government had doctored portions of General DeWitt’s Final Report¹²¹—the key document that set out the basis for the internment and formed the core of the government’s military necessity justification—in order to conceal DeWitt’s racism. Further, it emerged that the government possessed material that contradicted key claims about the disloyalty of Japanese Americans made in DeWitt’s Final Report but withheld this material from the Supreme Court.¹²²

Because of this government deception, a federal court would later grant the writ of *coram nobis* and vacate Fred Korematsu’s wartime conviction.¹²³ In 1988, in keeping with CWRIC’s recommendations, Congress enacted the Civil Liberties Act, whereby the United States government apologized for the internment and provided for the payment of \$20,000 to each survivor subject to Executive Order 9066.¹²⁴ In 2011, the Acting Solicitor General confessed error in re-

117. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96-317, 94 Stat. 964 (1980).

118. CWRIC, *supra* note 107, at 18.

119. *Id.* at 8-9. UNITED STATES COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS 8-9 (1983).

120. See PETER IRONS, JUSTICE AT WAR viii-x (1983).

121. FINAL REPORT, *supra* note 115.

122. *Korematsu v. United States*, 584 F. Supp. 1406, 1417-20 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591, 597-98 (9th Cir. 1987). See also ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 39-41 (2018); Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3037 (2013). This information was put before the CWRIC, but it was not included in the report. See ROGER DANIELS, THE JAPANESE AMERICAN CASES 166 (2013).

123. *Korematsu v. United States*, 584 F. Supp. 1406, 1419-20 (N.D. Cal. 1984). See also *Hirabayashi v. United States*, 828 F.2d 591, 608 (9th Cir. 1987). Min Yasui died before his case was resolved. *Id.* at 594 n. 4. Pub. L. No. 100-383, §1, 102 Stat. 903, 905-06 (1988). Eventually \$1.6 billion was paid to 82,250 individuals. DANIELS, *supra* note 122, at 164.

124. Pub. L. No. 100-383, §1, 102 Stat. 903, 905-06 (1988). Eventually \$1.6 billion was paid to 82,250 individuals. DANIELS, *supra* note 122, at 164.

spect of *Korematsu*, acknowledging in effect that the government should not have prevailed on account of its misconduct during the litigation.¹²⁵

These events reflect and reinforce the modern consensus that the internment was a gross injustice inflicted upon Japanese Americans, and also that *Korematsu* amounted to a shameful failure on the part of the Supreme Court. The CWRIC's verdict was that "*Korematsu* lies overruled in the court of history".¹²⁶ David Harris describes it as a "historical curiosity, a relic of an era in which the country collectively lost its head to the toxic combination of war hysteria, xenophobia, and racism".¹²⁷ Eric Muller describes the decision as "defunct",¹²⁸ and "deeply discredited".¹²⁹ In fact, *Korematsu* is so discredited that it features in discussions of anti-canonical decisions, the Supreme Court's hall of shame as it were.¹³⁰ The decision has been explicitly disavowed by a series of Supreme Court Justices either in opinions or confirmation hearings.¹³¹ It even features as a kind of constitutional canary in a coalmine of decisions of overseas courts concerning national security,¹³² and as a cautionary tale about the limitations of courts in wartime in overseas legal scholarship.¹³³

The September 11 terrorist attacks led to renewed interest in *Korematsu*. There is a considerable amount of scholarly discussion about the decision in post-9/11 legal literature, and, in particular, whether implementing certain security measures might amount to a

125. The confession of error extended also to *Hirabayashi v. United States*, 320 U.S. 81 (1943). Katyal, *supra* note 122, at 3029.

126. CWRIC, *supra* note 107, at 238.

127. David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women"*, 76 MO. L. REV. 1, 8 (2011).

128. Eric L. Muller, *Inference or Impact-Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 106 (2003).

129. Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002). See also Craig Green, *Ending the Korematsu Era: An Early View from the War on Terror Cases*, 105 NW. U.L. REV. 983, 985 (2011).

130. See Greene, *supra* note 4; Gerald N. Rosenberg, *Protecting Privilege: The Historic Role of the U.S. Supreme Court and the Great Progressive Misunderstanding*, in JUDICIAL POWER AND THE LEFT 78–90 (Richard Ekins & Graham Gee eds., 2017).

131. Harris, *supra* note 127, at 9–10; Greene, *supra* note 4, at 398–99.

132. See, e.g., *A v. Secretary of State for the Home Department*, [2005] 2 A.C. 68, para. 41 (U.K.) (citing passage from Judge Patel's *coram nobis* decision in *Korematsu*); *A v. Secretary of State for the Home Department* (no. 2), [2006] 2 A.C. 221, para. 113 (citing the loaded weapon metaphor from Justice Jackson's *Korematsu* dissent).

133. See, e.g., Johan Steyn, *Guantanamo Bay: The legal black hole*, 53 INT'L & COMP. L.Q. 1, 2–3 (2004); Tom Bingham, *Personal Freedom and the Dilemma of Democracies*, 52 INT'L & COMP. L.Q. 841, 855–56 (2003); Keith Ewing, *The Futility of the Human Rights Act*, 2004 PUB. L. 829, 851 n. 115.

failure to heed the lessons of *Korematsu*.¹³⁴ The post-9/11 era has also seen *Korematsu* periodically deployed as a pro-security talking point in discussions about counterterrorism measures¹³⁵—for example, in relation to a proposed registry for migrants from Muslim countries,¹³⁶ as well as with the then-proposed travel ban itself.¹³⁷ The deployment of *Korematsu* in this way speaks to the persistent generative power of judicial precedent. And prior to June 2018, *Korematsu* technically remained good law in the sense that it had never been overruled, regardless of the verdict of history.¹³⁸

Another thing revealed by the revival of interest in *Korematsu* since 9/11 is the fuzziness about what is wrong with the decision. To some extent, this is endemic to case law precedents. Cases often stand for more than one proposition, and each can be understood at differing levels of generality. Anticanonical (and also canonical) cases, which function like teachable moments in constitutional law, have an additional layer of fuzziness in that they “can stand for (or be made to stand for) many different things to different theorists.”¹³⁹ In the case of *Korematsu*, while there may be a clear consensus that it is a bad decision, its “wrongness is a matter of incompletely theorized consensus.”¹⁴⁰

There are two complicating factors. First, while related, the wrongness of the Japanese American internment is not the same as the wrongness of the Supreme Court’s *Korematsu* decision.¹⁴¹ Suppose the Court had managed to find some procedural avenue to avoid

134. See, e.g., Harris, *supra* note 127, at 27–32; John Ip, *How Do the Abuses of Civil Liberties Under the George W. Bush Administration Compare to the Internments of Japanese Aliens and Japanese-Americans During World War II?*, 36 WM. MITCHELL L. REV. 5023 (2010); Muller, *supra* note 129, at 584–87; Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

135. YAMAMOTO, *supra* note 122, at 5–7; Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J.F. 688, 699–701 (2019).

136. Jonah Engel Bromwich, *Trump Camp’s Talk of Registry and Japanese Internment Raises Muslims’ Fears*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/us/politics/japanese-internment-muslim-registry.html>.

137. *Hawaii*, 138 S. Ct. 2392, 2435 (2018).

138. Harris, *supra* note 127, at 12. *Korematsu* has often been cited positively for what it says about strict scrutiny and racial classifications. See Greene, *supra* note 4, at 398.

139. Greene, *supra* note 4, at 462.

140. Greene, *supra* note 105, at 630. Elsewhere, Greene suggests incomplete theorization is inherent to anticanonical cases. See Greene, *supra* note 4, at 460–61.

141. See *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting) (“Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself.”).

placing its “valuable institutional stamp on racism”.¹⁴² Our view of the decision’s anticanonical status might well be different, but the wrongfulness of the internment and the blameworthiness of its architects would remain. Second, there is more than one candidate for the core wrong of the internment that the Court ought not have blessed.¹⁴³ It could, for example, be the use of race as a proxy for being a security threat,¹⁴⁴ the use of this proxy only in relation to Japanese (but not Germans and Italians),¹⁴⁵ or that the use of the proxy led to the gross burdens imposed by the internment.¹⁴⁶ This uncertainty filters through to what it means to stop a repeat of *Korematsu*. The thing to be prevented from recurring could be detention measures similar to mass internment or some lesser security measure that burdens a discrete group. Or it could refer to the problem of ensuring meaningful judicial scrutiny over government claims about what national security requires.¹⁴⁷ Logically, this uncertainty must also complicate how we should view the overruling of *Korematsu*.¹⁴⁸

B. Two conceptions of *Korematsu*

This incompletely theorized consensus about why *Korematsu* is wrong, I suggest, helps explain the divide between Chief Justice Roberts and Justice Sotomayor. When the Chief Justice maintained that “*Korematsu* had nothing to do with this case,”¹⁴⁹ he did so with a reliance on a particular conception of what the case was about. Chief Justice Roberts’ narrow, stylized account of the case has three elements. *Korematsu* concerned a specific government policy, the “forcible relocation” of people to “concentration camps”, that burdened “U.S. citizens” and was carried out “solely and explicitly on the basis of race.”¹⁵⁰ Implicitly, the wrong of *Korematsu* for Chief Justice Roberts is closely tethered to the wrong of the internment—that is, *Korematsu* is wrong for its endorsement of the “morally repugnant”

142. Greene, *supra* note 4, at 425.

143. Greene, *supra* note 105, at 634. See generally Muller, *supra* note 128, at 115.

144. Greene, *supra* note 4, at 423–24; Geoffrey R. Stone, *National Security, National Origin, and the Constitution: 75 Years after EO 9066*, 68 CASE W. RES. L. REV. 1067, 1080 (2018).

145. Muller, *supra* note 128, at 115–16.

146. Muller ultimately singles this out as the “fundamental error” of the internment. *Id.* at 116–17. See also Samuel R. Gross & Debra Livingston, *Racial Profiling under Attack*, 102 COLUM. L. REV. 1413, 1424–25 (2002).

147. Green, *supra* note 129, at 1033. See also Sandra L. Lynch, *Constitutional Integrity: Lessons from the Shadows* 92 N.Y.U. L. REV. 623, 635–36 (2017).

148. Greene, *supra* note 105, at 632.

149. *Hawaii*, 138 S. Ct. 2392, 2423 (2018).

150. *Id.* at 2423.

Executive Order 9066, which inflicted the burdens of internment upon American citizens on the basis of race.¹⁵¹

Chief Justice Roberts' goal is clear enough: to try and disassociate *Hawaii* from *Korematsu* by highlighting the discontinuities between the two cases. And it is hard to deny that there is a certain intuitive logic to the proposition that denying non-citizens the privilege to enter the United States is different from the mass internment of citizens on the basis of race. Even if one accepts Aziz Huq's observation that the "distinction between entry and internment . . . is less crisp than first appears,"¹⁵² a point that has been highlighted by the recent mass detention of asylum seekers fleeing violence in Central America, it is hard to argue that the travel ban is a greater wrong than the Japanese American internment, however one construes the wrong of the former.

However, Chief Justice Roberts' three elements work in concert to construct a heavily qualified and artificial version of the case that is at odds with the facts of the case and the Court's decision in *Korematsu*. This has troubling implications. First, the implication that the case concerned detention at internment camps does not accord with the framing of the *Korematsu* majority itself. Justice Black's opinion explicitly refused to address the question of detention at assembly and relocation centers, and instead exclusively focused on *Korematsu*'s exclusion from the West Coast.¹⁵³ Accordingly, Justice Black professed ignorance as to what would have happened to *Korematsu* had he obeyed the exclusion order¹⁵⁴—despite the government's brief stating that he would have been detained.¹⁵⁵ Indeed, Chief Justice Roberts' account accords more closely with how the *Korematsu* minority characterized the case,¹⁵⁶ and with the common (but technically incorrect)

151. *Id.*

152. Huq, *supra* note 78, at 91.

153. *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (Black, J.) ("Regardless of the true nature of the assembly and relocation centres . . . we are dealing specifically with nothing but an exclusion order.").

154. *Id.* at 221–22. This formalistic sleight of hand was part of a broader strategy adopted by the Supreme Court. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 944–64 (2004).

155. Kang, *supra* note 154, at 952.

156. *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting) ("[I]t is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."); *id.* at 243 (Jackson, J., dissenting) ("Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way *Korematsu* could avoid violation was to give himself up to the military authority. This meant submis-

understanding of *Korematsu* as the case where the Court upheld the constitutionality of the Japanese American internment.¹⁵⁷ Putting that point aside, it is unclear how the Chief Justice views race-based security measures that fall short of mass internment—that is, the kind of security measures that are a far more likely prospect in the modern age than a repeat of the Japanese American internment. This uncertainty is further heightened by the majority opinion leaving the earlier *Hirabayashi* decision, which concerned an order imposing a race-based curfew, undisturbed.¹⁵⁸

Second, regardless of what one makes of the position that citizens have superior rights to non-citizens,¹⁵⁹ there are complications in distinguishing the internment and travel ban on the basis that one burdens citizens and the other non-citizens. This is because it is not true to say that the travel ban only affects non-citizens. Even the majority opinion accepts that citizens are affected for the purposes of establishing standing—more specifically, they are kept separated from family members and relatives from the countries covered by the travel ban.¹⁶⁰ Moreover, Chief Justice Roberts' account of *Korematsu*, in omitting non-citizens, strikingly erases the Issei, who constituted a third of those detained in the internment.¹⁶¹ Whether intended or not, his account recalls the sanguine extrajudicial take on the Japanese American internment offered by Chief Justice Rehnquist, which suggested that the problematic aspect of the internment was that it extended to citizens—with the implication being that the internment would have been less problematic, or even defensible, had it been limited to the non-citizen Issei,¹⁶² since they would technically have been

sion to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.”).

157. Corinna Barrett Lain, *Three Supreme Court Failures and a Story of Supreme Court Success* 69 VAND. L. REV. 1019, 1056 (2016) (noting the irony that “the case condemned for upholding the Japanese American internment never actually ruled on it at all”). See also Muller, *supra* note 128, at 110 n. 48.

158. See generally Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1335 (2009).

159. Certainly this is the position under United States law. See Margulies, *The Travel Ban Decision*, *supra* note 64, at 170 (“foreign nationals located abroad . . . are not subject to U.S. laws and therefore have no reciprocal claim to U.S. legal protections”).

160. *Hawaii*, 138 S.Ct. 2392, 2416 (2018). See also Huq, *supra* note 78, at 97–98.

161. Greene, *supra* note 105, at 634.

162. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 206–10 (1998).

detainable as enemy aliens.¹⁶³ Chief Justice Roberts' version of *Korematsu* is open to the same reading.¹⁶⁴

Third, the majority opinion's characterization of the exclusion order at issue in *Korematsu*, and by extension the Japanese American internment more broadly, as being "solely and explicitly on the basis of race"¹⁶⁵ is problematic in several respects. In general, as Jamal Greene observes, "It is difficult to imagine a government policy of any kind for which the *sole* criterion is race."¹⁶⁶ While *Korematsu* concerned an exclusion order that explicitly applied only to persons of Japanese ancestry, it is not clear that it even it satisfies the Chief Justice's "solely and explicitly on the basis of race" standard.¹⁶⁷ If race were really the sole basis for internment, then the failure to intern Japanese Americans in Hawaii, where other pragmatic considerations came into play, is difficult to explain.¹⁶⁸ Moreover, the case was not argued by the government nor understood by the *Korematsu* majority in this way—that is, as being a case of government action motivated solely and explicitly on the basis of race.¹⁶⁹

In sum, in order to make a superficially plausible claim that *Korematsu* had nothing to do with the travel ban litigation, Chief Justice Roberts had to construct a highly stylized version of *Korematsu*—namely, the case as being concerned with the mass internment of citizens solely on the basis of race.¹⁷⁰ *Hawaii* overrules this straw-version of *Korematsu*.¹⁷¹ But change any of the elements, and it is not clear whether the *Hawaii* majority's repudiation of *Korematsu* extends that far. All we can be reasonably sure of is that Chief Justice Roberts' overruling forecloses a repeat of the Japanese American internment as it applied to the Nisei (though possibly not the Issei).

163. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798). Chief Justice Rehnquist does not acknowledge that the Issei were legally barred from naturalization. Kang, *supra* note 154, at 940. The same is true of Chief Justice Roberts' opinion.

164. Greene, *supra* note 105, at 634; Huq, *supra* note 78, at 97.

165. *Hawaii*, 138 S.Ct. at 2423.

166. Greene, *supra* note 105, at 634 (emphasis in original). Greene suggests that the majority may be preserving space for government decisions to detain or exclude on grounds such as national origin or religion. *Id.* at 636. Huq also argues that the internment was based on national origin rather than race. Huq, *supra* note 78, at 83.

167. *Hawaii*, 138 S. Ct. at 2423.

168. Huq, *supra* note 78, at 87.

169. See *infra* text accompanying notes 364-368.

170. *Hawaii*, 138 S. Ct. at 2423.

171. Greene, *supra* note 105, at 637.

By contrast, for Justice Sotomayor, *Korematsu* has everything to do with the travel ban case.¹⁷² Her conception of *Korematsu* is broader than Chief Justice Roberts' account, which I argued was so constricted as to be ahistorical.¹⁷³ Justice Sotomayor's account of the wrong of *Korematsu* reflects her broader concept of the case. The wrong is not simply that the court endorsed the specific policy of the Japanese American internment, but rather that it bought the government's argument that a discriminatory policy was really concerned with national security, despite there being sound reasons to suspect that the national security claim was a masquerade.¹⁷⁴ In doing so, Justice Sotomayor affords the *Korematsu* majority more agency than Chief Justice Roberts' bare statement that *Korematsu* was "gravely wrong."¹⁷⁵

Once we dispense with the majority opinion's artificial version of *Korematsu*, the "stark parallels" between it and *Hawaii* become clear.¹⁷⁶ More specifically, both *Korematsu* and *Hawaii* concern security measures applied against marginalized outgroups long the target of nativist anxieties; in both cases, the claimed rationale was national security, when evidence suggested that prejudice or animus on the part of decision-makers was the key motivation; in both cases, the information before the court was incomplete; and in both cases, the Supreme Court responded to the government's invocation of national security by adopting a deferential posture that proved crucial to upholding the constitutionality of the government's actions.

C. Parallel 1: A broadly applied, non-individualized security measure directed at marginalized outgroups justified in the name of national security

While the specific policies at issue in *Korematsu* and *Hawaii* differ, both cases concern broad, group-based responses directed at

172. *Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

173. See *supra* text accompanying notes 153–170.

174. *Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

175. *Id.* at 2423.

176. *Id.* at 2447 (Sotomayor, J., dissenting). See also Greene, *supra* note 105, at 639; Huq, *supra* note 78, at 87–101; Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 *YALE L.J.F.* 641 (2019); Richard Primus, *How Trump Gave the Supreme Court a Second Chance on Japanese Internment*, *POLITICO MAGAZINE* (May 30, 2017) <https://www.politico.com/magazine/story/2017/05/30/donald-trump-korematsu-japanese-internment-supreme-court-215208>.

marginalized outgroups justified in the name of national security.¹⁷⁷ In both cases, the government justified its use of a broad, group-based security measure by claiming that distinguishing threats from non-threats was impossible or infeasible. In relation to the internment, the government claimed that the loyalty of Japanese Americans as a group was suspect on account of lack of assimilation and racial and cultural ties to Japan,¹⁷⁸ and it was impossible for the government to differentiate between the loyal and the disloyal in the time available. Thus, a group-based internment was militarily necessary.¹⁷⁹ Referring to the Court's earlier *Hirabayashi* decision that upheld the imposition of a curfew,¹⁸⁰ Justice Black accepted this claim:

It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground.¹⁸¹

However, as Justice Murphy pointed out in his dissent, the claim of insufficient time made in DeWitt's Final Report was hard to reconcile with the pedestrian pace with which the internment had actually been implemented.¹⁸²

Justice Murphy's skepticism would prove well-founded, as archival research revealed decades later that General DeWitt had not considered mass internment necessary because of a lack of time to sort the loyal from the disloyal.¹⁸³ An earlier version of DeWitt's Final Report expressly disclaimed the argument that there was not enough time; rather, DeWitt considered that sorting the loyal Japanese from the disloyal was impossible—all the time in the world would have made no difference.¹⁸⁴ At the insistence of Assistant Secretary of War

177. Robert S. Chang et al., *Stop Repeating History: The Story of an Amicus Brief and Its Lessons for Engaging in Strategic Advocacy, Coalition Building, and Education Symposium: National Security, National Origin, and the Constitution: 75 Years after EO 9066*, 68 CASE W. RES. L. REV. 1223, 1255 (2018).

178. *Korematsu*, 323 U.S. at 237. See also YAMAMOTO, *supra* note 122, at 30.

179. YAMAMOTO, *supra* note 122, at 32.

180. *Hirabayashi*, 320 U.S. at 99.

181. *Korematsu*, 323 U.S. at 219.

182. *Id.* at 241 (Murphy, J., dissenting).

183. *Hirabayashi v. United States*, 828 F.2d 591, 603 (9th Cir. 1987).

184. *Id.* at 598 ("The original version differed materially from the official version. Most significantly, the original report did not purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it would be impossible to separate the loyal from the disloyal, and that all would have to be evacuated for the duration of the war."); IRONS, *supra* note 120, at 208.

John McCloy, these portions of the report were redrafted to minimize the racist overtones and to protect the government's litigation position.¹⁸⁵ Thus DeWitt's claim of the impossibility of sorting the loyal from the disloyal became claims that "time was of the essence" and that the Army had "no ready means" of determining loyalty of the Issei and Nisei.¹⁸⁶ This language made its way into the sanitized version of the Final Report.¹⁸⁷ In order to ensure that the Justice Department did not rely on the original version of the Final Report in defending the government before the Supreme Court, the War Department had all known copies of the original version and associated documents burnt.¹⁸⁸

In respect to the travel ban litigation, the government claimed that the restrictions imposed by EO-3 were necessary in order to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information to assess the risks they pose to the United States".¹⁸⁹ EO-3's claim about the infeasibility of sorting out threats from non-threats, thereby necessitating a broad, group-based response, mirrors claims advanced in relation to the Japanese American internment.¹⁹⁰

Moreover, in both cases, the broad, group-based measure targeted a long-marginalized outgroup. The Japanese American internment cannot be properly understood without an appreciation of the history of discrimination and racist treatment against Japanese in the United States.¹⁹¹ As Peter Irons observes, most of the arguments that would be later put forward by proponents of the internment were originally deployed by nativists like the Chinese.¹⁹² The Japanese who immigrated to the United States, like the Chinese before them, settled on the West Coast, where they attracted the attention of xenophobic

185. IRONS, *supra* note 120, at 208.

186. *Hirabayashi*, 828 F.2d at 598; IRONS, *supra* note 120, at 210.

187. FINAL REPORT, *supra* note 115, at vii, 9.

188. IRONS, *supra* note 120, at 211. One surviving copy would be found in the National Archives by Aiko Herzig-Yoshinaga, a former internee who became the chief researcher for the CWRIC. See *Hirabayashi*, 828 F.2d at 594.

189. EO-3, §1(h)(i), 82 Fed. Reg. at 45,164.

190. Brief of Amicus Curiae the Japanese American Citizens League in Support of Respondents at 14, *Hawaii*, 138 S. Ct. 2392 (2018) [hereinafter JACL Amicus].

191. CWRIC, *supra* note 107, at 28. See also Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 37-40 (1998).

192. IRONS, *supra* note 120, at 9.

nativist groups, particularly in California.¹⁹³ The agitations of those groups would bear fruit in the early 20th century in the form of federal restrictions on immigration (which eventually became a complete ban),¹⁹⁴ and state legislation barring alien land ownership.¹⁹⁵

The period immediately following the attack on Pearl Harbor, however, was characterized by calm, and calls for the internment of Japanese on the West Coast did not arise until various white nativist groups began pushing for internment.¹⁹⁶ These voices were soon echoed by the media, and both congressional members and state level officials in the West.¹⁹⁷ There was no clear direction from the federal government—the War Department was initially ambivalent, and the Justice Department skeptical.¹⁹⁸ But the political pressure to remove the Issei and Nisei from the West Coast was unrelenting.¹⁹⁹ Finally, on February 14, 1942, General DeWitt sent a memorandum to Secretary of War, Henry Stimson, recommending the mass removal of the Japanese American population on account of the West Coast being under threat from Japan and the Japanese American population ultimately remaining loyal to Japan.²⁰⁰ Five days later, President Roosevelt signed Executive Order 9066, the legal foundation of the internment.²⁰¹ While it made no explicit reference to race or nationality, the order was “understood to apply only to persons of Japanese ancestry”.²⁰² As the CWRIC would later observe, nativist forces had carried the day:²⁰³

The War Department and the President, through the press and politicians with the aid of General DeWitt, had been sold a bill of

193. CWRIC, *supra* note 107, at 37 (“This notion [of the yellow peril] stirred both fear and hatred, although at its peak in 1907 Japanese immigration was less than 3% of immigration to the United States, and in California the Japanese never reached 3% of the state’s population.”).

194. Immigration Act of 1924, Pub. L. 68-139; 43 Stat. 153, 162 (1924) (revised 1952). *See generally* Kritzman-Amir & Ramji-Nogales, *supra* note 39, at 566–67.

195. CWRIC, *supra* note 107, at 28–36; IRONS, *supra* note 120, at 9–12.

196. CWRIC, *supra* note 107, 67–68.

197. *Id.* at 67–71, 80–81. *See also* Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489, 496–97 (1944).

198. CWRIC, *supra* note 107, at 72–77.

199. *Id.* at 80–81.

200. *Id.* at 82.

201. Exec. Order No. 9066, 7 *Fed. Reg.* 1407 (Feb. 19, 1942).

202. Stone, *supra* note 144, at 1067–68.

203. CWRIC, *supra* note 107, at 91. *See also* Rostow, *supra* note 197, at 496 (“The dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice. The program of excluding all persons of Japanese ancestry from the coastal area was conceived and put through by the organized minority whose business it has been for forty-five years to increase and exploit racial tensions on the West Coast.”).

goods. In accepting the vicious views of California's ugly past, they came to believe that the Issei and Nisei represented a threat to the security of the coast.

In the case of the travel ban, those affected are overwhelmingly Muslims. Accordingly, EO-3 should be understood in the context of longstanding views, reinforced by the legal system, about Muslims as outsiders.²⁰⁴ The travel ban's origins derive from then-candidate Trump's call for a crackdown on Muslims entering the United States—in effect “a full-fledged campaign strategy of Islamophobia”.²⁰⁵ Khaled Beydoun defines Islamophobia as “the presumption that Islam is inherently violent, alien, and unassimilable, a presumption driven by the belief that expressions of Muslim identity correlate with a propensity for terrorism”.²⁰⁶ This describes the very premise of the travel ban.

As Beydoun observes, while candidate Trump may have made Islamophobia mainstream with his call for a crackdown on Muslims entering the United States, by definition he was tapping into latent anxieties.²⁰⁷ Indeed the idea of the Muslim as an undesirable Other long predates the Trump Administration. The clearest legal manifestation of this was the Naturalization Act of 1790, which restricted naturalization to someone who was a “free white person”.²⁰⁸ As Cheryl Harris observes, “the very fact of citizenship itself was linked to white racial identity”.²⁰⁹ Other than an Amendment after the Civil War to extend eligibility to “aliens of African nativity and to persons of African descent”,²¹⁰ the law remained unchanged until the mid-20th century.²¹¹ One effect of the law was to deny the possibility of citizenship via naturalization for the Issei;²¹² another, as Beydoun explains, was to exclude Muslims:

204. See generally Khaled A. Beydoun, *'Muslims Bans' and the (Re) Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733; ARUN KUNDNANI, *THE MUSLIMS ARE COMING! ISLAMOPHOBIA, EXTREMISM, AND THE DOMESTIC WAR ON TERROR* 220 (2014).

205. Khaled A. Beydoun, *On Islamophobia, Immigration, and the Muslims Bans*, 43 OHIO N.U. L. REV. 443, 451 (2017).

206. KHALED A. BEYDOUN, *AMERICAN ISLAMOPHOBIA* 28 (2018).

207. Khaled A. Beydoun, *The Ban and the Borderlands Within: The Travel Ban as a Domestic War on Terror Tool*, 71 STAN. L. REV. ONLINE 251, 257 (2018).

208. Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103.

209. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1744 (1993).

210. Act of July 14, 1870, ch. 255, §7, 16 Stat. 254.

211. John Tehranian, *Compulsory Whiteness: Towards a Middle-Eastern Legal Scholarship*, 82 IND. L.J. 1, 9 (2007).

212. *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that a person of Japanese ancestry was not white and was therefore ineligible for naturalization); see also CWRIC, *supra* note 107, at 28–29.

[T]he Naturalization Act of 1790 also curbed the migration of Muslims to the United States, as they were largely aware of the opposition their religious identity would spur at ports of entry like Ellis Island. The Naturalization Act persuaded many Muslims considering emigrating to the United States to stay home, while those who did travel across the Atlantic for the promise of a better life were largely destined to become lifelong aliens in a new land, restricted from becoming naturalized citizens on account of their Muslim identity.²¹³

The ban on Muslims becoming naturalized citizens lasted until 1944.²¹⁴ So, in a historical sense, the Trump Administration's travel ban, which affects Muslims almost exclusively, is neither new nor aberrational.²¹⁵ Its effects have been entirely predictable. The flow of visitors and immigrants from affected countries has slowed to a trickle.²¹⁶ Refugee numbers have dropped, with Muslim refugee numbers dropping the most.²¹⁷ Indeed, the travel ban, together with the implementation of aggressive immigration enforcement measures²¹⁸ and the push to build a wall on the Southern border,²¹⁹ can be understood as a broad effort on the part of the Trump Administration to reverse the diversifying demographic trends of the United States by rolling the immigration system back to the pre-1965 situation that favored white immigrants.²²⁰

213. BEYDOUN, *supra* note 206 at 48.

214. *Id.*

215. *Id.* at 46–47.

216. Alicia Parlapiano, *The Travel Ban Has Been Upheld. Here Are Some of Its Effects So Far*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/trump-travel-ban-effects.html>.

217. *Id.*

218. Most cruelly with the policy of separating illegal immigrants from their minor children. See Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 602–03 (2019). Although the policy was later officially abandoned, children continue to be separated from their families. Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html>.

219. Matthew Lindsay, *The Perpetual “Invasion”: Past as Prologue in Constitutional Immigration Law*, 23 ROGER WILLIAMS U. L. REV. 369, 369 (2018).

220. Villazor & Johnson, *supra* note 218, at 582 (“[T]he 1965 Immigration Act in fact precipitated a revolution by undoing . . . nearly a century of immigration laws and policies preferring white Europeans for admission to the United States.”); Kritzman-Amir & Ramji-Nogales, *supra* note 39, at 601 (“There is also a racial dimension to the U.S. nationality bans, especially when viewed in the context of the Trump administration’s vocal hostility to immigrants of color. Set alongside policies that separate migrant children from their parents and ramp up prosecutions for illegal entry along the southwestern border, the nationality bans can be understood as part of a broader effort to prevent racial diversification in the United States.”); Huq, *supra* note 78, at 77 (observing that “the travel ban is an effective agent of demographic purification”). Indeed the

D. Parallel 2: The security measure is an ill-fit for the claimed national security imperative.

A second commonality is that the security measures in question (the internment and the travel ban) have obvious flaws in terms of their empirical foundations and scope. In the case of the internment, every investigation into the loyalty of the Japanese Americans concluded that the vast majority posed no threat at all, and that any threat there was from specific individuals had already been adequately dealt with.²²¹ More specifically, investigations by John Franklin Carter (on behalf of President Roosevelt), Commander Kenneth Ringle of the Office of Naval Intelligence, and the FBI all concluded that the claims of disloyalty on the part of Japanese Americans had little basis in fact.²²² Further, the approximately two thousand Japanese non-citizens that the government considered dangerous, along with several hundred German and Italian non-citizens, were already in custody prior to the internment, having been arrested by the FBI immediately after Pearl Harbor on the basis of a three-tiered compilation of suspect enemy aliens known as the “ABC list.”²²³ Also of note is that there was no mass internment in Hawaii, despite it having actually been attacked by Japan in 1941, and despite its proportionately larger Japanese American population.²²⁴ The reasons for this are several. Hawaii lacked the xenophobic anti-Asian history of the West Coast. The commanding military decision-makers took a different view about the loyalty of local Japanese from General DeWitt, and the economic consequences of interning over one-third of the population (some 158,000 people) presented a different proposition to the internment of Issei and Nisei on the mainland. As well, the military already had

emails of Stephen Miller, the Senior Advisor to the President who was integral to both the creation of the travel ban and the child separation policy, reveal an admiration for the race-based restrictions characteristic of 1920s immigration law and a distaste for the 1965 law that undid those restrictions. See Adam Serwer, *Trump’s White-Nationalist Vanguard*, THE ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/stephen-miller-alarming-emails/602242/>.

221. *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting). See also JACL Amicus, *supra* note 190, at 16–17.

222. CWRIC, *supra* note 107, at 51–54; ROBINSON, *supra* note 107, at 54–56.

223. IRONS, *supra* note 120, at 203; Kang, *supra* note 154, at 937.

224. CWRIC, *supra* note 107, at 261 (“Surely, if there were dangers from espionage, sabotage and fifth column activity by American citizens and resident aliens of Japanese ancestry, danger would be greatest in Hawaii, and one would anticipate that the most swift and severe measures of control would be taken there. Nothing of the sort happened.”). Less than 2,000 ethnic Japanese persons, about one third of them American citizens, were taken into custody. *Id.* at 278.

greater control over the territory, with the declaration of martial law in December 1941.²²⁵

Furthermore, the prospect of an invasion of the West Coast that might be aided by disloyal elements was never real. As Eric Muller highlights, military officials already knew in early 1942 that there was no realistic prospect of invasion by Japan:

Archival records now make clear that all this talk of a Japanese invasion bore no relationship to the military situation in the eastern Pacific in early 1942—not just the military situation we can see with the benefit of hindsight, but the one that *the military actually perceived at that time*. Top army and navy officials viewed a Japanese invasion of California, Oregon, or Washington as impracticable in early 1942. They were neither anticipating nor preparing for any such assault. Indeed, during the key time period of early 1942, the Army was more concerned with *scaling back* the defense of the West Coast from land attack than with bolstering it.²²⁶

Certainly by the time *Korematsu* reached the Court, the tide of the war had long swung in favor of the United States.²²⁷ Even if the government can be forgiven for thinking that there was a prospect of Japanese invasion in early 1942, it is harder to do so after June 1942, when the United States won a decisive battle at Midway.²²⁸ In June 1942, the relocation centers had been open only for weeks, and most of the excluded Issei and Nisei were still at the assembly centers. It was only six to twelve weeks after Midway that the government would move the great majority of them to the relocation centers to be interned.²²⁹

Quite apart from its dubious empirical foundation, the internment's scope is indefensible even if it were true that there was good reason to suppose that some amongst the population of ethnic Japanese living on the West Coast posed a security threat. DeWitt's orders to remove all Japanese from the West Coast were applied in a literal fashion—to all ages, to those of one sixteenth Japanese blood, to those who had been unaware of their Japanese ancestry, to orphans and children in the care of white foster parents,²³⁰ and to the infirm,

225. *Id.* at 261–62.

226. Muller, *supra* note 158, at 1337 (emphasis in original).

227. Rostow, *supra* note 197, at 502.

228. CWRIC, *supra* note 107, at 12; Eric L. Muller, *All the Themes but One*, U. CHI. L. REV. 1395, 1412 (1999).

229. Muller, *supra* note 228, at 1413.

230. JACL Amicus, *supra* note 190, at 7; ROBINSON, *supra* note 107, at 126.

some of whom were “transported to the camps on stretchers from West Coast hospitals.”²³¹

The internment’s over-inclusiveness—plainly, the very young, the old, and infirm could pose no realistic security threat—was mirrored by its under-inclusiveness. If the United States government operated under the proposition that broad security measures against a particular group could be justified by virtue of some amongst that group posing a security threat, then internment measures ought to have applied more broadly—for there was, at the very least, an equivalent (if not greater) threat to the East Coast. In contrast to a few sporadic and inconsequential attacks by Japanese forces on the West Coast, German submarines in 1942 were regularly sinking ships within view of East Coast beaches, and German saboteurs came ashore in New York and Florida.²³² There were also suspicions of assistance being provided to German submarines from those on shore. However, there was no mass exclusion or internment of either German Americans or Italian Americans.²³³ Although certain German and Italian citizens, together with a few German Americans, were subject to such security measures on an individualized basis.²³⁴

Regarding the travel ban, Harold Koh observed that “the U.S. government never offered a sworn declaration from a single executive official who was willing to describe the national-security-based need for the orders, or the process that led to their adoption.”²³⁵ One possible reason for this is that the empirical basis and scope of the travel ban are manifestly flawed. The empirical basis for the travel ban is suspect on several levels. First, its focus on foreign nationals is dubious because the “overwhelming majority” of perpetrators of terrorist crimes in the United States since the 9/11 attacks have been citizens or

231. Eric L. Muller, *Korematsu, Hirabayashi, and the Second Monster*, TEX. L. REV. (forthcoming 2019) (manuscript at 15).

232. CWRIC, *supra* note 107, at 283–88.

233. *Id.* at 283–84; JA CL Amicus, *supra* note 190, at 10–11. The CWRIC observed that the larger population of Germans and Italians would have made mass internment both practically infeasible and both economically and politically costly. Those groups were also perceived to pose a lesser threat than the Japanese. CWRIC, *supra* note 107, at 286, 89.

234. CWRIC, *supra* note 107, at 284–85.

235. Harold Hongju Koh, *Trump v. Hawaii: Korematsu’s Ghost and National Security Masquerades*, JUST SECURITY (June 28, 2018), <https://www.justsecurity.org/58615/trump-v-hawaii-korematsu-ghost-national-security-masquerades/>. *See also* Brief of Amici Curiae Former National Security Officials In support of Respondents at 3, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) [hereinafter FNSO Amicus].

long-term residents.²³⁶ Even putting this point aside, the restrictions imposed by EO-3 on the nationals of the banned countries are hard to square with the empirical data: the nationals of the eight countries originally covered by EO-3 “have committed *no deadly terrorist attacks on U.S. soil in the last forty years.*”²³⁷ Indeed, if one were to apply the basic logic of the travel ban, and target countries where individuals who have committed terrorist attacks in the United States have come from, the result would have been a substantially different list of countries—none of the top five countries of origin for foreigners who committed or attempted to commit a terrorist attack in the United States from 1975 to 2016 have been subject to the travel ban.²³⁸

Third, it is not as if there would be no control over the entry of persons into the United States, but for the measures put in place by the travel ban. After the 9/11 terrorist attacks, the United States government established an extensive system of security vetting that utilizes the resources of law enforcement and intelligence agencies and applies to travellers at multiple stages.²³⁹ As well, the burden of proof lies firmly upon the visa applicant,²⁴⁰ and consular officials must deny a visa if an applicant even “appears” ineligible.²⁴¹ In practice, this means “visa applicants who cannot provide information or cannot be vetted are routinely denied.”²⁴² Empirical data suggests that the vetting system has, since the reforms made after the 9/11 attacks, been highly effective.²⁴³ This casts further doubt upon the need for the nationality-based restrictions of the travel ban.

The scope of the travel ban is equally problematic. Being based on nationality, it is over-inclusive in that it affects millions of people from the affected countries, and it cannot plausibly be claimed that

236. FNSO Amicus, *supra* note 235, at 18. The DHS’s own draft study concluded the same. See Margulies, *Bans, Borders, and Sovereignty*, *supra* note 64, at 65.

237. FNSO Amicus, *supra* note 235, at 18 (emphasis in original).

238. These being Saudi Arabia, Pakistan, Egypt, Cuba and Croatia. See Alex Nowrasteh, *Guide to Trump’s Executive Order to Limit Migration for “National Security” Reasons* (Jan. 26, 2017), <https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons>. The majority of foreign nationals who committed terrorist offences in the United States were also long-term residents. See Margulies, *Bans, Borders, and Sovereignty*, *supra* note 64, at 65–66.

239. FNSO Amicus, *supra* note 235, at 15.

240. 8 U.S.C. §1361.

241. 8 U.S.C. §1201(g).

242. FNSO Amicus, *supra* note 235, at 17. See also David Bier, *Extreme Vetting of Immigrants: Estimating Terrorism Vetting Failures*, CATO INST. 29 (Apr. 17, 2018), <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-838.pdf>.

243. Bier, *supra* note 242, at 29.

the entry of all but a fraction of those affected is actually detrimental to the national interest of the United States.²⁴⁴ Included among those are persons who pose no plausible threat—notably children, even infants.²⁴⁵ As Peter Margulies notes, EO-3’s treatment of children demonstrates its over-inclusiveness most clearly:

Vetting young children requires little more than a doctor’s note and a DNA test. Moreover, children under the age of 12 rarely have criminal records or terrorist experience that would render them inadmissible. Information security is also not a major concern for this group; young children will typically not need to cover up travel that might raise concerns, such as efforts to join ISIS forces in Syria or Iraq. Finally, a young child is unlikely to have skeletons in his or her closet that would remain under wraps until after the child’s entry into the United States and is also not likely to commit crimes immediately after her entry.²⁴⁶

The travel ban is also over-inclusive because it fails to follow its own logic. EO-3 outlines an ostensibly objective and rational process, describing the worldwide review from which the DHS developed a baseline that foreign states needed to satisfy before their nationals could enter the United States.²⁴⁷ As described by Chief Justice Roberts, the DHS baseline consisted of three components:

The first, “identity-management information,” focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U. S. Government’s receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether it regularly declines to receive returning nationals following final orders of removal from the United States.²⁴⁸

244. Indeed this can be understood as an example of probability neglect. See Kritzman-Amir & Ramji-Nogales, *supra* note 39, at 593.

