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# INTRODUCTION

## Acts of Meaning: Telling and Retelling the Narrative of Race-Conscious Affirmative Action

ADERSON BELLEGARDE FRANÇOIS\*

No matter how well-crafted, reasoned, or pleaded, no narrative, analysis, or argument in support of race-conscious affirmative action policies that would seek to abate, not to say altogether eliminate, the privileged remains of white supremacy will ever matter in the long run because the question whether such policies are constitutionally permissible, socially valuable, or indeed morally defensible, was settled long ago in the waning days of the American Civil War.

Looking back over the precise moment when nearly four million “ordinary article[s] of merchandise”<sup>1</sup> became four million human beings, W. E. B. Dubois wrote in 1901:

[A]t a stroke of the pen, was erected a government of millions of men,—and not ordinary men, either, but black men emasculated by a peculiarly complete system of slavery, centuries old; and now, suddenly, violently, they come in a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.<sup>2</sup>

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\* Associate Professor of Law and Supervising Attorney for the Civil Rights Clinic, Howard University School of Law. I am grateful to the editors of the *Howard Law Journal* for the opportunity to help organize this Symposium issue of the *Journal* and thankful to my colleagues Deborah Archer, Derek W. Black, Danielle Holley-Walker, and Gregory S. Parks for their contributions to it. I am also thankful to my students in the spring 2013 and fall 2014 semesters of the Federal Civil Rights Seminar at Howard University School of Law. Their thoughtful discussion in class helped shaped the ideas expressed in this Introduction to the Symposium.

1. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).

2. W. E. B. Dubois, *The Freedmen's Bureau*, *ATLANTIC MONTHLY* (Mar. 1901), <http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm>.

To help ease the transition into this new birthright, between 1863 and 1868, Congress took up four major pieces of social welfare legislation. The 1864 Freedmen's Bureau Bill, introduced before the end of the Civil War, provided benefits to "persons of African descent" in the House version and to "such persons as have become free" in the Senate version.<sup>3</sup> One year later, the 1865 Freedmen's Bureau Act created a "Bureau of Refugees, Freedmen and Abandoned Lands" and was signed into law by President Abraham Lincoln.<sup>4</sup> At the expiration of the 1865 Act, Congress enacted the Freedman Bureau Act of 1866 over President Andrew Johnson's veto.<sup>5</sup> As the 1866 Act was set to expire in July 1868, Congress renewed the Freedmen's Bureau for another year.<sup>6</sup>

Each bill provided different federal services to freedmen.<sup>7</sup> The 1865 bill, for example, authorized the Department of War to provide "provisions, clothing and fuel" for "destitute and suffering refugees and freedmen,"<sup>8</sup> allowed the Bureau to sell a maximum of forty acres to refugees or freedmen,<sup>9</sup> and granted the Bureau authority with "the control of all subjects relating to refugees and freedmen."<sup>10</sup> The 1866 bill, in turn, provided for "such issues of provisions, clothing, fuel, and other supplies, including medical stores and transportation, and afford such aid, medical or otherwise, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen, their wives and children[.]"<sup>11</sup> Additionally, the 1866 Act "reserve[d] from sale or from settlement . . . for the use of freedmen and loyal refugees, [male or female], unoccupied public lands in Florida, Mississippi, [Alabama, Louisiana], and Arkansas, not exceeding in all three million acres of good land."<sup>12</sup> Lastly, the 1866

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3. CONG. GLOBE, 38th Cong., 1st Sess. 145 (1864); *id.* at 2798. The bill never made it out of conference, in part because of a disagreement whether the newly formed agency would fall within the jurisdiction of the Department of War or the Department of Treasury. *See id.* at 2799.

4. Act of March 3, 1865, ch. 90, 13 Stat. 507, 508.

5. *See* John T. Woodley & Gerhard Peters, *Andrew Johnson: Veto Message*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=71977> (last visited Dec. 18, 2013).

6. *See id.* In July of 1868, Congress passed over the President's veto of two new statutes continuing certain functions of the Freedmen's Bureau and discontinuing other functions. *See* Act of July 25, 1868, ch. 245, 15 Stat. 193; Act of July 6, 1868, ch. 135, 15 Stat. 83.

7. *See* Aderson B. François, *Borne Black Ceaselessly Into the Past: Fisher v. University of Texas, The Freedman's Bureau Act and the 'Originalist' Meaning of Color Blindness*, 21 GEO. MASON L. REV. 313, 319 (2014).

8. Act of Mar. 3, 1865, ch.90, 13 Stat. 507-08.

9. *Id.* at 508.

10. *Id.* at 507.

11. Cong. Globe, 39th Cong. 1st Sess. 209 (1866).

12. *Id.* at 210.



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Act authorized the Bureau Commissioner to “erect[ ] suitable buildings for asylums and schools” for the benefit of newly freed slaves.<sup>13</sup>

In one sense, the school provision of the 1866 Act has proven to be the most lasting of the bill’s legacy. In time, funds allocated by the Freedmen’s Bureau would lead to the establishment of no fewer than nine colleges and universities dedicated to the education of African Americans: Central Tennessee College in Nashville, Tennessee; Shaw University in Raleigh, North Carolina; Fisk University in Nashville, Tennessee; Rust University in Holly Springs, Mississippi; Storer College in Harpers Ferry, West Virginia; Morgan College in Baltimore, Maryland; Biddle Memorial Institute in Charlotte, North Carolina; Atlanta University in Atlanta, Georgia; and, last but not least, Howard University in Washington, D.C.<sup>14</sup> Today, seven of these historically black colleges and universities continue to play a vital role in the nation’s intellectual life,<sup>15</sup> including the very institution that has now published this Symposium issue on race-conscious affirmative action.

But in another sense, the most lasting legacy of the various Freedmen Bureau bills is that in the immediate aftermath of the American Civil War, congressional debates over the constitutional and moral legitimacy of policies designed explicitly to benefit the newly freed slaves established the basic narrative of race-conscious affirmative action. That narrative, which has remained remarkably consistent to this day, held:

[T]hat race consciousness was per se unconstitutional; that race-conscious remedies only served to confer benefits upon a special class of citizens; that benefits should be apportioned on the basis of social class rather than race; that race-conscious remedies would inevitably breed dependency in blacks and resentment in whites; that these remedies were in fact harmful to the newly freed slaves by creating the impression that they would be unable to succeed through their

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13. *Id.*

14. RAYFORD W. LOGAN, *HOWARD UNIVERSITY: THE FIRST ONE HUNDRED YEARS 1867–1967*, at 18 (1969).

15. Central Tennessee College, which was renamed Walden University in 1900, closed in 1925. See Bobby L. Lovett, *Walden University (1868–1925)*, TENN. ST. U., <http://ww2.tnstate.edu/library/digital/walden.htm> (last visited Dec. 18, 2013). Storer College ceased operations in 1956. See Vivian Verdell Gordon, *A History of Storer College, Harpers Ferry, West Virginia*, 30 J. NEGRO EDUC. 445, 445 (1961). Biddle Memorial Institute was renamed Johnson C. Smith University in 1922. See *Johnson C. Smith—Our History*, JOHNSON C. SMITH U., [http://www.jcsu.edu/about/our\\_university/history/](http://www.jcsu.edu/about/our_university/history/) (last visited Dec. 18, 2013). Atlanta University merged with Clark University in 1987 and now operates as Clark Atlanta University. See *Clark Atlanta History*, CLARK ATLANTA U., [http://www.cau.edu/About\\_CAU\\_History.aspx](http://www.cau.edu/About_CAU_History.aspx) (last visited Dec. 18, 2013).

own hard work; and that these remedies, once created, would go on in perpetuity.<sup>16</sup>

Thus, when the 1864 bill was introduced in the House, congressional Democrats argued for an equitable distribution of benefits to both whites and blacks. One congressman stated in the House Select Committee on Emancipation: “Your committee cannot conceive of any reason why this vast domain, paid for by the blood of white men, should be set apart for the sole benefit of the freedmen of African descent, to the exclusion of others.”<sup>17</sup> In the Senate, opponents of the bill complained about preferential treatment for blacks, claiming that the 1864 Freedmen’s Bureau Bill attempted “to make war for, to feed, to clothe, to protect and care for the negro, to give him advantages that the white race do not receive or claim.”<sup>18</sup>

When the 1865 bill came up for renewal, legislators questioned its constitutionality on the grounds that it created a favored class of citizens:

Not only are the negroes of the South set free, . . . but a bill passed by Congress conferring upon them all civil rights enjoyed by white citizens of the country, and they are now selected out from among the people of the United States, the public Treasury put at their disposal, and the white people of the country taxed for their support.<sup>19</sup>

One house member protested: “[T]he present proposed legislation is solely and entirely for the freedmen, and to the exclusion of all other persons.”<sup>20</sup> Others in the House maintained that the bill would create “one government for one race and another for another.”<sup>21</sup>

In the Senate, some took up the claim that any amelioration of the effects of the war should be based on social class rather than race: “I have sympathy for the poor negro who is left in a destitute and helpless condition. I am anxious to enter upon any practical legislation that shall help all classes and all sufferers, without regard to color—the white as well as the black.”<sup>22</sup>

While Congress would ultimately override his veto of the 1866 bill, President Andrew Johnson also took up the claim that race-con-

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16. See François, *supra* note 7, at 322.

17. CONG. GLOBE, 38th Cong., 1st Sess. 2801 (1864).

18. *Id.*

19. CONG. GLOBE, 39th Cong., 1st Sess. 3841 (1866).

20. *Id.* at 544.

21. *Id.* at 627.

22. *Id.* at 297.

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scious remedies on behalf of African Americans are per se unconstitutional.<sup>23</sup>

Opponents of the bill also pointed to its inherent unfairness, claiming that the bill, on the one hand, conferred special privileges upon blacks, while, on the other hand, indicated to white men and white soldiers that “they may starve and die from want, and no wail will be raised in their behalf; but when money is wanted to feed and educate the negro I do not hear any complaints of the hardness of the times or the scarcity of money.”<sup>24</sup> Or, as one senator put it: “This bill confers on the negro race favors that have not been extended to many men on this floor within my personal knowledge.”<sup>25</sup> In his veto message, President Johnson reiterated the unfairness argument:

A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another. Pending the war many refugees and freedmen received support from the Government, but it was never intended that they should thenceforth be fed, clothed, educated and sheltered by the United States.<sup>26</sup>

But, lest it be said that opponents of the 1866 bill were concerned merely about the effects of its provisions on white citizens, some wondered whether the bill would create dependency among freedmen,<sup>27</sup> provoke resentment among whites and destroy any chance of harmonious relationship between the two races,<sup>28</sup> or create the impression that newly freed slaves were unable to succeed on their own merits. As one senator reasoned, the Freedmen’s Bureau “will enable it to depress the whites, to favor and hold up the blacks, to flatter the vanity and excite the insolence of the latter, to mortify and irritate the former, and perpetuate between them enmity and strife.”<sup>29</sup> But perhaps President Johnson best articulated the fear that race-conscious remedies would both breed dependency in blacks and create the impression in whites that blacks were unable to succeed on their own merits: “The idea on which the slaves were assisted to freedom was

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23. Woodley & Peters, *supra* note 5.

24. CONG. GLOBE, 39th Cong., 1st Sess. 629 (1866).

25. *Id.* at 401.

26. Woodley & Peters, *supra* note 5.

27. *See* CONG. GLOBE, 39th Cong., 1st Sess. 401 (1866).

28. *See id.* at 935.

29. *Id.*

that on becoming free they would be a self-sustaining population. Any legislation that shall imply that they are not expected to attain a self-sustaining condition must have a tendency injurious alike to their character and their prospects.”<sup>30</sup> And lastly, as early as 1866, opponents worried about whether these special benefits would ever come to an end: “Will the white people who have to support the government ever get done paying taxes to support the negroes?”<sup>31</sup>

By the time the 1866 Act came up for what would prove to be its final renewal in 1868, the narrative of race-conscious affirmative action had already solidified in the form that it exists today. For example, one senator, echoing the 1866 debates, stated that the Bureau was for placing freedmen in supremacy and in power over the white race.<sup>32</sup> One House member disagreed with “taxing white men for the aid of blacks.”<sup>33</sup> Still another objected to the renewals that granted the Freedmen’s Bureau the authority “to feed, clothe, educate, and support one class of people to the exclusion of all others equally as destitute and much more deserving[.]”<sup>34</sup>

Nearly one hundred and fifty years later, the narrative remains the same. When, in response to an affirmative action program at the University of California, Justice Powell insisted that the Constitution does not “permit[ ] the recognition of special wards entitled to a degree of protection greater than that accorded others,”<sup>35</sup> he was, knowingly or not, merely rephrasing the objection to the Freedmen Bureau Act of 1866 that under the Constitution there is no good reason “why, as a permanent establishment, it should be founded for one class or color of our people more than another.”<sup>36</sup> When a leading academic argued in a brief to the Supreme Court in *Fisher* that affirmative action programs should not be structured to admit African Americans to top-tier institutions because African Americans are not matched to the rigors of the work and will be stigmatized as a result,<sup>37</sup> he was, knowingly or not, rephrasing, in slightly more polite language, the claim that the 1866 Freedmen Bureau Act will only serve to “depress

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30. Woodley & Peters, *supra* note 5.

31. CONG. GLOBE, 39th Cong., 1st Sess. 635.

32. See CONG. GLOBE, 40th Cong., 2d Sess. 1452 (1868).

33. See CONG. GLOBE, 40th Cong., 2d Sess. at app. 292 (1868).

34. *Id.*

35. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978).

36. Woodley & Peters, *supra* note 5.

37. Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support for Neither Party at 6, 29, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345).

the whites, to favor and hold up the blacks, to flatter the vanity and excite the insolence of the latter, to mortify and irritate the former, and perpetuate between them enmity and strife.”<sup>38</sup> And when in *Grutter* Justice O’Connor hoped “that 25 years from now, the use of racial preferences will no longer be necessary,”<sup>39</sup> she was, again knowingly or not, being only a little more patient than the legislator who wondered in 1866 “[w]ill the white people who have to support the [g]overnment ever get done paying taxes to support the negroes?”<sup>40</sup>

So, if indeed the story has remained the same and is unlikely to change in the future, the question becomes why publish a Symposium issue on the topic? To raise the question is in no way to diminish the serious and novel contribution the articles and essays that follow make to the field. Indeed, each of the contributing authors has given us a thoughtful and unique perspective on the subject race-conscious remedies in higher education admissions. In *Fisher v. Texas and the Irrelevance of Function in Race Cases*, Professor Derek W. Black persuasively catalogues the Court’s obsession with applying strict scrutiny to formalistic uses of race that may appear to benefit racial minorities but in reality have little meaningful consequence, while ignoring less obvious uses of race that in fact disproportionately disadvantages minorities. In *Opposing Affirmative Action: The Social Psychology of Political Ideology and Racial Attitudes*, Professor Gregory S. Parks and Professor Matthew W. Hughey deploy research in cognitive psychology to demonstrate how opposition to race-conscious policies that appear to benefit members of minority groups are often grounded in unconscious racial biases even while clothed in the language of high constitutional ideas. In *Defining Race-Conscious Programs in the Fisher Era*, Dean Danielle Holley-Walker carefully dissects Justice Kennedy’s opinion for the *Fisher* majority to show how the *Fisher* decision may well pose a far greater threat to race-conscious programs than its seemingly narrow holding at first suggests. In *Collective or Individual Benefits?: Measuring the Educational Benefits of Race-Conscious Admission Programs*, Dean Deborah Archer effectively demolishes the argument that race-conscious affirmative action programs are harmful to individuals while at the same time examining the innumerable benefits such programs afford society at large. Lastly, in *The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy*

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38. CONG. GLOBE, 39th Cong., 1st Sess. 935 (1866).

39. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

40. CONG. GLOBE, 39th Cong., 1st Sess. 635 (1866).

and *Affirmative Action*, the author traces the long battle of African American legislators in the House of Representatives to pass the Civil Rights Act of 1875 and offers a counter-narrative to the doctrine of white supremacy.

And yet, for all the importance of that work, it is difficult to imagine that it will change the narrative of affirmative action either in the Supreme Court or in society at large. So, if the question is why more articles on the topic, it seems to me the answer lies in part in the work of the late Derrick Bell.

In one of his last books, Professor Bell maintained that “racism lies at the center, not the periphery; in the permanent, not in the fleeting; in the real lives of black and white people, not in the sentimental caverns of the mind.”<sup>41</sup> He argued that scholars and activists who dedicate their lives to fighting that entrenched racism must make peace with the seemingly unbearable reality that nothing they do will ever change things for the better and indeed might change them for the worst.<sup>42</sup> Still, he insisted that the work had to continue because, “[w]e yearn that our civil rights work will be crowned with success, but what we really want—want even more than success—is meaning.”<sup>43</sup>

For Professor Bell, constructing meaning with civil rights work requires scholars and activists to simply do “what black people have had to do since slavery: making something out of nothing. Carving out a humanity for oneself with absolutely nothing to help—save imagination, will, and unbelievable strength and courage. Beating the odds while firmly believing in, knowing as only they could know, the fact that all those odds are stacked against them.”<sup>44</sup> So, he concluded that:

[I]t is not a matter of choosing between the pragmatic recognition that racism is permanent no matter what we do, or an idealism based on the long-held dream of attaining a society free of racism. Rather, it is a question of *both, and*. *Both* the recognition of the futility of action—where action is more civil rights strategies destined to fail—*and* the unalterable conviction that something must be done, that action must be taken.<sup>45</sup>

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41. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 198 (1992).

42. *See id.* at 198–99.

43. *Id.*

44. *Id.* at 198.

45. *Id.* at 199.

*Race-Conscious Affirmative Action*

This Symposium issue of the *Howard Law Journal* and the Essays in it are offered in the same spirit. They will not likely change a narrative of affirmative action that, even in the midst of a bloody war over whether whites could continue to own blacks as mere articles of merchandise, still held that taking race into account to begin erasing the vestiges of slavery was tantamount to creating a favored class of black people. Rather the Essays that follow represent, separately and collectively, an act of will and imagination; a struggle to create meaning; a realization, without bitterness, nostalgia, or despair, that the choice is not between the pragmatic admission that the narrative will never change or the idealistic dream of finding just the right words to change the story, but a conviction, borne out of long experience, that something must be done, an alternative story must be told and retold even though the old story will always be with us and will never go away.





# ESSAY

## *Fisher v. Texas* and the Irrelevance of Function in Race Cases

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### INTRODUCTION

When the Supreme Court granted certiorari in *Fisher v. Texas*,<sup>1</sup> scholars and commentators speculated that the Court was set to end affirmative action in higher education.<sup>2</sup> This outcome seemed even

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\* Professor of Law, University of South Carolina School of Law. I want to thank my dear friend, Aderson François, and the *Howard Law Journal* for extending me the opportunity to think through *Fisher v. Texas* more deeply and publish this Essay. I am grateful to my dean, Rob Wilcox, for supporting this and other research over the past year. Finally, without the continuing conversations regarding *Fisher* with my colleagues, Danielle Holley-Walker and Eboni Nelson, I may have had nothing to write. Unfortunately, any misdirection in this Essay is still my own.

1. *Fisher v. Univ. of Tex. at Austin*, 132 S. Ct. 1536 (2012).

2. See, e.g., Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 Nw. U. L. REV. 1037, 1039–40 (2013) (indicating that Justice Kagan's recusal from *Fisher* heightened fears that affirmative action would be coming to an end); Gerald Torres,

more likely given Justice Elena Kagan's recusal.<sup>3</sup> Without her, the best-case scenario required Justice Kennedy to affirmatively side with the three remaining "liberals." A carefully crafted concurrence by Justice Kennedy in *Fisher*, akin to the one he authored in *Parents Involved in Community Schools v. Seattle*,<sup>4</sup> would have no effect because the four other conservatives would have a majority over three dissents without Justice Kennedy. To the surprise of most, however, the final opinion in *Fisher* was neither a decisive win for the conservatives, nor a dramatic four-four split to save affirmative action. Instead, the Court delivered a dull seven-to-one decision in which the Court allowed *Grutter v. Bollinger*'s<sup>5</sup> holding—that the educational benefit of diversity is a compelling interest—to survive,<sup>6</sup> but remanded *Fisher* with an emphasis to apply a demanding narrow tailoring analysis.<sup>7</sup>

The only language in *Fisher* that potentially adds something to the jurisprudence of higher education admissions is the Court's statement that "[n]arrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."<sup>8</sup> The question is whether this is anything more than an emphasis of what the law already is.<sup>9</sup> The Court in *Fisher* presents the "necessity" requirement as being procedural rather than substantive in nature. The lower courts had been

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*Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ's America*, 65 VAND. L. REV. EN BANC 97, 101–02 (2012) (discussing fears that *Fisher* would reverse the diversity rationale adopted in *Grutter v. Bollinger*).

3. See *Fisher*, 133 S. Ct. at 2422.

4. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782–98 (2007) (Kennedy, J., concurring).

5. See *Fisher*, 133 S. Ct. at 2419–22 (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

6. See *id.* at 2419 (“[T]he parties here do not ask the court to revisit that aspect [approving diversity as a compelling interest] of *Grutter*'s holding.”). Justice Thomas concurred separately to emphasize that overturning *Grutter* was not before the Court and, thus, the holding is not an endorsement of *Grutter*. See *id.* at 2432 (Thomas, J., concurring). While the Justices are correct that overturning *Grutter* was not raised by the parties, the question of whether diversity is a compelling interest was necessarily bound up in the resolution of this case. If no compelling interest existed, narrow tailoring would be irrelevant. Likewise, if no compelling interest existed, the Court would be sanctioning what would otherwise be unconstitutional action by the University. Recognizing this problem, the Court has not hesitated in the past to reach out and address issues in race cases that were not squarely presented by the parties. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 138 (1995) (Souter, J., concurring).

7. See *Fisher*, 133 S. Ct. at 2421–22.

8. *Id.* at 2420.

9. See *Grutter*, 539 U.S. at 326 (indicating that government imposition of racial classifications is reviewed under strict scrutiny and is constitutional only if it is narrowly tailored to further compelling governmental interests).

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willing to assume the University of Texas's good faith and defer to its judgment in terms of the necessity of relying on race. The Supreme Court in *Fisher* indicated that the lower courts should examine the evidence on this point themselves rather than deferring to the University.<sup>10</sup> The underlying question, however, remains the same after *Fisher*: has the university engaged in a "serious, good faith consideration of workable race-neutral alternatives"<sup>11</sup> and established that "no workable race-neutral alternatives would produce the educational benefits of diversity"?<sup>12</sup>

Yet, the term "necessity" in *Fisher* sounds stricter than *Grutter*. Those opposing affirmative action will surely seize on this point to argue that *Fisher* raises the bar. But to do so, they will need to ignore the *Fisher* Court's quote of *Grutter* immediately thereafter: "[N]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative."<sup>13</sup> For the moment, the final word rests with the federal government, which reads the case as I do. In their recent official guidance, the Departments of Justice and Education concluded that *Fisher* "preserved the well-established legal principle that colleges and universities have a compelling interest in achieving the educational benefits that flow from a racially and ethnically diverse student body and can lawfully pursue that interest in their admissions programs"<sup>14</sup> and "did not change the [narrow tailoring] requirements articulated in *Grutter v. Bollinger*."<sup>15</sup> If this reading of *Fisher* is correct, *Fisher* is either unimportant or important for some other reason than having changed the law.

I posit that *Fisher* did not change the law, but is, nonetheless, important for a far more subtle reason: it represents the continuing triumph of form over function in race cases, which, as a practical matter, works to the serious disadvantage of minorities. By form over function, I mean that how a program operates and the net results it produces are of relatively little importance compared to the racial

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10. See *Fisher*, 133 S. Ct. at 2421.

11. *Id.* at 2420 (quoting *Grutter*, 539 U.S. at 339–40).

12. *Id.* ("If 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,' then the university may not consider race.") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80, n.6 (1986)).

13. *Id.*

14. Jocelyn Samuels & Catherine E. Lhamon, *Joint "Dear Colleague" Letter*, U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC. (Sept. 27, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309.html>.

15. *Questions and Answers About Fisher v. University of Texas at Austin*, ED.GOV (Sept. 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.html>.

forms it employs. A majority of the Court is obsessed with the forms that racial considerations take. A majority of the Court finds formalistic uses of race extremely objectionable, even if they have very little real-world impact. At the same time, the Court passes on less obvious uses of race even though they have huge consequences—typically negative for minorities.

Careful examination of *Fisher* reveals that the role of form over function is just below the surface. Comparing the effect that racial classifications played in the University of Texas's admissions policy to the effect that race-neutral classifications played brings form over function into clearer view. First, the University operated a multilevel admissions process in which the explicit use of race could have only come into play and been decisive in a small fraction of the total admissions offers extended by the state.<sup>16</sup> The functional weight of the use of race, however, has no effect on the Court's analysis. The Court indicated the program is only constitutional if the University can produce evidence that race-neutral alternatives are unworkable.<sup>17</sup> Second, the Court did not pause for a moment to critically consider the far more significant racial impacts<sup>18</sup> of Texas's Top Ten Percent Plan because the Plan did not rely on any explicit racial forms or classifications. Per this analysis, a state actor that avoids the use of prohibited racial forms can bestow any amount of good or harm on minorities that it wishes without drawing the serious concern of the Court.

In the context of Texas's Plan, this approach might seem fair enough. The Court scrutinized one racial impact but exempted another and, thus, the opinion does not work a net negative for minorities. But as a practical matter, Texas's Plan and motivations are not standard operating procedure for other state actors. States more frequently employ policies that harm, rather than benefit, racial minorities,<sup>19</sup> making the elevation of form over function a net negative for minorities. Thus, while *Fisher* allowed affirmative action to live to fight another day and seemingly changed little in terms of explicit doc-

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16. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 226–30 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536, (2012), and vacated and remanded, 133 S. Ct. 2411 (2013).

17. See *Fisher*, 133 S. Ct. at 2420.

18. See *Fisher*, 631 F.3d at 239–40 (mentioning that top ten applicants accounted for 8,984 of the 10,200 UT admittees, and they constituted eighty-eight percent of the admissions offers for Texas residents and eighty-one percent of enrolled UT freshman).

19. See generally THE LEADERSHIP CONFERENCE EDUCATION FUND, STILL SEGREGATED: HOW RACE AND POVERTY STYMIE THE RIGHT TO EDUCATION (2013) (reporting on the failure of U.S. laws to close the existing policy gap as it relates to economical, educational, and racial equality).

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trine, *Fisher* reaffirmed an underlying framework that is problematic on, at least, three levels. First, the effect that policies have on individual lives is just as important, if not more, as the symbolism of those policies. Form over function, however, gives enormous credence to symbolism and almost none to the effects. Second, by relying on racial forms as the primary trigger of judicial scrutiny, the Court discourages transparency and encourages the state to employ decision-making processes that obscure its real motivations. Those universities most seriously committed to diversity are unlikely to drop their motivations as a result of *Fisher*, but they are likely to hide the ways in which they achieve it. Thus, transparency and predictability, both of which are important and apparent in Texas's Plan, are lost. Third, race-neutral forms of achieving diversity tend to be far blunter tools, and can work at odds with universities' missions. The Court's failure to appreciate this may force some universities to choose between equally valid goals: achieving diversity or operating nuanced, selective admissions programs.

This Essay proceeds in three parts. As background to *Fisher*, the first Part of this Essay analyzes the Court's decision in *Parents Involved*, demonstrating the enormous role that racial forms played in the outcome and questioning whether the line between form and function is a meaningful one. It also points out that because this distinction between form and function may only be a technical one, sophisticated schools have found ways to consider race without relying on the technically prohibited racial forms, which calls into question the Court's premise regarding the importance of racial forms. The second Part analyzes the form and function of race in university admissions, comparing the University of Michigan's law school and undergraduate admissions programs to the University of Texas. This comparison demonstrates that the ways in which a program operates and the results it produces carry little weight. Again, the Court is primarily concerned with the form that racial considerations take. The final Part briefly discusses how the elevation of form over function has an even more significant negative effect on minorities when the racial considerations in question are insidious rather than benign. The Court's current intentional discrimination standards leave the vast majority of racial inequity untouched so long as defendants avoid obvious racial forms.

I. VOLUNTARY SCHOOL DESEGREGATION: DRAWING A FINE LINE BETWEEN INDIVIDUAL RACE CLASSIFICATIONS AND RACE CONSCIOUSNESS

A full appreciation of the triumph of form over function in race cases must begin with an analysis of Justice Kennedy's controlling opinion in *Parents Involved v. Seattle Schools*; it is there that Justice Kennedy makes the point most clearly. *Parents Involved* produced a fractured opinion in which four justices would have held that neither diversity nor the elimination of de facto segregation in education is a compelling interest sufficient to justify the use of race in assigning students to public schools.<sup>20</sup> Those four justices added that, even if diversity or eliminating de facto segregation was a compelling interest, the plans in question were not narrowly tailored.<sup>21</sup> Conversely, the four dissenting justices would have held that the student assignment plans were supported by a compelling interest and were narrowly tailored.<sup>22</sup> Justice Kennedy's concurring opinion rested in the middle. He agreed with the four dissenters that a compelling interest existed,<sup>23</sup> but he also agreed with the four other justices in the majority that the plans were not narrowly tailored.<sup>24</sup> Thus, Justice Kennedy's concurrence is the controlling opinion in the case.<sup>25</sup>

While Justice Kennedy indicated that the plans were not narrowly tailored, the language of his opinion revealed that his primary concern was the racial forms employed, not any specific impact suffered by students or any available alternative that would have worked better to achieve all of the schools' legitimate goals. Nowhere in his opinion did Justice Kennedy indicate he was striking down the plans because the use of race was overly broad or dominated the assignment process, nor could he have made such a claim. On a functional level, race played a relatively small role in the assignment of students, particularly when compared to the hundreds of desegregation plans that previously came before the courts in which race played a definitive role in

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20. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730–32 (2007).

21. See *id.* at 726.

22. See *id.* at 855 (Breyer, J., dissenting).

23. See *id.* at 797–98 (Kennedy, J., concurring).

24. See *id.* at 786–87 (Kennedy, J., concurring).

25. See *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 560 n.32 (3d Cir. 2011); see also U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011).

the assignment of nearly every student in the district.<sup>26</sup> Far more important than race in Louisville and Seattle was parental choice.<sup>27</sup> The districts did not mandate that any student attend any school based solely on race.<sup>28</sup> Rather, the districts operated a school choice plan in which parents' voluntary choices were the decisive factor in where the overwhelming number of students went to school.<sup>29</sup> Race only became a factor in a small percentage of assignments—those in which a school was oversubscribed, other race-neutral factors had been exhausted, and the failure to consider race would produce a school enrollment that was significantly imbalanced in comparison to the district's overall demographics.<sup>30</sup> But in most all instances, schools were not oversubscribed or non-racial tiebreakers were sufficient to determine enrollment in oversubscribed schools. In short, while these voluntary desegregation plans had a race-conscious goal, race was only infrequently considered in individual student assignments.

Of particular importance is also the fact that, at the most basic functional level of whether any student was denied educational opportunity, these plans produced a lot of good without substantially harming anyone. In Seattle, for instance, students got into their first or second choice of schools ninety-seven percent of the time.<sup>31</sup> The remaining three percent were still assigned to a school in the district.<sup>32</sup> This is the opposite of higher education admissions where only a small percentage is enrolled and those denied enrollment attend substantially different schools, potentially lower in quality and in distant locations.<sup>33</sup> Because voluntary desegregation plans assign all students to some school within the district, Goodwin Liu has argued that volun-

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26. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6, 29–31 (1971) (upholding the mandatory student assignment and busing of students, along with a reliance on statistics as a starting point for assessing appropriate integration).

27. See Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 151, 165 (2009).

28. See *Parents Involved*, 551 U.S. at 812, 818 (Breyer, J., dissenting).

29. See *id.* (discussing Seattle's and Louisville's choice programs). The overwhelming popularity of the district's voluntary desegregation plan was likewise a testament to the fact that parents, in large part, controlled their children's destiny, not their children's race. See, e.g., Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, at 38 (discussing an eighty-eight percent parental support rating for Louisville's desegregation plan); see also *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 349 (D. Mass. 2003) (discussing actions to make the plan popular among all demographics).

30. See *Parents Involved*, 551 U.S. at 812, 818 (Breyer, J., dissenting).

31. See *id.* at 813.

32. See *id.* at 812–13.

33. Ms. Gratz, for instance, enrolled at the University of Michigan at Dearborn after being denied admission to the University of Michigan at Ann Arbor. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

tary desegregation plans are more akin to voter redistricting than affirmative action in higher education.<sup>34</sup> In redistricting, individuals are “sorted” by race, but they are not granted or denied opportunities based on race. As such, the Court has applied a different legal analysis to voter redistricting.<sup>35</sup> If schools in integrating districts were significantly unequal, the analogy to voting would fall apart, as a student might have the opportunity to receive an adequate education in one school but not another. The evidence in *Parents Involved*, however, showed that the districts went to great lengths to ensure quality educational opportunities in all their schools.<sup>36</sup> Thus, the major concern of affirmative action opponents—the impact on innocent third parties<sup>37</sup>—was essentially non-existent in *Parents Involved*.

The limited function of race in *Parents Involved* and the minimal practical consequences that students suffered, were trumped by Justice Kennedy’s concern with the particular racial forms employed by the districts. Justice Kennedy’s entire opinion rests on the premise that individual race classifications are stigmatic in and of themselves. Thus, they harm individuals, regardless of the motivations or precise practical effect of the classification. Justice Kennedy reasoned that, by drawing racial classifications, one is necessarily expressing a “racial preference” and using it to treat individuals differently.<sup>38</sup> Drawing on

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34. See Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 311 (2007). Liu further explains:

In redistricting, however, there is no suggestion that government must “treat citizens as individuals” in an equally strict sense. A legislature does not violate equal protection when it assigns an individual voter or even a few voters to an electoral district predominantly based on race. The concern arises only when “race [is] the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district” in derogation of traditional districting principles.

Does this imply that de minimis racial discrimination is permitted in redistricting? Of course not. It implies that the stringent norm of individualized treatment developed in the admissions context does not extend to redistricting because the use of race in sorting does not present the same hazards as the use of race in selection.

*Id.* (alteration in original).

35. See, e.g., *Bush v. Vera*, 517 U.S. 952, 976–81 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

36. See *Parents Involved*, 551 U.S. at 820 (Breyer, J., dissenting); see also *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 352–53 (D. Mass. 2003) (describing the educational success of the voluntary desegregation plan); Black, *supra* note 27, at 123.

37. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 260 (1995) (noting that by making race a necessary qualification for preference in the 1977 Act, Asian American and African American millionaires would have qualified for preference while millionaires of other races would not).

38. See *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring in part and concurring in the judgment). And, of course, Justice Kennedy is not alone on this score. The characterization of racial classifications as racial preferences is littered throughout other Supreme Court opinions. See, e.g., *Gratz*, 539 U.S. at 267–68; *Adarand Constructors*, 515 U.S. at 220.



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prior opinions, Justice Kennedy reiterated that “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”<sup>39</sup> In other words, he, along with a majority of the Court, sees all racial classifications as roughly equivalent, not because they operate the same, but because they all share the same problematic form.

According to Justice Kennedy, even “benign” classifications stigmatize. Race classifications present a “danger to individual freedom” and “cause [a] hurt or anger of the type the Constitution prevents.”<sup>40</sup> He explained:

To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.<sup>41</sup>

While well-intentioned, the districts’ use of racial classifications in assigning students to schools “reduce[d] children to racial chits.”<sup>42</sup> They assigned value to race, whereby students, as “racial chits,” were “traded according to one school’s supply [of a particular race] and another’s demand.”<sup>43</sup> This alone would have been sufficient for Justice Kennedy to find the voluntary desegregation plans unconstitutional, but Justice Kennedy went a step further and criticized the particular racial forms used. He repeatedly indicated that the districts’ chosen classifications—“white and non-white”—were “crude” labels on their face. They furthered a false racial binary of two racial

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39. *See Parents Involved*, 551 U.S. at 783 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

40. *See id.* at 790.

41. *Id.* at 797.

42. *See id.* at 798.

43. *See id.*

groups and treated all non-white students as fungible.<sup>44</sup> Thus, not only did they classify individuals by race, they classified individuals inaccurately and lumped them into catch-all groups that obfuscated their racial identity.

Justice Kennedy's concern with form over function was even clearer in his distinction between the foregoing uses of race and others that he would find less objectionable. In particular, he drew a sharp distinction between individual race classifications and general considerations of race. By individual classifications, Justice Kennedy was referring to instances in which the government identifies an individual student's race and relies on it in making a decision about that student. By general consideration of race, he was referring to a governmental policy that is race conscious or has racial motivations, but does not actually rely on individual students' racial classifications in making decisions about those students as individuals. Speaking of this distinction between individual race classifications and general uses of race, Justice Kennedy wrote:

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.<sup>45</sup>

A district might, for instance, consider the racial demographics of neighborhoods in making a "strategic site selection of new schools; drawing attendance zones . . . ; [and] allocating resources for special programs,"<sup>46</sup> or consider race in "recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics."<sup>47</sup> The formal distinction between individual classifications and general considerations of race is so significant to Justice Kennedy that he wrote "it is unlikely any of [these general considerations of race] would demand strict scrutiny to be found permissible."<sup>48</sup>

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44. *See id.* at 786, 788–89, 797–98.

45. *Id.* at 788–89 (citation omitted).

46. *See id.* at 789.

47. *See id.*

48. *See id.*

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Justice Kennedy is correct that these two uses of race are formally different. It is less clear, however, that this formal distinction is as normatively important as he declared. Following the decision in *Parents Involved*, districts committed to racial diversity or reducing racial isolation have adopted student assignment policies that are explicitly race conscious, but which do not rely on individual racial classifications.<sup>49</sup> The most aggressive of these plans have been able to produce levels of integration nearly identical to those contemplated in *Parents Involved*.<sup>50</sup> On the one hand, the effectiveness of some post-*Parents Involved* plans would appear to vindicate Justice Kennedy and those who would argue that race-neutral options are available and we should pursue them first. On the other hand, these race-neutral options have proven complicated, burdensome to administer, less transparent, and not necessarily politically more popular than plans that relied more directly on race. Most important, the line between these plans and those in *Parents Involved* is extremely thin.

One of the most prominent post-*Parents Involved* plans is in the Berkeley Unified School District. Its current student assignment plan does not rely on students' individual racial classifications.<sup>51</sup> Instead, the plan considers group level racial data. The district uses the demographic characteristics of the neighborhood in which a student lives—including the average household income, the average education level of adults, and the percentage of “students of color”—to calculate a diversity category for each student.<sup>52</sup> The district then assigns students from each diversity category proportionately to individual schools so as to approximate the racial and socioeconomic diversity of the overall district.<sup>53</sup> As a result, “[t]he actual personal attributes of students’ [are] not relied upon ‘in determining student assignments.’”<sup>54</sup>

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49. See generally DEP’T OF JUSTICE & DEP’T OF EDUC., *supra* note 25 (providing guidance to elementary and secondary schools on how they can voluntarily consider race to achieve diversity or avoid racial isolation).

50. Compare *Parents Involved*, 551 U.S. at 811–12 (implementing a student choice plan with a racial tie-breaker in order to achieve integration in schools), with Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, at MM38 (implementing a class-plus-race formula plan to achieve integration in schools).

51. See *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 90 Cal. Rptr. 3d 789, 794 (App. 1st Dist. 2009).

52. See *id.*

53. See *id.*

54. *Id.*

In this last respect, the assignment plan is formalistically distinct from the assignment plans in *Parents Involved*, but in all others, there is little difference. They are all race conscious; they all seek to achieve racial balance reflective of the district as a whole; and race does, in fact, play a role in where a student is assigned. The Berkeley plan is distinct only in that it is the race of student's neighbors, not his own, that is determinative. Per Justice Kennedy's reasoning, this distinction is crucially important. Yet, Berkeley's consideration of race is barely removed from the individual student's race. It goes right to the edge of *Parents Involved's* prohibition and stops short. Given existing housing segregation, a student's neighbors' race strongly correlates with the student's own race.<sup>55</sup> This reality begs the question of whether the distinction between individual classifications and general race consciousness is one without meaning.

It is true that the Berkeley plan is race-neutral in regard to the individual. A white student living in a minority neighborhood would receive the same diversity category as his minority neighbors. But this fact is of more theoretical importance than practical. If this possibility were of significant practical relevance, the district would be thwarted in its attempt to produce diverse schools through its current plan. In this hypothetical world, the district could better achieve diversity by adopting a simple neighborhood school policy and ignoring race altogether. But we know neither of these things is true. Housing segregation is so prevalent in most metropolitan areas that the foregoing possibility is but a minor exception to the dominant rule.<sup>56</sup> As such, the only real reasons for assigning students in the way Berkeley does are to avoid a technical breach of the prohibited individual classification form and present the illusion of race neutrality.

Most telling is the California appellate court's willingness in *American Civil Rights Foundation v. Berkeley Unified School District* to exploit form over function to the school district's advantage in fending off a challenge to the school assignment plan.<sup>57</sup> Early on in its opinion, the court focused on the fact that "any preference given to

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55. See *id.*; see also Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, 81 N.C. L. REV. 1563, 1575-81 (2003) (discussing the gravity of interdistrict school segregation and its relationship to housing segregation).

56. See generally Reardon & Yun, *supra* note 55, at 1576 (exploring the high levels of educational and residential segregation in metropolitan areas).

57. See *American Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 90 Cal. Rptr. 3d 789, 792.

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the student is not based on the student's race. White and African-American students from the same neighborhood receive the same diversity rating and the same treatment."<sup>58</sup> It acknowledged that actual facts might make this point largely irrelevant, but in the context of a facial challenge to the policy, theoretical justifications were sufficient. The court wrote:

There is no indication that, in every case, a student from a category one planning area is more likely to be a student of color than is a student from a category three planning area. It appears mathematically possible that a category one planning area may have more White students than students of color depending on the area's household income and adult education levels.

While it is conceivable . . . that some neighborhoods are so racially segregated that using demographic data could potentially serve as a proxy for a student's race, that hypothetical possibility cannot sustain [Plaintiff's] facial challenge to the constitutional validity of the . . . assignment policy. On a facial challenge, we do not consider the policy's application to the particular circumstances of an individual. "[O]ur task is to determine whether the [challenged policy] can constitutionally be applied." "To support a determination of facial unconstitutionality, voiding the statute [or policy] as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" [Plaintiff] has not shown that the policy provisions challenged here inevitably pose a total and fatal conflict with section 31.<sup>59</sup>

The trouble with the court's approach is that demographics can serve as proxy in almost every metropolitan area in the country, they do.<sup>60</sup> In other words, for the facial challenge to be dismissed out of hand, the court had to assume a set of facts that do not exist.

None of the foregoing is a criticism of the assignment plan in Berkeley or any others that approximate it. These districts are committed to maintaining racially diverse schools and avoiding racially

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58. *Id.* at 798.

59. *Id.* at 798–99 (alterations in original) (citations omitted).

60. *See generally* Reardon & Yun, *supra* note 55, at 1576 (discussing the relationship between demographics and segregation).

isolated schools.<sup>61</sup> They understand the significant educational and social benefits that accrue from integrated schools.<sup>62</sup> Justice Kennedy indicated that form matters more than function, and these districts responded accordingly. Instead, the point of the foregoing is to question whether there is any significant functional difference or motivation between the plans at issue in *Parents Involved* and race conscious plans that eschewed individual classifications afterward. If there is no functional difference, one must also query whether form is as significant as Justice Kennedy asserted. First, in striking down the most obvious means by which to achieve diversity and integration, the Court expressed a hostility toward integration that dissuades most districts because they are litigation averse as a general principle.<sup>63</sup> Second, even those not generally dissuaded face an uphill battle. Pushing districts to use different forms imposes significant administrative burdens on them, which can be prohibitive for less sophisticated or less wealthy districts.<sup>64</sup> These burdens might be justified if there were some significant benefit to the Court's move, but such a benefit is far from clear.

Justice Kennedy defends the negative effect of his holding in *Parents Involved* with the assertion that “[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.”<sup>65</sup> The notion that elevating form over function will help eliminate prejudice or prevent entrenchment rests on questionable assumptions. First, eliminating formal individual classifications only matters if Justice Kennedy is correct that plans like those in Seattle or Louisville entrench prejudice. Logic and available evidence would suggest they do the opposite. By creating integrated schools, race conscious student assignment plans ironically make race irrele-

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61. See generally NAACP LEGAL DEF. & EDUC. FUND, INC., *Still Looking to the Future: Voluntary K-12 School Integration, A Manual for Parents, Educators & Advocates* (2008) (discussing research and theories regarding voluntary integration in schools).

62. See Black, *supra* note 27, at 112 (discussing whether voluntary desegregation stigmatizes children).

63. See Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 280 (2009) (noting that the Court's decision will “make any consideration of race in student assignments so difficult and impractical” that few districts, if any, will continue to consider race in school assignment plans).

64. See *id.* at 288 (“Even if a district considers race-neutral alternatives, the necessity requirement will create a difficult burden for a school district to meet for several reasons.”).

65. *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring).

vant in parents' choices of where to send their kids.<sup>66</sup> If all schools are roughly equal in their racial composition, families necessarily must base their decision on factors other than race. But, when schools are imbalanced, race—rather than other legitimate educational considerations—becomes a major determinate of school choice for families and teachers.<sup>67</sup>

Second, even if assignments based on individual race classifications stigmatized students for reasons overlooked here, nothing indicates that a Berkeley-style plan produces less stigma. Does anyone but attorneys, judges, and a few educational experts perceive Berkeley's plan differently than Louisville's? For Justice Kennedy's assumptions to prove true, this distinction would need meaning beyond experts. It would need to matter to those purportedly stigmatized because, at the level of district motivations and actual results, the pre- and post-*Parents Involved* plans are nearly identical, and the stigma is presumably the same.

Those who oppose the intentional integration—who are also often the ones raising the notion of stigma—do not appear to see a meaningful distinction between the Berkeley plan and the *Parents Involved* plans. After all, the American Civil Rights Foundation, an anti-affirmative action group, brought suit against Berkeley.<sup>68</sup> Similarly, when Wake County, North Carolina, began assigning students based on socioeconomic status rather than race, individuals filed a complaint with the Office for Civil Rights at the Department of Education that alleged that socioeconomic status was a proxy for race,<sup>69</sup> even though the district had a robust research basis for relying on socioeconomic status.<sup>70</sup> Thus, opponents' fundamental objection to

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66. See Black, *supra* note 27, at 181.

The unfortunate truth is that the history of de jure school segregation has not left us, and the invidious racial values that it indoctrinated continue to linger. As a result, parents and teachers make decisions based on race that only further exacerbate inequality. Voluntarily desegregating schools, however, does not run from this reality; it confronts it. By creating racially balanced schools, voluntary desegregation attempts to make our racial biases irrelevant. For once, it makes us choose our schools based on factors other than race. In short, it uses race to make race irrelevant.

*Id.*

67. See *id.* at 107 (“The lingering effects of past school segregation continue to stigmatize predominantly minority schools. As a result, quality teachers and middle-income students flee to other schools, depriving minority schools of the key resources for success.”).

68. See American Civil Rights Found. v. Berkeley Unified Sch. Dist., 90 Cal. Rptr. 3d 789, 792 (App. 1st Dist. 2009).

69. See RICHARD KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 252 (2001).

70. See, e.g., *id.*; see also JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966); Geoffrey D. Borman & Maritza Dowling, *Schools and Inequality: A Mul-*

these student assignment plans would seem to be their function, not their form. More bluntly, opponents of these plans tend to not really care how the district goes about achieving integration; what they care about is stopping the ends the districts seek to achieve: integrated schools and the transportation of students beyond the confines of their racially isolated neighborhoods.<sup>71</sup> While Justice Kennedy's opinion stops short of their extreme anti-integration position. Justice Kennedy delivers a symbolic victory for opponents of integration by striking down the plans in *Parents Involved*.<sup>72</sup>

For this reason, some commentators question whether Justice Kennedy does, in fact, countenance race based programs.<sup>73</sup> They suspect that Justice Kennedy is more concerned with being at the middle of the Court so that he can be the "decider"<sup>74</sup> and narrowly avoiding a legacy as the justice who ended affirmative action. One can draw these inferences, although Justice Kennedy's opinion in *Parents Involved* includes passages so forceful that I have trouble doubting his sincerity. He struck out directly at the more conservative justices and their fundamental principle, writing that Justice Roberts' opinion in *Parents Involved* reflects:

[A]n all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plural-

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tilevel Analysis of Coleman's Equality of Educational Opportunity Data, 112 TCHRS. COLL. REC. 1201 (2010); Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1355-56 (2004); Russell W. Rumberger & Gregory J. Palardy, *Does Segregation Still Matter? The Impact of Social Composition on Academic Achievement in High School*, 107 TCHRS. COLL. REC. 1999, 1999 (2005).

71. See Richard D. Kahlenberg, *A Tea Party Defeat on Schools in North Carolina*, CENTURY FOUNDATION 1203-04 (Oct. 14, 2011), <http://72.32.39.237:8080/Plone/blogs/botc/2011/10/a-tea-party-defeat-on-schools-in-north-carolina>.

72. Justice Kennedy split hairs so thin with his various distinctions in *Parents Involved* that some ignored his nuance and only focused on those aspects with which he agreed with the four other conservative members of the Court. For instance, the Office for Civil Rights, following the Court's decision, issued a *Dear Colleague Letter* that did not even acknowledge the avenues Justice Kennedy left open and implied that the districts were now barred from any sort of race conscious integration in the future. See Samuels & Lhamon, *supra* note 14.

73. See Michelle Adams, *Stifling the Potential of Grutter v. Bollinger: Parents Involved in Community Schools v. Seattle School District No. 1*, 88 B.U. L. REV. 937, 943 (2008) ("Justice Kennedy's *Parents Involved* concurrence demonstrates both an openness to racial diversity as an ideal and an abhorrence of '[g]overnmental classifications that command people to march in different directions based on racial typologies.'") (quoting *Parents Involved*, 551 U.S. at 797) (Kennedy, J., concurring in part and concurring in the judgment); Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-Parents Involved*, 59 S.C. L. REV. 841 (2008) (discussing class as a measure of diversity and the Supreme Court's interpretations in *Parents Involved*).

74. See Stuart Taylor Jr. et al., *The Power Broker*, NEWSWEEK, July 16, 2007, at 36 (discussing an interview with Justice Kennedy regarding his critics who believe he is "perhaps a little too eager to play the role of Wise Man in the Middle.").



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ity opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.<sup>75</sup>

Those words do not sound like those of a justice with an ulterior agenda. Rather, they reflect a justice who harbors a strong commitment to integration in theory and is willing to sanction state intervention to produce it. This would mean that the appropriate critique of Justice Kennedy is that his concerns are so dominated by theory that he disregards function and is inherently skeptical about forms, not that his uneasiness reflects a diabolic design to strike down every race-based plan that comes before the Court.<sup>76</sup> After all, in *Parents Involved*, he explicitly points out that it is the form that troubles him, not the end, and he points the way toward other forms that he would not even subject to strict scrutiny.

## II. UNIVERSITY ADMISSIONS: REFUSING TO TAKE FUNCTION AND CONTEXT INTO ACCOUNT

The triumph of form over function is not as explicit in *Fisher v. Texas* as *Parents Involved* because the Court did not strike down the University of Texas's admissions policy. Yet, the Court refused to uphold the plan, and a close examination of the opinion reveals the triumph of form. First, important racial aspects of the University's admissions program went largely unaddressed by the Court. A comparison of those aspects it ignored with those that drew its focus reveals the Court's continuing concern with form over function. Sec-

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75. *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007) (Kennedy, J., concurring).

76. Justice Kennedy would have, however, struck down every plan in the past. See, e.g., *Parents Involved*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

ond, a functional comparison between the admissions plans in *Grutter*, *Gratz*, and *Fisher* reveals that there is little reason to be suspicious of the Texas policy. Rather, the Court's unwillingness to uphold the plan in *Fisher* grows out of formalistic rather than functional concerns.

A. The Holistic Operation of the University of Texas's Admissions Process

The predicate step to understanding the Court's formal rather than functional approach in *Fisher* is to understand the admissions process holistically. The Court's opinion focuses on the narrow aspect of the admissions process that explicitly relies on race, but the admissions process at the University of Texas is multilayered and complex. Focusing just on the explicit consideration of race distorts how admissions operate at the University of Texas and the role that race plays in the process. In fact, a full picture of the admissions program cannot be had from the Supreme Court opinion in *Fisher*. Rather, one must refer back to the lower courts' opinions, which detail the history and impact of the admissions program.<sup>77</sup>

After the Fifth Circuit struck down the University of Texas School of Law's consideration of race in admissions in *Hopwood v. Texas*<sup>78</sup> in 1996, the entire University was forced to rethink how it might achieve diversity without considering race. Ultimately, the University of Texas adopted a "Personal Achievement Index" in its undergraduate admissions program.<sup>79</sup> The personal achievement index takes into account things like students' leadership and work experience, awards, extracurricular activities, and community service.<sup>80</sup> It also takes into account special circumstances that might have impeded a student's educational and life opportunities, such as growing up in a single-parent home, speaking a language other than English at home, significant familial responsibilities, and the low socioeconomic status of the student's family.<sup>81</sup> This personal achievement index was considered in conjunction with a student's academic index, as measured by test scores and high school grades.<sup>82</sup> By considering these personalized achievement factors, the University could both add context to

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77. See *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 590–99 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213, 222–26 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

78. *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).

79. See *Fisher*, 645 F. Supp. 2d at 596.

80. See *id.* at 597.

81. See *id.*

82. See *id.* at 596.

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students' raw achievement scores and identify personal traits that might add to the University's diversity.

The Texas legislature also got involved in maintaining some level of diversity at the University and passed a statute whereby the top ten percent of each high school's graduating class would be automatically admitted to any public college in the state, including the University of Texas.<sup>83</sup> These two policies—the Top Ten Percent Plan and the personal achievement index—remained in place for nearly a decade. But after the Court upheld the consideration of race in admissions in *Grutter*—thereby reversing *Hopwood*—the University took steps to reinstitute the consideration of race in admissions.<sup>84</sup> It reasoned, based on a formal study, that its admissions policy did not enroll a sufficient number of minorities to produce the educational benefits of racial diversity at the classroom level.<sup>85</sup> The study revealed that, in fall 2002, nearly all of the University's small classes “had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students.”<sup>86</sup> A survey of students also indicated that “[m]inority students reported feeling isolated, and a majority of all students felt there was ‘insufficient minority representation’ in classrooms for ‘the full benefits of diversity to occur.’”<sup>87</sup>

In response, the University adopted an explicitly race conscious admission process that left the previous one intact, save one exception. The University added race as one of the factors for consideration in a student's personal achievement index. Race was not assigned an explicit numerical value, but race was a meaningful factor.<sup>88</sup> In terms of the overall group of admitted students, this consideration of race came into play only a small percentage of the time. For instance, in 2008, a total of 10,200 admissions slots were available for Texas residents.<sup>89</sup> Students admitted under the Top Ten Percent Plan filled

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83. See TEX. EDUC. CODE ANN. § 51.803 (West 2009).

84. See Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 2–5, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-CV-00263-SS).

85. See *id.* at 4.

86. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012), *and vacated and remanded*, 133 S. Ct. 2411 (2013).

87. *Id.*

88. See *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 610 n.14 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213, 222–26 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

89. See *Fisher*, 631 F.3d at 239.

8,984 of those slots.<sup>90</sup> This left only 1,216 seats, or roughly twelve percent of the seats, available for more nuanced personalized review.<sup>91</sup> Thus, the potential consideration of race was limited to a small portion of the student body.

As to the twelve percent of the student body where race could have played a role, race was embedded alongside various other equally relevant and significant factors in the personal achievement index. “The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant’s entire file.”<sup>92</sup> Only on this third factor was race relevant. Even there, it was considered alongside with and in conjunction with other factors, including demonstrated leadership qualities, awards and honors, work experience, extracurricular activities, community service, the “socioeconomic status of the applicant and his or her high school, the applicant’s family status and family responsibilities, [and] the applicant’s standardized test score compared to the average of her high school.”<sup>93</sup> Neither race nor any of these factors is “considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context.”<sup>94</sup>

If one were to visualize the University’s admissions policy and the basis upon which students are admitted as a pie chart, the Top Ten Percent Plan would absorb almost the entire pie. The remaining piece of the pie would be so small that one would struggle to list all of the factors that go into allotting this small piece of the pie on the chart’s legend. If one managed to list all these factors on the legend, it would only be people who read very carefully and have good eyesight who would pick up the fact that race played a role in admissions. Such a person, however, would presumably also notice the asterisks at the end of the list noting that these factors are considered collectively, not individually. Such a person might then reasonably ask whether that small piece of the pie warranted so much ink. A simple “holistic competitive admissions” label might have sufficed. Of course, discrimina-

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90. *See id.*

91. *See id.* at 227.

92. *Id.* at 227–28.

93. *Id.* at 228.

94. *Id.*

tion based on race against just one person triggers constitutional protection. The foregoing is not meant to suggest otherwise. Rather, the point is that current jurisprudence permits universities to explicitly consider race in admissions, and one must seriously query whether the explicit consideration of race could play any smaller of a role than it already does at the University of Texas. The Court in *Fisher*, however, does not ask that question because its analysis hinges more on the formalistic than the functional use of race.

With that said, an honest functional approach reveals that race plays a much larger role in admissions than the Court or the foregoing sections of this Essay suggest. The foregoing analysis only explores the functional role that the explicit consideration of race through individual race classifications plays. But on the question of what role race functionally plays, regardless of whether it is achieved by individual race classifications, the answer is that the role is enormous. Given its analytical approach, the Court misses what is right below the surface of the purportedly race-neutral Top Ten Percent Plan: racial motivation and racial functionality. Neither was lost on the Fifth Circuit. On the Plan's motivation, the Fifth Circuit wrote: "The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose."<sup>95</sup> On the Plan's racial functionality, the Fifth Circuit acknowledged: "In 2004, among freshmen who were Texas residents, 77% of the enrolled African-American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students."<sup>96</sup>

In her dissent in *Fisher*, Justice Ginsberg lambasted the majority for its formalistic approach and blindness to these realities. She wrote:

[O]nly an ostrich could regard the supposedly neutral alternatives as race unconscious. As Justice Souter observed, the vaunted alternatives suffer from 'the disadvantage of deliberate obfuscation.'

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. [As the Texas House Research Organization's bill analysis found prior to passing the law,] '[m]any regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a

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95. *Id.* at 224.

96. *Id.*

single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities.’ It is race consciousness, not blindness to race, that drives such plans.<sup>97</sup>

Justice Ginsberg was not suggesting that the Court strike down the admissions policy on other grounds. She was pointing out the majority’s formalistic framework for deciding race cases makes little sense. Justice Kennedy’s majority opinion offered no response, nor did it need to. He made clear in *Parents Involved* that the formalistic use of race, not its function, matters most.

#### B. Comparing Texas’s Process to Michigan’s

A comparison of the admissions plans in *Grutter*, *Gratz v. Bollinger*,<sup>98</sup> and *Fisher* yields the same conclusion: the Court ignored how race functions in *Fisher*. The admissions policies in these three cases are drastically different from one another. The only thing that binds them together is their form: they all relied on individual racial classifications as a factor in the admissions process.<sup>99</sup> How they used the race classification varied significantly. The discussion of the University of Texas’s use of race is above and need not be repeated here.<sup>100</sup> *Gratz* involved the undergraduate admissions process at the University of Michigan. While Michigan considered a number of factors in making admissions decisions, those factors, including race, operated mechanically and automatically. “Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness

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97. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (citations omitted). Justice Ginsberg further wrote in a footnote:

The notion that Texas’ Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell’s famous statement: “If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.” Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

*Id.* at 2433 n.2 (Ginsburg, J., dissenting) (internal citation omitted).

98. 539 U.S. 244 (2003).

99. *See generally Fisher*, 133 S. Ct. 2411 (holding that burden of evidence primarily lies with the university “to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that student body diversity is a compelling state interest that can justify the use of race in university admissions); *Gratz*, 539 U.S. 244 (holding that a state university’s admission policy violated the Equal Protection Clause of the Fourteenth Amendment because its ranking system gave an automatic point increase to all racial minorities rather than making individual determinations).

100. *See supra* notes 75–95 and accompanying text.

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of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.”<sup>101</sup> Underrepresented minorities were awarded an additional twenty points based on race.<sup>102</sup> A student with a total point value of one hundred or more was automatically admitted.<sup>103</sup> Those with scores between ninety and ninety-nine were either admitted or postponed for a later decision.<sup>104</sup> Those with scores between seventy-five and eighty-nine were postponed or delayed.<sup>105</sup> Those below seventy-five were typically rejected or delayed for consideration.<sup>106</sup>

With twenty additional points automatically allotted for race, a minority student, whose application would otherwise be denied or delayed, was instead automatically admitted or placed in the next highest category for admission. In addition, starting in 1999, the University instituted another level of review whereby applicants who were not already admitted would be flagged for special consideration if the student demonstrated one of several traits, one of which was being an underrepresented minority.<sup>107</sup> The result of these two considerations of race was that “virtually” all underrepresented minorities that met the University’s minimum qualifications were admitted.<sup>108</sup>

Because race was automatic and decisive for most minimally qualified applicants, the Court’s analysis in *Gratz* was easy. Both the form and function were problematic and the Court did not need to draw sharp distinctions to reach its conclusion. But the law school’s consideration of race in *Grutter* was less obvious and required more nuanced analysis. The law school’s admissions process was based on an assessment of “academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential ‘to contribute to the learning of those around them.’”<sup>109</sup> An applicant’s undergraduate grade point average and Law School Admission Test score were used to measure academic ability.<sup>110</sup> The law school stressed, however, that

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101. *Gratz*, 539 U.S. at 255.

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. *See id.* at 256–57.

108. *See id.* at 253–54.

109. *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

110. *See id.* (“In reviewing an applicant’s file, admissions officials must consider the applicant’s undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school.”) (citation omitted).

high academic scores alone did not guarantee admission, nor did low scores automatically result in rejection.<sup>111</sup> Rather, admissions officers “look beyond grades and test scores to other criteria that are important to the Law School’s educational objectives.”<sup>112</sup> One of those objectives was a diverse learning environment. The policy recognized that many different characteristics and qualities contribute to a diverse environment and warrant substantial consideration, but the policy emphasized that “racial and ethnic diversity” are particularly important.<sup>113</sup>

To ensure the educational benefits of diversity, the school sought to enroll a “critical mass” of underrepresented minorities.<sup>114</sup> The University did not define a critical mass as any specific percentage of minorities, but roughly defined it as “a number that encourages underrepresented minority students to participate in the classroom and not feel isolated.”<sup>115</sup> Consistent with this flexible goal, race was a soft variable and only one of several factors considered in the admission of minority applicants. The extent to which race played a role “varie[d] from one applicant to another. In some cases, . . . an applicant’s race may play no role, while in others it may be a ‘determinative’ factor.”<sup>116</sup> In other words, race was considered as a “plus factor” that, while making the difference for a great number of minority applicants, did not result in automatic admission, did not lessen the need to evaluate an applicant’s entire file, and did not isolate minority applicants from competition with other applicants.<sup>117</sup>

A comparison of these three admissions programs reveals multiple functional differences that affect the significance of race in each. First, in *Gratz* and *Grutter*, race classifications effectively operated across the board to all students. The only students arguably unaffected were those undergraduate students, white and minority, who were automatically admitted without the consideration of race. In contrast, in *Fisher*, race classifications only operated in regard to twelve percent of the student body, at most.

Second, in *Gratz*, race had a predefined and automatic effect on an applicant’s application. In *Grutter* and *Fisher*, the effect was

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111. *See id.*

112. *Id.* (citation omitted).

113. *See id.* at 316.

114. *See id.*

115. *Id.* at 318 (citation omitted).

116. *Id.* at 319.

117. *See id.* at 334.



neither automatic nor predetermined. In *Grutter*, a white student could qualify for diversity consideration, just as a minority could. In *Fisher*, a poor white student could potentially have his or her life circumstances positively affect his or her personal achievement index in the same way as a minority. In none of these instances would one's race, adversity, or diversity result in automatic admission or a predefined "bump."

Third, in *Grutter*, the University emphasized race as a particularly important form of diversity and explicitly articulated its goals in regard to it. In other words, racial diversity appeared to be more important than other form of diversity or, at least, first among equals. This was not the case in *Fisher*. In *Fisher*, race was listed among various factors and was not given heightened importance, at least not explicitly. Moreover, none of the various factors were to be considered alone. Thus, students presumably were not reduced solely to their race. Rather, students would have been classified as low-income minorities, high-income minorities, low-income whites, whites from single-parent households, minorities who learned English as a second language, etc. In this respect, race, while very relevant, does not become a trait whereby individuals are essentialized.<sup>118</sup>

Fourth, the context in which race arose in *Fisher* and the factors alongside which it was considered indicate that racial considerations were motivated by serious efforts to identify student ability. The history of the University of Texas's admissions policies makes it obvious that it had strong diversity motivations as well, but the admissions criterion, by its very name, was not "diversity." It was "personal achievement," which expresses the well-founded notion that a student's admissions test score, high school course enrollments, and grade point average only tell part of the story of a student's intrinsic capacity, ability, and potential. Additionally, a significant body of research indicates that socioeconomic status and racial bias are embedded in the typical measures of educational qualifications, particularly

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118. See RICHARD DELGADO & JEAN STEFANIC, CRITICAL RACE THEORY: AN INTRODUCTION 62–65 (2d ed. 2012) (discussing the notion that focusing solely on an individual's race essentializes the individual). See generally Kevin Brown, *Should Black Immigrants Be Favored over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255 (2011) (analyzing the modifications and breadth to which racial groups are defined and affirmative action is applied; pointing out important distinctions within the group currently labeled "black").

the SAT.<sup>119</sup> Thus, if one is going to consider admissions criteria like the SAT, the only way to “compare apples to apples” when reviewing student applications is to consider, among other things, race and poverty. If an admissions officer is trying to assess ability, potential, or overachievement, a 770 score by a high-income student on the reading portion of the SAT is not equivalent to a 770 by a low-income score. Rather, the low-income student with the same score as a wealthy student—or even a lower but strong score—most likely has more aptitude than the wealthy student.<sup>120</sup> Many are uncomfortable with making the same point in regard to race, but if students are otherwise similarly situated, a strong basis exists for reaching the same conclusion in regard to race.<sup>121</sup>

Based on these four functional distinctions, the admissions process in *Gratz* employed the broadest, most mechanistic, and most consequential use of race, which, of course, rendered it unconstitutional. The admissions process in *Grutter* entailed a less consequential and more flexible—although potentially equally broad—use of race. The admissions process in *Fisher* relied on race in the narrowest of circumstances and alongside equally relevant factors, making it the least consequential consideration of race. These functional differences would otherwise provide a strong basis for finding the Texas Plan constitutionally permissible, given that the Court had already sanctioned the program in *Grutter*, and the Court in *Grutter* had relied heavily on the functional differences between the law school and undergraduate ad-

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119. See, e.g., SAT WARS: THE CASE FOR TEST-OPTIONAL COLLEGE ADMISSIONS 20 (Joseph A. Soares ed., 2012).

120. To push the analysis one step further, a low-income student with a 710 likely has more capacity than a high-income student with a 770. A study by Anthony Carnevale and Jeff Strohl found that the most socioeconomically disadvantaged students score 399 points lower on average on the combined math and verbal SAT than the most socioeconomically advantaged students. See Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS: HELPING LOW INCOME STUDENTS SUCCEED IN COLLEGE 71 (Richard D. Kahlenburg ed., 2010). Given this average gap, a socioeconomically disadvantaged student who does relatively well on the SAT has defied a lot of odds and obstacles whereas the high-income student could underachieve his peers and still have a score in excess of the low-income student. In the long run, however, the low-income student shows more potential. If potential or personal capacity are measures of merit, meritocratic admissions require that we consider things like socioeconomic status and race rather than ignore them. See *id.*

121. See Jay Rosner, *The SAT: New Techniques, Removing Test Bias, and Case Studies*, in SAT WARS, *supra* note 119, at 110–14; see also Kimberly West-Faulcon, *More Intelligent Test Design: Testing Measures of Merit*, 13 J. CONST. L. 1235 (2011) (discussing the availability of alternative test designs that more accurately measure merit and less frequently reproduce racial bias).

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missions programs.<sup>122</sup> Moreover, the Court in *Grutter* specifically emphasized that:

[S]trict scrutiny must take ‘relevant differences’ into account. Indeed, as we explained, that is its ‘fundamental purpose.’ Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.<sup>123</sup>

The Court in *Fisher*, however, did not even begin to assess functional differences. The references to *Grutter* and *Gratz* in *Fisher* are limited to short quotes emphasizing the basic law of strict scrutiny, with a particular emphasis on a presumption against race classifications and the need to establish race-neutral alternatives.<sup>124</sup> While the Court in *Grutter* did indicate that a race based policy is constitutional only when workable race-neutral policies are unavailable,<sup>125</sup> the Court in *Grutter* did not elevate this to the most important inquiry or suggest a high standard for “workable.”<sup>126</sup> Many read the Court in *Fisher* as doing the opposite on both scores,<sup>127</sup> directing the lower court to “verify that it is ‘necessary’” to use race and that “no workable race-neutral alternatives would produce the educational benefits of

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122. The Court in *Grutter* also offered comparisons between the law school’s admissions process and the Court’s original higher education admissions decision in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See *Grutter v. Bollinger*, 539 U.S. 306, 336–37.

123. *Grutter*, 539 U.S. at 327 (citations omitted).

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy’s assertions, we do not “abandon strict scrutiny[.]” Rather, as we have already explained, we adhere to *Adarand*’s teaching that the very purpose of strict scrutiny is to take such “relevant differences into account.”

*Id.* at 333–34 (first alteration in original) (citations omitted).

124. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418–21 (2013).

125. See *Grutter*, 539 U.S. at 339 (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”) (citation omitted).

126. In fact, the Court’s failure to demand a high standard was the primary criticism levied in Justice Kennedy’s dissent in *Grutter*. See *id.* at 387 (Kennedy, J., dissenting).

127. See, e.g., Eboni S. Nelson, *Reading Between the Blurred Lines of Fisher v. University of Texas*, VAL. U.L. REV. (forthcoming); COLLEGE BOARD & EDUCATION COUNSEL, LLC, UNDERSTANDING FISHER V. THE UNIVERSITY OF TEXAS: POLICY IMPLICATIONS OF WHAT THE U.S. SUPREME COURT DID (AND DIDN’T) SAY ABOUT DIVERSITY AND THE USE OF RACE AND ETHNICITY IN COLLEGE ADMISSIONS (July 9, 2013).

diversity.”<sup>128</sup> The Court is clear that, at the very least, the lower courts’ deference to the University on these points was an error.<sup>129</sup>

The demand for race neutrality oversimplifies the practical task before the University in *Fisher*. The University’s choice is not simply between a race-neutral and race-based admissions process. Rather, the choice is also one between individualized admissions and more formulaic ones. No doubt, the University could have achieved or approximated its desired level of diversity through race-neutral measures. It could have enrolled its entire entering class through a top eleven percent plan rather than the Top Ten Percent Plan. But an eleven percent plan would have eliminated the University’s ability to exercise its professional judgment in actually picking any of the students in its class. This is important because it would also deprive the University of the ability to ensure that it rounded out its entering class with multifaceted diversity. A top eleven percent plan would have achieved geographic and racial diversity, but may have eliminated or under enrolled other types.

