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SUBSCRIPTIONS: The *Howard Law Journal*, ISSN 0018-6813, is published three times per year. One year's domestic subscription rate is \$34, with a per-issue price of \$12. Symposium issues are \$15. International subscriptions are \$44. These rates are competitive with those of other journals and reviews.

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VOLUME 57 • ISSUE 3 • SPRING 2014

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HOWARD LAW JOURNAL

TABLE OF CONTENTS

TENTH ANNUAL
WILEY A. BRANTON/HOWARD LAW JOURNAL SYMPOSIUM
CIVIL RIGHTS AT A CRITICAL JUNCTURE:
CONFRONTING OLD CONFLICTS AND NEW CHALLENGES

LETTER FROM THE EDITOR-IN-CHIEF

FROM THE EDITOR-IN-CHIEF	By Erika A. James	viii
--------------------------------	-------------------	------

KEYNOTE ADDRESS

REMARKS	By Dr. Michael Eric Dyson	743
---------------	---------------------------	-----

ARTICLES

TO ACCEPT OR TO REJECT: ARIZONA v. INTER TRIBAL COUNCIL OF ARIZONA, THE ELECTIONS CLAUSE, AND THE NATIONAL VOTER REGISTRATION ACT OF 1993.....	By Robert A. Kengle	759
---------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------	-----

SHELBY COUNTY v. HOLDER: WHEN THE RATIONAL BECOMES IRRATIONAL	By Jon Greenbaum, Alan Martinson, & Sonia Gill	811
------------------------------------------------------------------------	------------------------------------------------------	-----

ESSAYS

INVISIBLE SPACES AND INVISIBLE LIVES IN IMMIGRATION DETENTION	By César Cuauthémoc García Hernández	869
---------------------------------------------------------------------------	--------------------------------------	-----

RACE AND IMMIGRATION, THEN AND NOW: HOW THE SHIFT TO “WORTHINESS” UNDERMINES THE 1965 IMMIGRATION LAW’S CIVIL RIGHTS GOALS	By Elizabeth Keyes	899
-------------------------------------------------------------------------------------------------------------------------------------------	--------------------	-----

IMMIGRATION REMARKS FOR THE 10TH ANNUAL WILEY A. BRANTON SYMPOSIUM	By Shoba Sivaprasad Wadhia	931
--------------------------------------------------------------------------------	----------------------------	-----

RECENT DEVELOPMENTS IN FEDERAL
IMPLEMENTATION OF EXECUTIVE
ORDER 12,898 AND TITLE VI
OF THE CIVIL RIGHTS ACT OF 1964 *By Daria E. Neal* 941

AFFIRMATIVE ACTION SURVIVES AGAIN IN THE
SUPREME COURT ON A LEGAL TECHNICALITY:
AN ANALYSIS OF *FISHER V. UNIVERSITY OF
TEXAS AT AUSTIN* *By John C. Brittain* 963

NOTES & COMMENTS

THE NEGATIVE EFFECTS OF ILL-ADVISED
LEGISLATION: THE CURIOUS CASE OF
THE EVOLUTION OF ANTI-SHARIA LAW
LEGISLATION INTO ANTI-FOREIGN LAW
LEGISLATION AND THE IMPACT
ON THE CISG *By Samir Islam* 979

CRIMINAL LIABILITY AGAINST CHILD
PROTECTIVE SERVICES CASEWORKERS:
AN UNSUITABLE SOLUTION TO DECREASE
THE NUMBER OF PREVENTABLE CHILD
FATALITIES IN NEW YORK *By Erika A. James* 1033

SECTION 342 OF THE DODD-FRANK ACT
DOES NOT ADEQUATELY CONSIDER
EDUCATION AND POVERTY *By Dayne Johnson* 1071

**About the Wiley A. Branton/
Howard Law Journal Symposium:**



Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal's* spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, *Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges*, in recognition of the great Wiley A. Branton. Past Symposium issues include:

*Unfinished Work of the Civil Rights Act of 1964:
Shaping An Agenda for the Next 40 Years*

The Value of the Vote: The 1965 Voting Rights Act and Beyond

*What Is Black?: Perspectives on Coalition Building
in the Modern Civil Rights Movement*

Katrina and the Rule of Law in the Time of Crisis

Thurgood Marshall: His Life, His Work, His Legacy

*From Reconstruction to the White House:
The Past and Future of Black Lawyers in America*

Collateral Consequences:

Who Really Pays the Price for Criminal Justice?

*Health Care Reform and Vulnerable Communities:
Can We Afford It? Can We Afford to Live Without It?*

Protest & Polarization: Law and Debate in America 2012

Letter from the Editor-in-Chief

On October 24, 2013, the *Howard Law Journal* hosted its tenth annual Wiley A. Branton Symposium. Each year, this Symposium symbolizes our continued effort to honor the life and legacy of not only a former Dean of this law school but a civil rights pioneer. For ten years, we have gathered to reflect on his contributions to the legal community and use them as a platform to confront new legal issues of the day. It is our mission to provide this necessary forum for practitioners and academicians to join with our students as we seek to fulfill our ultimate goal: continuing to lead the fight for social justice.

This year's Symposium, *Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges*, is truly special not only because it marks the tenth anniversary, but also because of our partnership with the Lawyers' Committee for Civil Rights Under Law. For fifty years, members of the Lawyers' Committee have dedicated their lives to protecting the civil rights of all Americans, and as social engineers, we are honored to celebrate their special anniversary as they partner with us to commemorate the legacy of Wiley A. Branton. Thank you for your partnership. The *Journal* would like to also give thanks to all of the speakers and panelists who helped lead pointed discussions and debates; your participation is truly appreciated.

This year's civil rights theme enabled the *Journal* to facilitate discussions concerning a myriad of topics, including: environmental justice, immigrant rights, Supreme Court jurisprudence, and comparative affirmative action. Although these four areas are not reflective of the traditional representations of civil rights, they represent more broadly the struggles of today that have brought us to this critical juncture.

The issue opens with motivating remarks from our keynote speaker, Dr. Michael Eric Dyson, who challenges Howard Law students to uphold the great traditions of this historical institution by recognizing the importance of the role we play at this critical juncture.

From our Supreme Court jurisprudence panel, *Cert. Granted: Affirming Our Progress or Vacating Our Future*, Robert A. Kengle leads this issue with our first Article: *To Accept or Reject: Arizona v. Inter Tribal Council of Arizona, the Election Clause and the National Voter Registration Act of 1993*. Kengle analyzes a recent Supreme Court decision in which the Court found, for the first time, that a state's election procedures

violated the National Voter Registration Act (NVRA). Although the Court failed to address Arizona's constitutional argument, Kengle argues that the Court's decision was significant in that it reaffirmed both Congress's power under the Election Clause and the validity of the NVRA, despite the Court's decision during the same term in *Shelby County v. Holder*. Next, joining this issue as a special addendum, in *Shelby County v. Holder: When the Rational Becomes Irrational*, Jon Greenbaum, Alan Martinson, and Sonia Gill explore the constitutional underpinnings of *Shelby County*, arguing that the Court's analysis defies the deferential nature of the rational basis test and conflicts with how the test was used in cases that preceded *Shelby County*.

From our immigrant rights panel, *Hidden Borders: Opportunities and Obstacles for Immigrants' Rights*, in *Invisible Spaces and Invisible Lives in Immigration Detention*, Professor César Cuauthémoc Garcíá Hernández argues that immigration detention operates in an invisible space that provides minimal, if any, limitations on the federal government's tendency to imprison immigrant detainees. In *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goal*, Professor Elizabeth Keyes explores the federal government's current approach to immigration reform, arguing that a new Senate Bill, which creates a class of excluded "super-undocumented" immigrants, does not, as it purports to do, fix the broken system, but instead, exacerbates many of the existing problems faced by the undocumented. Finally, in *Immigration Remarks for the 10th Annual Wiley A. Branton Symposium*, Professor Shoba Wadhia provides a recitation of her remarks from the Symposium, exploring the role of prosecutorial discretion as it relates to immigration law.

From our environmental justice panel, *Defending the Right to Healthy Communities: Addressing Environmental Justice as a Civil Rights Issue*, in *Recent Developments in Federal Implementation of Executive Order 12,898 and Title VI of the Civil Rights Act of 1964*, Professor Daria Neal discusses the recent critique of Title VI enforcement by the federal government and several federal agencies. Neal posits several recommendations for increasing the use of Title VI to address environmental justice concerns.

Next, in *Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of Fisher v. University of Texas at Austin*, an Essay derived also from our Supreme Court jurisprudence panel, John C. Brittain examines the strict scrutiny analysis for affirmative action in higher education. Brittain uses the analysis employed by the majority in the *Fisher* case, arguing that affirmative action remains a tool that can be used by universities even after the *Fisher* decision.

In addition to our Symposium pieces, we are pleased to publish three of our student-written Comments. In *The Negative Effects of Ill-Advised Legislation: The Curious Case of the Evolution of Anti-Sharia Law Legislation into Anti-Foreign Law Legislation and the Impact on the CISG*, Samir Islam, a Senior Notes and Comments Editor, argues that anti-foreign law statutes are evolutionary instruments of discriminatory measures that have no place in American jurisprudence.

Next, in *Criminal Liability Against Child Protective Services Caseworkers: An Unsuitable Solution to Decrease the Number of Preventable Child Fatalities in New York*, a Comment of my own, I argue that holding individual caseworkers criminally liable for the death of an abused or maltreated child is not a suitable solution to decrease the number of preventable child fatalities because the effects of such a solution will be more harmful than beneficial to the state of child welfare in New York.

Finally, in *Section 342 of the Dodd-Frank Act Does Not Adequately Consider Education and Poverty*, Senior Staff Editor Dayne Johnson argues that in order for Section 342 to achieve its goal of increasing diversity in the financial industry by providing specific opportunities to minorities and women, it must first implement a number programs that recognize the unique challenges faced by this demographic.

In closing, as this is my final letter as Editor-in-Chief of the *Howard Law Journal*, I would like to express what an honor it has been to be of service to this publication and this institution. I extend my deepest appreciation to our phenomenal Executive Editorial Board: Crinesha Brooks, Richard Carlton III, Joseph Garmon, and Christen B'anca Glenn; your dedication and passion have been evidenced throughout this publication process. I'd also like to thank the Editorial Board and the staff editors of Volume 57; your hard work and enthusiasm are greatly appreciated.

To our readers, we thank you for your continued support and hope you find that this issue fulfills our obligation to publish timely, relevant pieces that make meaningful contributions to the ongoing legal conversations across the world. It is in this spirit that we close Volume 57.

ERIKA A. JAMES
Editor-in-Chief
2013-2014

Keynote Address

DR. MICHAEL ERIC DYSON*

Thank you so much for that very gracious introduction and for that very kind birthday shout-out. To all the scorpions in the house! Today is Drake's birthday—"Started from the bottom now I'm here."

What an honor it is to be here today, to come to this [Symposium], named in honor of one of the great legal minds of our community and an extraordinary dean, and a man who rendered service at the heights of both his talent and our community. I'm honored to be here in the presence of many of his family members and to be invited by Dean Dark who is doing an extraordinary job here at Howard Law School. [The] Reverend Dr. Barbara Arnwine [is] sitting up here in the front, an evangelist in the legal community. [I want to thank] her [for her] co-sponsorship of this extraordinary event here today with Dean Dark.

You know black women are always leading the way, always leading the way. So, it's a real honor. My mentee Cadene Russell has been doing an extraordinary job over here, 2L, and I had two of my TA's from Georgetown last year, sister Amanda [Butler-Jones] and sister Sierra [Wallace], two of the finest from Howard Law School over at Georgetown dropping seditious science. They were hard on those students too—tough! So, it's an honor to have all three of them here and so many others. I gotta give a shout-out—there are so many who are here, I hesitate to name any name, but I gotta shout-out Professor Kimberlé [Williams] Crenshaw, . . . one of the great legal minds in America [and] the founder of critical race theory. That's big, that's big time. You know, we celebrate LeBron James, for those who do, we celebrate Michael Jordan, for those who do, or the greatest player of all time, Kobe Bryant. Stop hating. But we need to celebrate cerebral

* Michael Eric Dyson, named by *Ebony* as one of the hundred most influential black Americans, is the author of sixteen books, including *Holler If You Hear Me, Is Bill Cosby Right?* and *I May Not Get There With You: The True Martin Luther King Jr.* He is currently University Professor of Sociology at Georgetown University.

giants who found entire fields, who create paths, and who open up vistas of possibility. I want Professor Kim to stand up again. I know you all have seen her already; I want her to stand up again, way in the back.

And speaking of women leading the way, the great Susan Taylor is in the house today. And as you know, Susan Taylor, the Queen of Black America, a remarkable, iconic figure, a woman of tremendous devotion to our community, [is] now leading the CARES Mentoring Movement, which is attempting to mentor more than a million young people in our community and to call upon responsible adults to do so. So, before she leaves out, if ya'll get a chance and you want to sign up and help out with that tremendous program—. [W]hite women are the first to respond, white men are the second to respond, then black women, then black men. So, we can't be talking about kids if we ain't going to help them. We can't *point* at them without pointing the way. So, she is here along with her partner, beloved husband Khephra Burns, one of the great writers, poets, playwrights, raconteurs, smooth dressers, smooth criminals, and a remarkable human being, one of the smartest men on earth. I want both of them to stand up so you can see them: Khephra Burns and Susan Taylor.

I'ma go on, but I'm a Baptist preacher, so I gotta do a little introduction. I saw one of the great orators, . . . arguably the greatest orator of our generation, who fuses spiritual acumen and political commitment along with ethical and moral enlightenment, and does it with such beautiful and powerful prose; the Reverend Dr. Frederick Douglas Haynes III is in this house from Dallas, Texas. Stand up, Dr. Haynes. . . . We'd be like a jazz session, let him come up here and spit a little bit. Y'all wouldn't mind that, would you? At the end, when I'm flunking, I want him to come on up here and say a few words. He's a tremendous and brilliant young man.

Now, today, what I want to do is talk about—as Dean Dark's excellent leadership and the phrasing of Attorney Arnwine and this great school [says]—civil rights at this critical juncture, [about] the crisis that we are enduring as a community, and especially among you, a community of lawyers. I haven't been among this many lawyers since I was in trouble. And when I think about the extraordinary responsibilities that lay before you—look at the cover of the *New York Times* today. There is something about the healthcare law above the fold on the right side; the NSA stuff above the fold on the left side; and immigration law, ruled on by the highest Court, with Haitian im-

migrants, in the Dominican Republic. All three of those are relevant to what you do. All three of those point to the extraordinary relevance of your particular commission as lawyers, as legal minds, as jurists, as activists within the law. And we know that other communities have the leisure of believing in the essential divorce between jurisprudential rationality on the one hand, where they can talk about legal principles that transcend their mark in space and time, and on the other hand, a kind of activism that is relegated to the periphery because [it] is seen to somehow besmirch the integrity of the law, which is neutral to the contaminating influences that surround it. But ya'll know better than that.

I mentioned Professor Kimberlé Crenshaw because [of], among other things, what critical race theory invites us to understand: her notion of intersectionality, that the simultaneous convergence of conflicting forces that specify the degree to which we are both indebted to a more complicated and nuanced analysis of the problems that prevail, and how our lives are lived at those dangerous but productive intersections. And then to understand that ain't nobody sees, as the philosopher [Leibniz] calls it, *sub specie aeternitatis*—from the gaze of God. Th[ere]'s a bunch of Latin words flowing around in legal theory. A lot of that stuff has to do with our indebtedness to an enlightenment rationality that predicates reason upon its neutrality and its inability to intervene, except in specifically objective fashion. But the reality is, the very shaping of the categories that are referred to owe a debt to the historical context and the radical contingency of the very notions that we produce. In other words, all of this argument [is] about philosophy being part of a conversation, about theory being part of a conversation, and the conversation is indebted to the life worlds of the very peoples to which it refers.

We have always understood from the very beginning, [and] the best traditions of law in our community have always understood, that the law should be used as a weapon for those who are vulnerable, and those who are the weak, and those who are underrepresented. And so yall ain't becoming lawyers just to make mad cheddar. Cheddar can be had and should be made. Nice houses, nice cars, and sparkling reputations and living high on the hog—that's all good, but that's not your ultimate purpose. Your ultimate purpose is to fulfill the great tradition of the Howard Law School. We talk about Dean Branton. We talk about Dean Dark. We talk about Dean Schmoke. We can talk about Dean Charles Hamilton Houston. We speak about

Thurgood Marshall and Constance [Baker Motley]. There's so many people who emerge from these halls where you sit, where you study, where you learn, so that the application of what you study is so incredibly important to our community.

There are many young people trying to figure out what they're gon' do: "Is what I do relevant?" [They're] studying polymers or studying theoretical math or trying to figure out the application of some principle of thermodynamics, or some principle of physics; can this have particular material consequence on our peoples' lives? Well y'all working in a field where it's pretty obvious what you do is so relevant to the condition of our community, and especially now.

It's interesting, we got two black lawyers in the White House, as president and first lady, right? Now, we had Bill and Hillary—two lawyers, Yale lawyers—then they upgraded. I mean we ain't going to give Cambridge that much love, but y'know, since a brother and sister went there. Now, we've got two lawyers in the White House, and so, among other things, what's critical about that is that supposedly, ostensibly, they bring to bear a critical form of analysis—a way of thinking. [President] Obama [i]s a constitutional lawyer, though people have challenged him in terms of the application of that constitutional law pedigree. Because it's one thing to be theoretical about it, another thing when you get up in the spot and you are now the *subject* of a lot of analysis about how the constitution can be rejiggered to conform to the anatomy of your present desire. So now, that constitutional law background becomes quite significant, because the President himself, as a constitutional lawyer, is keenly aware of the contradictions and conflicts between the embodiment of his office and the theoretical ascription of power to that particular office.

Now, all of this is a matter of introduction to get down to my major points. So, I just wanted to clear a little bit of intellectual landing so we can get into some specific stuff, or as the brothers say, 'Pacific stuff,' as opposed to Atlantic stuff. And so, when we think about it more broadly, your particular vocation is critical, because as a nation of laws, as a nation that says it's governed by rules that are predicated upon the finest legal representation and the articulation of objective principles that should adjudicate between competing claims, lawyers adjudicate between competing claims—rival estimations of truth. And so, you're taught in law school—like they ain't taught in other places—about how to think and about logical processes and about deductive and inductive reasoning, about the application of le-

gal principles, and it ain't necessarily got nothing to do with what's right or wrong, it's gotta do with what you can prove in a court of law. That's why the few victories we end up getting, we get real excited about, especially when the tables get turned and now folk on the outside feel what we been feeling on the inside for a long time—like what happened with O.J. I don't want to go old school, and I'm not trying to make O.J. a hero. The general rule of thumb is, if you get away with murder, go somewhere and be quiet. I ain't naming no names, I'm just saying, that's a general principle.

But people now are mad, they want to change the law, the law is messed up, the law is jacked up—the law was jacked up when it was applied to us, too. In the same way, it never was about whether you're right or wrong or what's moral, it's about what can be proved—evidentiary hearings, disparate treatment and effects, all these big old terms y'all be slinging around like crack dealers. And so now, when applied to us, when we use the law in defense of our vulnerable humanity, it is a highly charged arena because the nation's major lawyer is under assault—besides the two lawyers in the White House. They jumping on Eric Holder like he done stole something from them. Done got \$14 billion from Goldman Sachs or JPMorgan—one of them big companies with a lot of money—and at the same time, trying to protect the Voting Rights Act—“Oh you deny us on number four, we hook up number two.” Black people play the numbers. But thank God he's there, because if he wasn't there, what would happen to us? What would happen when, immediately, everybody from Mississippi, Texas, North Carolina, waiting to apply that law . . . put out voter ID laws to try to rob us and deprive us of our freedom? All I'm saying in this introductory part here is what you do is important. Now, let me get to the main part. I ain't gon' take but two hours, and we'll be out of here.

Let me say this: civil rights is at a critical juncture. It's at a critical juncture, why? Because what we thought was sacred, what we thought was permanent, what we thought was inviolable—and some elements of our rights are certainly inviolable, [but] we also know they are vulnerable to rebuff because a Supreme Court can make a decision about the application of that law in ways that we find problematic—consternating to be exact. So now, the very success of the Civil Rights Movement, which produced the law which protected the people who were victimized formally, and still to this day, the very success of that is used to prove why it no longer is necessary. When from the

very beginning, if the universal principles that are, if you will, the proxy for enlightenment rationality in America were working—if you had universality and it was already working—you wouldn't need the specific and the particular. The Civil Rights Movement is a judgment against an offensive notion of universality because [if] it was already evident that it was true and powerful and necessary, the Civil Rights Movement would [not] be necessary. The reason there was a Civil Rights Movement is because it was already attacking this spurious, mythical notion of objectivity and universality. It ain't universal. It ain't objective. It is created for particular communities to defend themselves by appealing to principles that, when charged and challenged and scrutinized, can be put forth as the basis for messing folk up, in bigoted fashion, without looking like it. Now, that ain't exactly legal rationality I just gave you there, but that's what be happening.

And so, when I think about civil rights right now, the relationship between civil rights law and civil rights activity was at one point seen as necessarily parallel in our culture. Now, we know there was tension. There was Tupac versus Biggie tension between Thurgood Marshall and Martin Luther King, Jr. There was tension. You know, Thurgood Marshall thought you should be in the courts, you should be out there (and thank God he was) arguing the case, using Kenneth Clark or whoever, whatever psychologist was necessary in order to justify what was going on in *Brown v. [Board of Education]* in the mid-fifties. He understood the necessity for legal reasoning. Martin Luther King, Jr. said direct action is critical as well, because direct action led to a change in behavior, custom, convention, and tradition, and the transformative possibility of Dr. King's movement forced the courts to take, if you will, cognizance of what was going on in the streets and to challenge the law as the legal architecture of American bigotry. And so, you've got to understand that philosophical argument in order to understand the parallel track that the Civil Rights Movement was on, on the one hand, and [what] civil rights law was doing, on the other hand. They were parallel movements; without one, the other would never make sense. Martin Luther King, Jr. fought to change the law. The March on Washington was about policy and about law—Civil Rights Bill, [Voting] Rights [Bill], and [after] his death, the Fair Housing Act of 1968. This enshrined in American society a profound reorientation of this culture, toward a different way of thinking, legally and in terms of public policy, about the future of black folk.

[W]hen I think about this being . . . a critical juncture now, I think about the fact that we need more lawyers who are willing to stand up and understand that their legal education becomes a vehicle for us to make arguments on behalf of vulnerable people. Not only in terms of making arguments against those who would try to rob us of our freedoms with these spurious ID laws. Eric Holder is already suing folk, left and right. Why? Because he's not going to be intimidated by the Supreme Court which made a *judgment* about the necessity of the civil rights law being expired, because the South was no longer as bigoted and racist and fanatic as it once was. Where you livin' dude?

Now we know that our civil rights obligations are not exhausted by the vitality of the black voterate, which is part of the argument that was ironically being used: the fact that so many black people were voting, that black people were voting in disproportionate numbers to white folk. They were saying, "Obviously there ain't no problem, 'cause y'all gettin' out there and votin'." So now, the very success of our Movement, despite the limitations, is used against us to try to justify snatching away what we already got. And we need y'all to be on the front line using them Latin words in defense of Negro people. Right? We need you on the front line, preparing briefs (like you just sent out) in defense of African American and Latino and other native, and First Nation, and indigenous people. We need you on the front line talking about what happens with people who are immigrants. We need you on the front lines, as you're talking about in your . . . [Symposium] here, with environmental justice. We need you making arguments that are crisp and clear, that are compelling, that articulate a viewpoint, that challenge[] the spurious objectivity and transcendence of this so-called enlightenment tradition, 'cause you understand from the get go—black peoples' power and black peoples' passion was a driving force for our own agency, but the oppression we endured was a measure of the failure of the dominant society to recognize us as human beings.

Wasn't it the Supreme Court that said we ain't got no rights that folk are bound to respect? That's the law of the land. So when these crazy politicians out here talkin' 'bout "Obamacare is like slavery"—"Slow down Mase, you're killin' 'em." "Whatchu talkin' 'bout Willis?" Fugitive Slave Act is parallel to Obamacare? You know, isn't it interesting, isn't it ironic, isn't it crazy that the dominant American society fails to recognize our plight and predicament as vulnerable citizens in the United States of America? And so they will use the very

appeal to slavery—by the way, the people they come from wasn't checkin' for us when slavery was here, wasn't checkin' for us when Jim Crow did reign, wasn't checkin' for us when the Supreme Court was mauling and mugging our humanity, but now all of a sudden they see it as a litmus test for the vitality and the humanity they possess when they stood tooth and nail against it from the very beginning.

Now these kinds of arguments don't necessarily make it out to the broader public. Here, you got to do deep thinking. You gotta put your thinking caps on. You got to be willing to stay up late at night and pour over, you know, judgments that have been made and rendered. This is not an easy thing you do. This demands the most rigorous form of logic. This demands the most powerful form of thinking. This demands counterintuitive knowledge, and in order to do that, you got to study hard. And so, civil rights in terms of the parallel between the Civil Rights *Movement* and civil rights *law* was powerful. Yes, there was tension, but there was also cooperation. Because what these men and women understood ultimately [was] that we will never make any serious progress unless we can protect it in court and pursue it in policy in society. What we need you to do is to continue to make those arguments.

Yes, we know affirmative action is next after the Voting Rights Act. Now folk goin' 'round making the arguments about affirmative action, feeling all superior, askin' you how you got that job, and how you got up in to Howard, and how you got into Howard Law School, and how you went to them schools you went to . . . *assuming* that you are somehow inferior. Now that's a hell of a jump in logic right there, 'cause half the folk askin' you questions ain't really got no . . . ground to be standing on to begin with, right? It's like those poll taxes and those literacy tests; half the white folk administering literacy tests couldn't pass them. Ain't that something? The ignorance was so deep and lethal, the bigotry so profound and poisonous that they didn't understand the degree to which they had more in common with the Negroes they were trying to lambaste than the white supremacists of elite standing who used them as pawns in their broader game.

And so, the reality is when we think about civil rights law and when we think about affirmative action, affirmative action don't mean hookin' nobody up [who] don't deserve to get it. Affirmative action means what? When you've got two people of comparable standing, appealing for a particular position, competing for a particular slot, the nod goes to the person of color, or the woman, or the other minority

who has been historically underrepresented in the mainstream institutions of America. Now, that don't sound like to me you getting the hook up 'cause you black. That sound like to me: We been out here doin' the darn thing for a minute and now because of the creative edge we've been able to leverage as a result of our historically recognized minority status, we get a nod because the society itself has deprived us of the benefit of participation and the society has deprived itself of the benefit of our knowledge.

Affirmative action ain't just for us, it's for them too, right? If a society that doesn't want Michael Jordan playing basketball . . . or John Coltrane blowing his sax, or Toni Morrison writing, when Toni Morrison writes, or Coltrane blows, or Satchmo plays his trumpet, or when Jordan, or Kobe, or LeBron or whoever does their thing, that's not a way of compensating for intellectually inferior peoples, that's a way of expanding the boundaries of your society so you will be blessed by black genius. So, now they say, "Well all y'all ain't geniuses." All of y'all tryin' to keep us out ain't geniuses. I know, I teach your kids! Now all my kids are smart, but I'm just sayin'.

So, what happens is, affirmative action is critical because it becomes a mean[s] toward radical justice. Diversity on its own is not a good merit, but diversity as a means toward an end is a radical measure. See you could have a black person, an Asian person, a Native American person who are all homophobic. That's diversity but inequality. Y'all are just [diversifying] your bigotry. We all agree, gay people should step off, right? So, you now, you . . . go to your church and your church is black, your church is white, your church is red, your church is brown, your church is yellow. Y'all all agree gay people should mean nothing, have no . . . moral standing in our community. That's diversity toward inequality. But real equality demands diversity become a vehicle toward the realization of a broader goal, and that broader goal is about the transformation of our vision about who is a human being. That's why the beauty of civil rights law teaches us we shouldn't be tryin' to hate on nobody. You know I know a bunch of black preachers [were] mad when Obama came out for gay marriage. Like we really believed Obama wasn't for gay marriage from the get go: (in Obama voice) "The Lord has spoken to me." Jesus's name was Joe Biden. That's the blackest thing in the White House right there. So Joe Biden got up, (in Biden voice) "Hell yeah, I think it's good!" Obama's like, "Damn! This dude keeps trying to out me as a black man." So, Obama has to go on with Robin

Roberts, signifying, subtly, and confesses, (Obama voice) “I’ve had a change of mind. I’ve evolved in my thinking.” And now all of a sudden, gay people are good for marriage.

And, the thing is, y’all, all these black preachers messed up. Now, the black preachers don’t speak out over incarceration. Black preachers ain’t speaking out in terms of one out of two black boys being kicked out of school. Black preachers ain’t speaking out when it comes to fundamental injustice and disparity between suburban schools and urban schools. But, the black preachers gon’ speak out on some gay marriage. Now, even in terms of empirical verification of the numbers, that’s just the wrong-headed methodology, ‘cause you got more folk who gonna be kicked out of school, more folk who in prison, more folk who are subject to all those other forms of vicious mistreatment and bigotry than gay marriage. You ain’t even marrying nobody who’s gay or [lesbian] hardly in your church. You don’t even know no gay people who want to get married. Now they’re there, you’ve just suppressed them through the rigorous identification with an evangelical piety that beats up on people. You’re supposed to be worshipping a God that frees you up and your religion is reproducing the pathology of bigotry. So, you got all these gays, right? I mean all these gay and lesbian people in the church. Everybody know they gay. It ain’t a secret, right? And I don’t want to get into, you know, what James Baldwin terms the “burden of representation,” [about] the symbolic articulation of *difference* and otherness. You know, going to the choir after you done preached a homophobic sermon and the choir director gotta get up. (Gestures for people to stand up.) Get that extra swag on. (Gestures as if conducting a choir.) You know. Everybody know. But what everybody don’t know: some of them people preaching them sermons gay, too. I ain’t never been to a black church that turned down gay tithes. . . . So, the hypocrisy of the movement is that it refuses to be thorough and committed to its own principles because it compromises constantly with its own bigotry.

My point more broadly is this: we get outraged about gay and lesbian people, but legally, we shouldn’t be mad at nobody trying to claim their rights. And Negroes get real proprietary when it comes [to comparing civil rights to gay rights]: “That’s our movement. We own it. We don’t own much but we own the Civil Rights Movement, Incorporated.” Then you start looking back at it. King was borrowing it from a brown dude in India. I don’t know, he didn’t pay no royalties. . . . Legal principles themselves that are borrowed from more

ancient European, and, for that matter, even African societies. So, really all of us are sweetly promiscuous when it comes to sharing principles and knowledge. How we gon' own something? Why would we be upset that gay people get inspired by black people? Because people can be both black and gay at the same time. At the same damn time. And so, what's interesting is that civil rights law now puts us in the odd position of working against the intuitive and bigoted beliefs of conservative communities of color while we're trying to open up space for the permission of whosoever will, [which] we claim to be the basis of our religion. So my point is, your law should cut against the bigotry of your religion. The law in terms of civil rights but also in terms, not only in terms of voting rights, but in terms of people's ability to marry who they want. And black folk shouldn't be complaining about nobody when it comes to getting married. Our numbers are low; we gotta raise them up. So . . . count all the gay people, and if roaches and rats want to get married, if they're in our houses, we should count them, too.

The point is, how we gonna be talking about the health of the black family and turn around and hate on the health of the black family because it doesn't conform to a narrow conception? Now that's your *moral* problem, but your legal rationality, your jurisprudence, ought to be driven by a consideration of the integrity of the other, and the basis of your identification with them should not be the faith you possess but ultimately your understanding that in a secular society, no matter what your religion, no matter what your tradition, no matter what your sexual orientation, no matter what your faith tradition, no matter what your ethnicity, you are a human being who is a subject of the state. You should be protected by every law that can be mustered, and every logic that has been generated, and a place like Howard should be used and deployed to defend those folk. That's what you should do.

A couple more things, and I'm done. But the nitty-gritty of it, of course, is that your generation, which has been much maligned, talked about, beat up on . . . and which has been downplayed, talked about because y'all into social media, well, social media becomes an interesting arena . . . not only to contest intellectual property and to figure out legal bases in turns of ownership, but it also becomes a way of disseminating a message and getting information and coordinating a movement that can jumpstart an entire people into a way of conscience that is necessary in 2013. In other words, a lot of good stuff

happens on social media besides TMZ showing Kanye and Kim Kardashian. . . . There's a lot of other good stuff going on there. Even though I don't want to diss watching Bossip, World Hip-Hop Star or whatever that is. All that's good, but what's greater is to figure out ways in which your generation connects with each other, forges connections that are about liberation, about freeing people from their narrow constraints and about understanding the relationship between older and younger generations. The beauty of that, of course, is that in that social media space, you begin to not only organize, you begin to share information, you begin to dig up archives that used to take us a long time to [get by] going to the library, where the lies are buried; and then step up and use that information, all the knowledge at your fingertips. I don't want to get down to a Nicki Minaj ethic, but Google me . . . and check it out. But be careful about everything that you Google because everything you Google ain't got good information. So you still gotta use some old shoe leather and you gotta stay up late at night and read them books and understand what's going on. But you gotta combine the social media impetus of your generation with a good old-fashioned appreciation for [the] strategic advantages of deep thought.

And then finally, let me say this. I'm so proud of so many of you. I'm so proud of all of you for choosing to devote your life to this critical moment in civil rights, when immigrants who are being dissed, people deploying xenophobic narratives talking about "our land versus their land." And it's interesting to see these conservative black people join in this jingoistic, xenophobic narrative about "us versus them" when you have been owned, when you have been bought, when you have been sold and distributed—now talking about "us versus them." This Manichean distinction, you've got to get rid of that. Folk getting mad: "Them immigrants taking our jobs." First of all, you ain't even have them jobs. You was not working—not *were* not—you *was* not working them jobs. You weren't competing with Jose to get up at 4:30 in the morning to get on a truck; that was not your stilo. Negro, "I'm not doing that. Been there done that." I understand that. But we shouldn't be mad at Jose. We should be mad at American monopoly capitalism and global crises of capitalism that exploit[] indigenous people the world over, that fail[] to pay them a good wage. Your enemy is not Jose, it's not the *Puerto Ricans*, it's not the *Dominicans*, it's not the *Mexicans*. It's the *Republicans*. They're the ones who are our problem.

And so, that critical juncture of civil rights law suggests that you expand the horizon of opportunity for those who have been historically excluded. Now, that doesn't mean we're ignorant. We know that many Latino immigrants come to this country with deep and profound racial bias because blackness is demonized the world over. Even within Latino communities, darker is worse, lighter is preferred. There's a difference between being a white Cuban from Miami than a black Dominican from Washington Heights. There's a big difference. If Elian Gonzalez had been from Santiago de Cuba as opposed to Habana de Cuba, they would have gave him a Snickers bar and told him to take his black ass home. So, we know when we go to Cuba, when we go to Brazil, and we see the gradations predicated upon light versus dark, we know we are in the face of a pathology so deep and persistent that it is resistive to even our most sophisticated analysis, because at base, we have a deep down, deeply ingrained revulsion to *blackness*. So, what you and I must do is to continue to lift and fight against that, even as we deploy our legal education against some of the greatest forces of oppression in the modern world.

And then, finally, in terms . . . of what is going on with our environment. I know Dr. Bullard is here and others. You know, when Hurricane Katrina hit, we saw what happened. Black people and people of color are still the most vulnerable. They say, "Well the storm didn't have no color involved; storms don't segregate." That may be true. It may not be segregated in intent, but it sure is in terms of its consequence. If you live higher, you're usually richer and whiter. If you live lower, you're usually darker and poorer. That means already its pre-determined that those who are most vulnerable to natural disaster are the folk who are subjects of natural disasters and unnatural disasters in our political economy. Those who are in prison, those who get poor healthcare, those who are on the margins of society, those who don't get good education, those who don't do well in school, those who drop out early, all of those people happened to be victimized by the same forces of an environmental disaster that we continue to see perpetuated even now.

And so, in your day and age, as I end my little speech, I would say this to you. We have a real smart guy, who's a black lawyer, in the White House. Our people looked forward to his coming a long time. Now we know it's been a lot more complicated than we thought. And black folk [are] divided. On the one hand, you got some people who are very critical, some to the point of hate. Criticism is not hate, but

there is hate. Haters hate. But there is legitimate criticism, too. [T]he Obama contingent on the other hand that don't wanna hear nothin' wrong. "Don't be saying nothin' about him. That's my man." Like he paying your child support right there in the spot. "That's my daddy." "That's my boo." I ain't mad, but I'm telling you . . . that ain't what lawyers do, right? Lawyers understand principles applied in as objective a fashion as possible. Ain't no objectivity; there is fairness, though. Fairness means I put my biases on the table and examine them as part of the process by which I examine any particular issue. But the point is we can't pretend that everything been rosy, peachy keen with a black lawyer in the White House who's creating some awful, powerful conflicts for lawyers who understand the Constitution. Let that be an abject lesson to you about [how] power tends to corrupt. And let this be an abject lesson to you—stuff you think you can change is hard to change once you get in, but you must maintain some cutting edge of critique. I don't mean hating on Obama. I love to see Obama. I love to see him walk down [the stairs of] Air Force One. I love to see him with his little swag on. I just wish sometimes he would go haywire. Just a little bit. Just one morning get up and lose it, step out the White House with a skull cap on, with a terry-cloth robe, and some tube socks, and some gold teeth, and pick up his newspaper and say: "Waassup!" "This my house!" "We run this . . . right here!" Would love to see that. Ain't gon' happen.

You don't have to rebel in terms of the symbolic appropriation of blackness and the tropes and metaphors that have gone on consistently, but what you could do is create just a little space of dignified humanity in the midst that acknowledges us publicly and loves us unapologetically. Now if you can't do that with all your lawyer information, with your JD's and your LLM's, and your law professorships, if at the end of the day you are not capable of acknowledging—yes with finite possibilities, we get it, yes acknowledging, even though the [so-called] "crackerocracy" is deep and powerful—. I don't mean white folk; I'm talking about the vicious, bigoted edge of America that [concludes that] everything Obama does they hate, because they have an unconscious and sometimes conscious despisement and resentment of anything black so that his very presence occasions such opprobrium and such hatred that they don't even know how to explain it to themselves, that when he steps up in the spot, they see an angry, hateful black man. And all I wanna say to you is that we protect him and love him, but at the same time, we got to demand something of him. When

I look back on the best lawyers in our tradition, these were rigorously engaged, arguing lawyers, but they also expected something of their community, and they expected something of their leadership. And if you are serious, not just simply asking for *Obama* to be responsible, *you* gotta be responsible, too! What do you do with your time? What do you do with your resource[s]? What do you do with that knowledge? What do you do with that economic base you create? Some of the richest black folk in America will be lawyers, but they will be poor of spirit if they are not committed *ultimately* to the redefinition of our peoples' freedoms! That's what you must do!

And I'll end by saying this. And you gotta be there already. You gotta be thinking about that now! I was leaving the other day going from . . . Detroit to Chicago . . . Had my ticket, said I was leaving at 9 o'clock and arriving at 8:55. Then I got it: time change. We get that. We smart. Y'all lawyers. So I'm leaving at 9 and arriving at 8:55. I was arriving before I left, [as Therman Evans says]. . . . If you ain't already at where you going, you ain't gon' be there when you arrive, right? [Y]ou already, even as [a] 1L and 2L and 3L, . . . got to be laying strategy and plans about how you gonna deploy all this great information you gettin'. Yes, it's gonna change, yes, the exact picture may alter, but you've already got to be involved in getting there! Migrating your spirit! Migrating your mind! Migrating your soul! Migrating your knowledge! You already gotta be where you're heading so when you get there, something will stand with you, and the power of your conviction will never waiver! When you do that, then you live up to the great traditions of all these great lawyers who have done a marvelous and majestic job of bringing freedom and justice to our people. God bless you.

To Accept or To Reject: *Arizona v. Inter Tribal Council of Arizona*, the Elections Clause, and the National Voter Registration Act of 1993

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INTRODUCTION	760
I. THE ELECTIONS CLAUSE	761
II. THE NATIONAL VOTER REGISTRATION ACT OF 1993.....	767
III. ARIZONA’S PROPOSITION 200	775
IV. LOWER COURT LITIGATION	777
A. Initial Stages	777
B. Ninth Circuit Panel Decision	779
C. En Banc Decision	788
V. <i>ARIZONA V. INTER TRIBAL COUNCIL OF ARIZONA</i>	792
A. The Majority Opinion	793
1. The Scope of the Congressional Article I Authority	793
2. Conflict Analysis	795
3. Rejection of Arizona’s Constitutional Argument.....	798
4. Kennedy Concurrence, Thomas Dissent and Alito Dissent	801
VI. IMPLICATIONS OF <i>ARIZONA V. ITCA</i>	802
A. The Elections Clause	802
B. Preemption Jurisprudence	803
C. Voter Qualifications	805

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D. Implications for the NVRA and Other Federal Election Legislation..... 807
CONCLUSION 809

INTRODUCTION

On June 17, 2013, the United States Supreme Court decided *Arizona v. Inter Tribal Council of Arizona, Inc.* (“*Arizona v. ITCA*”).¹ The Court held that a 2004 proof of citizenship requirement for voter registration in Arizona (“Proposition 200”) was preempted by the National Voter Registration Act of 1993 (“NVRA”) as it applied to federal mail-in voter registration applications.² In contrast to the instantly-momentous ruling that followed just days later in *Shelby County v. Holder*,³ the Court’s decision in *Arizona v. ITCA* created few ripples.

The Court’s majority opinion, with only two dissenters, spanned the usual ideological divide. The decision nominally turned upon a narrow question of textual analysis: whether the NVRA’s requirement that states “accept and use” federal voter registration forms preempted, under the Constitution’s Elections Clause, Arizona’s requirement to “reject” such forms if they are not accompanied by what the state deems to be satisfactory proof of citizenship.⁴ The Court strongly reaffirmed its prior Elections Clause jurisprudence, and did not map out any major new doctrinal ground. Apart from its brevity, the majority’s conflict analysis tracked the same basic approach as the Ninth Circuit en banc decision that it affirmed.

So why then did the Supreme Court use one of the valuable spots on its docket to hear this case? The most likely answer is that Justice Kennedy was uneasy with the Ninth Circuit’s discussion of preemption principles in its en banc decision, which induced him and one other Justice to vote for certiorari, but did not ultimately prevent him, along with six other Justices, from finding that a textual conflict was present and that preemption was required.

1. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013).
2. See Pub. L. No. 103-31 (codified at 42 U.S.C. § 1973gg *et seq* (2012)); *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2260.
3. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). An in-depth discussion of the *Shelby County* decision by three of the author’s colleagues appears elsewhere in this volume. See Jon M. Greenbaum et al., *When the Rational Becomes Irrational*, 57 How. L.J. 3, 811 (2014).
4. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2251.

Did the Court perhaps leave troubling implications lurking beneath the surface of what appeared to be a fairly routine case of textual interpretation? In a word, no. Despite invitations to begin weakening Congress's Elections Clause authority, the majority showed no inclination to do so. To observers of the Court for the past several decades, this may be the most significant aspect of the Court's decision.

This Article attempts to place the *Arizona v. ITCA* decision in context. Section I reviews the Supreme Court's prior Elections Clause preemption decisions. Section II provides the structure and interlocking components of the NVRA. Section III discusses Arizona's Proposition 200. Section IV summarizes the case in the lower courts, with particular attention to the Ninth Circuit's preemption analysis. Section V reviews the Supreme Court's decision, focusing upon the scope of the Elections Clause authority, the Court's preemption analysis, and the rejection of a "Hail Mary" constitutional argument by Arizona. Section VI discusses the implications of the decision with respect to the scope of the Elections Clause powers, the Elections Clause preemption analysis, Arizona's constitutional argument, and the future of the NVRA.

The dispute over Proposition 200 is not over, but because the Court's decision squarely held that Congress controls voter registration procedures for federal elections, and because it confirmed that the NVRA rests upon solid constitutional ground, it represents a meaningful and welcome respite from the typical outcome of recent voting rights cases before the Court.

I. THE ELECTIONS CLAUSE

Congress enacted the NVRA in reliance upon its authority under the so-called Elections Clause of the Constitution of the United States.⁵ The Elections Clause provides that:

The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.⁶

Prior to its decision in *Arizona v. ITCA*, the Supreme Court had reviewed Congress's powers under the Elections Clause *vis-à-vis* the

5. See U.S. CONST. art. I, § 4.

6. *Id.*

States in only a relative handful of cases. Those cases, however, consistently recognized the plenary constitutional authority of Congress in regulating the conduct of congressional elections.

The Supreme Court first addressed the Elections Clause powers of Congress in detail in *Ex parte Siebold*.⁷ Hearing a habeas corpus petition arising from a criminal conviction for interference with the conduct of a congressional election in Baltimore, Maryland, the Court established the principle that the regulations of Congress are “paramount” with respect to the conduct of congressional elections:

As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are pro tanto superseded, and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no danger of disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.⁸

The Court’s description and application of the Elections Clause in *Siebold* became the touchstone for its subsequent Elections Clause

7. See *Ex parte Siebold*, 100 U.S. 371, 383–84 (1879); see also *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (illustrating another habeas action argued with *Siebold*).

8. *Ex parte Siebold*, 100 U.S. at 386–87.

Arizona v. Inter Tribal Council of Arizona

jurisprudence, as the Court continued to broadly construe Congress's authority. In 1884, the Supreme Court upheld the authority of Congress under the Elections Clause to enact federal criminal penalties to protect the exercise of the right to vote in congressional elections from violence and intimidation.⁹ In 1888, the Court affirmed the authority of Congress to regulate conduct at any election being conducted together with a federal contest.¹⁰ In 1915, the Court recognized the congressional power to ensure that eligible voters can have their ballots counted.¹¹ The Court reaffirmed its previous expansive readings of the Elections Clause powers in 1917 in *United States v. Gradwell*.¹²

In 1932, the Supreme Court ratified and expanded upon *Siebold's* description of the breadth of the Article I, Section 4 powers in *Smiley v. Holm*.¹³

Consideration of the subject matter and of the terms of the provision requires affirmative answer. The subject matter is the "times, places and manner of holding elections for senators and representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and in-

9. See *Ex parte Yarbrough* (The Ku-Klux Cases), 110 U.S. 651, 661–62 (1884).

10. See *Ex parte Coy*, 127 U.S. 731, 752–53 (1888).

11. *United States v. Mosley*, 238 U.S. 383, 386 (1915).

12. See *United States v. Gradwell*, 243 U.S. 476, 483 (1917).

Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under [the Elections Clause] in the prescribing of regulations for the conduct of elections for Representatives in Congress, or in adopting regulations which states have prescribed for that purpose, has been settled by repeated decisions of this Court in *Ex parte Siebold*, 100 U.S. 371, 100 U.S. 391 (1879); *Ex parte Clark*, 100 U.S. 399 (1879); *Ex parte Yarbrough*, 110 U.S. 651 (1884), and in *United States v. Mosley*, 238 U.S. 383 (1915).

Id. at 482. *Gradwell* described the 1870 congressional election legislation, 16 Stat. p. 144, 16 Stat. p. 254, and its 1872 amendments, 17 Stat. 347–349, as a "comprehensive system" giving "[f]ederal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete." *Id.* at 482–83 (citations omitted).

13. See *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932).

volves lawmaking in its essential features and most important aspect.

This view is confirmed by the second clause of [A]rticle I, [§] 4, which provides that “the Congress may at any time by law make or alter such regulations,” with the single exception stated. The phrase “such regulations” plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It “has a general supervisory power over the whole subject.” But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making “such regulations”; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.¹⁴

In 1941, the Court found that Congress could reach the conduct of primary elections for federal office under the Elections Clause in *United States v. Classic*.¹⁵ The Court continued its expansive reading of Congress’s Elections Clause powers in 1972, invoking *Smiley* for the “breadth” of those powers in the context of a dispute as to whether a state has authority to regulate U.S. Senate election recounts (versus the Senate’s authority to determine the seating of its members).¹⁶

The Supreme Court’s most recent Elections Clause preemption case prior to *Arizona v. ITCA* was *Foster v. Love*.¹⁷ In *Foster*, the Court maintained its broad reading of the scope of the Elections Clause. “The [Elections] Clause gives Congress ‘comprehensive’ authority to regulate the details of elections, including the power to impose ‘the numerous requirements as to procedure and *safeguards* which experience shows are necessary in order to enforce the fundamental right involved.’”¹⁸ “[I]t is well settled that the Elections

14. *Id.* (citations omitted).

15. *See* *United States v. Classic*, 313 U.S. 299, 317 (1941).

16. *See* *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972).

17. *Foster v. Love*, 522 U.S. 67 (1997) (concerning Louisiana’s schedule and method for electing members of Congress). Under the state’s unique “open-primary” system, a winning candidate for Congress could be determined before the general election required under 2 U.S.C. §§ 1–3 was ever conducted, and under the challenged statute, over eighty percent of the contested congressional elections in Louisiana had ended as a matter of law with the open primary. *See id.* at 69–70.

18. *Id.* at 71 n.2 (quoting *Holm*, 285 U. S. at 366) (emphasis added).

Arizona v. Inter Tribal Council of Arizona

Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.”¹⁹ The Court concluded that preemption results once a conflict with federal law is shown: “When Louisiana’s statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void.”²⁰

While Article I places final authority to set the time, place, and manner of congressional elections with Congress, Article I elsewhere places the authority to set voter qualifications for House elections with the states. Article I, Section 2 provides that electors in each state for the House of Representatives “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”²¹ The Seventeenth Amendment does the same with respect to Senate elections.²² Article II, Section 1 provides that each state shall appoint presidential electors “in such Manner as the Legislature thereof may direct.”²³

In *Oregon v. Mitchell*,²⁴ the Supreme Court grappled, inter alia, with challenges to the power of Congress to enact two different voting qualifications: then-Section 302 of the Voting Rights Act,²⁵ which set the minimum age for voting nationwide at eighteen for both state and federal elections; and Section 202 of the Voting Rights Act,²⁶ which established nationwide residency rules for voting in presidential and vice-presidential elections.²⁷

With respect to the age provisions contained in Section 302, Justice Black’s opinion in *Mitchell*, which expressed his own views and announced the Court’s decisions, concluded that “the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.”²⁸ Justice Black’s view was that Congress had the

19. *Id.* at 69 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 832–33 (1995)).

20. *Id.* at 74.

21. U.S. CONST. art. I, §2, cl. 1.

22. *See* U.S. CONST. amend. XVII.

23. U.S. CONST. art. II, § 1, cl. 2.

24. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

25. Pub. L. No. 91-285, § 302, 84 Stat. 314, 318 (1970), *invalidated by Oregon v. Mitchell*, 400 U.S. 112 (1970).

26. Pub. L. No. 91-285, § 202, 84 Stat. 314, 316 (codified at 42 U.S.C. § 1973aa-1 (2012)).

27. *See Mitchell*, 400 U.S. at 133 (upholding a nationwide ban on literacy tests based upon the Reconstruction Amendments, without the implication of the Elections Clause).

28. *Id.* at 118.

Elections Clause authority to set the age (or any other) qualification for voting in federal elections, but that it lacked the authority to do so for state elections.²⁹ However, no other member of the Court adopted Justice Black's view. Justice Douglas voted to uphold the challenged age provision, citing the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment, with respect to both state and federal elections.³⁰ Justices Brennan, White, and Marshall likewise voted to uphold Section 302 with respect to both state and federal elections on Fourteenth Amendment grounds.³¹ Chief Justice Burger and Justices Harlan, Stewart, and Blackmun voted to strike down Section 302 as applied to both state and federal elections.³² Section 302 subsequently was mooted by the adoption of the Twenty-Sixth Amendment in 1971.³³

The Court upheld Section 202 in *Mitchell*, with only Justice Harlan dissenting. Justice Black's view was that Section 202 was constitutional, for the same reasons he cited with respect to Section 302.³⁴ Justice Douglas concurred in the judgment but not with Justice Black's reasoning, relying upon the Privileges and Immunities Clause of the Fourteenth Amendment.³⁵ Justices Brennan, White, and Marshall concurred in the judgment but not with Justice Black's reasoning, relying on the right of interstate travel enforced through Section 5 of the Fourteenth Amendment.³⁶ Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, also concurred in the judgment but not

29. See *id.* at 117–18. “Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters, should be dispelled by the opinion of this Court in *Smiley v. Holm*, 285 U. S. 355 (1932).” *Id.* at 122.

30. See *id.* at 135 (Douglas, J., concurring in part with judgment and dissenting in part from judgment) (“I dissent from the judgments of the Court insofar as they declare [§] 302 of the Voting Rights Act, 84 Stat. 318, unconstitutional as applied to state elections and concur in the judgments as they affect federal elections, but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.”).

31. “We would uphold [§] 302 as a valid exercise of congressional power under [§] 5 of the Fourteenth Amendment.” *Id.* at 240 (Brennan, J., White, J., and Marshall, J., concurring in part with judgment and dissenting in part from judgment).

32. See *id.* at 281–82 (Stewart, J. concurring in part with judgment and dissenting in part from judgment); “Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.” *Id.* at 210 (Harlan, J., concurring in part with judgment and dissenting in part from judgment).

33. See U.S. CONST. amend. XXVI.

34. “What I said in Part I of this opinion applies with equal force here. Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate federal elections.” *Mitchell*, 400 U.S. at 134.

35. See *id.* at 135. “The right to vote for national officers is a privilege and immunity of national citizenship.” *Id.* at 149 (Douglas, J., concurring in judgment).

36. “Whether or not the Constitution vests Congress with particular power to set qualifications for voting in strictly federal elections, we believe there is an adequate constitutional basis

Arizona v. Inter Tribal Council of Arizona

with Justice Black's reasoning, basing their concurrence upon the Privileges and Immunities Clause of the Fourteenth Amendment.³⁷ Accordingly, no other member of the Court agreed with Justice Black's reading of the Elections Clause in *Oregon v. Mitchell*.³⁸

The Supreme Court summarily addressed the Elections Clause in *McConnell v. Federal Election Commission*, finding that challengers to campaign finance reform legislation had offered "no reason to believe that Congress has overstepped its Elections Clause power."³⁹

II. THE NATIONAL VOTER REGISTRATION ACT OF 1993

Congress enacted the NVRA in 1993.⁴⁰ The NVRA, commonly known as the "Motor Voter Law,"⁴¹ culminated years of unsuccessful efforts to pass legislation standardizing voter registration for federal

for § 202 in § 5 of the Fourteenth Amendment." *Id.* at 237 (Brennan, J., White, J. and Marshall, J., concurring in judgment) (footnote omitted).

37. *See id.* at 286–87 (Stewart, J., concurring with judgment). "In the light of these considerations, [§] 202 presents no difficulty. Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State." *Id.* at 286.

38. It is not surprising that the Court closed off Justice Black's line of reasoning in *Arizona v. ITCA*. *See infra* Section VI.4. But, today's Supreme Court is also unwilling to give an expansive reading to the fundamental right to vote under the Equal Protection Clause. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008).

39. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 101 (2003). "Congress has a fully legitimate interest in maintaining the integrity of federal officeholders and preventing corruption of federal electoral processes through the means it has chosen." *Id.* at 187 (emphasis added).

40. 42 U.S.C. § 1973gg *et seq.* A comprehensive profile of the newly-enacted NVRA was issued in the Federal Election Commission in 1994. NAT'L CLEARINGHOUSE ON ELECTION ADMIN., FED'L ELECTION COMM'N, IMPLEMENTING THE NATIONAL VOTER REGISTRATION ACT OF 1993: REQUIREMENTS, ISSUES, APPROACHES, AND EXAMPLES (1994).

An excellent recent survey of the NVRA is presented in a September 2013 Congressional Research Service study. *See* ROYCE CROCKER, CONG. RESEARCH SERV., THE NATIONAL VOTER REGISTRATION ACT OF 1993: HISTORY, IMPLEMENTATION, AND EFFECTS (2013); *see also* Kurtis A. Kemper, Annotation, *Validity, Construction, and Application of National Voter Registration Act*, 42 U.S.C.A. §§ 1973gg *et seq.*, 185 A.L.R. FED. 155 (2003).

The biennial reports issued initially by the FEC, and later by the EAC, provide the essential data points by which to assess the effect of the NVRA over time. For these reports, and numerous additional materials, see *NVRA Studies*, U.S. ELECTION ASSISTANCE COMM'N, <http://www.eac.gov/registration-data/> (last visited Feb. 18, 2014). For discussions of NVRA compliance and related issues, see DOUGLAS R. HESS & SCOTT NOVAKOWSKI, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007 (2008); Estelle H. Rogers, *The National Voter Registration Act at Fifteen*, in AMERICAN CONSTITUTION SOCIETY (2009); and Estelle H. Rogers, *The National Voter Registration Act Reconsidered*, in AMERICAN CONSTITUTION SOCIETY (2011). For the scope of congressional election authority generally, see KENNETH R. THOMAS, CONGRESSIONAL AUTHORITY TO STANDARDIZE NATIONAL ELECTION PROCEDURES (2003); U.S. GEN. ACCOUNTING OFFICE, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION (2001).

41. *See United States v. Lara*, 181 F.3d 183, 191 (1st Cir. 1999).

elections.⁴² There had been success, however, with the passage of laws providing for an increased federal role in two specific areas of voter registration: voter registration for elderly and handicapped voters,⁴³ and voter registration for military and overseas voters.⁴⁴ A direct predecessor to the NVRA was vetoed by President George H.W. Bush after passing both houses in the 102nd Congress.⁴⁵ President Clinton signed the NVRA into law on May 20, 1993,⁴⁶ and it went into effect for most states on January 1, 1995.⁴⁷

For states that employ voter registration as a prerequisite to voting, the NVRA provides a set of standards and procedures for each

42. A series of bills in the 1970s and 1980s unsuccessfully attempted to establish a national “postcard” or mail registration system, including the 92nd Congress, in which a Senate bill reached the floor but was tabled. *See* CROCKER, *supra* note 40, at 1. In the 93rd Congress, a bill to create a national mail-out postcard voter registration system, to be administered by a new National Voter Registration Administration located in the Census Bureau (S. 352, S. Rept. 93-91) (H.R. 8053, H. Rept. 93-778), passed the Senate but never was brought to the floor of the House. *See id.* In the 94th Congress, a bill establishing a modified postcard voter registration system, making postcards available at post offices and other public offices (H.R. 11552, H. Rept. 94-798), passed the House but did not move in the Senate. *See id.* In the 95th Congress, bills to provide for national election-day registration (H.R. 5400, H. Rept. 95-318, S. 1072, S. Rept. 95-171) were reported out of committee but never brought to a vote. *See id.* Other voter registration reforms were proposed between 1983 and 1988, but no bill reached the floor of either the Senate or the House. *See id.* at 2.

43. The Voting Accessibility for the Elderly and Handicapped Act, which was signed into law by President Reagan on September 28, 1984, established polling place accessibility requirements for elderly and handicapped voters, required each state to provide “a reasonable number of accessible permanent registration facilities,” to “make available registration and voting aids for Federal elections for handicapped and elderly individuals,” and required “[n]o notarization or medical certification . . . of a handicapped voter with respect to an absentee ballot or application for such ballot.” Pub. L. No. 98-435, 98 Stat. 1678 (codified at 42 U.S.C. § 1973ee (2012)).

44. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), signed into law by President Reagan on August 28, 1986. Pub. L. No. 99-410, 100 Stat. 924, *inter alia*, required the creation of an official postcard form containing a voter registration and absentee ballot application, and required each state to “permit absent uniformed services voters and overseas voters to use absentee registration procedures” in all federal elections. *See also* KEVIN J. COLEMAN, CONG. RESEARCH SERV., THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: OVERVIEW AND ISSUES (2014).

45. In the 101st Congress, a “motor-voter” bill (H.R. 15, as modified by H.R. 2190, H. Rept. 101-243) passed the House, but in the Senate (S. 874, S. Rept. 101-140) it was not brought to a vote. *See* CROCKER, *supra* note 40, at 2–3. In the 102nd Congress, the National Voter Registration Act of 1991 passed in the Senate (S. 250, S. Rept. 102-60) and the House, but President George H. W. Bush vetoed it. *Id.* at 3; *see also* Denise M. Crump, *The National Voter Registration Act of 1991: Keeping the Voter Motor Running*, 17 SETON HALL LEGIS. J. 473, 485–94 (1993).

46. The National Voter Registration Act of 1993 was introduced in the 103rd Congress as H.R. 2 in the House and as S. 460 in the Senate. CROCKER, *supra* note 40, at 3. H.R. 2 passed the House (H. Rept. 103-9) and, with some amendments, the Senate (S. Rept. 103-6). *Id.* The House and Senate then adopted the conference report (Conf. Rept. 103-66). *Id.*

47. *See* Pub. L. No. 103-31, § 13, 107 Stat. 77 (1993). For the states (Arkansas, Vermont, and Virginia) that had to amend their state constitutions, the effective date was January 1, 1996, or 120 days after implementing legislation could be passed under the amended state constitutions, whichever came later. *See id.*

Arizona v. Inter Tribal Council of Arizona

major step in the voter registration process.⁴⁸ The NVRA does not attempt to govern every aspect of the voter registration process; instead, it provides a baseline set of uniform procedures under which eligible citizens can register, be accurately listed on the voting rolls, and vote in federal elections, so long as they maintain their eligibility. The NVRA provides for three specific forms of voter registration opportunities, establishes rules and limits for voter purging and other list maintenance activities, and provides election-day procedures for eligible voters to reaffirm their registration status and vote. In addition, the NVRA establishes a system for centralized reporting of voter registration data, requires each state to designate a chief election official, and provides substantial criminal penalties for fraudulent voter registration.

The NVRA begins with the findings that “the right of citizens of the United States to vote is a fundamental right,” that “it is the duty of the Federal, State, and local governments to promote the exercise of that right,” and that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.”⁴⁹ The NVRA identifies its purposes as the following:

[T]o establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office; to protect the integrity of the electoral process; and to ensure that accurate and current voter registration rolls are maintained.⁵⁰

Section 4(a) of the NVRA requires states to provide three forms of voter registration procedures for federal elections: federal mail-in voter registration applications, voter registration at the time of drivers’ license applications, and voter registration at public assistance agencies and other state-designated offices.⁵¹

48. Section 4(b) of the NVRA exempts states from coverage if the state has no voter registration requirement for federal elections under the law in effect continuously on and after August 1, 1994, or if the state allows all voters in the state to register to vote at the polling place during federal general elections under the law that in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994. *See* 42 U.S.C. § 1973gg-2(b) (2012).

49. § 1973gg(a).

50. § 1973gg(b).

51. *See* § 1973gg-2(a).

Most pertinent here, Section 6 of the NVRA requires states to “accept and use” federal mail-in voter registration applications (the “Federal Form”); this was the statutory language directly at issue in *Arizona v. ITCA*.⁵² Section 6(a)(1) of the NVRA requires that “[e]ach State *shall accept and use* the [Federal Form] . . . for the registration of voters in elections for Federal office.”⁵³ Section 6(a)(2) provides that, “[i]n addition to *accepting and using* [the Federal Form], a State may develop and use a mail voter registration form that meets all the criteria” of the Federal Form.⁵⁴ Section 6(b) requires states to make the mail registration form “available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.”⁵⁵

Section 6 works in tandem with Section 9 of the NVRA. Section 9(a) assigns to the federal Election Assistance Commission (“EAC”) the responsibility for creating the Federal Form and for consulting with state officials.⁵⁶ Section 9(b) requires certain elements to be included on the Federal Form, prohibits certain other elements, and allows the exercise of some agency discretion as to including other elements. In particular, the Federal Form “may require only such identifying information” as is necessary to allow the state to determine the eligibility of the applicant and to administer the voter registration and election process; it must inform the applicant as to every eligibility requirement “including citizenship;” and it must require the applicant to attest, under penalty of perjury, that the applicant meets each such requirement.⁵⁷

52. § 1973gg-4; see *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251. Section 6(c) allows states to require citizens who register by mail to vote in person, subject to certain exceptions, if they have not previously voted in the jurisdiction. § 1973gg-4(c).

53. § 1973gg-4(a)(1) (emphasis added).

54. § 1973gg-4(a)(2) (emphasis added).

55. § 1973gg-4(b).

56. See § 1973gg-7(a)(2). The EAC is required to work “in consultation with the chief election officers of the States” in crafting the Form’s contents. *Id.*

57. § 1973gg-7(b). Specifically, Section 9(b) of the NVRA provides that the Federal Form:

- (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
 - (2) shall include a statement that—
 - (A) specifies each eligibility requirement (including citizenship);
 - (B) contains an attestation that the applicant meets each such requirement; and
 - (C) requires the signature of the applicant, under penalty of perjury;
 - (3) may not include any requirement for notarization or other formal authentication;
- and

Arizona v. Inter Tribal Council of Arizona

Section 5 of the NVRA provides a second uniform means for voter registration, using applications for motor vehicle drivers' licenses.⁵⁸ Section 7 of the NVRA provides for a third means of voter registration: at designated registration sites and offices, including public assistance offices.⁵⁹

Voter registration list maintenance is covered by Section 8 of the NVRA, which establishes several important national standards for voter registration list maintenance. On the one hand, the NVRA eliminated the practice of purging otherwise eligible voters based solely upon their failure to vote during a specified time period, and it requires list maintenance activities to be uniform and non-discriminatory. On the other hand, Section 8 balances the restrictions against improper purging with affirmative requirements for election officials

(4) shall include, in print that is identical to that used in the attestation portion of the application—

(i) the information required in [Section 8(a)(5)(A) and (B)] of this title; (ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and (iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

Id. (emphasis added). Sections 8(a)(5)(A) and (B) of the NVRA require states to provide all voter registration applicants with information about voter eligibility requirements and the penalties provided by law for submission of a false voter registration application. § 1973gg-6(5).

58. See § 1973gg-3. Section 5 of the NVRA provides that any application for a driver's license submitted to a state motor vehicle authority "shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." § 1973gg-3(a)(1). The voter registration form must be part of the driver's license application, and "may not require any information that duplicates information required in the driver's license portion of the form." § 1973gg-3(c)(2)(A). The form may require only the minimum amount of information necessary to prevent duplicate voter registrations and to enable state election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process. See § 1973gg-3(c)(2)(B).

59. See § 1973gg-5. Section 7 of the NVRA requires states to provide for federal registration at "all offices in the State that provide public assistance," § 1973gg-5(a)(2)(A), and "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," § 1973gg-5(a)(2)(B). Section 7 also provides that the state shall designate additional government offices such as "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and [other offices] that provide services to persons with disabilities" as voter registration agencies. § 1973gg-5(a)(3). The rationale for Section 7 was to complement the enhanced voter registration opportunities provided at motor vehicle agencies under Section 5 by providing voter registration for "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with" motor vehicle agencies. H.R. Rep. No. 103-66, at 19 (1993), *reprinted in* U.S.C.C.A.N. 140, 144 (1993). Section 7 requires designated agencies to provide applicants with the Federal Form issued pursuant to Sections 6 and 9 of the NVRA, to help them complete the form, and it requires the agencies' "[a]cceptance of completed voter registration application forms for transmittal to the appropriate State election official." 42 U.S.C. § 1973gg-5(a)(4)(A). Designated state agencies are permitted to distribute their own state's registration form, "if it is equivalent" to the Federal Form. § 1973gg-5(a)(6)(A)(ii).

to conduct an orderly and non-discriminatory list maintenance program to remove ineligible voters.⁶⁰

Section 10 of the NVRA requires each state to designate a chief election official who will be responsible for NVRA compliance.⁶¹ Section 11 of the NVRA regulates civil enforcement of the NVRA's provisions and designates a private right of action under the statute, subject to certain notice requirements.⁶²

Section 12 of the NVRA provides substantial criminal penalties for the submission of fraudulent voter registration applications.⁶³ Section 12 also added criminal penalties for knowingly and willfully intimidating or coercing prospective voters in registering to vote, or for voting, in any election for federal office.⁶⁴

60. See § 1973gg-6. Section 8(a)(3)–(4) of the NVRA provides that a registered voter's name may not be removed from the voter registration list except at the request of the applicant, by reason of criminal conviction or mental incapacity, by the death of the applicant, or by the applicant moving out of the jurisdiction. § 1973gg-6(a)(3)–(4). Section 8(b)(2) prohibits the removal of registered voters solely upon the grounds that they have failed to vote. § 1973gg-6(b)(2). Section 8(b)(1) requires registration list maintenance activities to be conducted in a “uniform, nondiscriminatory” fashion and “in compliance with the Voting Rights Act of 1965.” § 1973gg-6(b)(1). Section 8(c)(1) provides a set of procedures, based upon the U.S. Postal Service's “National Change Of Address,” that states may use to maintain accurate voter registration rolls. § 1973gg-6(c)(1). Section 8(d)(1) provides that states can remove names from the their registration lists if the registrants have notified their election office that they have moved out of the jurisdiction, or if the registrant has failed to respond to a forwardable notice sent by the registrar and failed to vote or appear to vote in two federal general elections. § 1973gg-6(d)(1).

61. § 1973gg-8; see also *Harkless v. Brunner*, 545 F.3d 445, 450 (6th Cir. 2008).

62. See 42 U.S.C. § 1973gg-9.

63. See § 1973gg-10; CRAIG C. DONSANTO & NANCY L. SIMMONS, *FEDERAL PROSECUTION OF ELECTION OFFENSES* 1, 1 (7th ed. 2007).

The NVRA enacted a new criminal statute that reaches the knowing and willful submission to election authorities of false information that is material under state law. 42 U.S.C. § 1973gg-10(2). Because all states currently make citizenship a prerequisite for voting, statements by prospective voters concerning citizenship status are automatically “material” within the meaning of this statute. Therefore, any false statement concerning an applicant's citizenship status that is made on a registration form submitted to election authorities can involve a violation of this statute. Such violations are felonies subject to imprisonment for up to five years.

For jurisdictional purposes, the statute requires that the fraud be “in any election for Federal office.” As discussed above, voter registration in every state is unitary in the sense that an individual registers to vote only once for all elective offices – local, state, and federal. Thus the jurisdictional element of Section 1973gg-10(2) is satisfied whenever a false statement concerning citizenship status is made on a voter registration form.

The use of the word “willful” suggests Section 1973gg-10(2) may be a specific intent offense. This means federal prosecutors may have to prove that the offender was aware that citizenship is a requirement for voting, and that the registrant did not possess United States citizenship. In most instances, proof of the first element is relatively easy because, since 1993 when the NVRA was enacted, the citizenship requirement must be stated on the voter registration form, and the form requires that the voter check a box indicating that he or she is a citizen.

Id. at 67–68.

64. See 42 U.S.C. § 1973gg-10(1); DONSANTO & SIMMONS, *supra* note 63, at 54.

Arizona v. Inter Tribal Council of Arizona

One particularly noteworthy aspect of the legislative deliberations, for this discussion, occurred when the Conference Committee rejected a proposed amendment that had been passed by the Senate, which would have allowed states to add proof of citizenship requirements to the Federal Form.⁶⁵ While this did not form any part of the Supreme Court’s rationale, it was noted by the Ninth Circuit’s en banc decision, and credited in particular by Judge Kozinski’s en banc concurrence.⁶⁶

The EAC has issued regulations concerning the requirements for applicants to successfully complete the Federal Form.⁶⁷ The regulations address voter eligibility by directing that the Federal Form will identify the state eligibility requirements—with special attention to citizenship—and that the applicant will attest under oath that she meets each of them.⁶⁸ The regulations provide for general instructions,⁶⁹ as well as state-specific instructions to identify the voting eligibility requirements of each State.⁷⁰ The regulations also identify three types of information about the applicant that may be the subject of state-specific instructions, but none are used to determine eligibility.⁷¹

The Help America Vote Act of 2002 (“HAVA”) modified some pre-existing portions of the NVRA.⁷² HAVA reassigned the responsibilities that originally had been assigned to the Federal Election Com-

65. S. 460, the Senate bill for the 1993 legislation, contained a provision that did not appear in the House bill, which would have allowed States to implement a citizenship verification procedure more demanding than attestation of voting eligibility under oath. *See* H.R. Rep. No. 103-66, at 23–24 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140, 148–49. The Senate provision stated that “nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration.” *Id.* at 148. The conference committee rejected the Senate language, explaining that it was “not necessary or consistent with the purposes of this Act.” *Id.* The conference committee report stated that it was “concern[ed]” that the Senate’s provision “could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act,” and that it might “adversely affect the administration of the other registration programs as well.” *Id.* The House and Senate both adopted the Conference Committee language without the Senate provision. *See* 139 CONG. REC. H2276 (daily ed. May 5, 1993); 139 CONG. REC. S5747–48 (daily ed. May 11, 1993).

66. *Infra* Part D.

67. *See* National Voter Registration Act, 11 C.F.R. §§ 9428.1–9428.7 (2014).

68. *See* § 9428.4(b).

69. *See* § 9428.3(a).

70. *See* § 9428.3(b); § 9428.4(a).

71. *See* § 9428.4(a)(6)–(8) (illustrating that the three items are: the voter identification number; the voter’s political party preference (in closed primary states); and the voter’s race or ethnicity, if applicable).

72. 42 U.S.C.A. §§ 15301–15545 (West 2002); *see* ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., RL 32685, THE HELP AMERICA VOTE ACT AND ISSUES FOR CONGRESS (2008); KEVIN J. COLEMAN & ERIC A. FISCHER, CONG. RESEARCH SERV., RS 20898, THE HELP AMERICA VOTE ACT: OVERVIEW AND ISSUES (2013).

mission, including creating the Federal Form and conducting the biennial survey of election data to the newly-created EAC.⁷³ HAVA also required each state to create a statewide voter registration database, and added provisions for verification of voter registration applications.⁷⁴

Litigation under the NVRA focused initially upon a set of cases involving states that refused to implement the NVRA, based upon their contention that the law was unconstitutional. All of these cases were decided against the states, and the Supreme Court denied certiorari in the case involving California.⁷⁵ The lower court decisions consistently read the Election Clause as providing Congress with full authority to regulate voter registration for federal elections. Subsequent NVRA enforcement litigation has concerned, inter alia, designation of state agencies as voter registration sites,⁷⁶ the provision of public assistance agency registration,⁷⁷ voter registration list maintenance procedures,⁷⁸ and voter registration application handling procedures.⁷⁹

While the Supreme Court discussed the operation of the NVRA in 1997 in *Young v. Fordice*,⁸⁰ the claim at issue in *Young* was an enforcement action under Section 5 of the Voting Rights Act.⁸¹ The defendants in the case unsuccessfully invoked the NVRA in an attempt to insulate the challenged voter registration procedures from the Section 5 preclearance requirement, and the Court did not address the constitutionality of the NVRA or the state's compliance with the

73. 42 U.S.C.A. § 15386(a).

74. Many states had pre-existing programs to collate county-level registration records but HAVA formalized the process and, as a consequence, gave state election directors a more day-to-day role in the maintenance of the "live" voter registration records. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, IMPROVING STATE VOTER REGISTRATION DATABASES: FINAL REPORT vii (2009), available at http://www.eac.gov/assets/1/workflow_staging/Page/52.PDF.

75. See *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996); see also *Ass'n. of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 834 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946, 967 (D.S.C. 1995); *Virginia v. United States*, No. CIV.A. 3:95CV357RLW, 1995 WL 928433, at *1 (E.D. Va. 1995); *ACORN v. Ridge*, Nos. CIV. A. 94-7671, CIV. A. 95-382, 1995 WL 136913 (E.D. Pa. 1995).

76. See *United States v. New York*, 255 F. Supp. 2d 73, 74 (E.D.N.Y. 2003).

77. See *Valdez v. Squier*, 676 F.3d 935, 938 (10th Cir. 2012); *Harkless v. Brunner*, 545 F.3d 445, 447 (6th Cir. 2008).

78. See *United States v. Missouri*, 535 F.3d 844, 846 (8th Cir. 2008).

79. See *Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1351 (11th Cir. 2005).

80. 520 U.S. 273, 275 (1997); see Brenda Wright, *Young v. Fordice: Challenging Dual Registration Under Section 5 of the Voting Rights Act*, 18 Miss. C. L. REV. 67, 68-69 (1997).

81. See 42 U.S.C. § 1973c (2012).

Arizona v. Inter Tribal Council of Arizona

NVRA, other than to conclude that the state retained discretion as to how it would implement certain provisions of the NVRA. Thus, the Supreme Court's decision in *Arizona v. ITCA*, coming twenty years after passage of the NVRA,⁸² was the first case in which the Supreme Court directly addressed the requirements of the NVRA.

III. ARIZONA'S PROPOSITION 200

Arizona v. ITCA concerned one of the election-related provisions of Arizona's Proposition 200, which was enacted by state initiative on November 2, 2004. Proposition 200 amended the procedures for voter registration and for checking voter identification at polling places in both state and federal elections, and made other changes to state law to restrict public benefits.⁸³

Proposition 200 amended two sections of the Arizona election code concerning voter registration. Proposition 200 added an evidence of citizenship requirement to Section 16-152 of the Arizona Revised Statutes, which specifies the contents of the state voter registration form.⁸⁴ Proposition 200 also amended Section 16-166 of the Arizona Revised Statutes to state that: "The County Recorder *shall reject* any application for registration that is not accompanied by

82. See J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, DEMOS (May 2013), <http://www.demos.org/registering-millions-success-and-potential-national-voter-registration-act-20>.

83. The "Findings and declaration" provided in the Secretary of State's ballot book for Proposition 200 state in their entirety that:

This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and devalues the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Proposition 200, ARIZ. SEC. OF STATE (2004), available at <http://www.azsos.gov/election/2004/Info/PubPamphlet/english/prop200.pdf> (last visited Feb. 18, 2014).

There was no finding that any "illegal immigrants" had registered to vote or voted, nor was there any claim that the NVRA Federal Form had been used by *any* non-citizen to register to vote. Thus, there was no explanation of how the stated goal of "discourag[ing] illegal immigration," *id.*, would be advanced by adding an evidence of citizenship procedure to the voter registration provisions of the state's election code.

84. The revised section provides that "[t]he form used for the registration of electors shall contain . . . [a] statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached." ARIZ. REV. STAT. ANN. § 16-152(A)(23) (2011).

satisfactory evidence of United States citizenship.”⁸⁵ In addition to voter registration, Proposition 200 imposed new polling place identification procedures.⁸⁶

The Arizona Secretary of State sent an e-mail to the EAC on December 12, 2005, in response to an inquiry from the EAC, which asked the EAC to alter the Arizona-specific instructions on the Federal Form to incorporate the Proposition 200 citizenship procedure.⁸⁷ The EAC’s Executive Director responded in a letter dated March 6, 2006, denying the Secretary’s request.⁸⁸ The EAC concluded that “[w]hile Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form.”⁸⁹ The Arizona Secretary of State wrote two subsequent letters asking the EAC to reconsider its decision,⁹⁰ which the EAC declined to do.⁹¹

85. ARIZ. REV. STAT. ANN. § 16-166(F) (2011) (emphasis added). Satisfactory evidence of United States citizenship is defined as including a driver’s license or similar identification license issued by a motor vehicle agency, a birth certificate, passport, naturalization documents or other specified immigration documents, or specified cards relating to Native American tribal status:

1. The number of the applicant’s driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant’s driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
2. A legible photocopy of the applicant’s birth certificate that verifies citizenship to the satisfaction of the county recorder.
3. A legible photocopy of pertinent pages of the applicant’s United States passport identifying the applicant and the applicant’s passport number or presentation to the county recorder of the applicant’s United States passport.
4. A presentation to the county recorder of the applicant’s United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
6. The applicant’s bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

Id.

86. Proposition 200 amended Section 16-579 of the Arizona Revised Statutes to require that voters “shall present . . . a valid form of identification that bears the photograph, name and address of the elector . . . [or] two different items [of identification] that contain the name and address of the elector.” ARIZ. REV. STAT. ANN. § 16-579(A)(1)(a)–(b) (2011). The Secretary of State issued rules specifying the forms of identification that would be accepted under the statute, which included photograph-bearing documents, such as driver’s licenses and non-photograph-bearing documents, such as utility bills or bank statements; these rules were legislatively adopted in 2009 as an amendment to Section 16-579. *See id.*

87. *See* Joint Appendix, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71), 2012 WL 6198263, at *181–82.

88. *See id.* at *181–87.

89. *Id.* at *187.

90. *See id.* at *188–89, *216–20.