245. *Trump v. Hawaii*, 138 S. Ct. 2392, 2445 (2018).

246. Margulies, *The Travel Ban Decision*, *supra* note 64, at 180–81.

247. EO-3, §1(c)–(h), 82 Fed. Reg. at 45,162–164. See also David Bier, *Travel Ban Is Based on Executive Whim, Not Objective Criteria*, CATO AT LIBERTY (Oct. 9, 2017), <https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria>.

248. *Hawaii*, 138 S. Ct. at 2404–05.

Having examined this information, DHS identified sixteen countries as failing to meet the baseline, and a further thirty-one countries at risk of doing so. Diplomatic efforts encouraged many states to improve their compliance, and ultimately, the Acting Secretary of Homeland Security concluded that only eight countries—Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen—fell short. The Acting Secretary’s subsequent recommendation that the President impose entry restrictions in respect of nationals from those countries largely reflected this, except with respect to Somalia, which was said to present special circumstances justifying restrictions, and Iraq, which was not included despite failing to meet the baseline. These recommendations were adopted by the President, who having consulted with members of his Cabinet and other officials, issued the proclamation (or EO-3).²⁴⁹

Even the majority opinion’s account indicates that the results of the worldwide review process were not simply replicated in the list of banned countries in EO-3.²⁵⁰ Iraq was found to fall short of the baseline, but was not subject to the ban for policy reasons.²⁵¹ Conversely, Somalia is subject to a ban on all immigration despite being found to satisfy the standard for information sharing.²⁵² Further digging into the details of the baseline standard reveals further anomalies. For example, certain banned countries (such as Iran) comply with what is required by one component of the baseline—by issuing electronic passports—while, at the same time, many countries that are not subject to the ban continue to permit the use of paper passports.²⁵³ Similarly, Iran, which reportedly cooperates in relation to stolen passports, is banned, whereas many countries that rarely or never report stolen passports are not subject to the ban.²⁵⁴ Bier’s analysis of the inconsistencies in the application of the baseline and its components is damning:

[T]he proclamation [EO-3] admits that the president did not ban all countries that failed the requirements and did ban others that met them. It applies higher-than-the-baseline criteria to the countries on

249. *Id.* at 2405.

250. *See generally* Bier, *supra* note 247.

251. Iraq is stated to be an important ally that is committed to fighting the Islamic State. EO-3, §1(g), 82 Fed. Reg. at 45,163.

252. Because of the special circumstances created by its “government’s inability to effectively and consistently cooperate” and “the terrorist threat that emanates from its territory”. EO-3, §1(i), 82 Fed. Reg. at 45,165.

253. Margulies, *Bans, Borders, and Sovereignty*, *supra* note 64, at 63–64.

254. Bier, *supra* note 247.

the list, but never applies those more stringent criteria to other countries that remained off the list. The president's proclamation also applies mitigating factors to avoid banning every failing country but then didn't apply those new mitigating factors to the other banned countries. Even when applying all of these additional criteria, no set of failed or met factors can explain the proclamation's choices of which countries to ban. The travel ban simply lacks an objective grounding.²⁵⁵

EO-3, being a nationality-based travel ban, is also under-inclusive since it uses nationality as a proxy for proximity to terrorism (which, in turn, is a proxy for terrorist threat). So, for example, it applies to a Syrian national who has spent their life in Europe, but not to someone who has lived in a part of Syria controlled by terrorists but who has not obtained Syrian citizenship.²⁵⁶

EO-3's differentiation between various categories of visa applicants demonstrates further problems. If it is thought necessary to restrict the entry of nationals of a particular country because it fails to meet the requirements of information sharing with the United States government, then it is not obvious why the entry of persons from that same country as students and exchange visitors is nonetheless permitted. Yet this is precisely what EO-3 does.²⁵⁷ While restricting persons entering the United States as immigrants, but not as non-immigrants, may conform to nativist logic, it makes little sense from the standpoint of security—if the needs of security require that children from a country be categorically denied entry to the United States as immigrants, then it is hard to rationally justify why adults from the same country can nonetheless be admitted as students, tourists and visitors.²⁵⁸ Similarly, to the extent that EO-3 is meant to incentivise affected countries to improve their vetting processes so as to meet the requirements of the United States, this is also undermined by the non-inclusion of non-immigrant visa applicants.²⁵⁹

E. Parallel 3: Evidence suggests prejudice on the part of decision-makers is the key motivation.

General DeWitt's racial prejudice against Japanese, which had a major impact on his thinking about the threat posed by the Issei and

255. *Id.*

256. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 634–35 (4th Cir. 2017).

257. *Hawaii*, 138 S. Ct. at 2445.

258. Margulies, *The Travel Ban Decision*, *supra* note 64, at 181.

259. *Id.*

Nisei, was clear from his candid public statements on the subject. His 1943 Final Report provides perhaps the clearest example:

The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become “Americanized”, the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes. It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today.²⁶⁰

His other public comments were similarly blunt. For example, DeWitt reiterated before a Congressional committee his view that ethnic loyalty trumped national loyalty in the case of the Japanese, but not Germans and Italians.²⁶¹ Around this time, he also made his infamous “a Jap is a Jap” comment to the media while defending his position that Nisei serving in the United States military should not be allowed in the exclusion zones of the West Coast.²⁶²

It is clear, then, that General DeWitt’s motivation for issuing his orders providing for curfew and exclusion was “ignorant race prejudice” rather than any reasoned judgment about the needs of national security.²⁶³ Given this fact, and given that he was in charge of Western Defense Command, DeWitt has accordingly assumed the primary villain’s role in most accounts of the internment,²⁶⁴ although it is likely that his views about the Japanese were not qualitatively different from those of his civilian superiors.²⁶⁵

260. FINAL REPORT, *supra* note 115, at 34.

261. CWRIC, *supra* note 107, at 66.

262. *Id.* at 220, 222.

263. *Hirabayashi v. United States*, 828 F.2d 591, 601 (9th Cir. 1987); Rostow, *supra* note 197, at 520.

264. *See, e.g.*, Tushnet, *supra* note 134, at 288 (“General John L. DeWitt, the West Coast military commander, was a racist who simply assumed, without evidence, that Japanese Americans posed a threat of sabotage and espionage.”).

265. President Roosevelt likely shared DeWitt’s racialized assumptions about the loyalty of Japanese Americans. *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 118–24 (2001). The same goes for Secretary of War Henry Stimson. *See* IRONS, *supra* note 120, at 364.

In the case of the travel ban, as detailed in Justice Sotomayor's dissent, there is a long record of anti-Muslim animus on the part of key decision-makers and President Trump. The key pre-election statement was the election pledge on December 7, 2015, calling for "a total and complete shutdown of Muslims entering the United States".²⁶⁶ The full statement, which remained on the Trump campaign's website until May 2017, referred to the threat of jihadi terrorism and the brutality of Sharia law, particularly for women. The following day, candidate Trump defended his proposal by reference to the Japanese American internment.²⁶⁷ His subsequent statements on the campaign trail continued in the same vein. He refused to disavow his call for banning Muslims from entering the United States and reiterated his claims about the inherent dangerousness of Muslims, unassimilable and committed to Sharia law.²⁶⁸

Nothing changed upon his taking office. President Trump and his advisors were candid about the religious preference manifest on the face of EO-1 and the "connection between EO-1 and the 'Muslim ban' that the President had pledged to implement".²⁶⁹ With EO-2 and EO-3, the Trump Administration continued to reiterate its steadfast commitment to fulfill that campaign promise, and stated that the modifications made to the original travel ban were only at the insistence of the government's lawyers. During the same period, President Trump also turned to Twitter to publicize the apocryphal story of General Pershing's killing of Muslim insurgents in the Philippines, and to retweet three anti-Muslim videos originally posted by a British far-right extremist group.²⁷⁰ At no point did President Trump resile from his earlier statements about Muslims.²⁷¹

There is another clue as to the true motivation underlying the travel ban in the texts of EO-1 and EO-2. The end of EO-1's purpose section provides:

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the

266. *Hawaii*, 138 S. Ct. 2392, 2435 (2018) (Sotomayor, J., dissenting).

267. *Id.* at 2435.

268. *Id.* at 2436.

269. *Id.*

270. *Id.* at 2437–38.

271. *Id.* at 2439.

United States should not admit those who engage in acts of bigotry or hatred (including “honor” killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.²⁷²

Honor killings make another appearance later in EO-1, with the Secretary of Homeland Security, in consultation with the Attorney General, being required to collect data and report every 180 days on a number of matters, including “information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals”.²⁷³ The reference to honor killing was removed from the purpose section of EO-2, but the requirement to collect data and report remains.²⁷⁴

At first glance, the references to honor killings, a particular form of gendered violence, in executive orders that ostensibly concern national security is incongruous. But their inclusion, which trades on the supposed association between Islam and honor killings,²⁷⁵ serves as a dog whistle: Muslims are dangerous Others who ought to be excluded on account of their retrograde and barbaric treatment of women.²⁷⁶ The majority in the Fourth Circuit’s decision on EO-2 recognized this:

Plaintiffs suggest that EO-2 is not facially neutral, because by directing the Secretary of Homeland Security to collect data on “honor killings” committed in the United States by foreign nationals, EO-2 incorporates “a stereotype about Muslims that the President had invoked in the months preceding the Order.” . . . Numerous amici explain that invoking the specter of “honor killings” is a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric. . . . We find this text in EO-2 to be yet another marker that its national security purpose is secondary to its religious purpose.²⁷⁷

272. EO-1, §1, 82 Fed. Reg. at 8,977.

273. EO-1, §10(a)(iii), 82 Fed. Reg. at 8,981.

274. EO-2, §11(a)(iii), 82 Fed. Reg. at 13,217. A report was accordingly issued. See Executive Order 13780: Protecting the Nation from Foreign Terrorist Entry into the United States: Initial Section 11 Report, UNITED STATES DEP’T OF JUSTICE (Jan. 2018), <https://www.justice.gov/opa/press-release/file/1026436/download>.

275. Brief of Muslim Rights, Professional and Public Health Organizations as Amici Curiae, In Support of Appellees, And in Opposition to Appellants’ Motion for a Stay and on the Merits, *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017). See also Leti Volpp, *Protecting the Nation from Honor Killings: The Construction of a Problem Symposium: Constitutional Law in the Trump Era*, 34 CONST. COMMENT. 133, 167–68 (2019).

276. Volpp, *supra* note 275, at 136; Huq, *supra* note 78, at 74 n. 158.

277. *International Refugee Assistance Project v. Trump*, 857 F.3d 554, 596 n. 17 (4th Cir. 2017). See also *id.* at 635 (Thacker, J., concurring) (“EO-2 identifies and discriminates against

The Supreme Court's decision on the travel ban, however, made no mention of honor killing. On some level this is unsurprising—EO-3, unlike its predecessors, does not include any reference to honor killings. But here it bears reiterating that EO-3 is a proclamation made after the worldwide review process set out in EO-2.²⁷⁸ While the permanent entry restrictions imposed by EO-3 replaced the temporary, 90-day restrictions imposed by EO-2, EO-3 does not revoke or replace EO-2 in the way that EO-2 replaced EO-1.²⁷⁹ Accordingly, the obligation in EO-2 to collect data and report on honor killings, remains intact,²⁸⁰ which, when combined with the consistent pattern of the statements by candidate Trump and President Trump, provides further evidence that the true motivation behind the travel ban was anti-Muslim animus.

F. Parallel 4: Information before the court is incomplete because of the government's actions.

In both *Korematsu* and *Hawaii*, the courts were denied the complete factual picture because relevant information in the hands of the government was withheld.²⁸¹ As noted earlier, in the litigation concerning *Korematsu* (and also *Hirabayashi*), the government had misled the Supreme Court by altering the Final Report to conceal General DeWitt's true motivation, and by withholding material showing that the threat of disloyalty on the part of the Issei and Nisei was minimal (the Ringle report), and that the FBI and Federal Communications Commission had discredited the Final Report's allegations of ship-to-shore communications between Japanese submarines and Japanese Americans.²⁸² As a result, the Department of Justice deceived the Supreme Court with an argument based on a faulty premise,

Muslims on its face. It identifies only Muslim majority nations, thus banning approximately 10% of the world's Muslim population from entering the United States. It discusses only Islamic terrorism. And, it seeks information on honor killings—a stereotype affiliated with Muslims—even though honor killings have no connection whatsoever to the stated purpose of the Order.”); Gerald Neuman, *Neither Facially Legitimate Nor Bona Fide—Why the Very Text of the Travel Ban Shows It's Unconstitutional*, JUST SECURITY (June 9, 2017), <https://www.justsecurity.org/41953/facially-legitimate-bona-fide-why-unconstitutional-travel-ban/> (arguing that the directive to collect data and report on honor killing “has no conceivable relation to the alleged national security purpose of the travel ban, and it continues to reveal the true underlying purpose of both orders”).

278. EO-3, §1(c)–(i), 82 Fed. Reg. at 45,162–165.

279. See EO-2, §13, 82 Fed. Reg. at 13,218.

280. Volpp, *supra* note 275, at 140.

281. Katyal, *supra* note 176, at 654.

282. See *Korematsu v. United States*, 584 F. Supp. 1406, 1418–19 (N.D. Cal. 1984); IRONS, *supra* note 120, at 202–12, 280–92; YAMAMOTO, *supra* note 122, at 42–44.

which would subsequently lead to the *coram nobis* petitions for Korematsu and other internees in the 1980s and the acting Solicitor-General's subsequent confession of error in 2011.

As for the travel ban, there is not, as yet, evidence of any equivalent misconduct—although some commentators have suggested that the Solicitor General may have misled the Court as to the operation of the waiver system and as to President Trump's motives.²⁸³ Whatever the merits of these claims might be, what is clear at this point in time is that the Supreme Court did not have before it a crucial piece of the puzzle. This is because the government refused to make available in any form the results of the worldwide review—the claimed basis for the travel ban²⁸⁴—and indeed strenuously fought to keep it hidden from public view.²⁸⁵ What is known about the report produced after the worldwide review is its brevity—it runs a mere seventeen pages. Although Chief Justice Roberts' opinion in *Hawaii* is dismissive of the relevance of a “simple page count,”²⁸⁶ the length of the report and the sheer amount of information it would need to canvas—“the identity systems, information practices, and security situation in every country in the world”²⁸⁷—must cast considerable doubt upon the document's rigor,²⁸⁸ and strengthen suspicions that its function was to serve as “mere pretextual legal scaffolding” rather than as a genuine and sound empirical basis for EO-3.²⁸⁹

G. Parallel 5: The Turn to Judicial Deference

In perhaps the most important parallel between *Korematsu* and *Hawaii*, the path to the majority upholding the government's actions as lawful was the same. As I explore further below, that was to adopt

283. Jed Shugerman, *A New Korematsu*, SLATE (June 26, 2018), <https://slate.com/news-and-politics/2018/06/trump-v-hawaii-the-travel-ban-ruling-will-be-the-roberts-courts-shameful-legacy.html>; Ilya Somin, *Evidence Indicates there is no “Extensive” Analysis Backing Trump’s Travel Ban*, VOLOKH CONSPIRACY, (May 24, 2018), <https://reason.com/volokh/2018/05/24/evidence-indicates-there-is-no-extensive/>.

284. *Hawaii*, 138 S. Ct. 2392, 2443 (2018) (Sotomayor, J., dissenting). See also Chang et al., *supra* note 177, at 1241.

285. Katyal, *supra* note 176, at 654.

286. *Hawaii*, 138 S. Ct. at 2421.

287. David Bier, *Government Claims It Has “Extensive” Analysis Backing the Travel Ban—It’s Not True*, CATO AT LIBERTY (May 24, 2018), <https://www.cato.org/blog/government-claims-it-has-extensive-analysis-backing-travel-ban-its-not-true>.

288. *Hawaii*, 138 S. Ct. at 2443 (Sotomayor, J., dissenting) (“That the Government’s analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President’s proclaimed national-security rationale.”).

289. JACL Amicus, *supra* note 190, at 20. See also Somin, *supra* note 283.

an approach highly deferential to the government's assessments concerning what national security required.

1. Judicial deference in matters concerning national security and immigration

Paul Horwitz defines deference as “a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently”.²⁹⁰ He goes on to identify two main rationales for deference:²⁹¹ deference on the grounds of legal authority—because, for example, the decision-maker is politically accountable or has democratic legitimacy,²⁹² and deference on the grounds of epistemic authority, with the most notable version being deference for reasons of relative (or comparative) institutional competence:

[W]hen courts defer to other decisionmakers on epistemic grounds related to comparative institutional competence, they are actually doing two things. First, they are suggesting that some other decisionmaker actually possesses important information, experience, and skills that will help it decide some relevant question correctly. Second, they are suggesting that the other decisionmaker is not just a good one: it is also a *superior* decisionmaker, relative to the court.²⁹³

Executive claims for deference on account of relative institutional competence in the realm of national security are legion.²⁹⁴ The claim of relative institutional competence in the national security domain coalesces around the executive having superior access to information and relevant expertise, meaning that it is likely to make better judgments and decisions concerning matters of national security.²⁹⁵

As well as implicating national security, the travel ban concerns the federal government's authority to regulate immigration. The Constitution itself is silent on the regulation of immigration;²⁹⁶ the pre-

290. Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072 (2008).

291. *Id.* at 1068.

292. *Id.* at 1080–82.

293. *Id.* at 1085–86 (emphasis in original). See also Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J. L. & PUB. POL'Y 213, 216 (2012).

294. See Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1404 (2009); Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 892 (2012).

295. Chesney, *supra* note 294, at 1404–11.

296. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 466 (2009).

eminence of the federal government in this area stems from Supreme Court precedent from the late nineteenth century, beginning with the *Chinese Exclusion Case*,²⁹⁷ which gave rise to the plenary power doctrine.²⁹⁸ Shawn Fields identifies three tenets of the plenary power doctrine: (1) the authority to control immigration does not stem from the Constitution, but is an incident of sovereignty; (2) immigration control is not subject to ordinary constitutional constraints and is primarily the domain of the political branches; and (3) the judiciary should afford deference in cases concerning immigration because of its connection to foreign affairs, and afford even greater deference if the matter also implicates national security.²⁹⁹

The scholarly consensus is that the courts, consistent with the third identified tenet of the plenary power doctrine, have been highly deferential in matters concerning immigration.³⁰⁰ Indeed, the strength of the plenary power doctrine has been such that, over the years, this deferential judicial posture has extended even to immigration cases lacking any obvious nexus to foreign affairs or security.³⁰¹ In immigration cases that do have national security dimensions, the plenary power doctrine's strength reaches its zenith, with the result that the courts may "overlook significant, deliberate constitutional rights violations in deference to vaguely articulated national security interests".³⁰²

2. Relaxed standards of review

The Trump Administration positioned itself to benefit from deferential judicial review in several ways. The titles of EO-1, EO-2 and EO-3 all refer in some way to protecting the United States from the entry of terrorists, firmly claiming a security rationale for the various immigration restrictions forming the heart of the travel ban. In keep-

297. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States* 149 U.S. 698 (1893). See generally Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION LAW STORIES 7 (David A. Martin & Peter Schuck eds., 2005).

298. Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 23 (2015).

299. Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 713, 737-38 (2017). See also Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002).

300. Spiro, *supra* note 299, at 339; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUPT. CT. REV. 255, 260 (1984); Cox & Rodriguez, *supra* note 296, at 460.

301. Spiro, *supra* note 299, at 350.

302. Fields, *supra* note 299, at 747.

ing with this, the government consistently argued that the Court ought to exercise deference given that the subject matter concerned national security and immigration.³⁰³ The majority of the Supreme Court obliged in upholding the constitutionality of EO-3, with deference playing an important role in that outcome:

[P]laintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy” While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.”³⁰⁴

Shirin Sinnar accordingly characterizes the decision as “only the latest example of judicial deference to the executive in national security cases,”³⁰⁵ thereby situating *Hawaii* as part of a body of case law that fails to uphold civil liberties because the courts exercise deference upon the executive’s invocation of national security.³⁰⁶

The significance of the travel ban case concerning admission to the United States, and hence the area of immigration, is also clear. Despite sustained academic critique,³⁰⁷ the plenary power doctrine remains, even if its worst edges have been pared down somewhat—with

303. See JACL Amicus, *supra* note 190, at 26.

304. *Hawaii*, 138 S. Ct. 2392, 2421–22. (2018).

305. Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 993 (2018). See also Margulies, *The Travel Ban Decision*, *supra* note 64, at 184 (“[T]he *Hawaii* majority’s argument for EO-3’s constitutional validity reduces to the familiar theme of deference.”); Kritzman-Amir & Ramji-Nogales, *supra* note 39, at 590 (describing the majority opinion as “exhibit[ing] extreme deference to the executive”); Yamamoto & Oyama, *supra* note 135, at 715 (describing the decision as showing “unconditional deference to the executive branch”); Greene, *supra* note 105, at 638 (“The parallel between [*Hawaii*]’s deferential posture and the Court’s performance in *Korematsu* is nearly impossible to ignore. . . .”); Katyal, *supra* note 176, at 642 (“[T]he Court’s decision . . . perpetuates the very-near-blind deference to the executive branch that led the *Korematsu* Court astray.”); Mari J. Matsuda, *This Is (Not) Who We Are: Korematsu, Constitutional Interpretation, and National Identity*, 128 YALE L.J.F. 657, 675–76 (2019) (arguing that the decision “reenacted the *Korematsu* majority’s complete deference to executive claims of necessity, ignoring copious evidence that animus, not national security, was the government’s motivation”).

306. See, e.g., REHNQUIST, *supra* note 162; STONE, *supra* note 112; Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89 (2012).

307. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of “Chinese Exclusion” and Its Progeny*, 100 HARV. L. REV. 858, 863 (1987); Legomsky, *supra* note 300, at 288–89; Spiro, *supra* note 299, at 340.

it evolving from “strict nonjusticiability to a highly deferential standard of review”.³⁰⁸ In keeping with this, the majority in *Hawaii* did not decline to examine the constitutionality of the travel ban, but rather it went about this task while affording a great deal of weight to the government’s judgements. Initially, the majority considered the “facially legitimate and bona fide” standard, which originated from *Kleindienst v. Mandel*.³⁰⁹ This case concerned Mandel, a Belgian Marxist, who was presumptively ineligible for a visa under the applicable law because of a specific provision barring those who advocated communism. The Attorney General, who had the power to make an exception for Mandel, declined to do so on the basis that Mandel had violated the terms of his visas on prior visits to the United States. The Supreme Court, noting Congress’ plenary power to regulate the entry of aliens, exercised deference by formulating a limited test that asked only whether the government had a facially legitimate and bona fide reason to exclude an alien. On the facts, the Attorney General’s decision, based on Mandel’s admission that he had violated the terms of his previous visas, met the requirements of being facially legitimate and bona fide, meaning that the Mandel’s claim failed.³¹⁰

The majority opinion asserted that the standard in *Kleindienst v. Mandel* would clearly have been met on the facts of *Hawaii*.³¹¹ Nonetheless, it went on to apply a standard of review that ostensibly allowed a more wide-ranging inquiry—one that allowed the Court to look beyond the four corners of EO-3 itself and consider the plaintiffs’ extrinsic evidence “to the extent of applying rational basis review.”³¹² But this apparently generous concession to the plaintiffs ultimately flattered to deceive.

The majority opinion’s application of rational basis scrutiny is suspect. Chief Justice Roberts began with the conventional observation that the Court rarely invalidates a policy when applying this standard of review.³¹³ However, as the majority opinion itself acknowledged, the precedents discussed did not give the government

308. Shalini Bhargava Ray, *Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L.J. 13, 30 (2019).

309. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

310. *Id.* at 769–70. Although it appears this was a pretext and the decision was made because of disfavor towards Mandel’s political views. Schuck, *supra* note 73, at 182–83.

311. *Hawaii*, 138 S. Ct. 2392, 2420 (2018). For a contrary view, see Margulies, *The Travel Ban Decision*, *supra* note 64, at 177–78.

312. *Hawaii*, 138 S. Ct. at 2420.

313. *Id.* Eyer argues that this is a misleading simplification. See generally Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018).

carte blanche.³¹⁴ Rather, the standard of review arising from those precedents, termed rational basis with bite, requires some connection between ends and means—marked under- or over-inclusiveness can lead to invalidation.³¹⁵ But the majority opinion did not engage in such scrutiny, ignoring the over-inclusive and under-inclusive aspects of EO-3.³¹⁶ Thus, there is a disconnect between the rigor of the advertised standard of review and the rigor of the standard of review as it is actually applied by the majority.³¹⁷

Similarly, in *Korematsu*, the government argued that the Court ought to defer to what the military considered necessary for the defense of the nation.³¹⁸ A majority of the Supreme Court obliged, gullibly accepting that the actions in question were motivated by the imperative of national security.³¹⁹ Significantly, the majority did so while purporting to apply an early version of strict scrutiny,³²⁰ which Justice Black set out at the start of his opinion:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.³²¹

Strict scrutiny in *Korematsu* proved to be anything but fatal in fact.³²² And subsequently, the decision would become, as Michael Dorf puts

314. *Hawaii*, 138 S. Ct. at 2420 (citing *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448–450 (1985), and *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996)).

315. Margulies, *The Travel Ban Decision*, *supra* note 64, at 178–79; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 759–61 (2011).

316. *See supra* text accompanying notes 244 to 259.

317. Margulies, *The Travel Ban Decision*, *supra* note 64, at 210 (“In relying on the *Cleburne* line of cases, the *Hawaii* majority wanted to have it both ways. Those cases apply a robust brand of means-ends scrutiny, as in *Cleburne*’s own cavil that the defendant town’s special permit ordinance for group homes did not apply to other uses with similar impacts, such as dormitories and hospitals. The *Hawaii* majority wished to advertise its allegiance to these ‘rational basis with bite’ cases, without actually committing itself to their robust methodology.”).

318. JACL Amicus, *supra* note 190, at 26.

319. *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

320. The decision is understood for establishing this proposition. *See* Peter J. Rubin, *Taking its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of the Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1891 (2006); Greene, *supra* note 105, at 635–36.

321. *Korematsu*, 323 U.S. at 216.

322. In this respect it stands out as one of the handful of cases where a racial classification survived strict scrutiny. *See Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell J., concurring) (“Only two of this Court’s modern cases have held the use of racial classifications to be constitutional. *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*,

it, “a cautionary tale about what happens when the Court recites its obligation to apply strict scrutiny but in fact defers to the executive’s assertion of a national security interest.”³²³

Rather than providing meaningful scrutiny of the relationship between the means and ends of EO-3 in accordance with the ‘rational basis with bite’ standard of review, the majority opinion in *Hawaii* instead relied on the ostensibly impressive worldwide review process conducted by the DHS.³²⁴ Chief Justice Roberts’ opinion is replete with references to it.³²⁵ This worldwide review process was crucial to the outcome of *Hawaii* in two ways. First, the fact that the worldwide review was carried out served as a demonstration of due diligence on the part of the Trump administration, giving the majority in *Hawaii* sufficient cover to adopt a deferential posture. Second, it functioned as the basis for showing that there was a plausible independent justification for the travel ban other than anti-Muslim animus, namely national security.

3. Due diligence and deference on the grounds of epistemic authority

As outlined earlier, the argument for judicial deference in relation to national security is typically premised upon the executive’s epistemic authority—that is, the executive’s relative institutional competence stemming from its superior access to expertise and information, means that judges ought to afford great weight to the executive’s judgments.³²⁶

Discussions about deference and relative institutional competence tend to be framed in general and abstract terms.³²⁷ The execu-

320 U.S. 81 (1943). Indeed, the failure of legislative action to survive strict scrutiny has led some to wonder whether our review of racial classifications has been strict in theory, but fatal in fact. See Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).”)

323. Michael C. Dorf, *SCOTUS Travel Ban Argument Post-Mortem and the Surprising Relevance of Korematsu*, TAKE CARE (Apr. 25, 2018), <https://takecareblog.com/blog/scotus-travel-ban-argument-post-mortem-and-the-surprising-relevance-of-korematsu>.

324. Margulies, *The Travel Ban Decision*, *supra* note 64, at 180.

325. See *Hawaii*, 138 S. Ct. at 2392.

326. See, e.g., Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2256–57 (2018) (noting that “The rationale that courts should defer, for example, to the President’s national security judgment has not been an argument entirely about democratic accountability. It has been grounded as well in the idea that the presidency, as an institution, is better equipped to exercise sound national security judgment. This is in part because of informational asymmetries that limit judicial capacity to evaluate policy and national security strategy.”).

327. Chesney, *supra* note 294, at 1404.

tive is a superior decision-maker regarding national security as compared to courts because of its abstract institutional qualities.³²⁸ But, for a variety of reasons, the relative institutional competence of the executive should not be so categorically presumed.³²⁹ While it is not disputed that the executive branch has superior capacity to gather information, it is not so much the capacity to gather information that matters, but rather an institution's "capacity to assess information at the point when factfinding occurs."³³⁰ If the key task is assessing information rather than accessing it, it is not so obvious that judges necessarily operate at a disadvantage.³³¹ Further, the executive's advantage in access to relevant information and expertise is only meaningful if that superior access is utilized. Therefore, in order to legitimately claim deference on the grounds its epistemic authority, the executive first ought to be able to show that it has made use of its institutional advantages.³³²

In reality, showing that the executive's national security expertise has been leveraged entails demonstrating the involvement of the sites of such expertise. The executive is not a monolith—it is headed by the Presidency, but is composed of a network of constituent agencies, bureaucracies and other bodies.³³³ The claim about the executive's superior access to expertise and information is accordingly a shorthand—the executive's national security expertise is concentrated in particular agencies within the executive. In sum, if the government can show that it has done its due diligence and leveraged its superior access to relevant information and expertise by involving the relevant agencies, then this strengthens the case for the courts to defer on epistemic grounds.³³⁴

328. *Id.*

329. Huq, *supra* note 294, at 904–18.

330. Chesney, *supra* note 294, at 1406.

331. *Id.*

332. Horwitz, *supra* note 290, at 1101–02 (“Under an epistemically based rule of deference, a party that invokes deference should display a number of qualities. First and most obviously, to the extent that judicial deference to such an institution is based on its epistemic superiority, we should oblige such an institution to actually bring the weight of its expertise to bear on the problem before the court.”). *See also* Chesney, *supra* note 294, at 1411–12; Huq, *supra* note 294, at 947–48.

333. Huq, *supra* note 294, at 904.

334. W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 *YALE L.J. F.* 825, 847 (2018) (stating that “Courts are inclined to defer to the President’s judgments in the national security arena, in no small measure because of the perception that a full array of experts at the National Security Council, the State Department, the Central Intelligence Agency, the Department of Homeland Security, the Department of Justice and other agencies is there to provide him with legal advice, intelligence,

This can be illustrated by considering the contrasting attitudes of courts towards EO-1 and EO-2, both made before the worldwide review process, and EO-3. The recitals of reasons for why the travel ban was needed were amateurish in both EO-1 and EO-2, and there was little to no involvement of agencies with relevant expertise. EO-1 began with an allusion to the 9/11 terrorist attacks being the result of lax screening of visas, and went on to state that “[n]umerous foreign-born individuals have been convicted or implicated in terrorism-related crimes” since 9/11, including foreign nationals who had entered the United States on various visas or as refugees.³³⁵ The focus on foreign nationals, for the reasons discussed earlier, is empirically dubious.³³⁶ The reference to 9/11 is also puzzling since EO-1 (and for that matter EO-2 and EO-3) would not have applied to the perpetrators of the 9/11 attacks.³³⁷ These are obvious flaws. Their presence in the case put forward by EO-1 is partly explicable by the irregular process that led to it. The Trump Administration bypassed the usual intra-agency process, meaning that agencies with relevant expertise—including the DHS and the Department of Justice—were not involved.³³⁸

More executive agencies were involved with EO-2,³³⁹ which included a recital of factual findings in response to judicial criticism of EO-1 being unsupported by evidence.³⁴⁰ But this recital was still flimsy. It began with boilerplate language lifted from State Department reports about general security conditions in the six banned countries, but not the security threat posed by the entry of nationals of those countries.³⁴¹ This was followed by three vague examples about

diplomatic information, and policy development to formulate the best policy. When a President wakes up one morning and decides to change a policy by tweet without involving that extensive apparatus, the courts simply cannot be expected to defer to the President’s judgment.”).

335. EO-1, §1, 82 Fed. Reg. at 8,977.

336. See *supra* text accompanying notes 236 to 238.

337. Mark Berman, *Supreme Court partially restores Trump travel ban that wouldn’t have kept out anyone behind deadly terrorist attacks*, WASH. POST (June 26, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/26/supreme-court-partially-restores-trump-travel-ban-which-wouldnt-have-kept-out-anyone-behind-deadly-terrorist-attacks/>.

338. *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017) (noting lack of interagency review regarding EO-1); FNSO Amicus, *supra* note 235, at 9 (noting that EO-1 “received little, if any, advance scrutiny by the Departments of State, Justice, Homeland Security, or the intelligence community”).

339. FNSO Amicus, *supra* note 235, at 12.

340. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (“The Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States.”).

341. EO-2, §1(e), 82 Fed. Reg. at 13,210–211. See also Aziz Huq, *The “Travel Ban” Executive Order as Separation-of-Powers Test Case*, JUST SECURITY (Mar. 10, 2017), <https://www.justsecurity.org/38675/travel-ban-executive-order-separation-of-powers-test-case/>.

the supposed threat posed by outsiders,³⁴² all of which collapsed upon scrutiny. The first was the claim that 300 persons who entered as refugees were being investigated by the FBI (although there was no indication of whether all, some, or any of this group came from the six banned countries). The second was the case of two Iraqis refugees who were sentenced for supporting terrorist activity overseas as part of an FBI sting operation.³⁴³ In any case, Iraq was not covered by EO-2. The third was the case of a Somali refugee who arrived in the United States as a child and tried to detonate a bomb in Portland with the assistance of the FBI, which nabbed him in a sting.

The courts were unimpressed. Indeed, the fact that the relevant agencies cobbled together a national security justification for the travel ban only after the initial litigation setback concerning EO-1 did little to quell judicial doubts about the government's claim that EO-2 was motivated by genuine national security imperatives. The view of the majority of the Fourth Circuit is illustrative:

EO-2's text does little to bolster any national security rationale: the only examples it provides of immigrants born abroad and convicted of terrorism-related crimes in the United States include two Iraqis—Iraq is not a designated country in EO-2—and a Somalian refugee who entered the United States as a child and was radicalized here as an adult. . . . The Government's asserted national security purpose is therefore no more convincing as applied to EO-2 than it was to EO-1.³⁴⁴

By contrast, EO-3 had been preceded by the worldwide review process undertaken by the DHS, with involvement from the State Department and the intelligence community.³⁴⁵ Chief Justice Roberts' opinion in *Hawaii* recounted the worldwide review process in some detail,³⁴⁶ and appeared impressed by its rigor, noting that EO-3's "12-page Proclamation . . . thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions".³⁴⁷ Being able to point to a process of information gathering as well as the involvement of the national security bureau-

342. EO-2, §1(h), 82 Fed. Reg. at 13,212.

343. Samantha Schmidt & Lindsey Bever, *Kellyanne Conway cites 'Bowling Green massacre' that never happened to defend travel ban*, WASH. POST (Feb. 3 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/03/kellyanne-conway-cites-bowling-green-massacre-that-never-happened-to-defend-travel-ban/>.

344. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 596 (4th Cir. 2017).

345. *Trump v. Hawaii*, 138 S. Ct. 2392, 2404 (2018).

346. *Id.* at 2408–09.

347. *Id.* at 2409.

cracy via worldwide review resulted in the government's case meeting with a more hospitable judicial reception.

Whether the worldwide review process really deserves the faith the majority places in it is another question. First, as noted earlier, the precise relationship between the findings of the worldwide review and the actual restrictions imposed by EO-3 remain murky. More specifically, it is unclear whether the DHS's baseline was faithfully applied or whether other unstated considerations played a role in determining which countries were subject to EO-3.³⁴⁸ Additionally, the relationship between the worldwide review, the recommendations of the Acting Secretary of Homeland Security, and the restrictions actually imposed by EO-3 is unclear. In particular, the restrictions imposed on non-immigrant visas are expressly stated to be in accordance with the recommendations of the Secretary of Homeland Security. There is no equivalent language in EO-3 regarding the restrictions imposed on immigrant visas.³⁴⁹ One plausible explanation for this contrasting text is that EO-3's restrictions on non-immigrant entry from affected states are based on the recommendations of the DHS, whereas the restrictions on immigrant entry are not (or, it could even be that they contradict the recommendations of the DHS). If so, then there is no basis for deference on epistemic grounds, at least with respect to the restrictions concerning immigrant entry.³⁵⁰ Second, if the effect of EO-3 is compared to EO-1, it is hard to avoid the conclusion that the only changes resulting from this worldwide review process were a few cosmetic adjustments—the inclusion of two non-Muslim majority countries in a way that affects negligible number of people from those countries—while leaving the fundamental structure and approach of EO-1 in place.³⁵¹

Put plainly, convincing a court that deference is not due because of particular matters of detail regarding the worldwide review is a more difficult task than convincing a court that deference is not due

348. See *supra* text accompanying notes 250 to 255.

349. EO-3, §1(h)(ii)–(iii), 82 Fed. Reg. at 45,164.

350. Eric Rothschild, *The Government Has Yet to Produce Evidence Showing the Travel Ban is About National Security*, JUST SECURITY (June 21, 2018), <https://www.justsecurity.org/58256/government-produce-evidence-travel-ban-national-security/>.

351. FNSO Amicus, *supra* note 235, at 13 (“Travel Ban 3.0’s generalized, country based approach remains virtually identical to its predecessors. This Ban includes a few new exceptions and names a slightly different list of countries, but still relies on sweeping and unprecedented nationality-based bans, directed at almost exclusively Muslim-majority countries, nearly all of which were on the prior lists. . . . Whatever additional governmental process transpired plainly was not meant to alter the structure, substance, or purpose of the original Travel Ban 1.0.”).

because of the failure to follow normal decision-making practices.³⁵² So, in contrast with the judicial doubts expressed about the national security bona fides of EO-1 and EO-2, in respect of which the courts noted there had either been no involvement or limited and belated involvement of the relevant national security experts, the majority in *Hawaii* was able to rely on the record of the worldwide review process as demonstrating sufficient executive conscientiousness so as to warrant deference. Having assumed such a deferential posture, the majority was never likely to consider whether the worldwide review process was conducted to reach a predetermined outcome;³⁵³ instead, it was content to rely on and, in effect, approve the worldwide review “mechanically and without meaningful scrutiny”.³⁵⁴

4. The sufficiency of hypothetical reasons

In addition to the process of going through the worldwide review giving the majority the necessary cover to defer on epistemic grounds, the outcome of the worldwide review served the purpose of supplying an independent basis for the travel ban untainted by unconstitutional animus. Chief Justice Roberts’ majority opinion made two key moves to achieve this. The first was to apply the relaxed, rational basis standard of review in the way it did:

For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes. See *Railroad Retirement Bd. v. Fritz*, 449 U. S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980) . . . As a result, we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.³⁵⁵

This standard of review was sufficiently relaxed to allow the travel ban to be upheld provided the government could plausibly argue that it had resulted from a justification independent of anti-Muslim animus.³⁵⁶ In effect, the majority applies what Shalini Ray terms a

352. Renan, *supra* note 326, at 2267.

353. Huq, *supra* note 78, at 74–75.

354. *Id.* at 75.

355. *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

356. *Id.*

“sole motive standard”.³⁵⁷ That is, in order for the plaintiffs to have prevailed, they would have had to be able to show that anti-Muslim animus was the only motive behind the travel ban. The availability of another motive, such as national security, meant that the government won.³⁵⁸

The second move, then, was for the majority opinion to rely on the worldwide review process as establishing the independent justification for the travel ban.³⁵⁹ Chief Justice Roberts thus avoided having to squarely confront the clear record of anti-Muslim animus on the part of the Trump Administration. His majority opinion did not claim that the evidential record demonstrated that the travel ban was not motivated by anti-Muslim animus,³⁶⁰ but instead relied on the government being able to come up with a separate justification—national security—for the travel ban.³⁶¹

At this point, let us return to Chief Justice Roberts’ account of *Korematsu* as concerning an order “solely and explicitly on the basis of race”.³⁶² Chief Justice Roberts thus sets up *Korematsu* as concerning a government policy where the sole motive was race. As noted earlier, this was part of Chief Justice Roberts’ attempt to distance the facts of *Hawaii* from those of *Korematsu*. On this view, the sole motive standard is met in *Korematsu* because General DeWitt’s exclusion order was based solely on race. But *Hawaii* does not satisfy this standard because there was an independent and legitimate motive available for the travel ban, namely national security.