Dissenting in *Grutter*, Justice Thomas had made an analogous argument. He posited that Michigan Law School could have achieved diversity by doing away with its “elite” admissions standards and individualized review.<sup>130</sup> In its place, the law school could have admitted students based upon, for instance, the completion of some minimum core curriculum prior to law school, or through a lottery among minimally qualified applicants.<sup>131</sup> The majority rejected this option as being no real option at all because it forced the University to choose between a nuanced admission process designed to achieve multiple objectives that were part of its mission and a mechanical admissions process that might achieve diversity, but would eliminate other relevant considerations and goals. Presumably, the majority appreciated that although race played a formal role in the law schools’ admissions, its functional effect was minimal in comparison to the fundamental functional change that removing race would work in admissions.<sup>132</sup>

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128. *Fisher*, 133 S. Ct. at 2420.

129. *See id.* at 2421 (“The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications and affirming the grant of summary judgment on that basis.”).

130. *See Grutter*, 539 U.S. at 368–69.

131. *See id.* at 340.

132. A similar quandary existed in *Parents Involved*. The student assignment places were both choice and race-based. But without some use of race, a choice-based program could make segregation worse rather than better. Without choice, a race-based assignment plan would have been unpopular. Without question, the district could have engaged in various types of race-

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What the Court missed in *Fisher*, ironically, the Texas public seemed to appreciate on some fundamental level. When the state first adopted the Top Ten Percent Plan, it was not without its critics.<sup>133</sup> In fact, the Plan proved very controversial in the most privileged, whitest areas of the state.<sup>134</sup> In the past, privileged families in Texas had grown accustomed to their children gaining admission to the University of Texas (or at least having a stronger chance). With higher average SAT scores, they had a far better chance of admission than students in high-poverty, racially segregated schools, as well as rural students, who had graduated at the top of their high school classes.<sup>135</sup> The Top Ten Percent Plan significantly lowered the odds of admission for students from these privileged areas and schools, so much so that some families tried to game the system by transferring to a disadvantaged school prior to applying to college.<sup>136</sup> The opposition to the Top Ten Percent Plan was strong enough that, at one point, there was serious talk of repealing or shrinking it.<sup>137</sup>

Without conceding the Court is prescient in its elevation of form over function, it is important to acknowledge that dropping racial forms following *Hopwood* may have had a positive effect. The Top Ten Percent Plan survived politically in the face of opposition, and may have done so only because race had been removed from the process. This paved the way for the state to engage in a broader discussion of fairness. Racial diversity motivations aside, the state's Top Ten Percent Plan represents an evolved sense of merit and fairness. It assesses merit based on past achievement in regard to a student's immediate peers. This comparison is important because immediate peers

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neutral mandatory assignments that would have integrated the schools. But those plans would have been pilloried. See *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 701–04 (2007). Thus, a flaw in Justice Kennedy's opinion is the failure to appreciate how the plans really work. Instead, he simply assesses "how they look" in terms of the uses of race that they relied upon. See *id.* at 782, 787.

133. See *Fisher*, 133 S. Ct. at 2432.

134. See Rebecca Leung, *Is the "Top 10" Plan Unfair?*, CBS NEWS (Oct. 15 2004), [http://www.cbsnews.com/8301-18560\\_162-649704.html](http://www.cbsnews.com/8301-18560_162-649704.html).

135. See Scott Jaschik, *Texas Limits "10%" Admissions*, INSIDE HIGHER ED (June 1, 2009), <http://www.insidehighered.com/news/2009/06/01/texas>.

136. See Leung, *supra* note 134.

137. See *id.* Although the state did not eliminate the policy, there was sufficient pressure to cap it. State law now limits the number of students admitted under the policy to no more than seventy-five percent of the total undergraduate admissions for that year. Thus, the exact effects of the policy will now vary from year to year. In 2011, for instance, there was only room for the top eight percent of graduating seniors. See *The University of Texas at Austin to Automatically Admit Top 8 Percent of High School Graduates for 2011*, U. OF TEX. AT AUSTIN (Sept. 16, 2009), [http://www.utexas.edu/news/2009/09/16/top8\\_percent/](http://www.utexas.edu/news/2009/09/16/top8_percent/).

are more similarly situated than peers somewhere on the other side of the state. Thus, this comparison permits a more innate assessment of applicants.

The Top Ten Percent Plan also represents an acknowledgment that the University of Texas and other leading public institutions in the state are not private institutions open only to the privileged class. Rather, these state institutions should be open to and serve the state's entire population. Once the explicit consideration of race was out and the Top Ten Percent Plan in, the University was also confronted with a situation where admissions slots were scarce. If the University was truly committed to creating opportunity for the "best" or most "worthy" students, it needed to engage in a serious evaluation of merit. The final determination of how to do this was to refrain from evaluating raw SAT and GPA scores in a vacuum and, instead, to evaluate them in the context of a student's life chances and obstacles. Analogous arguments about proportional representation and merit could and have been made in regard to race, but those arguments are more easily cut short by labeling the proposals as racial quota systems,<sup>138</sup> stereotypical,<sup>139</sup> and/or essentialist.<sup>140</sup> Thus, removing race as an explicit factor was likely a key factor in the state's willingness to adopt what amounts to a proportional or quota system based on geography—a proportional system that now better serves the collective people of Texas. Only by first envisioning merit and personal achievement in broader non-racial terms than it ever had before could the University later come back to defend race as a relevant consideration not just to diversity, but to merit and achievement.

None of this is to say that form over function is the legally appropriate principle. Racial forms have political salience that can overwhelm the fair consideration of an issue and, for this reason, removing racial forms from the conversation can have practical value. It does not follow, however, that race neutrality alone will necessarily lead to desirable outcomes. To the contrary, the facially neutral Top Ten Percent Plan may have never occurred without affirmative action advocates pressing for a work-around to ensure diversity. Disentangling these two factors and assigning preeminence to either is likely impossible. The Court in *Fisher*, nonetheless, comes down strong on the side of legal limitations on racial forms, regardless of their function.

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138. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 414–15 (1978).

139. See, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 799, 800, 828 (1st Cir. 1998).

140. See DELGADO & STEFANIC, *supra* note 118, at 62–65.

### III. WHEN STATE ACTORS INTENTIONALLY OBSCURE RACE

The Court's form over function approach extends beyond affirmative action cases. One might assume workarounds in affirmative action and, thus, discount the impact of the approach there. But in other contexts, racial justice advocates have fewer alternatives and the impact of the Court's approach has far more practical impact than affirmative action ever has. Most notable is the Court's contraction of causes of action for disparate impact and its adoption of an intent standard as the touchstone of racial discrimination in nearly every statutory and constitutional context.

The Court's first opinion to adopt the intent standard as a generally applicable standard was *Washington v. Davis*.<sup>141</sup> There, the Court held that intent was necessary to establish an Equal Protection violation under the Fifth Amendment.<sup>142</sup> The Court followed *Davis* with *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, in which the Court held that the same standard applies to the Equal Protection Clause of the Fourteenth Amendment.<sup>143</sup> More recently, the Court adopted the intent standard for Title VI of the Civil Rights Acts of 1964 in *Alexander v. Sandoval*.<sup>144</sup> Title VI regulates discrimination in all programs—private and public—that receive federal funding. Thus, its reach is broader than the Fifth and Fourteenth Amendments.

All of these cases involved facially race-neutral policies that exacted huge practical tolls on minorities, but because none included a crucial racial form, none invoked the Court's skepticism and scrutiny. In *Davis*, the City of Washington, D.C., had adopted a written exam that disproportionately excluded minorities from the opportunity to become a police officer.<sup>145</sup> The exam, however, had not been shown to relate to job performance.<sup>146</sup> In *Village of Arlington Heights*, the Village, a suburb outside of Chicago, had experienced significant population growth, but that growth was almost entirely white.<sup>147</sup> Data

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141. 426 U.S. 229 (1976). *Davis* cited *Keyes v. Denver School District No.1*, 413 U.S. 189 (1973), as having first adopted the intent standard, but *Keyes's* reliance on intent was more nuanced and also allowed for workarounds through a presumption of intent.

142. *See id.* at 240.

143. *See* 429 U.S. 252, 268 (1977).

144. *See* 532 U.S. 275, 281 (2001).

145. *Davis*, 426 U.S. at 234–36.

146. *Id.*

147. *See Vill. of Arlington Heights*, 429 U.S. at 260.

showed that only twenty-seven of the Village's 64,000 residents were African American.<sup>148</sup> When a proposal to develop low and middle-income housing that would have drawn more minorities to the area came before the Village's housing authority, it denied the proposal.<sup>149</sup> In *Sandoval*, the state of Alabama refused to administer its driver's license examination in any language other than English, the negative impact of which was felt almost exclusively by ethnic minorities.<sup>150</sup>

In each of these cases, the policies in question had far greater racial impacts than any of the admissions policies at issue in *Gratz*, *Grutter*, *Parents Involved* or *Fisher*. The screening exam in *Davis* worked to limit the most visible and powerful aspect of local government from reflecting the community it served, which was particularly important to the community given the police department's historical role in oppressing African Americans.<sup>151</sup> The facially neutral zoning policies in *Arlington Heights* maintained an entire political subdivision as a white enclave, notwithstanding the diversity of the overall metropolitan area.<sup>152</sup> The English-only policy in *Sandoval* had almost no effect on whites (or African Americans), whereas ethnic minorities, particularly the newly emerging Latino population in the state, felt a significant impact.<sup>153</sup>

In contrast, in *Fisher* and *Grutter*, the limited and holistic consideration of race only tipped the scales for a subset of minority applicants. Thus, whites continued to receive the predominant percentage of admissions and, as a group, were significantly advantaged by processes that heavily weighted factors like the SAT and LSAT.<sup>154</sup> Likewise, the evidence in *Parents Involved* showed that race only infrequently played a decisive role in student assignments.<sup>155</sup> In general, the process worked to the advantage of both whites and minorities, as it afforded them the opportunity to select and gain admission to their school of choice independent of race. These minimal

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148. *Id.* at 255.

149. *See id.* at 256–58.

150. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

151. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the cultural meaning of excluding minorities from the police force).

152. *Interpreting Neighborhood Change in Chicago*, CUPPA, <http://www.uic.edu/cuppa/voorheesctr/Gentrification%20Index%20Site/Main%20Neighborhood%20Change%20Revised.htm> (last visited Jan. 25, 2014).

153. *See Sandoval v. Hagan*, 197 F.3d 484, 489–90(11th Cir. 1999).

154. *See generally* SAT WARS, *supra* note 119 (discussing the socioeconomic bias of the SAT).

155. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007).



impacts, nonetheless, were subjected to the strictest of scrutiny and placed in serious jeopardy simply because they relied on racial forms. Whereas, in the absence of racial forms in *Davis*, *Arlington Heights*, and *Sandoval*, significant, if not extreme, racial impacts went unchecked. By placing so much weight on the presence or absence of racial forms, the Court severely discounts the importance of the contexts in which the forms arise, the result of which is judicial doctrine disconnected from reality and susceptible to obfuscation.

The intent standard is not the exact equivalent of a racial form standard because intentional discrimination can occur in the absence of a racial form, but, in practice, the intent standard amounts to a form standard. It is premised on historical discrimination, which was open, obvious, and explicit—in other words, formal—and presupposes a particular state of mind on the part of the discriminatory actor: a conscious or malevolent desire to disadvantage based on race.<sup>156</sup> As the Court in *Personnel Administrators of Massachusetts v. Feeney*<sup>157</sup> explained, a plaintiff must demonstrate that the defendant “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>158</sup> With such a legal standard in place and the social unacceptability of obvious racism, state actors do not dare enact or rely on racial forms that would disadvantage minorities.<sup>159</sup> In fact, most state actors are presumably well-intentioned and may not consciously intend to disadvantage minorities.<sup>160</sup> Subconscious biases, however, do disadvantage minorities and generally escape judicial review under intentional discrimination standards.<sup>161</sup> The net result is an intentional discrimination standard that does little to address racial inequality in the absence of a racial form, or its conscious equivalent in the mind of the state actor.<sup>162</sup>

Treating racial forms or intent as the touchstone of discrimination has the added problem of incentivizing state actors to obfuscate their

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156. See generally Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 335 (1997) (discussing the Court’s difficulty in shifting from a “segregation mentality”).

157. *Personnel Adm’rs of Mass. v. Feeney*, 442 U.S. 256 (1979).

158. *Id.* at 279.

159. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* xix-xxii, 1 (6th ed. 2008).

160. See Lawrence, *supra* note 151, at 322.

161. See *id.*; Selmi, *supra* note 156, at 288.

162. See Derek W. Black, *The Contradiction Between Equal Protection’s Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 572–75 (2006).

motives to avoid judicial scrutiny. If a community like the Village of Arlington Heights is inclined to keep minorities out, identifying a legitimate non-discrimination goal to achieve this end is relatively easy. Although a non-discriminatory explanation may be pretextual, victims face a heavy burden in ferreting out the hidden agenda with hard evidence. Therein lays the irony. A well-intentioned school district might make minimal use of explicit racial categories to integrate schools, but if it does, the district will face an uphill battle in defending its policies. In contrast, a district that wants to maintain racially isolated schools can obfuscate its motives and assert an interest in neighborhood schools. Absent Freudian slips or poor judgment, it is highly unlikely that a court would find the policy racially discriminatory. To put it bluntly, form over function allows segregation on a national scale while impeding integration even in the narrowest of circumstances at the local level.

The same principle applies to higher education. Recognizing this, the well-intentioned but rational university may now have the same obfuscation motivation as the biased or malevolent actor. If universities actualize their motivations, the Supreme Court may have succeeded in ridding higher education admissions of racial forms, but it will not have rid the racial inequality and discrimination that necessitated race-conscious measures in the first instance. Rather, the primary effect will have been to stymie those that sought to counteract inequality and discrimination, and prompt the most committed progressives to act in the same shadows as their opponents.

#### CONCLUSION

On its surface, the Court's opinion in *Fisher v. Texas* borders on irrelevant. It announced no new doctrine. At best, it emphasized that lower courts must pay close attention to evidence regarding the pre-existing standard requiring the consideration of race-neutral alternatives. But below the surface, the case evidences a continued and growing infatuation with formalistic reasoning that largely ignores real-world impacts. The majority of the Court believes that, if we could just redact racial classifications—even benign ones—from our policies, race would soon enough leave our minds, and real-world inequality would follow the same course. The Court may have a point. In certain contexts, removing race from a policy debate may offer some benefit because its presence so easily distracts us from fair and reasoned thought. But it does not follow that race classifications are

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themselves the problem. Rather, it is our ineptness in dealing with race that is often the problem. Even when excised from explicit conversation and policy, the issues and problems of race lie right beneath the surface and require solutions. Unfortunately, rigid formalistic reasoning has, thus far, proved unsuited to provide such solutions.



## ESSAY

# Opposing Affirmative Action: The Social Psychology of Political Ideology and Racial Attitudes

GREGORY S. PARKS\* AND MATTHEW W. HUGHEY‡

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### INTRODUCTION

Affirmative action in higher education has been a contentious issue for almost forty years. Since about 1970, litigants have challenged such programs in undergraduate and professional schools. In 1971, Marco DeFunis, a young man of Jewish descent, applied for admission to the University of Washington Law School.<sup>1</sup> The law school received approximately 1,600 applications for these 150 slots.<sup>2</sup> DeFunis

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\* Assistant Professor of Law, Wake Forest University School of Law. Thank you to Samantha Berner for her invaluable research assistance, as well as Elizabeth Johnson of the Wake Forest University School of Law Professional Center Library and her staff of research assistants. It should be noted that portions of this Essay will appear in MATTHEW W. HUGHEY & GREGORY S. PARKS, *THE WRONGS OF THE RIGHT: LANGUAGE, RACE, AND THE REPUBLICAN PARTY IN THE AGE OF OBAMA* (N.Y.U. Press 2014).

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1. *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974) (per curiam).

2. *Id.*

was denied admission.<sup>3</sup> In response, he filed a lawsuit against the University president, arguing that his admission denial resulted from the law school's affirmative action policy, favoring the admission of minority applicants over better-qualified white candidates (during the pendency of the case, DeFunis was provisionally admitted).<sup>4</sup> In sum, he contended that the Law School Admissions Committee procedures and criteria invidiously discriminated against him on account of his race, violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>5</sup> The United States Supreme Court determined that the case was moot since DeFunis had been admitted to the University of Washington Law School.<sup>6</sup>

In 1973 and 1974, Allan Bakke, a white male, applied to the University of California at Davis Medical School.<sup>7</sup> Both years, Bakke's application was considered under the regular admissions program.<sup>8</sup> His application was rejected in 1973.<sup>9</sup> Though his application had been submitted late, there remained four slots open for affirmative action admits.<sup>10</sup> In response, Bakke wrote the Admissions Committee, protesting that the affirmative action program operated as a racial and ethnic quota.<sup>11</sup> Bakke completed his 1974 application early in the year.<sup>12</sup> Again, however, Bakke's application was rejected.<sup>13</sup> Bakke brought suit in California state court against the Regents of the University of California with the help of the Center for Individual Rights (CIR).<sup>14</sup> The case worked its way to the United States Supreme Court, which upheld affirmative action, permitting race to be one of several factors in college admissions.<sup>15</sup> However, the Court held that racial quotas were impermissible.<sup>16</sup>

Then in 1992, after having her application rejected by the University of Texas School of Law, Cheryl Hopwood, a white female, filed

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3. *Id.*

4. *See id.*

5. *Id.*

6. *See id.* at 319–20.

7. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276 (1978).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 277.

13. *Id.* at 276.

14. Ann Mallatt Killenbeck, *Bakke, with Teeth?: The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1, 20 (2009).

15. *Regents of the Univ. of Cal.*, 438 U.S. at 317.

16. *See id.* at 375.

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suit along with several other white individuals who were similarly rejected.<sup>17</sup> Their contention was that they had better combined LSAT and undergraduate grade point averages than many of the black and Latino students who had been admitted.<sup>18</sup> After the 1994 bench trial in federal court, the judge held that the University could continue to employ its affirmative action admissions program.<sup>19</sup> On appeal, the United States Court of Appeals for the Fifth Circuit reversed.<sup>20</sup> Despite the University's appeal, the United States Supreme Court denied certiorari.<sup>21</sup>

Almost a decade later, in 2003, the United States Supreme Court decided two seminal affirmative action cases. In one case, Jennifer Gratz and Patrick Hamacher, both white, applied for admission to the University of Michigan's College of Literature, Science, and the Arts.<sup>22</sup> Both were denied admission to the University.<sup>23</sup> The CIR contacted Gratz and Hamacher and ultimately filed a lawsuit on their behalf in 1997 in federal court.<sup>24</sup> Their class action lawsuit alleged violation of the Equal Protection Clause of the Fourteenth Amendment, given the University of Michigan's affirmative action admissions policy.<sup>25</sup> The federal district court granted Gratz and Hamacher's motion with respect to admissions programs in existence from 1995 through 1998.<sup>26</sup> Ultimately, the United States Supreme Court held, *inter alia*, that the University of Michigan's freshman admissions policy violated the Equal Protection Clause because its use of race was not narrowly tailored to achieve the University's asserted compelling state interest in diversity.<sup>27</sup>

In the other case, Barbara Grutter, a white female, applied to the University of Michigan Law School in 1996.<sup>28</sup> The law school initially

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17. *Hopwood v. State*, 861 F. Supp. 551, 553 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

18. *Id.* at 563 n.32, 564–67.

19. *See id.* at 583–84 (holding that the affirmative action admissions program was unconstitutional as administered).

20. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000).

21. *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001).

22. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

23. *Id.*

24. *Id.* at 248; Killenbeck, *supra* note 14.

25. *Gratz*, 539 U.S. at 249–50.

26. *Id.* at 252–53.

27. *See id.* at 270–75 (finding that automatically distributing twenty points to every “under-represented minority” applicant solely because of race” does not provide the necessary “individualized consideration” as articulated by Justice Powell’s opinion in *Bakke*).

28. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

placed Grutter on a waiting list but later rejected her application.<sup>29</sup> In 1997, she filed suit in federal court against the law school, the Regents of the University of Michigan, Lee Bollinger (Dean of the law school from 1987 to 1994, and president of the University of Michigan from 1996 to 2002), Jeffrey Lehman (Dean of the law school), and Dennis Shields (Director of Admissions at the law school from 1991 until 1998).<sup>30</sup> Grutter alleged that the defendants discriminated against her on the basis of race in violation of, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>31</sup> In sum, she sued because of the University of Michigan Law School's affirmative action admissions policy. The District Court found unlawful the law school's use of race as an admissions factor.<sup>32</sup> The United States Court of Appeals for the Sixth Circuit reversed and held that *Bakke's* binding precedent established diversity as a compelling state interest.<sup>33</sup> Accordingly, the law school's affirmative action policy was narrowly tailored because race was merely a "potential 'plus' factor."<sup>34</sup> The Supreme Court affirmed.<sup>35</sup>

Then in 2008, Abigail Fisher and Rachel Michalewicz applied to the University of Texas at Austin for undergraduate admission and were both rejected.<sup>36</sup> The two women, both white, filed suit against the University of Texas.<sup>37</sup> They alleged that the University discriminated against them on the basis of their race in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>38</sup> The basis of their claim was the University's affirmative action admissions program.<sup>39</sup> In 2009, the District Court upheld the legality of the admissions policy on summary judgment.<sup>40</sup> In 2011, Michalewicz withdrew from the case, leaving Fisher as the sole plaintiff.<sup>41</sup> The case was appealed to the United States Court of Appeals for the Fifth Circuit, which af-

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29. *Id.*

30. *Id.*

31. *Id.* at 317.

32. *Id.* at 321.

33. *Id.*

34. *Id.*

35. *Id.* at 343–44.

36. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011) *vacated and remanded*, 133 S. Ct. 2411 (2013).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2413 (2013).

41. *Fisher v. University of Texas at Austin Challenges Affirmative Action in Higher Education*, DAILY TEXAN, Feb. 21, 2012.



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firmed the trial court's holding.<sup>42</sup> Two years later, in 2013, the Supreme Court vacated the Fifth Circuit's opinion and remanded the case for further consideration.<sup>43</sup>

Each of these cases underscores important constitutional issues that courts have had to grapple. This Essay, however, questions whether those constitutional ideals have truly driven efforts to end affirmative action in higher education or whether it is something else. For example, the CIR and other advocacy groups are politically conservative organizations that have conducted a nationwide litigation strategy to dismantle race-conscious preferences.<sup>44</sup> For example, the CIR represented the sponsors of Proposition 209, the California referendum that eliminated affirmative action in California State programs; fought bans on racial "hate speech"; and represented Cheryl Hopwood—a white woman denied admission to the University of Texas at Austin Law School—in a successful case to challenge a university's right to use affirmative action since *Regents of the University of California v. Bakke* in 1978.<sup>45</sup> While the CIR portrays itself as a "civil rights" organization, it engages largely in issues in which it believes whites to be unfairly treated by their race—a move that signals its defense of white privilege rather than a commitment to racial equality.<sup>46</sup>

It is this conservative movement and the attitudes and actions on the part of those seeking admission to programs of higher learning that underscore the racially-tinged nature of opposition to affirmative action. Take, for example, affirmative action bake sales. These events, generally hosted by conservative student groups on U.S. college and university campuses, attempt to sell baked goods at different price points based on the would-be customer's race and gender. For example, one might sell a cookie for \$1.00 to a white male whereas a black female would be sold the same cookie for .25¢. Importantly, the bake sale hosts oppose the differently priced items but engage in such

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42. *Fisher*, 133 S. Ct. at 2413.

43. *Id.* at 2414.

44. Philip C. Aka, *The Supreme Court and Affirmative Action in Public Education, with Special Reference to the Michigan Cases*, 2006 BYU EDUC. & L.J. 1, 46 n.303 (2006) (citing Vernon Jarrett, *Beware! Old Race War Still On!*, CHI. DEFENDER (May 10, 2003)).

45. See Paul Burka, *Cheryl Hopwood, She Fought Affirmative Action at the University of Texas and Won*, TEX. MONTHLY (Sept. 1996), <http://www.texasmonthly.com/content/law-%E2%80%A2-cheryl-hopwood>; *Proposition 209 Ends Preferences in California*, CTR. FOR INDIVIDUAL RIGHTS, [http://www.cir-usa.org/cases/prop209\\_info.html](http://www.cir-usa.org/cases/prop209_info.html) (last visited Jan. 26, 2014).

46. Matthew W. Hughey, *White Backlash in the "Post-Racial" United States*, ETHNIC AND RACIAL STUDIES REVIEW (forthcoming 2014).

a public critique of affirmative action that they believe will “bring the issue (of affirmative action) down to everyday terms.”<sup>47</sup> Such sales have taken place at UCLA and Texas A&M in 2003, the University of North Carolina at Greensboro and the University of Colorado at Boulder in 2004, Grand Valley State University in 2005, Kutztown University in 2006, the University of Nebraska in 2007, the University of California at Berkeley in 2011, and recently at the University of Texas at Austin.<sup>48</sup> The groups that support such bake sales often defend their provocative actions via the logic of “abstract liberalism.”<sup>49</sup> This approach synthesizes general social tenets such as “equal opportunity” and political and economic notions of “laissez-faire” into an idea that force should not be used to achieve social equity between groups but should be matters left up to individual choice. By discussing affirmative action within a “language of liberalism”<sup>50</sup> and appealing to the tenets of individual freedom within the free market ideology, these bake sales can be used to re-frame affirmative action as a violation of individual equality of opportunity, or simply put, “reverse discrimination”<sup>51</sup> against whites.<sup>52</sup> Accordingly, supporters of these bake sales might argue, “I am all for equal opportunity, that’s why I oppose affirmative action.”<sup>53</sup>

Most recently, on September 25, 2013, the University of Texas at Austin chapter of the Young Conservatives of Texas held a campus bake sale, charging different prices for treats based on the customer’s

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47. Nicolas Taborek, *Democrats Riled by Race and Gender-biased Bake Sale*, DAILY BRUIN (Feb. 14, 2003) (alteration in original), available at <http://www.freerepublic.com/focus/news/844214/posts>.

48. *Id.*; BILLS OF GOODS/ *Cookie Sale Was Half-baked Affirmative Action Protest*, Hous. CHRON., Nov. 21, 2003, at A46; David Dietrich, *Racially Charged Cookies: Anti-Affirmative Action “Bake Sales” and the Defense of White Privilege*, in THE BULL. OF THE N.C. SOC. ASSOC., May 2011, at N2B, available at <http://www.rockinghamcc.edu/NCSA/Bulletinv37n2/v37n2b.htm>; Tim Mak, *Diversity Bake Sale Under Fire*, POLITICO (Sept. 26, 2011, 6:38 AM ), <http://www.politico.com/news/stories/0911/64391.html>; David Weigel, *Happy Ninth Anniversary, College Republican Stunt!*, SLATE (Sept. 26, 2011, 12:07 PM), [http://www.slate.com/blogs/weigel/2011/09/26/happy\\_ninth\\_anniversary\\_college\\_republican\\_stunt\\_.html](http://www.slate.com/blogs/weigel/2011/09/26/happy_ninth_anniversary_college_republican_stunt_.html).

49. See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 76 (4th ed. 2014).

50. *Id.* at 305.

51. See EBONI M. ZAMANI-GALLAHER, ET AL., *THE CASE FOR AFFIRMATIVE ACTION ON CAMPUS: CONCEPTS OF EQUITY, CONSIDERATIONS FOR PRACTICE* 54 (2009).

52. See BONILLA-SILVA, *supra* note 49, at 76.

53. Keith R. Walsh, Book Note, *Color-Blind Racism in Grutter and Gratz*, 24 B.C. THIRD WORLD L.J. 443, 447 (2004) (reviewing EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* (4th ed. 2014)).

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race.<sup>54</sup> The group claimed that it wanted to show why affirmative action is a bad policy. Lorenzo Garcia, the group's president, stated that the group wanted to show that affirmative action is "demeaning to minorities" and creates "reverse discrimination."<sup>55</sup>

High ideals, right? The problem is that the attack on affirmative action from the political Right has been shown, in social-psychological literature, to be predicted by racial attitudes. To elucidate this point, this Essay provides a backdrop to understanding racial attitudes among political conservatives in Part I. Part II contends that the way to think about racial bias on the political Right is at the automatic, implicit, and subconscious level. In doing so, Part II provides a framework for understanding implicit biases and how they originate. Part III discusses how implicit bias relates to political ideology. Part IV ties implicit racial attitudes to attitudes about affirmative action, specifically. This Essay concludes by underscoring that while the legal arguments made for why affirmative action in higher education should be held unlawful, based on constitutional ideals, what lies at the heart of the opposition is less about constitutional principles. Rather, the opposition emerges from racial hostility.

## I. RACIAL ATTITUDES AND POLITICAL CONSERVATISM

Franklin D. Roosevelt and his "New Deal" helped the Democratic Party court blacks and Harry S. Truman's promotion of civil rights further cemented that relationship.<sup>56</sup> For example, Truman pushed for the Fair Employment Practices Act and made a worldwide radio address to the NAACP.<sup>57</sup> By the 1940s, the banality of entrenched white supremacy led many white Southerners to become disgruntled with the Democrats; they doubted that national Democratic leaders would uphold Jim Crow.<sup>58</sup> But by 1948, in the wake of Truman's announcement of his Civil Rights plan, southern Democrats

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54. Tyler Kingkade, *University of Texas Conservative Students Hold Affirmative Action Bake Sale*, HUFFINGTON POST (Oct. 1, 2013, 5:41 PM), [http://www.huffingtonpost.com/2013/10/01/affirmative-action-bake-sale\\_n\\_4025362.html](http://www.huffingtonpost.com/2013/10/01/affirmative-action-bake-sale_n_4025362.html).

55. Bacon, *Young Conservatives of Texas Throw "Affirmative Action Bake Sale" at University of Texas*, TOTAL FRAT MOVE, <http://totalfratmove.com/young-conservatives-of-texas-throw-affirmative-action-bake-sale-at-university-of-texas/#OrQhDYq8uvbtWE2r.99> (last visited Jan. 7, 2014).

56. JULES WITCOVER, *PARTY OF THE PEOPLE: A HISTORY OF THE DEMOCRATS* 426–27, 429–31 (2003).

57. *Id.*

58. MARY C. BRENNAN, *TURNING RIGHT IN THE SIXTIES: THE CONSERVATIVE CAPTURE OF THE GOP* 42 (1995).

stormed out of the 1948 Democratic National Convention.<sup>59</sup> As a result, Southern Democrats and Conservative Republicans formed an alliance called the “Inner Club”<sup>60</sup> that later resulted in the States’ Rights Democratic Party or the more commonly known “Dixiecrats.” Led by Strom Thurmond, their platform was one of segregation and racial purity.<sup>61</sup> And while they won only thirty-nine electoral votes, they signaled a new racialization of the two-party system.<sup>62</sup>

By 1964, Thurmond switched his party allegiance to the Republicans, and in doing so, set a precedent for other GOP members to oppose measures to achieve racial equality and to abandon the chase for black votes—the “Southern Strategy.”<sup>63</sup> Thurmond, like many GOP members, opposed the 1964 Civil Rights Act and helped unify the Republican Party under the banner of staunch conservatism by critiquing Johnson’s handling of the disorder and violence of various 1960s protest movements.<sup>64</sup> The GOP actively contended that the Civil Rights Act would only worsen race relations.<sup>65</sup> Conservatives became a dominant force in the 1960s and gained control of the Republican Party by 1964.<sup>66</sup> Consequently, the riots of the summer of 1964, the Civil Rights Movement, and the growth of Black Power together put Lyndon Johnson in a precarious situation—he had to keep from alienating white voters without losing his black constituency.<sup>67</sup> By the late 1960s, the GOP had a firm hold on the white and conservative South; the Southern Strategy led to a full-scale electoral realignment of Southern states to the Republican Party, but at the expense of losing more than ninety percent of black voters to the Democratic Party.<sup>68</sup>

The GOP turned full scale to abstract and implicit racial messaging to retain white conservative voters. In 1981, former Republican Party strategist Lee Atwater gave an interview discussing the racialized political strategy of the GOP:

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59. LIBRARY OF CONGRESS, DEMOCRATIC NATIONAL POLITICAL CONVENTIONS, 1832-2008, (2013) available at [http://www.loc.gov/rr/main/democratic\\_conventions.pdf](http://www.loc.gov/rr/main/democratic_conventions.pdf).

60. EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* 54 (2003).

61. MATTHEW W. HUGHEY & GREGORY S. PARKS, *THE WRONGS OF THE RIGHT: RACE, LANGUAGE, AND THE REPUBLICAN PARTY IN THE AGE OF OBAMA* (forthcoming 2014).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. BRENNAN, *supra* note 58, at 1–2.

67. *Id.* at 83.

68. R.W. Apple, Jr., *G.O.P. Tries Hard to Win Black Votes, but Recent History Works Against It*, N.Y. TIMES, Sept. 19, 1996, at B11.

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You start out in 1954 by saying, “Nigger, nigger, nigger.” By 1968 you can’t say “nigger”—that hurts you. Backfires. So you say stuff like forced busing, states’ rights and all that stuff. You’re getting so abstract now [that] you’re talking about cutting taxes, and all these things you’re talking about are totally economic things and a by-product of them is [that] blacks get hurt worse than whites.

And subconsciously maybe that is part of it. I’m not saying that. But I’m saying that if it is getting that abstract, and that coded, that we are doing away with the racial problem one way or the other. You follow me—because obviously sitting around saying, “We want to cut this,” is much more abstract than even the busing thing, and a hell of a lot more abstract than “Nigger, nigger.”<sup>69</sup>

When Ronald Reagan spoke of supposed “Welfare Queens” gaming the system, voters knew what he meant.<sup>70</sup> This latter imagery melded the Republicans’ focus on lower taxes and smaller government with whites’ racial animosity. The message to whites was implicit but clear: your taxes are high because Lyndon Johnson’s programs are funneling your money to undeserving black women. These seemingly race-neutral campaign themes, welfare and crime, have demonstrably racially-loaded undertones.<sup>71</sup>

In 1985, the national Democratic Party backed a series of focus groups to ascertain why working-class whites had abandoned their traditional support for the Party.<sup>72</sup> Pollster Stanley Greenberg attributed politicized white flight to dissatisfaction with the Democratic Party’s increasing association with black voters.<sup>73</sup> These defectors expressed an intense distaste for issues salient to black voters and even for black voters themselves. Whites’ racial animus influenced their thinking about, and attitudes toward, government and political issues. Blacks became an easy scapegoat for what whites perceived to be wrong in their lives; blacks were a “serious obstacle to their personal

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69. Bob Herbert, *Impossible, Ridiculous, Repugnant*, N.Y. TIMES, Oct. 6, 2005, at A37 (alterations in original).

70. See SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, *THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN* 178 (2004).

71. See Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 383–91 (1997) (analyzing several experiments demonstrating that blacks are more likely to be seen as criminal); see also Fred Slocum, *White Racial Attitudes and Implicit Racial Appeals: An Experimental Study of ‘Race Coding’ in Political Discourse*, 29 POL. & POL’Y 650, 650 (2001).

72. Stanley B. Greenberg, *Goodbye, Reagan Democrats*, N.Y. TIMES, Nov. 11, 2008, at A29.

73. *Id.*

advancement.”<sup>74</sup> “Being black” then became a perceived social advantage. Conversely, their whiteness supposedly relegated them to lower-class status. Personal decisions to segregate themselves from blacks influenced their belief that white neighborhoods were safe and decent places. And just as these whites moved to the suburbs to flee increasing integration in urban public schools, so, too, they shunned the increasingly integrated Democratic Party and its support for “hot button” racial topics like affirmative action. Arguably, these former Democrats found a new home in the Republican Party.

In recent years, social scientists have measured the distinction between liberal and conservative racial attitudes. Some researchers suggest that personality and disposition serve to influence and guide racial prejudice and acts of discrimination.<sup>75</sup> Throughout the 1950s and ‘60s, social scientists argued that some individuals harbored a generalized bias against out-groups. This “authoritarian personality” disorder was marked by a robust sense of conventionalism, aggression, toughness, and power.<sup>76</sup> However, by the 1990s, researchers found that Right-wing authoritarians—individuals who strongly endorse traditional values—are inclined to act aggressively toward out-group members, including blacks, while acting kindly toward other members of their in-groups.<sup>77</sup> Soon, researchers centered their attention on more than aggression, addressing the “Big Five” personality traits (i.e., openness, conscientiousness, extroversion, agreeableness, and neuroticism). Psychologists Bo Ekehammar and Nazar Akrami’s review of studies on the relationship between personality and racial attitudes found that “Openness to Experience” seems to have a stronger

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74. Frederick Slocum & Yueh-Ting Lee, *Racism, Racial Stereotypes, and American Politics*, in 1 THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION 61, 62 (Jean Lau Chin ed., 2004) (citation omitted).

75. See generally Bart Duriez & Bart Soenens, *The Intergenerational Transmission of Racism: The Role of Right-wing Authoritarianism and Social Dominance Orientation*, 43 J. RES. PERSONALITY 906 (2009) (explaining how research suggests that racism and prejudice dispositions are transmitted from one generation to the next due to a “fundamental intergenerational transmission of ideology”).

76. See Edward A. Shils, *Authoritarianism: “Right and “Left,”* in STUDIES IN THE SCOPE AND METHOD OF “THE AUTHORITARIAN PERSONALITY:” CONTINUITIES IN SOCIAL RESEARCH 24, 28–42 (Richard Christie & Marie Jahoda eds., 1954).

77. Bernard E. Whitley Jr., *Right-Wing Authoritarianism, Social Dominance Orientation, and Prejudice*, 77 J. PERSONALITY & SOC. PSYCHOL. 126, 126 (1999); see generally Bob Altemeyer, *The Other “Authoritarian Personality,”* in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 47–92 (Mark P. Zanna ed., 1998) (discussing research conducted in the 1990s which analyzes the personality traits of Right-wing authoritarians).

relationship with measures of prejudice and interracial attitudes.<sup>78</sup> In a 2005 study, social psychologist Francis Flynn found that among whites, Openness was inversely related to racial attitudes and positively related to impressions of a fictitious black person.<sup>79</sup> Moreover, Openness to Experience was also inversely related to impressions of black interviewees after they observed informal interviews of white and black targets.<sup>80</sup> Accordingly, Openness to Experience is a key personality trait negatively correlated with right-wing political ideologies.<sup>81</sup> In fact, psychologist Paul Trapnell noted that although most scholars “do not equate [O]penness to values with liberalism, they have on occasion identified liberal values with this facet.”<sup>82</sup>

Other scholars have focused on “symbolic racism.” As sociologists Michael Tesler and David O. Sears write, the presence of symbolic racism is marked by four beliefs: (1) that discrimination against blacks has largely declined; (2) that black disadvantage is the fault of blacks’ supposedly poor work ethic; (3) that blacks demand too many resources; and (4) that blacks have received more than they deserve.<sup>83</sup> Hence, social scientists argue that symbolic racism has replaced the Jim Crow-style overt racism in three ways. First, virulent and overt forms of racism fell out of social favor in the United States—save in the Deep South—and thus could not influence politics writ large.<sup>84</sup> Second, full-scale opposition to black political candidates and liberal, racially targeted policies was less about real or perceived racial threats to whites’ interests than it was the result of beliefs in abstract moral principles, such as obedience, egalitarianism, and meritocracy.<sup>85</sup> Third, symbolic racism emerged from “early socialized negative feelings about [b]lacks” and conservative values.<sup>86</sup> It is this latter point that has caused a considerable backlash among academics and the lay

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78. Bo Ekehammar & Nazar Akrami, *The Relation Between Personality and Prejudice: A Variable- and a Person-Centred Approach*, 17 *EUR. J. PERSONALITY* 449, 459–60 (2003).

79. Francis J. Flynn, *Having an Open Mind: The Impact of Openness to Experience on Interracial Attitudes and Impression Formation*, 88 *J. PERSONALITY & SOC. PSYCHOL.* 816, 816 (2005).

80. *Id.*

81. Alain Van Hiel et al., *The Relationship Between Openness to Experience and Political Ideology*, 28 *PERSONALITY & INDIVIDUAL DIFFERENCES* 741, 742 (2000).

82. Paul D. Trapnell, *Openness Versus Intellect: A Lexical Left Turn*, 8 *EUR. J. PERSONALITY* 273, 282 (1994).

83. MICHAEL TESLER & DAVID O. SEARS, *OBAMA’S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA* 17–18 (Benjamin I. Page et al. eds., 2010).

84. *Id.*

85. *Id.*

86. *Id.*

public.<sup>87</sup> The variety of theories that capture the relationship between political ideology and racial attitudes, though rich in their description and supported by a robust body of empirical social science, tend to not directly address the extent to which such attitudes may be automatic, if not subconscious. Implicit bias research over the past couple of decades, however, has helped elucidate this relationship.

## II. THE AUTOMATICITY OF RACIAL BIAS

People are complex. One's stated attitudes and beliefs often fail to align with one's actual thoughts and feelings. In experimental settings, for example, social desirability—the tendency of research study participants to reply in a manner that they believe will be viewed favorably by the experimenter—may serve as a motivating factor behind lack of candor.<sup>88</sup> In social settings, impression management, particularly saving face, may be a driving force.<sup>89</sup> Given that race remains such a contentious social issue, it serves as a catalyst for impression management—with whites, for example, seeking self- and other's-perceptions that they are racial egalitarians. As such, they attempt to cultivate a shared sense of self that is color-blind, or even non-prejudiced in disposition or political proclivity—even more so than nonwhite racial groups do.<sup>90</sup> This desire is expected given widely shared beliefs that whites are racially prejudiced.<sup>91</sup> White presentations of self, rest not necessarily on an effort to intentionally deceive others but rather on their lack of adequate appreciation for how deeply entrenched and collectively shared pro-white worldviews are.

The assumption that human thoughts are entirely accessible to conscious awareness, and that human behavior is largely governed by conscious agency, has been severely undermined in recent years. People's express reports of their cognitive processes are often inconsistent with their actual judgments. Hence, shared cultural logics and psycho-

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87. See Paul M. Sniderman & Philip E. Tetlock, *Symbolic Racism: Problems of Motive Attribution in Political Analysis*, 42 J. SOC. ISSUES 129, 130–31 (1986).

88. Douglas P. Crowne & David Marlowe, *A New Scale of Social Desirability Independent of Psychopathology*, 24 J. OF CONSULTING PSYCHOL. 349, 349 (1960); Maryon F. King & Gordon C. Bruner, *Social Desirability Bias: A Neglected Aspect of Validity Testing*, 17 PSYCHOL. & MARKETING 79, 80 (2000).

89. Erving Goffman, *Embarrassment and Social Interaction*, 62 AM. J. SOC. 264, 265 (1956).

90. Hilary B. Bergsieker & J. Nicole Shelton, *To Be Liked Versus Respected: Divergent Goals in Interracial Interactions*, 99 J. PERSONALITY & SOC. PSYCHOL. 248, 249 (2010).

91. Jacquie D. Vorauer et al., *How Do Individuals Expect to Be Viewed by Members of Lower Status Groups? Content and Implications of Meta-Stereotypes*, 75 J. PERSONALITY & SOC. PSYCHOL. 917, 917 (1998).



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logical influences on judgment seem to operate wholly above people's heads and outside of people's conscious awareness,<sup>92</sup> so much so that social psychologists now contend that people rely on two distinct systems of judgment. One system is rapid, intuitive, unconscious, and error prone.<sup>93</sup> Another is slow, deductive, and deliberative, but much more accurate.<sup>94</sup> The two systems may operate simultaneously, but produce contradictory responses.<sup>95</sup> Moreover, the intuitive system can often dictate choice, while the deductive system may fall behind to search for rationales that align with accessible memories and understandings.<sup>96</sup> As a result, individuals may be unaware (1) of the existence of a significant stimulus that influenced a response, (2) of the existence of the response, and (3) that the stimulus affected the response.<sup>97</sup>

Putting this dual system to a test, social psychologists Timothy Wilson and Richard Nisbett required participants to rate four identical pairs of stockings.<sup>98</sup> Forty percent selected the stocking in the right-most displayed position, while thirty-one percent selected the stocking just to the left of the most selected stocking.<sup>99</sup> In essence, there was a position effect. Out of the fifty-two participants, eighty spontaneous responses were given for why they made their selection.<sup>100</sup> None mentioned the position of the stocking as the reason for

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92. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4, 10–11 (1995); Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept*, 109 *PSYCHOL. REV.* 3, 17–18 (2002).

93. See generally Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49–81 (Thomas Gilovich et al. eds., 2002) (describing the intuitive cognitive system as rapid, intuitive, unconscious, and error prone).

94. See generally *id.* (describing the reflective cognitive system as slow, deductive, deliberate, and more accurate); Steven A. Sloman, *Two Systems of Reasoning*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 379–96 (Thomas Gilovich et al. eds., 2002) (describing the qualities of two forms of cognitive reasoning).

95. Sloman, *supra* note 94, at 383.

96. See Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 *PSYCHOL. REV.* 231, 248 (1977) (noting that people's reports are based on a priori, implicit causal theories, or judgments about the extent to which a particular stimulus is a plausible cause of a given response). Cf. Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 *PSYCHOL. BULL.* 3, 15 (1996) (“The associative system however always has its opinion heard and, because of its speed and efficiency, often precedes and thus neutralizes the rule-based response.”).

97. Nisbett & Wilson, *supra* note 96, at 231.

98. Timothy DeCamp Wilson & Richard E. Nisbett, *The Accuracy of Verbal Reports About the Effects of Stimuli on Evaluations and Behavior*, 41 *SOC. PSYCHOL.* 118, 123 (1978).

99. *Id.*

100. *Id.* at 124.

the selection.<sup>101</sup> When the subjects were directly asked whether the order of the stockings might have influenced their decision, only one indicated that reason as a possibility.<sup>102</sup> One participant noted that she was currently taking multiple psychology classes and knew a great deal about order effects.<sup>103</sup> But she, nonetheless, did not display a bias for stockings further to the right on the display. In fact, she chose the stocking in the second position.<sup>104</sup>

Conventional wisdom and even “naïve” psychological conceptions of human thought and social behavior<sup>105</sup> may place heavy influence on select thoughts and conscious intentions as the primary cause of beliefs and behavior.<sup>106</sup> The challenge to such an assessment is that it has long been known that social influences within interview and research settings can lead individuals to inaccurately describe their explicit beliefs.<sup>107</sup> Furthermore, people’s explanations as to their behavior often consist of irrational groping for answers, and thus they produce answers that are highly improbable, if not impossible.<sup>108</sup> Hence, when politically conservative voters, activists, commentators, or politicians are asked about what appears to be overly harsh or even racially motivated speech or actions, many defend themselves with the certainty that they know themselves not to be “racist.”<sup>109</sup> That is, in our culture, we define the “racists” as hood-wearing and swastika-

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. DANIEL D. HUTTO & MATTHEW RATCLIFFE, FOLK PSYCHOLOGY RE-ASSESSED 2 (2007); MATTHEW RATCLIFFE, RETHINKING COMMONSENSE PSYCHOLOGY: A CRITIQUE OF FOLK PSYCHOLOGY, THEORY OF MIND AND SIMULATION 42 (2007); Terrence Horgan & James Woodward, *Folk Psychology Is Here to Stay*, in MIND AND COGNITION: AN ANTHOLOGY, 419–36 (William G. Lycan & Jesse J. Prinz eds., 2008).

106. Anna Wierzbicka, *On Folk Conceptions of Mind, Agency and Morality*, 6 J. COGNITION & CULTURE 165, 169 (2006).

107. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 230–31 (1957) (aiding our understanding of individuals’ inability to accurately identify the causes of their thought and behavior); Milton J. Rosenberg, *The Conditions and Consequences of Evaluation Apprehension*, in ARTIFACT IN BEHAVIORAL RESEARCH, 279 (Robert Rosenthal & Ralph L. Rosnow eds., 1969); Martin T. Orne, *On the Social Psychology of the Psychological Experiment: With Particular Reference to Demand Characteristics and Their Implications*, 17 AM. PSYCHOL. 779, 777–78 (1962); see also Stephen J. Weber & Thomas D. Cook, *Subject Effects in Laboratory Research: An Examination of Subject Roles, Demand Characteristics, and Valid Inference*, 77 PSYCHOL. BULL. 278 (1972).

108. See generally DANIEL KAHNEMAN, THINKING FAST AND SLOW (2013) (describing the two-systems of cognitive judgment and how individuals seek to explain their beliefs and conduct in ways that are consistent with what they know or believe about themselves).

109. MATTHEW W. HUGHEY, WHITE BOUND: NATIONALISTS, ANTIRACISTS, AND THE SHARED MEANINGS OF RACE 8 (2012).

bearing ignoramuses. They can't be "racist," so they think, because they do not comport with the image of such a racist and they do not actively "hate" people of color. Once racism is conceived as a conscious and overt stereotypical thought or action, one too easily divides the world into those who are "sick" with the disease of prejudice and those who are "healthy" anti- or non-racists.

Thus, a growing body of research on implicit social cognition destabilizes the notion that human thoughts and behaviors are purely accessible and volitional. This body of research suggests that individuals lack absolute awareness of their own thoughts and the ability to control behaviors resulting from those thoughts. Since the 1980s, research on implicit memory has opened the door for the development of measures of other implicit and socially shared mental phenomena. Chief among these advancements were several measures for implicit attitudes.<sup>110</sup> By "attitude" we mean a hypothetical construct that represents the degree to which an individual likes or dislikes, or acts favorably or unfavorably toward, someone or something.<sup>111</sup> By using the term "implicit," we follow psychologists Anthony Greenwald and Mahzarin Banaji, who define implicit attitudes as "introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects."<sup>112</sup> So, also, people can evidence ambivalence toward select persons, groups, or objects, such that they are imbued with both positive and negative attitudes toward the subject in question. Yet, implicit attitudes are of greatest interest when they differ from explicit attitudes about the same category of individuals or things. Such discrepancies, referred to as dissociations,<sup>113</sup> are often observed in attitudes toward stigmatized groups—e.g., blacks.<sup>114</sup>

Biases certainly reflect preferences for particular groups or individuals. Accordingly, within biases, there are opposite sides to the

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110. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* 41 (2013) (examining new evidence supporting the position that social behavior is an unconscious function).

111. See Alice H. Eagly & Shelly Chaiken, *Attitude Structure and Function*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 269, 269 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

112. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 *PSYCHOL. REV.* 4, 8 (1995).

113. See generally Michael A. Olson & Russell H. Fazio, *Implicit and Explicit Measures of Attitudes: The Perspective of the MODE Model*, in *ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES* 19–64 (Richard E. Petty et al. eds., 2009) (exploring the implications of interpreting observed dissociations).

114. RICHARD E. PETTY ET AL., *ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES* (2008).

same coin—favorable and unfavorable categorizations of comparative groups. For example, in-group bias designates favoritism toward one's own group.<sup>115</sup> Such preferences may result in discriminatory biases. These biases are called implicit biases, which may diverge from an individual's expressed beliefs and result in behavior inconsistent with individuals' intended behavior. Accordingly, these implicit attitudes and biases on race might very well shape opinions in other realms, such as politics or public policy. To measure such an effect, social scientists would need to develop a strategy that avoided self-reporting. While self-reports of explicit attitudes have served as the social and behavioral sciences' typical method of attitude measurement, the drawback is that respondents may be unwilling or unable to report their attitudes in an unbiased or accurate manner.<sup>116</sup> Moreover, research shows respondents' answers are dependent on social desirability and interviewer effects—e.g., who asks, how they ask, and what the context of their asking is.<sup>117</sup> These concerns gave rise to measures that would indirectly gauge attitude. It is presumed that research participants are unaware of the relationship between these measures and the attitudes they are employed to ascertain. Indirect measures thus seem to minimize respondents' strategic responses to incentives.<sup>118</sup>

Such indirect measures were realized when social scientists applied subliminal priming techniques to measure implicit attitudes.<sup>119</sup> First, one uses a priming procedure to establish the degree to which the presentation of an object would influence study participants' positive or negative indication of a subsequently presented target. In one study, researchers found greater facilitation “when positively valued primes were followed by positive targets and when negatively valued primes were followed by negative targets than when the prime-target pairs were incongruent in valence.”<sup>120</sup> That is, objects that evoked negative attitudes caused subsequent evaluations of other, even nonrelated objects, to be negative. Nearly a decade later, researchers

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115. Luigi Castelli et al., *Implicit Ingroup Metafavoritism: Subtle Preference for Ingroup Members Displaying Ingroup Bias*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 807, 807–18 (2008).

116. See KAHNEMAN, *supra* note 108, at 1, 3.

117. SEYMOUR SUDMAN ET AL., THINKING ABOUT ANSWERS: THE APPLICATION OF COGNITIVE PROCESSES TO SURVEY METHODOLOGY 74 (1995); ROGER TOURANGEAU ET AL., THE PSYCHOLOGY OF SURVEY RESPONSE 302 (2000).

118. BERND WITTENBRINK & NORBERT SCHWARTZ, IMPLICIT MEASURES OF ATTITUDES 1–16 (Bernd Wittenbrink & Norbert Schwartz eds., 2007).

119. Russell H. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. PERSONALITY & SOC. PSYCHOL. 229, 230 (1986).

120. *Id.* at 235.

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used African American and white faces as primes and then employed adjectives with positive or negative connotations.<sup>121</sup> Participants pushed keys labeled either “good” or “bad” as quickly as possible.<sup>122</sup> White study participants’ reaction times to the good words were faster following presentation of white faces.<sup>123</sup> Their reaction times to the bad words were quicker when those words followed the presentation of black faces.<sup>124</sup> This work was monumental in that it gave direct, empirical support for the long-theorized hypothesis that within the context of a historically white-dominated society, blackness reproduced negative dispositions compared to whiteness.

Building upon this work, the Implicit Association Test (IAT) became the dominant attitude measure.<sup>125</sup> Today, it is employed to circumvent strategic responding. IAT-related research has found people to harbor a wide range of implicit attitudes concerning many aspects of social life, some of which people had previously thought rather mundane. For example, the research indicates that people hold implicit attitudes about such everyday aspects of life as yogurt brands, fast food restaurants, and soft drinks.<sup>126</sup> While these implicit attitudes may predict behavior thought inconsequential,<sup>127</sup> the effect of implicit attitudes toward group identities—whether racial or political—engenders a heightened level of concern.

Research on implicit racial attitudes and bias—particularly research focused on blacks—stands as the most robust area of current research. As previously indicated, people’s explicit and implicit attitudes are not completely concordant. Such discordance is most evident when it comes to the sensitive topic of race. Research suggests that Latinos demonstrate a limited explicit preference for whites (25.3% favor) over blacks (15.0% favor), with most showing no pref-

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121. Russell H. Fazio et al., *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 *J. PERSONALITY & SOC. PSYCHOL.* 1013, 1015 (1995).

122. *Id.*

123. *Id.* at 1017.

124. *Id.*

125. Steven R. Prueett & Fong Chan, *The Development and Psychometric Validation of the Disability Attitude Implicit Association Test*, 51 *REHABILITATION PSYCHOL.* 202–13 (2006).

126. Dominika Maison et al., *Predictive Validity of the Implicit Association Test in Studies of Brands, Consumer Attitudes, and Behavior*, 14 *J. CONSUMER PSYCHOL.* 405, 408–12 (2005).

127. Malte Friese et al., *Implicit Consumer Preferences and Their Influences on Product Choice*, 23 *PSYCHOL. & MARKETING* 727, 727, 733–34 (2006) (finding that participants who possessed incongruent explicit and implicit preferences in regard to generic food products and well-known food brands were more likely to choose the implicitly preferred brand when choices were made under time pressure).

erence (59.7%).<sup>128</sup> At the implicit level, however, Latinos show a substantial preference for whites (60.5% favor) over blacks (10.2% favor), with far fewer showing preferential neutrality (29.2%) in comparison to their explicit preferences.<sup>129</sup> In comparison to Latinos, Asians and Pacific Islanders show more of an explicit preference for whites (32.9% favor) over blacks (9.6% favor), with only slightly fewer showing preferential neutrality (57.5%).<sup>130</sup> At the implicit level, however, Asians and Pacific Islanders demonstrate a substantial preference for whites (67.5% favor) over blacks (7.7% favor), with far fewer showing preferential neutrality (24.8%) in comparison to their explicit preferences.<sup>131</sup> Whites show much more of an explicit preference for whites (40.7% favor) than blacks (3.4% favor), especially when compared to other racial groups, but still more than half (56.0%) show no preference.<sup>132</sup> At the implicit level, however, whites show a robust preference for whites (71.5% favor) over blacks (6.8% favor), with only 21.7% showing no preference.<sup>133</sup> Indeed, whites express more in-group favoritism on implicit measures (78.4%) than on explicit measures (51.1%).<sup>134</sup>

From where do racial biases stem? Consider that the mild distinction between liberals and conservatives in implicit racial biases may reflect differential exposures to anti-black sentiments, even very early in life. In an IAT assessment of white American six-year-olds, ten-year-olds, and adults, even the youngest group showed implicit pro-white/anti-black bias (self-reports also aligned with this finding).<sup>135</sup> The ten-year-olds and adults showed the same magnitude of implicit race bias, but self-reported racial attitudes became substantially less biased in older children and vanished entirely in adults.<sup>136</sup> Though this research does not indicate where such implicit biases originate, it does underscore that individuals both learn biases early on

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128. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 958 (2006).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 897 (2004).

135. Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 55–56 (2006).

136. *Id.* at 56.

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and learn how to hide such biases through an overt comportment with socially desirable answers and egalitarian norms.

Another study underscores these findings. Children's implicit racial attitudes may develop from exposure to anti-black socializing agents. Fourth- and fifth-grade children were asked to complete measures of implicit and explicit racial attitudes, as well as a survey assessing the degree to which the children identified with their parents.<sup>137</sup> Parents completed a survey that measured their attitudes toward blacks.<sup>138</sup> Results reveal a greater correspondence between parents' prejudice and children's prejudice among those children who were highly identified with their parents vis-à-vis those who were less identified with their parents.<sup>139</sup> Similarly, another study indicated that mothers' (but not fathers') implicit racial attitudes predict racial preferences among three- to six-year-olds. Parents' explicit racial attitudes, however, did not predict their children's preferences.<sup>140</sup>

These findings suggest that early life experiences greatly shape how individuals become oriented toward liberal or conservative political ideologies. Given this research, one can imagine a household that explicitly espouses the ideals of racial equality and recounts the horrors of American slavery, the virtues of the Civil Rights Movement, and the value of racial egalitarian policies, like affirmative action. Comparatively, imagine a household where parents bemoan blacks' acquisition of "unearned" advances and rights, complain about blacks on welfare, and describe blacks' supposed biologically or culturally rooted dysfunctions. One would reasonably expect children growing up in these environments to cultivate vastly different racial dispositions, especially toward blacks. Accordingly, if we consider the still-racialized social institutions of the nation, from racially segregated schools to houses of worship, neighborhoods, media, and workplaces, we face a possibly static, if not worsening, political-racial divide in coming generations.

Social psychologist, Laurie Rudman's proposition that individuals' early experiences may more strongly be reflected in implicit than explicit attitudes may explain why implicit attitudes generally high-

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137. Stacey Sinclair et al., *The Relationship Between Parental Racial Attitudes and Children's Implicit Prejudice*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 283, 284–85 (2005).

138. *Id.* at 285.

139. *Id.* at 287.

140. Luigi Castelli et al., *The Transmission of Racial Attitudes Within the Family*, 45 DEVELOPMENTAL PSYCHOL. 586, 587 (2009).

light more bias.<sup>141</sup> Strikingly, as Rudman also noted, cultural factors' influences on implicit attitudes also helps to explain why individuals often display implicit attitudes that appear more in line with their general cultural milieu than with experiences from their individual upbringing.<sup>142</sup>

Empirical research lends some credence to the argument that culture informs implicit attitudes. For example, mere exposure to negative representations of certain categories of people may bias individuals against such categories of individuals.<sup>143</sup> In one study by Rudman and Lee, primed subjects were exposed to violent and misogynistic rap music.<sup>144</sup> Control subjects were exposed to popular music.<sup>145</sup> In their first experiment, violent and misogynistic rap music increased the automatic associations underlying evaluative racial stereotypes in both high and low prejudiced subjects.<sup>146</sup> Explicit stereotyping, however, was dependent on priming and subjects' prejudice level.<sup>147</sup> In their second experiment, the priming manipulation was followed by what seemed to be an unrelated person perception task in which subjects rated black or white targets described as behaving ambiguously.<sup>148</sup> Primed subjects judged a black target less favorably than a white target.<sup>149</sup> Control subjects, however, rated black and white targets similarly.<sup>150</sup> Subjects' prejudice levels did not moderate these findings, suggesting the robustness of priming effects on implicit attitudes.<sup>151</sup>

In another study, Gilliam and Iyengar explored how local news crime scripts might create ingrained heuristics for understanding crime and race.<sup>152</sup> They created variations of a local newscast, and

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141. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 959 (2006) (citing Laurie A. Rudman, *Sources of Implicit Attitudes*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 79–80 (2004)).

142. *Id.*

143. *But see* Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 806–07 (2001).

144. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133, 135 (2002).

145. *Id.*

146. *Id.* at 138–39.

147. *Id.* at 139.

148. *Id.*

149. *Id.* at 145.

150. *Id.*

151. *Id.*

152. Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 561 (2000).



among them was one in which there was a crime story with a black suspect mug shot, and another crime story with a white-suspect mug shot.<sup>153</sup> Both suspects were represented by the same morphed photograph; the only difference was skin hue in order to control for facial expression and features.<sup>154</sup> The suspect appeared for only five seconds in a ten-minute newscast.<sup>155</sup> Nonetheless, having seen the black suspect, whites showed 6% more support for punitive remedies than did the control group, which saw no crime story.<sup>156</sup> When they were instead exposed to the white suspect, their support for punitive remedies increased by only 1%, which was not statistically significant.<sup>157</sup> These studies suggest that at least some portion of implicit biases is learned from the cultural milieu. Here, a daily diet of media content (e.g., FOX News, Rush Limbaugh) that focuses on the depravity of people of color and framing them as moochers—seeking and attaining unearned privileges—may amplify racial hostility on the political Right and opposition to policies and programs that seek to level the racial playing-field.

Without question, race matters. And racial categories influence how people perceive and judge phenomena. This process occurs whether people are conscious of it or not. Such findings point toward the necessity to move past discussions of whether or not people are “racist” based on their self-appraisals—which is clearly methodologically flawed if not an obvious conflict of interest. The use of such research is particularly important in a context of the political Right’s opposition to policies like affirmative action.

### III. POLITICAL IDEOLOGY AND UNCONSCIOUS RACE BIAS

The theory of “principled conservatism” suggests that white opposition to policies, like affirmative action, is largely derived from race-neutral political ideologies and value systems (e.g., self-reliance and a desire for small government), rather than racist or racialized ideologies or opinion.<sup>158</sup> The principled conservatism perspective

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153. *Id.* at 563.

154. *Id.*

155. *Id.* at 567.

156. *Id.* at 567–68.

157. *Id.* at 568.

158. DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 203 (Benjamin I. Page ed., 1996); Jack Citrin & Donald Green, *The Self-Interest Motive in American Public Opinion*, in 3 *RESEARCH IN MICROPOLITICS* 1 (Samuel Long

emerged from the dominant discourse of perceived American post-racialism<sup>159</sup>—a widely shared perspective and narrative that racism and dominance-oriented motives no longer undergird white attitudes toward race-targeted policies.<sup>160</sup> Proponents of principled conservatism contend that political values—not racism—provide the dominant framework for understanding race-based policies.<sup>161</sup> Accordingly, those who subscribe to the principled conservative model believe that once the effects of ideology (i.e., conservatism) and race-neutral political values are accounted for, racism and dominance-oriented attitudes should hold no predictive power in whites' opposition to race-based policies, such as affirmative action.<sup>162</sup> This theory has found some support in studies that indicate (1) that the anti-black effect is weakly related to conservatism and opposition to race-targeted policies<sup>163</sup> and (2) that conservatives are not more likely to hold a double standard with regard to blacks in the allocation of aid vis-à-vis disadvantaged members of other groups.<sup>164</sup> These are points we aim to upend.

To be clear, the principled-conservatism model does not suggest that opposition to race-targeted policies is free from racism, but rather that the opposition-racism relationship is more likely to be found among the poorly educated.<sup>165</sup> Theoretically, then, since some individuals supposedly lack the intellectual sophistication to understand both the explicitly egalitarian ethos of American political culture and abstract ideas, their attitudes toward race-based policies and politics

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ed., 1990); David O. Sears, *Symbolic Racism*, in *ELIMINATING RACISM: PROFILES IN CONTROVERSY* 53, 55–56 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988); John B. McConahay, *Modern Racism and Modern Discrimination: The Effects of Race, Racial Attitudes, and Context on Simulated Hiring Decisions*, 9 *PERSONALITY & SOC. PSYCHOL. BULL.* 551 (1983); Jim Sidanius et al., *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 476–90 (1996).

159. See Sears, *supra* note 158, at 55; Sidanius et al., *supra* note 158.

160. Kristina A. Lane & John T. Jost, *Black Man in the White House: Ideology and Implicit Racial Bias in the Age of Obama*, in *THE OBAMAS AND A (POST) RACIAL AMERICA?* 48, 48 (Gregory S. Parks & Matthew W. Hughey eds., 2011).

161. See PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 78 (1997); Paul M. Sniderman, Gretchen C. Crosby & William G. Howell, *The Politics of Race, in RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA* 236, 236–37 (David O. Sears, Jim Sidanius & Lawrence Bobo eds., 2000).

162. SNIDERMAN & CARMINES, *supra* note 161, at 78.

163. See Paul M. Sniderman et al., *Policy Reasoning and Political Values: The Problem of Racial Equality*, 28 *AM. J. POL. SCI.* 75, 84 (1984); Paul M. Sniderman et al., *The New Racism*, 35 *AM. J. POL. SCI.* 423, 436 (1991).

164. See SNIDERMAN & CARMINES, *supra* note 161, at 78; PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 113 (Harvard Univ. Press 1993); Sniderman et al., *The New Racism*, *supra* note 163.

165. See Sniderman et al., *The New Racism*, *supra* note 163, at 437.

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are driven by racial animus.<sup>166</sup> In contrast, well-educated, principled conservatives will base their policy positions on abstract principles and articulate them in light of express racial egalitarian norms, thus attenuating the influence of racism and in-group preference.<sup>167</sup>

However, scholars have long argued that Right-wing political conservatism hinges on the embrace of social inequality and resistance to change.<sup>168</sup> Studies of large datasets (ranging from  $n = 28,816$  to 732,881) found that at the explicit level, conservatives, when compared to liberals, generally favor higher-status groups to lower-status groups (e.g., others to Arabs-Muslims, others to Jews, straight people to gays, whites to blacks, light-skinned to dark-skinned people, and white to black children).<sup>169</sup> Such research destabilizes the contention that education, to the exclusion of political orientation, is the key variable for determining explicit racial bias. But what about implicit racial bias? The same pattern occurs. For example, at the implicit level, research suggests that conservatives, when compared to liberals, favor higher-status groups to lower-status groups (e.g., thin people to overweight people, others to Arabs-Muslims, others to Jews, others to the disabled, straight people to gays, whites to blacks, light-skinned to dark-skinned people, and white to black children).<sup>170</sup> The notion that liberals hold more egalitarian implicit attitudes than conservatives has found support in an array of studies.<sup>171</sup> Importantly, for whites and blacks both, the more conservative they are, the more they prefer whites over blacks.<sup>172</sup>

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166. Christopher M. Federico & Jim Sidanius, *Racism, Ideology, and Affirmative Action Revisited: The Antecedents and Consequences of "Principled Objections" to Affirmative Action*, 82 J. PERSONALITY & SOC. PSYCHOL. 488, 489 (2002).

167. See Paul M. Sniderman et al., *Reasoning Chains: Causal Models of Policy Reasoning in Mass Publics*, 16 BRIT. J. POL. SCI. 405, 417 (1986); Sniderman et al., *The New Racism*, *supra* note 163, at 437.

168. See generally FRED N. KERLINGER, *LIBERALISM AND CONSERVATISM: THE NATURE AND STRUCTURE OF SOCIAL ATTITUDES* (1984) (explaining that liberalism and conservatism are social attitudes and cognitive processes that are tied to the life of society); Jerry Z. Muller, *Conservatism: Historical Aspects*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 2624, 2625–26 (Neil J. Smelser & Paul B. Baltes eds., Vol. 4 2001); Samuel P. Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454, 455 (1957).

169. Brian A. Nosek et al., *The Politics of Intergroup Attitudes*, in SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 486 (John T. Jost et al. eds., 2009).

170. *Id.* at 486–87.

171. See generally Jost et al., *supra* note 134, at 881 (reviewing research regarding implicit favoritism in relation to liberalism and conservatism); William A. Cunningham, John B. Nezlek & Mahzarin R. Banaji, *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1333 (2004).

172. Jost et al., *supra* note 134, at 902. Some research does indicate that while liberals and conservatives differ substantially in their explicit preferences, they are much more similar at the implicit level. *Id.* Still, at both the explicit and implicit levels, conservatives showed little dis-

At the implicit level, empirical research suggests that conservatives, when compared to liberals, favor higher status groups to lower status groups—i.e., thin to over-weight people, others to Arabs-Muslims, others to Jews, others to the disabled, straight to gay, whites to blacks, light-skinned to dark-skinned, and white to black children.<sup>173</sup> The notion that liberals hold more egalitarian implicit attitudes than conservatives has been supported by others.<sup>174</sup> For example, Jost and colleagues found that conservatism exerts opposite effects on implicit racial group preference.<sup>175</sup> For whites, the more conservative they are, the more they prefer whites over blacks. For blacks, the more conservative they are, the more they also prefer whites over blacks.<sup>176</sup>

Nosek and colleagues found, however, that while liberals and conservatives differed substantially in their explicit preferences, they were much more similar at the implicit level.<sup>177</sup> That being said, conservatives showed little discrepancy between their strong preference for higher-status groups, at both the explicit and implicit levels.<sup>178</sup> In contrast, liberals demonstrated a larger discrepancy between their implicit preference for those who are higher status and their relatively weaker explicit preference for those who are higher status.<sup>179</sup> Nosek and colleagues interpreted the results as suggesting that liberals likely have complicated or conflicted social evaluative perspectives.<sup>180</sup> As such, liberals try harder to override their implicit biases in an effort to be more explicitly egalitarian.<sup>181</sup> Comparatively, conservatives' greater consistency in their implicit and explicit social evaluations sug-

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crepancy in their strong preference for higher-status groups. *Id.* In contrast, liberals demonstrated a larger discrepancy between their implicit preference for higher-status persons and their relatively weaker explicit preference for higher-status persons. *Id.*

173. Brian A. Nosek et al., *The Politics of Intergroup Attitudes*, in *Social and Psychological Bases of Ideology and System Justification* 481–83, 485–86 (John T. Jost et al. eds., 2009) (citing Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 38–88 (2007)).