IV. LOWER COURT LITIGATION

A. Initial Stages

Two lawsuits filed in 2006 challenging the election-related provision of Proposition 200 were consolidated, heard, and decided together.⁹² The NVRA claims in both cases rested upon the directive language in Section 6(a)(1) of the NVRA that states “accept and use” the Federal mail-in voter registration form. Both sets of plaintiffs moved for preliminary relief prior to the 2006 general election, which the district court denied.⁹³ On appeal, a Ninth Circuit motions panel reversed the district court and granted an injunction against both the voter identification and proof of citizenship requirements pending disposition of the merits on appeal.⁹⁴ In a *per curiam* order, the Supreme Court vacated the panel’s injunction.⁹⁵ The Supreme Court explained

91. *See id.* at *225.

92. *Inter Tribal Council of Ariz., Inc. v. Brewer*, No. 2:06-cv-1362 (D. Ariz.), consolidated with *Gonzalez v. State of Arizona*, No. 2:06-cv-1268 (D. Ariz.). *Gonzalez v. Brewer*, 2:06-cv-1268, at 2 (D. Ariz. June 6, 2006), Dckt. No. 33 (order granting consolidation). One group of plaintiffs (“Gonzalez Plaintiffs”), comprised of individual Arizona residents and organizational plaintiffs, claimed that Proposition 200 violated the NVRA, was a poll tax under the Twenty-fourth Amendment, violated the Equal Protection Clause of the Fourteenth Amendment due to its burden upon naturalized citizens, and violated the “results test” under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *See First Amended Complaint for Declaratory and Injunctive Relief, Gonzalez v. Arizona*, 435 F. Supp. 2d 997, (D. Ariz. 2006) (No. CV-06-1268-PHX-ROS) 2007 WL 2406532. Another group of plaintiffs (“ITCA Plaintiffs”), comprised of several organizations and one individual plaintiff, claimed that Proposition 200 violated “the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-4(a), which mandates that states ‘shall use and accept’ the Federal Mail Voter Registration Form to register voters,” and that Proposition 200 was an unauthorized and unnecessary burden on the fundamental right to vote in violation of the Fourteenth and Twenty-fourth Amendments, the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A) and (a)(2)(B), and Section 2 of the Voting Rights Act, 42 U.S.C. § 1983(a). *See Plaintiff’s Complaint* at 2, *Inter Tribal Council of Ariz., Inc. v. Brewer*, No. 2:06-cv-1362 (D. Ariz. May 24, 2006), Dckt. No. 1. A third case was filed on June 20, 2006. *See Verified Complaint* at 26, *Navajo Nation v. Brewer*, No. 2:06-cv-1575 (D. Ariz. June 20, 2006), Dckt. No. 1. The *Navajo Nation* case was later consolidated with the *Gonzalez* and *ITCA* cases, but dismissed before trial. *See Gonzalez v. State*, No. 2:06-cv-1268, at 1 (D. Ariz. Aug. 2, 2006), Dckt. 142 (order granting consolidation). *But see Gonzalez v. State*, No. 2:06-cv-1268, at 2 (D. Ariz. May 27, 2008), Dckt. No. 775 (order dismissing consolidation).

93. *Gonzalez v. Arizona*, No. 2:06-cv-1268, at 1–2 (D. Ariz. Sept. 11, 2006), Dckt. No. 183.

94. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706, at 1–2 (9th Cir. Oct. 5, 2006) (mem).

Appellants’ emergency motion for injunction pending interlocutory appeal is granted. The court enjoins implementation of Proposition 200’s voting identification requirement in connection with Arizona’s November 7, 2006 general election; and enjoins Proposition 200’s registration proof of citizenship requirements so that voters can register before the October 9, 2006 registration deadline. This injunction shall remain in effect pending disposition of the merits of these appeals.

Id. at 1–2.

95. *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (*per curiam*). The Court’s rationale rested upon the absence of factual findings or reasoning in the motions panel’s reversal of the district court and issuance of a preliminary injunction with respect to the approaching general election:

its vacatur as being required for consideration of the district court's findings of fact.⁹⁶

On remand to the Ninth Circuit, both groups of plaintiffs limited their requests for an injunction to the Proposition 200 proof of citizenship requirement for voter registration. The panel decision affirmed the district court's denial of preliminary relief.⁹⁷ The panel held that the proof of citizenship requirement was not a poll tax.⁹⁸ With respect to the NVRA claims, the panel found that the plaintiffs had "not demonstrated a likelihood of succeeding on the merits."⁹⁹

Although at the time the Court of Appeals issued its order the District Court had not yet made factual findings to which the Court of Appeals owed deference, *see* FED. R. Crv. 52(a), by failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals' bare order in light of the District Court's ultimate findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals' issuance of the order we vacate the order of the Court of Appeals.

Id. at 5. The Court did not address the merits.

We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and "[n]o bright line separates permissible election-related regulation from unconstitutional infringements."

Id. at 5 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997)) (alteration in original). The Court also stated that:

Countering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the "fundamental political right" to vote. Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.

Id. at 4 (citation omitted). This was a somewhat unfortunate construction of the issue, to the extent that it might be read to suggest that compliance with the NVRA is in opposition to the state and federal interest in preventing election fraud. As became clear in the subsequent stages of the case, Congress incorporated multiple protections against voter fraud in the NVRA; the dispute was more whether an Arizona ballot proposition billed as discouraging "illegal immigration" was entitled to countermand the judgment of Congress as to the appropriate protection against fraud in federal elections.

96. *See id.* at 5–6.

97. *See* *Gonzalez v. Arizona* (Gonzalez I), 485 F.3d 1041, 1047 (9th Cir. 2007).

98. *See id.* at 1049.

99. *Id.* at 1050–51. The entire *Gonzalez I* discussion of the merits of the NVRA claims was as follows:

Appellants next claim that Proposition 200 is preempted by the NVRA because, they say, the NVRA prohibits states from requiring that registrants submit proof of citizenship when registering to vote. The NVRA mandates that states either "accept and use the mail voter registration form prescribed by the Federal Election Commission[.]" or, in the alternative, "develop and use [their own] form," as long as the latter conforms to the federal guidelines.

The NVRA also prohibits states from requiring that the form be notarized or otherwise formally authenticated. Appellants interpret this as a proscription against states requiring documentary proof of citizenship. The language of the statute does not prohibit documentation requirements. Indeed, the statute permits states to "require[] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." The NVRA clearly conditions eligibility to vote on United

Arizona v. Inter Tribal Council of Arizona

On remand to the district court, the district court granted Arizona's motion for summary judgment, ruling in August 2007 that based upon the *Gonzalez I* decision, Proposition 200 was not preempted by the NVRA and was not an unconstitutional poll tax.¹⁰⁰ After trial, the district court held in August 2008 that Proposition 200 did not violate either Section 2 of the Voting Rights Act or the Equal Protection Clause, with respect to either the proof of citizenship registration requirement or the polling place identification requirement.¹⁰¹ The district court did find that between January 25, 2005 (the date Proposition 200 became effective), and September 2007, the "evidence of citizenship" requirement resulted in the rejection of 31,550 registration applications (in the fourteen of Arizona's fifteen counties reporting data).¹⁰²

B. Ninth Circuit Panel Decision

Before the Ninth Circuit, the Gonzalez Plaintiffs and the ITCA Plaintiffs each appealed the district court's summary judgment rulings with respect to their NVRA and Twenty-Fourth Amendment claims. The ITCA Plaintiffs also appealed the denial of their Fourteenth Amendment poll tax claim, and the Gonzalez Plaintiffs appealed the district court's denial of their Voting Rights Act claim and equal protection challenges. On October 26, 2010, the Ninth Circuit panel held that the NVRA preempted the Proposition 200 proof of citizenship requirement.¹⁰³ The Court held that "the NVRA supersedes Proposition 200's voter registration procedures, and that Arizona's documen-

States citizenship. Read together, these two provisions plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote. Thus, again plaintiffs have not demonstrated a likelihood of succeeding on the merits of this claim.

Id. (alterations in original) (citations omitted). The fundamental flaw in this cursory analysis was to interpret 42 U.S.C. § 1973gg-7(b)(1) as delegating authority to states, when in fact it governs the EAC's determination of the contents of the Federal Form.

100. *Gonzalez v. Arizona*, No. 2:06-cv-1268, at 1, 2–3 (D. Ariz. Aug. 28, 2007), Dckt. No. 330.

101. *Gonzalez v. Arizona*, No. 2:06-cv-1268, at 36, 47 (D. Ariz. Aug. 20, 2008), Dckt. Nos. 1041, 1042.

102. *Gonzalez v. Arizona*, No. 2:06-cv-1268, at 13 (D. Ariz. Aug. 20, 2008), Dckt. No. 1041. This number did not include forms where the applicant answered "no" to the U.S. citizenship question. Approximately thirty percent of the 31,550 applicants had gone on to successfully register as of July 2008. *Id.* The court's finding did not differentiate between rejected Federal Forms and rejected state forms.

103. *Gonzalez v. Arizona*, 624 F.3d 1162, 1169 (9th Cir. 2010). The panel ruled in favor of the Defendants on all other claims. *See id.* at 1169. The panel was comprised of Chief Judge Kozinski, Circuit Judge Ikuta, and retired Supreme Court Associate Justice Sandra Day O'Connor, sitting by designation pursuant to 28 U.S.C. § 294(a). *See id.* at 1168.

tary proof of citizenship requirement for registration is therefore invalid.”¹⁰⁴

Although the panel opinion subsequently was vacated by the grant of en banc review, it bears close attention for several reasons. First, much of the reasoning with respect to the Elections Clause was carried over to Judge Ikuta’s en banc majority opinion. In addition, the reach of the panel’s preemption decision was surprisingly broad, in contrast to the subsequent en banc decision. Finally, the presence of retired Justice O’Connor—the author of *Gregory v. Ashcroft*¹⁰⁵—lent persuasive authority to the panel’s distinctions between the Supreme Court’s Elections Clause and Supremacy Clause jurisprudences.

Part II-A of Judge Ikuta’s majority opinion began with a review of the historical background of the Elections Clause,¹⁰⁶ then moved to the critical construction of the Elections Clause:

[T]he Elections Clause empowers both the federal and state governments to enact laws governing the mechanics of federal elections. By its plain language, the Clause delegates default authority to the states to prescribe the “Times, Places, and Manner” of conducting national elections in the first instance. The states would not possess this authority but for the Clause: As the Supreme Court has noted, the authority to regulate national elections “aris[es] from the Constitution itself,” and is therefore “not a reserved power of the States.” Because federal elections did not come into being until the federal government was formed, individual states have no inherent or preexisting authority over this domain.

While the states have default responsibility over the mechanics of federal elections, because Congress “may at any time by Law make or alter such Regulations” passed by the state, power over federal election procedures has been described by the Supreme Court as ultimately “committed to the exclusive control of Con-

104. *Id.* at 1169.

105. 501 U.S. 452, 455 (1991). *Gregory v. Ashcroft* was a federalism decision concerning Congress’s powers under the Commerce Clause to address age discrimination claims with respect to appointed state officials. In passing, *Gregory v. Ashcroft* referenced the states’ power to set the qualifications of their officials as one guaranteed to them under the Constitution. *See id.* at 463 (“[T]he United States guarantee[s] to every State in this Union, a Republican form of Government.” (citing U.S. CONST. art. 4, § 4 (“Guarantee Clause”))). The Guarantee Clause has effectively been set aside under the political question doctrine, but it may be time, as the Supreme Court retrenches on the deference extended to Congress under the Reconstruction Amendments, to reconsider the argument that the Guarantee Clause can provide a textual basis to preserve individual rights. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 860–71 (1994). In the meantime, the Guarantee Clause remains a federalist shibboleth. *See* *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2623 (2013).

106. *See Gonzalez*, 624 F.3d at 1171–73.

Arizona v. Inter Tribal Council of Arizona

gress.” Accordingly, “the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.”¹⁰⁷

The panel opinion identified several characteristics that distinguish the Supremacy Clause.¹⁰⁸ “The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments.”¹⁰⁹ Under the Supremacy Clause, the conclusion that federal law preempts state law requires maintaining the “‘delicate balance’ between the States and the Federal Government.”¹¹⁰ “Only where no reconciliation between state and federal enactments may be reached do courts hold that Congress’s enactments must prevail.”¹¹¹

The panel opinion read the Supreme Court’s Elections Clause jurisprudence as obviating the need to “strike any balance between competing sovereigns”; the Elections Clause instead “establishes its own balance, resolving all conflicts in favor of the federal government.”¹¹² It therefore found that the presumption against preemption and plain statement rule that are applied in Supremacy Clause pre-

107. *Id.* at 1172–73 (second alteration in original) (citations omitted). The panel noted, as a further illustration of Congress’s Elections Clause powers, a pair of Ninth and Seventh Circuit decisions that upheld the constitutionality of the NVRA’s conscription of states to implement federal election requirements without compensation. *See id.* at 1173 (citing *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995); *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995)).

108. *See Gonzalez*, 624 F.3d at 1173–74. “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.” U.S. CONST. art. VI, cl. 2.

109. *Gonzalez*, 624 F.3d. at 1173 (quoting *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1985)).

110. *Id.* at 1173 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). The opinion singled out state legislation exercising traditional police powers as requiring particular consideration. “Courts thus endeavor to preserve the states’ authority when possible, particularly where a congressional enactment threatens to preempt a state law regulating matters of its residents’ health and safety, an area to which [s]tates traditionally have had great latitude to . . . legislate’ as a matter of local concern.” *Id.* at 1173–74 (alteration in original) (citations omitted).

111. *Id.* at 1174 (citing *Altria Group v. Good*, 555 U.S. 70, 76–77 (2008)); *see also* THE FEDERALIST NO. 33 (Alexander Hamilton).

112. *Gonzalez*, 624 F.3d. at 1174 (citing *Foster v. Love*, 522 U.S. 67, 71 (1997)). The panel noted that the Supreme Court never mentioned a presumption against preemption or requirement of a plain statement of congressional intent to preempt in *Foster*. *See id.* at 1174–75.

emption cases are “unsuited” to Elections Clause cases.¹¹³ The panel concluded that its review of Supreme Court Elections Clause decisions revealed “no case where the Court relied on or even discussed Supremacy Clause principles.”¹¹⁴

The panel opinion centered its analysis of the “accept and use” language of the NVRA, and the Proposition 200 language directing election officials to “reject” non-compliant voter registration applications around “consider[ing] the state and federal laws as if they comprise a single system of federal election procedures.”¹¹⁵ “If a natural interpretation of the language of the two enactments leads to the conclusion that the state law does not function consistently and harmoniously with the overriding federal scheme, then it is replaced by the federal statute.”¹¹⁶ Relying upon *Foster v. Love* and *Siebold*, the panel found it unnecessary to “strain to reconcile the state’s federal election regulations with those of Congress under the Elections Clause; rather, we consider whether the additional registration requirement mandated by Proposition 200 is harmonious with the procedures mandated by Congress under a natural reading of the statutes.”¹¹⁷

The panel opinion concluded that the proof of citizenship requirement in Proposition 200 “conflicts with the NVRA’s text, struc-

113. See *id.* at 1174 (comparing *Gonzalez* to *Gregory*). Both the plain statement rule and the presumption against preemption trace to federalism concerns not presented in Elections Clause cases:

In light of the different history and purpose of these constitutional provisions, it is not surprising that the preemption analysis for the Supremacy Clause differs from that of the Elections Clause. In its Supremacy Clause jurisprudence, the Supreme Court has crafted special guidelines to assist courts in striking the correct balance between federal and state power. First, in examining claims that a federal law preempts a state statute through the Supremacy Clause, the Supreme Court instructs courts to begin with a “presumption against preemption.” This principle applies because, as the Court has recently noted, “respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action.” Second, the Court has adopted a “plain statement rule,” holding that a federal statute preempts a state statute only when it is the “clear and manifest purpose of Congress” to do so. Like the presumption against preemption, this rule “is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”

Id. at 1174–1175 (citations omitted).

114. *Id.* at 1175.

115. *Id.* at 1169, 1176, 1207 (citing *Ex parte Siebold*, 100 U.S. 371, 384 (1879)). Note that the panel opinion refers to sections of the NVRA by their U.S. Code section numbers, in contrast to the generally-used reference tracing to the public law text. For example, the panel opinion refers to 42 U.S.C. § 1973gg-4 as Section 4 of the NVRA, while the generally-accepted reference for that provision is Section 6 of the NVRA. See *id.* at 1205.

116. *Id.* at 1181.

117. *Id.* at 1183 (citing *Foster*, 522 U.S. at 74; *Ex parte Siebold*, 100 U.S. at 384).

ture, and purpose.”¹¹⁸ “Under Congress’s expansive Elections Clause power, we must hold Arizona’s documentary proof of citizenship requirement superseded by the NVRA.”¹¹⁹

The panel explained its reasoning by noting that, because the NVRA is more specific than Proposition 200 about the information required to ensure eligibility to vote in federal elections, the NVRA leaves “no room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration for registrants using that form.”¹²⁰ Information for state officials to assess eligibility is provided by attestation under oath.¹²¹ The panel concluded that, if Proposition 200 is viewed as a second enactment by the same legislature, it is “clearly subsume[d]” by the NVRA.¹²² The panel further reasoned that it would defeat the purpose of the Federal Form if states “could add any requirements they saw fit to registration for federal elections through the Federal Form.”¹²³

The panel’s textual analysis found that the NVRA’s mandate in Section 6gg-4(a) to “accept and use” the Federal Form when applicants register by mail is, “when read in an unstrained and natural manner, . . . inconsistent with the [Proposition 200]” prohibition of registering applicants who have completed and submitted the Federal Form that have not provided documentary proof of citizenship.¹²⁴

118. *Id.* at 1181.

119. *Id.* at 1183 (citation omitted).

120. *Id.* at 1181. The panel opinion pointed to Section 9 of the NVRA, which specifies that the Federal Form “may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.” 42 U.S.C. § 1973gg-7(b)(1).

121. *See Gonzalez*, 624 F.3d. at 1181. Section 9(b)(2) of the NVRA requires applicants to attest that they meet every eligibility requirement, under penalty of perjury. *See* 42 U.S.C. § 1973gg-7(b)(2)(B). The panel found that Congress addressed the states’ interests in voter eligibility by permitting states to provide the EAC with their input on the contents of the Federal Form in an advisory capacity. *See* 42 U.S.C. § 1973gg-7(a)(2). Attestation under oath was for practical purposes the universal means of obtaining evidence of citizenship for purposes of voter registration, including in Arizona, where attestation under oath continues to be the means of establishing an applicant’s prima facie eligibility for all other qualifications.

122. *See Gonzalez*, 624 F.3d. at 1181.

123. *Id.* The panel cited the institution of a notarization requirement for registration, in contravention of the prohibition of such a requirement under Section 9(b)(3) of the NVRA, as an example of the “discriminatory or onerous registration requirements” that Arizona’s theory would allow states to impose. *See id.*

124. *Id.* at 1182.

The panel found that the state law requirement is “displaced by the NVRA’s ‘notwithstanding’ language” in Section 4(a).¹²⁵

The panel then examined the overall structure of the NVRA, concluding that “allowing states to impose their own requirements for federal voter registration on registrants using the Federal Form would nullify the NVRA’s procedure for soliciting state input, and aggrandize the states’ role in direct contravention of the lines of authority prescribed by Section 7.”¹²⁶ Because Congress has the ultimate authority over the federal voter registration process under the Elections Clause, “such a reading of the NVRA is untenable.”¹²⁷

The panel noted that Arizona had implemented the Proposition 200 registration requirement after its petition to include the requirement in the Federal Form was denied by the EAC, and that the EAC had “warned” Arizona that it may not refuse to register individuals to vote in a federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form.¹²⁸ The panel reasoned that “[i]f the NVRA did not supersede state-imposed requirements for federal voter registration, this type of end-run around the EAC’s consultative process would become the norm, and Congress’s control over the requirements of federal registration would be crippled.”¹²⁹

Examining the purpose of the NVRA, the panel opinion contrasted the intent of the NVRA to reduce state-imposed obstacles to federal registration with the “indisputable” fact that Proposition 200 creates an additional state hurdle to registration finding them not “in harmony.”¹³⁰ Looking at the EAC’s decision as to the contents of the Federal Form, the panel found that Proposition 200 is not consistent with the EAC’s balancing of the need to establish procedures to increase the number of eligible citizens who register to vote in elections for federal office and the need to protect the integrity of the electoral process.¹³¹

125. See *Gonzalez*, 624 F.3d. at 1182. The panel also noted that Section 7(a)(4)(iii) of the NVRA requires “acceptance” of completed Federal Form at state office buildings for transmittal to election officials. See *id.*; 42 U.S.C. § 1973gg-5(a)(4)(iii).

126. *Gonzalez*, 624 F.3d. at 1182. The panel noted that the NVRA allows states to suggest changes to the Federal Form, but the EAC has the ultimate authority to adopt or reject those suggestions. See *id.* (citing 42 U.S.C. § 1973gg-7(a)).

127. *Id.*

128. See *id.*

129. *Id.*

130. See *id.*

131. See *id.*

Arizona v. Inter Tribal Council of Arizona

The panel opinion disclaimed any reliance upon the legislative history of the NVRA or the EAC's interpretation of the NVRA. The panel opinion "merely note[d] that both are consistent with our holding."¹³² The panel cited the portion of the NVRA conference report, which explained why the conference rejected a provision in the Senate bill that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration."¹³³

The panel then discussed and rejected Arizona's arguments against preemption. These included Arizona's argument that, because the NVRA does not expressly prohibit states from imposing requirements in addition to those of the Federal Form, Proposition 200 does not conflict with the NVRA.¹³⁴ The panel rejected this argument that Arizona did "accept and use" the Federal Form per Section 6(a)(1) of the NVRA, so long as the Federal Form was accompanied by documentary proof of citizenship, as a "creative interpretation" of the state and federal statutes.¹³⁵ The panel did not accept Arizona's argument that the state was free to reject Federal Forms on Proposition 200 grounds because the NVRA anticipates that some Federal Forms may be rejected; the panel concluded that the proper understanding of the NVRA is that the statute contemplates the applicants who are ineligible, or whose forms are incomplete, inaccurate, or illegible.¹³⁶

The panel also rejected Arizona's arguments that it needed to apply Proposition 200 in order to combat voter fraud. The panel concluded that "federal law contains a number of safeguards against vote fraud, and it is entirely conjectural that they are inferior to the protections that [state] law offers."¹³⁷ The panel noted that "Congress was well aware of the problem of voter fraud when it passed the NVRA, as evidenced by the numerous fraud protections built into the act. . . . Because Congress dealt with the issue of voter fraud in the NVRA, we

132. *Id.* at 1210 n.15.

133. *Id.* (quoting H.R. Rep. No. 103-66, at 23 (1993)). The panel described the conference report, which stated that the amendment was not consistent with the purposes of the NVRA and could effectively eliminate, or seriously interfere with, the mail registration program of the Act, as "the most authoritative and reliable legislative material." *Id.* (citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996)).

134. *See id.* at 1182-83.

135. *See id.* at 1183 (citing *Foster v. Love*, 522 U.S. 67, 72 (1997)).

136. *See id.* at 1183-84.

137. *Id.* at 1184 (alteration in original) (quoting *ACORN v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995)).

are not persuaded by Arizona's claim that states must be permitted to impose additional requirements to address the same issue."¹³⁸

Finally, the panel found that Congress's enactment of the Help America Vote Act¹³⁹ did not alter its finding of preemption. "The NVRA and HAVA operate in separate spheres: while the NVRA regulates voter registration, HAVA is concerned with updating election technologies and other election-day issues at polling places. As relevant here, HAVA interacts with the NVRA only on a few discrete issues."¹⁴⁰ The panel concluded that "HAVA expressly provides that 'nothing [in HAVA] may be construed to authorize or require conduct prohibited under [the NVRA].' This language indicates Congress's intent was to prevent HAVA from interfering with NVRA's comprehensive voter registration system. Accordingly, Arizona's reliance on HAVA is unavailing."¹⁴¹

Having found preemption, the majority opinion then conducted a detailed analysis of the law of the case, concluding that the 2010 panel decision was "clearly erroneous," a recognized exception to the law of the case doctrine.¹⁴² This is an important issue for parties contemplat-

138. *Id.* The panel cited Section 10 of the NVRA, which provides federal criminal penalties for knowingly and willingly engaging in fraudulent registration tactics, *see* 42 U.S.C. § 1973gg-10(2); Sections 3 and 7 of the NVRA, which require the Federal Form and the combined motor vehicle-voter registration form to contain an attestation clause that sets out the requirements for voter eligibility, *see* § 1973gg-3(c)(2)(C)(i)-(ii); § 1973gg-7(b)(2)(A)-(B); and the requirement that applicants must sign Federal Forms under penalty of perjury, *see* § 1973gg-3(c)(2)(C)(iii), § 1973gg-7(b)(2)(C). *See Gonzalez*, 624 F.3d. at 1184. The panel also noted that Section 4 of the NVRA permits states to verify the eligibility and identity of voters by requiring first-time voters who register by mail to appear at the polling place in person, where the voter's identity can be confirmed, *see* § 1973gg-4(c); and that Section 6 of the NVRA allows states to detect fraudulent registrations by means of notices to applicants of the disposition of their registration applications, *see* § 1973gg-6(a)(2). *See Gonzalez*, 624 F.3d. at 1184.

139. 42 U.S.C. § 15301 (2012).

140. *Gonzalez*, 624 F.3d at 1184. These issues were: (1) HAVA's addition of two checkboxes to the Federal Form, requiring applicants to check off whether they are citizens of the United States and whether they are old enough to vote; (2) HAVA's authorization for mail registrants who have not previously voted in a federal election to submit documents verifying their identity along with the Federal Form; and (3) HAVA's requirement that states assign each registrant a "unique identifier" capable of being cross-checked against voters' identities at the polls. *See id.* (citing 42 U.S.C. § 15483(a)(1)(A), 15483(b)(3)-(b)(4)). Based upon the plain language of the provision, the panel also rejected Arizona's reliance upon 42 U.S.C. § 15545, the portion of HAVA providing that "nothing in this title shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law [including the NVRA and other federal voting regulations]." *Id.* at 1185.

141. *Id.* at 1185 (alterations in original) (citations omitted).

142. *See id.* at 1185-91. "Because, as set forth above, the prior panel's decision on the NVRA issue meets the standard of a recognized law of the case exception, we have discretion to review that decision, and we have chosen to exercise that discretion here." *Id.* at 1191.

ing whether to appeal preliminary injunction rulings, and it was especially important to Chief Judge Kozinski, who insisted in his dissent that the panel's hands were tied by the law of the case and law of the circuit doctrines.¹⁴³

The panel decision found that the Proposition 200 proof of citizenship requirement was preempted for purposes of federal elections without distinguishing between the Federal Form and the state's own mail-in form.¹⁴⁴ The panel's decision to broadly invalidate the Proposition 200 proof of citizenship requirement is indicated by the panel's conclusion that it did not need to reach the Plaintiffs' non-NVRA claims.¹⁴⁵ The panel's broad invalidation is further indicated by its reasoning that, if Arizona did not employ a unified federal/state voter registration system, other live claims would remain in the case.¹⁴⁶

Chief Judge Kozinski dissented from the panel opinion, based in large part upon the law of the case and law of the circuit doctrines,¹⁴⁷ but also based upon his disagreement with the majority's conflict analysis.¹⁴⁸

143. *See id.* at 1199–1205 (Kozinski, C.J., dissenting).

144. *See id.* at 1191 (“In light of Congress’s paramount authority to ‘make or alter’ state procedures for federal elections, we hold that the NVRA’s comprehensive regulation of federal election registration supersedes Arizona’s documentary proof of citizenship requirement.” (citations omitted)); *Id.* at 1198 (“Given the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA, which implemented a comprehensive national system for registering federal voters, supersedes Arizona’s conflicting voter registration requirement for federal elections.”).

145. *See id.* at 1191 (“Because we hold Arizona’s registration requirement void under the NVRA, we need not reach Gonzalez’s claim that the documentary proof of citizenship requirement imposes greater burdens of registration on naturalized citizens than on non-naturalized citizens and burdens the fundamental right to vote in violation of the Fourteenth Amendment’s Equal Protection Clause.”).

146. *See id.* at 1192 n.20 (“Because Congress’s authority under the Elections Clause is limited to preempting regulations related to federal elections, our holding invalidating Proposition 200’s registration requirement does not prevent Arizona from applying its requirement in state election registrations. However, Arizona has presented its system of voter registration under Proposition 200 as concurrently registering voters for state and federal elections, and has not indicated that, in the event Gonzalez prevails on the NVRA claim, it plans to establish a separate state registration system. We therefore do not consider whether Proposition 200’s registration requirement, as applied only to state registrations, is valid under Gonzalez and ITCA’s remaining claims.”).

147. *See id.* at 1199–1205 (Kozinski, C.J., dissenting).

148. *See id.* at 1207–08 (“There’s no conflict based on the text of the statutes. Arizona gladly accepts and uses the federal form, it just asks that voters also provide some proof of citizenship.”).

C. En Banc Decision

The Ninth Circuit issued an order in April 2011 setting the case for en banc review.¹⁴⁹ After reargument in June 2011, the en banc opinion was issued on April 17, 2012, written once again by Judge Ikuta.¹⁵⁰ The majority opinion reversed the district court with respect to the NVRA claim against the Proposition 200 proof of citizenship requirement, and affirmed the district court decision on all other issues.¹⁵¹ Chief Judge Kozinski concurred,¹⁵² as did Judge Berzon, joined by Judge Murguia.¹⁵³ Judge Pregerson concurred with respect to the NVRA claim but dissented with respect to the affirmance of the district court's dismissal of the Gonzalez Plaintiffs' Section 2 claim against the Proposition 200 polling place ID requirement.¹⁵⁴ Judge Rawlinson, joined by Judge Smith, dissented with respect to the NVRA claim and concurred with respect to the disposition of the remaining claims.¹⁵⁵

The en banc analysis tracked the panel decision. Perhaps the most significant difference between the panel and the en banc opinions, although it was not directly discussed, was the limitation of the en banc holding (notwithstanding some ambiguity) to voter registration applications using the Federal Form. The en banc majority opinion framed the NVRA issue as whether “the NVRA’s requirement that states ‘accept and use’ the Federal Form supersedes Proposition 200’s registration provision as applied to applicants using the Federal Form.”¹⁵⁶ The question as to whether a preemption ruling could extend to the state mail-in registration form as used for federal elections, as the panel decision contemplated, was taken off the table: “Gonza-

149. *Gonzalez v. Arizona*, No. 08-17094, at 5 (9th Cir. Apr. 27, 2011), Dckt No. 146. “Filed Order for PUBLICATION (ALEX KOZINSKI) Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.” *Id.*

150. *See Gonzalez v. Arizona*, 677 F.3d 383, 383, 387, 442 (9th Cir. 2012).

151. The Ninth Circuit normally sits en banc in eleven-judge panels. *See* 9TH CIR. R. 35-3. The en banc panel was comprised of Chief Judge Kozinski and Judges Pregerson, Rymer, Graber, Berzon, Rawlinson, Clifton, Bubee, Ikuta, Smith and Murguia. Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion. *See Gonzalez*, 677 F.3d at 387.

152. *See id.* at 439–42.

153. *See id.* at 442.

154. *See id.* at 442–44.

155. *See id.* at 444–53.

156. *See id.* at 398.

Arizona v. Inter Tribal Council of Arizona

lez and ITCA do not challenge Proposition 200's registration provision as applied to Arizona's State Form."¹⁵⁷

The en banc majority emphatically rejected Arizona's efforts to apply Supremacy Clause limiting principles to Elections Clause disputes. Like the panel majority opinion, the en banc opinion sharply distinguished the balancing of federal and state interests under the Supreme Court's Supremacy Clause jurisprudence from the Court's Elections Clause jurisprudence, tracing the difference to the allocation of pre-existing versus newly-created governmental powers under the Constitution. Specifically, the en banc opinion stated that "[i]n contrast to the Supremacy Clause, which addresses preemption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections."¹⁵⁸ The en banc majority found this lack of reserved authority to be a far-reaching distinction, such that "courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns."¹⁵⁹ The Elections Clause is a "standalone preemption provision," which "establishes its own balance."¹⁶⁰

The en banc opinion rejected outright the applicability of the "presumption against preemption" and "plain statement rule" to Elections Clause preemption disputes.¹⁶¹ Looking to the Supreme Court's decision in *Foster v. Love*, the en banc majority found a telling absence of either a presumption against preemption or plain statement rule, notwithstanding the Fifth Circuit's Supremacy Clause analysis.¹⁶² The en banc opinion further concluded that its "survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles."¹⁶³

Like the panel, the en banc majority described its preemption analysis as follows:

157. *Id.* at 398 n.24.

158. *Id.* at 392 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995)).

159. *Id.* at 392.

160. *Id.*

161. *See id.* The opinion cited one other circuit that declined to apply Supremacy Clause principles to NVRA preemption claims. *Id.* (citing *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008)).

162. *See id.* (citing *Foster v. Love*, 522 U.S. 67 (1997), *aff'g* 90 F.3d 1026 (5th Cir. 1996)).

163. *Id.* at 392.

Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold*, we consider the state and federal laws as if they comprise a single system of federal election procedures. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.¹⁶⁴

The en banc majority's conflict analysis and conclusions followed the panel opinion.¹⁶⁵ The en banc majority opinion stated that "[h]ere, under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form."¹⁶⁶ Like the panel, the majority rejected Arizona's "creative interpretation" of the state and federal laws,¹⁶⁷ and it rejected arguments based upon HAVA,¹⁶⁸ Section 6(a)(2) of the NVRA¹⁶⁹ and Section 9 of the NVRA.¹⁷⁰ The majority also credited the protections against voter fraud built into the NVRA and the Federal Form.¹⁷¹

The en banc majority concluded that "[i]n sum, the NVRA and Proposition 200's registration provision, when interpreted naturally, do not operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, we must hold that the registration provision, when applied to the Federal Form, is preempted by the NVRA."¹⁷²

164. *Id.* at 394 (citations omitted).

165. *Id.* at 398–403.

166. *Id.* at 398.

167. *See id.* at 398.

168. *See id.* at 401–03.

169. *See id.* at 399. *See generally* 42 U.S.C. § 1973gg-(4)(a)(2) (2012) (authorizing state mail-in forms).

170. *See Gonzalez*, 677 F.3d at 399–400. *See generally* § 1973gg-(7)(a)–(b) (authorizing issuance of Federal Form).

171. *See Gonzalez*, 677 F.3d at 403.

172. *Id.* at 403.

Arizona v. Inter Tribal Council of Arizona

The majority opinion then affirmed the district court's denial of the remaining claims at issue, which the majority identified as the ITCA Plaintiffs' and Gonzalez Plaintiffs' challenges to the Proposition 200 polling place identification requirement.¹⁷³ While this theoretically left some loose ends in terms of the plaintiffs' challenges to the proof of citizenship requirement as applied to the state's own mail-in form, the plaintiffs did not pursue the issue.¹⁷⁴

In an intriguing turn of events, Chief Judge Kozinski switched his dissenting vote from the panel decision and concurred with the en banc majority opinion.¹⁷⁵ This is explained in part by his apparent satisfaction with the resolution of the law of the circuit issue in the majority opinion.¹⁷⁶ But with respect to the merits of the preemption issue, Chief Judge Kozinski took a different, though equivocal, approach to the statutory texts than he did in his panel dissent.¹⁷⁷ He resolved the ambiguity that he saw in the text of the NVRA by reference to the legislative history of the NVRA, reasoning that the conference committee decision to remove the Senate language that would have allowed states to impose proof of citizenship requirements was more probative than a mere statement of legislative purpose, because it represented a legislative action with substantive meaning.¹⁷⁸ In the

173. *See id.* at 404–10.

174. The majority found that because Congress's authority under the Elections Clause is limited to preempting state regulations as they relate to federal elections, its holding invalidating Proposition 200's registration provision with respect to the Federal Form did not prevent Arizona from applying the proof of citizenship requirement to voter registrations for state elections. *See id.* at 404 n.30 (“[B]ecause Arizona has presented its system of voter registration as concurrently registering voters for state and federal elections, we do not consider whether Proposition 200's registration provision, as applied only to voter registrations for state elections, is valid under Gonzalez and ITCA's remaining claims.”); *cf. Gonzalez v. Arizona*, 624 F.3d 1162, 1191 n.20 (9th Cir. 2010).

175. *See Gonzalez*, 677 F.3d at 439 (Kozinski, C.J., concurring in judgment).

176. *See id.* at 389 n.4. The majority opinion dealt with the law of the case and circuit issues presented in the panel decision by clarifying the impact of published Ninth Circuit panel decisions in a footnote:

We now hold that the exceptions to the law of the case doctrine are not exceptions to our general “law of the circuit” rule, i.e., the rule that a published decision of this court constitutes binding authority which “must be followed unless and until overruled by a body competent to do so.” To the extent that our prior cases suggested otherwise, they are overruled. This determination, however, does not affect other recognized exceptions to the law of the circuit rule.

Id. (citations omitted). While this was strictly an “in-circuit” issue, it should be a consideration for parties weighing the potential consequences of appeals from the denial of motions for preliminary injunctions or other interlocutory orders.

177. “I find this a difficult and perplexing case.” *Id.* at 439. While he did not question the power of Congress to require that Federal Forms be processed per the majority's reading of the statute, Chief Judge Kozinski found the statutory language “tantalizingly vague.” *See id.* at 440.

178. *See id.* at 440–42.

end, the simple fact that Chief Judge Kozinski voted en banc to reverse the district court, as much as his rationale,¹⁷⁹ no doubt gave a substantial boost to the weight of the en banc ruling before the Supreme Court.

Arizona filed a motion to stay the issuance of the mandate while it sought certiorari.¹⁸⁰ The ITCA Plaintiffs opposed the motion,¹⁸¹ which the en banc panel denied on June 7, 2012.¹⁸²

V. ARIZONA V. INTER TRIBAL COUNCIL OF ARIZONA

After the Ninth Circuit denied Arizona's stay application, the State sought a stay of the mandate from Justice Kennedy, who granted it on June 14, 2012,¹⁸³ but referred the application to the full Court. On June 28, 2012, the Court issued an order vacating Justice Kennedy's stay, noting that Justice Alito would grant the stay.¹⁸⁴ Arizona filed its petition for certiorari on July 16, 2012, which the Court granted on October 15, 2012. The Court heard argument on March 18, 2013.¹⁸⁵

The Supreme Court ruled on June 17, 2013, that the NVRA preempted the Proposition 200 proof of citizenship requirement.¹⁸⁶ Justice Scalia wrote the opinion for the Court affirming the Ninth Circuit

179. See *id.* at 442. Chief Judge Kozinski carefully harmonized his prior dissent and his en banc concurrence as reflecting his continued view that the *Gonzalez I* panel was not *clearly* wrong. See *id.* ("As an en banc court, we cannot defer to *Gonzalez I*. Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I believe the preemptive reading of the statute is *somewhat* better than the alternative.") (emphasis added)).

180. See Motion to Stay Mandate, *Gonzalez v. Arizona*, No. 08-17094 (9th Cir. Apr. 24, 2012) Dckt. 213. Arizona made no constitutional argument with respect to voter qualifications in its stay application, nor had it done so at any prior stage of the case.

181. See Response of Inter Tribal Council of Ariz., et al in Opposition to Defendants-Appellees' Motion to Stay Mandate, *Gonzalez v. Arizona*, No. 08-17094, ITCA Plaintiffs' Response Opposing Motion to Stay the Mandate (9th Cir. May 4, 2012), Dckt. 218.

182. See *Gonzalez v. Arizona*, No. 08-17094, at 9-8 (9th Cir. June 7, 2012) (en banc), Dckt. 232. The panel found that Arizona had not demonstrated a reasonable probability that the Supreme Court would grant certiorari or a reasonable possibility that the Supreme Court would reverse, that the equities did not weigh in favor of granting a stay, and that Arizona had not made an adequate showing of good cause. *Id.*

183. *Arizona v. Gonzalez*, No. 11A1189 (U.S. June 14, 2012) (order granting stay).

184. See *Arizona v. Abeytia*, No. 11A1189 (U.S. June 28, 2012) (order vacating stay in pending case). The mandate issued from the Ninth Circuit on June 29, 2012. Following a short round of briefing, the district court issued interim injunctive relief in the run-up to the 2012 general election. See *Gonzalez v. Arizona*, No. 2:06-cv-1268, at 2 (D. Ariz. Aug. 15, 2012), Dckt. No. 1093 (mem).

185. The case for the Gonzalez Plaintiffs and the ITCA Plaintiffs was argued by Patricia A. Millett in her last argument before her confirmation as a judge of the U.S. Court of Appeals for the District of Columbia Circuit.

186. See *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2260.

Arizona v. Inter Tribal Council of Arizona

en banc decision, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan. Justice Kennedy joined in part with the majority opinion and concurred in the judgment. Justices Thomas and Alito filed separate dissents.

A. The Majority Opinion

Justice Scalia's majority opinion opened by framing the issue in direct textual terms:

The National Voter Registration Act requires States to “accept and use” a uniform federal form to register voters for federal elections. The contents of that form (colloquially known as the Federal Form) are prescribed by a federal agency, the Election Assistance Commission. The Federal Form developed by the EAC does not require documentary evidence of citizenship; rather, it requires only that an applicant aver, under penalty of perjury, that he is a citizen. Arizona law requires voter-registration officials to “reject” any application for registration, including a Federal Form, that is not accompanied by concrete evidence of citizenship. The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States “accept and use” the Federal Form.¹⁸⁷

1. The Scope of the Congressional Article I Authority

Part I of the majority opinion sets out the basics of the dispute before the Court. Describing the NVRA as “a complex superstructure of federal regulation atop state voter-registration systems,”¹⁸⁸ the majority opinion summarized the relevant federal and state statutory provisions giving rise to the dispute and the procedural history of the case.¹⁸⁹

Part II-A of the majority opinion delimits the function and scope of the Elections Clause.¹⁹⁰ The Elections Clause imposes what the Court describes as a “duty” upon the States to prescribe the time, place, and manner for conducting congressional elections, but it places with Congress the power to alter the states' regulations or to supplant them altogether.¹⁹¹

187. *Id.* at 2251.

188. *Id.*

189. *See id.* at 2251–53.

190. *See id.* at 2253–54.

191. *See id.*

Calling the Elections Clause “the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress,”¹⁹² Justice Scalia quoted Federalist No. 59 for the original reason that the Elections Clause established *both* a state duty to conduct federal elections *and* a congressional prerogative to set the terms for how they are to be their conducted:

“[E]very government ought to contain in itself the means of its own preservation,” and “an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.” That prospect seems fanciful today, but the widespread, vociferous opposition to the proposed Constitution made it a very real concern in the founding era.¹⁹³

The majority opinion then moved directly to ratify the Court’s prior holdings adopting a broad reading of “Times, Places, and Manner,” within the Elections Clause, including regulations relating to voter registration. The Court explicitly relied upon the formulation of the Elections Clause employed in *Smiley v. Holm* and *Ex parte Siebold* to succinctly set out the scope of the Elections Clause:

The [Election] Clause’s substantive scope is broad. “Times, Places, and Manner,” we have written, are “comprehensive words,” which “embrace authority to provide a complete code for congressional elections,” including, as relevant here and as petitioners do not contest, regulations relating to “registration.” In practice, the Clause functions as “a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.” The power of Congress over the “Times, Places[,] and Manner” of congressional elections “is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”¹⁹⁴

Justice Scalia’s majority opinion obviated any potential question about the precedential force of *Smiley*’s listing of regulations relating

192. *Id.* at 2254.

193. *Id.* at 2253 (alteration in original) (citation omitted); *see also* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 243 (2005).

194. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2253–54 (citations omitted).

to voter registration as an example of time, place, and manner regulations. The majority opinion held without qualification that Congress's authority to provide regulations "relating to 'registration'" is "relevant here" and within the meaning of "Times, Places, and Manner."¹⁹⁵

2. Conflict Analysis

Part II-B of the majority opinion explains its conclusion that a textual conflict existed between the "seemingly incompatible" texts of the NVRA and Proposition 200.¹⁹⁶ The Court treated Arizona's textual argument as being that the "NVRA . . . requires merely that a State receive the Federal Form willingly and use that form as one element in its (perhaps lengthy) transaction with a prospective voter."¹⁹⁷ Not surprisingly for an opinion authored by Justice Scalia, the majority opinion resolved the issue by conducting a close textual analysis of the statutes, with no reference to either statute's legislative history.

The majority opinion began by granting that "accept and use"—if viewed in isolation—might be amenable to Arizona's reading.

Taken in isolation, the mandate that a State "accept and use" the Federal Form is fairly susceptible of two interpretations. It might mean that a State must accept the Federal Form as a complete and sufficient registration application; or it might mean that the State is merely required to receive the form willingly and use it somehow in its voter registration process. Both readings—"receive willingly" and "accept as sufficient"—are compatible with the plain meaning of the word "accept." See 1 OXFORD ENGLISH DICTIONARY 70 (2d ed. 1989) ("To take or receive (a thing offered) willingly"; "To receive as sufficient or adequate"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 14 (2d ed. 1954) ("To receive (a thing offered to or thrust upon one) with a consenting mind"; "To receive with favor; to approve"). And we take it as self-evident that the "elastic" verb "use," read in isolation, is broad enough to encompass Arizona's preferred construction. *Smith v. United States*, 508 U. S. 223, 241 (1993) (Scalia, J., dissenting). In common parlance, one might say that a restaurant accepts and uses credit cards even

195. See *id.* at 2253. Inasmuch as *Smiley* concerned the consequences of a gubernatorial veto of a congressional redistricting plan, there was an opportunity for the majority to dismiss *Smiley* as *dictum* had the Court been disposed to qualify the extent to which voter registration is considered a "manner" regulation. As Justice Scalia noted, however, Arizona did not contest this point. See *id.* at 2268 (Thomas, J., dissenting).

196. *Id.* at 2254–57.

197. *Id.* at 2254.

though it requires customers to show matching identification when making a purchase.¹⁹⁸

However, the majority opinion also looked for the meaning of the “accept and use” language within the NVRA’s overall statutory scheme. “Words that can have more than one meaning are given content, however, by their surroundings.”¹⁹⁹ “Reading ‘accept’ merely to denote willing receipt seems out of place in the context of an official mandate to accept and use something for a given purpose. The implication of such a mandate is that its object is to be accepted *as sufficient* for the requirement it is meant to satisfy.”²⁰⁰

The majority opinion found Arizona’s reading “difficult to reconcile with neighboring provisions of the NVRA.”²⁰¹ Specifically, the Court cited the requirement in Section 8(a)(1)(B) of the NVRA, which requires that an applicant who submits a “valid voter registration form” by a specified time prior to an election must be registered for that election.²⁰² The Court reasoned that if Arizona’s reading of the NVRA was correct, then completed Federal Forms that are not accompanied by additional information could not be considered “valid,” and that it is “improbable that the statute envisions a completed copy of the form it takes such pains to create as being anything less than ‘valid.’”²⁰³

The Court also pointed to the wording Section 6(a)(2) of the NVRA, which authorizes states to create their own mail-in registration forms “in addition to accepting and using” the Federal Form.²⁰⁴ This allows the Federal Form to serve as a backstop, guaranteeing a simple means of registering to vote in federal elections, “[n]o matter what procedural hurdles a State’s own form imposes.”²⁰⁵ The Federal Form would cease to perform any meaningful function under Ari-

198. *Id.*

199. *Id.* (quoting *Whitman v. American Trucking Ass’ns., Inc.*, 531 U.S. 457, 466 (2001)).

200. *Id.* at 2250 (emphasis added). The Court cited a series of federal statutes that “contemplate more than mere willing receipt” for the term “shall accept.” *See id.* at 2254–55 (citing 5 U.S.C. § 8332(b), (m)(3) (2012) (civilian-employee retirement); 12 U.S.C.A. § 2605(l)(2) (Supp. 2013) (federally-related mortgage servicing); 16 U.S.C. § 1536(p) (2012) (Endangered Species Act Committee); § 4026(b)(2), 118 Stat. 3725, note following 22 U.S.C. § 2751 (2012) (certification of missile defense system); 25 U.S.C. § 1300h-6(a) (2012) (distribution of tribal funds); 30 U.S.C. § 923(b) (2012) (medical certification); 42 U.S.C. § 1395w-21(e)(6)(A) (2012) (health insurance coverage elections)).

201. *Id.* at 2255.

202. *See id.* (citing 42 U.S.C. § 1973gg-6(a)(1)(B) (2012)).

203. *Id.*

204. *See id.*

205. *Id.*

zona’s reading, however, because it would permit states to demand that the Federal match the state’s own form.²⁰⁶ In rejecting Justice Alito’s dissent, which would have accepted Arizona’s reading, the Court recognized a core principle of the NVRA: that “every eligible voter can be assured that if he does what the Federal Form says, he will be registered.”²⁰⁷

The majority opinion then considered and rejected Arizona’s “presumption against preemption” arguments, concluding that “there is no compelling reason not to read Elections Clause legislation simply to mean what it says.”²⁰⁸ Confirming the Ninth Circuit’s reading of the Supreme Court’s precedent, the Court found that it had “never mentioned such a principle in [its] Elections Clause cases.”²⁰⁹ The Court found good reason for treating Elections Clause cases differently than ones under the Supremacy Clause, namely that the underlying assumption that Congress is reluctant to preempt does not hold under the Elections Clause, which necessarily displaces some element of a pre-existing state congressional election system.²¹⁰ The Court explained that “[b]ecause the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress’s pre-emptive intent.”²¹¹ In addition, the Court found the federalism concerns under the Supremacy Clause “somewhat weaker” than under the Elections Clause because the states’ role has always been subject to a congressional decision to override it.²¹²

The majority opinion concluded that “the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal Form.”²¹³ This did not

206. *See id.* at 2256.

207. *Id.* at 2255 n.4.

208. *See id.* at 2256–57.

209. *Id.* at 2256.

210. *See id.* at 2256–57. Countering Justice Alito’s dissent, the Court, by definition, found no room for ambiguity about Congress’s intent under the Elections Clause. *See id.* at 2257 n.6 (“Put differently, *all* action under the Elections Clause displaces some element of a pre-existing state regulatory regime, because the text of the Clause confers the power to do exactly (and only) that.”).

211. *Id.* at 2257.

212. *See id.*

213. *Id.* (citing *Ex parte Siebold*, 100 U.S. 371, 397 (1879)). The Court noted that the NVRA does not preclude States from “deny[ing] registration based on information in their possession establishing the applicant’s ineligibility.” *Id.* “The NVRA clearly contemplates that not every submitted Federal Form will result in registration.” *Id.* (citing 42 U.S.C. § 1973gg-7(b)(1) (2012)

conclude the majority's analysis, however, as it went on to consider a constitutional issue raised by Arizona.

3. Rejection of Arizona's Constitutional Argument

Part III of the majority opinion rejected Arizona's argument that the Ninth Circuit's construction of the phrase "accept and use" was in tension with Arizona's enforcement of its voting qualifications.

Arizona had argued in its merits brief that "if the NVRA precludes Arizona from requiring registrants to show satisfactory evidence of citizenship, the NVRA intrudes on Arizona's determination that only citizens are qualified to vote."²¹⁴ In support of that argument, Arizona twice raised the prospect that the Ninth Circuit ruling would interfere with the enforcement of its "evidence-of-citizenship qualification," without elaborating on why such "evidence" should be categorized as a voter qualification.²¹⁵ In its reply brief, Arizona attempted to argue, for the first time, that the Proposition 200 evidence-of-citizenship registration procedure was itself a voter qualification. However, the Court did not accept this last-ditch argument, and treated U.S. citizenship—not "evidence" of U.S. citizenship—as the voter qualification that Arizona sought to enforce.²¹⁶

(State election officials use Federal Form to assess eligibility)); 42 U.S.C. § 1973gg-6(a)(2) (2012) (States required to send notice of disposition to each applicant).

214. Brief for Petitioner at 50, *Arizona v. Inter Tribal Council of Ariz., Inc.*, (No. 12-71). Arizona had not made this argument before. For example, Arizona's certiorari petition did not cite Art. 1 § 2, and its certiorari petition only used the term "qualification" with reference to members of Congress in discussing *Roudebush v. Hartke*, *supra*. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, (No. 12-71), Cert. Pet. at 18.

215. The state argued that:

[T]here is a persuasive argument that the Elections Clause does not authorize the NVRA to preclude Arizona from enforcing its *evidence-of-citizenship qualification* for voting in federal elections. Therefore, to avoid the constitutional question of whether the Elections Clause authorized Congress to enact the NVRA's provision that precludes Arizona from enforcing its *evidence-of-citizenship qualification* for voting in federal elections, this Court should adopt Arizona's interpretation of term "accept and use" the Federal Form in the NVRA.

Brief for Petitioner at 52–53, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71) (emphasis added). With Arizona having laid no groundwork for its conclusory characterization of the evidence of citizenship procedure as a voter qualification, the Court effectively read the state's use of the term "evidence-of-citizenship qualification" in its merits brief as referring to the Proposition 200 evidence-of-citizenship registration procedure.

216. The majority opinion noted that Arizona's reply brief argued: "[F]or the first time that 'registration is itself a qualification to vote.' We resolve this case on the theory on which it has hitherto been litigated: that citizenship (not registration) is the voter qualification Arizona seeks to enforce." *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2259 n.9 (citations omitted). Had the Court given any credence to Arizona's last-ditch argument that its voter registration procedure was a voter qualification; the majority opinion surely would have hedged its conclusion that voter registration is a time, place, and manner regulation.

Arizona v. Inter Tribal Council of Arizona

The Court observed that “the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.”²¹⁷ To the extent that there was any lingering question as to whether the Supreme Court’s decision in *Oregon v. Mitchell* was good authority for the proposition that Congress possesses at least some Elections Clause authority to set voter qualifications for federal elections, the Court removed it.²¹⁸ The Court accorded *Mitchell* “minimal precedential value,” given that Justice Black stood alone in his opinion that the eighteen-year age qualification set by Congress could be sustained on Elections Clause grounds.²¹⁹ “Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.”²²⁰ The Court thus concluded that “[p]rescribing voting qualifications . . . ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause, which is ‘expressly restricted to the regulation of the times, the places, and the manner of elections.’”²²¹

The Court further observed that a federal statute, which precluded a state from obtaining the information necessary to enforce its voter qualifications, would raise serious constitutional doubts.²²² However, the Court concluded that it was not necessary to resort to constitutional avoidance doctrine in this case,²²³ because Arizona may request that the EAC alter the Federal Form to include information that it deems necessary to determine eligibility, and may challenge the EAC’s rejection of that request in a suit under the Administrative Procedure Act.²²⁴ The Court concluded for this reason that giving the “accept and use” provision of the NVRA its fairest reading raised “no constitutional doubt.”²²⁵

217. *Id.* at 2257. “[Under] Article I, § 2, cl. 1, . . . electors in each State for the House of Representatives ‘shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,’ [which] the Seventeenth Amendment adopts for purposes of senatorial elections. *Id.* at 2258 (comparing Article II, § 1, cl. 2, which requires each state to appoint presidential electors as the legislature directs).

218. *See id.*

219. *See id.* at 2258 n.8.

220. *Id.* at 2258 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (Harlan, J., concurring in part and dissenting in part)) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 231–32 (1986) (Stevens, J., dissenting)).

221. *Id.* (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton)).

222. *See id.* at 2258–59.

223. *Id.* at 2259.

224. *Id.*; see also 5 U.S.C. §§ 701–706; 42 U.S.C. § 1973gg-7(a)(2); Transcript of Oral Argument at 55, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71).

225. *Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. at 2259.

The Court viewed the EAC's decision as to whether to grant a renewed request by Arizona as cabined by Section 9(b)(1) of the NVRA, which "acts as both a ceiling and a floor with respect to the contents of the Federal Form."²²⁶ The Court noted ambiguity about the meaning of the term "may require" in Section 9(b)(1), which the United States and the ITCA respondents argued should be read as meaning "shall require" necessary information.²²⁷ However, the Court did not attempt to conclusively interpret the meaning of "may" in this context because it accepted the United States' suggestion that "validly conferred discretionary executive authority is properly exercised to avoid serious constitutional doubt."²²⁸

The Court noted that although Arizona did not challenge the EAC's inaction on its 2005 request to modify the Federal Form, nothing prevented Arizona from renewing its request. "Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form."²²⁹

Having addressed Arizona's constitutional argument, the majority opinion concluded:

We hold that 42 U.S.C. § 1973gg-4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself. Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC's decision under the Administrative Procedure Act.²³⁰

226. *Id.* at 2259.

Section 1973gg-7(b)(1) of the Act provides that the Federal Form "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process."

Id.

227. *See id.* at 2259 (citing Transcript of Oral Argument at 55, 37–39, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71); Brief for ITCA Respondents at 46, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71)).

228. *See id.* ("That is to say, it is surely permissible if not requisite for the Government to say that necessary information which may be required will be required.")

229. *Id.* at 2260 (citing 5 U.S.C. § 706(1)). The Court noted that the EAC divided 2-to-2 in 2005 on Arizona's request to modify the state-specific instructions on the Federal Form, which meant that no action could be taken, and the EAC currently lacks a quorum. The Court contemplated, but did not attempt to decide whether a writ of mandamus could lie in such a posture. *See id.* at 2259–60 & n.10.

230. *Id.* at 2260.

4. Kennedy Concurrence, Thomas Dissent and Alito Dissent

Justice Kennedy’s concurrence stated that “[h]ere, in my view, the Court is correct to conclude that the National Voter Registration Act of 1993 is unambiguous in its preemption of Arizona’s statute. For this reason, I concur in the judgment and join all of the Court’s opinion except its discussion of the presumption against pre-emption.”²³¹ Justice Kennedy found it “unnecessary for the proper disposition of the case and . . . incorrect in any event” to conclude that the normal “starting presumption that Congress does not intend to supplant state law” does not apply to legislation under the Elections Clause.²³²

Justice Thomas accepted Arizona’s constitutional avoidance argument, writing in dissent that “[t]o avoid substantial constitutional problems created by interpreting § 1973gg-4(a)(1) to permit Congress to effectively countermand this authority, I would construe the law as only requiring Arizona to accept and use the form as part of its voter registration process, leaving the State free to request whatever additional information it determines is necessary to ensure that voters meet the qualifications it has the constitutional authority to establish.”²³³ To Justice Thomas, “[i]t matters not whether the United States has specified one way in which *it* believes Arizona might be able to verify citizenship; Arizona has the independent constitutional authority to verify citizenship in the way it deems necessary.”²³⁴

Justice Alito’s dissent concluded that “[p]roperly interpreted, the NVRA permits Arizona to require applicants for federal voter registration to provide proof of eligibility.”²³⁵ Justice Alito did not accept the majority’s treatment of the presumption against preemption.²³⁶

231. *Id.* at 2261–62 (Kennedy, J., concurring in part and concurring in judgment).

232. *Id.* at 2260. Justice Kennedy may have been contemplating a future Elections Clause case in which a preemption claim is not based upon a direct conflict. *Cf.* *Arizona v. United States*, 132 S. Ct. 2492, 2519 (2012) (finding field preemption with respect to immigration). There was no argument in *Arizona v. ITCA* that federal preemption of immigration, *id.*, extended to Proposition 200.

233. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2262 (Thomas, J., dissenting).

234. *Id.* at 2269.

235. *Id.* at 2275 (2013) (Alito, J., dissenting).

236. *See id.* at 2271.

In light of the States’ authority under the Elections Clause of the Constitution, Art. I, § 4, cl. 1, I would begin by applying a presumption against pre-emption of the Arizona law requiring voter registration applicants to submit proof of citizenship. Under the Elections Clause, the States have the authority to specify the times, places, and manner of federal elections except to the extent that Congress chooses to provide otherwise. And in recognition of this allocation of authority, it is appropriate to presume that the States retain this authority unless Congress has clearly manifested a contrary intent.

Accusing the majority of “refusing to give any weight to Arizona’s interest in enforcing its voter qualifications,” Justice Alito argued that “[t]he canon of constitutional avoidance also counsels against the Court’s reading of the Act.”²³⁷ Justice Alito also cautioned that “[t]he Court sends the State to traverse a veritable procedural obstacle course in the hope of obtaining a judicial decision on the constitutionality of the relevant provisions of the NVRA. A sensible interpretation of the Act would obviate these difficulties.”²³⁸

VI. IMPLICATIONS OF *ARIZONA V. ITCA*

Expansion of the franchise has been the historical trend in the United States, but it is neither inevitable nor continuous.²³⁹ The adoption of national voter registration standards, after all, had to overcome multiple previous failed attempts and a presidential veto before they became the law of the land under the NVRA. As *Shelby County v. Holder* vividly illustrated, it would be a mistake to suppose that the current Supreme Court will not radically recast Congress’s powers. The Supreme Court’s strong affirmation of Congress’s Elections Clause authority in *Arizona v. ITCA* therefore provided a welcome reprieve from a long series of decisions that progressively limited and weakened federal protections against voting discrimination.²⁴⁰

A. The Elections Clause

The Court’s treatment of the scope of the Elections Clause in *Arizona v. ITCA* was brief, but significant in at least three ways. First and foremost, the Court reaffirmed the “paramount” authority of Congress over the regulation of congressional elections. There was no effort in the majority opinion to use this case as an opportunity to

Id.

237. *Id.* at 2273.

238. *Id.*

239. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE, THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

240. See *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Riley v. Kennedy*, 128 S. Ct. 1970 (2008); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Vera v. Bush*, 517 U.S. 962 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Holder v. Hall*, 512 U.S. 874 (1994); *Shaw v. Reno*, 509 U.S. 630 (1993). While those cases involved racial discrimination in one form or another, the fundamental right to vote under the Fourteenth Amendment was also seriously jeopardized in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

narrow the Court's previous expansive constructions of the Elections Clause in *Ex parte Siebold* and *Smiley v. Holm*.²⁴¹ While Justices Alito and Thomas seemed eager to do so, the majority was not.

Second, the Court squarely recognized that the regulation of voter registration procedures is a "manner" of conducting federal elections.²⁴² The Court did not attempt to qualify any portion of the voter registration process as resting outside the scope of time, place and manner regulations. Accordingly, the Court created no toehold for arguments that voter registration, or some aspects of registration procedures, should be regarded as forms of state voter qualifications.

Third, the Court's boundary between Elections Clause powers and the Article I voter qualification provisions tracked the constitutional text, but went no further. The Court's statement that "the Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them" only recapitulates the respective constitutional provisions.²⁴³ In short, the Court's opinion affirmed that voter registration procedures lie within the scope of Congress's Elections Clause powers, and the Court gave no basis to think that it had begun to read them out.

B. Preemption Jurisprudence

The Court's preemption analysis was uncomplicated, well-supported by the Court's precedent and did not criticize the Ninth Circuit en banc decision. The Court's decision explicitly reaffirmed the Elections Clause preemption analysis that had been applied in previous Supreme Court decisions, up to and including *Foster v. Love*. As would be expected in a Justice Scalia opinion, the conflict analysis revolved around the plain meaning of the respective state and federal statutory texts. The Court construed the Elections Clause to place an *ab initio* duty upon the states to provide rules for conducting federal

241. It would not have been entirely surprising if Chief Justice Roberts, or Justices Scalia or Kennedy, had adopted a reading of time place and manner that sounded in federalism principles. The Court's approach to the Voting Rights Act in the past two decades has represented an increasingly aggressive questioning of Congress's judgments about the exercise of its enforcement powers under the Reconstruction Amendments, based in part upon the "federalism burden" of Section 5 of the Voting Rights Act. See *Nw. Austin Mun. Util. Dist. No. 1*, 557 U.S. at 202–03.

242. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2265–66.

243. *Id.* at 2257. To the extent that some vestigial precedent survived from Justice Black's reading of the Elections Clause in *Oregon v. Mitchell*, there should be no surprise that the Court overruled it. As discussed *supra* at 6–7, Justice Black's view did not garner the support of any other Justice even then.

elections, with a federal right to override those rules, and thus left no logical room to apply the Supremacy Clause's presumption against preemption. Justice Scalia did not even bother to discuss that other Supremacy Clause principle, the plain statement rule. The decision leaves little question about how lower courts should review similar claims in the future.²⁴⁴

Still, it seems most likely that the Court granted certiorari in *Arizona v. ITCA* due to the Ninth Circuit's discussion of preemption standards. Justice Kennedy's concurrence, as well as his questions during argument, made clear that he would have decided the case without categorically excluding the presumption against preemption from Elections Clause analysis. It is curious, however, that although only one Justice voted to stay the Ninth Circuit's issuance of the mandate after it was referred to the full Court, at least four Justices voted to grant certiorari. Although Justice Kennedy granted a preliminary stay, when he referred the application to the full Court only Justice Alito voted to grant it. This normally would make four votes for certiorari highly unlikely, since the Court's standards for granting a stay specifically include whether four justices are likely to grant certiorari. One possibly intervening factor was the Fifth Circuit decision in *Voting For America, Inc. v. Andrade*,²⁴⁵ which was called to the Court's attention after certiorari briefing was completed, and may have prompted Justice Kennedy and one or more members of the Court to agree to hear the case even though they later voted to affirm, due to concerns that denying certiorari might leave a circuit split on preemption issues.²⁴⁶ In the end, however, the *Andrade* decision played no role in the Court's decision.

As noted earlier, one potential issue that did not come before the Court was the extent to which the NVRA might preempt the application of Proposition 200 to Arizona's *state* mail-in voter registration form. Judge Ikuta's panel decision, for herself and Justice O'Connor, found that all applications of the Proposition 200 proof of citizenship

244. How the Court would treat a field preemption claim under the Elections Clause remains an open question. Because the textual, conflict-based claim in this case avoided the more complex issues that would arise under a field preemption claim, the Court might well come to a different conclusion as to the presumption against preemption and plain statement rule.

245. 488 Fed. Appx. 890 (5th Cir. 2012).

246. See Petitioners' Supplemental Brief in Support of Petition for Writ of Certiorari, *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013) (No. 12-71), 2012 WL 7008874, at *1; Gonzalez Respondents' Brief in Response to Petitioners' Supplemental Brief, *Arizona v. Gonzalez* (No. 12-71), 2012 WL 7008875, at *1.

Arizona v. Inter Tribal Council of Arizona

requirement were preempted, including the State's own mail-in voter registration form, at least to the extent that it is used for federal elections.²⁴⁷ This would have presented a more challenging set of preemption issues for the Supreme Court had it been followed in the en banc decision. However, the en banc decision, despite some ambiguous language, was limited to whether Proposition 200 could be applied to the Federal Form.²⁴⁸ The Supreme Court treated the en banc decision as extending only to the state's handling of Federal Forms and not to the state's disposition of its own mail-in voter registration application.²⁴⁹ Furthermore, Justice Scalia's reasoning was based, in part, on the Federal Form being able to serve as an easy method for eligible applicants to register regardless of the hurdles that states build into their own forms,²⁵⁰ and that rationale would not have been present if the preemption had extended to the state form as well. It is not clear to what degree any of the Justices would have agreed with the panel's broader reading of preemption.

C. Voter Qualifications

It would be a grave problem if racially discriminatory, excessively burdensome or irrational procedural barriers to voting could be legitimized by cloaking them in the garb of "letting states decide who is allowed to vote." But voter qualifications are anything but exempt from federal review. The Fourteenth Amendment has long provided protection from excessive and racially discriminatory prerequisites to voting.²⁵¹ The Fifteenth Amendment prohibits voter qualifications that discriminate on the basis of race, color, or previous condition of servitude.²⁵² The Nineteenth Amendment prohibits voting discrimination on the basis of gender.²⁵³ The Twenty-Fourth Amendment prohibits conditioning voting in federal elections upon payment of any

247. *Supra* pp. 27–28.

248. *Supra* p. 31.

249. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013). "The question is whether Arizona's evidence-of-citizenship requirement, as applied to Federal Form applicants, is pre-empted by the Act's mandate that States 'accept and use' the Federal Form." *Id.*

250. *See id.* at 2255.

251. *See* U.S. CONST. amend. XIV, §§ 1–2; *see, e.g.,* *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

252. *See* U.S. CONST. amend. XV, § 1; *see, e.g.,* *Rice v. Cayetano*, 528 U.S. 495 (2000); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915).

253. *See* U.S. CONST. amend. XIX.

poll tax or other tax.²⁵⁴ The Twenty-Sixth Amendment prohibits denying the right to vote to persons age eighteen or over.²⁵⁵ The Supreme Court's record in enforcing these protections in recent decades generally has been undistinguished and often has been deeply disturbing. However, these Amendments, and the "appropriate" legislation enforcing them, can and do reach voter qualifications, even if the Elections Clause does not.

That being said, the Court properly rejected Arizona's constitutional avoidance argument, finding that "no constitutional doubt is raised by giving the 'accept and use' provision of the NVRA its fairest reading."²⁵⁶ The Court reasoned that Arizona could request a new administrative determination from the EAC, and/or bring a challenge under the Administrative Procedure Act,²⁵⁷ but those options already were available to the state. The Supreme Court's decision thus did not open the door for Arizona to pursue such challenges; at most the Supreme Court provided guidance to the EAC and the trial court that their decisions should turn on the extent to which Proposition 200 is "necessary" to enforce the states' citizenship qualifications.

Recognizing the availability of these forms of redress provided a safety valve that kept the Court from making premature or unnecessarily broad judgments about Arizona's actual need for Proposition 200, and by extension, judgments about the constitutionality of the EAC's decision-making or potentially the NVRA itself. If the Court had found that Arizona had no judicial recourse for an argument based upon the explicit text of Article I, that very likely would have been the springboard for the Court to take on the constitutionality of the NVRA, a far more troubling prospect.

Had the Court considered Arizona's argument that the NVRA unconstitutionally interferes with the enforcement of the state's citizenship qualification, it would have seen that the Proposition 200 evidence of citizenship procedure was neither a historical necessity, nor was it a response to a recent pattern of widespread or organized fraud or criminal activity that made it imperative to tighten the voter regis-

254. See U.S. CONST. amend. XXIV, § 1; see, e.g., *Harman v. Forssenius*, 380 U.S. 528 (1965).

255. See U.S. CONST. amend. XXVI, § 1.

256. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013).

257. The NVRA has no provision exempting the EAC's decisions from judicial review, and the fact that Arizona is pursuing an APA claim following the Supreme Court's decision, see *infra* Part F.4, does not mean that the state could not have done so earlier; it simply had failed ever to do so.

Arizona v. Inter Tribal Council of Arizona

tration process.²⁵⁸ On the other hand, in *Crawford v. Marion County Election Board*,²⁵⁹ the Supreme Court recognized that states have a strong interest in preventing election fraud.²⁶⁰ Had Congress mandated acceptance and use of the Federal Form with an indifference or disregard for the prospect of fraudulent or mistaken registration by non-citizens, the Court surely would have found real teeth in Arizona's argument. However, the NVRA contains multiple protections against fraud.²⁶¹ As it should have, the Supreme Court left it to the lower courts to consider in the first instance whether Arizona can make a particularized showing of necessity for Proposition 200.

D. Implications for the NVRA and Other Federal Election Legislation

Without question, *Arizona v. Inter Tribal Council* broadly affirmed the constitutional underpinnings of the NVRA. Although the Court denied certiorari in one early case that questioned the constitutionality of the NVRA,²⁶² a decades-old certiorari denial could hardly have been expected to dissuade a determined majority of the Justices from drawing the constitutionality of the NVRA into question, had they wished to pursue the invitation to do so.²⁶³ But the Court did not, and that fact is the short but important takeaway from this case. Moreover, Congress can now legislate under the Elections Clause with a clear contemporary endorsement of the breadth of its powers.

With regard to the Court's dismissal of Justice Black's reading of Congress's power to set age and residency qualifications under the

258. When Proposition 200 was adopted in 2004, Arizona accepted affirmation under oath as fully sufficient evidence of citizenship, as did every other state that conducted voter registration. Arizona continues to accept affirmation under oath as sufficient evidence for every other voter qualification. Existing registered voters were "grandfathered in" under Proposition 200 without having to prove their citizenship, undermining not only the state's claim that Proposition 200 was a voter qualification, but also the state's claim that that Proposition 200 was essential to enforcing its citizenship qualification. Viewed most favorably to the state, the record contained only a handful of criminal convictions for non-citizen registration, none of which were shown to have occurred via the Federal Form.

259. 553 U.S. 181 (2008).

260. *See id.* at 196; *see also* *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

261. *See* *Gonzalez v. Arizona*, 677 F.3d 383, 403 (2012); *see also* *ACORN v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995).

262. *See* *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1412–12 (9th Cir. 1995).

263. *See, e.g.*, Brief for American Civil Rights Union and 12 Civil Rights Lawyers as Amicus Curiae Supporting Petitioners, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) (No. 12-71), 2012 WL 6694057, at *7 (raising constitutional issues regarding Ninth Circuit *en banc* decision). "If the NVRA is read as preempting Arizona's Proposition 200, then it is the NVRA that is unconstitutional." *Id.* at *16 (capitalization removed).

Elections Clause in *Oregon v. Mitchell*, there was nothing surprising in that and the effect is minimal. No current federal legislation under the Elections Clause sets voter qualifications; the eighteen-year-old voting qualification sustained in *Oregon v. Mitchell* was mooted by the passage of the Twenty-sixth Amendment, and Section 202 of the Voting Rights Act, which remains in effect, was sustained by a majority of the Court in *Mitchell* on various interstate travel grounds.²⁶⁴

The principal unfinished business after *Arizona v. ITCA* is a challenge to the EAC's Federal Form instructions for Arizona and Kansas under the Administrative Procedure Act ("APA").²⁶⁵ The plaintiffs are the States and the Secretaries of State of Kansas and Arizona; the defendants are the EAC and its executive director; a number of affected individuals and organizations have intervened as defendants. The *Kobach* case is the type of action that the Court's majority opinion noted was "happily" available to Arizona.²⁶⁶ After initial briefing, the district court deferred ruling and gave the plaintiffs an opportunity to make a new request to the EAC to modify the Federal Form.²⁶⁷ On January 17, 2014, the EAC's executive director issued an extensive ruling denying the states' requests.²⁶⁸ As this Article was going to print, on March 19, 2014, the district court issued an order that found the EAC to be under a ministerial duty to modify the instructions for

264. Section 202 of the Voting Rights Act allows otherwise qualified residents who apply to register no later than thirty days (or less if permitted by state law) prior to a presidential election to vote in that election notwithstanding any state durational residency requirement. See 42 U.S.C. § 1973aa-1(d) (1970). Citizens who move to another state after the 30th day preceding a Presidential election may vote in their former state. See 42 U.S.C. § 1973aa-1(e). The Supreme Court upheld these residency provisions for presidential elections in *Oregon v. Mitchell* separately from its holding concerning age qualifications. See *Oregon v. Mitchell*, 400 U.S. 112, 134, 237-36, 285-86 (1970). The Court gave no indication in *Arizona v. ITCA* that it intended to reconsider that aspect of *Mitchell*, or any of the Court's line of jurisprudence concerning Congress' regulation of Presidential elections. See, e.g., *Burroughs v. United States*, 290 U.S. 534 (1934).

265. *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095 (D. Kan.). See 5 U.S.C. §§ 551-59.

266. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2259 (2013).

267. State officials in Arizona and Kansas also reacted to the *Arizona v. ITCA* decision by announcing plans to create dual registration systems, under which citizens who have registered using the Federal Form will only be permitted to vote in federal contests, unless and until they comply with the state evidence of citizenship requirements. See Brief in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, *Kobach v. EAC* (No. 13-409) 2013 WL 7702029 (D. Kan. Oct. 23, 2013). Such "dual systems" are not precluded on the face of the NVRA, and at this time there have been no legal challenges claiming that these particular dual systems violate state or other federal laws.

268. See U.S. Election Assistance Comm'n, Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form (Docket No. EAC-2013-0004) (Jan. 17, 2014).

Arizona v. Inter Tribal Council of Arizona

Kansas and Arizona to accommodate the States' proof of citizenship requirements, and ordered the EAC to do so immediately.²⁶⁹

CONCLUSION

The defiance of the EAC's rulemaking authority displayed in *Arizona v. ITCA* is a case in point of the problem contemplated in *Ex parte Siebold*: that "officers or agents" of Congress might face "obstruction or interference from the officers of the State," and that in the absence of "harmonious action" by the states, there must be the "requisite authority" to enforce Congress's "constitutionally paramount" regulations.²⁷⁰ The Supreme Court's resolution of Arizona's appeal did not end the dispute over Proposition 200 and similar provisions, but the Court's decision settled the important point that Congress controls voter registration procedures for federal elections, and it showed that the NVRA rests upon solid constitutional ground.

269. *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095, (D. Kan. Mar. 19, 2014) (mem.). As of March 21, 2014, no notices of appeal had been filed, although appeals are highly likely. The defendant-intervenors filed notices of appeal on March 27, 2014.

270. *See Ex parte Siebold*, 100 U.S. 371, 387 (1879).

Shelby County v. Holder: When the Rational Becomes Irrational

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INTRODUCTION	812
I. THE HISTORICAL AND LEGAL CONTEXT	
LEADING UP TO <i>SHELBY COUNTY</i>	815
A. The Disenfranchisement of African Americans Prior to the Enactment of the Voting Rights Act	815
B. The Adoption of the Voting Rights Act of 1965	817
C. Unsuccessful Challenges to the Section 5 Preclearance Scheme and Reauthorizations of Section 5 in 1970, 1975, and 1982	819
D. The 2006 Reauthorization and the <i>Northwest Austin</i> Case	822
II. GAME CHANGE: <i>SHELBY COUNTY V.</i> <i>HOLDER</i>	
A. The Congruence and Proportionality Test Would Have Required the Court in <i>Shelby County</i> to Consider Factors It Largely Ignored	826
B. The <i>Shelby County</i> Supreme Court Majority Finds the Rational Irrational	831
1. The Rational Basis Test and Its Application to Section 5 Prior to <i>Shelby County</i>	831
2. Congress Elected to Cover Jurisdictions with Both Historical and Current Records of Discrimination	834

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3. The Supreme Court in <i>Shelby County</i> Departs from Precedent in Conducting Its Rational Basis Review	837
III. STATE SOVEREIGNTY AND RACE: DRIVING THE <i>SHELBY COUNTY</i> MAJORITY	840
A. State Sovereignty and Equal Sovereignty of the States	841
1. Congress’s Power Under the Civil War Amendments and State Sovereignty	843
2. State Sovereignty and the Equal Footing Doctrine	846
a. The Equal Footing Doctrine	847
b. <i>South Carolina v. Katzenbach</i> : Definitively Dismissing the Equal Footing Doctrine As Applied to the Act	849
c. The Perversion of the Equal Footing Doctrine in <i>Northwest Austin</i>	850
d. The Equal Sovereignty Doctrine Comes to Roost in <i>Shelby County</i>	852
B. Race and the Demise of Section 5	854
1. Constructing a More “Colorblind” Constitution	855
2. The Roberts Court’s Embrace of “Color-blind” Principles	857
3. Colorblindness and Voting Rights	859
CONCLUSION	866

INTRODUCTION

For most of our nation’s history, African Americans and other racial and ethnic minorities were systematically excluded from voting, particularly in the South and Southwest. By 1965, almost a century had passed since the Fifteenth Amendment had outlawed voting discrimination on the basis of race, color, or previous condition of servitude. Yet, despite the promise of the Fifteenth Amendment, state-sanctioned disenfranchisement of African Americans continued relentlessly. The failure of legal mechanisms to break apart discriminatory voting regimes resulted in intractable barriers to the ballot box for African Americans and other minority voters. Only with the enactment of the Voting Rights Act of 1965 (“Voting

Shelby County v. Holder

Rights Act” or “Act”)¹ did the constitutional right to vote free of racial discrimination begin to become a reality.

In its wisdom, Congress included a provision in the Act, Section 5, which required federal “preclearance” of voting changes in jurisdictions with the worst records of discrimination as captured by a coverage formula that was based on low political participation and the use of a voting test or device.² This system was extremely effective as the Department of Justice issued more than 1,000 objection letters that blocked racially discriminatory voting changes from going into effect³ and covered jurisdictions were deterred countless times from making discriminatory changes because of the preclearance process.

Given the unusually stringent nature of the Section 5 preclearance scheme, Congress limited the duration of the statute so that it would be subject to periodic review. The Supreme Court upheld the constitutionality of Section 5 in 1966, 1973, 1980, and 1999 as an appropriate use of Congress’s power to enact legislation to enforce the constitutional prohibitions against racial discrimination in voting.⁴ Indeed, in *South Carolina v. Katzenbach* and *City of Rome v. United States*, the Court showed substantial deference to Congress and applied the deferential “rational basis” test to Congress’s Fifteenth Amendment enforcement power.⁵

When Congress reauthorized the Act in 2006, the landscape had changed. The constitutionality of the Section 5 scheme would likely be decided by a conservative Supreme Court majority more hostile to congressional legislation to enforce the Civil War Amendments. Congress’s response was to amass a record of more than 15,000 pages, which showed that the covered jurisdictions that had historically engaged in the worst voting discrimination also had a recent record of racial voting discrimination.