Although certain contemporary commentators at the time did comprehend the racial basis underlying the internment,³⁶³ Chief Justice Roberts’ description of the internment as being “solely and ex-

357. Ray, *supra* note 308, at 29.

358. See also Aziz Huq, *The travel ban decision echoes some of the worst Supreme Court decisions in history*, Vox (June 26, 2018), <https://www.vox.com/the-big-idea/2018/6/26/17507014/travel-ban-internment-camp-supreme-court-korematsu-muslim-history>.

359. *Hawaii*, 138 S. Ct. at 2421.

360. Margulies, *The Travel Ban Decision*, *supra* note 64, at 177–78 (“It would have been appropriate to forthrightly assess whether the statements vitiated the stated grounds for EO-3’s restrictions. The majority’s failure to integrate candidate Trump’s statements into its analysis of EO-3 left a yawning gap at the heart of its opinion.”).

361. *Hawaii*, 138 S. Ct. at 2421 (“But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”). See also Ray, *supra* note 308, at 29–30.

362. *Hawaii*, 138 S. Ct. at 2423.

363. See Rostow, *supra* note 197, at 496–97; Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 176 (1945).

plicitly on the basis of race”³⁶⁴ represents a contemporary understanding of the internment—one that became mainstream after later developments such as the redress movement, the CWRIC, and the *coram nobis* cases. But it does not square with how *Korematsu* was argued, or with how the majority in *Korematsu* understood the facts as they were presented to the Court.³⁶⁵ The following exchange between Justice Frankfurter and Solicitor General Fahy during oral argument is instructive:

MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, “It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area.” Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it?

MR. FAHY: It would not have been.³⁶⁶

Likewise, Justice Black’s opinion unequivocally denied that racial prejudice against Japanese people had anything to do with Korematsu’s exclusion, and asserted instead that it had everything to do with national security:

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military

364. *Hawaii*, 138 S. Ct. at 2423.

365. See Ray, *supra* note 308, at 60 (“As even the majority opinion in *Korematsu* makes clear, however, that case has never been considered one in which the government offered *no justification apart from animus*. Indeed, the government in that case argued that national security justified the civilian exclusion order, and the *Korematsu* majority invoked that very justification in upholding Fred Korematsu’s conviction.”).

366. *Hirabayashi v. United States*, 828 F.2d 591, 600 (9th Cir. 1987) (reproducing portions of the oral argument in *Korematsu*). Justice Frankfurter’s hypothetical about General DeWitt’s motivations was closer to the mark than he realized; *Id.* at 601 (“The government also agrees with petitioner and the district court that General DeWitt acted on the basis of his own racist views and not on the basis of any military judgment that time was of the essence.”).

authorities feared an invasion of our West Coast and felt constrained to take proper security measures³⁶⁷

The upshot of this is striking: under the standard of review applied by the majority opinion in *Hawaii*, the Japanese American internment would have been upheld as constitutional. This is because the approach taken by the majority opinion in *Hawaii* does not require that the government actually be motivated by a legitimate motive (such as national security), so long as the impugned action can plausibly be understood to be justified by a legitimate motive. Under this approach, Fred Korematsu could only have succeeded if he could show that racial prejudice against the Japanese was the sole motive for his exclusion. But this was always going to be impossible, unless the government was unable to construct a separate independent justification. Of course, the government did proffer arguments based on national security, which the Court readily accepted. Thus, Justice Black denied that racial prejudice was the relevant motivation and insisted that Korematsu's exclusion (and by logical extension, the internment) was motivated by the needs of national security.³⁶⁸

Thus, even though Chief Justice Roberts describes *Korematsu* as “gravely wrong the day it was decided,”³⁶⁹ if one applies the logic of his majority opinion—that an impermissible animus only invalidates government action if it is the sole available motive—*Korematsu* ends in the same result as it did in 1944. Indeed, the approach taken in *Hawaii* is more troubling in the following way. The majority in *Korematsu* accepted that racial prejudice would have been an impermissible reason for exclusion. For this reason, Justice Black at least needed to deny, however implausibly, that anti-Japanese prejudice was the rationale underlying the decision to exclude. If the approach taken by the *Hawaii* majority is adopted, however, that denial would not even have been needed provided the government could put forward an independent justification based on national security.

There is a further problem with the standard of review applied by the majority opinion in *Hawaii*. If the standard of review only requires that an untainted justification be available—as opposed to requiring that justification to have actually motivated the decision-

367. *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

368. *See also* Huq, *supra* note 358.

369. *Hawaii*, 138 S. Ct. at 2423.

making—then this undermines the case for deference on epistemic grounds, an idea to which the majority opinion repeatedly refers.³⁷⁰

As we saw earlier, the majority placed great weight upon the executive branch’s having conducted a thorough worldwide review process involving various administrative agencies with the relevant expertise, although it never required the government to demonstrate that the worldwide review process actually justified the restrictions imposed by EO-3,³⁷¹ as opposed to being a post-hoc “animus-launders” device.³⁷² Fundamentally, the majority opinion’s approach is indifferent between these two outcomes. This is because the standard of review applied by the majority is sufficiently relaxed as to be agnostic as to whether the independent, legitimate justification was actually the motivation for action, or whether it is merely a hypothetical justification.³⁷³ What mattered was that this alternative legitimate justification (national security) existed, meaning that the illegitimate justification (anti-Muslim animus) was not the sole motive available for the travel ban.

However, if national security was a justification added after the fact—that is, a hypothetical set of good reasons for the government’s action concocted by executive branch lawyers to strengthen the government’s litigation position in defending the travel ban—and was not what actually motivated the travel ban, then it is not obvious why a court ought to defer on epistemic grounds, since under these conditions, the government policy is not actually the result of the informed deliberations of the national security bureaucracy.³⁷⁴

370. *Id.* at 2419 (“[O]n questions of national security, ‘the lack of competence on the part of the courts is marked.’”); *id.* at 2422 (“[T]he Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving ‘sensitive and weighty interests of national security and foreign affairs.’”).

371. Huq, *supra* note 78, at 85.

372. Joshua Matz, *Thoughts on the Chief’s Strategy in the Census Case*, TAKE CARE (July 1, 2019), <https://takecareblog.com/blog/thoughts-on-the-chief-s-strategy-in-the-census-case>.

373. Huq, *supra* note 78, at 85.

374. Richard Primus, *The Travel Ban and Inter-Branch Conflict*, TAKE CARE (June 26, 2018), <https://takecareblog.com/blog/the-travel-ban-and-inter-branch-conflict> (“The idea that the executive branch should get deference because of its superior expertise in foreign affairs and national security makes sense on its own terms. But to the extent that that rationale is the basis for judicial deference, courts should be examining the executive branch’s actual reasons for action, not a more palatable set of hypothetical reasons that the courts (or the executive branch’s lawyers) can imagine. The point of deferring to expertise is that the expert knows better. If a more expert branch takes an action and explains why its expertise points to that action, courts should be reluctant to think that they know better than the expert. But if the court judges the constitutionality of an action on the basis of something that isn’t actually the real reason why the other branch acted, then the rationale to which it is deferring is not the rationale that persuaded an expert to act. It’s just a rationale that the expert’s lawyers figured would sound plausible to non-

V. CONCLUSION

Contrary to Chief Justice Roberts' claim that "*Korematsu* has nothing to do with" the travel ban case,³⁷⁵ I have argued that the two cases have significant parallels—in respect of the general contours of the impugned government action, the motivation underlying that action, and, above all, the deferential posture assumed by the majority of the Supreme Court. That posture was so deferential that even unusually unequivocal evidence that the travel ban was motivated by discriminatory animus against Muslims did not suffice to render it invalid. As Peter Spiro observes, "[i]f Trump's statements will not taint executive branch conduct in judicial eyes, no extrinsic evidence ever will."³⁷⁶

While the majority in *Hawaii* attempted to distance its upholding of the travel ban from the constitutional pariah of *Korematsu*, what the *Hawaii* majority did in sanctioning the travel ban is in certain respects even less excusable. This stems from two other differences (or non-parallels). First, at the time of *Korematsu*, it was not yet firmly established that action of the federal government that made classifications based on race or national origin was wrong as a matter of constitutional law.³⁷⁷ Obviously, the same cannot be said of *Hawaii*, given legal developments in the latter half of the twentieth century.³⁷⁸ Second, the Japanese American internment was a grossly unjust government policy undertaken during wartime. The verdict of history rendered by the CWRIC was that it resulted not from military necessity, but from "race prejudice, war hysteria and a failure of political leadership".³⁷⁹ War hysteria is not even available here as an excuse; the travel ban is not a wartime measure.³⁸⁰ Indeed, it is a symbolic

expert judges. And the other branch is getting the benefit of deference because it is in general considered an expert on the topic, whether or not it is actually applying that expertise in the case at hand.").

375. *Hawaii*, 138 S. Ct. at 2423.

376. Peter J. Spiro, *Trump v. Hawaii*, 113 AM. J. INT'L. L. 109, 114 (2019). See also *First Amendment — Establishment Clause — Judicial Review of Pretext — Trump v. Hawaii*, 132 HARV. L. REV. 327, 334 (2018) ("The travel ban decision thus suggests that even the strongest evidence of discriminatory motive will not trigger heightened scrutiny, as long as that evidence is extrinsic to the face of the law under challenge. So even where challengers to a law like EO-3 can persuade a court to 'look behind' that law, doing so may be futile.").

377. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 985 (2004) ("[N]o holding yet established a constitutional rule that would override a legislative or administrative choice to discriminate.").

378. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954).

379. CWRIC, *supra* note 107, at 18.

380. JACL Amicus, *supra* note 190, at 28.

response to an imagined emergency, and one imagined and manufactured for political gain.³⁸¹

Regardless of whether the Court was in the position to technically overrule *Korematsu*,³⁸² it is safe to say that *Trump v. Hawaii* confirms finally that *Korematsu* is no longer good law. But, in the end, perhaps the only greater irony than overruling a decision a paragraph after asserting it has “nothing to do with” the case at hand,³⁸³ is, as Justice Sotomayor’s dissent suggests, overruling an anti-canonical decision while simultaneously replicating its logic:

Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as “gravely wrong the day it was decided.” . . . This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority’s decision here acceptable or right. By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one “gravely wrong” decision with another.³⁸⁴

381. Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. Rev. 611, 624–25 (2018).

382. Muller, *supra* note 129, at 586 (“In order to overrule a precedent, as distinct from merely disapproving it, that precedent must stand squarely in the way of the Court’s achieving a desired outcome in a new case.”).

383. *Hawaii*, 138 S. Ct. at 2423.

384. *Id.* at 2448.

The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection[†]

BY HOMER C. LA RUE^{††} AND ALAN A. SYMONETTE^{†††}

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[†] This article grew out of a workshop presented by the authors at the 13th Annual Labor and Employment Law Conference of the American Bar Association Section of Labor and Employment Law. The conference took place on November 9, 2019 in New Orleans, LA.

The workshop description was:

Parties select arbitrators based upon a reputation for acceptability and fairness. However, parties have criticized the makeup of arbitration panels as being too white, too male and too old. Yet those same parties select “who they know to hear and resolve disputes presented. The recruitment and advancement of women and persons of color to serve as arbitrators and mediators presents a vexing problem in the labor and employment ADR community. This panel will discuss the challenges and opportunities in developing more diverse rosters of arbitrators.

13th Annual Labor and Employment Conference, ABA Section of Labor and Employment Law *Program Guide* 1, 23 (Nov. 6-9, 2019).

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PART I
A RESTATEMENT OF THE PROBLEM

Introduction

To understand diversity and inclusion in the selection of arbitrators, the discussion must begin with a brief exposition of the ABA’s work to eliminate bias and enhance diversity.¹ The authors believe it necessary to begin with a brief exposition of the efforts of the ABA “. . . to become more diverse and inclusive as an Association and a profession.”² The *Goal III Report* states:

Diversity, inclusion, and equity—both the legal profession and the pursuit of justice are core values the American Bar Association

1. *Goal III* of the ABA’s mission is to “Eliminate Bias and Enhance Diversity.” Robert M. Carlson, *Letter from the ABA President, Goal III Report 2019* 4 (2019).

2. *Id.*

(ABA, or the Association). Among the ABA's most visible initiatives is Goal II (*formerly Goal IX*—Eliminate Bias and Enhance Diversity). Its objectives are to promote the full and equal participation in the Association, the profession, and the justice system by all persons and to eliminate bias in the profession and the justice system.³

* * *

In 1986, the Commission on Racial and Ethnic Diversity, the Commission on Disability Rights, the Commission on Women in the Profession, and the Commission on Sexual Orientation and Gender Identity—individually published an annual “Goal III Report,” collecting data from the ABA Sections, Divisions and Forums (SDFs) on the participation within the ABA leadership of their respective diverse groups—racial minorities, persons with disabilities, women and persons who are lesbian, gay, bisexual or transgender (LGBT). Collecting this data is critical to measuring how the Association is doing in its efforts to advance *Goal III*.⁴

It is significant to note that Goal IX⁵ was amended, “. . . to include “persons with disabilities,” and in 2008 to include “persons of differing sexual orientation and gender identities.”. . . [T]he House of Delegates voted to revise the Association’s Goals to ensure that the rights of other underrepresented groups could be addressed, and Goal III was adopted.⁶

These provisions of the *Goal III Report* are significant for the discussion that follows. As Goal III indicates, the ABA’s goal is to expand the mission of the Association, in the elimination of bias and the enhancement of diversity. The issue dealt with in this paper is that of arbitrator selection, and discussion that follows, as well as, the recommended plan of action is intended to be inclusive as expressed in Goal III. The unconscious bias that is at play in the selection of arbitrators of color and woman are equally at play in the selection of persons with disabilities and persons for those persons in the LGBTQ+ community. The authors fully intend that the discussion and the plan of action be read expansively rather than narrowly.

Second, the primary focus of this paper is on the selection of arbitrators of color and women and the problems posed by unconscious

3. *Id.* at 5.

4. *Id.* at 6.

5. Carlson, *supra* note 1 at 2 (explaining that that the American Bar Association adopts a ninth goal: “Goal IX: To Promoted Full and Equal Participation in the Profession by Minorities and Women”).

6. *Id.*

bias in that selection process. By focusing on the selection of arbitrators, the authors do not intend to minimize the challenges facing persons, particularly persons of color and women, who seek to become arbitrators.⁷ For this reason, Part I of this paper goes into some detail about the process for becoming an arbitrator of labor-management and employment disputes.

The authors further believe, however, that as daunting as the challenges of entry are, the challenges of selection for cases so that one can continue, thrive, and succeed are seemingly insurmountable. As the authors discuss in Part II of the paper, the challenges of bias, while difficult, are possible to overcome. Indeed, there is a strategy for the diminution or hopeful elimination of the problems of bias. We begin the discussion of the problem of arbitrator selection with a discussion of the challenges raised with the entry into the profession—a restatement of the long-existing problem.

A. Jay-Z’s Cried Alarm—Current Statement of an Old Problem

On November 28, 2018, in the Music Section of the New York Times an article appeared which covered a commercial dispute between an entrepreneur named Shawn Carter and the Iconix Brand Group.⁸ The dispute concerned an infringement matter involving the use of the “Roc Family” of trademarks principally promoted and associated with the well-known hip hop performer Shawn Carter (“Jay-Z”). Jay-Z was sued by Iconix because his entertainment company called Roc Nation had entered into an agreement with Major League Baseball to sell New Era baseball caps with the Roc Nation paper-airplane logo. Iconix claimed that the agreement violated the original sale agreement with Jay-Z involving the sale of his Rocawear Brand. Jay-Z counterclaimed saying that the agreement he had with Iconix applied only to Rocawear, not Roc Nation. The agreement of sale provided that the parties were to have the matter presented to a panel of arbitrators under the rules of the American Arbitration Association as it applied to Large and Complex Cases.

The AAA provided a list of twelve arbitrators to the parties from its database of neutrals qualified to handle such cases. According to

7. See ABA Resolution 105, August 2018 (adopted), *Report* at 3–9.

8. Deb Sopan, *Jay-Z Criticizes Lack of Black Arbitrators in a Battle Over a Logo*, N.Y. TIMES, (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/Arts/Music/Jay-Z-Roc-Nation-Arbitrators.html?Searchresultposition=1> (hereinafter *Jay-Z Criticizes Lack of Black Arbitrators*. . .).

Jay-Z, he “could not identify a single African-American arbitrator on the Large and Complex Cases roster.”⁹ Jay-Z expressed his concern to the AAA and discovered that out of the 200 eligible arbitrators on the roster only three identified as African American, two men and one woman. One of the men had a conflict of interest leaving just two arbitrators to choose from. On November 27, 2018, counsel for Jay-Z filed a petition asking the NY Supreme Court in Manhattan to enjoin the processing of the arbitration if the dispute was not resolved. According to the New York Times article, “The dearth of qualified black arbitrators deprives litigants of color of a meaningful opportunity to have their claims heard by a panel of arbitrators reflecting their backgrounds and life experience: because of “unconscious bias” that most people have against people of different races, Jay-Z’s lawyer, Alex Spiro, wrote in the filing.” This according to the lawyers was a form of racial discrimination. The Times noted that the petition did not cite any legal precedent. However, it noted that courts have ruled that jurors in criminal trials cannot be eliminated from jury pools on the basis of race.¹⁰

For many involved in the arbitration of labor or employee/management disputes, this news is not new. The underrepresentation of people of color as neutrals in labor and employment arbitration has been a constant concern within the labor management community. This issue has resonance considering an increasingly diverse workforce. The lack of diversity among neutrals has the potential impact of discrediting the benefits of the ADR process.

For example, in 1991 the Supreme Court ruled that the Federal Arbitration Act requires the enforcement of an arbitration clause to compel arbitration of statutory Age Discrimination in Employment Act claims.¹¹ In delivering the opinion of the Court, Justice White, citing *Mitsubishi v. Soler Chrysler-Plymouth, Inc.*¹² stated “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum.” 550 U.S. 20, 27.

9. *Id.*

10. The petition itself was not published. However, for an understanding of the underlying dispute see *Iconix Brand Group, Inc. v. Roc Nation Apparel Group, LLC*, 2019 U.S. Dist. Lexis 169140 (US District Court SD NY, 2019).

11. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)

12. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985)

B. What We Know About the Numbers and Why They Are Not Changing

There is limited information describing the extent of the lack of diverse neutrals involved in labor management dispute resolution. None of the major appointing agencies, the American Arbitration Association or Federal Mediation and Conciliation Service or JAMS keep demographic statistics of its arbitrators. The authors of this paper are members of the National Academy of Arbitrators. The National Academy is a “professional and honorary organization of arbitrators.”¹³ of labor-management and employment disputes. Its members are made up of persons in the United States and Canada. The Academy was founded in 1947. According to its NAA website, members are chosen by involved parties to hear and decide thousands of labor and employment arbitration cases each year in private industry, the public sector and non-profits in both countries. Admission standards are rigorous in keeping with the goal of establishing and fostering the highest standards of integrity and competence.¹⁴

According to its website, the Academy was formed [t]o establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management disputes on a professional basis, including those who as a part of their professional practice hold hearings and issue written decision in other types of workplace disputes; to secure the acceptance of and adherence to the Code of Responsibility for Arbitrators of Labor-Management Disputes prepared by the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service. . . .¹⁵

In other words the members of the Academy represent many of the most acceptable and respected labor and employment arbitrators in North America.

In order to attain membership in the Academy one must apply and generally demonstrate that he or she: (1) is of good moral character, as demonstrated by adherence to sound ethical standards in professional activities; and (2) have substantial and current experience as an impartial neutral arbitrator of labor-management disputes, so as to

13. Nat'l Acad. of Arbs., *Const. and By-Laws, Article III, Sec. 1* (Updated June 2019), <https://naarb.org/constitutions-and-by-laws/> (hereinafter NAA Con.).

14. Nat'l Acad. of Arbs., *Who We Are*, (last accessed Feb. 13, 2020, 10:11PM), <https://naarb.org/who-we-are/>.

15. NAA Con. at article II, sec. 1.

reflect general acceptability by the parties or alternatively (3) if the applicant has limited but current experience in arbitration but has attained general recognition thorough scholarly publication or other activities as an important authority on labor–management relations.¹⁶

As members of the National Academy of Arbitrators, the authors of this paper have been able to research the membership rolls and through our personal knowledge of members and the body’s oral history and institutional history have been able to identify nearly all of the persons of color who have served or are serving members of the organization. We have determined that as of January 25, 2019, the Academy had accepted 1484 members over its 72 years; approximately 35 persons or 2.35% of that group were persons of color. Half of those persons of color have been admitted within the last 25 years. While membership in the Academy does not represent all the individuals who have held themselves as arbitrators of labor/employee – management disputes we submit that these statistics adequately represent the gross underrepresentation of people of color in the profession.

C. The Factors that Lead to Under-Selection of Persons of Color and Women in Labor-Management and Employment Arbitrations

The objective of this paper is to discuss the various factors that contribute to the overall demographic makeup of professional arbitrators.¹⁷ We submit that most of these factors have a very neutral impact on the challenges one must face to become a professional arbitrator. However, one’s success in the profession depends almost exclusively on the ability of the individual to be recognized and selected by the parties as being competent, fair and ethical and do the best job possible in resolving the underlying dispute. In making these selections, the parties almost consistently select arbitrators with whom they are comfortable based on reputation or prior experience. In short, the parties tend to select “who they know.” This function can at times lend itself to unintended biases or a general failure to recognize

16. NAA Con., article VI, sec. 1.

17. This paper focuses on arbitration and the issues related to the underutilization of persons of color and women, but those issues are not limited to the selection of neutrals in arbitration; rather, they apply equally to the selection of neutrals in mediation—particularly high-stakes mediations. See Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in the Top Ranks* 15 DISPUTE RESOLUTION MAGAZINE 17, 17 (Spring 2009).

equally competent and capable but somewhat less experienced neutrals. Other factors contribute to the failure to select even highly experienced neutrals of color or women.¹⁸

A successful arbitrator in labor-management and employment disputes is one who is acceptable to the parties, and one who is recognized for their ability to run a hearing, and one who is discerning and judicious in their writing and decision making. There is no pattern for one to become eligible to serve as a labor/employment arbitrator.¹⁹ Arbitrators have extensive experience in the field as advocates, teachers, judges or hearing officers. In order to work as an employment arbitrator²⁰ one gains the necessary experience advocating on behalf of employers or employees as litigators, or in-house counsel. Over time, even before the person presents as an arbitrator, the person should have become recognized as someone who not only knows the processes of dispute resolution but is civil and fair to all parties. What is important here is that anyone seeking to arbitrate employment disputes may continue their practice on behalf of employers or employees while deciding those cases.

On the other hand, one who wishes to arbitrate labor-management disputes must be experienced in the area and recognized by the

18. Johnson and La Rue participated in a forum sponsored by the ABA Section of Dispute Resolution in 2003. That forum resulted in their identifying three primary themes that gave rise to a diversity initiative called *ACCESS ADR*. The themes were:

[T]he first theme was that the ADR user-community acknowledged that there was a lack of diversity in the pool of persons whom they regularly call upon for arbitration or mediation services, and participants further acknowledged the need to correct this imbalance.

The second theme was the acknowledgment by the ADR user-community that many of those who are responsible for the selection of arbitrators and mediators are lawyers who are responsible for the representation of their clients' interests. As such, they typically avoid selecting an unknown mediator without an assurance that the mediator has the perceived requisite knowledge, skill, and experience. To decide otherwise would, in the minds of many lawyers, compromise the interests of their clients, something that their ethical obligations do not permit. That risk aversion translates into the decision not to call upon the services of a neutral whom the lawyer does not know, or one whom the lawyer cannot easily learn about from a close colleague.

The third theme was that mediators from racial and ethnic groups that are underrepresented in the ADR field, no matter how experienced, are usually unknown to the relatively small group of lawyers who are responsible for selecting arbitrators and mediators. Although arbitration was included in the dialogue, much of the discussion centered around mediation. The initiative that resulted from the forum dialogue thus also focused on mediation.

Id. at 17–18.

19. When we discuss the practice of arbitration, we are exclusively referring to arbitration in labor and employment matters. We believe, however, that much of what we write about labor and employment arbitration is equally applicable to other modes of arbitration as well as other ADR processes.

20. These are individuals who arbitrate disputes not arising out of the collective bargaining process.

parties as neutral—not engaged in the representation of either labor or management. Many arbitrators have been former agents with the government agencies notably the National Labor Relations Board or other labor focused federal and state agencies. Many are academicians engaged in the study of labor relations law and/or policy. Unlike with employment arbitrators, one does not have to have a law degree to serve. Therefore, many successful arbitrators have experience as former management executives or union representatives.

It is extremely important to understand that there are stark differences in the paths taken to become qualified as an employment versus a labor arbitrator. In labor-management arbitration, in addition to having experience advocating on behalf of management and/or labor, one usually approaches one or several established arbitrators and enters a relationship as a mentee as one develops the practice. The type of relationship may vary. In most examples, the novice arbitrator will consult with one or more to receive pointers in drafting awards or handling the business considerations in setting up a practice. From time to time the novice arbitrator will sit in with an experienced neutral and observe the hearing. This is not solely for the purpose of observing the process from a neutral's point of view. In sitting with a well-respected arbitrator, the novice receives an implicit "seal of approval" indicating to the parties that that person will eventually be acceptable for selection.

Many experienced arbitrators sometimes have the new person "shadow write", write a second award on the same matter in order to have the experienced arbitrator review and critique the novice's analysis and drafting skills. In other cases, the novice may serve as a "ghost writer" for the experienced arbitrator. This exercise is like that of a law clerk for a judge. The novice will meet with the arbitrator, understand his or her thinking and create a draft that is edited and finalized. Meanwhile, while engaging in this mentorship process, the novice will also attempt to spend time networking at conferences and seminars in order to gain recognition by the parties.

At some point, the aspiring arbitrator will notify practitioners that he or she is available for selection by approaching one of the rostering agencies and asked to be placed on their panels. If one wants to practice in the employment area, he or she may approach agencies such as the American Arbitration Association or, depending on the persons reputation, he or she may receive and invitation to join JAMS.

For labor-management matters, one approaches either the American Arbitration Association and, as their experience increases, Federal Mediation or Conciliation Service to apply to be placed on the labor or employment panel.²¹ The AAA maintains several panels in addition to labor and employment. It also administers panels of arbitrators with expertise in resolving disputes in construction, commercial and international relations. The necessary qualifications for admission to the labor and employment panels are similar in many respects but there are stark differences.

Candidates for the employment panel must meet the following qualification criteria:

- Attorneys with a minimum of 10 years' experience in employment law with fifty (50) percent of your practice devoted to this field, retired judges, or academics teaching employment law.
- Educational degrees and or professional licenses(s) appropriate to your field of expertise.
- Honors, awards and citations indicating leadership in your field.
- Training or experience in arbitration and/or other forms of dispute resolution.
- Membership in a professional association(s)
- Other relevant experience or accomplishments (e.g. published articles).²²

In addition to this specific criteria, the candidate must demonstrate neutrality defined as “freedom from bias and prejudice” and commitment to impartiality; an “ability to evaluate and apply legal, business or trade principles” and judicial capacity defined as the “ability to manage the hearing process” and to evaluate evidence.²³

The qualification criteria for admittance to the labor panel is quite different and the process is lengthy. Candidates must meet the following qualifications:

- Must have a minimum of 10 years senior level business or professional experience or legal practice directly related to the labor industry.

21. The individual seeking to practice as a labor arbitrator may also seek to be placed on panels maintained by state public employee relations boards or other national boards such as the National Mediation Board which administers panels of arbitrators with experience in handling disputes in the railroad and airline industry.

22. *Qualification Criteria and Responsibilities for Members of the AAA® Panel of Employment Arbitrators*, AMERICAN ARBITRATION ASSOCIATION, 1 (last visited Feb. 14, 2020), https://www.adr.org/sites/default/files/document_repository/Employment%20Arbitrators%20Qualification%20Criteria.pdf.

23. *Id.*

The Ray Corollary Initiative

- **Cannot be an active advocate for labor or management.**
- Must possess significant hands-on knowledge about Labor Relations.
- Must have a judicial temperament.
- Must have strong writing skills. The AAA may ask for a writing sample.
- Educational degree(s) and /or professional license(s) appropriate to your field of expertise.
- Honors, awards and citation indicating leadership in your field.
- Training and experience in arbitration and/or other forms of dispute resolution.
- Membership in a professional association(s)
- Other relevant experience or accomplishment (e.g. published articles, part of a mentoring program. [Bold emphasis in original document.])²⁴

The individual candidate must also have the reputational attributes discussed above, including neutrality, judicial capacity and reputation.²⁵

The candidate for admission to the labor panel must also undergo a rigorous application process.

- Applicants must have someone **prominent in the Labor/Management field or user of AAA's services, preferably another arbitrator who is familiar with the applicant's work, write a letter of nomination** and include a copy of the applicant's resume and send it to the Labor/Employment/Elections Senior Vice President at 200 State Street, 7th Floor, Boston, MA 02109
- The AAA will review the nominating letter and the resume and then, if applicable, will schedule an interview to discuss the application process and AAA's expectations.
- If it is determined to proceed with the application, the AAA will send the nominee an application package, which will need to be completed and returned to the AAA for processing. **Included in the package is a request to identify nine (9) references; 3 management references; 3 union references, and 3 arbitrator references.**
- The AAA will write to your references and request their comments with regard to the nature and duration of their relationship with the applicant, why they think the applicant would be

24. *Qualification Criteria for Admittance to the AAA® Labor Panel*, AMERICAN ARBITRATION ASSOCIATION, 1 (last visited Feb. 14, 2020), https://www.adr.org/sites/default/files/document_repository/Labor_QualificationsCriteria_AAAPanel.pdf.

25. *Id.*

qualified to serve, and the number of arbitration cases the references was involved during the past 24 months. The application package will not be finalized until all the references are received.

- All follow-up to the references will be done by the nominee. [Bold emphasis is in the original].²⁶

The new labor arbitrator usually then applies to the FMCS for admission to their panel. The eligibility criteria and application process are set forth at 29 C.F.R. Part 1404 and is highly rigorous as well. The candidate must provide references as well as five recent labor arbitration awards that are final and binding or successfully complete the FMCS labor arbitrator training course and either submit one award or complete and apprenticeship that meets the specifications of the Agency may provide.²⁷ In addition, the regulation specifically states the following:

Any person who at the time of application is an advocate as defined in paragraph (c)(1) of this section, must agree to cease such activity before being recommended for listing on the Roster by the [Review] Board. Except in the case of persons listed on the Roster as advocates before November 17, 1976, any person who did not divulge his or her advocacy at the time of listing or who becomes an advocate while listed on the Roster and who did not request to be placed on inactive status pursuant to § 1404.6 prior to becoming an advocate, shall be recommended for removal by the Board after the fact of advocacy is revealed.²⁸

Advocacy is broadly defined in the regulation.

It is acknowledged that the requirements of neutrality do place a unique burden on a person seeking to become a labor arbitrator regardless of demographic representation. The candidate must effectively stop his or her practice and find another source of income while seeking to build a labor arbitration practice. However, while the integrity of arbitration has come under intense scrutiny by a media which has blanketly referred to the arbitration process and arbitrators as incompetent or corrupt,²⁹ the requirements described above have

26. *Id.* at 2.

27. 29 C.F.R. §1404.5 (a) and (b).

28. 29 C.F.R. §1404.5 (c).

29. See Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1; Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES, Nov. 1, 2015, at A1; *The Virtues of Arbitration*, N.Y. TIMES, Nov. 14, 2015, Opinion; Jessica Silver-Greenberg and Michael Corkery, *Efforts to Reign In Arbitration Come Under Well-Financed Attack*, N.Y. TIMES, Nov. 15, 2015, at B1; and Jessica Silver-Greenberg and Michael Corkery, *Bipartisan Bill Would Protect Service Members' Right to Avoid Arbitration*, N.Y. TIMES, Nov. 20, 2015, at B16.

supported its integrity as arbitration applies to collective bargaining. Indeed, some have suggested that the advocacy standard be relaxed to enable more candidates of color to enter the field without presenting a significant risk to their livelihood while they are struggling to make a “go of it”. Many would disagree. Any advantage that may be given to candidates as a result of this change will have a far greater negative impact on the integrity of the process and unfairly label such arbitrators as being somehow underqualified to adequately handle such cases.

Regardless of the rigorous challenges one has to undergo to become an arbitrator, it is apparent that in order to qualify for consideration one must, besides getting the requisite experience, one must seek to generate requisite recognition, and establish a reputation that would make one suitable to decide labor and employment disputes. This requires extensive guidance and mentoring. There are several examples of organizations and panel agencies that have worked with younger, less experienced arbitrators especially arbitrators of color and have trained and nurtured them through the qualification process. The National Academy of Arbitrators has for several years have reached out to individuals pursuing careers as arbitrators and have established mentoring relationships to help qualify them for acceptance to the agency panels and eventually to membership in the Academy itself. The American Arbitration Association has, since 2009, created the A. Leon Higginbotham, Jr. Fellows Program in order to provide training and “networking opportunities to up and coming diverse alternative dispute resolution professionals who have historically not been included in meaningful participation in the field of alternative dispute resolution.”³⁰

Despite the training efforts and mentoring of underrepresented professionals in dispute resolution, these individuals cannot be successful unless they are regularly selected by the parties themselves. Arbitration, after all, is a voluntary process when it comes to the selection of neutrals. Parties have the freedom to select who they choose to resolve their disputes. Indeed, this privilege is codified in the Code of Federal Regulations. It states, “Nothing contained in this part should be construed to limit the rights of parties who use FMCS

30. *AAA Higginbotham Fellows Program*, AMERICAN ARBITRATION ASSOCIATION, (last visited Feb. 14, 2020), <https://www.adr.org/higginbothamfellowsprogram>.

arbitration services to jointly select any arbitrator or arbitration procedure acceptable to them.”³¹

Parties as the gatekeepers to the selection of neutrals use a variety of processes and have differing reasons for selecting an arbitrator. The selection may depend on the parties’ comfort level with the arbitrator based on one’s perceived fairness and the comfort of the client.³² Parties have expressed preferences for arbitrators based upon the nature of the case, the arbitrator’s fee schedule, his or her willingness to travel and his or her handling of expenses.

The selection process may include certain biased perceptions based upon an arbitrator’s race or gender as it relates to the arbitrator’s ability to make fair and reasoned decisions.³³ Some parties have also expressed preferences based upon the perception that an arbitrator’s race or gender may show a bias toward individuals of the same race or gender. While the NAA and the appointing agencies have been engaged in the mentoring and nurturing new arbitrators of color, there is little they can do to combat exclusion from consideration for cases based on unfounded bias of the parties.

The American Bar Association has challenged practitioners to step up their efforts to select more persons of color and women as arbitrators. As the authors discuss below, initiatives begun by the Diversity Lab offer some promising opportunities for the ADR community. In 2017, the Diversity Lab partnered with thirty (30) of the country’s leading law firms to pilot the *Mansfield Rule*^{TM34}. The *Mansfield Rule* measures whether law firms affirmatively consider women and attorneys of color for leadership and governance roles. It is our view that a similar initiative could be applied in the selection of neutrals in the labor-management and employment field. The ABA, in general and this section, could urge users and providers of dispute res-

31. 29 C.F.R. §1404.8. It should be noted that while the parties have right to select arbitrators, the parties may not request that an arbitrator be included or excluded from a panel for selection “because of age, race, color, gender, national origin, disability, genetic information, or religion.” 29 C.F.R. §1404.11 (b).

32. The role of unconscious bias has been shown to play a role as we discuss later in the paper.

33. For example interviews of James Harkless and the Honorable Harry T. Edwards, “The Art and Science of Labor Arbitration” College of Labor and Employment Lawyers, Video History Project. See generally DVD: The Art and Science of Labor Arbitration (Carol M. Rosenbaum 2013).

34. The use of *Mansfield Rule* and *Mansfield Rule Certified* in this paper is intended to be consistent with the rights of *Diversity Lab* as the owner of the service mark rights for these terms.

olution services to expand ways to develop and encourage the selection of diverse neutrals.

PART II
HOW TO ACHIEVE DIVERSITY AND INCLUSION IN
ARBITRATION SELECTION: TIME TO EXPAND THE
MANSFIELD-RULE™ LAW-FIRM INITIATIVE TO
THE SELECTION OF ADR NEUTRALS

A. Thinking Outside-of-the-Box Based on Empirical Data

In this portion of the paper we address the proposal to meet the challenges posed in correcting the problem of the under-selection of women and persons of color as arbitrators³⁵. Both parts of the paper speak to the vexing problem of the *selection* of women and persons of color to serve as arbitrators and mediators in labor-management and employment disputes. The paper does not address the front-end issue of increasing diversity in the rosters—not that there is not course correction to be done there as well. It is the *black box*, in the selection of arbitrators and other neutrals, that must be opened, and the information therein decoded to create a solution to why there are so many *crashes* in the selection process when persons of color and women are involved.

The suggestions put forward in this portion of the paper address the suggestion of expanding the *Mansfield Rule*^{TM36} *Law-Firm Initiative* (the *Mansfield Initiative*). We believe that the *Mansfield Initiative* demonstrates an opportunity for the ADR community to think “outside of the box.” There is empirical data to support the notion that ADR providers and selectors must find ways to overcome unconscious biases that appears to operate against true diversity and inclu-

35. The reader is reminded that the authors intend this portion of the paper to be read broadly as applicable to those persons embraced by Goal III of the ABA’s mission. The elimination of bias and the enhancement of diversity is viewed as applicable to racial minorities, persons with disabilities, women and persons who are lesbian, gay, bisexual, or transgender (LGBTQ+).

36. Diversity Lab is the owner of the service mark rights for *MANSFIELD RULE* and *MANSFIELD RULE CERTIFIED*, and Diversity Lab is the sole entity that can use and authorize other parties to use these service marks in connection with diversity programs. These terms should not be used unless a law firm or other entity is registered and participating in the Mansfield Rule certification process administered by Diversity Lab. *Mansfield Rule 3.0*, DIVERSITY LAB, (last accessed Feb. 14, 2020), <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/>.

The use of the terms *Mansfield Rule* and *Mansfield Rule Certified* in this paper are intended to be used as descriptive of the programs administered by Diversity Lab. Hereinafter, the service mark will not be included when using the terms *Mansfield Rule* and *Mansfield Rule Certified*.

sion in the selection of neutrals. If there is going to be significant movement toward diversity and inclusion, there must be an intent coupled with a plan of action. Mere urging, we now know is insufficient.

This portion of the paper restricts itself to a discussion of the application of the *Mansfield Initiative* in the selection of arbitrators who are persons of color and women in the labor-management and employment arbitration arena. We see no reason, however, why the *Mansfield Initiative* could not have application in commercial and international arbitration as well as labor-management arbitration.

B. New Status Quo Around Race and Sex—Does Getting Two in the Final-Selection Pool Matter?

Earlier, we asserted that “[t]he ABA, in general and this section, in particular could urge users and providers of dispute resolution services to expand ways to develop and encourage the selection of diverse neutrals.”³⁷ Of course, this is not the first exhortation to action as we explained in the first part of this paper. Indeed, it is worth noting a humorous moment in the development of *ACCESS ADR*.³⁸ This was an initiative to expand the selection of experienced mediators of color in commercial mediation matters. The initiative was co-sponsored by the ABA Section of Dispute Resolution and JAMS. All the sponsors of the initiative were genuinely impressed with the quality of neutrals identified and invited to participate in *ACCESS ADR*. During the stage of the execution of the program in which the initiative was recruiting plaintiff and defendant advocates to agree to select *ACCESS ADR Fellows* (as participants were called), buy-in was slow. One of the sponsors was astonished and remarked, “I never thought that this would be so hard.”

That sponsor’s remark is indicative of the seeming intractability of the problem of persuading users of ADR services, whether in labor-management and employment matters or in commercial matters, to use persons of color and women as arbitrators or as mediators. The surprise expressed in the *ACCESS ADR* sponsor’s statement is also reflected in the data related to efforts to increase diversity.

Despite the ever-growing business case for diversity, roughly 85% of board members and executives are white men. This doesn’t

37. See text on page 16.

38. See Johnson & La Rue, *infra* note 85.

mean that companies haven't tried to change. Many have started investing hundreds of millions of dollars on diversity initiatives each year. But the biggest challenge seems to be figuring out how to overcome unconscious biases that gets in the way of these well-intentioned programs. . . . [R]ecently conducted research . . . suggests a potential solution.³⁹

As the authors further note:

[i]t's well known that people have a bias in favor of preserving the status quo; change is uncomfortable. So because 95% of CEOs are white men, the status quo bias can lead board members to unconsciously prefer to hire more white men for leadership roles.⁴⁰

The authors, whose statistics are cited in the above paragraphs, conducted two (2) empirical studies to determine “. . . what happens when you change the status quo among finalists for a job position.”⁴¹ The results of the studies were what the empiricists had predicted. In the first study, participants (144 undergraduate students) were asked to “. . . review the qualifications of three job candidates who made up a finalist pool of applicants. The applicants had the same credentials—the only difference among them was their race.”⁴²

Participants indicated the extent to which they agreed that each candidate was the best for the job. Half of them evaluated a finalist pool that had two white candidates and one black candidate, and the other half evaluated a finalist pool that had two black candidates and one white candidate. . . . [The researchers] found that when a majority of the finalists were white (demonstrating the status quo), participants tended to recommend hiring a white candidate. But when a majority of finalists were black, participants tended to recommend hiring a black candidate . . . [formula omitted].⁴³

The second study was equally as revealing. It involved 200 undergraduate students, focused on gender rather than race, with a similar result.