174. William A. Cunningham et al., *Implicit and Explicit Ethnocentrism: Revisiting the Ideologies of Prejudice*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1332, 1333 (2004); Jost et al., *supra* note 135, at 902.

175. Nosek et al., *supra* note 173 at 480–506.

176. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 902 (2004).

177. Nosek et al., *supra* note 173, at 480–506.

178. *Id.*

179. *Id.*

180. *Id.*

181. Nosek et al., *supra* note 169, at 488 (citing Linda J. Skitka et al., *Dispositions, Ideological Scripts, or Motivated Correction? Understanding Ideological Differences in Attributions for Social Problems*, 83 J. PERSONALITY & SOC. PSYCHOL. 470, 470–87 (2002)).

gests that they may be more inclined than liberals to justify and use their implicit biases for explicit judgment.<sup>182</sup>

Several empirical studies suggest that the distinction between political liberals and conservatives at the implicit level is meaningful beyond the extent to which that distinction predicts egalitarian attitudes. The distinction also appears to predict attitudes about public policy. In one study, Rudman and Ashmore analyzed the effect of implicit biases on economic discrimination vis-à-vis minority student organizations.<sup>183</sup> They found that a stereotype IAT—i.e., the degree to which people associate minority group members with negative attributes and majority group members with positive attributes—predicted participants' recommended funding for religious and racial minority and majority student organizations.<sup>184</sup> Participants who had implicit minority-negative and majority-positive stereotypes were more likely to recommend budget cuts for target minority student group organizations.<sup>185</sup> That is, among this group, Jewish (versus Christian), Asian (versus white), and black (versus white) student organizations were recommended to receive less money. They similarly found that an attitude IAT—i.e., the degree to which people associate pleasant and unpleasant words with blacks and whites—predicted participants' recommended funding for racial minority and majority student organizations.<sup>186</sup> Participants who had implicit pro-white associations were more likely to recommend budget cuts for Asian (versus white) and black (versus white) student organizations.<sup>187</sup>

With an eye toward national policy, Hurwitz and Peffley surveyed a representative sample of whites in order to gauge their support for allocating funds to prisons “to lock up violent criminals.”<sup>188</sup> Half the time, the researchers inserted “inner-city” between “violent” and “criminals.”<sup>189</sup> They presumed that the racialized connotation of the prime—“inner-city”—occurred outside of conscious awareness for

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182. *Id.* at 488 (citing John T. Jost et al., *Political Conservativeness as Motivated Social Cognition*, 129 *PSYCHOL. BULL.* 339–75 (2003)); Jost et al., *supra* note 134, at 902; Paul M. Sinderman et al., *The Politics of Race*, *supra* note 161, at 236.

183. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 *GROUP PROCESSES & INTERGROUP REL.* 359, 372 (2007).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 363–68.

188. Jon Hurwitz & Mark Peffley, *Playing the Race Card in a Post-Willie Horton Era: The Impact of Racialized Code Words on Support for Punitive Crime Policy*, 69 *PUB. OPINION Q.* 99, 104–09 (2005).

189. *Id.*

participants, even the participants in the prime condition were likely aware of the phrase.<sup>190</sup> Results showed that insertion of the prime made whites with negative attitudes toward blacks more likely to support prison funding; that is, explicit racial attitudes predicted policy support only when the racialized code-word was subliminally primed.<sup>191</sup>

Other studies, though not focusing on the liberal-conservative continuum, identified how implicit racial attitudes predict public policy—policies where there is a clear liberal-conservative divide. In one study, Perez focused on implicit attitudes and U.S. immigration policy.<sup>192</sup> He initially designed an IAT to measure automatic attitudes toward Latino, vis-à-vis white, immigrants.<sup>193</sup> Stimuli consisted of Latino and white surnames, and words with positive and negative connotations.<sup>194</sup> In both Perez's pilot study and web study, on average, participants more easily associated positive words with whites and negative words with Latinos.<sup>195</sup> More importantly, these implicit racial associations predict attitudes about immigration policy, above and beyond political ideology, socio-economic concerns, and measures of intolerance toward immigrants—e.g., authoritarianism and ethnocentrism.<sup>196</sup>

In their work, Knowles and colleagues found that implicit racial associations predict attitudes about legislative proposals that themselves have nothing to do with race. In this longitudinal study, researchers collected data on participants' implicit racial associations (October 28–30, 2008).<sup>197</sup> From November 1–3, 2008, researchers assessed participants' attitudes on a Likert-scale about Barack Obama—i.e., *American, patriotic, presidential, and trustworthy* versus *elitist, uppity, and radical*.<sup>198</sup> Then from November 19–21, 2008, they asked participants to report their vote for the general election.<sup>199</sup> Finally, between October 1–3, 2009, they divided participants into two

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190. *Id.*

191. *Id.*

192. Efrén O Pérez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517, 536–39 (2010).

193. *Id.* at 525.

194. *Id.*

195. *Id.* at 528–29.

196. *Id.* at 524.

197. Eric D. Knowles et al., *Racial Prejudice Predicts Opposition to Obama and His Health Care Reform Plan*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 420, 422–23 (2009).

198. *Id.*

199. *Id.*

groups.<sup>200</sup> One group completed a questionnaire that solicited ratings for Obama's health care reform plan.<sup>201</sup> The second group participated in an experiment designed to test any possible relationship between implicit racial associations and support for Obama's health reform policies.<sup>202</sup> Knowles and colleagues found that participants' implicit racial associations and their support for Obama's health care plan were mediated by negative attitudes about Obama.<sup>203</sup> Moreover, increased implicit prejudice was associated with concerns over Obama's health care policy implications.<sup>204</sup> That being said, those with higher levels of implicit pro-white associations took greater issues with a proposed health-care plan when the plan was represented as Obama's, but not when it was represented as Bill Clinton's plan.<sup>205</sup>

This robust correlation certainly poses a chicken-or-egg problem: Does being conservative make you more likely to harbor racial biases, or does the possession of racial biases make conservative ideological paradigms more attractive? While we make no claims regarding which it could be, we are confident that the "principled-conservatism" retort often evidenced is both intellectually bankrupt and morally deficient. In consideration of the former, the evidence simply fails to uphold the mantra of principled conservatism. In regard to the latter, the repeated refusal to admit that racial meanings might play a role in conservative ideology only drives home the point that the banner of "post-racialism" is devoid of ethical currency.

#### IV. THE POLITICAL PSYCHOLOGY OF AFFIRMATIVE ACTION

The contention that opposition to affirmative action is about high, constitutional ideals or simply broader notions about fairness, especially among political conservatives, is dubious. At the greatest level of abstraction, it likely has to do, generally, with whites' belief that racial progress for racial minorities is a "zero-sum" game. In their research, Norton and Sommers found that whites view racism in this way.<sup>206</sup> Specifically, to the extent that racism has decreased—at

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They are Now Losing*, 6 *PERSP. PSYCHOL. SCI.* 215, 215–17 (2011).

least in public expressions—against blacks since the 1940s, whites believe the racism against them has increased.<sup>207</sup> This is consistent with prior research finding that whites perceive the increase in racial equality as a threat to their dominant position in the United States.<sup>208</sup>

Indeed, whites generally oppose affirmative action when they believe it threatens their group's chances of receiving positive outcomes.<sup>209</sup> Even where affirmative action opponents suggest that their opposition is responsive to the concern that such a policy harms beneficiaries is largely a rouse. In one study, O'Brien and colleagues explored this issue.<sup>210</sup> Interestingly, they found that when whites believe that affirmative action harms whites, they endorse the "harm to beneficiaries" objection whereas they tend to endorse it much less when they believe otherwise.<sup>211</sup>

These findings are underscored by an extensive social scientific literature, finding that, for example, whites, when compared to racial minorities, not only view affirmative action as a harmful policy,<sup>212</sup> but rather that their hostility to the policy is undergirded by racist beliefs.<sup>213</sup> Not surprisingly, among whites, those who are high on measures of modern racism and collective relative deprivation, the belief that whites are disadvantaged relative to racial minorities,<sup>214</sup> perceive white disadvantage where organizations apply affirmative action.<sup>215</sup> While these lab-based experiments are helpful in understanding opposition to affirmative action, one national survey found that negative racial affect and the general denial of unequal opportunity are predictive, among other things.<sup>216</sup>

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207. *Id.*

208. JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 171–75 (1999).

209. Researchers have made this finding in the employment context. See David A. Harrison et al., *Understanding Attitudes Toward Affirmative Action Programs in Employment: Summary and Meta-Analysis of 35 Years of Research*, 91 J. APPLIED PSYCHOL. 1013, 1013–31 (2006).

210. Laurie T. O'Brien et al., *White Americans' Opposition to Affirmative Action: Group Interest and the Harm to Beneficiaries Objection*, 49 BRIT. J. SOC. PSYCHOL. 895, 900 (2010).

211. *Id.*

212. Euna Oh et al., *Beliefs About Affirmative Action: A Test of the Group Self-Interest and Racism Beliefs Models*, 3 J. DIVERSITY IN HIGHER EDUC. 163, 164–65 (2010).

213. *Id.*

214. See generally Faye Crosby, *A Model of Egotistical Relative Deprivation*, 83 PSYCHOL. REV. 85 (1976) (examining the theory of relative deprivation, which basically states that those who are the most objectively deprived are not the ones most likely to experience deprivation).

215. Garriv Shteyberg et al., *But Affirmative Action Hurts Us! Race-Related Beliefs Shape Perceptions of White Disadvantage and Policy Unfairness*, 115 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 1–2 (2011).

216. James R. Kluegel & Eliot R. Smith, *Affirmative Action Attitudes: Effects of Self-Interest, Racial Affect, and Stratification Beliefs on Whites' Views*, 61 SOC. FORCES 797, 797 (1987).



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Not surprisingly, despite the “equality” rhetoric associated with opposition to affirmative action, another variable that is predictive of opposition to affirmative action is political ideology. Political conservatives oppose it more so than liberals.<sup>217</sup> The link between political conservatism, racial attitudes, and opposition to affirmative action has direct and indirect links. With regard to the former, Gutierrez and Unzueta’s work investigated the extent to which social dominance predicted attitudes about affirmative action.<sup>218</sup> Social dominance orientation reflects an individual’s specific desire to protect in-group interests versus the general desire to maintain status hierarchies.<sup>219</sup> Gutierrez and Unzueta found that social dominance orientation predicted opposition to affirmative action.<sup>220</sup> One would think that this is based on egalitarian ideals and not based on race. However, social dominance orientation predicted support for legacy policies. In sum, those high on social dominance predicted policies that seem to favor whites and opposition to policies that favor racial minorities.<sup>221</sup> Importantly, research has demonstrated that there is a strong correlation between social dominance orientation and political conservatism.<sup>222</sup>

More directly, in two studies exploring these issues, Frederico and Sidanius looked at the antecedents and consequences of whites’ specific, race-neutral reasons for opposing affirmative action. In one study of a community sample of adults, they found three results. First, principled-objection endorsement was driven not only by race-neutral values, but also by dominance-related concerns like racism.<sup>223</sup> Second, the effects of group dominance operated via principled objections.<sup>224</sup> Third, education strengthened the relationship between dominance-related concerns and principled objections, but left the relationship between race-neutral values and the latter almost unchanged.<sup>225</sup> In the second study (a replication of the first study)

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217. Harrison et al., *supra* note 212, at 1016; Sidanius et al., *supra* note 159, at 476.

218. Angelica S. Gutierrez & Miguel M. Unzueta, *Are Admissions Decisions Based on Family Ties Fairer Than Those That Consider Race? Social Dominance Orientations and Attitudes Toward Legacy vs. Affirmative Action Policies*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 554, 554–57 (2013).

219. JIM SIDANIUS & FELICIA PRATTO, *supra* note 208, at 61.

220. Gutierrez & Unzueta, *supra* note 218, at 555.

221. *Id.*

222. See Sidanius et al., *supra* note 158, at 478; Alain Van Hiel & Ivan Mervielde, *Explaining Conservative Beliefs and Political Preferences: A Comparison of Social Dominance Orientation and Authoritarianism*, 32 J. APPLIED SOC. PSYCHOL. 965, 965–66 (2002).

223. Sidanius et al., *supra* note 158, at 479–81.

224. *Id.* at 482–85.

225. *Id.* at 486.

focusing, however, on an undergraduate sample, Federico and Sidanius similarly found that the completion of additional years of college increased the relationship between racism and principled objections, but it had no effect on the predictive power of conservatism.<sup>226</sup> Further undermining the notion principled conservatism as reflecting some lofty ideals, Reyna and colleagues also conducted two studies. In their work, they explored the principled conservative precept of fairness with regard to affirmative action.<sup>227</sup> In their work, they demonstrated two major findings. First, conservatives opposed affirmative action more for blacks than for women.<sup>228</sup> Second, the relationship between conservatism and affirmative action attitudes operated best via group-based stereotypes, predicated on notions of deservingness rather than other potential mediators like explicit racism or the perceived threat that affirmative action poses to oneself.<sup>229</sup>

## CONCLUSION

Opposition to, and litigation against, affirmative action—as seen in *Fisher v. Texas* and many other cases—may be framed in the context of high constitutional ideals or noble ideals such as merit. However, the reality is that such opposition and litigation is likely less about these ideals and more about racial hostility or preservation of racial group interest. It should not be expected that these litigants or the outside groups who support them will or can frame their opposition in the context of racial opposition. The research on implicit racial bias illustrates that out of fear of being labeled “racist,” such frankness is not likely forthcoming. Even more, however, many people may be wholly unaware of the negative associations they have with racial minorities, especially blacks. As such, while making automatic negative associations with blacks and basing cognitive judgments and decision-making on such associations, individuals are likely to reach for arguments that support their conscious beliefs and/or actions in a way that comports with what they believe about themselves. In the context of affirmative action litigation, and the Right-wing hostility to

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226. Christopher M. Federico & Jim Sidanius, *Racism, Ideology, and Affirmative Action Revisited: The Antecedents and Consequences of “Principled Objections” to Affirmative Action*, 82 J. PERSONALITY & SOC. PSYCHOL. 488, 496–99 (2002).

227. Christine Reyna et al., *Examining the Principles in Principled Conservatism: The Role of Responsibility Stereotypes as Cues for Deservingness in Racial Policy Decisions*, 90 J. PERSONALITY & SOC. PSYCHOL. 109, 114 (2005).

228. *Id.* at 122.

229. *Id.*

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it, the political Right has a long history of racial hostility and xenophobia. Nonetheless, this eschewing of “racist” opposition and embracing of egalitarian and broader constitutional ideals is not surprising.



## ESSAY

# Defining Race-Conscious Programs in the *Fisher* Era

DANIELLE HOLLEY-WALKER\*

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“I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious.”<sup>1</sup>  
Justice Ruth Bader Ginsburg

### INTRODUCTION

In *Fisher v. University of Texas*, the Supreme Court held that the United States Court of Appeals for the Fifth Circuit did not properly apply strict scrutiny in determining whether the admissions plan at the University of Texas violates the Equal Protection Clause.<sup>2</sup> The Court issued a relatively brief opinion in a 7–1 decision and remanded the case to the Fifth Circuit for rehearing.<sup>3</sup> This Essay will explore whether *Fisher* changed the landscape in Equal Protection Clause

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1. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting).

2. *Id.* at 2415 (majority opinion).

3. *Id.*

cases related to race-conscious admissions programs. I will argue that the Court in *Fisher* ratchets up the strict scrutiny analysis, especially in comparison to the strict scrutiny standard as defined by the Supreme Court in the *Grutter v. Bollinger* case from 2003. I will also examine Justice Ginsburg's dissent and particularly her assertion that the majority erroneously makes a distinction between "race-conscious" and "race-neutral" elements of the University of Texas admissions plan. In particular, I will argue that Justice Ginsburg's dissent meaningfully highlights one of the most pernicious flaws in the current Equal Protection Clause jurisprudence, which is that the strict scrutiny standard encourages universities to make their admissions process opaque instead of transparent and that there are many benefits that flow from having a transparent, race-conscious admissions program.

In Part I of this Essay, I will examine Justice Kennedy's majority opinion and his description of the strict scrutiny standard that is used when a plaintiff makes an Equal Protection Clause challenge to an affirmative action program. I will compare Justice Kennedy's description of strict scrutiny to Justice O'Connor's majority opinion in *Grutter* to demonstrate that in a few significant ways the majority opinion in *Fisher* employs a stricter form of strict scrutiny. This standard may prove to be fatal for race-conscious admissions programs.<sup>4</sup> In Part II of the Essay, I will examine Justice Ginsburg's dissent and her focus on whether "race-neutral" programs like the Texas Top Ten Percent Plan are motivated by race, thus destroying any real distinction between the "race-conscious" aspect of the University of Texas admissions plan and the "race-neutral" aspects. Finally, in Part III of the Essay, I will address the rehearing of *Fisher* before the Court of Appeals and whether the University of Texas admissions plan is likely to survive the strict scrutiny analysis as it has now been described by the Supreme Court.

### I. FISHER'S STRICT SCRUTINY

In *Fisher*, the plaintiff, Abigail Fisher, alleged that the admissions policy at the University of Texas considered race in a way that violated her rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>5</sup> The University of Texas's admissions policies have

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4. The Supreme Court has famously pronounced that "[s]trict scrutiny must not be 'strict in theory, but fatal in fact.'" *Fisher*, 133 S. Ct. at 2421 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

5. *Id.* at 2417.

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been under scrutiny since the *Hopwood v. University of Texas* decision in 1996 when the Fifth Circuit struck down a previous admissions plan that considered an applicant's standardized test scores, GPA, and the applicant's race.<sup>6</sup> In the wake of the *Hopwood* decision, the Texas legislature adopted the Top Ten Percent Plan.<sup>7</sup> Under the Top Ten Percent Plan, high school students who are in the top ten percent of their class in Texas receive automatic admission.<sup>8</sup> Remaining admissions decisions were based on an Academic Index ("AI"), which combines a student's GPA and standardized testing score and a Personal Achievement Index ("PAI") that looks at a student's extracurricular activities, leadership, work experience, community service, and other special circumstances.<sup>9</sup> In 2003, the admissions landscape changed with the Supreme Court's opinion in *Grutter v. Bollinger*, which held that the University of Michigan's law school had constructed a race-conscious admissions policy that did not violate the Equal Protection Clause.<sup>10</sup> In 2004, in the wake of *Grutter*, the University of Texas adopted a new admissions plan that returned to considering race as a factor in admissions. Race was included as part of the applicant's PAI score.<sup>11</sup> Race is not given a numerical value or weight.<sup>12</sup> The 2004 admissions plan is the plan at issue in the *Fisher* case.<sup>13</sup>

Justice Kennedy's majority opinion focuses on the strict scrutiny standard that is applied when a plaintiff makes an Equal Protection Clause challenge to a program that uses race as a factor in government decision-making.<sup>14</sup> Justice Kennedy begins by noting that there are three major Supreme Court precedents "that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process."<sup>15</sup> He then outlines the Court's opinions in *Regents of the Univ. of Cal. v. Bakke*, *Gratz v. Bollinger*, and *Grutter v. Bollinger* to identify the key law in this area.<sup>16</sup>

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6. *Id.* at 2415.

7. *Id.* at 2416.

8. *Id.*

9. *Id.* at 2415–16.

10. *See id.* at 2416.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.* at 2419.

15. *Id.* at 2417.

16. *Id.*

Justice Kennedy begins with *Bakke* to outline the basic Equal Protection Clause principles related to racial classifications in higher education. He notes that “decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment.”<sup>17</sup>

It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions “touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”<sup>18</sup>

Justice Kennedy further explains that in *Bakke*, Justice Powell identified one compelling government interest for considering race as a factor: “[T]he interest in the educational benefits that flow from a diverse student body.”<sup>19</sup>

Justice Powell’s central point, however, was that this interest in securing diversity’s benefits, although a permissible objective, is complex. “It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>20</sup>

Next, Justice Kennedy goes on to explore the holdings of *Gratz* and *Grutter* from 2003. Here, Kennedy emphasizes the importance of the strict scrutiny standard.

Race may not be considered unless the admissions process can withstand strict scrutiny. “Nothing in Justice Powell’s opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.” [*Gratz v. Bollinger*, 539 U.S. 244, 275 (2003)]. “To be narrowly tailored, a race-conscious admissions program cannot use a quota system,” [*Grutter v. Bollinger*, 539 U.S. 306, 334 (2003)], but instead must “remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application,” *id.*, at 337. Strict scrutiny requires

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17. *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978)).

18. *Id.*

19. *Id.*

20. *Id.* at 2418 (quoting *Bakke*, 438 U.S. 265 at 315).



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the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.” [Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978)].<sup>21</sup>

Justice Kennedy also goes on to discuss the narrow tailoring prong of the strict scrutiny analysis. He specifically utilizes *Grutter* in shaping his analysis.

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts, not for university administrators, to ensure that “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.”<sup>22</sup>

In perhaps the most interesting passage of the opinion, Justice Kennedy asserts that the narrow tailoring analysis requires courts to examine whether the use of race is “necessary.” In order to meet the narrow tailoring prong of the strict scrutiny standard, the University must show that they have exhausted race-neutral alternatives.

Narrow tailoring also requires that the reviewing court verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity. *Bakke*, [438 U.S.] at 305. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” strict scrutiny does require a court to examine with care, and not defer to, a university’s “serious, good faith consideration of workable race-neutral alternatives.” See *Grutter*, 539 U.S. at 339–40 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If “‘a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,’” *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986) (quoting

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21. *Id.*

22. *Id.* at 2419–20 (alterations in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university’s adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.<sup>23</sup>

The majority appears to move the goal post of narrow tailoring from where the *Grutter* Court left it. The crux of the *Fisher* majority’s criticism of the Fifth Circuit is that the Court of Appeals afforded deference to the University in its narrowly tailoring analysis.<sup>24</sup> The majority says that deference to the University is only appropriate when examining the compelling government interest prong of strict scrutiny; the question of whether the University believes it is a compelling government interest to seek the educational benefits that flow from diversity.<sup>25</sup>

The majority claims that their opinion is dictated by the opinion in *Grutter*.<sup>26</sup> However, contrast the quote above with the language from *Grutter* regarding narrow tailoring and race-neutral alternatives:

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.<sup>27</sup>

The language from *Grutter* states that a university must make a serious, good faith consideration of race-neutral alternatives. The majority in *Fisher*, however, says that a reviewing court must verify that it is “necessary” for a university to consider race to achieve the educational benefits that flow from diversity. This language is different from *Grutter* in several key ways. First, the majority in *Fisher* states that a part of the narrow tailoring analysis is for the reviewing court to make the necessity finding. This requirement is not specified in *Grut-*

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23. *Id.* at 2420.

24. *Id.* at 2421.

25. *See id.* at 2419.

26. *See id.* at 2421 (explaining how the Court of Appeals went against the controlling standard in *Grutter* and that *Grutter*’s holding does not allow a university’s assertion of good faith to forgive an impermissible consideration of race).

27. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (citations omitted).

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*ter.* This is an important deviation from *Grutter* in that it makes this necessity finding a key part of the narrow tailoring analysis. The suggestion is that if you are able to achieve educational benefits from diversity through the use of a “race-neutral” plan like the Top Ten Percent Plan, then any admissions program that considers race in those circumstances will be found to not be narrowly tailored.

Also, in *Grutter*, the Court states that universities should make a serious, good faith consideration of a workable race-neutral alternative.<sup>28</sup> In contrast, in *Fisher*, the Court says that the reviewing court should *not* defer to the University’s serious, good faith consideration of a race-neutral alternative.<sup>29</sup> Instead, the reviewing court must itself be “satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>30</sup> In the *Fisher* framework, the reviewing court must be satisfied that there is no workable alternative, not just that the University gave a race-neutral alternative serious, good faith consideration. Ultimately, the Supreme Court finds that the Fifth Circuit failed to properly apply the narrow tailoring prong of the strict scrutiny standard because they “confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications.”<sup>31</sup>

The announced necessity requirement may also present significant practical difficulties for a university. How will a university demonstrate to a court that it was “necessary” for them to use race to achieve diversity? A university must be able to satisfy a court that no workable race-neutral alternatives would produce the educational benefits of diversity. This creates substantial burdens for universities on the front and the back-end of developing an admissions policy. Prior to adopting an admissions policy that uses race as a factor, a university must consider race-neutral alternatives and find that they are not workable. Does this mean a university must actually implement (even on a small scale) a race-neutral admissions program? If a university does choose to make race a factor under its policy and the admissions program is later challenged in court, the university will be expected to provide evidence that is sufficient to meet a court’s searching and rigorous review under the narrow tailoring prong of the strict scrutiny standard. These types of practical barriers that flow

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28. *Id.*

29. *Fisher*, 133 S. Ct. at 2420.

30. *Id.* (emphasis added).

31. *Id.* at 2421.

from the majority's opinion may prove to have a significant impact on the future of affirmative action programs. Universities may determine that it is too risky or too costly to implement admissions policies that use racial classifications.

The issue of whether the majority opinion in *Fisher* has significantly altered the narrow tailoring prong of the strict scrutiny standard is currently being debated in the briefs that are being filed before the Fifth Circuit for the rehearing. The United States Department of Justice (DOJ) argues in its brief that *Fisher* does not alter the basic requirements under narrow tailoring, namely that each applicant receive individualized consideration and that the university must examine race-neutral alternatives and find those alternatives to be insufficient.<sup>32</sup> The DOJ goes on to argue that the University of Texas has already established that the use of racial classifications was necessary to achieve the educational benefits of diversity.<sup>33</sup>

## II. RACE-NEUTRAL V. RACE-CONSCIOUS

Justice Ginsburg's dissent focuses on a critical aspect of the majority opinion, specifically the supposed dichotomy between admissions programs that are "race-neutral" versus those that use racial classifications. She points out that programs such as the Top Ten Percent Plan were created with an eye toward the racial landscape of the state.<sup>34</sup> The Plan was conceived as a way to create more racial diversity at Texas universities by admitting the top ten percent of students from racially segregated high schools.<sup>35</sup> The entire premise of the Plan relies on racially segregated high schools and neighborhoods.<sup>36</sup> "It is race-consciousness, not blindness to race, that drives such plans."<sup>37</sup>

The history of the Top Ten Percent Plan clearly demonstrates Justice Ginsburg's assertion that at the heart of this "race-neutral" plan was the desire to fuel racial diversity, especially at the two flagship

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32. Supplemental Brief for the United States as Amicus Curiae Supporting the Defendants-Appellees and Urging Affirmance at 4, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822 (5th Cir. Nov. 1, 2013).

33. *Id.*

34. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

35. *Id.*

36. *Id.*

37. *Id.*

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universities in Texas, the University of Texas and Texas A&M.<sup>38</sup> The legislators who conceived the Plan were minority legislators concerned that *Hopwood* would present a barrier to the admission of racial minorities.<sup>39</sup> The Top Ten Percent Plan takes away the consideration of standardized testing scores, which often proves to be a negative factor for racial minorities under traditional admissions plans.<sup>40</sup> The legislators were aware that that the Top Ten Percent Plan is effective as a means of promoting racial diversity because Texas high schools are highly segregated.<sup>41</sup> The entire conception of the legislation was grounded in the racial history of the Texas public schools and the persistent inequality and segregation in the state's secondary schools.

Plaintiffs in affirmative action cases have also made the race-neutral versus race-conscious distinction. The plaintiff, Abigail Fisher, argued that the University of Texas should only be permitted to use the "Top Ten Percent Law and race-blind holistic review."<sup>42</sup> Ms. Fisher would not have been admitted under the Top Ten Percent Plan, but she was satisfied that the Ten Percent Plan complied with her rights under the Equal Protection Clause. In *Grutter*, the plaintiff also argued that race-neutral alternatives were available to universities, citing the Top Ten Percent Plan.<sup>43</sup> The underlying motivations behind the legislation and its racially aware conception and implementation were not seen as constitutional concerns to the plaintiffs in these cases.

Beyond the specifics of the Top Ten Percent Plan, the general distinction that courts typically make between race-neutral plans and race-conscious plans is not an easy line to draw. In *Fisher*, the majority uses the term "race-neutral" to mean admissions programs that do not overtly use racial classifications. At the same time, the Court also talks about universities taking a "non-racial approach" in its admissions policies. Does this language mean that narrow tailoring requires universities to first consider admissions plans that ignore race, or is the label of "race-neutral" or "non-racial" simply determined by

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38. See generally Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245 (1999) (describing the legislative history of the Top Ten Percent Plan).

39. See *id.* at 253–55 (describing the intent behind the bill).

40. See *id.* at 256–57.

41. See *id.* at 257.

42. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting).

43. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

whether the admissions criteria formally makes race a factor in admissions?

For example, the University of Texas, in its 1997 post-*Hopwood* admissions plan, considered in the Personal Achievement Index (“PAI”) many factors that appear to be proxies for race and ethnicity. The PAI factored in “special circumstances that give insight into a student’s background.”<sup>44</sup> These included considerations as to whether the applicant grew up in a single-parent household, whether a language other than English was spoken at home, and the general socio-economic condition of the applicant’s family.<sup>45</sup> These criteria would likely help the admissions personnel to give some preference to some racial minorities by helping them to identify Latino/Latina students, Asian students, and other minority students. Furthermore, the criteria are not clearly tied to any obvious educational qualifications for most undergraduate majors, so it appears that the goal of using these “race-neutral” criteria is to increase the chances of racial minority students being admitted.<sup>46</sup>

Justice Ginsburg makes clear that this type of obfuscation is one of the biggest disadvantages of labeling programs like the Top Ten Percent Plan as race-neutral. Instead of encouraging state universities to discuss the actual history of affirmative action and the intention behind the use of racial classifications, universities and legislatures should begin to act instrumentally and in a way that subtly implies that the use of race is constitutionally impermissible and/or morally wrong. I strongly agree with Justice Ginsburg that, “government actors, including state universities, need not be blind to the lingering effects of ‘an overtly discriminatory past,’ the legacy of ‘centuries of law-sanctioned inequality.’”<sup>47</sup> The best admissions plans that use race as a consideration are “those that candidly disclose their consideration of race.”<sup>48</sup>

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44. *Fisher*, 133 S. Ct. at 2415–16 (majority opinion).

45. *Id.* at 2416.

46. See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1807–08 (2004) (explaining that the race-neutral options became increasingly popular post-*Grutter* and that the federal government urged universities to adopt race-neutral factors in their admissions plans that were not connected to academic excellence, but instead to increase minority enrollment).

47. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

48. *Id.* (quoting *Gratz v. Bollinger*, 539 U.S. 244, 305 n.11 (2003) (Ginsburg, J., dissenting)).

### III. THE FUTURE OF THE *FISHER* CASE AND THE FUTURE OF AFFIRMATIVE ACTION

The *Fisher* case is currently pending before the Fifth Circuit for rehearing. Since the Supreme Court's opinion in the summer of 2013, scholars have debated the long-term impact of the case and what will be the case's outcome on remand. Some of the questions that the Fifth Circuit will confront are: the application of the narrow tailoring standard as described by the majority and whether the case should even be remanded for further factual development of the summary judgment record in light of the Supreme Court's ruling.<sup>49</sup>

One issue that has become a focus on rehearing, and may ultimately impact the outcome of the case, is whether Abigail Fisher has standing to continue to pursue her claims in this case. The University of Texas argues that because Ms. Fisher graduated from a different college in May 2012, she has no standing to pursue injunctive relief.<sup>50</sup> The University further asserts that to have standing to claim money damages, the plaintiff must be able to demonstrate that they would have been admitted to the University under an admissions plan that did not consider race.<sup>51</sup> The University claims that the summary judgment record in the case demonstrates that Ms. Fisher would have been denied admission regardless of her race.<sup>52</sup>

The Supreme Court did not address the standing question in its opinion. The plaintiff maintains that the Supreme Court's issuance of an opinion on the merits means that the Court considered standing and did not find any deficiency in the plaintiff's complaint.<sup>53</sup> The Fifth Circuit directed the parties in their supplemental briefing to address the issue of whether any standing questions remain in the case, so there does appear to be a chance that the Court of Appeals will examine whether the plaintiff has standing in this case.<sup>54</sup> As a threshold matter, the Fifth Circuit will need to consider whether the factual re-

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49. Appellees' Statement Concerning Further Proceedings on Remand at 4, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822 (5th Cir. July 23, 2013).

50. See Supplemental Brief for Appellees at 6-19, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822 (5th Cir. Oct. 25, 2013).

51. *Id.* at 5, 10.

52. *Id.* at 5.

53. See Plaintiff-Appellant's Supplemental Brief at 11, *Fisher v. Univ. of Tex. at Austin*, No. 09-50822 (5th Cir. Oct. 4, 2013).

54. *Id.* at 10.

cord developed on summary judgment is sufficient for the application of the Supreme Court's narrow tailoring standard.<sup>55</sup>

Beyond the standing question and the issue of a possible remand, the central issue of the remand will revolve around the application of the narrow tailoring standard. This is the issue that is likely to impact the future of admission policies that use racial classifications. The plaintiff's argument engages both prongs of the strict scrutiny test—whether diversity is a compelling government interest and whether the University of Texas's plan is narrowly tailored. On the narrow tailoring question, which was the focus of the Supreme Court's opinion, Fisher argues that the University has not met the standard because there are viable race-neutral alternatives. The University argues that Fisher's view of the narrow tailoring standard "exudes a view of constitutional law that . . . would prohibit the consideration of race in all circumstances."<sup>56</sup> The University asserts that nothing in *Grutter* or the Court's opinion in *Fisher* prohibits a university from using a "race-neutral" plan like the Top Ten Percent Plan in conjunction with the consideration of race for some applicants.<sup>57</sup>

#### CONCLUSION

The future of the *Fisher* case is still being written. There are many questions that will determine the ultimate legacy of this case. The case will likely be remembered for reshaping the narrow tailoring prong of the strict scrutiny standard and making it increasingly difficult for universities that seek to use race as a factor in admissions to be able to do so. Perhaps *Fisher* will also become known for Justice Ginsburg's powerful dissent and her argument that universities should be transparent in their efforts to reap the educational benefits of diversity and that the strict scrutiny test should be deployed by courts in a way that does not encourage universities to hide their concern about racial equality and racial diversity in admissions.

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55. Supplemental Brief for Appellees, *supra* note 50, at 5.

56. *Id.* at 4.

57. *Id.*



## ESSAY

# Collective or Individual Benefits?: Measuring the Educational Benefits of Race-Conscious Admissions Programs

DEBORAH N. ARCHER\*

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### INTRODUCTION

In *Fisher v. University of Texas at Austin*,<sup>1</sup> the United States Supreme Court ruled that colleges and universities could continue to consider race or ethnicity as one of several factors in an admissions policy that seeks to achieve broad diversity goals.<sup>2</sup> *Fisher* followed the Court's prior ruling in *Grutter v. Bollinger*, which held that a policy that considers racial and ethnic diversity as one of many admissions

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1. See generally *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (remanding the case to the Fifth Circuit so that the University's race-conscious admissions policy could be considered using strict scrutiny).

2. *Id.* at 2419.

factors could withstand constitutional scrutiny.<sup>3</sup> Although the *Fisher* Court preserved the *Grutter* ruling, it nonetheless questioned whether the court below applied the appropriate degree of rigor when it reviewed the University of Texas's policy. The Court remanded the case to the United States Court of Appeals for the Fifth Circuit to determine if the methods selected by the University of Texas to promote racial and ethnic diversity were narrowly tailored to achieve the educational benefits that flow from a diverse student body under strict scrutiny analysis.<sup>4</sup>

To the relief of proponents of race-conscious admissions programs, the *Fisher* Court affirmed that the "educational benefits" that flow from a diverse student body are a compelling government interest under strict scrutiny analysis.<sup>5</sup> The Court further upheld the Court of Appeals' determination that *Grutter* mandates "deference to the University's conclusion, 'based on its experience and expertise,' that a diverse student body would serve its educational goals."<sup>6</sup> The *Fisher* Court cautioned, however, that despite the considerable deference afforded to universities, the reviewing court must ensure that both a university's goal and implementation meet strict scrutiny.<sup>7</sup> This means that a university must ultimately prove that the means adopted to achieve diversity is "necessary" to achieve the educational benefits of diversity, which include "a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."<sup>8</sup> In the end, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."<sup>9</sup>

The Court gave little further guidance on precisely which of the several potential educational benefits of diversity are appropriate to consider. In exploring the availability of race-neutral alternatives and their effectiveness in achieving the same educational benefits as race-conscious programs, should courts focus on the benefits that inure to the larger educational community and society as a whole from having a diverse student population? Or should courts focus strictly on the

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3. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (concluding that obtaining the educational benefits of diversity is a compelling state interest).

4. *Fisher*, 133 S. Ct. at 2415.

5. *Id.* at 2419.

6. *Id.* (citation omitted).

7. *Id.* at 2419–20.

8. *Id.* at 2420; *see also* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978).

9. *Fisher*, 133 S. Ct. at 2420.

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“direct benefits” to individuals admitted under affirmative action programs? Past opinions of the Court have focused on the ability of affirmative action programs to transform and improve the broader educational community. But, in recent years opponents of affirmative action have redoubled their efforts to shift the focus to the impact on individual members of the community and the purported harms on the individual. This open question will be a primary source of debate as the Court revisits affirmative action.<sup>10</sup> Indeed, as the Court sends *Fisher* back to the Fifth Circuit to apply strict scrutiny, the question of whether “a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,”<sup>11</sup> will rely heavily on how “educational benefits” are defined. To measure the success of race-conscious admissions programs and the relative success of race-neutral alternatives, there must be some agreement on the goals.

How will the Court measure the relative success of race-neutral alternatives? Against what ultimate goal must the proponents of race-conscious policies measure the educational benefits their admissions policies are designed to achieve?<sup>12</sup> This Essay suggests that courts should continue to focus on the educational benefits of affirmative action that are shared by the entire educational community and society at large. Further, even if courts were to turn their focus to the impact that affirmative action programs have on individual beneficiaries of diversity initiatives, this Essay argues that the courts should conclude that the educational and career benefits to individuals far outweigh any purported harms to beneficiaries.

#### I. THE COURT’S FOCUS ON COMMUNITY IN IDENTIFYING THE EDUCATIONAL BENEFITS OF AFFIRMATIVE ACTION

Underpinning the Court’s affirmative action opinions is the recognition that the benefits of race-conscious admissions programs are substantial and inure to many segments of society. In *Fisher* and its previous affirmative action opinions, the Court has placed heavy em-

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10. See George R. La Noue & Kenneth L. Marcus, “*Serious Consideration*” of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991, 1002 (2008); Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163,165 (2008) [hereinafter Marcus, *Diversity and Race Neutrality*].

11. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986).

12. See Marcus, *Diversity and Race-Neutrality*, *supra* note 10, at 166.

phasis on the collective benefits of race-conscious admissions programs rather than embracing the belief that affirmative action programs are for the sole benefit of minority students who have benefitted from affirmative action. While the Court did not definitively state how it or other courts would define the educational benefits at issue, there is evidence in the *Fisher* opinion that the Court will focus on the broader educational benefits of affirmative action, as opposed to the benefits to any particular student. The Court acknowledged that a racial and ethnically diverse student body enhances classroom dialogue and lessens racial isolation and the use of racial stereotypes.<sup>13</sup> Additionally, the Court focused on a university's unique First Amendment rights and the importance of giving universities the flexibility to "provide that atmosphere which is most conducive to speculation, experiment, and creation" for all of its students.<sup>14</sup>

These elements of the Court's opinion are consistent with the Court's past treatment of affirmative action programs and a conclusion that minority students are not the sole intended beneficiaries of race-conscious admissions programs. Indeed, the Court has indicated that the primary purpose of race-conscious admissions policies is to provide the myriad benefits of a diverse learning environment to the larger educational community, and in fact to society as a whole. Among the benefits recognized by courts has been the promotion of "'cross-racial understanding,' 'break[ing] down racial stereotypes,' enabl[ing] students to better understand persons of other races, better prepar[ing] students to function in a multi-cultural workforce, cultivat[ing] the next set of national leaders, and prevent[ing] minority students from serving as 'spokespersons' for their race."<sup>15</sup> In *Grutter*, the Court recognized the additional benefits of better enabling students to understand people of different races and better preparing students to be professionals.<sup>16</sup>

In concluding that institutions of higher education have a compelling interest in creating a racially and ethnically diverse student body to advance their educational goals, the Court in *Grutter* implicitly recognized that those benefits should redound to the classroom. *Grutter* not only affirmed a university's interest in attaining a diverse student

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13. *Fisher*, 133 S. Ct. at 2418.

14. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

15. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 230 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013); *see also Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

16. *Grutter*, 539 U.S. at 330.

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body, but also recognized the paramount educational benefits that flow from a diverse classroom, as opposed to simply having diversity on the college campus generally.<sup>17</sup> In discussing the importance of diversity, Justice O'Connor stressed the importance of "cross-racial understanding" and classroom discussions that are "livelier, more spirited, and simply more enlightening and interesting" because of the existence of diversity in and outside of the classroom.<sup>18</sup>

Similarly, in *Bakke*, Justice Powell emphasized the importance of a university's pursuit of the "robust exchange of ideas which discovers truth 'out of a multitude of tongues'"<sup>19</sup> and the creation of an "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education."<sup>20</sup>

Courts have also supported educational institutions' recognition that the benefits of diversity go beyond the immediate learning environment, to embrace the role of colleges and universities to train diverse future leaders. The courts have responded to the "national consensus among university, business, and military leaders on the value of racial inclusiveness"<sup>21</sup> and the belief that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>22</sup>

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17. See generally *id.*, at 328–30 (discussing the benefits universities derive from having diverse student bodies).

18. *Id.* at 330 (quoting Petition for Writ of Certiorari at 246a, 244a, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (No. 02-241)).

19. *Bakke*, 438 U.S. at 312 (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943)).

20. *Id.* The importance of classroom diversity has long been recognized in the context of K–12 education. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 799 n.3 (2007) (Stevens, J., dissenting) ("[C]hildren of all races benefit from integrated classrooms . . ."); *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (noting public education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472 (1982) ("[W]hite as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'"); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486 n.5 (1979) (Powell, J., dissenting) ("It is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies.").

21. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 122 (2003); see also *Grutter*, 539 U.S. at 330–31 (citing to briefs in support of the benefits of race-conscious admissions programs).

22. *Grutter*, 539 U.S. at 332.

## II. INCREASING PRESSURE TO FOCUS ON THE INDIVIDUAL IMPACT OF RACE-CONSCIOUS MEASURES IN STRICT SCRUTINY ANALYSIS

Despite the guidance from the Court, not everyone is convinced that collective measures are the appropriate means to gauge the educational benefits of affirmative action programs. First, some assert that such collective measures are pretextual and mask the true motivations behind affirmative action programs.<sup>23</sup> Instead, some advocate that “the focus should be on the extent to which various diversity programs are able to translate educational strategies . . . into ultimate goals” and demonstrable educational attainment for individual students.<sup>24</sup>

Opponents of affirmative action have often resorted to a focus on the individual impact of affirmative action programs to undermine a program’s legitimacy and acceptance. However, in the past, opponents of affirmative action have primarily focused on the purported harms that race-conscious programs caused to “innocent third parties,” such as unsuccessful white applicants.<sup>25</sup> Today, an increasing number of opponents of race-conscious admissions programs have advocated measuring the educational benefits of race-conscious admissions programs by their impact on the individual educational achievements and experiences of those admitted under those programs.<sup>26</sup> They argue, for example, that if the Supreme Court permits affirmative action because of the educational benefits of diversity, the

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23. See Marcus, *Diversity and Race-Neutrality*, *supra* note 10, at 168. See generally Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (arguing that affirmative action actually harms its beneficiaries by not identifying students who will perform well in law school, which leads to many black students struggling academically).

24. See Marcus, *Diversity and Race-Neutrality*, *supra* note 10, at 168.

25. See, e.g., *Grutter*, 539 U.S. at 373 (2003) (Thomas, J., dissenting) (“The majority of blacks are admitted to the [University of Michigan] Law School because of discrimination, and because of this policy all are tarred as undeserving.”). See generally Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002) (arguing that opponents of affirmative action greatly exaggerate the unfairness and harm to white applicants that race-conscious admissions programs cause); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (defining and tracing the history of the “rhetoric of innocence” relied upon by opponents of affirmative action).

26. See Ashely M. Hibbet, *The Enigma of Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education*, 21 HARV. BLACKLETTER L. J. 75, 76–77 (2005); Marcus, *Diversity and Race-Neutrality*, *supra* note 10, at 168; Angela Onwuachi-Willig, et. al, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1301–02 (2008).

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only appropriate measure is the ability of the admissions program to achieve educational benefits for individuals.<sup>27</sup>

The most widespread of these arguments has focused on the alleged “mismatch” that occurs when minority students attend top-tier educational institutions.<sup>28</sup> Mismatch theory faults race-conscious admissions programs for inflicting “significant academic harm” on minority students.<sup>29</sup> According to this theory, mismatch happens when a “student finds herself in a class where she has weaker academic preparation than nearly all of her classmates” and falls behind.<sup>30</sup> Under mismatch theory, most black students do not belong in elite institutions and are better off at less competitive institutions, where their alleged academic mismatch is less pronounced. Mismatch theory has been most aggressively pushed in the context of admissions to “elite” law schools.<sup>31</sup> In his article about mismatch theory, Professor Richard Sander argues that we would see an increase in the number of black students who graduate from law school and pass the bar examination if affirmative action programs were eliminated.<sup>32</sup> This increase, according to Professor Sander, would result because black students would attend less competitive law schools where they would be able to compete more effectively.<sup>33</sup>

The argument that race-conscious admissions programs do not provide “educational benefits” because affirmative action violates the “fundamental legal premise”<sup>34</sup> for permitting race-conscious admissions—helping minority students—is both legally and factually incorrect. As discussed earlier in this Essay, race-conscious admissions programs are for the educational benefit of every member of the academic community, not only for minority students. Furthermore, the assertion that affirmative action programs have no educational benefit because minority students end up attending schools that are too academically challenging for them is factually incorrect and inappropriately seeks to displace minority students’ independent, informed

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27. Marcus, *Diversity and Race-Neutrality*, *supra* note 10, at 168.

28. See RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* 3–4 (2012).

29. *Id.* at 3.

30. *Id.* at 4.

31. See Sander, *supra* note 23, at 453.

32. *Id.* at 474–77.

33. *Id.*

34. Brief for Neither Party at 9–10, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

judgment about the potential costs and benefits of attending flagship universities and top-tier graduate schools. The choice to stretch and challenge themselves academically at top-tier schools in exchange for the academic opportunities and the potential of increased career opportunities is a valuable one that race-conscious admissions programs have made possible. The ability to make these choices for themselves should not be taken away because of a misplaced focus on educational benefits. As minority students make selections about their education and work to become legal professionals, they make choices about which law school to attend by engaging in their own cost-benefit analysis, which goes beyond potential GPA and class rank.

Educational and placement benefits are undoubtedly a large part of why students of all races, creeds, and colors fight so hard to get into top schools. As important as these benefits are, however, they fail to capture anything approaching the full value of attending an elite law school. In addition to acquiring substantive knowledge and gaining preferential initial access to the employment market, students attending elite schools are also socialized into the habits and possibilities of eliteness and granted a lifetime membership in the elite networks to which the graduates of such institutions automatically belong.<sup>35</sup>

If courts choose to ignore Supreme Court precedent indicating a focus on the collective educational benefits of affirmative action and adopt a measure that focuses on the individual students who benefit from race-conscious admissions programs, the evidence will establish that individual benefits do inure to minority students who attend elite and selective educational institutions that employ race-conscious admissions programs.<sup>36</sup> For example, despite statistics indicating that black law students often achieve lower-than-average GPAs and bar passage rates,<sup>37</sup> the fact is that most black law students go on to be

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35. David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 *STAN. L. REV.* 1915, 1931 (2005).

36. In addition to focusing on the individual educational benefits to minority students, a court would necessarily have to focus on the individual educational benefits white students get from being educated in a racially and ethnically diverse environment.

37. While reports that black law students fail the bar examination at higher rates than other law school graduates are cause for concern, these reports are not entirely useful without information regarding which state bar examinations were taken and adjustments for the difficulty of each state bar. Moreover, there is evidence that the disparity in bar pass rates is not attributable to affirmative action. See generally Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 *YALE L. J.* 1997 (refuting the claim that affirmative action causes blacks to fail the bar). There are several reasons for the disparity in educational outcomes for minority students and some of these reasons would only be made worse by getting rid of affirmative action, decreasing diversity and increasing racial isolation. To assess the impact of race-



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lawyers.<sup>38</sup> That some black students graduate in the bottom half of their class or may not pass the bar examination on their first attempt does not negate the value of the high-quality legal education they received. To the contrary, their legal education will continue to be valuable to them as they pursue legal and law-related careers.<sup>39</sup> In addition to substantive legal knowledge, the students have gained credentials that employers value and relationships and skills that will serve them throughout their law-related careers.<sup>40</sup> Considering these potential benefits, it is hard to believe that the black students who currently graduate from law school, even if they are not at the top of their class, would have been better off had they not been accepted into law school at all.<sup>41</sup>

Rather than misguiding minority law students, race-conscious admissions programs allow many a valuable opportunity to attend a top-tier, highly ranked law school. While their test scores and GPAs may be below the average as compared to other admitted students, their legal careers are not undermined by the choice they made to pursue this opportunity. For example, in a study of the post-graduate success of minority graduates of the University of Michigan Law School, Richard O. Lempert, David L. Chambers and Terry K. Adams found that LSAT scores and undergraduate GPAs do not predict the future career success of minority students.<sup>42</sup> Despite the lower LSAT scores and undergraduate GPAs of many minority students admitted to the University of Michigan Law School, these students went on to achieve levels of career success that met or surpassed the levels achieved by their white classmates.<sup>43</sup> Moreover, the study found that law school

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conscious admissions programs on minority students, courts must first acknowledge and address several critical factors that contribute to minority underperformance in the classroom, including racial discrimination, stereotype threat and segregated and inadequate K through 12 education systems. "Race continues to structure the opportunities and outlook of all Americans even as overt discrimination based on race recedes. Any dialogue about affirmative action, or about legal education and practice generally, must candidly acknowledge this complex reality." Wilkins, *supra* note 35, at 1961.

38. Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 *LAW & SOC. INQUIRY* 711, 727 (2004).

39. Although the recession and the resulting economic realities have negatively impacted the job market and the market for legal services, there is continuing value in a legal education as law schools provide valuable training and credentials that prepare their students for legal and law-related careers.

40. See Wilkins, *supra* note 35, at 1943–44.

41. See *id.* at 1931.

42. David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 *LAW & SOC. INQUIRY* 395, 397, 401 (2000).

43. *Id.* at 496.

grades explain less than five percent of the variance in income across the students in the sample.<sup>44</sup> Accordingly, a decision to eliminate race-conscious admissions programs should not rest on the perceived impact of the credentials of entering minority students or the fact that many black law students do not graduate at the top of their class, when those factors have not been found to predict future success.

Far from impeding their future achievements, the choices that black students are making about which law schools to attend have led them to success, individually and for their broader communities. It is not disputed that black graduates of top-tier law schools overwhelmingly complete law school and go on to pass the bar. Indeed, over ninety-five percent of blacks attending the most elite schools graduate.<sup>45</sup> And while many black students are not graduating in the top of their law school classes, race-conscious admissions programs at the undergraduate and graduate level help black students overcome systemic barriers that previously blocked their entrance to our nation's flagship colleges and universities, creating pipelines to higher education and impressive and influential careers.<sup>46</sup>

Black students at top-tier institutions, in fact, graduate at high rates and move on to have careers as distinguished and accomplished as their white classmates.<sup>47</sup> In *Crossing the Finish Line: Completing College at America's Public Universities*, the authors found a strong positive relationship between graduation rates and the selectivity of the educational institution.<sup>48</sup> The authors also directly challenged the assumption that "mismatching" led to lower graduation rates for black students. In their study, the authors grouped black men by their high school GPAs and then examined whether those with relatively low GPAs who enrolled in more selective public universities graduated at lower rates than those with the same GPAs who attended less selective institutions. The results proved just the opposite. To illustrate, of

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44. See *id.* at 501.

45. See Wilkins, *supra* note 35, at 1927 n.43.

46. See generally David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527 (2000) (introducing the "equality paradox" concept and discussing how graduating from a prestigious institution is "the most important determinant" of the future success of minorities).

47. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* at 55-57 (1998) [hereinafter BOWEN & BOK, *THE SHAPE OF THE RIVER*] (discussing the matriculation rates of underrepresented minorities); see also Chambers et al., *supra* note 42, at 397, 401.

48. WILLIAM G. BOWEN ET AL., *CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES* at 192, 193 fig.10.1 (2009) [hereinafter BOWEN ET AL., *CROSSING THE FINISH LINE*].

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the students with high school GPAs below 3.0, those who went to the most selective colleges and universities in the study had a graduation rate six percentage points higher than those who went to second-tier schools and eight percentage points higher than those who went to third-tier schools.<sup>49</sup> Indeed, for all GPA levels, black men who went to more selective institutions graduated at higher rates than their peers with similar grades who went to less selective colleges.<sup>50</sup>

Moreover, contrary to what the overmatch or mismatch hypothesis would lead us to expect, the relative graduation rate advantage associated with going to a more selective university was even more pronounced for black men at the lower end of the high school grade distribution than it was for students with better high school records.<sup>51</sup>

The findings of several studies also directly refute any claim that black students would fare better academically at schools where the average SAT score was similar to their own scores. The study found that the black students in the lowest category of SAT scores graduated at higher rates the more selective the school they attended.<sup>52</sup> Moreover, for students of similar gender, socioeconomic status, high school grades and SAT scores, graduation rates were highest for those students who attended the most selective schools.<sup>53</sup> Finally, students in the same category of SAT scores were more likely to ultimately earn an advanced degree the more selective the school they attended.<sup>54</sup> This was true even if the student received a lower GPA at the more prestigious school.<sup>55</sup>

These studies support the conclusion that to help improve the academic and professional outcomes for minority students we should not “discourage them from enrolling in academically strong programs that choose to admit them. On the contrary, [they] should be encouraged to ‘aim high’ when deciding whether and where to pursue educational opportunities beyond high school.”<sup>56</sup> Indeed, the problem of “undermatching,” where students with strong academic credentials do not enroll in colleges or universities that match their academic

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49. BOWEN ET AL., *CROSSING THE FINISH LINE*, *supra* note 48, at 209.

50. *Id.*

51. *Id.*

52. See BOWEN & BOK, *THE SHAPE OF THE RIVER*, *supra* note 47, at 61, 259; BOWEN ET AL., *CROSSING THE FINISH LINE*, *supra* note 48, at 209.

53. BOWEN & BOK, *THE SHAPE OF THE RIVER*, *supra* note 47, at 63, 259.

54. *Id.* at 114.

55. *Id.*

56. BOWEN ET AL., *CROSSING THE FINISH LINE*, *supra* note 48, at 211.

credentials, is far more troubling for minority students than the alleged issue of mismatch advanced in the Sander Brief.<sup>57</sup> A study of undermatching conducted by the authors of *Crossing the Finish Line* found that a disproportionate number of undermatches are among racial and ethnic minorities, with it being more common among black students.<sup>58</sup> The issue of undermatching is highly connected to the issue of diversity and race-conscious admissions programs because one reason students often fail to attend colleges and universities that match their academic credentials is their belief that, because of their race, they would be “uncomfortable” in that community.<sup>59</sup>

In addition to the clear benefits to the educational and career opportunities for blacks brought about by race-conscious admissions programs, the individual harms that were feared would befall minority students under these programs have not come to pass. A prominent and long-standing criticism of affirmative action programs is that minority students will experience “internal” and “external” stigma, both doubting their own abilities and merit and having their fellow students assume they were admitted because of their race and not their qualifications.<sup>60</sup> If race-conscious admissions programs in fact cause external or internal stigma for minority students, one would assume that minority students enrolled at colleges and universities in states that have banned race-conscious admissions programs would not experience this stigma. Or, that the stigma experienced by these students would be less than the stigma experienced by students attending schools on campuses actively employing race-conscious admissions programs. Yet, no causal connection between race-conscious admissions programs and racial stigma has ever been established. In fact, recent studies have discounted any role of race-consciousness in promoting racial stigma on college and university campuses. Rather, students attending schools in states banning the consideration of race are likely to find themselves in unwelcoming environments, and are more likely to encounter racial hostility and stigma. In many respects, they are not faring as well as their counterparts attending schools that em-

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57. *See id.* at 100.

58. *Id.* at 103.

59. *See id.* at 104.

60. In fact, those who argue that race-conscious admissions programs should be banned because they stigmatize minority students are only aiding racial discrimination. Stamping all minority students with “badge[s] of inferiority” by assuming they lack qualifications is itself racial discrimination. *See* André Douglas Pond Cummings, *The Associated Dangers of “Brilliant Disguises,” Color-Blind Constitutionalism, and Postracial Rhetoric*, 85 *IND. L.J.* 1277, 1282 (2010).

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brace the value of racial diversity and employ race-conscious admissions programs.

In one study of the experiences of minority students currently enrolled in undergraduate and graduate programs in the “hard sciences,” the author found that minority students in states that allow the use of race-conscious admissions programs experience far less stigma than students in states that have banned racial considerations.<sup>61</sup> First, the study confirms that overt acts of racism by students continue on college and university campuses, in fact, occurring twice as often on campuses in the four states in which the consideration of race has been banned.<sup>62</sup> Furthermore, the study suggests that in states where race-consciousness is banned, minority students are the victims of stigmatization more often than students attending school on campuses openly practicing race-conscious admissions.<sup>63</sup> Contrary to what opponents of race-conscious admissions have argued, the consideration of race may in fact help reduce the racial stigma suffered by minority students, not produce it.

Finally, the study suggests that increased racial diversity, not less, may help to alleviate feelings of stigma. Racial isolation on campuses may increase feelings of internal and external stigma, as minority students who have been the sole minority student in a course experience more stigma “than do their counterparts who have taken no classes in which they were the sole minority student.”<sup>64</sup> Unsurprisingly, minority students enrolled in schools in states that have banned race-conscious admissions programs were disproportionately more likely to attend classes in which they were the sole minority student.<sup>65</sup> Indeed, the study found that 68.6% of students who attended school in states that banned the consideration of race in admissions decisions had one or more classes in which they were the sole minority student.<sup>66</sup> Minority students who were the lone minority student in a class experienced overt racism from other students at a rate of four times as often as students who have never taken a class in which they were the only

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61. See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 *IND. L.J.* 1197, 1198–99, 1215 n.101 (2010). Four states included in the study—California, Washington, Florida, and Michigan—have banned race-conscious admissions programs. *Id.* at 1217–18. Twenty-three other states and two territories where affirmative action is allowed were also included in the study. *Id.* at 1218.

62. *Id.* at 1222 tbl.2.

63. *Id.* at 1224.

64. *Id.* at 1229.

65. *Id.* at 1227.

66. *Id.* at 1227 tbl.4.

minority,<sup>67</sup> and “encountered racism from faculty at twice the rate of students who have never found themselves as the lone minority in the classroom.”<sup>68</sup>

In another study, white and minority students at seven upper-tier public law schools were surveyed to explore<sup>69</sup> whether racial stigma would dissipate if race-conscious programs were eliminated.<sup>70</sup> The study compared the survey responses of students who attended educational institutions that employed affirmative action with responses of students who attended institutions that prohibited the use of affirmative action,<sup>71</sup> and sought to examine the impact of affirmative action on the “internal thoughts and feelings of minority law students while in school.”<sup>72</sup>

The study found that there was no statistically significant difference in feelings of stigmatization for minority students who attended schools with or without race-conscious programs.<sup>73</sup> The majority of students in both groups reported that classmates and teachers did not treat them differently because of affirmative action related stigma.<sup>74</sup> Interestingly, students who attended schools that did not employ race-conscious admissions programs were “more likely to agree that law schools should make special efforts to overcome past discrimination and that the benefits of affirmative action outweigh the costs.”<sup>75</sup>

The fact remains, the root causes of racial stigma reach back much further than race-conscious admissions programs. Minority students faced racial stigma on college campuses long before the use of these programs and that stigma will continue without these programs.<sup>76</sup> Not only do the alleged harms of race-conscious admissions programs not outweigh their documented benefits, there is no proof that those harms exist at all. Minority students are less likely to suffer

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67. *Id.* at 1228–29, 1230 tbl.6.

68. *Id.* at 1229.

69. The law schools included in this survey were the University of California, Berkeley; the University of California, Davis; the University of Cincinnati; the University of Iowa; the University of Michigan; the University of Virginia and the University of Washington. Onwuachi-Willig et al., *supra* note 26, at 1304.

70. *See id.* at 1305.

71. *Id.*

72. *Id.*

73. *Id.* at 1331 tbl.2, 1332.

74. *Id.* at 1332–33.

75. *Id.* at 1334.

76. *See generally* R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 816–23 (2004) (discussing the work of social scientist Erving Goffman, who is most notable for his research surrounding “the problem of racial stigma”).

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from stigmatization where they are part of a critical mass of minority students, often made possible through the use of race-conscious admissions programs.<sup>77</sup> Concerns about the impact of racial stigma, therefore, weigh in favor of expanding race-conscious admissions programs, not decreasing or abolishing them.

CONCLUSION

The Supreme Court has now repeatedly held that race-conscious admissions programs in public colleges and universities are constitutional and have significant educational benefits that flow to all members of the academic community and our larger society. In evaluating whether a particular race-conscious admissions program is narrowly tailored under strict scrutiny analysis, courts should continue to focus on the myriad benefits such programs provide to all members of the community. That opponents of affirmative action continue to argue that these programs undermine minority students' educational achievement by exposing them to stigma and academic environments in which they are outmatched does not undermine this analysis. The gap between the performance of minority and white students is quite troubling, but race-conscious admissions programs cannot be faulted for those troubles nor do those gaps negate the collective and individual benefits of affirmative action.

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77. Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equality and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 260, 299–301 (2001).





## ESSAY

# The Brand of Inferiority: The Civil Rights Act of 1875, White Supremacy, and Affirmative Action

ADERSON BELLEGARDE FRANÇOIS\*

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*“I cannot willingly accept anything less than my full measure of rights as a man, because I am unwilling to present myself as a candidate for the brand of inferiority . . . . If I am thus branded, the country must do it against my solemn protest.”<sup>1</sup>*

*“The purpose of education . . . is to create in a person the ability to look at the world for himself, to make his own decisions, to say to himself this is black or this is white, to decide for himself whether there is a God in heaven or not. To ask questions of the*

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1. 2 CONG. REC. 4784 (1874) (statement of Rep. James T. Rapier).

universe, and then learn to live with those questions, is the way he achieves his own identity.”<sup>2</sup>

## INTRODUCTION

In the two hundred and twenty-four years since it was first established, the Supreme Court of the United States has decided twelve cases where the central issue before the Court presumably concerned equal opportunities for African Americans in higher education. By the time this Essay is published, it will likely have decided a thirteenth.<sup>3</sup> Seven of the Court’s decisions—*Berea College v. Kentucky*,<sup>4</sup> *Missouri ex rel Gaines v. Canada*,<sup>5</sup> *Sipuel v. Board of Regents of University of Oklahoma*,<sup>6</sup> *Sweatt v. Painter*,<sup>7</sup> *McLaurin v. Oklahoma State Regents*,<sup>8</sup> *Fisher v. Hurst*,<sup>9</sup> and *United States v. Fordice*,<sup>10</sup>—grappled with the legitimacy and legacy of racial segregation. The remaining six—*DeFunis v. Odegaard*,<sup>11</sup> *Regents of the University of California v. Bakke*,<sup>12</sup> *Grutter v. Bollinger*,<sup>13</sup> *Gratz v. Bollinger*,<sup>14</sup> *Fisher v. University of Texas at Austin*,<sup>15</sup> and the yet to be decided *Schuetz v. Coalition to Defend Affirmative Action*<sup>16</sup>—have directly and indirectly confronted race-conscious affirmative action admission policies at public higher education institutions.

Whether considered separately or as a collective, these cases are far less constitutionally significant than one would at first glance suppose. Some, like *Berea College*, matter only as a sort of historical relic. Others, like *Gaines*, *Sipuel*, *Sweatt*, *Hurst*, and *McLaurin*, stand as embarrassing reminders of the Court’s fitful attempts over nearly half a century to disguise the doctrine of separate but equal as some-

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2. James Baldwin, *A Talk to Teachers*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948–1985*, at 326 (1985).

3. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), cert. granted sub nom., *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (U.S. Mar. 25, 2013).

4. 211 U.S. 45 (1908).

5. 305 U.S. 337 (1938).

6. 332 U.S. 631 (1948).

7. 339 U.S. 629 (1950).

8. 339 U.S. 637 (1950).

9. 333 U.S. 147 (1948).

10. 505 U.S. 717 (1992).

11. 416 U.S. 312, 314 (1974).

12. 438 U.S. 265 (1978).

13. 539 U.S. 306 (2003).

14. 539 U.S. 244 (2003).

15. 133 S. Ct. 2411 (2013).

16. 133 S. Ct. 1633 (U.S. Mar. 25, 2013).

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thing other than a moral abomination. As for the remaining decisions on race-conscious affirmative action, the Court has insisted time and time again that the single most important lesson to be derived from the American experience with slavery and Jim Crow is that race itself, as opposed to white supremacy, is such a corrosive concept that any and all of its uses should be subject to strict scrutiny.

So, if history holds true to form, the upcoming thirteenth decision on race and higher education, like the prior twelve, will have little of value, and even less of truth, to say about equal opportunities for African Americans in higher education. Rather, what that thirteenth case, like the prior twelve, will likely do is carefully and altogether avoid, acknowledging that the impediment to equal opportunities for African Americans in the field of higher education has always been and remains the doctrine of white supremacy. Indeed, with but a single exception, the Court has never brought itself to speak of white supremacy,<sup>17</sup> which perhaps might explain how in all of the twelve decisions it has rendered on the topic of equal opportunities in higher education for African Americans, the Court has not (and most likely will never) cite to the one piece of legislation that attempted but ultimately failed to challenge the orthodoxy of white supremacy: the Civil Rights Act of 1875.

### I. PASSAGE OF THE CIVIL RIGHTS ACT OF 1875

#### A. The Bill in the Senate

In January 1870, Radical Republican Senator Charles Sumner, a staunch proponent of ending segregation dating back to the antebellum era,<sup>18</sup> first introduced what would ultimately be enacted as the Civil Rights Act of 1875.<sup>19</sup> Sumner's initial bill proposed to:

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17. The one exception is *Loving v. Virginia*, 388 U.S. 1 (1967). In ruling unconstitutional a Virginia law that criminalized interracial marriages, the Supreme Court wrote:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.

*Id.* at 11. The decision is remarkable in the sense that it represents the only instance in which the Court explicitly discusses, albeit ever so briefly, the political doctrine of white supremacy.

18. See *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 202–04 (1849).

19. See CONG. GLOBE, 41st Cong., 2d Sess. 323 (1870). With assistance from John Mercer Langston, and co-sponsor Representative Benjamin F. Butler (R-Mass.), the act was eventually passed by Congress in February 1875 and signed into law by President Ulysses S. Grant on March 1, 1875. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

[S]ecure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or State authority; also on juries in courts, national and State.<sup>20</sup>

In many ways, “Sumner was both the best and worst champion a cause could have.”<sup>21</sup> Among other things, “[h]e was single-minded and persistent, self-righteous and overbearing to his allies and insufferable to his enemies. He was not well liked.”<sup>22</sup> From the moment Sumner introduced the bill, it faced fierce opposition from Senate Democrats. Various provisions outlawed discrimination in different facilities and accommodations, but the most controversial aspect of the bill was the schools provision that would have prohibited segregation in schools. Almost five years later, after more than a dozen votes featuring vigorous debates, a shifting political climate, and Sumner’s death, the civil rights bill would finally pass, but missing from it was the controversial schools provision.

The bill was first referred to the Senate Judiciary Committee. Senator Lyman Trumbull (D-Ill.), chairman of the Committee, twice reported adversely on Sumner’s bill, preventing it from being forwarded to the Senate floor for a vote in 1870 and in the beginning of 1871.<sup>23</sup> Hoping to force a vote by Democrats, Sumner attached the civil rights bill as a “rider” to an amnesty bill that would have permitted former Confederate members to regain eligibility for employment in states and national government.

The strategy initially failed<sup>24</sup> because at the time Radical Republicans were unwilling to join Democrats to form the two-thirds majority that would have been required to grant amnesty.<sup>25</sup> In early 1872, the Senate approved the civil rights bill rider by a 28–28 vote.<sup>26</sup> How-

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20. CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870) (statement of Sen. Charles Sumner).

21. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 987 (1995).

22. *Id.*

23. CONG. GLOBE, 41st Cong., 3d Sess. 1263 (1871); CONG. GLOBE, 41st Cong., 2d Sess. 5314 (1870).

24. CONG. GLOBE, 42d Cong., 2d Sess. 274 (1871).

25. See U.S. CONST. amend. XIV, § 3 (“No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.”).

26. CONG. GLOBE, 42d Cong., 2d Sess. 919 (1872).

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ever, the full amnesty bill, to which the civil rights rider was attached, again went down in defeat by two votes, with 33 “yeas” and 19 “nays.”<sup>27</sup> Three months later, following a series of complicated procedural maneuvers where Sumner’s civil rights bill was decoupled and then recoupled to the amnesty bill,<sup>28</sup> it obtained approval with a majority of votes, 32–22, but still short of the required two-third majority.<sup>29</sup> Later that month, when the bill was again up for a vote, Democrats engaged in a filibuster to prevent consideration of the bill.<sup>30</sup> In time, both parties grew weary of the many attempts to pass Sumner’s civil rights bill together with the amnesty bill. Senator George Edmunds lamented, “[T]his subject of civil rights and of amnesty . . . has been before the Senate three or four times, and both bills finally failed because gentlemen who were in favor of each separately would vote against both together.”<sup>31</sup>

In response to the stalemate, while Sumner was absent from the Senate Chamber, Senators George Edmunds and Matthew Carpenter reached a compromise where Democrats would vote for both the amnesty bill and civil rights bill, if they were put forth separately.<sup>32</sup> In addition, the civil rights bill, proposed by Carpenter, would not include provisions prohibiting discrimination in schools and juries.<sup>33</sup>

The debate surrounding the schools provision being deleted from Carpenter’s civil rights bill revealed how Radical Republicans thought desegregating school was a critical component of the Reconstruction Era and enforcement of the Civil War Amendments. Sumner commented that the elimination of the schools provision created “an emasculated civil rights bill.”<sup>34</sup> Over Sumner’s protest, Carpenter’s version of the civil rights bill replaced Sumner’s version and received the necessary majority vote, 28–14.<sup>35</sup> The compromise on the civil rights bill, however, was still not enough to gain passage from both

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27. *Id.* at 928–29.