1. 42 U.S.C. § 1973 (2012).

2. See 42 U.S.C. § 1973c(a) (2012).

3. See *Voting Rights Act: Section 5 of the Act—History, Purpose, and Scope: Hearing Before for Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Bradley Schlozman, Ass’t Att’y Gen. for Civil Rights).

4. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

5. See *City of Rome*, 446 U.S. at 177–78; *Katzenbach*, 383 U.S. at 324.

On June 25, 2013, in *Shelby County v. Holder*,⁶ the five-member Supreme Court conservative majority “immobilized”⁷ Section 5 by holding that the coverage formula was unconstitutional.⁸ The majority declined to use or even mention the arguably more rigorous “congruence and proportionality” test adopted in *City of Boerne v. Flores* to apply to Congress’s Fourteenth Amendment enforcement power, which had the twin benefits of enabling the majority to ignore that Congress was protecting two fundamental rights: the right to vote and to be free of racial discrimination, and to avoid examining the entire record compiled by Congress. Instead, the Court found that the formula was “irrational” because it was expressed in registration and turnout data and the use of a test or device in 1964, 1968, and 1972, and that this bore no relationship to current registration and turnout data.⁹

In this Article, we argue that the Court’s decision defied the deferential nature of the rational basis test and conflicted with how it was applied in *Katzenbach* and *City of Rome*. In the process, the Court misstated the theory of coverage Congress used to enact the 2006 reauthorization and refused to acknowledge that Congress’s purpose was to cover jurisdictions with historical and current records of discrimination. We demonstrate the Court’s doctrinal departure from Fifteenth Amendment jurisprudence by first reviewing the historical and legal developments from the initial adoption of the Act in 1965 and through subsequent reauthorizations in 1970, 1972, 1982, and 2006.

We further argue that a close reading of the opinions and transcripts of *Shelby County* and earlier cases reveals two aspects of the Section 5 scheme that motivated the *Shelby County* decision. First, the conservative justices viewed the treating of states differently as an affront to the “equal sovereignty” of the states. This led the Court to place the burden on Congress to justify reauthorizing Section 5 in 2006, even though the rational basis standard places the burden of proving irrationality on the party challenging legislation. The equal sovereignty argument, however, had been flatly rejected by the Court

6. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). Chief Justice Roberts wrote the majority opinion on behalf of himself and Justices Kennedy, Scalia, Thomas, and Alito. *Id.* at 2612. Justice Thomas wrote a separate concurring opinion. *Id.* at 2631. Justice Ginsburg wrote a dissenting opinion on behalf of herself and Justices Breyer, Sotomayor, and Kagan. *Id.* at 2632.

7. *Id.* at 2632 n.1 (Ginsburg, J., dissenting).

8. *Id.*

9. *See id.* at 2628 (majority opinion).

in *Katzenbach* as having any relevance and finds no support in constitutional jurisprudence prior to 2009, when Chief Justice Roberts initially introduced it as dicta in a previous challenge to the 2006 reauthorization.¹⁰ Second, despite Section 5's firm constitutional footing under the Fifteenth Amendment and the record supporting the need for its protections, Section 5 offended the conservative majority's view that the explicit use of race conflicts with the Equal Protection Clause of the Fourteenth Amendment. Section 5 protects minority voters but not white voters and required covered jurisdictions, when making decisions related to changes in voting rules and procedure, to ensure that the position of racial minorities would not ultimately worsen. In prior opinions, the conservative members, and Justice Kennedy in particular, had repeatedly mentioned the concern that Section 5 conflicted with the Fourteenth Amendment, and this concern was expressed again in *Shelby County*.¹¹

Part I of this Article summarizes the history of discrimination in voting and of Section 5 prior to the *Shelby County* decision; Part II discusses the implications of the Court declining to apply the congruence and proportionality test and the Court's departure from rational basis principles; and Part III analyzes the significance of the equal sovereignty and colorblindness principles to the *Shelby County* decision and argues that the Court's reliance on those principles was unfaithful to the Constitution and the Court's jurisprudence.

I. THE HISTORICAL AND LEGAL CONTEXT LEADING UP TO *SHELBY COUNTY*

A. The Disenfranchisement of African Americans Prior to the Enactment of the Voting Rights Act

Prior to the Civil War, African Americans in the South did not possess the right to vote. The Civil War Amendments gave African Americans, among others, a set of civil rights against racial discrimination by state and local governments.¹² One such endowment provided in both the Fourteenth and Fifteenth Amendments is the right to vote free of racial discrimination.¹³ The Fifteenth Amendment is direct in

10. *See* *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

11. *Shelby Cnty.*, 133 S. Ct. at 2627.

12. The Civil War Amendments, also commonly referred to as the Reconstruction Amendments, include the Thirteenth, Fourteenth, and Fifteenth Amendments. For the purposes of this Article, "Civil War Amendments" refers only to the Fourteenth and Fifteenth Amendments.

13. U.S. CONST. amend XV, § 1; *see* U.S. CONST. amend. XIV, § 1.

this regard: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁴ The last section of both amendments provides Congress with the power to enforce the amendments with appropriate legislation.¹⁵

In the first decade after the Civil War, Congress and the executive branch undertook aggressive efforts to use its enforcement powers to enable African Americans to exercise the right to vote,¹⁶ but after the election of 1876 when Reconstruction ended, the federal government largely abandoned these efforts.¹⁷ For nearly 100 years thereafter, many Southern states prevented most of their African American citizens from exercising their right to vote through laws and by force.¹⁸ The failure of legal redress to dismantle pervasive, and oftentimes violent, voting discrimination resulted in intractable problems for African American voters. Beginning in the 1940s, the heroic efforts of those in the Civil Rights Movement, combined with legislation and some legal victories began to break down this generational assault on the

14. U.S. CONST. amend. XV, § 1. The language of the Fourteenth Amendment is not as direct, but the Court has held that it prohibits racial discrimination in voting. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

15. Section 5 of the Fourteenth Amendment provides, “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5. Section 2 of the Fifteenth Amendment provides, “[t]he Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend XV, § 2.

16. The Military Reconstruction Acts of 1867, 14 Stat. 428–430, ch. 153, *amended by* 15 Stat. 2–5, ch. 6, *amended by* 15 Stat. 14–16, ch. 30, *amended by* 15 Stat. 41, ch. 25, required former Confederate states to provide for African American male suffrage in their state constitutions before the state could be admitted to the Union. The Enforcement Acts of 1870 and 1871 provided that any citizen shall be entitled to vote without regard to race, color, or previous condition of servitude, provided penalties against officials and citizens who obstructed the right to vote, and established election supervisors for municipalities with more 20,000 people. An Act to enforce the Right of Citizens of the United States to vote in the Several States of the union and for other Purposes, 16 Stat. 140, ch. 114 (1870); An Act to enforce the rights of citizens to vote in the several states of this union, 16 Stat. 433, ch. 99 (1871). The Supreme Court found portions of the Enforcement Acts unconstitutional in *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875) (holding Enforcement Act penalties for interference of the vote cannot be enforced against private citizens), and *United States v. Reese*, 92 U.S. 214, 221–22 (1875) (finding that the Enforcement Act provision enabling citizens who are refused voter registration to be registered if they present affidavit establishing registration exceeded Congress’s Fifteenth Amendment authority). Congress repealed much of the rest of the Enforcement Act in 1894. 28 Stat. 36, ch. 25.

17. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (discussing the abandonment of efforts to enforce the right to vote of African Americans beginning in the 1870s); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PART SOUTH, 1880-1910*, at xiii (1974) (discussing disenfranchisement of African Americans in the South in the late nineteenth and early twentieth centuries).

18. See KEYSSAR, *supra* note 17; KOUSSAR, *supra* note 17.

right to vote.¹⁹ But even as of the 1964 Presidential election, low African American political participation in several Southern states demonstrated that much more needed to be done.²⁰

The reports and images of the March 7, 1965, “Bloody Sunday” attack by Alabama State Troopers on John Lewis, Hosea Williams, and other civil rights activists as they crossed the Edmund Pettus Bridge in Selma, Alabama on their way to Montgomery to protest the denial of African American citizens’ rights to register and vote finally provided the long-needed impetus for sweeping federal legislation. Eight days later, President Lyndon Baines Johnson addressed Congress and informed it and the nation that he would be sending a bill to Congress which, among other things, “will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.”²¹ That bill would become the Voting Rights Act of 1965.²²

B. The Adoption of the Voting Rights Act of 1965

In seeking “to banish the blight of racial discrimination in voting”²³ in a comprehensive way, Congress adopted various provisions to confront different issues. Some provisions were national in scope and permanent, including Section 2, which allows the federal government and private plaintiffs to bring lawsuits regarding voting practices

19. See *South Carolina v. Katzenbach*, 383 U.S. 301, 312–33 (1966) (summarizing the Fifteenth Amendment cases that invalidated grandfather clauses, the white primary, racial gerrymandering, and the discriminatory application of voting tests). See generally STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969* (2001) (discussing the progress made from 1944–1964). The Court in *Katzenbach* also discussed federal voting rights litigation that had been brought pursuant to the Civil Rights Acts of 1957 and 1960, which were the first federal civil rights laws enacted since the Reconstruction era. See *Katzenbach*, 383 U.S. at 313–15.

20. For example, the registration rate of the African American voting age population in 1964 in Mississippi was estimated at 6.4% in Mississippi and 19.4% in Alabama. *Katzenbach*, 383 U.S. at 313.

21. Lyndon Baines Johnson, U.S. President, Special Message to the Congress: The American Promise (Mar. 15, 1965).

22. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), 42 U.S.C. § 1973 *et seq.*

23. *Katzenbach*, 383 U.S. at 308.

or procedures that racially discriminate,²⁴ and Section 10, which barred the use of poll taxes.²⁵

There were three sets of provisions limited in time and geography that covered certain jurisdictions (“covered jurisdictions”) for five years. One set enabled the Attorney General to certify examiners who could oversee the registration of voters for federal elections and the observation of elections.²⁶ The second barred voting tests and devices, such as a literacy test or a test for moral character, in covered jurisdictions.²⁷ In 1975, the ban on tests and devices became permanent and nationwide.²⁸

The third set, contained in Section 5 of the Act, required covered jurisdictions to get federal approval for any changes to a voting practice or procedure.²⁹ This came to be known as Section 5 preclearance. Under Section 5, the covered jurisdiction has to demonstrate to the Attorney General, or to a three judge court for the United States District Court for the District of Columbia, that a voting change will not have a discriminatory purpose or effect before the jurisdiction can implement the change.³⁰ The impetus for Section 5 was the numerous examples where the Department of Justice would prevail after spending years litigating against a discriminatory voting barrier that a Southern jurisdiction had erected to prevent African Americans from registering to vote or voting, and the jurisdiction would effectively undermine the victory by enacting a new provision that had a similar purpose and effect as the prior provision.³¹

These requirements applied to jurisdictions based on a formula contained at Section 4(b) of the Act. States and political subdivisions were covered under the formula if: (1) less than fifty percent of their voting age residents were registered as of November 1, 1964, or voted

24. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965). Originally Section 2 largely tracked the language of the Fifteenth Amendment. After the Supreme Court decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), see discussion *infra* n.54, Congress amended Section 2 in 1982 to explicitly provide for discriminatory results claims. Pub. L. 97-205, § 3, 96 Stat. 134 (1982).

25. 42 U.S.C. § 1973h (2012).

26. Voting Rights Act of 1965, Pub. L. 89-110, §§ 6–9, 79 Stat. 439–42 (1965).

27. § 4, 79 Stat. 438–39.

28. See generally Pub. L. 94-73, 89 Stat. 400 (1975) (making the ban against certain prerequisites to voting permanent).

29. § 5, 79 Stat. at 439.

30. *Id.*

31. *South Carolina v. Katzenbach*, 383 U.S. 301, 327–28 (1966); H.R. Rep. No. 89-439, at 9–11 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2439–42; S. Rep. No. 89-162, pt. 3, 6–9 (1965), reprinted in 1965 U.S.C.C.A.N. 2508, 2543–47.

in the November 1964 Presidential Election according to the Census Bureau and (2) the jurisdiction employed a test or device for voting.³² Congress had largely reverse engineered the formula: it decided which jurisdictions should be covered because of their record of discrimination and then designed a formula around it.³³ The formula captured many of the Southern states with horrific records of discrimination—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as many political subdivisions in North Carolina.³⁴ Also, by focusing on jurisdictions with low political participation, and that had employed tests or devices, the formula did a reasonably good job of reflecting where discrimination was most prevalent.

Congress tailored the coverage to reduce potential overinclusion by providing a means for jurisdictions to “bail out” of coverage. The original provision enabled a covered jurisdiction to bail out if it could demonstrate in a federal declaratory judgment action that any test or device had not “been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color.”³⁵ At the same time, Congress enabled federal courts to “bail-in” jurisdictions not covered by the 4(b) formula if found by a court to violate the Fifteenth Amendment and the court deems it appropriate.³⁶

C. Unsuccessful Challenges to the Section 5 Preclearance Scheme and Reauthorizations of Section 5 in 1970, 1975, and 1982

Not surprisingly, covered jurisdictions wasted little time in challenging the formula and the Section 5 preclearance scheme as exceeding Congress’s enforcement power under the Civil War Amendments. In *South Carolina v. Katzenbach*, the Supreme Court upheld the constitutionality of the geographically limited provisions of the Act, including the Section 4(b) formula and Section 5 preclearance.³⁷ With respect to South Carolina’s federalism challenge, the Court responded that the “[t]he gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.”³⁸ The Court found that

32. § 4(b), 79 Stat. at 438.

33. *Katzenbach*, 383 U.S. at 329.

34. See Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

35. § 4(a), 79 Stat. at 438.

36. § 3(c), 79 Stat. at 437–38.

37. *Katzenbach*, 383 U.S. at 325–26.

38. *Id.* at 325.

the two unusual components of the Section 5 preclearance scheme—the preclearance process and selective geographical coverage—were constitutionally acceptable. The Court held that Congress could remedy voting discrimination absent prior adjudication because of the history of systematic resistance to the Fifteenth Amendment and Congress’s determination that case-by-case litigation was inadequate.³⁹ The Court found that selective geographical coverage was “acceptable” because it had “learned that substantial voting discrimination presently occurs in certain sections of the country, and it knew no way of accurately forecasting whether the evil may spread elsewhere in the future.”⁴⁰ As discussed more fully below, the Court applied the deferential “rational basis” test and found that the coverage formula was rational in theory and fact.⁴¹

In the first five years after passage of the Act, there were some significant changes in voter participation in the covered jurisdictions as the bans on tests and devices, the ability of federal examiners to register voters, and continued voting litigation made a difference. A 1968 report of the United States Commission on Civil Rights found that black voter registration exceeded fifty percent in every Southern state, whereas at the time the Act passed, only Florida, Tennessee, and Texas had black registration rates over fifty percent.⁴² In response, Southern jurisdictions were introducing voting changes that were designed to dilute black voting power,⁴³ such “as conversion from elections by district to elections at-large, laws permitting the legislature to consolidate predominantly Negro counties with predominantly white counties, and reapportionment and redistricting statutes.”⁴⁴ The next year, in *Allen v. State Board of Elections*, the Supreme Court would make clear that the Act, in general, and Section 5, in particular, was

39. *Id.* at 327–28.

40. *Id.* at 328.

41. *See infra* at Section III.B.1.

42. U.S. COMM’N ON CIV. RTS., POLITICAL PARTICIPATION 12 (1968) [hereinafter POLITICAL PARTICIPATION]. For example, Mississippi’s black voter registration rate increased from 6.7 percent to 59.8 percent. *Id.* The Commission found that there was a positive correlation between the use of federal examiners and black voter registration rates. *Id.*

43. The Court began discussing the concept of vote dilution in the one person, one vote cases where it held that the constitutional right to vote under the Fourteenth Amendment can be violated where there are legislative districts of substantially unequal population and, as a result, the voting strength of individuals in the districts with larger populations is diluted compared to those with smaller populations: “[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.” *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

44. POLITICAL PARTICIPATION, *supra* note 42, at 21.

“intended to reach any state enactment which altered the election law of a covered State in even a minor way[.]”⁴⁵ including changes that had the potential of diluting minority voting strength.⁴⁶

Congress would reauthorize and amend the Section 4 coverage formula in 1970, for five years, and 1975, for seven years. The 1970 reauthorization added jurisdictions where less than fifty percent of voting age residents were registered as of November 1, 1968, or voted in the November 1968 Presidential Election according to the Census Bureau and had employed a voting test or device.⁴⁷ Subsequently, the 1975 reauthorization added jurisdictions where less than fifty percent of voting age residents were registered as of November 1, 1972, or voted in the November 1972 Presidential Election according to the Census Bureau and had employed a voting test or device. It also added as a test or device the use of English-only elections in jurisdictions where at least five percent of the voting age citizens are from a single language minority.⁴⁸ As a result of the changes in 1975, the states of Alaska, Arizona, and Texas became covered under Section 5.⁴⁹

The Supreme Court continued to dismiss challenges to the Section 5 preclearance regime. The Court declined to hear full argument to a challenge to the 1970 reauthorization.⁵⁰ Regarding the 1975 reauthorization, the Court upheld the constitutionality of Section 5 in *City of Rome v. United States*.⁵¹ The Court rejected Rome’s federal-

45. *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969).

46. *See id.* at 569. In *Allen*, private litigants brought four cases claiming that covered jurisdictions had implemented voting changes without preclearance. The Court held that private parties had standing to bring an action alleging that a covered jurisdiction had not complied with Section 5 and found that the jurisdictions had violated Section 5 by not submitting the changes. *See id.* at 554–57, 564–71. Prior to the *Allen* decision, most jurisdictions were not submitting voting changes to the Department of Justice. The Civil Rights Commission found that the Department of Justice was not enforcing Section 5. POLITICAL PARTICIPATION, *supra* note 45, at 176. From 1965 to 1969, the Department of Justice only received thirty Section 5 submissions. *Voting Rights Act: Section 5 of the Act—History, Purpose, and Scope: Hearing Before for Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2005) (statement of Bradley Scholzman, Ass’t Att’y Gen. for Civil Rights). Things changed after the *Allen* decision. In 1970, the Department received 331 submissions. In 1976, the Department received 2,685 submissions. *Id.*

47. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 4–5, 84 Stat. 315, 315 (1970).

48. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 202–04, 89 Stat. 400, 401–02 (1975). As defined by the Act, the “term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.” § 207, 89 Stat. at 402.

49. U.S. DEP’T OF JUSTICE, CIV. RTS. DIVISION, *Section 5 Covered Jurisdictions*, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited Jan. 21, 2014).

50. *Georgia v. United States*, 411 U.S. 526, 534–35 (1973).

51. *City of Rome v. United States*, 446 U.S. 156, 180 (1980).

ism challenge to Section 5 because “principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by “appropriate legislation,”’” reaffirming one of the central tenets of *Katzenbach*.⁵² As in *Katzenbach*, the Court applied the deferential “rational basis” test.⁵³ The Court also found that Congress could prohibit changes with a discriminatory impact as part of its enforcement powers even if such changes did not violate the Constitution.⁵⁴ In reviewing the record, the Court accepted Congress’s determination that though minority registration and turnout were increasing in the covered jurisdictions, Section 5 was still needed because of efforts to dilute minority voting strength as reflected in Department of Justice objections to proposed voting changes.⁵⁵

During the 1982 reauthorization, which extended the Section 4 and 5 preclearance scheme for twenty-five years without changing the coverage formula,⁵⁶ Congress changed the bailout standard so that any jurisdiction with a “clean” record for ten years could bail out of coverage by filing a declaratory judgment action.⁵⁷ The Court denied the State of California’s as-applied constitutional challenge in 1999.⁵⁸

D. The 2006 Reauthorization and the *Northwest Austin* Case

Going into the 2005–06 reauthorization process, there were signals that the increasingly conservative Supreme Court might more closely scrutinize the Section 5 scheme. As detailed below in Part III, the Supreme Court had raised constitutional concerns about Section 5 in several cases and had limited both the purpose prong in *Reno v. Bossier Parish*,⁵⁹ and the effect prong in *Georgia v. Ashcroft*.⁶⁰ In addition, the Court had adopted a new method of reviewing the consti-

52. *Id.* at 179.

53. *Id.* at 177.

54. *Id.* at 177–78. On the same day the Supreme Court decided *City of Rome*, it also decided *City of Mobile v. Bolden*, where a plurality of the Court held that a discriminatory purpose was required to find a violation of the Fourteenth or Fifteenth Amendments and that discriminatory vote dilution did not violate the Fifteenth Amendment. *See City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980). The Court previously held that discriminatory vote dilution violates the Fourteenth Amendment. *White v. Regester*, 412 U.S. 755, 765 (1973).

55. *See City of Rome*, 446 U.S. at 180–82.

56. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b)(8), 96 Stat. 131, 133 (1982).

57. *See* § 2(b)(4), 96 Stat. at 131–32.

58. *See Lopez v. Monterey County*, 525 U.S. 266, 268 (1999).

59. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 340–41 (2000) (“*Bossier Parish II*”).

60. *See Georgia v. Ashcroft*, 539 U.S. 461, 461–62 (2003).

tutionality of Fourteenth Amendment legislation that appeared to be more demanding than the rational basis test applied in *Katzenbach* and *City of Rome*. This new method of review, often referred to as the “congruence and proportionality test,” first appeared in *City of Boerne v. Flores*,⁶¹ and then in a series of cases that followed.⁶² The congruence and proportionately test is described in more detail in Part II. Some commentators expressed the view that these changes in Supreme Court jurisprudence would constrain Congress’s authority to reauthorize Section 5 before it expired in 2007.⁶³

Against this backdrop, Congress undertook an extensive process in 2005 and 2006 to reauthorize the Act. Congress held twenty-one hearings and heard from ninety-two witnesses and amassed a record of more than 15,000 pages.⁶⁴ With respect to the preclearance scheme, the predominant focus was on the extensive record of discrimination in the covered jurisdictions since the 1982 reauthorization instead of changing the coverage formula or performing an extensive comparative analysis between covered and non-covered jurisdictions.⁶⁵ The most significant comparative analysis, which looked at Section 2 cases with reported opinions since the 1982 reauthorization, showed that there had been more successful Section 2 cases in the covered jurisdictions than in the non-covered jurisdictions even though the covered jurisdictions represented a minority of the states

61. See *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997).

62. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 521 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81–82 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

63. See, e.g., Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177 (2005); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225 (2003); Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?*, 91 CALIF. L. REV. 769 (2003).

64. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 435 (D.D.C. 2011).

65. See generally Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007) (giving an account of the reauthorization process). As noted in that article, there were political and practical challenges to changing the coverage formula, and the current formula had the benefit of having been upheld by the Supreme Court in *City of Rome*. *Id.* at 208–11. The article also noted that comparing covered to non-covered jurisdictions was difficult because “[r]eliance on almost any of the voting data in the record to prove a greater need for section 5 in the currently covered jurisdictions, however, must account for the fact that the successful operation of section 5 will prevent the emergence of the type of evidence that would best justify its continued operation.” *Id.* at 207. A comparative analysis had not been something Congress had devoted much attention to in 1965 or in subsequent reauthorizations. The lack of a comparative analysis had not troubled the Supreme Court in *Katzenbach*, and the Court did not mention the issue in *Georgia v. United States*, *City of Rome*, or *Lopez*.

and were also subject to Section 5.⁶⁶ The law which reauthorized the Act⁶⁷ extended the preclearance scheme for twenty-five years and left the coverage formula intact.⁶⁸ In addition, Congress legislatively overruled the decisions in *Bossier Parish II* and *Georgia v. Ashcroft*⁶⁹ and eliminated the federal examiner provisions while reaffirming the ability for the federal government to send observers.⁷⁰

Days after President George W. Bush signed the 2006 reauthorization into law a municipal utility district in Texas filed an action before the three-judge federal court in the District of Columbia requesting bailout and, alternatively, challenging the constitutionality of Section 5.⁷¹ The district court denied bailout because the municipal utility district was not a political subdivision as defined under the Act,⁷² and found that Section 5 was constitutional as reauthorized in 2006.⁷³ On appeal, the Supreme Court, in *Northwest Austin Municipal Utility District No. 1 v. Holder*, effectively punted on the constitutional issue by adopting a strained definition of “political subdivision” and stating that the district was eligible to bail out.⁷⁴ The opinion acknowledged the dispute as to the governing legal standard (rational basis or congruence and proportionality) but did not resolve it.⁷⁵

At the same time, however, Chief Justice Roberts’s majority opinion, on behalf of eight justices, threw down some markers for a future challenge to the preclearance scheme. While acknowledging the accomplishments of the Act and Section 5 preclearance in particular, the opinion contains statement after statement suggesting skepti-

66. The analysis, which was performed by Professor Ellen Katz and students at the University of Michigan Law School, can be found at *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 964–1124 (2005).

67. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

68. § 4, 120 Stat. at 580.

69. §§ 2(b)(6), 5, 120 Stat. at 578, 580–81.

70. § 3, 120 Stat. at 578–80.

71. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 223 (D.D.C. 2008).

72. The Voting Rights Act defines political subdivision as follows: “The term ‘political subdivision’ shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.” 42 U.S.C. § 1973 (c)(2) (2012). The municipal utility district was located in Travis County, which conducted voter registration as well as the other electoral administrative functions for the district. *See Nw. Austin*, 573 F. Supp. 2d at 231–34.

73. *See Nw. Austin*, 573 F. Supp. 2d at 223–24.

74. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206–11 (2009).

75. *See id.* at 204.

cism that the 2006 reauthorization was constitutional.⁷⁶ Preluding principles that the Court would come back to in *Shelby County*, the opinion in dicta stated that “the Act imposes current burdens and must be justified by current needs,”⁷⁷ and that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem it targets.”⁷⁸

The decision in *Northwest Austin* left supporters of Section 5 relieved and opponents of Section 5 resolved to bring a new challenge.⁷⁹

II. GAME CHANGE: *SHELBY COUNTY V. HOLDER*

About a year after the *Northwest Austin* decision, Shelby County, Alabama brought a new constitutional challenge to Section 5. Shelby County’s legal team framed its claims more strategically than those in *Northwest Austin* so that the Court would more likely need to confront the facial constitutionality of Section 5.⁸⁰ In addition, Shelby County separately challenged the constitutionality of the coverage formula.⁸¹ This gave the Supreme Court a way to effectively undermine Section 5 without finding it unconstitutional.

As discussed more fully below, both the district court and court of appeals rejected Shelby County’s claims.⁸²

By a five to four vote, the Supreme Court reversed the lower courts and held that the Section 4(b) coverage formula was unconsti-

76. *See id.* at 202 (Section 5 “imposes substantial ‘federalism costs’”) (citing *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)); *id.* (“Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C.”) (emphasis in original); *id.* (“[C]onditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved. Things have changed in the South.”); *id.* at 203 (“[F]ederalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another”); *id.* (“The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions”).

77. *Id.*

78. *Id.*

79. *See, e.g.*, Michael King, *Point Austin: The Supremes Bail Out*, AUSTIN CHRON. (June 26, 2009), <http://www.austinchronicle.com/news/2009-06-26/799163/>.

80. First, it produced a plaintiff that was “bailout-proof” because there had been a recent Section 5 objection to a voting change within Shelby County. *See Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 443 (D.D.C. 2011). Second, it made only a facial challenge to minimize the likelihood that the Court would find that Section 5 was unconstitutional as applied to Shelby County and then not reach a facial claim. *See id.* at 443–44.

81. *See id.*

82. *See Shelby Cnty. v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012); *Shelby Cnty.*, F. Supp. 2d at 427–28.

tutional.⁸³ Chief Justice Roberts’s majority opinion explicitly did not address the constitutionality of Section 5 directly.⁸⁴ As Justice Ginsburg’s dissent noted, however, the decision had the effect of immobilizing Section 5.⁸⁵

By referencing the determination in *Katzenbach* that the original coverage formula was rational in practice and theory⁸⁶ and stating three times that the reauthorization of the coverage formula in 2006 was irrational,⁸⁷ the majority in *Shelby County* appeared to be applying a rational basis test. However, the purported rational basis analysis the Court engaged in bore no resemblance to standard rational basis analysis and was in conflict with how the Court applied rational basis to Section 5 in *Katzenbach* and *City of Rome*.

Before discussing the rational basis test, how it was applied in *Katzenbach* and *City of Rome*, and how the *Shelby County* Supreme Court majority departed from precedent, it bears discussion that the majority’s decision not to analyze the 2006 reauthorization under the congruence and proportionality test enabled the Court to sidestep aspects of the preclearance scheme that would favor a finding of constitutionality.

A. The Congruence and Proportionality Test Would Have Required the Court in *Shelby County* to Consider Factors It Largely Ignored

The 1997 case of *City of Boerne v. Flores* further developed—or some might say muddled—the standard of review for congressional enforcement power under the Civil War Amendments. *Boerne* involved the question of whether Congress had exceeded its enforce-

83. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2615 (2013).

84. See *id.* at 2631–32 (Thomas, J., concurring). The Court previewed this in granting *Shelby County*’s petition writ of certiorari. The Supreme Court stated that it would limit its inquiry to whether the coverage exceeded Congress’s enforcement powers under the Fourteenth and Fifteenth Amendments. *Shelby County v. Holder*, 133 S. Ct. 594 (2012).

85. *Shelby Cnty.*, 133 S. Ct. at 2632 n.1 (Ginsburg, J., dissenting).

86. See *id.* at 2629 (majority opinion).

87. “Viewing the preclearance requirements as targeting such efforts simply highlights the *irrationality* of continued reliance on the § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution.” *Id.* (emphasis added).

If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been *irrational* for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story. And it would have been *irrational* to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

Id. at 2630–31 (emphasis added).

ment power under §5 of the Fourteenth Amendment when it enacted the Religious Freedom Restoration Act.⁸⁸ In answering the question, the Court required that Fourteenth Amendment enforcement legislation exhibit a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁸⁹ The Court adopted the “congruence and proportionality” test for the purpose of designating remedial legislation legitimately enacted pursuant to Congress’s Fourteenth Amendment enforcement power from legislation that expands the substantive scope of rights under the Amendment, which the Court in *Boerne* held exceeds the scope of Congress’s enforcement power.⁹⁰

The jurisprudential ambiguity, which many scholars and voting rights practitioners expected the Court to resolve in *Shelby County*, was whether the *Katzenbach-Rome* standard, which dealt with the specific question of Section 5 of the Act’s constitutionality and Congress’s Fifteenth Amendment enforcement powers, or whether *Boerne* and its progeny, which dealt with Congress’s Fourteenth Amendment enforcement power, was controlling precedent for determining the constitutionality of the Section 4(b) coverage formula and Section 5 preclearance remedy.⁹¹ Though the Court has never explicitly held that the “congruence and proportionality” test extends to Fifteenth Amendment enforcement legislation or the Act, the enforcement provisions of the Fourteenth and Fifteenth Amendment have frequently been read as coextensive,⁹² and *Boerne* embraced *South Carolina v.*

88. *City of Boerne v. Flores*, 521 U.S. 507, 511–12 (1997).

89. *See id.* at 520.

90. *Id.*; *see also Tennessee v. Lane*, 541 U.S. 509, 520 (2004). *Boerne* itself may provide the best example of how Congressional legislation could change substantive constitutional rights. In *Emp’t Div. v. Smith*, 494 U.S. 872, 874–76 (1990), the Court rejected a Free Exercise Clause claim brought by individuals who were fired and denied state unemployment benefits because they had used peyote as members of a Native American church. Congress enacted legislation where it specifically stated that it was changing the test for Free Exercise Clause cases like those in *Smith* and cited the Fourteenth Amendment as its rationale against applying the legislation against a state. *Boerne*, 521 U.S. at 517. The Court found that Congress had gone beyond its enforcement power and was substantively defining the Constitution, which was the job of the Court. *Id.* at 536; *see also Lane*, 541 U.S. at 520; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

91. *See Shelby Cnty. v. Holder*, 811 F.Supp. 2d 424, 447–48 (D.D.C. 2011).

92. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 742, n.** (2003) (Scalia, J., dissenting) (“Section 2 of the Fifteenth Amendment is practically identical to §5 of the Fourteenth Amendment.”); *Garrett*, 531 U.S. at 373 n.8 (“Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment.”); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) (“[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendment as coextensive.”); *City of Boerne*, 521 U.S. at 518 (comparing Congress’s “parallel power to enforce the provisions of the Fifteenth Amendment”); *City of Rome*, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting)

Katzenbach and *Rome* by underscoring Section 5 of the Act as a model of appropriate use of congressional enforcement powers.⁹³

Both of the lower courts in *Shelby County* applied the *Boerne* standard of review, though varied in reasoning as to why it applied. After the district court found that *Boerne* “merely explicated and refined the one standard of review that has always been employed to assess legislation enacted to both the Fourteenth and Fifteenth Amendments”⁹⁴ it concluded that “*Boerne*’s congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*, and hence provides the appropriate standard of review to assess *Shelby County*’s facial constitutional challenge to Section 5 and Section 4(b).”⁹⁵ The Court of Appeals for the District of Columbia Circuit looked to the two principles raised in *Northwest Austin*—that current burdens are justified by current needs and disparate geographic coverage is sufficiently related to the problem—“as sending a powerful signal that congruence and proportionality” was the correct test.⁹⁶ It also found *Katzenbach* and *City of Rome* highly relevant to its analysis in that those cases “tell [a] great deal about [t]he evil that § 5 is meant to address, as well as the types of evidence that are probative of ‘current needs.’”⁹⁷

Given these series of decisions interpreting Congress’s enforcement power under the Civil War Amendments, it was bizarre that the *Shelby* majority did not seek to explain *Boerne*’s position relative to the “any rational means” standard, or its application to the Fifteenth Amendment. In fact, the opinion did not cite *Boerne* even once, though it seemed that the two guiding principles first raised in *Northwest Austin* and subsequently adopted in *Shelby*—that current burdens are justified by current needs and disparate geographic coverage is sufficiently related to the problem—fit the “congruence and proportionality” model.

(“[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive.”); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (“Section 2 of the Fifteenth Amendment grants Congress a similar power to enforce by appropriate legislation [Section 5 of the Fourteenth Amendment].”).

93. See *City of Boerne*, 521 U.S. at 518, 525–27. *Boerne*’s progeny similarly invoked the reasoning of *South Carolina v. Katzenbach* and *Rome* in evaluating Congress’s Fourteenth Amendment enforcement power. See *Lane*, 541 U.S. at 547–48; *Hibbs*, 538 U.S. at 757–58 (Scalia, J., dissenting); *Garrett*, 531 U.S. at 373; Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 638–39, 662 (1999) (Stevens, J., dissenting).

94. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 449 (D.D.C. 2011).

95. *Id.*

96. *Shelby Cnty. v. Holder*, 679 F.3d 848, 859 (D.C. Cir. 2012).

97. *Id.* (second alteration in original) (citations omitted).

The “congruence and proportionality” test set forth in *Boerne* is considered to be “arguably more rigorous” than rational basis review⁹⁸; this increased rigor of the *Boerne* test extends not only to the test appearing less deferential to Congress than rational basis, but to requiring the Court to analyze the enactment at issue more methodically. The Court in *Boerne* and subsequent cases developed a three-part test to assess “congruence and proportionality.” “The first step . . . is to identify with some precision the scope of the constitutional right at issue.”⁹⁹ Second, the Court “examine[s] whether Congress identified a history and pattern of unconstitutional” conduct.¹⁰⁰ Third, the Court examines whether the legislation at issue is “an appropriate response to this history and pattern” of conduct.¹⁰¹

In applying the *Boerne* framework to the Section 5 preclearance scheme, the first step—the scope of the constitutional right at issue—would have weighed heavily in favor of constitutionality because Section 5 protects two fundamental rights: the right to vote and the right to be free from racial discrimination by the government.¹⁰² In the *Boerne* cases, the scope of the right at issue has often largely suggested the outcome; when Congress has legislated to protect a right not subject to heightened protection, the Court has struck it down, whereas when Congress was protecting a right subject to greater protection, the Court has been more deferential.¹⁰³ If the Court in *Shelby County* had analyzed the preclearance scheme under the *Boerne* test, it would have had to give substantial weight to the fact that Section 5’s purpose is to protect two fundamental rights. Instead, the Court

98. *Id.* (“In any event, if section 5 survives the arguably more rigorous ‘congruent and proportional’ standard, it would also survive *Katzenbach*’s ‘rationality’ review.”).

99. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001).

100. *Id.* at 368.

101. *Tennessee v. Lane*, 541 U.S. 509, 530 (2004).

102. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 10 (1967) (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

103. *Compare Garrett*, 531 U.S. at 374 (holding that Congress violated the Fourteenth Amendment when enacting a provision that allowed employees to sue states for damages under the Americans with Disabilities Act), *and Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91–92 (2000) (holding that employees could not sue state employers for damages under the Age Discrimination in Employment Act), *with Lane*, 541 U.S. at 533–34 (upholding provisions of the Americans with Disabilities Act as applied to the “fundamental [due process] right of access to the courts.”), *and Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737, 740 (2003) (upholding provisions of the Family and Medical Leave Act forbidding states from having different family leave provisions based on gender).

cluded any discussion of the importance of the Fifteenth Amendment's proscriptions against racial discrimination in voting.

The second prong of *Boerne* requires an analysis of whether there was a pattern of unconstitutional conduct. Moreover, the Court has stated that “it [is] easier for Congress to show a pattern of state constitutional violations” when the right sought to be protected merits heightened protection.¹⁰⁴ The Supreme Court in *Shelby County* acknowledged that “voting discrimination still exists; no one doubts that.”¹⁰⁵ But then the Court never analyzed how much voting discrimination still exists in the covered jurisdictions. If it had employed the *Boerne* standard, it would have needed to do so. Both lower courts in *Shelby County* applied the fact-intensive *Boerne* test and then extensively reviewed the record of discrimination Congress amassed.¹⁰⁶ Both courts found the record was sufficient to find a pattern of unconstitutional conduct in the covered states based on evidence of contemporary discrimination in voting.¹⁰⁷ Indeed, the district courts in *Northwest Austin* and *Shelby County* examined the congressional record of the 2006 reauthorization in detail and found that the pattern of unconstitutional conduct was “more powerful”¹⁰⁸ and “far exceed[ed]”¹⁰⁹ that in *Hibbs* and *Lane*.

If the Court had employed the *Boerne* analysis in *Shelby County*, the closest issue would have been the third prong because it would have weighed the needs and the costs of the legislation and analyzed whether the Section 5 scheme was appropriately tailored. But the Court would have had to answer these questions in a functional way by reviewing the entire legislative record by weighing the actual need

104. *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 736).

105. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2619 (2013).

106. See *supra* text accompanying notes 94–97.

107. See *Shelby Cnty. v. Holder*, 679 F.3d 848, 865; *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 498. The evidence relied upon by the district court included: “significant” disparities between non-Hispanic white and minority registration rates in several covered states; the underrepresentation of African Americans in state legislatures of covered states based on percentage of population; the more than 700 Section 5 objections lodged by the Attorney General between 1982 and 2006, including more than 400 based on discriminatory purpose; the couple hundred voting changes between 1982 and 2006 that were withdrawn after the Department of Justice issued a written request for more information; the twenty-five unsuccessful judicial preclearance suits between 1982 and 2006; the 105 successful Section 5 enforcement suits between 1982 and 2006, which led jurisdictions to submit changes or abandon them; the tens of thousands of federal observers that were sent to monitor elections between 1982 and 2006; and fourteen reported Section 2 cases between 1982 and 2006 where courts made findings of intentional discrimination. See *Shelby Cnty.*, 811 F. Supp. 2d at 492–94 (citations omitted).

108. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 271 (D.D.C. 2008).

109. *Shelby Cnty.*, 811 F. Supp. 2d at 494.

for the Section 5 preclearance scheme against the federalism cost.¹¹⁰ Instead, as discussed below,¹¹¹ the Court placed form over function and ignored the bulk of the record because it involved second-generation voting discrimination issues. Moreover, in a functional analysis, the Court would have had to give greater consideration to the tailoring effect of bailout, which the Court in *Boerne* referenced as a positive component of the Section 5 preclearance scheme.¹¹²

It would not have been impossible for the Supreme Court majority in *Shelby County* to find that the 2006 reauthorization of the Section 5 scheme did not satisfy the congruence and proportionality test given that *one* of the *six* lower court judges in *Northwest Austin* and *Shelby County*, Judge Williams, reached that conclusion.¹¹³ But the Court would have had to account for the fundamental rights that the Section 5 preclearance scheme protects, carefully analyze the entire 2006 record to determine whether there was a substantial pattern of unconstitutional conduct, weigh the need for the Section 5 scheme against the federal cost, and account for the tailoring mechanisms of bail-in and bailout. By ignoring *Boerne*, the majority got around this.

B. The *Shelby County* Supreme Court Majority Finds the Rational Irrational

1. The Rational Basis Test and Its Application to Section 5 Prior to *Shelby County*

Rational basis review of a statute by a Court is usually highly deferential to the governing body that enacted the statute. The Court has stated that the legislative act bears a “strong presumption of validity” and those challenging the statute “have the burden ‘to negative every conceivable basis which might support it.’”¹¹⁴ Indeed, the justification for the statute need not be one that actually motivated the

110. For example, the circuit court in *Shelby County* described the two key issues as whether “the legislative record contain[s] sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy[.]” and “whether the record supports the requisite ‘showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.’” 679 F.3d at 865, 873 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

111. See discussion *infra* Section III.B.3.

112. See *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997).

113. See *Shelby Cnty. v. Holder*, 679 F.3d 848, 884–905 (D.C. Cir. 2012) (Williams, J., dissenting).

114. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

legislature, and the “legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”¹¹⁵ A study of Supreme Court decisions from 1971 to 1996 found that challenges to government acts were successful less than ten percent of the time when the Court applied the rational basis test.¹¹⁶ Most of the time when the Supreme Court has stricken down a statute under rational basis scrutiny, it claims to be applying rational basis but in actuality is more closely scrutinizing the purposes of the law and/or the legislative record supporting it.¹¹⁷

Regarding Section 5, the Supreme Court applied the traditional rational basis review in *South Carolina v. Katzenbach* and *City of Rome*. In *Katzenbach*, the Court explicitly stated that it was applying rational basis: “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”¹¹⁸ The Court explained that such deference was appropriate because Congress’s enforcement power under the Civil War Amendments superseded state authority.¹¹⁹ In finding that the formula was “rational in both practice and

115. *Id.* at 315 (citation omitted).

116. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 370 (1999).

117. *Id.* at 360. The two sets of instances in which the Court has applied a more rigorous rational basis test is when the statute discriminates against a class that, though not subject to heightened constitutional protection, has some similarities with classes subject to heightened protection, or the government benefit at issue that has been denied is significant. Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same Sex Relationships*, 86 WASH. L. REV. 281, 305 (2011). Even in these instances, the Court has sometimes applied the typical rational-basis analysis and sometimes a heightened rational basis analysis. *Id.* at 305–06.

118. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). In setting forth the standard of review, the Court in *Katzenbach* stated that “[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.” *Id.* at 326. The Court stated the “classic formulation” of the test that was originally derived from *McCulloch v. Maryland*, which involved a challenge to the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)).

119. The Court in *Katzenbach* said the following about how Congress’s Fifteenth Amendment enforcement power to prevent discrimination in voting is greater than state power to regulate elections:

This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice. These decisions have been rendered with full respect for the general rule, reiterated last Term in *Carlington v. Rash*, 380 U.S. 89, 91, that States “have broad powers to determine the conditions under which the right of suffrage may be exercised.” The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power. “When a State exercises power wholly within the domain of state interest, it is insulated from federal

theory,”¹²⁰ the Court showed substantial deference to Congress. The Court accepted Congress’s approach of reverse engineering, starting with “reliable evidence of actual voting discrimination” in certain states and then constructing a formula that included those states.¹²¹ The Court stated that Congress was “entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered” by the formula.¹²² The Court found that this approach was rational because tests and devices had been used as a means of preventing African Americans from registering and voting and because a low rate of registration and voting reflected the effect of the tests and devices.¹²³ The Court also was relatively dismissive of South Carolina’s claims that the formula was unconstitutionally overbroad or underinclusive. Regarding overbreadth, the Court cited to the bailout provision,¹²⁴ and with respect to underbreadth, the Court said that it was “irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination”¹²⁵ because “[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.”¹²⁶

The Court’s deference to Congress’s enforcement authority in *City of Rome* was similar to that in *Katzenbach*. The Court reiterated the statement in *Katzenbach* that “‘the Fifteenth Amendment supersedes contrary exertions of state power,’”¹²⁷ because the “[Civil War] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”¹²⁸ The Court also repeatedly indicated that rational basis was the appropriate standard of review.¹²⁹ In reviewing the factual support for the 1975 reauthorization, the Court referenced the Committee reports from the House and Senate record repeatedly and deferred to the conclusions drawn by

judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”

383 U.S. at 325 (citations omitted).

120. *Id.* at 330.

121. *Id.* at 329–31.

122. *Id.* at 329.

123. *Id.* at 330.

124. *Id.* at 331.

125. *Id.* at 330–31.

126. *Id.* at 331.

127. *City of Rome v. United States*, 446 U.S. 156, 180 (1980) (quoting *Katzenbach*, 383 U.S. at 325).

128. *Id.* at 179.

129. *See id.* at 177–79.

Congress in those reports. The Court mentioned that Congress “acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965” though some registration disparities between white and African American citizens remained.¹³⁰ The Court also accepted Congress’s determination in the Committee reports that African American representatives in the covered states were not elected in proportion to the African American share of the population.¹³¹ The final piece of evidence the Court credited was Congress’s determination, as reflected in Section 5 objections, that although minority registration was increasing, covered jurisdictions were engaged in practices that diluted the voting strength of minority voters, and Section 5 remained necessary to protect the gains that had been accomplished.¹³²

2. Congress Elected to Cover Jurisdictions with Both Historical and Current Records of Discrimination

In 2006, Congress elected to maintain the same coverage formula because it reflected those jurisdictions that it believed were most likely to discriminate in the future: those with historical and contemporary records of discrimination. In the 2006 reauthorization statute, Congress laid out a series of findings in support of its decision to reauthorize Section 5. Congress first found that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, state legislatures, and local elected offices. This progress is the

130. *Id.* at 180.

131. *See id.* at 180–81.

132. After examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General, Congress not only determined that § 5 should be extended for another seven years, it gave that provision this ringing endorsement:

‘The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength.

The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success.’

Id. at 181 (first alteration in original) (quoting H.R. REP. NO. 94-196, 10–11 (1975)).

direct result of the Voting Rights Act of 1965.”¹³³ Congress found, however, that in the covered jurisdictions “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”¹³⁴ After Congress noted the continued evidence of racially polarized voting in the covered jurisdictions and how it “demonstrate[d] that racial and language minorities remain politically vulnerable” in those jurisdictions,¹³⁵ Congress then listed the items of evidence of continued discrimination, beginning with the hundreds of Section 5 objections.¹³⁶ Congress concluded that:

continuance of this discrimination without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.¹³⁷

House Judiciary Committee Chair James Sensenbrenner explained Congress’s approach to cover those jurisdictions with both historical and contemporary discrimination when he spoke during floor debate in opposition to a proposed amendment that would have based coverage on registration and turnout figures from the 1996, 2000, and 2004 elections. Regarding the importance of historical discrimination, Rep. Sensenbrenner stated:

133. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006).

134. § 2(b)(2), 120 Stat. at 577.

135. § 2(b)(3), 120 Stat. at 577.

136. (4) Evidence of continued discrimination includes—

(A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;

(B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;

(C) the continued filing of section 2 cases that originated in covered jurisdictions; and (D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.

(5) The evidence clearly shows the continued need for Federal oversight in jurisdictions covered by the Voting Rights Act of 1965 since 1982, as demonstrated in the counties certified by the Attorney General for Federal examiner and observer coverage and the tens of thousands of Federal observers that have been dispatched to observe elections in covered jurisdictions.

§§2(b)(4)–(5), 120 Stat. at 577–78.

137. § 2(b)(9), 120 Stat. 578.

By radically altering the coverage formula of the Voting Rights Act in a way that severs its connection to jurisdictions with proven discriminatory histories, this amendment will render H.R. 9 unconstitutional and leave minority voters without the essential protections of the preclearance and the Federal observer requirements central to the VRA.¹³⁸

He also made clear that “the reauthorization of this formula in H.R. 9 is based on recent and proven instances of discrimination in voting rights compiled in the Judiciary Committee’s 12,000-page record.”¹³⁹

In finding Section 5 preclearance and 4(b) formula constitutional as reauthorized in 2006, the district court found “the legislative record amassed by Congress in support of the 2006 reauthorization of Section 5 is at least as strong as that held sufficient to uphold the 1975 reauthorization of Section 5 in *City of Rome*.”¹⁴⁰ The court then found that the coverage formula was constitutional because “Congress ensured that the Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of discrimination,”¹⁴¹ “Congress found substantial evidence of contemporary voting discrimination by the very same jurisdictions that had histories of unconstitutional conduct,”¹⁴² and bail-in and bailout minimized underinclusiveness and overinclusiveness.¹⁴³ The district court also found that the record contained “substantial evidence” showing that discrimination was worse in the covered jurisdictions than in the non-covered jurisdictions “to the extent” such a showing was required.¹⁴⁴

Relying largely on the same evidence as the district court,¹⁴⁵ the majority in the court of appeals affirmed the district court. The court defined the essential question regarding whether Section 5 was still needed as follows: “Does the legislative record contain sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy?”¹⁴⁶

138. 152 CONG. REC. H14,274 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (internal quotation marks omitted).

139. *Id.* at H14,275.

140. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 492 (D.D.C. 2011).

141. *Id.* at 506 (emphasis in original).

142. *Id.*

143. *See id.*

144. *Id.*

145. *See Shelby Cnty. v. Holder*, 679 F.3d 848, 865–73 (D.C. Cir. 2012).

146. *Id.* at 865.

The court concluded that the record supported such a finding.¹⁴⁷ Regarding the appropriateness of the coverage formula, the court relied on the fact there were more successful Section 2 cases—in reported decisions, unreported decisions, and settlements—in covered jurisdictions than in non-covered jurisdictions despite: (1) the covered jurisdictions having less population than the noncovered jurisdictions and (2) the existence of Section 5 in the covered jurisdictions blocks discriminatory voting changes before they are put into effect and could be challenged under Section 2.¹⁴⁸ The court also relied on the bail-in and bailout provisions as providing for additional tailoring.¹⁴⁹ In dissent, Judge Williams found the coverage formula “irrational” for two reasons: first, because the formula was based on data that was decades old,¹⁵⁰ and, second, he found that the current data did not support a finding that “the disparity in current evidence of discrimination between the covered and uncovered jurisdictions [was] proportionate to the severe differential in treatment imposed by § 5.”¹⁵¹ Of the six lower court judges who reviewed the record in *Northwest Austin* and *Shelby County*, Judge Williams was the only one who found the record lacking.¹⁵²

3. The Supreme Court in *Shelby* Departs from Precedent in Conducting Its Rational Basis Review

The reasoning and analysis in the Supreme Court majority opinion in *Shelby County* simply cannot be reconciled with standard “rational basis” analysis or how “rational basis” was applied in *Katzenbach* and *City of Rome*. Far from requiring Shelby County to satisfy the typical burden of demonstrating that is no conceivable basis to justify the statute, the Court placed the burden on the federal government to show that the current needs justified the current burden

147. *See id.*

148. *See id.* at 880–81.

149. *See id.* at 881–82.

150. *Id.* at 884 (Williams, J., dissenting).

151. *Id.* at 889.

152. The three judge district court that decided *Northwest Austin* consisted of Judges Tatel, Friedman, and Sullivan. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 223 (D.D.C. 2008). The district court judge in *Shelby County* was Judge Bates, *Shelby, Cnty. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011), and the three-judge circuit court panel consisted of Judges Tatel, Griffith, and Williams. *Shelby Cnty., v. Holder*, 679 F.3d 848, 852 (D.C. Cir. 2012).

placed on the covered jurisdictions.¹⁵³ This is in direct contrast to the deferential approach adopted in both *Katzenbach* and *City of Rome*.

Moreover, in adopting this standard for judging rationality, the Court seems to narrow the extent and kinds of historical evidence Congress may rationally rely upon as probative in adopting Fifteenth Amendment remedial legislation. If this is indeed what the Court is doing, this is diametrically opposed to basic canons underlying rational basis review that “legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data”¹⁵⁴ and that it “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.”¹⁵⁵ The Court disregarded the bulk of the evidence Congress had compiled of current need because the evidence was second generation vote dilution evidence, while the coverage formula was based on first generation metrics of registration and turnout rates and the use of a test or device.¹⁵⁶ This directly conflicts with *City of Rome* where the Court explicitly found that the 1975 reauthorization, which was based on the very same coverage formula, was appropriate based in significant part on vote dilution evidence,¹⁵⁷ and the Court’s 1969 precedent in *Allen* that changes where vote dilution was the possible type of discrimination were subject to Section 5.¹⁵⁸ It also conflicts with the statement of purpose in the 2006 reauthorization, which stated that the Act was designed to ensure “that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and

153. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013). The Court’s use of the “current needs justify the current burden” standard suggests a jurisprudential departure toward an analysis that marginalizes history. See *id.* *Katzenbach* stated that “[t]he constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which [the legislation] reflects.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). *City of Rome* similarly cited to an extended history of racial discrimination in voting. See 446 U.S. 156, 181–82 (1980). Moreover, in the context of determining whether a decision maker has acted with a discriminatory purpose, the Court’s longstanding principle is that the “historical background . . . particularly if it reveals a series of official actions taken for invidious purposes” is relevant in the analysis of intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

154. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

155. *Id.* at 313.

156. In response to the dissent pointing out that the majority had largely disregarded the record, the majority stated that “[c]ontrary to the dissent’s contention, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today.” *Shelby Cnty.*, 133 S. Ct. at 2629 (citation omitted).

157. See *City of Rome*, 446 U.S. at 187.

158. See *Allen v. State Bd. of Elections*, 393 U.S. 554, 569 (1969).

protected as guaranteed by the Constitution.”¹⁵⁹ Even to the extent the Court analyzed the record regarding minority electoral participation and officeholding, it cherry-picked the evidence least favorable to the federal government. Indeed, the conclusion it reached was in contrast to the district court, which found that these factors weighed in favor of reauthorization.¹⁶⁰ As a result, the Court never analyzed whether the formula was rational in practice.

Though the Court appears to analyze whether the coverage formula was rational in theory, and finds that it is not, it misstates the theory. Drawing from the Government’s brief, the Court suggests that the “approach” used for coverage was reverse engineering: Congress identified jurisdictions that engaged in discrimination, discovered that those jurisdictions had low voter participation and employed tests or devices, and then constructed a coverage formula based on those factors.¹⁶¹ Then the Court goes on to find that while this approach might have been rational in 1965, it is not rational today because conditions have changed, most notably in regard to voter participation, and that Congress did not rely on current data to justify the continued use of the formula.¹⁶² The problem with the Court’s analysis is that reverse engineering was the theory for coverage Congress used in 1965, not 2006. As discussed above,¹⁶³ Congress’s coverage theory in 2006 was that those jurisdictions with both a historical and recent history of discrimination are those that should be covered.¹⁶⁴ Indeed, this was the approach the Government actually ar-

159. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(a), 120 Stat. 577 (2006).

160. The district courts in *Northwest Austin* and *Shelby County* found the voter participation disparity between whites and minorities to be “comparable” to what the Supreme Court deemed “significant” in *City of Rome*. See *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 468 (2011); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 248 (2008).

161. *Shelby Cnty.*, 133 S. Ct. at 2628.

162. See *id.* at 2628–29.

163. See discussion *supra* Section III.B.2.

164. The circuit court took a similar approach regarding the theory of coverage:

Congress chose the section 4(b) criteria [in 1965] not because tests, devices, and low participation rates were all it sought to target, but because they served as accurate proxies for pernicious racial discrimination in voting. The question, then, is not whether the formula relies on old data or techniques, but instead whether it, together with bail-in and bailout, continues to identify the jurisdictions with the worst problems. If it does, then even though the formula rests on decades-old factors, the statute is rational in theory because its “disparate geographic coverage” remains “sufficiently related to the problem that it targets.”

Shelby Cnty. v. Holder, 679 F.3d 848, 879 (2012) (quoting *Nw. Austin Mun. Util. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

gued in its brief.¹⁶⁵ As a result, the Court’s apparent finding that the coverage formula was irrational in theory was based on a theory different than what Congress used.¹⁶⁶

Finally, by concluding that current burdens are not met by current needs,¹⁶⁷ the Court substitutes its own judgment for that of Congress without properly valuing the current needs—the Court did not credit Section 5 for protecting two fundamental rights and did not analyze the whole record to calculate the positive impact of Section 5 in the covered jurisdictions. For this reason, the *Shelby County* standard of rational review is functionally different even from “heightened” rational basis. “Heightened” rational basis involves more rigorous scrutiny of the purpose and effect of a law than traditional rational basis, but does not alter the standard itself, which is what the Court did in *Shelby County* by avoiding meaningful review of the record, incorporating the current burdens/current needs requirement and asserting “equality of the states” as “highly pertinent” to its analysis. The latter is discussed below.

III. STATE SOVEREIGNTY AND RACE: DRIVING THE *SHELBY COUNTY* MAJORITY

As the decision in *Shelby County* cannot be explained as a faithful application of rational basis review or even the *Boerne* congruence and proportionality standard, it is evident that something else was driving the Court’s decision. Perhaps unsurprisingly, it appears that two principles dear to the conservative majority are at play. Over the

165. See Brief of the Federal Respondent at 49–50, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

166. As a related matter, the Court states that “[i]f Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula” because it would be “irrational” to base a formula on forty-year-old data when conditions had changed since. *Shelby Cnty.*, 133 S. Ct. at 2630–31. But the Court fails to offer a reason why Congress needed to “start from scratch” in 2006 when the record revealed that the current formula was continuing to capture jurisdictions engaged in substantial discrimination even though the nature of the discrimination—from vote denial to vote dilution—had changed to a significant degree.

167. In relevant part:

There is no denying . . . that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.

[T]hings have changed dramatically in the South [since the initial adoption of the Voting Rights Act of 1965, and that] . . .

[N]o one can fairly say that [the record] shows anything approaching the “pervasive,” “flagrant” “widespread,” and “rampant” discrimination that faced Congress in 1965, and that clearly distinguished the covered jurisdictions from the rest of the Nation at that time.

See *Shelby Cnty.*, 133 S. Ct. at 2618, 2625, 2629 (third alteration in original).

past several decades, coinciding with the conservative ascendancy on the Court, increased skepticism of race-based legislation that protects the rights of minority citizens has taken hold, and the Court has undergone a so-called “federalism revolution.”¹⁶⁸ As discussed in this Part, the majority’s opinion in *Shelby County* is of a piece with those jurisprudential trends and stretches those principles beyond their breaking points.

A. State Sovereignty and Equal Sovereignty of the States

The *Shelby County* majority repeatedly emphasizes the burdens that Section 5 of the Act places on covered jurisdictions, purportedly raising issues of state sovereignty.¹⁶⁹ This emphasis immediately and significantly shifts the tone from what otherwise might be deference to Congress’s will to a more skeptical one. The emphasis, however, is in error.

The majority in *Shelby County* advances a federalism argument focusing on the Tenth Amendment.¹⁷⁰ The Court notes that “states retain broad autonomy in structuring their governments and pursuing legislative objectives” and that such federalism protections are critical to “secure[] to citizens the liberties that derive from the diffusion of sovereign power.”¹⁷¹ The Court believes that these costs are even higher after the 2006 reauthorization, as Congress expanded the substantive reach of Section 5 at that time.¹⁷²

As discussed below, the Court’s attempt to invoke these federalism principles, which are of great concern to the Court, does not withstand scrutiny in the context of Congress’s Fifteenth Amendment enforcement power. Nonetheless, reliance on federalism principles undergirds the majority’s invocation of a supposed constitutional principle of “equal sovereignty”; in short, because the federalism costs of

168. See Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001).

169. See *Shelby Cnty.*, 133 S. Ct. at 2621, 2623–24, 2626–27, 2630.

170. See *id.* at 2623.

171. *Id.* (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)).

172. See *Shelby Cnty.*, 133 S. Ct. at 2626–27 (“In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.”). Compare *Georgia v. Ashcroft*, 539 U.S. 461, 483–84 (2003) (permitting state to consider “influence and coalitional districts,” not just districts where minority voters can elect “candidates of choice,” in assessing Section 5 retrogression), and *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (“*Bossier Parish II*”) (holding that Section 5 does not cover “discriminatory but nonretrogressive vote-dilutive purposes”), with 42 U.S.C. § 1973c(b) (2012) (pegging retrogression analysis to minority group’s “ability . . . to elect their preferred candidates of choice”), and 42 U.S.C. § 1973c(c) (“The term ‘purpose’ . . . shall include any discriminatory purpose.”).

Section 5 are high, the fact that Section 5 treats states differently is especially problematic. Consequently, Chief Justice Roberts pins much of the rationale for invalidating the Section 4(b) coverage formula on the equal sovereignty principle, which disfavors any federal government attempt to impose different requirements on the various states.¹⁷³ Chief Justice Roberts asserts that “equal sovereignty requires a showing that a statute’s geographic coverage is sufficiently related to the problem that it targets.”¹⁷⁴ The importance of this differential treatment to the Justices against the background of robust state sovereignty interests was made clear at oral argument, where several justices expressed concern as to the basis for the differential treatment.¹⁷⁵ This invocation of equal sovereignty was far from inconsequential; the concept formed a crucial piece of the Court’s logic.

173. See *Shelby Cnty.*, 133 S. Ct. at 2618, 2622–24.

174. *Id.* at 2622 (quoting *Nw. Austin*, 557 U.S. at 203).

175. Transcript of Oral Argument at 21, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

Justice Kennedy: I don’t know why under the equal footing doctrine it would be proper to just single out States by name.

Justice Scalia: I thought it’s sort of extraordinary to say Congress can just pick out, we want to hit these eight States.

Justice Kennedy: This reverse engineering that you seem so proud of, it seems to me that that obscures the—the real purpose of —of the statute. And if Congress is going to single out separate States by name, it should do it by name.

Justice Alito: Then why shouldn’t it apply everywhere in the country?

Chief Justice Roberts: [I]s it the government’s submission that the citizens in the South are more racist than citizens in the North? . . . And not—and not impose it on everyone else?

Id. 21, 35, 40–42.

Justice Kennedy: Do you think the preclearance device could be enacted for the entire United States?

General Verrilli: I don’t think there is a record that would substantiate that. But I do think Congress was—[Justice Kennedy]: And that is because that there is a federalism interest in each State being responsible to ensure that it has a political system that acts in a democratic and a civil and a decent and a proper and a constitutional way.

If Alabama wants to have monuments to the heros [sic] of the Civil Rights Movement, if it wants to acknowledge the wrongs of its past, is it better off doing that if it’s an own [sic] independent sovereign or if it’s under the trusteeship of the United States government?

Justice Scalia: I don’t think anybody is contesting that it’s more effective if you use Section 5. The issue is why just in these States. That’s it.

Chief Justice Roberts: I guess the question is whether or not that disparity [in Section 5 objections] is sufficient to justify the differential treatment under Section 5. Once you take away the formula, if you think it has to be reverse engineered and—and not simply justified on its own, then it seems to me you have a much harder test to justify the differential treatment under Section 5.

Justice Scalia: Do you think all of the noncovered States are worse in that regard than the nine covered States, is that correct? . . . Every—very one of them is worse. [Mr.

The majority opinion repeatedly stressed that the coverage formula did not respond to current conditions regarding voting discrimination.¹⁷⁶ As discussed earlier, however, there was sufficient basis to uphold the coverage formula under rational basis review despite this purported shortcoming.¹⁷⁷ Thus, the Court relied in significant part on equal sovereignty in subjecting the legislation to greater scrutiny by requiring the formula to more directly fit the problem: “And in the context of a decision as significant as this one—subjecting a *disfavored subset of States* to ‘extraordinary legislation otherwise unfamiliar to our federal system,’—that failure to establish even relevance is fatal.”¹⁷⁸ The Court, thus, used the principle of equal sovereignty, at least in significant part, to require something more than rationality.¹⁷⁹

The problem, of course, is that Chief Justice Roberts’ reliance on “the fundamental principle of equal sovereignty”¹⁸⁰ is reliance on a constitutional principle that, to the extent it exists at all, is wholly inapplicable to the situation the Court faced in *Shelby County*.

1. Congress’s Power Under the Civil War Amendments and State Sovereignty

Despite the *Shelby* majority’s misgivings, the degree of sovereignty possessed by the states with regard to voting rights issues is, in fact, quite limited. This is especially so with respect to racial discrimination in voting.

Any reliance on the Tenth Amendment in supporting limits on congressional legislation faces several key obstacles. By the Amendment’s very terms, this reservation of powers does not include powers the Constitution explicitly grants to the federal government.¹⁸¹ Thus,

Adegbile]: Justice Scalia, it’s—it’s a fair question, and—and I was speaking to the aggregate [Justice Scalia]: It’s not just a fair one, it’s the crucial question. Congress has selected these nine States. Now, is here some good reason for selecting these nine?

Chief Justice Roberts: Have there been episodes, egregious episodes of the kind you are talking about in States that are not covered?

Mr. Adegbile: Absolutely, Chief Justice Roberts.

Chief Justice Roberts: Well, then it doesn’t seem to help you make the point that the differential between covered and noncovered continues to be justified.

Id. at 50–51, 53, 56, 58–59, 61–62.

176. *See Shelby Cnty.*, 133 S. Ct. at 2625–31.

177. *See* discussion *supra* Section III.B.

178. *Shelby Cnty.*, 133 S. Ct. at 2628 (emphasis added) (citation omitted).

179. *Id.* at 2630 (“[T]his case is about a part of the sentence that the dissent does not emphasize—the part that asks whether a legislative means is ‘consist[ent] with the letter and spirit of the constitution.’”) (second alteration in original).

180. *Id.* at 2623–24.

181. *See* U.S. CONST. amend. X.

there is a fundamental problem with relying on the Tenth Amendment as an argument against congressional action taken pursuant to other, more specific provisions of the Constitution, as is the case with voting and racial discrimination.

The degree of sovereignty states possess in the conduct of elections is already significantly limited, as Congress already has the power to regulate the “[t]imes, [p]laces, and [m]anner” of federal elections under the Elections Clause.¹⁸² Thus, many of the voting changes that Section 5 requires preclearance of are already within an area where congressional authority is broad in substantive scope and “paramount.”¹⁸³

To the extent states do maintain sovereign power with regard to their electoral systems that power is further limited vis-à-vis Congress as a result of the Fourteenth and Fifteenth Amendments, particularly the enforcement powers granted to Congress under those provisions.¹⁸⁴ Those amendments, of course, were enacted for the *purpose* of restricting state sovereignty.¹⁸⁵ For this reason and others, the Supreme Court has previously held that the Tenth Amendment does not act as a constraint on Congress’s powers under the Civil War Amendments.¹⁸⁶ And the Court has explicitly and repeatedly recognized that

182. U.S. CONST. art., I, § 4.

183. See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253–54 (2013) (“The power of Congress over the ‘Times, Places and Manner’ of congressional elections is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.”) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)); see also Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1207 (2012) (“[T]he Elections Clause gives states autonomy . . . but [states are] not sovereign because Congress retains its authority to modify or alter state practices.”).

184. See U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

185. See, e.g., *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (“[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments. Those [Civil War] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (“When Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.”); *Ex parte Virginia*, 100 U.S. 339, 346 (1880) (“[The Thirteenth and Fourteenth Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress [sic].”).

186. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983) (“[W]hen properly exercising its power under § 5 [of the Fourteenth Amendment, Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause Powers.”), *superseded by statute*, 29 U.S.C. 621 *et. seq.* (2012); *Fitzpatrick*, 427 U.S. at 456 (1976) (“When Congress acts pursuant to § 5 [of the 14th Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority

these powers vis-à-vis states apply to voting protections and, with respect to the Act in particular, “the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion[.]”¹⁸⁷

The cases cited in *Shelby County* asserting great state sovereignty in voting do not concern the direct grant of power to Congress under the Fourteenth and Fifteenth Amendments, so they do not advance the majority’s position.¹⁸⁸ Indeed, the Court in *City of Rome* considered and rejected the very argument advanced by the majority opinion in *Shelby County*, concluding that federalism principles do not limit Congress’s enforcement powers under the Fifteenth Amendment.¹⁸⁹

Nonetheless, despite this previously clear understanding, recent Court opinions have referenced sovereignty concerns in cases concerning Section 5 of the Act, warning Congress that the Act comes close to the line in terms of constitutionality. In *Miller v. Johnson*, the Court expressed concern about the burden placed on states by an interpretation of Section 5 that required overreliance on race in redistricting: “[O]ur belief in *Katzenbach* that the federalism costs exacted by § 5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of

under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.”); *cf.* *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (“[T]he Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment.”).

187. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 284–85 (1999); *see also City of Rome*, 446 U.S. at 179–80 (“Applying [the] principle [that the Civil War Amendments were designed as an expansion of federal power and an intrusion on state sovereignty], we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act.”); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (“The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.”).

188. *See Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (limiting power of Congress to enact voting policies under the Commerce Clause); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (rejecting the state’s voting policies as a violation of the Fourteenth Amendment); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 170 (1892) (rejecting power of state to declare naturalized U.S. citizen ineligible for election to public office); *see also Perry v. Perez*, 132 S. Ct. 934, 941–43 (2012) (addressing standards to be applied by a federal court in drawing interim redistricting maps pending state enactment of a redistricting plan).

189. *City of Rome*, 446 U.S. at 179 (“[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments.”); *see also Katzenbach*, 383 U.S. at 324 (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

this litigation.”¹⁹⁰ In *Bossier Parish II*, the Court expressed concern that including nonretrogressive changes enacted with a discriminatory purpose within the ambit of Section 5 would “exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5’s constitutionality.”¹⁹¹ And in *Northwest Austin*, the Court echoed the concerns in *Miller v. Johnson* and Justice Kennedy’s concurrence in *Georgia v. Ashcroft* regarding the supposed tensions between Section 5 and the Equal Protection clause and noted the misgivings about Section 5’s constitutionality expressed in dissents and concurrences in previous cases.¹⁹² The concerns, in the Court’s mind, increased after Congress reversed the rulings in *Bossier Parish II* (which had held that voting changes enacted with discriminatory but nonretrogressive purpose must be precleared under Section 5) and *Georgia v. Ashcroft* (which had held that states were permitted to consider not only effective minority districts,¹⁹³ but also coalition and influence districts,¹⁹⁴ in complying with Section 5 responsibilities) during the 2006 reauthorization.¹⁹⁵

2. State Sovereignty and the Equal Footing Doctrine

The Constitution’s framers took state sovereignty very seriously, building in various protections against federal intrusion. Nevertheless, nothing in the text of the Constitution suggests, let alone dictates,

190. 515 U.S. 900, 926–27 (1995) (rejecting the Justice Department’s interpretation of Section 5 due in part to federalism concerns and indicating that the rejected interpretation raised “troubling and difficult constitutional questions”).

191. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 321–22 (2000) (citations omitted) (internal quotations omitted); *see also, e.g., Ashcroft*, 539 U.S. at 491–92 (Kennedy, J., concurring) (discussing perceived tension between the Equal Protection Clause and Section 5 of the Act); *Lopez*, 525 U.S. at 289–98 (Thomas, J., dissenting) (asserting that interference with state sovereignty is extreme and arguing for a more limited interpretation of Section 5 to avoid the constitutional question).

192. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202–03 (2009); *see also id.* at 224 (Thomas, J., dissenting) (“[Section] 5 pushes the outer boundaries of Congress’[s] Fifteenth Amendment enforcement authority.”).

193. 539 U.S. 461, 479 (2003) (The “ability of minority voters to elect their candidate of choice.”).

194. *Id.* at 481–82 (discussing approvingly districts comprised of “coalitions of voters who together will help to achieve the electoral aspirations of the minority group” and districts “where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process”).

195. *See supra* note 176.

that the federal government must treat states equally in legislative enactments.¹⁹⁶

a. The Equal Footing Doctrine

Despite the absence of a direct textual basis for the general principle of equality of the states—and that the Constitution’s text concerning admission of states also does not discuss state equality¹⁹⁷—the Supreme Court has developed a doctrine establishing the *constitutional* equality of the states, often called the “Equal Footing Doctrine.”¹⁹⁸ In sum and substance, the Equal Footing Doctrine holds that Congress cannot place any special restrictions on states at admission that it could not place on states after their admission.

The Supreme Court’s most complete discussion of the Equal Footing Doctrine is contained in *Coyle v. Smith*,¹⁹⁹ a case Chief Justice Roberts relies on in *Shelby County* to support his equal sovereignty argument.²⁰⁰ Therein, the Justices considered whether Congress had exceeded its authority with respect to the admission of states when it forbade Oklahoma from moving its capital for a certain period after its admission.²⁰¹ To make clear the question to be addressed, *Coyle* distinguished among three different types of congressional restrictions

196. Rather, the Constitution mentions equality of the states in two places. First, Article I, Section 3 provides that each state has two Senators. U.S. CONST. art. I, § 3. Second, Article V provides that no state may be “deprived of its equal Suffrage in the Senate” without its consent. *Id.* at art. V. Indeed, the equality of representation in the Senate—written into the Constitution to protect state interests—suggests that the Founders contemplated the differential effects of federal laws on the various states and chose to protect states at the legislative stage. *See, e.g.,* *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) (“States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”).

197. *See* U.S. CONST. art. IV, § 3. To the contrary, earlier drafts of the Constitution contained language requiring that new states “shall be admitted on the same terms with the original states,” but that provision did not make it into the final draft. 2 *The Records of the Federal Convention of 1787*, at 173, 188 (Max Farrand ed., Yale Univ. Press 1966) (1911); *see also* Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 383–95 (2002) (discussing drafting history of Article IV, § 3). Nonetheless, Congress has typically granted admission to new states on equal footing as the original states. *See* *Coyle v. Smith*, 221 U.S. 559, 566–67 (1911) (noting that Congress had used the term “on equal footing with the original states in all respects whatsoever” since the admission of Tennessee as the third new state).

198. *See, e.g.,* *Coyle*, 221 U.S. at 570; *Bolln v. Nebraska*, 176 U.S. 83, 87 (1900); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 688–89 (1883); *Pollard v. Hagan*, 44 U.S. 212, 216 (1845); *cf.* *United States v. Texas*, 339 U.S. 707, 717–18 (1950) (holding, based on the Equal Footing Doctrine, that Texas was not entitled to *more* rights than other states by virtue of its prior status as an independent sovereign nation).

199. *See* *Coyle*, 221 U.S. at 564–80.

200. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013).

201. *See* *Coyle*, 221 U.S. at 562–66.

on states.²⁰² First, the Court discussed legislative provisions that are “fulfilled by the admission of the state,” such as requiring the state constitution to contain particular provisions (which could subsequently be modified by the state) as a condition of admission, holding that such legislation is permissible.²⁰³ The second distinct category was “compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject.”²⁰⁴ Such legislation is permissible as applied to the admission of states because it is “plainly within the regulating power of Congress.”²⁰⁵ In other words, Congress can enact laws affecting states differently at admission where its powers would allow it to do so in any event. Implicit in this, of course, is the notion that Congress may enact legislation that affects different states differently. The third category, meanwhile, consists of “compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power.”²⁰⁶ This third category of legislation is what the Equal Footing Doctrine forbids.²⁰⁷ Stated more clearly, Congress cannot place restrictions on states that “would not be valid and effectual if the subject of congressional legislation after admission.”²⁰⁸

Significantly, absent from *Coyle* and other cases prior to *Northwest Austin* is the idea that Congress is restricted in enacting legislation that treats different states differently after they have already joined as states. Indeed, it would make little sense to apply the Equal

202. *See id.* at 568.

203. *Id.*

204. *Id.*

205. *Id.* at 574.

206. *Id.* at 568.

207. *See id.* at 570–80; *see also, e.g.,* *Bolln v. Nebraska*, 176 U.S. 83, 87–89 (1900) (holding that provision of Nebraska Constitution permitting prosecution of felonies on the basis of information was valid despite enabling act arguably forbidding such a provision); *Ward v. Race Horse*, 163 U.S. 504 (1896) (holding that federal government’s treaty with Native Americans entered before Wyoming was a state could not restrict state’s ability to regulate hunting within its borders); *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 688–89 (1883) (holding that congressional act admitting Illinois could not restrict state’s power over its rivers insofar as the original thirteen states had such power); *Pollard v. Hagan*, 44 U.S. 212, 235 (1845) (holding that Alabama has the same sovereignty and jurisdiction over its territory as the original thirteen states possessed at the Founding); *cf. United States v. Wheeler*, 435 U.S. 313, 320 (1978) (“Each [state] has the power, inherent in any sovereign, independently to determine what shall be an offense against *its* authority and to punish such offenses.”) (emphasis added), *superseded by statute on other grounds as recognized in United States v. Lara*, 541 U.S. 193, 207 (2004).

208. *Coyle*, 221 U.S. at 573; *see also* Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 834–35 (1980) (“[T]he equal footing doctrine does not require the federal government to treat every state equally. Rather, the doctrine only guarantees states equal authority within the federal system.”).

Footing Doctrine beyond the admission of states, as the issue of whether those states have the same sovereign powers as other states has already been resolved by that doctrine.²⁰⁹ Rather, the only question in the case of post-statehood legislation affecting states is whether the restriction is within the scope of congressional power to legislate generally vis-à-vis the states.²¹⁰

In practice, Congress has passed a number of laws that treat different states differently, based on various factors. Justice Ginsburg, in her *Shelby County* dissent, noted several of those laws.²¹¹ The Emancipation Proclamation, while not a congressional enactment, famously limited its coverage to the rebel states.²¹² Reconstruction is another obvious example, whereby the federal government imposed a wide variety of burdens on the rebel states.²¹³ It has not been suggested that these laws are suspect by nature of the fact that they do not subject all states to the same burdens.

b. *South Carolina v. Katzenbach*: Definitively Dismissing the Equal Footing Doctrine As Applied to the Act

In *South Carolina v. Katzenbach*, the Supreme Court evaluated the impact of “the doctrine of equality of States” on Section 4(b) of the Act’s geographic limitation on the application of Section 5, and

209. The constitutional equality of the states does, however, have implications beyond admission. For example, in deciding lawsuits between states, the Supreme Court evaluates those disputes “on the basis of equality of right.” *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *see also, e.g., Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (“One cardinal rule, underlying all the relations of the states to each other, is that of equality of right.”). But that is an issue of interstate relations, not federal-state relations.

210. *See McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”); *see also* Touton, *supra* note 212, at 834–35. In recent years, the Supreme Court has limited congressional power to require states to administer federal regulatory programs. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). The principle embodied in those cases, however, derives from limits on congressional power and the Tenth Amendment, not from any principle of equal sovereignty. *See New York*, 505 U.S. at 169–83. And, in any event, those cases do not concern Congress’s broad legislative powers over states when enforcing the Fourteenth and Fifteenth Amendments, making the cases of little relevance in the context of evaluating the Act. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 179 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

211. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting).

212. Emancipation Proclamation, January 1, 1863; Presidential Proclamations, 1791–1991; Record Group 11; General Records of the United States Government; National Archives.

213. *See* 14 Stat. 428–430, c.153; 15 Stat. 2–5, c.6; 15 Stat. 14–16, c.30; 15 Stat. 41, c.25 (providing for, *inter alia*, the creation of five military districts headed by generals to act as governments for the rebel states, the requirement that the rebel states rewrite their state constitutions and have them approved by Congress, the requirement that the rebel states ratify the Fourteenth Amendment, and the requirement that the rebel states provide voting rights to black men).

definitively answered the question, determining that the doctrine “does not bar this, for that doctrine applies *only* to the terms upon which States are admitted to the Union, and not the remedies for local evils which have subsequently appeared.”²¹⁴ In fact, the *Katzenbach* Court appears to have viewed the limited geographic scope as a virtue of Section 5, not a vice: “In acceptable legislative fashion, Congress chose to limit its attention to geographic areas where immediate action seemed necessary.”²¹⁵ In *City of Rome*, the Court expressed the same sentiment.²¹⁶ The Court again reiterated this position in *City of Boerne v. Flores*²¹⁷ and several other cases applying the *Boerne* standard.²¹⁸

c. The Perversion of the Equal Footing Doctrine in *Northwest Austin*

When the Supreme Court again looked at the constitutionality of the preclearance regime in 2009 in *Northwest Austin*, the majority opinion again discussed the “fundamental principle of equal sovereignty,”²¹⁹ albeit as dicta.²²⁰

Initially, Justice Kennedy raised the issue of equal sovereignty at oral argument when he commented that “Congress has made a finding

214. *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966) (emphasis added).