In this case, . . . [the researchers] expected that the status quo would be to hire women, so . . . [they] looked at the effect of having two

39. Stefanie K. Johnson, David R. Hekman, & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, HARVARD BUS. REV. Reprint H02U2U, 1, 2 (April 26, 2016) [hereinafter *If There's Only One . . .*], <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired>.

40. *Id.* at 3.

41. *Id.*

42. *Id.*

43. *Id.*

men in the pool. . . . [They] found that when two of the three finalists were men, participants tended to recommend hiring a man, and when two of the three finalists were women, participants tended to recommend hiring a woman . . . [formula omitted].⁴⁴

As the researchers predicted, “[w]hen there were two minorities or women in the pool of finalists, the status quo changed, resulting in a woman or minority becoming the favored candidate.”⁴⁵ Perhaps equally enlightening about the two studies is that the researchers “. . . were also able to measure each participant’s unconscious racism or sexism using implicit association tests (IATs)—reaction-time tests that measure unconscious bias.”⁴⁶

The researchers found

that the status quo effect was particularly strong among participants who had scored high in unconscious racism or sexism on the IAT. So when hiring a black candidate was perceived to be the status quo (i.e., the pool was two black candidates and one white candidate), individuals scoring average in unconscious racism tended to rate the black candidate 10% better than the white candidate; individuals scoring one standard deviation above average in unconscious racism tended to rate the black candidate 23% better than the white candidate [formula omitted]. . . . [They] found a similar effect for gender.⁴⁷

In a third study to test the *status-quo hypothesis*, the researchers examined “. . . a university’s hiring decisions of white and nonwhite women and men for academic positions.”⁴⁸ Their sample included “. . . 598 job finalists, 174 of whom received job offers over a three-year period. Finalist pools ranged from three to 11 candidates (the average was four).”⁴⁹

The researchers wanted “. . . to see . . . whether more than one woman or minority in the finalist pool . . . would increase the likelihood of hiring a woman or minority—beyond the increased . . . [expected] simply due to probability.”⁵⁰

The findings were somewhat startling. They found that

. . . when there were two female finalists, women had a significantly higher chance of being hired . . . [formula omitted]. The odds of

44. *Id.*

45. *If There’s Only One . . .*, *supra* note 39, at 4.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

hiring a woman were **79.14** times greater than if there were at least two women in the finalist pool (controlling for the number of other men and women finalists) [emphasis added]. There was also a significant effect for race . . . [formula omitted]. The odds of hiring a minority were **193.72** greater if there were at least two minority candidates in the finalist pool (controlling for the number of other minority and white finalists) [emphasis added]. This effect held no matter the size of the pool (six finalists, eight finalists, etc.), and these analyses excluded all cases in which there were no women or minority applicants.”⁵¹

The researchers concluded the following:

[b]asically, . . . [the] results suggest that we can use bias in favor of the status quo to actually change the status quo. When there was only one woman or minority candidate in a pool of four finalists, their odds of being hired were statistically zero. But when we created a new status quo among the finalist candidates by adding just one more woman or minority candidate, the decision makers actually considered hiring a woman or minority candidate.⁵²

What might this study begin to tell us about lawyers who select arbitrators and neutrals? In arbitration, the lawyers want to win their cases. Every advocate and arbitrator, however, knows that winning is not completely dependent on the arbitrator; although, it cannot be gainsaid that in some cases who the neutral is weighs heavier than in others. This brings the discussion back to the point that lawyers tend to be *risk adverse*; and therefore, they do not want to explain to their client that they lost the case and that this was the first time that the lawyer had appeared before this arbitrator. The client may very well ask, “why didn’t you stay with the status quo—who you knew?”

Juxtaposing the lawyer’s dilemma with the findings from the study just discussed, a lawyer might very well decide that a “strike/rank” list that contains only one woman or person of color “. . . highlights how different . . . [the woman or person of color] is from the norm.”⁵³ It follows that “. . . deviating from the norm can be risky for the decision . . . [maker], as people tend to ostracize people who are different from the group. For women and minorities, having . . . [those] differences made salient can also lead to inferences of incompetence.”⁵⁴ Thus, the lawyer is less likely to select the person of color

51. *If There’s Only One . . .*, *supra* note 39, at 5.

52. *Id.*

53. *If There’s Only One . . .*, *supra* note 39, at 6.

54. *Id.*

or the woman as the arbitrator. The researchers suggest that their study provides a start to providing a solution to the problem of diversity in the selection of who to hire. They “. . . believe that the *get two in the pool effect* represents an important first step for overcoming unconscious biases and ushering in the racial and gender balance that we want in organizations . . . [and in the arbitrator-selection process].” [emphasis added].⁵⁵

The authors also reject the notion that their proposal to add “. . . a second minority or woman candidate to the finalist pool is a type of affirmative action or reverse discrimination against white men.”⁵⁶ According to the authors such a criticism “. . . implies that there are fewer qualified women or nonwhite candidates than white male candidates.”⁵⁷ They suggest a change in the perception of what is the status quo, achieved in part, by *get two in the pool effect*, moves the selection process closer to a *blind audition*. In such *blind auditions*, more women than men are hired as programmers and engineers—similarly true in blind auditions for professional orchestras.⁵⁸

By citing the results of this study, the authors of this paper do not suggest that it contains a panacea to speed up the incredibly slow pace of moving toward true diversity and inclusion in the selection of arbitrators. We do suggest, however, that the community of providers and advocates must acknowledge what is “. . . apparent[,] that an individual [who] is female or nonwhite . . . [is] rated worse than when . . . [that individual’s] sex or race is obscured.”⁵⁹ The purpose for obscuring is not an attempt to achieve the platitude, “I don’t see race or sex.” The purpose is to ensure that unconscious bias about race and sex does not eliminate from selection qualified persons because of race and sex.

55. *Id.*

56. *Id.*

57. *Id.*

58. Curt Rice, *How Blind Auditions Help Orchestras to Eliminate Gender Bias*, THE GUARDIAN (Oct. 14, 2013, 7:00 AM), <https://www.theguardian.com/women-in-leadership/14,2013/oct/14/blind-auditions-orchestras-gender-bias>).

59. *If There’s Only One*. . . , *supra* note 39, at 6.

C. The Mansfield Rule—Origins and How it Works

On September 3, 2019, Diversity Lab⁶⁰ “. . . announced . . . that . . . 102 trailblazing law firms . . . are piloting Mansfield Rule 3.0.”⁶¹

Now in its third iteration, the Mansfield Rule Certification measures whether law firms have affirmatively considered at least 30 percent women, attorneys of color, LGBTQ+ and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions. New for 3.0 is the addition of lawyers with disabilities. There are also five participating firms, Eversheds Sutherland, Hogan Lovells, Holland & Hart, Miller Canfield, and Stoel Rives, that have volunteered to pilot a more intensive tracking process that measures the consideration of individual demographic groups for each category. The goal of the Mansfield Rule is to boost the representation of diverse lawyers in law firm leadership by broadening the pool of candidates considered for these opportunities.⁶²

D. The Mansfield Rule Builds on the Success Shown by the Rooney Rule in the NFL

The *Mansfield Rule Initiative* began on June 7, 2017 in San Francisco. Diversity Lab announced a partnership with “. . . 30 of the country’s leading firms to pilot the *Mansfield Rule*.”⁶³ The *Mansfield Rule* got its genesis from the National Football League’s “Rooney Rule”. The brief historical origin of the “Rooney Rule” is that:

[f]or decades, many criticized NFL teams’ minority hiring practices. These criticisms peaked in 2002, as data revealed that while more than 60% of players were black, only 6% of head coaches were.[footnote omitted] The “Rooney” Rule, adopted in 2003 and

60. “Diversity Lab is an incubator for innovative ideas and solutions that boost diversity and inclusion in law. Experimental ideas are created through our Hackathons and piloted in collaboration with more than 50 top law firms and legal departments across the country. We leverage data, behavioral science, design thinking, and technology to further develop and test the ideas, measure the results, and share the lessons learned.” DIVERSITY LAB, <https://www.diversitylab.com/> (last visited Feb. 13, 2020).

61. *Mansfield Rule: Boosting Diversity in Leadership*, DIVERSITY LAB, <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/>.

62. *Id.*

63. Caren Ulrich Stacy, *30 Law Firms Pilot Version of Rooney Rule to Boost Diversity in Leadership Ranks*, DIVERSITY LAB, (June 7, 2017), <https://amlawdaily.typepad.com/files/mansfield-rule-release.pdf>; <https://amlawdaily.typepad.com/files/mansfield-rule-release.pdf>; *Id.* (“Named after Arabella Mansfield, the first woman admitted to the practice of law in the United States . . .”); see Donald E. Young, *America’s First Woman Lawyer*, ARABELLA MANSFIELD, <https://arabellamansfield.com/> (stating that Belle Babb was admitted to the practice of law in 1869).

named for then-Pittsburgh Steelers Chairman Dan Rooney, [footnote omitted] requires teams to interview at least one minority candidate for a head coaching vacancy.⁶⁴

Data from “. . . the 1992 through 2014 seasons . . . suggests that a minority candidate is . . . statistically significant . . . more likely . . . to fill an NFL head coaching vacancy in the post-Rooney era than the pre-Rooney era.”⁶⁵ While one may argue that progress in the number of minority coaches in the NFL is still woefully slow compared with the percent of NFL players who are persons of color, it cannot be gainsaid that there has been a significant increase in minority head coaches during the Rooney Rule era.

Indeed, the United States Senate, based on the success of the Rooney Rule in the NFL,

. . . encourages each corporate, academic, and social entity, regardless of size or field, to—

- (1) Develop an internal rule modeled after a successful business practice, such as the Rooney Rule or RLJ Rule, and in accordance with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), adapt that rule to specifications that will best fit the procedures of the individual entity; and
- (2) Institute the individualized rule described in paragraph (1) to ensure that the entity will always consider candidates from underrepresented populations before making a final decision with respect to selecting a business vendor or filling a leadership position.⁶⁶

A recent study in 2016 attempted to measure the impact of the “Rooney Rule” in the hiring of head coaches in the NFL. “The Rooney Rule” is an example of a “soft” affirmative action policy in that no quota or preference is given to minorities in the hiring decision”⁶⁷

[T]eams are simply required to interview at least one minority candidate. If a team fails to interview a minority candidate for a vacant

64. *The Mansfield Rule and “Big Law’s” Embrace of Diversity Hiring*, MEDIA, <https://law-shelf.com/blog/post/the-mansfield-rule-and-big-laws-embrace-of-diversity-hiring>.

65. Cynthia DuBois, *The Impact of “Soft” Affirmative Action Policies on Minority Hiring in Executive Leadership: The Case of the NFL’s Rooney Rule*, 18 AMER. L. & ECON. REV. 208 (2015), [https://pdfs.semanticscholar.org/1db6/1062a0988cb16e203bf309e7673a1960d7b9.pdf?_ga=2.86868571.2106868983.1581908856-124013924.1581908856.208,210\(2016\)](https://pdfs.semanticscholar.org/1db6/1062a0988cb16e203bf309e7673a1960d7b9.pdf?_ga=2.86868571.2106868983.1581908856-124013924.1581908856.208,210(2016)).)

66. S. Res. 11, 115th Cong. (2017) (Senate Resolution 11 was introduced by Tim Scott (R-South Carolina)). Senator Scott was joined by cosponsors Senators Rand Paul (R-KY), Rob Portman (R-OH), Marco Rubio (R-FL), Cory Booker (D-NJ), Sherrod Brown (D-OH), and Kamala Harris (D-CA).

67. *DuBois*, *supra* note 65.

head-coaching position they are subject to league-imposed sanctions. For example, in 2003 the Detroit Lions were fined \$200,000 for failure to interview a minority candidate. However, other than the 2003 fine and reprimand levied on the Detroit Lions, no other NFL team has been found in violation of the Rooney Rule when hiring a head coach.⁶⁸

There are two things that are significant about the author's account of her research on the Rooney Rule and its implementation. First, the interview of minority candidates for head-coaching positions is mandatory by the NFL. This means that there is accountability—an important element to the successful implementation of any policy—even a *soft affirmative action* policy.

Second, the study seems to be consistent with the research cited earlier in this paper about the composition of the candidate pool. Both studies seem to suggest that how the candidate pool is composed is crucial to overcoming unconscious bias. “[T]he Rooney Rule does not impact hiring criteria but simply the racial composition of candidates interviewed.”⁶⁹ Similarly, in the consideration and selection of arbitrators, the criteria for selection (e.g., high ability to run an efficient and fair hearing and the ability to write a clear and well-reasoned award) do not change. Both studies suggest that the racial and sexual composition (number, race and sex) of the candidates in the pool considered for selection as the arbitrator does matter.

It is beyond the scope of this article to assess the success or impact of the Rooney Rule; however, the authors do note that the Rooney Rule has not proven to be the *answer* that some may have hoped for the dearth of head coaches of color in the NFL. We are reminded that three-quarters of the players in the NFL are African American. “In November [2019, however], Richard Lapchick, the director of the Institute for Diversity and Ethics in Sport, issued his annual report on the hiring of women and minorities in the N.F.L. and gave the league its lowest grade since the Institute began tracking this data in 2004.”⁷⁰

“We’re celebrating the 100th anniversary of the N.F.L., yet we have only three head coaches of color, said Rod Graves, a former N.F.L. general manager and league executive who now runs the Fritz Pol-

68. *Id.*

69. *Id.*

70. Ken Belson, *Only Three N.F.L. Coaches Are Black. 'It's Embarrassing.'*, N.Y. Times 1 (January 1, 2020), <https://www.nytimes.com/2019/12/31/sports/football/nfl-coach-diversity.html?smid=nytcore-ios-share>.

lard Alliance, which promotes diversity in football. “For all the hoopla that football has become in this country, that kind of progress, or lack of it, is shameful.”

As Graves noted, the December firing of Carolina Panthers Coach Ron Rivera, who is Hispanic, brought the number of minority head coaches to three—Mike Tomlin of the Steelers, Anthony Lynn with the Chargers and Brian Flores with the Dolphins—down from a record eight, in 2018 and other years. (Perry Fewell, who is African-American, replaced Rivera, but only on an interim basis.) There are just two general managers of color.⁷¹

Jeff Pash⁷², perhaps summed up the impact of the Rooney Rule best when he said:

. . . [T]he Rooney Rule, while imperfect, has been impactful. “It’s made a difference in our league that’s been valuable and important[,] and I think over time it will continue to be a valuable part of what we do.” [citation omitted] Mehri, meanwhile, sees the Rooney Rule as a process, not a numerical solution. “We’re not asking for a leg up. Just give us a level playing field. At least we have a plan for progress.” [citation omitted].⁷³

E. The Ray Corollary—the ADR Expansion⁷⁴ of the Mansfield Rule Concept

The goal of this paper is to call on the ADR community to act to increase diversity in the selection of arbitrators and other neutrals in labor-management and employment disputes. The Diversity Lab’s work with 102 law firms ensures that *Mansfield Certified* entities have considered at least 30% diverse lawyers for all governance and leadership roles. This means that these firms have “. . . affirmatively considered at least 30 percent women, attorneys of color, LGBTQ+ and lawyers with disabilities for . . . equity partner promotions, formal client pitch opportunities and senior lateral positions.”⁷⁵

71. *Id.* See also Pamela Newkirk, DIVERSITY, INC. 170 (2019) in which the author cites Cyrus Mehri, co-founder of the Fritz Pollard Alliance Foundation along with former civil rights lawyer Johnny Cochran.

Mehri acknowledged that the Rooney Rule only works if there’s oversight. “They’re going through the motions,” Mehri said of some of the companies that have adopted . . . [the Rooney Rule]. “Who’s actually enforcing it? If someone doesn’t own carrying it out, it doesn’t happen. You need accountability. [citation omitted].”

72. Jeff Pash is the N.F.L. Executive Vice President and General Counsel. *Id.* at 165.

73. DIVERSITY, INC. at 175.

74. HOMER C. LA RUE, COROLLARY—THE ADR EXPANSION AND RAY COROLLARY CERTIFICATION (forthcoming) (on file with author).

75. Diversity Lab, *Mansfield Rule 3.0, Mansfield Rule: Boosting Diversity in Leadership*, DIVERSITY LAB, (Sept. 3, 2019), <https://www.diversitylab.com/pilot-projects/mansfield-rule-3-0/>.

The *Ray Corollary*⁷⁶ to the *Mansfield Rule* is quite simple. Expand the work that has been done and the lessons that have been learned in “biglaw” to the arbitration-selection process in the ADR community. The *Ray Corollary—the ADR Expansion of the Mansfield Rule* is an initiative that calls for the commitment and collaboration of the sections of the American Bar Association, those entities that maintain arbitrator rosters, those lawyers who select arbitrators, those public and private entities that hire the lawyers who select arbitrators, and other neutrals. The *Ray Corollary* would be the title for a national task force that would reach out to the Diversity Lab to partner with the ADR community to help bring about diversity in the selection of ADR neutrals.

It is beyond the scope of this paper to specify the details of how the national task force will ultimately compose itself or what the outcomes will be. The charge of the task force, however, would be as stated in Senate Resolution 11:

. . . [To] [d]evelop an internal rule modeled after a successful business practice, such as the Rooney Rule . . . and in accordance with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), adapt that rule to specifications that will best fit the procedures of the . . . [ADR community] and . . . [To] [i]nstitute the individualized rule described . . . [above] to ensure that the entity will always consider candidates from underrepresented populations before making a final decision with respect to selecting . . . [an arbitrator or other neutral].⁷⁷

An important element of the charge of the task force would be to build into any rule or procedure *accountability* on the part of the participants. A way to hold those seeking *Ray Corollary Certification* accountable to the initiative would be an integral part of what the task force would need to work through. These, however, are not new challenges, and they have been faced and overcome in the work done by Diversity Lab with its partners in the *Mansfield Rule* program.

Finally, the authors of this paper suggest that such a task-force undertaking would excite a good deal of interest in the ADR community—that finally the issue of diversity in the selection of arbitrators and other neutrals is being tackled and not just talked about. While

76. J. CLAY SMITH JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944* 55 (U. of Pa. Press ed., 1993) (explaining that the “Corollary” is named after Charlotte E. Ray, who “. . . graduated from Howard University School of Law in 1872 . . . [and is] the first black woman to receive a law degree and the first to be admitted to the bar in the . . . [United States]).”

77. S. Res. 11, 115th Cong. (2017).

the authors do not speak on behalf of the National Academy of Arbitrators (NAA) or the NAA Research and Education Foundation (REF), the authors are, nonetheless, confident that a proposal for the funding of such national task force would be of great interest to both the NAA and the REF.

F. The Ray Corollary is a Natural Outgrowth of ABA Resolution 113 and Resolution 105

In 2016, the American Bar Association’s House of Delegates, the governing body of the American Bar Association (ABA), approved Resolution 113. It reads:

RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Associate urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, “diverse attorneys” means attorneys who are included within the ambit of Goal III of the American Bar Association.⁷⁸

In 2018, the Section of Dispute Resolution of the ABA introduced, in the ABA House of Delegates, Resolution 105 pertaining to diversity in ADR. It reads:

RESOLVED, That the American Bar Association urges providers of domestic and international disputes to expand their rosters with minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities (“diverse neutrals”) and to encourage the selection of diverse neutrals; and

FURTHER RESOLVED, That the American Bar Association urges all users of domestic and international legal and neutral services to select and use diverse neutrals.⁷⁹

78. American Bar Association, *Adopted by the House of Delegates 113*, A.B.A. (2016), https://law.duke.edu/sites/default/files/centers/judicialstudies/panel_4-american_bar_association_resolution.pdf.

79. American Bar Association, *Section of Dispute Resolution Report to the House of Delegates 105*, A.B.A. (2018), <https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf>.

The Report to the House of Delegates that accompanied Resolution 105 concisely summarized the problem pertaining to the selection of *diverse neutrals*:

To enhance diversity and inclusion in Dispute Resolution, it is essential to shine a spotlight on the low level of diverse representation on neutral rosters and the special challenges created by the combination of the network-based culture within the profession, implicit bias, and the confidentiality that tends to obscure the degree to which Dispute Resolution lags behind the legal profession as a whole. By explicitly linking ABA Goal III to Dispute Resolution, this Resolution provides precisely the spotlight needed to encourage active engagement on the part of all stakeholders with the ability to move the needle to increase representation of diverse neutrals on rosters, and to enhance their likelihood of success in the selection process.⁸⁰

Then 2018 Dispute Resolution Section Chair, Harrie Samaras wrote to explain the new policy (i.e., Resolution 105) adopted by the ABA. It was “. . . aimed at increasing diversity in the hiring of neutrals”⁸¹ In pertinent part, she stated:

Diverse neutrals may not be chosen or recommended for a number of reasons including: because they are not “like” the individuals choosing them; implicit bias about their capabilities and experience; and the inaccurate belief that experienced and qualified diverse neutrals do not exist. Clients lose out because they are deprived of the opportunity to have the valuable experience, expertise, and perspectives of diverse neutrals.

So what does this mean to you? Regardless of whether you are an advocate/law firm, court, client/corporation, or ADR service provider – you can make a difference.⁸²

Resolution 113 and Resolution 105 are well-intentioned and fall short of what the authors of this paper believe is necessary at this point in history. First, the data suggests that the needle does not move unless there is accountability and identifiably achievable goals. The authors would suggest that the next iteration of Resolution 105 include additional “Resolved” statements. They would read:

FURTHER RESOLVED, That the American Bar Association urges providers and users of neutral services, including law firms,

80. *Id.*

81. Email from Harrie Samaras, 2018 Chair, Section of Dispute Resolution (on file with author).

82. *Id.*

corporations, and other users of neutral service to develop an internal rule modeled after a successful business practice, such as the Rooney Rule, and in accordance with title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), adapt that rule to specifications that will best fit the procedures and selection processes of the different parts of the ADR community; and

FURTHER RESOLVED, That providers and users of neutral services develop the individualized rule described above to ensure that the entity will always consider candidates from underrepresented populations before making a final decision with respect to arbitrators, mediators and other ADR neutrals.

FURTHER RESOLVED, That providers and users of neutral services affirmatively demonstrate that they have considered persons of color and women—at least 30% of the candidate pool—for appointments as arbitrators, mediators and other ADR neutrals and that the results of such affirmative considerations be objectively measured and reported annually to a certifying entity with responsibility for assistance and oversight of the diversity initiative.

Of course such a resolution would be accompanied by the relevant sections of the ABA participating in the *Ray Corollary Initiative*. It is through such collaborative action that the needle can be moved in the ADR community toward real diversity and inclusion.

CONCLUSION AND RECOMMENDATIONS

A. Summary of What is Needed

The authors of this paper suggest that much progress has been made at the entry level of the ADR field. While barriers do still exist at the entry level, the real issue is how to get selected to serve as an ADR neutral so that one can make it to the mid-level and on into the master-level of the field. To do that the ADR field must become intentional about overcoming unconscious bias in the selection process. This paper has documented some of the data that makes doubt about the operation of bias in the selection process unwarranted and baseless.

The opportunity, created by the current ongoing crisis pertaining to diversity, is reason for optimism. The *Ray Corollary Initiative* discussed in this paper offers the chance for the ADR community—providers, advocates and neutrals—to come together in a collaborative problem-solving process. The *Ray Corollary—the Expansion to ADR National Task Force* (the *Ray Corollary Task Force*) presents a histor-

ical chance to bring the best talents of our profession to the resolution of what appears (but is not) an intractable problem. All that is required is commitment and genuine accountability for the accomplishment of the task.

B. The Road to Success is Not Empty; There Are Guideposts and Waymarks

The remainder of this section of the paper is devoted to identifying what might be starting points for the *Ray Corollary Task Force*. What is set forth here is not intended to be prescriptive. It is, rather, intended to describe some of the things that the *Task Force* might draw on. In addition to what is described here, there are, no doubt, other initiatives underway by various entities that have gone unnoticed; therefore, this section is not intended to be exhaustive of the potential sources of experience and wisdom.

Much of the literature on diversity initiatives is focused on programs inside organizations and concern first-time hiring, lateral hires, and promotion to more responsible positions in the organization. That fact, notwithstanding, the authors believe that the difference, between the selection of arbitrators to resolve a dispute and the selection of persons for hiring and promotion, are differences without meaningful distinction. In both instances, the goal is to remove the operation of unconscious bias from the selection process. Similar strategies will be required in the plans for increasing diversity and inclusion in the selection of arbitrators and the selection of persons for hiring and promotion.

First, the authors believe that the lack of diversity in the selection of arbitrators (and other ADR neutrals) in labor and employment disputes is a national problem.⁸³ That problem requires the commitment and efforts of all entities in the ADR community. Hence, a national coordinated effort is called for—one that invites all stakeholders to participate. The *Task Force*, therefore, would be the steering-body for the *Ray-Corollary Initiative* and would serve a clearinghouse and certification function. With the assistance of diversity experts (e.g., Diversity Lab), the *Task Force* would develop the plan of action to be implemented by those participating in the *Ray Corollary Initiative*.

83. Indeed, the problem of arbitrator selection because of bias is not limited to labor-management and employment arbitration. The problem can be found in commercial and international arbitration as well; however, it is beyond the scope of this paper to embark on the nuances of the issues facing those other arbitration arenas.

The *Task Force*, or its designee, would be responsible for certifying that participating entities are acting consistently with the *Task Force* plan and are meeting targeted goals. Participating entities should be encouraged to have task forces in their respective organizations that would be responsible in those participating enterprises to monitor and to oversee the implementation of the *Ray-Corollary Certification* strategies.⁸⁴ Evidence suggests that enterprise task forces help to create “buy-in” among those responsible for implementing the diversity initiative. Because of the periodical progress reports, peers and superiors will know the degree of success of each *Ray Corollary Certification* participant.

Earlier in this paper, the authors referenced a 2004 experiment to increase diversity in the mediation of high-stakes disputes in commercial mediation—*ACCESS ADR*.⁸⁵ That initiative proceeded under the auspices of an advisory board made up of a major ADR-services provider and ADR-services users. The advisory board was essentially

84. See Frank Dobbin & Alexandra Kalev, *Spotlight on Building a Diverse Organization, Why Diversity Programs Fail, And What Works Better*, HARV. BUS. REV., (July-Aug., 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> (quoting that “diversity task forces promote social accountability because members bring solutions back to their departments—and notice whether their colleagues adopt them.”).

85. MARVIN E. JOHNSON & HOMER C. LA RUE, *ACCESS ADR-HEWELETT GRANT APPLICATION: RESPONSE TO PROPOSAL NARRATIVE QUESTIONS 1 OF 17 (2004)* (Off. of Homer La Rue) (The description and mission of *ACCESS ADR* are explained as follows:

ACCESS ADR is an independent project with an advisory board charged with the oversight and the overall administration of the project. Oversight and administration include: (a) the selection of fellows for the program; (b) the evaluation of the fellows during their tenure in the program; (c) providing mediation cases for fellows during their tenure in the program; (d) overseeing the subsequent mentoring efforts of the fellows.

ACCESS ADR is an initiative to increase the exposure of experienced ADR professionals (with at least five years of experience) who are from ethnic and racial groups, who are available and qualified to handle high stakes/complex cases, but who are under-utilized in the ADR field.

* * *

Messrs. Johnson and La Rue are the co-founders and initiators of *Access ADR*.

The program was further described in the grant application:

ACCESS ADR Fellows will be in the program for a period of twelve (12) to eighteen (18) months. During that period, they will be assigned to mediations that members of the . . . [Advisory Board] will assist in providing. Project Fellows will be paid by the parties at the prevailing rate for mediators of experience in the region in which they are working. *Access ADR* Fellows will be assigned approximately two (2) cases per month for a maximum of twenty-four (24) cases during their tenure in the program. Fellows will be evaluated by the parties to their respective mediations. Those evaluations will be shared with the . . . [Advisory Board] who, in turn, will provide feedback to the Fellows.

At the end of the program, the Fellows will be awarded a certificate of completion. Some Fellows will be asked by the Board to become formal mentors for future groups of *Access ADR* Fellows. Members of the Advisory Board will be asked to use their best efforts to continue to assist former Fellows by helping them to further their careers as full-time ADR neutrals. “*ACCESS ADR*”—HEWELETT GRANT APPLICATION at Cover Sheet).

a national task force. The model might be useful in formulating the *Ray Corollary Task Force*, and useful as a guide to the organization of the *Task Force*.

Second, the authors believe that a key ingredient for the success of a diversity initiative, of the type described here, is that service providers and users agree to a plan with substantially the following elements:

- a. That users of neutral services affirmatively demonstrate that they have considered persons of color and women—at least 30% of the candidate pool—for appointments as arbitrators, mediators and other ADR neutrals;
- b. That providers of arbitrator rosters make such consideration by the users possible by providing appropriate selection lists;
- c. That the results of such affirmative considerations by service users should be objectively measured and reported periodically to the *Task Force* or its designee, peers and superiors for the purpose of certifying that the 30% consideration requirement is being adhered to.

The elements set forth above come under the headings of *social accountability* and *transparency*, defined simply as “. . . [the] need to look good in the eyes of those around us.”⁸⁶ In the context of the instant discussion, participants in the *Ray Corollary Initiative* will “look good in the eyes of those around . . . [them]” if they are reported to have met the 30%-consideration goal.⁸⁷ The effectiveness of *social accountability* to achieve program success is illustrated in a field study conducted at MIT’s Sloan School of Management:

A firm found it consistently gave African Americans smaller raises than whites, even when they had identical job titles and performance ratings. So . . . [the researcher] suggested transparency to activate social accountability. The firm posted each unit’s average performance rating and pay raise by race and gender. Once manag-

86. Dobbin & Kalev, *supra* note 84.

87. The firm of White and Case has participated in the *Mansfield Certification* since the inception of the program. The firm’s website clearly states the importance of the “30% consideration factor” as an important element its success in reaching its *Mansfield Certification* goals. In pertinent part, it reads:

“The 30 percent metric and the built-in accountability have had a positive effect on encouraging our leaders to expand the pool of talented lawyers they develop and select as the next generation of leaders,” said White & Case Vice Chair David Koschik (New York). “Our Plus rating demonstrates that we are continuing to succeed at increasing diversity in key leadership roles.”

<https://www.whitecase.com/firm/awards-rankings/award/white-case-receives-2019-mansfield-rule-certification-plus?s=mansfield>.

ers realized that employees, peers, and superiors would know which parts of the company favored whites, the gap in raises all but disappeared.⁸⁸

Control tactics and injunctive managerial techniques are not effective, according to current thinking, to bring about successful diversity initiatives.⁸⁹ There is less diversity, and there is resentment among managers about, from their perspective, being coerced. The lessons learned in the trials and errors in establishing organizational diversity initiatives should be heeded by the *Ray Corollary Task Force*. “It’s more effective to engage . . . [the lawyers doing arbitrator-selection] in solving the problem, [to] increase their . . . [professional] contact with . . . [the pool of available arbitrators of color and who are women,] and [to] promote social accountability—the desire to look fair-minded.”⁹⁰

A third ingredient for any action plan devised by the *Task Force* ought to focus on creating opportunities for contact between persons of color and women, seeking to be selected as arbitrators, and those doing the selection. If it is true, as the authors state in the title of this paper, “I choose who I know”, then the pool of persons, whom the selectors know must be expanded. There is evidence that contact between groups can lessen bias. Increased professional contact between the *Access ADR* Fellows and the members of the Advisory Board was a key element of the planned structure of the program.

88. *Id.* (explaining that the field study was conducted by Emilio Castilla, MIT Sloan Sch. of Mgmt); see Emilio J. Castilla, *Accounting for the Gap: A Firm Study Manipulating Organizational Accountability and Transparency in Pay Decisions*, 26 *Organ. Sci. J.*, 311, 311 (2015).

89. *Id.* (quoting that “In analyzing three decades’ worth of data from more than 800 U.S. firms and interviewing hundreds of line managers and executives at length, . . . [researchers saw] . . . that companies get better results when they ease up on the control tactics. It’s more effective to engage managers in solving the problem, increase their on-the-job contact with female and minority workers, and promote social accountability—the desire to look fair-minded.”).

90. *Id.*; see also Pamela Babcock, *Diversity Accountability Requires More Than Numbers*, SHRM (Apr. 13, 2009), <https://www.shrm.org/ResourcesAndTools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/Pages/MoreThanNumbers.aspx> (explaining that the experience expressed by successful diversity officers, the author recounts their statements as noting that “[i]n addition to quantitative measures, diversity and inclusion success should be measured, and rewarded, based on qualitative factors—including key behavioral changes that can create cultural shifts When it comes to creating accountability for diversity and inclusion, experts suggest that organizations: Keep the process clear, simple and understandable. Make sure that the idea of scorecards and accountability is aligned with the culture of your organization, Sodexo’s Anand said. “If you don’t have metrics and scorecards for other things you can’t just have them for diversity.” Think carefully about the behaviors that you want. Sodexo first focused heavily on outcome or “quota” metrics such as recruiting, retention and promotion, when in retrospect, Anand said, “we should have focused more on the qualitative measures because those are the behavior changers.””).

The Ray Corollary Initiative

In closing this section of the paper and the overall discussion, the authors reiterate that this section is not intended to prescribe a way forward. It is intended only to note that there *is* a path forward, and that the path is not untrodden. There are guideposts, markers and, of course, new directions to which this path will lead. It is now time to step onto that path to begin the journey.

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Failed Application of Federal Student Aid—Why the Federal Student Aid Program Fails to Provide Aid to the Most at Risk Youth

JONATHAN THOMPSON

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I. INTRODUCTION AND THESIS

Stressed, overworked, and afraid. That is the reality for many senior high school students who face an important decision: which college or university should they attend. This reality is no less true for Joshua, our hypothetical senior high school student, who is navigating college applications, studying for the SAT, juggling a full-time class load, and working a part-time job. Joshua has worked extremely hard through his high school years and is a great applicant for any university. Joshua has straight A's, a decent SAT score, has been involved with student government, and volunteers for his church every weekend. Despite his successes, Joshua has also faced many challenges at home and in his personal life.

During Joshua's junior year of high school, Joshua's father heard rumors that his son was in a romantic relationship with another male classmate. Joshua's father was furious, demanding that Joshua stop seeing this classmate and attend several sessions of conversion therapy and counseling to help "get him on the correct path towards seeking Christ." Joshua complied with his father's demands and attended these sessions during his junior year and most of his senior year of high school. But when Joshua turned eighteen, he decided to defy his parents' wishes and stopped attending conversion therapy. Joshua was never kicked out of his family's home, but there was a great deal of tension between him and his parents. Joshua was under the impression that this tension would be short lived, as he was about to graduate from high school and attend college. However, a major road block would soon appear.

While Joshua was filing his Free Application for Student Aid, ("FAFSA") it came to his attention that the application required the financial information of his parents. This included his parents' social security numbers, date of birth, savings account balances, and the gross-income amount from their last filed taxes with the IRS.¹ Joshua asked his father and mother for this information, but both refused to give over their financial information. Joshua's parents were upset that Joshua stopped going to his conversion therapy sessions, and the last thing they wanted was for their son to go to a "liberal" school. Not knowing what to do, Joshua went to his high school career counselor, who informed him that without this information, Joshua would be in-

1. *Reporting Parent Information*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/fafsa/filing-out/parent-info> (last visited Feb. 11, 2020).

eligible for receiving any subsidized loans, financial aid assistance based on income, and would be ineligible for a Pell Grant. Unable to show an Independent status² and with no viable co-signer, Joshua was also unable to find any private lender that would give him a private student loan. This left Joshua with no option, other than to work, save, and pay for college classes in cash. Joshua's dream of attending a university was completely dashed by his parents' unwillingness to help him complete his FAFSA.

Joshua's problem is not uncommon. It occurs every year to thousands of high school students.³ There is currently little to no remedy for students who are unable to obtain their parents' information, which is required for the FAFSA.⁴ This creates barriers for senior high school students who are already struggling to understand the complex issues surrounding college admissions and the funds they need to pay for the next steps in their education. Applying to colleges and universities is an exciting and fulfilling experience, however, the looming cloud of financial uncertainty is an ever-present reality for many students. The average tuition for a private nonprofit four-year institution is \$34,740 a year, and \$9,970 a year for a public four-year institution.⁵ With these prices, students have no choice but to turn to the FAFSA for government assistance, or look to private loans, many of which require a co-signer or have extremely high interest rates.

Students who are unable to obtain their parents' financial information, as required by the FAFSA, are debilitated in such a way that attending a college or a university may be impossible. The FAFSA was created as a tool to help assist disadvantaged students to receive a higher education, but the current requirements needed are creating a gap that many students are falling through with no remedy.⁶

A student's inability to obtain and provide the financial information of their parents for the FAFSA is detrimental. Students who are unable to provide their parents' information are immediately ineligi-

2. This is a type of undergraduate student defined in 20 U.S.C. § 1087vv (2015).

3. Joseph Gentile, *Disowned LGBT Students Need Financial Aid Help*, HUFFINGTON POST (Apr. 4, 2012, 7:45 PM), https://www.huffingtonpost.com/tngg/lgbt-students-financial-aid_b_1246762.html.

4. *Reporting Parent Information*, *supra* note 1; see Terry Savage, *The Unfortunate Reality: When Parents Refuse to Fill Out the FAFSA*, IGRAD.COM (Mar. 23, 2018), <https://www.igrad.com/articles/the-unfortunate-reality-when-parents-refuse-to-fill-out-the-fafsa>.

5. Emmie Martin, *Here's How Much More Expensive It Is for You to Go to College than It Was for Your Parents*, CNBC (Nov. 29, 2017, 9:55 AM), <https://www.cnbc.com/2017/11/29/how-much-college-tuition-has-increased-from-1988-to-2018.html>.

6. 20 USC § 1070 (2018).

ble for obtaining federally funded aid.⁷ In addition, students would also be limited from several other forms of private aid within their own colleges or universities.⁸ Currently there is no adequate remedy for students who are unable to provide their parents' information to complete the FAFSA.⁹ The most vulnerable students who may be unable to obtain financial aid information from their parents are at-risk youth within many communities. Many of the students who are unable to obtain their parents' information for FAFSA purposes are students from first-generation families, low-income households, and students who may be facing homelessness.¹⁰ The goal of a social program like the FAFSA is to help those who need assistance in obtaining higher education, yet the current policy negatively impacts the most disadvantaged students who could benefit the most from federal student aid. For these reasons, the FAFSA must be reformed to provide additional options for students who are unable to provide the financial information from their parents.

In this note, this paper will first discuss the history of the federal government's role in aiding individuals in their pursuit of a higher education. The beginning of federal higher education assistance began with the passage of the Higher Education Act of 1965 and has expanded throughout the decades to help lower-income and middle-income Americans. Second, I will demonstrate the detrimental hurdles students face if they are unable to provide their parents' information when completing the FAFSA. The impact of not having a parent's financial information can cause a student to not only be barred from receiving federal aid, but can also impact a student's ability to receive other forms of aid for college. Third, I will discuss how the current process of collecting parent financial information in order for the student to complete the FAFSA negatively impacts our most vulnerable student communities. Lastly, I will discuss how the federal and state governments could remedy this issue so that students may receive assistance for college without needing parental consent to access their financial information.

7. *What Are Your Options When Your Parents Refuse to File the FAFSA?*, FASTWEB (Aug. 25, 2017), <https://www.fastweb.com/financial-aid/articles/what-are-your-options-when-your-parents-refuse-to-file-the-fafsa>.

8. *Id.*

9. *Reporting Parent Information*, *supra* note 1.

10. Lauren A. DiMartino, *The "Free College" Illusion: How State Tuition Support Programs Are Widening the Opportunity Gap*, 25 *GEO. J. POVERTY L. & POL'Y* 257, 281–82 (2018).

II. PROVIDING OPPORTUNITY FOR THE FUTURE

In 1965, President Johnson’s “Great Society” brought about large social changes in the way the national government aided those who were less fortunate.¹¹ Given the public acceptance of many of the New Deal programs and the post-World War II economic boom, President Johnson was able to pass legislation that expanded the role of government in a way that helped lower income Americans have access to food, housing, and higher education.¹² On November 8, 1965, President Johnson signed the Higher Education Act, (“HEA”).¹³ During the signing of the Act, President Johnson said that obtaining an education was a “path to achievement and fulfillment.”¹⁴

The goal of the Higher Education Act was aimed at helping those less fortunate in accessing an education from a college or university. One congressman stated, “[T]here is increasingly an element of national policy that this Congress is trying to state - that any qualified American should not be denied the opportunity for a college education by reason of lack of financial means.”¹⁵ In addition, the congressional official statement of purpose for the HEA was “[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”¹⁶ The overall aim of the legislation was to provide a social safety net to those who were qualified and willing to enter into higher education but lacked the financial means to do so. The HEA was passed with the hope of “keep[ing] the college door open to all students of ability, regardless of socioeconomic background.”¹⁷ The HEA produced several programs to assist colleges and universities in accommodating more lower income students, and provided a number of ways to aid students who sought higher education. Specifically, the HEA provided students coming from lower income backgrounds with

11. Joseph Fishkin & William E. Forbath, *The Great Society and the Constitution of Opportunity*, 62 *DRAKE L. REV.* 1017, 1021 (2014).

12. *Id.*

13. *Higher Education Act Media Kit*, LBJ PRESIDENTIAL LIBRARY, <http://www.lbjlibrary.org/mediakits/highereducation/> (quoting President Johnson’s speech during the signing of the Act).