28. *See id.* at 3268.

29. *Id.* at 3270.

30. *See id.* at 3730–31.

31. *Id.* at 3729.

32. *Id.* at 3730, 3732–34.

33. *Id.* at 3737–38.

34. *Id.* at 3737 (statement of Sen. Charles Sumner). Senator Spencer said Carpenter’s substitute “emasculat[ed] the bill entirely” and hoped “that every genuine friend of civil rights will vote against it.” *Id.* at 3735. Senator Frelinghuysen said “the opinion of the Senate has been expressed over and over again in favor of retaining the provisions in reference to public schools,” and that the omission “very much impairs the effect of the bill.” *Id.*

35. *Id.* at 3736.

houses. After two unsuccessful attempts in the House, Carpenter's version of the bill would die and never be considered again.<sup>36</sup>

In late 1873, Sumner renewed his attempts when he introduced his civil rights bill in conjunction with Butler's civil rights bill that was introduced in the House.<sup>37</sup> In addition to inns, cemeteries, and juries, Sumner's bill provided:

That no citizen of the United States shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished . . . by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation or authorized by law.<sup>38</sup>

#### B. The Bill in the House

Although Carpenter's civil rights bill died, efforts continued in the House to pass a civil rights bill. On February 19, 1872, Representative William Frye (R-Me.) introduced a bill, similar to Sumner's, that would guarantee every citizen "the full and equal enjoyment of any accommodation, advantage, facility, or privilege," which included common school and other public institutions that received some form of government funding.<sup>39</sup> Initially, the proceedings and voting of the House bill did not feature the same vigorous debates as its Senate counterpart. Republicans attempted to bypass normal House rules by having the House vote on the bill without a debate. Doing so, however, would have required two-third votes to suspend the normal House rules. After months of unsuccessful attempts, "[e]ventually, they gave up in frustration and devoted their energies to a different vehicle for achieving their objective."<sup>40</sup>

The following year, in 1873, Representative Butler introduced a version of the civil rights bill. Although, different textually, Butler's civil rights bill was seen as identical to Sumner's.<sup>41</sup> Similar to Sum-

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36. *Id.* at 3932, 4322.

37. 2 CONG. REC. 318 (1874); 2 CONG. REC. 10 (1874).

38. *Id.*

39. 2 CONG. REC. 1116 (1872).

40. McConnell, *supra* note 21, at 1063; *see* CONG. GLOBE, 42d Cong., 2d Sess. 2440-41 (1872).

41. 2 CONG. REC. 378 (1874) (statement by Rep. Alexander H. Stephens). Butler's version provided civil penalties stated:

That whoever, being . . . any public school supported, in whole or in part, at public expense or by endowment for public use, shall make any distinction as to admission or

ner's version when it reached the Senate floor, the schools provision was the subject of intense debate.<sup>42</sup> After three months of debate, Butler withdrew his bill in January of 1874, and later reintroduced the bill with the schools provision removed.<sup>43</sup> The bill would ultimately die, as Sumner's version of the civil rights bill would become the focus of the House. Similar to the attempts with the Frye version of the civil rights bill, it faced difficulty receiving the necessary votes to have it sent to the House floor. On three separate occasions, Butler attempted, but failed to obtain enough votes,<sup>44</sup> and discontinued his efforts afterwards.<sup>45</sup>

### C. The Final Compromised Bill

In the November 1874 elections, Republicans lost eighty-nine seats and their majority in the House, effectively ending Reconstruction in the South.<sup>46</sup> Spurred on by Sumner's death, lame duck Republicans attempted to pass a version of his bill, but Republicans facing re-election in 1876 declined to continue their support for the bill, one reasoning: "I do not want to go down with my party quite so deep as the bill will sink it if it becomes the law . . . ."<sup>47</sup> When deliberations began in January 1875, House Democrats engaged in tactics to stall and prevent the bill's passage, such as filibustering.<sup>48</sup> The debate resumed in February when the civil rights bill was presented with a pro-

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accommodation therein, of any citizen of the United States, because of race, color, or previous condition of servitude, shall, on conviction thereof, be fined not less than one hundred nor more than five thousand dollars for each offense; and the person or corporation so offending shall be liable to the citizens thereby injured, in damages to be recovered in an action of debt.

*Id.*

42. Compare 2 CONG. REC. 380 (1874) (statement of Rep. Alexander H. Stephens) ("[Passage of the civil rights bill] would entirely upset the whole fabric of the Government, the maintenance of which in its integrity was the avowed object of the war."), with *id.* at 409 (statement of Rep. Robert Elliot) ("[I]n this discussion I cannot and I will not forget that the welfare and rights of my whole race in this country are involved.").

43. 2 CONG. REC. 458 (1874). Speculation surrounds the reasoning behind Butler's decision, but one historian attributes the schools provision being deleted to the influence of the "Peabody Fund, [which] had been spending in the neighborhood of a hundred thousand dollars annually on subsidies for public schools, both white and Negro, in the southern states." Alfred H. Kelly, *The Congressional Controversy over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537, 554 (1959) ("Opposition of this kind was too powerful to be ignored.").

44. 2 CONG. REC. 4242-43, 4439, 4691 (1874).

45. *Id.* at 5162-63.

46. See generally WILLIAM GILLETTE, *Retreat from Reconstruction 1869-1879* (1979) (discussing reconstruction in the south).

47. 3 CONG. REC. 982 (1875) (statement of Rep. Simeon Chittenden).

48. Interestingly, as a result of the House Democrats' action, the House filibuster was abolished.

vision allowing separate but equal school facilities.<sup>49</sup> However, three different provisions concerning segregation in schools were up for vote.<sup>50</sup> One provision restored the language of the Sumner's bill, prohibiting segregated schools.<sup>51</sup> Another version permitted separate accommodations in all the facilities and institutions covered by the Act.<sup>52</sup> And finally, another provision completely removed the schools provision but prohibited segregation in other public accommodations provisions intact.<sup>53</sup>

Ultimately, the version of the civil rights bill that passed omitted the schools provision.<sup>54</sup> Several Republicans viewed that giving legitimacy to separate but equal was "worse than nothing" and "a distinction in color which we ought not to recognize by any legislation of the Congress of the United States."<sup>55</sup> Thus, "[e]ven at the end, then, when the Republicans no longer had the votes to enact a school desegregation bill, they refused to admit the legitimacy of the separate-but-equal principle, and they were able to block it from enactment."<sup>56</sup> Black legislators made it clear that:

[They] would rather have their people take their chances under the Constitution and its amendments; that they would rather fall back upon the original principles of constitutional law and take refuge under their shadow than to begin with this poor attempt to confer upon them the privileges of education connected with this discrimination . . . .

. . .

They think their chances for good schools will be better under the Constitution with the protection of the courts than under a bill containing such provisions as this.<sup>57</sup>

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49. See 3 CONG. REC. 938-39 (1875).

50. See *id.* at 939.

51. See *id.*

52. See *id.*

53. See *id.*

54. 3 CONG. REC. 1011 (1875).

55. *Id.* at 981, 997 (statement of Rep. Stephen Kellogg); see also *id.* at 1000 (statement of Rep. Julius Burrows) ("If you cannot legislate free schools, I prefer that the bill should be altogether silent upon the question until other times and other men can do the subject justice."). A separate but equal provision would have a "pernicious influence [that] would be felt in every State and Territory. . . ." *Id.* at 1006 (statement of Rep. Benjamin Butler) ("I should very much rather have all relating to schools struck out than have even the committee's provision for mixed schools.").

56. McConnell, *supra* note 21, at 1085.

57. 3 CONG. REC. 997-98 (1875).



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In the end, Sumner's civil rights bill, without provisions for schools or juries, and what would be known as the Civil Rights Act of 1875, was passed and signed by President Ulysses Grant.<sup>58</sup>

### II. HOUSE AND SENATE DEBATES OVER THE CIVIL RIGHTS ACT OF 1875

For more than four years, members of Congress vigorously debated for and against the schools provision in Sumner's civil rights bill. Proponents of the measure simply believed it was a valid exercise of Congress's power to enforce the Fourteenth Amendment<sup>59</sup> and that segregation based on race, particularly in the field of education, was "an ill disguised violation of the principle of [e]quality."<sup>60</sup> For example, during a colloquy, Sumner asked Senator Joshua Hill, if segregation were permissible in railroad cars, then "[w]hy, sir, we have had in this Chamber a colored Senator from Mississippi, but according to the rule of the Senator from Georgia we should have set him apart by himself; he should not have sat with his brother Senators," to which Senator Hill responded, "No . . . it is under the institutions of the country that he becomes entitled by law to his seat here; we have no right to deny it to him." Sumner responded, "Very well and I intend to the best of my ability to see that under the institutions of his country he is equal everywhere."<sup>61</sup>

Opponents, on the other hand, lodged five main arguments against the bill: that it represented an unconstitutional encroachment of federal authority upon States' rights;<sup>62</sup> that the Reconstruction Amendments intended to give newly freed slaves political and civil, but not social, equality;<sup>63</sup> that the bill, particularly its schools provi-

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58. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875). The partial victory for Radical Republicans with the passage of the Civil Rights Act of 1875 would prove to be short-lived, as the U.S. Supreme Court invalidated the law, holding that Congress did not have the power under the Fourteenth Amendment to prohibit racial discrimination by private individuals and organizations. *The Civil Rights Cases*, 109 U.S. 3, 19 (1883).

59. See Mitch McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 460 (1996).

60. CONG. GLOBE, 42d Cong., 2d Sess. 384 (1872); see also *id.* at 3735 (statement of Sen. Frederick Frelinghuysen) ("[T]he opinion of the Senate has been expressed over and over again in favor of retaining the provisions in reference to public schools.").

61. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1872).

62. See 2 CONG. REC. 405 (1874) (statement of Rep. Milton Durham) ("[Regulation of schools] are matters purely of local legislation or of private contract."); CONG. GLOBE, 42d Cong., 2d Sess. 3190 (1872) (statement of Sen. Lyman Trumbull) ("[Attending school] is not any right at all. It is a matter to be regulated by the localities."); Kelly, *supra* note 43, at 548.

63. See CONG. GLOBE, 42d Cong., 2d Sess. 3189 (1872) (statement of Sen. Lyman Trumbull) ("The right to go to school is not a civil right and never was.").

sion, would be unacceptable to the majority of Southern citizens;<sup>64</sup> that the bill was an attempt to enforce the sort of social equality that both races would find repugnant,<sup>65</sup> and that the “next step will be that they [blacks] will demand a law allowing them, without restraint, to visit the parlors and drawing-rooms of the whites, and have free and unrestrained social intercourse with your unmarried sons and daughters.”<sup>66</sup>

In response, Republicans insisted that Congress did indeed have the power to enact the bill pursuant to its Reconstruction Amendment powers.<sup>67</sup> As to the claim that the bill went beyond political and civil equality, Republicans maintained that segregation in places of public accommodation in general, and in schools in particular, was “an enactment of personal degradation” and a form of “legalized disability or inferiority.”<sup>68</sup> One congressman stated that the sole purpose of segregation was “the subjugation of the weak of every class and race” and he would “never give [his] vote or voice to the support of any such pernicious doctrine.”<sup>69</sup>

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64. Even before Sumner’s bill was drafted, Virginia, for example, sent to Congress a note expressly disclaiming any desire to have integrated schools when readmitted to the Union. *See* CONG. GLOBE, 41st Cong., 2d Sess., 362 (1870) (“[T]he Constitution of said States shall never be so amended or changed . . . to prevent any person on account of race, color, or previous condition of servitude from . . . participating equally in the school fund or school privileges provided for in said Constitution.”); *see also* L.E. Murphy, *The Civil Rights Law of 1875*, 12 J. NEGRO HIST. 110, 119 (1927) (citing 2 CONG. REC., 4145 (1874)) (“[Senator] Bogy warned the Senate that the white children of the South would be kept away by their parents; and while those of the richer class could be accommodated by private schools, the poor whites would have no education at all.”).

65. Some Democrats even asserted that blacks preferred segregation, stating, “the negro is as much interested in keeping aloof from the white man as the white man is interested in keeping aloof from the negro.” 2 CONG. REC. app. 316, 381 (May 22 1874) (statement of Sen. Merimon). But perhaps Democrat Representative James came to the heart of the social relation objection when he stated on the floor of the House:

If Congress has the power to pass this bill and make it a law it has the power to enact laws to regulate the minutest social observances of domestic or fashionable life. If it has the right to say to my neighbor, “You must ride in the same car, eat at the same table, and lodge in the same room with a negro,” it can also say that you must not interpose an objection on account of his color to any advances he may make toward your children or family.

CONG. GLOBE, 42d Cong., 2d Sess. app. at 372 (1872); *see, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 2449 (1868) (statement of Rep. James Beck) (“I can scarcely conceive of a more despotic, galling, and degrading provision in the fundamental law of a state pretending to be free,” referring to proposed state constitutional provision in Louisiana and South Carolina); *see also* Steven A. Bank, *Anti-Miscegenation Laws and the Dilemma of Symmetry: The Understanding of Equality in the Civil Rights Act of 1875*, 2 U. CHI. L. SCH. ROUNDTABLE 303, 306–07 (1995).

66. 2 CONG. REC. app. at 343 (1874).

67. *See* McConnell, *supra* note 21, at 997–98.

68. 2 CONG. REC. 3451–52 (1874) (statement of Sen. Frederick Frelinghuysen).

69. 3 CONG. REC. 999 (1875) (statement of Rep. Julius Burrows).

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But by far, Republicans reserved the best of their argument to assuage fears of compulsory private social mixing. Black Republicans in particular, repeatedly assured Democrats that the “negro is not asking social equality. We do not ask . . . that the two races should intermarry one with the other.”<sup>70</sup> In any case, Republicans pointed out, fear mongering over the intermeddling of races had been “successfully refuted in the past”<sup>71</sup> in places that had already integrated schools:

It is gratifying to state that the satisfactory results of its workings has dispelled all doubts in regard to its practicability, quieted apprehension, and contributed largely to remove fears and annihilate that prejudice which has been declared upon this floor should be fostered and respected. It is with the aim of making more complete the destruction of this uncharitable sentiment and proscription that the opening of the public schools to all is so much to be desired.<sup>72</sup>

Representative Alonzo J. Ransier, an African American legislator, relied on the example of Berea College in Kentucky that had been integrated even before the end of the Civil War, reminding his colleagues in the House that when integration did come to Berea College, there “gathered from twelve to fifteen hundred people from the mountains and from the Blue Grass country, literate and illiterate, rich and poor, white and colored, farmers, mechanics, and professional men; a very mingled crowd, but a very attentive and orderly audience.”<sup>73</sup> In response to the argument by Democrats that “social equality” could not stamp out racial prejudice, many Republicans used the experiences of Charles C. Fairchild, an abolitionist member of the faculty of integrated Berea College as an example of why integrated schools could succeed. Fairchild wrote:

This prejudice is not so intangible . . . [i]t is not inborn, but an educated prejudice, and a little compulsory education of a different nature will do much to remove it. . . . Progress in the matter of public conveyances and of schools [in the North] has been a constant illustration of this. . . . The social waters have always been greatly disturbed; but in a short time they ran quietly through a channel[,] which contained one less obstacle.<sup>74</sup>

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70. 2 CONG. REC. 343–44 (1874) (statement of Rep. Joseph H. Rainey).

71. 3 CONG. REC. 960 (1875) (statement of Rep. Joseph H. Rainey).

72. *Id.*

73. 2 CONG. REC. 1314 (1874) (statement of Rep. Alonzo J. Ransier).

74. James M. McPherson, *Abolitionists and the Civil Rights Act of 1875*, 52 J. AM. HIST. 493, 506 (1965) (quoting Fairchild Letter).

Some Black Republicans viewed desegregating schools as beneficial not only for the newly freed slaves, but for the entire nation, stating that “the education of the race, the education of the nation, is paramount to all other considerations. I regard it important, therefore, that the colored people should take place in the educational march in this nation, and I would suggest that there should be no discrimination.”<sup>75</sup> During one debate, Representative Cain reiterated his point on the necessity of the schools provision in the civil rights bill:

The education of the masses is to my mind of vital moment to the welfare, the peace, the safety, and the good government of the Republic. Every enlightened nation regards the development of the minds of the masse as of vital importance. How are you going to elevate this large mass of people? What is the means to be employed? Is it not the development of their minds, the molding and fashioning of their intellects, lifting them up from intellectual degradation by information, by instruction? I know of no other means so well adapted to the development of a nation as education.<sup>76</sup>

One of the main reasons the schools provision was so important to Radical Republicans is because they viewed school desegregation as a necessary component of achieving a truly color-blind nation. “Although the term ‘color-blind,’ later made famous by the first Justice Harlan in his dissenting opinion in *Plessy v. Ferguson*, was not uttered during the debate, proponents of the bill used synonymous formulations.”<sup>77</sup> For example, Sumner, the drafter of the civil rights bill, said “it remains that equal rights shall be secured in all the public conveyances, and on the railroads. . . . All schools must be opened to all, without distinction of color.”<sup>78</sup> Similarly, publications that favored the civil rights bill echoed the same sentiment, writing “the Republican party has not yet accomplished its work, and will not till a perfect civil rights bill secures to every ransomed citizen the full enjoyment of his personal liberty. The Republican party must take that next step in the order of its march.”<sup>79</sup>

Abolitionists expressed nearly identical views, stating: “[S]o long as the freedmen are excluded from the public schools, equal seats on

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75. 2 CONG. REC. 566 (1874) (statement of Rep. Richard Cain).

76. 3 CONG. REC. 981–82 (1875) (statement of Rep. Richard Cain).

77. McConnell, *supra* note 21, at 1009.

78. Sumner’s speech was published in the *Independent* on April 14, 1870. McPherson, *supra* note 74, at 500.

79. *Id.*

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the railroad cars and churches, . . . and places of amusement and hotels, our work is not done.”<sup>80</sup> For Black Republicans in Congress, education meant equality: “We do not ask the passage of any law forcing us upon anybody who does not want to receive us. But we do want a law enacted that we may be recognized like other men in the country.”<sup>81</sup> Representative Rainey elaborated:

All we ask of this country is to put no barriers between us, to lay no stumbling blocks in our way, to give us freedom to accomplish our destiny, that we may thus acquire all that is necessary to our interest and welfare in this country. Do this, sir, and we shall ask nothing more.<sup>82</sup>

Additionally, achieving color-blindness did not mean imposing social equality, “it is not social rights that [blacks] desire. We have enough of that already. What we ask is protection in the enjoyment of *public* rights. Rights which are or should be accorded to every citizen alike.”<sup>83</sup> “We cannot engage in the industrial pursuits, educate our children, defend our lives and property in the courts, receive the comforts provided in our common conveyances . . . when we are circumscribed within the narrowest possible limits on every hand, disowned, spit upon, and outraged in a thousand ways.”<sup>84</sup> In sum, blacks desired “to have the cloud of proscription removed from [their] horizon, that [they] may clearly see [their] way to intellectual and moral advancement.”<sup>85</sup>

Interestingly, proponents of color-blindness diverged on their views concerning equality in schools. In Congress, “Desegregationists, the larger group, maintained that all children should have the right to attend any public school without discrimination on the basis of their race, but that individuals of both races could (and probably would) choose to attend separate schools”; “Integrationists,” the much smaller group, “stressed that the goal should be actual integration.”<sup>86</sup> Representative Lynched, on behalf of Desegregationists, describes the group’s view as not requiring mixed schools, but to confer “[equal] rights to which they are entitled under the Constitution . . .

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80. JULIE REY JEFFREY, *ABOLITIONISTS REMEMBER: ANTISLAVERY AUTOBIOGRAPHIES AND THE UNFINISHED WORK OF EMANCIPATION* 101 (2008).

81. 2 CONG. REC. 344 (1873) (statement of Rep. Joseph H. Rainey).

82. 3 CONG. REC. 957 (1875) (statement of Rep. Richard Cain).

83. *Id.* at 944.

84. 2 CONG. REC. 383 (1874) (statement of Rep. Alonzo J. Ransier).

85. 3 CONG. REC. 960 (1875) (statement of Rep. Joseph H. Rainey).

86. McConnell, *supra* note 21, at 1074–75.

then both races will be satisfied, because they will know that the separation is their own voluntary act and not legislative compulsion.”<sup>87</sup> Senator Boutwell stressed the need for integration because “human equality cannot be taught in families,” but “in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions.”<sup>88</sup> What both groups did agree on, however, was that there should be an enforceable legal remedy, if a person was prevented from attending school on the basis of race.

In essence, in advocating for a civil rights bill that was eventually passed in 1875, the main argument for the bill by those most affected by the vestiges of slavery was not for special or preferential treatment, but simply the opportunity to prove themselves.

Those who opposed the civil rights bill, either fully or in part, had divergent views on the United States Constitution and its application of equality. There was the familiar separate but equal argument that segregation imposed the same treatment on both races, and therefore constituted equality. As Senator Hill described the position, he was “entitled, and so is the colored man, to all the security and comfort that either presents to the most favored guest or passenger,” but proximity to a person of a different race “does not increase my comfort or security, nor does proximity to me on his part increase his; and therefore it is not a denial of any right in either case.”<sup>89</sup> Similarly, with school segregation, the argument was that if separating the races was indeed unlawful, then “it is just as much a violation of the right of a white child to keep him out of a black school as it is of a black child to keep him out of a white school.”<sup>90</sup>

For others though, no matter the interpretation of color-blindness, it had no place in the private spheres. Those who distinguished civil rights (public activity) and social rights (private activities, including school) feared the government would be allowed to invade all provinces of an individual’s livelihood if the civil rights bill was passed.<sup>91</sup> For the most part, Senator Trumbull based his argument

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87. 3 CONG. REC. 945–46 (1875) (statement of Rep. John R. Lynch).

88. 2 CONG. REC. 4116 (1874) (statement of Rep. George S. Boutwell).

89. CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871) (statement of Sen. Joshua Hill).

90. CONG. GLOBE, 42d Cong., 2d Sess. 3195 (1872) (statement of Sen. Arthur Boreman).

91. *See* CONG. GLOBE, 42d Cong., 2d Sess. 3189 (1872) (statement of Sen. Lyman Trumbull).

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against the civil rights bill on the widely accepted (at the time) taxonomy of rights as civil, political, and social. It was generally understood that the nondiscrimination requirement of the Fourteenth Amendment applied only to “civil rights.” This would be the view that prevailed temporarily in the legal realm with the Supreme Court’s decisions in the *Slaughter House Cases*,<sup>92</sup> *The Civil Rights Cases*,<sup>93</sup> and *Plessy v. Ferguson*.<sup>94</sup>

As noted above, despite the valiant effort by Republicans, the schools provision was eventually deleted from the enacted version of the Civil Rights Act of 1875. One newspaper called the law an “apology for the civil rights bill” without “the most important feature”:

What should have been a great measure of justice, has, by this action, proved of the very least consequence. . . . To let the colored people ride in cars, stop at hotels, and go to places of amusement, while they are denied equal school education . . . can bring no satisfaction to a thoughtful and logical mind.<sup>95</sup>

An abolitionist warned that the elimination of the schools provision would constitute “a surrender of the principle for which the war was waged. . . . If the war settled anything it settled this: that neither law nor constitution here can recognize race in any way, or in any circumstances.”<sup>96</sup> “The negro child loses if you shut him up in separate schools, no matter how accomplished his teacher or how perfect the apparatus furnished the school.”<sup>97</sup>

### III. THE COUNTER NARRATIVE TO WHITE SUPREMACY IN THE 1875 CIVIL RIGHTS ACT DEBATES

The debates over the 1875 Civil Rights Act are significant for a number of reasons. Most starkly, they stood as one more battlefield

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92. 83 U.S. (16 Wall.) 36, 78 (1872) (holding that the Fourteenth Amendment’s Privileges and Immunities Clause safeguards the rights of citizens of the United States against the actions of the State).

93. 109 U.S. 3, 25 (1883) (holding that Congress could not enforce the Fourteenth Amendment against private action).

94. 163 U.S. 537, 551–52 (1896) (“Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane.”).

95. DAVID MILES JOHNSON, *BEYOND FREEDOM: THE BLACK NORTH 1863–1893*, at 205 (2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

96. ANDREW KULL, *THE COLOR BLIND CONSTITUTION* 88 (1992) (quoting letter from Wendell Phillips published in the *Boston Advertiser*, Jan. 11, 1875).

97. McPherson, *supra* note 74, at 508.

in a Civil War that some in the South had never stopped—and in some ways would never stop—fighting. They revealed with unremitting clarity, and almost for the first time in the records of congressional history, how deeply and irrevocably white supremacy was embedded in the core of American identity.<sup>98</sup> They served as a legislative rehearsal for the intellectual foundations of Jim Crow; in time, the United States Supreme Court would give judicial imprimatur to the doctrine of separate but equal, but a quarter of a century before *Plessy v. Ferguson*, the arguments for racial apartheid had already been perfected.<sup>99</sup> Lastly, they represented a harbinger of twentieth and twenty-first century racial politics. Upon signing the Civil Rights Act of 1964 into law, President Lyndon Johnson is said to have predicted (correctly it turned out) that “Democrats have lost the South for a generation.”<sup>100</sup> So, too, Democrats thought that the 1875 bill would mean the end of the Republican Party in the South, with a white representative from South Carolina warning: “If you pass this bill your power over the South will pass away; the power of the Republican Party in the South will pass away.”<sup>101</sup>

But as significant as these reasons are, above all, the debates over the 1875 Civil Rights Act are historically and constitutionally for the counter narrative to white supremacy that African American representatives would carefully and painfully craft over the course of four years. That counter narrative was unprecedented for its time and remains to this day unique in American constitutional history for the clarity and force with which men—some of whom had themselves been slaves prior to the Civil War—articulated a repudiation of white supremacy and black inferiority and offered a vision of human equality that the Supreme Court in its long history has never—not once—cited or indeed even acknowledged.

Read together, these speeches are of a piece logical:

There are privileges and immunities which belong to me as a citizen of the United States, and there are privileges and immunities which

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98. For example, in one of the earliest debates in the House, Representative John Harris of Virginia stated: “[T]here is not one gentleman upon this floor who can honestly say he really believes the colored man is created his equal.” 2 CONG. REC. 376 (1874).

99. For example, one southern Senator offered what, in his view, was the clearest objection to the bill, namely that the Act appeared to say: “You must ride in the same car, eat at the same table, and lodge in the same room with a negro . . .” CONG. GLOBE, 42d Cong., 2d Sess. 372 (1872).

100. Clay Risen, *How the South Was Won*, BOS. GLOBE (Mar. 5, 2006), [http://www.boston.com/news/globe/ideas/articles/2006/03/05/how\\_the\\_south\\_was\\_won](http://www.boston.com/news/globe/ideas/articles/2006/03/05/how_the_south_was_won).

101. 2 CONG. REC. 900 (1874) (statement of Rep. Williams Robbins).



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belong to me as a citizen of my State. . . . But what of that? Are the rights which I now claim—the right to enjoy the common public conveniences of travel on public highways, of rest and refreshment at public inns, of education in public schools, of burial in public cemeteries—rights which I hold as a citizen of the United States or of my State? Or, to state the question more exactly, is not the denial of such privileges to me a denial to me of the equal protection of the laws?<sup>102</sup>

And precise:

It is not social rights that we desire. . . . What we ask is protection in the enjoyment of *public* rights. Rights which are or should be accorded to every citizen alike.<sup>103</sup>

And clear:

The colored people in asking for the passage of this bill . . . do not thereby admit that their children can be better educated in white than in colored schools; nor that white teachers because they are white are better qualified to teach than colored ones. But they recognize the fact that the distinction when made and tolerated by law is an unjust and odious prescription; that you make their color a ground for objection, and consequently a crime.<sup>104</sup>

And philosophical:

[W]e feel that we are part and parcel of this great nation; and as such, we propose to stay here and solve this problem of whether the black race and the white race can live together in this country.<sup>105</sup>

And realistic:

Our interests are bound up in this country. . . .

[W]e are going to remain in this country side by side with the white race. We desire to share in your prosperity and to stand by you in adversity. In advancing the progress of the nation we will take our part; and if the country should again be involved in the devastation of war, we will do our part in the struggle. We propose to identify ourselves with this nation, which has done more than any other on earth to illustrate the great idea that all races of men may dwell together in harmony, working out together the problem of advancement and civilization and liberty.<sup>106</sup>

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102. 2 CONG. REC. 409 (1874) (statement of Rep. Robert B. Elliott).

103. 3 CONG. REC. 944 (1875) (statement of Rep. John R. Lynch).

104. *Id.* at 945.

105. 2 CONG. REC. 902 (1874) (statement of Rep. Richard Cain).

106. *Id.* at 903.

And even, at times, pleading:

Our purpose is to remain in your midst an integral part of the body politic. We are training our children to take our places when we are gone. We desire this bill that we may train them intelligently and respectably, that they may thus be qualified to be useful citizens in their day and time. We ask you, then, to give us every facility, that we may educate our sons and our daughters as they should be.<sup>107</sup>

But also uncompromising:

Men may concede that public sentiment, and not law, is the cause of the discrimination of which we justly complain and the resultant disabilities under which we labor.

. . . .

If this be so, then such public sentiments need penal correction, and should be regulated by law . . . .

We will hear no more of a public sentiment that feeds upon the remnants of the rotten dogmas of the past, and seeks a vitality in the exercise of a tyranny both cheap and unmanly.<sup>108</sup>

And unyielding:

I want to say we do not come here begging for our rights. We come here clothed in the garb of American citizenship. We come demanding our rights in the name of justice. . . . We come here, five millions of people—more than composed this whole nation when it had its great tea-party in Boston Harbor, and demanded its rights at the point of the bayonet—asking that unjust discriminations against us be forbidden. We come here in the name of justice, equity, and law, in the name of our children, in the name of our country, petitioning for our rights.<sup>109</sup>

And confrontational:

The gentleman states that we would make no movement to achieve our liberty. Why, sir, the education which those gentlemen gave the southern slaves was of a peculiar kind. What schoolhouse in all the South was open to the colored race? Point to one. Name the academy where you educated black men and black women as lawyers or doctors, or in any other department of science or art. Point out the county. Give us the name of the district. Tell the name of the school commissioner. Name the teacher.

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107. 3 CONG. REC. 959 (1875) (statement of Rep. Joseph H. Rainey).

108. 2 CONG. REC. 416 (1874) (statement of Rep. Josiah Walls).

109. 2 CONG. REC. 901 (1874) (statement of Rep. Richard Cain).

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Examine the laws of the South, and you will find that it was a penal offense for any one to educate the colored people there. Yet these gentlemen come here and upbraid us with our ignorance and our stupidity. Yet you robbed us for two hundred years. During that time we toiled for you . . . We have made your wealth for your support and your education, while we were slaves, toiling without pay, without the means of education, and hardly of sustenance. And yet you upbraid us for being ignorant; call us a horde of barbarians!<sup>110</sup>

And demanding:

The cotton crop of this country have been raised and its rice fields have been tilled by the hands of our race. . . . This was done in the time of slavery. And if, for the space of time I have noted, we have been hewers of wood and drawers of water; if we have made your cotton-fields blossom as they rose; if we have made your rice-fields wave with luxuriant harvests; if we have made your corn-fields rejoice; if we have sweated and toiled to build up the prosperity of the whole country by the productions of our labor, I submit, now that the war has made a change, now that we are free—I submit to the nation whether it is not fair and right that we should come in and enjoy to the fullest extent our freedom and liberty.<sup>111</sup>

And insistent:

[N]othing short of a complete acknowledgement of my manhood will satisfy me. I have no compromise to make, and shall unwillingly accept any. . . . I cannot willingly accept anything less than my full measure of rights as a man, because I am unwilling to present myself as a candidate for the brand of inferiority . . . If I am thus branded, the country must do so against my solemn protest.<sup>112</sup>

And even impatient:

I have sat in this House for nine months, and I have listened to gentlemen recognized as the leaders of the other side attempting to demonstrate as they supposed the inferiority of a race of men whom they have so long outraged, and to cast a slur upon them because they have been helpless. But revolutions never go backward. The mills of the gods grind slowly, but surely and exceedingly fine. The times have changed.<sup>113</sup>

To the point of defiance:

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110. 2 CONG. REC. 901 (1874) (statement of Rep. Richard Cain).

111. *Id.* at 565–66.

112. 1 CONG. REC. 4784 (1874) (statement of Rep. James T. Rapier).

113. 3 CONG. REC. 956 (1875) (statement of Rep. Richard Cain).

I come to the national, instead of going to the local [l]egislatures for relief, . . . because the grievance is national and not local; because Congress is the lawmaking power of the General Government, whose duty it is to see that there be no unjust and odious discriminations made between citizens. I look to the Government in the place of the several States, because it claims my first allegiance, exacts at my hands strict obedience to its laws, and because it promises in the implied contract between every citizen and the Government to protect my life and property. I have fulfilled my part of the contract to the extent I have been called upon, and I demand that the Government, through Congress do the same.”<sup>114</sup>

Bordering on contempt:

But he tells us that the negroes never produced anything. Well, sir, it may be that in the gentleman’s opinion negroes have never produced anything. I wonder if the gentleman ever read history. Did he ever hear tell of any persons of the names of Hannibal, of Hanno, of Hamilear, of Euclid—all great men of ancient times—of Aesop and others. No, sir, so; for that kind of literature does not come to North Carolina.<sup>115</sup>

And dissolving into recrimination:

The gentleman from North Carolina admits, ironically, that the colored people, even when in bondage and ignorance, could equal, if not excel, the whites in some things—dancing, singing, and eloquence, for instance. We will admit, for the sake of the argument, that in this the gentleman is correct, and will ask the question, Why is it that the colored people could equal the whites in these respects, while in bondage and ignorance, but not in others? The answer is an easy one: You could not prevent them from dancing unless you kept them continually tied; you could not prevent them from singing unless you kept them continually gagged; you could not prevent them from being eloquent unless you deprived them of the power of speech; but you could and did prevent them from becoming educated for fear that they would equal you in every other respect; for no educated people can be held in bondage. If the argument proves anything, therefore, it is only this: That if the colored people while in bondage and ignorance could equal the whites in these respects, give them their freedom and allow them to become educated and they will equal the whites in every other respect.<sup>116</sup>

And bitterness:

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114. 1 CONG. REC. 4782–83 (1874) (statement of Rep. James T. Rapier).

115. 2 CONG. REC. 902 (1874) (statement of Rep. Richard Cain).

116. 3 CONG. REC. 946 (1875) (statement of Rep. John R. Lynch).

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They do not want any enactment by Congress that will have a tendency to elevate the negro and make him feel that he is a man and an American citizen. Just so long as you will let . . . Southern States, and some of the Northern and Western States, mete out to us what they think we ought to have, and we receive it without objection, we are good and clever fellows; but just as soon as we begin to assert our manhood and demand our rights we are looked upon as men not worthy to be recognized, we become objectionable, we become obnoxious, and we hear this howl about social equality.<sup>117</sup>

And sarcasm:

The gentleman starts out by saying that we pass the pending civil rights bill it may indeed seem pleasant to the northern people, but to his section, and to the South, it will be death. I do not think it is correct, for the reason that they have in the South suffered a great many more terrible things than civil rights, and still live. I think if so harmless a measure as the civil rights bill, guaranteeing to every man of the African race equal rights with other men, would bring death to the South, then certainly that noble march of Sherman to the sea would have fixed them long ago.”<sup>118</sup>

And reproach:

[H]ow can I have respect for the prejudices that prompt a man to turn up his nose at the males of a certain race, while at the same time he has a fondness for the females of the same race to the extent of cohabitation? Out of the four poor unfortunate colored women who from poverty were forced to go to the lying-in branch of the Freedmen’s Hospital here in the District last year three gave birth to children whose fathers were white men, and I venture to say that if they were members of this body, would vote against this civil rights bill.<sup>119</sup>

But also full of humor:

I regret exceedingly gentlemen talk of social equality. . . . Do you suppose for one moment I would introduce into my family a class of white men I see in this country? Do you suppose for one moment I would do it? No sir; for there are men even who have positions upon this floor, and for whom I have respect, but of whom I should be careful how I introduced them into my family. I should be afraid indeed their old habits acquired beyond Mason and Dixon’s line might return.<sup>120</sup>

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117. 2 CONG. REC. 344 (1873) (statement of Rep. Joseph Rainey).

118. 2 CONG. REC. 901 (1874) (statement of Rep. Richard Cain).

119. 1 CONG. REC. 4784 (1874) (statement of Rep. James T. Rapier).

120. 3 CONG. REC. 957 (1875) (statement of Rep. Richard Cain).

And poetry:

We are grateful [ ] that the day has come that no slave mother will lament in plaintive strains the parting of herself and daughters thus:

Gone, gone—sold and gone  
To the rice-swamp, dank and lone—  
Toiling through the weary day,  
And at night the spoiler's prey.  
O, that they had earlier died,  
Sleeping calmly, side by side,  
Where the tyrant's power is o'er  
And the fetter galls no more  
Gone, gone—sold and gone  
To the rice-swamp, dank and lone  
From Virginia's hills and waters  
Woe is me my stolen daughters!<sup>121</sup>

And prophesy:

Another reason why the school clause ought to be retained is because the negro question ought to be removed from the politics of the country. It has been a disturbing element in the country since the Declaration of Independence, and it will continue to be so long as the colored man is denied any right or privilege that is enjoyed by the white man.<sup>122</sup>

And hope:

The negro desires to forget the wrongs of the past, and has imposed no disabilities upon those who held him as a slave, when and where he has been in a position to do so; and he rejoices today, both from motives of patriotism and self-interest that the bitter feeling against him in the South . . . is fast dying out; that a better state of feeling exists, which must increase as he becomes educated, and, therefore, better acquainted with his duties and responsibilities as a citizen.<sup>123</sup>

And always faith:

I have no fear for the future. I believe the time will come when the sense of justice of this nation, when the enlightenment of this century, when the wisdom of our legislators, when the good feeling of the whole people will complete this grand work by lifting up out of degradation a race of men which has served long and faithfully by placing it, so far as the laws are concerned, upon an equal footing with all other classes. I have faith in this country.<sup>124</sup>

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121. *Id.* at 960 (statement of Rep. Joseph Rayney February 3 1875).

122. *Id.* at 945 (statement of Rep. John R. Lynch).

123. 2 CONG. REC. 1312 (1874) (statement of Rep. Alonzo J. Ransier).

124. 3 CONG. REC. 957 (1875) (statement of Rep. Richard Cain).

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And finally, even love:

The Holy Scriptures tell us of an humble hand-maiden who long, faithfully, and patiently gleaned in the rich fields of her wealthy kinsman; and we are told further that at last, in spite of her humble antecedents, she found complete favor in his sight. For over two centuries our race has “reaped down your fields.” The cries and woes which we have uttered have “entered into the ears of the Lord of Sabaoth,” and we are at last politically free. The last vestiture only is needed—civil rights. Having gained this, we may, with hearts overflowing with gratitude, and thankful that our prayer has been granted, repeat the prayer of Ruth: “Entreat me not to leave thee, or to return from following after thee; for whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God; where thou diest, will I die, and there will I be buried; the Lord do so to me, and more also, if aught but death part thee and me.”<sup>125</sup>

### CONCLUSION

In 1978, Justice Thurgood Marshall wrote in his partial dissent in *Bakke*: “[D]uring most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.”<sup>126</sup> Beginning with slavery and moving through the Civil War, Reconstruction, and Jim Crow, Justice Marshall told the story that no majority of the Supreme Court had ever spoken of then or since. That story he explained meant that “[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.”<sup>127</sup> That story, Justice Marshall also reminded the majority, meant that “[m]easured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”<sup>128</sup>

Thus, in 1978 Justice Marshall wrote that “[a] Negro child today has a life expectancy which is shorter by more than five years than that of a white child.”<sup>129</sup> In 2013, the United States Center for Disease Control (CDC) reported that African Americans born in 2010

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125. 2 CONG. REC. 410 (1874) (statement of Robert B. Elliott).

126. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978).

127. *Id.* at 395.

128. *Id.*

129. *Id.*

had a life expectancy shorter by almost four years than that of whites born the same year.<sup>130</sup> In 1978, Justice Marshall wrote: “The Negro child’s mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites.”<sup>131</sup> In 2012, the CDC reported that African American women are three times more likely to die from childbirth complications than white women,<sup>132</sup> while the infant mortality rate for African Americans remained more than twice that of whites in 2009.<sup>133</sup> In 1978, Justice Marshall wrote: “The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.”<sup>134</sup> In 2011, the median income of African Americans still remained approximately 60% that of whites,<sup>135</sup> and the percentage of African Americans living below the poverty line is nearly three times that of whites.<sup>136</sup> In 1978, Justice Marshall wrote: “For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers.”<sup>137</sup> In 2013, the unemployment rate for African American adults remained twice that of whites,<sup>138</sup> and that of African American teenagers is more than twice that of their white counterparts.<sup>139</sup> In 1978, Justice Marshall wrote: “Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers, and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university

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130. Kenneth D. Kochanek et. al, *How Did Cause of Death Contribute to Racial Differences in Life Expectancy in the United States in 2010?*, NCHS (July 2013), <http://www.cdc.gov/nchs/data/databriefs/db125.pdf>.

131. *Bakke*, 438 U.S. at 395.

132. *Pregnancy Mortality Surveillance System*, CDC (July 18, 2013), <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pmss.html>.

133. *Morbidity and Mortality Weekly Report*, CDC (Feb. 8, 2013), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6205a6.htm>.

134. *Bakke*, 438 U.S. at 395.

135. Drew Desilver, *Black Incomes Are Up, but Wealth Isn't*, PEW RES. CTR. (Aug. 20, 2013), <http://www.pewresearch.org/fact-tank/2013/08/30/black-incomes-are-up-but-wealth-isnt/>.

136. *Poverty Rate by Race/Ethnicity*, HENRY J. KAISER FAM. FOUND. (2012), <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/>.

137. *Bakke*, 438 U.S. at 395.

138. Drew Desilver, *Black Unemployment Rate Is Consistently Twice That of Whites*, PEW RES. CTR. (Aug. 21, 2013), <http://www.pewresearch.org/fact-tank/2013/08/21/through-good-times-and-bad-black-unemployment-is-consistently-double-that-of-whites/>.

139. *Data Brief: Black Unemployment and Employment in July 2013*, U. C. Berkeley Lab. Ctr. (Aug. 12, 2013), [http://laborcenter.berkeley.edu/blackworkers/monthly/bwreport\\_2013-08-02\\_63.pdf](http://laborcenter.berkeley.edu/blackworkers/monthly/bwreport_2013-08-02_63.pdf).



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professors.”<sup>140</sup> In 2013, although African Americans represent 13% of the population,<sup>141</sup> they are only 4% of the lawyers,<sup>142</sup> 3.8% of the physicians,<sup>143</sup> 5% of the dentists,<sup>144</sup> 4% of the engineers,<sup>145</sup> and of the college and university professors.<sup>146</sup>

On February 4, 1875, the House held the last debate on the civil rights bill. By then, Republicans, with the reluctant assent of African American representatives, had already conceded to removing the school equality provision from the bill. The African American legislators, who fought in vain for so long and for so hard to retain it, held fast to a belief, borne out of their experience in slavery, that literacy equaled freedom and “it is education that makes a people great.”<sup>147</sup> But faced with the bill’s certain defeat, if they preserved the school provision, they agreed that “if your objections is to guaranteeing to us in the civil-rights bill an equal enjoyment of school privileges, then . . . say nothing of the school-house if you choose.”<sup>148</sup> Once the concession was made, the bill quickly moved to a vote. James Rapier was the last African American representative to speak on that last day of debate prior to the vote. Here is how the Congressional Record memorialized that final moment:

Sir, if any man is entitled to the protection of the laws of his country, I hold that the colored man is that man. When he had no particular reason for liking this Government; when your Government was threatened with destruction . . . it was that the negro came forward, made bare his breast and in it received the thrusts of the bayonets aimed at the life of the nation. And you now hesitate to say

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140. *Bakke*, 438 U.S. at 395–96.

141. *State & County Quick Facts*, U.S. CENSUS BUREAU (Jan. 7, 2014), <http://quickfacts.census.gov/qfd/states/00000.html>.

142. *With One Foot in the Door, Black Lawyers Still Struggle*, NEW PITTSBURGH COURIER (Feb. 20, 2013), <http://newpittsburghcourieronline.com/2013/02/20/with-one-foot-in-the-door-black-lawyers-still-struggle/>.

143. Eilyn R. Boukus, et. al, *A Snapshot of U.S. Physicians: Key Finding from the 2008 Health Tracking Physician Survey*, HEALTH SYSTEM CHANGE (Sept. 2009), <http://www.hschange.com/CONTENT/1078/>.

144. Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds*, N.Y. TIMES (May 27, 2013) [http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html?\\_r=0](http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html?_r=0).

145. Brian L. Yoder, *Engineering by the Numbers*, AM. SOC’Y OF ENG’G EDUC. <http://www.asee.org/papers-and-publications/publications/college-profiles/2011-profile-engineering-statistics.pdf> (last visited Jan. 28, 2014).

146. *The Snail-Like Progress of Blacks into Faculty Ranks of Higher Education*, J. OF BLACKS IN HIGHER EDUC., [http://www.jbhe.com/news\\_views/54\\_black-faculty-progress.html](http://www.jbhe.com/news_views/54_black-faculty-progress.html) (last visited Jan. 27, 2014).

147. 3 CONG. REC. 981 (1875) (statement of Rep. Richard H. Cain).

148. *Id.*

whether I shall be regarded as a man or not in this country, being a representative of that race.

[Here the Hammer fell.]

MR. RAPIER: In the name of my constituents I demand passage of the Senate Bill.<sup>149</sup>

Reading the debates over the Civil Rights Act of 1875 from beginning to end, one is left with the inescapable impression that these newly minted African American members of Congress anticipated the very problem that Justice Marshall would come to identify a century later in *Bakke* in 1978 and that has remained virtually unchanged to this day, namely, that insisting upon equal educational opportunities they were “not dealing with the past, but with the immediate present and for the future.”<sup>150</sup> But, in spite of their often stated belief that the bill, if passed, would settle once and for all the question of racial segregation in schools and other public places, one wonders whether, for all of their profession of faith in their country, they must have known that the question would not be settled in their lifetime and for a long time to come. One wonders, too, whether they must have known that the counter narrative to white supremacy they took so much time and care to craft would need to be reframed and retold to every generation. When a mere eight years after its passage, the Supreme Court in the *Civil Rights Cases* ruled unconstitutional the provisions of the Act prohibiting private acts of discrimination in places of public accommodation, it did not once cite to any of the statements of African American legislators.<sup>151</sup> Rather, it explained that Congress lacked the power under the Fourteenth Amendment to prohibit private discrimination and then went on to lecture the African American plaintiffs in the case that:

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149. 1 CONG. REC. 4784 (1874) (statement of Rep. James T. Rapier).

150. 3 CONG. REC. 960 (1875) (statement of Rep. Joseph H. Rainey).

151. African Americans predictably reacted with outrage at a decision that had erased rights they believed they had rightly earned. Frederick Douglass told an assembled crowd:

We have been grievously wounded in the house of our friends, and the wound is too fresh, too deep, and too painful for the measured speech of ordinary occasions.

...

We cannot, however, overlook the fact that, whether so intended or not, this decision has inflicted a heavy calamity upon the seven millions of the colored people of this country, and left them naked and defenceless [sic] against the action of a malignant, vulgar and pitiless prejudice.

See Henry McNeal Turner, *The Barbarous Decision of the United States Supreme Court Declaring the Civil Rights Act Unconstitutional and Disrobing the Colored Race of All Civil Protection*, <http://docsouth.unc.edu/church/turnerbd/turner.html>.

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[W]hen a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.<sup>152</sup>

When James Baldwin wrote that “[t]he purpose of education . . . is to create in a person the ability to look at the world for himself, to make his own decisions, to say to himself this is black or this is white, to decide for himself whether there is a God in heaven or not,” he also pointed out that “no society is really anxious to have that kind of person around.”<sup>153</sup> Instead, “[w]hat societies really, ideally, want is a citizenry which will simply obey the rules of society.”<sup>154</sup> But, he insisted, “[t]he obligation of anyone who thinks of himself as responsible is to examine society and try to change it and to fight it—at no matter what risk. This is the only hope society has. This is the only way societies change.”<sup>155</sup> The African American representatives who fought for the Civil Rights Act of 1875 saw their obligation to examine and change white supremacy. They did not succeed; perhaps they knew they never would. Perhaps all they hoped to accomplish was to mark their time and their place; to say, even if they were not heard then and, to this day, have remained unheard in the precincts of the United States Supreme Court: *we were here and we remember*.

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152. The Civil Rights Cases, 109 U.S. 3, 61 (1883).

153. James Baldwin, *A Talk to Teachers*, in *THE PRICE OF THE TICKET, COLLECTED NON-FICTION 1948–1985* at 326 (1985).

154. *Id.*

155. *Id.*



## COMMENT

# The Constitution Versus Congress: Why Deference to Legislative Intent Is Never an Exception to Double Jeopardy Protection

RICHARD T. CARLTON, III\*

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INTRODUCTION

*The Story of Roland Jeter-El*

In 1990, Roland Jeter-El was an eighteen-year-old high school student, who along with his friend, sixteen-year-old Arthur Rinald Miles, hatched an ill-fated scheme to rob a pizza deliveryman while posing as inhabitants of a long-vacated home.<sup>1</sup> On the night of the robbery, Roland was “armed” with a toy gun while Miles was armed with a real gun.<sup>2</sup> The boys called Domino’s Pizza to deliver to the vacant house where they would be hiding; the plan was to force the deliveryman inside the house so they could rob him.<sup>3</sup> The unfortunate victim was Carl Krogmann, the manager of the Domino’s store, who made the fateful decision to take the delivery himself, a delivery that he intended to be his last for the evening.<sup>4</sup>

When Krogmann arrived at the home, the boys answered the door and invited Krogmann inside, but Krogmann refused.<sup>5</sup> The boys closed the door and began to confer with each other as to what their next action would be, but Krogmann began to walk back to his car.<sup>6</sup> The boys opened the door again and called out to Krogmann to come back; Krogmann complied.<sup>7</sup> As Krogmann began to walk back to the house, a shot rang out and Krogmann fell to the ground dead.<sup>8</sup> The

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1. Jeter v. Maryland, No. 1980, at 2 (Md. Ct. Spec. App. 1991) (per curiam); Transcript of Proceedings at 37, Maryland v. Jeter, No. CT 90-0879B (Cir. Ct. 1990); see Stephen Buckley, *Two Suspects Arrested in Domino’s Killing*, WASH. POST, Apr. 10, 1990, at B7 (noting the shooting occurred at 10 p.m. on a Saturday night in Prince George’s County, Maryland). Roland H. Jeter appears to have added “El” to his surname while in prison.

2. Jeter, No. 1980, at 2.

3. *Id.* at 2.

4. *Id.* at 1; *Children and Gun Violence: Hearings Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary*, 103d Cong. 11–12 (1993) [hereinafter *Senate Hearing*] (statement of Jennifer Ramsay, girlfriend of Carl Krogmann and witness to his murder). According to Ramsay, Miles and Jeter were arrested two days later; apparently discovered because they bragged about the incident at school. *Senate Hearing*, at 11. In addition to testifying on the effect that losing a loved one has on a person, Ramsey advocated for stricter gun control laws as a possible counter measure to gun violence, particularly among juveniles. *Id.* at 11–12; see Roger Simon, *A Missed Reunion, a Life Cut Short*, DAILY GAZETTE, May 2, 1990, at B14 (reporting that Jeter and Miles decided to rob Krogmann in order to get money for a “rock concert”).

5. Jeter, No. 1980, at 2.

6. *Id.* at 2–3.

7. *Id.* at 3.

8. *Id.*

two boys ran away without robbing any money from Krogmann, who, incidentally, only had fifteen dollars on him.<sup>9</sup>

Roland Jeter-El was not holding the gun that killed Carl Krogmann; it was his friend, Arthur Rinald Miles, who pulled the fateful trigger on accident, they claim.<sup>10</sup> Jeter-El was sentenced to thirty years for second-degree murder, twenty years for the use of a handgun in the commission of a felony, and twenty years for attempted robbery with a deadly weapon.<sup>11</sup> In total, Roland Jeter-El was sentenced to serve seventy years.<sup>12</sup>

In 2012, Jeter-El filed a Motion to Correct Illegal Sentence, more than twenty years after his conviction, arguing that only one crime had occurred, the armed robbery, and that the handgun crime should merge into the armed robbery, thereby shortening his sentence.<sup>13</sup> For his petition, Roland Jeter-El relied on *Newton v. Maryland*, a case where the Maryland Court of Appeals held that “felony murder and the underlying felony must be deemed the same for Double Jeopardy

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9. Buckley, *supra* note 1, at B7. The incident would spark a national debate over gun violence. Ann Zanger-Calderone, *Prom Knight: The Unlikely Hero She Never Forgot*, BETHESDA MAG., May–June 2012, available at <http://www.bethesdamagazine.com/Bethesda-Magazine/May-June-2012/Prom-Knight/>; see *Senate Hearing*, *supra* note 4, at 6 (discussing juvenile gun violence in America).

10. *Jeter*, No. 1980, at 3 (“[Jeter] told the police that Mr. Miles ‘told me it was an accident, and I really think it was, because the guy didn’t do nothing.’”). Arthur Rinald Miles had no previous criminal record and was tried as an adult, separately from Jeter. Paul Duggan, *Largo Teen Gets Life Term in Pizza Deliveryman Slaying*, WASH. POST, Oct. 2, 1990, at B1. He was sentenced to life in prison for first-degree murder: twenty years for the use of a handgun in the commission of a felony, and twenty years for conspiracy to commit robbery with a dangerous and deadly weapon. *Miles v. Maryland*, 594 A.2d 1208, 1210 (Md. Ct. Spec. App. 1991). On appeal, Miles argued, among other things, that his constitutional due process rights were violated because there was no rational basis for a Maryland law that allowed juveniles aged fourteen and fifteen to get a “reverse waiver” but which denied such a procedure to juveniles aged sixteen and seventeen. *Id.* at 1222–23. The court denied Miles’s motion, stating that “[w]e are convinced . . . that appellant’s due process rights were not infringed in the instant case. The fact remains that there is no constitutional right to be treated as a juvenile . . .” *Id.* at 1223–24. Interestingly enough, Miles was the son of a twenty-year veteran of the District of Columbia Police Force; additionally, after three years, he was transferred from a maximum security prison to another prison more focused on rehabilitation, offering him a chance to be on parole after ten years. *Senate Hearing*, *supra* note 4, at 12.

11. *Jeter*, No. 1980, at 1; Petitioner’s Motion to Correct Illegal Sentence at 6, *Jeter-El v. Maryland*, No. CT 90-0879B (Cir. Ct. 2012). Initially, Jeter was found guilty on five counts: (1) second degree murder, (2) use of a handgun in the commission of a felony, (3) attempted robbery with a deadly weapon, (4) use of a handgun in the commission of a crime of violence, and (5) conspiracy to robbery with a deadly weapon. Memorandum and Order at 1, *Maryland v. Jeter-El*, No. CT 90-0879B (Cir. Ct. 2012). Armed robbery with a deadly weapon merged with use of a handgun in a crime of violence; the conspiracy count was to be served concurrently with the other counts. *Id.* at 1.

12. Memorandum and Order at 1, *Jeter-El*, No. CT 90-08979B.

13. Petitioner’s Motion to Correct Illegal Sentence at 6, *Jeter-El*, No. CT 90-0879B; Memorandum and Order at 1, *Jeter-El*, No. CT 90-08979B.

purposes.”<sup>14</sup> The *Newton* court merged an attempted robbery charge (the felony) with the murder charge because proof of the armed robbery was required to prove felony murder.<sup>15</sup> However, Roland Jeter-El was charged with *second-degree murder*, and based on the *Newton* decision, second-degree murder does not trigger merger with the underlying felony itself. Jeter’s Motion was denied based on *Newton* and the holding of *Whack v. Maryland*, which held that the Maryland legislature *intended* for the handgun crimes to be punished more severely as separate offenses in addition to any other charged crime.<sup>16</sup>

Although Jeter-El’s legal argument was incorrect, there is a principle illustrated here that may strike the reader as almost fundamental, based perhaps on principles of public policy or fairness. Jeter-El was sentenced to *seventy* years for this crime. *Seventy* years for participating in a botched robbery that tragically and unintentionally left one man dead. For his participation in this *single* criminal incident, he was charged with *multiple* crimes. Even though he did not pull the trigger, he was sentenced to a total of *seventy* years, mostly due to the sentencing provisions of these multiple charges: thirty years for second degree murder, twenty years for armed robbery, and twenty years for the separate handgun crime, to be served consecutively. There is no doubt that second degree murder is an altogether different crime than armed robbery and should be punished separately; however, for carrying a fake gun and participating in this single criminal incident, Jeter-El was sentenced to an additional forty years. Roland Jeter-El was a young man, one who made a terrible decision, and he was given no second chance. For carrying this fake handgun, he was charged not only with (1) armed robbery but with (2) use of a handgun in commission of a crime of violence. Was Jeter-El not put in jeopardy twice for both of these crimes?

This Comment discusses the principle of double jeopardy as outlined in the Fifth Amendment and the judicial practice of deferring to legislative intent when determining whether offenses merge for double jeopardy protection. Part I of this Comment discusses the Double Jeopardy Clause of the Fifth Amendment; the required evidence test, which determines when two crimes must merge; and the

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14. 373 A.2d 262, 268 (Md. 1977). Felony murder, murder which occurs in the commission of a felony, is considered first degree murder under Maryland law. MD. CODE ANN. CRIM. LAW § 2-201 (West 2013).

15. *Newton*, 373 A.2d at 266–67.

16. Memorandum and Order at 1, *Jeter-El*, No. CT 90-0879B; *Whack v. Maryland*, 416 A.2d 265, 271 (Md. 1980).



two Maryland crimes that Jeter-El was convicted of (armed robbery and use of a handgun in the commission of a crime of violence), which highlight the forthcoming discussion relating to the problems with judicial deference to legislative intent. Part II discusses the application of the required evidence test in Maryland; analyzes Maryland case law with a focus on cases that deal exclusively with the two aforementioned Maryland laws and the double jeopardy implications that arise from their prosecution; and discusses some inconsistencies in application of double jeopardy law. Part III discusses important Supreme Court precedent, focusing on the dissent of Justice Thurgood Marshall in *Missouri v. Hunter*, as well as certain principles in double jeopardy law. Part IV advocates for an end to the judicial deference to legislative intent to impose multiple punishments for crimes arising out of a single criminal transaction that would otherwise merge under the required evidence test and offers a different test that would protect defendants' constitutional rights more fully. This Comment does not focus on the double jeopardy issue of successive prosecutions, but will discuss it in certain aspects to implement an understanding of, and solutions for, multiple punishments.<sup>17</sup>

## I. DOUBLE JEOPARDY, DOUBLE TAKE

What we know as double jeopardy today derives from common law pleas of *autrefois acquit* and *autrefois convict*.<sup>18</sup> The concept of double jeopardy was so important that the Framers saw fit to include it in the Constitution. The Double Jeopardy Clause of the Fifth Amendment states: “[N]or shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb . . . .”<sup>19</sup>

Double jeopardy protection has three distinct aspects: (1) “[i]t protects against a second prosecution for the same offense after acquittal,” (2) “[i]t protects against a second prosecution for the same

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17. Multiple punishment questions—the concern that the defendant is being punished twice for the same offense—may arise whenever the defendant is convicted on multiple related charges, whether in a single proceeding or multiple proceedings. In contrast, successive prosecution issues arise only when the defendant is subject to two or more proceedings on related charges. In both contexts, the double jeopardy issues turn on whether the crimes charged against the defendant are the same offense.

Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1202 (2004).

18. *Id.* at 1186. *Autrefois convict* is a plea made by a defendant that he has been “formerly convicted of the same identical crime. BLACK’S LAW DICTIONARY 121 (9th ed. 2009). *Autrefois acquit* is a plea made by the defendant that “he has been once already indicted and tried for the same alleged offense and has been acquitted.” *Id.*

19. U.S. CONST. amend. V.

offense after conviction,” and (3) “it protects against multiple punishments for the same offense.”<sup>20</sup> The third aspect of double jeopardy protection—the protection against multiple punishments for the same offense—and its application, particularly in Maryland, are the focus of this Comment.

A. The Required Evidence Test & Legislative Intent as an Exception

To determine when double jeopardy protection against multiple punishments must be applied, the Supreme Court developed the famous required evidence test (also called the *Blockburger* test), which is applied in situations where a criminal defendant is charged with more than one crime for a single criminal offense.<sup>21</sup> In *Blockburger v. United States*, the defendant was convicted under the Harrison Narcotic Act for (1) selling drugs without their original stamped packaging and (2) selling drugs without a written order.<sup>22</sup> The defendant argued that because the two violations were the result of a single illegal sale of narcotics, there was only one offense and therefore, only one penalty for which he could be charged.<sup>23</sup>

In affirming the defendant’s conviction, the Supreme Court applied the *Blockburger* (required evidence) test and concluded that even though the defendant committed only one illegal act, two sections of the Narcotics Act were violated and thus, two offenses were committed.<sup>24</sup> The Court analyzed the legislature’s intent by looking at the language of the statutes in question, finding that “upon the face of the statute, two distinct offenses are created.”<sup>25</sup>

The Court explained that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”<sup>26</sup> The Court explained: “A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either stat-

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20. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled by* *Alabama v. Smith*, 490 U.S. 794 (1989).

21. *See Blockburger v. United States*, 284 U.S. 299, 301–02 (1932); *infra* Part I.A.

22. *Blockburger*, 284 U.S. at 303–04.

23. *Id.* at 301.

24. *Id.* at 304.

25. *Id.*

26. *Id.*

### Double Jeopardy Protection

ute does not exempt the defendant from prosecution and punishment under the other.”<sup>27</sup>

The *Blockburger* test looks at the elements of each crime, and if the court finds that each crime “requires proof of an *additional* fact which the other does *not*” then the crimes are different offenses for the purposes of double jeopardy protection and the defendant may be properly charged with *both* crimes.<sup>28</sup> If all of the elements of one offense are already included in a latter offense, “so that only the latter offense contains a distinct element or distinct elements, the former *merges* into the latter.”<sup>29</sup> To put it another way, “the required evidence is that which is minimally necessary to secure a conviction for each . . . offense.”<sup>30</sup> If, however, “each offense requires proof of a fact which the other does not, or . . . contains an element which the other does not, there is no merger under the required evidence test *even though* both offenses are based upon the same act or acts.”<sup>31</sup> As mentioned above, sometimes these “modern” laws may be more difficult to grasp and seemingly counter-intuitive. One such law is an exception to the normal protection that a defendant would receive under the Double Jeopardy Clause.

When a merger occurs under the required evidence test, separate sentences are usually precluded; instead, the “lesser” included offense merges into the “greater” offense, and a sentence is imposed only for the offense with the additional element or elements.<sup>32</sup> This ensures that a person is not unfairly sentenced to additional years for essentially the same crime. However, there is a certain exception to the rule, where, even if two offenses merge under the *Blockburger* test, courts will allow a defendant to be charged for both offenses, despite the apparent double jeopardy implications; this situation arises when the legislative body that passed the laws in question demonstrates an *intent* that the two offenses be punished separately.<sup>33</sup> Legislative intent, therefore, is an exception to the constitutional protections that an individual would normally receive under the Fifth Amendment.

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27. *Id.* (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)).

28. *See id.* (emphasis added); *infra* Part I.A.

29. *Nicolas v. Maryland*, 44 A.3d 396, 405 (Md. 2012) (emphasis added).

30. *Id.*

31. *Id.* (emphasis added).

32. *Id.* at 406.

33. *See Missouri v. Hunter*, 459 U.S. 359, 368–69 (1982); *Maryland v. Lancaster*, 631 A.2d 453, 467, 468 (Md. 1993); *infra* Part II–III.

Now imagine the scenario of Roland Jeter-El, who committed a single crime and was charged with: (1) armed robbery and (2) the use of a handgun in the commission of a crime of violence. These are two separate offenses arising from a single criminal act, yet thanks to the deliberate wording of the statutes, both crimes require proof of separate elements (the first offense requires proof of a robbery, which the other does not, and the second requires proof of the use of a handgun, which the first does not). Under the doctrine of merger mentioned above, in order to avoid double jeopardy, the lesser included handgun offense would normally merge into the armed robbery offense, because to prove armed robbery in this specific case, one would need to prove that there was use of a handgun. However, by deferring to legislative intent to try these crimes separately, for all intents and purposes, the defendant is being charged twice for committing a single crime.

Even *if* a party is able to prove that two crimes are the same for double jeopardy purposes and must be merged to prevent multiple punishment, if the court determines that the legislature intended for the two crimes to be punished separately, then the court will defer to this legislative intent and refuse to merge the charges.

The offenses of “armed robbery with a deadly weapon” and “use of a handgun in the commission of a crime of violence,” both of which could arise out of a single criminal transaction, are essentially the same *exact* crime but with a different name in circumstances such as Roland Jeter-El’s. Courts should not be able to subject defendants to punishment for both of these crimes in a single trial. Courts should decide that the practice of deferring to legislative intent and allowing multiple punishments for crimes that arise out of the same offense, which require no additional facts to prove, violates the spirit of the Double Jeopardy Clause of the Fifth Amendment.

#### B. Two Maryland Laws, One Actual Crime

Roland Jeter-El was convicted of (1) “armed robbery with a deadly weapon,” which provides for a penalty not to exceed twenty years,<sup>34</sup> and (2) “use of a handgun in the commission of a felony,” which imposes a punishment between five and twenty years “in addition to any other penalty imposed for the crime of violence or fel-

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34. See MD. CODE ANN., CRIM. LAW § 3-403(b) (LexisNexis 2013).

ony.”<sup>35</sup> Thus, in Maryland, a person can be sentenced cumulatively for upwards to forty-five years for violating these two offenses in a single criminal transaction. Consequently, Roland Jeter-El was sentenced to twenty years for the armed robbery charge and twenty years for the handgun charge, a total of forty years for these two offenses alone; a heavy sentence for a young man who did not even pull the ill-fated trigger.

To clarify, the two offenses being discussed: “use of a handgun in the commission of a crime of violence” and “use of a handgun in the commission of a felony” both appear to be governed by the same Maryland statute, and appear to be interchangeable.<sup>36</sup> For the purposes of the rest of this Comment, because most of the Maryland cases discussed below refer to it as such, the offense will be described as a “crime of violence,” rather than a “felony,” for which Jeter-El was specifically charged.

Under Maryland law, there are numerous criminal offenses that fall under the definition of “crime of violence,” such as abduction, arson, assault, burglary, carjacking, kidnapping, manslaughter, maiming, mayhem, murder, rape, robbery, *robbery with a dangerous weapon*, numerous sexual offenses, as well as any attempt to commit any of these crimes and any assault with intent to commit any of these crimes.<sup>37</sup> The statute, thus, seeks to punish the use of handguns in a broad variety of violent crimes. The language in the handgun statutes expressed the legislature’s intent that these charges be punished separately; they wanted harsher penalties for handgun users.<sup>38</sup> To determine when a weapon is classified as a “dangerous weapon,” the courts must implement an objective test: “[T]o be deadly or dangerous a

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35. See MD. CODE ANN., CRIM. LAW § 4-204(a)–(c) (LexisNexis 2013).

36. § 4-204(b). “A person may not use a firearm in the commission of a *crime of violence*, as defined in § 5-101 of the Public Safety Article, or any felony, whether the firearm is operable or inoperable at the time of the crime.” *Id.* (emphasis added). The elements of the offense under this statute are: (1) “that a felony or crime of violence was committed;” and (2) “that a handgun was employed in its perpetration.” § 4-204. Under section 5-101(c) of the Maryland Public Safety Code, a crime of violence means: abduction; arson; assault; burglary; carjacking and armed carjacking; escape in the first degree; kidnapping; voluntary manslaughter; maiming; mayhem; murder in the first or second degree; rape in the first or second degree; robbery; robbery with a dangerous weapon; sexual offense in the first, second, or third degree; an attempt to commit any of the crimes listed; or assault with intent to commit any of the crimes listed. MD. CODE ANN., PUB. SAFETY § 5-101(c) (LexisNexis 2013).

37. MD. CODE ANN., PUB. SAFETY § 5-101(c) (LexisNexis 2013) (emphasis added).

38. MD. CODE ANN., CRIM. LAW § 4-204(c)(2) (“For each subsequent violation, the sentence shall be consecutive to and not concurrent with any other sentence imposed for the crime of violence or felony.”).

weapon must be inherently of that character or must be used or useable in a manner that gives it that character.”<sup>39</sup>

Examining the two crimes by plain language alone, “armed robbery with a deadly weapon” sounds very similar to “use of a handgun in the commission of a felony.” Although each offense has specific elements that are different, an “armed robbery” from the first offense is clearly a “felony” for the second offense, and a “handgun” from the second offense clearly encompasses a “deadly weapon” from the first offense. Under Maryland law, a crime of violence is defined to include several possible felonies, such as rape, kidnapping, and arson, *any* of which could be applicable to the use of a handgun in the commission of a felony.<sup>40</sup>

Although the majority of Maryland cases uphold the imposition of separate sentences for these two crimes, one Maryland case actually held that these two crimes were the same for double jeopardy purposes.<sup>41</sup> This will be discussed more fully below, along with other Maryland precedent concerning these two specific crimes. Additionally, it must be reiterated that the required evidence test and the *Blockburger* test are the same test. For the sake of clarity, it will be referred to as the required evidence test for the remainder of this Comment.

## II. MARYLAND CASE LAW & DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment has been incorporated to the states through the Due Process Clause of the Fourteenth Amendment.<sup>42</sup> As such, Maryland has found that the multiple punishment analysis applies to two different situations: (1) “those involving two separate statutes embracing the same criminal conduct,” and (2) “those involving a single statute creating multiple units of prosecution for conduct occurring as a part of the same criminal transaction.”<sup>43</sup> The crimes of “armed robbery” and “use of a

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39. *Handy v. Maryland*, 745 A.2d 1107, 1110 (Md. 2000) (citing *Brooks v. Maryland*, 552 A.2d 872, 875 (1989)).

40. MD. CODE ANN., PUB. SAFETY § 5-101(c).

41. *See Maryland v. Ferrell*, 545 A.2d 653, 658 (Md. 1988).

42. *See Benton v. Maryland*, 395 U.S. 784, 794 (1969); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled by Alabama v. Smith*, 490 U.S. 794 (1989).

43. *Randall Book Corp. v. Maryland*, 558 A.2d 715, 720–23 (Md. 1989) (“[I]t generally will require an extraordinary set of circumstances to demonstrate that a cumulation of valid sentences for distinct offenses is cruel and unusual.”). The Eighth Amendment’s prohibition on the infliction of “cruel and unusual punishments” is often brought up as a complaint by defendants in response to the imposition of multiple punishments. *See United States v. Andersson*, 803 F.2d 903, 908 (7th Cir. 1986) (holding that consecutive sentences for mailing and conspiring to

handgun in the commission of a crime of violence” are two statutes that may be considered as “embracing the same criminal conduct” if occurring during a single criminal transaction.