215. *See id.* at 328. Even Justice Black’s partial dissent in *Katzenbach* acknowledges that the Act is not suspect by reason of its differential treatment of states. *Katzenbach*, 383 U.S. at 356 (Black, J., dissenting in part). Specifically, his opinion noted that, by stating in detail that certain provisions would apply to certain areas based on criteria that the Attorney General are able to mechanically apply, “Congress has acted within its established power to set out preconditions upon which the Act is to go into effect.” *Id.*

216. 446 U.S. 156, 178 (1980) (“Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.”).

217. 521 U.S. 507, 533 (1997) (“[L]imitations of this kind tend to ensure Congress’[s] means are proportionate to ends legitimate under § 5.”).

218. *See, e.g., United States v. Morrison*, 529 U.S. 598, 626–27 (2000) (“By contrast, the § 5 remedy upheld in *Katzenbach v. Morgan* was directed only to the State where the evil found by Congress existed, and in *South Carolina v. Katzenbach* the remedy was directed only to those States in which Congress found that there had been discrimination.”); *see also Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 741–42 (2003) (Scalia, J., dissenting) (“There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other State. . . . Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965 . . . were restricted to States with a demonstrable history of intentional racial discrimination in voting.”) (citations omitted) (internal quotation marks omitted).

219. *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

220. *See id.* at 211 (“Whether conditions continue to justify such [extraordinary] legislation is a difficult constitutional question we do not answer today.”).

that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments than the other.”²²¹ The comment demonstrates the sovereignty concerns that are driving the Court, with regard to Section 5, which carry over to the written opinion.

Chief Justice Roberts’ majority opinion first states that the Act “differentiates between the States, despite our historic tradition that all the States enjoy ‘equal sovereignty.’”²²² The cases he cites for that proposition, however, do not support the idea that any doctrine of state equality may serve as the basis for invalidating an act of Congress that treats different states differently. *United States v. Louisiana* addressed whether the Submerged Lands Act had *granted additional land rights* to the states beyond those their sovereignty guaranteed them.²²³ *Louisiana* did not address equal sovereignty, as the Court noted that the states did not own submerged lands outside their borders (the land at issue in that case) and was grappling with a statutory interpretation as to whether Congress granted them ownership of those lands.²²⁴

The second case the *Northwest Austin* majority opinion cites is *Texas v. White*.²²⁵ That case concerned the question of whether Texas remained a state during its rebellion in the Civil War and could file a lawsuit in United States federal court.²²⁶ The section the *Northwest Austin* opinion cites²²⁷ simply holds that the Constitution does not permit secession and, therefore, Texas remained a state during its rebellion.²²⁸ *Texas v. White* does address issues of state sovereignty, noting their residual sovereignty in most areas *as a contrast* to their total lack of power to secede.²²⁹ However, nothing in *Texas v. White* sug-

221. Transcript of Oral Argument at 34, *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193 (2009) (No. 08-322).

222. *Nw. Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)).

223. *See id.* at 6, 13–18 (emphasis added).

224. *Louisiana*, 363 U.S. at 16–20. In dicta, the *Louisiana* Court noted that, because the original thirteen states owned their own lands beneath navigable inland waters, “each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission.” *Id.* at 16 (citing *Pollard v. Hagan*, 44 U.S. 212 (1845)). The point is one about equality of states at admission, a conclusion confirmed by the fact that the case cited for the point is *Pollard v. Hagan*, 44 U.S. 212 (1845), a leading case with regard to the Equal Footing Doctrine.

225. 74 U.S. 700 (1869).

226. *Id.* at 717.

227. *See Nw. Austin*, 557 U.S. at 203.

228. *See Texas*, 74 U.S. at 725–26.

229. *See id.* at 725 (emphasis added).

gests that the Equal Footing Doctrine or any similar principle may require the federal government to treat states equally.²³⁰ Essentially, then, the idea that any “historic tradition” of “equal sovereignty” has any bearing on the validity of an Act of Congress that treats different states differently is wholly without support in *Northwest Austin*.

Northwest Austin noted *Katzenbach*’s holding that “[t]he doctrine of equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.”²³¹ In the subsequent sentence, however, *Northwest Austin* unjustifiably eviscerates the basis upon which *Katzenbach*’s holding rests (i.e., the conclusion that the Equal Footing Doctrine is irrelevant to the issue): “But a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”²³² In addition to lacking any support from authority, this statement contradicts the statement in *Katzenbach*, which is curiously omitted from *Northwest Austin* by use of ellipses, that “[t]he doctrine of equality of states . . . applies only to the terms upon which States are admitted to the Union”²³³

d. The Equal Sovereignty Doctrine Comes to Roost in *Shelby County*

As noted above, the conservative members of the Court focused extensively on the unequal treatment of states under Section 5 at oral argument.²³⁴ Building off of the dicta in *Northwest Austin*, Chief Justice Roberts in the *Shelby County* written opinion faults Congress for departing from “the fundamental principle of equal sovereignty” in enacting the Act.²³⁵ As support for the existence of this principle, the

230. In fact, the Supreme Court in *Texas v. White* took a very broad view of congressional power to regulate vis-à-vis states:

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

Id. at 729.

231. *Nw. Austin*, 557 U.S. at 203 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29).

232. *Id.*

233. *Katzenbach*, 383 U.S. at 328–29.

234. *See supra* note 176.

235. *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623–24 (2013).

majority opinion relies primarily on two cases, *Northwest Austin*²³⁶ and *Coyle v. Smith*.²³⁷ As discussed above, however, *Coyle* does not support the existence of a principle of equal sovereignty outside of the admission context,²³⁸ and *Northwest Austin*'s discussion of the issue, which is dicta, relies on a perversion of constitutional provisions and prior case law.²³⁹ In short, the majority's conclusion that any "principle of equal sovereignty" was applicable to the Act is wholly without support.

Chief Justice Roberts also attempts to avoid the clear language of *Katzenbach* that confines the Equal Footing Doctrine to admission of states. To that end, the *Shelby County* opinion describes *Katzenbach* as "reject[ing] the notion that the principle operated as a bar on differential treatment outside [the] context" of the admission of new states.²⁴⁰ Chief Justice Roberts focuses on the use of the term "bar," suggesting that, while differential treatment of the states is not *forbidden*, the fact of unequal treatment *weighs against* the validity of congressional action.²⁴¹ That approach, much like the dicta in *Northwest Austin*, ignores the other language in that same sentence in *Katzenbach* explaining *why* there is no bar, namely that the law "applies only" to admission of states and "not" to remedies for state conduct subsequent to admission.²⁴² In other words, Chief Justice Roberts treats that holding in *Katzenbach* as creating a sliding scale, while claiming to remain true to the decision, when *Katzenbach*, in fact, creates a bright line rule that directly contradicts Chief Justice Roberts's position.

Moreover, Chief Justice Roberts's federalism arguments addressed at the outset of this Section do not provide additional support for the principle of equal sovereignty. First, the Tenth Amendment, which notes that powers not granted to the federal government are

236. The *Shelby County* decision also notes the cases *Northwest Austin* cites, but those cases also do not support the position asserted, as discussed above. See *Shelby Cnty.*, 133 S. Ct. at 2622, 2624.

237. *Id.* at 2623; see *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

238. See discussion *supra* Section III.A.2.a. Chief Justice Roberts acknowledged that *Coyle* "concerned the admission of new states" without noting that that context was crucial to *Coyle*'s outcome. See *Shelby Cnty.*, 133 S. Ct. at 2623.

239. See discussion *supra* Section III.A.2.c.

240. *Shelby Cnty.*, 133 S. Ct. at 2623–24.

241. See *id.* at 2624 ("[T]he fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent equal disparate treatment of States"); see also *Nw. Austin*, 557 U.S. at 203 ("But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficient[].").

242. *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966).

reserved for the states, says nothing about *equality* of states.²⁴³ Second, a law that covers only select states is less offensive to federalism principles than a law that covers all states.²⁴⁴ Thus, to the extent state sovereignty principles bear on the Court's analysis, the Act's unequal treatment of states should not make it more constitutionally suspect, particularly in light of *Katzenbach's* approval of this approach.²⁴⁵

In sum, as Judge Richard Posner noted in the immediate aftermath of the *Shelby County* decision, "there is no doctrine of equal sovereignty. The opinion rests on air."²⁴⁶

B. Race and the Demise of Section 5

While state sovereignty may have been the jurisprudential vehicle for the decision, the Roberts Court's views on issues of race were also a key driving force in its consideration of *Shelby County*. A central premise of the majority opinion in *Shelby County*, stated in conclusion to justify the evisceration of Section 5, is that "[o]ur country has changed."²⁴⁷ Chief Justice Roberts's opinion repeatedly downplays the problem of racial discrimination in voting, distinguishing discrimination in 1965 from the record before Congress in 2006²⁴⁸ and exhorting that "today's statistics tell an entirely different story."²⁴⁹ This approach flips the problem around, making racial discrimination by state and local governments seem less significant than the federal government's actions done to prevent such discrimination, which the Court views as themselves discriminatory against majority white interests.

Against the broader background of the Court's shift over the past forty years toward a more "color-blind" Constitution and the Roberts Court's even more skeptical approach to racial discrimination claims, the majority's opinion in *Shelby County* can hardly be seen as a surprise. A review of the limited history of race discrimination cases de-

243. See U.S. CONST. amend. X.

244. See *supra* notes 218–19.

245. *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting) ("Congress could hardly have foreseen that the VRA's limited geographic reach would render the Act constitutionally suspect.").

246. Richard A. Posner, *The Voting Rights Act Ruling Is About the Conservation Imagination*, SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html.

247. See *Shelby Cnty.*, 133 S. Ct. at 2631.

248. See *id.* at 2625–31.

249. See *id.* at 2631.

cided by the Roberts Court reveals a tendency to limit or invalidate any law that does not conform to the majority's view that the Constitution generally does not permit differential treatment based on race, regardless of the purpose.²⁵⁰ The "postracial" jurisprudence, which "purports to be merely a ban on discrimination against whites," makes all racial classifications highly suspect (i.e. subject to "strict scrutiny").²⁵¹ Although the Court in *Shelby County* did not apply strict scrutiny, it is also evident that the Court has applied something more than rational basis (as discussed in Part II), and race seems to play a key role in driving the decision to do so.

1. Constructing a More "Colorblind" Constitution

The idea of constitutional color-blindness has its roots in the seminal case of *Plessy v. Ferguson*, where Justice Harlan famously said in his dissent against the majority's decision upholding "separate but equal" accommodations on common carriers that "[o]ur Constitution is colorblind."²⁵² Seizing that concept, the Court in recent years has moved more and more toward the idea of a colorblind Constitution. This development has been untrue to the Constitution, particularly the Civil War Amendments.

As an initial matter, Harlan's dissent does not support the notion that conduct intended to help disadvantaged minorities is constitutionally impermissible. Justice Harlan was concerned with subordination by the dominant racial group, viewing that as the constitutionally objectionable conduct.²⁵³

Further, the intent and early understanding of the Civil War Amendments similarly suggests an anti-caste, rather than colorblind,

250. One commenter has suggested that the Roberts Court believes that "a prospective commitment to colorblind race neutrality is now sufficient to promote racial equality, and any deviation from such neutrality will itself constitute unlawful discrimination." Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 39 (2009).

251. Spann, *supra* note 250, at 39; *see also* Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 435 (2010) ("Although the application of strict scrutiny is desirable in cases involving invidious discrimination, it is devastating in cases involving affirmative action.").

252. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

253. *See id.*

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.

Id.

view of those amendments.²⁵⁴ As a result, courts have generally been more tolerant, at least since *United States v. Carolene Products Co.*,²⁵⁵ of race distinctions meant to achieve greater equality than race distinctions enacted for invidious purposes.²⁵⁶

Despite these jurisprudential and purpose-based obstacles, the idea of a Constitution hostile to all racial classifications, regardless of purpose, began to gain traction. By the mid-1970s, it was being used against policies and programs intended to promote racial equality.²⁵⁷ In particular, Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*, although it did not use the term, brought color-blindness squarely into the conversation about the constitutionality of such policies and programs by holding that all classifications, even those made for remedial purposes, that "den[y] an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background . . . must be regarded as suspect" and applying strict scrutiny.²⁵⁸

254. See Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglas, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 833 n.44 (2008) (listing support for proposition that the legislative history of the Civil War Amendments dictates a conclusion that they "were color-conscious, group rights based constitutional amendments"); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 340 (1993) ("Originally the Fourteenth Amendment was understood as an effort to eliminate racial caste—emphatically not as a ban on distinctions on the basis of race. A prohibition on racial distinctions would excise all use of race in decision-making. By contrast, a ban on caste would throw discriminatory effects into question and would allow affirmative action.")

255. 304 U.S. 144 (1938). Therein, the Court stated:
Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities. [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.
Id. at 152 n.4 (citations omitted); see also JOHN HART ELY, *DEMOCRACY & DISTRUST* 73–77 (1980) (describing the Warren Court's approach as ensuring that the "political process . . . was open to those of all viewpoints on something approaching an equal basis" and noting Footnote 4 of *Carolene Products* as presaging that approach).

256. Jones, *supra* note 257, at 430.

257. See Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1513–21 (2004) ("Courts . . . understood equal protection as a race-asymmetric constraint on governmental action; they understood that the purpose of equal protection doctrine was to prevent the state from inflicting certain forms of status harm on minorities."); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (plurality opinion) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."); cf. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that violation of the Equal Protection Clause requires intentional discrimination).

258. *Regents of the Univ. of Cal.*, 438 U.S. at 305–06 (plurality opinion); cf. *id.* at 414–17 (Stevens, J., concurring in part & dissenting in part) (arguing that Title VI of the Civil Rights Act of 1964 was intended to prescribe a colorblind standard). Justice Brennan's opinion in *Bakke* explicitly rejected the idea of constitutional color-blindness. *Id.* at 355–56 (Brennan, J., concurring in judgment and dissenting in part).

And, more recently, the Supreme Court has endorsed the application of strict scrutiny to all racial classifications,²⁵⁹ overruling prior precedent that recognized the utility of benign classifications and subjecting such classifications to lesser scrutiny.²⁶⁰ In the wake of this shift, racial classification plans have only been allowed to survive if they survive strict scrutiny, as was the case in *Grutter v. Bollinger*.²⁶¹ *Grutter* further acknowledged the goal, if not the realization, of the color-blind Constitution.²⁶²

2. The Roberts Court's Embrace of "Color-blind" Principles

Building from the foundation created during the Burger and Rehnquist Courts, the Supreme Court under Chief Justice Roberts's watch has focused on further undermining efforts to remedy racial disparities, validating attacks on those efforts several times.²⁶³

The first significant case in this regard was the challenge to Seattle and Louisville programs designed to decrease segregation in K-12 public schools in *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*.²⁶⁴ Therein, despite the Court's recent approval of post-secondary school programs that promote diversity in *Grutter*, the majority held that the Seattle and Louisville plans (which were narrowly drawn to affect only a small number of students) could not withstand constitutional scrutiny.²⁶⁵ Chief Justice Roberts went even further on behalf of a plurality of the Court, suggesting that *Brown v. Board of*

259. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995). The decision in *Adarand* is arguably a logical extension of an earlier case. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to affirmative action plan and holding that the plan could not be upheld based on general assertions of past racial discrimination). *Croson*, however, dealt with racial classifications made by state and local governments, as opposed to Congress. See *Adarand*, 515 U.S. at 222 (“But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government.”).

260. See *Adarand*, 515 U.S. at 227 (overruling *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990)). *Metro Broadcasting* had held that intermediate scrutiny, rather than strict scrutiny, applies to benign racial classifications enacted by Congress. *Id.* at 564–65; see also *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment) (“[T]he proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives.”).

261. See 539 U.S. 306, 329–33 (2003).

262. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

263. See generally Spann, *supra* note 256 (discussing Supreme Court's jurisprudence related to race through the prism of *Ricci v. DeStefano*, 557 U.S. 557 (2009)).

264. 551 U.S. 701 (2007) (plurality opinion).

265. See *id.* at 735. Chief Justice Roberts's majority opinion refused to apply *Grutter*, cabin-ing that opinion as based upon “considerations unique to institutions higher education.” *Id.* at 724–25.

Education required this result.²⁶⁶ To Chief Justice Roberts, the limited use of race to achieve greater racial balance in schools was legally equivalent to the total segregation of African American and white schools in *Brown*: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again.”²⁶⁷ Finally, as a further endorsement of a wholly “color-blind” Constitution, he ended his opinion with the line: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁶⁸ It is evident, as set forth at length in Justice Breyer’s dissent, that Chief Justice Roberts’s formalistic approach ignores the realities of racial inequality in this country and, in fact, undermines *Brown*.²⁶⁹

Justice Kennedy’s separate opinion in *Parents Involved* suggests that there is not a true Court majority for constitutional colorblindness, albeit in a way that makes little practical difference in the outcome of cases involving *explicit* use of race to remedy discrimination and promote diversity. Justice Kennedy asserts that, “[i]n the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle.”²⁷⁰ The problem to Justice Kennedy, it appears, is not the consideration of race as *a reason* for enacting legislation, but rather the use of race as *a means* by which legislation achieves its goals.²⁷¹ Put another way, Justice Kennedy’s view requires colorblindness as to the appearance and applicability of government action to individuals, but allows some consideration of race as the basis for policy decisions of general applicability.

Parents Involved is just the first example of the Roberts Court co-opting protections intended to protect racial minorities, and it is emblematic of the approach. Another key case in this regard is *Ricci v.*

266. See *Parents Involved in Cmty. Schs.*, 551 U.S. at 746–48.

267. *Id.* at 747.

268. *Id.* at 748.

269. See *id.* at 803–68 (Breyer, J., dissenting). Further, while Chief Justice Roberts’s opinion does note the lack of any current desegregation orders in Seattle or Louisville (*id.* at 753–54 (plurality opinion)), this ignores the reality of the considerable segregation that existed in those districts. See *id.* at 806–22 (Breyer, J., dissenting).

270. *Id.* at 788 (Kennedy, J., concurring in judgment). Compare *id.* at 748 (plurality opinion), with *id.* at 772–82 (Thomas, J. concurring) (espousing belief in colorblind Constitution that does not permit “race-based decisionmaking”).

271. Justice Kennedy asserts that school administrators 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” and describing ways they could do that without running afoul of the Equal Protection Clause. *Id.* at 788–89.

DeStefano.²⁷² That case involved a situation where the city of New Haven had declined to use the results of a firefighter promotion exam that disproportionately favored white candidates because it had received evidence of problems with the test in terms of identifying firefighting skills and believed using the test would subject the city to disparate *impact* liability under Title VII of the Civil Rights Act of 1964.²⁷³ The Supreme Court held that New Haven was required to follow the tests, as refusing to follow them because they favored whites was disparate *treatment* in violation of Title VII.²⁷⁴ The Court cast the case as one of reverse discrimination,²⁷⁵ and Justice Alito's concurrence, joined by two other justices, paints a picture of powerful minority interests dictating New Haven's unfair treatment of whites.²⁷⁶ Again, in *Ricci*, what animates Justice Kennedy (who delivered the Court's opinion) is the appearance of a race-driven decision and the differential treatment of individuals because of their race.

Ultimately, the Roberts Court's approach boils down to this: extreme skepticism of any law, action, or program that takes race into account in seeking to address the vast racial inequalities that continue to exist in the United States.

3. Colorblindness and Voting Rights

Voting rights law has been one of the prime targets of colorblindness jurisprudence for the last two decades, beginning before the Roberts Court, but definitively carrying over into it. Section 5 of the Act places the Court's views about the appropriate use of race in legislation at issue in large degree because, unlike some other civil rights laws, Section 5 only protects racial minority voting rights. The Court made this clear in 1976 when it held, in *Beer v. United States*, that "the purpose of [Section] 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of *racial minorities* with respect to their effective exercise of the electoral franchise."²⁷⁷ In this way, Section 5 groups people by

272. 557 U.S. 557 (2009).

273. *See id.* at 563–74.

274. *See id.* at 593.

275. *See id.* at 578–80, 585.

276. *See id.* at 598–605 (Alito, J., concurring) (“[A] reasonable jury could easily find that the City’s real reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.”).

277. 425 U.S. 130, 141 (1976) (emphasis added).

race. For that reason, to the extent that some Justices are concerned about laws that are designed to benefit minorities only, perhaps to the detriment of the majority race, Section 5 necessarily runs up against serious objections.²⁷⁸

The Supreme Court's concerns about the consideration of race to advance minority interests have largely arisen in redistricting cases, where Section 5 of the Act has long *required* jurisdictions to consider race to ensure that voting changes are not "retrogressive" in purpose or effect.²⁷⁹ This requirement continued to exist at the same time the Court began to consider, over the last twenty years, whether the Fourteenth Amendment's Equal Protection Clause *prohibited* consideration of race in redistricting, as discussed below.

The modern shift toward colorblindness in voting protections started with a bang in 1993 with the Court's decision in *Shaw v. Reno*.²⁸⁰ The case challenged a North Carolina congressional-redistricting plan that had been designed to create an additional majority-minority district in response to a Department of Justice Section 5 objection.²⁸¹ The redistricting plan at issue was responsible for sending African American representatives to Congress from North Carolina for the first time since Reconstruction.²⁸² *Shaw* invalidated the plan as violating the Equal Protection Clause because it "rationally [could] be viewed only as an effort to segregate the races for purposes of voting."²⁸³ The Court believed that while it was constitutionally permissible for the state legislature to consider race, the legislature could not place too much weight on it.²⁸⁴ While not an explicit endorsement of colorblindness—and Justice O'Connor's opinion denied requiring col-

278. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) (discussing concerns, particularly with respect to voting, about laws that treat people as members of a particular race as opposed to as "individuals").

279. See *Beer*, 425 at 140–41.

280. 509 U.S. 630 (1993).

281. See *id.* at 635.

282. *Id.* at 659 (White, J., dissenting).

283. *Id.* at 642 (majority opinion); cf. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (invalidating school district boundaries drawn to aid religious community). *Shaw* is in tension with an earlier case, *United Jewish Organizations of Williamsburgh, Inc. v. Carey* ("*UJO*"), where the Court found that there had been no Equal Protection Clause violation when the state intentionally split a group of white voters to create majority-minority districts. 430 U.S. 144, 167–68 (1977); see also *Shaw*, 509 U.S. at 658, 664–69, 674–75 (Souter, J., dissenting) (discussing *UJO*).

284. Cf. *Bush v. Vera*, 517 U.S. 952 (1996) (discussing determinations of whether race was "predominant" in mixed motive redistricting cases).

orblindness²⁸⁵—the reasoning in *Shaw* relied on colorblindness principles and was a step in that direction.²⁸⁶ Justice O'Connor decried the consideration of race in redistricting with a statement that in some ways mirrors Chief Justice Roberts's statement in *Parents Involved* about "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."²⁸⁷ "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."²⁸⁸

More important than the outcome in *Shaw* was the tension that the conservative members on the Court perceived between the Equal Protection Clause and Section 5 of the Act, perhaps spurred by what it viewed as overreach by the Department of Justice in its redistricting objections. That tension grew more acute in *Miller v. Johnson*, where Justice Kennedy took up the cause in considering whether a redistricting plan adopted because of Department of Justice Section 5 objections nonetheless violated the Equal Protection Clause.²⁸⁹ In *Miller*, the Court avoided a situation where the Equal Protection Clause and Section 5 were working at cross purposes by rejecting the Department of Justice's interpretation of Section 5, which the Court described as a black "maximization" policy.²⁹⁰ Nonetheless, the implication for Congress's enforcement powers was unmistakable: "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress[s] authority under § 2 of the Fifteenth Amendment into tension with the Fourteenth Amendment."²⁹¹ Justice Kennedy further noted the existence of "troubling and difficult constitutional questions" related to congressional actions enforcing the Fifteenth Amendment to the extent they came into tension with the Court's announced Equal Protection prin-

285. See *Shaw*, 509 U.S. at 642 ("Despite their invocation of the ideal of a 'color-blind' Constitution appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise.") (citations omitted)).

286. Cf. T. Alexander Aleinikoff & Samuel Issacharoff, *Race & Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 650 (1993) ("We believe that Justice O'Connor and a majority of the Court would ultimately like to push equal protection law toward a color-blind standard.")

287. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

288. *Shaw*, 509 U.S. at 657.

289. See 515 U.S. 900, 911–12 (1995).

290. See *id.* at 924–25.

291. *Id.* at 927 (citations omitted).

ciples, which was a particular concern in the context of Section 5 in light of the statute's "federalism costs."²⁹² Perhaps more than any other opinion, *Miller v. Johnson* demonstrates Justice Kennedy's fundamental objection against Section 5, namely that, in some circumstances, it allows race to become a predominant factor in shaping voting laws.

The Court appears to have had similar concerns in *Reno v. Bossier Parish School* ("*Bossier Parish II*"), which addressed the issue of whether voting changes enacted with a discriminatory but nonretrogressive purpose²⁹³ were subject to Section 5 objections, holding in the negative.²⁹⁴ Indeed, Justice Scalia's opinion implicitly expressed strong skepticism about the purpose of the challenge—which it essentially described as similar to the minority "maximization" plan attacked in *Miller*²⁹⁵—noting that "[t]o deny preclearance to a plan that is *not* retrogressive—*no matter how unconstitutional it may be*—would risk leaving in effect a status quo that is even worse."²⁹⁶ Thus, the majority accused the government of "chang[ing] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan."²⁹⁷ This shift, in the Court's view, would also raise the federalism costs of Section 5, "perhaps to the extent of raising concerns about § 5's constitutionality."²⁹⁸ The Court's invocation of *Miller* in this context suggests that the Court has concerns about discriminatory but nonretrogressive purpose, which would likely increase states' consideration of race in voting changes running up against the same tension with the Equal Protection Clause.²⁹⁹

292. *See id.*

293. For an example of a factual scenario where a voting change was enacted with a discriminatory but nonretrogressive purpose, see *Busbee v. Smith*, which addressed a Georgia redistricting plan that was not retrogressive in that the resulting district had a higher black population than the previous district; the plan was clearly enacted with a discriminatory purpose in that it split a large, cohesive black community and that the chairman of the Reapportionment Committee had stated that he would not draw a majority-minority district because "I don't want to draw nigger districts." 549 F. Supp. 494, 501 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983). The holding in *Busbee* is in contradiction to the *Bossier Parish II* holding.

294. *See Bossier Parish II*, 549 U.S. at 341.

295. *See id.* at 324–25, 335 (describing challenge to redistricting plan as based on the fact that the Bossier Parish School board could have enacted more majority-minority districts but did not).

296. *Id.* at 336 (emphasis in original).

297. *Id.* (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier Parish I*").

298. *Id.* (citing *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995)).

299. At the same time, the Court may additionally or alternatively be asserting that by measuring states against a hypothetical plan that would raise the bar for states to clear, compared to

Although the concerns discussed in *Shaw* and its progeny regarding the predominance of race in voting changes were largely addressed in the aftermath of those decisions, such that *Shaw* violations became rare, the Court took a further turn toward color-blindness in *Georgia v. Ashcroft*, where the Court more explicitly stated that as the goal: “the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life.”³⁰⁰ While the decision in *Georgia v. Ashcroft* did not address the Equal Protection Clause, Justice Kennedy’s concurring opinion did.³⁰¹ He argued that, while the majority opinion was correct in interpreting Section 5 of the Act, the redistricting plan at issue likely violated the Equal Protection Clause³⁰² (although no such claim was before the Court) because race was “a predominant factor” in the redistricting.³⁰³ In his view, this raised serious constitutional questions about Section 5: “There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive.”³⁰⁴ Curiously, Justice Kennedy’s discussion did not aim to clarify, qualify, or modify anything stated in the majority opinion. Thus, there was no clear reason for Justice Kennedy to raise his point, other than to express his strong doubts about the constitutionality of Section 5; such skepticism toward Section 5 did not portend well for later cases.

As the Rehnquist Court gave way to the Roberts Court, the trend against the consideration of race to combat racial discrimination in voting only accelerated. The October Term 2008 case of *Bartlett v. Strickland*³⁰⁵ demonstrates how far the thinking had shifted. Therein, the Supreme Court held that plaintiffs may not maintain a vote dilution claim under Section 2 of the Act when the district in question is a

the existing benchmark plan, increases the burden on those states and thus Section 5’s federalism concerns.

300. 539 U.S. 461, 490–91.

301. *See id.* at 491–92 (Kennedy, J., concurring).

302. *See id.* (“If the Court’s statement of facts had been written as the preface to consideration of a challenge brought under the Equal Protection Clause or under §2 of the Voting Rights Act of 1965, a reader of the opinion would have had sound reason to conclude that the challenge would succeed.”).

303. *See id.*

304. *Id.*

305. 556 U.S. 1 (2009) (plurality opinion).

so-called “crossover” district where minority and white voters combine to elect the minority group’s candidates of choice.³⁰⁶ In support of this conclusion, Justice Kennedy’s controlling plurality opinion³⁰⁷ asserted that the improvement in race relations in the United States is the reason why “crossover” districts exist, and the Court would not go any further.³⁰⁸ Justice Kennedy viewed this limitation of Section 2 to majority-minority districts only as appropriate to avoid the types of constitutional concerns first raised in *Shaw*. Specifically, he argued that consideration of coalition districts raised “serious constitutional concerns under the Equal Protection Clause” in that it would inject race into more redistricting decisions, which “would result in a substantial increase in the number of mandatory districts drawn with race as ‘the predominant factor motivating the legislature’s decision.’”³⁰⁹ Thus, Justice Kennedy, uneasy about the consideration of race in any circumstances, limited the consideration of race under Section 2 to circumstances where minorities could elect candidates without cooperation from whites.

That same term, the Court also considered the previous challenge to Section 5 of the Act in *Northwest Austin*. The Court in *Northwest Austin* demonstrated the strong influence of a post-racial, color-blind view of the Constitution when it indicated that the Act’s coverage formula raised constitutional concerns not present when the law was passed because “we are now a very different Nation.”³¹⁰ Moreover, the Equal Protection principles established in *Shaw* and *Miller* provided further ammunition for the Court’s attacks against Section 5 on equal sovereignty grounds, relying on Justice Kennedy’s concurrence in *Georgia v. Ashcroft*: “These federalism concerns are underscored by the argument that the preclearance requirements in one State

306. *See id.* at 12–23.

307. Justices Thomas and Scalia would have held that vote dilution claims are not cognizable under § 2 of the Act. *See id.* at 26 (Thomas, J., concurring in the judgment); *see also* *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring in the judgment) (arguing that Section 2 only reaches state legislation that interferes with an individual’s right to vote).

308. *See Bartlett*, 556 U.S. at 25–26 (“Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of § 2 to require, by force of law, the voluntary cooperation our society has achieved.”). This is, of course, an overly simplistic analysis, as crossover districts would often rely on a relatively small proportion of white voters who may be voting against the overwhelming majority of white voters.

309. *Id.* at 21–22 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

310. *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 211 (2009).

would be unconstitutional in another.”³¹¹ The message was unmistakable; “[t]hings have changed in the South”³¹² and the Court was going to subject the preclearance regime to close scrutiny despite its previous endorsements.

Ultimately, the Court’s jurisprudence on race, including in voting cases, is defined by Justice Kennedy’s views, because he tends to provide the swing vote in close cases.³¹³ His recent opinions discussed herein show a hostility toward Section 5 and a desire to limit, if not eliminate, it. More generally, those cases (and others³¹⁴) show an overriding concern with the use of race as an overriding factor in re-districting and other voting changes. Colorblindness is not the test he applies, but it is something like “color-weakness,” where attention to race must be tempered such that its consideration is secondary.

As noted at the outset, the fingerprints of the Court’s recent approach to race issues are all over the Court’s consideration of Section 5’s continued constitutionality in *Shelby County*. That much was clear from the oral argument, where Justice Scalia described Section 5 as a “racial entitlement.”³¹⁵ Moreover, much like the other recent voting cases discussed herein, Chief Justice Roberts’s opinion is based on the premise that “our country has changed,” such that the primary concern to the Court is not discrimination against minorities, but rather the Voting Rights Act’s requirement that race be considered.³¹⁶ Not only did the majority opinion ignore the record showing the continued prevalence of voting discrimination in the covered jurisdictions, but it also interjected evidence that purported to show the lack of a need for Section 5’s protections throughout the decision.³¹⁷

311. *Id.* at 203 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491–92 (Kennedy, J., concurring)).

312. *Id.* at 202.

313. See Kedar Bhatia, *October Term 2012 Summary Memo*, SCOTUSBLOG (June 29, 2013, 10:25 AM), <http://www.scotusblog.com/2013/06/october-term-2012-summary-memo/> (“Justice Kennedy was once again the Justice most frequently in the majority of 5-4 decisions. He has been either the most frequent Justice in the majority of 5-4 decisions, or tied for that title, in every Term since OT03 and 13 times since OT95.”).

314. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423–43 (2006) (invalidating under Section 2 of the Act a congressional district drawn as a majority-minority district that artificially connected two distinct Latino populations to replace a compact Latino opportunity district elsewhere in the state, where voters in the original Latino opportunity district had become increasingly politically active and that district had been redrawn to create the “façade of a Latino district,” while protecting an incumbent who had not been responsive to the Latino community).

315. Transcript of Oral Argument at 47, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

316. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

317. See *id.* at 2618–19, 2625–29.

As a result, the concerns about Equal Protection again emerge in the majority's opinion: "We have also previously highlighted the concern that 'the preclearance requirements in one State [might] be unconstitutional in another.' . . . Nothing has happened since to alleviate this troubling concern about the current application of § 5."³¹⁸ This concern seems to animate the Court in two ways. First, the Court seems to believe that Section 5 is, as Justice Kennedy put it in *Georgia v. Ashcroft*, "fundamentally flaw[ed]"³¹⁹ because it injects race into voting decisions more than the Court believes should be permitted under the Equal Protection Clause. Second, the Court's belief that Section 5 requires covered states to violate the Equal Protection Clause adds to the "federalism burden" of Section 5, which is particularly relevant in light of the equal sovereignty holding discussed above.

The result in *Shelby County* was consistent with the Court's recently-adopted view of the propriety (or lack thereof) of legislation that seeks to benefit minorities through means that consider race.³²⁰ Particularly in light of the supposed sovereignty concerns that the Court raised and discussed at length, which allowed the Court to assert that certain states were being burdened with the requirement that they violate the Constitution, observers can hardly be surprised that the Court would seek to limit the consideration of race for the benefit of minorities in this context. What is surprising, or at least inconsistent with the purposes of the Civil War Amendments, is that this Court's hostility to legislation benefiting minorities took hold in the first place.

CONCLUSION

The purpose of the Fifteenth Amendment was to prioritize federal enforcement to eliminate racial discrimination in voting over state sovereignty issues. The Supreme Court's decision in *Shelby County v. Holder* completely undermines this purpose and cannot be reconciled with prior Supreme Court cases analyzing the constitutionality of the Section 5 preclearance scheme or other precedents regarding the rational basis standard.

318. *Id.* at 2627 (alteration in original) (citations omitted) (quoting *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (Kennedy, J., concurring)).

319. 539 U.S. 461, 491 (2003).

320. Consistent with Justice Kennedy's views, the Court stops short of declaring colorblindness as the standard. *See Shelby Cnty.*, 133 S. Ct. at 2618–31.

Shelby County v. Holder

When President Reagan signed the 1982 reauthorization of the Act, he stated that “the right to vote is the crown jewel of American liberties, and we will not see its luster diminished.”³²¹ With the *Shelby County* decision, the Roberts Court has significantly diminished the luster of America’s crown jewel.

321. President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982).

ESSAY

Invisible Spaces and Invisible Lives In Immigration Detention

CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ*

INTRODUCTION	869
I. IN LEGAL LIMBO	873
II. CREATING NONPERSONS	880
III. AUTHORITY WITHOUT OVERSIGHT.....	885
A. Judicially Obscured Private Prisons	886
B. Congressional Reluctance to Regulate	888
C. Self-Regulation Failure	889
D. Obstacles to Public Oversight.....	890
IV. WHEN NO ONE IS WATCHING	892
CONCLUSION	897

INTRODUCTION

The immigration detention estate in the United States has morphed into a poignant reflection of late modernity’s construction of migrants as disposable.¹ Spread across roughly 250 facilities, hundreds of thousands of individuals have seen the inside of a secure site each of the last several years, detained while immigration officials decide whether they will be allowed to remain in the United States. In fiscal year 2012, the last year for which the United States Department

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1. See Susan Bibler Coutin, *Exiled by Law: Deportation and the Inviability of Life*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 351, 353 (Nicholas De Genova & Nathalie Peutz eds., 2010) (arguing that the confluence of criminal and immigration law “constitutes ‘criminal aliens’ or émigrés as expendable”).

of Homeland Security (DHS) had released data about its immigration detention population, 477,523 were held pending immigration proceedings.²

Remarkably, this mass detention system operates not as part of the criminal justice system overseen by constitutional guarantees and the courts, but as a result of civil administrative proceedings that is largely outside the reach of both.³ Executive branch officers employed by DHS's Immigration and Customs Enforcement (ICE) agency decide whether to arrest and detain these individuals. Other DHS officials oversee their confinement, though often only indirectly as actual detention operations are frequently outsourced to local governments or private prison companies. Meanwhile, detainees are afforded the opportunity to challenge their detention before employees of another executive branch unit, the United States Department of Justice.

Judicial oversight of immigration detention is possible but rare. A right to challenge one's detention before a federal court by invoking the ancient writ of habeas corpus remains,⁴ but the practical hurdles of obtaining counsel and litigating while confined in a remote facility make this a thin right.⁵ Both the United States Supreme Court and Congress have provided immigration officials with impressively broad authority to detain free of judicial intervention. Challenges based on statutory claims that an individual simply is not the type of person who Congress intended to keep confined are also possible,⁶ but the process is long, the obstacles to success many, and, all the while, the individual remains detained often losing hope with every day that passes.⁷

This Essay contends that immigration officials have this expansive detention authority because the courts have effectively stripped confined migrants⁸ of procedural rights that occupy central roles in

2. JOHN F. SIMANSKI & LESLEY M. SAPP, IMMIGRATION ENFORCEMENT ACTIONS: 2012 ANNUAL REPORT 5 (2013).

3. DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 4 & n.2 (2009).

4. See *Clark v. Martinez*, 543 U.S. 371, 386–87 (2005); *Demore v. Kim*, 538 U.S. 510, 517 (2003).

5. See *infra* notes 88–89 and accompanying text.

6. See *Matter of Joseph*, 22 I&N Dec. 799, 802–03 (BIA 1999).

7. See Julie Dona, *Making Sense of “Substantially Unlikely”: An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 72 table 1 (2011).

8. Rather than use the term “immigrant,” which has a specialized definition under the Immigration and Nationality Act that does not precisely overlap with the confined individuals

the juridical construction of persons within liberal legal regimes⁹—the presumption of liberty, review of executive detention decisions by neutral arbiters, and legislative constraints on the power of executive detention. These individuals are not just migrants ineligible for the privileges of full participation in civic life. Rather, detained migrants have been moved, by law, outside the law, and rendered ineligible for basic human dignities. They are so far outside the polity that the shadow of judicial oversight does not reach their quarters. They have been reduced, as Hannah Arendt wrote about the stateless, to the position of “the scum of the earth,”¹⁰ shuffled from prison to prison with little regard to their social relationships and access to support networks, at times locked in isolated chambers for the most trivial of infractions, and commonly subjected to physical violence, sometimes at the hands of the staff charged with the inmates’ care.

This is not to say that immigration detainees are worse off than criminal detainees. In many ways the two are indistinguishable.¹¹ The point, instead, is that immigration detention operates in a legal black hole unknown even in the penal incarceration context. Instead of the judicial oversight—imperfect and justifiably criticized¹²—that characterizes most deprivations of liberty, including confinement as punishment for engaging in criminal activity, people detained because of a suspected violation of civil immigration law are almost exclusively in the hands of administrative officials. To a large extent, as this Essay reveals, the judiciary quite simply has refused to impose law’s traditional limitations on government’s imprisoning tendency. This judicial concession has rendered immigration detainees largely invisible to the outside world.

who are the subject of this Essay, I use the term “migrant” to refer to people who are in the United States but are not United States citizens. See Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* in GOVERNING IMMIGRATION THROUGH CRIME: A READER 41, 41 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013). Except when “immigrant” appears in a quotation, it is used in this Essay as defined by the Immigration and Nationality Act (INA) § 101(a)(15) (2012).

9. Following Anna Pratt, this Essay understands liberal legality as “a metanarrative that construes law in terms of ‘universal principles grounded in the dictates of reason deemed intrinsic to all human subjects.’” ANNA PRATT, SECURING BORDERS: DETENTION AND DEPORTATION IN CANADA 16 (2005).

10. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 364 (2004).

11. See SCHIRO, *supra* note 3, at 4.

12. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW (2010); PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 272 (2011).

To expand this thesis, the Essay proceeds in four parts. Part I describes a historical evolution in legal doctrine in immigration law that has left immigration detainees in a form of legal in-between state—they are inside the United States, but in substantial part beyond the reach of its constitutional guarantees of due process. The “entry fiction,” as the doctrine discussed in this section is termed, sets the stage for future doctrinal shifts recounted in Part II, the absence of the judicial oversight that characterizes imprisonment in liberal legal systems. Without ready access to judicially imposed constraints on executive officials, immigration detainees are subject to the state’s second greatest power, confinement (second only to the state’s power to execute), without any of the tools long relied upon to limit the state’s arbitrary or excessive use of that authority. Building from the doctrinal discussions of the Essay’s first two sections, Part III addresses the lack of meaningful legislative, executive, or public oversight that characterizes immigration detention. In addition to the judiciary’s reluctance to intervene, Congress has continuously expanded immigration officials’ detention power, while displaying little interest in curtailing or overseeing their use of that authority. Meanwhile, immigration officials have resisted attempts to impose internal controls on the immigration detention practice. They have, however, placed immigration prisons in remote locations where civil society actors are few and far between, thereby using the realities of prison siting to facilitate obscurity. What happens behind the prison walls is further hidden by judicial decisions that leave the private actors who oversee much of the current immigration detention estate beyond the reach of the nation’s transparency laws. Collectively, the judicial and legislative failure to reach into immigration detention centers has created spaces where anything is possible and, indeed, where the unimaginable has become routine, as Part IV reveals. Individuals detained ostensibly for violations of civil immigration law are commonly required to submit to the petty indignities of their jailers, the ready use of techniques of penal incarceration, and consistently lamentable medical care. These shortcomings are compounded by rampant sexual violence, which itself is punctuated by periodic deaths inside immigration prisons. All of this, this Essay contends, is possible because the law has turned its back on immigration detainees.

I. IN LEGAL LIMBO

Immigration law has long been exceptional. The power to regulate cross-border migration, the Supreme Court has repeatedly explained since the late nineteenth century, is firmly within the province of the political branches of the federal government. As the Court announced in an 1889 decision interpreting the aptly named Chinese Exclusion Act, Congress and the President can exercise the power to exclude anyone from the United States who they deem undesirable.¹³ Concerning the question directly at issue in that case, *Chae Chan Ping v. United States*, the Court even concluded that the political branches can exclude “foreigners of a different race” thought “to be dangerous to its peace and security.”¹⁴ Excluded individuals unhappy about the United States’ decision could raise their complaints through diplomatic channels.¹⁵ Four years later the Court announced that the federal government possesses an equally unconstrained power to deport people from the United States. In *Fong Yue Ting v. United States*, another case challenging the Chinese Exclusion Act, the Court framed the power to exclude as a parallel authority to the power to expel.¹⁶ As with exclusion, Congress may enact a statute directing executive branch officials to expel noncitizens “as it may see fit.”¹⁷ Equipped with this impressive authority, Congress has at one time or another excluded or deported migrants based on political opinion and sexual orientation in addition to race.¹⁸

Importantly, decisions to exclude and deport lie almost entirely outside the courts’ jurisdiction. Both powers, the Court explained in *Fong Yue Ting*, “may be exercised entirely through executive officers.”¹⁹ Though Congress can involve the courts if it likes, the Constitution, at most, imposes a limited obligation upon it do so—the power to determine whether an immigration officer has correctly applied immigration law, but not the power to decide the conditions that result in exclusion or deportation.²⁰ Indeed, today most removal deci-

13. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

14. *Id.*

15. *See id.*

16. *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 707, 713 (1893).

17. *Id.* at 714.

18. *See* KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 55–57, 140–47 (2004).

19. *Fong Yue Ting*, 149 U.S. at 714.

20. *See id.*; *see also* *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (“[C]ongress may, if it sees fit . . . authorize the courts to investigate and ascertain the facts on which the right to land depends. But . . . the final determination of those facts may be in trusted by congress to

sions—as determinations about exclusion and deportation are now formally known—are made by immigration judges housed within the Justice Department.²¹ Relatedly, if Congress chooses to involve the judiciary, as it has, it can largely set the terms of the courts' review.²² The legislature can substantially dictate what the courts can examine and the procedures they ought to use when doing so.²³

This division of authority is constitutive of the sovereign state.²⁴ Without the unhindered power to exclude and deport, the Supreme Court suggests, the United States would lose its ability to construct and preserve itself.²⁵ “It is an accepted maxim of international law,” the Court announced in an 1892 case involving a Japanese citizen seeking admission to the United States, “that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”²⁶ That is, regulating immigration was viewed as an important means by which the ambitious young nation could manifest its prerogative as a sovereign nation to control its own destiny, interacting on the world stage as an equal to other sovereign nations.²⁷

executive officers”); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (noting that the federal government’s decision to exclude a particular individual “is conclusive upon the judiciary”). In *INS v. St. Cyr*, the Court held that the Constitution’s Suspension Clause, which references the writ of habeas corpus, provides that “some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’” U.S. CONST. art. I, § 9; 533 U.S. 289, 301 (2001) (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)). Though the Constitution authorizes Congress to suspend the writ of habeas corpus—hence the Suspension Clause’s name—it must do so through a “clear and unambiguous statement of congressional intent,” but failed to do that in the immigration statutes before the Court. *St. Cyr*, 533 U.S. at 305.

21. INA § 240(a)(3) (2012). In some instances, federal courts may issue a removal order. INA § 238(c) (2012).

22. Congress has prohibited courts from reviewing most discretionary determinations, INA § 242(a)(2)(B) (2012), and curtailed review of decisions to remove individuals for engaging in criminal activity, INA § 242(a)(2)(C). Though Congress continues to authorize habeas actions to review questions of law, it imposes several stringent requirements, including that review occurs in the courts of appeals rather than district courts. INA §§ 242(a)(b)(2), (9).

23. See *Fong Yue Ting*, 149 U.S. at 729 (upholding a requirement, as “within the acknowledged power of every legislature to prescribe the evidence which shall be received” in court, that a Chinese citizen seeking to prove he is authorized to reside in the United States provide the testimony of a white witness).

24. See Nicholas De Genova, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 33, 51 (Nicholas De Genova & Nathalie Peutz eds., 2010).

25. See James P. Walsh, *From Border Control to Border Care: The Political and Ethical Potential of Surveillance*, in *GOVERNING IMMIGRATION THROUGH CRIME: A READER* 285, 285 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013).

26. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

27. See *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (describing the power to regulate immigration as “an incident of every independent nation”).

In short order, this extensive power to shape the nation's membership and protect the nation itself by regulating migration became the basis for a similarly broad authorization to detain.²⁸ At first, government officials charged with sorting noncitizens deemed desirable from those deemed undesirable were able to do so rather quickly. Individuals were literally confined to the ship on which they traveled to the United States while officials deliberated.²⁹ If rejected, they were turned back on the same vessel. While officials deliberated—an increasingly common occurrence as Asian immigration became disfavored—migrants needed somewhere to stay. For a while, transportation companies were expected to find accommodations for individuals undergoing review by immigration authorities.³⁰ Uninterested in devoting much money to detaining its passengers upon arrival in the United States, conditions at company operated facilities were frequently detestable.³¹ Soon this arrangement proved unworkable. With time, the large number of newcomers arriving at United States ports led immigration officials to lose the ability to make timely decisions.

Governmental detention was seen as the obvious answer. Indeed, an 1882 statute requiring inspection of incoming passengers “simply assumed [detention] to be incidental to the other powers conferred by the Act.”³² A congressional committee charged with investigating the success of the 1882 act observed, “it was very obvious to them that it was almost impossible to properly inspect the large number of persons who arrive daily during the immigrant season with the facilities afforded.”³³ To remedy this, the committee called for an “immigrant depot” to be built in New York Harbor to allow government officials the time necessary to decide who to allow into the United States.³⁴

Less than a decade later, in 1891, Congress enacted the first statute to explicitly authorize immigration detention.³⁵ Designated inspection officials were allowed to temporarily remove individuals

28. See DANIEL WILSHER, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* 8 (2012).

29. See *id.* at 11.

30. See *id.* at 19.

31. See *id.*

32. *Id.* at 11.

33. *Id.* at 12 (quoting *Select Comm. to Inquire into the Importation of Contract Laborers, Convicts, Paupers, etc.*, H.R. Rep. No. 3792 (1889)).

34. *Id.*

35. *Id.* at 11; see Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085.

arriving on ships “for examination at a designated time and place, and then and there detain them until a thorough inspection is made.”³⁶ The law also required that detainees be “properly housed, fed, and cared for” while in government custody.³⁷ Two years later Congress enacted the first mandatory detention statute in immigration law.³⁸ This act provided that immigration inspectors “shall . . . detain for special inquiry . . . every person who may not appear to him to be clearly and beyond doubt entitled to admission.”³⁹

Importantly, in addition to creating a statutory detention framework for the first time, the 1891 act also introduced into immigration law a legal fiction that remains a feature of immigration detention and exemplifies the exceptional juridical nature of immigration detention and the extraordinary nature in which immigration detention occurs. Though individuals detained by immigration officials pursuant to new powers granted by this statute were clearly within the territorial United States, the act provided that presence in the United States while detained “shall not be considered a landing.”⁴⁰ That is, detained individuals were, as a matter of law, characterized as not present in the United States.⁴¹ Instead, they were, as Daniel Wilsher put it, in “a kind of limbo—with the detention centre constituting perhaps an extra-legal space.”⁴²

This position of legal limbo soon led to the curious situation in which individuals who were physically present in the United States sought permission to “enter” the United States. Two Supreme Court decisions from the middle of the twentieth century illustrate the oddity of the entry fiction by denying constitutional due process protections to detained individuals on the basis that they were not in fact present in the United States. In 1948, Ellen Knauff, newly married to a United States citizen veteran, arrived by ship and sought entry into the United States. According to Justice Minton writing for a majority of the Supreme Court, “she was temporarily excluded from the United States and detained at Ellis Island.”⁴³ There she remained for three years while her case made its way through the courts—ulti-

36. Act of March 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085.

37. *Id.*

38. See WILSHER, *supra* note 28, at 15.

39. Act of March 3, 1893, ch. 206, § 5, 27 Stat. 569, 570.

40. Act of March 3, 1891, ch. 551, § 8, 26 Stat. 1084, 1085.

41. See WILSHER, *supra* note 28, at 13.

42. *Id.*

43. *Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950).

mately finding no relief at the Supreme Court.⁴⁴ After a strong public relations campaign led to intense political pressure, the Attorney General ordered her released from Ellis Island in 1951.⁴⁵

Similarly, Ignatz Mezei was also “temporarily excluded” at Ellis Island in 1950, while he unsuccessfully petitioned the courts to allow him to venture freely throughout the United States.⁴⁶ In denying Mezei’s plea for legally recognized entry, Justice Clark, writing for the majority of the Supreme Court, explained that Mezei’s “temporary harborage” on Ellis Island was “an act of legislative grace” and nothing more.⁴⁷ In the eyes of the law, the Court continued, “he is treated as if stopped at the border.”⁴⁸ Justice Jackson, recently returned from his service at the Nuremberg tribunal, responded with an impassioned dissent. The majority’s conclusion that Mezei had not been deprived of his liberty “overworks legal fiction,” he explained.⁴⁹ Having repeatedly failed to obtain entry into numerous other countries, the majority’s conclusion that Mezei’s liberty was unrestricted, in Jackson’s view, was wrong “by the commonest of common sense.”⁵⁰ Mezei’s time on Ellis Island, he exclaimed, “might mean freedom, if only he were an amphibian!”⁵¹ Despite Jackson’s colorful language, Mezei remained on Ellis Island until 1954 when the Attorney General paroled him into the United States.⁵²

In both instances, the Court relied on the entry fiction to deny individuals, who were very clearly physically present in the United States in the literal sense, the due process rights that otherwise apply to people within the United States.⁵³ *Knauff* and *Mezei*, a majority of

44. See Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955 (1995).

45. *Id.* at 964.

46. *Shaughessy v. Mezei*, 345 U.S. 206, 208 (1953).

47. *Id.* at 215.

48. *Id.*

49. *Id.* at 220 (Jackson, J., dissenting).

50. *Id.*

51. *Id.*

52. Weisselberg, *supra* note 44, at 983–84. After Congress codified the parole concept in 1952, the Supreme Court described it as “simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien’s status, and to hold that petitioner’s parole placed her legally ‘within the United States’ is inconsistent with the congressional mandate, the administrative concept of parole and the decisions, of this Court.” *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958). Immigration officials continue to possess parole authority, but it is explicitly treated as not an “admission,” the requirement that has replaced “entry.” INA §§ 101(a)(13)(B), 212(d)(5)(A) (2012).

53. See *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 101 (1903). Congress replaced the “entry” requirement with an “admission” requirement in 1996. RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 2:29 (2013).

the Court held in each case, had not crossed the imaginary threshold that triggers constitutional norms despite having crossed into the territorial United States. Instead, they were subject to the government's whims to decide as it wishes whether to allow them to enter or not: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," the Court announced in 1950 and has reiterated periodically since.⁵⁴ This conclusion led Justice Jackson, in tellingly hyperbolic language, to ask whether the government could "effectuate [Mezei's] exclusion to eject him bodily into the sea or to set him adrift in a rowboat."⁵⁵

Whether or not the government could do as Justice Jackson feared, these cases evidence that the government's power vis-à-vis noncitizens deemed by law to be outside the United States is extraordinary. Once positioned as legally outside the United States, they are simultaneously positioned outside the reach of constitutional features intended to curtail the government's power to deprive people of their liberty without being held to account—namely, the Due Process Clause.⁵⁶ This represented a significant turning point in the evolution of liberal legal systems. Except during times of war, a core tenet of liberal legalism for generations had been that everyone enjoyed a presumption of liberty.⁵⁷ As Winston Churchill famously wrote:

The power of the executive to cast a man into prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers for an indefinite period, is in the highest degree odious It is only when extreme danger to the State can be pleaded that this power may be temporarily assumed by the Executive, and even so its working must be interpreted with the utmost vigilance by a Free Parliament.⁵⁸

That is, people were assured that their liberty could be denied only after executive branch officials convinced a neutral arbiter that there was a legitimate legal basis to do so.⁵⁹ In short, the presumption

54. *Mezei*, 345 U.S. at 212 (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

55. *Id.* at 226 (Jackson, J., dissenting).

56. Weisselberg, *supra* note 44, at 951–52.

57. See WILSHER, *supra* note 28, at 57.

58. WINSTON S. CHURCHILL, *CLOSING THE RING: THE SECOND WORLD WAR, VOLUME 5*, at 679 (2012) (1951).

59. Indeed, the phrase "due process" appears to have originated in a fourteenth century announcement by Edward III that "[n]o man, of whatever estate or condition he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law." Stephen F. Williams, "Liberty" in *the Due*

of liberty assures people subject to the government's power that they will be not "deprived of . . . liberty . . . without due process of law."⁶⁰ As the Supreme Court noted, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."⁶¹ It was, of course, always possible to deny a person of liberty, but to do so required adherence to ordinary principles of due process, including, at a minimum, the opportunity to be heard by an ostensibly neutral decision-maker.

This presumption was not based in citizenship status, but in every individual's innate human worth.⁶² Indeed, Edward III's fourteenth century reference to "due process of law" referenced any "man, of whatever estate or condition he be."⁶³ Likewise, the Fifth Amendment to the U.S. Constitution speaks of "persons" entitled to due process and the Supreme Court has emphatically explained that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."⁶⁴ The entry fiction, however, effectively strips some migrants who are physically inside the territorial United States from the personhood that triggers the due process guarantee.⁶⁵ Despite the fact that their detention was plainly visible to anyone who viewed their physical presence without the skewed perception of the entry fiction, noncitizens such as Knauff and Mezei were not entitled, as a matter of law, to their freedom while in the United States. As the Supreme Court wrote of Mezei almost a full half-century after his release: "His presence on Ellis Island did not count as entry into the United States. Hence, he was 'treated,' for constitutional purposes, 'as if stopped at the border.' And that made all the difference."⁶⁶

Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions, 53 U. COLO. L. REV. 117, 120 (1981).

60. U.S. CONST. amend. V; Weisselberg, *supra* note 44, at 1030–31.

61. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)); see *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

62. See 1 ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 4 (1858) (describing the "right of personal liberty" as "inhering in man as an independent sentient being").

63. *Williams*, *supra* note 59, at 120.

64. *Zadvydas*, 533 U.S. at 693.

65. See *id.*

66. *Id.*

The experiences of Knauff, Mezei, and others subject to the entry fiction demonstrate that immigration detention's roots grew in space conceived of as beyond the reach of legal oversight. Because people deemed outside the United States are legally positioned as outside the national territory, they are beyond the reach of the Due Process Clause and its presumption of liberty.⁶⁷ Lacking this presumption, they can be detained at the mercy of the executive without any of the procedural protections normally attendant to confinement. They are forced, as Nicholas De Genova writes of people cast as “foreigners” rather than “citizens,” to experience “the arbitrariness of state violence.”⁶⁸

II. CREATING NONPERSONS

The departure from the presumption in favor of liberty that the entry fiction allowed did not remain limited to the detention of noncitizens seeking entry. In the late twentieth and early twenty-first centuries this departure from tradition would become characteristic of the immigration detention practice. Executive branch officials employed first by the former Immigration and Naturalization Service (INS) and now by DHS have been granted permission to confine increasingly broad swaths of the noncitizen population. The current version of the Immigration and Nationality Act (INA) authorizes immigration officials to arrest and detain any noncitizen “pending a decision on whether the alien is to be removed from the United States” and provides that officials “shall” detain any applicant for admission “if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted.”⁶⁹ Under many circumstances, Congress has deprived immigration officials of discretion; instead, it has mandated that they take into custody noncitizens who have engaged in specified conduct, usually involving criminal activity.⁷⁰ Once an immigration officer decides that a particular person is subjected to the INA's mandatory detention provision,

67. *See id.*

68. De Genova, *supra* note 24, at 51.

69. INA § 236(a), § 235(b)(2)(A) (2012). A group of ICE officers brought suit against DHS claiming that § 235(b)(2)(A)'s use of the word “shall” means that they lack the authority to not detain any applicant for admission “not clearly and beyond a doubt entitled to be admitted.” *See Crane v. Napolitano*, 2013 WL 1744422, at *8, No. 3:12-cv-03247-O (N.D. Tex. Apr. 23, 2013). The district court expressed a great deal of sympathy toward this argument, *see id.* at *9, but ultimately dismissed the officers' claim on jurisdictional grounds. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, slip op. at 2 (N.D. Tex. July 31, 2013).

70. INA § 236(c).

the burden of securing release is placed on the detainee.⁷¹ Rather than require immigration officials to justify the administrative decision to detain, immigration law requires a person accused of being removable for almost any crime-based reason to show that DHS is “substantially unlikely” to be correct and, as in all immigration proceedings, to do so without the right to appointed counsel.⁷² Importantly, the INA also provides that courts are prohibited from reviewing discretionary decisions about whether to detain a particular noncitizen.⁷³

As with the early entry fiction cases, the Supreme Court took a hands-off approach to the modern detention practice as well. In *Demore v. Kim*, a case challenging the constitutionality of the current mandatory detention scheme on due process grounds, the Court upheld confinement pending removal proceedings based on categorical assessments—that is, because a particular migrant has been convicted of a broad set of crimes.⁷⁴ Immigration judges are not allowed to query whether a particular person is unlikely to appear for a court date or poses a danger to the public if released. Individualized assessments of absconding or dangerousness, the Court explained, were not necessary to comport to constitutional requirements because “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”⁷⁵

Outside the immigration context, executive officials are not afforded such expansive power even regarding individuals suspected or convicted of engaging in criminal activity. Fourth Amendment protections apply upon arrest⁷⁶ and to detentions that do not rise to the level of a deprivation of liberty necessary to constitute an arrest.⁷⁷ Tellingly, it is the government’s burden to show that such seizures were justified.⁷⁸ The government is required to show that a deprivation of liberty—even one that is too minor to constitute an arrest—is necessary because, as the Court reiterated in the famous *Terry v. Ohio* decision:

71. See INA § 236(c); 8 C.F.R. § 1003.19(h)(2)(ii) (2014).

72. Matter of Joseph, 22 I&N Dec. 799, 806 (BIA 1999); see INA § 292 (2012).

73. INA § 236(e).

74. 538 U.S. 510, 530–31 (2003).

75. *Id.* at 521.

76. See *Florida v. Royer*, 460 U.S. 491, 501–02 (1983).

77. See *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

78. See *Royer*, 460 U.S. at 500.

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.⁷⁹

Moreover, the lack of individualized consideration for the immigration detainee's particular circumstances stands in stark contrast to the usual pretrial confinement process used in federal courts. In the criminal context, the court must "hold a hearing to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and the community."⁸⁰ This requirement, the Supreme Court noted, assures that the government proves that the arrestee "already indicted or held to answer for a serious crime, presents a demonstrable danger to the community."⁸¹ Unlike the immigration mandatory detention process upheld in *Demore*, it is not enough in the federal pretrial detention process for the government to merely lodge an accusation that a person has violated the law. Instead, a suspect will be deprived of her liberty only if the government also convinces a judicial officer that there is something about that individual that makes her likely to flee or endanger others.

In contrast, in *Zadvydas v. Davis*, the Court refused to allow indefinite detention after being ordered removed but allowed detention for up to six months without judicial intervention.⁸² Indefinite detention, the Court explained, is impermissible in part because "the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous."⁸³ Detention under these conditions for six months, however, is presumptively reasonable.⁸⁴ The Court seemed to invite detained individuals to pursue writs of habeas corpus in the federal courts after that six-month window expired, but only if they can show "that there is no significant likelihood of removal in the reasonably foreseeable future."⁸⁵ A migrant who meets this burden is entitled to

79. 392 U.S. at 9 (1968) (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

80. 18 U.S.C. § 3142(f) (2012).

81. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

82. 533 U.S. 678, 701 (2001).

83. *Id.* at 692.

84. *See id.* at 701.

85. *Id.*

a bond hearing before an immigration judge.⁸⁶ Any release that occurs, the *Zadvydas* Court added, “may and should be conditioned on any of the various forms of supervised release that are appropriate in the circumstances.”⁸⁷

Though *Zadvydas* represents an important glimmer of judicial oversight of immigration detention, its impact is rather meager given that detainees are not afforded appointed counsel and are frequently detained in remote locations that make securing counsel quite difficult.⁸⁸ Moreover, as with all habeas actions, the burden of pursuing one’s claim to liberty is on the detained individual.⁸⁹ Instead of presuming that an individual is entitled to liberty, *Zadvydas* does the opposite—it presumes that a person is rightfully detained and merely provides a path through which to challenge that detention. Without question, this presumption is significant for the detainees.

Where *Zadvydas* departs from the legal norm, however, is that it creates a time period during which judicial review of the executive’s decision to detain is not available to challenge the fact of confinement. Specifically, the Court announced that detention pending removal was permissible for up to six months by virtue of the fact that an immigration judge had ordered removal for any of a large number of reasons, “including tourist visa violations,” as the Court commented.⁹⁰ No judicial body, the Court added, would question the legality of detention during this six-month period. Implied within this framework is a presumption that confinement following entry of an order of removal that lasts up to six months is not sufficiently significant to concern the courts. Migrants detained six months or less after being ordered removed are simply prohibited from bringing their jailers before a judicial tribunal and demanding that they defend the lawfulness of their confinement.

86. The Ninth Circuit recently upheld a preliminary injunction automatically granting bond hearings to all detainees held longer than six months. *See generally* *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013). Only time will tell whether this position gains moment in other circuits.

87. *See id.* at 700.

88. *See* INA § 292 (2012); César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 *BERKELEY LA RAZA L.J.* 17, 20–21 (2011). To be sure, some detained immigrants are able to muster the resources to successfully utilize the habeas power to contest their detention. *See, e.g.,* *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Reid v. Donelan*, 2014 WL 105026, No. 13-CV-30125-MAP (D. Mass. Jan. 9, 2014).

89. *See* 8 C.F.R. § 241.4(d)(1) (2014).

90. *Zadvydas v. Davis*, 533 U.S. 678, 691.

Combined, the Court's decisions in *Demore* and *Zadvydas* subject hundreds of thousands of migrants annually to detention for potentially long periods of time without affording them the judicial review that is characteristic of liberalism. Indeed, any claims to possess a presumptive right to liberty fall on deaf ears within the judiciary. As persons present in violation of immigration law, they "are deemed to be inherently illegitimate."⁹¹ Lacking a legitimate place in the polity, their complaints go unheard.

Treating immigration detainees like criminal detainees, then, would actually represent a step toward greater procedural protections serving as a buffer between the individual and the state's exercise of its power to confine. Hannah Arendt masterfully captured the irony of improving one's status vis-à-vis the law by being suspected of or actually engaging in criminal activity in *The Origins of Totalitarianism*:

The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights. For then a criminal offense becomes the best opportunity to regain some kind of human equality, even if it is as a recognized exception to the norm. The one important fact is that law provides for this exception. As a criminal even a stateless person will not be treated worse than another criminal, that is, he will be treated like everybody else. Only as an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no lawyers and no appeals. The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizen because of a little theft. Even if he is penniless he can now get a lawyer, complain about his jailers, and he will be listened to respectfully. He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person.⁹²

In effect, the refugees who concerned Arendt were ascribed a legal status less than that of people suspected of flouting the social mo-

91. See WILSHER, *supra* note 28, at 123–24.

92. ARENDT, *supra* note 10, at 364.

res codified in criminal law. Accordingly, these stateless individuals were deemed unworthy of the legal process and social visibility—that is, the legal recognition—of suspected criminals. And because they were not worthy of being recognized by law, they were not worthy of being protected by the law. Instead, they were rendered invisible to the law and, as such, they were always at risk of the arbitrary assertions of power “against which there are no lawyers and no appeals.”⁹³

Immigration law has likewise placed detainees at the peril of executive power, far beyond the origins of the entry fiction. Whether immigration detainees are “member[s] of the ‘public’, and thus entitled to reap the benefits of collective security,” as Leanne Weber asked of immigration detainees in Australia, lies at the heart of their legal positioning.⁹⁴ Either they are deemed worthy of the legal protections that form a hallmark of the public’s “sacred” right to be “free from all restraint or interference of others” or they are not.⁹⁵ Part III suggests that the lack of meaningful oversight of immigration detention evidences that they are not deemed worthy of the legal recognition that ostensibly inheres in personhood.

III. AUTHORITY WITHOUT OVERSIGHT

Initially developed outside the reach of constitutionally derived procedural norms, immigration detention remains characterized by the substantial power granted to detention authorities. Legal doctrines and practices that have sprouted since the days when Knauff and Mezei were detained have failed to bring immigration detention within the reach of traditional oversight mechanisms, leaving immigration detention centers to operate largely outside the field of vision of courts, Congress, or the public. Through a series of longstanding judicial practices, courts have afforded detention officials impressive flexibility in managing the people under their control. Congress, meanwhile, has largely refused to impose binding guidelines on detention center operations, a type of confinement that is especially prominent in the immigration context. In addition, immigration officials have failed to adequately self-regulate their activities. All the while, the public has effectively been excluded by the geographic impediments that characterize the security-focused immigration detention

93. *Id.*

94. See LEANNE WEBER, *POLICING NON-CITIZENS* xii (2013).

95. See *Terry v. Ohio*, 392 U.S. 1, 9 (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

system as well as the judicial obstacles that characterize government transparency law.

A. Judicially Obscured Private Prisons

Aside from the judiciary's hands-off approach regarding any review of who, precisely, should be detained pending a removal decision or after a removal order,⁹⁶ the courts have also limited external oversight of prison conditions in a variety of ways. First, in *Minneci v. Pollard*, the Supreme Court considered an Eighth Amendment claim for cruel and unusual punishment brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*⁹⁷ against a privately operated prison.⁹⁸ The Court explained that in most instances involving physical or emotional harm suffered while imprisoned—the kind of harms that typically form the basis of Eighth Amendment claims—state tort law provides adequate remedies, and thus no private right of action need be implied under the Constitution.⁹⁹

Though *Minneci* was not an immigration detention case, its implications for this type of confinement are significant. Stretching to the middle of the 1980s, a booming private immigration detention industry has developed alongside government-operated prisons.¹⁰⁰ While only about 8% of all prisoners in the United States and 17.8% of federal inmates are held in privately owned or operated facilities,¹⁰¹ private prisons oversee between forty and fifty percent of the immigration prison population.¹⁰² Leading private prison companies Corrections Corporation of America (CCA) and GEO Group depend

96. See *supra* Part II.

97. 403 U.S. 388 (1971).

98. See *Minneci v. Pollard*, 132 S. Ct. 617, 626 (2012). In *Bivens*, the Court held that the Fourth Amendment implies a private right of action for money damages for individuals who suffered a Fourth Amendment violation. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396 (1971).

99. *Minneci*, 132 S. Ct. at 626.

100. See PILAR MARRERO, *KILLING THE AMERICAN DREAM: HOW ANTI-IMMIGRATION EXTREMISTS ARE DESTROYING THE NATION* 118–28 (2012).

101. E. ANN CARSON & WILLIAM J. SABOL, *PRISONERS IN 2011*, app. tbl. 15, at 32 (Dec. 2012).

102. CODY MASON, *DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION* 5 (2012) (Forty-three percent of all immigrant detainees are being held privately in 2012, representing a slight decrease compared to 48 percent in 2009 and 2010.) According to the advocacy organization the Detention Watch Network, 15,942 individuals were held each night in private immigration prisons in 2009. *The Influence of the Private Prison Industry in Immigration Detention*, DET. WATCH NETWORK, <http://www.detentionwatchnetwork.org/privateprisons> (last visited Jan. 23, 2014). That year, reports DHS, the average daily population in immigration prisons nationwide was 32,098. *Id.*

on DHS contracts for significant revenue streams, and have developed business models designed to accommodate DHS's growing incarceration needs,¹⁰³ while simultaneously devoting substantial resources to lobbying state and federal government officials for policies that help develop their business goals.¹⁰⁴ To be sure, both companies are involved in penal confinement as well and appear not to favor civil or penal detention. As CCA put it in a 2004 Annual Report to shareholders, "Further [revenue] growth is expected to come from increased focus and resources by the Department of Homeland Security dedicated to illegal immigration, stricter sentencing guidelines, longer prison sentences and prison terms for juvenile offenders."¹⁰⁵ Almost a decade later, GEO Group issued a similar statement that reflected a shift in political priorities. The company stated that "[i]mmigration reform laws which are currently a focus for legislators and politicians at the federal, state and local level also could materially adversely impact us."¹⁰⁶ It added that "amending criminal laws and regulations to reduce prisoner headcount by reducing or eliminating mandatory minimum sentencing guidelines, especially those relating to non-violent drug possession or technical parole violations" "could have adverse effects on our industry."¹⁰⁷

Without question, the individuals held in privately owned or operated immigration detention facilities are deeply invested in the ability to remedy abuse through the courts. For them, in particular, *Minneeci's* explanation that state tort law provides an adequate remedy rings hollow. States where several of the largest privately owned or operated immigration prisons are located have imposed significant hurdles to tort recovery. Arizona, for example, bars "[a] person who is present in this state in violation of federal immigration law related to improper entry by an alien" from receiving punitive damages.¹⁰⁸ For its part, Texas takes a less extreme approach but one that, none-

103. See MARRERO, *supra* note 100, at 124–25; see also GEO Group, Registration Statement (Form S-4) 32 (Nov. 7, 2013) (explaining that 17.3% of its revenue comes from contracts with ICE); CORRECTIONS CORPORATION OF AMERICA, SUPPLEMENTAL FINANCIAL INFORMATION FOR THE QUARTER ENDED JUNE 30, 2013, at 12 (Aug. 7, 2013) (noting that 12.46% of its revenue during the first half of the 2013 calendar year came from ICE).

104. See César Cuauhtémoc García Hernández, *Immigrant Outsider, Alien Invader: Immigration Policing Today*, 48 CAL. W. L. REV. 231, 236–37 nn.27–33 and accompanying text (2012).

105. Geiza Vargas-Vargas, *White Investment in Black Bondage*, 27 W. NEW ENG. L. REV. 41, 41 (2005) (citing Corrs. Corp. of Am., Annual Report (Form 10-K) 16 (Mar. 12, 2004)).

106. GEO Group, Registration Statement (Form S-4), at 31 (Nov. 7, 2013).

107. *Id.* at 6.

108. ARIZ. REV. STAT. ANN § 12-512 (West 2014).

theless, limits tort law's utility to potential tort claimants, including migrants. Texas caps "exemplary damages" at the greater of two times the economic damages plus up to \$750,000, or \$200,000.¹⁰⁹ Importantly, exemplary damages may be awarded only if the jury unanimously agrees about the defendant's liability and the amount of exemplary damages.¹¹⁰

By limiting potential damage awards, both states disincentivize private litigation. That is, they subtly discourage parties and attorneys from bringing tort law claims no matter the egregiousness of the conduct. Importantly, by discouraging litigation, they also limit oversight by allowing private prison operators to avoid the disclosure that frequently comes from adversarial proceedings at the same time that they limit the consequences of engaging in tortious conduct. To be clear, neither Arizona nor Texas limits tort recovery for people held in private immigration detention centers, specifically. Their respective limitations on tort recovery, however, have an outsized presence in the context of immigration detention because so many more of these facilities are privately owned or operated than is true of incarceration generally.¹¹¹

B. Congressional Reluctance to Regulate

Meanwhile, Congress has shown itself unwilling to impose meaningful oversight on immigration detention. In multiple provisions, the INA authorizes the federal government to detain certain migrants.¹¹² Nowhere, however, does it regulate the conditions under which that detention occurs. Most other federal statutes also fail to discuss conditions of immigration confinement. The most significant exception to this norm is a relatively recent interpretation of the Prison Rape Elimination Act (PREA), a statute enacted in 2003.¹¹³ Initially, the federal government viewed the PREA as inapplicable to immigration detention. However, in 2012, after much criticism from migrants' rights advocates, the Obama Administration announced that it would interpret

109. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (West 2013). Exemplary damages are statutorily defined as "any damages awarded as a penalty or by way of punishment but not for compensatory purposes." CIV. PRAC. & REM. § 41.001(5).

110. CIV. PRAC. & REM. § 41.003(d).

111. See *supra* notes 100–02 and accompanying text.

112. See INA §§ 232(a), 236(a), 236(c), 236A(a), 241(g) (2012).

113. Prison Rape Elimination Act, 42 U.S.C. § 15601–15609 (2012).

the PREA as applying to immigration detention centers.¹¹⁴ Despite that, sexual abuse remains rampant in immigration detention centers and DHS efforts to curtail it have proven woefully inadequate.¹¹⁵ Indeed, the U.S. Government Accountability Office (GAO) recently found that up to forty percent of sexual abuse and assault allegations were not reported to ICE headquarters as required by agency procedures.¹¹⁶

C. Self-Regulation Failure

At the same time, DHS has proven itself incapable of regulating the officials who actually operate immigration detention facilities. Despite having issued various iterations of detention standards,¹¹⁷ prison officials have consistently failed to meet the Department's standards. For many years, for example, DHS and its predecessor, INS, failed to notify attorneys of a detained client's transfer, as required by agency protocol.¹¹⁸ Consequently, attorneys and family members often lost track of where their clients and loved ones were located, frequently requiring them to devote considerable effort to learning a detainee's new whereabouts. Similarly, the GAO found that immigration detention facilities regularly failed to meet ICE's standards for providing detainees with access to telephones through which they can contact legal representatives, consular officials, and a complaint hotline operated by the DHS Office of Inspector General.¹¹⁹ As the GAO noted, in addition to allowing detainees to retain counsel if they so choose, "[t]he pro bono telephone system is also to ensure that detainees can voice complaints regarding their conditions of confine-

114. 77 Fed. Reg. 75300-01, 75303 (Dec. 19, 2012) (citing 42 U.S.C. § 15609(7) (2012)); see also Elise Foley, *Prison Rape Elimination Act to Expand to Immigration Detention Centers*, HUFFINGTON POST (May 17, 2012) http://www.huffingtonpost.com/2012/05/17/prison-rape-elimination-act-immigrant-detention_n_1524470.html.

115. See *infra* notes 156–65 and accompanying text.

116. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 19 (2013).

117. See U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, 2011 OPERATIONS MANUAL: ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (PDNDS), available at <http://www.ice.gov/detention-standards/2011/>; see also U.S. DEP'T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT, 2000 DETENTION OPERATIONS MANUAL, available at <http://www.ice.gov/detention-standards/2000/>.

118. See *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 566 (9th Cir. 1990); DEP'T OF HOMELAND SECURITY, IMMIGRATION AND CUSTOM ENFORCEMENT'S TRACKING AND TRANSFER OF DETAINEES 1, at 8 (2009).

119. U.S. GOV'T ACCOUNTABILITY OFFICE, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE 10 (2007).

ment to organizations with responsibility for investigating or monitoring detainee treatment.”¹²⁰

D. Obstacles to Public Oversight

The consistent violation of DHS detention standards that facilitate detainees connecting with resources outside the prison walls means that outside oversight is regularly subverted. The less that detainees are able to communicate what is happening inside the immigration detention facility to advocates outside, the less they are able to catalyze the power of public scrutiny. Importantly, DHS has never terminated a contract for failure to comply with the guidelines.¹²¹ This is not insignificant. Given that private prison corporations receive significant revenue from immigration detention contracts, terminating a contract would represent anything from a serious impediment to a death knell for their financial viability. In contrast, ICE’s failure to use the power of its contracting budget to demand compliance with its standards suggests that, from its perspective, the standards are not all that important. Indeed, DHS’s willingness to continue paying for immigration detention services even when they violate standards designed to promote external awareness of conditions of confinement suggests that DHS does not place a high value on this type of public oversight.

The public has also effectively been shut out of overseeing detention conditions by policy decisions about prison siting. Immigration officials have typically located large immigration detention centers in isolated parts of the country. The largest facilities, as measured by detainee populations, are situated in rural parts of Arizona, Georgia, Louisiana, and Texas.¹²² One facility, the South Texas Detention Complex (“STDC”), for example, is located in Frio County, home to approximately 17,702 people, and about one hour’s drive from the nearest metropolitan area, San Antonio.¹²³ In May 2010, ICE held, on average, 1,662 people at the STDC each night, making this the

120. *Id.* at 11.

121. *Id.* at 9. In a sign that this trend might change, the appropriations bill signed by President Obama on January 17, 2014 prohibits DHS from using any allocated funds “to continue any contract for the provision of detention services if the two most recent overall performance evaluations received by the contracted facility are less than ‘adequate.’” Consolidated Appropriations Act, Pub. L. No. 113-76 (2014).

122. See García Hernández, *supra* note 88, at 34–36.

123. U.S. Census Bureau, *Frio County, Texas*, <http://quickfacts.census.gov/qfd/states/48/48163.html> (last visited Jan. 19, 2014).

largest population at any facility it reported that month.¹²⁴ Not surprisingly, access to legal representation is difficult, if not impossible, in such locations.¹²⁵

In addition, public oversight is also constrained by limitations incorporated into the principal government transparency statute, the Freedom of Information Act (FOIA).¹²⁶ That statute requires disclosure of all “agency records” except those specifically enumerated in the statute.¹²⁷ Documents are “agency records” only if they were created or obtained by an agency subject to FOIA.¹²⁸ According to the Court of Appeals for the District of Columbia Circuit—which disposes of thirty-eight percent of FOIA cases and thus has an outsized impact on the development of FOIA law nationwide¹²⁹—documents created and maintained by a private entity are not “agency records” subject to FOIA’s disclosure requirements.¹³⁰ Applied to the immigration detention context that relies extraordinarily heavily on private prison operators,¹³¹ the D.C. Circuit’s conclusion suggests that documents created and maintained by private prison corporations that contract with ICE to provide immigration detention services are not “agency records,” so long as they have not been handed over to DHS. As a result, prison documents related to confinement conditions can be kept from the public simply by not handing them over to DHS officials.