14. *Id.*

15. Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, 43 *J.C. & U.L.* 195, 213 (2018) (citing 1965 Cong. Rec.-House 21,892, Aug. 26, 1965, statement of Rep. Reid).

16. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

17. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1030 (9th Cir. 2009).

the ability to receive scholarship-aid based on their financial needs;¹⁸ provided education loan insurance to encourage financial lending to students;¹⁹ and provided grants to support on-campus work-study programs.²⁰

The HEA legislation was far reaching and many programs, including the Federal Work-Study program, are still incorporated to this day.²¹ Over the years, additional programs have also been added to the HEA. Today, the federal government awards Pell Grants to help financially needy students meet the costs of attending a college or a university.²² In addition to grants and scholarships, the federal government also provides a number of Student Loan Programs, including Direct Unsubsidized Loans, Direct PLUS Loans, and the Direct Consolidated Loans.²³ Over the years, student loans have become a main source of assistance for many college students. Unlike many private student loans, the federal government's student loans do not require a credit check or an examination to determine if the student has the ability to repay the students loans taken out.²⁴ The only requirements to receive federal student aid are those which are instituted by the Department of Education.²⁵

With the growth of the federally funded higher education assistance programs, in 1992, the federal government decided to pass a series of Higher Education Amendments, which included the creation of a formula that shows the extent a student's family can contribute to the cost of the student's higher education.²⁶ The formula created in 1992, which is still in use today, is generally referred to as the student's "Expected Family Contribution" ("EFC"), and is determined when a prospective college student completes their FAFSA.²⁷ The EFC takes into consideration many factors which include: (1) the income of the student, spouse, and student's parents; (2) the number of individuals in the family; (3) the number of dependent family members who are in

18. 20 U.S.C. § 1070a (2018).

19. 20 U.S.C. § 1071 (2018).

20. 20 U.S.C. § 1087-51 (2018).

21. *Work-Study Jobs*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/work-study> (last visited Feb. 11, 2020).

22. Federal Pell Grant Program, 34 C.F.R. 690.1 (2018).

23. 20 U.S.C. § 1087e (2018).

24. *See* 20 U.S.C. § 1091 (2018).

25. *See id.*

26. Timothy Chessher, *Keeping Up With The American Dream: An Analysis of the Federally Mandated Pell Grant to Ensure Educational Equality*, 41 SETON HALL LEGIS. J. 391, 397 (2017).

27. *Id.*

post-secondary education at the time the FAFSA is being completed for the prospective student; (4) the student's marital status; (5) the assets of the student, spouse, and student's parents; (6) the age of the student, and the age of the student's parents; and (7) any additional expenses incurred by dual employment of the student or the student's parents.²⁸ The EFC determination is important for all college students, as it is used to regulate whether or not a student is eligible for: the Federal Pell Grant; Federal Supplemental Education Opportunity Grant; Direct Unsubsidized Loan; Federal Perkins Loan; and the ability to participate in a Federal Work-Study program.²⁹

In addition to creating a more mechanical way of determining a student's possible assistance from their parents, the 1992 amendments to the Higher Education Act also furthered the federal government's trend of providing more loans to students instead of grants.³⁰ The rationale for moving towards providing assistance through loans rather than grants was to accommodate more middle-income students, rather than solely aiding students who showed extreme financial need.³¹ Overall, the main purpose of the 1992 Amendments remained the same as the 1964 passage of the HEA, which is to encourage students who are low-income and disadvantaged to have an opportunity to access a higher education.³²

The last major change to the HEA came in 2008 under the Higher Education Opportunity Act.³³ The main purpose of the 2008 amendments were to require the collection of data regarding higher education tuition prices, and the potential cost of attending certain institutions for prospective students.³⁴ However, in addition to the provisions requiring more information to prospective students, the 2008 amendments also required the U.S. Department of Education to promote the use of the federal student financial aid's website to better help inform families of their potential aid eligibility.³⁵

All proceeding amendments to the HEA, including the 2008 amendments, have promoted the goal of providing access to funds for

28. Higher Education Amendments of 1992, Pub. L. No. 102-305, § 474(b).

29. *Federal Student Aid: What's the Expected Family Contribution (EFC)?*, FEDERAL STUDENT AID, <https://studentaid.gov/complete-aid-process/how-calculated#efc>.

30. Chessher, *supra* note 26, at 398.

31. Julia Margetta Morgan, *Consumer Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education*, 17 J. L. & POL'Y 531, 541-42 (2009).

32. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 101.

33. Chessher, *supra* note 26, at 396.

34. Morgan, *supra* note 31, at 554.

35. *Id.* at 555.

students who are otherwise disadvantaged from accessing a higher education. The government has attempted to provide aid through scholarships, grants, loans, and work-study programs. Any improvements that would better assist the federal government in aiding students who are disadvantaged and are not able to receive benefits because of their inability to provide their parents' information for the FAFSA would be consistent with the purpose and history of the HEA. The spirit of the HRA is that any qualified student should not be denied his or her opportunity for a college education because of a lack of financial means. Therefore, addressing the issue of students not able to provide their parent's income information for the completion of the FAFSA, would be a compelling interest for the federal government to consider.

III. THE HURDLE: THE LACK OF PARENTAL INFORMATION FOR DEPENDENT STUDENTS AND THE CONSEQUENCES OF AN INCOMPLETE FAFSA

For many students, accessing and providing their parents' financial information is not a major obstacle. Many students are able to complete their FAFSA alongside their parents. However, there are students who are unable to access their parents' information and are not able to complete their FAFSA. The first issue facing many students who are unable to provide their parents' financial information, is determining whether or not they are considered to be a "Dependent" or "Independent" student. If the student is able to show that they are an Independent student, then they are not required to provide their parent's financial information.³⁶

There is a list of possible situations where a student may be considered to be "Independent" under the FAFSA, and would not require the student to provide any of their parents' information for determining their EFC.³⁷ The factors considered include: (1) If the student was born prior to January 1st, 1996 (or be over the age of 24); (2) If the Student is currently married; (3) If the student is working on a graduate degree; (4) If the student is currently or had served in the

36. See 20 U.S.C. § 1087nn (1998) (stating a parent's income data is required for dependent students); See also *Federal Student Aid: Am I Dependent or Independent?*, FEDERAL STUDENT AID, <https://studentaid.ed.gov/sa/fafsa/filling-out/dependency#dependent-or-independent>.

37. See 20 U.S.C. § 1087vv (2014); see also 34 C.F.R. § 668.2 (stating, "Any student who does not qualify as an independent student. . ." as being classified as a Dependent student); *Federal Student Aid: Am I Dependent or Independent?*, FEDERAL STUDENT AID, <https://studentaid.ed.gov/sa/fafsa/filling-out/dependency#dependent-or-independent>.

U.S. Military; (5) If the student has children or other dependents upon whom they support; (6) If the student's parents have been deceased or the student has been within the foster care system; and (7) If the student is homeless as determined by the U.S. Department of Housing and Urban Development.³⁸ If a student answers yes to any of these questions, then the student is considered to be an Independent student under the FAFSA, and their parent's financial information is not required.³⁹ If, however, a student is not classified as an Independent student, then they are automatically classified as a Dependent student and must submit their parent's financial information.⁴⁰ Even considering the outlined factors, the FAFSA states that students who are entering Law school or Medical school may still need to provide the financial information of their parents regardless of their dependency status.⁴¹

The rules governing the FAFSA and parental information are unbending, and the Department of Education does not provide substantive remedies for students who fall in-between what is considered to be a "Dependent" and "Independent" student. The Department of Education clearly states that even if the student does not live with their parents or if the student is not claimed by their parents on their tax forms, the student will still not be considered an Independent student for the purposes of the FAFSA.⁴²

In limited situations that fall outside of the factors used to determine a student's dependency status, the Department of Education has four additional, "special circumstances" which may be considered when concerning Dependent students.⁴³ These special circumstances include: (1) whether the student's parents are incarcerated; (2) whether the student has left home due to an abusive family environment; (3) whether the student knows or does not know where their parents are and if they are unable to contact them; and (4) if the student is older than 21 but not yet 24 and are unaccompanied, and are either homeless or self-supporting and at risk of being homeless.⁴⁴

38. See 20 U.S.C. § 1087vv (2014).

39. *Id.*

40. See 20 U.S.C. § 1087oo (2009).

41. 34 C.F.R. § 668.2; see *Federal Student Aid*, *supra* note 37.

42. *Id.*

43. See 20 U.S.C. § 1087tt (2015); see also *id.*

44. *Federal Student Aid: Dependent Students Must Report Their Parents' Information, as well as Their Own, on the FAFSA Form*, FEDERAL STUDENT AID, <https://studentaid.gov/apply-for-aid/fafsa/filling-out/parent-info#special-circumstances>.

However, under these four circumstances, if the student's FAFSA is submitted, it will not be fully processed, and the student's EFC will be deemed "incomplete."⁴⁵ Furthermore, the student would be required to contact their college's financial aid office and would have to provide evidence and reasoning for why they are unable to obtain their parent's information.⁴⁶ This type of evidence would include court or law enforcement documents; letters from a clergy, school counselor, or social worker; and any other relevant documents pertaining to the student's circumstance.⁴⁷ The decision made by the school's financial aid office is final, and cannot be appealed to the Department of Education.⁴⁸

If a student fails to show their independent status and does not fall within one of the limited "special circumstances," then the ability for the student to obtain funds for attending college becomes limited or non-existent.⁴⁹ The process of obtaining financial assistance from the government without a parent's signature and without being declared an independent student is difficult, and becomes a major obstacle for prospective students.⁵⁰

When a dependent student is not able to retrieve their parents' information, the Department of Education asserts that the student will not be considered independent from their parents, just because the parents refused to sign the FAFSA.⁵¹ However, while the FAFSA provides steps for these "special circumstances," it does not provide any sufficient remedy or alternative. When a student does not qualify for one of the "special circumstances" and their parent refuses to give the student their information, the student may still submit their FAFSA, but the student will not receive any federal student aid other than a partial unsubsidized loan, and even that may not be awarded to the student.⁵² The decision determining whether the student receives the unsubsidized loan is ultimately up to the financial aid office or career center of the college the student plans to attend.⁵³

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Terry Savage, *The Unfortunate Reality: When Parents Refuse to Fill Out the FAFSA*, IGRAD.COM (Mar. 22, 2018), <https://www.igrad.com/articles/the-unfortunate-reality-when-parents-refuse-to-fill-out-the-fafsa>.

50. *Id.*

51. 34 C.F.R. § 668.2; *see* Federal Student Aid, *supra* note 37.

52. *See* 20 U.S.C. § 1087tt (2015); *see also* Federal Student Aid, *supra* note 37.

53. *Id.* § 1087tt.

Federal Student Aid Program

When a student submits their FAFSA without their parent's information, the student must immediately contact their prospective college's financial aid office for them to determine if it is possible for the student to receive an unsubsidized loan.⁵⁴ The college may request a written statement from the student's parents, indicating that they refused to provide their information on the FAFSA form.⁵⁵ However, as one may think, it would be incredibly difficult for a student to receive a written statement from their parents, when their parents refused to grant them information to complete the FAFSA in the first place. Again, the decision made by the college's financial aid department is final, and cannot be appealed to the Department of Education by the student.⁵⁶ Therefore, in many instances, a student who is denied help from their college or university is left with no additional options for relief, and the federal government remains silent and apathetic.

In addition to not receiving federal assistance for college expenses, a student who is unable to complete their FAFSA may also face difficulties receiving aid from other financial sources. In a report by Rebecca Safier, she states that fifty-two percent of students believe that the FAFSA is only used to determine federal financial aid.⁵⁷ However, as the report points out, many state-run higher education financial assistance programs and many higher education institutions rely on the data supplied by the FAFSA to determine how much financial aid a student should receive from their institutions.⁵⁸

In addition to government aid and institutional aid, private scholarships and grants can also be impacted by an incomplete FAFSA. For example, one of the most generous scholarships available to undergraduate students is the Gates Scholarship. The Gates Scholarship provides funding for the full cost of attendance of a four-year undergraduate institution to an incoming underrepresented college freshmen.⁵⁹ However, one of the main requirements for the scholarship is that the applicant be "Pell-eligible," meaning that the student must

54. *Id.*

55. *Id.*

56. *Id.*

57. Rebecca Safier, *Survey Reveals Deep Misunderstandings About Financial Aid*, STUDENT LOAN HERO (Dec. 3, 2018), <https://studentloanhero.com/featured/survey-most-common-financial-aid-myths/>.

58. *Id.*

59. THE GATES SCHOLARSHIP, <https://www.thegatesscholarship.org/scholarship> (last visited Feb. 15, 2019).

qualify for a Federal Pell Grant.⁶⁰ As we have seen, the only way to show that a student qualifies for the Federal Pell Grant is through the FAFSA application. So, if the application is incomplete and the student's EFC is never finalized, then the student would automatically be disqualified from applying for the Gates Scholarship.

For students who are unable to obtain the necessary financial information to complete the FAFSA, the inability to receive any federal aid, state aid, institutional aid, and other scholarships and grant opportunities, forces students to apply for private student loans. In cases where the parental figure is absent, these students will also have to apply without the assistance of a co-signer. Many private companies will not offer student loans to a student without a co-signer, and will require a student to demonstrate they have built up some sort of credit.⁶¹ Even if a student were able to get approved for a private student loan, the interest rates could be as high as twelve percent.⁶² Conversely, the 2018-2019 interest rate for the Direct Subsidized and Unsubsidized undergraduate student loans were capped at five point zero five percent.⁶³ Student loan debt is a major issue facing over forty-four million Americans, and over ten percent of those who have a large student loan burden default or become delinquent.⁶⁴ By forcing students to take out private loans with higher interest rates, it will only make it more difficult for students to pay off their student loans.

Dependent students who are unable to provide their parent's information are at a clear disadvantage. A student is essentially "cut off" from state sponsored aid and there are no reasonable alternatives in the private sector. Students who are unable to contact their parents for their financial information are also unlikely to receive support in applying for private student assistance. These students are unable to receive any support for their higher education expenses, which forces the students to cut off their educational goals until they no longer need their parent's financial information or when the student can pay for their higher education expenses in cash.

60. *Id.*

61. Madison Miller, *Student Loans Without a Cosigner: The Best Options and Alternatives*, VALUEPENGUIN (Oct. 26, 2018), <https://www.valuepenguin.com/student-loans/student-loans-without-a-cosigner>.

62. *Id.*

63. ACCESSLEX.ORG, <https://www.accesslex.org/xblog/2018-19-federal-student-loan-interest-rates-announced> (last visited Feb. 15, 2019).

64. Zack Friedman, *Student Loan Debt Statistics In 2019: A \$1.5 Trillion Crisis*, FORBES (Feb. 25, 2019), <https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#fba6282133fb>.

IV. THE MOST VULNERABLE STUDENTS ARE BEING IMPACTED TODAY

Many students are confused by the basic requirements needed to complete their FAFSA application. In a recent survey, fifty-nine percent of the student participants believed they did not need to have their parents' information for the FAFSA if they supported themselves.⁶⁵ This is incorrect unless the student can show they are an independent student as defined by the FAFSA, but many students are not informed about this requirement until they actually start to complete the application.⁶⁶ For many students, not knowing they need their parents' financial information can be easily fixed. However, if the student finds out about the parental requirement while they are filing their FAFSA application, it may be too late. The students who are most negatively impacted by the rule requiring parental financial information to complete the FAFSA are those who are in communities that are already at risk of not receiving a higher education.

A. *Students who are in Poverty*

One major group that is negatively impacted by the requirement to provide parental information are students who come from lower-income homes. Lauren DiMartino states, "Approximately forty percent of low-income students accepted to college never make it to the first day of class, which some attribute to the sticker shock of tuition prices and the complicated array of paperwork requirements."⁶⁷ For many students, the process of completing the FAFSA is confusing, and many do not know their parents' information is even a requirement.

Many students who come from low income families find it even harder to receive required parent information than their peers who come from more wealthy households.⁶⁸ Many low-income students find it difficult to gain access to their parents' financial information as many parents do not communicate their financial situation to their children.⁶⁹ In a study from the Teachers Insurance and Annuity Association of America, it was found that just eleven percent of parents

65. Safier, *supra* note 57.

66. *Id.*; *see also*, 34 C.F.R. § 668.2.

67. DiMartino, *supra* note 10.

68. *Id.* at 282; *see* 20 U.S.C. § 1087tt (2015); *see also* Federal Student Aid, *supra* note 37.

69. *Id.*

will initiate conversations regarding money with their adult children.⁷⁰ If parents are not able to talk to their children about finances once their children are adults, it is even more unlikely they will have these conversations with their children when they are still in High School. Finances are a personal matter, and some parents may feel too embarrassed to discuss their financial situation with their children. A parent's unwillingness to give out their financial information due to privacy concerns or embarrassment is not an acceptable excuse under the FAFSA guidelines for independent status, and students are provided no remedy or additional options if their parent refuses to give their financial information.⁷¹

B. Toxic Family Households

Another population of students who are at risk of not obtaining aid due to a parent's unwillingness to give their financial information, are students who come from families that do not have a supporting parent or guardian. Students who come from broken or toxic households may no longer be living with their parents or may not communicate with their parents. In a recent study from Chapin Hall at the University of Chicago, research found that as many as one in ten young adults who are eighteen to twenty-five have experienced homelessness over the past year.⁷² The article states that "experiencing homelessness" may not be the traditional form of being homeless, but could simply include having to live with friends or having to "couch surf" for an extended period.⁷³ All in all, many homeless youths, would find it difficult to use this as a way to become emancipated from their parents and be deemed to be an Independent student under the current statute and regulation.⁷⁴ The process of becoming an "emancipated youth" needs to be reformed. Current regulations should clearly communicate to homeless youth the process they need to take to become emancipated. Additionally, the regulations also need to become less restrictive and complicated, so youth can go

70. Elizabeth Anderson, *It's Time for Parents and Their Adult Children to Start Having Better Financial Discussions*, TIAA (Mar. 1. 2017), <https://www.tiaa.org/public/about-tiaa/news-press/press-releases/pressrelease663.html>.

71. See 20 U.S.C. § 1087vv(d) (2015).

72. M.H. MORTON, A. DWORKSY, & G.M. SAMUELS, MISSED OPPORTUNITIES: YOUTH HOMELESSNESS IN AMERICA. NATIONAL ESTIMATES, VOICES OF YOUTH COUNT 6 (2017), <https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf>.

73. *Id.*

74. See 20 U.S.C. § 1087vv (2015); see also Federal Student Aid, *supra* note 37.

through the process without feeling overburdened or intimidated by the legal process.

Many students who come from abusive family homes are forced to work and live independently, and they do so without thinking of the possible consequences of no longer living with their parents.⁷⁵ However, as stated above, simply not living with one's parents is not sufficient to show that a student is technically an Independent student for the FAFSA.⁷⁶ The student would still be considered a Dependent student and would still need to find their parents' financial information. However, if the student was able to contact their parents it may still not be enough, as many estranged parents will often refuse to provide their information for their children.⁷⁷ Moreover, about one-third of the students who have completed their FAFSA will be selected for verification, which mandates that the student collect their parent's tax returns, proof of income, and proof of legal residency.⁷⁸ The initial process of obtaining parental financial information is already a barrier for many homeless students, but if the students are selected for verification, it adds even more confusion to an already confusing and stressful process.

For obvious reasons, it is difficult for an estranged student to obtain their parents' basic financial information, it is even more difficult for them to provide additional proof upon verification. Many students will likely find the process too overly demanding. The student may determine that it would be impossible to complete FAFSA, let alone an additional verification process.⁷⁹ With these realizations, many students will likely give up on the application process. It is clear the issues facing many students are their inability to gain information from their parents due to a lack of communication and an overall troubled relationship, so it is illogical that the current system requires a student to have to go back to the very source of the problem itself, their parents.

75. Lauren A. DiMartino, *supra* note 10.

76. *See* 20 U.S.C. § 1087vv (2015).

77. Lauren A. DiMartino, *supra* note 10.

78. Meredith Kolodner, *Why Are Low-Income Students Not Showing Up to College, Even Though They Have Been Accepted?*, THE HECHINGER REPORT (Aug. 14, 2015), <https://hechingerreport.org/why-are-low-income-students-not-showing-up-to-college-even-though-they-have-been-accepted/>.

79. DiMartino, *supra* note 10 (citing *Past Due Balances and Collections*, BROOKLYN C., <http://www.brooklyn.cuny.edu/web/about/offices/bursar/collections.php> (last visited Nov. 11, 2017)).

Many suggest that the current system already assists displaced youth, stating that those students who have been emancipated from their parents would be counted as being an Independent student under the FAFSA, and they would no longer need their parents' information.⁸⁰ While it is true, it is not always that easy for a student to become emancipated.⁸¹ One-third of the states have no statutory process in place for unaccompanied youth to become emancipated from their parents.⁸² Additionally, many unaccompanied youths do not have the resources, money, and knowledge on how to navigate the complex legal process of becoming emancipated through the court system.⁸³ Therefore, with it being unlikely for these students to obtain their parents' information and documents, and with the confusion of becoming legally emancipated, many students find themselves in a difficult situation with no remedy.

C. Individuals in the LGBTQ Community

Another group of students who are at risk of not being able to receive their parent's financial information includes students who identify as lesbian, gay, bi-sexual, transgender, or queer (LGBTQ). Those who are in the LGBTQ community have a hundred and twenty higher percentage of being homeless than their non-LGBTQ peers.⁸⁴ Unlike their non-LGBTQ peers, LGBTQ youths who are forced to leave home due to family rejection are more likely to enter the juvenile justice system and run away from the child welfare placement programs.⁸⁵ Overall, younger people who identify as being a part of the LGBTQ community are also more likely to end up homeless given that they have fewer family members and community resources to rely on.⁸⁶

Moreover, students who identify as LGBTQ face another more unique and nuanced issue. For LGBTQ students who come from more conservative and religious households, the parents of these students may use their information as leverage to influence their student

80. See 20 U.S.C. § 1087vv (2015).

81. Jordan Blair Woods, *Unaccompanied Youth and Private-Public Order Failures*, 103 IOWA L. REV. 1639, 1698 (2018).

82. *Id.*

83. *Id.*

84. MORTON, *supra* note 72.

85. Woods, *supra* note 85, at 1698.

86. *My So-Called Emancipation*, HUMAN RIGHTS WATCH (May 12, 2010), <https://www.hrw.org/report/2010/05/12/my-so-called-emancipation/foster-care-homelessness-california-youth>.

in deciding which college or university to attend. Today, parents are becoming even more concerned with where their child goes to college and are attempting to control what their child may be exposed to when they attend college.⁸⁷ This is even more true with parents who want to curtail their LGBTQ student's lifestyle.

Christian colleges and universities are institutions that discourage individuals from being a part of the LGBTQ community or acting on their "homosexuality."⁸⁸ Additionally, some colleges may not discriminate based on one's sexual identity, but punish those who participate in, "homosexual conduct."⁸⁹ Overall, Christian colleges and universities also discourage and demoralize those in the LGBTQ community in many underhanded ways. In 2016, the Richmond Times-Dispatch reported that the evangelical university, Liberty University, special-ordered their psychology textbooks to omit certain sections on sexual orientation.⁹⁰ Overall, the article pointed out that Liberty displays a pattern of pushing a religious-political agenda upon its students and faculty, which many times is an anti-LGBTQ agenda filled with propaganda and misinformation.⁹¹

Colleges and Universities that openly object and attempt to control those in the LGBTQ community are attractive options for parents who disapprove of their child's sexual orientation and may view their child's attendance at such institution as a way to "fix" their child. With the current requirement that students need to obtain their parents' financial information to complete the FAFSA, gives the parents a degree of control and influence on which institution the student chooses to attend. This is an unintended consequence of how the current FAFSA application gathers student information, and it is harming students who are facing discrimination within their home.

D. First Generation Americans

The last at-risk group that is negatively impacted by the parental information requirement of the FAFSA are students who are first-

87. Scott Jaschik, *Brown Is Completely Off the Table*, INSIDE HIGHER ED (June 26, 2017), <https://www.insidehighered.com/admissions/article/2017/06/26/private-college-counselors-report-parents-increasingly-bring-politics>.

88. *Bob Jones University Student Handbook*, Bob Jones University (2018) at 65.

89. *Liberty University Law School Honor Code*, Liberty University School of Law (May 26, 2017) at 23.

90. Karin Kapsidelis, *Liberty Psychology Course Omits LGBT Content*, RICHMOND TIMES-DISPATCH (June 14, 2016), https://www.richmond.com/news/virginia/article_b4de73d5-b0a4-5581-9ba7-4fa29d63a6a7.html.

91. *Id.*

generation Americans or who have family members who are not documented immigrants. These students already facing hardships and complications in trying to obtain a higher education, but many are faced with their parents' refusal to give out information regarding their finances due to fear and misunderstanding. Additionally, it must be understood that students who are not legal residents of the United States are unable to obtain any financial assistance for higher education.⁹² However, even students who are legal residence may still be negatively impacted by their parents' misunderstanding of the FAFSA and fear of possible consequences of providing their financial information to the federal government.⁹³

Students who are first-generation Americans are faced with many more challenges than other students. These additional challenges may include, guilt for leaving home, higher social anxiety, and possible language barriers.⁹⁴ Today, many immigrants are also people of color comprising of poor and working-class individuals, and face marginalization within U.S. society by their immigration status in general.⁹⁵ The FAFSA application may be unfamiliar for many families who are new to the United States, and providing personal financial information may be uncomfortable for many parents.

Moreover, students that have parents who are not citizens of the United States may face even more challenges. Currently, immigrants living in the United States who are not citizens may be at risk of being deemed a "public charge" if they receive certain types of government assistance.⁹⁶ For example, public charge status may be given to an immigrant if they routinely accept "cash benefits" for income maintenance or have been institutionalized in long-term care at the government's expense.⁹⁷ However, despite this current rule, there is still a great deal of confusion within many immigrant communities.⁹⁸ Fur-

92. See 20 U.S.C. § 1091(a)(5) (2015).

93. Claire R. Thomas & Ernie Collette, *Unaccompanied and Excluded from Food Security: A Call for the Inclusion of Immigrant Youth Twenty Years After Welfare Reform*, 31 GEO. IMMIGR. L.J. 197, 212 (2017) (stating that many immigrants refrain from applying for public benefits because of the fear of becoming a public charge, which could lead to deportation).

94. Brittany Sims, *Should First-Generation College Students Receive More Financial Aid?*, STUDYBREAKS (Feb. 13, 2018), <https://studybreaks.com/college/first-generation-students/>.

95. Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 L. & CONTEMP. PROBS. 1, 5 (Fall 2009).

96. Public Charge Fact Sheet, UNITED CITIZENSHIP AND IMMIGRATION SERVICES, (Apr. 29, 2011) <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet>.

97. 64 Fed. Reg. 28689 (Mar. 26, 1999) (stating that being classified as a public charge can place an individual at risk of deportation).

98. See *supra* note 96.

ther still, the Department of Homeland Security contemplates expanding reasons for immigrants to become a public charge. These potential methods include receiving certain benefits which are not limited to cash benefits and could also include benefits received by the immigrants children.⁹⁹ All in all, with the confusion surrounding that may negatively impact an immigrant's livelihood, some immigrant parents are cautious about signing their child up to receive government assistance for a higher education. Overall, the current system which requires a parent's information is limiting the student, who is likely a U.S. citizen, from receiving benefits they are entitled to under law.

Another group of students negatively affected by the requirement to give out their parents' financial information are those who have undocumented parents. Many students, who are U.S. citizens, will not complete their FAFSA out of fear that their family members, who are undocumented, may be outed and could face potential deportation.¹⁰⁰ In these cases, the only remedy for these students would be to claim to be Independent or forgo obtaining any assistance for college due to circumstances which are completely out of the student's control. Because of the federal government's inability to create legislation that caters to different types of students and because of the federal government's inability to address this problem, U.S. citizens are not aided in the way they are entitled.

V. MOVING FORWARD: HOW TO ADDRESS THE "GAP" WITHIN THE FAFSA

There are several solutions that can be used to address the issues facing students who are unable to provide their parents' financial information. Federal and state statutes as well as agency rules may all play a vital role in making the transfer of required information from the student's parent to the Department of Education easier. In this last section, I will explore the possible solutions that the federal government may take to help students obtain financial aid when the student's parent refuses to cooperate.

99. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28676 (proposed July 7, 2018) (to be codified in 8 C.F.R. pt. 212).

100. Kat Tretina, 3 *Obstacles That Can Affect Financial Aid for Immigrants*, STUDENTLOANHERO.COM (Oct. 24, 2017), <https://studentloanhero.com/featured/financial-aid-for-immigrants-obstacles-affect/>.

A. Compelling Parents to Give their Tax Information to their Child for Purposes of Completing the FAFSA

Through legislation, the federal government could require parents to give their child their tax return information for the purposes of completing the FAFSA. This would allow students to obtain the required documents currently needed by the FAFSA. Local schools and school districts may be used to see if parents cooperate with this rule, and may also help report parents who refuse to give their information for their children.

Currently, tax return information is protected from disclosure made to third parties by the Internal Revenue Service.¹⁰¹ However, adding an exception to the general rule, may be permitted. There are already several exceptions to the general prohibition on disclosure of tax return documents. Individuals may be required to share their tax information under court order or with law enforcement agencies during investigation proceedings.¹⁰² Legislation mandating disclosure of an individual's IRS tax return information could be used like a court order, which would mandate that all parents comply with the law and require them to let their children have access to their IRS tax return information.

Another important consideration of implementing this idea is how local and state governments could enforce a rule that mandates parental financial disclosure. Parents generally have broad protection from possible suits filed by their minor children.¹⁰³ Generally, a parent may only be liable for a personal tort when the allegation is of willful or malicious conduct.¹⁰⁴ Another enforcement option, however, could fall on the local school districts. The Commonwealth of Virginia has several state requirements parents must follow for their child to be admitted into the public school system.¹⁰⁵ Some of the requirements are: (1) the child's birth certificate;¹⁰⁶ (2) documentation proving child's residency;¹⁰⁷ (3) completion of certain health forms;¹⁰⁸ and (4) the child's social security number.¹⁰⁹ State governments could

101. See 26 U.S.C. § 6103(a) (2019).

102. *Id.*

103. 118 A.L.R. 5th 513 (2004).

104. *Id.*

105. See generally, VA. CODE ANN. §§ 22.1 (2018).

106. VA. CODE ANN. §§ 22.1-3.1 (2018).

107. VA. CODE ANN. §§ 22.1-4.1 (2018).

108. VA. CODE ANN. §§ 22.1-270 (2018).

109. VA. CODE ANN. §§ 22.1-260 (2018).

easily place a requirement that parents also provide certain financial information for soon-to-be graduating high school seniors, for purposes of completing the FAFSA. Parents may elect to withdraw their child from the public school, but in so doing, they would have to enroll their child into an alternative private school, which would cost money and could be extremely difficult. By adding state requirements for parents to disclose certain financial documents for their child's FAFSA application, many students will obtain the necessary information for completing the FAFSA faster and easier than before.

However, several issues may still arise from this possible solution, which could make implementation of this solution difficult. First, some students who are estranged from their parents may not be able to locate their parents and would still be unable to obtain the necessary information. Second, it may be difficult for some students to confront their parents and demand to see their financial information. Lastly, parents may argue that the government should not be allowed to mandate that they turn over their financial information. This solution may cause a political push backs and may be difficult to have passed by elected representatives. Issues regarding privacy and security may be raised which could negate the impact of this solution as well. Overall, mandating that parents give their financial information may solve the issue at hand, but it could also cause a large pushback from the average parent.

B. Allow inter-communication between the Department of Education and the Internal Revenue Service

Another possible solution allows for the Department of Education and the Internal Revenue Service to communicate instantaneously with one another regarding a student seeking federal student aid and their parent's financial information. The current system for processing student financial aid allows the Department of Education to obtain the parent's financial information from the IRS, but only if the student has provided certain parental information.

Additionally, the IRS already shares tax return information with other federal and state agencies.¹¹⁰ Creating a system which automatically streamlines the process of giving information from one agency to another may be an effective way of allowing disadvantaged students from obtaining their needed parental information.

110. See 26 U.S.C. § 6103(l)(1) (2019).

This solution may be the most efficient way to solve this issue, given that both agencies either have or need to collect the same data from the student and the student's parent. Much of the necessary information linking the parent to their child is already within the parent's IRS tax return. Moreover, when parents file their taxes, they are required to list the names and social security numbers of all dependents who are living in the household, which includes the student's social security number. The dependency listing on the tax return could be used to connect both the child and the parent together.¹¹¹

Currently, there are already provisions within Title 26 that allow the IRS to communicate with different agencies regarding an individual's tax return. Certain tax return information may be shared with the Social Security Administration as needed to carry out certain mandatory tasks under the Social Security Act.¹¹² Additionally, the IRS may also share an individual's tax return information with certain state agencies responsible for tax administration.¹¹³ Adding an additional provision within Title 26 that allows the IRS and the Department of Education to communicate information pertaining to parental financial information would not be an unprecedented act. If the IRS can safely and correctly transfer certain tax return data from a federal agency to a state agency, then it should also be able to transfer this data to another federal agency.

Today, there is already a law that addresses this very issue.¹¹⁴ The Fostering Undergraduate Talent by Unlocking Resources for Education Act ("FUTURE Act") links the two agencies together, allows for the Secretary of Education to request necessary information from the IRS regarding an individual student applying for the FAFSA.¹¹⁵ The FUTURE Act allows the IRS and Department of Education to communicate with regard to: (1) the taxpayer's identity information; (2) the filing status of such tax payer; (3) the adjusted gross income of the taxpayer; (5) total number of exemptions claimed if applicable; and (6) number of dependents taken into account in determining the credit allowed.¹¹⁶ The FUTURE Act gives the Department of Educa-

111. Fostering Undergraduate Talent by Unlocking Resources for Education Act of 2019, Pub. L. No. 116-91, §3(a)(13)(A), 133 Stat. Ann. 1189-90 (2019).

112. See 26 U.S.C. § 6103(l)(1) (2019).

113. See 26 U.S.C. § 6103(d) (2019).

114. Fostering Undergraduate Talent by Unlocking Resources for Education Act of 2019, Pub. L. No. 116-91, §3(a)(13)(A), 133 Stat. Ann. 1189-90 (2019).

115. *Id.*

116. *Id.*

tion and IRS the ability to streamline the process of obtaining parental financial information and could automatically allow students to have access to the requisite documentation needed to complete the FAFSA.

Despite the passage of the FUTURE Act, the burden now shifts to the Department of Education and the IRS to implement agency rules that allows for the automatic connection of parental financial information to the applicable student. As stated previously, a student applicant is required to provide their social security number when completing the FAFSA. This could be used to connect the student with their parents IRS tax fillings, given that the student is listed as a dependent on their parent's tax forms. By connecting the student's social security number with the correlating parental tax form, the Department of Education would be able to access the needed financial information needed to determine a student's financial need.

- C. Amend the appeal system: Allow students to still receive financial assistance despite not having their parental information

Another remedy involves creating another set of Federal Student Aid to be given to students who were able to show that they were estranged from their parents or that their parents had refused to give over their financial information. The process would be similar to the one already used by the Department of Education's "special circumstances," but instead of the student needing to show actual emancipation, the Department of Education could propose a lower standard, which does not place a high burden on the student to meet.

Congressional action is needed to amend Title 20's Discretion of Student Financial Aid Administrators section. Currently, this section of Title 20 only allows a financial aid administrator to "offer a dependent student financial assistance under section 1078-8 of this title or a Federal Direct Unsubsidized Stafford Loan without requiring the parents of such student to file the financial aid form prescribed under section 1090. . ."117 Congress should amend this section to allow for additional scholarship, grants, or other financial aid assistance programs for these dependent students.

This solution would have benefits and possible risks. One risk would be that the government would have to trust the student's affida-

117. See 20 U.S.C. § 1087tt(a) (2015).

vits, and there may be a risk of more wealthy families trying to game the system to also receive some money to attend college. However, as stated within the statute, the ultimate determination is with the financial aid administrator, and they are encouraged to evaluate each student on a case-by-case-basis.¹¹⁸ The financial aid administrators may be in the best position to determine the needs of each student and to identify students with financial needs. By providing the administrators with more tools to aid prospective students, it may allow students who would have been discouraged from attending college to gain the financial means to do so.

VI. CONCLUSION

It is not fair that our most vulnerable student populations may face the grim possibility of attending college with no means of paying for it. It is also troubling that the reason for the student's inability to receive these funds, has nothing to do with them or their lack of work or preparation, but solely based on the lack of knowledge, fear, or spite from the student's parents. The Higher Education Act was passed with the sole reason that any qualified American should not be denied the opportunity for a college education because they lack the financial means to attend. The current system disproportionately impacts most vulnerable youth communities and limits their opportunity solely because of their inability to show their parents' financial information. The solutions for this issue are not complicated and can be resolved by simply allowing two government agencies to communicate with one another. This is an issue that should have been addressed yesterday because the deadline for solution is passed due.

118. *Id.*

Income Share Agreements: A Solution to the Student Loan Debt Crisis or a Welcome Mat for Discrimination?

MESCHELLE L. NOBLE

“In a global economy where the most valuable skill you can sell is your knowledge, a good education is no longer just a pathway to opportunity—it is a prerequisite.”¹

ABSTRACT: In a growing economy dependent on workers with advanced degrees, obtaining a higher education has become a common, if not essential, prerequisite to success in the America of the twenty-first century. However, the risks of taking out a traditional student loan in order to attend college may outweigh the benefits. The alternative of Income Share Agreements (“ISA[s]”) to fund higher education – a resurfacing concept – has the potential to lessen the burden of student loan debt upon graduated borrowers, providing a better cost-benefit balance for some students. ISAs allow students to borrow funds for tuition and other educational related purposes while they are enrolled in school. At the outset, the student agrees to pay the lender a certain percentage of their future earnings upon completion of their degree. The problem, however, is that whereas traditional loans are subject to regulations that prohibit discrimination, ISAs are not. Lenders have the opportunity to discriminate in their distribution of funds based on illegitimate grounds such as race or socioeconomic status. Additionally, ISAs have the potential to encourage predatory lending practices. To prevent the possibility of discrimination and exploitation by lenders, this article proposes that legislators create a regulatory scheme that will guard against the undesirable side-effects of ISAs, before their use becomes any more widespread in colleges and universities across the country. Specifically, Congress should author-

1. President Barack Obama, First Speech to a Joint Session of Congress (Feb. 24, 2009).

ize the Consumer Financial Protection Bureau and the Federal Trade Commission to exercise administrative oversight over ISAs. Additionally, the Truth in Lending Act and the Equal Credit Opportunity Act should be amended to encompass ISAs so they can reach their full potential as alternatives to traditional student loans.

INTRODUCTION

I graduated with a BA in Mass Communications and found shortly after a few internships and graduation, I wanted to work more on the business side of an organization. I decided to get an MBA and pursue that desire. Finding employment in either was extremely difficult, and I found a career in software. I enjoy what I'm doing but my payments for student loans aren't even putting a dent on the increasing interest. These student loans have been dark clouds over every other concern, triumph and failure over these last 6 years. It sounds extreme, but I remember getting my MBA and the moment being overshadowed by the newly acquired debt. I've spent many sleepless nights thinking, "I wish I'd made smarter decisions in my undergrad and not borrowed so much. I should've been better and sought more scholarships. I should've researched more. . . Could've done this, that etc. . ." These thoughts occurred while simultaneously crying over my credit score and searching for ways to build it. Staying positive and completing normal adult activities is difficult with the running thought of student loan debt. My mom passed in the middle of my undergrad, and my dad passed at the beginning of my MBA. The combination of the grief from those losses and stress of student loans is overwhelming at times. It's hard to ever feel a sense of "normalcy." If I could do things over, I'd still attain both degrees, but I'd certainly find different ways to fund them. This stress decreases your mental health and quality of life. - Charity, *Real Student Debt Stories*.²

Charity's story is familiar to students across the United States. After the Great Recession of 2007-09, the United States "economy [. . .] divided the country along a fault line demarcated by college education."³ Approximately 11.6 million jobs have been created since then, but ninety-nine percent of them have gone to applicants with at

2. Charity, *Real Student Debt Stories*, STUDENT DEBT CRISIS (Sept. 15, 2018), <https://studentdebtcrisis.org/read-student-debt-stories/>.

3. Anthony Carnevale et al., *America's Divided Recovery College Have and Have-Nots*, CEW GEO. (2016), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Americas-Divided-Recovery-web.pdf>.

least some form of a college education.⁴ As a result, obtaining a college degree in the United States is an important, if not essential, step to earning higher or any wages at all.⁵

Unfortunately, for an increasing number of young Americans, traditional student loans are the principal option available for financing their education.⁶ Lenders rarely determine, however, whether these borrowers are likely to be successful in securing fulltime employment that will allow them to repay their debt upon graduation.⁷ Nonetheless, there is hope that things will change as policymakers and loan administrators are becoming more aware of the problem. Many are eager to propose and implement solutions to reduce defaults.⁸ One of the many suggestions to slow the growing student loan debt crisis is to offer Income Share Agreements to students as an alternative to traditional student loans.