A. The Required Evidence Test in Maryland

In *Brooks v. Maryland*,<sup>44</sup> the Maryland Court of Appeals held that the required evidence test, and not the “actual evidence” test, is the standard test to be used by Maryland courts when determining whether offenses will merge for purposes of double jeopardy protection.<sup>45</sup> In *Brooks*, after the defendant got into an altercation with a person at a park, he went to his automobile and returned with a shotgun with which he fired at the person twice while the person was attempting to run away.<sup>46</sup> Consequently, the defendant was charged and convicted for both “assault with intent to murder” and “carrying a deadly weapon openly with intent to injure” for that single criminal transaction.<sup>47</sup>

The defendant argued for the use of the actual evidence test, which states that “the standard for determining merger of offenses is somewhat broader, and that if two convictions rest upon substantially identical ‘actual evidence,’ there should be a merger.”<sup>48</sup> After discussing previous Maryland precedent, the court determined that the required evidence test has always been the standard in Maryland.<sup>49</sup> The

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mail child pornography is not cruel and unusual, particularly due to the severity of the offenses); *United States v. Serhant*, 740 F.2d 548, 554–55 (7th Cir. 1984) (holding that consecutive sentences of five years each for three counts of mail fraud is not “constitutionally disproportionate”); *United States v. Shaid*, 730 F.2d 225, 230 (5th Cir. 1984) (holding that consecutive sentences for nine counts of mail fraud is not cruel and unusual because each use of the mail constitutes a separate offense).

44. 397 A.2d 596 (Md. 1979).

45. *Id.* at 599.

46. *Id.* at 596–97.

47. *Id.* at 597.

48. *Id.*

49. *Id.* at 598; see also *Newton v. Maryland*, 373 A.2d 262, 268 (Md. 1977). The actual evidence test was rejected by the Supreme Court when multiple punishments were upheld for two narcotics violations based on the same evidence of possession; under the required evidence test the two violations were distinct, but under the actual evidence test they were the same. *Harris v. United States*, 359 U.S. 19, 23 (1959). The required evidence test encourages the courts to consider what is “required” instead of what is “actually produced.” *Couplin v. Maryland*, 378 A.2d 197, 205 (Md. Ct. Spec. App. 1977).

[U]nder both federal double jeopardy principles and Maryland merger law, the test for determining the identity of offenses is the required evidence test. If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

court concluded that under the required evidence test, the crimes of “assault with intent to murder” and “carrying a deadly weapon openly with intent to injure” did not merge because “each offense has at least one distinct element not present in the other, and thus they are entirely separate offenses under the required evidence test.”<sup>50</sup>

Additionally, the court in *Brooks* recognized that in certain situations where offenses are “separate and distinct” under the required evidence test, a court may find that the legislature *did not* intend for a person to be “convicted of two . . . offenses growing out of the same act or transaction.”<sup>51</sup> Thus, the court recognizes that legislative intent can go both ways; there may be legislative intent to either impose multiple punishments for a single criminal transaction *or* there may be instances where the legislature intended for there not to be multiple punishments for a single crime that violated multiple criminal statutes.

In an interesting statement, the *Brooks* court stated that even though the required evidence test is “the usual standard to be applied . . . it is not the exclusive standard. . . . [T]here may be situations where the required evidence test . . . might not be adequate to afford the protection . . . embodied in the purpose of the prohibition against double jeopardy.”<sup>52</sup> This apparent ambiguity appears to leave some room for argument over whether or not certain situations might allow Maryland courts to step outside of the usual required evidence test for double jeopardy, and perhaps implement different tests that might strengthen a defendant’s protection from double jeopardy.

In *Maryland v. Lancaster*, the Maryland Court of Appeals recognized that *express* authorization by the legislature is *required* to allow for the imposition of multiple punishments for offenses that merge under the required evidence test.<sup>53</sup> In *Lancaster*, the court found the defendant guilty of a fourth degree sexual offense under a Maryland

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Newton, 373 A.2d at 266 (“[F]elony murder and the underlying felony must be deemed the same for double jeopardy purposes.”).

50. *Brooks*, 397 A.2d at 599. The court reasoned that:

[T]he crime of carrying a weapon openly with intent to injure a person would not merge into assault with intent to murder. An essential element of the former offense is the carrying of a dangerous or deadly weapon, whereas this is not a necessary element of an assault with intent to murder. For example, one who attempts to strangle another with his bare hands could be guilty of assault with intent to murder. Assault with intent to murder, on the other hand, requires proof of an assault. However, one who has not committed an assault could nevertheless be guilty of carrying a weapon openly with intent to injure.

*Id.*

51. *Id.* at 600.

52. *Id.* at 599–600 (quoting *Cousins v. Maryland*, 354 A.2d 825, 833 (Md. 1976)).

53. 631 A.2d 453, 467 (Md. 1993).



law that prohibited participating in fellatio “with another person who is 14 or 15 years of age and the person performing the sexual act is four or more years older than the other person.”<sup>54</sup> Based on this single act, the court also found the defendant guilty under a Maryland law that prohibited any person from taking “into his or her mouth the sexual organ of any other person.”<sup>55</sup> The defendant was found guilty of both crimes and sentenced separately for each.<sup>56</sup>

On appeal, the Maryland Court of Special Appeals found that under the required evidence test, the statute prohibiting oral sex generally merged into the age-based statute that restricted fellatio.<sup>57</sup> The *Lancaster* court agreed with the Court of Special Appeals, that under the required evidence test, the two offenses merged into one.<sup>58</sup> The court explained that “specific or express authorization by the Legislature is a pre-condition for multiple punishments when two offenses are deemed the same under the required evidence test”<sup>59</sup> and regarding these two crimes, the Maryland legislature did not expressly authorize such multiple punishments.<sup>60</sup>

Similar to the *Brooks* court, the *Lancaster* court also appeared to be creating some space whereby the Maryland courts could bypass the required evidence test when determining whether multiple offenses merged for purposes of double jeopardy. The *Lancaster* court stated that although the required evidence test is the “normal standard,” it is not the “exclusive standard;” the required evidence test is the “threshold test.”<sup>61</sup> When the required evidence test is satisfied “merger follows as a matter of course,” but when there is no merger “other criteria are considered to determine whether the offenses should merge.”<sup>62</sup>

Maryland law concerning the required evidence test seems both clear and somewhat ambiguous at the same time. The required evidence test is the standard test to be used when determining merger,

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54. *Id.* at 455–56.

55. *Id.* at 456.

56. *Id.*

57. *Id.* at 459.

58. *Id.* at 464.

59. *Id.* at 467.

60. *Id.* at 469.

61. *Id.* at 458.

62. *Id.* Examples of these “other criteria” include “the rule of lenity . . . as a principle of statutory construction, as well as the position taken in other jurisdictions, whether the type of act has historically resulted in multiple punishment, and the fairness of multiple punishments in a particular situation . . . .” *Id.* at 458 n.9 (internal quotation marks omitted) (citing *White v. Maryland*, 569 A.2d 1271, 1274 (Md. 1990)).

but there are some situations where other tests can be used to determine whether the offenses should merge or not. As discussed above, legislative intent to merge offenses or to punish them separately is at the forefront of these other tests. The required evidence test itself “does not provide the final answer in cases involving multiple punishment because, when specifically authorized by the legislature, cumulative sentences for the same offense may under some circumstances be imposed after a single trial.”<sup>63</sup>

However, leaving the legislature with the power to impose multiple punishments for a single offense, based on the legislature’s *intent* alone, seems to give the legislature an amazing amount of unchecked discretion. The following Maryland Court of Appeals cases concern the two specific crimes discussed above for which Roland Jeter-El was charged.

B. Armed Robbery & Use of a Handgun in Commission of . . .  
Armed Robbery?

In *Whack v. Maryland*,<sup>64</sup> the Maryland Court of Appeals described how the legislature’s concern with handgun crimes led to the intent to punish handgun crimes more severely, even when they merged under the required evidence test.<sup>65</sup> In *Whack*, the defendant, similar to Roland Jeter-El, was convicted of both “robbery with a deadly weapon” and “use of a handgun in the commission of a felony” for the single criminal act of robbing a grocery store.<sup>66</sup> The defendant argued that (1) only one offense was committed under these acts, (2) that there was no legislative intent to impose separate punishments for these offenses, and (3) that even if the legislature intended to impose multiple punishments for both offenses such an imposition would violate the Double Jeopardy Clause of the Fifth Amendment.<sup>67</sup>

The Maryland Court of Appeals analyzed legislative history, particularly a 1972 handgun statute, and found that the state legislature had *specifically* intended to impose separate punishments for these two offenses.<sup>68</sup> The legislature found, among other things, that there was an “alarming increase in the number of violent crimes,” that a

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63. *Randall Book Corp. v. Maryland*, 558 A.2d 715, 719–20 (Md. 1989).

64. 416 A.2d 265 (Md. 1980).

65. *Id.* at 271.

66. *Id.* at 266.

67. *Id.* at 267.

68. *Id.* at 270 (“Any person who shall use a handgun in the commission of any felony or any crime of violence . . . shall be guilty of a separate misdemeanor and on conviction thereof shall,

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large percentage of these crimes involved handguns, that “[t]he laws currently in force have not been effective,” and that consequently, further regulations were required.<sup>69</sup> Thus, even though the offenses merged under the required evidence test, the court found that the *existence of legislative intent* to impose separate sentences for these crimes made it acceptable.<sup>70</sup> The court concluded that:

[U]nder certain circumstances, multiple punishment . . . for offenses deemed the same under the required evidence test do[es] not violate the Fifth Amendment prohibition against double jeopardy. . . . [T]he legislature may indicate an express intent to punish certain conduct more severely if particular aggravating circumstances are present by imposing punishment under two separate statutory offenses which otherwise would be deemed the same under the required evidence test . . .<sup>71</sup>

In *Maryland v. Ferrell*,<sup>72</sup> the Maryland Court of Appeals’ application of double jeopardy protection is different from its application in *Whack*, demonstrating why there may be some inconsistency with its interpretation of double jeopardy protection. In *Ferrell*, the defendant was charged with both “[armed] robbery” and the “use of a handgun in the commission of a crime of violence” for a single robbery committed on an elementary school playground.<sup>73</sup>

The indictment charging the defendant with armed robbery made no mention of the handgun charge.<sup>74</sup> As the trial date approached, the prosecution and defense began plea negotiations for the armed robbery charges.<sup>75</sup> During the negotiations, the prosecutor found out that the handgun count was accidentally left out of the indictment.<sup>76</sup> In an attempt to make up for that oversight, the prosecutor filed a criminal charge against the defendant for the forgotten handgun offense—one day before the trial for the defendant’s armed robbery charge.<sup>77</sup> Before the trial began, while the handgun charges were still

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in addition to any other sentence imposed by virtue of commission of said felony or misdemeanor. . . .”).

69. *Id.*

70. *Id.* at 271.

71. *Id.*

72. 545 A.2d 653, 655–56 (Md. 1988).

73. *Id.* at 653.

74. *Id.* at 653–54.

75. *Id.* at 654.

76. *Id.*

77. *Id.*

pending, the State and the defendant concluded a plea bargain agreement that made no mention of the handgun charge.<sup>78</sup>

Once the plea was entered, the court began a presentence investigation, however, during this time the defendant was arraigned for the subsequently filed handgun charge.<sup>79</sup> In response, the defendant filed a motion to dismiss on the grounds that Double Jeopardy and res judicata barred the handgun prosecution, and that the plea agreement should be seen as disposing of all the charges, including the handgun charge.<sup>80</sup>

The defendant argued that “for purposes of the double jeopardy prohibition against successive trials for the same offense, the handgun offense and the armed robbery offense, when based on the same act or acts, should be deemed the same” under the “required evidence” test or *Blockburger* test.<sup>81</sup> Additionally, the defendant argued that where the same evidentiary facts would be used to sustain the prosecution of both the armed robbery and the handgun charge, and where the “‘use of the same handgun in the same armed robbery’ was adjudicated in the prior proceeding, res judicata principles preclude the re-litigation of the same matter in a second proceeding.”<sup>82</sup> Both the circuit court and the intermediate level appellate court agreed with the defendant and held that the prosecution of the handgun charge was barred because of the prior armed robbery conviction.<sup>83</sup>

One of the State’s main contentions was that the two offenses were not the same under the required evidence test, because each requires proof of an element which the other does not; therefore, the State was free to prosecute the offenses separately, even though they arose from the same criminal transaction.<sup>84</sup> The *Ferrell* court held

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78. *Id.* (noting the defendant agreed to plead guilty to a single count of armed robbery in exchange for all of the other charges to be dropped).

79. *Id.*

80. *Id.*

81. *Id.* at 655.

82. *Id.*

83. *Id.* at 654.

84. *Id.* at 655. The same transaction test was rejected by the court in *Cousins v. Maryland*, 354 A.2d 825, 834 (Md. 1976) (holding that the offenses of ‘assault’ and ‘carrying a weapon openly with intent to injure’ each require proof of an element that the other does not and therefore they are not the same offense for double jeopardy purposes). Additionally, the court found that (1) the Supreme Court had not adopted the same transaction test as a matter of federal constitutional law, (2) there was no “State constitutional or statutory provision requiring joinder of all charges arising from a single criminal act or episode,” (3) prior Maryland cases did not “reflect any common law right to have joined at one trial all charges arising from a single act or transaction,” and (4) the Maryland Rules of Procedure do not require joinder of all charges that arise from a single criminal act. *Id.* at 833.

that the armed robbery violation and the handgun violation “must be deemed the same offense under the required evidence test.”<sup>85</sup> The court further stated that “[p]roof of the armed robbery, with all of its legal elements, is necessary in order to prove the handgun offense,” the crime of violence is therefore an element, an “essential ingredient,” of the handgun offense.<sup>86</sup>

The court analogized this merger of offenses to its decisions concerning felony murder charges, where the practice is to merge the underlying felony with the felony murder itself.<sup>87</sup> To secure a conviction of felony murder, one must prove that a felony occurred; this underlying felony is considered an essential element of felony murder and therefore the underlying felony, whatever it may be, merges into the crime of felony murder.<sup>88</sup> Thus, the court barred the subsequent prosecution for the handgun crime based on the defendant’s previous conviction of armed robbery.<sup>89</sup>

### C. Is *Ferrell* a Contrary Tale?

Both *Ferrell* and *Whack* dealt with the same two offenses: “use of a handgun in the commission of a crime of violence” and “armed robbery.” In both, the court recognized that the two offenses merged under the required evidence test; however, in *Ferrell* the court came to a very different conclusion than what it had decided in *Whack*. In *Whack*, the court found that legislative intent overrode merger for double jeopardy purposes, that it is the legislature’s desire to punish handgun crimes more severely, and separately, that has allowed these multiple punishments to overcome a double jeopardy bar. It is interesting to note that the *Ferrell* court did not engage in an analysis of legislative intent, but merely held that the two offenses merged under *Blockburger*, and thus precluded the successive prosecution.<sup>90</sup> The key to understanding *Ferrell* may lie in the fact that there, the court was dealing with an instance of *successive* prosecution for the same offense and not multiple punishment for the same offense.

Arguments may be made that, in instances of successive prosecution, the courts will be stricter in determining whether double jeop-

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85. *Ferrell*, 545 A.2d at 656.

86. *Id.*

87. *Id.* at 657; see *Newton v. Maryland*, 373 A.2d 262, 266 (Md. 1977) (“[F]elony murder and the underlying felony must be deemed the same for double jeopardy purposes.”).

88. *Ferrell*, 545 A.2d at 657.

89. *Id.* at 658.

90. See *id.* at 657–58.

ard principles have been violated than in instances where multiple punishments are at stake. But is this a fair application of the Double Jeopardy Clause of the Fifth Amendment? As will be noted below, in *North Carolina v. Pearce*,<sup>91</sup> the Supreme Court held that the Double Jeopardy Clause protects against “a second prosecution for the same offense after conviction,” and “against multiple punishments for the same offense.”<sup>92</sup> The Court did not appear to give any more weight, or any more protection, to one type of protection over another.

If the Maryland court may hold that in a successive prosecution, double jeopardy prevents the charges from being tried separately because the charges merge under the required evidence test, why does the required evidence test fail for the exact same charges in cases of multiple punishments? Why does legislative intent apply in cases of multiple punishments but not in cases of successive prosecution?

*Ferrell* dealt with the problem of successive prosecution for crimes that arose out of a single criminal act, and yet also merged under the required evidence test. In this way, it is distinguished from cases, such as *Whack*, that dealt with the cumulative/multiple punishments for crimes that merge under the required evidence test but were actually prosecuted at the same time and in the same trial. The difference in the application of the court’s interpretation of double jeopardy protections in *Ferrell* and *Whack* must therefore arise from the court’s belief that the Double Jeopardy Clause offers different degrees of protections between cases involving multiple punishments and cases involving successive prosecutions.

If the Fifth Amendment offers only three different constitutional protections against double jeopardy: (1) protection from “a second prosecution for the same offense after acquittal,” (2) protection from “a second prosecution for the same offense after conviction,” and (3) protection from “multiple punishments for the same offense,”<sup>93</sup> then it appears that, at least in Maryland, multiple punishments are not protected to the same extent that successive prosecutions are. One has to wonder if this was the original intent of the Framers when they drafted the Fifth Amendment, or if the courts are shirking constitu-

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91. 395 U.S. 711 (1969).

92. *Id.* at 717.

93. *Id.*

tional duties and misinterpreting what double jeopardy protection truly meant.<sup>94</sup>

If the *Ferrell* court allowed the defendant to be prosecuted in a separate, successive prosecution for the additional handgun charge, after his plea agreement for the actual armed robbery, the end result would essentially be the same as if the prosecutor never forgot the second charge in the original indictment and the defendant was charged and sentenced for both crimes at the same time in a single trial, making it a case of multiple punishment. By this logic, it appears that legislative intent to punish these crimes separately is only applicable in cases where the charges are being brought at the same time in a single trial; in other words, in cases involving multiple punishment for the same offense.

The defendant in *Ferrell* was extremely fortunate that the prosecutor forgot the second charge at trial because if he did not, then according to Maryland precedent, the two charges would not have merged because of legislative intent, and he would have been charged and sentenced for each offense separately. This leaves defendants in an unfair position. They will never be able to successfully challenge a conviction arising from the multiple punishments for these two crimes, or any other crimes that merge under the required evidence test, but where legislative intent overrides any double jeopardy bar. Yet, if by some stroke of luck the prosecutor forgets one of the charges and a conviction, acquittal, or a plea bargain has already taken place by the time the successive prosecution is brought to trial, the defendant can rest easy knowing that the two offenses will be the same and that a successive prosecution will be barred by the court. Is this something

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94. A plain reading of the Double Jeopardy Clause of the Fifth Amendment leads to the conclusion that the Framers intended to prevent a person from being “twice put in jeopardy” for the “same offense.” U.S. CONST. amend V. As discussed above, the Supreme Court has applied this protection not only to successive prosecution, but to multiple punishments as well. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled by Alabama v. Smith*, 490 U.S. 794 (1989). However, even with cases applying double jeopardy protection to multiple punishments, the Court has suggested at times that their view is that the Framers did not consider multiple punishments to be protected by the Fifth Amendment, only multiple prosecutions. See *Kepner v. United States*, 195 U.S. 100, 130 (1904) (“[Double jeopardy] protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense.”); *United States v. Ball*, 163 U.S. 662, 669 (1896) (“The prohibition is not against being twice punished, but against being twice put in jeopardy.”); see also Eli J. Richardson, *Recent Development, Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273, 277 (1992) (“[S]ome of the Court’s decisions suggest that the clause primarily reflects the Framers’ concern with second prosecutions rather than second punishments. Thus, the imposition of multiple punishments in the same proceedings implicates fewer constitutional concerns than does subjecting a defendant to successive prosecutions.”).

that can be adequately described as justice? Is it fair that a defendant's best chance at receiving full double jeopardy protection depends on the diligence of the prosecuting attorney?

### III. SUPREME COURT DEFERENCE TO CONGRESSIONAL INTENT

As mentioned above, the Double Jeopardy Clause under the Fifth Amendment consists of three different constitutional protections: (1) “[i]t protects against a second prosecution for the same offense after acquittal,” (2) “[i]t protects against a second prosecution for the same offense after conviction,” and (3) “[i]t protects against multiple punishments for the same offense.”<sup>95</sup> In other words, double jeopardy protection applies not only to successive prosecutions for the same criminal offense but to successive *punishments* as well.<sup>96</sup>

#### A. Congressional Intent as an Exception to Double Jeopardy Protection

*Whalen v. United States*<sup>97</sup> provides an example of how the Supreme Court interpreted double jeopardy protection for and application of the required evidence test (often referred to by the Supreme Court as the *Blockburger* test) in situations where legislative intent is silent. In *Whalen*, the defendant was convicted in the Superior Court of the District of Columbia for (1) rape and (2) killing the victim in perpetration of the rape, both of which occurred during a single criminal act.<sup>98</sup> The defendant argued that the rape offense should be vacated because “that offense merged for purposes of punishment with the felony-murder offense, just as . . . simple assault is ordinarily held to merge into the offense of assault with a dangerous weapon.”<sup>99</sup>

The Court declared that if Congress had not authorized cumulative punishments for rape and the “unintentional killing committed in the course of the rape,” then the defendant was illegally sentenced.<sup>100</sup> The Court continued, stating that “[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive

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95. *Pearce*, 395 U.S. at 717.

96. *United States v. Dixon*, 509 U.S. 688, 696 (1993).

97. 445 U.S. 684 (1980).

98. *Id.* at 685.

99. *Id.* at 686.

100. *Id.* at 688–89.



sentences unless authorized by Congress to do so.”<sup>101</sup> Conversely, the Court stated that a federal court would “exceed[ ] its own authority” if it imposed multiple punishments that were *not* authorized by Congress, for this would violate not only double jeopardy protection, but the constitutional separation of powers.<sup>102</sup>

The Court found that Congress had not authorized consecutive sentences for the offenses the defendant was charged with and reversed the lower court’s judgment that affirmed his cumulative punishments.<sup>103</sup> Additionally, the Court noted that in the District of Columbia, rape and the killing of a person during the perpetration of the rape are two different statutory offenses with two different punishments. The Court found that the District of Columbia had also adopted the required evidence test into its penal code.<sup>104</sup>

When the Court applied the required evidence test, it found that proof of the rape was a necessary element in finding proof of the felony murder; therefore, absent specific congressional intent to impose consecutive punishments for both the felony murder and the underlying felony itself (the rape), the offenses merged under the required evidence test.<sup>105</sup> “The assumption underlying the [*Blockburger*/required evidence] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.”<sup>106</sup> Additionally, the Court stated that in the absence of such clear legislative intent, and as far as any doubt that may exist concerning such intent, “the doubt must be resolved in favor of lenity” to the defendant.<sup>107</sup>

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101. *Id.* at 689 (“The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.”); *see also* *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

102. *Whalen*, 445 U.S. at 689.

103. *Id.* at 690.

104. *Id.* at 690–91. The D.C. Code states that:

A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) *arises out of the same transaction and requires proof of a fact which the other does not.*

*Id.* at 691 (emphasis added).

105. *Id.* at 694.

106. *Id.* at 691–92.

107. *Id.* at 694. The Rule of Lenity states that when there is “ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” *United States v. Bass*, 404 U.S. 336, 348 (1971). “[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *Id.* at 347 (quoting *United States v.*

In *Missouri v. Hunter*,<sup>108</sup> the defendant was convicted of both “robbery in the first degree” and “armed criminal action” (any felony committed with the aid of a deadly weapon) for actions arising out of a single criminal act involving the armed robbery of a supermarket.<sup>109</sup> Up to this point, the Missouri Supreme Court had steadfastly refused to enforce cumulative punishments for crimes that were the “same offense” under the required evidence test, in spite of the state legislature’s clear intent to punish these crimes cumulatively.<sup>110</sup> The Missouri Supreme Court went so far as to state:

Until such time as the Supreme Court . . . declares clearly and unequivocally that the Double Jeopardy Clause . . . does not apply to the legislative branch . . . we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction.<sup>111</sup>

The Supreme Court would respond to that challenge here in *Missouri*. The Court held that the Missouri Supreme Court had “misperceived the nature of the Double Jeopardy Clause’s protection against multiple punishments.”<sup>112</sup> The Court stated that “[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature *intended*.”<sup>113</sup> The Court further explained that when “a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under *Blockburger*, a court’s task of statutory construction is at an end.”<sup>114</sup>

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Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952)). The principle is based on two policies: (1) “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear,” and (2) “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” *Id.* at 348.

108. 459 U.S. 359 (1983).

109. *Id.* at 360–61.

110. *Id.* at 363–64. The cases where the Missouri Supreme Court ruled against imposing cumulative punishments, even though legislative intent was clear, were: *Sours v. Missouri*, 593 S.W.2d 208, 209 (Mo. 1980) (dealing with both armed robbery and armed criminal action arising from a single criminal act; also known as *Sours I*); *Sours v. Missouri*, 603 S.W.2d 592, 593 (Mo. 1980) (*Sours I* on remand from 446 U.S. 962; also called *Sours II*); and *Missouri v. Haggard*, 619 S.W.2d 44 (Mo. 1981).

111. *Hunter*, 459 U.S. at 365 (quoting *Missouri v. Haggard*, 619 S.W. 2d 44, 51 (Mo. 1981)).

112. *Id.* at 366.

113. *Id.* (emphasis added).

114. *Id.* at 368–69; see Richardson, *supra* note 94, at 308 (“*Blockburger*’s sole purpose is not to prevent Congress from purposefully imposing multiple punishments, but rather to help determine what punishments Congress intended.”).

## Double Jeopardy Protection

The Court's belief that judicial deference must be given to legislative intent stems from *United States v. Wiltberger*,<sup>115</sup> in which the Supreme Court stated that "the power of punishment is vested in the legislative, not in the judicial department. "It is the legislature, not the Court, which is to define a crime, and ordain its punishment."<sup>116</sup> In the words of the Court in *Missouri v. Hunter*, "[l]egislatures, not courts, prescribe the scope of punishments."<sup>117</sup> This means that once the legislature has demonstrated its intent to impose multiple punishments for a single offense, even if those offenses are the *same* under the *Blockburger* test, a judicial court cannot exceed its own authority by defying the legislature's intent to impose such multiple punishments. This judicial interpretation on the limitations of double jeopardy protection goes against the spirit of the Constitution.

### B. Justice Marshall's Dissent in *Missouri v. Hunter*

In a passionate dissent, Justice Thurgood Marshall gave numerous reasons as to why he believed that legislative intent to impose multiple punishments was unconstitutional. To begin with, Justice Marshall points out that because the two offenses of "first degree robbery" and "armed criminal action" constituted the same offense under the required evidence test, after prosecutors had sufficient evidence to punish the defendant for first degree robbery, they were not required to find any additional evidence to punish the defendant for armed criminal action.<sup>118</sup> Because the State did not need to find evidence of any different state of mind, any different act, or any different result from one offense to the other, once the defendant was punished under both offenses, he was punished twice for double jeopardy purposes.<sup>119</sup> "If the prohibition against being 'twice put in jeopardy' for 'the same offence' is to have any real meaning, a State cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally distinct crimes."<sup>120</sup>

Justice Marshall argued that if the Double Jeopardy Clause did not restrict the legislature's power to authorize multiple punishments, then a state could create "substantively identical crimes differing only

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115. 18 U.S. (5 Wheat.) 76, 95 (1820); see *Hunter*, 459 U.S. at 368.

116. *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

117. *Hunter*, 459 U.S. at 368.

118. *Id.* at 369–70.

119. *Id.* at 370.

120. *Id.* at 370–71.

in name,” or the state could create numerous crimes that are actually just lesser included offenses of another crime.<sup>121</sup> When multiple charges are brought against a defendant, he is “put in jeopardy” for each of those charges.<sup>122</sup> Marshall continues, stating that the defendant will have to defend against numerous charges while the prosecution will have the advantage of only needing to prove one, increasing the defendant’s risk of being found guilty,<sup>123</sup> moreover, when a doubtful jury is offered the choice between convicting a defendant for one crime or the other, they may choose to simply find the defendant guilty of the lesser crime than actually continue to debate his or her innocence.<sup>124</sup>

Justice Marshall found that there is no legitimate state interest in seeking “multiple convictions and multiple punishment” for a defendant because a state can easily achieve its goals by convicting and sentencing the defendant for just one crime; in fact, all that the creation of multiple crimes does is to “strengthen the prosecution’s hand.”<sup>125</sup> “[T]he Double Jeopardy Clause cannot reasonably be interpreted to leave legislatures completely free to subject a defendant to the risk of multiple punishment[s] on the basis of a single criminal transaction.”<sup>126</sup> Marshall concluded by saying that “the Double Jeopardy Clause limits the power of all branches of government, including the legislature.”<sup>127</sup>

#### IV. A CALL FOR GREATER DOUBLE JEOPARDY PROTECTION

The importance for protection from double jeopardy arises in large part due to the creation of multiple and complex criminal provisions that all reach the same conduct.<sup>128</sup> Moreover, “[l]egislatures have not taken responsibility either for creating a less duplicative

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121. *Id.* at 371.

122. *Id.* at 372.

123. *Id.*

124. *Id.* (citing *Cichos v. Indiana*, 385 U.S. 76, 81 (1966)) (“The submission of two charges rather than one gives the prosecution the ‘advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence.’”) (quoting *Cichos*, 385 U.S. at 81).

125. *Id.* at 373.

126. *Id.*

127. *Id.* at 374. Unfortunately, due to the majority’s opinion, *Missouri v. Hunter* “establishes that the multiple punishment doctrine is not a limitation on the legislature’s power.” George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 54 (1985).

128. *Poulin*, *supra* note 17, at 1189.

criminal code or for mandating joinder of offenses. There is no constitutional limitation on the number of offenses the legislature can define, and political forces encourage enactment of new criminal laws;” and as a result, criminal laws have developed with no “concern for coherence or coordination.”<sup>129</sup>

It is undoubtedly true that state legislatures, and Congress itself, determine what the laws are and the punishments for violating those laws, for “the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>130</sup> Yet, as Marshall declares, if the Double Jeopardy Clause does not have the power to restrict what legislatures can do, then legislatures are free to create “substantively identical crimes differing only in name.”<sup>131</sup> In essence, the two crimes discussed throughout this Comment—armed robbery with a deadly weapon, and use of a handgun in the commission of a crime of violence—are “substantively identical,” “differing only in name.”

There is no doubt that the legislature has a right to impose harsher penalties for certain crimes it deems more severe, but instead of creating separate laws, with separate mandatory sentences, that are broad and substantively merge into other laws, such as the handgun statute, the legislature should focus on continuing to give judges sentencing guidelines for specific crimes and circumstances surrounding them. In this way, judges will continue to have discretion in determining the appropriate sentence and will not be hampered by complete and utter deference to legislative intent.

Moreover, allowing judges to have deference in deciding the appropriate sentence, and preventing legislatures from imposing multiple punishments for crimes arising from a single transaction, should not be seen as a violation of the separation of powers principles that give a legislature power to define criminal offenses or to determine what the proper punishment for a crime is. The Double Jeopardy Clause protects defendants from both multiple punishments and successive punishments *equally*; that is the true spirit of the Fifth Amendment. This spirit was created by the Framers of the Constitution, the founders of the United States, people uniquely situated to understand

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129. *Id.* at 1189–90.

130. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

131. *Hunter*, 459 U.S. at 371.

the liberties and protections that a free society required, and what the absence of those liberties entailed.

The story of Roland Jeter-El, an eighteen-year-old man with his entire life ahead of him, was used to illustrate the results of blind adherence to criminal penalties imposed by a legislature. Although the crime that Jeter-El committed was terrible, the legislature's strict policy of mandating cumulative punishment for his two crimes resulted in a sentence that effectively ended the rest of his life. It is not disputed that the legislature is justified in making sure that crimes are punished, and punished severely in certain circumstances involving acts or behavior that are of particular concern, such as using guns and weapons in commission of crimes. However, the blind judicial deference to this legislative intent forces courts to ignore specific facts and adhere solely to the punishment deemed appropriate by the legislature, such as the life sentence of Arthur Rinald Miles, a *sixteen*-year-old with *no* prior criminal convictions.<sup>132</sup>

The apparent harshness of our criminal justice system appears even more disparate when compared to the recent case in Norway, where thirty-two-year-old, mass murderer Anders Behring Breivik was sentenced to twenty-one years for the intentional killings of seventy-seven people.<sup>133</sup> Breivik will likely spend much longer in jail, due to the fact that judges in Norway have the ability to add successive five year extensions to the sentence.<sup>134</sup> However, notions of what sentences are "just" and "fair" in this country are very different from a country like Norway, which has abolished the death penalty, favors rehabilitation over retribution, and views American criminal justice as "cruelly punitive."<sup>135</sup>

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132. See Duggan, *supra* note 10.

133. Mark Lewis & Sarah Lyall, *Norwegian Mass Killer Gets Maximum Sentence: 21 Years*, N.Y. TIMES, Aug. 25, 2012, [http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html?pagewanted=all&_r=0).

134. *Id.*

135. *Id.* Because the Norwegian penal system has no death penalty, and its maximum sentence is twenty-one years, "Norwegian society is forced to confront the fact that most prisoners, however heinous their crimes, will one day be released back into society"; thus Norway has adopted more experimental types of penal systems, focusing more on giving prisoners personal responsibility and jobs, healing the mind, rather than giving into the desire for revenge and "focusing on prisons as places of punishment and pain." Piers Hernu, *Norway's Controversial 'Cushy Prison' Experiment—Could it Catch On in the UK?*, DAILY MAIL, <http://www.dailymail.co.uk/home/moslive/article-1384308/Norways-controversial-cushy-prison-experiment—catch-UK.html> (last updated July 25, 2011, 4:14 PM). Whatever the criticism of Norway's experimental penal system, Norway has the lowest 'reoffending' rate in Europe, only twenty percent as compared to approximately seventy-five percent in the rest of Europe. *Id.*; see also Gwladys

## Double Jeopardy Protection

This is not to say that the required evidence test for determining merger of offenses is unconstitutional; it has withstood the test of time. The test is logical: if each offense contains a separate element which the other does not, then naturally and literally, there are two offenses. If all of the elements of one offense exist in another offense, then they merge. However, the real issue is not the test, but the exception. As Marshall mentioned in his dissent, legislatures are free to create “substantively identical crimes differing only in name,”<sup>136</sup> thus, bypassing the kind of protection the required evidence test was meant to give. For example: the crime of *armed robbery with a deadly weapon*, discussed above, can be seen to require the element of an “armed robbery” *specifically*, and a “deadly weapon” *broadly*;<sup>137</sup> on the other hand, the crime called *use of a handgun in the commission of a crime of violence*, requires the use of a handgun *specifically*, and the existence of *any* crime of violence, whether robbery, rape, or arson,<sup>138</sup> *broadly*. Thus, when a person commits armed robbery with a firearm, they automatically commit two crimes—substantively identical, differing only in name.

Regardless of specific legislative intent to punish both crimes cumulatively, this type of legislative manipulation is something courts should be able to recognize and overrule. These are the specific types of situations where courts should be able to refuse to defer to legislative intent, particularly when deference results in a defendant being punished multiple times for literally, the same exact crime, under two different names, distinguished by elements that are either narrow *or* broad, in order to fit *any* situation. This is essentially what the court in *Ferrell* did; they bypassed legislative intent and focused solely on what the required evidence test would determine.

The court in *Ferrell* found that the two crimes of “armed robbery” and “use of a handgun in the commission of a crime of violence” actually *did* merge under the required evidence test; the court recognized that proof of the armed robbery was a necessary element to prove the handgun offense, therefore they merged.<sup>139</sup> In other

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Fouche, *Where Convicts Lead the Good Life*, GLOBAL POST (Oct. 19, 2009, 5:35 AM), <http://www.globalpost.com/dispatch/europe/091017/norway-open-prison>.

136. *Hunter*, 459 U.S. at 371; *see supra* Part III.B.

137. *See* MD. CODE ANN., CRIM. LAW § 3-403(b) (LexisNexis 2013).

138. *See* MD. CODE ANN., CRIM. LAW § 4-204 (LexisNexis 2013). The various crimes listed as “violent” are defined under MD. CODE ANN., PUB. SAFETY § 5-101(c) (LexisNexis 2013); *see supra* note 36.

139. *Maryland v. Ferrell*, 545 A.2d 653, 657 (Md. 1988).

words, the armed robbery was an underlying offense of the handgun statute; therefore, when the defendant was faced with a second prosecution for the handgun crime, following conviction for armed robbery, the court barred its *successive* prosecution.<sup>140</sup> However, concerning *multiple* or *cumulative* punishments for these two crimes in a single trial, a court may still allow it if the court finds the legislature intended the two crimes to be punished separately.<sup>141</sup> By its decision, the *Ferrell* court seems to imply that multiple punishments in a single trial are essentially the equivalent of successive prosecutions, as far as double jeopardy protections are concerned. Moreover, the Double Jeopardy Clause protects from multiple punishments and successive prosecutions *equally*. The unfortunate reality *Ferrell* shows us is that only a difference in procedural outcomes, whether defendant is prosecuted in one trial or two, changes the entire constitutional protection that a defendant receives under the Fifth Amendment.

Instead of blindly deferring to the legislature, courts should apply a different kind of test. First, the court should apply the required evidence test for merger and determine whether any legislative intent exists to punish cumulatively. If the offenses merge, but there is legislative intent to punish a defendant for both crimes cumulatively, the court should determine whether a *successive* prosecution of the offenses would be barred. If a successive prosecution would be barred, as it was in *Ferrell*, then the court should merge the two offenses in order to ensure double jeopardy protection. This test would still take legislative intent into account, as a factor, but would not blindly adhere to it, especially if a court finds, as it did in *Ferrell*, that a successive prosecution of the multiple charges would be barred. In this way a defendant's Fifth Amendment protection would be more secure.

## CONCLUSION

Protection under the Double Jeopardy Clause of the Fifth Amendment unquestionably extends to the protection against multiple punishments. Although it has long been understood that legislatures have the power to define criminal offenses and to prescribe the

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140. *Id.* at 657–58; *see supra* Part II.C.

141. *See supra* Part II.B.



### *Double Jeopardy Protection*

punishment for those offenses,<sup>142</sup> courts should find Justice Marshall's dissent in *Missouri v. Hunter* to be the foundation of a new interpretation of constitutional double jeopardy protection: that "the Double Jeopardy Clause cannot reasonably be interpreted to leave legislatures completely free to subject a defendant to the risk of multiple punishment on the basis of a single criminal transaction."<sup>143</sup>

When applying the required evidence test to determine the merger of offenses arising from a single transaction, a court's decision-making should not be limited to only what the legislature intended. This gives the legislature entirely too much power. Until it is recognized that legislatures are also bound by the Fifth Amendment, and must not write laws that essentially charge a person with the same crime twice, more people will be unfairly punished more severely, especially in situations such as Jeter-El's, where a court should be able to take into consideration all of the circumstances surrounding the crime, past criminal history, and age of the defendant. Common sense in juristic decisions should *never* be left outside the doors of the courtroom. State legislatures should *not* be able to override constitutional provisions with their own legislative intent. The Fifth Amendment protects defendants from successive prosecutions *and* multiple punishments;<sup>144</sup> nothing in the Fifth Amendment states that double jeopardy protection exists at the whim of legislative intent. It is the Constitution that has the final word, not Congress.

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142. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

143. *Missouri v. Hunter*, 459 U.S. 359, 373 (1983).

144. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled by* *Alabama v. Smith*, 490 U.S. 794 (1989).



## COMMENT

# The Need for a Parental Training Mandate in D.C.'s Temporary Assistance for Needy Families Program to Close the Educational Achievement Gap

DWIGHT JOHN DRAUGHON, JR.\*

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### INTRODUCTION

Anthony and Brian<sup>1</sup> are fifth graders who attend the same school and are from the same neighborhood. Anthony, who attends school daily and on time, regularly turns in homework and performs well on examinations. Based on the child’s account, Anthony goes to bed nightly at ten o’clock and is prohibited from eating candy and fast food. In class, Anthony is modestly dressed, always prepared for class, and has never been a disciplinary issue. On the other end of the spectrum, Brian is frequently absent or late, and struggles to submit any homework assignments. Although Brian catches on to concepts quickly in class, he struggles on examinations and frequently gets into trouble. Along with coming into class with candy in the morning, Brian has fast food dropped off by his parents at lunch and brags to other students about watching television shows that come on late. Brian wears the most popular footwear available and idolizes music stars. Although their diagnostic tests indicated a negligible difference in their fluency and arithmetic skills at the beginning of the year, by the end, Anthony far exceeded Brian in essentially every metric available. These two students now have very different projections, largely due to the guidance they were given at home. While Anthony will

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1. These are fictional names, but they represent the stories of two students whom I had in my class while teaching in Washington, D.C.

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probably go to and excel at college, Brian will likely repeat the cycle of poverty that his family has been a part of for years.

Poverty is a troubling subject. How federal and state governments [hereinafter “Government”] address poverty, especially in minority communities, is more troubling. Given the history of the Government’s hand in creating poverty from the Compromise of 1877<sup>2</sup> up to Reaganomics,<sup>3</sup> Government initiatives to address poverty are met with contempt and distrust.<sup>4</sup> Significantly, the Government offends indigent communities when it suggests cultural issues as being part of the problem, giving the impression that those in need are somehow inherently disposed to make poor decisions and are in need of the guidance of those who *know* how to be productive citizens.<sup>5</sup> I hope that this Comment provides an idea for a Government initiative that can be appreciated by all.<sup>6</sup>

This Comment attempts to put forth a workable proposal to have a parental training program implemented as part of the Temporary Assistance for Needy Families program.<sup>7</sup> Temporary Assistance for

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2. See MANNING MARABLE & LEITH MULLINGS, *LET NOBODY TURN US AROUND: VOICES OF RESISTANCE, REFORM, AND RENEWAL* 120 (2000) (“Despite the efforts of black reformers, the Compromise of 1877 and the withdrawal of federal troops from the South effectively ended the gains of Reconstruction. . . . Economically, millions of poor southern blacks were trapped in sharecropping, a system structured to ensure that they provided cheap agricultural labor for the benefit of white landlords.”).

3. See *Ronald Wilson Reagan*, GOROWLETT.COM, <http://www.gorowlett.com/rowlett-democrats/reagan.html> (last visited Jan. 8, 2014) (providing an overview of Reaganomics and the affect it had on poverty and the distribution of wealth).

4. See PAUL TOUGH, *WHATEVER IT TAKES: GEOFFREY CANADA’S QUEST TO CHANGE HARLEM AND AMERICA* 95 (2008) (“Christopher Jencks and Meredith Philips, in 1998, warned of the same problem: ‘As a practical matter,’ they wrote, ‘whites cannot tell black parents to change their practices without provoking charges of ethnocentrism, racism, and much else.’”).

5. See *id.*

6. To be clear, I am a native of the poorest congressional district in America, the South Bronx. Richard Risk, *South Bronx Is Poorest District in Nation, U.S. Census Bureau Finds: 38% Live Below Poverty Line*, N.Y. DAILY NEWS (Sept. 29, 2010, 8:30 PM), <http://www.nydailynews.com/new-york/south-bronx-poorest-district-nation-u-s-census-bureau-finds-38-live-poverty-line-article-1.438344>. I grew up benefitting from the very programs that I challenge today. I do not challenge the need for these programs—as I believe there is a need for more—rather, I challenge the effectiveness of these programs. Through personal experiences and relationships, it seems apparent that these programs diminish the fire of ambition that capitalism seeks to ignite in all of us, creating a sort of caste system with very little flexibility despite the country priding itself on the possibility of “rags to riches.” I do not believe that those from the neighborhood I grew up in, and others like it, are any less talented, intelligent, caring, honest or otherwise inherently gifted as any from other neighborhoods. Likewise, I do not believe that those receiving Government aid are inherently disposed to make bad decisions. However, I do believe that a lack in education makes it more likely that those receiving Government aid will make less informed decisions. It is this problem that my proposal modestly seeks to address.

7. *Temporary Cash Assistance for Needy Families (TANF)*, DEP’T OF HUMAN SERVICES, <http://dhs.dc.gov/service/temporary-cash-assistance-needy-families-tanf> (last visited Jan. 15, 2014).

Needy Families (TANF) provides cash assistance to needy families with dependent children when available resources do not fully address the family's needs and prepares program recipients for independence through work.<sup>8</sup> TANF is federally funded but is administrated by each state and focuses on providing financial assistance for low-income families that have children and for pregnant women in their last three months of pregnancy.<sup>9</sup> In 2010, the monthly average number of families receiving TANF financial assistance was 1,847,155.<sup>10</sup> In that same year, the percentage of TANF families who were white was 31.8%, while blacks were 31.9% and Hispanics were 30%.<sup>11</sup> The percentages for adult recipients with no financially dependent children was slightly different, with 37% white, 33% black, 24% Hispanic, 2.4% Asian, and 1.2% Native American.<sup>12</sup>

Opponents of the federal aid provided by TANF say that the TANF program liberally allows for long-term welfare dependency,<sup>13</sup> while supporters of the federal aid provided by TANF say that the TANF program does not provide enough support to the poor.<sup>14</sup> However, both sides agree that the TANF program does not improve the conditions of the demographic it helps long-term.<sup>15</sup> Combining the

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8. *See id.*

9. *What Is the TANF Program*, TANF PROGRAM, <http://www.tanfprogram.com/what-is-tanf> (last visited Jan. 15, 2014).

10. *Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2010*, ADMIN. FOR CHILD. AND FAMILIES (Aug. 8, 2012), <http://www.acf.hhs.gov/programs/ofa/resource/character/fy2010/fy2010>.

11. *See id.* The significant percentage of white recipients should highlight that any concerns for the community of TANF recipients goes beyond a concern for blacks and/or Hispanics.

12. *See id.*

13. *Barry Was Right: Welfare Creates Dependency*, WASH. EXAMINER (Aug. 21, 2012, 3:30 PM), <http://washingtonexaminer.com/examiner-local-editorial-barry-was-right-welfare-creates-dependency/article/2505525#.UKaLxHCm7bA> ("In 2010, Councilman Marion Barry, D-Ward 8, made headlines when he said: 'Let's face it, both locally and nationally, [TANF] has failed to alleviate long-term poverty, allowing individuals to continue on this cycle of reliance and dependency.'"); *see also* Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC ONLINE (March 1997), [www.theatlantic.com/past/docs/issues/97mar/edelman/edelman.htm](http://www.theatlantic.com/past/docs/issues/97mar/edelman/edelman.htm) ("It was a system that contributed to chronic dependency among large numbers of people who would be the first to say they would rather have a job than collect a welfare check every month—and its benefits were never enough to lift people out of poverty.").

14. *See* LaDonna Pavetti, *TANF at 16: Time to Retool*, OFF THE CHARTS BLOG (Aug. 22, 2012, 1:50 PM), <http://www.offthechartsblog.org/tanf-at-16-time-to-retool/> ("Since then, TANF has played a shrinking role as a safety net for poor families, serving a small share of poor families and lifting many fewer families out of deep poverty than AFDC did.").

15. LaDonna Pavetti, *Fixing Some of TANF's Failures*, OFF THE CHARTS BLOG (June 6, 2012, 4:46 PM), <http://www.offthechartsblog.org/fixing-some-of-tanfs-failures/> ("All three witnesses at a hearing yesterday on Temporary Assistance for Needy Families agreed that TANF has failed in two important respects. First, it has not adequately prepared program participants for long-term employment success. Second, it did not respond adequately to increased need during the recession.").

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perspectives of both sides provides the most accurate assessment: the TANF program does not impact the circumstances of its recipients long-term because it does not provide enough support for the poor, causing families to rely on government aid for multiple generations.<sup>16</sup> To address generational dependence, the TANF program should incorporate a way to ensure that children of families dependent on TANF are better educated and capable of long-term financial success by training the parents of these children on parenting skills.<sup>17</sup>

Because of the impact parents have on student academic performance<sup>18</sup> and the deference Congress gives to the states to regulate their respective TANF programs,<sup>19</sup> Washington, D.C. should serve as a model state<sup>20</sup> and mandate parental training for TANF welfare recipients who are exempt from the work requirement due to having dependent children.<sup>21</sup> Part I of this Comment discusses the contributing factors, effects of, and the proposed solutions to the achievement gap in education. Part II details the history and purpose of TANF, along with details of its work requirement. Part III uses the District of Columbia as a microcosm to analyze the current practicalities of the implementation of TANF. Part IV provides the substantive and procedural details of the parental training program. Part V proposes that TANF participants are exempted from the work requirement due to dependent children attending mandatory parental training programs, and explains the substantive and procedural details of the proposed TANF parental training program. Lastly, Part VI addresses the legal

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16. *Barry Was Right*, *supra* note 13.

17. See *Education and Training in Welfare/TANF*, AM. ASS'N OF U. WOMEN (Aug. 2009), <http://www.aauw.org/files/2013/02/position-on-education-in-TANF-111.pdf> (“AAUW supports policies which provide long-term solutions to economic inequity, an example of which is providing women and girls with unrestricted access to education and job training. Statistics show that educational access is closely linked to economic security. Only by improving employability through education and training can women and their families become financially empowered and economically self-sufficient.”).

18. Jordan Weissmann, *Occupy Kindergarten: The Rich-Poor Divide Starts with Education*, ATLANTIC (Feb. 11, 2012, 9:00 AM), <http://www.theatlantic.com/business/archive/2012/02/occupy-kindergarten-the-rich-poor-divide-starts-with-education/252914/> (“The greatest predictor of a child’s academic success, even more than economic class, is still their parents’ education level.”).

19. See GENE FALK, CONG. RES. SERV., RL32748, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 17 (2013) (“In public finance lingo, a block grant is a grant-in-aid given to states and local governments to address ‘broad purposes.’ Block grants typically give governmental entities discretion in both defining problems and expending funds to address them.”); see also *Comacho v. Tex. Workforce Comm.*, 408 F.3d 229, 235 (5th Cir. 2005).

20. Although Washington, D.C. is a city, it is treated as a state by the TANF program. See FALK, *supra* note 19.

21. See *infra* pp 19–20.

and social issues that may potentially arise with a parental training program.

## I. THE EDUCATIONAL ACHIEVEMENT GAP: CAUSES AND EFFECTS

The TANF program can be used to combat against the educational achievement gap seen between students from different socioeconomic backgrounds by mandating parental training. This section details what the education achievement gap is, what contributes to the achievement gap, especially the impact of a parents' education, and the long-term effects of the educational achievement gap. In education, the achievement gap "refers to the disparity in academic performance between groups of students. The achievement gap shows up in grades, standardized-test scores, course selection, dropout rates, and college-completion rates, among other success measures."<sup>22</sup>

### A. Race as an Indicator of a Child's Academic Success

The most common factor considered when discussing the academic achievement gap is race.<sup>23</sup> According to *Education Week*, the achievement gap is "most often used to describe the troubling performance gaps between African American and Hispanic students, at the lower end of the performance scale, and their non-Hispanic white peers, and the similar academic disparity between students from low-income families and those who are better off."<sup>24</sup>

While black and Hispanic students "have made great strides in improving performance in reading and mathematics, a breach still separate[s] them from their white peers."<sup>25</sup> Studies done in 2009 and 2011 demonstrated that black and Hispanic students "trailed their white peers by an average of more than 20 test-score points on the NAEP math and reading assessments at fourth and eighth grades, a difference of about two grade levels."<sup>26</sup> Additionally, "both white and Asian American students were at least twice as likely to take classes considered academically rigorous in those subjects than black and His-

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22. *Achievement Gap*, EDUC. WK. (Aug. 3, 2004), <http://www.edweek.org/ew/issues/achievement-gap/>.

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.*



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panic students. Fewer than 10 percent of black or Hispanic students participated in rigorous courses in 2009.”<sup>27</sup>

B. Parental Income an Indicator of a Child’s Academic Success

A mandate for parental training for the parents who qualify for TANF would help address the lack of attention given to the problem of the achievement gap created by income. Even though the achievement gap between socioeconomic classes has been widely discussed in academia, “the income divide has received far less attention from policy makers and government officials than gaps in student accomplishment by race.”<sup>28</sup> Indeed, “while the achievement gap between white and black students has narrowed significantly over the past few decades, the gap between rich and poor students has grown substantially during the same period . . . .”<sup>29</sup> In fact, “since the 1960s, the difference in test scores between affluent and underprivileged students has grown 40%, and is now twice the gap between black and white students.”<sup>30</sup> Affluent students are much more likely to earn a high school diploma, with “about 68 percent of 12th-graders in high-poverty schools graduated with a diploma in 2008, compared with 91 percent of 12th-graders in low-poverty schools.”<sup>31</sup> Poor students are five times more likely to drop out of high school than affluent students.<sup>32</sup>

The achievement gap created by wealth disparities shows up early in a child’s education, displaying how imperative it is for a parental training program to help new parents benefitting from TANF.<sup>33</sup> By the time an affluent student enters school, “they’ve spent 400 more hours on ‘literacy activities’ than their less fortunate peers.”<sup>34</sup> Studies indicate that by the age of three, “children of professionals have vo-

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27. *Id.*

28. Sabrina Tavernise, *Poor Dropping Further Behind Rich in School*, N.Y. TIMES, Feb. 10, 2012, at A1.

29. *Id.*

30. Weissmann, *supra* note 18.

31. *Achievement Gap*, *supra* note 22.

32. See Russell W. Rumberger, *Poverty and High School Dropouts*, AM. PSYCHOL. ASS’N (May 2013), <http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx> (“In 2009, poor (bottom 20 percent of all family incomes) students were five times more likely to drop out of high school than high-income (top 20 percent of all family incomes) students.”).

33. According to Greg Duncan and Katherine Magnuson, “the income achievement gap is large when children enter kindergarten and does not appear to grow (or narrow) appreciably as children progress through school.” Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES 91, 91 (Greg J. Duncan & Richard J. Murnane eds., 2011).

34. Weissmann, *supra* note 18.

cabularies that are nearly 50 percent greater than those of working class children, and twice as large as those of children whose families are on welfare.”<sup>35</sup> The learning experience of affluent children goes beyond literacy as well because “affluent children spend 1,300 more hours than low-income children before age 6 in places other than their homes, their day care centers, or schools.”<sup>36</sup> These disparities are crucial since a child’s education provides the most opportunity for it to improve the socio-economic conditions of itself and its family.<sup>37</sup> The financial capability of affluent families certainly plays a role in the development of children. Affluent families spend “vastly more on their children compared to the poor than they did 40 years ago, and spending more time as parents cultivating their intellectual development.”<sup>38</sup> In addition to financial limitations, low-income families have a difficult time competing with affluent families, who are able to devote their greater resources into extracurricular activities for their children, such as sports and music lessons, because low-income families “are now more likely than ever to be headed by a single parent, [and] are increasingly stretched for time and resources.”<sup>39</sup>

### C. Parental Education an Indicator of a Child’s Academic Success

There is no doubt that the income of a student’s family plays a vital role in academic success, but studies have shown that the education of a student’s parents remains the number one indicator of a student’s success in school.<sup>40</sup> While the parents’ education and a family’s income are inextricably linked, the still more significant impact of pa-

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35. *The Academic Achievement Gap: Facts & Figures*, TCHRS. C. (June 9, 2005), <http://www.tc.columbia.edu/news.htm?articleID=5183>.

36. Tavernise, *supra* note 28.

37. *See id.* (“[T]he imbalance between rich and poor children in college completion—the single most important predictor of success in the work force—has grown by about 50 percent since the late 1980s.”).

38. Weissmann, *supra* note 18.

39. Tavernise, *supra* note 28.

40. *See* Weissmann, *supra* note 18 (“The greatest predictor of a child’s academic success, even more than economic class, is still their parents’ education level.”); *see also* Eric F. Dubow, Paul Boxer & L. Rowell Huesmann, *Long-term Effects of Parents’ Education on Children’s Educational and Occupational Success: Mediation by Family Interactions, Child Aggression, and Teenage Aspirations*, NCBI, [www.ncbi.nlm.nih.gov/pmc/articles/PMC2853053/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2853053/) (last visited Jan. 5, 2014) (“Parents’ educational level when the child was 8 years old significantly predicted educational and occupational success for the child 40 years later.”); Carly Seifert, *Does the Education Level of a Parent Affect a Child’s Achievement in School?*, GLOBAL POST, [everydaylife.globalpost.com/education-level-parent-affect-childs-achievement-school-6869.html](http://everydaylife.globalpost.com/education-level-parent-affect-childs-achievement-school-6869.html) (last visited Jan. 5, 2014) (“According to the National Institutes of Health, the education level of a parent is a significant predictor of a child’s educational achievements and behavioral outcomes.”).

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rental education cannot be ignored. As noted in the *New York Times*, “parenting matters as much as, if not more than, income in forming a child’s cognitive ability and personality, particularly in the years before children start school.”<sup>41</sup> The distinction being made is that parents’ ability to properly raise their child is more significant than the parents’ income when the two factors are isolated.<sup>42</sup> In theory, a parent can be financially poor and still provide strong parenting. This is significant because the non-income benefits of a parent being educated can be shared with parents receiving TANF through this program.

Due to the major impact that parents have on student academic performance, regardless of socio-economic background, jurisdictions, such as Washington, D.C., should mandate parental training for TANF welfare recipients. In a recovering economy, it is important to consider ways to help the poor alleviate their financial issues. The 2012 presidential race reignited debate about requiring people on welfare to enter work programs in an effort to reduce welfare assistance.<sup>43</sup> The argument for work programs for welfare recipients is that the program improves the individual and society.<sup>44</sup> Similarly, mandating parental training may improve the individual family and society.

## II. THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM (TANF)

### A. History of TANF

The history of TANF demonstrates that a mandatory parental training program would fit in well with TANF’s purpose. This section outlines the legislative history of the TANF program, its purpose and the work requirement for the program.

In 1996, the federal government’s Personal Responsibility and Work Reconciliation Act (PRWORA) created the TANF program out of the preexisting Aid to Families with Dependent Children (AFDC)

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41. Tavernise, *supra* note 28.

42. See Reardon, *supra* note 33 (“Family income is now nearly as strong as parental education in predicting children’s achievement.”).

43. See Ari Shapiro, *Despite Fact Checks, Romney Escalates Welfare Work Requirement Charge*, NPR (Aug. 22, 2012, 5:17 PM), <http://www.npr.org/blogs/itsallpolitics/2012/08/22/159791065/despite-fact-checks-romney-escalates-welfare-work-requirement-charge>.

44. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. §§ 2, 101 (1996).

program,<sup>45</sup> which itself was created by Congress in 1935 as part of the Social Security Act “to assist states in providing cash welfare payments for needy children who had been deprived of parental support or care because their parent was absent from home, incapacitated, deceased or unemployed.”<sup>46</sup>

One of the major differences between TANF and the AFDC was the increased deference given to the states, which would allow states to implement a mandatory parental training program. Previously, the AFDC provided cash payments to its recipients “based upon national eligibility standards and a uniform federal definition which created an entitlement for recipients,” but “TANF eliminated national eligibility standards and abolished the national entitlement to aid.”<sup>47</sup> Now, under TANF, each state is free to distribute a predetermined block of funding as it sees fit, but the “states must fulfill certain requirements, including meeting specific goals in moving welfare recipients into work and toward self-sufficiency, and complying with a variety of federal regulations.”<sup>48</sup> And, while states can choose which families to help, they are “required to continue spending at least 80 percent of their previous levels under a ‘maintenance of effort’ provision.”<sup>49</sup> Not only are states free to set their benefit levels, but they can also set “the tax rate, income limits, asset requirements, and even the form of assistance (cash or in-kind services). . . . [T]here are no requirements on how much or little must be spent on cash aid directly.”<sup>50</sup> Annually, each state gets a fixed amount of money from the federal government,<sup>51</sup> and because of the deference given to states, “more than one-third of states have an income limit less than 50% of the Federal Poverty Level and benefit levels vary between states from \$200 to \$1,000 per month for a family of three.”<sup>52</sup>

The change from AFDC to TANF resulted in stark changes in enrollment, with the number of Americans on welfare plunging “from 12.6 million in 1996 to 4.2 million individuals by 2009, a dramatic 67-

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45. *TANF: Temporary Assistance for Needy Families*, ADVOCACY ON CALL, [http://www.advocacyoncall.org/public\\_benefits/tanf/](http://www.advocacyoncall.org/public_benefits/tanf/) (last visited Jan. 15, 2014).

46. *See id.*

47. *Dozier v. Williams Cnty. Soc. Serv. Bd.*, 603 N.W.2d 493, 495 (N.D. 1999).

48. *Id.*

49. Michael Tanner and Tad DeHaven, *TANF and Federal Welfare*, CATO INST. (Sept. 2010), <http://www.downsizinggovernment.org/hhs/welfare-spending>.

50. Robert A. Moffit, *The Temporary Assistance for Needy Families Program*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 291, 299 (Robert A. Moffit ed., 2003).

51. *See Edelman, supra* note 13.

52. Moffit, *supra* note 50.

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percent decrease.”<sup>53</sup> With “no federal definition of who is eligible and therefore no guarantee of assistance to anyone; each state can decide whom to exclude in any way it wants, as long as it doesn’t violate the Constitution.”<sup>54</sup> Additionally, states were able to change the amount of direct cash assistance, which accounted for seventy-three percent before TANF, and dropped to about forty-one percent under TANF.<sup>55</sup>

The movement towards welfare reform under Bill Clinton started during his presidential campaign with his pledge to “‘empower people with the education, training and child care they need’ to escape the trap of dependency.”<sup>56</sup> In 1992, Bill Clinton pledged in his “Putting People First” campaign to “empower people with the education, training and child care they need” for up to two years so they can break the cycle of dependency; the goal, he said then, was to “make work pay” by preparing people for well-paid, high-skill jobs that would help them attain self-sufficiency.<sup>57</sup>

Despite the significance of the Act, TANF passed through both the House of Representatives and the Senate quickly. After several behind the scenes changes to what welfare reform would entail,<sup>58</sup> Republican Representative John Kasich of Ohio, introduced the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 on June 27, 1996.<sup>59</sup> The House of Representatives passed the bill on July 18, 2006, with sixty percent of the vote, and the Senate passed the bill on July 23, 1996, with seventy-four percent of the vote, including twenty-three out of the forty-seven democrats.<sup>60</sup> In less than *one* month, both houses passed the bill with a clear majority.<sup>61</sup> However, in that short time frame, substantial discussion went on about what should be included in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, including thoughts on how to improve parental choices.<sup>62</sup>

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53. Tanner and DeHaven, *supra* note 49.

54. Edelman, *supra* note 13.

55. *See* Tanner and DeHaven, *supra* note 49.

56. Peter T. Kilborn and Sam Howe Verhovek, *Clinton's Welfare Shift Ends Tortuous Journey*, N.Y. TIMES (Aug. 2, 1996), [www.nytimes.com/1996/08/02/us/clinton-s-welfare-shift-ends-tortuous-journey.html](http://www.nytimes.com/1996/08/02/us/clinton-s-welfare-shift-ends-tortuous-journey.html).

57. *Id.*

58. *See* Edelman, *supra* note 13.

59. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. (1996).

60. *See id.*

61. *See* H. R. Rep. No. 104-725 (1996) (emphasis added).

62. *See id.* at 9.

The 500-plus page House conference report on the Personal Responsibility and Work Opportunity Reconciliation Act included several items on promoting better parental choice.<sup>63</sup> Title VI of the report, entitled “Child Care,” included ideas on how to better ensure that children are being well developed.<sup>64</sup> The goals described in section two for the Child Care and Development Block Grant included: allowing states flexibility in “developing child care programs and policies that best suit the needs of children and parents within the State”;<sup>65</sup> promoting “*parental choice in making decisions on the child care that best suits their family’s needs*”;<sup>66</sup> and, encouraging states “to provide consumer information to help parents make informed child care choices.”<sup>67</sup> Although Congress did not mandate parental training as part of the TANF program, it contemplated the importance of improving parental decisions. Notably, the language appears to defer the method in which parental decisions would be improved to the states. Thus, states can mandate a parental training program to satisfy the goals set out in this section of the report.

Later in the conference report, section six describes expectations for activities to improve child care that would appropriately be seen as an indication that mandatory parental training has a fit in TANF.<sup>68</sup> The section entitled “Activities to Improve the Quality of Child Care,” explains that any state that:

[R]eceives child care funds must use at least 4 percent of all funds received (both mandatory and discretionary) for activities designed to provide comprehensive consumer education to parents and the public, *for activities that increase parental choice*, and for activities designed to improve the quality and availability of child care.<sup>69</sup>

Based on this section, the Personal Responsibility and Work Opportunity Reconciliation Act would provide funding for programs that helped increase parental choice, among other services to improve child care. Such funding could be used to support states to implement a mandatory parental program for recipients who are exempt from the work requirement because of dependent children.

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63. *See id.* at 181, 186, 406, 411.

64. *See id.* at 181.

65. *Id.* at 406.

66. *Id.* (emphasis added).

67. *Id.* at 407.

68. *See id.* at 411–12.

69. *Id.* at 411 (emphasis added).

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Prior to the Personal Responsibility and Work Opportunity Reconciliation Act and the conference report on the Act, Congress discussed the need for parental training programs, indicating the appropriateness of a parental training program. On May 17, 1995, Democratic Representative Sanford Bishop of Georgia read a letter to Congress that he had received from members of the State of the Country Committee at the 83rd Session of the South Georgia Annual Conference held at Bethel African Methodist Episcopal Church of Albany, Georgia.<sup>70</sup> In the letter composed by local religious leader of Georgia, the committee concluded that welfare reformation “should take the following steps: . . . [r]eformation including parental training, vocational training and social skills’ training.”<sup>71</sup> The Honorable Sanford Bishop read this letter to show his support for the idea of parental training, among the other ideas presented in the letter. The notion of parental training was also mentioned in the District of Columbia Appropriations Act Senate conference report, when Senator Ted Kennedy of Massachusetts declared, “[w]e must invest in children at the earliest possible age. That is why 2 years ago we changed the Head Start Program to include younger children and provide programs for parents to learn parenting skills for children to get them involved in school.”<sup>72</sup> As both of these legislative declarations make clear, there had been considerable discussion from prominent democrats to implement parental training programs, which explains the discussion of parental training with the Personal Responsibility and Work Opportunity Reconciliation Act. A mandatory parental training program for those exempted from the work requirement due to dependent children would fulfill the considerations made during the inception of TANF.

The rest of the legislative history related to TANF indicates a willingness to continue to provide funding for the program while implementing conditions to regulate parenting decisions. The Personal Responsibility and Work Opportunity Reconciliation Act, which established the block grant for TANF through Fiscal Year 2002, was signed into law on August 22, 1996.<sup>73</sup> In 2005, the Deficit Reduction Act modified TANF by issuing “new regulations that substantially in-

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70. See 141 CONG. REC. E1065–66 (1995) (statement of the Hon. Sanford D. Bishop, Jr.).

71. *Id.*

72. 142 CONG. REC. S1321 (1996) (statement of Sen. Kennedy).

73. See *Temporary Assistance for Needy Families Legislative History*, GREEN BOOK (Oct. 15, 2012), <http://greenbook.waysandmeans.house.gov/2012-green-book/chapter-7-temporary-assistance-for-needy-families/legislative-history>.

creased the proportion of recipients required to participate in work activities.”<sup>74</sup> On February 8, 2006, the Deficit Reduction Act of 2005 provided more funding and encouraged healthy families by: extending most TANF grants through Fiscal Year 2010; eliminating TANF bonus funds; establishing “grants within TANF for healthy marriage and responsible fatherhood initiatives; revis[ing] the caseload reduction credit; and requir[ing] HHS to issue regulations to develop definitions for the statutory activities that count toward the TANF work participation standards as well as verify work and participation in activities.”<sup>75</sup> The remaining TANF grants, which were the supplemental grants, were extended on July 15, 2008,<sup>76</sup> and the Economic Recovery Bill of 2009 “provides states with additional financial resources and increased flexibility in program benefits due to the recession.”<sup>77</sup> The legislative branch extended TANF funding with the Middle Class Tax Relief and Job Creation Act of 2012, which “also prevented electronic benefit transaction access to TANF cash at liquor stores, casinos, and strip clubs” and required that states “prohibit access to TANF cash at Automated Teller Machines (ATMs) at such establishments.”<sup>78</sup> Most recently, the Continuing Appropriations Resolution 2013—signed into law on September 28, 2012—extended TANF funding through March 2013.<sup>79</sup> Today, TANF provides grants on a yearly basis to all U.S. states, tribal governments and territories, which use the funds from these grants to help pay for benefits and services distributed to assist needy families.<sup>80</sup> In its sixteen years regulating the TANF program, the legislative branch has extended funding while implementing new ways to ensure that the funding was moving families toward self-sufficiency. A mandatory parental training program would be the next step in the progression.

#### B. Purpose of TANF

The goals of the TANF program and the requirements placed on states emphasize the program’s mission to help families become self-sufficient. The goals are as follows:

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74. *TANF: Temporary Assistance for Needy Families*, *supra* note 45.

75. *Temporary Assistance for Needy Families Legislative History*, *supra* note 73.

76. *See id.*

77. *TANF: Temporary Assistance for Needy Families*, *supra* note 45.

78. *Temporary Assistance for Needy Families Legislative History*, *supra* note 73.

79. *See id.*

80. *See What Is the TANF Program*, *supra* note 9.



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(1) provide assistance to needy families so that children can be cared for in their own homes or in the homes of relatives; (2) end dependence of needy parents on government benefits through work, job preparation, and marriage; (3) reduce the incident of out-of-wedlock pregnancies; and (4) promote the formation and maintenance of two-parent families.<sup>81</sup>

To further these goals, states may “count toward the [maintenance-of-effort] expenditures for *any* program that provides cash assistance, administration, child care, education, and training, . . . and other activities to further a TANF purpose.”<sup>82</sup> It is apparent from these listed goals that a parental education program to help end a family’s dependence on government assistance would certainly be welcomed. A parental education program would provide support for children living with their families, as it would inform parents of the educational needs their children have at home. Furthermore, the parental training would qualify for maintenance-of-effort (“MOE”) as an education expenditure.

#### C. Requirements and Exceptions of TANF for States and Individual Recipients

States are given an allocation of funding to distribute within the confines of the TANF Act, while also inheriting goals and regulations. All fifty states, as well as the District of Columbia, receive TANF funding through a block grant of \$16.5 billion.<sup>83</sup> In addition, the federal government distributes a combined \$319 million of supplemental grants to seventeen states that qualify.<sup>84</sup> TANF also requires every participating state to satisfy a MOE, which has them contribute at least \$10.4 billion towards the program.<sup>85</sup> Additionally, in order to receive their annual TANF grants, each state must show that their

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81. See FALK, *supra* note 19, at 10.

82. See *id.* at 11.

83. See *id.* at 9 (“In public finance lingo, a block grant is a grant-in-aid given to states and local governments to address ‘broad purposes.’ Block grants typically give governmental entities discretion in both defining problems and expending funds to address them.”).