Even when documents about immigration detention centers are considered “agency records” because they were created or obtained by a federal agency, courts have proven themselves quite reluctant to require disclosure. Despite the statute’s explicit instruction that courts review such decisions *de novo*,¹³² judicial review of agency decisions to withhold information requested under FOIA has been “less than vigorous.”¹³³ According to an analysis done by Paul Verkuil, district courts affirm agency decisions about FOIA in a full ninety per-

124. U.S. DEP’T OF HOMELAND SEC., IMMIGRATION & CUSTOMS ENFORCEMENT AGENCY, ICE DETAINEE POPULATION FOR THE MONTH OF MAY 2010 (2010), available at <http://www.ice.gov/doclib/foia/dfs/detentionfacilitystatsmay2010.pdf>.

125. See García Hernández, *supra* note 88, at 36.

126. See Margaret B. Kwoka, *The Freedom of Information Act Trial*, 61 AM. U. L. REV. 217, 218–19 (2011).

127. *Id.* at 222–23.

128. *Forsham v. Harris*, 445 U.S. 169, 182 (1980).

129. See Kwoka, *supra* note 126, at 261.

130. *Wolfe v. Dep’t of Health and Human Servs.*, 711 F.2d 1077, 1082 (D.C. Cir. 1983).

131. See *supra* notes 100–02 and accompanying text.

132. 5 U.S.C. § 552(a)(4)(B) (2012).

133. Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 187 (2013).

cent of cases—a far cry from the sixty to seventy percent agency win rate across standards of review.¹³⁴ As Margaret B. Kwoka put it in her study of FOIA litigation, “contrary to Congress’s purpose, the judiciary has created a de facto system of deference in its judicial review of FOIA cases, while continuing to pay lip service to the de novo standard of review articulated in the statute.”¹³⁵ The end result is that FOIA, too, fails to provide the public with a path through which meaningful oversight can result. In affirming agency decisions to withhold government records, the courts have made it more difficult for interested members of the public to learn about what happens inside immigration detention centers, in effect “deferring to secrecy,” as Kwoka characterized the judiciary’s treatment of FOIA litigation.¹³⁶

Without meaningful oversight by the courts, Congress, departmental superiors, or the public, immigration detention center personnel operate in an accountability-free zone. Though there are undeniably many morally sound officials working in immigration prisons, the immigration detention regime is large enough that scofflaws exist and, as Part IV chronicles, systemic failures of accountability have repeatedly reared their heads in the ugliest of ways.

IV. WHEN NO ONE IS WATCHING

The lack of legal accountability that results from the judiciary’s reluctance to become entangled in immigration detention decisions, Congress’s hesitation to regulate the conditions of immigration confinement, immigration officials’ failure to abide by their own standards, and the public’s inability to monitor what happens inside immigration prisons creates the perfect storm for abuse. Not surprisingly, immigration detention has been plagued by the gamut of physical and emotional abuse: detainees are denied basic mobility within the prison walls, visits from friends and advocates are closely monitored and highly controlled, solitary confinement is sometimes meted out for trivial infractions, medical care is frequently inadequate, sexual violence is rampant, and deaths are not uncommon.

Despite ICE’s insistence that it does not maintain prisons but rather civil detention centers, immigration confinement facilities are secured environments that resemble prisons and frequently operate as

134. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 719 (2002); see David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 169 (2010).

135. Kwoka, *supra* note 133, at 187–88.

136. See generally *id.*

such. Within the facility walls, inmates' activities are highly controlled. According to a report by the advocacy organization Human Rights Watch, detainees are commonly located within a single large room for up to twenty-three hours a day.¹³⁷ Given this, access to outdoor space is rare in many institutions.¹³⁸ Meanwhile, contact with outside visitors is equally constrained. Oftentimes family visits occur through plexiglas barriers or videoconferencing; both prevent person-to-person contact.¹³⁹ As one detainee explained his experience in an Arizona immigration prison, "I didn't see the sun for 2 years. 'Outside' was a room with walls but no roof. You stay in one room the whole time, 24 hours a day. You eat there, sleep there, use the bathroom there."¹⁴⁰ This assessment is consistent with a report produced by the former director of ICE's Office of Detention Policy and Planning, Dora Schriro. According to Schriro, "[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, constructions, staffing plans, and population management strategies are based largely upon the principles of command and control."¹⁴¹ Immigration detainees are effectively treated as criminal prisoners only without the procedural norms that accompany criminal prosecution.

In implementing their "command and control" strategy, immigration officials regularly turn to a tactic usually associated with the most dangerous of criminal detainees: segregation. According to news reports, approximately 300 immigration detainees are held in solitary confinement each day, some for more than seventy-five days.¹⁴² Though some are undoubtedly placed there due to legitimate security concerns, others are segregated for the most trivial of reasons: not speaking English when able, watching Spanish-language television programming, or playing cards in the prison dayroom instead of at-

137. See HUMAN RIGHTS FIRST, *JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW* i (2011).

138. See *id.*

139. See *id.*; see also Christina Fiahlo, *A Model Immigration Detention Facility for LGBTI?*, 42 *FORCED MIGRATION REV.* 50, 51 (2013) (describing visits to immigration detainees at the Santa Ana City Jail, which includes a dedicated unit for lesbian, gay, transgender, and intersex detainees).

140. *CTRS. FOR VICTIMS OF TORTURE ET AL., TORTURED AND DETAINED: SURVIVOR STORIES OF U.S. IMMIGRATION DETENTION* 10 (2013).

141. SCHIRO, *supra* note 3, at 4.

142. Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1.

tending church services.¹⁴³ Particularly vulnerable populations such as lesbian, gay, bisexual, transgender, or intersex (“LGBTI”) individuals are often subjected to solitary confinement for no other reason than their identity. A county jail in Nevada that houses immigration detainees for ICE explicitly states that individuals with “overt homosexual tendencies” are to be segregated.¹⁴⁴ Similarly, officials at the Cobb County Jail in Georgia take the position that “gender challenged” individuals should be considered for segregation.¹⁴⁵ Moreover, in response to complaints of abuse by LGBTI detainees, ICE opened a 64-bed protective custody unit for gay and transgender individuals.¹⁴⁶ Ironically, some individuals detained in this unit claim that prison officials have threatened to return them to the general population, presumably if they failed to comply with prison rules.¹⁴⁷ In an effort to standardize the use of segregation across immigration detention facilities, ICE recently announced a policy that views “administrative segregation due to a special vulnerability” as a last resort used only “when no other viable housing options exist.”¹⁴⁸ Disciplinary segregation, however, may continue to be used more readily, though only “following a hearing in which the detainee is determined to have committed serious misconduct in violation of a facility rule.”¹⁴⁹ The policy does not explain what constitutes “serious misconduct,” thus it is impossible to know whether flagrant violations of petty rules, such as those prohibiting watching Spanish-language television programs, will suffice to justify segregation.

In addition, immigration detention centers have provided notoriously poor medical care.¹⁵⁰ In 2006 the DHS Inspector General found frequent instances of failure to comply with departmental policies regarding medical care at four of five facilities reviewed, including some instances where staff failed to record required fifteen minute security

143. See NAT’L IMMIGRANT JUSTICE CTR., *INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION* 17–18 (2012).

144. *Id.* at 19.

145. *Id.*

146. Fialho, *supra* note 139, at 50.

147. NAT’L IMMIGRANT JUSTICE CTR., *supra* note 143, at 15.

148. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT AGENCY, *REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES* 1, 1 (2013).

149. *Id.* at 2.

150. See Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47 (2010).

checks for individuals on suicide watch.¹⁵¹ Three years later, Schriro informed Congress that “there is reason for concern” about medical care that immigration detainees receive.¹⁵² More recently, in 2011, the agency’s Inspector General reported that ICE’s Health Services Corps, the ICE unit responsible for delivering or arranging for detainees’ medical care, “is not fully aware of all detainees with mental health conditions, or the level of care being provided” because it has outsourced mental health care at most facilities.¹⁵³ In fact, the Inspector General concluded that ICE has sufficient information about mental health care provided at only 18 of approximately 250 detention centers; these 18 institutions house roughly half of the immigration detention population.¹⁵⁴ At those facilities where the Health Services Corps has not outsourced mental health care delivery (thus providing ICE with full information on the quality of care provided), the Inspector General found that many facilities were vastly understaffed, and “were not always well-equipped to support the needs of detainees with mental illness or located in areas with access to community mental health care facilities.”¹⁵⁵

At the same time, sexual violence inside immigration detention centers has become a recurring problem.¹⁵⁶ Officials have repeatedly failed to exhibit a strong desire to address the allegations that have come to their attention over the years.¹⁵⁷ In the past, for example, immigration officials failed to inform detainees how they could report allegations of sexual abuse.¹⁵⁸ Though it is unclear how many incidents of sexual abuse occur within immigration prisons, government documents indicate that ICE received complaints of almost 200 allegations of sexual abuse of detainees from 2007 to 2011.¹⁵⁹ In response to

151. See U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 1, 3–5 (2006).

152. *Medical Care and Treatment of Immigration Detainees and Deaths in DRO Custody*, Hearing Before the H. Appropriations Comm. Subcomm. on Homeland Sec., 5 (Mar. 3, 2009) (statement of Dora Schriro, Special Advisor to Secretary Napolitano on Detention and Removal Operations).

153. U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., MGMT. OF MENTAL HEALTH CASES IN IMMIGRATION DET. 1, 1 (2011).

154. See *id.* at 5.

155. See *id.* at 1.

156. See NAT’L PRISON RAPE ELIMINATION COMM’N, NAT’L PRISON RAPE ELIMINATION COMM’N REPORT 1, 175–76 (2009).

157. See *id.* at 175.

158. *Id.* at 182.

159. Lisa Graybill, *Immigration Detainees Fear Rape and Death*, ACLU BLOG (Oct. 25, 2011, 5:45 PM), <https://www.aclu.org/blog/prisoners-rights-immigrants-rights/immigration-detainees->

widespread criticism spurred by media attention, members of Congress asked the Agency Inspector General to investigate sexual abuse allegations inside immigration prisons and ICE's responsiveness to those claims.¹⁶⁰ After reviewing ICE records, the Inspector General reported that fifteen allegations of sexual abuse and assault in immigration detention facilities from October 2009 to March 2013 could be substantiated.¹⁶¹ Four of these involved staff-on-detainee allegations, while the rest involved detainee-on-detainee incidents.¹⁶² Most glaringly, the report found that ICE officials failed to report to Agency headquarters as many as forty percent of sexual abuse allegations. The report added that there are no controls to ensure that field officers actually report all sexual abuse allegations, although an Agency directive instructs them to, and that field officers have already stated their failure to report some sexual abuse claims.¹⁶³ In other situations, detainees who complain have quickly been transferred to another facility, hampering their ability to develop a strong legal defense to removal.¹⁶⁴ Still others are quickly removed from the United States, leaving other detainees to believe that removal is the consequence of complaining about sexual abuse.¹⁶⁵

Perhaps most egregiously, migrants have occasionally died while in detention, with government officials sometimes going out of their way to hide the deaths from public scrutiny. ICE reports that 131 people died while in immigration detention between October 2003 and December 6, 2012. At least five others have died since then.¹⁶⁶ As

fear-rape-and-death; see NAT'L PRISON RAPE ELIMINATION COMM'N REPORT, *supra* note 152, at 175.

160. Melanie Asmar, *Jared Polis Wants Investigation into Abuse of LGBT Immigrants in Detention*, WESTWORD BLOG (Jan. 9, 2012, 2:59 PM), http://blogs.westword.com/latestword/2012/01/jared_polis_abuse_lgbt_immigrants.php.

161. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 60 (2013).

162. *Id.* at 60–62.

163. *See id.* at 20.

164. *See* NAT'L PRISON RAPE ELIMINATION COMM'N REPORT, *supra* note 152, at 186.

165. *Id.* at 179–80.

166. *See, e.g., ICE Detainee Passes Away at South Texas Hospital*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT (Aug. 1, 2013), <http://www.ice.gov/news/releases/1308/130801harlingen.htm>; *ICE Detainee Passes Away at Texas Hospital*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT (June 12, 2013), <http://www.ice.gov/news/releases/1306/130612corpuschristi.htm>; *ICE Detainee Passes Away at Eloy Detention Center*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 30, 2013), <http://www.ice.gov/news/releases/1304/130430phoenix.htm>; *ICE Detainee Passes Away at Haskell Memorial Hospital in Texas*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 26, 2013), <http://www.ice.gov/news/releases/1304/130426dallas.htm>; *ICE Detainee Passes Away at Conroe Regional Medical Center in Houston*, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT (Feb. 8, 2013),

New York Times reporter Nina Bernstein, who focused considerable attention on deaths within immigration prisons, explained in 2010, “[f]or years, [deaths in immigration prisons] went uncounted and unnamed in the public record.”¹⁶⁷ Frequently, these deaths occurred because of inadequate medical attention provided within the facilities.¹⁶⁸ Reviewing deaths while in detention, one commentator wryly noted, “[d]etention can become a death sentence.”¹⁶⁹

Judicial oversight is unlikely to eliminate all of this abuse. Indeed, the poor conditions of penal confinement point to law’s limits in this regard. There is, nonetheless, value to be had by more readily interjecting the courts into immigration detention. Few groups of people have as little political power as do detained migrants. Many find themselves in confinement because they have committed or been convicted of a crime. Others are simply perceived to be dangerous by virtue of their detention.¹⁷⁰ Almost all lack the ability to formally participate in electoral politics by voting or financially contributing to political candidates. Courts’ countermajoritarian role uniquely positions them to constrain greater abuse by identifying the outer limits of permissible behavior and—perhaps more importantly—serving as a venue through which what happens inside the prison walls can see the light of day on the outside. Neither is a panacea. Both, however, would begin the long process of bringing immigration detention into the body of law that characterizes the rest of the United States’ legal tradition.

CONCLUSION

Lacking the restraints that usually control executive officials, immigration detention has come to be characterized by unhindered exer-

<http://www.ice.gov/news/releases/1302/130208houston.htm>; *ICE Detainee Passes Away at Phoenix Hospital*, U.S. DEP’T OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT (Dec. 26, 2012), <http://www.ice.gov/news/releases/1212/121226phoenix.htm>.

167. Nina Bernstein, *Officials Obscured Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1; see also Nina Bernstein, *Documents Reveal Earlier Immigrant Deaths*, N.Y. TIMES (Jan. 9, 2010), <http://www.nytimes.com/2010/01/10/nyregion/10detainside.html>.

168. See Kalhan, *supra* note 150, at 42, 47; see Lisa A. Cahan, Note, *Constitutional Protections for Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. HEALTH & BIOMED. L. 343, 353 (2007).

169. Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 694 (2008).

170. See César Cuauhtémoc García Hernández, *Time to Rethink Immigration Detention*, NACLA: N. AM. CONGRESS ON LATIN AM. BLOG, <https://nacla.org/blog/2013/3/27/time-rethink-immigration-detention> (Mar. 27, 2013).

cises of raw power. As one former guard at a large immigration prison in Port Isabel, Texas, explained, inside detention centers the “degenerate power” of prison officials is an “evil” that “destroy[s] and maim[s]” as much as any weapon.¹⁷¹ Doctrinal and policy developments stretching from the entry fiction to the location of contemporary immigration prisons have created a situation in which law regularly fails to function as a guarantee of the basic dignity of the people confined.

Fortunately, there is no shortage of policy, regulatory, statutory, or constitutional means by which to remedy at least some of the most egregious abuses. DHS, for example, could adopt a policy of terminating contracts with private prison companies that regularly violate its detention standards. The Department could also adopt regulations limiting the use of solitary confinement. Congress could do the same and much more to improve the conditions that characterize immigration detention by, for instance, enacting a statute that requires disclosure of information about conditions inside privately owned or operated prisons. For their part, the courts could revisit their unwillingness to review detention decisions; this way there would at least be fewer people detained.

None of these changes, however, seem likely in the near future. Instead, immigration detention is almost certain to continue operating outside the reach of the law’s usual constraints on executive authority. The end result is that the activities and people who dwell inside the prison walls will continue to be invisible.

171. TONY HEFNER, *BETWEEN THE FENCES: BEFORE GUANTÁNAMO: THERE WAS THE PORT ISABEL SERVICE PROCESSING CENTER* 17 (2010).

ESSAY

Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals

ELIZABETH KEYES*

INTRODUCTION	900
I. THE SHIFTING HISTORY OF IMMIGRATION AND IMMIGRATION RHETORIC	902
A. Complicated Early Immigration History	902
1. Founding Through 1880s	903
2. 1880s Through 1965	904
B. Attempting to Make Immigration a Civil Rights Issue: The 1965 Immigration Act	905
C. Formal Equality, Functional Inequality Since 1965	908
II. REFORM TODAY: A NEW PARADIGM OF WORTHINESS AND THE CREATION OF THE “SUPER UNDOCUMENTED”	914
A. The People Excluded from Immigration Reform ...	915
B. Who, by Contrast, is Welcome	920
CONCLUSION: WHAT THESE CHANGES MASK AND SIGNIFY	924

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“Favoritism based on nationality will disappear. Favoritism based on individual worth and qualifications will take its place.”¹

INTRODUCTION

Today at this Symposium focused on civil rights at a critical juncture, I am interested in examining the ways in which immigration reform itself mirrors critical challenges to civil rights happening beyond the field of immigration. Senator Kennedy’s quote, above, from 1965 demonstrates both the explicit civil rights character of the 1965 immigration law that reshaped America, and also the optimism that proved to be overstated in the intervening decades, as the factors determining “individual worth and qualifications” too often became proxies for race in ways that are deeply familiar to this audience. The criteria for worthiness that dominate today’s rhetoric of reform are, I argue, race-blind in name only, and I will show this by focusing on the bill that the Senate passed with bipartisan support in 2013,² which remains the most complete articulation of the state of political agreement on the role of immigrants, present and future. Finally, as I consider how worthiness and utility have supplanted—legally and rhetorically—the explicit goals of the 1965 law, I want to connect that shift to comparable issues facing communities of color more generally, for immigrants and citizens alike.

Questions of worthiness permeate immigration law, and they arise in different ways: how to define it, where to look for it, whether and when it is an appropriate guide for decision-making. While always present in immigration law’s history, worthiness has become an increasingly powerful concept and sorting device within immigration law, and provides a sharp, and I believe problematic, counterpoint to the egalitarianism envisioned by the civil rights era 1965 immigration law. Our immigration laws (both current and proposed) provide narrower and narrower openings for legal immigration, seeking only the “best and the brightest,” and will likely deploy a host of criteria from minor criminal issues to uneven employment histories to keep legalization out of reach for the millions presently here without status. And as that same undocumented population is largely comprised of people of color, the issues of economic marginalization, over-policing and

1. 111 CONG. REC. 24226 (1965) (remarks of Sen. Kennedy).

2. S. 744, 113th Cong. (as passed by Senate, June 27, 2013) [hereinafter Senate Bill].

mass incarceration that affect people of color throughout society, narrow the possibilities for legalization even further.³

Race, worthiness, and immigration intersect in specific and powerful ways in contemporary immigration policy debates. The Senate Bill, as shown in far greater detail in Section II below, reveals this dramatically.⁴ For future flows of immigrants, the bill elevates the highly skilled more explicitly than ever before, and for the present population of roughly eleven million undocumented immigrants, the bill legalizes only the hardest-working, most financially stable, and best educated among them. The multiple requirements to qualify for legalization create a composite of who is most worthy of more permanent membership in the U.S., and through these requirements, the bill excludes millions of the eleven million. It imposes criteria of worthiness at the expense of more completely addressing the problematic situation of the eleven million people, mostly people of color, living in our community without immigration status.

I am not speaking today about how the immigrant rights movement is a modern-day civil rights movement. Others have explored that idea—and its limitations—thoughtfully and thoroughly already.⁵ Instead, I want to connect the shifts away from diversity and inclusion in the immigration context to similar shifts happening beyond the field of immigration. As critical race scholar Kevin Johnson, Dean of the University of California at Davis, has said, immigration law is a “help-

3. In my earlier writings, I have explored how immigration law and practice is slowly narrowing the ways in which people, especially poor people and immigrants of color, can become “American.” In one article, I showed how our binary stories about worthy and unworthy immigrants limit legal remedies available to immigrants in court. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 207 (2012) [hereinafter Keyes, *Beyond Saints and Sinners*]. I noted how some of those stories intersect with stories about race and overly tie our hands as advocates for immigrants. *Id.* More recently, I looked at how claims to being American by immigrants brought to America as children (the “DREAMers”) rest upon their worthiness of citizenship and how such a claim may create significant problems for other immigrants and for citizens alike—particularly for economically and racially marginalized communities. Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, NEV. L. J. (forthcoming 2014) [hereinafter Keyes, *Defining American*]. The DREAMers’ path to belonging, where they are seen as deserving the rights of membership in U.S. society, increasingly requires a high level of “worthiness”; in that earlier article, I argued that the worthiness framework echoed the treatment of African Americans in issues from welfare reform in the 1990s up through current-day issues like voter identification laws and felon disenfranchisement. *Id.*

4. S. 744, 113th Cong. For a full discussion of the Senate Bill, see Part II, *infra*.

5. See, e.g., Cristina M. Rodriguez, *Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125, 126 (2010) (arguing that the conceptualization of immigration reform should be expanded beyond the civil rights framework).

ful gauge for measuring the nation's racial sensibilities.”⁶ Johnson powerfully conceives that the ways America judges its prospective citizens form a “magic mirror” for understanding how America treats—or wishes to treat—citizens of color. I believe Johnson’s “magic mirror” is still a useful way of understanding immigration policy, and understanding America. I hope that by bringing that perspective to today’s Symposium, I can offer immigration reform as an example of yet another critical juncture in civil rights.

To draw these strands together, I first set out a very brief history of changing immigration laws in Part I, paying special note to how the 1965 Act reversed decades of often explicit, egregious racial discrimination found in U.S. immigration law. This section also looks at the *de facto* erosion of the 1965 Act’s egalitarian goals, as subsequent laws and immigration enforcement permitted discrimination to flourish amid, in particular although not exclusively, the undocumented population. In Part II, I assess the present attempt at reform, looking at the qualities of immigrants being welcomed under the Senate Bill, and the characteristics of those who will be excluded from reform, a group that can be called, in Michael Wishnie’s phrasing, the “super-undocumented.”⁷ Finally, I conclude by turning to the costs I see in the current approach to reform, and I offer a view that as the reform focuses on documentation, as it potentially deepens troubling narratives about the undocumented population, and as it continues to move away from ideas of redemption and mercy, it mirrors civil rights challenges far beyond the issue of immigration itself.

I. THE SHIFTING HISTORY OF IMMIGRATION AND IMMIGRATION RHETORIC

A. Complicated Early Immigration History

To make the case that immigration reform today marks a significant break from past immigration policy, I want to briefly situate reform in the broader history of U.S. immigration policy. Widely perceived as being “a nation of immigrants,” and a country proud of the Statue of Liberty’s welcome to the world’s tired and poor, the history is considerably less welcoming than the mythology suggests. It is

6. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1148 (1998).

7. *ALBA Roundtable on Immigration Reform: What Can Be Done*, *THE VOLUNTEER* (June 15, 2013), <http://www.albavolunteer.org/2013/06/alba-roundtable-on-immigration-reform/>.

impossible to do justice to this subject in broad strokes, and others have thoughtfully and thoroughly explored it.⁸ Here, I will look briefly at three periods: from the founding through the 1880s when the Supreme Court recognized a federal immigration power, the explicitly racialized period from the 1880s through 1965 when racial restrictions were lifted as part of the civil rights movement, and the erosion of that civil rights high-water point between 1965 and today.

1. Founding Through 1880s

For the first hundred years of the United States' existence, from the late eighteenth to late nineteenth century, the federal and state governments had largely unregulated stances toward immigration. The major exception, so morally and numerically significant as to hardly be an exception at all, was the forced migration of Africans as slaves, a practice that existed lawfully until 1808.⁹ Africans and their descendants suffered the highest, most formal levels of exclusion from membership in the U.S. During this period, Africans and their descendants were denied anything approaching full membership, and even when free, were subject to the prospect of re-enslavement upon crossing state borders, a practice found constitutional in the infamous *Dred Scott* decision,¹⁰ and lately brought to vivid life in the film *12 Years a Slave*.¹¹

Other immigrants were welcome, provided they had the means to travel to the U.S. Individual states put up barriers that applied equally to individuals migrating from other countries as from other

8. Scholars from law and history, alike, have examined this subject with great insight. See, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 3–14 (2006); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 1–14 (2004); Johnson, *supra* note 6, at 1119–48; Leti Volpp, *The Culture of Citizenship*, 8 *THEORETICAL INQUIRIES* L. 571, 572–75, 600 (2007).

9. The Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426 (1807). The Act took effect in 1808, which, under the Constitution, was the first year that Congress could enact legislation regulating the slave trade. U.S. CONST., Art I, § 9 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.”).

10. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 396 (1856).

11. *12 YEARS A SLAVE* (Regency Enterprises 2013). Professor Karla McKanders has thoughtfully explored the parallels between this period of history and contemporary immigration enforcement practices. See generally Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 *CATH. U. L. REV.* 921 (2012) (comparing the Fugitive Slave Acts with current immigration policies).

states,¹² but generally, this was a time of expansion in the U.S. population and economy, and there was neither a general system of visas or entry permits nor any means of excluding people from coming. For white immigrants who homesteaded, presence quickly became full membership, as homesteaders—typically white Europeans—could claim full legal status as citizens after fulfilling homestead requirements for a five-year period.¹³ During this period, too, immigrants from Asia were able to enter freely and did so in significant numbers to work on the railroads or in mining camps in the West.¹⁴

2. 1880s Through 1965

In this time period, the federal government moved to assert its ability and authority to regulate immigration and imposed restrictions that were largely racially-based, although other categories were used as the basis to bar entry as well. In 1875, the Page Act created categories of exclusion for “any subject of China, Japan or any Oriental Country” (including for involuntary labor or “lewd and immoral purposes”); the Act also broadly regulated the immigration of prostitutes and those who had been convicted of “felonious crimes.”¹⁵ This law was followed in 1882 by the Chinese Exclusion Act, which put a ten-year moratorium on Chinese immigration, and excluded “skilled and unskilled laborers.”¹⁶ Congress extended the moratorium another ten years in 1892¹⁷ and extended it indefinitely in 1902.¹⁸ The 1917 Asiatic Barred Zone extended these restrictions to all prospective Asian

12. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 VAND. L. REV. 1353, 1355 (2009) (citing GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996)).

13. Homestead Act, ch. 75, 12 Stat. 392 (1862). Homesteading was directed to and marketed at prospective European settlers, not immigrants from other parts of the world. See Abrams, *supra* note 12, at 1403. Beyond implementation targeted at Europeans, citizenship was only granted without regard to race through the Fourteenth Amendment in 1868, so the claim to citizenship from homesteading *de facto* only existed for white homesteaders. See *id.* at 1413–14. The Naturalization Act of 1870, which limited naturalization to “white persons and persons of African descent” also put the Homesteading possibility out of reach of immigrants from other ethnicities who could not meet the requirement that they be eligible for citizenship at the end of the homesteading period. *You Can, But You Can't!*, HOMESTEAD CONG. (Aug. 12, 2011, 9:00 AM), <http://homesteadcongress.blogspot.com/2011/08/you-can-but-you-cant.html>.

14. See ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* xi (1971); see also Leila Higgins, *Immigration and the Vulnerable Worker: We Built This Country on Cheap Labor*, 3 AM. U. LAB. & EMP. L.F. 522, 528–32 (2013).

15. Page Act, ch. 141, 18 Stat. 477 (1875).

16. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1952).

17. Geary Act, ch. 60, 27 Stat. 25 (1892).

18. Act of Apr. 29, ch. 641, 32 Stat. 176 (1902).

immigrants, and also put immigration off limits for “mental defectives,” interpreted to include homosexuals.¹⁹

The 1924 Johnson-Reed Act instituted quotas for immigrants, setting the level of available visas to two percent of the number of people from any given country living in the U.S. as of 1890, a time when immigration was dominated by Northern and Western Europeans.²⁰ The law entirely excluded Asians and banned immigrants from Asia from ever acquiring citizenship, no matter how long they lived in the U.S.²¹ The 1924 law has been widely regarded as a law intending to freeze a certain racial make-up for the country.²² In the same period, *de facto* barriers were set up for Mexicans and others, through literacy test, entry taxes and humiliating entry procedures, as has been comprehensively documented by historian Mae Ngai.²³

B. Attempting to Make Immigration a Civil Rights Issue: The 1965 Immigration Act

With some adjustments in between, including expanding the right to naturalize to immigrants of Asian descent,²⁴ the next great shift in U.S. immigration policy occurred during the heyday of the civil rights movement, with the passage of the Immigration and Nationality Act of 1965.²⁵ The 1965 Act was very much part of the civil rights movement’s emphasis on removing color-barriers from our laws, and the bill’s drafters consciously saw their role as crafting another piece of civil rights legislation by removing those barriers.²⁶ Senator Hiram Fong of Hawaii said at the time that the old quotas were like Jim

19. See Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 281 n.30 (1996); Tracy J. Davis, *Opening the Doors of Immigration: Sexual Orientation and Asylum in the United States*, 6 HUM. RTS. BRIEF 19, 19 (1999).

20. Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 329 n.154 (2012).

21. (Johnson-Reed) Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

22. See Saucedo, *supra* note 20, at 328–29 n.154 (exploring the power of narratives about Mexican immigrants).

23. NGAI, *supra* note 8, at 64–75; see also Saucedo, *supra* note 20 at 328–29 n.154.

24. Chin, *supra* note 19, at 281–82.

25. Immigration and Nationality Act (“INA”) of 1965 (Hart-Cellar Act), Pub. L. 89-236, 79 Stat. 911 (1965).

26. Chin, *supra* note 19, at 299–302; see also Jennifer Ludden, *1965 Immigration Law Changed Face of America*, NPR (May 9, 2006, 3:35 PM), <http://www.npr.org/templates/story/story.php?storyId=5391395> (quoting Karen Narasaki of the Asian American Justice Center) (“It was not what people were marching in the streets over in the 1960s It was really a group of political elites who were trying to look into the future. And again, it was the issue of, ‘Are we going to be true to what we say our values are?’”).

Crow segregation that contradicted “America’s ideal of the equality of all men without regard to race, color, creed, or national origin.”²⁷ Representative Laurence Burton remarked that “[j]ust as we sought to eliminate discrimination in our land through the Civil Rights Act, today we seek by phasing out the national origins quota system to eliminate discrimination in immigration to this Nation composed of the descendants of immigrants.”²⁸ Seeing that the national-origins quota resulted in heavily racialized patterns of immigration, the Act eliminated those quotas, and established formal equality among nations in terms of the number of visas available: no nation could claim more than seven percent of the available visas in any given year.²⁹ In signing the bill, President Johnson stated:

[Signing the bill] is still one of the most important acts of this Congress and of this administration.

For it does repair a very deep and painful flaw in the fabric of American justice. It corrects a cruel and enduring wrong in the conduct of the American Nation.

• • • •

[T]he fact is that for over four decades the immigration policy of the United States has been twisted and has been distorted by the harsh injustice of the national origins quota system.³⁰

The Act, and its demolition of the quota system, began a decades-long period of intense demographic change in the U.S.—change that has been both lauded and lamented.³¹ Although these demographic consequences were largely unforeseen to lawmakers,³² several specific structures set up in the 1965 Act permitted them to happen. A look at two countries alone, among many others, shows the sweep of this. Dramatic increases in immigration from the Philippines show the

27. *To Amend the Immigration and Nationality Act, and for Other Purposes: Hearings Before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary*, 89th Cong. 43–45 (1965) (statement of Sen. Fong).

28. Chin, *supra* note 19, at 302 (quoting 111 CONG. REC. 21,783 (1965)).

29. See U.S.C. § 1152(a)(2) (2012).

30. President Lyndon B. Johnson’s Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 PUB. PAPERS 546 (Oct. 3, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/651003.asp>.

31. See Chin, *supra* note 19, at 276–78; see also *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, CTR. FOR IMMIGRATION STUDIES (Sept. 1995), <http://cis.org/1965ImmigrationAct-MassImmigration>.

32. Chin, *supra* note 19, at 278. Chin argues that some of the change was expected, especially the increase in immigration from Asia. *Id.* at 305 (“The prevailing scholarly view does not give Congress enough credit. Close examination of the legislative history and interviews with people involved in the bill suggest that Congress knew more Asians would immigrate.”).

power of the immigration options created by the 1965 Act on the family-based side, where there were multiple paths for not just parents, spouses and children, but also siblings.³³ Drawing primarily on such paths, migration from the Philippines tripled between 1980 and 2006.³⁴ Likewise, on the employment-based side of immigration, the removal of racial restrictions has permitted enormous numbers of Indian immigrants to migrate for work in the technology sector, with Indian immigrants accounting for sixty-four percent of those who receive H1B visas for specialized workers.³⁵ Beyond these examples, immigration has also increased from many other non-European countries that had not historically sent any significant numbers of migrants.³⁶ The impact of the 1965 Act has been clear, and it has been one diversifying legal migration from historically under-represented countries. But as

33. INA § 203(a).

34. Aaron Terrazas, *US in Focus: Filipino Immigrants in the United States*, MIGRATION POL'Y INST. (Sept. 2008), <http://www.migrationinformation.org/usfocus/display.cfm?ID=694> (“The number of Filipino immigrants in the United States tripled between 1980 and 2006, from 501,440 to 1.6 million, making them the second largest immigrant group in the United States after Mexican immigrants and ahead of the Chinese, Indian, and Vietnamese foreign born.”). A separate MPI report attributes the migration to family-based immigration. Sierra Stoney & Jeanne Batalova, *US in Focus: Filipino Immigrants in the United States*, MIGRATION POL'Y INST. (June 2013), <http://www.migrationinformation.org/usfocus/display.cfm?ID=954> (“The foreign born from the Philippines gained LPR status mostly through family reunification. About 87 percent obtained green cards through family relationships, 13 percent through employment, and less than 1 percent through other routes, including a small number of refugees or asylees.”).

35. Neil G. Ruiz, *H-1B Visas and Immigration Reform: A Sticking Point in the U.S.-India Relationship*, BROOKINGS INST. (Sept. 18, 2013, 12:10 PM), <http://www.brookings.edu/blogs/up-front/posts/2013/09/18-immigration-reform-us-india-ruiz>. Also notable, however, is the fact that for both countries, eligibility for visas surpasses the numbers available for issuing visas because of per-country limits, another piece of formal equality found in the 1965 Act. Mae M. Ngai, *Reforming Immigration for Good*, N.Y. TIMES, Jan. 29, 2013, <http://www.nytimes.com/2013/01/30/opinion/reforming-immigration-for-good.html>. The Act has also been criticized for perpetuating undocumented migration from Mexico. Professor Gerald Lopez notes, “Desirous of being perceived as the ‘egalitarian champion of the ‘free world,’ ‘Congress ended the 1920s system that favored Western European immigrants and established an open system based on family reunification and equality between countries of origin. The changes led to significant (and largely unanticipated) shifts in legal migration. But the new regime severely reduced to 120,000 the number of immigrant visas available to Mexico and the Western Hemisphere, leading immediately to a huge and growing backlog. And the egalitarian system made no room for—did not acknowledge and did not legally accommodate—the massive undocumented migration of Mexican labor that had already become an essential feature of U.S. and Mexican life and, not coincidentally, again avoided enacting employer sanctions.” Gerald P. Lopez, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1772 (2012). No country may claim more than seven percent of all available visas, so would-be immigrants from countries like India and the Philippines, where many are eligible for visas, face long waits before visa numbers are made available to them. Ngai, *supra* note 35.

36. The Center for Immigration Studies, which advocates heavily restricted immigration, presents a graph showing the changes, derived from the INS Statistical yearbook. *Three Decades of Mass Immigration: The Legacy of the 1965 Immigration Act*, CIS (Sept. 1995), <http://cis.org/1965ImmigrationAct-MassImmigration>.

Jack Chin noted in his thorough assessment of the law's intentions and impact, "[i]f the magnitude of the change was unexpected, it was also probably not a major issue to a group of legislators who, by passing laws prohibiting discrimination in a variety of contexts, demonstrated the sincerity of their faith in the irrationality of racial distinctions."³⁷

C. Formal Equality, Functional Inequality Since 1965

The 1965 Act was the high-water mark for seeing immigration as a place of equality in the law, as the 1960s were for civil rights generally. Just as the civil rights laws of the 1960s set broad societal changes in motion, from voting to workplaces to schools and beyond, the 1965 Immigration and Nationality Act set in motion significant demographic changes across the nation. And just as other civil rights era achievements are being rolled back in today's political climate, the civil rights achievement in immigration reform is likewise rolling back, with a widening gap between the formal equality created by the 1965 Act, and the functional inequality in amendments and enforcement since that time. This disparate impact has many sources, but I will look briefly today at two sources: the conjoining of immigration status and employment authorization in 1986, and the hyper-conflation of the criminal justice system with immigration enforcement since 1996.

The gap between the 1965 law's commitment to formal equality and the situation for immigrants of color has widened slowly and steadily. However, before turning to that general trend, I want to note two significant exceptions, one of which endures, and the other of which is being rolled back now. The first exception is the story of civil rights for gay and lesbian immigrants. Restrictions on entry for homosexuals, which existed since 1917 and were entrenched in the 1952 McCarran-Walter Act, persisted with the 1965 Act.³⁸ And while family-based immigration increased, gay and lesbian marriages were not recognized for immigration purposes³⁹ even before the Defense of Marriage Act.⁴⁰ As the movement for gay rights has led to state after

37. Chin, *supra* note 19, at 278.

38. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 89–101 (2001) (discussing a fascinating account of George Fleuti's experiences demonstrating how barriers against homosexual immigration were enforced).

39. First established through case law, the Ninth Circuit held that even if a gay marriage were locally valid, it could not provide the basis for a spousal petition because federal definitions controlled under the plenary power doctrine. *Adams v. Howerton*, 673 F.2d 1036, 1038, 1040 (9th Cir. 1982).

40. Defense of Marriage Act, Pub. L. No. 104-199, 3(a), 110 Stat. 2419, 2419 (1996).

state recognizing gay marriage, and Congress repealing DOMA, pathways for gay and lesbian immigrants opened up rapidly—a counterpoint to the story of erosion in the area of race, and one that is in no danger of being reversed.

A second exception extending the spirit of the 1965 Act was the 1986 creation (and 1990 extension) of the diversity visa for under-represented countries.⁴¹ This new visa uses a lottery system to allocate visas to individuals from “low admission” countries—countries sending, relatively, the least numbers of immigrants annually (although Ireland was also prominently included, prompting it to be called the “Irish sweepstakes”).⁴² Because other pathways depend on the existence of previous immigrant connections (family members who could petition for relatives) or employment (the bulk of other immigrant and nonimmigrant visas), legislators wanted to provide visas for those without such routes available.⁴³ Unlike President Johnson’s emphasis on the importance of removing racial barriers to immigration in 1965, however, President Bush’s remarks on the passage of the 1990 Act entirely omitted reference to the diversity visa, focusing instead on family reunification provisions and provisions related to the war on drugs.⁴⁴ And unlike the progress made for LGBT immigration since 1965, the diversity visa is, as discussed below, the first on the chopping block for reform.

On one side of the story then, we see increasing diversification of immigration since 1965, and doors being opened explicitly for immigrants from underrepresented countries in 1990 and, most recently, for LGBT immigrants. On the other side of the story is the disparate impact of immigration laws and enforcement on communities of color,

41. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359, 3439. The visa was extended, but with forty percent reserved for the Irish, in 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 132(c), 104 Stat. 4978, 5000; see also Andowah A. Newton, Note, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT’L L.J. 1049 (2005) (discussing the impact of the diversity visa program on African immigration).

42. Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After “9/11?”*, 7 J. GENDER RACE & JUST. 315, 330 (2003).

43. The intent—and moral and ethical justifications for the program—have been debated and questioned. See Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT’L L. 319, 329 (1993); Victor C. Romero, *Symposium on Confronting Realities: The Legal, Moral, and Constitutional Issues Involving Diversity Panel II: Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375, 383 (2003).

44. Presidential Signing Statement on Immigration Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1946 (Nov. 29, 1990).

despite the promises of formal equality in the law, largely because the undocumented population is so predominantly non-European in origin.⁴⁵

The first site of this disparate impact is in the workplace. The Immigration Reform and Control Act (IRCA) of 1986⁴⁶ legalized large numbers of the undocumented in exchange for workplace controls; IRCA required proof of work authorization (almost always available only through lawful immigration status) in order for workers to be lawfully hired.⁴⁷ This requirement pushed the new undocumented—those who either did not qualify for IRCA, or those who arrived subsequently⁴⁸—into an underground economy where employers hired workers without the correct paperwork, leaving them extremely vulnerable to various forms of workplace exploitation.⁴⁹ As the undocumented population grew over the subsequent decades,⁵⁰ IRCA created a sizeable underclass of undocumented workers whose workplace rights were violated with great frequency and relative impunity.

Compounding these difficulties, the workplace also quickly became the principal site for enforcement after 9/11. During the Bush Administration, workplace enforcement was characterized first by militaristic workplace raids, such as the dramatic Postville Raid in Iowa, when immigration agents in helicopters and SUVs raided an agricultural factory and arrested 389 immigrants.⁵¹ Under President

45. The Department of Homeland Security notes that in 2011, fifty-nine percent of the undocumented population was from Mexico (6.8 million people), followed by El Salvador (600,000), Guatemala (520,000), Honduras (380,000) and China (280,000). MICHAEL HOFER ET AL., DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 4 (2012).

46. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 314, 100 Stat. 3359.

47. *Id.* § 314.

48. These two categories overlap substantially, as IRCA, itself, contained a provision limiting eligibility to those who had arrived by January 1, 1982. *Id.* § 201(a).

49. See KIM BOBO, WAGE THEFT IN AMERICA: WHY MILLIONS OF WORKING AMERICANS ARE NOT GETTING PAID—AND WHAT WE CAN DO ABOUT IT 62 (2011).

50. The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (IIRIRA). The Act also had the unintended consequence of trapping the undocumented in America. Where previous generations of the undocumented, from Mexico and Central America particularly had gone back and forth with some fluidity, working when there was work, leaving when there was none, IIRIRA's creation of a ten-year bar for the accrual of unlawful presence essentially stopped that. *Id.* § 301 (amending 8 U.S.C.A. § 1182). Anyone with a year or more of unlawful presence would be forbidden to re-enter for ten years. *Id.* As new migrants arrived, and previous migrants could not easily leave, the undocumented population grew.

51. For a dramatic account of the raid and its complicated aftermath, see Maggie Jones, *Postville, Iowa Is Up for Grabs*, N.Y. TIMES, Jul. 11, 2012, at <http://www.nytimes.com/2012/07/15/magazine/postville-iowa-is-up-for-grabs.html?pagewanted=all>.

Obama, less dramatic but equally consequential audits of workplaces brought undocumented workers to the attention of immigration authorities.⁵²

A second powerful site to demonstrate how immigration enforcement disparately impacts communities of color is the criminal justice system. In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁵³ vastly expanded the number of crimes that would trigger deportation.⁵⁴ Such crimes included low level drug crimes and other minor offenses, and the law simultaneously removed most judicial discretion that could have given lower-level offenders a second chance.⁵⁵ Since 1996, second chances have been remarkably hard to come by, with only 10,000 slots available for the form of relief, or redemption, known as “Cancellation of Removal,”⁵⁶ which itself requires not repentance but a showing of exceptional and extremely unusual hardship to U.S. citizen spouses or children—a level of hardship far surpassing the known hardships of families being divided, incomes being lost, and lives built over years or decades in America being ended.⁵⁷ Although not an explicit racial barrier to immigration, the over-policing of communities of color and disparate rates of arrests and convictions of people—particularly men—of color means that this intersection of the criminal and immigration systems reintroduces race powerfully into immigration enforcement.⁵⁸

This intersection is exacerbated by the issue of the extent to which racial profiling is permitted—and in the recent past, required—in the immigration context. First, in the national security setting, pro-

52. Here again, the history of slave labor casts a shadow on today’s immigration debates. As Karla McKanders has discussed, slave labor existed without the laborers being seen as members, as undocumented workers in oftentimes vulnerable, dangerous occupations are denied membership as well. McKanders, *supra* note 11, at 949 (“The key connection between the Fugitive Slave Acts and current migration policies is the ways in which immigration law and policy have facilitated dehumanization and created a quasi-citizen worker.”).

53. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996).

54. IIRIRA also placed both deportation and exclusion proceedings under the rubric of “removal,” but the term deportation is still popularly used for the removal of any immigrant, whether formally admitted, seeking admission, or present without having been inspected. *Id.* tit. III.

55. See Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1940–41 (2000).

56. INA § 240A.

57. *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 59 (BIA 2001) (holding that the exceptional and extremely unusual hardship standard requires hardship “substantially beyond that which ordinarily would be expected to result from the alien’s deportation.”).

58. See generally Keyes, *Defining American*, *supra* note 3 (illustrating the role played by race at every stage of the immigration pipeline, from acquiring status, to maintaining it, to becoming a citizen).

filing by national-origin was explicitly required for a decade. For a period of time following 9/11, country-specific immigration requirements returned and slammed the doors closed for many Arabs and South Asians who had been here lawfully, or who aspired to come.⁵⁹ 1,200 noncitizens from predominantly Muslim countries were detained following the 9/11 attacks,⁶⁰ and interior enforcement efforts focused on men from countries where Al Qaeda had been active.⁶¹ During this time, the government also implemented a program of special registration for men from those predominantly Muslim countries that remained in effect from 2002 until 2011.⁶² Advocates also decried profiling and surveillance based on national origins in the broader immigration context (such as differential attention paid in border interviews and naturalization applications).⁶³

Second, in immigration enforcement more generally, racial profiling is actually condoned—to a large extent—by the Supreme Court decision in *U.S. v. Brignoni-Ponce*,⁶⁴ which allows police to consider race alongside other factors (“Mexican appearance”) when making an

59. Muzaffar Chishti & Claire Bergeron, *Post-9/11 Policies Dramatically Alter the US Immigration Landscape*, MIGRATION POL’Y INST. (Sep. 8, 2011), <http://www.migrationinformation.org/USFocus/display.cfm?ID=852>.

60. Muzaffar A. Chishti et. al., *America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, MIGRATION POL’Y INST. 2003, at 12.

61. Memorandum from the Deputy Att’y Gen., U.S. Dep’t of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), <http://news.findlaw.com/hdocs/docs/doj/absconder012502mem.pdf>. See generally Nora Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 NO. 6 CRIM. L. BULL. 2 (2004) (discussing “the connections among terrorism, crime and immigration within the last decade”).

62. *DHS Removes Designated Countries from NSEERS Registration*, DEP’T HOMELAND SEC. (May 2011), <https://www.dhs.gov/dhs-removes-designated-countries-nseers-registration-may-2011>; see also ARAB-AMERICAN INSTITUTE, NATIONAL SECURITY ENTRY EXIT REGISTRATION SYSTEM 1 (n.d.). Then-INS connected immigration and national security in the following way in setting up procedures for special registration:

Terrorist attacks have claimed the lives of thousands of Americans, as well as nationals from many other countries. As a result, new regulations have gone into effect to help ensure the safety of all persons in the United States. These regulations require the Immigration and Naturalization Service (INS) to register certain individuals in the interest of national security or law enforcement.

Special Registration Procedures, INS (Sep. 11, 2002), <http://www.ice.gov/doclib/nseers/SRProc.pdf>.

63. DEEPA IYER, SOUTH ASIAN AMERICANS LEADING TOGETHER, WRITTEN TESTIMONY FOR THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES, HEARING ON RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT POLICY 7–8 (2010).

64. *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975); see Kevin Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010).

immigration stop.⁶⁵ Part of the Court's justification was the seeming uncontrollability of immigration from Mexico along the southern border⁶⁶ (a concern eerily reminiscent of the opinion upholding the Chinese Exclusion Act, speaking of the "hordes" of Chinese "invading" America⁶⁷). This permissibility of profiling, except in egregious cases, exists alongside exceptionally heightened levels of federal immigration enforcement⁶⁸ that involve state law enforcement,⁶⁹ potentially creating a perfect storm for local law enforcement to engage in racial profiling in the name of implementing federal immigration law. Indeed, Sheriff Joe Arpaio of Maricopa County, Arizona, built his national reputation on his tough stance toward "illegal immigrants," and was a long-time participant in the federal government's 287(g) program to deputize local law enforcement entities to act as immigration enforcers.⁷⁰ He instructed his officers that "they could consider race or 'Mexican ancestry' as one factor among others in making law enforcement decisions during immigration enforcement operations without violating the legal requirements pertaining to racial bias in policing."⁷¹ Arpaio, for example, launched "saturation patrols" to make pre-textual stops in the hopes of identifying undocumented im-

65. Even if race were impermissibly used as the *only* factor in an immigration stop, excluding such evidence is difficult (although not impossible) under *Lopez-Mendoza*, because the Fourth Amendment's exclusionary rule does not *generally* apply in removal proceedings (although it can apply if the violation was egregious). *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Professor Kristina Campbell explores this subject in relation to the Arizona law. Kristina Campbell, (*Un*)*Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 367, 386 (2013).

66. "The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the INS now suggests there may be as many as 10 or 12 million aliens illegally in the country. Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services." *Brignoni-Ponce*, 422 U.S. at 878–79.

67. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

68. President Obama's administration removed 1.9 million immigrants by the end of fiscal year 2013, although the rate slowed somewhat in 2013. Julia Preston, *U.S. Deportations Decline; Felons Made Up Big Share*, N.Y. TIMES, Dec. 20, 2013 at A20.

69. Whether this involvement is encouraged, required, or commandeered is a matter of debate, as the recent debate over California's TRUST Act demonstrated. Under the TRUST Act, California would only honor Immigration and Custom Enforcement detainers for immigrants convicted of serious offenses, instead of for all those arrested. Patrick McGreevy, *Brown Resets Bar on Migrant Rights; Governor Signs Trust Act, Giving Expanded Protections for Those Here Illegally*, L.A. TIMES, Oct. 6, 2013, at A1.

70. INA § 287(g).

71. *Melendres v. Arpaio*, 2013 WL 2297173, at *5–6 (D. Ariz. May 24, 2013).

migrants.⁷² A federal court found that Arpaio had engaged in impermissible racial profiling in 2013.⁷³ But as states continue seeking ways to use state law enforcement agents to enforce federal immigration law, such as the S.B. 1070 law in Arizona,⁷⁴ the threat of racial profiling persists.

As a result of these various trends, enforcement itself became heavily racialized even while the 1965 Act's formal equality remained in place. This erosion of the egalitarian goals of 1965 mirrors the widely critiqued problems of disparate racial impacts from health to education to criminal justice despite the nation's explicit abandonment of racial discrimination in the law.

II. REFORM TODAY: A NEW PARADIGM OF WORTHINESS AND THE CREATION OF THE "SUPER UNDOCUMENTED"⁷⁵

Our current efforts at immigration reform spring from this muddled context, where goals of equality have been undermined by an increasingly draconian enforcement system, with its criminal justice and national security intersections. Immigration reform is intended to fix the "broken" immigration system, one whose broken-ness is underscored by the fact of eleven million people living in the U.S. without any legal immigration status.⁷⁶ Scholars have noted how this undocumented population leads the public to conflate the phenomenon of immigration with "illegality" and how the status quo under-

72. *Id.* at *114.

73. *Id.* at *273.

74. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). The law contained a provision permitting police to stop individuals suspected of lacking immigration status. While conceding that the law's opponents had voiced fears of racial profiling, the Supreme Court upheld that provision in *Arizona v. United States* to give the state a chance to find a way of enforcing the law that would not fall afoul of racial profiling prohibitions. *Arizona v. United States*, 132 S. Ct. 2492 (2012); see also ACLU & RIGHTS WORKING GROUP, THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 43 (2009).

75. This term was coined by Mike Wishnie, Director, Jerome N. Frank Legal Services Organization at Yale Law School, and I first heard the term used by his colleague Muneer Ahmad, Clinical Professor of Law at Yale University, at the AALS Clinical Conference in San Juan, Puerto Rico, Apr. 2013.

76. Although the size of the undocumented population is necessarily an estimate, eleven million is a widely accepted figure. See, e.g., PEW RESEARCH CTR. & PEW HISPANIC CTR., A NATION OF IMMIGRANTS: A PORTRAIT OF THE 40 MILLION, INCLUDING 11 MILLION UNAUTHORIZED (2013).

mines the rule of law.⁷⁷ The reform efforts seek to address these problems while improving the future flows of immigrants so that the law does not generate millions of *new* undocumented in subsequent decades, as happened after the 1986 reform. Unfortunately, the Senate Bill, passed in July 2013, and still the most detailed articulation of what comprehensive reform could look like, is estimated to leave out several *million* of the eleven million undocumented.⁷⁸ And piecemeal bills that could be taken up by the House of Representatives are, as described below, unlikely to do any better, which means that one impetus driving reform—fixing the situation of the eleven million in the shadows—will not be fully addressed. Thus, while immigration reform is theoretically fixing a problem affecting, in particular, communities of color in the U.S., and while there is much to appreciate and celebrate in the bill for fixing some of the difficulties described above, what is equally clear is that it will exclude many, especially from marginalized communities of color, as the framework deliberately, ever more explicitly, shifts from away from formal equality to worthiness. Indeed, a problem of the new “super undocumented”—those left out of reform entirely for a broad range of reasons—will be created the day any such reform is signed into law, creating inequalities that undermine and reverse the egalitarian goals of the 1965 Act.

A. The People Excluded from Immigration Reform

With such dramatic numbers of people left out of reform, it is clear that fixing the problem of the eleven million undocumented is not the only goal of the legalization component of immigration reform. Rather, reform offers an opportunity to pick and choose those most worthy of inclusion. While many of these factors are understandable and some are normatively appealing (the idea that length of time and connection to the community matter, for example), two problems bear mentioning immediately. First, it is a specific choice to cut into the size of the legalization program by making inclusion contingent on meeting so many factors—and such contingencies undermine the “rule of law” goal of legalization (addressing the concern that a vast population of people indefinitely living without documents

77. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 536 (2009).

78. The Congressional Budget Office estimates that 3.5 million will not gain legal status as a result of the law. CONG. BUDGET OFFICE, COST ESTIMATE: S.744, BORDER SECURITY, ECONOMIC OPPORTUNITY, AND IMMIGRATION MODERNIZATION ACT 21 (2013).

undermines the rule of law generally). Second, and explored in more detail below, reform that purposefully excludes millions also purposefully creates a new, profoundly marginalized class of “super undocumented.” If the undocumented is the subject of controversy and even hatred pre-reform,⁷⁹ those left out of reform are likely to be even more reviled, as their lack of status will signify their status as those least desired among the undocumented population. Before discussing the implications of this, I am interested in who these new “super undocumented” are and how they reflect America’s sense of who least deserves inclusion—the true “aliens” in our midst, those not worthy of being brought under the reform umbrella. I turn now to these groups.

The first group left out of reform comprises those who arrived most recently, upholding a tradition of valuing connection to community. The Senate Bill stops relief for those who entered after December 2011.⁸⁰ Indeed, the only affirmative eligibility requirement, before the bill defines exceptions to eligibility, is physical presence before December 31, 2011.⁸¹ It has been a common wisdom in immigration law, as in other areas of the law, that longevity is significant, and that our willingness to remove immigrants may rightfully diminish the longer they are present here.⁸² The “cancellation of removal” provision in the Immigration and Nationality Act explicitly recognizes that, as it opens the possibility for individuals without lawful permanent residence (LPR status) who have been in the U.S. ten years or more continuously to obtain LPR status, if they can show that their removal would cause exceptional and extremely unusual hardship to citizen spouses or children (another element of the relief that approximates membership and integration in America).⁸³ The December 30, 2011 requirement knocks out a significant percentage of the currently undocumented, perhaps 500–700,000 (or approximately 4–6%).⁸⁴ In-

79. See Keyes, *Beyond Saints and Sinners*, *supra* note 3, at 250.

80. S. 744, 113th Cong. § 2101.

81. *Id.*

82. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (tracing, among other ideas, the multiple ways that immigration law has recognized and rewarded longevity and connection). In the context of removing immigrants convicted of crimes, Juliet Stumpf has explored how longevity matters far less as “the law privileges the moment of the crime as the determining factor for often-permanent expulsion.” Juliet Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 *UCLA L. REV.* 1705, 1709 (2011).

83. INA § 240A.

84. David Nakamura, *Immigration Deal Would Exclude Millions*, *WASH. POST*, July 28, 2013, at A03.

deed, when I asked my immigration clinic students at the University of Baltimore to consider how many of our clients during the fall 2013 semester might benefit from reform, this provision alone knocked eleven of the twelve clients out of contention. All had arrived too recently. Despite the appeal of requiring a degree of connection to community, using the proxy of time in the U.S., this provision will be a major source of the new “super undocumented,” with all the attendant problems discussed below.

Another requirement to benefit from reform is that individuals demonstrate that they have met all their tax liabilities.⁸⁵ This requirement occurs both at the initial application stage, and the ultimate adjustment of status stage (at the end of the twelve year waiting period).⁸⁶ This understandable requirement comes from the perception, a grossly overstated one, that undocumented immigrants uniformly do not pay taxes. While the truth is far more ambiguous, the commitment to paying taxes is of a piece with the legalization plan in general, bringing people into the rule of law where they had been in the shadows previously. However, there is going to be considerable difficulty for many immigrants as they try to assemble documentation to retrace tax obligations from years when employers were paying them in cash and not providing W2s. Many immigrants work in occupations where they are the sole employee, like domestic work or being a home health care companion, where employers are less likely to generate the paperwork that would help the employees comply with their tax obligations.⁸⁷

Another provision will challenge immigrants working at society’s economic margins, namely, the requirement that people be able to work for the twelve years it will take before receiving permanent residence, with no more than a sixty-day gap in employment.⁸⁸ In a recessionary period where the workforce is increasingly irregular and

85. S. 744, 113th Cong. § 2101. The extent of the liabilities is not detailed in the bill and will presumably be governed by the tax code, which currently treats most immigrants working in the United States the same as citizens in terms of their tax obligations.

86. S. 744, 113th Cong. §§ 2101–2102.

87. See generally Sharon Parrott and Robert Greenstein, *Benefit Restrictions Beyond Those in Senate Immigration Bill Would Jeopardize Legalization for Many and Risk Severe Hardships for Others*, CTR. FOR BUDGET AND POL’Y PRIORITIES (June 14, 2013), <http://www.cbpp.org/cms/?fa=view&id=3974> (detailing the effect the Senate Immigration Bill would have on undocumented workers).

88. S. 744, 113th Cong § 245B(c)(9)(B)(i)(I). Registered provisional immigrant status cannot be extended unless the immigrant can show that her or she was regularly employed throughout the period of admission as a registered provisional immigrant, allowing for brief periods lasting not more than 60 days. *Id.* The bill provides exceptions for time when the immigrant was

unstable, such job stability is challenging. Workers in occupations that vary by seasons, from construction to landscaping, may be productively employed over the course of a year in terms of income-earned, but exceed sixty-day unemployment periods within any given year, and these occupations rely heavily on immigrant labor. Worse, it provides an incentive for workers to stay in bad employment because the immigration consequences of leaving are too great.

The reform's requirement of demonstrating English-language skills⁸⁹ will eliminate many more from legalization. Many immigrants do learn English, and wait lists for ESL classes have historically been lengthy.⁹⁰ Many obstacles, however, limit the effectiveness of those classes or the ability of people to take them or learn English in other ways. Whether because working multiple jobs limits the time available for studying, because classes are unavailable, or because learning language at later stages of life is difficult even for the most educated (and many of the undocumented were poorly educated in their own countries),⁹¹ English language proficiency is a hurdle. Currently, approximately one half of the undocumented lack the English skills to be able to pass the proficiency test associated with citizenship,⁹² which suggests that even slightly less stringent proficiency requirements will be responsible for 3.6 million people not qualifying.

Finally, any of a series of criminal convictions will remove people from the umbrella of reform. Someone with a single state felony conviction, a single immigration "aggravated felony" (a term of art encompassing crimes that states might classify as misdemeanors) or three or more misdemeanor convictions will be ineligible.⁹³ This is

on medical, maternity, or employment leave, or enrolled full-time in school. §§ 245C(b)(3)(D), (E).

89. § 245C(b)(4) provides that only those who meet the standards for English proficiency required for naturalization under INA § 312 may adjust their status to lawful permanent residence.

90. JAMES THOMAS TUCKER, NALEO ED. FUND, *THE ESL LOGJAM: WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS* 1 (2006).

91. According to the Pew Hispanic Center, "Adult unauthorized immigrants are disproportionately likely to be poorly educated. Among unauthorized immigrants ages 25–64, 47% have less than a high school education." JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* iv (2009).

92. One-third clearly fall below the standard, with Level 3 proficiency. A majority lack Level 4 proficiency or below, but because the citizenship test currently requires a level between Level 3 and Level 4, it is not quite possible to say where the percentage falls. Marc R. Rosenblum et al., *Earned Legalization: Effects of Proposed Requirements on Unauthorized Men, Women, and Children*, MIGRATION POL'Y INST., Jan. 2011, at 7.

93. S. 744, 113th Cong. § 245B(b)(3)(A)(i). There is the possibility of a waiver for those with three or more misdemeanors, "for humanitarian purposes, to ensure family unity, or if such a waiver is otherwise in the public interest." § 245B(b)(B)(i).

uncontroversial for most—if anyone is to be left out, it should be those who committed crimes while “guests on our shores.” That impulse to expel criminals runs deep in immigration history, and as noted above, has been deepening over recent decades; immigration is overwhelmingly depicted in the media as a crime control issue.⁹⁴ It is therefore utterly unsurprising to see it as a factor in the Senate Bill, but it does mean that many more immigrants will not qualify for reform.

Even without ineligibility problems at the outset, problems of application fees and lack of information may limit the reach of reform, as happened with IRCA in 1986.⁹⁵ The Senate Bill imposes a \$1,000 penalty, in addition to application filing fees, for anyone seeking to benefit from the legalization provisions.⁹⁶ Recent experience with the Administration’s program to provide temporary employment authorization for certain immigrant youth (the Deferred Action for Childhood Arrivals, or “DACA,” program) suggests that such fees put relief out of reach for many families. Many perceived DACA to be a precursor to the rollout of immigration reform, and this economic barrier—intended not to exclude but simply to generate fees to cover the program’s costs—provides a cautionary tale for the roll-out of broader immigration reform.⁹⁷ With an estimated twenty percent of adult, undocumented immigrants living in poverty,⁹⁸ the monetary penalty and fees may make otherwise eligible individuals unable to participate. Indeed, the Social Security Administration estimates that as many as 400,000 might drop out of the legalization program because of these costs.⁹⁹

94. Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L. J. 1106, 1112 (2013) (citing BROOKINGS INST. & UNIV. OF S. CAL., ANNENBERG SCH. FOR COMM’N, *DEMOCRACY IN THE AGE OF NEW MEDIA: A REPORT ON THE MEDIA AND THE IMMIGRATION DEBATE* 13, 23–27 (2008)) (analyzing coverage of immigration since 1980 and concluding that it has “focused overwhelmingly” on crime and other illegality).

95. See Betsy Cooper & Kevin O’Neil, *Lessons from the Immigration Reform and Control Act of 1986*, MIGRATION POL’Y INST., Aug. 2005.

96. S. 744, 113th Cong. § 245C(c)(5)(B).

97. Gordon Whitman, *How Many Could Be Left Out of Immigration Reform?*, HUFFINGTON POST (May 7, 2013, 5:29 PM), http://www.huffingtonpost.com/gordon-whitman/how-many-could-be-left-ou_b_3222685.html.

98. PEW HISPANIC CTR., *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES*, 17 (2009).

99. Nakamura, *supra* note 84.

B. Who, by Contrast, is Welcome

Beyond the steadily-employed, English-proficient, financially able immigrants with limited or no criminal records, the Senate Bill also provides a simpler, shorter path for two other groups. One group comprises the youth who were brought to the U.S. before the age of sixteen, usually by their parents.¹⁰⁰ These youth, known collectively as the DREAMers, qualify for permanent residence much more quickly—after five years instead of twelve.¹⁰¹ They also do not need to pay the \$1,000 penalty required of registered provisional immigrants.¹⁰² A second group consists of agricultural workers who must meet comparable requirements as the general legalization program, but who can obtain special “blue cards” immediately and apply for permanent residence after five years (as opposed to twelve under the general program) if they continue working in agriculture, pay a fine, and show that they have paid their taxes.¹⁰³

The Senate Bill does more than provide a pathway for certain currently undocumented immigrants to legalize their immigration status. It also restructures future flows, and in ways that diverge from the 1965 Act’s civil rights ethos and commitment to opening doors to new, previously underrepresented or excluded populations. Many of the changes are welcomed by advocates for immigrants, particularly the ability of lawful permanent residents to apply for their own immediate relatives (spouses and children) just as citizens can (instead of facing a multi-year backlog before visas are available, as is presently the case).¹⁰⁴ The commitment to family unification, although defining “family” more narrowly now than in 1965, will continue to be a major source for future immigration flows.

The interesting change comes from the emphasis, both rhetorical and legal, on the *utility* of future immigrants. Economic concerns have always been part of immigration history, but perhaps never more clearly, prominently and at the rhetorical forefront as with the current reforms, which share a vision of admitting people based upon their

100. § 245D (“Adjustment of Status for Certain Aliens who Entered the United States as Children”).

101. § 245D(b)(1)(A)(i).

102. § 245C(c)(5)(B).

103. § 2211 (“Requirements for Blue Card Status”).

104. America’s Voice, a pro-immigrant advocacy organization cited thirty-two different provisions as being positive in a blog post after passage of the Senate Bill. *What We Won with Senate Bill S. 744*, AMERICA’S VOICE (June 27, 2013), <http://americasvoice.org/research/what-we-won-with-senate-immigration-bill-s-744/>.

likelihood of contributing to the economy while not undercutting opportunities for citizens. The Senate Bill does this by creating a two-track points-based architecture for “merit-based” immigration, each of which is divided into tiers.¹⁰⁵ For Track 1, which would comprise half of the merit-based immigrants, employment and education matter most.¹⁰⁶ In descending order of importance, applicants receive points for years of employment experience in occupations that require “considerable” or “extensive” preparation (i.e., high-skill) employment (up to twenty points),¹⁰⁷ and points for formal education (fifteen points for a doctorate, or ten points for a master’s degree). Applicants also receive points if currently employed in certain occupations or have a job offer in a high-demand occupation. Lower on the points scale are English language skills or having a U.S. sibling or parent, being young, coming from a nation that sends relatively few immigrants, and—least important—civic involvement (maximum of two points).¹⁰⁸ For the less-skilled Track 2 applicants, employment is far and away the most important criteria (maximum of forty points when exceptional employment records or employment in high-demand occupations are factored in). On this track, individuals can earn ten points for English language skills, for having a U.S. sibling or parent, and/or for being a caregiver tied behind that (maximum of ten points each).¹⁰⁹ The Migration Policy Institute estimates that this would mean instead of six percent of immigrant visas going to skills-based applicants (or fourteen percent, if you include the accompanying family members of those immigrants), sixteen to nineteen percent of immigrant visas would go to those applicants (or thirty-five to forty-one percent, if including family members).¹¹⁰ Compared to other countries, this increase still keeps the U.S. fairly low in its reservation of

105. See §§ 2301–02.

106. § 2301(c)(4).

107. § 2301(c)(9)(G), (H).

108. As one pro-immigrant policy organization noted, “The message of this distribution is very clear: it prioritizes educated, experienced, skilled, English-fluent, young immigrants. The inclusion of family ties and diversity in this system, on the other hand, seems more like an extra bonus than an attribute that the system aims to embrace.” AM. IMMIGRATION POLICY CTR., DEFINING “DESIRABLE” IMMIGRANTS: WHAT LIES BENEATH THE PROPOSED MERIT-BASED POINT SYSTEM (May 20, 2013), <http://www.immigrationpolicy.org/just-facts/defining-desirable-immigrants-what-lies-beneath-proposed-merit-based-point-system>.

109. See § 2301(c)(5).

110. Madeleine Sumption & Claire Bergeron, *Remaking the US Green Card System: Legal Immigration under the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*, MIGRATION POL’Y INST., June 2013, at 6.

visas for immigrants with particularly desired skills and employment contributions.¹¹¹

One way to make space for these changes without dramatically increasing overall immigration levels is the elimination of some existing immigrant flows. Two particular programs have historically drawn fire and were eliminated in the Senate Bill: the diversity visa and the sibling category for family-based immigration. First, the Senate Bill eliminates the diversity visa, the program described above from 1990, which intentionally formed a path for immigrants from historically underrepresented nations, immigrants not likely to enter through employment or existing family ties.¹¹² Discussions in the House revealed the shift as a clear policy choice away from providing opportunity to random individuals dreaming of a new life in America—a common profile in American immigration mythology—toward industry-specific needs. One House bill attempted to take the 55,000 diversity visa slots and move them into visas for students graduating from U.S. schools with various science, technology, engineering and math degrees.¹¹³ As House Republican leader Bob Goodlatte noted, “[t]he visa lottery, we think, is the best example that there is of how to issue green cards on a basis that has absolutely no correlation to what is in the interest of growing the American economy or family unification, because it does neither. It’s based on pure luck.”¹¹⁴ The randomness of the program—literally, a lottery program—sustains this kind of argument, but notably, diversity visa immigrants have, on average, higher educational and employment attainment than typical immigrants through the family-based immigration channels, and the program has been particularly effective at bringing educated African immigrants with managerial-level experience into the country.¹¹⁵

The second eliminated immigration pathway is that for siblings, currently the “fourth preference” in family-based permanent resident visas, after unmarried sons and daughters of citizens, is spouses and

111. *See id.*

112. *See* § 2303.

113. H.R. 2131, 113th Cong. (2013).

114. Jennifer Martinez, *Goodlatte and Issa Defend Cutting Diversity Visa Program*, THE HILL (May 23, 2013, 5:10 PM), <http://thehill.com/blogs/hillicon-valley/technology/301605-goodlatte-and-issa-defend-cutting-diversity-visa-program-in-tech-visa-bill>.

115. Arun Lobo, *Unintended Consequences: Liberalized U.S. Immigration Law and the African Brain Drain*, in THE NEW AFRICAN DIASPORA IN NORTH AMERICA 203 (Kwado Konadu-Agyemang et. al, eds., 2006) (quoted in Michael Kremer, *The Diversity Visa Lottery: A Study Linking Immigration Politics to Immigrant Characteristics and Experiences* (2011), available at dl.tufts.edu/file_assets/tufts:UA005.004.061.00001 (unpublished thesis, Tufts University)).

children (below eighteen) of lawful permanent residents, and married sons and daughters of citizens.¹¹⁶ (Spouses and minor children of citizens are considered immediate relatives and do not need separate petitions or visa numbers to be able to get permanent residence.)¹¹⁷ This category has been criticized as expanding too far the pool of people who can enter the U.S. already in the pipeline for citizenship, who can then petition for their circle of eligible family members, and so forth: for critics, “‘chain migration’ [is] a concept whose connotation is almost as poisonous as ‘amnesty’ among the bill’s detractors.”¹¹⁸ Notably, the category has also been credited with bringing in many immigrants of color, especially from the Philippines, where the popularity of the sibling-category visa has led to an infamous backlog of twenty years in visa availability.¹¹⁹

The 1965 Act shifted the demographics of this country and permitted less skilled and less educated people to come through family members and through slots for unskilled workers; reform today focuses on immigrants’ likely economic contributions. This has attracted a coalition of business interests who champion reform. Michael Bloomberg created the Partnership for a New American Economy in 2010, pushing for reform because of its likely economic impacts.¹²⁰ Chamber of Commerce President Thomas J. Donahue makes similar arguments, noting that “America cannot compete and win in a global economy without the world’s best talent, hardest workers, or biggest dreamers. We cannot sustain vital programs for the elderly and needy without more workers—both low skilled and high skilled—to grow our economy and tax base.”¹²¹ Technology sector leaders like Bill Gates and Mark Zuckerberg more recently created FWD.US to call for reform that establishes, among other things, “a streamlined process for admitting future workers to ensure that we

116. See 8 U.S.C. § 1153(a).

117. See *id.* § 1151(b)(2)(A)(i).

118. David Grant, *Immigration Reform: When Is Family Reunification Also ‘Chain Migration’?*, CHRISTIAN SCI. MONITOR (May 6, 2013), [http://www.csmonitor.com/USA/DC-De coder/2013/0506/Immigration-reform-When-is-family-reunification-also-chain-migration/\(page\)/2](http://www.csmonitor.com/USA/DC-De%20coder/2013/0506/Immigration-reform-When-is-family-reunification-also-chain-migration/(page)/2).

119. For the most recent length of wait for visas, see U.S. STATE DEP’T, VISA BULLETIN, available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

120. See Marc LaVorgna, *Mayor Bloomberg Discusses Need for Comprehensive Immigration Reform*, CITY OF N.Y. OFFICIAL WEBSITE (July 26, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/257-13/mayor-bloomberg-need-comprehensive-immigration-reform>.

121. *Reforming Immigration for a Better America*, U.S. CHAMBER OF COM. (Apr. 26, 2013) (remarks by Thomas J. Donohue President and CEO), available at <https://www.uschamber.com/speech/reforming-immigration-better-america-remarks-thomas-j-donohue-president-and-ceo-us-chamber>.

continue to promote innovation and meet our workforce needs.”¹²² In September 2013, a coalition of 100 business leaders from companies, including but well beyond the technology sector (such as Coca-Cola, American Express, Johnson & Johnson, among others), sent a letter to House of Representatives leaders arguing that reform would be “a long overdue step toward aligning our nation’s immigration policies with its work force needs at all skill levels to ensure U.S. global competitiveness.”¹²³

CONCLUSION: WHAT THESE CHANGES MASK AND SIGNIFY

There are many reasons to applaud the innovations to the immigration system, and during an era of recession, the shift to an emphasis on economic productivity and job-creation makes intuitive policy sense. It also provides a timely counter-narrative to the common argument *against* immigration, that it takes jobs away from Americans—an argument with extra resonance during a recession. It sounds particularly good when accompanied by calls like those from Gates, Zuckerberg, and others, to improve the educational system in the U.S., to improve the competitiveness of U.S. citizens graduating with record levels of unemployment for jobs currently being filled by immigrants.

My concern with basing reform on worthiness (the plan for the legalization of the undocumented) and utility (reforming future flows) is what such a shift both masks and signifies. First, what it masks: As this Symposium focuses on new civil rights challenges, I have been considering how far the current debates over immigration reform have come since the 1965 Act—the only law that explicitly attempted to set immigration law in a civil rights paradigm. As with other laws of the time, the 1965 Act was righting obvious and overt historical wrongs: the litany of race-based exclusions that run in a straight, bold line through the history of immigration law in the U.S. The frank acknowledgment by leaders in 1965 of the racism in America’s prior immigration law history is entirely absent from today’s bill; in lieu of any

122. FWD.US, http://www.fwd.us/immigration_reform (last visited Feb. 5, 2013).

123. Letter from Coalition of 100 Business Leaders to John Boehner, Speaker of the House of Representatives, and Nancy Pelosi, Minority Leader of the House of Representatives, (Sept. 10, 2013), available at http://www.hrpolicy.org/downloads/2013/CHRO_Immigration_Reform_Letter.pdf; see also Julia Preston, *Business Leaders Tell Lawmakers Not to Forget About Immigration*, N.Y. TIMES (Sept 10, 2013, 1:13 PM), http://thecaucus.blogs.nytimes.com/2013/09/10/business-leaders-tell-lawmakers-not-to-forget-about-immigration/?_r=0.

discussion of equality and removing barriers as values and pillars of immigration policy, the rhetoric and structure of the reforms suggest that utility is the new lodestar guiding reform. This is a plausible policy choice, but what I hope to convey today by contrasting reform with what happened in the height of the civil rights era, is that it *is* a choice, not an inevitability.

Second, what the reforms signify: Reform that excludes millions creates significant new problems for those left out, the “super undocumented” whose vulnerability to discrimination and exploitation will far exceed the already tremendous vulnerability of today’s undocumented population because they will be seen as even more culpable for their own lack of status. I fear that being undocumented the day after immigration reform will make being undocumented today look good by comparison. And three of the emerging problems—the demonization and blaming of those excluded; the increasingly pervasive focus on documentation; and society’s abandonment of the notion of redemption—show us something about America more broadly, beyond the specific context of America’s immigrants.

I fear the narratives that will be told about immigrants who do not qualify for immigration reform. The narrative being created about immigration reform is that it is fixing the broken system, and solving the problem of the eleven million undocumented. As I have hopefully demonstrated today, with millions left out for varying reasons, reform does nothing of the kind—and those whose situation is not resolved are likely to be understood by the public as criminal because of the ongoing conflation of undocumented status with illegality and criminality. Undocumented immigrants already suffer this stigma, and those left out of reform will surely be perceived as even less worthy members of society. And although some will be excluded literally because of criminal convictions, the majority of those excluded are excluded because of poverty, lack of education, and lack of financial stability. In my earlier work, I have explored the problematic psychological power of narratives about immigrants, and how tales of unworthiness in society seep into our laws and our courtrooms.¹²⁴ In the new world post-reform, that power will be multiplied by the public’s perception that this problem was already fixed—so those for whom the problem was not fixed must be deeply unworthy characters.

124. See Keyes, *Beyond Saints and Sinners*, *supra* note 3.

The implications of such an attitude toward the new “super undocumented” can only be known through time, but it is easy to imagine that if undocumented workers face challenges accessing the courts now to file wage complaints against their employers—as they do in my experience litigating wage and hour claims in Maryland—such challenges will be worse when juries define the workers first and foremost as lawbreakers. If undocumented students—a highly sympathetic portion of the undocumented population—now have access to higher education only through powerful grassroots organizing campaigns like the extraordinarily effective Maryland DREAM campaign,¹²⁵ the ability of the “super undocumented” to access loans or maintain the ability to attend public institutions of higher education will be more difficult when the story shifts post-reform.

As noted above, many of the reasons people will not qualify for reform flow not from personal failing but from poverty and lack of education. Yet the narrative of the “super undocumented” is unlikely to be anything other than accusatory: “you stayed undocumented because of your failings.” Such accusations are sadly in line with attacks on the poor generally, from cutting food stamps to limiting unemployment benefits, all with the idea that such supports encourage laziness. As Charles Blow wrote recently in the *New York Times*:

[S]omehow, when some poor people, or those who unexpectedly fall on hard times, take advantage of benefits for which they are eligible it’s an indictment of the morality and character of the poor as a whole. The poor are easy to pick on. They are the great boogymen and women, dragging us down, costing us money, gobbling up resources. . . . We have gone from a war on poverty in this country to a war on the poor, in which poor people are routinely demonized and scapegoated and attacked¹²⁶

Race and poverty intersect as a matter of reality and rhetoric alike, and as Peter Edelman has shown throughout his scholarship, the demonization of poor people as undeserving of benefits intersects too frequently with racial politics.¹²⁷ Nothing in this conflation is new—

125. See Elizabeth Keyes, *Examining Maryland’s Views on Immigrants and Immigration*, 43 U. BALT. L.F. 1 (2012).

126. Charles Blow, *The Appalling Stance of Rand Paul*, N.Y. TIMES (Dec. 11, 2013), http://www.nytimes.com/2013/12/12/opinion/blow-the-appalling-stance-of-rand-paul.html?ref=charlesmblow&_r=0.

127. Peter Edelman explores this persuasively by looking both at race as a proxy for “undeserving”-ness and exclusion of people of color from welfare rolls, and at race as a means of demonizing welfare programs generally. See Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL’Y 389 (2004). Of course, immi-

political scientist Theda Skocpol has traced the line of deserving/undeserving in welfare back until the Civil War era—and I mention it here simply to remind us of its enduring power, and connect the blame likely to be assigned in the immigration context, disproportionately affecting immigrants of color—with the same phenomenon that has been a feature of the American political landscape in other contexts for so many decades.