An ISA is a contract between a student and his or her educational institution that commits the student to pay a percentage of his or her earnings for a fixed period after graduation in return for the cost of the student's education.⁹ ISAs, in their technical sense, take a sharp departure from the traditional practices of lending for higher education, such as private or federal student loans.¹⁰ Mainly, they alter the potential repayment burdens for students post-graduation, because payments are income-driven and based on the graduate's earnings, rather than being based on a pre-determined principal plus

4. *Id.* (“By contrast, workers with a high school diploma or less hear about an economic recovery and wonder what people are talking about. Of the 7.2 million jobs lost in the recession, 5.6 million were jobs for workers with a high school diploma or less.”).

5. Becton Loveless, *Benefits of Earning a College Degree*, *Education Corner* (last updated 2018), <https://www.educationcorner.com/benefit-of-earning-a-college-degree.html>. (“Studies show that college graduates earn significantly more money throughout their lifetime than those with only high school education.”).

6. Anne Johnson et al., *The Student Debt Crisis*, *CTR. FOR AM. PROGRESS* (Oct. 25, 2012), <https://www.americanprogress.org/wp-content/uploads/2012/10/WhiteStudentDebt-4.pdf>; see also Kate Elengold, *The Investment Imperative*, 57 *Hous. L. Rev.* 1, 5 (2019).

7. Patrick Healey, *We Should All Be Concerned About the Student Debt Crisis*, *C.N.B.C.* (Nov. 4, 2019, 8:00 AM), <https://www.cnn.com/2019/11/04/we-should-all-be-concerned-about-the-student-debt-crisis.html/>.

8. Susan Dynarski et al., *An Economist's Perspective on Student Loans in the United States*, *ECON. STUDIES AT BROOKINGS*, 11 (Sept. 2014), https://www.brookings.edu/wp-content/uploads/2016/06/economist_perspective_student_loans_dynarski.pdf.

9. *Income-share Agreements are a Novel Way to Pay Tuition Fees*, *THE ECONOMIST* (July 19, 2018), <https://www.economist.com/finance-and-economics/2018/07/19/income-share-agreements-are-a-novel-way-to-pay-tuition-fees>.

10. Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 *VAND. L. Rev.* 681, 684 (2015). (“An individual seeking immediate financing obtains funds by pledging a percentage of her future income to investors for a certain number of years.”).

interest formula and a mandatory repayment schedule.¹¹ For instance, if a graduate is unemployed, generally, monthly payments are suspended or significantly lowered until employment is secured.¹² In this context, ISAs undoubtedly have the ability to mitigate the growing \$1.5 trillion student loan debt facing our country.¹³

Nevertheless, the administration and structure of ISAs are currently controlled by the private-sector and are unregulated by the federal government.¹⁴ Without a regulatory framework, ISAs have the ability to cause harm, specifically in effectuating discriminatory and predatory practices. If they are to realize their full potential, but avoid such practices, Congress should direct its attention to the potential problems stemming from the use of ISAs prior to their widespread implementation in colleges and universities across the nation.

Part I of this Comment describes student borrowing in the United States. It first explores the history of student loan debt in the United States – taking a detailed look at how the need for a college degree has forced millions of Americans into assuming a massive amount of debt, often without the ability to repay it. After detailing the history of student loan debt, this section also compares and contrasts traditional student loans, including the option to repay using the federal-income driven repayment method, and income share agreements. Part II then examines the positive and negative impacts that ISAs could potentially have on an individual seeking to finance a higher education. In highlighting the potential problems arising from ISAs, this section will also explain how ISAs could lead to (1) disparate impact and discrimination based on race and institution choice and (2) predatory lending practices through limited term disclosures. After weighing the pros and cons of ISAs, Part III proposes potential solutions that could resolve and curtail the pitfalls of ISAs. Such solutions include: (1) implementing improved educational tools for high school and college students regarding their lending options, (2) the establishment of explicit oversight authority by the Federal Trade Commission

11. *What are Income Share Agreement (ISAs)*, VEMO EDUC. (last updated 2019), <https://vemoeducation.com/about-income-share-agreements/>.

12. *Id.*

13. Zack Friedman, *Student Loan Debt Statistics In 2019: A \$1.5 Trillion Crisis*, FORBES (Feb. 25, 2019, 8:32 AM), <https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#21cd70fd133f>.

14. Mary Clare Amselem, *Income Share Agreements Have the Potential to Revolutionize College*, THE HERITAGE FOUND. (Oct. 19, 2018), <https://www.heritage.org/sites/default/files/2018-10/IB4910.pdf>.

(“FTC”) and the Consumer Financial Protection Bureau (“CFPB”) for the implementation and administration of ISAs on college campuses across the United States, and (3) lastly, the use of the Truth in Lending Act (“TILA”) and the Equal Credit Opportunity Act (“ECOA”) as means of relief should a student ever seek judicial redress regarding an ISA. This Comment concludes by highlighting the critical role that Congress can play in creating a functional approach to slowing the ever-increasing student loan debt crisis.

I. FINANCING HIGHER EDUCATION: A BRIEF HISTORY

Congress first opened the financial door for many to attend college with the passage of the Servicemen’s Readjustment Act, or G.I. Bill, in 1944, which covered the cost of education for World War II veterans.¹⁵ In 1958, Congress passed the National Defense Education Act (“NDEA”), which initiated the administration of federal student loans.¹⁶ The NDEA created the National Defense Student Loan (“NDSL”) program, which provided “low-interest federal loans to promising yet needy students to enable them to pursue undergraduate and graduate educations.”¹⁷ As a result of the success of the NDSL program, Congress enacted the Higher Education Act of 1965 (“HEA”) which “increased access to higher education for students from the lowest income levels, but [imposed] strict qualifications on aid recipients [and] precluded the eligibility of many students from middle-income families.”¹⁸ In 1972, the HEA was amended “to ensure [that] programs whose students were receiving financial assistance and student loans did not discriminate based on gender.”¹⁹ After the amendment of the HEA, federal student borrowing became much more accessible and widely used.²⁰

15. Servicemen’s Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944).

16. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (repealed 1970).

17. Pamela Ebert Flattau, et al., *The National Defense Education Act of 1958: Selected Outcomes*, INST. FOR DEF. ANALYSES (2006), <https://www.ida.org/-/media/feature/publications/t/th/the-national-defense-education-act-of-1958-selected-outcomes/d-3306.ashx>.

18. Robert Cloud & Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U.L. 467, 473 (2014), citing Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

19. *State of Student Debt in the U.S., Part 2*, CTR. FOR ONLINE EDUC. (last updated 2019), <https://www.onlinecolleges.net/student-debt-in-the-u-s-part-2-a-brief-history-of-student-debt-in-the-united-states/>.

20. *Id.*

Growth in the use of financial assistance for student loans started to show signs of trouble in the 1980s.²¹ In 1986, parents and students combined had incurred roughly ten billion dollars in federal student loans.²² Between the late 1980s and the early 2000s, student loan debt began to “skyrocket.”²³ In 1993, the average student debt for a bachelor’s degree was approximately \$9,000.²⁴ In 1998, the average debt increased to \$15,000.²⁵ “By 2003, it had jumped to approximately \$17,500.”²⁶ The average outstanding loan debt per student currently averages around \$30,000.²⁷ To put this in perspective, roughly twenty percent of all households in the United States currently owe student loan debt.²⁸ Additionally, economists calculate that outstanding student debt will creep upwards of two trillion dollars within the next three years.²⁹

There are several factors to consider when evaluating why student loan debt is continuously on the rise. Some argue that increased tuition, predatory lending behavior, and a reduction in state educational spending are to blame for the current student loan debt crisis.³⁰ Over the past thirty years alone, the average cost of attending a public four-year university increased by 213 percent.³¹ Adjusting for inflation, the average public, four-year university student paid roughly \$3,190 for tuition in the 1987-1988 academic year.³² Today, average annual tuition has increased to \$9,970.³³ Critics counter that the United States economy has placed an undue burden on students to obtain a bachelor’s degree and/or a specialized degree, in some instances to land a well-paying job.³⁴ Like Charity, many students desire to work in corporations or big businesses which favor applicants

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. John Aidan Byrne, *US Student Debt Might Lead to the Next Financial Crisis*, N.Y. POST (Sept. 22, 2018, 9:44 PM), <https://nypost.com/2018/09/22/us-student-debt-might-lead-to-the-next-financial-crisis/>.

30. *Supra*, note 19; *see also* Elengold, *supra*, note 6.

31. Emmie Martin, *Here’s How Much More Expensive It Is for You to Go to College Than it was for Your Parents*, CNBC (Nov. 29, 2017, 9:55 AM), <https://www.cnbc.com/2017/11/29/how-much-college-tuition-has-increased-from-1988-to-2018.html>.

32. *Id.*

33. *Id.*

34. Jeffrey J. Selingo, *College Students Say They Want A Degree for a Job. Are They Getting What They Want?*, THE WASH. POST (Sept. 1, 2018), <https://www.washingtonpost.com/news/>

with graduate degrees such as a Master of Business Administration. Unfortunately, obtaining such a degree does not always guarantee such employment because “[o]ver half of all recent graduates are either unemployed or jobless.”³⁵ Considering those who have attained employment, many graduates are not working in their field of study and expertise. To add, many of these “out-of-expertise” jobs do not compensate graduates enough to make monthly student loan payments.³⁶ Needless-to-say, there is high stress placed on the shoulders of graduates in the race to pay off any debts incurred during their educational journey.

Having explored the history of student loans in the United States and assessed their impact on society, the next subsections will compare and contrast traditional student loans with ISAs – illustrating how both methods operate to fund a college degree.

A. Traditional Student Loans

With roughly 44.2 million Americans with student loan debt,³⁷ it is important to understand the process by which a student applies for financial aid. Under the traditional model for financing a college degree, students can choose between federal and private student loans. There are three major types of federal loans: Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct Plus Loans.³⁸ In order to be considered for one of these loans, the student must first complete the Free Application for Federal Student Aid (“FAFSA”).³⁹ FAFSA is a free online application used by a majority of colleges and universities to assemble financial aid packages for individual institutions.⁴⁰ These packages include a student’s eligibility for grants, work-study programs, federal loans, and individual state and school finan-

grade-point/wp/2018/09/01/college-students-say-they-want-a-degree-for-a-job-are-they-getting-what-they-want/.

35. Jennifer Wadia, *Rising Tuition Costs and the History of Student Loans*, STUDENT DEBT RELIEF (Sept. 25, 2018), <https://www.studentdebtrelief.us/news/rising-tuition-costs-and-the-history-of-student-loans/>.

36. *Id.*

37. *A Look at the Shocking Student Loan Debt Statistics for 2018*, STUDENT LOAN HERO (updated Feb. 4, 2019), <https://studentloanhero.com/student-loan-debt-statistics/>.

38. *Compare Federal vs Private Loans*, SALLIE MAE, <https://www.salliemae.com/college-planning/student-loans-and-borrowing/compare-federal-vs-private-loans/>. (Although there are other types of federal loans, such as Perkins, for the purposes of this Comment, the focus will remain on the three mentioned above.)

39. *Id.*

40. *Fill out the FAFSA*, SALLIE MAE, <https://www.salliemae.com/college-planning/financial-aid/fafsa/>.

cial aid.⁴¹ The FAFSA requires information about the student, such as the student's latest family federal income tax return or the student's personal bank statements, in order to calculate the financial need and also the eligibility for certain aid.⁴² After all of the student's pertinent information is received, the information is used to calculate the student's Expected Family Contribution ("EFC").⁴³ As a result of a student's EFC, determined by the college or university, the government then decides how much federal financial aid the student is eligible to receive.⁴⁴ The government looks at factors such as the student's EFC, the student's year in school, the student's enrollment status, and the cost of attendance of the school the student will be attending.⁴⁵ The cost of attendance typically includes the cost of tuition, books, school supplies, transportation, and room and board.⁴⁶ At the conclusion of this process, the student will receive a financial aid award letter from the college or university which will detail how much aid the student is eligible to receive.⁴⁷ If the student is not awarded enough aid to cover all costs or is uninterested in borrowing from the government, the student can explore other options such as private student loans.

The process of obtaining a private student loan is vastly different from that of a federal student loan. Instead of submitting the FAFSA, the student will apply directly to the bank or institution from which the student seeks to secure a loan.⁴⁸ Because a student seeking a private student loan must apply directly to an individual financial institution, each application may differ. However, the main commonality in private loan applications, and difference from federal loan applications, is that the loans are based on the student's credit profile.⁴⁹ Because a student will generally have a short credit history, or no credit history at all, the student's cosigner's credit will also be evaluated in the private student loan application process.⁵⁰ Similar to the FAFSA, private lenders will ask for basic information about the student and

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Supra* note 38.

49. *Student Loans for all Types of Students*, SALLIE MAE, <https://www.salliemae.com/college-planning/student-loans-and-borrowing/compare-federal-vs-private-loans/>.

50. *Consider a Student Loan Cosigner*, SALLIE MAE, <https://www.salliemae.com/student-loans/get-ready-to-borrow/consider-a-cosigner/>.

their financial history.⁵¹ The application will also consist of selecting an interest rate and repayment option for the loan.⁵² Lastly, the student will need to supply the financial institution with the basic financial information of the student's creditworthy cosigner.⁵³ After applying for a private student loan, the financial institution will either accept or reject the student's application. Upon acceptance, the student will receive notice to review, accept, and e-sign the terms of the loan agreement.⁵⁴ Lastly, the college or university receiving the loan will certify the final amount borrowed and send a final disclosure to the student before the financial institution disburses the loan to the school.⁵⁵

Irrespective of their structural differences, it is also important to note the consumer protections afforded to federal and private student borrowers. First, student borrowers are protected through full disclosure requirements—arguably the most important protection.⁵⁶ Though the borrowing process for most federal student loans does not require information about the student's financial history, TILA provides borrowers the right to have all terms of the loan disclosed prior to signing the loan agreement.⁵⁷ Second, student borrowers are protected from discrimination based on classifications such as race, sex, or marital status from loan service providers.⁵⁸ Under ECOA, "it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age."⁵⁹ Third, the credit information of student borrowers is protected by the Fair Credit Reporting Act ("FCRA"), which makes it unlawful for any consumer reporting agency to provide a consumer report containing information such as civil suits, tax liens, and accounts in collection.⁶⁰

51. *Understand the Student Loan Application Process*, SALLIE MAE, <https://www.salliemae.com/student-loans/get-ready-to-borrow/understand-the-student-loan-application-process/>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* Truth in Lending Act, 15 U.S.C. § 1631(a) (2010).

57. Bruce McClary, *Know Your Student Loan Consumer Rights*, U.S. NEWS (Oct. 31, 2018, 10:09 AM), <https://www.usnews.com/education/blogs/student-loan-ranger/articles/2018-10-31/know-your-consumer-protection-rights-when-it-comes-to-student-loans.>; *See also id.*

58. *See* Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2018).

59. *Id.*

60. Fair Credit Reporting Act, 15 U.S.C. § 1681c(a)(2)-(4) (2018).

Additionally, the details regarding the repayment period and interest rate for both federal and private student loans are the same: “Whether you choose federal student loans or private student loans, you have to pay back the money you borrow, plus interest – whether you graduate or not.”⁶¹ In most cases, repayment schedules are based on the fixed amount that ensures a student’s loan will be paid off within 10 years.⁶² Additionally, interest rates vary between fixed and variable, which is determined at the outset of the loan.⁶³ Fixed interest rates stay the same which allow predictable monthly payments, whereas variable rates fluctuate throughout the life of the loan which means monthly payments can adjust.⁶⁴

Currently, students in need of financial aid for college only have the option of borrowing from the government through federal student loans or borrowing from a private bank through private student loans. However, ISAs provide a valuable alternative for some students to finance their higher education.

B. Alternatives to Traditional Student Loans

In contrast with the preceding subsection, this subsection will examine the processes behind ISAs and Federal Income-Driven Repayment Plans.

i. Income Share Agreements

An ISA is an agreement between a student and their college or university under which the student receives educational funding in exchange for the promise to pay a fixed percentage of their post-graduate income for a defined period of time.⁶⁵ Because the amount paid during post-graduation is based solely on the graduate’s income, payments are geared to affordability.⁶⁶ Ultimately, ISAs are investment vehicles designed to produce profits for lenders, reduce financial bar-

61. *Supra* note 38.

62. *Repayment Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/understand/plans>.

63. Matt Carter, *Fixed or Variable Student Loan: Which is Right for You?*, CREDIBLE (Jan. 14, 2020), <https://www.credible.com/blog/student-loans/choosing-fixed-or-variable-rate-student-loan/>.

64. *Fixed or Variable: Which Student Loan Rates Do You Want?*, EDUC. LOAN FIN. (Aug. 23, 2017), <https://www.elfi.com/fixed-variable-student-loan-rates/>.

65. *What are Income Share Agreements (ISAs)*, VEMO EDUC. (updated 2019), <https://vemoeducation.com/about-income-share-agreements/>.

66. *See generally id.*

riers to obtaining a higher education, and increase access to college.⁶⁷ The concept behind ISAs was first described by Milton Friedman in 1955.⁶⁸ He proposed that students should be funded through equity investments such that:

[Investors] could “buy” a share in an individual’s earning prospects: to advance him the funds needed to finance his training on condition that he agree to pay the lender a specified fraction of his future earnings. In this way, a lender would get back more than his initial investment from relatively successful individuals, which would compensate for the failure to recoup his original investment from the unsuccessful.⁶⁹

Decades later, investors are starting to revisit Friedman’s idea and implement ISAs throughout the country.⁷⁰

In applying for an ISA, students are not required to provide the same information mandatory for federal or private student loans. Because each college will set up their own ISA contracts, the application process may vary slightly, however, the key contract terms remain consistent.⁷¹ An ISA contract will consist of the ISA amount, the income share, the minimum income threshold, a payment cap, and the payment terms.⁷² Further broken-down, these contract terms are straight-forward. The ISA amount is the amount that would be credited to the student’s account through the student’s college or university.⁷³ The income share is the percentage of income a student pledges to pay after leaving their college or university regardless of

67. See Dubruvka Ritter & Douglas Webber, *Modern Income-Share Agreement in Post-secondary Education: Features, Theory, Applications*, FED. RES. BANK OF PHIL. (Dec. 2019), <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2019/dp19-06.pdf>.

68. Milton Friedman, *The Role of Government in Education*, in ECON. AND THE PUB. INTEREST, (Robert A. Solo ed., 1955), <http://la.utexas.edu/users/hcleaver/330T/350kPEEFriedmanRoleOfGovttable.pdf>.

69. *Id.*

70. Ted Malone, *An Introduction to Income Share Agreements*, PURDUE UNIV. (Mar. 29, 2016), <https://www.purdue.edu/enrollmentmanagement/data-reports/presentations/2016/spring/IncomeShareAgreements-BackABoiler.pdf>. (in 2016, Purdue University introduced Income Share Agreements, through its Back A Boiler Program, to its students as a method of financing their education).

71. Farran Powell, *Using an Income Share Agreement to Pay for College*, U.S. NEWS & WORLD REP. (Sept. 26, 2018, 3:18 PM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2018-09-26/using-an-income-share-agreement-to-pay-for-college>.

72. See Dan Friedman, *Understanding Income Share Agreements (ISAs): A Glossary of Key Terms*, THINKFUL, <https://www.thinkful.com/blog/income-share-agreements-key-terms/>; see also *FAQ About Back A Boiler – ISA Fund*, PURDUE RES. FOUND., <https://www.purdue.edu/back-a-boiler/FAQ/index.html>.

73. See *infra* note 162.

whether they graduate or receive their degree.⁷⁴ The minimum income threshold guarantees that a student will not have to make payments if their income falls below a certain salary amount.⁷⁵ Generally, schools impose a payment cap which is the maximum amount a student would have to pay relative to the initial funding amount.⁷⁶ Lastly, the payment terms detail the maximum number of monthly payments the student is required to make to satisfy their ISA obligation.⁷⁷

The two major differences between ISAs and traditional student loans are the repayment periods and the fact that ISAs do not accrue interest on the principal amount borrowed.⁷⁸ Typically, a standard repayment period for an ISA is ten years.⁷⁹ Additionally, some institutions give students a six-month grace period post-graduation before payments must commence.⁸⁰ If a graduate makes all successful payments for the prescribed terms of the ISA, no additional payments are required even if the total payment is less than the amount initially funded.⁸¹ For example, if a graduate successfully makes payments for the proscribed ten year time frame, the graduate will not be obligated to make any further payments even if the total amount paid is less than the initial amount borrowed.

An additional stark difference between ISAs and traditional student loans is that ISAs do not provide the same consumer protections that are in place for federal and private student loans. Though there are no statutory interpretations or judicial opinions currently available, it is believed that TILA, ECOA, the Fair Credit and Reporting Act (“FCRA”), Federal Trade Commission Act (“FTCA”), Title V of the Gramm-Leach-Bliley Act and the federal laws regulating unfair and deceptive (or abusive) trades practices do not apply to ISAs because ISAs do not fall under the traditional umbrella of lending. Part III of this Comment will further illustrate why courts should analyze ISAs under some of these regulatory frameworks.

74. *Id.*

75. Friedman, *supra* note 72.

76. *See generally id.*

77. Tonio Desorrento, *Income Share Agreements 101: A Brief Primer on ISAs*, VEMO EDUC. (Jan. 13, 2019), <https://vemoeducation.com/blog/2019/01/13/isa-101-a-brief-primer-on-income-share-agreements/>.

78. *Back a Boiler Program Overview*, PURDUE RES. FOUND., <https://www.purdue.edu/back-a-boiler/overview/index.html>.

79. *Id.*

80. *Id.*

81. *Id.*

ii. Federal Income-Driven Repayment Plans

It is worth noting that the government has implemented a repayment option for federal student loans that is similar to ISAs.⁸² Analogous to ISAs, income-driven repayment plans set the graduate's monthly student loan payment at an amount based on the graduate's income and family size, which may make it more affordable for some.⁸³ There are four types of income-driven repayment plans: Revised Pay As You Earn Repayment Plan, Pay As You Earn Repayment Plan, Income-Based Repayment Plan and Income-Contingent Repayment Plan.⁸⁴ These plans differ based on the length of the graduate's repayment period, the percentage of the graduate's income that counts as payment, and the type of federal student loans that are eligible under an income-driven repayment plan.⁸⁵ For example, under the Pay As You Earn repayment plan, the graduate's monthly payments are equal to ten percent of their discretionary income, which is the amount the graduate's adjusted gross income exceeds 150% of the poverty line.⁸⁶ Additionally, monthly payments are capped at the amount they would be under a standard ten-year repayment.⁸⁷

Despite these similarities, ISAs are still arguably a better option for students. One example that highlights the superiority of ISAs to Federal Income-Driven Repayments options is that ISAs do not accrue interest for a graduate in the repayment period.⁸⁸ While borrowers have the option to change federal student loan repayment plans as often as needed, electing to pay less each month can lead to paying more overall due to accrued interest,⁸⁹ because unlike ISAs, Federal Student Loans accrue interest over the life of the loan.⁹⁰ In contrast, ISAs have no interest rate and no balance.⁹¹ Instead of paying inter-

82. See *Income-Driven Plans*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/repayment/plans/income-driven#eligibility>.

83. *Id.*

84. *Id.*

85. *Id.* (payment amounts vary from ten to twenty percent of the graduate's income and the repayment period can vary from twenty to twenty-five years).

86. Mark Kantrowitz, *Income Share Agreements*, SAVINGFORCOLLEGE.COM (Aug. 27, 2018), <https://www.savingforcollege.com/article/income-share-agreements>.

87. *Id.*

88. *Infra* note 162, at 2.

89. Ryan Lane, *Can You Change Your Student Loan Repayment Plan?*, NERD WALLET (Jan. 3, 2020), <https://www.nerdwallet.com/blog/loans/student-loans/how-much-student-loans-cost/>.

90. *Id.*

91. Preston Cooper, *Three Myths About Income-Share Agreements That Won't Die*, FORBES (Jan. 10, 2019, 2:30 AM), <https://www.forbes.com/sites/prestoncooper2/2019/01/10/three-myths-about-income-share-agreements-that-wont-die/#621fefee4005>.

est on a balance of debt, ISAs are an agreement to make payments based on income for a fixed period of time which is decided at the outset.⁹²

In short, the application process for obtaining an ISA and the repayment of an ISA is strictly based on the student's future rather than a student's past. That makes an ISA more accessible to those who do not come from a wealthy background. For this, and many other reasons, ISAs are starting to become more attractive than traditional student loans. This next part will further explore ISAs and explain the potential positive and negative effects that they may have on the future of access to higher education.

II. A CLOSER LOOK AT INCOME SHARE AGREEMENTS

A. The Positive Potential of Income Share Agreements

As previously mentioned, the typical conversation regarding a prospective student's pursuit of higher education will often include a sidebar discussion on how that education can be financed.⁹³ The option of an ISA can improve those prospects, because it may offer an attractive and more attainable alternative for funding a college education. ISAs: (1) provide more opportunities for low-income students and students who do not qualify for financial aid to attend more expensive and highly ranked colleges and universities; (2) are dependent on post-graduate net income and thus are more manageable regarding repayment than traditional student loans; (3) allow for smoother career path transitions to a possibly lower-paying job; and (4) can encourage public interest employment, because ISAs generally make allowance for lower salaries.⁹⁴ Ultimately, ISAs provide an additional tool in the toolbox for student borrowers, which can be used in conjunction with federal and private loans or as a complete replacement.

i. Opportunity for Low-Income Students and Students Who are Ineligible for Financial Aid

As colleges and universities continue to struggle to meet their enrollment goals, it is no surprise that cost of attendance is a factor that

92. *Id.*

93. *But see* Elengold, *supra* note 6, at 4-10.

94. *See infra* note 162, at 3-4.

dissuades some individuals from attending.⁹⁵ However, ISAs provide another avenue for students to consider in order to afford attendance. While scholarships and federal student loans are available for students, there are instances in which these options do not provide nearly enough capital for attendance at a four-year university.⁹⁶ ISAs are now available to fill those cost gaps for students.⁹⁷ In addition, ISAs generally end up being more affordable than private student loans, which often include higher interest rates than federal student loans and ISAs.⁹⁸

Low-income prospective students are disproportionately affected by impediments to financing higher education. ISAs are a straightforward way to allow these marginalized students, who have little to no financial backing, to afford college.⁹⁹ Amy Wroblewski, a student at Purdue University and participant in an ISA, theorizes that if more colleges offered an ISA option to students, more students would be inclined to go to college rather than abandoning that hope due to cost.¹⁰⁰ Additionally, ISAs may provide financing options for students who may not be eligible for financial aid due to their citizenship status¹⁰¹ or criminal history.¹⁰² ISAs may allow students considering college to weigh their options without assigning so much weight to their financial and social backgrounds.

95. Lucie Lapovsky *Colleges Are Lowering Tuition*, FORBES (Sept. 29, 2018, 8:44 AM), <https://www.forbes.com/sites/lucielapovsky/2018/09/29/colleges-are-lowering-tuition/#20db39401961>.

96. Kim Clark, *Now You Can Sell Shares in Yourself to Pay for College*, TIME (Nov. 16, 2016), <http://money.com/money/4568213/income-share-agreements-college/>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Question 14 on the FASFA asks a student to indicate their citizenship status. *See Student's Citizenship Status*, FED. STUDENT AID, <https://fafsa.ed.gov/fotw1920/help/fahelp39.htm>.

102. Students who were previously incarcerated have limited eligibility for federal student aid. *See Students with Criminal Convictions*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/eligibility/criminal-convictions> (last visited Oct. 20, 2019). Matt Gianneschi, Chief Operating Officer of the Colorado Mountain College, agrees that ISAs are a method around federal student aid for students who are not citizens or who were previously incarcerated. Third Way, Livestream of *#BehindtheBumperSticker on Income Share Agreements*, FACEBOOK (Sep. 24, 2019), <https://www.facebook.com/ThirdWayThinkTank/videos/2169391843363881/>.

ii. Payment is Tied to Income Which Allows for More Manageable Repayment Options

Critics of ISAs highlight that the arrangement constitutes a modern-day form of indentured servitude or even slavery.¹⁰³ While there may be commonalities between the two concepts, the repayment of an ISA compared to a traditional student loan is far more manageable.¹⁰⁴ Under a traditional student loan, graduates are obligated to pay back their loan regardless of the circumstance.¹⁰⁵ This sometimes includes bankruptcy, death, and other financial struggles.¹⁰⁶ When an ISA contract is executed, the student's obligation for repayment is based on a percentage of income for a fixed period of time.¹⁰⁷ This provides the student with more flexibility in the repayment phase.¹⁰⁸ In all, ISAs provide improved flexibility due to the fact that payment is dependent on future income, ultimately allowing for a much more manageable repayment in the event the graduate faces financial challenges.

iii. Easier Initial Career Choices and Smoother Career Path Transitions

One of the most attractive advantages of ISAs is the idea that they provide students with more financial freedom than traditional student loans.¹⁰⁹ Should the borrower decide that their current career path is no longer desirable, the borrower is not tied down to this choice because of the individual's need to make a certain amount of money in order to make student loan debt payments.¹¹⁰ The graduate has free range to transition career paths without fear of detrimental financial consequences.¹¹¹ On that same note, the graduate may also enjoy lower levels of anxiety related to the worry of market conditions and workforce layoffs.¹¹²

103. Timothy Machat, *Catalyzing Innovation with Regulation: Income Share Agreements and the Student Loan Debt Crisis*, 70 RUTGERS L. REV. 257, 271 (2017).

104. *See id.* at 271–72.

105. Todd Zipper, *Reinventing How We Pay for College: The Benefit of Income Share Agreements*, LEARNING HOUSE: UNCOMPROMISINGEDU (Feb. 3, 2017), <http://www.uncompromisingedu.com/2017/02/03/reinventing-how-we-pay-for-college-the-benefits-of-income-share-agreements/>.

106. *Id.*

107. *Id.*

108. *Id.*

109. Machat, *supra* note 103, at 271–72.

110. *Id.* at 272.

111. *Id.*

112. *Id.*; *see also* Elengold, *supra* note 6, at 55-56.

iv. Encourages Public Interest Employment

Similar to career transitions, ISAs may further encourage individuals to work in the public sector because repayment is based on income. In 2018, it was noted that federal employee salaries on average lag behind those of similar private-sector workers by about thirty-two percent.¹¹³ With a pay gap of more than thirty percent, students might be persuaded to set their sights on private sector employment over public employment in order to make enough to repay their loans. However, because ISAs are based on income, a borrower who seeks public employment will likely not be burdened by the idea of choosing a specific type of job for salary purposes. If a student does not feel the pressure to pick a certain career path in order to make a living wage, as well as pay back their student loan debt, it can be argued that the student may be free to seek any type of employment, including public employment. Even though the student may make less in the public sector versus a similar job in the private sector, the student will not feel a financial burden regarding the repayment of their ISA.

B. The Potential Pitfalls of Income Share Agreements

Although ISAs provide a wide variety of benefits, including enhancing a student's ability to continue their education and reducing financial burdens during the repayment period, ISAs pose two important problems that have yet to be addressed by regulators. First, the process of administering ISAs can be discriminatory based on the theory of disparate impact, race and institution choice.¹¹⁴ Second, the administrators of ISAs can potentially use predatory lending practices, such as not disclosing crucial terms that effectively misrepresent the reality of repayment.¹¹⁵ This subsection will examine these issues in further depth.

113. Eric Yoder, *Federal Employees Lag Behind Private Sector Workers in Salaries by 32 Percent on Average, Reports Say*, WASH. POST. (Apr. 11, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/04/11/federal-employees-lag-private-sector-workers-in-salaries-by-32-percent-on-average-report-says/?utm_term=.2e60374dda53.

114. MORRISON & FOERSTER, *Treatment of Educational ISAs Under Federal and Select State Anti-Discrimination Statutes* (Aug. 2019), <https://media2.mofo.com/documents/190816-treatment-of-educational-isas.pdf>. Jillian Berman, *New bill on students pledging future income 'an open license for discriminatory financing'*, MKT. WATCH (Aug. 5, 2019 11:23 a.m.), <https://www.marketwatch.com/story/are-income-share-agreements-an-innovative-answer-to-the-student-debt-crisis-or-a-predatory-financial-product-depends-who-you-ask-2019-08-05>.

115. See Matt Taylor, *'Income Sharing' Is Wall Street's Potentially Predatory Alternative to Student Loans*, VICE (Jan. 9, 2019, 3:13 PM), https://www.vice.com/en_us/article/d3bm5a/income-sharing-is-wall-streets-potentially-predatory-alternative-to-student-loans; see also Jen Mishory, *Private ISA Student Loans Highlight Consumer Protection Challenges*, CENTURY FOUND. (Aug.

i. Disparate Impact and Discrimination Based on Race and Institution Choice

ISAs provide investors with an opportunity to profit from students who need funding for their education.¹¹⁶ For example, an investor may lend one million dollars to an ISA program at an educational institution. The institution then uses those funds to contract with 100 students and provide each student with \$10,000, secured individually by an ISA. During repayment, some students with high earning occupations will end up paying back more than \$10,000 based on the percentage of their salary they agreed upon at the outset of the execution of the ISA, whereas other students who do not have high-earning occupations may pay back less. On the back-end, the educational institution will be able to repay the investor the initial one million, plus any additional profit due to the terms of the ISAs with the several different students, only if the pool of students yielded a net return that is better than what the investor could have secured through more traditional lending. This scenario seems fair to any investor, so long as it is profitable.

However, in making a strategic business decision, investors may have an incentive to judge historically lower-income earning populations, mainly minorities, “riskier” in comparison to higher-income earning groups who are generally not minorities. According to the US Census Bureau, in 2018, it was reported that the median household income for an African American family was \$41,361 compared to the combined average of all races of \$63,179.¹¹⁷ To further elaborate, the average weekly wage of an African American with a Bachelor’s Degree is \$933, which is \$256 lower than the national average.¹¹⁸ Even when an African American student graduates college, they statistically will make less than their peers. Because ISA investors are unregulated, they can use these figures to disproportionately find minority students “risky”, discriminating against them directly and against col-

22, 2019), <https://tcf.org/content/commentary/private-isa-student-loans-highlight-consumer-protection-challenges/?agreed=1>.

116. Joanna Darcus, Staff Attorney at the National Consumer Law Center, states that the most prominent ISAs are those which provide high yields for investors. *See Third Way, supra* note 101.

117. Jessica Semega et al., *Income and Poverty in the United States: 2018-Current Population Reports*, CENSUS (Sept. 2019), <https://www.census.gov/library/visualizations/2019/demo/p60-266.html>.

118. *African American Income*, BLACKDEMOGRAPHICS.COM, <https://blackdemographics.com/households/african-american-income/> (last updated 2019).

leges and universities with high minority populations by implementing more stringent terms and conditions. Additionally, statistical evidence highlights that African Americans and Latinos are more likely to be discriminated against, and as a result pay higher interest rates on loans, than those similarly situated in credit profiles.¹¹⁹ Thus, students who engage with ISAs are not immune to the discriminatory issues that generally accompany other lending practices. Due to the proven history that minorities are more likely to be discriminated against financially, ISA providers should be consistent in negotiating terms of ISAs with different universities and colleges to avoid being discriminatory to susceptible groups.

The terms and conditions of traditional loans are not dependent on degree or institution choice.¹²⁰ The HEA, which encompasses Federal Direct Stafford Loans, Federal Direct PLUS Loans, Federal Direct Consolidation Loans, and Federal Direct Unsubsidized Stafford Loans, states that all “[student] loans made to [student] borrowers [. . .] shall have the same terms, conditions, and benefits, and be available in the same amounts.”¹²¹ Thus, regardless of which institution or degree a student chooses, the terms, conditions, benefits and amount available to be borrowed would be the same as a student at another university. Currently, there are no regulatory provisions that give the same protections for ISAs. As a result, ISA providers have the ability to harm students, intentionally or unintentionally, by implementing unfair and unequal terms of repayment, disparately impacting students based on race, gender, class, age, disability, and alike, based on the institutions they seek to attend and the degrees they seek to pursue. This problem begs for a remedy to curtail less obvious forms of discrimination that might reflect deep-seated discriminatory traditions.

ii. Predatory Lending Practices Through Limited Term Disclosures

Another prominent issue that may result from the lack of regulation for ISAs is the threat of predatory lending practices through lim-

119. Tracy Jan, *Are You a Minority Borrower? You Might Want to Think Twice About Using an Online Lender*, THE WASH. POST (Nov. 14, 2018), https://www.washingtonpost.com/business/2018/11/14/are-you-minority-borrower-you-might-want-think-twice-about-using-an-online-lender/?utm_term=.ced419c855b5.

120. “Federal student loans are made by the government, with terms and conditions that are set by law.” See *Federal Versus Private Loans*, STUDENTAID.GOV, <https://studentaid.ed.gov/sa/types/loans/federal-vs-private> (last visited Feb. 7, 2020).

121. Higher Education Act of 1965, 20 U.S.C. §§ 1087e(a)(1)-(2) (2018).

ited, inadequate, or misleading term disclosures. Although ISAs have the potential to provide more affordable lending opportunities for low-income students, they are currently not subject to any uniform disclosure or education requirements, as are traditional loans. Adding to the risk of exploitation is the fact that ISAs may attract those students who might not be as knowledgeable of the risks taken when borrowing financial capital from a lender. Thus, an ISA lender's profit incentive, society's past history of discrimination and exploitation of minority groups and the vulnerability of the student population that is likely to find ISAs attractive provide a formula that makes the risk of discrimination and exploitation very high. Collectively, these factors work against informed decision-making.

"ISA funders are directly responsible for teaching students about their products."¹²² As lenders, ISA investors and the colleges and universities that work with them, therefore, should go above and beyond to ensure that students understand the terms of an ISA because they are unique to the student borrower market.¹²³ Lack of knowledge by borrowers can inevitably lead to predatory lending. The Federal Deposit Insurance Corporation ("FDIC") acknowledges that there is no one formula to determine whether a loan program is predatory.¹²⁴ Yet, the FDIC outlines that the following scenarios involve predatory lending: (1) "making unaffordable loans based on the assets of the borrower rather than on the borrower's ability to repay an obligation," (2) "inducing a borrower to refinance a loan repeatedly in order to charge high points and fees each time the loan is refinanced," or (3) "engaging in fraud or deception to conceal the true nature of the loan obligation, or ancillary products, from and unsuspecting or unsophisticated borrower."¹²⁵

Because ISAs are a new, attractive option for financing higher education, lenders could have an unfair advantage over borrowers due to the lack of education on the terms, conditions, risks and overall characteristics of an ISA. Not only is there concern that ISA lenders may disproportionately target minorities, low-income students, and less educated students with unfair repayment terms, there is also a

122. Audrey Peek et al., *The Income Share Agreement Landscape: 2017 and Beyond*, *Amer. Inst. for Res.*, (Apr. 26, 2017), <https://www.air.org/sites/default/files/downloads/report/Income-Share-Agreements-ISAs-Income-Share-Agreement-Landscape-April-2017.pdf>.

123. *See id.*

124. *FDIC's Supervisory Policy on Predatory Lending*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/news/news/financial/2007/fil07006a.html> (last updated Jan. 22, 2007).

125. *Id.*

concern that because the general population is not well-informed on this newer financing program, any student could fall victim to predatory practices by an ISA lender. Moreover, because ISAs are essentially contracts, they are typically detailed and lengthy, which may dissuade borrowers from reading the fine print. As a result, a student may not be aware of important terms of the ISA. Likewise, an ISA officer may not effectively explain all of the important terms and conditions to a student borrower.

One example of an important term that may not be fully disclosed to a borrower could be the term explaining deferment or repayment for graduates who become unemployed. There are certain events that may trigger deferment of payment such as (1) becoming unemployed or disabled or (2) enrolling in another educational program.¹²⁶ While most ISAs provide that a graduate is not obligated to make payments unless they are employed and their income meets a certain threshold,¹²⁷ there is a possibility that a term may be included that adds an additional month of payment to the total repayment period for every month of deferment. Likewise, it is possible that high-income graduates may not be fully aware that they could end up paying back more than they borrowed under the terms of certain ISAs. Without oversight and enforcement of the full disclosure and education of all terms for an ISA, a student may become a casualty in a scheme of unfair lending practices. As ISAs become increasingly popular, the general public may become more familiar with the concept but presently there is an immediate challenge to address the gap in financial literacy regarding their use.¹²⁸

In all, the risks that exist for ISAs are due to the absence of government oversight and regulation. These same issues do not exist for traditional student loans due to the years of administrative oversight by the federal government and the passage of various regulations for public and private lenders. In outlining the risks of ISAs and highlighting the shortage of governing laws, the next part offers potential solutions to combat these pitfalls of ISAs.

126. *Infra* note 162, at 4.

127. Peek, *supra*, note 122.

128. *Id.*

III. PROPOSALS FOR REFORM

This final part lays out some methods which could combat the issues of ISAs, such as educating the public on ISAs, implementing administrative oversight over ISA officers, and utilizing existing legislation.

A. Improved Education on Income Share Agreements

First, more widespread knowledge about ISAs could educate the population about their general use and thus a student borrower would be less susceptible to discrimination and deceptive lending practices. The more knowledge the student has, the more equipped they will be in recognizing these potential issues when executing an ISA to finance their education. Just as the general terms of traditional student loans are commonly known through widespread education, the general concept of ISAs should also be disseminated throughout the United States in order for students to be aware of their existence and their terms of use.