84. See *id.* at 5 (“During consideration of legislation that led to the 1996 law, fixed funding based on historic expenditures was thought to disadvantage two groups of states: (1) those that had relatively high population growth and (2) those that had historically low welfare grants relative to poverty in the state. Therefore, additional funding in the form of supplemental grants was provided to states that met criteria of high population growth and/or low historic grants per poor person”). The following states qualify for supplemental grants: Alabama; Alaska; Arizona; Arkansas; Colorado; Florida; Georgia; Idaho; Louisiana; Mississippi; Montana; Nevada; New Mexico; North Carolina; Tennessee; Texas; Utah. See *id.*

85. See *id.* at 6.

TANF program is assisting needy families so that children can be cared for in their own homes, and is reducing the dependency of parents by assisting in job preparation as well as work and marriage.<sup>86</sup> States' respective programs should also demonstrate an effort to prevent out of wedlock pregnancies and encourage the formation and maintenance of two-parent families.<sup>87</sup>

Notably, states are permitted to allocate TANF funding, however they see fit, towards programs that work to accomplish one of the four TANF goals. States can receive part of the \$50 million allocated annually for "Responsible Fatherhood Initiatives," which includes "promot[ing] marriage; teach[ing] parenting skills through counseling; mentoring, mediation, and dissemination of information; employment and job training services; media campaigns; and development of a national clearinghouse focused on responsible fatherhood."<sup>88</sup> The District of Columbia should use this flexibility to implement the parental training program and help move its citizens off of government aid.

While there is a lot of flexibility and deference given to the States, there are restrictions that the states must adhere to in order to continue receiving funding at the same level. "Federal TANF funds may not be used for a family with an adult who has received assistance for 60 months."<sup>89</sup> States that fail to meet the work participation standards of TANF are penalized by a reduction in its block grant.<sup>90</sup> A family is considered "engaged in work"—and counted in the numerator of the participation rate—if a member is participating in creditable activities for a minimum number of hours.<sup>91</sup> There are twelve categories of activities that count towards the work participation standards: unsubsidized unemployment; subsidized private sector employment; subsidized public sector employment; job search and readiness; community service; work experience; on-the-job training; vocational educational training; caring for a child of a recipient in community service; job skills training directly related to employment; education

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86. See *What is the TANF Program*, *supra* note 9.

87. See *id.*

88. See FALK, *supra* note 19, at 23.

89. See *id.* at i ("However, up to 20% of the caseload may be extended beyond the five years for reason of 'hardship,' with hardship defined by the states. Additionally, states may use funds that they must spend to meet the TANF MOE to aid families beyond five years.").

90. See *id.* ("The penalty is a 5% reduction in the block grant for the first year's failure to meet the standard, and increased by 2 percentage points each year, . . . up to a maximum penalty of 21%.")

91. See *id.* at 17.

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directly related to employment; and, completion of a secondary school program.<sup>92</sup>

While most people are expected to fulfill the work requirement, there are some exceptions made to the requirement. According to § 824(a)(3), individuals are excepted from the work requirement if they are: “(A) under 18 or over 50 years of age; (B) medically certified as physically or mentally unfit for employment; (C) a parent or other member of a household with responsibility for a dependent child; (D) otherwise exempt under subsection (d)(2); or (E) a pregnant woman.”<sup>93</sup> Additionally, “[s]tates are prohibited from sanctioning a family with a single parent with a child under the age of six if he or she refuses to comply with work requirements because he or she cannot find affordable child care.”<sup>94</sup> An adult with a dependent child must still meet eligibility requirements, including income restrictions and substance abuse provisions.<sup>95</sup>

III. THE DISTRICT OF COLUMBIA AS A PILOT SITE TO  
ANALYZE THE IMPLEMENTATION OF THE  
PARENTAL TRAINING PROGRAM

A. The Educational Achievement Gap in Washington, D.C.

The statistics of DC Public Schools demonstrates overall poor performance and a correlation between student educational performance and a high number of TANF recipients, making D.C. well-suited for the implementation of the mandatory parental training program. In 2011, a state-by-state analysis revealed that Washington, D.C. had the worst high school graduation rate in the country, with only fifty-nine percent of its students graduating on time.<sup>96</sup>

Despite dismal overall statistics, neighborhoods with high numbers of TANF recipients have dramatically more dismal academic statistics. Ward 3, which has the lowest poverty rate (7.1%) and people

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92. *See id.* at 17–18.

93. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

94. FALK, *supra* note 19, at 15. However, the parent must prove that the inability to find affordable child care is “because (1) appropriate child care within a reasonable distance from the parent’s work or home is unavailable; (2) informal child care by a relative or other arrangement is unavailable or unsuitable; and (3) appropriate and affordable child care is otherwise unavailable.” *See id.* at 16.

95. *See Temporary Cash Assistance for Needy Families (TANF)*, *supra* note 7.

96. *See* Pete Winn, *DC Takes Top Honors—for Worst Graduation Rate in U.S.*, CNS NEWS.COM (Nov. 28, 2012, 6:01 PM), <http://cnsnews.com/news/article/dc-takes-top-honors-worst-graduation-rate-us>.

receiving TANF benefits (66 out of 78,887) of the D.C. Wards, has the lowest percentage of people without a high school diploma (3.4%).<sup>97</sup> Conversely, Ward 8 has the highest poverty rate (34%) and people receiving TANF benefits (17,579 out of 73,662), and 20% of its residents do not have their high school diploma,<sup>98</sup> second only to Ward 7 (21%).<sup>99</sup>

Ward 3 dramatically out-performs Ward 8 schools in growth and proficiency levels.<sup>100</sup> In a chart measuring the two-year average school median growth percentile scores from 2009 to 2011, Ward 3 had a median percentage growth rate of 68.6 in mathematics and 70.8 in reading, while Ward 8 had a median percentage growth rate of 43 in mathematics and 46 in reading.<sup>101</sup> The statistics for the Wards were more distinct with proficiency levels of the standardized tests.<sup>102</sup>

## B. Overview of TANF in the District of Columbia

The Temporary Assistance for Needy Families program in the District of Columbia (“TANF D.C.”), which currently services 31,000 children<sup>103</sup> and 17,500 families with an average monthly benefit of \$350,<sup>104</sup> has a structure that would provide a smooth transition to a program that incorporated a mandated parental training program. Approximately “one-in-five D.C. residents—approximately 123,000—

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97. See *DC 2002 Ward Profile-Well-Being, Ward 3*, NEIGHBORHOOD INFO DC, [http://www.neighborhoodinfodc.org/wards/Nbr\\_prof\\_wrdb3.html](http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrdb3.html) (last updated Nov. 26, 2013).

98. See *DC 2002 Ward Profile-Well-Being, Ward 8*, NEIGHBORHOOD INFO DC, [http://www.neighborhoodinfodc.org/wards/Nbr\\_prof\\_wrdb8.html](http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrdb8.html) (last updated Nov. 26, 2013).

99. See *DC 2002 Ward Profile-Well-Being, Ward 7*, NEIGHBORHOOD INFO DC, [http://www.neighborhoodinfodc.org/wards/Nbr\\_prof\\_wrdb7.html](http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrdb7.html) (last updated Nov. 26, 2013).

100. Ward 3 has one public middle school and one public high school, Deal Middle School and Wilson High School. Ward 8 has two public high schools and three public middle schools: Anacostia High School; Ballou High School; Hart Middle School; Johnson Middle School; and Kramer Middle School. See DIST. OF COLUMBIA PUB. SCHS., <http://profiles.dcps.dc.gov> (last visited Jan. 15, 2014).

101. See MARIANN LEMKE ET AL., OFFICE OF THE STATE SUPERINTENDENT OF EDUC., ACADEMIC GROWTH IN THE DISTRICT OF COLUMBIA: 2009-10 & 2010-11 at 9 (2012).

102. See *id.* at 10-22. 2011 Percentage of Students Proficient or Above on DC-CAS in mathematics:

Anacostia High School (Ward 8)- 9.2; Ballou High School (Ward 8)- 19.3; Wilson High School (Ward 3)- 52.3; Deal Middle School (Ward 3)- 88.9; Hart Middle School (Ward 8)- 31.5; Johnson Middle School (Ward 8)- 17.1; Kramer Middle School (Ward 8)- 29.4. 2011 Percentage of Students Proficient or Above on DC-CAS in reading: Anacostia High School (Ward 8)- 13.3; Ballou High School (Ward 8)- 20.9; Wilson High School (Ward 3)- 65.7; Deal Middle School (Ward 3)- 83.5; Hart Middle School (Ward 8)- 29.5; Johnson Middle School (Ward 8)- 17.5; Kramer Middle School (Ward 8)- 19.2. See *id.*

103. Tim Craig, *D.C. Council Softens Penalties for Welfare Recipients Who Refuse Job Training*, WASH. POST, Jan. 8, 2013, at B01.

104. Justin Moyer, *Some Welfare Cuts May Be Delayed*, WASH. POST, Aug. 21, 2012, at B05.

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live in poverty.”<sup>105</sup> And, according to the U.S. Census Bureau, “the District of Columbia’s poverty rate is now the third highest in the nation at 19.9 percent, trailing only Mississippi and Louisiana.”<sup>106</sup> To qualify for TANF aid in the District of Columbia, you must be a resident that is “either pregnant or responsible for a child under 19 years of age, a U.S. national, citizen, legal alien, or permanent resident, have low or very low income, and be either under-employed (working for very low wages), unemployed or about to become unemployed.”<sup>107</sup> To support the recipients of the TANF program, the Department of Human Services “has five Income Maintenance Administration Service centers in the District of Columbia, with two in Anacostia.”<sup>108</sup> These five centers can serve as facilities in which the seminars can be held, assuming they have available rooms, or a connection to local community leaders who could help organize the program in their respective neighborhoods.

In addition to having facilities in which the program can be run out of, the TANF D.C. makes a parental training program more readily acceptable with its clear policy of the possibility of inquiries being made into a recipient’s personal life. The application for TANF benefits, which is included in a common application for “Medical Assistance,” “Food Stamps,” and “Interim Disability Assistance,” requires the applicant to list everyone who resides in their dwelling, along with any income and monthly expenses.<sup>109</sup> Additionally, the Department of Human Services reserves the right to perform “Quality Control,” which includes interviews and a review of medical records, recipients who refuse to cooperate risk losing their benefits.<sup>110</sup> The TANF program also requires that a recipient give the Department of Human Services permission to communicate with the recipient’s employer, landlord, and any other person privy to information about the recipient.<sup>111</sup> TANF D.C. makes clear that its recipients should expect to be

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105. Ed Lazere & Wes Rivers, *Poverty on the Rise in DC*, D.C. FISCAL POL’Y INST. (Sept. 12, 2012), <http://www.dcfpi.org/poverty-on-the-rise-in-dc>.

106. *New Census Data: 110,000 D.C. Residents Live Below Poverty Line*, HUFFINGTON POST (Sept. 23, 2011, 9:58 AM) [http://www.huffingtonpost.com/2011/09/23/new-census-data-district-of-columbia-poverty\\_n\\_977608.html?view=screen](http://www.huffingtonpost.com/2011/09/23/new-census-data-district-of-columbia-poverty_n_977608.html?view=screen).

107. *Temporary Cash Assistance for Needy Families (TANF)*, *supra* note 7.

108. See D.C. DEP’T OF HUMAN SERVS. COMBINED APPLICATION FOR DC MEDICAL ASSISTANCE FOOD STAMPS CASH ASSISTANCE, *available at* [dhs.dc.gov/sites/default/files/dc/. . /combinedform\\_eng1.pdf](http://dhs.dc.gov/sites/default/files/dc/. . /combinedform_eng1.pdf) (last visited Jan. 15, 2014).

109. *See id.*

110. *See id.*

111. *See id.*

willing to share personal information in order to continue to receive TANF benefits.<sup>112</sup> Compared to these measures, a parental training program that informs and advises, but does not require sharing personal information, respects the privacy that recipients may desire.

TANF D.C. has adopted a more flexible time limit than the federal government, providing more time for families to develop and become self-sufficient under the TANF program.<sup>113</sup> While the Federal TANF law includes time limits over the use of federal funds, the District of Columbia and the states have flexibility over the application of time limits when benefits are funded with local dollars, allowing them to let families go beyond the federally imposed sixty month restriction.<sup>114</sup> Historically, the District of Columbia had not reduced or eliminated benefits to families based on a time limit,<sup>115</sup> but the council recently voted eleven to two to modify rules that will help limit welfare benefits to five years.<sup>116</sup> Even with this recent modification, the program does not automatically cut families off after five years. Such flexibility would allow a family who has recently had a child to benefit from the parental training program even if they have already gone beyond the five-year federal limit.

In addition to its leniency with regard to the time limit put on TANF benefits, TANF D.C. already has a substantial portion of its TANF budget allocated towards supporting other programs and services, in which the parental training program could be included. While most of District of Columbia's TANF block grant and MOE funds are used to support the welfare-to-work program, TANF D.C. also uses some of its block grant to support other programs and services, which are available for both TANF families and non-TANF families.<sup>117</sup> Such programs include childcare services that are prioritized for TANF recipients (also open to families with incomes up to 250 percent over the poverty line, or \$46,333 for a family of three), and services to support homeless services and family preservation.<sup>118</sup> TANF D.C. provides over fourteen programs and services under its TANF program, including cash assistance, job training, job readiness,

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112. *See id.*

113. *See Washington DC TANF Eligibility Requirements*, TANF PROGRAM, <http://www.tanf-program.com/washington-dc-tanf-eligibility> (last visited Jan. 15, 2014).

114. *See id.*

115. *See id.*

116. *See Craig, supra* note 103.

117. *See Washington DC TANF Eligibility Requirements*, TANF PROGRAM, *supra* note 113.

118. *See id.*

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childcare, tuition assistance, case management, assistance for victims of domestic violence, and the Teen Parent Assessment Project, which empowers teen parents in TANF toward self-sufficiency.<sup>119</sup> Through its various programs, TANF D.C. has demonstrated a willingness to use its resources in ways that benefit its constituents, making it likely that a parental training program would be a welcomed venture.

#### C. Work Requirements

Similar to the guidelines outlined by the Federal TANF policies, TANF D.C.'s work requirements create exceptions that the parental training program can complement. Under TANF D.C., a number of activities are counted toward filling the work participation requirement, including “subsidized employment . . . [,] unsubsidized employment, on-the-job training, work experience, community service, job search and job readiness assistance, and vocational education.”<sup>120</sup> In addition to these activities, “[j]ob skills training, education related to employment, and education connected to obtaining a high school diploma or GED also count” if the TANF recipient has twenty hours of work activities per week.<sup>121</sup> Currently, “most D.C. TANF recipients are referred to a program that provides short-term job readiness services, while a small number participate in more targeted education or training programs.”<sup>122</sup> For those who are required to fulfill the work participation requirement, TANF D.C. could include an optional parental training in its category of targeted education or training programs.

In addition to the possibility of an optional parental training program, TANF D.C. can mandate parental training for those who are exempt from work requirements because of dependent children. The District of Columbia exempts certain populations from work requirements, including “single parents with children under 12 months, recipients 60 years old or older, recipients with a medical exemption or domestic violence waiver, those caring for an ill or injured family member, women in their second or third trimester of pregnancy, and full-time AmeriCorps or VISTA volunteers.”<sup>123</sup> The single parents

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119. *See id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

with dependent children under 12 months in age should be required to participate in the parental training program.

#### D. Individual Responsibility Plan & Sanctions

For those who are exempt from the work requirement because they have dependent children, TANF D.C. can mandate parental training through its new Individual Responsibility Plan (“IRP”), “which outlines the services available to the parent and the activities she is required to participate in.”<sup>124</sup> The Individual Responsibility Plan is a part of the changes to the TANF program that “will require recipients to get individualized counseling on how to gain skills to find work within 60 months so they can be independent when the TANF benefits end.”<sup>125</sup> The redesign of TANF D.C. requires new applicants to develop an IRP and current recipients to develop an IRP at their annual reapplication for benefits.<sup>126</sup> Having such a program in place is a great benefit in trying to incorporate the mandatory parental training program for parents with dependent children.<sup>127</sup>

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124. Kate Coventry, *DC Council Adopts New TANF Sanction Policy*, DC FISCAL POL’Y INST. (Jan. 8, 2013), <http://www.dcfpi.org/dc-council-adopts-new-tanf-sanction-policy>.

125. Craig, *supra* note 103.

126. See Coventry, *supra* note 124.

127. Tennessee legislature has already incorporated parental training into the delegation of TANF funds, although with a different approach. Tennessee State Senator Stacey Campfield and Representative Vance Dennis have introduced “legislation that would tie welfare assistance under the Temporary Assistance for Needy Families program to the educational performance of students who benefit from it, and the legislation was approved by committees in both the state House and Senate last week.” Travis Waldron, *Tennessee Advances Legislation That Would Tie Welfare to Children’s Grades*, THINK PROGRESS (Apr. 1, 2013, 12:00 PM), <http://thinkprogress.org/economy/2013/04/01/1802811/tennessee-advances-legislation-that-would-tie-welfare-to-childrens-grades/>. Instead of requiring parental class in anticipation of children entering school, which would be more proactive, the Tennessee program punishes TANF families whose students fail to make “satisfactory progress.” See *id.* The parenting class serves as a way for TANF families to get a reprieve from the thirty percent reduction in TANF benefits. See *id.* According to State Senator Campfield’s draft of the Bill, satisfactory academic progress means complying with the attendance requirements, and receiving a score of proficient or advanced on required math and reading state examinations, or maintaining a grade point average sufficient to be promoted to the next grade. See S.B. 132, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013). Along with attending a parental training course, parents can get a reprieve if they enroll their child in tutoring or attend a parent-teacher conference. See Diana Reese, *Proposed Tennessee Bill Would Cut Welfare Benefits When Kids Fail at School*, WASH. POST (Apr. 1, 2013, 2:37 PM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/04/01/proposed-tennessee-bill-would-cut-welfare-benefits-when-kids-fail-at-school/>. Unlike the Tennessee legislation, which could set up a “terrible relationship” and “animosity between school and home,” my program would not punish families for a child’s academic performance. Rather, it hopes to positively affect a child’s academic performance long term. See Carrie Healey, *Tennessee Bill: Welfare Benefits Depend on Child’s School Performance*, THE GRIO (Apr. 1, 2013, 1:58 PM), <http://thegrio.com/2013/04/01/tennessee-bill-welfare-benefits-depend-on-chilids-school-performance>.



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The Individual Responsibility Plan (“IRP”) also provides an established sanction for not completing the expected activities. If TANF D.C. recipients do not “complete the activities laid out in their plan for a period of 4 to 8 weeks, the family will be subject to a sanction, a reduction in their cash benefits.”<sup>128</sup> The sanctions for a recipient not following their IRP have three “levels of sanctions with the severity of the sanction, increasing at each step.”<sup>129</sup> In order to receive their full benefit amount after being sanctioned for noncompliance, a parent must comply with their IRP for four consecutive weeks.<sup>130</sup> Because of this sanction policy being in place, TANF D.C. would not have to create new consequences for parents who do not fulfill their mandatory parental training courses.

#### E. Budget Changes

The parental training program would align with the District of Columbia’s recent desire to make its TANF D.C. spending more purposeful. In an effort to spend more efficiently, Mayor Vincent Gray, Department of Human Services officials and anti-poverty advocates presented a plan that called “for ‘an aggressive yet deliberate strategy’ to determine whether those receiving Temporary Assistance for Needy Families (TANF) still need the subsidy and to connect them with services before their benefits are reduced.”<sup>131</sup> TANF D.C., which costs about \$159 million annually, plans to spend about \$4.5 million on reviewing TANF D.C. cases, with hopes to provide recipients with some direction.<sup>132</sup> In addition to the parental training program being incorporated into reviews, the program should be seen as an efficient way to reduce a family’s dependency on TANF.

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128. *See* Coventry, *supra* note 124.

129. *Id.* (“Level One– the head of household is removed from the benefit amount. For a family of three, this means cutting benefits from \$428 to \$336 a month. D.C.’s current sanction policy has only this level. Level Two– Under this new provision, the family receives a 50 reduction in the amount they usually receive after a second period of non-compliance. A family of three will see their benefits drop from \$428 to \$214 per month. Level Three– Under this provision, the family receives a full-family sanction, meaning they will receive no cash assistance for at least one month.”).

130. *See id.* (“It is noteworthy that the full-family sanctions policy adopted by the D.C. Council—one month—is far shorter than the initial proposal from the Department of Human Services, which would have imposed a 6-month full family sanction. . . . D.C.’s adopted policy is in line with 23 states that have full family sanctions but allow families to get back on TANF quickly if they comply with program requirements.”).

131. Moyer, *supra* note 104.

132. *See id.*

#### IV. THE SUBSTANTIVE AND PROCEDURAL DETAILS OF TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PARENTAL TRAINING

This section details the curriculum that would be included in a parental training program, along with the procedural and administrative considerations for the program. As far as execution, the federal program should lay out explicit guidelines for states to use when administering the program. While states will locally determine what would constitute a reasonable excuse for failing to meet the requirements, the TANF program should generally require<sup>133</sup> non-working parents receiving TANF benefits (exempted from work requirements because of dependent children) to attend a ninety-minute seminar once a week for nine weeks.<sup>134</sup> Transportation would be paid for, and babysitting services would be available on site for parents to not have to make additional trips to find a babysitter. The program would not apply to parents that work, but they could opt-in if they have dependent children, and be paid for their time spent at the seminar as they would at their job. TANF recipients without dependent children would not be included in the program. The program would not put an inappropriate onus on these TANF recipients, since they are not required to work because of their having dependent children.

Washington, D.C. should look at existing parental training programs, such as the “Baby College” of the Harlem Children’s Zone, to assess what is appropriate to cover in these seminars, and how to implement the program without offending the very population it is meant to serve.<sup>135</sup> The content will reflect the age of the children, so parents will be grouped based on the age of their children.<sup>136</sup> Parents with multiple children will join the group of the oldest child. In addition, similar to the Baby College, there would be a separate class for

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133. Along with developing strategies to motivate parents to come, the program should be required to ensure that parents are actually coming to the program. See TOUGH, *supra* note 4, at 93 (“A study published in 1999 that compared several home-visiting programs from around the country discovered that most of the programs had a hard time recruiting and retaining families.”).

134. The Baby College, which occurred five times a year, lasted nine consecutive Saturday mornings and enrolled expecting parents and parents of children up to the age of three. *Id.* at 58.

135. See generally *id.* (describing the Harlem Children Zone is a community oriented school lead by Geoffrey Canada, and the Baby College of the Harlem Children Zone is for expecting adults or adults with children under three years of age).

136. In the Baby College, parents were “assigned to classrooms according to the age of their youngest child—the expecting parents were in room 107; the zero-to-eleven-month class was in room 109; and so on up to the parents of three-year-olds in room 129.” *Id.* at 62.

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teenage parents<sup>137</sup> and parents who do not speak English.<sup>138</sup> Topics could include the benefits of: exercise; higher order/critical thinking questions; reading; discipline<sup>139</sup>; diverse experiences; healthy eating; disabilities (if applicable); and, strong attendance in school. With these general topics, the states could train local citizens to facilitate these classes and work with parents.

The program would have to encourage parents to want to come and ensure that parents are comfortable while participating in the program. Similar to how the outreach workers described the Baby College,<sup>140</sup> TANF D.C. workers who are responsible for helping create IRPs with parents should explain to parents that the program needs them to share their perspective in a discussion about raising young children. The first class should be an orientation<sup>141</sup> and there should be community-building exercises, such as “Baby Showers,”<sup>142</sup> to build familiarity and comfort. And, perhaps most importantly, the staff and instructors must always demonstrate an appreciation and respect for every participant.<sup>143</sup> The seminars will not try to force anything on the parents, but will instead be informative, leaving parents to decide what is best for their child. Based on numbers from the Baby College,

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137. Expectedly, there is a great need to help teenage parents, especially when it comes to helping their children excel academically. *Id.* at 78 (“Statistically, teenage parents are more at risk for all kinds of problems, from child abuse to substance abuse to homelessness, and they are less likely than other parents to provide their children with enough educational stimulation.”).

138. *See id.* at 62 (“There was a separate class for ‘young adults,’ meaning teenage parents and parents-to-be, plus a sizable class in Spanish and a smaller one in French, for the handful of parents who had immigrated to Harlem from West Africa.”).

139. *See id.* at 81 (“As Dr. Brazelton taught, discipline was intimately connected with cognitive growth. The middle-class style of discipline—negotiation, explanation, impulse control—was intertwined with the middle-class style of brain development. There was simply more talk in middle-class discipline, and thus more verbal stimulation; encouraging a child to understand the reasons for a prohibition, and to take part in choosing an alternative, was a powerful cognitive stimulus.”).

140. When recruiting parents, the outreach workers described it as a discussion instead of a class. *Id.* at 59 (“Another outreach worker stopped her and went into his rap: ‘We’ve got a free nine-week program for parents. It’s a discussion,’ he said, ‘a chance to share your expertise. Plus, there’s free breakfast and free lunch, nine Saturdays in a row.’”).

141. *See id.* at 62 (“Each session of the nine-week course was dedicated to a particular subject. The first week was an orientation session . . .”).

142. *See id.* at 61 (“The Baby Shower was a regular feature of Baby College, a get-to-know-you event that took place a few days before the first class.”).

143. *See id.* at 96 (“The staff members never acted as though they were doing the parents a favor, and the parents weren’t made to feel as though they should be grateful for the program. Quite the reverse, in fact: the parents were made to feel appreciated, like *they* were the ones doing a good civic deed. . . . And that approach extended into the classroom, where instructors solicited ideas and opinions from parents, offering plenty of praise and sparing amounts of criticism.”).

the program would cost the state about \$3,000 per graduating parent.<sup>144</sup>

## V. ELIMINATING POTENTIAL LEGAL ISSUES ARISING WITH PROGRAM

In order for the District of Columbia to launch a successful mandatory parental training program, it must address any legal challenges to the program. This section outlines the potential legal issues with the program, including privacy violations and claims of discrimination. The immediate legal question that comes to mind with a parental training mandate as part of the TANF program is whether the parents' constitutional rights to privacy and self-determination are being violated.

### A. Equal Protection

One possible legal argument against a mandatory parental training program would be a claim that such a program violates the equal protection of those required to participate in the program. According to the Fourteenth Amendment, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>145</sup> The issue is whether the classification requires a rational basis, intermediate or strict scrutiny review. The basic level of review is rational basis, which requires that the classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."<sup>146</sup> Intermediate scrutiny applies when classifications are based on gender, and requires that the classification "serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>147</sup> Finally, when race or some other suspect classification is involved, strict scrutiny is applied and mandates that the classification "must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."<sup>148</sup>

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144. *See id.* at 94 ("The \$1.2 million a year that the Harlem Children's Zone spends on Baby College works out to be about \$3,000 per graduating parent.").

145. U.S. CONST. amend. XIV, § 1.

146. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 155 (1897).

147. *Califano v. Webster*, 430 U.S. 313, 317 (1977).

148. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

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The classification considered here is not based on race or any other suspect classification. Regardless of race or any other identity, any person with a dependent child who is consequentially exempted from the work requirement is included. Nor is this classification based on gender, since women without dependent children are not included in the classification and single men with dependent children are included if they are exempt from the work requirement. As a result, the standard of review would be rational basis.

The classification created by the mandatory parental training program would survive a rational basis review because there is a reasonable basis for the classification. According to *Dandridge v. Williams*, “In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. . . . ‘A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.’”<sup>149</sup> The classification is reasonable for several reasons. The mandatory parental training course is more applicable to those who have dependent children (children who are younger than one year of age) versus someone who does not have children or has substantially raised their children already. Furthermore, the classification mandates an activity upon those who have been exempted from the more time-consuming work requirement. These reasons provide a rational basis for the classification created by the program, thereby having the program survive an equal protection claim.

#### B. Due Process

The other major legal concern would be that the program violates the Due Process Clause of the Constitution through a possible violation of the sanctity of family life. According to the Fourteenth Amendment, “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”<sup>150</sup> The first issue would be whether a possible violation of the sanctity of family life is a fundamental right protected by the Constitution. The Supreme Court asserted the sanctity of family to be a fundamental right because “‘freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Four-

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149. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

150. U.S. CONST. amend. XIV, § 1.

teenth Amendment[.]”<sup>151</sup> and the “‘Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.’”<sup>152</sup> As noted in *Griswold v. Connecticut*, the Fourth Amendment creates “a ‘right to privacy, no less important than any other right carefully and particularly reserved to the people.’”<sup>153</sup> The Supreme Court later explained in *Lawrence v. Texas* that liberty is a right protected by the Fourteenth Amendment, and “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>154</sup> Notably, the personal decisions highlighted by the court were: “marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>155</sup> Undeniably, any infringement on these rights of privacy and self-determination will be highly scrutinized. Because a fundamental right is possibly being violated, the treatment of the mandatory parental training program rests on how the Supreme Court has treated potential violations of fundamental rights.

Although the Supreme Court does protect fundamental rights from being violated by regulations, the protection does not extend to providing money to guarantee the ability to benefit from those fundamental rights.<sup>156</sup> According to *Roe v. Wade*, “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>157</sup>

Based on this principle, the mandatory parental training program would have to have a compelling state interest that is narrowly tailored. However, the parental training program would circumvent this requirement because the recipients are opting to receive money from the program (TANF) they would argue violates their fundamental

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151. *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977).

152. *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

153. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

154. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

155. *Id.* (emphasis added).

156. See generally *Harris v. McRae*, 448 U.S. 297, 318 (1980) (explaining that the Due Process Clause does not require the government to provide funding for citizens to enjoy their fundamental rights).

157. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (citations omitted).

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rights. As noted in *Harris v. McRae*, while the Due Process Clause protects people from government interference with fundamental rights, “it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”<sup>158</sup> In other words, the mandatory parental training does not prevent a family from enjoying its sanctity if it can afford to enjoy that fundamental right. Families that must rely on the TANF program cannot then claim that their reliance violates their rights. At any point, a family that refuses to waive this right to receive benefits can withdraw from the program. Therefore, it is unlikely that a Due Process claim would defeat the mandatory parental training program.

C. Cases Focusing on a Parent’s Ability to Determine Child-rearing

The Supreme Court was critical of an infringement of self-determination rights in the seminal case, *Pierce v. Society of Sisters*.<sup>159</sup> In this case, plaintiffs challenged a law requiring all students to attend public school under an argument based on patriotism.<sup>160</sup> In this matter, the Supreme Court dismissed any equal protection arguments, noting that “[t]he right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to every other person in the State under similar circumstances and conditions.”<sup>161</sup> However, the Supreme Court did rule against the law, explaining, “[u]nder the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>162</sup>

The Supreme Court reasoned that the law was insufficiently linked to a legitimate state purpose. The liberty of parents to control their children’s upbringing is a constitutional right, and “[a]s often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the [S]tate.”<sup>163</sup> The Supreme Court

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158. *Harris*, 448 U.S. at 318.

159. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

160. *Id.* at 534.

161. *Id.*

162. *Id.* at 534–35 (citation omitted).

163. *Id.* at 535.

went even further to explain, “[t]he child is not the mere creature of the [S]tate; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>164</sup> It is apparent from *Pierce v. Society of Sisters* and the cases that followed that the states are not allowed to infringe on the constitutional right to liberally control the upbringing and education of one’s children.

Although the right to liberally control the upbringing and education of one’s children is a strongly protected constitutional right, the Supreme Court noted an exception that allows States to seemingly interfere with a fundamental right. In *Rust v. Sullivan*, plaintiff challenged regulations that favored some recipients over others for Title X projects.<sup>165</sup> The regulations attached “three principal conditions on the grant of federal funds for Title X projects.”<sup>166</sup> The Supreme Court reasoned that the “Petitioners’ assertions ultimately boil down to the position that if the [G]overnment chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition.”<sup>167</sup> The Supreme Court noted the 1977 case, *Maher v. Roe*, in which the Supreme Court “upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions.”<sup>168</sup> In this welfare case, the Supreme Court noted that the State was allowed to prohibit nontherapeutic abortions under its Medicaid program despite abortions being a constitutional right of self-determination.<sup>169</sup> The Supreme Court likewise allowed the Title X preferences to stand, basing its decision off of the principle that “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”<sup>170</sup>

The principles derived from this case would support a mandated parental training program under TANF.<sup>171</sup> The program would not

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164. *Id.*

165. *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

166. *Id.* at 179.

167. *Id.* at 194.

168. *Id.* at 192.

169. *See Maher v. Roe*, 432 U.S. 464, 480 (1977); *see also Roe v. Wade*, 410 U.S. 113, 153–55 (1973) (holding that women have a relative right to choose whether to terminate a pregnancy).

170. *Rust*, 500 U.S. at 193.

171. *See supra* Part IV.



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violate these parents' constitutional right to control the upbringing of their children because a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."<sup>172</sup> Furthermore, those required to attend the parental training could not argue this is a penalty because a "refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."<sup>173</sup> Ultimately, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."<sup>174</sup>

Mandating parental training for a subsection of TANF recipients does not prevent those recipients from exercising their constitutional right to control the upbringing of their children for two reasons. One, the program does not require that a parent follow any directives when upbringing their children. The seminars are merely informative, and parents have the liberty to choose whether or not to make use of any of the material presented to them during the seminars. As such, the program does not interfere with the liberty to control the upbringing of one's children. Second, even if the program did require certain actions that had the effect of infringing on the right to control the upbringing of one's child, the States are allowed to do so because the TANF recipients can simply opt out of TANF benefits if they wanted to retain these constitutional rights. The States have discretion when determining how their money should be spent as long as those in like circumstances are treated the same, and mandating parental training is within the discretion of the State.<sup>175</sup>

A recent case in the Fifth Circuit supported the assertion that states are given discretion to condition TANF financial assistance on the fulfillment of certain behavior. In *Comacho v. Texas Workforce Commission*, plaintiffs challenged new rules that allowed the Texas Workforce Commission "to terminate medical cash assistance to TANF recipients who fail to ensure their children's immunizations, wellness check-ups, school attendance, or who fail to avoid substance abuse."<sup>176</sup> Although the Fifth Circuit ruled against the new rules be-

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172. *Rust*, 500 U.S. at 193.

173. *Id.* (citations omitted).

174. *Id.* at 194.

175. *See Gulf, C. & S. F. R. Co. v. Ellis*, 165 U.S. 150, 155-56 (1897).

176. *Comacho v. Tex. Workforce Comm'n*, 408 F.3d 229, 230 (5th Cir. 2005).

cause it was inconsistent with the federal Medicaid Act, the court noted, “Section 608(b)(3) authorizes states to reduce TANF assistance for failure to comply with an imposed ‘individual responsibility plan,’ which ‘may include a requirement that the individual keep school age children in school, immunize children, attend parenting and money management classes.’”<sup>177</sup> The rules were not struck down because States did not have the discretion to apply restrictions to the financial assistance.<sup>178</sup> Instead, the new rules were struck down because they were preempted.<sup>179</sup> However, the Fifth Circuit made clear that states are given discretion to impose requirements on individuals receiving TANF benefits.<sup>180</sup>

While a mandated parental training program may raise constitutional questions of privacy and self-determination, there are no constitutional rights being violated because states have the discretion to impose requirements as a condition to TANF benefits as long as the requirements are not preempted.<sup>181</sup> Furthermore, the program does not infringe on the parental right to control the upbringing and education of one’s child. The program only seeks to aid in making that control informed.

## CONCLUSION

As a country, it is imperative that we attack poverty head on in any way that we can. We make education a right because we understand the unmatched value it has in determining the future of students throughout the country. Being aware of this, we cannot continue to allow children in poverty with uneducated parents to be so significantly behind their peers in academic achievement. While there are private attempts to curb the achievement gap,<sup>182</sup> which have seen some success, the government needs to boldly further the cause by attacking the achievement gap at home.<sup>183</sup> TANF will not be successful in making families self-sufficient until children benefitting from

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177. *Id.* at 235 (citations omitted).

178. *See id.* at 235–37.

179. *See id.* at 236–37.

180. *See id.* at 236.

181. *See id.* at 235.

182. *A Solvable Problem*, TEACH FOR AM., <http://www.teachforamerica.org/our-mission/a-solvable-problem> (last visited Jan. 15, 2014).

183. No Child Left Behind and Race to the Top both pressure schools and teachers but not parents.

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TANF close the academic achievement gap. Having a mandated parental training program helps further this goal.

There is an obvious need to address the long-term well being of TANF recipients in a way that the program currently fails to do. States implementing a mandated parental training program is both feasible and practical, as we see when looking at the means already available to create such a program, and the examples throughout the country. This program will work. States should take heed.



## COMMENT

# The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS

JOSEPH ALLEN GARMON\*

*Society has acutely feared the infected, the sick, and the unknown. History has recorded the discriminatory stories of the infected victim. Many of these stories remain either silenced or biased, but they, nevertheless, unveil a rigid pattern of a type of discrimination that incorrectly blurs the line between the victim and the culprit. Such discrimination is still pervasive today, and the law has often been its conduit. Fear has continually plagued those who should be shielded under the law and the advancement of medicine rather than condemned by the legal and penal system. History often repeats itself, but it does not have to.<sup>1</sup>*

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\* J.D. Candidate, Howard University School of Law, Class of 2014; Executive Notes and Comments Editor, *Howard Law Journal*, Vol. 57; B.A., The University of Alabama, 2011. I give thanks to God, who has showered me with an overflowing amount of grace and love in all the days of my life. I would not be where I am today without Dr. Frank Thompson, who taught me that discomfort is the key to enlightenment and without whom my potential would not have been fully realized. Thanks to Dr. Greg Austin and Dr. Boylorn for inspiring me to stand up and speak out for those who are “othered” and to Professor Farrar, who has graciously mentored me throughout my time in law school. I appreciate all of the work of the *Howard Law Journal*, and I dedicate this Comment to my family and friends, who have remained unwaveringly by my side.

1. These are my own reflections regarding the content and scope of the issues discussed within. Throughout this Comment, I attempt to refer to those persons infected with HIV/AIDS as the “infected victim” in an effort to reframe their narrative and mitigate the stigma that often attaches to any victim of a virus and/or disease.

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## INTRODUCTION

In 2012, CNN released a disconcerting story about Nick Rhoades, an HIV<sup>2</sup> positive gay man who was sentenced to twenty-five years in prison for allegedly, intentionally spreading the virus, despite the fact

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2. Also referred to as human immunodeficiency virus, HIV is a virus that gradually destroys the immune system making it difficult for the body to fight off infection. HIV is spread through sexual contact, blood, and from mother to child. Treatment can sometimes prevent or delay the virus's progression into the disease, acquired immune deficiency syndrome, or AIDS. *HIV Infection*, NAT'L INST. HEALTH, <http://www.nlm.nih.gov/medlineplus/ency/article/000602.htm> (last updated Feb. 27, 2013); see *HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/> (last updated on Mar. 1, 2013).

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that he wore protection and had an undetectable viral load.<sup>3</sup> The dreadful irony is that after reaching a plea deal, Rhoades discovered that he *did not* actually transfer the virus to his partner at all.<sup>4</sup> Since that discovery, Rhoades's legal battle is currently making its way up to Iowa's Supreme Court, yet the law that the decision was based upon is a federal mandate that has been fully enforced for the past three decades as a part of Iowa's HIV criminalization statute.<sup>5</sup> The statute is one of thirty-four various state statutes that make the spread of HIV a crime, sometimes regardless of intent or despite the preventative measures that were taken; each of these statutes have been legally enabled by the Ryan White Comprehensive AIDS Resources Emergency Act (CARE Act).<sup>6</sup>

The CARE Act was codified into law in 1990 and is the most sweeping HIV/AIDS legislation in this country's history.<sup>7</sup> The legislation, which was reauthorized in 2009, provides for widespread funding that is aimed at improving healthcare for those affected by HIV/AIDS. Alongside this beneficent purpose in the Act, and as a condition of receiving funding for HIV/AIDS relief, the original 1990 statute required that states enable their own criminalization statutes with regard to the "intentional transmission of HIV."<sup>8</sup>

By 1993, most states enacted their own HIV transmission statutes, with the intent to deter persons infected with HIV from intentionally transmitting the virus.<sup>9</sup> While the federal statute explicitly

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3. Saundra Young, *Imprisoned over HIV: One Man's Story*, CNN (Aug. 2, 2012), <http://www.cnn.com/2012/08/02/health/criminalizing-hiv/index.html>. A viral load refers to the amount of the virus found in the bloodstream. *Id.*; see also *Rhoades v. Iowa*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/rhoades-v-iowa> (last visited Mar. 3, 2013). After being arrested in Iowa for exposing his partner to HIV, Nick Rhoades was sentenced to twenty-five years in prison. *Id.* For the past five years, Rhoades has sought legal recourse. *Id.* His case is currently pending before the Iowa Supreme Court. *Id.*

4. Young, *supra* note 3.

5. *Id.*; see Criminal Transmission of Human Immunodeficiency Virus, IOWA CODE § 709C.1(a) (2003); see also LAMBDA LEGAL *supra* note 3.

6. See Ryan White Comprehensive AIDS Resources Emergency Act of 1990, 42 U.S.C. § 300ff-47 (repealed 2000). The purpose of the Act was to "provide emergency assistance to localities that are disproportionately affected by the Human Immunodeficiency Virus epidemic and to make financial assistance available to States and other public or private nonprofit entities to provide for the development, organization, coordination and operation of more effective and cost efficient systems for the delivery of essential services to individuals and families with HIV disease." *Id.*

7. *Id.*

8. *Id.*; see *A Living History*, HRSA (Aug. 30, 2012), <http://hab.hrsa.gov/living-history/legislation/enactment-4.htm> ("[T]he more we listen, the more we learn about how that future needs to look.").

9. Young, *supra* note 3.

identifies “intent” as a component of the criminal requirement, individual states have adopted stricter statutory schemes, making even protected sex a violation under the law and sometimes virtually eradicating the consent defense.<sup>10</sup>

Overtime, some states have either repealed or revised their outdated HIV criminal statutes, but a majority of states have retained HIV criminalization statutes that are legally problematic.<sup>11</sup> Among states with the most trolling statutory language are Michigan, Iowa, and Missouri.<sup>12</sup> Michigan provides that culpability exists whether or not the use of protection is used and prevents transmission.<sup>13</sup> The Missouri law codifies criminal liability for an HIV-positive individual that bites someone—insinuating the medical impossibility that HIV is passed through saliva.<sup>14</sup> Iowa does not require an intent element at all, which allows courts to find culpability simply by proving that an individual is aware of her positive status.<sup>15</sup> While each state statute varies in its language, the laws’ widespread effects indicate that states

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10. *Id.*

11. *See generally id.* (discussing the fact that most states in America still have these statutes in place).

12. IOWA CODE § 709C.1(1)(a) (2003); MO. ANN. STAT. § 191.677(2)(c) (2004); *see* MICH. COMP. LAWS § 333.5210(1) (2001).

13. *See* MICH. COMP. LAWS § 333.5210(1) (2001). The Michigan statute reads:

A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.

*Id.*

14. MO. REV. STAT. § 191.677(2)(c) (2004). The Missouri statute reads in relevant part: It shall be unlawful for any individual knowingly infected with HIV to:

[B]e or attempt to be a blood, blood products, organ, sperm or tissue donor except as deemed necessary for medical research; . . . . By biting another person or purposely acting in any other manner which causes the HIV-infected person’s semen, vaginal secretions, or blood to come into contact with the mucous membranes or nonintact skin of another person.

*Id.* § (1), (2)(c).

15. IOWA CODE § 709C.1(1) (2003). The Iowa statute reads in relevant part:

A person commits criminal transmission of the human immunodeficiency virus if the person, knowing that the person’s human immunodeficiency virus status is positive, does any of the following:

- a. Engages in intimate contact with another person.
- b. Transfers, donates, or provides the person’s blood, tissue, semen, organs, or other potentially infectious bodily fluids for transfusion, transplantation, insemination, or other administration to another person.
- c. Dispenses, delivers, exchanges, sells, or in any other way transfers to another person any nonsterile intravenous or intramuscular drug paraphernalia previously used by the person infected with the human immunodeficiency virus.

*Id.*



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have codified outdated notions about a virus that are contradicted by medical reality and well-established medical treatment.

This Comment argues that the legal reaction to the HIV/AIDS epidemic has followed the trajectory of previous legal responses to viral infections and diseases in earlier centuries because of the inability to overcome stigma despite medical progression. In doing so, this Comment seeks to highlight a common theme—that medical cognizance of epidemics is typically far more advanced than the laws that seek to contain those same outbreaks. By examining the responses to previous epidemics that began by being criminalized and then were decriminalized as society and medicine understood and contained the disease, this Comment argues for the eradication of these statutes and proposes new ways to address the HIV/AIDS epidemic in the twenty-first century.

Part I examines the legislative response that followed as a result of a rise in HIV infections and AIDS related deaths in the 1990s. It also examines the history of the state statutes and their current status. Part II explores the judicial responses to the state statutes that remain in effect today, providing an overview of the legal interpretation of the more problematic statutes. Part III comprehensively examines the social and legal responses to viruses and epidemics in earlier centuries. Part IV compares and contrasts those earlier legal responses to the current laws regarding the HIV/AIDS epidemic, showing how the law starts by criminalizing a terrifying epidemic and then decriminalizes victims as medicine finds cures and contains both the epidemic and society's fears. Part V offers possible solutions and frameworks for progress in the new fight against the HIV epidemic, given the medical advances in prevention and treatment since the 1990s. Part VI concludes with a look into the future of HIV/AIDS and a call to action that seeks to avoid the legal missteps of previous decades.

### I. THE HISTORY OF HIV CRIMINALIZATION

#### A. The Ryan White CARE Act

In the early 1980s, Ryan White, an Indiana teenager, became infected with HIV as a result of a blood transfusion from his hemophilia treatment.<sup>16</sup> White quickly became the poster child for HIV, and

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16. *Ryan White Care Act History*, W. VA. DEP'T HEALTH AND HUMAN RES., [http://www.dhhr.wv.gov/oeps/std-hiv-hep/HIV\\_AIDS/caresupport/Pages/RyanWhite\\_CareAct.aspx](http://www.dhhr.wv.gov/oeps/std-hiv-hep/HIV_AIDS/caresupport/Pages/RyanWhite_CareAct.aspx) (last visited Jan. 25, 2014).

while he was initially given six months to live, White publicly battled HIV and survived five more years until his death a month prior to his high school graduation.<sup>17</sup>

White's life and death began to change the American perception of HIV. Before White's story, HIV was largely seen as a "gay man's disease," but in the wake of White's death and the publicized stories of other men with HIV, such as Magic Johnson,<sup>18</sup> a public conversation regarding education about the epidemic began.<sup>19</sup> In 1987, President Reagan created the Presidential Commission on the Human Immunodeficiency Virus Epidemic, which released a report the following year suggesting "continued state efforts to explore the use of the criminal law in the face of this epidemic."<sup>20</sup> The report supported criminalizing behavior of the HIV infected individual that was, "according to scientific research, . . . likely to result in transmission of HIV."<sup>21</sup>

With mounting pressure to criminalize transmission of HIV, Congress passed the CARE Act in 1990.<sup>22</sup> The CARE Act created a series of grant programs to fund treatment for people with HIV/AIDS who were either uninsured or underinsured; the Act was reauthorized in 1996, 2000, and 2009.<sup>23</sup> The initial 1990 Ryan White CARE Act mandated that states provide criminal prosecution of intentional transmission of HIV before they received funding.<sup>24</sup> By 1993, more

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17. *Id.*

18. Magic Johnson played in the NBA off and on for thirteen years with the Los Angeles Lakers. *Magic Johnson Biography*, ESPN, [http://espn.go.com/nba/player/bio/\\_id/2334/magic-johnson](http://espn.go.com/nba/player/bio/_id/2334/magic-johnson) (last visited Jan. 25, 2014). Before the 1991–92 seasons, Johnson tested positive for HIV. *Id.* In 1991, Johnson announced his retirement from the NBA and founded the Magic Johnson Foundation, a non-profit foundation that "works to develop programs and support community-based organizations that address the educational, health and social needs of ethnically diverse, urban communities." MAGIC JOHNSON FOUNDATION, <http://magicjohnson.com/foundation/about.php> (last visited Jan. 25, 2014).

19. See *Ryan White Care Act History*, *supra* note 16.

20. James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707, 713 (2009).

21. *Id.* at 715.

22. *Id.*; see also 42 U.S.C. § 300ff-47 (2012).

23. Ryan White HIV/AIDS Treatment Extension Act of 2009, 42 U.S.C. § 201 (2009); see Jessamy Taylor, *The Ryan White CARE Act*, NAT'L HEALTH POL'Y F. (Sept. 14, 2005), available at [http://www.daytop.org/pdf/Basics\\_RyanWhite.pdf](http://www.daytop.org/pdf/Basics_RyanWhite.pdf).

24. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, 42 U.S.C. § 201 (1990). The CARE Act provided that funding would not be received unless [it is] . . . determine[d] that the criminal laws of the State are adequate to prosecute any HIV infected individual . . . who—(1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another HIV in the event that the donation is utilized; (2) engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV; and (3)

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than half of the states had enacted HIV criminal legislation, and though the 2000 reauthorization of the CARE Act removed the criminalization requirement, thirty-eight states maintained statutes that either directly criminalized the transmission of HIV or criminalized the transmission of any STD.<sup>25</sup> Thus, although the 2000 reauthorization abandoned the criminalization mandate that had been a condition of state funding, the 1990 Ryan White CARE Act set the stage for laws that remain in effect today.

### B. State HIV Statutes

The laws in effect today vary from state to state, yet the content and language of each statute are strikingly regressive. The European AIDS Treatment Group has labeled the United States as the number one “hot spot” for criminalization of HIV in the world and has argued that the United States has created an “uncertain and inequitable legal environment for people living with HIV.”<sup>26</sup>

According to the Center for HIV Law and Policy, thirteen of the states that criminalize HIV have laws that specifically target HIV-positive people for spitting or biting someone even though such behavior does not transmit the virus.<sup>27</sup> To be clear, HIV is transmitted *only* by certain bodily fluid exposure—not by saliva.<sup>28</sup> The Centers for Dis-

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injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized.

*Id.*

25. Brett Ashton Williams, *Criminalization of AIDS Transmission & Exposure at the State & Federal Level*, GA. ST. U. C. OF L. (Dec. 1, 2011), available at [http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1034&context=col\\_lib\\_student](http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1034&context=col_lib_student). As of early 2012, the states that maintained criminalization statutes against the transmission of HIV/AIDS or, more generally, any STD, were: Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin. *Id.*

26. Reed Vreeland, *U.S. Tops List of Global HIV-Criminalization Hot-spots*, EUR. AIDS TREATMENT GROUP (July 28, 2012), <http://www.eatg.org/eatg/Global-HIV-News/World-Policy/U.S.-tops-list-of-global-HIV-criminalization-hot-spots>. Currently, at least sixty-three countries have HIV specific criminalization statutes. *Id.* Forty-eight countries have used these laws for non-disclosure, exposure, or transmission. *Id.* The United States has the most HIV transmission convictions. *Id.* The top states responsible for those convictions are: South Dakota, Idaho, Mississippi, Louisiana, Tennessee, Illinois, Missouri, Indiana, Ohio and Oklahoma. *Id.*

27. Nicole Pasulka, *Should Not Disclosing Your HIV Status Be a Crime?*, MOTHER JONES (Jun. 21, 2012, 2:00AM), <http://www.motherjones.com/mojo/2012/06/criminal-transmission-hiv-law>.

28. Amicus Curiae Brief of Lambda Legal Defense Fund, Inc. et.al, at 10–11, Michigan v. Allen, No. 09-004960-FH (Macomb Cnty. Cir. Ct. Apr. 19, 2010); *HIV and Its Transmission*, THE

ease Control and Prevention lists the fluids that carry the propensity of transmission as “blood, semen . . . , pre-seminal fluid . . . , rectal fluids, vaginal fluids, and breast milk,” and further clarifies that contact with “saliva, tears, and sweat alone has never been shown to transmit HIV.”<sup>29</sup> However, states such as Michigan do little to silence that medical improbability.<sup>30</sup> The HIV Justice Network<sup>31</sup> estimates that more than one-quarter of arrests and prosecutions made under these statutes are made for actions that do not actually cause transmission of HIV.<sup>32</sup> In fact, the Michigan statute states “emission of semen is not required.”<sup>33</sup>

While Michigan’s statutory language is not ideal, it does not directly codify the notion that the transfer of saliva may transmit HIV.<sup>34</sup> However, other state statutes specifically codify the notion that HIV can be transmitted by saliva, which has led to more denigrating judicial outcomes than those discussed in Michigan.<sup>35</sup> Specifically, six states currently criminalize the transmission of HIV through saliva: Pennsylvania, Mississippi, Missouri, Utah, Georgia, and Idaho.<sup>36</sup> Though the reality is that saliva does not transmit HIV, outdated no-

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BODY (July 1999), <http://www.thebody.com/content/art30025.html> (relaying information from the Centers for Disease Control and Prevention); *see also* N.Y. STATE DEP’T OF HEALTH, 100 QUESTIONS AND ANSWERS ABOUT HIV/AIDS 1, 13 (Aug. 2011), <http://www.health.ny.gov/publications/0213.pdf> (“No one has ever gotten HIV through casual kissing . . .”).

29. *HIV and Its Transmission*, *supra* note 28.

30. *See* MICH. COMP. LAWS § 333.5210(1)–(2) (2001). The entire Michigan statute reads as follows:

(1) A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.

(2) As used in this section, “sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.

*Id.*

31. The HIV Justice Network is “a global information and advocacy hub for individuals and [organizations] working to end the inappropriate use of the criminal law to regulate and punish people living with HIV.” *About Us*, HIV JUST. NETWORK, <http://www.hivjustice.net/site/about/> (last visited Jan. 26, 2014). And it seeks “to connect, inform, educate, support and empower individuals and communities advocating for a fairer, just, rational, proportionate and limited use of laws, policies and practices to regulate and punish people living with HIV.” *Id.*

32. *See* Vreeland, *supra* note 26.

33. MICH. COMP. LAWS § 333.5210(2) (2001).

34. *Id.*

35. GA. CODE ANN. § 16-5-60(d) (2003); IDAHO CODE ANN. § 39-608(2)(a) (1988); MISS. CODE ANN. § 97-27-14(2)(a) (2004); MO. REV. STAT. § 565.085.1 (2005); 18 PA. CONS. STAT. § 2703(b) (2012); UTAH CODE ANN. § 76-5-102.6 (2)(a)(iv) (West 2013).

36. *See supra* note 35.

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tions about the virus have largely driven the improper codification of incorrect science from misinformed legislatures.

While this trend is disconcerting, perhaps the most problematic is that the intent element of HIV transmission is missing in many of the state statutes. Alarming, intent appears to be derived not from the intent to cause injury but from the mere failure to disclose information.<sup>37</sup> For instance, the Iowa Code is written in a way that establishes culpability if an individual is merely aware of his status and engages in conduct with a person, noting that “[a] person commits criminal transmission of [HIV] if the person, knowing [of his or her HIV-positive status] [e]ngages in intimate contact with another person.”<sup>38</sup> Additionally, Iowa does not provide for the consent defense as other states do.<sup>39</sup> Given the discordant nature of these laws, amendments and repeals over the course of thirty years would seem probable. Yet, despite the release of the federal mandate, little progress has been made.

## II. CRIMINALIZATION CASES

The state statutes have remained in force for over thirty years, and case law has painted a telling story of their effects on those infected with HIV. For instance, in 2007, a Michigan defendant encountered the perils of the state’s statutory language. In *People v. Odom*, an HIV-positive inmate allegedly punched and spat on correctional officers.<sup>40</sup> Because of his saliva, which contained traces of blood, the court declared that his spit was a “harmful biological substance” and under Michigan bioterrorism laws, his sentence was increased from five to fifteen years.<sup>41</sup>

Three years later, in 2010, a defendant was tried under bioterrorism laws for the “possession” of a harmful substance.<sup>42</sup> Though the defendant bit a victim, there was no evidence of blood.<sup>43</sup> The court,

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37. *State Criminal Statutes on HIV Transmission*, LAMBDA LEGAL (Aug. 2008) available at [http://img.thebody.com/lambda/2008/criminal\\_statutes.pdf](http://img.thebody.com/lambda/2008/criminal_statutes.pdf). See generally Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. LEGAL F. 389, 390, 91, 92 (2006) (discussing the affirmative defense of consent in HIV criminalization statutes).

38. IOWA CODE § 709C.1(a) (2003).

39. *Id.* Consent is an affirmative defense used by some states in their HIV criminalization statutes; however, other states do not mention consent as a defense, meaning that an individual might still be liable for transmission despite consensual sexual intercourse. Weiss, *supra* note 37, at 392.

40. *People v. Odom*, 740 N.W.2d 557, 560 (Mich. Ct. App. 2007).

41. *Id.* at 560, 561–62.

42. *People v. Allen*, No. 2009-4960, at 2 (Macomb Cnty. Cir. Ct. Mich. 2010).

43. *Id.* at 3.

relying on reports from the CDC, dropped the bioterrorism charge but still confirmed the holding in *Odom*.<sup>44</sup> Notably, the court maintained that HIV-infected blood is a “harmful biological substance” under Michigan state bioterrorism laws.<sup>45</sup>

*People v. Odom* reveals the widespread ignorance that has often accompanied this epidemic and has led to ineffective judicial decisions.<sup>46</sup> Notably, courts have referred to the blood, semen, and saliva of HIV-positive individuals as “deadly weapons,” and individuals have been charged under various laws, ranging from assault and attempted murder to bioterrorism laws.<sup>47</sup> As case law indicates, in most states, individuals with no intent to transmit HIV and those who use protection are punished just as harshly as the rare instances when people use their positive status as a weapon.<sup>48</sup> Some argue that these decisions, and the laws that drive them, proffer an inconsistent message when compared with evidenced-based initiatives (such as condom use to prevent HIV transmission); these decisions are often at odds with U.S. public health initiatives and HIV prevention strategies and programs.<sup>49</sup>

For example, because state statutes mandate sentences between ten to thirty years even in the absence of transmission, some argue that the criminalization based on knowledge of status actually discourages HIV testing and disclosure—paramount factors in the U.S. policy for treating and preventing HIV.<sup>50</sup> A further examination of case law reveals many of the principal problems associated with the present statutes.

#### A. *Weeks v. Scott*

In 1995, the Fifth Circuit Court of Appeals first examined Texas’s statute and infamously ruled “HIV transmission through saliva and spitting is possible.”<sup>51</sup> In 1988, Curtis Weeks, a prisoner infected with

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44. *Id.* at 6–7.

45. *Id.* at 6.

46. *See generally Odom*, 740 N.W.2d 557 (holding that saliva with traces of HIV positive blood is a harmful biological substance).

47. H.R. 3053, 112th Cong. (2011); *Repeal HIV Discrimination Act*, LAMBDA LEGAL (Oct. 24, 2012), available at [http://www.lambdalegal.org/sites/default/files/publications/downloads/fs\\_repeal-hiv-discrimination-act\\_1.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_repeal-hiv-discrimination-act_1.pdf).

48. *Repeal HIV Discrimination Act*, *supra* note 47.

49. *Id.*

50. *Id.*

51. *Weeks v. Scott*, 55 F.3d 1059, 1064 (5th Cir. 1995).

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HIV, grew angry with prison guards and spit in their faces.<sup>52</sup> The court examined the “likely to transmit” language of the Texas statute, and Weeks argued that there was no evidence that would indicate that saliva could transmit HIV.<sup>53</sup> The court analyzed this action under its murder statute and found that “[i]t follows that to prove an ‘attempted murder’ it is sufficient if the accused has the intent to cause serious bodily injury and commits an act ‘amounting to more than mere preparation’ that *could cause* the death of an individual but fails to do so.”<sup>54</sup>

An expert testified as to whether saliva could cause death to a victim, and a doctor testified that the possibility of transmitting HIV through saliva was low but “not zero.”<sup>55</sup> However, the doctor further elaborated that it had never been proven that HIV could be transmitted through spitting; he concluded that it was “extremely remote” if not “impossible.”<sup>56</sup>

Despite this testimony, the court found that by spitting on the guards, Week’s HIV status could have caused death; the court, thus, held that an HIV-positive individual was guilty of attempted murder.<sup>57</sup> *Weeks*, in many ways, highlights the general misconceptions about HIV/AIDS that have infiltrated the law and persist today, despite science’s nuanced understanding of the epidemic and its effects. While *Weeks* occurred during the more ignorant early years, some recent cases have rendered different results.

### B. *State v. Rick*

In 2012, the Minneapolis Appellate Court reviewed a case involving an HIV-positive appellant who engaged in consensual intercourse with his partner; the partner later contracted the virus.<sup>58</sup> The Minneapolis statute, like many state statutes, does not account for consensual relations, thus, the District Court found for the prosecution.<sup>59</sup>

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52. *Id.* at 1061.

53. *Id.*

54. *Id.* at 1062.

55. *Id.* at 1063.

56. *Id.*

57. *Id.* at 1064.

58. *State v. Rick*, 821 N.W.2d 610, 611 (Minn. Ct. App. 2012).

59. *Id.*; see MINN. STAT. § 609.2241(1995) (“It is an affirmative defense to prosecution, if it is proven by a preponderance of the evidence, that: (1) the person who knowingly harbors an infectious agent for a communicable disease took practical means to prevent transmission as advised by a physician or other health professional; or (2) the person who knowingly harbors an infectious agent for a communicable disease is a health care provider who was following profes-

The Minneapolis Court of Appeals reversed the District Court's opinion in a split decision; the court ruled in favor of the appellant, overturning the previous conviction.<sup>60</sup> The court noted that sex between consenting adults should not be grounds for the punishment of an HIV infected individual.<sup>61</sup> The Court of Appeals held that the statute was too broad and legislative intent would indicate that the law was not aimed at consensual relations.<sup>62</sup> While this court took great efforts to impose strict construction on this statute, others have not.

C. *United States v. Dacus*

*United States v. Dacus* was a federal decision regarding Army personnel where the court held against an army sergeant who was HIV-positive.<sup>63</sup> In 2008, a sergeant, who was HIV-positive, was found guilty for engaging in intercourse with two females, even though he had a rare condition where his viral load was undetectable.<sup>64</sup> Like state courts, the Court of Appeals for the Armed Forces, relied on statutes to decide that assault occurs when an individual uses "a dangerous weapon or other means or force likely to produce death or grievous bodily harm."<sup>65</sup> Despite the miniscule possibility of passing infection, the court ruled against the sergeant, arguing that he was 'likely' to have passed the virus to his partners.<sup>66</sup>

Nevertheless, justices in the majority noted that if a transmission were remote then it would not appear to fulfill the statutory element of "likely to produce."<sup>67</sup> The army staff sergeant was charged with

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sionally accepted infection control procedures."). While Minneapolis does account for mitigation efforts made by the infected victim, it does not account for instances with both partners consent to sexual intercourse with each other. *Id.*

60. *Rick*, 821 N.W.2d at 618.

61. *Id.*

62. *Id.*

63. *United States v. Dacus*, 66 M.J. 235, 235-36 (C.A.A.F. 2008).

64. *Id.* at 237.

65. 10 U.S.C. § 928(b)(1) (2000). The statute reads:

(a) Any person subject to this chapter who attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault and shall be punished as a court-martial may direct.

(b) Any person subject to this chapter who—(1) commits an assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm; or (2) commits an assault and intentionally inflicts grievous bodily harm with or without a weapon; is guilty of aggravated assault and shall be punished as a court-martial may direct.

*Id.* Thus, the court found HIV to be synonymous with "a deadly weapon." *Dacus*, 66 M.J. at 235 (C.A.A.F. 2008).

66. *Dacus*, 66 M.J. at 235.

67. *Id.* at 240 (Ryan, J., concurring) ("[A]s a matter of first impression, it would not appear that the statutory element—'means or force likely to produce death or grievous bodily harm'—



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and convicted of attempted murder.<sup>68</sup> The court did leave the door open for future interpretation by noting “there is a point where the statistical risk of harm is so low that the statutory standard of ‘likely to produce death or grievous bodily harm’ is not satisfied.”<sup>69</sup> While a federal court decided *Dacus*, there are current cases that are pending review by state supreme courts.

### D. The Nick Rhoades Case

The most recent pending case involves Iowan, Nick Rhoades, an HIV-positive man currently in prison because of an Iowa statute that renders wearing a condom insufficient protection under the law.<sup>70</sup> Rhoades wore a condom, and his partner did not contract the disease, yet Rhoades was convicted for up to twenty-five years in an Iowa state prison.<sup>71</sup> While he now faces a shorter sentence, his case is currently pending appeal to the Supreme Court of Iowa.<sup>72</sup> Despite facing a lesser sentence given pushback by HIV advocates, Rhoades was forced to register as a sex offender for the rest of his life—facing even more heightened stigmatization than before.<sup>73</sup> During his stay in jail, he was sometimes forced to skip several antiretroviral medications.<sup>74</sup> It is estimated that the treatment and procedures that should have been properly conducted in Rhoades’s case would cost the taxpayer \$65,000 to \$75,000 a year per victim.<sup>75</sup>

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should be satisfied where the record shows that the likelihood of death or grievous bodily harm from a particular means is statistically remote.”).

68. *Id.*

69. *Id.*

70. *See Rhoades v. Iowa*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/rhoades-v-iowa> (last visited Jan. 25, 2014); *see also* Young, *supra* note 3.

71. Young, *supra* note 3.

72. *Id.*

73. *See* Vreeland, *supra* note 26.

74. *Id.*; *see also Effect of Antiretroviral Therapy on Risk of Sexual Transmission of HIV Infection and Superinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/topics/treatment/resources/factsheets/art.htm> (last updated Apr. 15, 2013). Antiretroviral therapy (ART) has made significant advances over the past ten years. *Id.* ART is medication used to reduce the replication of HIV and treat HIV infected victims. *Id.* Through the use of ART, some HIV infected victims are able to reduce their viral loads to undetectable levels. *Id.*

75. Vreeland, *supra* note 26. ART treatment is important for the scope of this Comment because when ART is used properly it can reduce viral loads meaning that transmission of HIV is less likely. *Effect of Antiretroviral Therapy on Risk of Sexual Transmission of HIV Infection and Superinfection*, *supra* note 74. This medical advancement is one that was available when the HIV criminalization statutes were created. *Id.*

Rhodes's amicus brief to the Supreme Court of Iowa largely focuses on the likelihood of transmission.<sup>76</sup> The brief notes that when an infected individual's load is low or undetectable, the risk of infection is unlikely.<sup>77</sup> Notably, Rhoades argues that even without the use of a condom, when antiretroviral medication has been used properly, transmission rates are much lower than what is typically perceived by the public.<sup>78</sup> Studies show that unprotected receptive anal sex carries a three percent probability of HIV infection while unprotected insertive anal sex carries a .06 % chance of HIV infection.<sup>79</sup> Rhoades argues that condom use brings that risk down to nearly zero.<sup>80</sup> The national media has given this case a lot of attention, however, just three years ago, Iowa ruled on a similar set of facts and held that the Iowa statute was clear in its language that "could result" does not mean "did result."<sup>81</sup> But for Nick Rhoades, and many victims like him, he followed every proper procedure by continuously using treatment, maintaining an undetectable viral load, and practicing safe sex, but under the law, those measures were not enough.<sup>82</sup> With the media attention surrounding Rhoades's story, it remains to be seen how the Supreme Court of Iowa will resolve this case.

The judicial response to the HIV criminalization state statutes remains as checkered as the laws themselves. The cases illustrate the problems facing those individuals who *did not* act with malicious intent and who deserve a change in the laws—a change that reflects the evolving medical landscape.

### III. THE HISTORY OF THE UNITED STATES' LEGAL RESPONSES TO VIRAL EPIDEMICS

To examine the trajectory of the law's treatment of those who have been affected by the HIV/AIDS epidemic, it is important to review the history of other laws that have targeted other epidemics and those stigmatized as dangerously infected. By drawing similarities and differences from those historical reference points, the country can be-

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76. Brief for Nat'l Alliance of State & Territorial AIDS Dirs. et al. as Amicus Curiae Supporting Appellant at 8–14, *Rhoades v. Iowa*, No. 3-572 (Iowa Oct. 2, 2013).

77. *Id.* at 12.

78. *Id.* at 9.

79. Julie Fox et al., *Quantifying Sexual Exposure to HIV Within an HIV-Serodiscordant Relationship: Development of an Algorithm*, 25 AIDS 1065, 1073, 1075 (2011).

80. Brief for Nat'l Alliance of State & Territorial AIDS Dirs. et al., *supra* note 76, at 19.

81. *Keene v. Ault*, 2005 WL 1177905 (N.D. Iowa 2005).

82. *Vreeland*, *supra* note 26.

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gin to move forward with a proper and humane legal approach to HIV/AIDS. This Comment surveys those reference points by exploring historical contagion concepts as well as the law's previous responses to health epidemics.

### A. The Potent Power of Illness and Sin

History has proffered a variety of responses to the outbreak of deadly diseases and viruses. Much of the early understanding of the ways in which viruses were transmitted and contracted were misunderstood; therefore, to gain a more comprehensive understanding of society's legal response to diseases, it is important to examine the theories underpinning those responses.<sup>83</sup> Some individuals seeking to criminalize the HIV/AIDS crisis in this country have used these same, often outdated theories today.

From the fifteenth to nineteenth century, many of the reactions to the spread and contraction of disease was believed to be a result of circumstance.<sup>84</sup> It was believed that “[p]ersonal susceptibilities, cleanliness, morality, social environments, race, heredity, gender, and politics” all played a role in sickness. Additionally, it was a widely held belief that certain types of individuals were immune from contracting particular diseases—this concept is referred to as “contingent contagionism.”<sup>85</sup> Misconceptions and confusion about the spread, contraction, and eradication of diseases are all a part of the contingent contagionism theory.<sup>86</sup> One example of contingent contagionism can be found in the government's response to venereal disease. In the twentieth century, black men with venereal disease were accepted into the army for service, yet white men with venereal disease were excluded; this policy was “based on the assumption that virtually all blacks had venereal disease.”<sup>87</sup>

While contingent contagionism has played an undeniable role in historical responses to epidemics, religion is another indisputable factor that has contributed to the historical response with regard to the spread of disease. Specifically, the Judeo-Christian tradition has often

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83. *Concepts of Contagion and Epidemics*, CONTAGION HISTORICAL VIEWS DISEASES & EPIDEMICS, <http://ocp.hul.harvard.edu/contagion/concepts.html> (last visited Jan. 26, 2014).

84. *Id.*

85. *Id.*

86. *Id.*

87. ALLAN M. BRANDT, *NO MAGIC BULLET: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880*, at 116 (1985).

linked suffering and sickness with divine punishment for sin.<sup>88</sup> It has been argued that in the Western world, “[a]ny disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious.”<sup>89</sup>

This pattern has been consistent most notably in relation to sexual diseases. Religious and moral views have traditionally influenced every aspect of sex, including sexually transmitted infections.<sup>90</sup> Blaming the contraction of a venereal disease on immoral behavior has historically been rooted in religion. For instance, during the height of syphilis, Americans blamed the infected victim, alone, for her sinful behavior.<sup>91</sup> Indeed, given this sin and punishment metaphor, it was believed that trying to cure diseases such as syphilis would be, itself, immoral.<sup>92</sup> The debate over protection and preventative contraceptives also finds its roots in morality and religion. Throughout American history, many have criticized the promotion or education of safe sex practices because of the possible effect of promoting promiscuity.<sup>93</sup> The relationship between morality and disease has historically been intertwined during various epidemics, yet the nexus between sin and venereal disease has been peculiarly and inextricably linked throughout American history.