As the narrative deepens in its demonization of those who have “failed” to fix their status, it will conflate with the increasing centrality of documentation itself, in both the workplace and beyond. The Senate Bill creates a social security card that is “fraud-resistant, tamper-resistant, wear-resistant, and identity theft-resistant,”¹²⁸ and mandates the use of E-Verify,¹²⁹ the federal database for employers to verify employment authorization. The only employment left for the millions of undocumented immigrants not included in immigration reform will be employment even deeper in the shadows than what is available now. Because such employment is rife with workplace abuse, any additional barriers to emerging from the shadows to avail of courts for enforcement will permit such abuses to flourish. The day after immigration reform, those who do not qualify for all the reasons I have described above will be without documents in a world that demands them even more than it does today. And as social security numbers become ever more central to daily life, used as a means of identification far beyond the employment context,¹³⁰ the absence of a card puts people at a significant disadvantage.

The focus on documents as a way to separate “them” and “us” also mirrors a similar division created by voter ID laws, where the

grants, themselves, were part of the group deemed undeserving in 1996, and even lawful permanent residents were excluded from many public benefits following the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. Michael J. Wishnie, *Welfare Reform After a Decade: Integration, Exclusion, and Immigration Federalism*, in *IMMIGRANTS AND WELFARE: THE IMPACT OF WELFARE REFORM ON AMERICA'S NEWCOMERS* 69, 69 (Michael E. Fix ed., 2009).

128. S. 744, 113th Cong. § 3102(a)(1).

129. § 274A(d)(2)(G) (“Except as provided in subparagraph (H) [concerning tribal government employers], not later than 4 years after regulations are published implementing this subsection, all employers shall participate in the System with respect to all newly hired employees and employees with expiring temporary employment authorization documents.”).

130. As the Congressional Research Service has noted, “In the view of some, a person’s SSN has attained the status of a quasi-universal personal identification number. Today one can be required to furnish one’s SSN to obtain a driver’s license, apply for public assistance, donate blood, or take out a loan.” KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RL30318, *THE SOCIAL SECURITY NUMBER: LEGAL DEVELOPMENTS AFFECTING ITS COLLECTION, DISCLOSURE, AND CONFIDENTIALITY* (2008).

existence and availability of documentation is the dividing line between being able to vote or not. These laws are seen as disproportionately affecting communities of color, as current Justice Department lawsuit against the North Carolina voter ID law alleges.¹³¹ As Kevin Johnson argued with his “magic mirror” metaphor, this treatment of immigrants tells something about America more generally, where the centrality of documents is a way to further marginalize those at society’s edges, with disproportionate impacts on communities of color.

Even for those in this population of super undocumented who are excluded because of crimes committed, the clear message of immigration reform is that, for them, there are no second chances. Among my own clients, some of the hopefulness about America that I have heard and felt most powerfully from my clients comes from those who came with the least but are working to help their children succeed, and among these, I count many who have amassed relatively minor criminal convictions, and one or two with more serious or lengthy criminal records whose turnaround has been extraordinary—but unforgivable in immigration terms. By excluding them from reform, we are saying that nothing they could do in the future would make up for the wrongs done in their past. I think of my client who fled Sudan who is thrilled to now be working at a difficult, dangerous job in a poultry factory in the South, or my client who finally laid the demons of drug abuse to rest and is raising her two young boys in rural Maryland with her partner, and I find this societal abandonment of the idea of redemption short-sighted and deeply sad.

And this says something about America more generally, where second chances are harder and harder to come by for immigrants and nonimmigrants alike. Expectations like these are higher for American citizens at society’s margins as well, where mistakes (real or perceived), can be the difference between liberty and deprivation of liberty. Symptoms of this are all around: the mass incarceration of black men,¹³² and the often-permanent disenfranchisement of felons even after they have completed their sentences.¹³³

131. Carrie Johnson, *Justice Department Sues North Carolina over Voter ID Law*, NPR (Sept. 30, 2013), <http://www.npr.org/blogs/thetwo-way/2013/09/30/227591062/justice-department-to-sue-north-carolina-over-voter-id-law>.

132. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (2012).

133. Jamin Raskin, *Lawful Disenfranchisement: America’s Structural Democracy Deficit*, 32 HUM. RTS. 12, 15 (2005) (examining the “democracy deficit” created by felon disenfranchise-

Race and Immigration, Then and Now

In closing, I do celebrate the efforts to fix the broken system and to solve the intolerable situation of having eleven million members of our community living without legal status. But as we move slowly but surely forward toward reform, we must beware of creating a new set of even deeper problems for the future. As Erika James, the *Howard Law Journal's* Editor-in-Chief, said in her inspiring opening comments this morning, we must “ensure that what is being done is just and what is just is done.” Let immigration reform be done, and let us ensure that it is done justly.

ment, ballot validation problems, and other measures that disproportionately impact African American and Hispanic voters).

ESSAY

Immigration Remarks for the 10th Annual Wiley A. Branton Symposium

SHOBA SIVAPRASAD WADHIA*

Good morning. Thank you to Richard Carlton and the *Howard Law Journal* for inviting me to speak today. Speaking at Howard carries special meaning for me for a few reasons. Like for many, my ideas about social justice and race came early and in part from the opinions of the late Thurgood Marshall, and so it is a privilege to feel his presence at Howard and to have Cecilia Marshall, wife of the late Thurgood Marshall in the audience. Also in 2008, I had the pleasure of teaching immigration law as an adjunct while working as a legislative lawyer in Washington D.C. For all of these reasons, it is an honor to be speaking at Howard School of Law.

This morning (despite the pressure that our panel comes right before lunch), I am going to provide a “101” on the role of prosecutorial discretion in immigration law, which is my primary area of research and fundamental to understanding how the immigration system operates. Prosecutorial discretion is a largely invisible tool that enables thousands, if not millions, of unauthorized noncitizens to reside in the United States without fear from deportation. It may be characterized as invisible because prosecutorial discretion decisions are largely connected to *no action at all* or as some call it, *non-enforcement*.

A favorable exercise of “prosecutorial discretion” refers to a decision by a Department of Homeland Security, or DHS, employee to abstain from enforcing the immigration laws against a person or group

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of persons.¹ A grant of immigration prosecutorial discretion does not amount to a formal legal status but rather functions as a tenuous one.² There are two or maybe three theories that lie beneath prosecutorial discretion in immigration law. One theory is economic. The agency has limited resources and deporting ten million people is not cost-effective (the agency has the resources to deport less than four percent or 400,000 of the total removable population). Therefore, the agency should target its resources toward its highest priorities such as those who present a risk to national security or a danger to the community. The second theory is humanitarian. There are scores of individuals— young people pursuing higher education, spouses of U.S. military members, single mothers acting as primary breadwinners and caregivers, and migrant workers who left their families to build a life for themselves—who are contributing to the U.S. in meaningful ways and therefore, should be protected from deportation.³ There is a possible third theory that I might characterize as more political in nature that occurs when the agency chooses to exercise executive power in the wake of congressional inaction or action.

So what exactly does it mean to exercise prosecutorial discretion and at what stage of the immigration enforcement process may it be exercised? While you might hear the term “prosecutorial discretion” and associate it only with one action, or one form, there are in fact more than twenty different kinds of prosecutorial discretion, some with more fancy names than others. One policy document issued from the immigration agency in June 2011 lists the following examples, or forms, of prosecutorial discretion:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (“NTA”);
- focusing enforcement resources on particular administrative violations or conduct;

1. See, e.g., Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243–244 (2010); Memorandum from Doris Meissner, Comm’r of Immigration and Naturalization Serv. on Exercising Prosecutorial Discretion 1 (Nov. 17, 2000) [hereinafter Meissner Memo] (on file with author); Memorandum from John Morton, U.S. Immigration and Customs Enforcement on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Det., and Removal of Aliens 2 (June 17, 2011).

2. See, e.g., Wadhia, *supra* note 1, at 246.

3. *Id.* at 244–45.

- deciding who to stop, question, or arrest for an administrative violation;
- deciding who to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a form removal proceeding in immigration court;
- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.⁴

“Deferred action” is one form of prosecutorial discretion that has received some recent popularity in light of a 2012 program called Deferred Action for Childhood Arrivals or DACA.⁵ A less ornate form of prosecutorial discretion is when DHS refrains from filing a charging document called the Notice to Appear with the immigration court.⁶ When this notice is filed with the immigration court, removal proceedings are triggered and the noncitizen is all at once placed into an adversarial forum at which the government has alleged him as deportable and the immigration judge will hear arguments surrounding the noncitizen’s relief from removal, should any be raised.⁷

Think about the decision to file or not to file the Notice to Appear, even where it appears legally sufficient. Thousands of dollars are saved—labor from the trial attorney, time for the immigration

4. Morton, *supra* note 1, at 2–3.

5. For the requirements for DACA from USCIS website, see *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (last updated Jan. 18, 2013), available at <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process>.

6. See Immigration and Nationality Act § 239(a), 8 U.S.C. § 1229a(a)(1) (2012); 8 C.F.R. §§ 1003.13, 1239.1 (2014).

7. 8 C.F.R. § 1003.14; For more information about the role of NTAs during the prosecutorial discretion process, see *New Report Calls for Improvements to DHS Notice to Appear Procedure*, PENN ST. L. NEWS (Oct. 22, 2013), available at <http://law.psu.edu/news/new-report-calls-improvements-dhs-notice-appear-procedure>.

judge, travel by all parties, time in detention if the individual is detained and so on. Likewise, the noncitizen is protected from the shame of a court proceeding and happy receiving his justice in a quieter or subtler way. Another way DHS may exercise prosecutorial discretion is to release a noncitizen from detention.⁸ Yet another way DHS may exercise discretion is to move to dismiss a case after removal proceedings have commenced or choose to not file an appeal with the administrative appellate court, the Board of Immigration Appeals, after the immigration judge sitting at the lower immigration court has determined that relief should be provided to the person.⁹

Prosecutorial discretion enjoys a rich history. The practice of prosecutorial discretion has existed for as long as the immigration system has operated but was first revealed in the early 1970s through some case law and a lawsuit involving a well-known music icon named John Lennon.¹⁰ In fact, one document, issued in 2000 by then INS Commissioner Doris Meissner, included pages of information about the theory of prosecutorial discretion and the types of equities that should be considered in deciding whether a favorable exercise of discretion is appropriate—some of these equities include: residence in the U.S., potential for an immigration benefit, and medical conditions affecting the individual or his family.¹¹ The Meissner Memo also offers a good illustration of how guidance might be influenced by congressional activity or inactivity.¹² The Meissner Memo was issued on the heels of the passage of two immigration laws by Congress in 1996, which together resulted in a statutory scheme that severely reduced the discretion once held by immigration judges and the federal courts in determining whether a person's equities or circumstances warranted a pardon or protection from deportation. The elimination of this discretion coupled with the creation of new grounds for deportation created a situation that made the agency look bad in media stories and public forums, at which the unintended consequences of the

8. See, e.g., Morton, *supra* note 1, at 2; see also U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 11064.1: FACILITATING PARENTAL INTERESTS IN THE COURSE OF CIVIL IMMIGRATION ENFORCEMENT ACTIVITIES (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf.

9. See 8 C.F.R. § 1239.1 to .2 and 1240.15; see generally EXEC. OFF. FOR IMMIGR. REV., <http://www.justice.gov/eoir/> (last visited Jan. 21, 2014) (providing more information on the Executive Office for Immigration Review).

10. Leon Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99, 101 (1979); see Wadhia, *supra* note 1, at 246.

11. See Meissner Memo, *supra* note 1, at 7.

12. See *id.* at 1; Wadhia, *supra* note 1, at 252–254.

1996 immigration laws were showcased (consider: a mom stealing a sweater and being labeled as an aggravated felony and barred from relief despite the presence of children born in the U.S. and enjoying lawful permanent residence or green card status for more than a decade).¹³ And there you have the possible third theory of prosecutorial discretion.

After the 9/11 attacks, Congress was *swift* in their deliberation about reorganizing the immigration agency (I know, hard to believe in the wake of a sixteen day furlough and delay on immigration reform) and in 2002, passed a bill called the Homeland Security Act of 2002, which abolished the Immigration and Naturalization Service (INS) and transferred key immigration units to a new cabinet agency called the Department of Homeland Security, or DHS. DHS handles three core functions—services, border protection and interior enforcement.¹⁴ These functions have names and acronyms—Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). So, you do the coordination math—these three units all play “share authority” to exercise prosecutorial discretion.

For the administrative law lovers in the room, appreciate that nearly every document issued by the INS and DHS on immigration prosecutorial discretion has been issued as a general policy statement and without notice and comment rulemaking under the Administrative Procedures Act (APA). In fact, when the courts tried to litigate whether or not the old Lennon rule (then known as an Operations Instruction) was a substantive benefit or merely an act of administrative convenience, the agency was quick to modify the rule to make clear that its prosecutorial discretion policy confers no right or benefit and, instead, acts solely as a convenience measure for the agency.¹⁵ Notably, prosecutorial discretion has historically lacked transparency. This was first revealed in the John Lennon case when Leon Wildes had to sue the agency before obtaining the files of some 1800 deferred

13. See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1957 (2000); see also Shoba S. Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 871 (2008).

14. *Department Components*, DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/department-components> (last visited Feb. 6, 2014).

15. See Administrative Procedure Act, 5 U.S.C.A. § 553 (West 2014); Shoba S. Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 41 n.4 (2013); see, e.g., Wadhia, *supra* note 1, at 248–49.

action cases but continued for many years thereafter.¹⁶ I, too, went through a Freedom of Information Act (FOIA) adventure that began with a skeletal request in 2009 and evolved into a lawsuit with one agency (ICE), regular communication with the FOIA office in the second one (USCIS), and little to no movement from the third (CBP).¹⁷

And for the budding criminal lawyers in the room, appreciate that immigration prosecutorial discretion bears some resemblance to criminal law, which historically has considered prosecutorial discretion since America's founding. Though the immigration law system is a civil one, it retains criminal law-like features such as interrogation, arrest, detention, the filing of charges, and in some cases a hearing before an immigration judge with the government serving as a "prosecutor" and the noncitizen serving as the "defendant." At each of these stages, DHS has the opportunity to exercise prosecutorial discretion. Like with the criminal system, the decision by DHS to bring and file charges against a person is a poignant stage in the enforcement process.¹⁸

The resemblances between the two systems were illustrated by early memos by INS like a memo published by Sam Bernsen in 1976 and the later one published by Doris Meissner in 2000—both of these memos recognized that while immigration officers are not prosecutors in the "literal" sense, they function as prosecutors in a certain practical way.¹⁹ The Meissner Memo went one step further by explicitly naming and referring to the United States Attorney's Manual and the federal "substantial federal interest standard" as a guidepost for the immigration agency.²⁰ Finally, both the civil and criminal systems center the theory of prosecutorial discretion on saving resources and public interest or humanitarian reasons. Certainly, both systems have a broad list of conduct that makes a person prosecutable or deportable, so the resource constraints are as much actual as they are theo-

16. See generally Leon Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 SAN DIEGO L. REV. 42 (1976–1977); see also Wadhia, *supra* note 1, at 246–248.

17. Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 4 (2012); see Shoba Sivaprasad Wadhia, *My Great FOIA Adventure and Discoveries of Deferred Action Cases at ICE*, 27 GEO. IMMIGR. L.J. 345 (2013); see also *My FOIAs with DHS on Prosecutorial Discretion*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195758.

18. See, e.g., Wadhia, *supra* note 1, at 268.

19. Meissner Memo, *supra* note 1, at 4; Memorandum from Sam Bernsen, Gen. Counsel, on Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 12, 1976), <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

20. Meissner Memo, *supra* note 1, at 4.

retical. There are some key differences between the civil and criminal law systems, some of which include the lack of a sentencing stage in immigration enforcement, the role of the victim in the criminal context and the lack of major due process protections in the immigration system like a court-appointed attorney, flexible rules about detention, and detention without charges or notice, and others.²¹

Let me fast forward to the last few years and highlight the role prosecutorial discretion has played during the Obama Administration. Early on, the Administration made public announcements about comprehensive immigration reform and legislative solutions to the broken immigration system.²² But the political landscape sharpened. The failure of Congress to pass the DREAM Act in 2010 was a setback for the Administration and thousands of young people who would have benefited from the bill. In addition to the failure of the DREAM Act, was the execution of deportation orders by the agency at record levels and public statements by the Administration about the importance of enforcement which one pundit called “enforcement on steroids.”²³

Together, the demise of the DREAM Act, the inability of Congress to push immigration reform over the finish line, and a record number of deportations created a humanitarian crisis that activated the Executive branch to consider administrative solutions in the form of prosecutorial discretion. Beginning in late 2010, DHS published a collection of memoranda to outline its civil enforcement “priorities” and also identify the various factors that ICE employees and attorneys should consider in deciding whether prosecutorial discretion is appropriate.²⁴ The Administration received support if not pressure from members of Congress, immigration advocates, Dreamers and law professors to exercise its prosecutorial discretion.²⁵

21. See, e.g., Wadhia, *supra* note 1, at 268–69.

22. For a sampling of President Obama’s public discussion about comprehensive immigration reform, see David Jackson, *Obama Talks Immigration with Officials—But No Members of Congress*, USA TODAY (Apr. 19, 2011), <http://content.usatoday.com/communities/theoval/post/2011/04/obama-talks-immigration-with-officials-but-no-members-of-congress/1#.Ut1qK9Io5kg>; see also Julie Mason, *President Obama Pushes Immigration Overhaul*, POLITICO.COM (May 10, 2011), <http://www.politico.com/news/stories/0511/54696.html>; WHITE HOUSE, *President Obama on Comprehensive Immigration Reform*, <http://www.whitehouse.gov/photos-and-video/video/president-obama-comprehensive-immigration-reform> (last visited July 1, 2010).

23. *Lost in Detention*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/race-multi-cultural/lost-in-detention/transcript-11/> (last visited Jan. 21, 2014).

24. See e.g., Morton, *supra* note 1.

25. See *A Sad Comparison: Napolitano’s DHS, Tougher Than Bush*, AMERICA’S VOICE, http://americasvoiceonline.org/press_releases/a_sad_comparison_napolitanos_dhs_tougher_than_bush/ (last visited Feb. 6, 2014); Letter from the Senate Judiciary Subcomm. on Immigration to Janet Napolitano, Sec’y Dept. Homeland Sec. (Apr. 14, 2011), <http://arnolaw.blogspot.com/2011/>

Public interest over prosecutorial discretion peaked in June 2012 when President Barack Obama announced a policy termed DACA, or “Deferred Action for Childhood Arrivals.”²⁶ DACA is a sort of deferred action which itself is a form of prosecutorial discretion in immigration law. DACA has enabled more than 500,000 young people to work and study in the United States with dignity and without the constant fear of arrest and possible deportation.²⁷ Critics have labeled the memoranda on prosecutorial discretion and the DACA program, in particular, as excessive and politically motivated.²⁸

Whether or not DACA was created for political reasons, the policy itself is nothing new and dates back to the John Lennon rule called the Operations Instruction.²⁹ There have been concerns from both immigration restrictionists and activists about the implementation of the Morton Memos and the limitations of the DACA program. Some of these concerns include the fact that parents of Dreamers remain vulnerable to deportation, young people with minor offenses that constitute a “significant misdemeanor” are ineligible for DACA protection, and scores of parents with U.S. citizen children continue to sit in immigration detention or scheduled for deportation.³⁰ This situation

04/letter-from-senate-judiciary.html; Letter from Senator Harry Reid et al. to President Barack Obama (Apr. 13, 2011), <http://www.scribd.com/doc/53014785/22-Senators-Ltr-Obama-Relief-for-DREAMers-4>; Letter from Am. Immigration Lawyers Ass’n and Am. Immigration Council to Janet Napolitano, Sec’y, Dept. Homeland Sec. (Apr. 6, 2011), available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/AILA-AIC-Napolitano-4-6-2011.pdf>; Wadhia, *supra* note 17, at 28.

26. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-deferred-action-childhood-arrivals> (last visited Mar. 23, 2014).

27. *Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-8-15.pdf> (last visited Jan. 20, 2013).

28. See, e.g., Griselda Nevarez, *Deferred Action Approval Rate Dispute Erupts Between Center for Immigration Studies and USCIS*, HUFFINGTON POST (Apr. 29, 2013), http://www.huffingtonpost.com/2013/04/29/deferred-action-approval-rate_n_3180073.html; Brad Plumer, *Can Obama Legalize 11 Million Immigrants on His Own?*, WASH. POST (Aug. 22, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/22/marco-rubio-says-obama-could-legalize-11-million-immigrants-on-his-own-is-that-right/>; Hansi L. Wang, *Deferred Action: A Bird in Hand for Young Immigrants*, CODE SWITCH (Apr. 23, 2013), <http://www.npr.org/blogs/codeswitch/2013/04/23/178669698/Deferred-Action-A-Bird-In-Hand-For-Young-Immigrants>.

29. Immigration and Naturalization Service, U.S. Department of Justice. Operations Instructions. Regulations and Interpretations, Sec. 103.1(a)(ii) (1952, as revised 1979).

30. See, e.g., *Dreamer, DACA Recipient Yoli Navas: “We Live in Fear Every Day.”* AMERICA’S VOICE (June 25, 2013), <http://americasvoiceonline.org/blog/dreamer-daca-recipient-yoli-navas-we-live-in-fear-every-day/>; *One Year Later: Report Shows Morton Memo Hasn’t Delivered on Promises of Relief*, REFORM IMMIGR. FOR AM., <http://www.reformimmigrationforamerica.org/blog/item/1307-30one-year-later-report-shows-morton-memo-hasn-t-delivered-on-promises-of-relief.html> (last visited Jan. 20, 2014); Seth F. Wessler, *Nearly 205k Deportations of*

is not tolerable. Whether or not prosecutorial discretion can be a tool that delays deportation, each of these injustices is worthy of discussion.

CONCLUSION

Rather than offer possible solutions to each injustice of the immigration system in my final few minutes let me share a few that are specific to immigration prosecutorial discretion.

- DHS should increase transparency about the cases involving prosecutorial discretion;³¹
- DHS should hold employees who abuse prosecutorial discretion accountable and create more incentives for attorneys to do the right thing;
- DHS should issue fewer Notices to Appear against noncitizens who do not fit within the Administration's highest priorities³²; and
- The Administration should recognize "deferred action" in the law as a formal benefit by promulgating a regulation.³³

Thank you.

Parents of U.S. Citizens in Just over Two Years, COLORLINES (Dec. 17, 2012), http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.

31. For more on this recommendation, see Wadhia, *supra* note 17, at 51.

32. For more on this recommendation, see *New Report Calls for Improvements to DHS Notice to Appear Procedure*, PENN ST. L. NEWS (Oct. 22, 2013), <http://law.psu.edu/news/new-report-calls-improvements-dhs-notice-appear-procedure>.

33. For more on this recommendation, see Wadhia, *supra* note 17, at 60–61.

ESSAY

Recent Developments in Federal Implementation of Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

DARIA E. NEAL*

INTRODUCTION	941
I. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 ...	945
II. CRITIQUE OF FEDERAL TITLE VI ENFORCEMENT ACTIVITIES IN ENVIRONMENTAL JUSTICE MATTERS	949
A. U.S. Commission on Civil Rights	949
B. Citizen Suits Against EPA	950
III. CURRENT EFFORTS TO STRENGTHEN TITLE VI ENFORCEMENT AND IMPROVE COMPLIANCE WITH THE EXECUTIVE ORDER	952
A. Environmental Protection Agency	952
B. Department of Transportation	957
C. Department of Homeland Security	960
CONCLUSION	961

INTRODUCTION

Twenty years after the issuance of Executive Order 12,898, Federal Actions to Address Environmental Justice in Minority Popula-

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tions and Low-Income Populations, and on the eve of the fiftieth anniversary of the Civil Rights Act of 1964, the federal government has bolstered its commitment to incorporate environmental justice into its policies and programs and to vigorously enforce civil rights laws. In September 2010, the Federal Interagency Working Group on Environmental Justice (“IWG”) was reconvened for the first time in over a decade during a White House meeting hosted by the White House Council on Environmental Quality Chair and the Environmental Protection Agency Administrator.¹ The meeting was attended by five Cabinet Secretaries and senior officials from numerous federal agencies committed to promoting a healthy and sustainable environment for all.² In December 2010, the White House hosted its first Forum on Environmental Justice, bringing together over 100 environmental justice leaders from across the country.³ Advocates had the opportunity to hear directly from the federal officials, such as White House Council on Environmental Quality Chair Nancy Sutley, Environmental Protection Agency Administrator Lisa P. Jackson, Attorney General Eric Holder, and Secretary of Labor Hilda Solis, about their agencies’ environmental justice priorities.⁴ Additionally, attendees were able to speak directly to agency representatives about existing challenges to eliminating disproportionate environmental and health burdens on minority and low-income communities.⁵

In August 2011, the members of the reinvigorated IWG signed a Memorandum of Understanding on Environmental Justice and Executive Order 12,898 (“MOU”), declaring the “continued importance of identifying and addressing environmental justice considerations in agency programs, policies, and activities as provided in the Executive Order.”⁶ Notably, six agencies not originally covered by the Executive Order agreed to implement its goals and requirements for the first

1. See Nancy Sutley, *Promoting a Sustainable and Healthy Environment for All Americans*, WHITE HOUSE (Sept. 22, 2010, 6:40 PM), <http://www.whitehouse.gov/blog/2010/09/22/promoting-a-sustainable-and-healthy-environment-all-americans>.

2. *Id.*

3. Press Release, The White House, Obama Admin. Convenes Env'tl. Leaders at Historic White House Env'tl. Justice Forum Featuring Five Cabinet Sec'y's (Dec. 15, 2010), *available at* http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/December_15_2010.

4. *Id.*

5. *See id.*

6. Memorandum from Obama Administration of Understanding on Env'tl. Justice and Exec. Order 12,898 (Aug. 4, 2011), *available at* <http://www.epa.gov/compliance/ej/resources/publications/interagency/ej-mou-2011-08.pdf> [hereinafter Memorandum].

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

time.⁷ Pursuant to the MOU, agencies committed to review and update their environmental justice strategies, post those strategies on the agencies' websites for public comment, and post an Annual Implementation Progress Report that describes their efforts to implement their environmental justice strategy and participation in interagency collaboration.⁸ The IWG also issued a Charter governing its operation.⁹ The Charter established three permanent standing committees, including the Title VI committee, which is focused on utilizing Title VI of the Civil Rights Act to address environmental justice issues.¹⁰

Many federal agencies have developed strategies for implementing the Executive Order and have established a number of programs and guidance documents related to environmental justice. The Environmental Protection Agency ("EPA") estimates that it will provide \$1.2 million in grants through its Environmental Justice Collaborative Problem Solving Cooperative Agreements Program in 2014.¹¹ The Program provides funding for projects that address local environmental and public health issues within an affected community.¹²

The Department of Energy ("Energy") has a record of developing strategies for engaging communities and collaborating with state and local government to incorporate the goals of the Executive Order in its work. Since 2009, Energy has been a leading sponsor of the National Environmental Justice Conference and Training Program.¹³ The annual conference brings together representatives from federal and state agencies, local governments, tribes, community groups, business and industry, public interest groups, and academia to discuss new approaches to environmental justice.¹⁴

The Department of Transportation ("DOT") has provided significant guidance on incorporating environmental justice in the programs

7. The six participating agencies are: Department of Education, Veterans Affairs, Department of Homeland Security, Council on Environmental Quality, General Services Administration, and Small Business Administration.

8. Memorandum, *supra* note 6, at 3.

9. U.S. ENVTL. PROT. AGENCY, CHARTER FOR INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE (2011), available at <http://www.epa.gov/compliance/ej/resources/publications/interagency/iwg-charter-2011.pdf>.

10. *Id.*

11. *EJ Collaborative Problem-Solving Cooperative Agreements Program*, EPA, <http://www.epa.gov/compliance/ej/grants/ej-cps-grants.html> (last visited Feb. 9, 2014).

12. *Id.*

13. *See EJ Conference and Other Activities*, DEP'T OF ENERGY, <http://energy.gov/lm/services/environmental-justice/ej-conference-and-other-activities> (last visited Feb. 9, 2014).

14. *2014 National Environmental Justice Conference and Training Program*, NAT'L ENVTL. JUST. CONF. & TRAINING PROGRAM, <http://thenejc.org/?conference=national-environmental-justice-conference-and-training-program> (last visited Feb. 9, 2014).

it funds. In 2012, the agency updated the Federal Transit Administration's ("FTA") environmental justice circular.¹⁵ The circular provided guidance on incorporating environmental justice principles into plans, projects, and activities that receive funding from the FTA.¹⁶ The FTA also updated its guidance on Title VI of the Civil Rights Act of 1964 to provide its recipients of financial assistance with guidelines and instructions necessary to comply with DOT Title VI regulations.¹⁷ The FTA requires its recipients to conduct their own disparity analysis of projects meeting certain criteria to determine whether the project has a discriminatory effect on minority populations.¹⁸

These policy actions were developed in the midst of the unwavering pressure environmental justice advocacy organizations have put on federal, state, and local entities to address the ongoing adverse effects of discriminatory environmental practices. Considerable criticism has been directed at federal enforcement of Title VI of the Civil Rights Act of 1964 to address racially discriminatory effects of federally funded activities impacting the environment and human health.¹⁹ Several agencies have responded by aggressively evaluating the effectiveness of their civil rights offices and increasing the transparency of their enforcement and compliance activities by posting policy changes and complaint settlement agreements on their websites.²⁰

Below is a discussion on the recent critique of federal Title VI enforcement, the recent efforts of the EPA, DOT, and the Department of Homeland Security ("DHS") to improve their Title VI enforcement and compliance activities as part of their effort to implement Executive Order 12,898, and recommendations for increasing the utilization of Title VI to address environmental justice issues broadly across the federal government.

15. See FED. TRANSIT ADMIN., ENVIRONMENTAL JUSTICE POLICY GUIDANCE FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS 1 (2012), available at http://www.fta.dot.gov/legislation_law/12349_14740.html.

16. *Id.*

17. See FED. TRANSIT ADMIN., TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS (2012), available at http://www.fta.dot.gov/legislation_law/12349_14792.html.

18. *Id.* at 42, 45.

19. See *infra* text accompanying note 43.

20. The Environmental Justice Implementation Progress Reports of the members of the EJ IWG can be accessed through the IWG's website. See *Federal Interagency Working Group on Environmental Justice*, EPA, <http://www.epa.gov/compliance/environmentaljustice/interagency/> (last updated Oct. 30, 2013); see also U.S. ENVTL. PROT. AGENCY, DEVELOPING A MODEL CIVIL RIGHTS PROGRAM FOR THE ENVIRONMENTAL PROTECTION AGENCY 4 (2012), available at http://www.epa.gov/epahome/pdf/executive_committee_final_report.pdf.

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

I. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

In 1963, President John F. Kennedy stated: “Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.”²¹ A year later, the Civil Rights Act of 1964 was enacted. Title VI of the Act states: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²² Section 602 of Title VI authorizes federal agencies “to effectuate the provisions of [Section 601] . . . by issuing rules, regulations, or orders of general applicability.”²³

Most federal agencies have promulgated regulations to implement Title VI, which explicitly state that:

[Recipients shall not] directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the pro-

21. H.R. Misc. Doc. No. 124-88, at 1454 (1963).

22. 42 U.S.C. § 2000d (2012).

23. 42 U.S.C. § 2000d-1(2012).

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Id.

gram as respects individuals of a particular race, color, or national origin.²⁴

These regulations are enforced by the civil rights offices of each agency.

Federal enforcement of Title VI became critically important after the 2001 United States Supreme Court decision in *Alexander v. Sandoval*.²⁵ The Court held that Title VI only provided a private cause of action for intentional discrimination and that only federal agencies could enforce their Title VI regulations prohibiting the discriminatory effects of federally funded programs and activities.²⁶ Although an individual can still pursue Title VI claims of intentional discrimination in federal court, the public is now required to rely solely on each funding agency to secure compliance with its regulations by each of its recipients.²⁷

Approximately thirty agencies provide federal financial assistance to diverse recipients, such as state environmental agencies, local municipalities, police departments, housing authorities, universities, school districts, hospitals, local emergency management agencies, and transportation authorities.²⁸ Additionally, multiple federal agencies provide funding to the same recipient entities.²⁹ For example, a city may receive funding from the EPA and the Department of Housing and Urban Development for improving its sewage drainage system. Coordination among federal agencies is necessary for the law to be applied consistently and effectively. Consistency provides recipients and beneficiaries notice of what actions violate Title VI and what practices recipients can establish to prevent their programs from having unjustified discriminatory effects.

With thousands of funding recipients across the federal government, there is an obvious need to have a central body responsible for

24. 28 C.F.R. §42.104(b)(2) (2013); *see also* EPA Specific Prohibitions, 40 C.F.R. §7.35(b) (2013); DOT Discrimination Prohibited, 49 C.F.R. §21.5(b)(1) (2013); Department of Energy Discrimination Prohibited, 10 C.F.R. §1040.13(c) (2014); DHS Discrimination Prohibited, 6 C.F.R. §21.5(b)(1) (2014); FEMA Specific Discriminatory Actions Prohibited, 44 C.F.R. §7.5(b) (2013).

25. 532 U.S. 275 (2001).

26. *Id.* at 275, 282–83.

27. *Id.* at 312.

28. *See generally Prime Award Spending Data*, USASPENDING.GOV, <http://usaspending.gov/explore> (last visited Feb. 9, 2014) (providing spending information for fiscal year 2014 for over sixty federal agencies).

29. *See* Memorandum from Thomas E. Perez, Assistant Att’y Gen., on Title VI Interagency Coordination 1 (May 20, 2013), *available at* http://www.justice.gov/crt/about/cor/AAG_Perez_Coordination_memo_5_20_13.pdf.

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

issuing guidance to agencies and providing assistance to agencies as they analyze legal questions that arise when developing policies and conducting complaint investigations and recipient compliance reviews. The Civil Rights Division of the U.S. Department of Justice (“DOJ”) fills this role. Executive Order 12250 directs the Attorney General to:

[C]oordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of . . . Title VI . . . [by] review[ing] the existing and proposed rules, regulations, and orders of general applicability of the Executive agencies in order to identify those which are inadequate, unclear or unnecessarily inconsistent . . . [and] develop[ing] standards and procedures for taking enforcement actions and for conducting investigations and compliance reviews.³⁰

The authority of the Attorney General was delegated to the Assistant Attorney General (“AAG”) for the Civil Rights Division.³¹

In 2010, the AAG for the Civil Rights Division issued a memorandum to federal funding agency civil rights directors on Title VI coordination and enforcement outlining the resource the Division has developed and the legal and technical assistance it can provide.³² The AAG also reminded agencies of the Attorney General’s authority to initiate civil litigation on behalf of agencies for violations by recipients when voluntary compliance cannot be achieved.³³

In 2011, AAG for the Civil Rights Division established the Federal Interagency Working Group on Title VI of the Civil Rights Act.³⁴ The purpose of the working group is to serve as a forum for continued collaboration across key areas of Title VI enforcement and compliance.³⁵ In May 2013, the AAG issued a memorandum to civil rights directors encouraging increased interagency coordination and noting the shared policy interests of addressing discrimination and preventing inconsistent findings by agencies funding the same entities.³⁶ Each agency was asked to provide the Division with a list of the categories of recipients they fund, which would aid the Division in developing tools that would be available for use by all agencies in determining

30. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995, 72,995 (Nov. 4, 1980).

31. 28 C.F.R. § 42.412(a) (2013).

32. Memorandum from Thomas E. Perez, Assistant Att’y Gen., on Title VI Coordination and Enforcement (Aug. 19, 2010), available at http://www.justice.gov/crt/about/cor/titlevi_memo_tp.pdf.

33. *Id.* at 3.

34. Memorandum from Thomas E. Perez, *supra* note 29.

35. *Id.*

36. *Id.*

referrals and planning coordination efforts.³⁷ Improved information sharing and interagency collaboration among civil rights offices should also strengthen the ability of agencies to address environmental justice matters through Title VI enforcement.

Every federal agency covered by the Executive Order that also provides funding for activities outside the federal government has both Title VI enforcement and Executive Order compliance obligations.³⁸

President Bill Clinton highlighted this point in a memorandum regarding the Executive Order:

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.³⁹

“[T]he core tenet of environmental justice—that development and urban renewal benefitting a community as a whole not be unjustifiably purchased through the disproportionate allocation of its adverse environmental and health burdens on the community’s minority—flows directly from the underlying principal [sic] of Title VI itself.”⁴⁰ Despite the clear connection between civil rights enforcement and achieving environmental justice, agencies have struggled to enforce Title VI consistently and effectively. There are numerous reasons explaining the limited, or lack of, enforcement activity: changing policy priorities of the agency, constricted budgets, and insufficient staffing and resources are a few. While great strides have been made recently to fulfill the mission of the Executive Order and to improve Title VI enforcement activities,⁴¹ the development of sustainable practices is needed to maintain the public trust and assurance that tax dollars will not be used to support unlawful discrimination.

37. *Id.* at 4.

38. Exec. Order No. 12,250, 45 Fed. Reg. 72,995, 72,995 (Nov. 4, 1980); Title VI of the Civil Rights Act 1964, 42 U.S.C. § 2000d (2012).

39. Memorandum from William J. (Bill) Clinton, President of the United States, on Executive Order on Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (Feb. 11, 1994), available at http://www.epa.gov/swerffrr/documents/executive_order_12898.htm.

40. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL 59 (2001), available at <http://www.justice.gov/crt/about/cor/coord/vimannual.pdf>.

41. U.S. ENVTL. PROT. AGENCY, *supra* note 20.

II. CRITIQUE OF FEDERAL TITLE VI ENFORCEMENT
ACTIVITIES IN ENVIRONMENTAL
JUSTICE MATTERS

A. U.S. Commission on Civil Rights

In October 2003, the U.S. Commission on Civil Rights (“USCCR”) issued a report entitled *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, which examined how effectively the EPA, DOT, Department of Housing and Urban Development, and Department of Interior, were implementing the Executive Order and Title VI.⁴² The Commission found that those four federal agencies had neither fully incorporated environmental justice into their core missions nor established accountability and performance outcomes for their programs and activities.⁴³ It was especially critical of the EPA’s significant backlog of Title VI complaints at the time and the lack of guidance to stakeholders when complaints involve several agencies.⁴⁴ The Commission provided recommendations to the agencies, including promulgating regulations, guidelines, and procedures for investigating Title VI complaints and implementing formal Title VI compliance review programs.⁴⁵ It also recommended, in appropriate circumstances, that EPA conduct independent analyses of adverse disparate impacts to determine if they actually are present in a given community.⁴⁶

Since the publication of the USCCR report, the EPA and other agencies have made meaningful progress in improving their civil rights programs. As noted above, the DOJ has provided guidance to agencies on improving interagency coordination of Title VI enforcement and compliance activities. The establishment of a permanent standing Title VI committee of the Environmental Justice Interagency Working Group is also a step toward supporting agencies use of Title VI to address environmental justice concerns. The EPA has obtained voluntary agreements related to several Title VI complaints in the past two years and has committed greater resources to civil rights enforcement by assigning staff to focus exclusively on building a stronger enforce-

42. U.S. COMM’N ON CIVIL RIGHTS, *NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE* 7–8 (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

43. *Id.*

44. *Id.* at 167.

45. *Id.* at 167–68.

46. *Id.* at 168.

ment and compliance program.⁴⁷ Additionally, DOT has issued guidance to its recipients on Title VI compliance, conducting Title VI disparity analyses on certain projects, and incorporating environmental justice analyses in their activities.⁴⁸

B. Citizen Suits Against EPA

Environmental justice advocates have become frustrated with the pace of change. As a result, they have employed various strategies to hold EPA accountable for enforcement practices, including suing the Agency for violating the Administrative Procedures Act (“APA”).⁴⁹

The 2009 Ninth Circuit decision in *Rosemere Neighborhood Association v. EPA*⁵⁰ shone a light on the deficiencies within the EPA’s Office of Civil Rights, noting its failure to “process a single complaint from 2006 or 2007 in accordance with its regulatory deadlines.”⁵¹ Rosemere Neighborhood Association (“Rosemere”) filed a Title VI administrative complaint with the EPA alleging that the City of Vancouver “failed properly to utilize EPA funds to address lingering environmental problems in low-income and minority communities in the City.”⁵² Rosemere later filed a retaliation complaint with the EPA based on the City of Vancouver’s revocation of Rosemere’s status as a neighborhood association after it filed the first complaint.⁵³

The EPA’s regulations require it to accept or reject complaints within twenty days of receipt.⁵⁴ After accepting a complaint for investigation, the EPA must, within 180 days, notify the recipient of preliminary findings and recommendations, if any, for achieving voluntary compliance, and of the recipient’s right to engage in voluntary compliance negotiations where appropriate.⁵⁵

The EPA failed to timely accept or reject Rosemere’s retaliation complaint. After eighteen months, Rosemere filed suit under the

47. See *Title VI Settlements*, EPA, available at <http://epa.gov/civilrights/TitleVICases/index.html> (last updated Dec. 13, 2013); Memorandum from Lisa P. Jackson on Strengthening and Revitalizing the EPAs [sic] Civil Rights and Diversity Programs (Apr. 1, 2011), available at <http://www.epa.gov/epahome/ocr-statement.htm#depadmin> [hereinafter Jackson Memo].

48. Environmental Justice: Final Circular, 77 Fed. Reg. 42,077 (July 17, 2012).

49. 5 U.S.C. § 706(1) (2012).

50. 581 F.3d 1169 (9th Cir. 2009).

51. *Id.* at 1175.

52. *Id.* at 1171; see also Jennifer Koons, *EPA: Appeals Court Finds Widespread Failure to Investigate Civil Rights Complaints* (Sept. 18, 2009), <http://www.eenews.net/stories/82395>.

53. *Rosemere Neighborhood Ass’n*, 581 F.3d at 1171.

54. 40 C.F.R. § 7.120(d)(1) (2013).

55. 40 C.F.R. § 7.115(c)(1)(i)–(iii) (2013).

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

APA to compel the EPA to accept or reject the complaint.⁵⁶ The EPA accepted the complaint and then moved to have the lawsuit dismissed as moot. The district court granted the motion concluding that the delay was merely an isolated incident.⁵⁷ The EPA then failed to meet the 180-day timeframe for conducting its investigation and making a finding.⁵⁸ Rosemere filed a suit again seeking, in part, a declaratory judgment that the EPA had violated the regulatory deadlines.⁵⁹ The Ninth Circuit found, based on the litigation history and evidence provided by amicus, a “consistent pattern of delay” by the EPA and reversed the district court’s dismissal.⁶⁰

More recently, a lawsuit was filed against the EPA, again under the APA, on behalf of a Latino community in central California that filed a Title VI administrative complaint with the Agency in December 1994.⁶¹ The plaintiffs alleged several state and county agencies discriminated against Latinos resulting in disparate human health and other impacts on Latinos from permitting decisions for three commercial hazardous waste disposal facilities in California.⁶² In July 1995, the complaint was accepted and was still pending with the Agency in 2011 when the community initiated litigation.⁶³ On August 30, 2012, the EPA completed its investigation and dismissed the complaint.⁶⁴

The EPA’s Title VI regulations impose restrictive investigation timelines that have proven to be a challenge for compliance. It is clear that the current timeframes are not realistic, particularly when the complexity of the EPA’s investigations is considered. Until the EPA changes its regulations or increases its capacity to handle these matters under the current tight timeframes, the Agency will likely continue to face more APA lawsuits.

56. *Rosemere Neighborhood Ass’n*, 581 F.3d at 1171.

57. *Id.* at 1172.

58. *Id.*

59. *Id.*

60. *Id.* at 1175–76.

61. *See Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057, 1059 (E.D. Cal. 2013).

62. *Title VI Complaint 1R-95-R9 Fact Sheet*, EPA, available at http://www.epa.gov/ocpage1/TitleVIcases/decisions/padres/Padres_01R-95-R9_Fact_Sheet.pdf (last visited Jan. 20, 2014).

63. *See id.*

64. *Padres Hacia Una Vida Mejor*, 922 F. Supp. 2d at 1060.

III. CURRENT EFFORTS TO STRENGTHEN TITLE VI
ENFORCEMENT AND IMPROVE COMPLIANCE
WITH THE EXECUTIVE ORDER

A. Environmental Protection Agency

The EPA has responded to the criticisms by taking some meaningful steps to improve the operations of its civil rights office. In December 2009, the EPA Administrator appointed a special counsel for Title VI to help the agency address the backlog of pending complaints.⁶⁵ The Administrator also hired Deloitte Consulting LLP to conduct an audit of the EPA's civil rights program.⁶⁶ In March 2011, the EPA publicly released Deloitte's *Final Report*. The Report did not paint a favorable picture of the Title VI program, noting that:

Administering the Title VI program for environmental regulation is highly complex Due to this complexity, the Title VI program has struggled to develop a consistent framework to analyze complaints, resulting in a lengthy and time-consuming effort to evaluate the complaints and once accepted, to adequately investigate the cases. Only 6%, or 15 out of 247, were compliant with EPA targeted 20-day timeframe for acknowledgement. In fact, half of the complaints have taken one year or more to move to accepted or dismissed status. One case was accepted after nine years and a second case was accepted only after ten years.

Feedback from Title VI employees indicated that major delays result primarily from the complexity of determining whether cases fall within jurisdiction because there is little or no legal precedence for comparison. Investigations are further challenged by a lack of scientific methods to conduct needed analyses.⁶⁷

At the request of the Administrator, the Agency established a Civil Rights Executive Committee to review the Deloitte report and other sources of information and to make recommendations for fundamentally improving the EPA's civil rights program.⁶⁸ The Committee did not address unsettled civil rights *legal or policy* questions.⁶⁹ However, the EPA has taken several steps to address key Title VI policy questions.

65. Jackson Memo, *supra* note 47.

66. *Id.*

67. DELOITTE CONSULTING LLP, FINAL REPORT ON THE EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 25 (2011), http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf.

68. Jackson Memo, *supra* note 47.

69. See U.S. ENVTL. PROT. AGENCY, *supra* note 20.

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

In 2012, the EPA laid out its strategy for utilizing Title VI to address environmental justice issues in its Draft Supplement to EJ Plan 2014, *Advancing Environmental Justice through Title VI of the Civil Rights Act*. The EPA committed to do the following:

1. Establish a robust Title VI pre-award and post-award compliance program.
2. Strengthen Title VI in EPA's National Program Management guidance, performance partnership agreements and performance partnership grants.
3. Partner with other federal agencies to improve and strengthen compliance with Title VI.
4. Advance EJ goals through Limited English Proficiency initiatives.⁷⁰

The EPA's Office of Civil Rights ("OCR") will report annually on its progress implementing the strategies outlined in the plan.⁷¹

Additionally, in January 2013, the EPA issued two draft policy papers and posted them on its website for public comment.⁷² The first paper, *Adversity and Compliance with Environmental Health-Based Thresholds*, proposed to change the way the EPA assesses "adversity."⁷³ This paper represents a significant policy shift away from the standard articulated in the EPA's administrative decision known as *Select Steel*.⁷⁴ In *Select Steel*, the EPA's OCR dismissed an administrative complaint concerning a permit issued by the Michigan Department of Environmental Quality for the Select Steel facility based, in part, on the fact that the applicable National Ambient Air Quality Standards were already being met and that the facility's permitted emissions, in combination with other stressors, were not causing an adverse effect.⁷⁵ The "rebuttable presumption," that health-based

70. U.S. ENVTL. PROT. AGENCY, *ADVANCING ENVIRONMENTAL JUSTICE THROUGH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: DRAFT IMPLEMENTATION PLAN 2* (2012), available at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-civil-rights.pdf>.

71. *Id.* at 7.

72. See U.S. ENVTL. PROT. AGENCY, *TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ADVERSITY AND COMPLIANCE WITH ENVIRONMENTAL HEALTH-BASED THRESHOLDS 2* (2013) [hereinafter *EPA REPORT, ADVERSITY AND COMPLIANCE*]; U.S. ENVTL. PROT. AGENCY, *TITLE VI OF THE CIVIL RIGHTS ACT OF 1964: ROLE OF COMPLAINANTS AND RECIPIENTS IN THE TITLE VI COMPLAINTS AND RESOLUTION PROCESS 1* (2013) [hereinafter *EPA REPORT, COMPLAINTS AND RECIPIENTS*].

73. See *EPA REPORT, ADVERSITY AND COMPLIANCE*, *supra* note 72, at 1.

74. U.S. ENVTL. PROT. AGENCY, *INVESTIGATIVE REPORT FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 5R-98-R5 (SELECT STEEL COMPLAINT) 1* (1998).

75. See *EPA REPORT, ADVERSITY AND COMPLIANCE*, *supra* note 72, at 2 (citing *EPA, INVESTIGATIVE REPORT FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 5R-98-R5 (SELECT STEEL COMPLAINT) 14* (1998)); see also Letter from Ann E. Goode, Director, Office of Civil

standards are set at a level that is presumptively sufficient to protect public health, and therefore, no affected population suffers “adverse” impacts within the meaning of Title VI, was later incorporated into the 2000 *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*.⁷⁶ Frequently cited by advocates as the EPA’s effort to equate compliance with environmental laws with compliance with civil rights laws, this decision represented an abrogation of the EPA’s civil rights enforcement obligations. In this new policy paper, the EPA reexamines the weight it gives to compliance with environmental health-based standards.⁷⁷ The draft states the EPA’s intention to eliminate the application of the rebuttable presumption when investigating allegations about environmental health-based thresholds.⁷⁸ The EPA proposed to assess other information that may be available and appropriate when investigating whether adverse health impacts exist.⁷⁹ “While no presumption is established, compliance with a health-based threshold would be considered, along with other information, to enable the Agency to focus on the most significant cases (*i.e.*, those representing the highest environmental and public health risk) and to determine whether adversity exists.”⁸⁰

In the second paper, *Roles of Complainants and Recipients in the Title VI Complaints and Resolution Process*, the EPA clarifies the roles of complainants and recipients in the Title VI complaint process.⁸¹ Many agencies may be hesitant to speak to complainants during a pending investigation. As a result, complainants often feel like their complaint has not been heard or their thoughts on resolution not valued. The EPA’s goal is “to promote appropriate involvement by complainants and recipients in the Title VI complaint process.”⁸² While the EPA’s position prior to this paper was to communicate with a complainant to clarify issues in the complaint, to request additional information, or to offer the complainant an opportunity to participate in alternative dispute resolution, the policy paper proposes to extend communications with a complainant to include notifying the com-

Rights, U.S. Evtl. Prot. Agency, to Father Phil Schmitter and Sister Joanne Chiaverini, Co-Directors, St. Francis Prayer Ctr. (Oct. 30, 1998).

76. See Draft Title VI Guidance for EPA Assistance and Draft Revised Guidance for Investigating Title VI Administrative Complaints, 65 Fed. Reg. 39,680 (June 27, 2000).

77. See EPA REPORT, ADVERSITY AND COMPLIANCE, *supra* note 72, at 1.

78. EPA REPORT, ADVERSITY AND COMPLIANCE, *supra* note 72, at 4.

79. *Id.*

80. See *id.*

81. EPA REPORT, COMPLAINTS AND RECIPIENTS, *supra* note 72, at 1.

82. *Id.*

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

plainant upon issuing a preliminary finding of noncompliance in addition to notifying the recipient.⁸³ This may provide complainants an opportunity to propose ideas for resolving the complaint, leading to an agreement that accounts for their interests.

The EPA has settled a handful of complaints between 2011 and 2014. In August 2011, the EPA entered into an agreement with the California Department of Pesticide Regulation (“CDPR”) to resolve a 1999 Title VI complaint known as *Angelita C.*⁸⁴ The complaint alleged that CDPR’s annual renewal of the registration of methyl bromide in 1999 discriminated against Latino schoolchildren based on the health impacts of this pesticide.⁸⁵ The EPA OCR made a preliminary finding of a prima facie violation of Title VI based on the adverse disparate impact upon Latino schoolchildren in California from the application of methyl bromide between 1995 and 2001.⁸⁶ Per its regulations, the EPA worked with the CDPR to reach a voluntary agreement to resolve the violation. The agreement required CDPR to expand ongoing monitoring of methyl bromide air concentrations by adding a monitor at or near one of the schools named in the original complaint.⁸⁷ The CDPR also agreed to share the monitoring results with the EPA and the public and to increase its community outreach and education efforts to schools that are in high methyl bromide usage areas.⁸⁸

Complainants were extremely dissatisfied with the process the EPA utilized to reach an agreement with the CDPR. Complainants expected to be informed of the preliminary finding and for the matter to be immediately referred to the DOJ for litigation.⁸⁹ However, the EPA’s regulations require the Agency to attempt to obtain a voluntary resolution from the recipient first; only when a voluntary agree-

83. *Id.* at 3–4.

84. Press Release, U.S. Env’t. Prot. Agency, EPA Reaches Title VI Civil Rights Agreement with the California Department of Pesticide Regulation (Aug. 25, 2011), available at <http://www.epa.gov/civilrights/TitleVICases/title6-c-press-release-english.pdf>.

85. *Id.*

86. U.S. ENVTL. PROT. AGENCY, AGREEMENT BETWEEN THE CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 1–2 (2011), available at <http://epa.gov/civilrights/TitleVICases/title6-settlement-agreement-signed.pdf>.

87. *Id.* at 2.

88. *Id.* at 5–6.

89. Press Release, Ctr. on Race, Poverty & the Env’t, EPA Fails to Enforce Civil Rights Act (Aug. 25, 2011), available at www.ejnet.org/ej/angelitac-crpe-pr.pdf.

ment cannot be achieved can the EPA take steps to refer the matter to the DOJ or withhold funding.⁹⁰

In 2013, the EPA entered into two more settlement agreements: one with the Illinois Environmental Protection Agency (“IEPA”), the other with the Louisiana Department of Agriculture and Forestry (“LDAF”).⁹¹ For the complaint against the IEPA, the EPA investigated whether the IEPA intentionally discriminated against the African American residents of Ford Heights, Illinois, by not providing an opportunity for meaningful involvement in the decision-making process with the issuance of construction permits for the Midwest Micro-nutrients processing facility and for the trial use of wood biomass fuel at the Geneva Energy facility.⁹² Likely learning from the backlash experienced after the *Angelita C.* resolution, the EPA gave complainants an opportunity to submit recommendations in a proposed settlement.⁹³ The complainants’ request that the IEPA revise its environmental justice public participation policy was included in the final settlement agreement.⁹⁴

The complaint against LDAF alleged that the LDAF’s policy of requiring in-person interviews for Worker Protection Standard (“WPS”) investigations intentionally discriminated against migrant agriculture workers based on their national origin.⁹⁵ After conducting an investigation of the complaint allegations and a compliance review of the LDAF, the EPA negotiated a settlement agreement that required the LDAF to submit a plan for providing meaningful access to limited English proficient individuals to its WPS program.⁹⁶ These recent resolutions represent meaningful progress for the EPA as it improves its enforcement activities.

90. See 40 C.F.R. §§ 7.115, 7.120(d)(2), 7.130(a) (2013).

91. See *Title VI Settlements*, EPA, <http://www.epa.gov/ocr/TitleVICases/index.html> (last visited Feb. 9, 2014).

92. Letter from Vicki Simons, Acting Director, U.S. Env’tl. Prot. Agency, to Keith Harley, Chicago Legal Clinic, Inc. 1 (Apr. 23, 2013), available at <http://www.epa.gov/civilrights/TitleVICases/harley.closure.letter4.24.14.pdf>.

93. *Id.* at 2.

94. *Id.*; see also U.S. ENVTL. PROT. AGENCY, SETTLEMENT AGREEMENT FOR ADMINISTRATIVE COMPLAINT NO. 13R-10-R5, at 2 (Apr. 18, 2013), available at <http://epa.gov/civilrights/TitleVICases/title6.iepa.rev.pdf>.

95. See U.S. ENVTL. PROT. AGENCY, SETTLEMENT AGREEMENT FOR ADMINISTRATIVE COMPLAINT NO. 04R-08-R6 AND LIMITED ENGLISH PROFICIENT COMPLIANCE REVIEW 1 (Dec. 14, 2011), available at <http://epa.gov/civilrights/TitleVICases/ldaf/EPA-OCR-Settlement.pdf>.

96. *Id.* at 2–3.

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

B. Department of Transportation

The DOT's environmental justice and Title VI policies and guidance are well established and have been instrumental to the Agency's ability to tackle complicated transportation equity issues. On May 2, 2012, the DOT published a revised Order 5610.2(a), *Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, which is a key component of the Department's strategy to promote the principles of environmental justice in all departmental programs, policies, and activities.⁹⁷ The Order sets forth steps to prevent disproportionately high and adverse effects to minority or low-income populations through Title VI analyses and environmental justice analyses conducted as part of federal transportation planning.⁹⁸

On July 17, 2012, FTA issued the *Environmental Justice Policy Guidance for Federal Transit Administration Recipients* ("EJ Circular"), a new guidance to help recipients of the FTA grant funding better understand and comply with environmental justice principles.⁹⁹ The *EJ Circular* is the first stand-alone FTA guidance issued to address the intent of the Executive Order.¹⁰⁰ It reiterates recommendations to FTA funding recipients illustrating:

[H]ow to fully engage EJ populations in the [public] transportation decision-making process; . . . how to determine whether EJ populations would be subjected to disproportionately high and adverse human health or environmental effects [as a result] of a public transportation project, policy, or activity; and . . . how to avoid, minimize, or mitigate these effects.¹⁰¹

The FTA also revised its Title VI Circular, *Title VI Requirements and Guidelines for Federal Transit Administration Recipients, to provide guidance to its recipients on complying with the DOT's Title VI regulations*.¹⁰²

More recently, the Federal Highway Administration ("Federal Highway") issued a finding against the City of Beavercreek, Ohio,

97. *Environmental Justice—2012 Implementation Report*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/2012_implementation_report/ (last visited Feb. 9, 2014).

98. *Id.*

99. See ENVIRONMENTAL JUSTICE POLICY GUIDANCE FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, *supra* note 15, at 1.

100. *Id.*

101. *Id.* at 8.

102. See TITLE VI REQUIREMENTS AND GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS, *supra* note 17, at 1.

concluding that the City's decision to deny the Greater Dayton Rapid Transit Authority's ("RTA") bus stop application had a disparate impact on African American bus riders.¹⁰³ In August 2011, the advocacy organization Leaders for Equality and Action in Dayton ("LEAD") submitted a complaint to the Federal Highway alleging that the City of Beavercreek, Ohio violated Title VI and the DOT's Title VI regulations by denying the RTA's application to place bus stops near Fairfield Commons Mall.¹⁰⁴ LEAD alleged that the City of Beavercreek used criteria for deciding whether to allow bus stops in the city that resulted in the denial of RTA's application, thus having a discriminatory effect on African American residents in the Greater Dayton Regional Transit Authority's service area who disproportionately ride public transit.¹⁰⁵ They further alleged that the refusal to allow the RTA to site bus stops in the city excluded minority riders from the full use of its roads.¹⁰⁶

The Federal Highway conducted an extensive investigation that included interviews of City of Beavercreek representatives, reviewing documents related to the Federal Highway funding to Beavercreek, meeting with complainants, taking a bus tour and walking the dangerous overpass bus riders must use to get from the last bus stop to the mall.¹⁰⁷ The Agency found that the City Council required nineteen criteria that the RTA needed to meet to "obtain approval of its bus stop application, 11 of which went beyond the criteria required to be met by [the] ordinance."¹⁰⁸ Those additional criteria included posting Rules of Behavior/Consequence Cards, providing police phone call boxes at each stop, providing "state of the art" surveillance cameras, providing heated and air-conditioned shelters, and limiting the use of the stops to small airport shuttle type buses.¹⁰⁹

The City responded that its refusal to approve additional stops did not have a discriminatory effect on African Americans because the City was simply maintaining the status quo and that riders already

103. See Letter from Warren Whitlock, Assoc. Admin'r for Civil Rights, Fed. Highway Admin., to Michael Cornell, City Mgr., Beavercreek, Ohio, Stanley Hirtle and Ellis Jacobs, Att'ys, Advocates for Basic Legal Equality, Inc. 15 (June 26, 2013), available at http://ci.beavercreek.oh.us/wp-content/uploads/2008/11/fhwa-response-beavercreek_oh_june-2013.pdf.

104. See *id.* at 1.

105. See *id.* at 4.

106. See *id.*

107. See *id.* at 4-5.

108. See *id.* at 8-9.

109. See *id.* at 9.

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

had access to the mall.¹¹⁰ Additionally, the City argued that Greene CATS, an on-demand and “flex route” public transportation provider, was planning to extend service to Beaver Creek and would be available to the complainants and other residents.¹¹¹ The Federal Highway found these arguments lacked credibility and insufficient to meet the needs of the residents of the City of Dayton and Montgomery County.¹¹² Existing access to the mall was in no way analogous to the direct route that would be created with the addition of bus stops.¹¹³ Furthermore, the proposed Greene CATS service was inadequate. Per the request of the Federal Highway, the City shared the Greene CATS proposal with LEAD complainants.¹¹⁴ The complainants rejected the proposal because it failed to meet the needs of the residents.¹¹⁵ The existing conditions were dangerous and did not comport with the City’s stated concern for public safety.¹¹⁶ The new stops actually satisfied engineering and design criteria by the City’s transit stop ordinance and presented an opportunity for expanded, safer access to jobs and services that did not previously exist.¹¹⁷ The Federal Highway found the City violated its Title VI regulations by imposing criteria that had the effect of discriminating against African-American riders.¹¹⁸ The Federal Highway required the City to implement certain recommendations to come into compliance with Title VI, including re-hearing the RTA application without requiring the RTA to meet the additional criteria the Federal Highway found to not be reasonably necessary to meet a legitimate goal of the City.¹¹⁹ Subsequently, the City approved three new bus stops.¹²⁰

The Federal Highway investigation has been heralded by transit equity advocates for holding a sub-recipient of federal funds accountable for complying with its obligations under Title VI and for con-

110. *See id.* at 14.

111. *See id.* at 5.

112. *See id.* at 11–15.

113. *Id.*

114. *Id.*

115. *Id.*

116. At the time, RTA riders were required to walk 1.5 miles from the last stop on Route 1 to the mall, a path that lacked pedestrian walkways at points requiring individuals to walk on grass along the road with no crosswalk to reach the mall side of the road. *See id.* at 15.

117. *See id.* at 13, 14.

118. *See id.* at 15.

119. *See id.* at 16.

120. Doug Page, *Beaver Creek Council Approves RTA Bus Stops*, DAYTON DAILY NEWS (Oct. 14, 2013), <http://www.daytondailynews.com/news/news/beaver-creek-council-approves-rta-bus-stops/nbNpj/>.

ducting a meaningful analysis of the City's justifications.¹²¹ This investigation and resolution is an example of the Agency's commitment to enforcing Title VI and its implementing regulations and demonstrates the ability of agencies to utilize their enforcement authority effectively to address discriminatory conduct by recipients (including sub-recipients) of federal dollars.

C. Department of Homeland Security

DHS stands out as an agency prioritizing environmental justice and Title VI enforcement. The DHS consists of twenty-two different federal departments and agencies, including the Federal Emergency Management Agency ("FEMA"), that were combined into a unified, integrated cabinet agency when it was established in 2002.¹²² The DHS was not a member of the IWG at the time the Executive Order was issued because the Agency did not exist. Nevertheless, the DHS signed the IWG MOU as a participating agency, committing itself to the goals of the Executive Order.¹²³ Hundreds of millions of dollars in grant funds support state and local emergency management offices. These offices play a key role in protecting communities during natural and man-made disasters. Communities most vulnerable to these disasters are often ones that disproportionately bear the burdens of environmental harms.

The DHS's effort to build a strong Title VI compliance program can play a significant role in providing guidance to emergency managers to ensure they include the "whole community" as they execute emergency preparedness, response, and recovery plans. In its 2012 Environmental Justice Implementation Progress Report, implementation of Title VI was one of four focus areas for DHS.¹²⁴ In 2012, the Office of Civil Rights and Civil Liberties ("CRCL") and FEMA, "in cooperation with the Department of Justice (DOJ) and the Department of Health and Human Services (HHS), hosted community stakeholder listening sessions focused on the topic of the 'civil rights

121. See Marybelle Nzegwu & Samuel P. Tepperman-Gelfant, *Title VI in Action: Paving the Way for Equity in Ohio*, PUB. ADVOC. BLOG (Nov. 19, 2013), <http://www.publicadvocates.org/2013-11-19/title-vi-in-action-paving-the-way-for-equity-in-ohio>.

122. *History*, DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/history> (last visited Feb. 9, 2014); *Who Joined DHS*, DHS, <http://www.dhs.gov/who-joined-dhs> (last visited Feb. 9, 2014).

123. See Memorandum from Obama Administration, *supra* note 6.

124. U.S. DEP'T OF HOMELAND SEC., ENVIRONMENTAL JUSTICE ANNUAL IMPLEMENTATION PROGRESS REPORT 1 (2012), available at <http://www.dhs.gov/publication/ej-annual-report-fy2012> [hereinafter DHS REPORT].

Executive Order 12,898 and Title VI of the Civil Rights Act of 1964

foundations of emergency preparedness.’”¹²⁵ The sessions provided stakeholders with an opportunity to share their experiences and perspectives on the disaster-related application of Title VI, including the impact on immigrant communities and LEP individuals.

In fiscal year 2012,¹²⁶ the CRCL continued to develop and oversee the Department-wide Title VI compliance program. “Major activities included the development of a civil rights pre-award program for applicants for DHS grants and other types of federal financial assistance.”¹²⁷ “Once the pre-award program is fully implemented, applicants for financial assistance will be required to submit data and information related to civil rights complaints, including those that raise environmental justice concerns, and their policies and procedures to fulfill various civil rights obligations.”¹²⁸

DHS’s recent Title VI and environmental justice activities suggest the Agency can positively impact the inclusion of low-income and minority communities in building emergency response and recovery strategies that address some of their unique challenges, such as limited access to transportation to evacuate, if needed, and communicating lifesaving information to limited English proficient residents.

CONCLUSION

Title VI enforcement needs to be part of every agency’s conversation about environmental justice. The guidance provided by DOT and the recent steps to bolster civil rights enforcement at the EPA and DHS highlight the ability of agencies to effectively use their authority under Title VI in environmental justice matters. Promoting the intersection of Title VI and environmental justice can be facilitated through improved communication between agencies’ civil rights offices and environmental justice program offices as well as greater interagency coordination. Because many environmental justice matters raise claims of discrimination against an entity that receives federal funds from multiple agencies, interagency coordination is key to successfully addressing the unjustified discriminatory effects of federally funded programs affecting the environment and human health.

Improved tracking of Title VI complaints raising environmental issues or human health concerns can allow agencies to strategically

125. *Id.* at 4.

126. Fiscal year 2012 ran from October 1, 2011, through September 30, 2012.

127. DHS REPORT, *supra* note 124, at 3.

128. *Id.*

conduct Title VI compliance reviews that also promote environmental justice. Additionally, agencies can categorize Title VI complaints in a manner that would identify complaints that raise environmental justice concerns, among others, and develop procedures for analyzing these matters.

Finally, expanding outreach activities to funding recipients and beneficiaries of federally funded programs will improve their understanding of agencies' authority under Title VI, recipients' obligations to comply with the statute, and the process for resolving violations or addressing potential violations.

Agency enforcement of Title VI and its implementation of regulations need to be a fundamental part of every funding agency's environmental justice strategy. In many matters, the federal government is the only body that can address unjust discriminatory effects of local actions on the health and environmental sustainability of communities. To fully realize the goals of Executive Order 12,898, there must be robust, high functioning, and collaborative civil rights enforcement throughout government.

ESSAY

Affirmative Action Survives Again in the Supreme Court on a Legal Technicality: An Analysis of *Fisher v. University of Texas at Austin*

JOHN C. BRITTAIN*

INTRODUCTION	964
I. FISHER'S TECHNICAL RULING	966
II. REMAND TO THE FIFTH CIRCUIT: A NEW ROUND OF LITIGATION	969
III. A RELUCTANT PREDICTION OF THE FUTURE IN THE CASE	973
IV. AN ODE TO JUSTICE LEWIS POWELL?	974
V. INFLUENCE OF JUSTICE KENNEDY'S SWING VOTE	976
CONCLUSION	977

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If I may digress to share a privileged part of my autobiography, Howard University School of Law J.D. 1969 trained me to become a social engineer. Charles Hamilton Houston mentored Justice Marshall and also, my mentor, the late Herbert O. Reid, the Charles Hamilton Distinguished Professor of Law at Howard University School of Law. Thus, Houston taught Marshall and Reid, and Reid trained me from 1966–1969 in civil rights theory and practice. Therefore, I consider myself a third-generation social engineer.

INTRODUCTION

This Essay developed from a talk that I delivered at the tenth annual Wiley A. Branton/Howard Law Journal Symposium entitled *Civil Rights at a Critical Juncture: Confronting Old Conflicts and New Challenges*. I analyzed a case in the Supreme Court's October 2012 Term that marks the third time in thirty-seven years that the justices deliberated on the question of affirmative action in admission to institutions of higher education.

Both supporters and opponents of the use of race in admissions by colleges and universities anticipated yet another major ruling by the Supreme Court's June 24, 2013 decision in *Fisher v. University of Texas at Austin*.¹ Instead, the High Court punted the case back to the lower courts on a legal technicality, deliberately sidestepping the constitutionality of affirmative action for the time being.²

An article published around the same time asserted that, “[r]ace-conscious affirmative action is perhaps the most contentious issue in education policy, and challenges to race-conscious admissions policies, both in courts and at the ballot box, have been regular events over the past three decades.”³ That challenge⁴ will continue in *Fisher* in the next round of litigation as the lower federal court of appeals or district court seek to apply what some commentators call a “clarification of the [narrowly tailored] means” test dating back to *Wygant v. Jackson*

For most of four decades in the legal profession, I have followed in the footsteps of Houston and Reid as a law professor and a civil rights lawyer. (In a tribute to Justice Thurgood Marshall, I describe key members of the Howard University School of Law faculty who played a significant role on the legal team in the *Brown v. Board of Education* case. John C. Brittain, *The Culture of Civil Rights Lawyers: A Tribute to Justice Thurgood Marshall*, 25 CONN. L. REV. 599 (1993).) In one of my proudest accomplishments, I was one of the lead attorneys in a landmark school desegregation case decided by the Connecticut Supreme Court in 1996 styled, *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996). For further discussion on this case, see John C. Brittain, *Why Sheff v. O'Neill is a Landmark Decision*, 30 CONN. L. REV. 211 (1997). I learned from the master social engineers at Howard University School of Law; they taught me how to use law as a means of bringing about social changes. Some of these social engineers include James M. Nabrit, Jr., President of Howard University and co-counsel in *Brown*; my mentor, Professor Reid, co-counsel in *Bolling v. Sharpe*, a companion case with *Brown*; Professor George E. C. Hayes, another co-counsel in *Brown* with Marshall; and Spottswood W. Robinson, an additional lawyer on the *Brown* team. William Bryant, a former Howard Law professor, once said, “There’s no denying that Thurgood Marshall is a direct bequest to us from Charles [Hamilton] Houston.” Ken Gormley, *A Mentor’s Legacy: Charles Hamilton Houston, Thurgood Marshall and the Civil Rights Movement*, 78-JUN A.B.A. J. 62, 63 (1992). I consider myself a beneficiary of that legacy.

1. 133 S. Ct. 2411 (2013).

2. *Id.*

3. Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367, 368 (2013).

4. *Id.*

Affirmative Action Survives Again in the Supreme Court

Board of Education,⁵ and more recently articulated in *Gratz v. Bollinger*⁶ and *Grutter v. Bollinger*,⁷ or what others call an entirely new standard. In the past, the Supreme Court has sought “to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”⁸ Now, however, the Court has coined an additional moniker, that “[s]trict scrutiny must not be strict in theory but *feeble* in fact.”⁹

This Essay will explore the history and potential impact of the Court’s recent pronouncement of the test for determining the constitutionality of affirmative action in admissions. More specifically, this Essay will trace the application of the *second prong* of the strict scrutiny test—namely the dimensions of the means used to achieve the beneficial goals of diversity in higher education. The topics will include: the narrowly tailored with the least restrictive means method; the role of race-neutral means in the equation and any exhaustion of them; the Court’s scope of deference to UT; and the Court’s own requirement of independent judicial review of the means. My goal, in the words of the call of the Symposium, is to explore “strategies on how we, as social engineers[,] can move forward”¹⁰ in civil rights with consciousness of race in admissions.

In this Essay, I conclude that the Court’s new clarification of the second prong of the strict scrutiny test is clear, though some conflicting language used by the majority muddles the picture. As a result of such conflicting language, the Court explained the narrowly tailored standard, but not how a university can meet its burden of showing that race-neutral means fail to achieve the compelling interest in the educational benefits of diversity or exactly how courts are to refuse to defer to a university’s determination that it cannot use race-neutral means to achieve the narrowly tailored standard. At the same time though, the Court acknowledged UT’s experience and expertise in adopting or rejecting admissions processes.¹¹ And finally, this Essay discovers a line of doctrines that traces from Justice Lewis Powell’s plurality opinion in *Bakke*,¹² through Justice Anthony Kennedy’s dis-

5. 476 U.S. 267, 274, 279 (1986) (plurality opinion).

6. 539 U.S. 244, 269 (2003).

7. 539 U.S. 306, 333, 339–40 (2003).

8. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

9. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (emphasis added).

10. HOWARD LAW JOURNAL, CIVIL RIGHTS AT A CRITICAL JUNCTURE: CONFRONTING OLD CONFLICTS AND NEW CHALLENGES (2013).

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

12. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–91, 305–09, 311–19 (1978) (plurality opinion) (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring)).

sent in *Grutter*,¹³ and ending with an understanding of Kennedy's majority opinion in *Fisher*.¹⁴ In the end, affirmative action walked out of the Supreme Court in *Fisher* still legal and available to universities, more by default but no less the law.

I. FISHER'S TECHNICAL RULING

The Supreme Court originally agreed to decide the question presented as follows: "Whether this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*, 539 U.S. 306 (2003), permit UT's use of race in undergraduate admissions decisions."¹⁵

By a vote of 7-1,¹⁶ the Supreme Court vacated the judgment of the United States Court of Appeals for the Fifth Circuit, and remanded the case to the appellate court.¹⁷ Without deciding the constitutionality of UT's affirmative action plan, but reaffirming diversity in higher education as a compelling goal, the Court articulated what some believe is a clarification, but what others refer to as a new application of the strict scrutiny standard.

Under the strict scrutiny standard, a public institution of higher public education must show that the use of race in admissions decisions (the means chosen) is necessary (the least restrictive means and narrowly tailored) for furthering its goals (which must be a compelling interest). In *Fisher*, the Supreme Court found that the lower court erred in "not apply[ing] the correct standard of strict scrutiny."¹⁸ "Once [a] [u]niversity has established that its goal of diversity is consistent with strict scrutiny," it has the burden of proving "that the means [that it has] chosen . . . to attain diversity are narrowly tailored to that goal."¹⁹ On the means part of the strict scrutiny test, "[a] [u]niversity receives *no deference*[" and "it is for the courts . . . to ensure that [this burden has been met]."²⁰

13. See *Grutter v. Bollinger*, 539 U.S. 306, 387-95 (2003) (Kennedy, J., dissenting).

14. See 33 S. Ct. at 2415-22.

15. 11-345 *Fisher v. Univ. of TX at Austin*, SUPREME CT., <http://www.supremecourt.gov/qp/11-00345qp.pdf> (last visited Mar. 15, 2014).

16. *Fisher*, 133 S. Ct. at 2414 (writing for the majority, Justice Kennedy joined by Chief Justice Roberts, Scalia, Thomas, Breyer, Alito, and Sotomayor; Justice Kagan did not participate in the case); *id.* at 2422 (Scalia, J., concurring); *id.* at 2422 (Thomas, J., concurring); *id.* at 2432 (Ginsburg, J., dissenting).

17. *Fisher*, 133 S. Ct. at 2422.

18. *Id.* at 2415.

19. *Id.* at 2419-20 (emphasis added).

20. *Id.* at 2420 (emphasis added).

Affirmative Action Survives Again in the Supreme Court

Furthermore, the majority in *Fisher* found that while UT does not have to “exhaust[] . . . every conceivable race-neutral alternative,” the courts cannot simply adopt “[UT]’s serious, good faith consideration of workable race-neutral alternatives.”²¹ “The reviewing court must . . . be satisfied that no [available] workable race-neutral” means would accomplish UT’s objectives.²² “If a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense, then [a] university may not consider race.”²³ While the *Fisher* decision clearly appears to reaffirm UT’s goals as part of the strict scrutiny test, at least insofar that the holistic use of race in the admissions process can be permissible in achieving the state interest of diversity, the majority sent the case back to the Fifth Circuit Court of Appeals to determine the second prong of the means part of the test, namely: “[W]hether [UT] has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”²⁴

The majority in *Fisher*²⁵ relied upon three cases as precedent for its clarification of the means prong of the strict scrutiny test: *Grutter*,²⁶ *Bakke*,²⁷ and *Wygant*.²⁸ Whereas, the first two cases dealt with affirmative action in higher education,²⁹ *Wygant* arose in an employment context where white employees were laid-off on the basis of race under a collective bargaining agreement to maintain the racial ratio of teachers, as opposed to having a future hiring opportunity affected.³⁰ *Wygant* thus further illustrates the Court’s articulation of the second

21. *Id.* (emphasis in original) (internal quotation marks omitted).

22. *Id.*

23. *Id.* (citation omitted) (internal quotation marks omitted) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)) (plurality opinion) (“The term [“]narrowly tailored,[“] so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used. Or, as Professor Ely has noted, the classification at issue must [“]fit[“] with greater precision than any alternative means. See John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727, n.26 (1974). [“]Courts] should give particularly intense scrutiny to whether a nonracial approach or a more narrowly-tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense.[“] Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975).”) (citations altered from the original) (bracketed word as quoted in the Opinion).

24. *Fisher*, 133 S. Ct. at 2421.

25. *See id.* at 2417, 2420.

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

27. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality opinion).

28. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion); *see supra* note

23.

29. *See Grutter*, 539 U.S. at 311; *Bakke*, 438 U.S. at 269.

30. *See Wygant*, 476 U.S. at 269–70.

prong of the test for affirmative action in *Fisher's* case.³¹ To be sure, “the means chosen by the [Government] to effectuate its purpose must be *narrowly tailored* to the achievement of that goal.”³² There must be a “*most exact* connection between justification and classification”—a demanding standard.³³ Chosen means must necessarily contain a “logical stopping point”³⁴ and not lag for an indefinite period “long past the point required by any legitimate remedial purpose.”³⁵

As the Plaintiffs in *Fisher* continually remind courts, affirmative-action programs disadvantage parties who played no part in past discrimination.³⁶ It bears emphasizing that, while unfair, disadvantages to innocent bystanders are permissible; indeed, despite the exigent standards outlined by Justice Powell in *Wygant*, the Court nonetheless conceded that:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a sharing of the burden by innocent parties is not impermissible. . . . [Especially if] the actual burden shouldered by nonminorit[ies] . . . is relatively light.³⁷

Unlike people who lost their jobs as a result of racial classifications, the Court distinguishes this from situations where a person is disadvantaged in pursuing one particular opportunity—without change to present circumstances:

While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board’s layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board’s selection of layoffs as the means

31. *Id.* at 279.

32. *Id.* at 274 (emphasis added) (internal quotation marks omitted).

33. *Id.* at 280 (emphasis added).

34. *Id.* at 275.

35. *Id.*

36. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded by* 133 S. Ct. 2411(2013). The Fifth Circuit heard oral arguments on November 13, 2013.

37. *Wygant*, 476 U.S. at 280–82 (citations omitted) (internal quotations and citations omitted).

Affirmative Action Survives Again in the Supreme Court

to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.³⁸

The majority in *Fisher* appears to cite *Wygant*, less for the facts and holding in that case, but for its sixth footnote, referring to a quote by Greenawalt concerning intense judicial scrutiny of a non-racial approach.³⁹ Greenawalt's article probes a wide variety of pro and cons of affirmative action and ultimately concludes, "that two of the asserted purposes of preferential admissions, the amelioration of harmful stereotypes and compensation for injustice, can support a policy of preference as broad as that employed by the University of Washington Law School in the *Defunis* case."⁴⁰

With what the *Harvard Law Review* calls, "*Fisher's* recalibration of the affirmative action strict scrutiny analysis,"⁴¹ I will turn next to the remand *Fisher* with a possible prediction of how the Fifth Circuit will reanalyze Texas's affirmative action plan.