For example, the FTC dedicates a section of its website to consumer education.¹²⁹ Specifically, this portion of the website provides information on scams related to scholarships, financial aid, and student loan debt relief.¹³⁰ The FTC also provides general information regarding federal loans, private loans, FAFSA, loan consolidation and loan repayment.¹³¹ When high school students and their parents begin their research on which college or university they may want to attend, they also have ample access to mainstream information related to financing their higher education such as that provided by the FTC. Additionally, the CFPB provides an interactive guide to choosing a student loan on its website.¹³² This action tool walks a student through the steps of understanding what options they have to help them finance their education while providing important information related to the different loan types.¹³³ In order to improve prospective student understanding of ISAs, the FTC, CFPB, and other financial regulatory organizations should include additional sections on their

129. *See Education & Training*, FED. TRADE COMM'N, <https://www.consumer.ftc.gov/education> (last visited Feb. 7, 2020).

130. *Id.*

131. *Id.*

132. *Student Loans: Choosing a loan that's Right for You*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/paying-for-college/choose-a-student-loan/#o1> (last visited Feb. 7, 2020).

133. *Id.*

website dedicated to explaining ISAs. In this case, if a student is looking to gain more information on traditional student loans by logging onto the FTC's website, they will also have immediate access to ISAs, giving the student the ability to decide whether an ISA is a good option for them.

Aside from information provided on the internet, many students depend on the information provided by the many college representatives who flood high school campuses in order to promote attendance at their institution. During these critical interactions, the college representatives also provide high school students with information related to cost and attendance. In addition to information relayed regarding traditional and private student loans, information about ISAs should also be offered to further the public's understanding of this financing option. As more and more students become educated about ISAs, it is less likely that a student borrower will be susceptible to the abuses that could accompany an ISA.

B. Administrative Oversight of the Implementation of Income Share Agreements

Second, ISAs currently lack administrative oversight. Congress has yet to assign ISAs to the appropriate regulatory agency in order to protect students from abuses while the ISA market is still developing.¹³⁴ Using the FTC Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") as models, Congress could assign the CFPB and the FTC regulatory authority to oversee the implementation and use of ISAs on college and university campuses across the nation.

Passed in 1914, the FTC Act effectively created the administrative agency – the FTC.¹³⁵ Under this Act, as amended, the FTC has been granted the power, among other things, to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.¹³⁶ Specifically, the Commission is empowered and directed to prevent persons, partnerships or corporations, with exceptions that include banks, savings and loan institutions, from using unfair methods of competition in or affecting commerce and unfair or

134. Sheila Bair and Preston Cooper, *The Future of Income-Share Agreements: Policy and Politics*, Manhattan Institute, MANHATTAN INST. (Mar. 12, 2019), <https://www.manhattan-institute.org/future-income-share-agreements-to-finance-higher-education>.

135. Federal Trade Commission Act, 15 U.S.C. § 41 (2018).

136. See 15 U.S.C. § 45(a)(1) (2018).

deceptive acts or practices in or affecting commerce.¹³⁷ As explained in Part IB, ISAs are not issued by banks, so they do not fall outside of the controls of the FTC.¹³⁸ To this point, the FTC has the power and ability to oversee the practice of ISA officers in their implementation of these agreements on college campuses. Furthermore, in 2017, the FTC announced “Operation Game of Loans” which is a coordinated federal-state law enforcement initiative targeting deceptive student loan debt relief scams.¹³⁹ This initiative serves as an example of how the FTC can take steps to also prevent the deceptive practices that may accompany ISAs. Similar to this model, the FTC can join forces with states to oversee the implementation of ISAs. Thus, the FTC has the power to ensure that when ISA service providers are disclosing terms of an ISA to a student, the disclosures are made accurate and clear, the practices of the service provider are well documented and all payments during the repayment period are properly processed. With the oversight of these procedures, the risk that students could fall victim to the pitfalls of ISAs could be decreased.

Furthermore, in response to the financial crisis of 2007-09, the enactment of the Dodd-Frank Act in 2010 led to the creation of the CFPB.¹⁴⁰ The CFPB was established to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”¹⁴¹ The CFPB has the ability to supervise lenders and non-bank entities as well as promote educational materials to make credit card, mortgage, and other loan disclosures clearer so consumers are aware of their rights and responsibilities.¹⁴² Under this description, the CFPB may also use its authority to oversee ISAs, because ISAs are so closely linked to other financial products such as traditional student loans. Also, on December 3, 2013, the CFPB issued a rule that allowed the Bureau to supervise certain nonbank student loan services for the first time.¹⁴³ The purpose of this rule, as

137. 15 U.S.C. § 45(a)(2) (2018).

138. Bair & Cooper, *supra*, note 134.

139. *FTC, State Law Enforcement Partners Announce Nationwide Crackdown on student Loan Debt Relief Scams*, FED. TRADE COMM’N (Oct. 13, 2017), <https://www.ftc.gov/news-events/press-releases/2017/10/ftc-state-law-enforcement-partners-announce-nationwide-crackdown>.

140. 12 U.S.C.S. § 5491(a) (2018).

141. *Id.*

142. *Consumer Financial Protection Bureau*, USA.GOV, <https://www.usa.gov/federal-agencies/consumer-financial-protection-bureau> (last visited April 21, 2019).

143. *CFPB to Oversee Nonbank Student Loan Servicers*, CONSUMER FIN. PROT. BUREAU (Dec. 3, 2013), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-to-oversee-nonbank-student-loan-servicers/>.

stated by the former director of the CFPB, was for student loan borrowers to rest assured that when they make a payment toward their loans, the company that takes their money is playing by the rules.¹⁴⁴

Because the CFPB has already been granted the ability to oversee nonbank student loan servicers, the CFPB could also be empowered to oversee ISA service providers. Lastly, it is important to note that the idea of having the CFPB oversee the implementation of ISAs is not so farfetched. In the 115th Congress, former congressmen Luke Messer introduced a bill that would authorize the CFPB to implement anti-discrimination and consumer protections in the regulation of ISAs.¹⁴⁵

Although it is arguable that ISAs could fit squarely within the existing powers and controls of the FTC and the CFPB, it is time for Congress to expressly grant this authority to these regulatory agencies, more specifically empowering them to tackle the regulation of ISAs. Once power has been granted, both agencies can pass a regulation, similar to Regulation Z, which would specifically lay out the authority, purpose, and enforcement of regulating ISAs. Regulation Z was passed by the CFPB with the purpose of promoting, among other things, “the informed use of consumer credit by requiring disclosures about its terms and costs.”¹⁴⁶ Regulation Z explicitly states that it covers individuals or businesses who extend credit, and was issued to implement the Federal Truth in Lending Act.¹⁴⁷ A similar regulation for ISAs should be passed so ISA officers and student borrowers would be on notice as to the regulation guidelines which must be followed for the use and implementation of ISAs. With administrative oversight from both the FTC and the CFPB, students could feel more comfortable in executing an ISA, knowing that their rights will be better protected.

C. Utilizing the Truth in Lending Act and the Equal Credit Opportunity Act as Judicial Redress for Discriminatory and Deceptive Lending Practices

Often, unhappy consumers look toward the judicial system when they believe they have been wronged by financial lenders. Fortunately, Congress has passed TILA and ECOA, which address discrim-

144. *Id.*

145. Bair & Cooper, *supra*, note 134.

146. Regulation Z, 12 CFR § 1026.1(b) (1969).

147. Regulation Z, 12 CFR § 1026.1(a),(c) (1969).

ination and deceptive lending practices.¹⁴⁸ In taking a deeper look at these Acts, one might argue that judicial interpretation of these Acts could serve as a vehicle to give consumers redress when they feel they have been denied their rights in accordance with an ISA. Currently, “ISAs lack an explicit legal framework under which to operate.”¹⁴⁹ Furthermore, there is no court on record that has heard a case dealing with ISAs.¹⁵⁰ Thus, through analyzing and expanding the definition of “credit” in both TILA and ECOA, courts may find a starting point at which to interpret ISAs.

i. The Truth in Lending Act

TILA, enacted on May 29, 1968, was intended to ensure that credit terms were disclosed in a meaningful way so consumers could compare credit terms more readily and knowledgeably.¹⁵¹ In proposing TILA, the House Committee on Banking and Currency reported that:

By requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the application percentage rate, the American consumer will be given the information [needed] to compare the cost of credit and to make the best informed decision on the use of credit.¹⁵²

After the implementation of TILA, creditors have been required to use the same credit terminology and expression of rates so consumers can easily compare loans with the same format.¹⁵³ Additionally, this Act, among other things, protects consumers against inaccurate or unfair credit billing, provides consumers with recession rights, and prohibits unfair or deceptive mortgage lending practices.¹⁵⁴ In all, TILA seeks to ensure “economic stabilization” whereby the competi-

148. See generally, 15 U.S.C. §1601 (1976); 15 U.S.C. § 1691(a) (2014).

149. Blair & Cooper, *supra*, note 134.

150. Dubravka Ritter & Douglas Weber, *Modern Income Share Agreements in Post Secondary Education: Feature, Theory, and Applications*, at 25 (2019), <https://www.philadelphiafed.org/-/media/consumer-finance-institute/payment-cards-center/publications/discussion-papers/2019/dp19-06.pdf>.

151. *Truth in Lending Act (TILA) Examination Procedures*, CONSUMER FIN. PROT. BUREAU (Mar. 25, 2019), <https://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/truth-in-lending-act-tila-examination-procedures/>.

152. H. R. Rep. No. 1040 (1967).

153. *Supra*, note 151.

154. *Supra*, note 150, at 7-8.

tion of financial institutions would be enhanced as a result of informed credit use by consumers.¹⁵⁵

As stated previously, ISAs are not an extension of credit, rather they are an agreement for a post-graduate to make payments for a specified period of time.¹⁵⁶ Some may argue that ISAs should not be analyzed under the same preview as traditional credit terms. However, because they are similar in function, ISAs should also be regulated under the directive of TILA because the definition of “credit” under TILA can be interpreted to include ISAs.

Under TILA, “credit” is defined as “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.”¹⁵⁷ Further, this definition describes credit as a relationship between a lender and borrower in which the borrower agrees to make or defer payments to the lender. One way to determine whether a contract includes “credit” is to determine the allocation of the risk of loss.¹⁵⁸ When a student executes an ISA, the student grants the ISA service provider (i.e. lender) the ability to pay for the student’s educational costs in exchange for the student making payments to the lender upon graduation. Though the student never directly receives the funds and does not pay back a balance, the transaction is analogous to that of credit. Overall, the student is indebted to the lender until the terms of the ISA have been satisfied. Moreover, in *Cody*, the Fifth Circuit Court of Appeals noted that TILA is meant to be “liberally construed in favor of the consumer.”¹⁵⁹ As a result of the decision in *Cody*, the Fifth and Eleventh Circuits have consistently reiterated that TILA is to be “enforced strictly against creditors.”¹⁶⁰ This further illustrates how TILA might be interpreted to include ISAs.

Additionally, TILA defines a creditor as a person who (1) regularly extends consumer credit payable by agreement in more than four installments and (2) the person to whom the debt arising from the

155. 15 U.S.C. § 1601(a) (1976).

156. James Gallagher, *Income Share Agreements (ISAs)-State of the Market in 2018*, CAREER KARMA (Nov. 12, 2019), <https://careerkarma.com/blog/income-share-agreement-market-report-2019/>.

157. 15 U.S.C. §1602(f) (1976).

158. Peek, *supra*, note 122.

159. *Cody v. Cmty. Loan Corp. of Richmond Cty*, 606 F.2d 499, 505 (5th Cir. 1979) (holding that when a company extends credit for the purchase of insurance, the company is considered a credit seller and thus responsible for making “credit sale” disclosures under the Truth in Lending Act).

160. See *Fairley v. Turan-Foley Imports*, 65 F.3d 475, 479 (5th Cir. 1995); *Davis v. Werne*, 673 F.2d 866, 869 (5th Cir. 1982); *Williams v. Public Fin. Corp.* 609 F.2d 1179, 1184 (5th Cir. 1980); *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1068 (11th Cir. 2004).

consumer credit transaction is initially payable on the face of the evidence of indebtedness.¹⁶¹ It is also arguable that an ISA service provider should fall within the definition of a “creditor.” Here, an ISA service provider would be deemed anyone who regularly extends ISAs to various college students across a variety of campuses in the United States. Debts under an ISA are also payable over an amount of time which surpasses the four-installment requirement.¹⁶² Lastly, the student in the repayment period would essentially make payments to the ISA service provider in order to fulfill their ISA obligation or indebtedness to the service provider.

The current definitions of credit and creditor under TILA, therefore, could be interpreted to include ISAs. The expansion of the definitions to explicitly include ISAs would provide clarity for both ISA service providers and student borrowers. Thus, ISA service providers should be held to the same standards as other creditors subject to TILA in that they must “clearly and conspicuously disclose the ISA term to mitigate the risk of deceptiveness claims.”¹⁶³

ii. The Equal Credit Opportunity Act

Currently, ECOA states that “it shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age.”¹⁶⁴ ECOA defines creditors as “any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.”¹⁶⁵

In applying this definition, it can be argued that the principal lender of an ISA is a creditor. Whether it is a private financial institution or a university, the extension of an ISA to a student for the funding of their education is analogous to the extension of credit from a creditor. ECOA further defines credit as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or service and defer payment

161. 15 U.S.C. § 1602(g) (1976).

162. *Regulatory Treatment of Educational ISAs Under Federal and Select State Consumer Credit Statutes*, MORRISON FOERSTER 5 (Mar. 2019), <https://media2.mofo.com/documents/190408-regulatory-educational-consumer-credit-statutes.pdf>.

163. Peek, *supra* note 122.

164. 15 U.S.C. § 1691(a)(1) (2014).

165. 15 U.S.C. § 1691a(e) (2011).

therefor.”¹⁶⁶ Once a student executes an ISA, they assume a “debt” which funds their education.¹⁶⁷ After the student graduates, the student is responsible, similar to a debtor, for making deferred payments on the credit that was extended to them.¹⁶⁸ Lastly, the credit is used for funding of education which would be considered a service.¹⁶⁹

An ISA fits into the mold of ECOA. It can further be argued that Congress would have intended this Act to govern ISAs although it is not explicitly stated. Thus, in an effort to make this rule governing ISAs abundantly clear, ECOA should be amended to specifically list ISAs as a type of credit transaction. Should ISAs be specifically listed in ECOA, educational institutions and private lenders would be prohibited from discriminating based on race, color, religion, national origin, sex, marital status, or age of the student who is looking to fund their college education through an ISA.

D. The Kids to College Act

On March 18, 2019, Representative Mark Green of Tennessee and Representative Vincente Gonzales of Texas introduced a bipartisan bill that would authorize the use of ISAs.¹⁷⁰ The bill was designed to allow prospective students to reach “innovative agreements” with educational institutions on how to pay for their school related expenses.¹⁷¹ Among other things, the bill addresses the issues of tax treatment, state laws, and securities laws as they would relate to the widespread implementation of ISAs.¹⁷² The two congressmen theorize that ISAs will incentivize colleges and universities to help students secure “good paying employment after they graduate.”¹⁷³ Representative Green stated that “the Kids to College Act would allow promising, hardworking youth to get an education and pursue their career goals without facing a mountain of crippling debt or hefty admissions price tags.”¹⁷⁴ Representative Gonzales added, “this bipartisan legislation would aim to level the playing field by allowing

166. 15 U.S.C. § 1691a(d) (2011).

167. Gallagher, *supra* note 156.

168. *Id.*

169. *Id.*

170. Press Release, Reps. Mark Green and Vincente Gonzales Introduce “Kids to College Act” (Mar. 18, 2019).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

alternative repayment options through income share agreements.”¹⁷⁵ In its latest action, this bill was referred to the Subcommittee on Economic Opportunity.¹⁷⁶ Though it is unclear whether this bill has any likelihood of passing both the House of Representatives and the Senate, it is important that our members of Congress are introduced to the idea of ISAs. Greater awareness of ISAs may motivate Congress to support a bill and ultimately ensure its passage. Thus, even if the Kids to College Act does not become law, its presence reinforces the notion that congressional support of ISAs is both important and likely to take place in the future.

CONCLUSION

ISAs can provide a valuable option for financing higher education for many aspiring students. In their current, unregulated state, however, they also put those students at risk. With improved education, adoption, and implementation of administrative oversight by the FTC and CFPB, and the availability of judicial redress through TILA and ECOA, ISAs can move forward as a common means of funding a higher education without students potentially falling victim to discriminatory and deceptive lending practices. More importantly, students who might now find college beyond their reach might be empowered to attend the university of their dreams, pursue the job of their dreams thereafter, and be unburdened by monstrous student loan payments post-graduation. Likewise, colleges and universities will find an increase in enrollment as students are provided with another means of educational funding, ultimately bettering the educational institution and further growing the all-important alumni network. It is now time for Congress to recognize that continued reliance on more traditional student loans, whether federal or private, will only exacerbate the uncontrollable student loan debt crisis. Seeking alternative options, such as ISAs, is the first step to solving this puzzle of America’s troubling student loan debt. The diversification of financing options for students would equip them with means to avoid falling into the traps of student loan debt. Though it is undeniable that the government must play a bigger role to overcome this issue, ISAs overall place the United States in a better debt position.

175. *Id.*

176. H.R. 1810 – Kids to College Act, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1810/text> (last visited Feb. 12, 2020).

Utilizing Educational Focused Community Funds in the Fight Against Displacement and the Revitalization of Distressed Communities

LANGSTON A. TOLBERT

ABSTRACT

The term “gentrification” invokes the ire of many due to its association with displacing existing, indigent residents from distressed communities.¹ In order to combat the phenomenon, impact entrepreneurs are utilizing investment funds and economic tools such as crowdfunding to provide community members the opportunity to own an equity stake in their neighborhoods. By doing so, these activists hope to stem the negative effects of gentrification and keep residents in their communities. In support of these ventures, this paper seeks alterations to these activists’ approach. This paper advocates that these activists should, additionally, (1) place an emphasis on establishing educational initiatives and (2) supplement community-funded financing with additional governmental programs.

INTRODUCTION

Recently, there has been push in the investor community to focus on community welfare and sustainability when making business decisions; this phenomenon is commonly referred to as impact investing.² In the same vein, impact entrepreneurs are those who engage in busi-

1. Distressed communities are defined by the Economic Innovation Group to be communities “where median household incomes remain far below the national level, which is \$59,000 a year, and the poverty rate is well above the national average.” Jim Tankersley, *Tucked Into the Tax Bill, a Plan to Help Distressed America*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/business/tax-bill-economic-recovery-opportunity-zones.html>.

2. Impact investing refers to investments made to generate positive social and environmental impact along with a financial return. THE GINN, <https://thegiin.org/impZSAXact-investing/need-to-know/#what-is-impact-investing> (last visited Jan. 31, 2020).

ness practices meant to promote social welfare and responsibility.³ In the fight against gentrification, some impact entrepreneurs have begun to raise capital from distressed communities to form community investment funds⁴ in an effort to provide communal equity to existing residents.⁵

For example, The Tulsa Real Estate Fund (“TREF” or “the Fund”) is a Black-owned LLC⁶ using crowdfunding⁷ as “an economic vehicle to enable working class and institutional investors to own shares and equity in a portfolio of real estate assets acquired or managed by the [TREF.]”⁸ Essentially, the Fund solicits monies from community members in distressed communities. In turn, the Fund uses the money raised from the community to purchase real estate in distressed communities. As such, TREF acts as a vehicle for community members to collectively pool their resources together to purchase properties that they may not be able to do so individually.⁹ TREF hopes to use monies garnered from community residents to cure the “displacement of existing residents” while “increas[ing] property values for new residents.”¹⁰ The Fund refers to this process as “Participation Past Donation.”¹¹ Through this process, TREF argues that money will circulate within residents’ communities, creating a com-

3. See IMPACT ENTREPRENEUR LLC, IMPACT INVESTING FOR CHARTER SCHOOLS 1 (2019) (“The term ‘impact investi2ng’ was coined by a group of investors, entrepreneurs and philanthropists who gathered for a 2007 convening, led by the Rockefeller Foundation, to explore the increasing interest in investments generating social and environmental value as well as financial return. Impact investing builds on a long tradition of socially responsible investing, which has deep roots in faith-based communities, and has evolved significantly in the past forty years – moving from negative screening and dis-investment to proactively investing in options producing ‘impact.’”)

4. Community investment funds are ventures that raise capital directly or indirectly from their community. *Community Investment Funds*, CUTTING EDGE CAPITAL, <https://www.cuttingedgecapital.com/community-investment-funds-page/> (last visited Jan. 31, 2020).

5. See generally, *About*, OURS TO OWN, <http://www.ourstowntown.org/about/> (last visited Jan. 31, 2020); see also, *About Us*, KIVA, <https://www.kiva.org/about> (last visited Jan. 31, 2020).

6. See generally Tulsa Real Estate Fund, *Part II- Offering Circular*, SECURITIES AND EXCHANGE COMMISSION (2017), https://www.sec.gov/Archives/edgar/data/1704303/000147793217006267/tulsa_1a.htm.

7. Tim Smith, *Crowdfunding*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/crowdfunding.asp>. (last visited Jan. 31, 2020) (“Crowdfunding is the use of small amounts of capital from a large number of individuals to finance a new business venture. Crowdfunding makes use of the easy accessibility of vast networks of people through social media and crowdfunding websites to bring investors and entrepreneurs together, with the potential to increase entrepreneurship by expanding the pool of investors beyond the traditional circle of owners, relatives and venture capitalists.”).

8. See *supra* note 6.

9. *Id.* at 25.

10. *Id.*

11. *Id.*

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mon unifying interest because residents would have their own vested interest.¹² In summary, this process potentially provides members of distressed communities the ability to withstand the pressures of gentrification by controlling their own communities.

This paper argues that, for this method to be successful, there must also be an emphasis on the nexus between the level of education attainment in a community and individual—and in turn communal—wealth. By investing in educational initiatives, community members will be able to increase their earning potential and create more individual capital for themselves which will allow community members to endure the economic burdens of gentrification.

There are funds which already concentrate on education focused impact investing.¹³ The New School Venture Fund is self-described “as a nonprofit venture philanthropy firm” that “supports teams of educators and entrepreneurs . . . reimagining public education.”¹⁴ Similarly, the Equitable Facilities Fund is a “nonprofit social impact fund create[d] to provide long-term, low cost facility loan” to charter schools.¹⁵ Camelback Ventures is an “accelerator that identifies, develops, and promotes early-stage underrepresented entrepreneurs with the aim to increase individual and community education, and generational wealth.”¹⁶ The objective of this paper is to bridge the gap between the missions of funds such as TREF and those that are educationally focused, while also providing potential stratagem that they may implement.

Part I of this paper will discuss gentrification, separating the revitalization and community development from displacement. Part II of this paper will highlight why educational investment is necessary by discussing the nexus between educational attainment and wealth in a community. Part III of this paper will discuss how educationally focused community investment funds may be financed via crowdfunding and other governmental incentive programs. Finally, Part IV of this

12. *Id.*

13. *See* NEW SCHOOL VENTURE FUND, <https://www.newschools.org/about-us/our-model/> (last visited Jan. 31, 2020); *see also* EQUITABLE FACILITIES FUND, <https://eqfund.org> (last visited Jan. 31, 2020); *see also* CAMELBACK VENTURES, <https://www.camelbackventures.org/about> (last visited Jan. 31, 2020).

14. *Our Model*, NEW SCHOOL VENTURE FUND, <https://www.newschools.org/about-us/our-model/> (last visited Jan. 31, 2020).

15. EQUITABLE FACILITIES FUND, *supra* note 13.

16. *About*, CAMELBACK VENTURES, <https://www.camelbackventures.org/about> (last visited Jan. 31, 2020).

paper will suggest strategies and offer examples that may be applied or replicated to improve educational attainment in communities.¹⁷

PART I: ENCOURAGING COMMUNITY DEVELOPMENT WHILE DISCOURAGING RESIDENTIAL DISPLACEMENT

During an impromptu or freestyle rap performance at his “B-Sides 2” concert, rap artist Jay-Z (Shawn Carter) directed people residing in distressed communities to “gentrify [their] own hood before these people do it, claim eminent domain and have your people move in.”¹⁸ Carter’s words were met with mixed reviews.¹⁹ Those who don’t consider gentrification to be a negative term most likely believed that Carter wished for existing residents of distressed communities and local businessmen to capitalize on the economic opportunities that they many times miss out on.²⁰ Others, however, interpreted Carter’s words to be encouraging the exploitative horrors generally associated with gentrification such as the involuntary displacement of existing residents.²¹

When speaking of gentrification, there appears to be a divide in regard to how the phenomenon is perceived.²² Whether or not you are an advocate of gentrification seems to depend upon how you con-

17. Educational attainment is defined as “the level of education completed.” JOEL MCFARLAND ET AL., *THE CONDITION OF EDUCATION 2019* 236 (Thomas Nachazel et al. eds., 2019).

18. See Abel Shifferaw, *JAY-Z Performs New Freestyle at Webster Hall: ‘Gentrify Your Own Hood Before These People Do’*, COMPLEX (Apr. 26, 2019), <https://www.complex.com/music/2019/04/jay-z-webster-hall-b-sides-show-new-freestyle-brings-out-nas>.

19. Briana Ellison, *Trending: Something tells me “gentrify” shouldn’t have been the verb HOVA used*, WASH. POST (Apr. 28, 2019), <https://www.washingtonpost.com/express/2019/04/28/trending-something-tells-me-gentrify-shouldnt-have-been-verb-hova-used/>.

20. Angel Jennings, *Must Reads: One of California’s last black enclaves threatened by Inglewood’s stadium deal*, LOS ANGELES TIMES (Apr. 10, 2019), <https://www.latimes.com/local/la-now/la-me-inglewood-gentrification-rent-crenshaw-rams-stadium-20190410-htmstory.html> (Inglewood is the ‘City of Champions’ and . . . is rising again,” said Daniel Tabor, a former mayor and councilman. “But it has been a missed opportunity for economic participation by the residents and local businesses.”)

21. Ellison, *supra* note 19.

22. Jesse Van Tol, *Yes, you can gentrify a neighborhood without pushing out poor people*, THE WASHINGTON POST, (Apr. 8, 2019), <https://www.washingtonpost.com/outlook/2019/04/08/yes-you-can-gentrify-neighborhood-without-pushing-out-poor-people/>. (“In some communities, gentrification evokes instant distrust. It implies the arrival of selfish developers, investors and corporate chains replacing locally owned, independent business – and a flood of well-off white people who inevitably push out the poor black and brown people who were there before. But for many neighborhoods, gentrification represents much-needed investment. Local residents welcome the resurrection and revival of neglected and disinvested areas. Community leaders desire capital investments, leading to better services, jobs, thriving business and other components of a healthy, vibrant neighborhood.”).

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strue the term itself.²³ Thus, it is important that we establish a better understanding of the phenomenon for the purposes of this paper to understand why there are those which argue that gentrification should be encouraged.

The definition of gentrification varies amongst scholars and articles.²⁴ The U.S. Department of Housing and Urban Development defines gentrification as “a form of neighborhood change that occurs when higher-income groups move into low-income areas, potentially altering the cultural and financial landscape of the original neighborhood.”²⁵ It can also be described as a “tool, goal, outcome, or unintended consequence” of the revitalization of urban areas, marked by physical deterioration, poverty concentrations, and racial segregation of people.²⁶ Most recently, the phenomenon has manifested itself as a return to cities with redevelopment and investment in many downtown areas of the nation.²⁷

Gentrification ignites much community anxiety.²⁸ Residents fear that their neighborhoods will cease to look as they have for generations, supplanted by high-priced residential complexes and commercial centers that drive up rent prices and price out existing residents.²⁹ This apprehension is not without merit, as, historically, residents of low-income communities have been displaced due to the influx of wealth and high-income residents.³⁰ Thus, it is understandable that communities are wary of gentrification.

23. *Id.*

24. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT 1, 1 (2018); see also Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 SAGE JOURNALS 31, 32 (2018).

25. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *supra* note 24, at 1.

26. Zuk et al., *supra* note 24, at 32.

27. *Id.*

28. *Id.* at 31 (“Anxieties about residential, cultural, and job displacement reflect the lived experiences of neighborhood change and the social memory of displacements past.”).

29. *Id.*; On December 2nd, 2017, over 700 attendees, most of them African American, came together for the Resist Gentrification Action Summit in Los Angeles. Sparked by major redevelopment projects in the Baldwin Park, Crenshaw, Leimert Park, communities in Los Angeles, the community members sought ways to protect against rent increases; keep residents in their homes and neighborhoods; and share community wealth-building tools to improve communities without displacement. Niele Anderson, *Crenshaw Community Concerns Invoke Gentrification Summit*, LOS ANGELES SENTINEL (Dec. 7, 2017), <https://lasentinel.net/crenshaw-community-concerns-invoke-gentrification-summit.html>.

30. See Michael deHaven Newsom, *Blacks and Historic Preservation*, 36 L. & CONTEMP. PROBS., 423, 423-26 (1971) (examining the displacement of a large black community in Georgetown in order to revitalize the area and attract new White residents); see also *Gentrification and Neighborhood Revitalization: WHAT'S THE DIFFERENCE?*, NAT'L LOW INCOME HOUSING COALITION (Apr. 5, 2019), <https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference>. (“One case of extreme gentrification is the Bay Area in California,

However, gentrification has positive aspects that distressed communities should find attractive, as gentrification brings along rehabilitation and revitalization to distressed communities.³¹ For instance, the phenomenon has been shown to increase property values and tax revenues.³² Even more, studies have shown that public housing developments in gentrifying neighborhoods have lower violent crime rates, and that public elementary schools in those areas have greater standardized test scores compared to lower-income communities.³³ Additionally, neighborhood residents of gentrifying communities have a lower unemployment rate, higher income, greater educational attainment levels, and greater overall satisfaction with their living conditions.³⁴ Revitalization also commonly brings an inflow of potentially beneficial services previously nonexistent in those neighborhoods.³⁵ Thus, gentrification is not without its advantages.

As such, when impact entrepreneurs state a desire to stem the tide of gentrification, they are most likely referring to involuntary residential and cultural displacement³⁶ caused by an influx of wealth, and

which is undergoing a radical makeover due to the rise in technology companies replacing old industries and jobs. New people moved in to work for these companies and replaced the pre-existing residents. Land values and housing prices increased dramatically, as did the pressure for property owners to get the most out of rents on urban spaces. The Bay Area has become the second densest urbanized area in the country after Los Angeles.”).

31. Rowland Atkinson, *Does Gentrification Help or Harm Urban Neighbourhoods? An Assessment of the Evidence-Base in the Context of the New Urban Agenda*, CENTRE FOR NEIGHBOURHOOD RESEARCH 1, 14 (June 2002).

32. *Id.*

33. DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT, *supra* note 24, at 8.

34. *Id.*

35. *Id.*

36. Displacement occurs “when any household is forced to move from its residence by conditions which affect the dwelling or immediate surroundings, and which: (1) are beyond the household’s reasonable ability to control or prevent; (2) occur despite the household’s having met all previously imposed conditions of occupancy; and (3) make continued occupancy by that household impossible, hazardous or unaffordable.” It may also ensue when low-income housing options are limited or when an entire neighborhood changes and the services and support system that low-income families relied on become unavailable. Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 34–35 (2018); see also *Gentrification and Neighborhood Revitalization: WHAT’S THE DIFFERENCE?*, NAT’L LOW INCOME HOUSING COALITION (Apr. 5, 2019), <https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference> (“Cultural displacement is also common. The closing of long-time neighborhood landmarks like historically black churches or local restaurants can erase the history of a neighborhood and with it a sense of belonging. The influx of a new population of upper- and middle-income residents can also change the political landscape, with new leaders ignoring the needs of long-time residents. The loss of long-time residents’ political power leads to further withdrawal from public participation and a loss of control.”).

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not to the revitalization of disinvested neighborhoods.³⁷ In all probability, distressed communities desire for their neighborhoods to be thriving, hospitable places where residents have ample opportunity to succeed in life.³⁸ Arguing against the revitalization or development of a community would be counterproductive to the welfare of existing residents.

Yet, the problem lies in the fact that existing residents may never see the benefits of revitalization because of displacement.³⁹ As such, communities must secure methods to endure the economic pressures wealth influxes create in order to profit from the potential benefits of community revitalization.⁴⁰ It is difficult for people to endure the economic pressures created by influxes of wealth when new developments can cause rents to rise by 140% in some cases.⁴¹ In other

37. See *supra* note 6, at 25. (“Urban neighborhoods across the nation do not have control of our dollars, our real estate, and it is hard to find funding for real estate redevelopment within our community. As a result, across the country urban neighborhoods are being developed by individuals who do not share the same interests. This leads to the displacement of longtime residents of the neighborhood and an increase in property values for new residents. Tulsa Real Estate Fund is the solution to this problem.”).

38. See Lynda Laughlin, *Community revitalization must start with persistently poor neighborhoods*, GREATER GREATER WASH. (Aug. 10, 2009), <https://ggwash.org/view/2512/community-revitalization-must-start-with-persistently-poor-neighborhoods>. (“Children and families living in poor communities need access to high quality and better-coordinated social services to meet immediate needs. Policies to improve the long-term health of persistently poor neighborhoods will require a combination of economic, housing, and social solutions.”).

39. *Displacement of Lower-Income Families in Urban Areas Rep.*, U.S. DEP’T HOUSING & URB. DEV. 1, 4 (2018), <https://www.huduser.gov/portal/sites/default/files/pdf/DisplacementReport.pdf>. (“The most common critique of gentrification is its potential to displace long-term, low-income residents.”). However, the report found that “most quantitative studies [found] little evidence of direct displacement.” *Id.* at 5. Though, many studies may understate the actual number of people being displaced. *Id.*

40. One potential option to stem residential and cultural displacement in black communities, particularly, would be through the reintegration of affluent black people into lower-income neighborhoods. See Kesha S. Moore, *Gentrification in Black Face?: The Return of the Black Middle Class to Urban Neighborhoods*, URB. GEOGRAPHY 118, 132 (May 16, 2013). (“Rather than seeing themselves as Black gentrifiers, these [Black] middle-class residents see their move to [low-income Black neighborhoods] as an investment in the Black community and a means of protecting the neighborhood from gentrification. . . . Many [Black] middle-class residents work through local community-based organizations to limit displacement and ensure that [low-income Black neighborhoods] become[] . . . class-integrated Unlike traditional gentrification, the outcome of neighborhood change is not the creation of a wealthy neighborhood to replace a lower-income community. From the perspective of the Black gentrifiers . . . , the intended outcome is a racially homogenous, class-integrated community similar to those existing during the era of forced segregation.”).

41. Jason Henry, *Inglewood caps rent increases at 5 percent, backtracks on relocation fees*, DAILY BREEZE (June 28, 2019, 12:11 PM), <https://www.dailybreeze.com/2019/06/12/inglewood-caps-rent-increases-at-5-percent-backtracks-on-relocation-fees/>.

instances, the exorbitant rise of rent can cause people to resort to living out of their cars or motels.⁴²

In turn, all of this begs the question of how a city or community can invite investment, which spurs revitalization and community development, while also curtailing involuntary residential and cultural displacement. For a city official it may look as if it is a zero-sum game, as advocating for one appears to come at the expense of the other.⁴³ That was the case in Inglewood, California, where the mayor attempted to manage the conflicting objectives of courting an NFL stadium while simultaneously persuading landlords to keep rents constant and struggling to ensure that long-term owners secure the benefits of a booming market.⁴⁴ On one hand, it is reported that the stadium, and other conjoining projects, will create 12,000 permanent jobs in the area.⁴⁵ However, on the other hand, there is fear that the project will cause rent increases, displacing existing residents and business owners.⁴⁶ Already, property values and rents have drastically increased in parts of Inglewood.⁴⁷ Therefore, in an effort to strike a balance, Inglewood's City Council approved a rent control ordinance that capped rent increases to five percent.⁴⁸ Thus, for many, securing affordable housing is a significant tactic in the fight against displacement.⁴⁹ Others, in a similar vein, have suggested that the way to re-

42. Matt Morrison, *High rents create a new class of hidden homeless in Los Angeles*, CBS NEWS (Feb. 22, 2019, 9:07 AM), <https://www.cbsnews.com/news/los-angeles-hidden-homeless-priced-out-cbsn-originals/>; see also Ken Suarez, *Families, unable to afford rising rents, move into Polk County motels*, FOX NEWS 13 (Nov. 4, 2019), <https://www.fox13news.com/news/families-unable-to-afford-rising-rents-move-into-polk-county-motels>.

43. See Jennings, *supra* note 20.

44. *Id.*

45. Tyler Shaun Evains, *Biggest stories of the decade: NFL stadium helps Inglewood redevelop, grow economically, but also has unintended side effects*, DAILY BREEZE (Dec. 27, 2019, 1:30pm), <https://www.dailybreeze.com/2019/12/27/biggest-stories-of-the-decade-nfl-stadium-helps-inglewood-redevelop-grow-economically-but-also-has-unintended-side-effects/>.

46. *Id.*

47. Henry, *supra* note 41.

48. *Id.*

49. See generally Josh Silver, *The Community Reinvestment Act: How CRA Can Promote Integration and Prevent Displacement in Gentrifying Neighborhoods* at 9–12, NCRC (Dec. 2016); The struggle of striking a balance between development and affordable housing in Inglewood is ongoing. In November 2019, a judge decided against Uplift Inglewood Coalition, which brought suit against the city of Inglewood and the Los Angeles Clippers. Uplift Inglewood Coalition sought for the court to void a contract between the Clippers and the city to develop the Clippers' new arena in Inglewood, in order to give affordable housing developers and other entities and chance to bid on the land. The judge determined that an affordable housing development could not be constructed because the site was under the Los Angeles International Airport (LAX) flight path, posing a potential public health hazard. Jessica Flores, *Judge rejects affordable housing argument, sides with city in Clippers arena battle*, CURBED LOS ANGELES (Dec. 19, 2019),

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talize a community sans displacement is “[c]ommunity organizing that brings different groups to the same table to identify a shared interest[.]”⁵⁰

This paper agrees with the latter sentiment and proposes that community investment funds provide such organization. Ancillary to investing into affordable housing, this paper proposes that impact entrepreneurs utilize crowdfunding and other governmental incentive programs to invest into educational initiatives meant to increase residents’ income capacity. These initiatives should span a broad spectrum, ranging from educational programs and curriculum to the actual purchasing of real estate where such programs will take place. In doing so, these initiatives should aim to increase the individual wealth potential of existing residents, helping them withstand rising costs of living in gentrified communities. In addition, these initiatives will provide existing residents with additional equity in their communities, lessening the possibility of displacement, as ownership of one’s community plays a material role in resisting displacement.⁵¹ By participating in equity-focused, community-funded ventures, existing residents will not only weather the economic pressures of gentrification, but reap the benefits of its windfall.

PART II: THE NEXUS BETWEEN EDUCATIONAL
ATTAINMENT AND A COMMUNITY’S
SOCIOECONOMIC STATUS

In order to help distressed communities, there must be a focus on education as a primary community development strategy,⁵² as there is strong evidence that points to an interconnection between a community’s socioeconomic status and its level of educational attainment.⁵³

<https://la.curbed.com/2019/11/5/20948869/clippers-arena-inglewood-lawsuit-trial-affordable-housing>.

50. *Gentrification and Neighborhood Revitalization: WHAT’S THE DIFFERENCE?*, NAT’L LOW INCOME HOUSING COALITION (Apr. 5, 2019), <https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference>.

51. Tol, *supra* note 22.

52. Levy et al., *Keeping the Neighborhood Affordable: A Handbook of Housing Strategies for Gentrifying Areas*, URB. INST., at 23.

53. “[The] educational system and economy are two closely related social institutions. Schools as an important component of educational system provide instruction and personality formation which enables economic progress and community development. Community development and change is particularly related to the education and instruction that social problems are identified and citizens are informed about these matters in a democratic way.” Prof. Dr. Mimar Türkahraman, *THE ROLE OF EDUCATION IN THE SOCIETAL DEVELOPMENT*, 2 J. EDUC. & INSTRUCTIONAL STUD. IN THE WORLD 39 (Nov. 2012); Matthew A. Diemer

For one, “an individual’s level of educational attainment is the primary predictor of poverty in adulthood.”⁵⁴ On average, people who attain higher level of degrees tend to make more money and are more financially stable in their lifetime.⁵⁵ Annually, people with bachelor degrees earn around \$32,000 more than those who only obtained a high school diploma.⁵⁶ Moreover, at the height of the Great Recession,⁵⁷ the unemployment rate for recent college graduates was around seven percent, compared to almost sixteen percent for all young workers.⁵⁸ Even more, in 2018 the unemployment rate for young adults with only a high school diploma was three times higher

and Saba Rasheed Ali, *Integrating Social Class Into Vocational Psychology*, J. CAREER ASSESSMENT (2009) (“At the critical juncture of adolescence, being a member of the upper social classes is associated with achievement motivation [Argyle, 1994], the likelihood of being placed or choosing a college preparatory curriculum (regardless of ability) and being tracked toward college [Burwood, 1992], educational ability and attainment [Sewell & Hauser, 1975], vocational exploration and planfulness [Blustein et al., 2002], greater work salience and valuing of work [Brown et al., 1996], and higher expectations for one’s occupational attainment [Constantine et al., 1998].”); see Nikki L. Aikens & Oscar Barbarin, *Socioeconomic Differences in Reading Trajectories: The Contribution of Family, Neighborhood, and School Contexts*, J. EDUC. PSYCHOL. 1 (2008) (“[F]unction[] and development are not merely reflections of children themselves but also of the nature of experiences, resources, and interactions encountered by children across settings[.]”); Tama Leventhal and Jeanne Brooks-Gunn, *The Neighborhoods They Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 26 PSYCHOL. BULL. 309, 315 & 317 (2000) (“In a series of studies, Brooks-Gunn and colleagues . . . documented the powerful and beneficial effects of neighborhood affluence (the proportion of residents in the tract with income over \$30,000) or high SES (a composite variable derived from factor analysis that includes percentage of managerial/professional workers, percentage of residents with incomes over \$30,000, and percentage of college-educated residents) on young and early school-age children’s IQ, verbal ability, and reading recognition scores.”); U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2019, at 246. (“For young adults ages 25–34 who worked full time, year round, higher educational attainment was associated with higher median earnings. This pattern was consistent from 2000 through 2017.”); *id.* at 252. (“In 2018, the employment rate was higher for young adults with higher levels of educational attainment than for those with lower levels of educational attainment. For example, the employment rate was 86 percent for young adults with a bachelor’s or higher degree and 59 percent for those who had not completed high school.”).