When diseases are resistant to medical cures or to scientific understanding, they begin to generate social panic, and alongside this panic, they “generate metaphors of general decay.”<sup>94</sup> The medical uncertainty surrounding unfamiliar diseases can begin to create a symbol of “viciousness” and “weakness” of the victim.<sup>95</sup> Such symbolism is rooted in the moral notion that “evil is contagious” and infectious toward other men and women.<sup>96</sup> These notions have been pervasive in the context of disease and societal responses to illness.

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88. *Id.*

89. SUSAN SONTAG, *ILLNESS AS A METAPHOR AND AIDS AND ITS METAPHORS* 6 (1989) (comparing the similarities of HIV/AIDS with cancer and tuberculosis).

90. *See generally* JOHN PARASCANDOLA, *SEX, SIN, AND SCIENCE: A HISTORY OF SYPHILIS IN AMERICA* (2008) (discussing the inability for Americans to speak openly about syphilis because of the sinful stigma attached to the disease).

91. *Id.*

92. *Concepts of Contagion and Epidemics*, *supra* note 83.

93. *See generally* PARASCANDOLA, *supra* note 90 (discussing the inability for Americans to speak openly about syphilis because of the sinful stigma attached to the disease).

94. SONTAG, *supra* note 89, at 47–75.

95. *Id.*

96. R.I. MOORE, *THE FORMATION OF A PERSECUTING SOCIETY: POWER AND DEVIANCE IN WESTERN EUROPE 950–1250*, at 75 (2d ed. 2006).

B. Epidemics and the Law

While there have been differing theories regarding the country's reactions to epidemics, the specific responses to those epidemics has typically consisted of some form of physical and legal isolation or quarantine. Quarantine laws are "used to separate and restrict the movement of well persons who may have been exposed to a communicable disease to see if they become ill. . . . Quarantine can also help limit the spread of communicable disease."<sup>97</sup> Similarly, isolation laws are "used to separate ill persons who have a communicable disease from those who are healthy."<sup>98</sup>

The Centers for Disease Control and Prevention has indicated that the last time widespread isolation and quarantine laws were employed was during 1917–1918 with the rise of influenza or the "Spanish Flu" pandemic.<sup>99</sup> Yet, there have also been other instances of isolated quarantine measures. In *Crayton v. Larabee*, a New York court upheld a quarantine of an individual who was neighbors with someone who had smallpox.<sup>100</sup> The court noted:

Among all the objects to be secured by governmental laws none is more important than the preservation of the public health. . . . 'The importance of sustaining that board (of health), in all lawful measures, tending to secure or promote the health of the city, should make us cautious in declaring any curtailment of their authority except upon clear grounds. On the contrary, powers conferred for so greatly needed and most useful purposes, should receive a liberal construction for the advancement of the ends for which they were bestowed.'<sup>101</sup>

While, in recent years, widespread quarantine and isolationism has not frequently been employed as a medical or legal tool, these laws, nevertheless, provide a unique lens through which this Comment seeks to examine the effects of the HIV criminalization statutes. In order to compare the current HIV criminalization statutes to isolation

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97. *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/quarantine/AboutLawsRegulationsQuarantineIsolation.html> (last updated June 28, 2013).

98. *Id.*

99. *State Quarantine and Isolation Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/health/state-quarantine-and-isolation-statutes.aspx> (last updated Aug. 2010).

100. *Crayton v. Larabee*, 220 N.Y. 493, 503 (1917) (affirming the State of New York's authority to quarantine the neighbor of a smallpox victim).

101. *Id.* at 501–02.

quarantine mechanisms employed in the past, the specific epidemics that triggered quarantine laws must be examined.

i. Leprosy

Leprosy<sup>102</sup> can be traced back to biblical times.<sup>103</sup> In fact, the earliest documented account of leprosy was recorded on Egyptian papyrus in 1550 B.C.<sup>104</sup> Throughout history, Leprosy has been acutely feared, and society's response has been the model of isolation tactics for other diseases.<sup>105</sup> During the Middle Ages, lepers were forced to wear bells and specific clothing to warn others of their status.<sup>106</sup> The stigma attached to the disease produced classic fear responses, which in turn led to erratic legal and public health mandates by governments.<sup>107</sup> In the 1800s, British Columbia placed lepers on an island.<sup>108</sup> Other lepers joined the island and became ridden with depression and debilitating health.<sup>109</sup> This form of "exiled incarceration" existed until 1957 when the island's last occupant died.<sup>110</sup>

Given the severe responses that have occurred across the world and throughout history, lepers were made to feel stigmatized and out-cast. In particular, leprosy was seen as a manifestation of sin, a moral

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102. Leprosy is a disease that targets the nerves, respiratory tract, skin, nasal mucosa, and eyes. It is still unclear how leprosy is spread, but many researchers believe that it is passed by the respiratory system. *Leprosy (Hansen's Disease)*, NAT'L INST. OF ALLERGY AND INFECTIOUS DISEASE, <http://www.niaid.nih.gov/topics/leprosy/understanding/Pages/whatis.aspx> (last updated Apr. 25, 2011).

103. See *Leviticus* 13; *Numbers* 12:10–15.

104. *Leprosy (Hansen's Disease)*, *supra* note 102.

105. *Id.*

106. *Id.*

107. See *An Act to Provide for the Care and Treatment of Persons Afflicted with Leprosy and to Prevent the Spread of Leprosy in the United States*, Pub. L. 64-299 (1917).

In many countries, including the United States and Canada, medical practitioners and government officials argued that leprosy was a 'foreign' disease that originated in the warmer climate of the tropics and that invaded and infected these nations through the bodies of dirty and diseased immigrants. Although the mode of leprosy transmission was largely undetermined and intensely debated during this period, many medical professionals agreed that the origins of leprosy could be traced to Chinese workers who imported the disease from China, only to contaminate white and non-white populations alike.

Renisa Mawani, *The Island of the Unclean': Race, Colonialism and 'Chinese Leprosy' in British Columbia, 1891 – 1924*, L. SOC. JUST. & GLOBAL DEV. J., Apr. 30, 2003, available at [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003\\_1/mawani/](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/mawani/).

108. David Claborn & Bernard McCarthy, *Incarceration and Isolation of the Innocent for Reasons of Public Health*, 2011 J. INST. JUST. INT'L STUD. 75, 76 (2011).

109. *Id.*

110. *Id.* Originally, five Chinese immigrants with leprosy were placed on D'Arcy Island; they were eventually deported to a hospital to be taken care of for the rest of their lives, but in the interim, other lepers were placed on the island with only an interpreter and a guardian to oversee the colony. *Id.*

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association that is classic in misunderstood contagious diseases.<sup>111</sup> As such, lepers were often forbidden from contacting children—for the purposes of stopping the spread of “sinfulness.”<sup>112</sup> As a result, many lepers began to hide themselves; in Hawaii, lepers hid in “valleys, caves, and lava tubes” to avoid persecution.<sup>113</sup> Remaining hidden from ridicule was the only solution for the infected victims to escape being exiled in a “leper colony.”<sup>114</sup> The history of society’s medical and legal condemnation of leprosy provides an appropriate lens by which to examine other social responses to acutely feared diseases. Leprosy elicited a response of condemnation, isolation, stigma, and secrecy—themes not unfamiliar in the age of the HIV/AIDS crisis.<sup>115</sup> Yet, as medicine moved forward and countries began to understand leprosy, countries eventually replaced their isolation laws with new legislative responses that would help treat the infected victim, rather than condemn her.<sup>116</sup>

### ii. Tuberculosis

The United States’ response to tuberculosis is worth examining, as it has been one of the modern diseases where the legal and medical response has been quarantine and isolation. Tuberculosis was the cause of more deaths in industrialized countries in the nineteenth and twentieth centuries than any other disease.<sup>117</sup> As is consistent with contingent contagionism, there have been many misconceptions surrounding spread and contraction of the disease.<sup>118</sup>

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111. Amy D. Ronner, *Scouting for Intolerance: The Dale Court’s Resurrection of the Medieval Leper*, 11 L. & SEXUALITY 53, 56–57 (2002).

112. *Id.*

113. *Id.*

114. *Id.*

115. Lepers and HIV/AIDS victims share many similarities. Amy Ronner notes that HIV/AIDS victims, who were initially seen as exclusively being homosexual, also faced persecution for their existence. *Id.* at 57. Interestingly then, the “closet” for homosexuals, in the wake of the HIV/AIDS crisis, parallels the hiding that many lepers went into to avoid oppression. *Id.* at 65.

116. An Act to Amend Various Provisions of the Public Health Services Act, PL 99–117, 42 U.S.C § 201 (1985). The amendment provides that the U.S.:

(1) shall provide care and treatment (including outpatient care) without charge at the Gillis W. Long Hansen’s Disease Center in Carville, Louisiana, to any person suffering from Hansen’s disease who needs and requests care and treatment for that disease; and  
(2) may provide for the care and treatment (including outpatient care) of Hansen’s disease without charge for any person who requests such care and treatment.

*Id.*

117. *Specific Laws and Regulations Governing the Control of Communicable Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 10, 2012), <http://www.cdc.gov/quarantine/specificlawsregulations.html>.

118. *Id.*

Originally, tuberculosis was thought to be hereditary. Toward the end of the nineteenth century, however, society began to be convinced that tuberculosis infection was the result of poverty.<sup>119</sup> Another misconception that persisted from late antiquity until relatively recently was the erroneous association of tuberculosis and cancer, which were clumped in the same category, one often seen as synonymous with the other.<sup>120</sup> Despite the misconceptions surrounding the disease, mortality rates resulting from tuberculosis significantly declined in the late nineteenth century as sanitation and nutrition improved. However, as recently as 2007, the United States has employed quarantine statutes to eradicate the spread of tuberculosis.<sup>121</sup>

Yet as mortality rates declined, the need for quarantine did, too. As the medical community's cognizance of tuberculosis treatment grew, so did the public's response to the disease. And the need for isolation significantly subsided.<sup>122</sup>

### iii. Yellow Fever and the Plague

Yellow fever has been afflicted with similar misconceptions about how it is spread. A significant contingent contagionism response occurred when individuals in Philadelphia believed African Americans were immune from yellow fever.<sup>123</sup> Relying on this supposed immu-

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119. *Id.*

120. SONTAG, *supra* note 89, at 10 (comparing the similarities of HIV/AIDS with cancer and tuberculosis).

121. *See infra* Part IV.B; *see also Concepts of Contagion and Epidemics, supra* note 83.

122. The Centers for Disease Control and Prevention deem tuberculosis as a disease that "can be treated by taking several drugs, usually for 6 to 9 months." *Basic TB Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/tb/topic/basics/default.htm> (last updated Mar. 13, 2012). The federal government has, however, retained tuberculosis in a list of communicable diseases that can be quarantined by the government. Regulations to Control Communicable Diseases, 42 U.S.C § 264 (2002). The statute lists the following outbreaks still under federal control:

(a) Cholera; Diphtheria; infectious Tuberculosis; Plague; Smallpox; Yellow Fever; and Viral Hemorrhagic Fevers (Lassa, Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or named).

(b) Severe Acute Respiratory Syndrome (SARS), which is a disease associated with fever and signs and symptoms of pneumonia or other respiratory illness, is transmitted from person to person predominantly by the aerosolized or droplet route, and, if spread in the population, would have severe public health consequences.

(c) Influenza caused by novel or reemergent influenza viruses that are causing, or have the potential to cause, a pandemic.

*Id.*

123. *The Yellow Fever Epidemic Philadelphia, 1793*, CONTAGION: HISTORICAL VIEWS OF DISEASES AND EPIDEMICS, <http://ocp.hul.harvard.edu/contagion/yellowfever.html> (last visited Jan. 28, 2014). During the Yellow Fever epidemic in Philadelphia, white Philadelphians solicited the help from the black population. Katherine Polak, *Perspectives on Epidemic: The Yellow Fever in 1793 Philadelphia*, 5 CONSTRUCTING THE PAST 5 (2004), available at <http://digitalcommons.iwu.edu/cgi/viewcontent.cgi?article=1038&context=constructing>. This population nursed



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nity, Philadelphians sought the assistance of African Americans to help nurse the sick.<sup>124</sup> Not surprisingly, they later fell ill with the disease.<sup>125</sup>

In the late 1800s and early 1900s, the United States used widespread quarantine laws for the bubonic plague.<sup>126</sup> The plague broke out in small numbers in Honolulu's Chinatown, and, as a result, the white elites governing the territory of Hawaii quarantined all Chinese, Japanese, and Native Hawaiians from leaving the island.<sup>127</sup> In 1900, the Hawaiian police department set Chinatown and surrounding quarantined areas on fire, causing 4,000 of the quarantined victims to lose their homes.<sup>128</sup> Hawaii lifted the quarantine status five months later, and very few individuals received any compensation for the loss of their homes and belongings.<sup>129</sup> This remains one of the most tragic responses to disease made by the United States. For yellow fever, vaccinations eventually lessened the threat of contraction, thus, eliminating the need for a public response,<sup>130</sup> and the advent of antibiotics effectively eradicated the need for further reaction to the plague.<sup>131</sup>

### iv. The Influenza Pneumonia Pandemic of 1918

The largest public health catastrophe occurred in 1918 with the Influenza Pneumonia Pandemic, an epidemic that many now call the "Spanish Flu."<sup>132</sup> Roughly forty million people died worldwide as a result of the Spanish Flu, and 675,000 Americans lost their lives to the

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the sick and buried those who died; however, African Americans began to become ill with yellow fever. *Id.*

124. CONTAGION: HISTORICAL VIEWS OF DISEASES AND EPIDEMICS, *supra* note 123.

125. *Id.*

126. See Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 98 (2007).

127. *Id.*

128. *Id.* at 99.

129. *Id.*

130. The United States still provides for quarantine protection against yellow fever. See Regulations to control communicable diseases, 42 U.S.C § 264 (2002). However, the CDC promotes easy methods to prevent contraction of yellow fever by "using insect repellent, wearing protective clothing, and getting vaccinated." *Yellow Fever*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/yellowfever/> (last updated Dec. 13 2011).

131. *Plague*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/plague/> (last updated Nov. 28, 2012) ("Today, modern antibiotics are effective in treating plague. Without prompt treatment, the disease can cause serious illness or death. Presently, human plague infections continue to occur in the western United States, but significantly more cases occur in parts of Africa and Asia.").

132. Joseph P. Mcmenamin, *Pandemic Influenza: Is There A Corporate Duty to Prepare?*, 64 FOOD & DRUG L.J. 69, 69 (2009).

pandemic.<sup>133</sup> In fact, this pandemic has been referred to as the “most devastating epidemic in recorded world history,” taking more lives in a year than the Black Death/Bubonic Plague did in its four-year worldwide savage.<sup>134</sup>

Interestingly, what occurred in the wake of this pandemic in the United States was a reasoned collective reaction. For once, society did not descend into collective condemnation. St. Louis was seen as the model city during this epidemic, requiring influenza cases to be registered with the health department, closing schools and churches, and quarantining people inside of their homes.<sup>135</sup> This local collective action made by St. Louis is seen as being largely effective despite there being an absence of pharmaceutical relief.<sup>136</sup>

A question remains, however: How, in the wake of the deadliest pandemic in world history, was the country able to take collective reaction? A notable difference arises in the sexual disease and criminalization context—where a collective condemnation is often present.

#### v. Venereal Disease

While a common response to epidemics has been federal/state-ordered quarantine or isolation, many laws were established in the twentieth century to combat the contraction of venereal disease. The country’s early responses to sexually transmitted infections mirrors the criminalization of HIV/AIDS in both purpose and effect. Most of the early federal laws targeting women and venereal disease have been absent from the historical discussion of United States quarantine laws.<sup>137</sup> Nevertheless, to establish those areas of similarity between the criminalization of HIV/AIDS and the laws in the twentieth century, it is pertinent to look at the United States’ treatment of women and venereal disease through the scope of federal legislation.

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133. Hillary R. Ahle, *Anticipating Pandemic Avian Influenza: Why the Federal and State Preparedness Plans Are for the Birds*, 10 DEPAUL J. HEALTH CARE L. 213, 216 (2007) (noting that half of Earth’s population was infected by the Spanish Flu.). See generally Molly Billings, *The Influenza Pandemic of 1918*, <http://virus.stanford.edu/uda/> (last updated Feb. 2005) (noting that twenty-eight percent of Americans were infected with the Spanish Flu).

134. Billings, *supra* note 133.

135. Nicholas Bakalar, *How (and How Not) to Battle Flu: A Tale of 23 Cities*, N.Y. TIMES (Apr. 17, 2007), [http://www.nytimes.com/2007/04/17/health/17flu.html?\\_r=0mea](http://www.nytimes.com/2007/04/17/health/17flu.html?_r=0mea).

136. *Id.* (“[N]onpharmaceutical measures effectively were able to mitigate the impact of severe pandemics . . .”).

137. Scott Wasserman Stern, *Home for Street Women: Venereal Disease and the Unknown Imprisonment of Women in the Early 20th Century* 3, [digitalcommons.providence.edu/auchs/2012/panela2/2/](http://digitalcommons.providence.edu/auchs/2012/panela2/2/).

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In 1918, concerned with the spread of venereal disease to men in the military, the federal government passed the Chamberlain-Kahn Act.<sup>138</sup> The purpose of the Act was to give the government the ability to quarantine, for the “protection of the military and naval forces of the United States,” any woman suspected of having venereal disease; similar to the Ryan White CARE Act, the Chamberlain-Kahn Act was a federal allocation of \$1,000,000 for programs to treat those infected with venereal disease.<sup>139</sup>

The legality of the federal action was rooted in the war powers, noting that the funding was for “civilian persons whose detention, isolation, quarantine, or commitment to institutions may be found necessary for the protection of the military and naval forces of the United States against venereal disease.”<sup>140</sup> The effects of the law, however, did more than contain the venereal disease epidemic. It operated as a way to contain or incarcerate thousands of women.<sup>141</sup> In fact, the law gave broad authority for the government to incarcerate women as prostitutes; notably, if upon examination, a woman had venereal disease, she would be convicted of being a prostitute regardless of her behavior.<sup>142</sup>

The government gave federal funding assistance under the auspices of the Chamberlain-Kahn Act to forty-three detention centers.<sup>143</sup> Over the course of the twenty-seven months between the war and demobilization period, the government quarantined 15,520 women for being infected with venereal disease as a way to protect the troops.<sup>144</sup> The women who were admitted to the internment camps

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138. Chamberlain-Kahn Act, ch. 15, 40 Stat. 886 (1918).

139. Stern, *supra* note 137, at 3 (quoting C.C. Pierce, *Progress of Venereal Disease Control*, 73 JAMA 417, 419 (1919)).

140. *Id.*

141. *Id.* at 1.

142. *Id.*

143. MARY MACEY DIETZLER, *Detention Houses and Reformatories as Protective Social Agencies*, in THE CAMPAIGN OF THE UNITED STATES GOVERNMENT AGAINST VENEREAL DISEASES 3 (1922).

144. *Id.* Some of the purported purposes of the Chamberlain-Kahn Act were to:

[P]rotect the civilian population against venereal diseases during the war and after the war; To assist States in building reformatories and detention houses for the hygienic, social, and economic redemption and restoration of venereal disease carriers; assist States in the cure of persons with venereal diseases; To assist States in the eradication of venereal diseases; To assist colleges, universities, and other suitable institutions to carry out scientific research for the discovery of better medical methods for the treatment and prevention of venereal diseases; To assist colleges, universities, and other suitable institutions in the instruction of their students concerning the defensive hygiene of venereal disease.

Chamberlain-Kahn Act, *supra* note 138.

were subject to humiliating physical examinations and were incarcerated in jails and workhouses.<sup>145</sup> While the Interdepartmental Social Hygiene Board ended its executive order in 1922, many of the quarantine policies continued.<sup>146</sup> In fact, the Los Feliz Hospital, one of the many institutions that were a part of the internment process, remained in operation until 1932.<sup>147</sup> Other institutions transitioned to become prisons and hospitals for women.<sup>148</sup> The incarceration and internment of women with venereal disease is one of the most perplexing and unfamiliar realities of Americans' response to the medical, social, and legal fears provoked by disease.<sup>149</sup>

Along the same lines, on June 25, 1910, the New York State legislature passed the Inferior Courts Act, which was created to deal with prostitution.<sup>150</sup> The law, known as the Page Law, included a requirement that women who were found guilty of soliciting must be convicted as prostitutes and tested for venereal disease.<sup>151</sup> If a woman was found to be infected with a venereal disease, she would be detained until she was determined to be noncontagious.<sup>152</sup>

Many noted that the Page Law was directed at a particular class of women for the protection of a particular class of men.<sup>153</sup> Prince Morrow<sup>154</sup> proclaimed that the Page Law and other venereal isolation attempts suffered from a particular flaw:

The fatal defect of every sanitary scheme to control venereal disease has been that the masculine spread of contagion has been entirely ignored as mythical or practically nonexistent; the woman has been regarded not only as the chief offender against morality, but the

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145. See Stern, *supra* note 137; ALLAN M. BRANDT, NO MAGIC BULLETS: A SOCIAL HISTORY OF VENEREAL DISEASE IN THE UNITED STATES SINCE 1880, at 91 (1985). Brandt quotes one of the director's of the detention hospital as mentioning that the incarceration efforts did little to curb the desires of women and their promiscuity. *Id.* In fact, he observed that the vast majority of the incarcerated women were unconcerned with the severity of their infections despite incarceration. *Id.*

146. Stern, *supra* note 137, at 1–2.

147. *Id.* at 2.

148. *Id.* at 7.

149. *Id.* at 8.

150. BRANDT, *supra* note 87, at 36.

151. *Id.*

152. *Id.*

153. *Id.* at 37.

154. Prince Morrow was a doctor who studied at the Medical College in New York and worked to prevent the spread of venereal diseases. See generally PRINCE ALBERT MORROW, SOCIAL DISEASES AND MARRIAGE: SOCIAL PROPHYLAXIS (1904) (discussing Prince Morrow's findings). Morrow's book was published in 1904, but the actual Page Law was not codified into law until 1910. *Id.*

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responsible cause of disease, all repressive measures to stamp out the diseases of vice have been directed against the woman alone.<sup>155</sup>

While the categorical distinctions between those who are marginalized by quarantine laws and those who are not are beyond the scope of this Comment, it is notable that women were used as scapegoats for venereal disease. Similarly, HIV/AIDS infected victims have classically been used as societal scapegoats in ways that the criminalization statutes further highlight as discussed *infra*.<sup>156</sup> Additionally, the Page Law is another example of the state (in this case the New York government) quarantining individuals by categorizing its purported purpose of eliminating “prostitution.”<sup>157</sup>

Yet, it was the advent of modern medicine that eventually buffered the actions made by the government. Up until the 1940s, venereal disease was seen as having no cure.<sup>158</sup> However, with the discovery of antibiotics, both syphilis and gonorrhea were met with a cure.<sup>159</sup> And it was the innovation of medicine that eventually tailored the responses of the public and the government during the latter half of the twentieth century. Just thirty years after the incarceration of women, the Surgeon General stated to Congress that it was time to “close the books on infectious diseases.”<sup>160</sup> Medical cognizance was the revolution that was needed for advancement in the law.

#### IV. THE LEGAL COMPARISON BETWEEN PRIOR LEGAL AND MEDICAL RESPONSES AND THE HIV/AIDS CRIMINALIZATION RESPONSE

As briefly discussed above, the United States currently has quarantine laws that legitimize the isolation of the contagions—similar to the laws in the past.<sup>161</sup> After examining these laws, this Comment inquires as to whether the criminalization of HIV/AIDS constitutes an effective quarantine or isolation.

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155. BRANDT, *supra* note 87, at 37.

156. *See infra* Part IV.A.

157. BRANDT, *supra* note 87, at 37.

158. *Venereal Disease*, ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD IN HISTORY AND SOC’Y, <http://www.faqs.org/childhood/Th-W/Venereal-Disease.html> (last visited Jan. 27, 2014).

159. *Id.*

160. Brad Spellberg & Bonnie Taylor-Blake, *On the Exoneration of Dr. William H. Stewart: Debunking an Urban Legend*, U.S. NAT’L LIBR. OF MEDICINE (Feb. 18, 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3707092/>.

161. *See supra* Part III.B.

A. Contagion and Sin

The fear of contagion has been pervasive throughout history, and the particular theory of contingent contagionism still exists today despite advancements made in medical knowledge related to the spread and treatment of particular diseases. When the CARE Act was authorized, HIV/AIDS was largely thought of as the “gay man’s disease.”<sup>162</sup> Later research has discredited those notions, yet many diseases of the past have been used as a way to marginalize the infected by splitting diseases among minority lines.<sup>163</sup> While the HIV/AIDS criminalization statutes do not per se discriminate among groups, as applied, these laws do work in ways that mask the realities of the disease by codifying false information about the virus/disease and the way it is spread—a common theme of contingent contagionism.<sup>164</sup>

For instance, some state HIV laws criminalize infected individuals who have spread the virus through spitting on someone or who have used protection.<sup>165</sup> Both of these notions are discordant with the medical reality of HIV transmission.<sup>166</sup> While proponents of these laws might argue that there is a minute possibility of spreading HIV through saliva or through the malfunction of protective measures, the laws do not take into account the near statistical impossibility of such outcomes nor other factors such as low viral loads, antiretroviral treatment, or receptive/insertive practices.<sup>167</sup> As history has shown, contingent contagionism has been used to divide groups, to spread unfounded notions about various viruses and diseases, and to codify this confusion and moral opprobrium into criminal penalties. The same theory has been used in the fight against HIV/AIDS—both to

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162. David Salyer, *Getting it Straight: HIV as a Gay Disease Is a Myth That Refuses to Die*, THE BODY (Mar. 1999), <http://www.thebody.com/content/art32330.html>. The article, written in the 1990s, points to the contagionism theory by explaining that the “gay disease” notion is rooted in misinformation, fear, and ignorance. *Id.* Additionally, Salyer points to heterosexual women and men contracting HIV/AIDS from sexual contact and needle sharing—just as homosexuals contract the virus/disease. *Id.*

163. *Id.*; see *Concepts of Contagion and Epidemics*, *supra* note 83; see also Batlan, *supra* note 126, at 98.

164. See *Concepts of Contagion and Epidemics*, *supra* note 83.

165. GA. CODE ANN. § 16-5-60 (2003); IDAHO CODE ANN. § 39-608 (1988); IOWA CODE ANN. § 709C.1(a) (2003); MICH. COMP. LAWS § 333.5210(2) (2001); MISS. CODE ANN. § 97-27-14 (2004); MO. REV. STAT. § 191.677(2)(c) (2004); 18 PA. CONS. STAT. § 5902 (2012); UTAH CODE ANN. § 76-5-102.6 (2013).

166. 100 QUESTIONS AND ANSWERS ABOUT HIV/AIDS, *supra* note 28 (dispelling both the notion that wearing protection carries a high risk of transmission and that biting or the passing of saliva can readily pass along HIV without blood-to-blood contact).

167. *Id.*

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initially mark the GLBTQ<sup>168</sup> community as the scapegoat for a terrifying disease and then to codify erroneous notions about HIV/AIDS through the state criminalization statutes.<sup>169</sup>

The early discussion of criminalizing HIV/AIDS also has roots in religion and morality. As with other venereal diseases, HIV stigma has often been perpetuated by the denunciation of HIV infection as sinful.<sup>170</sup> Fear of the transmission of HIV in the late 1980s not only generated a rejection of HIV/AIDS patients, but it also revealed society's rejection of homosexuality, itself.<sup>171</sup> Because the majority of religious institutions condemn pre-marital sex and homosexuality, it is no surprise that the initial arguments for laws criminalizing HIV were rooted in these notions of morality.<sup>172</sup>

For example, a physiologist arguing before the Texas legislature, proposed a bill that would incarcerate homosexuals infected with HIV/AIDS "until and unless they can be cleansed of their medical problems."<sup>173</sup> Before the CARE Act of 1990, when the federal government initially allocated funds for medical research on AIDS, Ronald S. Godwin, an executive of the fundamentalist political sect, the Moral Majority, explained, "[w]hat I see is a commitment to spend our tax dollars on research to allow these diseased homosexuals to go back to their perverted practices without any standards of accountability."<sup>174</sup> When the criminalization statutes were created a few years later, not only did they include tinges of contingent contagionism theories, but they also codified a notion rooted in sin and morality—that AIDS is a result of bad behavior and therefore, divine punishment for such behavior. It is apparent that in the 1980s and early 1990s, some

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168. GLBTQ is an acronym for Gay, Lesbian, Bisexual, Transgendered, or Queer/Questioning identity. *Welcome to The Alliance for Gay, Lesbian, Bisexual, Transgender & Questioning Youth*, THE ALLIANCE FOR GLBTQ YOUTH, <http://www.glbqtalliance.org/category/glbqt/> (last visited Jan. 27, 2014). See generally *Sexual Orientation and Gender Identity: Terminology and Definitions*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Jan. 13, 2014) (discussing the terminology associated with sexual orientation and gender identity).

169. See GA. CODE ANN. § 16-5-60 (2003); IDAHO CODE ANN. § 39-608 (1988); IOWA CODE ANN. § 709C.1(a) (2003); MICH. COMP. LAWS § 333.5210(2) (2001); MISS. CODE ANN. § 97-27-14 (2004); MO. REV. STAT. § 191.677(2)(c) (2004); 18 PA. CONS. STAT. § 5902 (2012); UTAH CODE ANN. § 76-5-102.6 (2013); see also Salyer, *supra* note 162.

170. *Gender, Sexuality, Rights and HIV: An Overview for Community Sector Organizations*, INT'L COUNCIL OF AIDS SERVICE ORGS. (2007), available at [http://www.icaso.org/publications/genderreport\\_web\\_080331.pdf](http://www.icaso.org/publications/genderreport_web_080331.pdf).

171. BRANDT, *supra* note 87, at 183.

172. See *Gender, Sexuality, Rights and HIV: An Overview for Community Sector Organizations*, *supra* note 170.

173. BRANDT, *supra* note 87, at 183.

174. *Id.*

further elevated that logic by perpetuating the notion that it was “homosexuality that causes AIDs, not a virus.”<sup>175</sup>

With such responses, victims of uncertain diseases such as AIDS are typically left “vulnerable to identification as scapegoats.”<sup>176</sup> Given the uncertainty surrounding HIV/AIDS during the 1980s and early 1990s, morality and religion, like contingent contagionism theories, played a significant role in the early debate about federal funding toward the HIV/AIDS crisis.<sup>177</sup> While it is true that there is no direct proof that morality and religion informed the legislative decision to criminalize HIV/AIDS, it is true that the criminalization statutes were created during this time of uncertainty—calling into question not only the statutes’ current application but also the animus behind their original inception.<sup>178</sup>

Considering the immense scientific discoveries that have been made with regard to HIV/AIDS over the past three decades, there is a strong argument that neither the original intent behind the statutes, nor their current use is based in reality. Morality and religion has informed public perception on epidemics throughout the centuries—the HIV/AIDS epidemic has followed that same trajectory.<sup>179</sup> While morality and religion both have a discursive place in public debate, neither informs the law that it has failed to remain compatible with science at the expense of the incarcerated, infected, and marginalized victim.

## B. Current Quarantine and Isolation Laws

While quarantine and isolation may seem to be antiquated responses rooted in early contagionism theories, both methods are used today and often for good purpose when used appropriately. The United States has authorized the Department of Human Health and Services to oversee statutes that cover the spread of contagion.<sup>180</sup> The

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175. *Id.*

176. MOORE, *supra* note 96, at 75.

177. BRANDT, *supra* note 87, at 183. Fear of the HIV/AIDS crisis in America is evident in the early legislative history of the CARE Act. 136 Cong. Rec. S2179-03 (1990). Congressional members referred to the epidemic as a “grave threat” and “a disaster as severe as any earthquake, hurricane, or drought.” *Id.* The urgency to act on the epidemic was couched in terms such as “chaos” and “grave threat.” *Id.*

178. BRANDT, *supra* note 87.

179. *Id.*

180. *Specific Laws and Regulations Governing the Control of Communicable Diseases*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/quarantine/specificlawsregulations.html> (last updated Dec. 17, 2013).



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United States Congress derives its authority to quarantine and isolate individuals with possible contagious diseases by way of the Commerce Clause.<sup>181</sup>

The United States has currently authorized the quarantine and/or isolation of individuals for various diseases that have been discussed above.<sup>182</sup> Likewise, the United States Secretary of Health and Human Services is authorized to prevent the spread of communicable diseases from foreign countries into the United States and between states.<sup>183</sup> The authority is vested in the Centers for Disease Control and Prevention (CDC) for carrying out these functions on a regular basis.<sup>184</sup>

While the federal government has the ability to quarantine and isolate as needed for public safety, states have a similar authority. Because of the police powers enumerated in the Constitution, states have enacted their own quarantine statutes, which protect individuals within their territories.<sup>185</sup> States are said to have widespread authority with regards to quarantine laws, and in the past, courts have taken steps to legitimize that power.<sup>186</sup> The historical uses of federal quarantine have continued to be employed even into the modern era—most recently in 2007, in response to the threat of tuberculosis.<sup>187</sup>

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181. *Id.*; The Surgeon General

is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 U.S.C. § 264 (2012); *see also* U.S. CONST. art. I, § 8, cl. 3 (enumerating Congress's power to regulate commerce with foreign nations, among the states, and with the Indian Tribes).

182. Congress has given the President the executive authority to quarantine or isolate individuals for the following diseases: cholera, diphtheria, infectious tuberculosis, the plague, smallpox, yellow fever, viral hemorrhagic fevers, SARS, and the flu. *Legal Authorities for Isolation and Quarantine*, *supra* note 97. *See generally supra* Part III.B (explaining the legal reactions to health epidemics).

183. Public Health Service Act, 42 U.S.C. § 264 (2012).

184. *Legal Authorities for Isolation and Quarantine*, *supra* note 97.

185. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *see State Quarantine and Isolation Statutes*, NAT’L CONFERENCE OF STATE LEGISLATURES (Aug. 2010), <http://www.ncsl.org/issues-research/health/state-quarantine-and-isolation-statutes.aspx>.

186. Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 *HOFSTRA L. REV.* 53, 63 (1985). Since the early 1900s courts have been more reluctant to expand or condone the plenary authority of the state to enact quarantine laws. *Id.*

187. *State Quarantine and Isolation Statutes*, *supra* note 185.

C. HIV Criminalization—A Form of Isolationism or Quarantine?

The purpose of isolation and quarantine laws has largely been to separate the sick from the healthy, which appears to be at the underpinning of the laws related to the criminalization of HIV/AIDS. Because the federal quarantine power includes the isolation of individuals infected with diseases that are much more readily communicable than HIV, HIV/AIDS has never appeared on the list of diseases or viruses that the government is authorized to quarantine.<sup>188</sup> In 1987, the Surgeon General declared that the quarantine of AIDS infected individuals has “no role in the management of AIDS because AIDS is not spread by casual contact.”<sup>189</sup> Under modern quarantine laws, a state must provide a particular method that is carefully tailored to meet its public health protection.<sup>190</sup> Thus, the inclusion of HIV/AIDS in the modern day quarantine laws has never been considered a realistic approach in the fight against the epidemic.<sup>191</sup>

However, one is left to question whether the incarceration of HIV/AIDS infected victims is an indirect, covert form of isolation and quarantine—leveled directly against and *only* against those infected by HIV/AIDS. The criminalization of HIV/AIDS, in many ways, harkens back to the quarantine methods and the moral condemnation it codified that was used in the early twentieth century under the auspices of the Chamberlain-Kahn Act and the Page Law.<sup>192</sup>

The Chamberlain-Kahn Act, which initially gave funding to isolate and incarcerate women with venereal disease, was ended in 1922; however, many of the quarantine programs in the internment programs remained in place.<sup>193</sup> Similarly, the CARE Act removed its requirement for HIV Criminalization statutes ten years after its inception; yet thirty-four states have maintained their statutes fourteen years later.<sup>194</sup>

The Page Law, which was another form of isolation, was rooted in the notion that venereal disease was spurned by evil, immoral, and completely voluntary acts.<sup>195</sup> In the HIV/AIDS criminalization statutes, this same warped moral thinking is likely true. As discussed, the

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188. DAVID WEBBER, AIDS AND THE LAW 59 (3d ed. 2005).

189. *Id.* at 263.

190. *Id.*

191. *Id.*

192. *See supra* Part III.B.

193. Stern, *supra* note 137.

194. Young, *supra* note 3.

195. BRANDT, *supra* note 87, at 37.

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debate concerning HIV/AIDS during the time of the inception of the CARE Act centered on deeply moral and religious notions about the disease and its relation to homosexuality.<sup>196</sup> While many might argue that the criminalization statutes are not a widespread form of isolation or quarantine, it is notable that the victims of these outdated state statutes carry familiar similarities to those earlier individuals who remained victims of legislative responses to the venereal disease epidemics of the twentieth century long after the original medical theories behind the legal regimes had been discredited.

One of the perverse ironies is that the purpose behind the HIV statutes could disincentivize possible infected individuals from following the very public health methods that the legislature was trying to ensure—protection and prevention of HIV transmission. Some scholars argue that by incarcerating victims of the HIV/AIDS epidemic, the statutes discourage individuals who are at the highest risk of becoming infected with HIV from getting tested so that he or she may avoid public health problems.<sup>197</sup> This willful ignorance so as to avoid criminal penalties not only undermines the attempt to differentiate between the infected and non-infected, but it also exacerbates the problem by creating an unsafe public health perception in the mind of the potentially infected victim. Such perception leads to the perpetual spread and contraction of the virus.

Additionally, while the statutes attempt to separate the *dangerous* infected group from the non-infected society, the state statutes also undermine public health educational initiatives. Notably, heightened publicity of criminalization cases, many of which have been mentioned in this Comment, could cause confusion about the very methods in which HIV infection can actually occur.<sup>198</sup> When cases that perpetuate the notion that spitting or biting can lead to criminalization under current HIV transmission statutes, the wider public arena might be misled about true forms of transmission.<sup>199</sup> Such misconceptions do little to successfully isolate or quarantine the virus. Rather, they galvanize those who believe that they may be and those who actually are infected with HIV to remain in the shadows, silent, and unannounced.<sup>200</sup> In some cases, they leave the wider public un-

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196. *See supra* Part IV.A.

197. WEBBER, *supra* note 188, at 263.

198. *Id.*

199. *Id.*

200. *Id.*

certain about the science surrounding the virus, undermining years of public health educational efforts made to eradicate such confusion.<sup>201</sup>

As a result of the early response to the HIV/AIDS epidemic, it does appear that, at minimum, the current state statutes closely mirror previous responses to medical epidemics. Given the legal and medical comparison, states must appropriately usher in statutory change as the trajectory of HIV/AIDS begins to enter a new dawn with the promise of ensuing medical resolve.

## V. REVISITING STATE STATUTES AND RECOMMENDATIONS

Given the significant advances that science has made in both the understanding and treatment of the HIV/AIDS epidemic, legal complacency is no longer a viable response to the criminalization statutes that remain in effect. Legal change must be made from state to state. There have been many proposals to fade these statutes out of existence, and this Comment examines two viable options for fixing the law: language revisions or the federal de-authorization of the statutes altogether.

### A. Statutory Revision

Some scholars have argued that the state statutes should not be repealed but should instead be revised.<sup>202</sup> Such revisions would occur with the purpose of eliminating all transmission where the intent element is lacking. Because the original purpose advanced by congressional policy-makers was to criminalize those who knowingly committed a moral wrong, criminal statutes should only be imposed on HIV transmission when individuals “purposefully or maliciously” transmit the virus with the “intent to harm.”<sup>203</sup>

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201. *Id.*

202. There is a separate argument that the statutes should not be eradicated but should, rather, be written to include the elements of typical criminal liability. *See* McArthur, *supra* note 20, at 713; *see also* Sara Klemm, *Keeping Prevention in the Crosshairs: A Better HIV Exposure Law for Maryland*, 13 J. HEALTH CARE L. & POL’Y 495, 522 (2010) (“A useful and fair HIV-specific statute for Maryland will have at least five components: it should 1) define knowledge as it relates to HIV status; 2) define specifically the conduct prohibited; 3) outline conduct implicating different levels of culpability; 4) provide affirmative defenses; and 5) provide fair and commensurate penalties.”).

203. Open Society Institute, *Ten Reasons to Oppose Criminalization of HIV Exposure or Transmission*, PUBLIC HEALTH PROGRAM (Dec. 1, 2008), <http://www.soros.org/publications/ten-reasons-oppose-criminalization-hiv-exposure-or-transmission>.

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However, others argue that revision alone may be a measure that, in itself, is too limiting. As mentioned in Part II, many state statutes codify outdated notions of the disease, namely that biting, spitting, or engaging in protected sex carry some nefarious power to infect a sexual partner with HIV despite the medical virtual impossibility of such transmission.<sup>204</sup> While revising these outdated laws on a state-by-state basis would be beneficial for creating a normalized standard of HIV transmission, studies indicate that legislation might not necessarily influence the behavior of the infected victim.<sup>205</sup>

In the alternative, others have urged to adopt a traditional criminal law standard that would focus on the “likelihood” of causing injury as a tenet for criminality, in this case, the likelihood of transmission. Under the traditional modern penal code, such a focus on likelihood would account for the “intent” element that is lacking in many state HIV statutes.<sup>206</sup> Individuals could be penalized under “aggravated assault” or “assault” depending on the risk of exposure, rather than being subjected to felony charges.<sup>207</sup> Whether states choose to revise their HIV criminalization statutes or ease into the traditional criminal law, criminal prosecution should only be available when an individual has acted both maliciously and with the intent to harm.

### B. H.R. 3053: REPEAL HIV Discrimination Act and Similar Proposals

In 2011, concerned with the disparate effect that these laws create, Representative Barbara Lee proposed a bill in the House that is aimed at “eliminat[ing] discrimination in the law for those who have

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204. See GA. CODE ANN. § 16-5-60 (2003); IDAHO CODE ANN. § 39-608 (1988); IOWA CODE ANN. § 709C.1(a) (2003); MICH. COMP. LAWS § 333.5210(2) (2001); MISS. CODE ANN. § 97-27-14 (2004); MO. REV. STAT. § 191.677(2)(c) (2004); 18 PA. CONS. STAT. § 5902 (2012); UTAH CODE ANN. § 76-5-102.6 (2013).

205. McArthur, *supra* note 20, at 713; see Scott Burris et al., *Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial*, 39 ARIZ. ST. L.J. 467, 511–12 (2007).

206. The MPC statute reads in part:

(1) A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

Model Penal Code § 211.1 (1985).

207. *Id.*

tested positive for HIV, and for other purposes.”<sup>208</sup> The bill would require federal and state officials to review federal and state laws and policies that involve criminal cases against people living with HIV/AIDS and to provide support for education and reform initiatives.<sup>209</sup>

The Repeal HIV Discrimination Act specifically designates officials (the Attorney General, the Secretary of Health and Human Services, and the Secretary of Defense) to: (1) work with state stakeholders (i.e., state attorneys general, state public health officials, people living with HIV, nongovernmental health organizations, legal advocacy and HIV service organizations) to review federal and state laws, policies and court cases that involve criminal liability for people living with HIV; (2) develop a set of best practices for the treatment of HIV in criminal and civil commitment cases; (3) issue guidance to states based on those best practices; (4) monitor whether and how states can change their policies consistent with that guidance; and (5) provide support to states to assist with education, reform and implementation.<sup>210</sup>

While this proposed legislation is a profound step in the right direction, there must be public support before the bill will have overwhelming backing. As of today, the bill is still pending in Congress.<sup>211</sup> Given the controversy and taboo still surrounding the topic of HIV/AIDS generally, legislators would need to be galvanized to support such sweeping and consequential legislation.

Nevertheless, toward the end of 2013, Senator Chris Coons of Delaware proposed a similar bill in the Senate.<sup>212</sup> The bill is entitled the Repeal Existing Policies that Encourage and Allow Legal HIV Discrimination Act.<sup>213</sup> Similar to Congresswoman Lee, Senator Coons explained that he was interested in ending these statutes that

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208. H.R. 3053, 112th Cong. (2011).

209. *Id.* The bill notes that “[o]ver the past 3 decades, scientists have learned much about HIV, its transmission, and the treatment of those who become infected with it. State and federal law does not currently reflect the medical advances and discoveries made with regards to HIV/AIDS.” *Id.*

210. *Id.*; see also *REPEAL HIV Discrimination Act Fact Sheet*, LAMBDA LEGAL (Oct. 24, 2012), [http://www.lambdalegal.org/sites/default/files/publications/downloads/fs\\_repeal-hiv-discrimination-act\\_1.pdf](http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_repeal-hiv-discrimination-act_1.pdf).

211. REPEAL Act, H.R. 3053, 112th Cong. (2011), available at <http://www.govtrack.us/congress/bills/112/hr3053/text>.

212. Dan Roberts, *New Bill Seeks to Repeal Outdated State HIV Discrimination Laws*, THE GUARDIAN (Dec. 10, 2013), <http://www.theguardian.com/world/2013/dec/10/us-house-hiv-bill-discrimination>; see S. 1790, 113th Cong. (2013).

213. Roberts, *supra* note 212.

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perpetuate an “outdated fear.”<sup>214</sup> Senator Coons explained during his proposal that, “[r]ather than [recognizing] that HIV/A[IDS] is a treatable medical condition, these laws perpetuate the idea that HIV is a deadly weapon and people with HIV/A[IDS] are dangerous criminals.”<sup>215</sup> It is past time that Congress begin to echo Senator Coons’s sentiments.

### CONCLUSION

The United States has grappled with its response to HIV/AIDS for the better part of four decades, and while it has spent billions in domestic and global relief efforts, its laws have remained static even as medicine has moved forward.<sup>216</sup> Today, HIV/AIDS persons can receive treatment that reduces their viral load to virtually undetectable levels.<sup>217</sup> The presence of antiretroviral treatment has proved largely successful for HIV victims.<sup>218</sup> As many Americans have come to learn more about both the virus and the disease, the stigma has, at the very least, been confronted with less ignorance.

As the country moves further in the fight against HIV/AIDS, the laws of the twentieth century are tragically out of step with the medical reality of infected persons in the twenty-first century. Punishing individuals for crimes that they neither intended to commit nor are medically capable of committing stands in direct contravention with the basic premises of culpability. While all state statutes must undergo their own revisions and redactions, each state *must* eradicate the laws in their current form, which codify outdated and erroneous stigmas about HIV/AIDS.

The legal response to previous epidemics has been met with confusion, stigmatization, ignorance, and improper condemnation. The response to HIV/AIDS has been no less hostile to the victims of the epidemic. Yet what has always been true must remain true for this

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214. *Id.*

215. *Id.*

216. H.R. 3053, 112th Cong. (2011); S. 1790, 113th Cong. (2013); *see also How We’re Spending*, AIDS.GOV, <http://aids.gov/federal-resources/funding-opportunities/how-were-spending/> (last updated July 5, 2013).

217. *Effect of Antiretroviral Therapy on Risk of Sexual Transmission of HIV Infection and Superinfection*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/topics/treatment/resources/factsheets/art.htm> (last updated Aug. 31, 2009); *see* 100 QUESTIONS AND ANSWERS ABOUT HIV/AIDS, *supra* note 28.

218. *Id.*

epidemic—this country has eventually corrected itself and turned toward legal and medical justice.

This story is bigger than just Nick Rhoades. This story is a compilation of Nick Rhoades, of the street women, of the flu victims and plague victims, of the lepers, and all of the unnamed victims of medical ignorance and fear who deserve to be shielded, not condemned, under the law. As the legal community looks back at the nation's previous responses to health epidemics, it is important to look forward to the eradication of this one—not just through research and medicine, but also through statutory revision and legislative action.



## COMMENT

# A Tale of Three EULAs: Why Some End User License Agreements Should Be Preempted by the Anticircumvention Provisions of the Digital Millennium Copyright Act of 1998

NOELLE S. A. GREEN\*

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ABSTRACT

This Comment contends that digital copyright owners should not be allowed to bind consumers to end user license agreements (“EULAs”) that extend the copyright owners’ rights under copyright law, that create rights that the copyright law does not already confer on copyright owners, or that abridge consumers’ rights. These EULAs should be preempted by the anticircumvention provisions of the Digital Millennium Copyright Act of 1998 (“DMCA”). The person or entity that owns the copyright in a work is entitled to various exclusive rights under § 106 of the Copyright Act of 1976. Section 1201 of the DMCA, which contains its anticircumvention provisions, reinforces the exclusive § 106 rights granted to copyright owners in the 1976 Copyright Act and provides remedies available to digital copyright owners in the event their rights are infringed. Particularly, § 1201 allows digital copyright owners to employ technological protection measures (“TPMs”) to control access to and use of their copyrighted works, and digital copyright owners use EULAs to a similar end. This Comment provides a background on the anticircumvention provisions, analyzes the issue of conflict preemption, argues that EULAs should not be automatically immunized from preemption, suggests which EULAs should be preempted, and proposes that Congress explicitly address the EULA-anticircumvention preemption issue by amending the statute.

INTRODUCTION

“I Agree.” These two words, as unassuming as they appear, represent what is one of the most salient issues relating to intellectual

property as applied in the digital age: whether digital copyright owners should be allowed to bind consumers to agreements that potentially enlarge the copyright owners' rights under copyright law. When users select the "I Agree" option, they explicitly consent to the terms of a contract. These contracts are of various types,<sup>1</sup> but those relevant to this Comment are called end user license agreements ("EULAs"). EULAs are also known as "clickwrap agreements," which appear on an Internet webpage and require the user to agree to certain terms or conditions by clicking "I Accept" or "I Agree" (or any variation thereof) in order to proceed with the transaction.<sup>2</sup> They can be considered the electronic version of "shrinkwrap agreements," which are physical writings that accompany computer software products and contain terms that the consumer "accepts" once he or she opens the package containing the product (i.e., breaks the shrinkwrap).<sup>3</sup>

Section 106 of the Copyright Act of 1976 ("Copyright Act") grants copyright owners the exclusive right to: (1) reproduce the copyrighted work in copies or phonorecords; (2) prepare derivative works based on the copyrighted work; (3) distribute copies or phonorecords to the public by sale or other transfer of ownership, rental, lease or lending; (4) perform the work publicly in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works; (5) display the copyrighted work publicly in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works; and (6) perform the work publicly via digital audio transmission (e.g., radio).<sup>4</sup> The anticircumvention provisions reflect the exclusive § 106 rights granted to copyright owners in the 1976 Copyright Act and creates remedies that are available to digital copyright owners in the event that those existing rights are infringed.<sup>5</sup> Specifically, the anticircum-

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1. These include license agreements that accompany computer software downloads as well as those that accompany the provision of online services, such as creative works compilations or research databases.

2. 1 TRANSNATIONAL BUS. TRANSACTIONS § 3:16 (quoting *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa. 2007) IONA (2013)).

3. See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241-42 (1995). Both shrinkwrap and clickwrap agreements are generally enforceable so long as their terms do not result in a contract that is illegal, unconscionable or objectionable on other grounds applicable to contract law. 15B AM. JUR. 2D *Computers & the Internet* § 106 (2013). In general, courts uphold their validity. JULIE E. COHEN ET AL., *COPYRIGHT IN A GLOBAL INFORMATION ECONOMY* 630 (3d ed. 2010).

4. Copyright Act of 1976, 17 U.S.C. § 106(1)-(6) (2012).

5. See Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended at 17 U.S.C. § 1201 (2012)) ("DMCA").

vention provisions allow digital copyright owners to employ technological protection measures (“TPMs”) to control how consumers access and utilize their copyrighted works.<sup>6</sup>

With the tendency of digital copyright owners to use EULAs to control how consumers utilize their works comes the possibility that the digital copyright owners will also use the EULAs to expand their rights beyond the limits that the federal copyright law establishes. This may give rise to the issue of preemption.<sup>7</sup> EULAs are governed by state law, and the DMCA is a federal law.<sup>8</sup> A federal law preempts a state law where the state law is in direct conflict with the federal law, either because it frustrates the purpose of the federal law or renders compliance with both the state and federal law impossible.<sup>9</sup> Applying that principle here, if the EULA in question were to contain terms that effectively obstruct the purpose of the anticircumvention provisions or render compliance with both the terms of the EULA and the provisions impossible, those terms would be preempted.

This Comment notes that the anticircumvention provisions attempt to maintain a balance between the competing rights of digital copyright owners and consumers and argues that EULAs that extend the rights of digital copyright owners beyond the limits that the copyright law establishes, or infringes on the rights of consumers as derived from those limitations, skew that balance in favor of the digital copyright owners. In so doing, such EULAs conflict with the anticircumvention provisions by impeding the realization of their purpose. For both analytical and illustrative purposes, this Comment employs three EULAs that are in actual use and categorizes each as either a EULA that wholly comports with the anticircumvention provisions, one that wholly conflicts with them, or one that comports in part but conflicts in part. This Comment also determines whether each EULA would be preempted by the DMCA.<sup>10</sup> This Comment concludes that

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6. See *id.* § 1201(a)–(b).

7. See Elizabeth M.N. Morris, *Will Shrinkwrap Suffocate Fair Use?*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 237, 258 (2007) (“When a contract, like a shrinkwrap license, prohibits a right given to a software user under copyright law there is a potential conflict between copyright and contract law.”).

8. See *id.*

9. See *id.*

10. The first EULA, a Creative Commons agreement, is an example of a EULA that comports with the anticircumvention provisions. It contains the following language: “Nothing in this License is intended to reduce, limit, or restrict any uses free from copyright or *rights arising from limitations or exceptions* that are provided for in connection with the copyright protection under copyright law or other applicable laws.” CREATIVE COMMONS, *Attribution-ShareAlike 3.0 Un-*

those provisions of a EULA that extend digital copyright owners' rights under copyright law, that create rights that do not already exist, or that infringe on consumers' rights are in direct conflict with the anticircumvention provisions and should thus be preempted by the DMCA.

Part I of this Comment explains the substance and purpose of the DMCA's anticircumvention provisions. Part II introduces the three types of preemption, focusing on the frustration of purpose branch of conflict preemption. Part III proposes a workable frustration of purpose framework to be applied to EULAs. Part IV applies the frustration of purpose methodology proposed in Part III to the EULA at issue in *Davidson & Associates v. Jung*.<sup>11</sup> Part V calls for congressional action to resolve the EULA-anticircumvention conundrum.

## I. THE ANTICIRCUMVENTION PROVISIONS: CONTROVERSY AND CASE LAW

As the digital revolution progressed, Congress recognized the necessity for legislation that could accommodate rapidly developing technological advances.<sup>12</sup> The DMCA as a whole was Congress's attempt to facilitate the expansion of technology in the digital age.<sup>13</sup> The anticircumvention provisions, contained in § 1201 of the DMCA, amended Title 17 of the United States Code<sup>14</sup> to ensure that digital copyright owners continued to enjoy their exclusive § 106 rights conferred by the 1976 Copyright Act despite owning works existing in

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*ported License*, <http://creativecommons.org/licenses/by-sa/3.0/legalcode> (last visited Apr. 4, 2013) (emphasis added).

The second EULA, a Westlaw agreement, is an example of one that conflicts with the anticircumvention provisions. It contains the following language: "Westlaw, including the format, layout and data structures, is proprietary. User may not *reverse engineer or otherwise attempt to discern* the proprietary architecture of Westlaw." WESTLAW, *Westlaw User Agreement*, <http://lscontent.westlaw.com/images/content/2012ClickwrapAll.pdf> (last visited May 5, 2013) (emphasis added). Please note: the Westlaw EULA may very well be valid on other grounds. This particular portion is excerpted for illustrative purposes only.

The third EULA, a Blizzard Corporation agreement, is an example of one that comports in part and conflicts in part with the anticircumvention provisions. It contains the following language:

Subject to that Grant of Licence hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, *reverse engineer*, derive source code, modify, disassemble, decompile, create derivative works based on the Program, or remove any proprietary notices or labels on the Program without the prior consent, in writing, of Blizzard.

*Davidson & Assocs. v. Jung*, 422 F.3d 630, 634 n.4 (8th Cir. 2005) (emphasis added).

11. 422 F.3d 630 (8th Cir. 2005).

12. See H.R. REP. NO. 105-551, at 21 (1998), 1998 WL 414916.

13. S. REP. NO. 105-190, at 1-2 (1998), 1998 WL 239623.

14. Title 17 of the U.S. Code codifies U.S. copyright law.

technological mediums that were not contemplated by the Act.<sup>15</sup> The provisions are meant to protect digital copyright holders from the unlawful pirating of their copyrighted works.<sup>16</sup> To this end, they prohibit consumers from circumventing technological protection measures (“TPMs”)<sup>17</sup> that copyright owners utilize to control access to and use of their works and from trafficking in of devices that are intended to circumvent TPMs.<sup>18</sup> However, the provisions also specify certain situations in which an individual’s circumvention of TPMs will not be considered a violation.<sup>19</sup> For example, persons are allowed to circumvent a TPM in order to make the software program compatible with another independently-created software program<sup>20</sup> or to determine its vulnerabilities.<sup>21</sup>

The anticircumvention provisions distinguish between TPMs that restrict access to a copyrighted work and TPMs that are designed to prevent violation of one or more of the copyright owner’s exclusive rights in the work.<sup>22</sup> They also differentiate the act of circumventing TPMs from the act of manufacturing or trafficking in technology that can circumvent TPMs.<sup>23</sup> In making this distinction, the provisions protect two types of technological measures: those that control access to a protected work (access controls)<sup>24</sup> and those that protect the rights of the copyright owner (rights controls).<sup>25</sup>

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15. See S. REP. NO. 105-190, at 2.

16. See Steve P. Calandrillo & Ewa M. Davidson, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 361–62 (2008). Armed with the anticircumvention provisions of the DMCA, these digital copyright holders now have more power to control users’ access to their computer software than was afforded them under traditional copyright. Morris, *supra* note 7, at 257. For the purposes of this Comment, “traditional copyright” refers to copyright law that was codified in the Copyright Act of 1976.

17. Technological protection measures are essentially electronic gatekeepers. That is, they are electronic systems that copyright holders design in order to control how consumers access and use their products. Ryan Mitchell, *A Holistic Approach to the Digital Millennium Copyright Act*, SYRACUSE SCI. & TECH. L. REP., Fall 2010, at 4.

18. See 17 U.S.C. § 1201 (2012). To circumvent means “[T]o avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner . . . .” *Id.* § 1201(a)(3)(A).

19. See, e.g., 17 U.S.C. § 1201(c)–(g) (exempting fair use, nonprofit libraries, archives, and educational institutions, law enforcement, intelligence, and other government activities, reverse engineering, and encryption research).

20. *Id.* § 1201(f).

21. *Id.* § 1201(g).

22. COHEN ET AL., *supra* note 3, at 662.

23. *Id.*

24. 17 U.S.C. § 1201(a)(1)(A).

25. *Id.* § 1201(b)(1)(A); see also Mitchell, *supra* note 17, at 5 (noting that Congress grants protection to technological measures that act as access controls and those that act as rights controls).

*Digital Millennium Copyright Act of 1998*

Section 1201(a) of the anticircumvention provisions applies when an individual has not been granted access to a copyrighted work for which the copyright owner has employed TPMs.<sup>26</sup> Section 1201(a)(1) prohibits individuals from circumventing TPMs that restrict access to the copyrighted work.<sup>27</sup> This prohibition applies in cases where such protection measures would otherwise be effective at controlling access to the copyrighted work.<sup>28</sup> Furthermore, § 1201(a)(2) prohibits the manufacture of and trafficking of devices that can circumvent TPMs that effectively control access to the copyrighted work.<sup>29</sup> In so doing, § 1201(a)(2) supplements the § 1201(a)(1) prohibition on the circumvention of access control TPMs by also proscribing users from disseminating the means to circumvent access control TPMs.<sup>30</sup> Hence, one of the effects of § 1201(a)(2) is to protect copyright holders from infringement by persons who manufacture and/or sell technology that allows users to circumvent technological safeguards to gain restricted access to the copyrighted work.<sup>31</sup>

Section 1201(b) applies when a person has lawfully obtained access to a copyrighted work, but the owner has employed TPMs that effectively protect his right to control or limit further use of his work.<sup>32</sup> It prohibits the circumvention of TPMs that are put in place to protect the owner's rights in the work.<sup>33</sup> Moreover, § 1201(b)(1) parallels § 1201(a)(2), and prohibits a consumer from creating, trafficking in, offering, or otherwise making available any means to circumvent protection measures established to protect the copyright owner's rights in his work.<sup>34</sup> In so doing, § 1201(b)(1) seeks to effectively protect and enforce copyright owners' use of TPMs to protect their rights under the 1976 Copyright Act.<sup>35</sup>

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26. H.R. REP. NO. 105-551, pt. 1, at 17 (1998), 1998 WL 261605.

27. See H.R. REP. NO. 105-551, pt. 1, at 17-18 ("Paragraph (a)(1) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner . . ."); see also COHEN ET AL., *supra* note 3, at 662.

28. H.R. REP. NO. 105-551, pt. 1, at 18-19.

29. See 17 U.S.C. § 1201(a)(2).

30. H.R. REP. NO. 105-551, pt. 1, at 18.

31. 17 U.S.C. § 1201(a)(2); see also Calandrillo & Davidson, *supra* note 16, at 362 ("The real muscle behind the anticircumvention rule lies in the two DMCA 'antitrafficking' provisions that target hacker-devices at their source, outlawing their manufacture and sale.").

32. H.R. REP. NO. 105-551, pt. 1, at 19.

33. COHEN ET AL., *supra* note 3, at 662.

34. H.R. REP. NO. 105-551, pt. 1, at 19.

35. *Id.*

The DMCA, particularly its anticircumvention provisions, has garnered much criticism from the scholarly legal community. Some argue that the anticircumvention provisions run against the traditional copyright regime.<sup>36</sup> Specifically, some critics contend that the DMCA creates new rights that ordinarily would not be afforded copyright owners under the traditional notions of copyright,<sup>37</sup> such as a “pseudo-copyright” in works whose true copyright may not even exist.<sup>38</sup> Others note that it encourages the use of EULAs, which are particularly problematic because copyright owners use them to avoid limits placed on their rights under copyright law.<sup>39</sup> Some opponents of the DMCA also assert that copyright owners have used the anticircumvention provisions to impart protections on their products that exceed those provided in both the 1976 Copyright Act and the DMCA.<sup>40</sup>

Courts continue to grapple with copyright owners’ use of TPMs to protect their copyrighted digital works and consumers’ circumven-

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36. See, e.g., Calandrillo & Davidson, *supra* note 16, at 363 (“Copyright scholars characterize the anticircumvention rule[s] . . . as a ‘paradigm shift’ away from a three-century-old focus on the activities of individuals who make unauthorized copies.”); L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33, 52 (2002) (“The DMCA thus represents a remarkable change from the pro-learning, pro-public domain, and pro-access copyright the Founders empowered Congress to provide.”); Joshua Schwartz, *Thinking Outside the Pandora’s Box: Why the DMCA Is Unconstitutional Under Article I, § 8 of the U.S. Constitution*, 10 J. TECH. L. & POL’Y 93, 100 (2005) (“The DMCA adds a completely new class of violation that seems at odds with copyright as a legal principle.”).

37. See, e.g., Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 590 (2006) (noting that the DMCA provided “new rights” intended to update copyright law in the wake of digital technology); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1096, 1105–06 (2003) (contending that the DMCA confers paracopyright, which constitutes a separate set of rights that is different from copyright and discussing the right to access as an example of a new right created under the DMCA); Stacey L. Dogan & Joseph P. Liu, *Copyright Law and Subject Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. 203, 218 (2005) (asserting that the DMCA created “new rights” and hindered the courts’ ability to adapt those rights to changing markets and technology).

38. See Schwartz, *supra* note 36, at 100.

39. See, e.g., Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1319 (2003) (noting that copyright owners can use EULAs to foreclose access to their works while contractually precluding fair use or the use of facts or public domain materials); Lydia Pallas Loren, *Slaying the Leather-Winged Demons in the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse*, 30 OHIO N.U. L. REV. 495, 496 (2004) (“Through these [licensing agreements], copyright owners increasingly are attempting to assert rights that are not, in fact, consistent with the rights that these copyright and content owners possess.”). Instead, this Comment posits that the anticircumvention provisions do not create new rights for digital copyright owners but parallel those exclusive rights granted in § 106 of the Copyright Act and serve as the remedial counterpart to the § 106 exclusive rights granted copyright owners in the Copyright Act.

40. See Jacqueline Lipton, *The Law of Unintended Consequences: The Digital Millennium Act and Interoperability*, 62 WASH. & LEE L. REV. 487, 490 (2005); see also Morris, *supra* note 7, at 266 (“Courts should not allow software creators to use adhesion contracts to create a zone of protection around their products far wider than both traditional copyright law and the DMCA allows.”).



tion of those TPMs. For example, in *Universal Studios, Inc. v. Reimerdes*,<sup>41</sup> the plaintiffs, eight major U.S. motion picture studios, brought an action against computer hackers under the anticircumvention provisions.<sup>42</sup> The plaintiffs in that case distribute motion pictures for home use via DVD.<sup>43</sup> The DVDs contain a copy of the motion picture in digital form.<sup>44</sup> That copy is protected by an encryption system called CSS.<sup>45</sup> CSS-encrypted DVDs can only be viewed on players and computer drives that are equipped with licensed technology that allows the devices to decrypt and play, but not copy, the movies.<sup>46</sup> The defendants, a group of computer hackers, developed a computer program, called DeCSS, that could circumvent the CSS encryption software.<sup>47</sup> The hackers promptly posted the program on their website, making it widely available for download.<sup>48</sup> The plaintiffs brought the action to enjoin the defendants from posting the program on their website.<sup>49</sup> The defendants argued that their actions did not violate the DMCA.<sup>50</sup> The court disagreed and ultimately ruled in favor of the plaintiffs.<sup>51</sup> The court reasoned that the defendants violated the anticircumvention provisions because the DeCSS program was clearly a means of circumventing a technological measure, the CSS encryption system, and defendants' development and posting of the program did not qualify as an exception to the anticircumvention provisions.<sup>52</sup>

In *Davidson & Associates v. Jung*,<sup>53</sup> the plaintiffs, conducting business under the name Blizzard Entertainment ("Blizzard"), developed and sold software games for PCs.<sup>54</sup> Blizzard created "Battle.net," which was a free online service exclusively available to persons who purchased Blizzard games.<sup>55</sup> In order to play Blizzard games, purchasers had to agree to Blizzard's EULA and terms of use ("TOU"),

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41. 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

42. *Id.* at 303.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 304. The defendants also argued that the DMCA is unconstitutional because DeCSS is constitutionally protected expression that the DMCA prohibits them from engaging in. *Id.* at 327. The court also rejected this argument. *Id.* at 332.

51. *Id.* at 346.

52. *Id.* at 317–24.

53. 422 F.3d 630 (8th Cir. 2005). The *Jung* case is discussed in more detail *infra* Part III.A.

54. *Id.* at 633.

55. *Id.*

both of which prohibited reverse engineering.<sup>56</sup> Battle.net was initially well received, but after some time, users began to experience difficulties using the site and became frustrated with the service.<sup>57</sup> Consequently, a group of programmers created “Bnetd.org” and made it available to the public as an alternate forum to play Blizzard games.<sup>58</sup> The programmers used reverse engineering to create software that was compatible with that of Battle.net, since without that compatibility, Bnetd.org would not be able to serve as a functional alternative to Battle.net.<sup>59</sup> Blizzard brought the action, alleging that programmers infringed Blizzard’s copyright and violated the anticircumvention provisions, *inter alia*.<sup>60</sup> The court held that the computer programmers violated the anticircumvention provisions when they reverse engineered Blizzard’s software program in order to create Bnetd.org.<sup>61</sup> The *Jung* case is discussed in more detail in Part IV of this Comment.

Courts also apply the anticircumvention provisions to uses of circumvention software in situations that initially do not appear to warrant application of the DMCA and that likely were not anticipated by Congress when it enacted the DMCA.<sup>62</sup> For example, *Lexmark International, Inc. v. Static Control Components, Inc.*<sup>63</sup> involved a dispute concerning computer programs embedded in printer ink cartridges.<sup>64</sup> In that case, Lexmark, a manufacturer of printers and printer ink cartridges, sued Static Control Components (“SCC”), a remanufacturer of replacement cartridges, for circumventing a TPM that Lexmark put in place to control access to software contained in its T520/522 and T620/622 printer ink cartridges.<sup>65</sup>

Lexmark’s T-Series printers use computer programs to control different functions of the printer and to monitor operation of its printer ink cartridge.<sup>66</sup> The computer programs at issue in the case

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56. *Id.* at 634–35.

57. *Id.* at 635.

58. *Id.*

59. *Id.* at 635–36.

60. *Id.* at 637.

61. *Id.* at 642.

62. 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1:50 (3d ed. 2013).

63. 253 F. Supp. 2d 943 (E.D. Ky. 2003), *vacated*, 387 F.3d 522 (6th Cir. 2004).

64. *Id.* at 947.

65. *Id.* Lexmark also sued for copyright infringement. *Id.* However, as this Comment focuses on the DMCA’s anticircumvention provisions, only Lexmark’s claim alleging violation of those provisions will be addressed.

66. *Id.* at 948.

were Lexmark's Printer Engine Program and Toner Loading Programs.<sup>67</sup> Lexmark employs an authentication sequence to protect its Printer Engine Program and Toner Loading Programs and to prevent unauthorized ink cartridges from being used with its T-Series printers.<sup>68</sup> The sequence is initiated when the ink cartridge is loaded into the printer, when the printer is turned on, or when the printer is opened and closed.<sup>69</sup> Lexmark obtained federal copyright registration for both sets of programs.<sup>70</sup>

SCC manufactures and sells components that are used to remanufacture ink cartridges for Lexmark's T-Series printers.<sup>71</sup> SCC's SMARTEK microchip, which served as a substitute for the Lexmark microchip found on Lexmark ink cartridges, was one such component and was the source of the alleged anticircumvention violations at issue.<sup>72</sup> SCC sold one SMARTEK chip to be used with Lexmark's T520/522 ink cartridges and another to be used with Lexmark's T620/622 ink cartridges.<sup>73</sup> SCC acknowledged that it used exact copies of Lexmark's Toner Loading Programs in its SMARTEK chips and that the SMARTEK chip was designed specifically to circumvent Lexmark's authentication sequence.<sup>74</sup> Lexmark moved for a preliminary injunction against SCC, which the district court ultimately granted.<sup>75</sup>

One question before the district court was whether Lexmark had demonstrated a likelihood of success on the merits of its anticircumvention claims.<sup>76</sup> The district court concluded that Lexmark had met its burden.<sup>77</sup> The district court reasoned that Lexmark's authentication sequence effectively controlled access to both its Printer Engine Program and Toner Loading Programs.<sup>78</sup> The district court posited

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67. *Id.* The Printer Engine Program is located in the T-Series printers and controls the printer's various functions, including paper feed, paper movement, and motor control. *Id.* The Toner Loading Programs are embedded in microchips that are attached to the ink cartridges used in the T-Series printers and display a "toner low" alert on the printer screen when needed. *Id.*

68. *Id.* at 952.