II. REMAND TO THE FIFTH CIRCUIT: A NEW ROUND OF LITIGATION

Following the remand of *Fisher* to the Fifth Circuit, that court requested that the parties file supplemental briefs on any issues that the parties deemed relevant, while also including a list of seven of its own topics.⁴² Two issues the court articulated concerned the strict scrutiny test.⁴³ What happens next in the Fifth Circuit is a matter of speculation, but the parties have expressed their desires in post remand briefs and oral argument.

First, appellant Abigail Fisher has understandably resisted any attempts to prolong the case by further remanding it to the district court (which would further risk finding more facts unfavorable to her position), and admonished the Fifth Circuit to apply strict scrutiny with

38. *Id.* at 283–84 (footnotes omitted).

39. *See id.* at 280 n.6; Greenawalt *supra* note 23 and accompanying text.

40. Greenawalt, *supra* note 23 at 599 (citing *Defunis v. Odegaard*, 94 U.S. 1704 (1974) (per curiam)). *Defunis* was the first affirmative action case to reach the Supreme Court, but it was found moot because the unsuccessful plaintiff would have graduated from law school by the time the Court would have decided the case.

41. *Fourteenth Amendment—Equal Protection Clause—Public-University Affirmative Action—Fisher v. University of Texas at Austin*, 127 HARV. L. REV. 258, 267 (2013).

42. *See* Letter from Lyle W. Cayce, Clerk, Fifth Circuit of Appeals, to Parties' (Sept. 12, 2013), <http://www.utexas.edu/vp/irla/Documents/Sheduling%20Order.pdf>.

43. The questions are: "(3) If this court elects to not remand [to the district court] how ought it apply strict scrutiny as directed by the Supreme Court on the record now before it?" and, "(7) What workable alternatives to the use of race were available to the University that were not being deployed?" *Id.*

facts comprising no more than those in the existing record (and thereby rule in her favor).⁴⁴ That record below consists of cross-motions by the parties for summary judgment—both parties ideally wishing for a fully favorable decision without the need for any further proceedings. Indeed, at least as far as Fisher is concerned, as she has the most to lose in the event of a remand, as her counsel reminded so unobtrusively at oral argument, “the Supreme Court *instructed* that this Court undertake the responsibility of applying traditional standards of strict scrutiny to UT’s racial admissions preferences in the first instance, . . . circumscrib[ing] the *limited area* in which this Court could defer to UT’s academic judgment.”⁴⁵ However, this should beg the question of why the Supreme Court bothered to remand the case in the first place.

Fisher disingenuously emphasizes that UT was given a “‘full and fair opportunity’ . . . to present ‘all evidence available to [it]’ . . . regarding the rationale for and operation of its use of racial preferences in admission.”⁴⁶ This contention would make sense but for the Supreme Court’s remand, changing the context of the second prong of the strict scrutiny test, which the courts must now apply. Logically one cannot presumably have a full and fair opportunity to prepare for the Supreme Court’s unforeseeable remand. Fisher’s brief even concedes that “[i]n its prior appearance before [the Fifth Circuit], UT was able to avoid confronting [with exacting clarity what constitutes “critical mass”] because the [Fifth Circuit’s] ‘good-faith’ deference made it unnecessary to provide clear answers.”⁴⁷ Therefore, how else can the case thus proceed other than with a remand to the district court for further fact-finding to construe the Supreme Court’s clarification of narrow tailoring?

Second, appellee UT at Austin, confidently maintains, “the [Supreme] Court did not hold that [UT’s affirmative action] plan was invalid in any respect. . . . Instead . . . the Court sent the case back for reconsideration of the narrow-tailoring analysis in light of its decision

44. Plaintiff-Appellant’s Supplemental Reply Brief, at 4 (“The only course ‘consistent’ with the Supreme Court’s mandate is for the ‘Court of Appeals’ to apply the correct strict-scrutiny standard ‘in the first instance’ based on ‘this record.’”); *see also id.* at 5 (“The opinion makes clear that the question being remanded is ‘whether *this record* . . . is sufficient’ to sustain UT’s admissions program against constitutional challenge.”) (emphasis in original).

45. Plaintiff-Appellant’s Supplemental Reply Brief, at 1 (emphasis added).

46. *Id.* at 7 (alteration in original) (quoting in part *Washington v. Finlay*, 664 F.2d 913, 925–26 (4th Cir. 1981)).

47. *Id.* at 32.

Affirmative Action Survives Again in the Supreme Court

reiterating that *Grutter* and *Bakke* do not provide for deference on narrow tailoring.”⁴⁸ UT also confidently maintains that the existing record suffices for the three-judge panel of the Fifth Circuit to determine that its contested affirmative action plan is narrowly tailored per prior Supreme Court holdings; but it would willingly accept a further remand to the district court for “additional evidence.”⁴⁹

Failing to appreciate that university admissions is not an exact science, Fisher has steadfastly maintained that UT has already achieved critical mass in its admissions through its “Top Ten Percent Law,”⁵⁰ and that any other use of race is categorically prohibited as non-narrowly tailored.⁵¹ However, as UT contends, Fisher overestimates the sufficiency of this law in obtaining holistic rather than mere numerical diversity.⁵² Emphasizing that *Bakke* eschewed mere “numerology” via straightforward unapologetic quotas,⁵³ UT reminds the court that it is constitutionally permitted (if not admonished) to “conduct[] the individualized assessments necessary to assemble a student body that is not just *racially* diverse, but *diverse along all the qualities valued by [UT]*.”⁵⁴ Despite Fisher’s insistence on the sufficiency of the Top Ten Percent Law, it was carefully considered by UT and deliberately debunked as neither a “work[able]”⁵⁵ nor “alternative”⁵⁶ race-neutral method.⁵⁷ (Ignoring the arguments of *Grutter* and UT regarding the non-alternative nature of the alternatives upon which Fisher keeps insisting, Fisher states that, “[r]acial preferences can *never* be necessary unless preexisting or reasonably available race-neutral alternatives cannot produce the critical mass necessary to achieve the educational benefits of diversity.”⁵⁸)

48. Supplemental Brief for Appellees, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 09-50822), 2013 WL 5885633, at *25 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

49. *See id.* at 26, 52.

50. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (Ginsburg, J., dissenting) (providing a frank description of the UT’s Top Ten Percent Plan, which automatically admits those high school graduates, who rank in the top ten percent based upon the accumulated grade point average to a University of Texas state university).

51. *See, e.g.*, Plaintiff-Appellant’s Supplemental Reply Brief, at 36–37.

52. *See* Supplemental Brief for Appellees, at 35.

53. *See id.*

54. *Id.* at 32 (quoting *Grutter*, 539 U.S. at 340) (emphasis added).

55. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279 n.8 (1986) (plurality opinion) (confirming how popularly-approved-of classifications are problematic no matter how popular).

56. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (requiring that race-neutral alternatives be considered before resorting to race-based classifications).

57. *See* Supplemental Brief for Appellees, at 29–30.

58. Plaintiff-Appellant’s Supplemental Reply Brief, at 9.

And finally, Amicus NAACP Legal Defense and Education Fund (“LDF”), hopeful for a favorable opinion of the three-judge panel as it has been inclined in the past, has also contended that that court could find for UT on the existing record, but to a less timid extent than UT, arguing in favor of further remand, should the court feel that further facts are useful.⁵⁹ Albeit in a footnote, Amicus reminds the court that race should be considered “as part of a broader effort to achieve exposure to widely diverse people, cultures, ideas, and viewpoints.”⁶⁰ Amicus does not mince words when it criticizes Fisher’s “narrow focus on the bottom-line numeric impact on minority enrollment [that] inappropriately treats all minority students as fungible.”⁶¹

Indeed, referring to the following as “[c]ontext’ that ‘matters.’”⁶² Amicus encourages such remand, as “additional fact development should dispel any doubt about the deleterious impact of the substantial racial isolation that was an unavoidable aspect of campus life for those who attended [UT],” and “the pronounced chilling effect that such incidents may have on minority students[.]”⁶³ Amicus further encourages the taking into account of “personal experience[] [testimony to] bring[] the cold numbers convincingly to life.”⁶⁴

To be sure, looking at the numbers holistically, UT does not “flunk[] narrow-tailoring.”⁶⁵ Going beyond mere numbers and giving minimal concession to Fisher’s unyielding claims that minority-enrollment numbers do indeed appear at least “modest,”⁶⁶ Amicus touts multiplier effects of these numbers in terms of their impact on cross-racial interaction.⁶⁷

59. See Supplemental Brief of Amici Curiae the Black Student Alliance at the Univ. of Tex. at Austin, the Black Ex-Students of Tex., Inc., and the NAACP Legal Defense & Educational Fund, Inc. (“LDF”) [hereinafter “Amicus”] in Support of Appellees, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013), (No. 09-50822), 2013 WL 6080487, at *10–11. The Fifth Circuit has permitted Amicus to participate in oral argument throughout the litigation.

60. Supplemental Brief of Amici, at 22 n.6 (internal quotation marks omitted) (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007)).

61. Supplemental Brief of Amici, at 22 (citation omitted).

62. Supplemental Brief of Amici, at 16 (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

63. Supplemental Brief of Amici, at 13–14.

64. Supplemental Brief of Amici, at 17 (internal quotation marks omitted) (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

65. Supplemental Brief of Amici, at 20.

66. Compare Supplemental Brief of Amici, at 18 (citing *Grutter*, 539 U.S. at 393 (confirming the constitutionality of “considering race as one *modest* factor among many others to achieve diversity”) (Kennedy, J. dissenting) (emphasis added)), with Plaintiff-Appellant’s Supplemental Reply Brief, at 26 (complaining of UT’s “reverse-engineer[ing] a justification for racial discrimination that has made . . . an *infinitesimal* contribution”) (emphasis added).

67. See Supplemental Brief of Amici, at 20–21.

III. A RELUCTANT PREDICTION OF THE FUTURE
IN THE CASE

After fully dissecting the Supreme Court's super majority opinion, reviewing the briefs and oral arguments, and studying the Fifth Circuit's issues that it wished to see addressed on remand, one can safely reach several conclusions about the strict scrutiny test. First, the Supreme Court appears to have reaffirmed its precedents on the first prong of the test: universities have a compelling state interest in pursuing "the educational benefits of a more diverse student body."⁶⁸ And second, the sole issue remaining for resolution by the Fifth Circuit or district court is the issue of narrow tailoring, though that issue is now settled in principle, as explained throughout this discussion.

Critically, that court, without affording deference to UT, must independently determine if UT satisfies its burden of proof that the means are narrowly tailored—with or without additional proof from the parties. However, Fisher claims that any effort to continue achieving diversity for the educational benefits reopens the goals part of the strict scrutiny test, while Amicus asserts the opposite with the statement: "The *means* used to achieve a compelling interest are the focus of narrow-tailoring, not the *end* [goal] itself."⁶⁹

I suggest that the most lightning-rod words from the Supreme Court's opinion in *Fisher* are that while UT does not have to "exhaust[] . . . every *conceivable* race-neutral alternative," the courts cannot simply adopt the "[UT]'s . . . serious, good faith consideration of workable race-neutral alternatives."⁷⁰ Further, "[t]he . . . court must . . . be satisfied that no [available] workable race-neutral" means would accomplish UT's objectives.⁷¹ And finally, the Court said, "[i]f a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense, then [UT] may not consider race."⁷² In this process, the Supreme Court clarified that UT was not entitled to deference on the means part in contrast to deference to the University on the compelling interests' part of the strict scrutiny test. Yet, the Court pronounced that this clarification, which

68. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417.

69. Supplemental Brief of Amici, at 8 (emphasis added).

70. *Fisher*, 133 S. Ct. at 2420 (emphasis in original) (internal quotation marks omitted).

71. *Id.*

72. *Id.* at 2420 (internal quotation marks omitted) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion) (quoting Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975))).

the majority said was at odds with *Grutter*, does not create a new heightened standard.⁷³ And with a nod to UT, the Court further announced that “[A] court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes.”⁷⁴

It does thus appear that UT will still command relevance in the means analysis. However, as much as the Supreme Court clarified the second prong of the strict scrutiny test, it obfuscated it. While the burdens placed on the courts and universities are clarified, the Supreme Court leaves lower courts with some ambiguity in application of the second prong of the test.

IV. AN ODE TO JUSTICE LEWIS POWELL?

While the principle that public universities are constitutionally permitted to take an applicant’s race into consideration has remained—subject to a strict scrutiny test—the Court did not actually decide whether UT’s admissions program passed muster.⁷⁵ Indeed, for some, *Fisher* merely restated what legal scholars had assumed was obvious. So much so that the Court might have just as easily engaged in what court-watchers coin a “GVR” (Grant, Vacate, Remand), i.e., without calling for oral argument or merits briefing, the Court will grant a petition for a writ of certiorari, vacate the opinion of the lower court to which certiorari is sought, and remand the case to that court for further consideration in light of a previous case.⁷⁶ Indeed, upon initial reading, the Court might as well have just granted *Fisher*’s petition for a writ of certiorari to the Fifth Circuit, vacated its opinion, and remanded *Fisher*’s case back to it for further consideration in light of *Grutter*.

However, upon a more careful reading, *Fisher* neither breaks new ground, nor gives a redundant encore of *Grutter*’s majority opinion. Overall, *Fisher* represents the wishes of Justice Kennedy.⁷⁷ In Justice Kennedy’s dissent in *Grutter* (joined by no other justice), he pays homage to *Bakke*—albeit arguable dicta sections written by Justice

73. See *id.* at 2020–21.

74. *Id.* at 2420.

75. See *id.* at 2421.

76. See *Glossary of Legal Terms*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/> (last visited Feb. 3, 2014).

77. See, e.g., Sean Lengell, *Anthony Kennedy Turns Moderation into Power*, WASH. EXAMINER (Jan. 10, 2014, 11:38 AM), <http://washingtonexaminer.com/anthony-kennedy-turns-moderation-into-power/article/2541804>.

Affirmative Action Survives Again in the Supreme Court

Powell and joined only by Justice Powell himself, for the most part⁷⁸; Justice Kennedy explicitly states, “[t]he [separate] opinion by Justice Powell, in my view, states the correct rule for resolving this case.”⁷⁹ Just like Justice Powell, and consistent with his opinion in *Fisher*, Justice Kennedy does believe that consideration of race can play a constitutional role in furthering a public university’s compelling interest in diversity.⁸⁰ (However, as he has insisted in both *Grutter* and *Fisher*, a specific test of strict scrutiny must be passed.)⁸¹ To be sure, Justice Kennedy’s opinion in *Fisher*⁸² takes Justice Powell’s *Bakke*⁸³ dicta (where most portions of the opinion did not garner more than one vote, let alone five) and his own *Grutter*⁸⁴ dissent (also dicta by definition) and turns them into the majority opinion. *Fisher* thus represents Justice Kennedy’s (and Justice Powell’s) views on affirmative action in public higher education—but with precedential value and not a mere “semantic distinction.”⁸⁵

There is an urban legend about a professor who gave an A to a plagiarized paper because the paper had actually been written by him when he was a student—at which point he only got a B.⁸⁶ As the professor felt that the paper had always deserved an A, rather than penalizing the plagiarizer, he used the opportunity to finally give it the A that it deserved.⁸⁷ By way of analogy, the professor is Justice Powell and the student is Justice Kennedy—though Justice Kennedy has in no way plagiarized Justice Powell. On the contrary, before writing the majority opinion in *Fisher*, Justice Kennedy had written in his lone dissent in *Grutter* that despite his disagreement with the majority, consideration of race can nonetheless be permissible; Justice Powell’s individual opinion in *Bakke* and plurality opinion in *Wygant* deserved to be the controlling tests, i.e., those opinions did not get the A that they

78. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–91, 305–09, 311–19 (1978) (plurality opinion) (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring)).

79. *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

80. *See Grutter*, 539 U.S. at 387–95 (Kennedy, J., dissenting); *see also* *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (illustrating his views in support of racial and ethnic divert in K-12 grades).

81. *See* 539 U.S. at 387–95 (Kennedy, J., dissenting); 133 S. Ct. 2411, 2415–22.

82. *See* 133 S. Ct. at 2415–22.

83. *See Bakke*, 438 U.S. at 287–91, 305–09, 311–19 (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring)).

84. *See* 539 U.S. at 387–95.

85. *Bakke*, 438 U.S. at 289 (Powell, J., concurring).

86. *The Old Man and the ‘C’*, SNOPES.COM, http://www.snopes.com/college/homework/prof_paper.asp (last updated Jun. 28, 2011).

87. *Id.*

deserved.⁸⁸ In *Fisher*, with proper attribution, Justice Kennedy has taken Justice Powell's individual-*Bakke* and plurality-*Wygant* opinions and proudly given them an A. With Justice Powell's fingerprints all over *Fisher*, the opinion is indeed his—albeit from beyond the grave.

V. INFLUENCE OF JUSTICE KENNEDY'S SWING VOTE

Justice Anthony Kennedy is one of the most influential members on the Court, especially in race cases, because he often provides the swing vote that tips the case for the majority. As predicted, he wrote the opinion in which six of his colleagues across the liberal to conservative spectrum on the Court joined him. But agreed with him in what? The *Fisher* decision decided to allow the affirmative action precedent established in *Grutter* to continue for the indefinite future. Affirmative action survived not by a decision on the merits, but through a default to the status quo precedent of *Grutter*, which upheld diversity in colleges and universities ten years earlier. The default in favor of affirmative action resulted from, what I refer to as, the technical decision that avoided the ultimate question of the most controversial policy in higher education. With a clarification of the legal doctrine created by the Court to determine when a university may take race in account to promote the educational benefits of diversity now firmly set, the remainder of this case, and presumably the future of affirmative action will be determined by lower courts on a factual basis.

Classic Kennedy? He has expressed views that some would call liberal, especially on LGBT rights⁸⁹ and the death penalty,⁹⁰ but he could insist all along that these views are based on what he views as conservative rationales; as long as he gets to write the controlling opinion, he has no problem. Indeed, he dissented in *Grutter* not because he felt that the use of race in admissions was categorically unconstitutional, but rather because he felt that the University of Michigan's plan did not pass strict scrutiny. Now that he finally had a chance to articulate his views in *Fisher*, he was not going to pass up

88. Compare *Bakke*, 438 U.S. at 287–91, 305–09, 311–19 (1978) (i.e., Sections III-A, IV-A, IV-B, IV-D, and V-A (Powell, J., concurring) (containing Justice Powell's essentially lone opinion)), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 269–84 (1986) (plurality opinion) (containing Justice Powell's Opinion), with *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting) (“The [separate] opinion by Justice Powell [in *Bakke*], in my view, states the correct rule for resolving this case. The Court, [in the instant case], does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.”).

89. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2682–97 (2013); *Lawrence v. Texas*, 539 U.S. 558, 562–79 (2003); *Romer v. Evans*, 517 U.S. 620, 623–36 (1996).

90. See, e.g., *Graham v. Florida*, 560 U.S. 48, 52–85 (2010).

Affirmative Action Survives Again in the Supreme Court

the chance to reframe the divisive issue of affirmative action in the way that he wanted.

CONCLUSION

The clarification of the strict scrutiny rule articulated in *Fisher*—i.e., no deference to UT in the means part of the test; independent review by the court; and some display by UT of exhaustingly calculated race-neutral means—only belies a missed message that if a non-racial means could accomplish the goal at a tolerable expense, then UT may not consider race. All could later come out in the wash during further proceedings where there is no guarantee that if *Fisher* or UT lost, the Court would be inclined to accept their appeal a second time. In all three of the major higher-education affirmative action cases decided by the Supreme Court—*Bakke*, *Grutter*, and *Fisher*—affirmative action managed to endure, though with limitations. It remains to be seen in *Fisher* how the lower courts will interpret the new clarification of the narrowly-tailored prong of the strict scrutiny test. The line is narrow⁹¹ (pun intended) between the logo of the test, “strict in theory, but fatal in fact,”⁹² and the new version announced in *Fisher*, “strict in theory but *feeble* in fact.”⁹³ Will courts interpret the new clarification to mean that no university can meet the test, or will public institutions of higher education be unwilling to expend the substantial financial resources when sued in court?

The role of the social engineer in the model of Charles Hamilton Houston is to prodigiously study law from every doctrinal and strategic perspective. Once reasonably confident in the theory and the tactics, Houston believed in selectively commencing test cases. Today, whether filing a new case for social change, or defending existing civil rights doctrines that benefit people of color, this Essay is intended to enable the social engineer to continue in the Houstonian tradition.

In summary, I cannot predict with any degree of certainty how the lower court will apply the Supreme Court’s guidance on the second prong of the strict scrutiny test. Therefore, like the Court, I, too, will punt in making a prediction until a lower court rules on the legality of the precise means of affirmative action at UT.

91. See *Bakke*, 438 U.S. at 319 (Powell, J., concurring) (citing *McLeod v. Dilworth*, 322 U.S. 327, 329 (1944)).

92. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995).

93. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013) (emphasis added).

COMMENT

The Negative Effects of Ill-Advised Legislation: The Curious Case of the Evolution of Anti-Sharia Law Legislation into Anti-Foreign Law Legislation and the Impact on the CISG

SAMIR ISLAM*

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”— Justice Jackson.¹

INTRODUCTION	980
I. INTRODUCTION TO ISLAMIC LAW	983
A. Are the Terms “Islamic Law” and “Sharia Law” Interchangeable?.....	985
B. Islamic Law Application in the United States	990
II. EXAMINATION OF ANTI-SHARIA LEGISLATION AND WHETHER THE LEGISLATION IS CONSTITUTIONAL UNDER ESTABLISHMENT CLAUSE ANALYSIS	997
A. Sharia-Specific Legislation	997

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1. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

B. Facially-Neutral Legislation 1000
C. Constitutionality of the Proposed Provisions..... 1001
 1. Sharia Specific Legislation and the Application
 of the *Larson* Test 1001
 2. Facially Neutral Legislation and Application of
 the *Lemon* Test 1005
III. THE TRANSITION FROM ANTI-SHARIA
 LEGISLATION TO ANTI-FOREIGN LAW
 LEGISLATION 1012
 A. Transition 1012
 B. Other Possible Negative Effects of Anti-Foreign
 Law Legislation 1015
IV. THE CISG AND CONTRACTUAL OBLIGATIONS
 IN THE UNITED STATES 1017
 A. Introduction to the CISG 1017
 B. The Controversy of Choice of Law Provision 1019
 C. The CISG as Treaty Law in the United States 1022
 D. Analysis 1026
CONCLUSION 1030

INTRODUCTION

In May 2010, the Oklahoma House of Representatives passed House Joint Resolution 1056 directing the Secretary of State of Oklahoma to refer a proposed amendment to the state constitution.² The proposal, called the “Save Our State Amendment,” (“SOS Amendment”) stated:

The Courts provided for in [S]ubsection A of this section, when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated thereto, and if necessary the law of another state of the United States *provided the law of the other state does not include Sharia Law*, in making judicial decisions. The courts shall *not look to* the legal precepts of other nations or cultures. Specifically, the courts *shall not consider international law or Sharia law*. The provisions of this subsection shall apply to all cases before the

2. *Awad v. Ziriax*, 670 F.3d 1111, 1117 (10th Cir. 2012).

The Evolution of Anti-Sharia Law Legislation

respective courts including, but not limited to, cases of first impression.³

In all, there are a total of forty-seven similar bills proposed in twenty-one different states.⁴

In Oklahoma, before a state amendment can take effect, the legislature must create a ballot initiative and the Oklahoma State Election Board must certify the constitutional amendment based on election results.⁵ In turn, the SOS Amendment became a ballot initiative titled State Question 755 [“SQ 755”].⁶ Subsequently, a vast majority of Oklahoman voters ratified SQ 755, effectively curtailing the use of international and Sharia law in guiding opinions in Oklahoma State Courts.⁷

Immediately following the election, Muneer Awad, the director of the Council on American Islamic Relations in Oklahoma, filed for a temporary restraining order and a preliminary injunction denying the Election Board the opportunity to ratify the results of the midterm elections and challenging the constitutionality of SQ 755.⁸ The United States District Court for the Western District of Oklahoma granted a preliminary injunction holding, in part, that SQ 755 violated the Establishment and Free Exercise Clauses of the First Amendment.⁹ On appeal, the United States Court of Appeals of the Tenth Circuit upheld the injunction.¹⁰

Anti-Sharia legislation has now evolved into anti-foreign law statutes that may have broad, unintended impacts, including hampering the right to contract and stifling arbitration agreements with choice of

3. *Id.* at 1117–18 (emphasis added).

4. Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 *FIRST AMEND. L. REV.* 363, 370 (2012) (citing that number as of June 2011).

5. *Awad*, 670 F.3d at 1117.

6. Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 *CLEV. ST. L. REV.* 189, 192 (2011) (stating that before becoming a ballot initiative, the bill was titled House Joint Resolution 1056 and passed both the Oklahoma House of Representatives and Senate with decisive majorities.).

7. *See id.* at 190 (reporting that just about 70.08% of voters voted in support of the amendment).

8. *See Awad v. Zirriax*, 754 F. Supp. 2d 1298, 1302 (W.D. Okla. 2010).

9. *Id.* at 1307.

10. *See Awad*, 670 F.3d at 1132. The Tenth Circuit discusses two tests that might apply to discrimination against a religion, ultimately applying the *Larson* test. The *Larson* test applies strict scrutiny when a law discriminates among religions “because [n]eutral treatment of religions [is] the clearest command of the Establishment Clause.” *Id.* at 1127 (internal quotation marks omitted). Under the *Larson* test, a law that discriminates among religions must closely fit a “compelling interest asserted.” *Id.*

law provisions.¹¹ Unexplored is the effect of state-based anti-Sharia and anti-foreign law legislation on the United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG is considered a self-executing treaty and serves as the model of interpretation for contracts between signatory countries.¹² The CISG contains choice of law provisions that allow for state law to be used to govern contracts.¹³ As a result, federal courts may incorrectly apply contradictory state law in interpretation of contracts governed by the CISG.

This Comment explores the effects of anti-Sharia and anti-foreign law legislation on choice of law provisions in the CISG. This Comment argues that in passing restrictive legislation, state legislatures were unaware of specific consequences of their actions and the implications regarding international contracting. In their rush to pass legislation, proponents of anti-foreign law and anti-Sharia statutes failed to recognize how the legislation would be found unconstitutional. Anti-Sharia legislation is unconstitutional in its application of First Amendment analysis, and anti-foreign law statutes are preempted pursuant to the application of the Supremacy Clause when the CISG is applied. These types of legislation have no place in American jurisprudence.

This Comment is divided into five sections. Section I defines Islamic law and Sharia law and examines the application of the religious code in the United States. Further, this Section explores whether Islamic law is a threat to American jurisprudence. Section II introduces anti-Sharia legislation and anti-foreign law legislation and determines whether both types of legislation are constitutional under First Amendment Establishment Clause analysis. Section III serves as a bridge examining the evolution of anti-Sharia legislation into anti-foreign law statutes. Section IV serves as an introduction to the CISG and choice of law provisions. Section IV also details how confusing state law negatively impacts federal court analysis on the application of law regarding contracts between an entity in the United States and another entity located in a country that is a signatory of the CISG.

11. See Katherine A. Sanoja, *The Impact of "Anti-Sharia" Legislation on Arbitration and Why Judge Nielsen in Florida Got It Right*, 8 FLA. INT'L L. REV. 181, 213–14 (2012) (arguing that similar legislation affecting arbitration makes the United States an unfriendly place for arbitration and denies parties the concept of comity).

12. See Michael P. Van Alstine, *The International Sales Contract Including the United Nations Convention on the International Sale of Goods*, in INTERNATIONAL COMMERCIAL TRANSACTIONS §1.2 (MICPEL, 2005).

13. See The United Nations Convention on Contracts for the International Sale of Goods art. 6, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 [hereinafter CISG].

Further, Section IV examines how the federal government upholds treaty law. Section V analyzes the effects of anti-foreign law legislation on CISG application. In all, this Comment adds to the recent scholarship exhibiting how anti-Sharia legislation and anti-foreign law statutes were ill-conceived and inefficient in application.

I. INTRODUCTION TO ISLAMIC LAW

Originally, the proposed state constitutional amendments were largely geared toward restricting the applicability of Sharia law, and generally Islamic law, in American jurisprudence.¹⁴ Further, as the Muslim-American population is “estimated to range from five to eight million and Islam is projected to become the nation’s second largest religion early in the next century,”¹⁵ understanding Sharia law and Islamic jurisprudence will become increasingly important.

Islam is influential on the world stage. There are 1.6 billion Muslims, comprising about twenty-three percent of the world’s population, making Islam the world’s second largest religion; the religion affects politics in the Middle East, South and Southeast Asia, and Sub-Saharan Africa.¹⁶ Further, sixty-nine countries have significant Muslim populations; Muslims are a majority population in forty-nine countries and Indonesia is the home to the largest number of Muslims in any one country with 209 million.¹⁷ In North America, there are almost 3.5 million Muslims while about 43.4 million Muslims live in Europe.¹⁸

Islamic law is also influential on the world stage. Islamic law is considered one of three major world legal systems, including Roman (civil) and common law.¹⁹ Further, there are seven Muslim countries that are signatories of the CISG including, Egypt, Lebanon, Kyrgyz-

14. See Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 119, 163 (2012).

15. Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in *UNDERSTANDING ISLAMIC LAW: FROM CLASSICAL TO CONTEMPORARY* 1 (Hisham M. Ramadan ed., 2006).

16. Drew DeSilver, *World’s Muslim Population More Widespread Than You Might Think*, PEW RES. CTR. (June 7, 2013), <http://www.pewresearch.org/fact-tank/2013/06/07/worlds-muslim-population-more-widespread-than-you-might-think/>.

17. T.S. Twibell, *Implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG) Under Shari’a (Islamic Law): Will Article 78 of the CISG Be Enforced When the Forum Is in an Islamic State?*, 9 *INT’L LEGAL PERSP.* 25, 32–33 (1997); DeSilver, *supra* note 16 (reporting that India is the second most populous Muslim country with a population of 176 million followers).

18. DeSilver, *supra* note 16.

19. Twibell, *supra* note 17, at 33.

stan, Mauritania, Syria, Turkey, and Uzbekistan.²⁰ As a result, a practitioner should be cognizant of whether Islamic law is applicable and how unique provision under the religious law, like a ban against interest, affects international contracts.

Further, there has been a rise in transnational commerce guided by Islamic law as a result of Islamic finance.²¹ Islamic financing is a pressing issue when analyzing international sale contracts because when dealing with “credit or discounting of bills of exchange or factoring or forfaiting, the issue of interest will necessarily have to be considered.”²² Interestingly, Islamic Law has a major issue with charging or paying of interest.²³ The differences between Western canon and Islamic jurisprudence can be a source of issue between contracting parties. As Jason Chuah recognized, Oklahoma’s SQ 755 provides a stark reminder that where legislation makes no distinction between personal and commercial matters, unintended conflicts can arise under “matters falling under state jurisdiction.”²⁴ Conflicts that may arise include jurisdictional issues; application of secular law when a contract also has Sharia compliance clauses; interpretation of capacity clauses; and application of Sharia on the CISG.²⁵

Here, in the United States, Islamic law is viewed as a threat. In 2010, the conservative Center for Security Policy published a report entitled “Sharia: The Threat to America” that defined Sharia as an “all-encompassing Islamic political-military-legal doctrine” that mandates the establishment of a worldwide Islamic State by obliging Muslims to engage in jihad.²⁶ A number of American conservative pundits have identified Sharia, or Islamic Law, as a growing threat to the United States because Sharia “is a strategy extremists are using to transform the United States into an Islamic state.”²⁷ Former presiden-

20. See Albert H. Kritzer, *CISG: Table of Contracting States*, PACE L. SCHOOL INST. OF INT’L COMM. L., <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last updated Oct. 4, 2013).

21. Jason Chuah, *Impact of Islamic Law on Commercial Sale Contracts—A Private International Law Dimension in Europe*, 4 EUR. J. COM. CONT. L. 191, 191 (2010).

22. *Id.* at 192.

23. *Id.*

24. *Id.* at 192–93.

25. See *id.*

26. TEAM B II, CTR. SEC. POL’Y, SHARIAH: THE THREAT TO AMERICA 13 (2010), available at <http://shariahthethreat.org/wp-content/uploads/2011/04/Shariah-The-Threat-to-America-Team-B-Report-Web-09292010.pdf>.

27. Wajahat Ali & Matthew Duss, *Young Muslim American Voices: Understanding Sharia Law: Conservatives’ Skewed Interpretation Needs Debunking*, CTR. FOR AM. PROGRESS (March 31, 2011), <http://www.americanprogress.org/issues/religion/report/2011/03/31/9175/undersanding-sharia-law/>.

The Evolution of Anti-Sharia Law Legislation

tial candidate Newt Gingrich claimed that Sharia is a “mortal threat” to American law because Sharia looks to replace the secularism that represents the United States.²⁸ Furthermore, in American discourse, Sharia law is seen as an extension of terrorism, an oppressor of women, and a provider of harsh penalties for violators of criminal laws.²⁹

Viewing Sharia as a threat to the United States has resulted in the enactment of state and federal legislation to ban the application of the specific religious law in American courtrooms.³⁰ As of June 2011, there were forty-seven bills drafted to curtail the use of Sharia and/or international or foreign law in twenty-one states.³¹ However, in supporting anti-Sharia legislation, “most Americans know nothing about what they are being asked to ban, nor enough about how judges currently treat sharia-based claims to know whether a ban is even needed in the first place” and what rules are applicable to implement foreign laws in U.S. courts.³² This section will focus on providing a generalized definition of Sharia law and how Islamic jurisprudence is applied in American courts.

A. Are the Terms “Islamic Law” and “Sharia Law” Interchangeable?

Sharia law is not a mortal threat to the United States, and Islamic law will not replace the secular law already in place in this country. Islamic law is considered the overarching term that encompasses law and jurisprudence of the religion of Islam “including (1) the primary sources of law (Shari’ah) and (2) the subordinate sources of law and the methodology used to deduce and apply the law (. . . called *fiqh* in Arabic).”³³ Further, Sharia law is a “moral, religious, ethical, and legal system” that is based on two primary sources: the Quran (the holy book in Islam) and the Sunnah (the teachings of the Prophet Muhammad).³⁴ Some academics have adopted the following nomenclature: Islamic law is referencing the entire system of law and jurisprudence, Sharia law and *fiqh* are parts under the umbrella of Islamic law.³⁵

28. Asifa Quraishi-Landes, *What is Sharia and Is It Creepy?*, ISLAMIC MONTHLY (June 18, 2012, 5:10 AM), <http://www.theislamicmonthly.com/what-is-sharia-and-is-it-creepy/>.

29. *Id.*

30. See Ali & Duss, *supra* note 27; Quraishi-Landes, *supra* note 28.

31. See Uddin & Pantzer, *supra* note 4, at 370.

32. Quraishi-Landes, *supra* note 28, at 20. See Elver, *supra* note 14, at 164.

33. Abdal-Haqq, *supra* note 15, at 3.

34. Muhammad Elsayed, *Contracting into Religious Law: Anti-Sharia Enactments and the Establishment and Free Exercise Clauses*, 20 GEO. MASON L. REV. 937, 939 (2013).

35. Abdal-Haqq, *supra* note 15, at 3.

Literally translated, Sharia “means ‘road to the watering place’ or ‘path leading to the water,’ or, in practical terms, ‘the way to the source of life.’”³⁶ Further, the main objective of Sharia law is to “promote the well-being of the people” and is classically designed to safeguard a person’s faith, self, intellect, posterity, and wealth.³⁷ For Muslims, Sharia is a divine concept and can be thought of as God’s Law, where God is directly asking and directing people to live.³⁸ Subsequently, Sharia consists of five main branches: (1) *adab* (behavior, morals, and manners); (2) *‘ibadah* (ritual worship); (3) *i’tiqadat* (beliefs); (4) *mu’amalat* (transactions and contracts); and (5) *‘uqubat* (punishments).³⁹

Classically, Sharia is derived from two main sources: (1) The Quran, the holy book of Islam and what Muslims believe as the Word of God as revealed to the Prophet Muhammad; and (2) The Sunnah and Hadith, the Sunnah is the lived example and Hadith are the recorded tradition of the Prophet Muhammad—the verbalized accounts of what the Prophet said and did as authenticated by followers of the time.⁴⁰ In general, The Quran is seen as the cornerstone of law containing the literal Word of God.⁴¹ However, the Quran and Sunnah do not answer every single life and legal question presented to a Muslim; instead Islamic jurists developed tools like canons of construction and analogical reasoning.⁴² In aggregate, the jurisprudential tools are called *fiqh*, or understanding.⁴³

36. Yaser Ali, Comment, *Shariah and Citizenship – How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CAL. L. REV. 1027, 1063 (2012); see ABU AMEENAH BILAL PHILIPS, THE EVOLUTION OF FIOH (ISLAMIC LAW & THE MADH-HABS) 12 (1988), available at <http://www.kalamullah.com/Books/The%20Evolution%20of%20Fiqh.pdf> (citing *Soorah al-Jaathiya* (45):18) (“Then, we put you on a straight path (Sharee’ah) in you affairs, so follow it and do not follow the desires of those have no knowledge.”)).

37. M. Umer Chapra, *The Islamic Vision of Development in the Light of Maqasid Al-Shari’ah* 5–6 (2007) (citing Abu Hamid al-Ghazali, a well-respected fifth-century Islamic Scholar), available at http://www.irti.org/irj/go/km/docs/documents/IDBDevelopments/Internet/English/IRTI/CM/downloads/Distance_Learning_Files/The%20Islamic%20Vision%20of%20Development%207.pdf.

38. Asifa Quraishi, *Who Says Shari’a Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. MIDDLE E. & ISLAMIC L. 163, 164 (2008).

39. Qasim Rashid, *Shari’ah Ban Violates Muslim, Jewish, and Christian American Civil Liberties*, KARAMAH, available at <http://www.karamah.org/wp-content/uploads/2011/12/Shariah-and-Civil-Rights-Qasim-FINAL.pdf>.

40. See Ali, *supra* note 36, at 1063–64 (2012); Abdal-Haqq, *supra* note 15, at 12; Quraishi, *supra* note 38, at 164.

41. Abdal-Haqq, *supra* note 15, at 11.

42. See Quraishi, *supra* note 38, at 164.

43. See *id.* at 164–65.

The Evolution of Anti-Sharia Law Legislation

Fiqh, also a part of Islamic law, supplements Sharia; *fiqh* is comprised of legal rules, governing topics like punishment and contract interpretation in Islamic contexts.⁴⁴ *Fiqh* is “the process of deducing and applying Shari’ah principles and injunctions in real or hypothetical cases or situations”⁴⁵ *Fiqh* is an Islamic jurist’s interpretation of both Quran and Sunna and is not ordained by God; rather it arises from discourse among scholars without state intervention.⁴⁶ Further, *fiqh* is based on the concept of fallibility of human interpretation of God’s Law, if an Islamic Jurist makes a mistake in interpretation, then the assumption is that a jurist from a different school of thought⁴⁷ might have a correct interpretation on the matter.⁴⁸ Ultimately, *fiqh* describes five categories of human interaction: (1) *wajib*, actions that are mandatory; (2) *mandub*, actions that are recommended; (3) *mubah*, actions that are neutral; (4) *makruh*, actions that are discouraged; and (5) *haram*, actions that are strictly prohibited.⁴⁹ *Fiqh* is considered non-binding because of the fallible nature of human interpretation.⁵⁰

Another aspect of Islamic law is the concept of *siyasa*, a temporal understanding of law established by a ruler of a society for public welfare.⁵¹ *Siyasa* is binding on an applicable society and is usually uniform; unlike *fiqh*, *siyasa* authorities are not interpreting divine texts.⁵² The ruler of the society—whether caliph, king, or state government—chooses individual scholars from the *fiqh* community and stands behind their rulings, providing the binding legal code for the society.⁵³ A ruling regarding Islamic Jurisprudence by a member of the *fiqh*

44. See BABER JOHANSEN, CONTINGENCY IN A SACRED LAW: LEGAL AND ETHICAL NORMS IN THE MUSLIM FIOH 1 (1999) (“[Fiqh] . . . classifies and sanctions human acts, gives ethical and legal guidance to the believers and determines at the same time the rights and duties of the non-believers under an Islamic government.”); Quraishi, *supra* note 38, at 165.

45. Abdal-Haqq, *supra* note 15, at 5; see PHILIPS, *supra* note 36, at 12 (“*Fiqh* refers to the science of deducing Islamic laws from evidence found in the sources of Islamic Law.”).

46. See JOHANSEN, *supra* note 44, at 1 (“*Fiqh* is a system of rules and methods whose authors consider it to be the normative interpretation of the revelation, the application of its principles and commands to the field of human rights.”); Quraishi, *supra* note 38, at 169.

47. Rashid, *supra* note 39 (reporting that the major schools of thought in Islamic Jurisprudence are the *Hanafi*, *Hanbali*, *Malaki*, *Shafi’i*, *Ja’fari*, *Zaydi*, *Ibadi*, and *Zahiri* branches).

48. See Quraishi, *supra* note 38, at 167.

49. *Id.* at 173. See also TAHA JABIR AL-ALWANI, TOWARDS A FIOH FOR MINORITIES: SOME BASIC REFLECTIONS 1 (2003) (citing Ibn Khaldun) (“*Fiqh* is the knowledge of God’s rules . . . regarding the behavior and actions of adult individuals, be they obligatory, forbidden, recommended, abhorrent or permissible.”).

50. See Quraishi, *supra* note 38, at 171.

51. See *id.* at 170–71.

52. See *id.* at 170.

53. See *id.* at 172.

community is called a *fatwa*; *fatwas* can be issued for topics like specific martial disputes between a man and a woman.⁵⁴

Interestingly, colonization has played a role in determining the type of law practiced in Muslim majority countries. Most contemporary Muslim majority countries in the post-colonial era do not operate under a *fiqh-siyasa* model, but base their governments on a Western nation-state model.⁵⁵ These contemporary Muslim majority countries sometimes seek to mandate the use of Sharia as the law of the land by codifying a certain *fiqh* viewpoint, ignoring the pluralism and the inherent fallibility of *fiqh*.⁵⁶ With this uniformed judicial code ignoring the cultural underpinnings of *fiqh*, countries establish Sharia based courts that decide Islamic law in question, but while often ignoring the disagreement that defined traditional interpretation.⁵⁷ Unlike *siyasa*, which changes depending on the reign of a new ruler, the introduction of a Sharia Court creates a static interpretation of Islamic law that may not be representative of classical *fiqh* interpretation.⁵⁸

In aggregate, Sharia law is inherently complicated, classically comprised of both *fiqh* and *siyasa*. Sharia is partially restrained by human interpretation because *fiqh* is developed by authors that “consider to be the normative interpretation of the revelation.”⁵⁹ A mistake in interpretation is tolerated because a different school of thought, or a different jurist, might have the correct interpretation; Islamic law embraces legal pluralism.⁶⁰ Under a concept of *siyasa*, rulers of society chose to follow a certain *fiqh* understanding, establishing uniform rules of law that aid in maintaining public order.⁶¹ The balance between *fiqh* and *siyasa* is not a point of emphasis for contemporary majority Muslim states that legislate Sharia as the law of the

54. *See id.*

55. *Id.* at 175; *see also* OSSAMA ARABI, STUDIES IN MODERN ISLAMIC LAW AND JURISPRUDENCE 1–2 (2001) (suggesting that part of modernization was the borrowing of conceptual structures from Europe including industry, commerce, scientific knowledge, and the judiciary. As a result modernization affected how Islamic law was implemented post colonization).

56. *See* Haider Ala Hamoudi, *The Death of Islamic Law*, 38 GA. J. INT’L & COMP. L. 293, 305, 307 (2010) (reporting that in modern times, Sharia is applied through codification in which could be a distortion of the message of the religious law because all law related to Sharia is not codified); Quraishi, *supra* note 38, at 176.

57. *See* Quraishi, *supra* note 38, at 176.

58. *See id.*; *see also* Hamoudi, *supra* note 56, at 311 (reporting that judges are trained in professional law schools focusing on common or civil law, without formal education in Sharia law, where the only part of Sharia law still considered truly influential is personal status law).

59. *See* JOHANSEN, *supra* note 44, at 1.

60. *See* Quraishi, *supra* note 38, at 166.

61. *See* Asifa Quraishi, Book Note, *Taking Shari’a Seriously*, 26 CONST. COMMENT. 297, 301 (2010) (reviewing NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* (2008)).

land.⁶² These countries mandating Sharia no longer respect or value that *fiqh* is inherently fallible but instead only follow one interpretation of jurisprudence and establish Sharia courts based on that understanding.⁶³

As a result of the inherent pluralism of Islamic law, some courts in the United States considering the application of Sharia law have deemed that Islamic jurisprudence “‘lacks a legal character’ because ‘Sharia law is a set of religious traditions that differs depending upon the country in which the individual Muslim resides.’”⁶⁴ Most importantly, Muslims living in non-Muslim territories must abide by the laws of the territory.⁶⁵ Subsequently, especially in the *Hanafi* school of thought, “as long as these Muslims are allowed to practice their religion privately and are not forced to obey the religious laws of the host state, these Muslims may continue to reside in non-Muslim territory even if the public laws of Shari’a are suspended.”⁶⁶

In effect, the United States, in theory, creates a perfect environment for Muslim Americans to live. Muslims in the U.S. are mandated to follow the United States Constitution and the laws of the states in which they live. Consequently, Islamic scholars have recognized that Muslims residing in non-Muslim countries “like the United States ‘should respect the law of the land’ because ‘being a citizen or a resident or a visitor means you have agreed to go with the law of the land you accepted to be a part of.’”⁶⁷ Theoretically, Sharia law mandates that Muslims living in the United States must follow the United States Constitution subject to the Muslims being able to privately practice their religion and are not forced to obey other religious law.⁶⁸ Sharia is not a tool to transform the United States into an Islamic state and is not an inherent enemy system of law that some commentators have argued. Further, in the United States, Islamic law is applied in only certain circumstances.

62. See Hamoudi, *supra* note 56, at 301.

63. See Quraishi, *supra* note 38, at 177 (describing how modern *fiqh* is binding, singular, and articulated by one court while classical *fiqh* was more pluralistic and was not binding).

64. Ismael T. Salam, “Save Our State” Amendment: Dead on Arrival, 17 PUB. INT. L. REP. 35, 38 (2011) (citing *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1306 (W.D. Okla. 2010)).

65. Khaled Abou El Fadl, *Muslims and Accessible Jurisprudence in Liberal Democracies: A Response to Edward B. Foley’s Jurisprudence and Theology*, 66 FORDHAM L. REV. 1227, 1229 (1998).

66. See *id.*

67. Salam, *supra* note 64, at 38.

68. See Lee Tankle, *The Only Thing We Have to Fear Is Fear Itself: Islamophobia and the Recently Proposed Unconstitutional and Unnecessary Anti-Religion Laws*, 21 WM. & MARY BILL RTS. J. 273, 279–80 (2012).

B. Islamic Law Application in the United States

The Center for Security Policy analyzed cases involving Sharia law in state courts to determine how Islamic law is being used in the United States. The Center for Security Policy found a total of fifty significant cases from twenty-three different states in which at the trial level, twenty-two decisions found Sharia law not applicable based on state's public policy; fifteen decisions found Sharia applicable to the case at bar; nine decisions were indeterminate on the issue; and four cases holding that Sharia was not applicable at that trial court level.⁶⁹ The numbers are similar at the appellate level: twenty-three decisions found Sharia inapplicable because application would violate the

69. CTR. FOR SEC. POL'Y, SHARIAH LAW AND AMERICAN STATE COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES 10–11 (2011) (citing *Nationwide Resources Corp. v. Masabni*, 694 P.2d 290 (Ariz. Ct. App. 1984)) (regarding the commission of a promissory note where the trial court applied Moroccan Islam law to determine the matter while the appellate court applied Syrian Christian law instead); *see, e.g.*, *El-Farra v. Sayyed*, 226 S.W.3d 792 (Ark. 2006) (regarding the termination of an Imam from the Islamic Center of Little Rock; the Arkansas Supreme Court held that it could not interfere with the interpretation of a contract without violating the First Amendment); *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Ct. App. 2001) (holding that the marriage contract signed by the parties did not provide sufficient information to constitute a pre-marital agreement); *In re Marriage of Vryonis*, 248 Cal. Rptr. 807 (Ct. App. 1988), *disapproved of by* *Ceja v. Rudolph & Sletten, Inc.*, 302 P.3d 211 (Cal. 2013) (declining to uphold the sanctity of a temporary marriage, called a *muta*, because it does not provide another individual a good faith belief that the couple had entered a legal marriage in the state); *In re Marriage of Malak*, 227 Cal. Rptr. 841 (Ct. App. 1986) (regarding a divorce proceeding where the appellate court ordered the Lebanese Sharia custody order to be enforced); *Saudi Basic Indus. Corp. v. Mobil Yanu Petrochem. Co., Inc.*, 866 A.2d 1 (Del. 2005) (regarding a contract dispute between Saudi Basic Industries Corporation and Exxon and Mobil in which the trial court applied Saudi Islamic law and found that the Saudi company had committed usurpation; the appellate court affirmed); *Akileh v. Elchahal*, 666 So. 2d 246 (Fla. Dist. Ct. App. 1996) (regarding the enforcement of an antenuptial agreement, called a *sadaq*, where the appellate court overruled the trial court in holding the agreement as enforceable); *Aleem v. Aleem*, 947 A.2d 489 (Md. 2008) (regarding whether an Islamic instantaneous divorce, called *talaq*, was enforceable; the Maryland Supreme Court held that *talaq* violated Maryland public policy and is therefore unenforceable); *Hosain v. Malik*, 671 A.2d 988 (Md. Ct. Spec. App. 1996) (regarding a custody dispute and whether comity should have been granted to a custody order from Pakistan); *Abd Alla v. Mourssi*, 680 N.W.2d 569 (Minn. Ct. App. 2004) (regarding whether an arbitration committee's ruling should be upheld; the appellate court held that the challenge of the award was untimely and that the award was not a result of fraud or undue means); *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010) (regarding the court's grant of a restraining order following particularly gruesome episodes of physical and sexual abuse; the trial court denied the wife's restraining order holding that it was the husband's religious right to abuse and harass his wife; the appellate court reversed the trial court and ordered the entrance of a final restraining order against the husband); *Chaudry v. Chaudry*, 388 A.2d 1000 (N.J. Super. Ct. App. Div. 1978) (regarding the division of marital property following a divorce, either applying Pakistani or New Jersey state law); *Farah v. Farah*, 429 S.E.2d 626 (Va. Ct. App. 1993) (determining whether a marriage that occurred in London, but not satisfying the formalities of English law, is valid if it fulfills mandates under Islamic law); *In re Marriage of Obaidi*, 226 P.3d 787 (Wash. Ct. App. 2010) (regarding whether the pre-marital agreement, called a *mahr*, was enforceable at the time of divorce; the appellate court held that the trial court erred in looking to Islamic law and applied Washington contract law).

The Evolution of Anti-Sharia Law Legislation

state's public policy; twelve found Sharia to be applicable to the case; eight decisions were indeterminate to the application of Sharia; and seven decisions found Sharia to not be applicable to the case at bar.⁷⁰ The report found no cases of Sharia application in any Oklahoma state courts.⁷¹

In terms of these cases, state courts have seen reoccurring Sharia topics as legal issues.⁷² Of those reoccurring topics, many of the cases focus on religious accommodations, specifically in the workplace, including concessions for “religious dress, dietary rules and ritual practice, such as prayer and fasting.”⁷³ Other, more complex cases involve business transactions and family law.⁷⁴ Business transactions, like business contracts, often consist of wills and testaments, non-interest financial agreements, and charitable giving are of interest because many American Muslims follow prohibitions against high speculation and usury and will follow specific regulations when making contracts.⁷⁵ Also, when foreign law is the basis for governing a dispute, a judge may need to consult Sharia law.⁷⁶

Judges have been asked to apply Islamic law where parties have contracted for religious arbitration. Generally, courts have ruled “that ‘biblically based mediation[s]’ . . . are enforceable.”⁷⁷ In *Jabri v. Qaddura*, the Texas Court of Appeals ultimately upheld an arbitration agreement based on an Islamic Marriage Certificate in a divorce proceeding.⁷⁸ The case started as a divorce proceeding between Rola and Jamal Qaddura in which the wife, Rola, filed for divorce and sought sole custody of her children.⁷⁹ Rola then sued her husband's brother, Osama, as a third party defendant alleging that her husband “was wrongfully transferring community assets to Osama”⁸⁰

70. CTR. FOR SEC. POLICY, *supra* note 69, at 11.

71. *Id.* at 44.

72. Quraishi-Landes, *supra* note 28.

73. *Id.*

74. See Abed Awad, *The True Story of Sharia in American Courts*, THE NATION, June 13, 2012, <http://www.thenation.com/article/168378/true-story-sharia-american-courts> (stating that cases involving Sharia arise with marriages, divorces, corporate, and business transactions); Andrea Elliott, *Behind an Anti-Shariah Push*, N.Y. TIMES, July 31, 2011, at A1 (stating that many cases involving Sharia are due to divorce and custody hearings or in commercial litigation); Quraishi-Landes, *supra* note 28.

75. Tankle, *supra* note 68, at 280; see also Quraishi-Landes, *supra* note 28.

76. Tankle, *supra* note 68, at 280.

77. *Id.* (citations omitted) (internal quotation marks omitted).

78. *Jabri v. Qaddura*, 108 S.W.3d 404, 413–14 (Tex. App. 2003).

79. *Id.* at 407.

80. *Id.*

Lastly, Jamal filed a protective order against Rola's parents.⁸¹ The trial court held that because the parties could not agree to the scope of the arbitration agreement, where the claims would be submitted in front of three local *imams*, the agreement was not valid or binding.⁸² On appeal, the Court of Appeals of Texas reversed the trial court and held that there was a meeting of the minds in establishing a contract for the arbitration agreement and that the agreement was valid and enforceable.⁸³

Similarly, in *Abd Alla v. Mourssi*, the Court of Appeals of Minnesota upheld an arbitration clause based on Islamic law arising from conflicts over the ownership of a restaurant.⁸⁴ The original arbitration clause,⁸⁵ found in a partnership agreement, mandated that "[a]ny dispute, controversy or claim arising out of or in connection with or relating to this Agreement . . . shall . . . be submitted to and settled by arbitration . . . pursuant to the laws of Islam"⁸⁶ Ultimately, a committee of arbitrators issued an award against the best interests of Mourssi, one of the owners of the failed restaurant, favoring the other party, Abd Alla.⁸⁷ Abd Alla then moved the district court to confirm the arbitration award, but Mourssi "responded that the court should deny Abd Alla's motion and vacate the arbitration award 'on the grounds that it was procured by corruption, fraud, or other undue means and that the Committee exceeded its authority.'"⁸⁸ The district court remanded the matter to the committee, and the committee decided that it did not exceed its own authority and the decision was not

81. *Id.*

82. *Id.* at 408–09.

83. *See id.* at 413–14.

84. *Abd Alla v. Mourssi*, 680 N.W.2d 569, 570–71, 574 (Minn. Ct. App. 2004).

85. The clause, in its entirety stated:

Any dispute, controversy or claim arising out of or in connection with or relating to this Agreement or any breach or alleged breach hereof shall, upon the request of any party involved, be submitted to and settled by arbitration before the Arbitration Court of an Islamic Mosque located in the State of Minnesota pursuant to the laws of Islam (or at any other place or under any other form of arbitration mutually acceptable to the parties involved). Any award rendered shall be final and conclusive upon the parties and a judgment thereon may be entered in the highest court of the forum, state or Federal, having jurisdiction. The expenses of the arbitration shall be borne equally by the parties to the arbitration, provided that each party shall pay for and bear the costs of its own experts, evidence, and counsel.

Id. at 570.

86. *Id.*

87. *See id.* at 571.

88. *Id.*

The Evolution of Anti-Sharia Law Legislation

procured in corruption, fraud, or undue means.⁸⁹ Mourssi appealed the committee's findings.⁹⁰

Subsequently, the Court of Appeals of Minnesota held that the committee awarding the arbitration award neither overstepped its boundaries nor reached a decision based on corruption or fraud.⁹¹ Furthermore, the Court of Appeals of Minnesota also noted that “[a]lthough the arbitration in this case was conducted pursuant to Islamic law, judicial review of any arbitration award is limited to those matters where jurisdiction is statutorily granted.”⁹² Like in *Jabri*, the court was not concerned that the arbitration agreement was based on Sharia law but worried about correctly applying a contractual provision.⁹³

Apart from business transactions, Sharia law has been applied to family law situations, especially “where a judge must determine marital status based on religious law.”⁹⁴ In family law, many American Muslims follow prescribed rules for marriage, drafting marriage contracts in which a bride gift becomes important in the event of dissolution of marriage.⁹⁵ Muslim marriages are contractual in nature and generally include a written contract enumerating a *mahr* (a specified amount of money) owed to the wife upon divorce.⁹⁶ Courts have held that to give effect for the meeting of the minds of a contract, parties can choose a foreign choice of law as long as the foreign law in application “is not outweighed by American public policy or constitutional principles.”⁹⁷ Accordingly, religious law is generally honored in a context of contract claims unless: “(1) it violates basic contract law (for example, its terms are unclear), or (2) applying it would violate public policy.”⁹⁸

Courts routinely decline to apply Sharia law in criminal law and some divorce cases. Courts in the United States have routinely rejected Sharia based criminal law defenses for prohibited acts such as

89. *Id.* at 572.

90. *Id.* at 570.

91. *See id.* at 574.

92. *Id.* at 572.

93. *Id.*

94. Ann Rodgers, *Proposed State Law Draws Religious Criticism*, PITTSBURGH POST-GAZETTE (Dec. 12, 2011, 12:00 AM), <http://www.post-gazette.com/stories/local/state/proposed-state-law-draws-religious-criticism-223890/>.

95. Quraishi-Landes, *supra* note 28.

96. *Id.*

97. *Id.*

98. *Id.*

domestic violence and child abuse.⁹⁹ In divorce law, Sharia based arguments have been rejected as violating public policy for cases such as the unilateral access to no-fault divorce (which denies due process to the wife); custody arguments that interfere with the best interests of a child; and where a party signing a marriage contract is coerced into agreement.¹⁰⁰ Ultimately, Islamic law is not taking over American courts, and if individuals view Sharia as a threat, then they “mistake religious freedom for religious invasion.”¹⁰¹

The application of anti-Sharia Law statutes would change the tenor of how courts interact with inherently personal items of faith. As an example, a Muslim couple would be unsure of their rights in case of dissolution of marriage. Further, Muslim businesses implementing religious arbitration would be weary of how state courts would react to the entities’ right to contract.

Regardless, proponents of anti-Sharia legislation point to one particular case as proof that Islamic law is encroaching on American courts: *S.D. v. M.J.R.* The facts of the case present a bleak outlook on domestic abuse. Plaintiff S.D. and Defendant M.J.R. are citizens of Morocco and were married in Morocco on July 31, 2008, and the couple moved to New Jersey on August 29, 2008.¹⁰² Once in New Jersey, Plaintiff described that domestic abuse started on November 1, 2008.¹⁰³ The abuse started when Defendant ordered Plaintiff to prepare food for guests that were coming over for breakfast; Plaintiff did not know how to cook but tried to prepare two out of three dishes requested.¹⁰⁴ Due to her failure, after the guests left, Defendant decided to “punish” Plaintiff by pinching Plaintiff all over her body, including her breasts, under her arms, and around her thighs; the pinching left noticeable bruises that were part of photographs taken for evidence of November 22, 2008.¹⁰⁵

A second incident of domestic abuse occurred on November 16, 2008.¹⁰⁶ Defendant told Plaintiff that they would have guests over at

99. *Id.*

100. *Id.*

101. Quraishi-Landes, *supra* note 28; *see also* Elliott, *supra* note 74 (countering the Center on Security Policy’s assertion that Islamic law is encroaching on American courts by stating that judges tend to give preference to constitutional rights over religious doctrine).

102. *S.D. v. M.J.R.*, 2 A.3d 412, 413 (N.J. Super. Ct. App. Div. 2010).

103. *Id.* at 414.

104. *Id.*

105. *Id.*

106. *Id.*

The Evolution of Anti-Sharia Law Legislation

9:00 or 10:00 pm that night and demanded that she make dinner.¹⁰⁷ Again, Plaintiff did not know how to cook, so Defendant returned with his mother at 6:00 pm who prepared the meal.¹⁰⁸ The mother-in-law refused Plaintiff's help, so Plaintiff went to her room, and in anger and frustration pushing the papers that Defendant had placed on a desk onto the floor.¹⁰⁹ That night, around midnight, Defendant commenced punishing Plaintiff by pinching and also pulling pubic hair, and the abuse culminated in marital rape; Plaintiff was clear in saying she did not want to have sex.¹¹⁰

A third incident of domestic abuse occurred on November 22, 2008.¹¹¹ Plaintiff had gotten in an argument with her mother-in-law, and locked herself in the bedroom.¹¹² Plaintiff denied Defendant entry but Defendant removed the door, entered the apartment, and engaged in nonconsensual intercourse with Plaintiff.¹¹³ Defendant's mother and sister were in the apartment and heard Plaintiff crying but did not intervene.¹¹⁴ Plaintiff escaped the room by breaking a window and climbing out; a Pakistani woman found Plaintiff and took her to Christ Hospital in Jersey City.¹¹⁵

After being treated at the hospital, Plaintiff learned that she was pregnant and went with a representative to meet Defendant in front of an *Imam* and reached an agreement that Defendant would stop being abusive.¹¹⁶ However, during the night that Plaintiff moved back in, Defendant again had nonconsensual sex with Plaintiff.¹¹⁷ After more incidents of domestic abuse and spousal rape, Defendant finally took Plaintiff to an *Imam* and verbally divorced her.¹¹⁸

A complaint was filed with the Superior Court on January 29, 2009, and a domestic violence trial and a hearing for a restraining order were combined.¹¹⁹ The judge offered an oral opinion in June 2009, holding that Plaintiff had not proven criminal restraint, sexual

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 414–15.

111. *Id.* at 415.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 416.

117. *Id.*

118. *Id.*

119. *Id.*

assault, or criminal sexual contact.¹²⁰ The judge relied on the testimony of an *Imam*; the *Imam* testified that due to religious obligations “a wife must comply with her husband’s sexual demands, because the husband is prohibited from obtaining sexual satisfaction elsewhere.”¹²¹ The judge held that Defendant was operating under the religiously influenced belief that he could have sex with Plaintiff whenever he wanted to, and that he was not prohibited to that right; the judge held that Defendant did not act with criminal intent when having intercourse with Plaintiff, even against her wishes.¹²²

Based on the testimony of the *Imam*, the judge applied Islamic law in holding for the defendant.¹²³ The judge did find acts of domestic violence to have occurred but held that a restraining order was unnecessary and dismissed Plaintiff’s domestic violence action.¹²⁴ Plaintiff appealed the decision.¹²⁵ On appeal, the Superior Court held that New Jersey state laws apply to crimes of sexual assault and criminal sexual assault, and that because of the serious nature of domestic violence, the trial court judge erred by applying Sharia law.¹²⁶ The Court of Appeals effectively stopped the “contamination” of Sharia law into American jurisprudence.

Even though the case was reversed on appeal, it became “the poster child for the anti-Sharia movement.”¹²⁷ Politicians like Herman Cain and Rex Duncan have cited the case as an example of Muslims influencing court decisions through application of their religious law.¹²⁸ Opponents of Sharia law application cite more than fifty similar cases in which Sharia law was upheld at the trial court level in which the religious law was “to the detriment of women.”¹²⁹ However, most cases that would result in a detriment to women were overturned after an appeal.¹³⁰ The charge that Sharia law is overtaking American courts by citing to the above case is dubious because the appellate court in the state overruled the holding of the trial court.¹³¹

120. *Id.* at 418.

121. *Id.* at 417–18.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 419.

126. *Id.* at 426; *see also* Quraishi-Landes, *supra* note 28, at n.13 (reporting that the appellate court in the New Jersey case rejected the Muslim cultural defense).

127. Awad, *supra* note 74.

128. *See id.*

129. *See* Rodgers, *supra* note 94.

130. *See id.*

131. *S.D.*, 2 A.3d at 428.

The Evolution of Anti-Sharia Law Legislation

The view that Sharia law is toxic to the United States is unfounded and is based on a fundamental misunderstanding of the religious law in question.

II. EXAMINATION OF ANTI-SHARIA LEGISLATION AND WHETHER THE LEGISLATION IS CONSTITUTIONAL UNDER ESTABLISHMENT CLAUSE ANALYSIS

After *S.D. v. M.J.R.*, politicians sought to restrict the application of Islamic law, foreign, and international law in the United States.¹³² As a result, two types of anti-Sharia legislation have evolved: (1) legislation like SQ 755 that specifically mention Sharia law; and (2) bills that are facially neutral and focus on international and foreign law, called anti-foreign law statutes.¹³³ Sharia-specific legislations are unconstitutional under the Establishment Clause of the First Amendment. Whether facially neutral bills violate the First Amendment is a more nuanced analysis.

A. Sharia-Specific Legislation

As previously noted, SQ 755 mandated that courts could not apply foreign, international, or Sharia law.¹³⁴ A bill like SQ 755 is considered rare because it specifically targets a particular religion. As a result, bills that target religions pose recognizable First Amendment constitutional issues.¹³⁵ Those constitutional issues can contribute to a bill being overturned.¹³⁶

To help pass SQ 755, lawmakers have tried to show a public policy interest beyond curtailing religious practice.¹³⁷ However, in the case of SQ 755, the supporters of the bill have been explicit in stating that a paramount reason for the legislation is an impending onslaught of Sharia law in Oklahoma.¹³⁸ In essence, proponents of the bill ar-

132. See Awad, *supra* note 74.

133. Bradford J. Kelley, Comment, *Bad Moon Rising: The Sharia Law Bans*, 73 LA. L. REV. 601, 612 (2013).

134. See O.K. CONST. art. 7, §1 (2012) (mandating, in part, as proposed by SQ 755, that Oklahoma state courts shall not use international or Sharia law in making judicial decisions).

135. See Adam Serwer, *Federal Court Considers Oklahoma Shariah Ban*, MOTHER JONES (Sept. 14, 2011, 9:10 AM), <http://www.motherjones.com/mojo/2011/09/federal-court-considers-oklahoma-shariah-ban>.

136. See *id.*

137. See *id.*

138. See Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, EDMOND SUN (June 4, 2010), <http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot> (examining how fear of Sharia law stems from the entrenched nature of Islamic law in the United Kingdom and how the onslaught of Islamic law would be coming to Oklahoma next).

gued that use of Sharia law needed to be curtailed because Sharia law was a “theo-political law system” used in Islamic countries like Iran where “women have few rights compared to men, freedom of speech is severely curtailed and freedom of religion is limited or nonexistent.”¹³⁹

The primary author of SQ 755, Oklahoma State Rep. Rex Duncan, saw Sharia law as “a cancer upon the survivability of the UK” and that the SOS Amendment would be a “preemptive strike against Islamic law coming to Oklahoma.”¹⁴⁰ To the legislature of Oklahoma, a preemptive strike against Sharia law was needed to combat the evils that Sharia Law purportedly represented.

In what would become a key point during litigation at the time the ballot was voted on, Rep. Duncan admitted that “Oklahoma does not have [a] problem yet” with Sharia law, especially since Oklahoma state courts heard no cases regarding Islamic Jurisprudence.¹⁴¹ The bill was created in response to an American court trend, embodied by recent Supreme Court precedent, using foreign law and acknowledging international law to shape opinions.¹⁴²

There are several proposed bills and constitutional amendments, across a variety of states, which are similar in nature to the Oklahoma SOS legislation.¹⁴³ Of the SOS-like bills still being considered,¹⁴⁴ three are substantially similar to SQ 755: Iowa House Joint Resolution

139. Brigitte Gabriel & Lauren Losawyer, *Sharia Law Question Merits Support*, NEWSOK.COM (Oct. 16, 2010), <http://newsok.com/sharia-law-question-merits-support/article/3504834/?page=1>.

140. Marc Ambinder, *Oklahoma's Preemptive Strike Against Sharia Law*, ATLANTIC (Oct. 25, 2010, 10:10 AM), <http://www.theatlantic.com/politics/archive/2010/10/oklahomas-pre-emptive-strike-against-sharia-law/65081/>; see also Schlachtenhaufen, *supra* note 138.

141. See Ashby Jones, *Ban of Islamic Law in Oklahoma Renders a Quick Lawsuit*, WALL ST. J. L. BLOG (Nov. 4, 2010, 4:52 PM), <http://blogs.wsj.com/law/2010/11/04/ban-of-islamic-law-in-oklahoma-renders-a-quick-lawsuit/> (furthering the understanding that even though Oklahoma does not have a Sharia law problem at the time of the bill, the legislation would provide a deterrent for Sharia law in the state).

142. Joel Siegel, *Islamic Sharia Law to be Banned, in, Ah, Oklahoma*, ABCNEWS.COM (June 14, 2010), <http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521> (“It should not matter what France might do, what Great Britain might do, or what the Kingdom of Saudi Arabia might do Court decisions ought to be based on federal law, or state law.”) (quoting Rep. Duncan).

143. Venetis, *supra* note 6, at 194.

144. See Bill Raftery, *Ban on Court Use of Sharia/International Law: 33 Bills in 20 States to Start 2012; Review of all Efforts Since 2010*, GAVEL TO GAVEL (Jan. 30, 2012), <http://gavelto-gavel.us/site/2012/01/30/bans-on-court-use-of-shariainternational-law-33-bills-in-20-states-to-start-2012-review-of-all-efforts-since-2010/> (documenting, comparing, and synthesizing anti-Sharia legislation along with explaining where in the process the bills are in each state).

The Evolution of Anti-Sharia Law Legislation

14,¹⁴⁵ New Mexico Senate Joint Resolution 14,¹⁴⁶ and South Carolina Senate Joint Resolution 1387.¹⁴⁷ Each of these state constitutional amendments specifically mention that courts may not use international law or apply Sharia law to cases, especially, but not limited to those cases of first impression.¹⁴⁸ The bills are similar in that the authors made a point to define the sources of law that a court could use in forming a decision including established common law, federal regulations, and constitutions of the specified state.¹⁴⁹ South Carolina Senate Joint Resolution 1387 went further than the other two bills in saying that “courts shall not look to the legal precepts of other nations or cultures,” defining those legal precepts as “Sharia Law, international law, the constitutions, laws, rules, regulations, and decisions of courts or tribunals of other nations, *or conventions or treaties, whether or not the United States is a party.*”¹⁵⁰ Under these circumstances, the state legislature mandated that state courts would not be able to look to treaty law, regardless if the United States has adopted the provision.

145. H.R.J. Res. 14, 84th Gen. Assemb., 2011 Sess. (Iowa 2011) (“The courts created under the authority of this article, when exercising judicial power, shall uphold and adhere to the law as provided in the Constitution of the United States, the Constitution of the State of Iowa, the United States Code, federal regulations, established common law, the Iowa Code, the Iowa administrative code, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law. The courts shall not use the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law. The provisions of this section shall apply to all cases before the respective courts including but not limited to cases of first impression.”).

146. S.J. Res. 14, 50th Leg., 2d Sess. (N.M. 2012) (“The courts shall not consider or apply a rule of comity to the legal precepts of other nations or cultures, international law, laws promulgated by foreign governments or national laws of foreign countries if the consideration or application of the foreign precepts or laws would violate the public policy of the state of New Mexico”). The legislation also prohibited the consideration or application of Sharia law, and the provisions of the section apply to all cases, including those cases of first impression. *Id.*

147. S.J. Res. 1387, 118th Gen. Assemb. (S.C. 2010). In upholding the United States Constitution, rules and regulations promulgated in the state of South Carolina, and the South Carolina Constitution, the legislation instructed that “[t]he courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider Sharia law, international law, the constitutions, laws, rules, regulations, and decisions of courts or tribunals of other nations, or conventions or treaties, whether or not the United States is a party.” *Id.* The proposed provisions would be applicable to all cases before the courts, including those cases of first impression. *Id.*

148. Iowa H.R.J. Res. 14; N.M. S.J. Res. 14; S.C. S.J. Res. 1387.

149. *Id.* (“The courts created under the authority of this article, when exercising judicial power, shall uphold and adhere to the law as provided in the Constitution of the United States, the Constitution of Iowa, the United States Code, federal regulations, established common law, the Iowa Code, the Iowa administrative code, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia law.”); see S.J.R. 14, 2012 Leg., 2d Sess. (N.M. 2012); S.J.R. 1387, 118th Sess. (S.C. 2010).

150. S.C. S.J. Res. 1387 (emphasis added).

B. Facially-Neutral Legislation

Other proposed state legislation do not specifically mention Sharia law, but instead focus on generally restricting a court's use of foreign or international law; these types of legislation are called Anti-Foreign law statutes.¹⁵¹ As an example, Alabama Senate Bill 84, entitled "The American and Alabama Laws for Alabama Courts Amendment," says that the public policy of the state is to "protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the Alabama Constitution or of the United States Constitution"¹⁵² The key concept for this group of states is that foreign law cannot be applied where the application would violate a right as guaranteed by either the state amendment or the United States Constitution.¹⁵³ Further, both Iowa¹⁵⁴ and Idaho¹⁵⁵ are considering similar legislation.

Arguably, the highest profile of this type of legislation is Arizona HB 2064 which has already been enacted. Arizona HB 2064 is very similar to the Alabama bill in calling for "a Court, Arbitrator, Administrative Agency or other Adjudicative, Mediation or Enforcement Authority" to refrain from applying foreign law where the application would violate a state and federally protected right.¹⁵⁶ Due to the variation of the bills, scholars and courts have applied different standards of constitutional analysis to the two different types of legislation.

151. See Andrea Billups, *Muslims See 'Foreign Law' Bill as Attack on Shariah*, WASH. TIMES (Aug. 22, 2011), <http://www.washingtontimes.com/news/2011/aug/22/muslims-see-foreign-law-bill-as-attack-on-shariah/?page=all#pagebreak> (referencing statutes in 20 states, like in Michigan, as anti-foreign law legislation).

152. S. 84, 2012 Leg., Reg. Sess. (Ala. 2012).

153. See, e.g., H. Sub. 79, 2012 Leg., Reg. Sess. (Kan. 2012).

154. The proposed legislation states in part:

A judicial officer shall not use judicial precedent, case law, penumbras, or international law as a basis for rulings. A judicial officer shall only use the Constitution of the United States, the Constitution of the State of Iowa, and the Code of Iowa as the basis for any ruling issued by such judicial officer.

H. File 2313, 83d Gen. Assemb. (Iowa 2010).

155. The proposed legislation states in part:

Whereas, Congress should prevent foreign entities, including the United Nations, from having authority over activities within the United States; and [f]or any domestic issue, no court should consider or use as precedent any foreign or international law, regulation, or court decision

H. Con. Res. 44, 60th Leg., 2d Reg. Sess. (Idaho 2010).

156. H.R. 50-2064, 1st Sess., at 1 (Ariz. 2011).

C. Constitutionality of the Proposed Provisions

The First Amendment of the Constitution of the United States mandates, in part: “Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof.”¹⁵⁷ Subsequently, the Supreme Court has held that “the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.”¹⁵⁸ As a result, anti-Sharia legislation is unconstitutional based on Establishment Clause analysis. State legislation that explicitly bans the use of Sharia law will likely be deemed unconstitutional based on the analysis using the *Larson* test applied in *Awad v. Ziriax*. Legislation not mentioning a particular religion will likely be constitutional even after *Lemon* test application.

1. Sharia Specific Legislation and the Application of the *Larson* Test

As previously noted, in upholding a preliminary injunction, the Tenth Circuit ruled that the Oklahoma SOS Amendment was likely unconstitutional because it violated the Establishment Clause of the First Amendment.¹⁵⁹

First, the Tenth Circuit had to determine the proper legal test to use: the *Lemon* or *Larson* test. The *Lemon* test articulates three-prongs that a statute must satisfy when facing Establishment Clause challenges: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁶⁰ However, in later cases, the Supreme Court acknowledged that the three-pronged *Lemon* test is “intended to apply to laws affording a uniform benefit to *all* religions and not to provisions . . . that discriminate *among* religions.”¹⁶¹

The Supreme Court developed a separate standard, the *Larson* test, to examine statutes with the “explicit intention of including par-

157. U.S. CONST. amend. I.

158. *Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985).

159. *Awad v. Ziriax*, 670 F.3d 1111,1127 (10th Cir. 2012).

160. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (internal citations omitted).

161. *Larson v. Valente*, 456 U.S. 228, 252 (1982) (citing *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664 (1970); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968)).

ticular religious denominations and excluding others.”¹⁶² The *Larson* test states that if a statute specifically discriminates against religions, then the statute will violate the Establishment Clause if it “is not closely fitted to the furtherance of any compelling governmental interest asserted . . .”¹⁶³

In examining the standards, the Tenth Circuit chose to apply the *Larson* test because “the proposed amendment discriminates against religions.”¹⁶⁴ The court noted that the legislation specifically mentioned Sharia law. In justifying the application of the *Larson* test, the court focused on two ways the legislation restricted Sharia law: (1) the amendment prohibited courts from upholding and applying principles of Islamic law specifically and no other faith denomination; and (2) courts were mandated to not apply the laws of other nations and cultures, specifically mentioning international or Sharia law.¹⁶⁵ The court then acknowledged that the Oklahoma statute was designed to only affect one religion; because of the discrimination of only one religion, the strict scrutiny of the *Larson* test was applied.¹⁶⁶

The Tenth Circuit then defined the rule for strict scrutiny: to pass constitutional muster under strict scrutiny, a statute must remedy a compelling governmental interest and the statute must be narrowly tailored to that governmental interest.¹⁶⁷ Further, to satisfy a compelling governmental interest, a statute that discriminates among religions “must address an identified problem that the discrimination seeks to remedy” and the actual problem must be identified, speculation does not satisfy the compelling governmental interest test.¹⁶⁸ In application to the SOS Amendment, Oklahoma failed in establishing a compelling governmental interest. In supplemental briefings, the appellants asserted, “Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts.”¹⁶⁹ However, no actual problem was identified because there were no instances of Sharia law being applied by an Oklahoma court.¹⁷⁰ The court deter-

162. *Id.* at 254.

163. *Id.* at 255.

164. *Awad*, 670 F.3d at 1128.

165. *Id.* at 1128–29.

166. *Id.* at 1129.

167. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1243–44 (4th ed. 2011).

168. See *Awad*, 670 F.3d at 1129 (citing *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted)).

169. *Id.* at 1130.

170. *Id.*

The Evolution of Anti-Sharia Law Legislation

mined that without showing of an actual problem, the statute did not meet the high burden of strict scrutiny analysis.¹⁷¹

Further, even though the Tenth Circuit could not find a compelling state interest, the court also examined whether the SOS Amendment closely fit a compelling state interest.¹⁷² In dicta, the court ruled that the proposed amendment was not narrowly tailored because the legislation would ban the application and consideration of Sharia law in general without specific application to issues.¹⁷³

Subsequently, in a recently published Order in determination of cross motions for summary judgment, the United States District Court for the Western District of Oklahoma reexamined whether the SOS Amendment was constitutional under First Amendment Analysis. The court agreed with the Tenth Circuit's use of the *Larson* test and noted that defendants did not submit additional evidence showing a "compelling state interest."¹⁷⁴ As a result, "[b]ecause defendants have failed to satisfy strict scrutiny, the Court finds that the proposed amendment's references to Sharia law violate the Establishment Clause."¹⁷⁵

For states proposing legislation specifically banning Sharia law, applicable amendments will likely be held unconstitutional based on First Amendment analysis. In application of the *Larson* test, legislation like the SOS Amendment must satisfy strict scrutiny by identifying an existing problem that would be a compelling governmental interest and narrowly tailoring the statute to the compelling governmental interest. Even if a compelling governmental interest is established, legislation will have to be more narrowly tailored than the SOS Amendment; a blanket exception to both the application and consideration of Sharia law in all cases is too broad.

First, a state must show that the anti-Sharia legislation satisfies a compelling interest. To satisfy a compelling governmental interest, a statute that discriminates among religions "must address an identified problem that the discrimination seems to remedy" and the actual problem must be identified. Speculation does not satisfy the compel-

171. *Id.*

172. *Id.* at 1130–31.

173. *Id.* at 1131.

174. *Awad v. Ziriax*, No. CIV-10-1186-M, 2013 U.S. Dist. LEXIS 115396, at *8 (W.D. Okla. Aug. 15, 2013).