54. Laura Choi, *Community Development and Education: A Shared Future*, 24 CMTY. INV. FED. RES. BANK OF S.F. 5, 15 (2012), https://www.frbsf.org/community-development/files/CI_Summer2012_FullIssue.pdf.

55. ASSOC. OF PUBLIC & LAND-GRANT UNIV., HOW DOES A COLLEGE DEGREE IMPROVE GRADUATES’ EMPLOYMENT AND EARNINGS POTENTIAL?, <https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicvalues/publicvalues-resources/q3/employment-and-earnings.pdf>. “Today, Millennials with a high school diploma earn 62 percent of what the typical college graduate earns.

56. *Id.*

57. “The Great Recession is a term that represents the sharp decline in economic activity during the late 2000s. This period is considered the most significant downturn since the Great Depression.” Jim Chappelow, *The Great Recession*, INVESTOPEDIA (Jul. 25, 2019), <https://www.investopedia.com/terms/g/great-recession.asp>.

58. Jaison R. Abel et al., *Are Recent College Graduates Finding Good Jobs?*, 20 CURRENT ISSUES IN ECONOMICS AND FINANCE FED. RES. BANK OF N.Y., 1, 3 (2014), https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci20-1.pdf.

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than those with a bachelor's degree or higher.⁵⁹ For young adults without a high school diploma, the unemployment rate was almost five times as great when compared to those with bachelor degrees or higher.⁶⁰

This dynamic is also reflected in children from low-income families. The majority of children from low-income families have parents without any form of college education.⁶¹ Furthermore, eighty-two percent of children with parents that have less than a high school diploma live in low-income families.⁶² In comparison, only twenty-four percent of children with parents who have at least some form of college education live in low-income families.⁶³ Conversely, a community's socioeconomic status can be a predictor of one's educational attainment.⁶⁴ Studies suggests that children from low-income communities develop academic skills at a slower rate than those from higher income communities.⁶⁵ Underprivileged socioeconomic environments are correlated with "poor cognitive development, language, memory, socioemotional processing, and consequently poor income and health in adulthood."⁶⁶ In addition, school systems in low-income neighborhoods are generally deprived of resources, adversely affecting students' academic development.⁶⁷ Children from lower socioeconomic statuses are less likely to be put into college preparatory curriculum and tracked to go to college.⁶⁸ Additionally, children from low-income communities begin high school, on average, five years behind in terms of literacy skills.⁶⁹ The adverse effects of negative socioeconomic conditions have even been shown to occur as early as five years of age.⁷⁰ Studies have predicted children's secondary school grades

59. Joel McFarland et al., *The Condition of Education 2019* (NCES 2019-144), U.S. DEPT OF EDUC.: INST. OF EDUC. SCI. 1, 254 (2019), <https://nces.ed.gov/pubs2019/2019144.pdf>.

60. *Id.*

61. NATIONAL CENTER FOR CHILDREN IN POVERTY, PARENTS' LOW EDUCATION LEADS TO LOW INCOME, DESPITE FULL-TIME EMPLOYMENT (2007), http://www.nccp.org/publications/pdf/text_786.pdf.

62. *Id.*

63. *Id.*

64. *Education and Socioeconomic Status*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/ses/resources/publications/education>, (last visited Feb. 13, 2020).

65. *Id.*

66. *Id.*; see also Aikens & Barbarin, *supra* note 53, at 1. ("Economically disadvantaged children acquire language skills more slowly, exhibit delayed letter recognition and phonological sensitivity, and are at risk for reading difficulties[.]").

67. AM. PSYCHOL. ASS'N, *supra* note 64.

68. Diemer & Ali, *supra* note 53, at 257, 259.

69. AM. PSYCHOL. ASS'N, *supra* note 64.

70. Lee Shumow et. al., *Risk and Resilience in the Urban Neighborhood: Predictors of Academic Performance Among Low-Income Elementary School Children*, 45 MERRILL-PALMER

based on neighborhood socioeconomic levels.⁷¹ Unsurprisingly, students who resided in lower socioeconomic conditions performed more poorly compared to those who did not.⁷²

Inequities in schools in distressed communities negatively impact those students' readiness for the labor market.⁷³ Students from under-resourced institutions have reduced access to requisite vocational guidance, internships, worked-based learning programs, and a rigorous academic curriculum.⁷⁴ All of these factors inhibit students from lower socioeconomic statuses from attaining income at the same level as their counterparts from higher socioeconomic statuses.⁷⁵

Despite the overlap between education and community development outcomes, the two arenas have traditionally functioned independently of one another.⁷⁶ Generally speaking, educators focus on in-school factors, while community developers focus on neighborhood factors.⁷⁷ This dynamic must change, as the reciprocal relationship between a community's well-being and its educational attainment should be duly appreciated in the discussion of community development and displacement. This is because the improvement of one will lend itself to the improvement of the other.⁷⁸ When existing residents become better educated they acquire the requisite skills to raise their level of income, and will be better equipped to cope with the economic pressures that accompany gentrification. Thus, impact entrepreneurs should place attention on investing in education by utilizing collective

QUARTERLY 309, 311 (1999), <https://www.jstor.org/stable/pdf/23093680.pdf?refreqid=excelsior%3A1edad45e975722c61a0658ade07d327f>.

71. *Id.* at 310–11 (examining how a study by Dornbusch, Ritter, and Steinberg “found that neighborhood socioeconomic level predicted secondary school grades, after controlling for family characteristics; students who resided in neighborhoods with fewer socioeconomic resources did more poorly in school than did those who resided in neighborhoods with more resources”).

72. *Id.*

73. Diemer & Ali, *supra* note 53, at 257-58.

74. *Id.* at 258.

75. *Id.* (“The array of external resources facilitative of career development and preparedness for labor market entry among individuals from the upper social classes likely account for the differing degrees of progress in career development and occupational attainment between individuals from the upper and lower social classes. Given the relationships between progress in career development and occupational attainment [Hotchkiss & Borow, 1996], one can see how social class plays a reproductive role in perpetuating ‘two islands’ with differing levels of access to resources and opportunity [Rossides, 1990].”).

76. Choi, *supra* note 54, at 5; *see also* Connie Chung, *Connecting Public Schools to Community Development*, COMMUNITIES & BANKING, FED. RES. BANK OF BOSTON 10, 14 (2005) (“Often, local school reform efforts work disparately from community organizing initiatives. As a result, the relationship between good neighborhoods and good schools is lost.”).

77. Choi, *supra* note 54, at 5.

78. Chung, *supra* note 76, at 15.

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economic practices such as crowdfunding, supplemented with other governmental programs discussed below.

PART III: UTILIZATION OF CROWDFUNDING AND GOVERNMENT INCENTIVE PROGRAMS

In order to stem displacement and promote positive community development for existing residents, financing is needed.⁷⁹ It is more difficult for existing residents of lesser means to access adequate financing.⁸⁰ Many times, this results in profitable opportunities evading them.⁸¹ Thus, this section will explore: (1) the potential of harnessing the collective wealth of communities via crowdfunding; (2) the newly installed Opportunity Zones, which are meant to spur investment in distressed communities; and (3) the potential benefits of partnering with Community Development Financial Institutions (“CDFIs”).

Harnessing the Collective Wealth of Communities via Crowdfunding

As a result of the JOBS Act, the Securities and Exchange Commission (“SEC”) initiated rules permitting the general public to participate in early capital raising activities through a process known as crowdfunding.⁸² In general, crowdfunding refers to a method of financing where capital is raised via soliciting relatively small individual investments or contributions from a wide range of people.⁸³ Investors are limited in how much they may invest during any twelve-month period.⁸⁴ Those with an annual income or net worth less than \$107,000 may invest up to the greater of either \$2,200 or five percent of their annual income or net worth during a twelve-month period.⁸⁵ For those whose annual income and net worth are equivalent to or more than \$107,000, then, within a twelve-month span, they may invest up

79. Tol, *supra* note 22.

80. Amanda Abrams, *Why Have Banks Stopped Lending to Low-Income Americans?*, TALK POVERTY (Dec. 5, 2017), <https://talkpoverty.org/2017/12/05/banks-stopped-lending-low-income-americans/>.

81. Charles Davidson, *Lack of Access to Financial Services Impedes Economic Mobility*, FED. RES. BANK ATLANTA (Oct. 16, 2018), <https://www.frbatlanta.org/economy-matters/community-and-economic-development/2018/10/16/lack-of-access-to-financial-services-impedes-economic-mobility>.

82. Jumpstart Our Business Startups Act, H.R. 3606, 112th § 2 (2012).

83. *Investor Bulletin: Crowdfunding Investment Limits Increase*, U.S. SEC. & EXCH. COMM’N (May 5, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_crowdfunding_increase.

84. *Updated Investor Bulletin: Crowdfunding for Investors*, U.S. SEC. & EXCH. COMM’N (May 10, 2017), https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_crowdfunding.html.

85. *Id.*

to either \$2,200 or ten percent of their annual income or net worth, whichever is lesser.⁸⁶ However, for these investors, they may not exceed an investment of \$107,000.⁸⁷ Contributions through crowdfunding can be made through the internet, without any need to resort to using a bank or underwriter as a go-between.⁸⁸ An individual may opt to choose crowdfunding in lieu of a traditional investment mechanism because of the ability to be directly involved in the process.⁸⁹ This can be particularly attractive for community members who wish to gain control over the communities which they have resided in for generations.⁹⁰

In regard to investing in educational initiatives, community crowdfunding is viable because the community possesses an incentive that investors outside the community may not have—their own educational achievement.⁹¹ The development of educational programs and initiatives is expensive and does not deliver an immediate economic return for investors.⁹² However, investors from the community itself should be more willing to invest in an initiative whose outcomes are more delayed, as they would be the main benefactors.⁹³ Thus, distressed communities should use crowdfunding as a funding vehicle for educational projects and programs. However, crowdfunding alone

86. *Id.*

87. *Id.*

88. *Id.*

89. Jared Brey, *Crowdfunding and Opportunity Zones Joining Forces in Philadelphia Project*, NEXT CITY (Nov. 5, 2018), <https://nextcity.org/daily/entry/crowdfunding-and-opportunity-zones-joining-forces-in-philadelphia-project>.

90. Buy The Block is a black owned real estate crowdfunding portal dedicated to making real estate investment easier by connecting “real estate developers seeking to crowdfund any type of property” to investors. Through the platform, an entrepreneur who finds a property, may make an offer on it and bring it to Buy The Block. Investors, in turn, are able to invest in the properties on Buy the Block’s website for as little as \$100. Taking Buy The Block and TREF (mentioned above) as examples, community members can begin to invest in real estate via crowdfunding with a relatively small individual investment. Selina Hill, *BUY THE BLOCK IS BUILDING UP BLACK COMMUNITIES AND CURBING GENTRIFICATION ONE BLOCK AT A TIME*, BLACK ENTERPRISE (Nov. 1, 2017) <https://www.blackenterprise.com/em-powering-black-block/>.

91. Chung, *supra* note 76, at 15.

92. *Id.* (One dilemma is that developing educational institutions and establishing initiatives are expensive and they may provide “virtually no financial returns for investors.”).

93. *Id.* (“The challenge is to make the case to funders that community/school partnerships make sense and can produce significant social benefits. . . . To date, however, most financing has remained at the advocacy, policy, and research levels. . . . In New Jersey, for instance, the state’s School Renaissance Zone program is funding pilot projects that use smart-growth strategies in the redevelopment of public school facilities. . . . In Los Angeles, the nonprofit New Schools, Better Neighborhoods organization leverages school bond dollars with other funding to build joint-use educational centers.”).

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may not be sufficient, and, therefore, it should be supplemented by relying on governmental incentive programs.⁹⁴

Making Use of Opportunity Zones

Impact entrepreneurs can take advantage of newly established Opportunity Zones. Spawned from an effort to cope with the gaping hole in the recovery from the Great Recession of 2008, the Trump Administration's Tax Cuts and Jobs Act of 2017 created what are known as Opportunity Zones ("OZs").⁹⁵

OZs provide tax incentives to attract investment into distressed communities to help revitalize neighborhoods in need of investment.⁹⁶ Particularly, investors who profit from OZs are able to curtail their tax burden through preferential treatment of capital gains.⁹⁷ The longer the investment is held, the greater the benefit to the investor.⁹⁸ The new law permits an investor to roll unrealized capital gains into Opportunity Funds and (at least temporarily) suspend federal taxes on the proceeds.⁹⁹ An investor is only required to pay eighty-five percent of the taxes that would have been due without the incentive for an investment held for seven years.¹⁰⁰ For an investment held for ten years or more, an investor may permanently avoid any capital gain tax from the profit made from an Opportunity Fund investment.¹⁰¹

The provision in the tax bill directs states and the District of Columbia to designate OZs from a pool of low-income, high poverty census tracts, with approval certification by the Treasury secretary.¹⁰² Once certified, investors may then establish Opportunity Funds to

94. The Company is relying upon (1) the increased demand for affordable housing; (2) partnership with established non-profit NGOs (non-governmental organizations); (3) government agencies directly involved in revitalization efforts; (4) GAP funding; and (5) community support and outreach. See TULSA REAL ESTATE FUND, OFFERING CIRCULAR.

95. Tankersley, *supra* note 1.

96. *Id.*

97. *Id.*

98. *Id.*

99. Ann Carrns, 'Opportunity Zones' Offer Tax Breaks and, Maybe, Help for Communities, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/business/opportunity-zone-tax-break-controversy.html> ("Opportunity funds let investors postpone federal taxes on recent capital gains until the end of 2026; they can also reduce the taxable portion of those gains by as much as 15 percent, after seven years. Further, investors can eliminate taxes on additional gains from investing in the fund itself, if they hold the investment for 10 years.").

100. *Tax Incentives for Opportunity Zones: In Brief*, CONG. RES. SERV. 6 (June 28, 2019).

101. *Id.* at 1.

102. *Id.*

sow new businesses in those areas or expand current ones, including real estate development.¹⁰³

The qualifications a community must have in order to be considered an Opportunity Zone overlaps with the attributes of communities prone to have residents involuntarily displaced.¹⁰⁴ According to Richardson et al., seventy percent of gentrified neighborhoods are within or adjacent to an Opportunity Zone.¹⁰⁵ Thus, impact entrepreneurs with objectives to invest in the revitalization of distressed communities and provide residents of such communities with an equity stake in their community may also benefit from the formation of OZs and their tax incentives. Further, the incentives provided by OZs would be maximized for a community investment fund, because, as members of the community where the investment is held, they would be more likely to hold their investment long enough to avoid capital gains taxes altogether.

However, there are those skeptical of OZs, believing that they will not work as intended.¹⁰⁶ Critics of OZs argue that they frequently target the wrong districts, allowing affluent groups to benefit from programs meant for the unfortunate.¹⁰⁷ Critics are also concerned because there are no “guardrails around the kind of investments that can qualify for this preferential tax treatment[.]”¹⁰⁸ According to skeptics, therefore, OZs may accomplish the opposite effect that they were intended for by adding “fuel on [the] fire,” resulting in large scale displacement of indigent people.¹⁰⁹

103. *Id.* at 8.

104. See *Understanding Gentrification and Displacement*, THE UPROOTED PROJECT, <https://sites.utexas.edu/gentrificationproject/understanding-gentrification-and-displacement/> (“Renters, low-income households, persons of color, households headed by a resident without a college degree, and families with children in poverty are, overall, more vulnerable to displacement from rising housing costs than other groups of residents.”); see also *Opportunity Zones*, U.S. ECON. DEV. ADMIN, <https://www.eda.gov/opportunity-zones/>. (“An Opportunity Zone is an economically-distressed community where private investments, under certain conditions, may be eligible for capital gain tax incentives.”); see also *Opportunity Zones: Facts and Figures*, ECON. INNOVATION GROUP, <https://eig.org/opportunityzones/facts-and-figures> (“The median family income (MFI) in the average Opportunity Zone is \$47,316, compared to \$73,965 nationally[.]”).

105. Richardson et al., *SHIFTING NEIGHBORHOODS Gentrification and cultural displacement in American cities*, NCRC (Mar. 19, 2019), <https://nrc.org/gentrification/>.

106. Carrns, *supra* note 99.

107. *Id.*

108. Jennings, *supra* note 20.

109. *Id.*; see also *CRC Members Raise Concerns That Opportunity Zones Will Facilitate Displacement Of Low-Income Communities And Communities Of Color*, CAL. REINVESTMENT COALITION (Mar. 16, 2018), <http://calreinvest.org/press-release/crc-members-raise-concerns-that-opportunity-zones-will-facilitate-displacement-of-low-income-communities-and-communities-of-color/> (“The Opportunity Zone program, as designed . . . assumes a trickle down philosophy that

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Nonetheless, OZs provide a potential avenue for impact entrepreneurs to profit from governmental tax incentives for the betterment of the communities they wish to serve.¹¹⁰ Furthermore, crowdfunding is a potentially powerful tool to make OZs succeed where previous attempts have failed.¹¹¹ Distressed communities, lacking the required capital to take advantage of the opportunities OZs provide, may now pull their funds together and invest in projects that they may not have been able to individually.¹¹²

Charter schools are already developing strategies to capitalize on the tax incentives offered by Opportunity Zones.¹¹³ For the past four years, the growth of charter schools has slowed, and one universally agreed upon reason is the barrier to accessing and affording sites for these schools.¹¹⁴ Proponents for charter schools are looking at the tax incentives Opportunity Zones provide to help them overcome these barriers.¹¹⁵ Community investment activists looking to invest in education can follow suit and utilize Opportunity Zones' tax incentives to improve schools in the communities they serve. The amount of money that could be utilized via Opportunity Zone financing has the potential to dwarf the amount that advocates of charter schools have been able to receive from other federal financing programs, such as the New Market Tax Credit (discussed below).¹¹⁶

Partnering with Community Development Financial Institutions

There are programs that focus on partnering with established non-governmental organizations (“NGOs”) and government agencies,

all and any investment in low-income areas is good for neighborhoods. But we are very much concerned about the harmful consequences from such an approach . . .”).

110. Brey, *supra* note 89.

111. *Id.*

112. *Id.*

113. Rachel Cohen, *The Tax Break That Could Fund New Charter Schools*, BLOOMBERG (Apr. 23, 2019), <https://www.citylab.com/equity/2019/04/charter-school-education-opportunity-zones-tax-incentives/587791/>; see also Andrew Atterbury, *DeSantis: Use Trump tax plan to expand charter schools*, POLITICO (Feb. 19, 2019), <https://www.politico.com/states/florida/story/2019/02/19/desantis-use-trump-tax-plan-to-expand-charter-schools-859362> (“[Gov. Ron] DeSantis[’s] budget proposed linking the state’s Schools of Hope program to federal ‘opportunity zones’ created by Trump’s \$1.5 billion tax plan.”).

114. Cohen, *supra* note 113. “Finding adequate spaces to open new schools, or to expand to bigger buildings if the charter operator wants to increase its student enrollment, remains an elusive and expensive challenge for charter leaders in virtually every state.”

115. *Id.*

116. *Id.*; see also Ben Carson, *2019 Opportunity Zone Expo Remarks*. “. . . Treasury Secretary Steven Mnuchin predicted that \$100 billion dollars in private investment would be directed to local communities across the nation in Opportunity Zones.”

with the purpose of utilizing governmental programs that help people with low to moderate-income secure affordable housing.¹¹⁷ Similarly, impact entrepreneurs should partner with government agencies and organizations that have access to governmental programs focused on providing quality educational opportunities to people of low to moderate-income such as Community Development Financial Institutions (“CDFIs”).

CDFIs are private financial institutions that are committed to “delivering responsible, affordable lending to help low-income, low-wealth, and other disadvantaged people and communities join the economic mainstream.”¹¹⁸ In addition, CDFIs provide financial advice to distressed communities.¹¹⁹ CDFIs help encourage economic growth by financing community businesses such as nonprofit organizations, commercial real estate, and affordable housing.¹²⁰ So far, CDFIs have created hundreds of thousands of jobs and affordable housing units, developed or renovated millions of square feet of real estate, financed tens of thousands of small businesses, and provided safe, affordable financial products and services to millions of low-income people.¹²¹ Though CDFIs generate profits, they do not maximize them.¹²² Instead, CDFIs’ main priority is the community they serve—which is ideal for impact entrepreneurs looking to establish community investment funds.¹²³

CDFIs have access to governmental programs that can be leveraged by impact entrepreneurs. The CDFI Bond Guarantee Program is a federal credit subsidy program¹²⁴ that makes debt available to CDFIs through the Federal Financing Bank.¹²⁵ It offers formerly unavailable long-term capital via below-market loans in order to “inject

117. See TULSA REAL ESTATE FUND, *supra* note 94.

118. *What is a CDFI?*, OPPORTUNITY FINANCE NETWORK, <https://ofn.org/what-cdfi>; *CDFI Program and NACA Program Awardees: A Snapshot in 2017*, U.S. DEP’T OF TREASURY: CDFI FUND 1, 3 (2019), https://www.cdfifund.gov/Documents/CDFI%20Performance%202017%20Approval%2006-14-2019_508%20Compliance.pdf. “Nearly 75% of [CDFIs]’ lending portfolio was targeted to serve low-income families, high poverty communities, and underserved populations.”

119. *Id.*

120. *Id.*; *supra* note 117.

121. *IMPACT AND EXCELLENCE, A Five-Year Plan*, U.S. DEP’T OF TREASURY: CDFI FUND 1, 2–3 (2016), <https://www.cdfifund.gov/Documents/Final%20Strategic%20Plan%20102516.pdf>.

122. *Id.* at 8; *supra* note 117.

123. *Id.*

124. *CDFI Bond Guarantee Program*, U.S. DEP’T OF TREASURY: CDFI FUND, https://www.cdfifund.gov/Documents/CDFI7205_FS_BOND_updatedMar2018.pdf (last visited Sept. 26, 2019).

125. *Id.*

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new and substantial investment into [the] nation's most distressed communities."¹²⁶ In turn, CDFIs are incentivized and enabled to implement large-scale projects, such as developing commercial real estate, housing schools, daycare or healthcare centers, and municipal infrastructure.¹²⁷ CDFIs are also permitted to extend credit to other community development borrowers even more than in the past.¹²⁸

The New Market Tax Credit ("NMTC") is another CDFI program which provides tax credits as incentives to private investment initiatives in distraught communities.¹²⁹ The NMTC supports a diverse array of businesses, including education.¹³⁰ Specifically, the program was created to alleviate issues regarding lack of investment in underserved communities by allowing investors to receive a tax credit against their federal income tax in return for investors making equity investments in Community Development Entities ("CDEs").¹³¹

CDEs are domestic corporations or partnerships which operate as intermediary vehicles for the delivery of loans, investments, or financial counseling in low-income communities.¹³² In order to qualify and become certified as a CDE, an organization must: (1) be a domestic corporation or partnership at the time of the certification application; (2) demonstrate a primary mission of serving, or providing investment capital for, low-income communities or persons; and (3) maintain accountability to residents of low-income communities

126. *Id.*

127. *Id.*

128. *Id.*

129. *New Markets Tax Credit Program*, U.S. DEP'T OF TREASURY: CDFI FUND, <https://www.cdfifund.gov/programs-training/Programs/new-markets-tax-credit/Pages/default.aspx> (last visited Sept. 29, 2019); see also *Opportunity zones and New Markets Tax Credits (NMTC) interactive map*, COHN REZNICK, <https://www.cohnreznick.com/nmtc-map>.

130. *NMTC Fact Sheet*, U.S. DEP'T OF TREASURY: CDFI FUND, https://www.cdfifund.gov/Documents/NMTC%20Fact%20Sheet_Jan2018.pdf (last visited Sept. 29, 2019); *New Markets Tax Credit (NMTC) Public Data Release*, U.S. DEP'T OF TREASURY: CDFI FUND 1,8 (2018), <https://www.cdfifund.gov/Documents/NMTC%20Public%20Data%20Release%20112818.pdf>.

"To date, the top investment sectors have been Single and Mixed-Use Real Estate, Health Care and Social Services, Manufacturing and Educational Services."

131. *Id.*

132. *CDE Certification*, U.S. DEP'T OF TREASURY: CDFI FUND, <https://www.cdfifund.gov/programs-training/certification/cde/Pages/default.aspx> (last visited Sept. 29, 2019); *supra* note 129, at 17. "Allocantees can go beyond the statutory minimum distress requirements of the NMTC Program by committing to serve areas of higher distress. CDEs can do this in one of two ways: (1) CDEs can invest in areas that meet at least one of the criteria for Primary indicators of higher distress; or (2) CDEs can invest in areas that meet at least two of the criteria for Secondary indicators of higher distress. One way to meet the primary criteria is by investing in census tracts that meet at least one of the following three 'severe distress' criteria: (1) poverty rates of 30% or greater; (2) median family income at or below 60% of applicable area median income; or (3) unemployment rates at least one and a half times the national average."

through representation on a governing board of or advisory board of the entity.¹³³ Through the NMTC, tax credits are distributed by Congress to CDFIs.¹³⁴ CDFIs, in turn, award the tax credits to CDEs, which may liquidate the tax credits via syndication to private investors.¹³⁵ The NMTC program permits CDEs to be flexible in administering capital in the most efficient way that matches the needs of low-income communities.¹³⁶

According to the CDFI Fund, ninety-four to ninety-six percent of NMTC business investments consist of terms and conditions more favorable than the market generally provides.¹³⁷ In addition, decisions regarding investments are made at the community level.¹³⁸ Investments made on behalf of NMTC provide advantages in regard to lower interest rates, flexible provisions such as subordinated debt, lower origination fees, higher loan-to-values, lower debt coverage ratios and longer maturities.¹³⁹ Thus far, through the NMTC Program, the CDFI Fund has allocated over fifty billion dollars in tax credits.¹⁴⁰ In general, NMTC allocations may be placed in two categories: real estate and non-real estate.¹⁴¹ Up until 2017, almost a third of all NMTC proceeds went to single and mixed-use real estate developments.¹⁴² Additionally, for the same period, almost ten percent was invested into education. Thus, when combined, up until 2017, almost forty percent of NMTC allocations went towards real estate and education. As such, by organizing a broad approach that includes purchasing real estate and establishing curriculum, community investment funds may line themselves up for a substantial amount of NMTC allocations.

133. John Carlisi, *Will a Community Development Financial Institution Finance Your Next Project?*, 41 REAL ESTATE REVIEW JOURNAL (2012).

134. Sarah Vallim, *The New Markets Tax Credit and the Community Economic Development Movement: A Los Angeles Case Study*, 16 AFFORDABLE HOUSING & COMMUNITY DEV. L. 117, 121 (2007).

135. *Id.*

136. *Compliance Review of New Markets Tax Credit Program*, U.S. DEP'T OF TREASURY: CDFI FUND 1,3 (2017), <https://www.cdfifund.gov/Documents/Summit%20-%20Compliance%20Review%20of%20New%20Markets%20Tax%20Credit%20Program%20-%20August%20Date%20-%2020508%20Compliant.pdf>

137. *Supra* note 129.

138. *Id.*

139. *Id.*

140. *New Markets Tax Credit (NMTC) Public Data Release*, U.S. DEP'T OF TREASURY: CDFI FUND 1,5 (2017), <https://www.cdfifund.gov/Documents/NMTC%20Public%20Data%20Release%20112818.pdf>.

141. *Id.* at 6.

142. *Id.* at 9.

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Collectively, these programs should be ideal for impact entrepreneurs who have established community investment funds to aid distressed communities. This is because distressed communities and their residents comprise a class specially situated to utilize these incentives concurrently, potentially maximizing their benefits.¹⁴³

PART IV: STRATEGIES AND EXAMPLES TO ACHIEVE EDUCATIONAL ATTAINMENT AND COMMUNITY DEVELOPMENT

Over recent years, there have been several approaches meant to tackle the unique educational and communal needs of low-income communities with varying success.¹⁴⁴ There are various “onsite” and supplemental “offsite” strategies that can be analyzed and potentially useful. Additionally, we can examine those already addressing these issues in an effort to glean useful tactics for impact entrepreneurs to implement. Using community investment funds, impact entrepre-

143. See generally, *HIDING IN PLAIN SIGHT: Impact Investing in the Creative Economy*, <https://www.rockpa.org/wp-content/uploads/2019/01/Hiding-in-Plain-Sight-Impact-Investing-in-the-Creative-Economy.pdf>. “New Jersey Community Capital is a CDFI that invests in quality homes, educational facilities, and employment opportunities in underserved communities[.] Boston community Capital is a CDFI investing in projects that provide affordable housing, good jobs, and new opportunities in low-income communities. The Boston community Capital Venture Fund provides equity investments in high-potential businesses that create financial, social, and environment returns across a broad range of industries including transportation, media, education, and food services.”

144. Choi, *supra* note 54, at 5. Numerous strategies have emerged in recent years to comprehensively address the unique educational, health, and social development needs of low-income children. Perhaps the best known is the highly publicized Harlem Children’s Zone (HCZ), which takes a holistic approach to educating low-income students by integrating a high-performing charter school with after-school, parental education, social-service, health and community-building programs. In 2010, the Department of Education (ED) launched the Promise Neighborhoods program, modeled after HCZ, which provides funding for the planning and implementation of a “complete continuum of cradle- to-career solutions of both educational programs and family and community supports, with great schools at the center.” *Id.* Similarly, the Department of Housing and Urban Development (HUD) launched the Choice Neighborhoods program in 2010, which aims to transform distressed neighborhoods and public and assisted projects into viable and sustainable mixed-income neighborhoods by linking housing improvements with appropriate services, schools, public assets, transportation, and access to jobs.

In addition to these efforts at the federal level, locally driven initiatives to support broader partnerships between public schools and their surrounding communities have also emerged. *Id.* For example, six years ago in Cincinnati, more than 300 leaders from the education, nonprofit, community, civic, and philanthropic sectors came together to form the Strive Partnership, under the common goal of improving the educational success and career readiness of children from the region. *Id.* The Strive Partnership aligns the efforts of these multiple entities through the infrastructure of a common set of core metrics tied to the Partnership’s shared goals, such as kindergarten readiness, high school graduation, and postsecondary retention and completion (see the article “New Civic Infrastructure: The ‘How To’ of Collective Impact” in this issue of *CI* for more information). *Id.*

neurs can build upon these various examples as ways to institute programs meant to promote educational attainment, community development, and, in turn, stem displacement.

Onsite Strategies

When speaking of strategies to improve school development, approaches may be categorized by two methodologies: onsite and off-site.¹⁴⁵ Onsite approaches are those that directly affect the school in ways that benefit the overall community, such as its size, shape, use, location, staff, and student body.¹⁴⁶ Currently, the nation is experiencing a school facilities' emergency: many of the country's aging schools are destitute of capital improvements and modernization.¹⁴⁷ Due to a dearth of modern school facilities, impact entrepreneurs may utilize funding to renovate underused communal facilities, transforming them into new learning institutions.¹⁴⁸

Where there is a scarcity of readily accessible facilities that may be renovated, activists can also sponsor the implementation of shared-use facilities, where schools and other community groups jointly utilize facilities.¹⁴⁹ Given that the school will be communally owned, this further promotes the connection between the school and the community.¹⁵⁰ Under this approach, schools can become communal centers, serving as health clinics, gyms, or senior centers.¹⁵¹ Moreover, schools are often times among the largest communal employers.¹⁵² Thus, impact entrepreneurs can use their economic influence to connect schools with local business and community labor forces.¹⁵³ Commu-

145. Chung, *supra* note 76, at 12.

146. *Id.*

147. *Id.*

148. *Id.* at 13. "Pueblo Nuevo Development in Los Angeles, California, for example, rehabbed a declining strip mall into an award-winning charter school. The Pratt Institute Center for Community and Economic Development and the Cypress Hills Community Development Corporation in Brooklyn, New York, are currently rehabbing an old industrial building for the Cypress Hills Community School."

149. *Id.*

150. *Id.* "By benefiting the whole neighborhood, joint-use projects draw the support of empty nesters, senior citizens, and other residents who might not otherwise have a vested interest in a neighborhood school."

151. Chung, *supra* note 76, at 13. "Noble High School in North Berwick, Maine, is an example of the concept in practice. The school serves as a community center for three nearby towns and includes a restaurant, an adult education center, a performing arts center, and a health clinic."

152. *Id.*

153. *Id.* Community groups have actively encouraged public schools to purchase supplies and services from local businesses and to award school construction and capital improvement projects to local contractors. In some communities, schools are now emphasizing local hiring

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nity investors may also finance after-school programs that not only benefit the community as a whole, but also help students realize their educational potential.¹⁵⁴

Offsite Strategies

In addition to onsite strategies, there are also offsite strategies that may be implemented to increase educational attainment. Developing the surrounding area of a school can be a useful strategy to increase student success. For instance, creating affordable housing developments can establish a stable environment for students, teachers, and other school staff.¹⁵⁵ This will increase student success by providing them a sense of control over their environment. Community organizing groups and impact entrepreneurs can work together to foster education initiatives that are directly related to their community-building goals.¹⁵⁶ However, to bring together community developers and educational activists, “stakeholder outreach” is essential.¹⁵⁷ The “end-users” of the established facilities can be “invaluable sounding boards, helping to determine the most appropriate site location, design, or implementation strategy.”¹⁵⁸ Additionally, financing these initiatives via crowdfunding will not only give end-users equity, but will also incentivize end-users to participate in the development of facilities and programs because they have the requisite “skin in the game.”

Studies have also recognized individual qualities that assist students who achieve despite adverse conditions, including high self-esteem, impulse control, and social problem-solving skills.¹⁵⁹ Educational investment programs may be wise to recognize these positive, resilient qualities and implement ways to emphasize or strengthen these attributes amongst students. For instance, communi-

practices. The Cypress Hills Community School in Brooklyn, for example, developed a program to employ parents in its cafeteria lunch program.

154. *Id.* Community development organizations can create neighborhood service-learning opportunities and after-school programs for youth that benefit both schools and communities.

155. *Id.* at 14. In 2002, the U.S. Conference of Mayors recommended that school districts and public housing authorities work together to address the need for affordable housing in the United States. At a hearing of the Atlanta Millennial Housing Commission in 2000, Beverly Hall, superintendent of Atlanta Public Schools, also emphasized the importance of coordinating housing and schools.

156. *Id.*

157. Chung, *supra* note 76, at 14.

158. *Id.*

159. Lee Shumow et al., *Risk and Resilience in the Urban Neighborhood: Predictors of Academic Performance Among Low-Income Elementary School Children*, 45 WAYNE STATE UNIV. PRESS 309, 311 (1999).

ties can provide encouragement and supervising functions for children.¹⁶⁰

The Harlem Children's Zone

The Harlem Children's Zone ("HCZ") is a non-profit organization that subsidizes and manages a neighborhood-based system of education and social services for children from low-income families in Harlem, New York.¹⁶¹ The holistic, neighborhood-centered methodology to educational achievement of low-income students is the motivation and draw of the HCZ.¹⁶² Encompassed in the HCZ are (1) early childhood programs with parenting classes, (2) public charter schools, (3) academic advisors, (4) afterschool programs for students who attend traditional public schools, and (5) a support system for HCZ alum currently enrolled in college.¹⁶³ Also included within the purview of HCZ are health and wellness-centered agendas such as a fitness program, asthma management, and a nutrition program.¹⁶⁴ Moreover, the HCZ offers neighborhood services in the form of tenant associations, one-on-one counseling to families, foster care prevention programs, community centers, and an employment and technology center which imparts job-related skills to teenagers and adults.¹⁶⁵ Impact entrepreneurs can utilize funds garnered through the methods described above and other model aspects of HCZ to serve their own purposes.¹⁶⁶

Though it is difficult to assess the effectiveness of the HCZ because it is relatively new, there are signs of success.¹⁶⁷ In New York, to be given a Regents diploma, students must score at least a sixty-five on the Regents exam. In 2012, half of the HCZ students who took the exam scored an eighty-five or higher on the comprehensive English exam; ninety percent scored a sixty-five or higher on the Geometry exam; and ninety-six percent scored a sixty-five or higher on the Alge-

160. *Id.* at 313.

161. Michael Croft & Grover J. "Russ" Whitehurst, *The Harlem Children's Zone, Promise Neighborhoods, and the Broader, Bolder Approach to Education*, BROOKINGS (July 20, 2010), <https://www.brookings.edu/research/the-harlem-childrens-zone-promise-neighborhoods-and-the-broader-bolder-approach-to-education/>.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Danielle Hanson, *Assessing the Harlem Children's Zone*, in THE HERITAGE FOUNDATION, CENTER FOR POLICY INNOVATION (2013).

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bra 2 and Trigonometry exam. These scores rival KIPP Star Academy, a charter school which HCZ critics use as a measuring stick to gage academic success.¹⁶⁸

A study even concluded that the HCZ had “reversed ‘the black–white achievement gap in mathematics (HCZ students outperform the typical white student in New York City and the difference is statistically significant) and reduce[d] it in ELA [English Language Arts].’” Critics of the study state that the conclusions were faulty because they were based on a single test from a single year. Critics point out that for other grades, state-exam scores are not consistently impressive. Nevertheless, the HCZ has shown signs of promise and impact entrepreneurs who do well to investigate areas which they may replicate in order to promote educational attainment.

SUN Community School Model

Schools Uniting Neighborhoods (“SUN”) acts as a vehicle to connect community institutions such as libraries, parks, community centers, neighborhood health clinics, churches, businesses, and etc. with schools.¹⁶⁹ SUN aims to provide a strong core instructional program, educational support and skill development for youth and adults, enrichment and recreation activities, social health and mental resources, familial support, and community events.¹⁷⁰

SUN support students from grades K-12, focusing on the child as a whole.¹⁷¹ It combines academics and social services tailored to the specific needs of each school. Additionally, community resources are deliberately structured to encourage student success.¹⁷² Schools open early to provide students with a place to eat breakfast, finish homework, or participate in extracurricular activities.¹⁷³ Community school site managers and school staff work together to pinpoint individual family and student needs in order to arrange services which come directly to campus.¹⁷⁴ The assistance SUN’s programs provide include

168. *Id.*

169. Diana Hall & Multnomah County, *Schools Uniting Neighborhoods: Community Schools Anchoring Local Change*, in 24 COMMUNITY INVESTMENTS, COMMUNITY DEVELOPMENT AND EDUCATION, PLUS: CDFI INDUSTRY ANALYSIS, THE AFFORDABLE MULTIFAMILY MORTGAGE INDUSTRY 14, 16 (Federal Reserve Bank of San Francisco 2012).

170. *Id.*

171. *Id.* at 14.

172. *Id.*

173. *Id.* at 15.

174. *Id.*

parenting classes, health support, food, clothing, and access to anti-poverty and mental health service.¹⁷⁵

SUN has shown varying signs of success. Of the students participating in SUN, seventy-four percent reach the state benchmarks or growth target in Reading.¹⁷⁶ Additionally, in most grades, the average benchmark gains for students were equal to or higher than expected.¹⁷⁷ Moreover, the average daily school attendance was around ninety-five percent.¹⁷⁸ Further, seventy-four percent of students made improvements in at least one behavioral or academic area.¹⁷⁹ Lastly, ninety-six percent of families who were recipients of anti-poverty case management, life and job skills services, rent assistance or other support were able to stay in permanent housing after the support ceased.¹⁸⁰

SUN aims to be more than a program. Instead, SUN is a “place and support hub where schools and communities work together to have a collective impact on the success of children and families and provide a comprehensive array of services.”¹⁸¹ Impact entrepreneurs would do well to replicate aspects of SUN for their own benefit.

CONCLUSION

In sum, community investment funds promising vehicles for impact entrepreneurs to combat the economic pressures of gentrification and displacement in distressed communities. In addition, they are exciting because, in theory, by giving residents an equitable stake in their neighborhood, community investment funds will allow residents to profit off the surplus of property value that comes alongside gentrification. However, to ensure their success, community investment funds must value the nexus between educational attainment and wealth by allocating resources to educational initiatives meant to increase residents’ income potential. This is possible through a combination of crowdfunding, use of Opportunity Zones, and partnering with CDFIs. Lastly, those in charge of such funds should research educational initiatives that have shown signs of improving the educational attainment of distressed communities.

175. *Supra* note 168, at 15.

176. *Id.* at 17.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Supra* note 168, at 15.