69. *Id.*

70. *Id.* at 948–49.

71. *Id.* at 955.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 974.

76. *See id.* at 966–71. The other question before the court was whether Lexmark demonstrated a likelihood of success on the merits of its copyright infringement claim. *Id.* at 957–66.

77. *See id.* at 974.

78. *Id.* at 952–53.

that if the authentication sequence failed, the printer would not recognize the ink cartridge as an authorized cartridge and the sequence would block access to the Printer Engine Program and the Toner Loading Programs embedded in the printer and the ink cartridge, respectively.<sup>79</sup> The district court also noted that SCC admitted designing its SMARTEK chips to circumvent Lexmark's authentication sequence and concluded that the SMARTEK chips, in fact, do so.<sup>80</sup> Finally, the district court eliminated fair use as a viable defense to SCC's circumvention of Lexmark's access-control TPM.<sup>81</sup> Having concluded that Lexmark's authentication sequence effectively controlled access to its computer programs and that SCC willfully circumvented the authentication sequence, the district court ruled in favor of Lexmark.<sup>82</sup> However, the decision was subsequently reversed on appeal.<sup>83</sup>

The circuit court in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*<sup>84</sup> also dealt with the application of the anticircumvention provisions to a unique product: garage door openers.<sup>85</sup> In that case, the Chamberlain Group ("Chamberlain"), a manufacturer of garage door openers, accused Skylink Technologies ("Skylink"), a manufacturer of universal remote controls, of violating the anti-trafficking clause of the anticircumvention provisions.<sup>86</sup> Chamberlain, however, neither alleged copyright infringement nor established how the access that Skylink's universal transmitter granted users facilitated infringement of any right that the 1976 Copyright Act protects.<sup>87</sup> These omissions ultimately proved to be fatal in Chamberlain's case.<sup>88</sup>

When users purchase a garage door opener system, they receive both a hand-held transmitter and the mechanism that opens the garage door, which is mounted in the homeowner's garage.<sup>89</sup> The opening mechanism includes both a receiver containing software that

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79. *Id.*

80. *Id.* at 968–69.

81. *Id.* at 960–62.

82. *Id.* at 974.

83. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 387 F.3d 522, 546–47, 551 (6th Cir. 2004) (vacating the district court's ruling on grounds that the district court misconstrued the definition of "access" under the anticircumvention provisions).

84. 381 F.3d 1178 (Fed. Cir. 2004).

85. *Id.* at 1183.

86. *Id.*

87. *Id.* at 1204.

88. *See id.* ("Chamberlain . . . has failed to show . . . the necessary fifth element of its claim, the critical nexus between access and protection.")

89. *Id.* at 1183.

processes the incoming signal and a motor to open or close the garage door.<sup>90</sup> Users can purchase replacement or spare transmitters in the aftermarket and have long been able to purchase universal transmitters that can be programmed to operate any garage door opening system.<sup>91</sup> Chamberlain did not restrict consumers' ability to purchase universal transmitters.<sup>92</sup>

The technology at issue was Chamberlain's Security+ line of garage door openers and Skylink's Model 39 universal transmitter.<sup>93</sup> Chamberlain's Security+ garage door openers use a "rolling code" computer program that constantly alters the transmitter signal required to open the garage door.<sup>94</sup> Skylink's Model 39 universal transmitter allows users to operate their Security+ garage door openers even though the universal transmitter does not employ rolling code.<sup>95</sup> Chamberlain contended that Skyline's universal transmitter allows unauthorized users to circumvent the security that exists in rolling code and that this feature of Skylink's universal transmitter constitutes a violation of the anti-trafficking prohibition contained in the anticircumvention provisions.<sup>96</sup>

The court stated that a plaintiff alleging violation of the anti-trafficking clause must establish:

- (1) ownership of a valid copyright on a work, (2) effectively controlled by a technological measure, which has been circumvented, (3) that third parties can now access (4) without authorization, in a manner that (5) infringes or facilitates infringing a right protected by the Copyright Act, because of a product that (6) the defendant either (i) designed or produced primarily for circumvention; (ii) made available despite only limited commercial significance other than circumvention; or (iii) marketed for use in circumvention of the controlling technological measure.<sup>97</sup>

The court agreed with the district court's conclusion that Chamberlain failed to establish a lack of authorization because Chamberlain never alleged copyright infringement.<sup>98</sup> The court further noted that Chamberlain did not demonstrate the existence of a protected right

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1203.

98. *Id.* at 1204.

because Chamberlain never explained how Skylink’s universal transmitter facilitated the infringement of a right protected under the 1976 Copyright Act.<sup>99</sup> Additionally, the court reasoned that the customers were immune from circumvention liability because, pursuant to the 1976 Copyright Act, they were simply using the copyrighted software contained in the garage door openers that they purchased.<sup>100</sup> The court ultimately held that absent allegations of copyright infringement and without any instances of prohibited circumvention, Skylink could not be liable for trafficking in circumvention technology.<sup>101</sup>

## II. PREEMPTION

Preemption issues arise in the context of the anticircumvention provisions when digital copyright owners draft EULAs, which are governed mostly by state law, with provisions that expand their rights beyond the limits prescribed in the federal copyright law.<sup>102</sup> Thus, state contract laws that permit copyright owners to establish and enforce such EULAs potentially conflict with federal law.<sup>103</sup> The doctrine of preemption provides that, generally, where state law conflicts with federal law, the federal law preempts the state law.<sup>104</sup> The justification for preemption is based in the Supremacy Clause of the U.S. Constitution, which mandates that the Constitution is “the supreme Law of the Land” and requires that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>105</sup> In addition, preemption protects federal law by ensuring that states do not remove or alter rights granted by federal law or create rights that cannot coexist with the federal law.<sup>106</sup>

There are two types of preemption: statutory preemption (or express preemption) and constitutional preemption (or Supremacy Clause preemption).<sup>107</sup> Constitutional preemption also includes two

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99. *Id.*

100. *Id.*

101. *Id.*

102. Morris, *supra* note 7, at 258.

103. *Id.*

104. *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964) (“When state law touches upon the area of these federal statutes, it is ‘familiar doctrine’ that the federal policy ‘may not be set a naught, or its benefits denied’ by the state law.”).

105. U.S. CONST. art. VI, cl. 2.

106. *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 616 (S.D.N.Y. 2010).

107. *See* 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 18:60 (2013).

subcategories: field and conflict preemption.<sup>108</sup> This Comment will evaluate three EULAs—one that comports with the anticircumvention provisions, one that conflicts with them, and one that comports in part but conflicts in part—using only the constitutional conflict preemption analysis. Statutory preemption is beyond the scope of this Comment. However, an overview of statutory preemption is helpful to understand the various avenues through which a state law can be preempted.

### A. Statutory Preemption

Section 301(a) of the Copyright Act of 1976 provides that a state law is preempted if three conditions are met: (1) the right must be in a “work of authorship that is fixed in a tangible medium of expression,” (2) the work of authorship must fall within the “subject matter of copyright” as specified in §§ 102 and 103 of the 1976 Copyright Act, and (3) the right conferred by the state law must be “equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”<sup>109</sup> The drafters of § 301(a) desired to abolish the two-level copyright system that had been in effect since the passage of the very first copyright statute in 1790.<sup>110</sup> Under the bifurcated framework of the 1790 Copyright Act, unpublished works were protected under the common law,<sup>111</sup> while published works were protected under the statute, so long as the author complied with the notice requirement and other procedural formalities.<sup>112</sup> The drafters of the 1976 Copyright Act characterized the system as “anachronistic, uncertain, impractical, and highly complicated” and determined that replac-

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108. *See id.*

109. 17 U.S.C. § 301(a) (2012).

110. H. R. REP. NO. 94-1476, at 129 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5745, 1976 WL 14045; *see also* Copyright Act, 17 U.S.C. § 301(a) (“[A]ll legal or equitable rights . . . in works of authorship that are fixed in a tangible medium of expression . . . whether published or unpublished, are governed exclusively by this title.”) (emphasis added).

111. *See* *Wheaton v. Peters*, 33 U.S. 591, 595 (1834). In *Wheaton v. Peters*, the Court noted that an author of an unpublished manuscript can seek relief against someone who takes his manuscript and makes copies in order to profit from its publication. *Id.*; *see also* 1-1 NIMMER ON COPYRIGHT § 1.01 (2013) (“In the first significant copyright decision, *Wheaton v. Peters*, the Supreme Court, in an aside, acknowledged the existence of the state law of common law copyright in unpublished manuscripts.”).

112. H.R. REP. NO. 94-1476, at 129. Under the 1790 Act, works were not afforded copyright protection unless the author published the work, gave public notice of copyright protection, registered the work, and deposited a copy of the work with a designated entity. COHEN ET AL., *supra* note 3, at 145.

ing the dual system with a single federal system would promote consistent and uniform application of the copyright law.<sup>113</sup>

Statutory preemption has a rather simple application in those cases involving a single common law copyright issue.<sup>114</sup> Before the 1976 Copyright Act was passed, causes of action for copyright infringement could be established under the common law.<sup>115</sup> However, once the 1976 Copyright Act was passed, any disputes involving an original work of authorship fixed in a tangible medium of expression that fell within the subject matter of copyright specified in the Act and implicating rights equivalent to those enumerated in the Act had to be resolved under the statute.<sup>116</sup> There was no longer a common law copyright action for such disputes.<sup>117</sup> Consequently, the complainant had to seek relief under federal law instead of state law.<sup>118</sup>

Statutory preemption has a more complex application when state law doctrines other than common law copyright are involved.<sup>119</sup> It is difficult to sever related state doctrines for purposes of preemption because common law copyright is so pervasive in state jurisprudence.<sup>120</sup> For example, the common law right of privacy is a branch of the common law right to first publication.<sup>121</sup> Prior to the 1976 Copyright Act, if an author were to write a diary, distribute it among friends, and then discover someone published the diary without permission, he would have a cause of action for common law copyright infringement or for invasion of privacy.<sup>122</sup> However, the diary would be his original work of authorship and would be fixed in a tangible medium expression.<sup>123</sup> Furthermore, his common law rights against reproduction and distribution would be equivalent to the reproduction and distribution rights outlined in the 1976 Copyright Act.<sup>124</sup> Thus, § 301(a) today may preclude him from bringing both the common law copyright claim and the privacy claim.<sup>125</sup>

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113. H.R. REP. NO. 94-1476, at 129.

114. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.2 (3d ed. Supp. 2013).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*



B. Constitutional Preemption

Constitutional preemption is derived from the Supremacy Clause of the U.S. Constitution.<sup>126</sup> Before § 301(a) of the 1976 Copyright Act became effective on January 1, 1978, state statutory laws that dealt with copyright could only be preempted by the Supremacy Clause.<sup>127</sup> Even with the existence of the § 301(a) preemption provision, constitutional preemption continues to occupy an integral role in state law preemption analysis as it relates to copyright.<sup>128</sup> The mere existence of a preemption statute does not prevent further application of constitutional preemption principles.<sup>129</sup> In instances where statutory preemption does not apply, such as when one or more of the requirements specified in § 301(a) have not been met, constitutional preemption provides the framework necessary to determine if federal law should nevertheless control.<sup>130</sup> Hence, a state law that is not expressly preempted by § 301(a) should still be subject to constitutional preemption analysis because its operation may yet frustrate the principles that undergird the federal copyright system.<sup>131</sup>

There are three situations in which constitutional preemption analysis arises: (1) when Congress explicitly states that a certain state law is preempted (statutory or express preemption), (2) when Congress has regulated a certain field so comprehensively that it can be inferred that Congress has “left no room” for state regulation in that

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126. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 18:59 (2006).

127. PATRY, *supra* note 126. State common law, on the other hand, remains functional in limited areas. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8C.02 (2013).

128. PATRY, *supra* note 126.

129. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000).

130. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (noting that the Court has previously found state laws preempted in the absence of a federal preemption provision); see also *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989) (discussing preemption in the absence of an express preemption provision where the state law occupied a field that Congress intended to regulate exclusively); *Florida Wine & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963) (finding preemption in the absence of an express preemption provision where it was impossible to adhere to both the state and federal law); *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (finding preemption in the absence of an express preemption provision where the state law prevented the federal law from realizing its purpose); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][3][a] (“[E]ven apart from Section 301, the general proposition pertains in copyright law, . . . that a state law is invalid that ‘stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.’”).

131. *Morris*, *supra* note 7, at 262.

area (field preemption), and (3) where the state law conflicts with the federal law (conflict preemption).<sup>132</sup> Conflict preemption can be further broken down into two subcategories: when the state law acts as a barrier to the fulfillment of Congress's purposes and objectives (frustration of purpose), or when it is physically impossible to abide by both the state and federal laws (conflict of obligation).<sup>133</sup> However, when applied, the doctrine of preemption is not always easily confined to these discrete categories.

C. The *Goldstein* Case: Demonstrating the Nexus Between Field Preemption and Conflict Preemption

In practice, the three types of constitutional preemption are not so easily separable. For example, field preemption and conflict preemption may overlap because a finding of conflict preemption may turn on the existence of field preemption.<sup>134</sup> The relevant question is whether Congress intended for states to play a role in regulating the field.<sup>135</sup> If no, then a state law that occupies the field that was meant exclusively for congressional regulation inherently conflicts with the federal law.<sup>136</sup> If yes, then the state law may be able to coexist with the federal law and thus does not automatically conflict with the federal law.<sup>137</sup> However, in order to determine whether a state law addressing copyright encroaches on Congress's power to regulate copyright, the required inquiry is whether the grant of congressional power to regulate copyright strips the states of their ability to exercise concurrent powers to enact their own copyright laws.<sup>138</sup>

The *Goldstein* case illustrates the complexities of preemption analysis. The Supreme Court in *Goldstein v. California* noted that Congress does not hold exclusive power to regulate copyright.<sup>139</sup> In *Goldstein*, the petitioners appealed their conviction under a California

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132. NIMMER & NIMMER, *supra* note 130, § 1.01[B][3][a].

133. *Id.*

134. *See, e.g., Goldstein v. California*, 412 U.S. 546, 552–54 (1973) (asking whether Congress intended to be the exclusive body regulating copyright, a question of field preemption, in order to determine whether a California statute conflicted with federal copyright law, a question of conflict preemption).

135. *See, e.g., id.* at 571 (1973) (concluding that the California statute at issue was not preempted because it did not intrude into an area that Congress has reserved for its exclusive regulation).

136. *Id.* at 554–55 (quoting THE FEDERALIST NO. 32, at 243 (Alexander Hamilton) (B. Wright ed. 1961)).

137. *See id.* at 559.

138. NIMMER & NIMMER, *supra* note 130, § 1.01[A].

139. *Goldstein*, 412 U.S. at 553.

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statute that prohibited the pirating of recordings and criminalized such conduct.<sup>140</sup> Petitioners contended, inter alia, that the California statute conflicted with federal law and was thus preempted.<sup>141</sup> At the time, the California statute did not explicitly offer copyright protection for recordings.<sup>142</sup> Petitioners claimed that Congress intended to establish a uniform law throughout the United States and that as part of this federal regime, Congress intended to allow individuals to copy works that were not protected under federal copyright.<sup>143</sup> They argued that in its effect, the California law prohibits the copying of uncopyrighted federal works and thus directly conflicts with federal law.<sup>144</sup> The Court began by noting that while the case was pending at the state court level, the federal copyright law was amended to include copyright protection for sound recordings.<sup>145</sup> However, the Court determined that the amendments were irrelevant in the case, since they only applied prospectively to recordings fixed on or after February 15, 1972, and before January 1, 1975.<sup>146</sup>

The Court ultimately held that the California statute was not preempted.<sup>147</sup> Consequently, petitioners were guilty of pirating under the California statute.<sup>148</sup> To begin, the Court reflected on the manner in which it had previously construed state power.<sup>149</sup> The Court specified three situations in which a state would be completely stripped of its power to enact copyright statutes: (1) where the Constitution expressly granted exclusive authority to Congress, (2) where the Constitution simultaneously grants authority to Congress and divests the states of that same authority, and (3) where the Constitution grants authority to Congress that would be in direct conflict if a similar authority would be granted to the states.<sup>150</sup> The Court quickly determined that the first two scenarios were not obstacles to state enactment of copyright laws, since the Copyright Clause in the Consti-

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140. *Id.* at 548.

141. *Id.* at 551.

142. *Id.* at 551–52.

143. *Id.* at 551.

144. *Id.*

145. *Id.* at 551–52.

146. *Id.* at 552.

147. *Id.* at 571.

148. *Id.*

149. *Id.* at 552–53.

150. *Id.* at 552–53. The Court here was not defining the various types of preemption, but instead was specifying those situations in which a state law would be necessarily preempted. *See id.*

tution neither grants Congress the exclusive authority to issue copyrights nor prohibits the states from exercising that power.<sup>151</sup>

The Court focused its inquiry on the third situation, which implicates the conflict preemption analysis.<sup>152</sup> Relying upon *Cooley v. Board of Wardens*,<sup>153</sup> the Court drew a parallel between the grant of power under the Copyright Clause involved in the instant case and the grant of power under the Commerce Clause at issue in *Cooley*.<sup>154</sup> Adopting the rationale of the Court in *Cooley*, the *Goldstein* court reasoned that absent an exclusive grant of congressional power expressly made in the Constitution, such an exclusive grant can only be inferred if “the subjects of this power are in their nature national, or admit of only one uniform system, or plan of regulation, [so that they] may justly be said to be of such a nature as to require exclusive legislation by Congress.”<sup>155</sup> The Court concluded that, although the purpose of the Copyright Clause was to facilitate the grant of rights that are national in breadth, there is no indication that writings are a national matter or subject to the exclusive legislation of Congress.<sup>156</sup> Furthermore, the Court determined that conflicts are not guaranteed to arise when states grant copyright protection.<sup>157</sup> With respect to the petitioners’ conflict preemption claims, the Court determined that the California statute did not conflict with federal law because Congress, by passing the Copyright Act of 1909, did not divest sound recordings of copyright protection.<sup>158</sup> Finally, the Court determined that in passing the 1909 Copyright Act, Congress did not preempt state control over unpublished works that may be considered writings.<sup>159</sup>

The *Goldstein* case established the principle that the power to grant copyright protection does not vest exclusively in the federal government.<sup>160</sup> Thus, a state holds concurrent power to do so as long as its exercise of that power does not conflict with federal law.<sup>161</sup> In

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151. *Id.* at 553.

152. *Id.* at 553–60.

153. 53 U.S. 299, 318–19 (1851).

154. See *Goldstein*, 412 U.S. at 553–54; see also NIMMER & NIMMER, *supra* note 130, § 1.01[A] (“Analogizing to the grant to Congress of the commerce power, the Court looked to the line of cases initiated by the leading decision of *Cooley v. Board of Wardens*.”).

155. See *Goldstein*, 412 U.S. at 553–54 (quoting *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851) (internal quotation marks omitted)).

156. *Id.* at 556–57.

157. *Id.* at 559.

158. *Id.* at 566.

159. *Id.* at 567.

160. NIMMER & NIMMER, *supra* note 130, § 1.01[A].

161. *Id.* § 1.01[B].

reaching its final holding, the *Goldstein* court applied both field preemption and conflict preemption analysis because the two concepts, in this context, were virtually inseparable.<sup>162</sup>

### III. DETERMINING WHETHER A EULA FRUSTRATES THE PURPOSE OF THE ANTICIRCUMVENTION PROVISIONS

The anticircumvention provisions may preempt EULAs through frustration of purpose preemption. Express preemption analysis does not apply because § 301(a) of the Copyright Act of 1976 expressly preempts certain state copyright laws, not the anticircumvention provisions. Furthermore, there is no inherent conflict of obligation since it is possible for digital copyright holders to draft EULAs with provisions that specify the rights that they already possess under copyright law and thus comport with both state law and federal law simultaneously.<sup>163</sup>

Although it seems simple to apply a frustration of purpose analysis to the EULA at issue, such a straightforward application has proved more workable in theory than in practice. As *Goldstein* demonstrates, the courts have utilized very complex and nuanced lines of reasoning that implicate every area of preemption analysis in their attempt to grapple with the complexities of preemption.<sup>164</sup> It is necessary to outline an explicit three-prong methodology in order to focus the inquiry on the frustration of purpose analysis.

The first step is to examine the federal statute on its face. What is Congress' stated purpose? What goals are being advanced through the actual text of the statute? The second step is to determine the

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162. See *Goldstein*, 412 U.S. at 571. The *Goldstein* Court noted that the California statute at issue did not conflict with federal law because the federal government has given states room to exercise their power to regulate copyright. *Id.* at 556–57. The Court also addressed the other types of preemption in its reasoning. See *id.* at 560, 570 (noting that the Copyright Clause of the Constitution does not expressly proscribe states from granting copyrights and that Congress left the category of “Writings” unattended). For a brief outline of the Court’s reasoning on this point, see *id.* at 546, 556–57.

163. An example of these types of agreements are open source licenses. Open source licenses are licenses that allow software to be freely used, modified, and shared. OPEN SOURCE INITIATIVE, *Open Source Licenses*, <http://opensource.org/licenses> (last visited Nov. 20, 2013).

164. In *Goldstein*, the Court ultimately determined that the California law did not conflict with the Federal copyright law. *Goldstein*, 412 U.S. at 571. However, the Court did not follow a particular conflict preemption analysis, i.e., frustration of obligation or frustration of purpose. Instead, the Court reasoned that the California law does not conflict with the federal law because the federal law did not preempt the California law, either expressly or by occupying the field. *Id.* at 560–71. The Court essentially concluded that there is no conflict preemption since there is no express or field preemption. *Id.* at 571.

congressional purpose behind the act. This second prong should employ an investigation into the congressional record to determine the primary motivations behind the enactment of the legislation. The areas to be examined include, but are not limited to, House and Senate reports, congressional findings, the context surrounding the act's passage, and the desired ends to be achieved by the act as well as explicit statements of the purpose and motivations behind the act. Indeed, express statements of purpose are immensely helpful here, but the idea is to conduct a comprehensive review of the record so that motivations contained in the subtext of the act are also unearthed. However, such an approach is not without its shortcomings. Given that the most reliable source of congressional intent is the statute itself, this step should only be reached where a facial examination of the act yields inconclusive results, such as where the statute on its face is silent as to legislative intent or the text of statute is so ambiguous as to render congressional purpose worthy of myriad interpretations.

The third and final inquiry should ask whether the state law frustrates the purpose of the federal law, and if so, how it frustrates the purpose of the federal law. This third prong should involve a determination of not only the intended effects of the state law but also its practical effects and how those effects interact with the federal law. Relevant questions include: Will the state law, in theory, prove to be an obstacle in the achievement of federal objectives? Will it be an obstacle to those objectives in practice?

A. What is the purpose of the anticircumvention provisions and how do they relate to the 1976 Copyright Act?

Congress enacted the DMCA to ensure that the rights of digital copyright owners would remain protected in light of technological advances that the 1909 Copyright Act and its subsequent amendments, did not foresee.<sup>165</sup> The anticircumvention provisions exist to address

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165. See S. REP. NO. 105-190, at 2 (1998); see also H.R. REP. NO. 105-551, pt. 1, at 9 (1998) ("With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works."); H.R. REP. NO. 105-551, pt. 2, at 21 (1998) ("In this [digital revolution], the development of new laws and regulations will have a profound impact on the growth of electronic commerce and the Internet."). The Copyright Act was amended several times following its original enactment in 1909. H.R. REP. NO. 94-1476, at 47 (1976). However, Congress found that the subsequent amendments barely changed the 1909 Copyright Act, and thus, the copyright regime needed to be updated to deal with the unique and unanticipated issues of the current digital age. *Id.* But see H.R. REP. NO. 105-551, pt. 2, at 86-87 ("[W]e think the 1976 Copyright Act is sufficiently flexible to deal with changing technology.") (statement of Rep. Scott Klug & Rep. Rick Boucher).

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conduct that was not anticipated by traditional copyright, namely, the creation of computer programs that consumers utilize to gain unauthorized access to or engage in prohibited use of copyrighted digital works.<sup>166</sup> Accordingly, they appear to create a right that did not exist at the inception of copyright protection.<sup>167</sup> However, the provisions merely incorporate the exclusive rights conferred in § 106 of the 1976 Copyright Act and supply a remedy for violation of those rights that is applicable to digital copyrighted works.<sup>168</sup> For example, § 501(a) of the 1976 Copyright Act dictates that anyone who engages in unauthorized importation of copyrighted goods is an infringer of those goods.<sup>169</sup> This is based on the exclusive § 106(3) distribution right.<sup>170</sup> Similarly, the anticircumvention provisions prohibit consumers from circumventing TPMs and trafficking in technology designed to circumvent TPMs.<sup>171</sup> This seems to also be founded on the exclusive § 106(3)

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166. Congress refers to this as “paracopyright.” H.R. REP. NO. 105-551, pt. 2, at 24–25. By regulating conduct that had originally fallen outside of the zone of traditional copyright, the DMCA’s anticircumvention provisions are entering “unchartered . . . domain.” *Id.* Even though Congress used “paracopyright” in a purely descriptive manner, the term has acquired a negative connotation among critics of the DMCA. *See, e.g.*, Haimo Schack, Symposium, *Anti-Circumvention Measures and Restrictions in Licensing Contracts as Instruments for Preventing Competition and Fair Use*, 2002 U. ILL. J.L. TECH. & POL’Y 321, 326–27 (2002) (arguing that the DMCA is paracopyright that was the result of the copyright industry’s forceful lobbying efforts that were put forth in order to enlarge the monopoly of content providers at the expense of the public domain); Ryan J. Shernaman, *The Digital Millennium Copyright Act: The Protector of Anti-Competitive Business Models*, 80 UMKC L. REV. 545, 546 (2011) (“The notion of a paracopyright introduced by the DMCA . . . is important to the understanding of how the DMCA went beyond the bounds of copyright legislation.”). For an overview of the DMCA’s anticircumvention provisions, *see id.*; *see also* COHEN ET AL., *supra* note 3, at 661–63 (discussing circumvention of technological protections in the context of the DMCA); PAUL GOLDSTEIN & R. ANTHONY REESE, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 834–35 (Rev. 6th ed. 2010) (outlining the DMCA’s anticircumvention provisions).

167. *See* H.R. REP. NO. 105-551, pt. 2, at 20 (referring to the grant to copyright owners of a *new* right against circumvention) (emphasis added).

168. *See also* R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 620 (2003) (stating that the anticircumvention provisions provide copyright owners who employ technological protection measures (“TPMs”) with remedies against the circumvention of those TPMs and against suppliers of devices or technologies that do so effectively). *Compare* 17 U.S.C. § 106 (2012) (granting copyright owners exclusive rights that reflect copyright owners’ ability to control the use of and access to their copyrighted works), *with* 17 U.S.C. § 1201 (prohibiting the circumvention and trafficking in technology designed to circumvent TPMs that digital copyright owners use to control consumers’ access to and use of their copyrighted digital works).

169. 17 U.S.C. § 501(a).

170. *See id.* § 106(3). Intuitively, a person who imports a copyrighted work without the permission of the copyright owner is impinging on the copyright owner’s exclusive right to control how the work is distributed and determine who receives it.

171. H.R. REP. NO. 105-551, pt. 2, at 20. In fact, circumvention of TPMs is considered the equivalent of breaking into a locked room to obtain a copy of a book. *Id.* pt. 1, at 17.

distribution right as well as the § 106(1) reproduction right, § 106(2) right to create derivative works, and § 106(4) performance right.

Moreover, by reinforcing the exclusive § 106 right provided in the 1976 Copyright Act, the anticircumvention provisions simultaneously incorporate the limitations that accompany those rights. For example, § 109(a) of the 1976 Copyright Act sets forth the first sale doctrine, which limits a copyright owner's exclusive rights to distribute his or her work<sup>172</sup> and the anticircumvention provisions limit the reach of the prohibition against TPMs by providing a reverse engineering exception.<sup>173</sup>

The first sale doctrine provides that an individual who purchases or otherwise lawfully obtains a copyrighted work is free to dispose of that work as he or she deems fit.<sup>174</sup> The reverse engineering exception contained in the anticircumvention provisions states that an individual who purchases or otherwise lawfully obtains a software program is free to reverse engineer that work in order to make it interoperable with other programs.<sup>175</sup> Taken together, the two sets of provisions, and their respective limitations, seem to correlate: the DMCA's prohibition on circumventing TPMs reflects the 1976 Copyright Act's prohibition on unauthorized importation, as both draw from the copyright owner's exclusive right to control how and to whom the copyrighted work is distributed.<sup>176</sup> Moreover, the DMCA's reverse engineering exception is similar to the 1976 Copyright Act's first sale doctrine in that both qualify the copyright owner's exclusive distribution right by limiting the extent to which the copyright owner can dictate who may gain access to the copyrighted work and under what circumstances they may do so.<sup>177</sup>

A recent Supreme Court case, *Kirtsaeng v. John Wiley & Sons, Inc.*,<sup>178</sup> illustrates the relationship between provisions that confer rights on copyright owners and those that incorporate those rights

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172. 17 U.S.C. § 109. The first sale doctrine provides, "Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." *Id.* Section 106(3) grants the copyright owner the exclusive right to distribute his or her copyrighted work. *Id.* § 106(3).

173. *See* 17 U.S.C. § 1201(f).

174. *See id.* § 109.

175. *See id.* § 1201(f).

176. *See id.* § 602(a)(1).

177. *See id.* § 109(a).

178. 133 S. Ct. 1351 (2013).



while placing limitations on them. The Supreme Court in *Kirtsaeng* held that the importation into the United States and subsequent resale of goods that were lawfully obtained and manufactured abroad was not copyright infringement.<sup>179</sup> The Court reasoned that these actions fell under the first sale doctrine, which is codified in § 109 of the 1976 Copyright Act.<sup>180</sup> The petitioner, Supap Kirtsaeng (“Kirtsaeng”), was a citizen of Thailand who moved to the United States to pursue a degree in mathematics.<sup>181</sup> While he was studying, he asked his friends and family in Thailand to purchase foreign editions of English-language textbooks at Thai book shops, which sold at low prices, and mail them to him in the United States.<sup>182</sup> Kirtsaeng then sold the books, reimbursed his family and friends, and kept the remainder as profit.<sup>183</sup>

The respondent, John Wiley & Sons, Inc. (“Wiley”), sued Kirtsaeng for copyright infringement, arguing that Kirtsaeng’s unauthorized importation of the books and his subsequent resale of those books infringed on Wiley’s exclusive right to distribution under § 106(3) and violated the prohibition against importation in § 602.<sup>184</sup> Kirtsaeng countered that the books were “lawfully made” and acquired.<sup>185</sup> Thus, he reasoned, the § 109(a) first sale doctrine permitted him to resell or otherwise dispose of the books however he wanted without prior permission from the copyright owner.<sup>186</sup> The district court held that Kirtsaeng was not sheltered by the first sale doctrine because the doctrine does not apply to “foreign-manufactured goods,” even if produced abroad with the copyright owner’s permission, and a split Second Circuit affirmed the district court’s decision.<sup>187</sup>

The Supreme Court granted certiorari and reversed the decisions below.<sup>188</sup> In reaching its decision, the Court examined the relation-

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179. *Kirtsaeng*, 133 S. Ct. at 1355–56.

180. *Id.* The first sale doctrine provides, “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a). Section 106(3) grants the copyright owner the exclusive right to distribute his or her copyrighted work. *Id.* § 106(3).

181. *Kirtsaeng*, 133 S. Ct. at 1356.

182. *Id.*

183. *Id.*

184. *Id.* at 1357.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1357, 1371.

ship between the § 109(a) first sale doctrine and the § 106(3) exclusive distribution right.<sup>189</sup> The Court noted that § 602(a)(1) of the 1976 Copyright Act<sup>190</sup> makes it clear that the unauthorized importation of a copyrighted work violates the owner's exclusive right to distribute the work *under* § 106(3).<sup>191</sup> The Court reasoned that by referring explicitly to the § 106(3) right to distribute, § 602(a)(1) incorporates the exclusive § 106(3) right and thus, also incorporates the limitations that accompany § 106, which are codified in §§ 107-122 and include the § 109(a) first sale doctrine.<sup>192</sup> Essentially, the § 602(a)(1) prohibition on the unauthorized importation of copyrighted goods solidifies the exclusive § 106(3) of distribution but also subjects it to the limitations on the exclusive rights of copyright owners.<sup>193</sup> These limitations include the first sale doctrine.<sup>194</sup>

The *Kirtsaeng* case illustrates how the 1976 Copyright Act employs internal remedies that are designed to reinforce both the rights it grants copyright owners and the limitations it places on those rights. Along a similar vein, the anticircumvention provisions incorporate remedies afforded copyright owners upon discovering that an individual has violated one or more of their exclusive rights as well as the limitations on those rights. Under the 1976 Copyright Act, a copyright owner can assert his or her exclusive right to distribute his or her copyrighted work under § 106(3) by suing an individual for importing copies of his or her work under § 501(a). Similarly, under the anticircumvention provisions, a copyright owner can assert his or her exclusive right to distribute his or her work by implementing TPMs and by suing an individual for circumventing those TPMs under § 1201. In

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189. *Id.* at 1355.

190. 17 U.S.C. § 602(a)(1) states that “[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the *exclusive right to distribute* copies or phonorecords under section 106, actionable under section 501.” (emphasis added).

191. *Kirtsaeng*, 133 S. Ct. at 1355 (emphasis added).

192. *Id.*

193. As stated previously, these limitations are codified in §§ 107–122 of the 1976 Copyright Act. These include fair use (§ 107), permission for limited library reproduction for archival purposes (§ 108), and, as was the issue in *Kirtsaeng*, the first sale doctrine (§ 109). *Kirtsaeng*, 133 S. Ct. at 1354.

194. *Kirtsaeng*, 133 S. Ct. at 1355. The Court employed this line of reasoning to decide *Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998). Although *Quality King* involved distribution in the United States of a copy that was initially manufactured in the United States then sent abroad and sold and *Kirtsaeng* involved copies of a book that was manufactured abroad, the *Kirtsaeng* Court employed the same reasoning because it found that the fair use doctrine also applies to copies of a copyrighted work lawfully manufactured abroad, as was the case here. *Id.* at 1368.

the same manner that the § 501(a) cause of action for unauthorized importation of copyrighted works reinforces a copyright owner's exclusive § 106(3) right to distribute his or her copyrighted work, which is limited by the § 109(a) first sale doctrine, the anticircumvention provisions also incorporate a copyright owner's exclusive right to distribute his or her copyrighted digital work by establishing a cause of action under § 1201 for circumvention of TPMs, which is qualified by exceptions for which circumvention will not be considered a violation.<sup>195</sup>

As previously stated, the anticircumvention provisions afford the copyright owner significant control over users' access to the copyrighted work, but not without limitations. For one, the prohibition on circumvention of protection measures that control access to the owner's copyrighted work only applies in situations where the access was not authorized.<sup>196</sup> Thus, "an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of the work."<sup>197</sup> Furthermore, the anticircumvention provisions explicitly provide that rights, remedies, limitations or defenses to copyright infringement, including fair use, shall not be affected by the anticircumvention provisions.<sup>198</sup> This provision, found in § 1201(c), is meant to ensure that the anticircumvention provisions do not change the existing copyright regime, as codified in the 1976 Copyright Act, or the case law that interprets the Act.<sup>199</sup> In fact, the anticircumvention provisions reinforce the rights granted in the 1976 Copyright Act as well as the limitations on those rights.<sup>200</sup> The 1976 Copyright Act provides for limitations on the rights of copyright owners so that consumers may not be completely deprived of opportunities to partake in and benefit from copyrighted works.<sup>201</sup> Similarly, the anticircumvention provisions specify a pleth-

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195. See 17 U.S.C. § 1201(d)-(g).

196. H.R. REP. NO. 105-551, pt. 1, at 18.

197. *Id.*; see also S. REP. NO. 105-190 at 28 ("Paragraph (a)(1) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner . . . . This paragraph does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of the work protected under title 17, even if such actions involve circumvention of other types of technological protection measures."); Davidson & Assocs., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164, 1183 n.14 (E.D. Mo. 2004).

198. 17 U.S.C. § 1201(c).

199. 17 U.S.C. § 1201(c); H.R. REP. NO. 105-551, pt. 1, at 20.

200. See *supra* Part III.A.

201. For example, the principle of fair use allows particular unauthorized uses of a copyrighted work in certain circumstances. C.T. Drechsler, Annotation, *Extent of Doctrine of Fair*

ora of exemptions for nonprofit libraries, archives, and educational institutions,<sup>202</sup> law enforcement, intelligence and other government activities,<sup>203</sup> reverse engineering,<sup>204</sup> and encryption research.<sup>205</sup>

The interaction of the various clauses contained in the anticircumvention provisions and the caveats that accompany them illustrate the true purpose of the anticircumvention provisions: to strike and maintain a delicate balance between the conflicting rights of copyright owners and the public interest.<sup>206</sup> In other words, although copyright owners possess the right to control access to and use of their works, that right is not absolute. Thus, the anticircumvention provisions embody the notion that although copyright owners have a right to control how consumers access and use their works, they cannot use that right to expand their existing rights under the copyright law, to create for themselves rights that do not already exist under the copyright law, or to encroach on consumers' rights. Doing so would skew the balance that the anticircumvention provisions seek to preserve.

B. Do state EULAs frustrate the purpose of the anticircumvention provisions?

Given that both the purpose of the anticircumvention provisions and their relationship to the 1976 Copyright Act have been established, the analysis turns on the issue of frustration. The relevant inquiry is whether state laws that authorize and enforce EULAs frustrate the purpose of the anticircumvention provisions. As previously stated, the anticircumvention provisions seek to balance the rights of digital copyright owners with those of consumers.<sup>207</sup> It is clear that the rights of digital copyright owners are sometimes enforced at the expense of the rights of consumers. However, despite

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*Use Under Federal Copyright Act*, 23 A.L.R.3d 139 (1969). The most prominent justification for this principle is based on the public interest in and constitutional mandate of the advancement of the arts and sciences. *Id.* Also, some courts have found that, in the interest of progress, fair use is appropriate where that use is reasonable, customary, necessary, or required. *Id.* Finally, some courts have noted that the copyright owner has given implied consent to certain uses that someone may possibly make of his work. *Id.*

202. 17 U.S.C. § 1201(d).

203. *Id.* § 1201(e).

204. *Id.* § 1201(f).

205. *Id.* § 1201(g).

206. See H.R. REP. NO. 105-551, pt. 2, at 24 (“[The anti-circumvention provisions] prohibit certain actions and create exceptions to permit certain conduct deemed to be in the greater public interest, all in a way that balances the interests of copyright owners and users of copyrighted works.”).

207. See *supra* Part III.A.

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the obvious tension between them, the rights of copyright owners and those of consumers can coexist if balanced appropriately. The achievement of that balance is the ultimate goal of the anticircumvention provisions.<sup>208</sup>

Not all EULAs frustrate the purpose behind the anticircumvention provisions.<sup>209</sup> To be sure, a EULA does not, per se, upset the delicate balance that the anticircumvention provisions seek to maintain.<sup>210</sup> Rather, whether the EULA has this effect depends on whether the terms of the EULA extend the copyright owner's rights, confer on copyright owners rights that they do not already possess, or abridge consumers' rights. EULAs can be grouped into three general categories with respect to their content and how their content reflects the anticircumvention provisions: (1) EULAs with terms that comport with the anticircumvention provisions by asserting copyright owners' rights as they exist under copyright law, (2) EULAs with terms that

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208. See *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed. Cir. 2005) (“[T]he DMCA must be read in the context of the Copyright Act, which balances the rights of the copyright owner against the public’s interest in having access to the work.”); *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1196 (Fed. Cir. 2004) (quoting H.R. REP. NO. 105-551, pt. 2, at 26); see also 17 U.S.C. § 1201(c)(1) (“Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”); Jacqueline D. Lipton, *Solving the Digital Piracy Puzzle: Disaggregating Fair Use from the DMCA’s Anti-Device Provisions*, 19 HARV. J.L. & TECH. 111, 115 (2005) (“The DMCA contains provisions which try to balance the competing needs of fair use and digital content protection.”). But see H.R. REP. No. 105-551, pt. 2, at 85 (“The anti-circumvention language . . . fundamentally alters the balance that has been carefully struck in 200 years of copyright case law . . .”) (statement of Rep. Scott Klug and Rep. Rick Boucher); Terri Branstetter Cohen, Note, *Anti-Circumvention: Has Technology’s Child Turned Against Its Mother?*, VAND. J. TRANSNAT’L L. 961, 983 (2003) (arguing that the exceptions to the anti-circumvention provisions are ineffective at balancing the rights of copyright owners with those of consumers because they favor the former); Rick Boucher, *Perspective: Time to Rewrite the DMCA*, CNET (Jan. 29, 2002, 12:00 PM), <http://news.cnet.com/2010-1071-825335.html> (declaring that the DMCA needs to be rewritten to achieve a balance that promotes the interests of copyright owners while respecting the rights of information consumers).

209. In fact, courts have held that users can voluntarily relinquish their rights under the DMCA by assenting to terms in a EULA. See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 639 (8th Cir. 2005) (“Appellants contractually accepted restrictions on their ability to reverse engineer by their agreement to the terms of the TOU and EULA.”); *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325–26 (Fed. Cir. 2003) (“[P]rivate parties are free to contractually forego the limited ability to reverse engineer a software product . . .”).

210. Courts generally sidestep a frustration of purpose analysis by summarily holding that EULAs, by virtue of being voluntary agreements between private consenting individuals, do not conflict with federal copyright law. See, e.g., *ProCD v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (holding that a simple two-party contract, whether generous or restrictive, is not equivalent to any of the exclusive rights under copyright and is therefore not preempted); *BanxCorp v. Costco Wholesale Corp.*, 723 F. Supp. 2d 596, 615 (S.D.N.Y. 2010) (agreeing with cases holding that contract claims are not preempted by federal copyright law); *Architectronics, Inc. v. Control Systems, Inc.*, 935 F. Supp. 425, 439 (S.D.N.Y. 1996) (holding that the promise contained in a contract immunizes it from federal law preemption).

conflict with the provisions by extending their rights beyond the boundaries established under copyright law, and (3) EULAs with terms that comport in part but conflict in part with the provisions. The difficulty with determining whether a certain EULA frustrates the purpose of the DMCA arises when the EULA does not fall into either extreme, but rather rests in the gray area in between. This “problem EULA” is the focus of the frustration of purpose analysis employed here.

The first category includes EULAs that comport with the anticircumvention provisions. These EULAs enforce the rights of the copyright owner while preserving the rights of the consumer, thereby maintaining the balance achieved by the anticircumvention provisions. These EULAs do not frustrate the purpose of the DMCA. Specifically, if a EULA contains terms that explicitly list copyright owners’ rights as enumerated in the anticircumvention provisions, such as the right of the copyright owner to utilize TPMs, or specify limitations on those rights, such as the reverse engineering exception, it does not run afoul of those provisions. Also, if a EULA explicitly states that its terms are not meant to reduce or limit the consumer’s rights under copyright and other applicable laws (indeed, the DMCA is an applicable law), then it comports with the anticircumvention provisions.

The anticircumvention provisions generally prohibit consumers from using and trafficking in technology that can circumvent the various protection measures that digital copyright owners utilize to control consumers’ access to and use of their products.<sup>211</sup> More specifically, it prohibits consumers from using, marketing and distributing technology that copyright owners utilize to either control access to their copyrighted works<sup>212</sup> or to assert their rights under the DMCA.<sup>213</sup> Despite providing for such a comprehensive protection of copyright owners’ rights, the anticircumvention provisions also contain various exceptions that favor the consumer.<sup>214</sup> A EULA that comports with the anticircumvention provisions may contain prohibitions against the use of anticircumvention technology but will qualify those prohibitions with a clause allowing the consumer to engage in fair use of the copyrighted work and/or list those exceptions contained

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211. 17 U.S.C. § 1201(a)(1).

212. *Id.* § 1201(a)(1)(A).

213. *Id.* § 1201(b)(1)(A)–(C).

214. *See id.* § 1201(d)–(g).

in the anticircumvention provisions.<sup>215</sup> In addition, the EULA may contain a clause providing that its terms are not intended to reduce or limit the consumer's rights under copyright and other applicable laws.

The Creative Commons<sup>216</sup> license agreement is an example of a EULA that comports with the anticircumvention provisions. The Creative Commons EULA is unique in that it is not a contract. Even if it was a contract, it would not be preempted by the anticircumvention provisions, as long as its terms remain the same, because its terms protect consumer's rights arising from limitations placed on copyright owner's rights in the 1976 Copyright Act. It states, "Nothing in this License is intended to reduce, limit, or restrict any uses free from copyright or *rights arising from limitations or expectations* that are provided for in connection with the copyright protection under copyright law or *other applicable laws*."<sup>217</sup> Accordingly, this EULA incorporates by reference rights and limitations from both the 1976 Copyright Act and the DMCA, since the DMCA is an "applicable law" considering that it is the digital age remedial counterpart to the 1976 Copyright Act. In so doing, this EULA makes itself unitary with the anticircumvention provisions. Thus, this Creative Commons EULA protects the balance that the anticircumvention provisions were enacted to maintain and therefore does not frustrate the purpose behind the DMCA.

The second category includes EULAs that conflict with the anticircumvention provisions. EULAs that blatantly extend the rights of the copyright owner, or create new ones, while manifestly trampling on the rights of the consumer clearly frustrate the purpose of the DMCA's anticircumvention provisions. For example, a EULA that limits or denies a consumer's access to or use of a non-copyrightable work or a work that is not copyrighted conflicts with the DMCA.

Copyright protection is afforded to works that are original works of authorship and are fixed in any tangible medium of expression.<sup>218</sup>

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215. These include exemptions for nonprofit libraries, archives, and educational institutions, law enforcement, intelligence, and other government activities, reverse engineering, and encryption research. *See id.*

216. Creative Commons is a nonprofit organization that promotes the sharing and use of creativity and knowledge by providing open licenses to authors who wish to grant the public at large permission to share and use their work. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited Nov. 15, 2013).

217. *Attribution-ShareAlike 3.0 Unported License*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by-sa/3.0/legalcode> (last visited Nov. 15, 2013) (emphasis added). These licenses are atypical because they are drafted to solely protect users, not copyright owners.

218. 17 U.S.C. § 102.

A tangible medium of expression is one from which the work can be perceived, reproduced, or otherwise communicated.<sup>219</sup> Furthermore, § 102 of the 1976 Copyright Act lists seven categories that are considered works of authorship for purposes of determining copyright protectability.<sup>220</sup> Additionally, there are certain categories of works that have been established as unworthy of copyright protection,<sup>221</sup> and copyright protection generally does not extend to works already in the public domain.<sup>222</sup> As discussed above, the anticircumvention provisions retain the rights granted copyright owners under the copyright law.<sup>223</sup> Thus, a work that has not been copyrighted or is not amenable to copyright under copyright law, either because it is not considered a work of authorship under § 102 or is already in the public domain, will not be afforded protection under the DMCA.

Also, the exceptions to the circumvention prohibition that are contained in the anticircumvention provisions embody uses of the digital work that are considered fair use under § 107 of the 1976 Copyright Act.<sup>224</sup> For example, § 107 provides that making copies of a copyrighted work for the purposes of teaching or research is not considered copyright infringement but is instead regarded as a fair use of the work.<sup>225</sup> Similarly, the anticircumvention provisions exempt non-profit libraries, archives, and educational institutions from the prohi-

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219. *Id.*

220. These include: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. 17 U.S.C. § 102(a)(1)–(8). This list is meant to be illustrative only; thus, a work that does not fall into one of the eight categories is not automatically excluded from copyright protection. *See id.* § 102(a) (“Works of authorship *include* the following categories . . . .”) (emphasis added).

221. Words and short phrases; ideas, plans, methods, systems, or devices; blank forms meant for recording as opposed to conveying information; works consisting entirely of information that is common property containing no original authorship; and typeface are not subject to copyright protection. 37 C.F.R. § 202.1 (2013).

222. *See id.* *But see* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (making the United States party to the Berne Convention for the Protection of Literary and Artistic Works, which provides that *international* works that fell into the public domain due to a technicality will still receive copyright protection in the United States).

223. *See* discussion *supra* Part III.A.

224. *See* 17 U.S.C. § 1201(d)–(g); *cf.* 17 U.S.C. §§ 107–122 (listing limitations on a copyright owner’s exclusive rights). The doctrine of fair use is codified in § 107 of the Copyright Act. It provides that the fair use of a copyrighted work, including the reproduction of the work, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not considered infringement of copyright. *Id.* § 107; *see also* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 323 (S.D.N.Y. 2000) (“[Congress] created a series of exceptions to aspects of Section 1201(a) for certain uses that Congress thought ‘fair’ . . . .”).

225. 17 U.S.C. § 107.



bition on circumvention<sup>226</sup> and states that circumvention of TPMs in order to conduct encryption research is not a violation.<sup>227</sup> The § 1201(d) exemption for nonprofit libraries, archives, and educational institutions embodies the § 107 fair use of copyrighted works for scholarship purposes. Also, the § 1201(g) exemption for encryption research is an application of the § 107 fair use for research purposes. Thus, a EULA that eliminates a consumer's right to engage in fair use of the work shifts the balance of the anticircumvention provisions in the copyright owner's favor. This frustrates the purpose of the DMCA.

The Westlaw license agreement is an example of a EULA that conflicts with the anticircumvention provisions to the extent that it limits a consumer's use of and access to material that is not copyrightable or is in the public domain. It does not contain an explicit prohibition on the use of circumvention technology, but it does expressly prohibit reverse engineering. It states, "Westlaw, including the format, layout and data structures, is proprietary. User may not *reverse engineer or otherwise attempt to discern* the proprietary architecture of Westlaw."<sup>228</sup> Westlaw has a valid copyright in its database as a compilation,<sup>229</sup> but its use of a EULA to restrict how a user may utilize court opinions and legislative documents, which are government property and thus not subject to copyright<sup>230</sup> and are likely in the public domain, is problematic for preemption purposes. As previously stated, the 1976 Copyright Act only extends exclusive rights to owners of copyrighted works.<sup>231</sup> Similarly, the anticircumvention provisions do not apply to computer software or other digital works that are not already copyrighted.<sup>232</sup> Hence, one cannot lawfully develop TPMs to control access to or assert rights in a work for which one does not own a copyright or for a work that is not copyrightable. Therefore, this Westlaw EULA conflicts with the anticircumvention provisions to the extent that it imposes restrictions on the use of documents that are either not subject to copyright or are in the public domain.

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226. *Id.* § 1201(d).

227. *Id.* § 1201(g)(2).

228. *Westlaw User Agreement*, WESTLAW, <http://lscontent.westlaw.com/images/content/2012ClickwrapAll.pdf> (last visited Nov. 18, 2013) (emphasis added).

229. *See id.*

230. *See* 17 U.S.C. § 105.

231. *See id.* § 106.

232. *See id.* § 1201(a)(1)(B).

The third category includes EULAs that comport in part but conflict in part with the anticircumvention provisions. These EULAs are not completely reconcilable with the provisions but also do not blatantly disregard them. Unlike EULAs that are completely in line with the anticircumvention provisions, these agreements will not contain terms that reflect all of the rights afforded copyright owners and all of the limitations placed on those rights by the anticircumvention provisions. Also, they will not contain a clause that states that the EULA does not reduce any of the consumer's rights under copyright and other applicable law. And, unlike EULAs that blatantly disregard the anticircumvention provisions, these EULAs will not contain terms that explicitly expand the rights of copyright owners and/or ignore the limitations on those rights. Instead, these EULAs will contain terms that appear to retain all aspects of the anticircumvention provisions but that, upon further inspection, omit important aspects out. They may also contain some terms that comport with the anticircumvention provisions and some that do not. For example, a EULA that contains a blanket prohibition against the reverse engineering of a computer program falls within this problematic area. The anticircumvention provisions prohibit the development, use and distribution of technology that is meant to circumvent the protection measures implemented by the digital copyright owners.<sup>233</sup> But they also contain an exception for those persons who lawfully obtained the copyrighted work and were able to circumvent the protection measures through reverse engineering with the intent to achieve interoperability with other independently created computer programs.<sup>234</sup>

A clause stating that the user may not reverse engineer the product that the user otherwise lawfully obtained is problematic because the anticircumvention provisions explicitly allow reverse engineering under limited circumstances.<sup>235</sup> By prohibiting all reverse engineering, this EULA does not completely eliminate the limitations placed on copyright owners' rights, but it does weaken them. A ban on reverse engineering in all circumstances ignores those limited situations in which reverse engineering is not considered a violation of the anticircumvention provisions. Accordingly, a blanket prohibition on reverse engineering prevents individuals working within the exempted scenarios from exercising their right to reverse engineer, and thus ef-

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233. *Id.*

234. *Id.* § 1201(f).

235. *See id.*

fectively expands the copyright owners' rights past the point that the anticircumvention provisions allow. In this manner, a EULA that contains a blanket prohibition on reverse engineering, given that it does not contain any other terms that blatantly undermine the anticircumvention provisions, comports in part with the anticircumvention provisions, but conflicts in part as well. The *Jung* case involved a EULA that contained a blanket prohibition on reverse engineering.<sup>236</sup> The *Jung* EULA is an example of the kind of agreement that occupies the boundary between those EULAs that are unitary to the anticircumvention provisions and those that blatantly undermine them.

#### IV. CASE STUDY: WHY THE REVERSE ENGINEERING PROHIBITION IN BLIZZARD'S EULA FRUSTRATED THE PURPOSE BEHIND THE ANTICIRCUMVENTION PROVISIONS

Although the *Jung* court held that the 1976 Copyright Act did not expressly preempt the EULA at issue, it should have found that the anticircumvention provisions preempted the EULA's reverse engineering clause on frustration of purpose grounds. The court should have concluded that the EULA's blanket prohibition on reverse engineering expanded Blizzard's rights under the anticircumvention provisions, thereby tipping the scales in Blizzard's favor and upsetting the copyright owner-consumer balance that the provisions seek to maintain. The court should have held that by undermining this balance, the reverse engineering prohibition frustrated the purpose behind the anticircumvention provisions and was preempted.

*Jung* involved Blizzard, a California corporation that creates and markets software video games for PCs, and Tim Jung, who is the president, co-owner and operator of Internet Gateway, an internet service provider based in St. Peters, Missouri.<sup>237</sup> In January 1997, Blizzard launched "Battle.net," the free gaming site available exclusively to the purchasers of Blizzard games.<sup>238</sup> On the Battle.net website, users are able to play Blizzard video games with other users, create and join multi-player games, and even chat with other players.<sup>239</sup> Like most video games, Blizzard's games were susceptible to copying and In-

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236. Davidson & Assocs. v. Jung, 422 F.3d 630, 634 n.4 (8th Cir. 2005).

237. *Id.* at 633.

238. *Id.*

239. *Id.*

ternet distribution.<sup>240</sup> To prevent piracy, Blizzard designed Battle.net to restrict access to and use of the Battle.net mode feature of the game.<sup>241</sup> All but one of the Blizzard games comes with a CD Key.<sup>242</sup> Before a user can log on to Battle.net and use the Battle.net feature of the game, the game software initiates an authentication sequence, or “secret handshake,” between itself and the Battle.net server.<sup>243</sup> The game is contained on a CD-ROM.<sup>244</sup> In order to play the game, the user must first install the game onto a computer and agree to the EULA and Terms of Use (“TOU”).<sup>245</sup> The EULA dictates the use of the game and the TOU dictates the use of the Battle.net website.<sup>246</sup> Both the EULA and TOU contain prohibitions on reverse engineering.<sup>247</sup> The relevant part of the EULA reads:

Subject to that Grant of Licence hereinabove, you may not, in whole or in part, copy, photocopy, reproduce, translate, *reverse engineer*, derive source code, modify, disassemble, decompile, create derivative works based on the Program, or remove any proprietary notices or labels on the Program without the prior consent, in writing, of Blizzard.<sup>248</sup>

Jung, along with Ross Combs and Robb Crittenden (collectively “appellants”), purchased and installed Blizzard games and agreed to the EULAs therein.<sup>249</sup>

Users of Battle.net were experiencing difficulties using the service.<sup>250</sup> In an effort to address their frustrations, a number of users, including game hobbyists, programmers and other individuals, launched a group called the “bnetd project.” The bnetd project developed a program called the “bnetd.org server” which was an alternative to the Battle.net service that allowed users to play their Blizzard games without using Battle.net.<sup>251</sup> The bnetd.org server allowed players who were unable to connect with Battle.net to, nonetheless, expe-

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240. *Id.*

241. *Id.* For example, each time a user logs onto Battle.net, the server inspects the user’s version of the game software. If it is not up to date, the server updates the customer’s version before allowing the customer to play the game on Battle.net. *Id.*

242. *See id.* A CD Key is “a unique sequence of alphanumeric characters printed on a sticker attached to the case in which the CD-ROM was packaged.” *Id.*

243. *Id.*

244. *Id.* at 634.

245. *Id.*

246. *Id.* at 635.

247. *Id.*

248. *Id.* at 634 n.4 (emphasis added).

249. *Id.* at 635. Crittenden and Jung logged onto Battle.net and agreed to the TOU. *Id.*

250. *Id.*

251. *Id.*

rience the multi-player features of their Blizzard games.<sup>252</sup> The bnetd.org server was a free service that the bnetd project offered to anyone.<sup>253</sup> Jung, Combs, and Crittenden were the lead developers for the group.<sup>254</sup> The service was organized and managed through www.bnetd.org, a website made available to the public by Internet Gateway.<sup>255</sup> The bnetd.org server mirrored the Battle.net website, even including online discussion forums similar to the ones available on the Battle.net website.<sup>256</sup> It also provided information about the bnetd project and granted access to the program's computer code for all to copy and modify.<sup>257</sup>

In order to for bnetd.org to serve as a functional alternative to Battle.net, bnetd.org had to be able to support Blizzard's game software, which in turn required that bnetd.org speak the same protocol language that Battle.net speaks.<sup>258</sup> Once the two websites speak the same protocol language, the bnetd programs become interoperable with Blizzard games.<sup>259</sup> Thus, Jung, Combs, and Crittenden used reverse engineering to figure out Blizzard's protocol language and to test whether Blizzard games could be operated on the bnetd.org website.<sup>260</sup> Blizzard brought suit against Jung, Combs, and Crittenden for a variety of causes of action, most notably for circumventing copyright protection systems and trafficking in technology for the circumvention of copyright protection systems in violation of the anticircumvention provisions.<sup>261</sup>

As an initial matter, the court disposed of appellants' argument that the 1976 Copyright Act preempted Blizzard's breach of contract claims.<sup>262</sup> The court easily rejected appellants' preemption argu-

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252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 635–36.

260. *Id.* at 636. Combs and Crittenden used reverse engineering to develop different components of the bnetd.org server, including a program that logs communications between the Blizzard games and the Battle.net server and a program to decompile Blizzard client files that initially existed as one file. *Id.*

261. *Id.* at 637.

262. *Id.* at 638. One of the many causes of action that Blizzard brought against Appellants was one for breach of contract. *Id.* at 632. Blizzard alleged that by reverse engineering the Battle.net computer software, Appellants acted in violation of the EULA that they assented to. *Id.* at 637.

ment.<sup>263</sup> The court reasoned that express preemption does not apply in this case, since the 1976 Copyright Act preempts only those state laws that attempt to protect rights that are exclusively protected by federal law and does not preempt state laws that enforce non-equivalent legal or equitable rights.<sup>264</sup>

The court then determined that the appropriate analysis for the issue at hand fell under conflict preemption.<sup>265</sup> Conflict preemption occurs when a state law is not expressly preempted by the federal law but either makes it impossible to comply with both the state law and the federal law or frustrates the purpose behind the federal law.<sup>266</sup> Appellants relied on *Vault v. Quaid Software, Ltd.*<sup>267</sup> to argue that Blizzard's EULA was preempted by the 1976 Copyright Act because it was in direct conflict with the terms of the Act.<sup>268</sup> The court promptly distinguished *Vault*, stating that the state law at issue in this case did not conflict with the interoperability exception under the anticircumvention provisions<sup>269</sup> nor did it limit any rights conferred under federal law.<sup>270</sup> The court emphasized that the Appellants assented to restrictions on their ability to reverse engineer by agreeing to Blizzard's EULA and TOU.<sup>271</sup>

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263. *Id.* at 638.

264. *See id.*; *see also* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l., Inc., 991 F.2d 426, 428 (8th Cir. 1993) (stating that non-equivalent rights are not preempted). "Equivalent rights" are rights that are the same as the rights enumerated in § 106 of the Copyright Act. Nat'l Car Rental Sys., 991 F.2d at 428. Accordingly, if the state law at issue does not assert one of the rights listed in § 106 of the Copyright Act, the state law is not expressly preempted by the Copyright Act. However, even if a state law is not expressly preempted by the federal copyright law, it can still be preempted if it renders compliance with both the state and federal law impossible or frustrates the purpose of the federal law. *See* Davidson & Assocs. v. Jung, 422 F.3d 630, 638 (8th Cir. 2005); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983). For further discussion of the various ways a state law can be preempted by federal law, *see supra* Part II.A–B.

265. *Jung*, 422 F.3d at 638.

266. *Id.*; *see also supra* Part II.B for a detailed discussion on conflict preemption.

267. 847 F.2d 255 (5th Cir. 1988). *Vault* involved a challenge to the Louisiana Software License Enforcement Act, which allowed software producers to require consumers to assent to the software producers' contractual terms so long as those terms were set forth in a license agreement that was in agreement with the statute. *Id.* at 268. The statute specified enforceable terms and defined reverse engineering, decompiling and disassembling. *Id.* at 268–69. The court in *Vault* held that the statute conflicted with § 117 of the Copyright Act, which permits a computer program owner to make an adaptation of the program as long as that adaptation is necessary to utilize the program in conjunction with a machine or is solely for purposes of storage. *Id.* at 270.

268. *Jung*, 422 F.3d at 638.

269. *Id.* at 639; *see also* 17 U.S.C. § 1201(f) (2013).

270. *Jung*, 422 F.3d at 639.

271. *Id.*

*Digital Millennium Copyright Act of 1998*

Furthermore, the court explained that under *Bowers v. Baystate Technologies, Inc.*,<sup>272</sup> a party is free to contract away its limited rights to reverse engineer a software product under the exemptions of the 1976 Copyright Act.<sup>273</sup> Moreover, a state can allow parties to relinquish by contract the fair use defense or forego uses of the copyrighted work that are allowed by the copyright law if the contract is freely negotiated.<sup>274</sup> Summarily, the court determined that Blizzard's EULA was not preempted by the federal copyright law simply because appellants agreed to it.<sup>275</sup> The court ultimately held that Jung, Combs, and Crittenden violated both § 1201(a)(1) and § 1201(a)(2) when they reverse engineered Blizzard's game software.<sup>276</sup>

The court's reasoning is incomplete because it focuses exclusively on the voluntariness of the parties' assent to the EULA. Indeed, the defendants in *Jung* agreed to abide by the EULA. However, the meaningfulness of that choice is negligible, considering that they were consumers who assented to the agreement, which was drafted by a corporation that develops and distributes PC-based video games, so that they could play the games that they had already purchased. Not to mention, the court ignores the pertinent part of its own statement regarding the ability of parties to contract away their rights under copyright law: the caveat that parties can do so if the contract is freely negotiated.<sup>277</sup> By ending the inquiry on grounds that the agreement

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272. *Bowers v. Baystate Techs.*, 320 F.3d 1317 (Fed. Cir. 2003). The *Bowers* case involved a shrinkwrap license agreement. 320 F.3d at 1322. *Bowers* alleged that Baystate copied its software in violation of a shrinkwrap license agreement. *Id.* at 1326–37. Baystate argued that the agreement, which contained a prohibition on reverse engineering, was preempted by the DMCA. *Id.* at 1323. The court disagreed, pointing to the private nature of contracts that are based on mutual assent and consideration. *Id.* at 1325.

273. *Jung*, 422 F.3d at 639 (citing *Bowers*, 320 F.3d at 1325–26).

274. *Jung*, 422 F.3d at 639 (citing dissenting opinion of Judge Dyk in *Bowers*); see also *Nat'l Car Rental Sys., Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (concluding that the legislative history indicates Congress's intent to not preempt breach of contract claims). The Court also makes sure to point out that although both the *Bowers* and *Nat'l Car Rental* cases involved express preemption as opposed to conflict preemption, their reasoning also applies here. *Jung*, 422 F.3d at 639.

275. *Jung*, 422 F.3d at 639.

276. *Id.* at 640. Section 1201(a)(1) of the DMCA prohibits the development of circumvention technology. See 17 U.S.C. § 1201(a)(1). Section 1201(a)(2) prohibits the trafficking of circumvention technology. See *id.* § 1201(a)(2); *Jung*, 422 F.3d at 640–41.

277. There are various defenses to contract formation that hinge on the lack of voluntariness involved when the parties agreed to the contract terms. These include duress, undue influence, misrepresentation, mistake and unconscionability. See generally AMY KASTELY ET AL., *CONTRACTING LAW* 405 (4th ed. 2006) (discussing the numerous defenses to contract formation). These defenses are considered the result of market misconduct or error that undermined the parties' volition when forming the contract. *Id.* Initially, the characteristics of Blizzard's EULA (e.g., the lack of reasonable choice on the part of the signatories and the existence of terms that

was voluntary, the court sidesteps the issue of whether the EULA disproportionately benefited one party, namely Blizzard, and thus tipped the scales that are so carefully balanced by the anticircumvention provisions. An instrument that inherently creates a one-sided benefit cannot comport with the purpose behind the anticircumvention provisions, which were designed and implemented to maintain a balance between the interests of copyright owners and consumers. In fact, such inherently one-sided agreements affirmatively eliminate such a balance and thus frustrate the purpose behind the anticircumvention provisions.

The *Jung* EULA did not contain any language informing the consumer of potential rights he or she may have in certain limited circumstances, and it did not specify situations in which reverse engineering is not unlawful. Such a sweeping prohibition ignores those situations in which reverse engineering is not considered a violation of the prohibition on circumvention. Given that a consumer with no outside knowledge of the law would not know that they can, in fact, reverse engineer in limited circumstances, the terms of the EULA were entirely to the benefit of Blizzard. Blizzard unlawfully expanded its rights under the anticircumvention provisions by forcing consumers to sign a one-sided agreement that contained no mention of the pertinent anticircumvention provisions that allow reverse engineering in specific circumstances. Moreover, the reverse engineering prohibition expanded Blizzard's rights beyond those already conferred through the 1976 Copyright Act and reinforced in the anticircumvention provisions. Accordingly, the prohibition upset the delicate balance that the anticircumvention provisions seek to achieve, thereby frustrating the purpose behind the DMCA.

#### V. CONGRESSIONAL ACTION AS A POSSIBLE SOLUTION TO THE EULA-ANTICIRCUMVENTION PREEMPTION PROBLEM

It is clear that courts are reluctant, at best, to abandon the principle that contracts do not conflict with federal copyright law. Since

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disproportionately favor the more powerful party) appear to implicate the contract defense of unconscionability. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (discussing a widely accepted explanation of the doctrine of unconscionability). However, Blizzard's EULA was likely not unconscionable. Indeed, if it were, there would be no need for a preemption analysis because the EULA would already be unenforceable on contract grounds. Since Blizzard's EULA was likely enforceable on contract grounds, it will only be dissolved if it is preempted by federal law.



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EULAs are a type of contract, it is equally evident that courts will not soon begin to examine these EULAs on an ad hoc basis to determine whether their effect is to undermine the balance sought to be achieved by the anticircumvention provisions. Indeed, courts are able to establish and continuously apply this per se rule because there is no explicit statutory language that disposes of the issue. Thus, Congress needs to act affirmatively to abolish the rule that no contracts are preempted by the federal copyright generally and to enumerate the types of agreements that frustrate the purpose behind the anticircumvention provisions in particular. To this end, Congress should amend the 1976 Copyright Act and the anticircumvention provisions with a clause providing that contracts are not automatically immunized from federal copyright law preemption. The clause should state that agreements that skew the balance in favor of either party will be considered to frustrate the purpose behind the anticircumvention provisions and are, accordingly, preempted.

The clause should explicitly provide that agreements through which copyright owners assert their rights outside the bounds of the anticircumvention provisions, create new rights that the copyright owners do not already possess under the copyright law, or abridge the rights of consumers shall be construed to undermine the balance achieved by the anticircumvention provisions. Thus, such agreements frustrate the purpose behind the provisions and are determined to be preempted by them. The clause should provide the same mandates for agreements that assert the rights of consumers beyond those that flow from the anticircumvention provisions' exceptions, create new rights that consumers do not possess under current copyright laws, or abridge the rights of the copyright owners.

### CONCLUSION

The drafters of the DMCA were faced with a unique task. They had to ensure that digital copyright owners could continue to enjoy their exclusive rights under the federal copyright law in an age where digital technology was expanding at a pace that far exceeded the evolution of the law. Congress was forced to grapple with changing technologies that afforded consumers unprecedented access to copyrighted digital works. These same changing technologies also created opportunities for consumers to develop ingenious means to gain unauthorized access to those copyrighted works. Such prohibited access was not anticipated when the first copyright law was enacted in 1790.

But Congress's task did not end there. Congress not only had to adapt the original copyright regime to rapidly advancing digital technology, but it had to do so without undermining the very law it was seeking to update. The need to adjust the existing copyright regime to account for technological advances was inevitable, since there were new mediums available through which copyright owners could exercise their rights and through which consumers could violate the copyright owners' rights. By updating the copyright law such that the exclusive rights granted to copyright owners at the law's inception would remain viable in the digital age, Congress had to ensure that the limitations on those rights were also updated and that remedies applicable to digital copyrighted works were available to copyright owners. The original copyright law achieved a balance between copyright owners' rights and the rights and privileges of the users of those copyrighted works and the DMCA, through its anticircumvention provisions, retained that balance in the face of constantly evolving digital technologies.

However, digital copyright owners who draft and enforce EULAs that expand their rights under the copyright law, create rights that do not exist under the copyright law or abridge consumers' rights threaten that balance, thereby frustrating the purpose behind the anticircumvention provisions. Thus, these EULAs should be preempted to the extent that they frustrate the purpose behind the anticircumvention provisions. However, absent any indication that the judiciary will revisit the virtually bright line rule immunizing EULAs from federal preemption, Congress must act affirmatively to preclude digital copyright owners from binding consumers to agreements that do not comport with federal copyright law or related laws, such as the anticircumvention provisions. Otherwise, digital copyright owners will be able to redefine their rights under copyright, at the expense of the consumer's rights, with impunity.