175. *Id.* at *13.

ling governmental interest test.¹⁷⁶ As previously discussed, cases regarding application of Islamic and Sharia law have similarly shied away from application of religious law when the application of religious law would violate the public policy of the state.¹⁷⁷ Further, state courts have dealt with various legal issues, like family and contractual law, in deciding whether to apply Sharia law.¹⁷⁸ Even if a trial court erroneously applies Sharia law, state appellate courts have corrected the misapplication of law promulgated by lower courts.¹⁷⁹

Proponents of anti-Sharia legislation believe that Sharia law is invading the specific states of the United States.¹⁸⁰ However, proponents of legislation are unable to show how discrimination against Islamic law remedies an *existing* problem, but instead rely on the fear of an imagined problem.¹⁸¹ As the Tenth Circuit argued, speculation of a problem is not enough to justify discrimination in violation of the Establishment Clause.¹⁸² As a result, states supporting Sharia-specific bans will be unable to advance a specific problem in applying Islamic law; states will be unable to show legislation satisfies a compelling interest.

Second, a state must show that Sharia-specific bans are narrowly tailored to satisfy the identified compelling interest.¹⁸³ In holding that the Islamic law specific bans are insufficiently tailored, a court will likely realize that the state suggests applicable legislation as a stopgap for all issues pertaining to Islamic law. The statutes are indiscriminate in scope: anti-Sharia legislation is meant to prohibit the application of Islamic law in all contexts, regardless of circumstances. State courts will be prohibited in applying Islamic law to legal issues as diverse as family law and contractual law without application to specific fact based legal questions. A court, like the Tenth Circuit, would likely find Sharia specific bans as too over encompassing to qualify as narrowly tailored to satisfy a compelling governmental interest.

176. *See Awad*, 670 F.3d at 1129 (citing *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (internal citations omitted)).

177. *CTR. FOR SEC. POL'Y, SHARIAH LAW AND AMERICAN COURTS: AN ASSESSMENT OF STATE APPELLATE COURT CASES 11* (2011).

178. *Awad*, *supra* note 74, at 2; *Elliott*, *supra* note 74, at 3.

179. *See S.D. v. M.J.R.*, 415 N.J. Super. 417, 420 (N.J. Super. App. Div. 2010).

180. *Awad*, *supra* note 74, at 2; *Elliott*, *supra* note 74, at 1.

181. *Awad*, *supra* note 74, at 4.

182. *See Awad*, 670 F.3d at 1130.

183. *See id.* at 1131.

2. Facially Neutral Legislation and Application of the *Lemon* Test

Conversely, statutes that do not specifically mention a ban on Shariah law will likely be held as constitutional even after the application of the Establishment Clause of the First Amendment. The First Amendment analysis occurs through application of the *Lemon* test. In *Lemon v. Kurtzman*, the Court consolidated a three-pronged test to determine whether facially neutral legislation is constitutional when the Establishment Clause is applied.¹⁸⁴ In order to not violate the Establishment Clause, a statute must: (1) have a secular legislative purpose; (2) “its principal or primary effect must be one that neither advances nor inhibits religion;” and (3) “the statute must not foster ‘an excessive government entanglement with religion.’”¹⁸⁵ The *Lemon* test is reserved for use¹⁸⁶ where “a law is not discriminatory”¹⁸⁷ and in application “to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions.”¹⁸⁸

The first prong of the *Lemon* test examines the purpose of legislation where a court must determine “whether [the] governments’ actual purpose is to endorse or disapprove of religion.”¹⁸⁹ Purpose can be evidenced through examining “promotion of religion in general” or “by advancement of a particular religious belief.”¹⁹⁰ Where legislation does not have a clear secular purpose, consideration of the second and third prongs of the *Lemon* test are not needed.¹⁹¹

In *Stone v. Graham*, the Supreme Court held that a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms was unconstitutional, violating the Establishment

184. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

185. *Id.* at 612–13.

186. However, the *Lemon* test has come under scrutiny in recent years. Most famously, Justice Scalia has called the use of the *Lemon* Test, “[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause Jurisprudence once again” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (Scalia, J., dissenting).

187. CHEMERINSKY, *supra* note 167, at 1246.

188. *Larson v. Valente*, 456 U.S. 228, 252 (1982).

189. *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

190. *Id.* (internal citations omitted).

191. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). *But see* *Sch. Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 296–303 (1963) (Brennan, J., concurring) (arguing that where legislation has purely secular ends that alleviate burdens on practicing religion it is not a violation of the Establishment Clause, especially in situations of uniform tax exemptions for religious institutions and with activities with religious origins).

Clause of the First Amendment.¹⁹² Applying the *Lemon* test, the Court held that the statute violated the Establishment Clause because the legislation did not have discernable secular legislative purpose. Attempting to address secular purpose, the Kansas legislators mandated that a statement be included at the bottom of each display, stating “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.”¹⁹³ The Court acknowledged the “avowed secular purpose” but looked to the preeminent purpose of the statute, holding that the actual purpose of the legislation was to further religion. The Court found no educational function in posting the Ten Commandments.¹⁹⁴

In another case, the Supreme Court was tasked to decide whether two statutes in Alabama promoting a moment of silence or voluntary prayer violated the Establishment Clause.¹⁹⁵ The District Court held that the provisions were an effort to promote religion by the State of Alabama and were constitutional. In upholding the constitutionality of the provisions, the District Court decided that “Alabama has the power to establish a state religion if it chooses to do so.”¹⁹⁶ In reversing the District Court, the Court of Appeals agreed that the provisions were an Alabama sponsored promotion of religion and subsequently found the statutes unconstitutional.¹⁹⁷

Writing for the majority, Justice Stevens argued that the District Court’s holding—that the “Federal Constitution imposes no obstacle to Alabama’s establishment of a state religion”—was remarkable.¹⁹⁸ In applying the *Lemon* test, the Court examined Alabama’s purpose in endorsement of the legislation. The Court found that the stated reason for the legislation was an “effort to return voluntary prayer” to public schools; Alabama did not present any evidence of a secular purpose.¹⁹⁹ The Court held that the Alabama wanted to make voluntary prayer a favored practice and deemed the legislation unconstitutional due to a lack of secular purpose. The lack of secular purpose

192. *Stone v. Graham*, 449 U.S. 39, 41 (1980).

193. *Id.*

194. *Id.* at 42.

195. *Wallace*, 472 U.S. at 40–42.

196. *Id.* at 41.

197. *Id.*

198. *Id.* at 48–49.

199. *Id.* at 57.

The Evolution of Anti-Sharia Law Legislation

was a violation of the Establishment Clause of the First Amendment and the statutes did not satisfy the *Lemon* test.

In concurrence, Justice O'Connor noted that "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."²⁰⁰ Justice O'Connor argued that a statute, advocating a moment of silence, can be superficially drafted to pass constitutional muster, but in lieu of text and legislative history, a statute can be deemed unconstitutional.²⁰¹ Thus, Justice O'Connor advocated that a court scrutinize the text, legislative history, and implementation of state legislation to determine secular purpose.

In *Edwards v. Aguillard*, the Supreme Court adopted Justice O'Connor's analysis in examining textual and legislative history of a statute in question to determine secular purpose.²⁰² The Court acknowledged that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."²⁰³

In *Edwards*, the Court held that Louisiana legislation forbidding the teaching of evolution unless accompanied by instruction in creationism was unconstitutional because the statute furthered "religion in violation of the Establishment Clause."²⁰⁴ The Court found the statute had no secular purpose and, in turn, violated the *Lemon* test. The Court reasoned that the legislation was devoid of secular purpose because "[t]here is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution."²⁰⁵ The Court examined other cases with antievolution statutes and found that the purpose of similar legislation was to "suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man."²⁰⁶ The Court felt that "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind."²⁰⁷

The purpose of the facially neutral, anti-foreign law legislation is to disapprove of religious law, international law, and foreign law in

200. *Id.* at 76 (O'Connor, J., concurring).

201. *Id.* at 76-77.

202. *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).

203. *Id.*

204. *Id.* at 594.

205. *Id.* at 590.

206. *Id.*

207. *Id.* at 591.

application of judicial disputes. However, following the historical trajectory of Supreme Court decisions, a court is unlikely to hold that foreign law bans are devoid of secular purpose because it disapproves of religious beliefs. In order to be adopted, a facially neutral legislation must have a secular purpose. In *Lemon*, determining secular purpose was defined as “whether the government’s actual purpose is to endorse or disapprove of religion.”²⁰⁸ Supreme Court jurisprudence has historically focused on whether non-discriminatory legislation promoted or endorsed one religion at the expense of others. The Supreme Court has ruled on cases involving posting the Ten Commandments in public school classrooms, legislation supporting voluntary prayer in classrooms, and the teaching of creationism as a viable alternative to education on evolution. The proliferation foreign law bans aims not to promote one religion over others, but instead aims to strike down the application of religious law in all circumstances.

As a result, the “endorsement test” can be used, in part, to satisfy the secular purpose prong of the *Lemon* Test. The endorsement test was articulated by Justice O’ Connor and serves as clarification of the *Lemon* test.²⁰⁹ To Justice O’ Connor “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”²¹⁰ Further, “[d]isapproval sends the opposite message.”²¹¹ In describing the endorsement test, O’ Connor expressed that “[t]he purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion.”²¹² Further, O’ Connor stated “the effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”²¹³

However, scholars have roundly criticized the endorsement test.²¹⁴ Among the chief criticisms of the endorsement test is that no court has struck down a governmental action because it disapproves

208. *Id.* at 585 (citing *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

209. *See* *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’ Connor, J., concurring).

210. *Id.*

211. *Id.*

212. *Id.* at 690.

213. *Id.*

214. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 148 (1992).

The Evolution of Anti-Sharia Law Legislation

of a religion.²¹⁵ One theory regarding why no governmental action has been invalidated through analysis of disapproval of religion is because disapproval is not an establishment of religion, but an expression of secular values by the governmental entity.²¹⁶ Commentators suggest that governmental actions disapproving of religion would plausibly violate the Free Exercise Clause, but would not satisfy the secular purpose prong of the *Lemon* test.²¹⁷

Anti-foreign law statutes are state governmental actions that disapprove the application of religious, international, and foreign law in adjudicatory processes. Even so, the purpose of the laws is not to elevate one religion over another. Examining the history behind the foreign law bans, a researcher will find that the primary purpose behind passing such legislation is to prevent Sharia law from being applied in American state courts.²¹⁸ David Yerushlami, considered the father of the anti-Sharia Movement, initially drafted legislation making the observance of Islamic law an act of sedition punishable by a twenty year prison sentence.²¹⁹ In concluding that he was unable to pass legislation at the federal level, Yerushlami took his crusade to the state level and began writing model foreign law bans called “American Laws for American Courts.”²²⁰ Many of the foreign law bans, and even anti-Sharia legislation, being considered by the states can definitively find a direct genetic ancestor in the model statutes created by Yerushlami. As the state specific-statutes evolved, the bills “made no mention of Shariah, which was necessary to pass constitutional muster”²²¹

However, even with overwhelming evidence that foreign law bans are created to adversely affect Muslim Americans, courts are unlikely to hold that the statutes are without secular purpose. The analysis would have to revolve around determining whether secular purpose is invalidated because the statutes disapprove of religion. As commentators have argued, governmental action has never been deemed unconstitutional based on Establishment Clause analysis where the action disapproved of a religion. Further, the states are not favoring another religion over Islam. As a result, the second and third prongs of the *Lemon* test will have to be analyzed.

215. *See id.* at 152.

216. *See id.*

217. *See id.*

218. *See Elliott, supra* note 74.

219. *See id.* at 6.

220. *See id.* at 6–7.

221. *Id.* at 7.

The second prong of the *Lemon* test is the requirement for secular effect: a government action's primary effect cannot inhibit or favor a religion.²²² In recent Supreme Court jurisprudence, the requirement of a secular effect has been expressed in terms of symbolic endorsement.²²³ Under the theory of symbolic endorsement, "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"²²⁴ In *Estate of Thornton v. Caldor, Incorporated*, the Supreme Court decided the constitutionality of a Connecticut statute that allows for a person to not work on a day of the week in which his/her Sabbath is observed.²²⁵ In holding the statute unconstitutional, the Court argued that "[i]n essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee"²²⁶ The Court held that "the statute goes beyond having an incidental or remote effect of advancing religion. The statute has a primary effect that impermissibly advances a particular religious practice."²²⁷ The Court envisioned the statute as placing religious concerns over secular interests and that the statute impermissibly advances particular religious practice.²²⁸

In application to foreign law bans, courts will likely decide that the state statutes have a secular effect in restricting application of foreign and international law to disputes, especially where the application of such law will negatively impact the constitutional rights of citizens. The reasoning behind these laws is succinct and resonates with non-legal audiences. Further, the anti-foreign law statutes are not expressly indicative of governmental action that takes a position on questions of religion. As a result, a court will likely uphold a foreign law ban even after application of the first two prongs of the *Lemon* test.

Lastly, a statute must satisfy the third prong of the *Lemon* test: governmental actions may not cause excessive entanglement with re-

222. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

223. See CHEMERINSKY, *supra* note 167, at 1248.

224. See *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593–94 (1989).

225. 472 U.S. 703, 706 (1985).

226. *Id.* at 709.

227. *Id.* at 710 (citation omitted).

228. *Id.* at 709.

The Evolution of Anti-Sharia Law Legislation

ligion. To determine excessive governmental entanglement with religion, the Court has previously stated “we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”²²⁹ Further, excessive governmental entanglement with religion results in “[a] comprehensive, discriminating, and continuing state surveillance”²³⁰ In holding that the Rhode Island and Pennsylvania statutes reimbursing parochial teacher salaries for secular instruction as unconstitutional, the Court focused on how the governments of both states would be excessively entangled with religion. The Court focused on a broader type of entanglement: the divisive political potential of the state programs.²³¹ The Court wrote, “Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system . . . but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.”²³² In the case of the statutes in question, the Court held that political fragmentation along religious lines would grow as the demands for larger appropriations to parochial schools increase. As a result, the statutes were deemed unconstitutional.

Analysis involving the excessive entanglement prong of the *Lemon* test has been almost exclusively examined when applied to education cases based on giving state funded aid to parochial schools.²³³ The general concept of divisive political potential of state programs was applied specifically to whether reoccurring aid from states would provide the backdrop to extensive entanglement with parochial institutions.²³⁴ The application to foreign law bans will be difficult, in comparison to state education funding cases, because the entanglement with religion is not as apparent. States are not supporting funding to stop application of religious, foreign, or international law; the idea of stark identity politics is not as apparent as a fight for state sponsoring of parochial schools; and the growing political divi-

229. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

230. *Id.* at 619.

231. *Id.* at 622.

232. *Id.*

233. *See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794 (1973).

234. *See Nyquist*, 413 U.S. at 796 (“The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.”) (citing *Lemon*, 403 U.S. at 623).

siveness will not be as apparent. While there is a growth of political divisiveness over the application of religious law, proponents of the foreign law bans will also point to the overriding factor in passing legislation: to curb foreign and international law in general. While curbing such law will affect application of religious law, the excessive entanglement by the governmental bodies will be hidden by more secular purpose.

The *Lemon* test is uniquely ill-fitting to consider the constitutionality of anti-foreign law statutes. In application, courts favoring neutrality with governmental action will be uneasy ruling against these facially neutral bans, claiming that through Establishment Clause analysis the bans have secular purpose; that the primary effect of applicable legislation is secular in nature; and that a finding of excessive entanglement would be premature. However, courts will likely find the bans constitutional through First Amendment analysis. As a result, the constitutionality of facially neutral legislation can be critically examined through a separate constitutional analysis: the Supremacy Clause.

III. THE TRANSITION FROM ANTI-SHARIA LEGISLATION TO ANTI-FOREIGN LAW LEGISLATION

A. Transition

After the Tenth Circuit declared the Oklahoma SOS Amendment, and other Sharia-specific amendments, unconstitutional, state legislatures started to adapt. Realizing that mentioning Sharia law within legislation might lead to an unconstitutional ruling, state legislatures started to adopt facially neutral bills stopping the growth of foreign law application in courts.²³⁵ As of August 2013, seven states have enacted anti-foreign law statutes: North Carolina, Arizona, Kansas, Louisiana, Oklahoma, South Dakota, and Tennessee.²³⁶ Further, the anti-foreign law bills are modeled after the “American Laws for American Courts” (“ALACs”) provisions.²³⁷ The ALAC model stat-

235. See Kelley, *supra* note 133, at 624–25.

236. Manar Hijaz, *North Carolina Sharia Ban Is Unconstitutional*, POLICYMIC (Aug. 29, 2013), <http://www.policymic.com/articles/61419/north-carolina-sharia-ban-is-unconstitutional> (last visited Nov. 2, 2013).

237. See Tyler Roberts, *Anti-Sharia Legislation and North Carolina Courts: The Constitutional and Practical Concerns Regarding Foreign Law Bans*, CAMPBELL LAW OBSERVER (Nov. 14, 2013), <http://campbelllawobserver.com/2013/11/anti-Shariaanti-Shariaanti-Shariaanti-Sharia-legislation-and-north-carolina-courts-the-constitutional-and-practical-concerns-regarding-for->

The Evolution of Anti-Sharia Law Legislation

utes are created by the American Public Policy Alliance; David Yerushlami started the organization.²³⁸

According to the American Public Policy Alliance (“APPA”), the ALAC “was crafted to protect American citizens’ constitutional rights against the infiltration and incursion of foreign laws and foreign legal doctrines, especially Shariah Law.”²³⁹ The express goal of the ALAC is to prevent the denial of “the liberties, rights, and privileges guaranteed in our constitutional republic.”²⁴⁰ The ALAC is a model draft of legislation that says “it shall be the public policy of this state to protect its citizens from the application of foreign laws when the application of a foreign law will result in the violation of a right guaranteed by the constitution of this state or of the United States”²⁴¹ Further, the ALAC defines foreign law, legal code, or system as “any law, legal code, or system of a jurisdiction outside of any state or territory of the United States, including, but not limited to, international organizations and tribunals”²⁴² The ALAC provides that “[t]his statute shall not be interpreted by any court to conflict with any federal treaty or other international agreement to which the United States is a party to the extent that such treaty or international agreement preempts or is superior to state law on the matter at issue.”²⁴³ The APPA claims that Tennessee, Louisiana, Arizona, and Kansas have passed laws based on the ALAC model legislation.²⁴⁴

Some adopted anti-foreign law statutes may violate international treaty law. While the ALAC recommends that legislation explicitly profess to not interfere with the application of federal treaty or international agreements that the United States is a party to, some state legislatures have passed encompassing anti-foreign law statutes that may violate international treaty application. In Louisiana, an anti-foreign law statute passed in 2011 defines foreign law as “any law, rule, or legal code or system established and used or applied in a jurisdic-

eign-law-bans/ (“Versions of ALAC have been enacted in Kansas, Louisiana, South Dakota, Tennessee and Arizona.”).

238. Annie Yu, *Liberal Groups Attack State Anti-Sharia Statutes*, WASH. TIMES (May 16, 2013, 2:24 PM), <http://www.washingtontimes.com/blog/inside-politics/2013/may/16/liberal-groups-attack-state-anti-Shariaanti-Shariaanti-Sharia-statutes/>.

239. *American Laws for American Courts*, AM. PUB. POL’Y ALLIANCE, <http://publicpolicyalliance.org/legislation/american-laws-for-american-courts/> (last visited Nov. 3, 2013).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *American Laws for American Courts*, *supra* note 239.

tion outside of the states or territories of the United States.”²⁴⁵ Anti-foreign law statutes in Kansas and Tennessee²⁴⁶ also define foreign law similarly.²⁴⁷ These states have not addressed whether the amended state law violates international treaty law. Expansive definitions as promulgated by these states can easily be applied to international treaty law, especially in terms of the CISG and international arbitration.

Further, Aaron Fellmeth, Professor of Law at Arizona State University, argues that it becomes challenging to understand what qualifies as a foreign system as provided by ambiguous anti-foreign law regulations.²⁴⁸ Professor Fellmeth questions whether “public international law, private international law, or contractually incorporated, foreign-origin rules and principles . . . would fall under the definition of foreign ‘system.’”²⁴⁹ As a result, there is ample ambiguity in whether state courts acting under the bans will be able to “enforce international law norms that draw upon foreign law.”²⁵⁰ Since a main source of international law is treaties, uncertainty remains regarding how states embracing anti-foreign law statutes will embrace treaties with roots in foreign law.²⁵¹

245. In general, the legislation instructs state courts or any enforcement authority in Louisiana “shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States.” LA. REV. STAT. § 9:6001 (2011).

246. The Anti-foreign law statute in Tennessee is slightly different from legislation passed in other states. In consideration of contract or arbitration agreements that provide for choice under foreign law, legal code, or legal system, and where the application of the foreign law, legal code or system will result in a violation of a right guaranteed by the Tennessee Constitution or the United States Constitution, the statute states that “it is the public policy of this state that the primary factor in interpretation, enforcement or application of the contract . . . shall be preservation of the constitutional rights of the natural person in this state against whom enforcement is sought, unless otherwise directed by state statute.” TENN. CODE ANN. §20-15-103 (2013) (emphasis added). In contrast, other anti-foreign law statutes, like in Louisiana, usually state that where foreign law application to a contractual provision or agreement will violate a right guaranteed by that state’s constitution or the United States Constitution, “the agreement or contractual provision shall be modified or amended to the extent necessary to preserve the constitutional rights of the parties.” LA. REV. STAT. §9:6001(D); see also KAN. STAT. ANN. § 60-5104 (2012) (mandating that if a foreign law or system violated the public policy of Kansas, the foreign law or legal code should be held as void an unenforceable).

247. See KAN. STAT. ANN. § 60-5102 (2012); TENN. CODE ANN. § 20-15-101 (2012).

248. Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT’L L. 107, 108 (2012).

249. *Id.* at 108.

250. FAIZA PATEL, MATTHEW DUSS & AMOS TOH, CTR. FOR AM. PROGRESS & BRENNAN CTR. FOR JUST., *FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS* 20 (2013).

251. See *id.*

B. Other Possible Negative Effects of Anti-Foreign Law Legislation

The Center for American Progress, in conjunction with the Brennan Center for Justice at the New York University School of Law, analyzed practical problems that anti-foreign law statutes may have in the near future. The report, entitled “Foreign Law Bans: Uncertainties and Practical Problems,” analyzed problems in two broad categories: “Problems for American Families” and “Disadvantages to American Business.”²⁵² While not definitive, the report provides an adequate starting point in examining the negative consequences of the statutes.

First, the statutes will prove to be problematic for American families in the context of marriage, divorce, and prenuptial agreements and religious arbitration. The concept of marriage, divorce, and prenuptial agreements was visited earlier in this paper; foreign or religious law can often govern marriage, divorce, and prenuptial agreements. In application of anti-foreign legislation, courts may refuse to recognize marriages performed in light of religious law because a court may deem religious law as depriving a party of rights and liberties as protected in the United States²⁵³ A court’s refusal of marriages based on foreign law may deprive Americans and their spouses of lower tax rates; immigration benefits to the partner; and decision-making during medical emergencies.²⁵⁴

Further, in application of anti-foreign law statutes, parties will find divorce difficult where the marriage contract was drafted in regards to religious law, especially in consideration of Jewish, Protestant, Catholic, Hindu, or Muslim legal traditions.²⁵⁵ In Florida, an anti-foreign law statute passed the state senate with the clear intent to ban foreign law from infiltrating family courts.²⁵⁶ The bill received critical review by both Muslim and Jewish congregations. A representative of the Anti-Defamation League said of the measure: “In Jewish communities, the Beth Din regulates family law . . . Courts in Florida will no longer be able to honor that under this legislation.”²⁵⁷ Similar

252. *Id.* at 25, 28.

253. *Id.* at 25.

254. *Id.* at 26.

255. *Id.* at 25.

256. Larry Hannan, *Bills Banning Sharia Law Get Mixed Reaction in Florida*, MAYPORT MIRROR (Apr. 22, 2013, 9:12 PM), <http://mayportmirror.jacksonville.com/news/premium-news/2013-04-22/story/bills-banning-sharia-law-get-mixed-reaction-florida>.

257. *Id.*

statutes could mean complications for marriages of couples under religious principles.

Anti-foreign law statutes may cause issues for families relying on religious arbitration.²⁵⁸ The use of faith-based arbitration functions in working “hard to peacefully resolve every manner of dispute the faithful manage to get themselves into” and has become more prevalent in the United States.²⁵⁹ Religious tribunals are common in the three monotheistic faiths of Judaism,²⁶⁰ Christianity,²⁶¹ and Islam.²⁶² Anti-foreign law statutes may force courts to consider whether the religious arbitration systems are entirely fair, deeming such statutes unconstitutional for being excessively entangled in religion.²⁶³

These anti-foreign law statutes may have chilling effects on American families. As mentioned, the statutes may affect marriages performed in foreign countries, may complicate divorces based on religious marriages, and may thwart specifically contracted religious arbitration clauses. Even where the statutes do not specifically deny the application of Sharia law, members of other religions are concerned about the consequences regarding these short cited and discriminatory measures.

Second, anti-foreign law statutes may result in disadvantages to American businesses.²⁶⁴ While some of the statutes already passed exempt incorporated businesses from being affected by the legislations, the exemptions do not take into account “three-quarters of American businesses that are unincorporated and employ half the nation’s private workforce.”²⁶⁵ In turn, anti-foreign law statutes result in uncertainty and make states with applicable bans unattractive markets

258. PATEL, DUSS & TOH, *supra* note 250, at 28.

259. R. Seth Shippee, *Peacemaking: Applying Faith to Dispute Resolution*, 10 DISP. RESOL. MAG. 3, 3 (2003–2004).

260. Jewish rabbinical courts are called batei din (singular: beth din). See Ginnine Fried, *The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts*, 31 FORDHAM URB. L. J. 633, 634 (2004); Shippee, *supra* note 259, at 5.

261. While not used on a frequent basis, Peacemaker Ministries serves congregations by providing mediation services for “doctrinal schism, and secular issues like patent infringement and nuisance torts.” Michael C. Grossman, *Is this Arbitration? Religious Tribunals, Judicial Review, and Due Process*, 107 COLUM. L. REV. 169, 178 (2007).

262. While a national mediation apparatus does not exist in the United States, some states and localities, like in Texas, have developed Islamic Arbitration tribunals. See, e.g., *Jabri*, 108 S.W.3d at 413 (mentioning an arbitration clause stating that any disputes must come before the Texas Islamic Court).

263. PATEL, DUSS & TOH, *supra* note 250, at 28.

264. *Id.*

265. *Id.* at 28–29.

for foreign commerce.²⁶⁶ States are seen as unattractive markets because “foreign law bans create the perception that the states that pass them are hostile to international trade.”²⁶⁷ As a result, commerce is affected in application of anti-foreign law statutes, to choice of law clauses, and arbitral awards.

Further, states with foreign law bans are more likely to strike down choice of law provisions within contracts. The likelihood of striking down would threaten to “disrupt the fine balance between the interests of the contracting parties and those of the state.”²⁶⁸ The statutes may have far ranging effects including striking down contracted provisions and disrupting rights to arbitration because foreign systems of law may violate the bills passed.²⁶⁹ As a result, the impact of foreign law bans on international commerce may be pervasive. The impact could impact treaty law like the CISG.

IV. THE CISG AND CONTRACTUAL OBLIGATIONS IN THE UNITED STATES

A. Introduction to the CISG

The CISG is an international convention adopted by the United Nations Commission on international trade law in 1980.²⁷⁰ The CISG mandates that in interpretation of the Convention, “regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”²⁷¹ Further, the Convention provides matters not expressly governed by the CISG should be settled in the interest of uniformity with general principles on which it is based, or in the absence of common principles, with conformity of application of private international law.²⁷² In essence, the CISG advocates for uniformity in governance of international sales contracts. The CISG was adopted to instruct buyers and sellers on their rights and obligations when entering an

266. *Id.* at 29.

267. *Id.*

268. *Id.* at 30.

269. *Id.*

270. BRIAN BLUM & AMY BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* 56 (2d ed. 2008) (acknowledging that because the CISG was adopted in Vienna, it is sometimes known as the Vienna Convention).

271. CISG, *supra* note 13, at art. (7)-(1) (emphasis added).

272. *Id.* at art. (7)-(2).

international contract.²⁷³ Currently, there are seventy-nine signatory countries²⁷⁴ to the CISG, including the United States.²⁷⁵ The combined economies of the signatory countries comprise more than two-thirds of world trade.²⁷⁶

In general, the CISG is divided into three parts. Part I of the CISG defines general provisions where “when applying the CISG . . . , the appropriate international law may be considered; case law interpreting analogous provisions of the Uniform Commercial Code (U.C.C.) may be considered; and, unlike the U.C.C., the Statute of Frauds and the parole evidence rule are not applicable.”²⁷⁷ In Part II, the CISG defines offer and acceptance under the Convention.²⁷⁸ Lastly, in Part III, the CISG deals with rights and obligations of parties contracting for the sale of goods.²⁷⁹

The CISG applies to contracts for the sale of goods in two instances: (1) between parties found in different States where the States are Contracting Nations;²⁸⁰ and (2) where the contracting parties are in different States, even if one of the nations is not a contracting state, “when the rules of private international law lead to the application of the law of a Contracting State.”²⁸¹ The CISG does not apply to sales for goods bought for personal or family use, through auction, on execution of law, of stocks or investments, sales of ships or vessels, or of

273. Elizabeth D. Lauzon, *Construction and Application of United Nations Convention on Contracts for the International Sale of Goods (CISG)*, 200 A.L.R. FED. 541, §2(a) (2005).

274. Current signatory countries include: Albania, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Benin, Bosnia-Herzegovina, Brazil, Bulgaria, Burundi, Canada, Chile, China, Columbia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, South Korea, Kyrgystan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Macedonia, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Romania, Russia, Saint Vincent & Grenadines, San Marino, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syria, Turkey, Uganda, Ukraine, United States, Uruguay, Uzbekistan, Zambia. See Kritzer, *supra* note 20.

275. BLUM & BUSHAW, *supra* note 270, at 56.

276. Van Alstine, *supra* note 12, at §1.2.

277. Lauzon, *supra* note 273.

278. *Id.*

279. *Id.*

280. CISG, *supra* note 13, at art. (1)(a). Further, Contracting States are those signatory nations that ratify, accept or approve the Convention. See *id.* at Article 91(2). Further, Contracting States include those nations who are not signatory states but accede to the Convention. See *id.* at art. 91(3).

281. CISG, *supra* note 13, at art. (1)(b).

The Evolution of Anti-Sharia Law Legislation

electricity.²⁸² The CISG does not apply to contracts where the predominant purpose is labor or providing some type of service.²⁸³

The application of the CISG is particularly important for American businesses. The CISG is applied over a number of topics, including warranties and breach of contract. However, United States courts have struggled in application of the CISG, specifically in determining what law governs when a contract includes a choice of law provision. The application of the CISG is dependent on whether the parties have opted out of the Convention through application of choice of law provisions.²⁸⁴

B. The Controversy of Choice of Law Provision

Contracting parties from signatory countries can opt of CISG application pursuant to Article 6 of the Convention. Article 6 states “[t]he parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any its provisions.”²⁸⁵ Through application of Article 6, parties can choose the law that governs the contract.²⁸⁶ However, if a choice-of-law provision is not present in a contract between two entities found in two different signatory nations, the CISG governs the contract for sale.²⁸⁷ Regardless, applying a choice of law provision is controversial, especially in American courts.

In discussing the precarious nature of American federal courts’ interpretation of choice of law provisions in international contracts, scholars have argued that imprecise language used by courts fuels “misunderstanding of the application of the CISG and its effective exclusion.”²⁸⁸ There are two approaches in interpreting applicable choice-of-law provisions. The majority position is that a reference to a particular state’s laws, without affirmatively opting out of CISG, does not constitute an effective choice-of-law provision.²⁸⁹

282. CISG, *supra* note 13, at art. (2)(a)-(f).

283. CISG, *supra* note 13, at art. (3)(2).

284. ALLISON E. BUTLER, *A PRACTICAL GUIDE TO THE CISG: NEGOTIATIONS THROUGH LITIGATION* §2.02(A) (2007).

285. CISG, *supra* note 13, at Article (6).

286. BUTLER, *supra* note 284, at §2.02(D).

287. *Claudia v. Oliviveri Footwear Ltd.*, No. 96 Civ. 8052 (HB)(THK), 1998 WL 164824, at *4 (S.D.N.Y. Apr. 7, 1998).

288. William P. Johnson, *Understanding Exclusion of the CISG: A New Paradigm of Determining Party Intent*, 59 *BUFF. L. REV.* 213, 229 (2011).

289. *See Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001) (holding that without clear language in a choice-of-law provision, the provision does not

In *Travelers Property Casualty Company of America v. Saint-Gobain Technical Canada Ltd.*, Saint-Gobain, a Canadian company, argued that the parties involved in the case effectively opted-out of CISG application. Saint-Gobain reasoned that TEC's (an American company) purchase order stated that Minnesota law governs disputes arising out of the contract and that short statement qualified as an effective choice-of-law provision.²⁹⁰ Instead, the court held that "absent an express statement that the CISG does not apply, merely referring to a particular state's law does not opt out of the CISG."²⁹¹ Instead, parties need to affirmatively opt-out of CISG application within the choice-of-law provision itself.²⁹²

Conversely, the minority position is articulated in *American Biophysics Corp. v. Dubois Marine Specialties*. In *American Biophysics*, American Biophysics Company ("ABC"), a Delaware corporation, brought action against Dubois Marine Specialties ("Dubois"), a Canadian company, for breach of contract. Dubois moved for dismissal based on forum *non conveniens*.²⁹³

The court ultimately examined the applicability of the CISG in conjunction with a forum selection clause that both parties had agreed. Dubois argued that the forum selection clause²⁹⁴ should be avoided because the CISG applies, especially when the contract was between parties from two signatory nations, the United States and Canada.²⁹⁵ The court held that the clause, even though it did not affirmatively disclaim the application of the CISG, was sufficient to exclude the application of the CISG.²⁹⁶ The court literally interpreted Article 6 of the CISG in reasoning that the "CISG governs contracts for sale of goods between parties of signatory nations 'unless the contract con-

opt-out of CISG application); see also *BP Oil Int'l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003) (holding that a choice-of-law provision applying Ecuadorian law to disputes arising out of contracts was not valid because CISG law is Ecuadorian Law and the opt-out clause needs to specifically deny applicability of CISG); *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Tech. Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1081-82 (D. Minn. 2007).

290. *Travelers Prop. Cas. Co. of Am.*, 474 F. Supp. 2d at 1081-82.

291. *Id.*

292. *Id.*

293. *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 61-62 (D.R.I. 2006).

294. The forum selection clause provides that "the Agreement 'shall be construed and enforced in accordance with the laws of the state of Rhode Island.'" *Id.* at 63 (internal citations omitted).

295. *Am. Biophysics Corp.*, 411 F. Supp. 2d at 63.

296. *Id.*

The Evolution of Anti-Sharia Law Legislation

tains a choice of law provision to the contrary.’”²⁹⁷ For this court, the parties did not have to expressly opt-out of CISG application. The minority approach is incorrect because it violates the Supremacy Clause of the United States Constitution.

Where the federal court is following the majority rule for choice-of-law provisions, and two contracting parties affirmatively state that the CISG is not applicable to the contract, then the court can apply law independent to the Convention. Without the affirmative disclaimer against the application of the Convention, the CISG will govern the contract.

However, the decision in *American Biophysics* seems to suggest that where a choice-of-law provision exists, the CISG is inapplicable, and a court can apply state law to the dispute. Where federal courts apply state law while being forced to consider an anti-foreign law statute, judges will be prohibited from resolving a dispute using any law system developed outside of United States jurisprudence. Courts will likely identify the CISG as a system of foreign laws, and the state laws being applied will conflict with the Convention.

However, even if the anti-foreign law statutes conflict with the application of the CISG, courts applying state law will be compelled to apply the CISG to disputes. The United States is a signatory of the CISG and because the CISG is a self-executing treaty, the Convention is a part of every state law system.²⁹⁸ Where a choice-of-law provision provides that the laws of the State of Michigan—or any other jurisdiction of the United States—apply to a dispute, the CISG is applicable to that contract.²⁹⁹ Foreign law bans instructing a court that international law, which could easily be interpreted to mean treaty law, is inapplicable, may confuse courts deciding whether to apply state law. Understanding that the CISG is controlling state law, federal courts applying the minority test for choice of law provisions and applying state law divorced of consideration of the CISG, run the risk of violating federal treaty law.

297. *Id.* at 64 (citing *Viva Vino Import Corp. v. Farnese Vini S.R.L.*, 2000 WL 1224903, at *1 (E.D. Pa. Aug. 29, 2000)).

298. *See Electrocraft Ark., Inc. v. Super Elec. Motors, Ltd.*, No. 4:09CV00218 SWW, 2009 WL 5181854, at *4 (E.D. Ark. Dec. 23, 2009) (“[A]s a treaty to which the United States is a signatory, the CISG is federal law; thus under the Supremacy Clause, it preempts inconsistent provisions of state law where it applies.”)

299. Johnson, *supra* note 288, at 255.

C. The CISG as Treaty Law in the United States

The United States' relationship with the CISG is fundamentally unique. The CISG is a self-executing treaty³⁰⁰ ratified by the Senate in 1986 and entered into force between the United States and other signatory countries in 1988 pursuant to Article II of the Constitution.³⁰¹ According to Article VI of the Constitution, because the CISG is a self-executing treaty, the CISG is part of the "Supreme Law of the Land."³⁰² In defining treaty law, the Constitution instructs that "judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."³⁰³ There is judicial consensus over the issue of treaties and conflicting state law: "where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control."³⁰⁴

However, states have argued that treaty power should be curtailed by a state's protection under the Tenth Amendment.³⁰⁵ In *Missouri v. Holland*,³⁰⁶ the State of Missouri brought action in order to prevent a game warden of the United States from enforcing the Migratory Bird Treaty Act³⁰⁷ of 1918.³⁰⁸ Missouri alleged that the enforcement of the treaty was an unconstitutional interference of the

300. A self-executing treaty comes into force after Senate approval and the President's formal ratification notification even "without separate Congressional legislation incorporating [a treaty] into the formal body of the United States Code." Van Alstine, *supra* note 12. Further, a treaty is self-executing "when it 'operates of itself without the aid of any legislative provision.'" Subsequently, "while treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.'" *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008).

301. See U.S. CONST. art. II, § 2; *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992).

302. See U.S. CONST. art. VI.

303. *Id.*

304. R.H.S., Annotation, *Relation of Treaty to State and Federal Law*, 134 A.L.R. 882 (1941) (citing *United States v. Belmont*, 301 U.S. 324 (1936); *Nielsen v. Johnson*, 279 U.S. 47 (1928); *Clark v. Pigeon River Improv. Slide & Boom Co.*, 52 F.2d 550 (8th Cir. 1931); *United States v. Rockefeller*, 260 F. 346 (D.C. Cir. 1919)).

305. The Tenth Amendment to the U.S. Constitution instructs that "[t]he 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." U.S. CONST. amend. X.

306. See *Missouri v. Holland*, 252 U.S. 416, 431 (1920).

307. The treaty was enacted between the United States and Great Britain and "provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out." The main goal of the treaty was to prohibit the killing, capturing, or selling of migratory birds and allowed for the Secretary of Agriculture to create regulations based on the treaty's terms. See *Missouri v. Holland*, 252 U.S. 416, 431–32 (1920).

308. *Id.* at 430.

The Evolution of Anti-Sharia Law Legislation

rights of the State pursuant to the Tenth Amendment of the United States Constitution.³⁰⁹ To Missouri, the infraction on the State's rights invaded "the sovereign right of the State and contravene its will manifested in statutes."³¹⁰

In upholding the Migratory Bird Treaty, the Supreme Court acknowledged that before the treaty was passed, Congress had attempted to regulate the killing of migratory birds, but the District Court in that case did not uphold the act.³¹¹ The Court argued that Article II of the Constitution gave power to treaties to be expressed and that Article VI declared that treaties were the supreme law of the land.³¹² Explaining the difference between the powers of Congress and that of ratified treaty law, the Court said, "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."³¹³ The Court then argued that valid treaties are binding within the limits of the States and that a treaty can override the powers of the States.³¹⁴ Then, the Court provided further rationale supporting their holding: the idea that treaty law may override State law has been an encompassing theory in cases pertaining to statutes of limitation as of 1806³¹⁵ and acknowledged for situations of confiscation since 1796.³¹⁶ In upholding the Migratory Bird Treaty, the Supreme Court acknowledged that the treaty power overriding state laws is a theory that has been present since the beginning of the United States.

Case law in some jurisdictions suggests that because the CISG is a self-executing treaty, the CISG is incorporated into state law and conflicting state law is preempted.³¹⁷ Decided in 1992, in *Filanto, S.p.A.*

309. *Id.* at 431.

310. *Id.*

311. *Id.* at 432.

312. *Id.*

313. *Id.* at 433.

314. *Id.* at 434.

315. *See generally* *Hopkirk v. Bell*, 7 U.S. 454 (U.S. 1806) (discussing statute of limitations provisions agreed to by Great Britain and the United States in order to satisfy debts post war).

316. *See, e.g.,* *Ware v. Hylton*, 3 U.S. 199 (1796).

317. A significant portion of recent case law cites *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001). In *Asante*, the Northern District of California decided, in part, the effect of choice of law clauses that the parties signed. The court said, "even Plaintiff's choice of applicable law generally adopts the 'laws of' the State of California, and California is bound by the Supremacy Clause to the treaties of the United States" pursuant to Article VI of the Constitution. *Asante Tech, Inc.*, 164 F. Supp. 2d at 1150. Further, the court said "[t]hus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG." *Id.* There are a number of cases that

v. Chilewich International Corporation, the Southern District of New York was trying to determine whether New York or U.S.S.R. law governed a dispute between an arbitration clause between a company in Italy and the United States.³¹⁸ In determining applicable law, the court took note that the ‘general principles of contract law,’ based on the situation in the case, was found in the CISG.³¹⁹ The court acknowledged that, at the time, virtually no precedential guidance existed in the application of the CISG, but that where both parties represent signatories of the Convention, then the CISG would govern.³²⁰

A further concern is that the application of the CISG may be curtailed by reservations, understandings, or declarations (“RUDs”) assigned to the Convention as a condition to ratification by the United States. The President of the United States can ratify a treaty with the advice and consent of the Senate.³²¹ Further, along with the advice and consent of the Senate, a super-majority, two thirds, of the Senate must concur with the ratification.³²² As a result, even though treaty ratification is solely the responsibility of the President, the Senate has a fundamental role in shaping the treaty application.³²³ The Senate can demand changes to the text of the treaty before consenting or request that RUDs be submitted with a treaty’s ratification instrument.³²⁴ Further, RUDs are present in four human rights treaties rati-

follow the Northern District of California’s interpretation. See *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336–37 (5th Cir. 2003); *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005) (holding in part that because CISG is federal law, it preempts conflicting Illinois law); *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (holding that because Illinois is bound by the Supremacy Clause of the United States, under general Illinois law, the CISG is applicable to contracts between parties from different countries that have adopted the CISG); *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007) (“[U]nder the Supremacy Clause, the law in every state is that ‘the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.’”); *Microgem Corp. v. Homecast Co.*, No. 10 Civ. 3330(RJS), 2012 WL 1608709, at *3 (S.D.N.Y. Apr. 27, 2012); *St. Paul Guardian Ins. Co. v. Neuromed Medical Sys. & Support*, No. 00 Civ. 9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) (holding that because Germany and the US are signatory nations in the US, and because the CISG is an integral body of law in Germany, the CISG is applicable).

318. See *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229, 1235 (S.D.N.Y. 1992).

319. *Id.* at 1237.

320. *Id.*

321. U.S. CONST. art. II, §2, cl. 2.

322. *Id.*

323. Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 101–02 (2011).

324. *Id.*

The Evolution of Anti-Sharia Law Legislation

fied by the United States and the United States added a reservation to the ratification instrument of the CISG.³²⁵

The acronym, RUD, stands for reservations, understandings, and declarations, respectively. First, Reservations “change U.S. Obligations without necessarily changing the text, and they require the acceptance of the other party.”³²⁶ Second, “understandings are interpretive statements that clarify or elaborate provisions but do not alter them.”³²⁷ Third, “[d]eclarations are statements expressing the Senate’s position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.”³²⁸ The terms are not defined by explicit law and are often used interchangeably.³²⁹

There are four types of modern RUDs: (1) substantive reservations; (2) interpretive conditions; (3) non-self-execution declarations; and (4) federalism understandings. First, substantive reservations are reservations where the United States declines to consent to certain provisions of treaties either because of potential conflict between treaty provisions and United States’ constitutional rights or conflicts due to political and policy disagreements with individual treaty provisions.³³⁰ Second, interpretive conditions clarify the scope of the United States’ consent by interpreting vague treaty terms.³³¹ Third, non-self-execution declarations are declarations stating that substantive provisions of a treaty are not self-executing. Further, “[t]hese declarations are designed to preclude the treaties from being enforceable in United States’ courts in the absence of implementing legislation.”³³² Fourth, the Senate may require an RUD that contains an understanding of federalism so that a balance between state and federal law is not compromised.³³³

325. See *id.* at 102; *CISG: Participating Countries – United States*, PACE L. SCH. INST. OF INT’L COMMERCIAL LAW (Jan. 22, 1998), <http://www.cisg.law.pace.edu/cisg/countries/cntries-United.html>.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 417 (2000).

331. *Id.* at 418.

332. *Id.* at 419. There are several reasons for the declarations, including the belief that US domestic laws and remedies are sufficient in resolving the issue; the treaty may provide a destabilizing effect because wording of the treaty does not exactly mirror US law construction; a disagreement between which treaty terms would be self-executing; where there is a fundamental change between the treaty and applicable domestic law, some lawmakers prefer legislation passed in conjunction with the House of Representatives. *Id.* at 419–20.

333. *Id.* at 422.

When ratifying the CISG, the Senate mandated that one RUD, specifically a substantive reservation, be included in the ratification instrument for the Convention. The United States filed an Article 95 Declaration.³³⁴ Article 95 of the Convention allows “[a]ny State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this Convention.”³³⁵ As a result, the reservation “restricts the role of private international law in determining the application of the Convention when both contracting parties do not have their relevant places of business in Contracting States.”³³⁶ Basically, the CISG is not applicable against a party not from a contracting state where a dispute is with a company in the United States.³³⁷ In conclusion, in ratifying the CISG, the United States chose not to restrict the applicability of substantive provisions of the Convention, like the opt-out clause, by employing a RUD. Instead, the RUD mandated by the Senate looked to restrict the Convention to application between parties in the United States and another State that has ratified the CISG.

D. Analysis

Anti-foreign law statutes are superfluous in design and are unconstitutional in application of the Supremacy Clause of the Constitution. The major conflict is that Anti-foreign law bans will further confuse courts when courts are deciding what law applies to contracts based on international law. Anti-foreign law legislation mandate that where a contract or contractual provision provides for the choice of foreign law, legal code or system to govern disputes between parties, the contract or contractual provision will be void if the legal code or system includes or incorporates substantive or procedural law that will not grant fundamental liberties guaranteed under the United States and State constitutions.³³⁸

While the contents of the legislation seem narrow, legislators define foreign law as “any law, rule or legal code or system established and used or applied in a jurisdiction outside of the states or territories

334. *CISG: Participating Countries – United States*, PACE L. SCH. INST. OF INT’L COMMERCIAL LAW (Jan. 22, 1998), <http://www.cisg.law.pace.edu/cisg/countries/entries-United.html>.

335. CISG, *supra* note 13, at art. 95.

336. PACE L. SCH. INST. OF INT’L COMM. L., *supra* note 334.

337. BUTLER, *supra* note 284, at §2.02 [B].

338. N.C. GEN. STAT. § 1-87.5 (2013); KAN. STAT. ANN. § 60-5104 (2012); LA. REV. STAT. ANN. § 9:6001(D) (2011).

The Evolution of Anti-Sharia Law Legislation

of the United States.”³³⁹ As a result of ambiguity of what constitutes foreign law under these types of regulations, commentators have questioned whether the statutes affect international law.³⁴⁰ A major source of international law is treaty law, and the United States is a party to a number of treaties, including the CISG.³⁴¹

Where the parties of a contract are from two different countries, and where those two countries are signatories to the CISG, the CISG applies.³⁴² However, the parties may opt-out of CISG application if a proper choice-of-law provision is contracted within the provisions of the agreement.³⁴³ Where the choice-of-law provision is proper—two parties show clear intent to opt-out of CISG application—the court hearing the case may then apply the specific jurisdictional law agreed upon in place of the CISG.³⁴⁴

Portions of the bans regarding choice-of-law provisions become important due to the statutes’ vague definition of foreign law. Based on these statutes, legislators mandate banning “*any* law, rule, or legal code or system” that is established or used outside the jurisdiction of the United States. In essence, the CISG could be considered a foreign system of law that is established and applied in jurisdictions outside the United States. The CISG was adopted in 1980 after the conclusion of the Diplomatic Conference in Vienna, Austria.³⁴⁵ Sixty-two participating countries were present at the Diplomatic Conference, divided between common law and civil law jurisdictions; all of them were signatories.³⁴⁶ Because of the intense debate surrounding the Convention, the CISG is far from perfect.³⁴⁷ As a result, signatory countries, including the United States, have opted out of some of the provisions of the Convention.³⁴⁸

339. N.C. GEN. STAT. § 1-87.2(2) (2013); KAN. STAT. ANN. § 60-5102 (2012); LA. REV. STAT. ANN. § 9:6001(A) (2011).

340. Fellmeth, *supra* note 248, at 108.

341. *See* Chatea des Charmes Wines Ltd v. Sabate USA Inc., 238 F.3d 528, 530 (9th Cir. 2003) (acknowledging that the United States, among other represented countries party to the dispute, is a contracting state).

342. CISG, *supra* note 13, at art. 1 (1)(b).

343. CISG, *supra* note 13, at art 6.

344. *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001).

345. Michael Joachim Bonell, *The CISG, European Contract Law and the Development of a World Contract Law*, 56 AM. J. COMP. L. 1, 1 (2008).

346. *Id.* at 2–3.

347. *Id.* at 3.

348. Marcia J. Staff, *United Nations Convention on Contracts for the International Sale of Goods: Lessons Learned from Five Years of Cases*, 6 S.C. J. INT’L. L. & BUS. 1, 3 (2009).

According to anti-foreign law statutes, the CISG fits the definition of foreign law: The CISG was established in Austria and has been applied in jurisdictions outside the United States, like Germany. As a result, because the United States has opted out of specific portions of the CISG, application of the entirety of the CISG could be against the public policy of the state. The anti-foreign law statutes were expressly created to bar the application of foreign systems of law, like the CISG in cases governed by state law.

However, the CISG is a self-executing treaty, and as a self-executing treaty, based on the Supremacy Clause of the United States Constitution, the CISG is considered binding on state and federal law. The Supremacy Clause simply states that treaty law 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, anything in the Constitution or laws of any State to the contrary notwithstanding.”³⁴⁹ As a result, a number of courts have held that the CISG, as a valid self-executing treaty, is part of state law.³⁵⁰ Further, the CISG preempts state law where the state law is in conflict with the Convention; however, preemption is limited to those parties in privity of contract.³⁵¹ As a result, the CISG is an entrenched entity within state laws of the various states in the Union. Anti-foreign law legislation is

349. See U.S. CONST. art. VI.

350. A significant portion of recent case law cites *Asante Tech., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001). In *Asante*, the Northern District of California decided, in part, the effect of choice of law clauses that the parties signed. The court said, “even Plaintiff’s choice of applicable law generally adopts the ‘laws of’ the State of California, and California is bound by the Supremacy Clause to the treaties of the United States” pursuant to Article VI of the Constitution. *Asante Tech., Inc.*, 164 F. Supp. 2d at 1150. Further, the court said “[t]hus, under general California law, the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.” *Id.* There are a number of cases that follow the Northern District of California’s interpretation. See *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 336–37 (5th Cir. 2003); *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 673 (N.D. Ill. 2005) (holding in part that because CISG is federal law, it preempts conflicting Illinois law); *Microgem Corp. v. Homecast Co.*, No. 10 Civ. 3330(RJS), 2012 WL 1608709, at *3 (S.D.N.Y. Apr. 27, 2012); *Travelers Prop. Cas. Co. of Am. v. Saint-Gobain Technical Fabrics Can. Ltd.*, 474 F. Supp. 2d 1075, 1082 (D. Minn. 2007) (“[U]nder the Supremacy Clause, the law in every state is that ‘the CISG is applicable to contracts where the contracting parties are from different countries that have adopted the CISG.’”); *St. Paul Guardian Ins. Co. v. Neuromed Medical Sys. & Support*, No. 00 Civ. 9344(SHS), 2002 WL 465312, at *3 (S.D.N.Y. Mar. 26, 2002) (holding that because Germany and the US are signatory nations in the US, and because the CISG is an integral body of law in Germany, the CISG is applicable); *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880, 884 (N.D. Ill. 2002) (holding that because Illinois is bound by the Supremacy Clause of the United States, under general Illinois law, the CISG is applicable to contracts between parties from different countries that have adopted the CISG).

351. See *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 675 (N.D. Ill. 2005).

The Evolution of Anti-Sharia Law Legislation

in direct conflict with the Supremacy Clause of the Constitution: proponents of the statute would ideally restrict the application of the CISG because the application of the CISG might result in harm to a business or citizen of a state.

Apart from the tenuous relationship between the CISG as a part of state law and foreign law bans, anti-foreign legislation may also work to confuse courts in deciding how to decipher choice-of-law provisions. Where two parties intend to opt-out of applying the CISG to a contract, the parties should include an exclusion that expressly states that the Convention does not apply to the contract.³⁵² Included in the exclusion should be a provision stating what law should govern the contract.³⁵³ Where clear language referencing an explicit request to opt out of CISG application is not provided within a contract, but a choice-of-law provision selecting specific law that should be applied to the dispute, a court should apply the Convention.

However, federal courts faced with choice-of-law provisions have been inconsistent in applying the right law to officiate a contractual dispute. A prime example of inconsistency in applying the correct law to an international contractual dispute is illustrated in *American Biophysics*. The District Court of Rhode Island held that because a forum selection clause was included in a contract between an American and Canadian company, the CISG was inapplicable to the contract.³⁵⁴ The clause states: “the Agreement ‘shall be construed and enforced in accordance with the laws of the state of Rhode Island.’”³⁵⁵ Compared to the standard for proper choice-of-law and forum selection clauses, the Rhode Island clause is insufficiently vague: the parties to the contract do not explicitly state an intention that the CISG could not be applied. In holding that the CISG does not apply to the contract because of the forum selection clause, the court fails to uphold valid treaty law and fails to recognize that the CISG is part of the laws of Rhode Island.

The inclusion of foreign law bans may intensify the inconsistency in applying the correct law when navigating a choice-of-law provision in a contract. Presumably, one of the reasons the District Court of

352. *BP Oil Int’l, Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333, 337 (5th Cir. 2003).

353. *Id.*

354. *Am. Biophysics Corp. v. Dubois Marine Specialties*, 411 F. Supp. 2d 61, 63 (D.R.I. 2006).

355. *Id.*

Rhode Island applied Rhode Island law to the contract, instead of the CISG, is because the court may have thought the CISG is independent contractual law when compared to state law. Anti-foreign law legislation will likely exacerbate the understanding that the CISG is independent from state laws. Since the definition of foreign law nebulously includes the CISG, courts when deciding to apply state laws may incorrectly find that the CISG may deprive a business or person a constitutionally protected right. As a result, the court may violate the Supremacy Clause.

Overall, the impact of anti-foreign law legislation may be diverse and severe. Foreign law bans may affect families and businesses, and may create legitimate economic concern for businesses that enact such statutes. The main goal of the CISG is to instill a cohesive system to adjudicate international contract disputes. However, foreign law bans are hostile to foreign systems of law like the CISG and may create confusion on what law governs international contracts. As a result, there may be a lack of cohesion, and international businesses may be wary to enter into contracts with entities located in states with robust anti-foreign law legislation.

CONCLUSION

In a race to ban Sharia law application from their jurisdictions, conservative legislatures drafted, and, in some instances, passed deeply flawed legislation that may have lasting impacts on American families and American businesses. The legislation has evolved for the past three years. In the beginning, state legislatures were so intent on banning Sharia law that they explicitly banned its application in state courts. This approach was misguided, and, in the flagship case from Oklahoma, legislation that explicitly denied the Sharia law application was deemed unconstitutional after application of the Establishment Clause of the First Amendment.

Not to be deterred, conservative state legislatures then proposed new legislation looking at banning foreign law application. The underlying reason stayed the same; the goal was still to ban Sharia law from being implemented in the various jurisdictions. The neutral approach was successful in circumventing First Amendment analysis, but provided new problems in Supremacy Clause analysis. The overarching definition of foreign law in legislation, like that passed in Louisiana, arguably encompasses valid treaty law, resulting in an effective

The Evolution of Anti-Sharia Law Legislation

ban against treaties that the United States is a party of. An example of such a treaty is the CISG. However, in application of the Supremacy Clause of the Constitution, treaties like the CISG are a part of state law. Further, the CISG, in some instances, effectively preempts conflicting state law. As a result, applicable treaty law may preempt anti-foreign law legislation.

Further, some contracts governed by the CISG may have choice-of-law provisions. Federal courts have been inconsistent in applying state law correctly in determining whether choice-of-law provisions are applicable. As a result, some federal courts have inadvertently violated the Supremacy Clause by applying state UCC law without application of the CISG. anti-foreign law legislation may further confuse federal courts when determining applicability of choice-of-law provisions. The confusion resulting from foreign law bans may negatively impact the commerce of the states that have passed robust Anti-Foreign law statutes. As observed by the Brennan Center, where a business situated internationally forms a contract with a business within a state with a foreign law ban, there may be sufficient confusion and uncertainty in what law is applied to the contract. As a result, an international business may forgo the risk of contracting in a state with an applicable foreign law ban.

To summarize, there are a number of negative effects of passing legislation that looks to bar Sharia law application. First, anti-Sharia legislation is unconstitutional based on the First Amendment. Second, anti-foreign law legislation may be preempted where treaty law is applied. Third, anti-foreign law legislation may lead to an effect on commerce in the individual states. Further, as is seen in Florida, foreign law bans harm religious law application outside of Islamic law; rabbinical Beth Din courts are weary of such bans. These conservative legislatures have reacted to a non-problem, that Sharia law is taking over America, through legislation that creates more problems that it purported to solve. In summation, the overall benefit of these laws is expressly overshadowed by the negative realities.

COMMENT

Criminal Liability Against Child Protective Services Caseworkers: An Unsuitable Solution to Decrease the Number of Preventable Child Fatalities in New York

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“In New York:
A child is abused or neglected every seven minutes.
A child dies before his or her first birthday every six hours.”¹

INTRODUCTION	1034
I. THE CHILD WELFARE SYSTEM	1038
A. The Creation of Child Protective Services	1040
1. The New York Society for the Prevention of Cruelty to Children	1041
2. A Shift from Private to Public Protection	1042
B. New York City’s Administration for Children’s Services	1045
1. The Caseworkers	1046
2. Reporting Requirements	1047

* J.D. Candidate, Howard University School of Law, Class of 2014; Editor-in-Chief, *Howard Law Journal*, Vol. 57; B.A., Temple University, 2009. I give thanks to God, who has continuously blessed my life and given me strength to endure all things. I thank Professors Lenese Herbert, Cynthia Mabry, and Mariela Olivares for their guidance and thoughtful feedback on previous drafts of this Comment. I give many thanks to the hardworking staff and Editorial Board of the *Howard Law Journal*, who not only provided thoughtful feedback, but also continue to build upon the legacy of this historic publication. Finally, I dedicate this Comment to my family and friends, in particular, my mom and dad, Carla and Derrick James, who have always provided their unending support and continue to push me to reach beyond the stars.

1. CHILDREN’S DEF. FUND, CHILDREN IN NEW YORK (2012).

3. Case Assignment	1048
4. Investigating Reports	1048
5. Case Dispositions	1050
C. ACS: Why Is the System Failing?	1051
II. INADEQUATE REMEDIAL MEASURES	1052
A. Quality Controls	1052
1. Child Fatality Review Teams in New York	1053
2. ChildStat.....	1053
B. Impact of Quality Controls	1054
C. Legislative Amendment: “Marchella Pierce’s Law”.....	1055
D. Practicality of the Proposed Legislative Amendment	1057
III. CRIMINAL CULPABILITY AS A UNIQUE SOLUTION TO END PREVENTABLE CHILD FATALITIES	1058
A. Criminally Negligent Homicide	1059
B. Limitations of Criminal Culpability: Statutory Immunity Protection	1060
1. Statutory Immunity Pursuant to the New York Social Services Law.....	1061
2. Limitations to Statutory Immunity.....	1062
C. Statutory Immunity: Marchella’s Case	1063
V. THE ADVANTAGES AND DISADVANTAGES OF USING CRIMINAL CULPABILITY AS A UNIQUE SOLUTION	1065
A. Pros.....	1066
B. Cons	1067
1. Caseworker Retention and High Turnover Rates	1067
2. An Unwarranted Spike in Child Removal Rates	1068
CONCLUSION	1070

INTRODUCTION

Far too many abused and maltreated children die post child protective services intervention. In 2010, for example, riveting news articles and broadcasts told the heart-wrenching story of four-year-old Marchella Pierce who was beaten, bound, drugged, and starved to

Criminal Liability Against Child Protective Services Caseworkers

death by her mother, Carlotta Brett-Pierce.² New York's chief medical examiner attributed the cause of death to "child abuse syndrome with acute drug poisoning, blunt impact injuries, malnutrition and dehydration."³ Marchella was found dead with rope marks on her wrists and ankles—signs that Carlotta tied the child to the bedposts—and one kernel of corn in her stomach.⁴ Marchella's mother and grandmother were indicted and found guilty of murder and manslaughter.⁵

Child care professionals—one child protective services caseworker and his supervisor—knew of Marchella's suffering, but unfortunately, like many other cases,⁶ Marchella's case was not adequately nor properly investigated.⁷ Specifically, these caseworkers from the Administration for Children's Services (ACS)—New York City's Child Protective Services (CPS) agency—knew of Marchella's case starting in March of 2010, six months before her untimely death.⁸ An ACS supervisor, who had already been acquainted with Carlotta

2. See, e.g., Jamie Schram et al., *4-Year-Old, 15-lb. Girl Found Dead; 'Starved' & 'Tied to Bed' in Home ACS Probed*, N.Y. POST, Sept. 3, 2010 (Sports + Late City Final), at 6; *Cops: Brooklyn Girl, 4, Found Dead, Apparently Tied Up*, CBS N.Y. (Sept. 2, 2010, 6:33 PM), <http://newyork.cbslocal.com/2010/09/02/cops-brooklyn-girl-4-found-dead-apparently-tied-up/>; Amelia Harris, *Marchella's Mom Sentenced*, WALL ST. J., June 7, 2012, <http://online.wsj.com/news/articles/SB20001424052702303753904577450660810223048>; Monika Plocienniczak, *Girl, 4, Weighed 15 Pounds at Death*, CNN (Sept. 3, 2010, 10:12 PM), <http://www.cnn.com/2010/CRIME/09/03/new.york.mother.charged/index.html>.

3. Ray Rivera, *Mother of Girl Who Died is Charged with Murder*, N.Y. TIMES, Nov. 10, 2010, at A27; see also Joe Kemp, *Brooklyn toddler Marchella Pierce's death is ruled murder; 4-year-old was 18 pounds when found*, N.Y. DAILY NEWS (Oct. 30, 2010, 4:00 AM), <http://www.nydailynews.com/news/crime/brooklyn-toddler-marchella-pierce-death-ruled-murder-4-year-old-18-pounds-found-article-1.192753>.

4. See The Associated Press, *Prison Term for Mother of a Girl, 4, Found Dead*, N.Y. TIMES, June 7, 2012, at A22; Jaya Saxena, *Malnourished Girl's Mother Charged with Assault*, GOTHAMIST (Sept. 4, 2010, 10:45 AM), available at http://gothamist.com/2010/09/04/malnourished_girls_mother_charged_w.php.

5. Harris, *supra* note 2.

6. See Jennifer Preston, *Grand Jury Cites Deaths of Children in Inquiry*, N.Y. TIMES, Oct. 5, 2013, at A17 ("A Brooklyn grand jury found that 19 children in New York City died of abuse and neglect because the city's child protective agency had failed to rigorously investigate cases even after a city report recommended new practices in 2007."); Colleen Long, *DA: NYC abuse case goes beyond job incompetence*, YAHOO NEWS (Mar. 24, 2011, 4:52 PM), <http://news.yahoo.com/da-nyc-abuse-case-goes-beyond-job-incompetence-20110324-135230-803.html> ("Long before 4-year-old Marchella Pierce was found starved, beaten and drugged, New York City's child welfare agency oversaw 11 cases in under a year where the child ended up dead.")

7. See *infra* Part I.B.4, describing ACS investigation requirements.

8. Jennifer Gonnerman, *The Knock at the Door; The Last Thing Child-Welfare Supervisor Chereece Bell Wanted to See Was What Happened to 4-year-old Marchella Pierce. The Last Thing She Expected Was to Go to Jail for It.*, N.Y. MAG. (Sept. 19, 2011), <http://nymag.com/news/features/acs-chareece-bell-2011-9/>.

from a prior case,⁹ received Marchella's case and assigned it to ACS caseworker, Damon Adams.¹⁰ During his initial investigation, Adams discovered that the case was called into ACS by a hospital official who disclosed that Carlotta brought Marchella into the hospital after having trouble with the child's tracheal breathing tube.¹¹ Before Marchella received medical services, Carlotta abruptly left the hospital.¹² The record reveals that when caseworker Adams contacted Carlotta, she blamed her abrupt departure on a hungry Marchella and the need to tend to her children left at home.¹³ At the time, this seemed like a reasonable explanation to Adams.¹⁴ While the family remained under investigation, several events occurred,¹⁵ causing ACS to keep the child's case open and under supervision. Because Marchella's case remained open, Adams was required to conduct home visits to check on the child.¹⁶ However, as time and Marchella's emaciated body would show, he did not complete these visits.

Two separate investigations opened after Marchella's death in an effort to learn what went wrong with her case. ACS officials conducted one investigation, and a grand jury conducted another pursuant to authorization by the Brooklyn District Attorney's Office.¹⁷ The grand jury determined that caseworker Adams failed to make the required visits to Marchella's home prior to her death, and his supervisor did not provide proper oversight.¹⁸ The grand jury also reported that Adams falsified ACS records to make it appear as though he vis-

9. *Id.* A year before Marchella's death, a hospital official called in a report against Carlotta after she tested positive for marijuana while pregnant. *Id.* Bell received Carlotta's case and referred her to drug treatment services. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. See N. R. Kleinfeld & Mosi Secret, *A Bleak Life, Cut Short at 4, Harrowing from the Start*, N.Y. TIMES, May 9, 2011, at A1 (explaining that both Marchella's grandmother and mother tested positive for marijuana, ultimately leading to a June 2010 arrest for the grandmother).

16. Gonnerman, *supra* note 8; see also *infra* Part I.B.4 (discussing the ongoing obligations of an ACS caseworker during the life of an open case or an ACS caseworker's obligation to provide services post investigation).

17. See Gonnerman, *supra* note 8; Daniel Wise, *Caseworkers Face Negligent Homicide Charges in Girl's Death*, N.Y. L.J., Mar. 24, 2011. Brooklyn District Attorney Charles J. Hynes put together a special grand jury to investigate the case and determine whether Marchella's death was the result of systematic failures within ACS. *Id.*

18. Grand Jury Report Pursuant to CPL § 190.85(1)(c) at 41, In the Matter of the Investigation Into R10-359 (2010); see also Wise, *supra* note 17.

Criminal Liability Against Child Protective Services Caseworkers

ited Marchella prior to her death when, in fact, he did not.¹⁹ In what appears to be an unprecedented occurrence in New York,²⁰ both Adams and his supervisor were arrested and charged with criminal negligent homicide in connection with Marchella's death.²¹

Caseworker misconduct that results in child fatalities is not a new phenomenon.²² Children are dying when, instead, they should be receiving protection. What is the solution to decrease the number of these preventable child fatalities? Often times, families will sue the CPS agency.²³ But, should the government seek to prosecute individual caseworkers, too, holding them criminally responsible for the death of a child under their protection?

This Comment argues that such a solution is unsuitable and will have a detrimental effect on the state of child welfare in New York City. Prosecution against individual caseworkers, compared to suits filed against CPS agencies, is less common because of statutory immunity protections. Notwithstanding the immunity protection generally offered to caseworkers, this Comment shows that an individual caseworker can be culpable for criminally negligent homicide for misconduct relating to the death of a child to whom they have been assigned to protect. Although this culpability is a viable alternative, this Comment concludes that the effects of such culpability will be more detrimental than beneficial for abused and maltreated children in New York City. ACS already struggles to combat high caseworker turnover rates and has historically been known to remove children from their home when such removal is unwarranted. Imposing such criminal liability will not only make caseworkers fearful,²⁴ but also exacerbate these already pressing issues.

19. Grand Jury Report Pursuant to CPL § 190.85(1)(c) at 42, In the Matter of the Investigation Into R10-359 (2010) (“[P]ost-mortem entries were made about investigatory steps that investigators determined had not been undertaken.”).

20. See Wise, *supra* note 17.

21. *Id.*

22. See generally DOUGLAS J. BESHAROV, *CRIMINAL AND CIVIL LIABILITY IN CHILD WELFARE WORK: THE GROWING TREND* (3d ed. 1986) (illustrating how caseworkers have been held liable for misconduct that results in the death of a child).

23. See, e.g., Carolina D. Watts, Note, “Indifferent (Towards) Indifference:” *Post-DeShaney Accountability for Social Services Agencies When A Child Is Injured or Killed Under Their Protective Watch*, 30 PEPP. L. REV. 125, 126–27 (2002) (explaining how lawsuits against state agencies have become “an increasingly common phenomenon”).

24. See Raquel Arellano & John Kelly, *Leaders Fear Dangerous Precedent as Homicide Case Against Caseworkers Continues*, CHRON. SOC. CHANGE (Apr. 30, 2013), <https://chronicleof-social-change.org/news/leaders-fear-dangerous-precedent-as-homicide-case-against-caseworkers-continues/2657> (“There is fear among some child welfare leaders that convictions of the two caseworkers could create a precedent . . .”).

Part I examines the current state of child protective services in New York City. Specifically, it lays the foundation for understanding the obligations of ACS caseworkers by exploring the history of child protective services and the events leading up to the creation of ACS. It also identifies existing infrastructural deficiencies of ACS that contribute to the occurrence of preventable child fatalities. Part II examines legislative and ACS responses to these deficiencies and explains why these responses are inadequate. Part III uses Marchella's case to demonstrate how the unique solution of criminal culpability, specifically criminally negligent homicide, is a viable remedy to decrease the number of preventable child fatalities, despite the existence of statutory immunity. Part IV concludes that the benefits of criminal culpability are outweighed by the negative effects such a solution will have on ACS and the abused and neglected children of New York City.²⁵

I. THE CHILD WELFARE SYSTEM

In the United States, children die at an advanced rate from abuse and neglect when compared to other countries.²⁶ In 2011, the National Child Abuse and Neglect Data System (NCANDS)²⁷ received 1,545 child fatality reports.²⁸ Even more disturbing, a significant num-

25. Although new in form, there have been several calls to criminalize caseworkers' malfeasance. See, e.g., Don Lash, *Criminalizing Caregivers*, SOCIALISTWORKER.ORG (Mar. 31, 2011), <http://socialistworker.org/2011/03/31/criminalizing-caregivers> (explaining how the threat of this type of criminalization may serve as a catalyst for caseworkers, educators, and foster care providers, alike, to combine forces and begin having critical discussions that can bring about the necessary "radical change" to offer better forms of protection and services to victimized children).

26. See EVERY CHILD MATTERS EDUCATION FUND, WE CAN DO BETTER: CHILD ABUSE AND NEGLECT DEATHS IN AMERICA 8 (2d ed. 2010) [hereinafter CHILD ABUSE AND NEGLECT DEATHS IN AMERICA 2010] ("Among the rich democracies, the U.S. child abuse death rate is 3 times higher than Canada's, and 11 times higher than Italy's."); see also Natalia Antelava, *America's Child Death Shame*, BBC NEWS (Oct. 17, 2011), <http://www.bbc.co.uk/news/world-us-canada-15288865> (explaining how out of the sixty-six children under the age of fifteen that die each week in the world from abuse and neglect, twenty-seven of those deaths occur in the United States—a number higher than in any other country).

27. Pursuant to the 1988 Child Prevention and Treatment Act (CAPTA) and its amendments, the NCANDS was created by the federal government to collect and analyze child abuse and neglect information. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2011, at vii (2012) [hereinafter CHILD MALTREATMENT 2011]. Researchers believe that the fatality numbers presented by the NCANDS and organizations are not fully accurate because of several factors contributing to miscalculations. See CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD ABUSE AND NEGLECT FATALITIES 2011: STATISTICS AND INTERVENTIONS 2-3 (2013) [hereinafter CHILD WELFARE INFORMATION GATEWAY, CHILD ABUSE AND NEGLECT FATALITIES 2011].

28. CHILD MALTREATMENT 2011, *supra* note 27, at 56.

Criminal Liability Against Child Protective Services Caseworkers

ber of these child fatalities were preventable because their cases were made known to CPS agencies *before* the fatality occurred.²⁹

In the United States, a CPS agency's involvement does not always equal protection for an abused or maltreated child. For example, of the 1,545 child fatalities reported to NCANDS, many of them were abused and neglected children whose cases were reported to CPS agencies well before their deaths.³⁰ Specifically, in thirty-three out of the fifty-one states that reported to NCANDS, 8.8% of the child fatalities involved families who had received protective services within the five years prior to the fatality.³¹ These statistics prove that children die despite agency involvement mostly because of the deficiencies that exist within the current child protection infrastructure.³²

More specifically, in New York, the stories of Marchella and countless others illustrate that child fatalities post-child protective services intervention is a pressing problem. Unfortunately, New York's rate of child fatalities that occur post-agency involvement is not discernable because the state refuses to disclose these types of statistics to the NCANDS.³³ Despite this lack of disclosure, the state's general child fatality rates are indicative of a need for change. In 2010, New York ranked twelfth among the fifty states, including the District of Columbia and Puerto Rico, at a rate of 2.58 deaths per 100,000 children for the number of fatalities caused by child abuse and neglect.³⁴

29. See, e.g., *The Danieal Kelly Jury Connects the Dots*, PHILLY.COM (July 16, 2011, 10:01 PM), http://www.philly.com/philly/blogs/crime_and_punishment/125697383.html (discussing the guilty verdict of a social worker who was responsible for monitoring a child who was eventually starved to death by his mother); see also 6-66 FAMILY LAW & PRACTICE § 66.02(1) ("Tens of thousands of . . . children receive serious injuries while under child protective supervision.").

30. CHILD MALTREATMENT 2011, *supra* note 27, at 61.

31. *Id.*

32. See Margie Menzel, "Anybody but DCF": Judge Wants Failing Agency off Child Investigations After 5th Death, FLAGERLIVE.COM (July 23, 2013), <http://flaglerlive.com/56898/anybody-but-dcf-judge-wants-failing-agency-off-child-investigations-after-5th-death/> (describing the poor level of investigative services provided by the Florida Department of Children and Families and how these inadequacies resulted in the death of five children within two months); *Failed to Death*, 9NEWS (Nov. 9, 2012, 2:37 PM), http://www.9news.com/news/specials/failed_to_death/ (explaining that over the past five years, 72 of the 175 child fatalities that occurred in Colorado were made known to the department of human services prior to their death).

33. See CHILD MALTREATMENT 2011, *supra* note 27, at 65. Interestingly enough, reporting requirements vary from state to state. See CHILD WELFARE INFORMATION GATEWAY, CHILD ABUSE AND NEGLECT FATALITIES 2011, *supra* note 27, at 2. Thus, New York's refusal to disclose is permissible even though it yields inaccurate child fatality data.

34. See EVERY CHILD MATTERS EDUCATION FUND, CHILD ABUSE AND NEGLECT DEATHS IN AMERICA 17 (2012) [hereinafter CHILD ABUSE AND NEGLECT DEATHS IN AMERICA 2012]. The top eleven states, starting with the state that ranked the highest, include: Florida, New Mexico, Texas, Vermont, Ohio, Michigan, Georgia, Kentucky, Oklahoma, Arkansas and Louisiana. See *id.*

These numbers also show that New York yielded a substantially higher rate of child fatalities than the most child-populated state in the country—California.³⁵ Thus, although New York had far fewer children to protect, child fatalities occurred more frequently.³⁶

These statistics prove that a problem exists within New York's CPS system. Abused and neglected children, who are brought to the attention of the state, continue to die despite CPS intervention. This problem, however, is far from novel, and in order to understand why the current, common solutions are an inadequate means to rectify the existing problems and thus decrease the number of preventable child fatalities, one must understand how the caseworker profession developed and the statutory obligations under which the caseworkers operate to protect abused and neglected children.

A. The Creation of Child Protective Services

Child abuse, and thus, the need for child protective services, is a deeply rooted problem visible throughout American history.³⁷ New York was the first state in the country to create a child protective services agency,³⁸ and its failure to live up to its earlier, trailblazing standard is quite ironic. This section provides a historical overview of child welfare institutions in New York, including the founding of the first child protective services agency and the effect that its creation had on the rest of the country. This historical discussion will serve as

35. *See id.* In 2010, California's child population was approximately 9.3 million while New York's child population was approximately 4.3 million. *Compare* United States Census Bureau, 2010 Population, <http://www.census.gov/popfinder/> (select "California" from the dropdown menu; then click "Display" hyperlink) (last visited Mar. 3, 2014), *with* United States Census Bureau, 2010 Population, <http://www.census.gov/popfinder/> (last visited Mar. 3, 2014) (select "New York" from the dropdown menu; then click "Display" hyperlink). Nonetheless, in 2010, California's rate of child fatalities was 1.27, while New York's was 2.58. CHILD ABUSE AND NEGLECT DEATHS IN AMERICA 2012, *supra* note 34, at 17.

36. Some may argue that New York's CPS agencies are more effective than other states' CPS agencies given the higher child fatality rates of other states, such as Florida (4.44), New Mexico (3.27), and Texas (3.22). *See id.* However, despite any variances that may exist, New York's somewhat consistent rates between 2007 and 2011, *see* Child Maltreatment 2011, *supra* note 27, at 55, arguably show quite the opposite. Consistency shows that despite all the changes that have been made to New York's welfare system, these changes are ineffective because they have yet to significantly decrease the number of child fatalities in the state.

37. *See* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008) (explaining that the history of child welfare can be categorized into three distinct periods: (1) colonial times through 1875; (2) 1875 to 1962; and (3) modern day).

38. *See* *History*, NYSPPCC, <http://www.nysppcc.org/nysppcc/history/> (last visited Feb. 22, 2014) ("The New York Society for the Prevention of Cruelty to Children was the first child protection agency in the world.").

Criminal Liability Against Child Protective Services Caseworkers

the foundation upon which this current problem and unprecedented solution may be assessed.

1. The New York Society for the Prevention of Cruelty to Children

Prior to 1875, there existed no formal institution for child protection.³⁹ State intervention for children generally occurred “only when [a] child threatened social order.”⁴⁰

The rescue mission of a nine-year-old girl in New York led to the creation of the first child protective services organization: the New York Society for the Prevention of Cruelty to Children (NYSPCC).⁴¹ Mary Ellen’s guardians repeatedly abused and neglected her.⁴² She did not receive help until a visiting nurse, after being denied help from the police and child charities, reached out to a friend (Henry Bergh) who happened to be the president of the American Society for the Prevention of Cruelty to Animals.⁴³ It was Henry Bergh who then took Mary Ellen’s case to court to seek help on her behalf.⁴⁴

In 1875, after realizing that no governmental or nongovernmental agency was charged with protecting children, Bergh founded the NYSPCC.⁴⁵ Its mission was to “rescu[e] . . . children from the cruelty and demoralization[,] which neglect, abandonment[,] and improper treatment engender”⁴⁶ With authorization of the state attorney general and the county district attorneys, the NYSPCC quickly began

39. See Myers, *supra* note 37, at 449 (discussing how without outside assistance from the criminal justice system in the most severe circumstances, many children went without adequate formal protection); see also Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, in *CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES AND PROGRAMS* 16 (Gerald P. Mallon & Peg McCartt Hess, eds., 2005) (explaining how organizations that previously solely focused on juvenile delinquents did not begin to focus on protecting children’s basic rights until the latter part of the nineteenth century).

40. McGowan, *supra* note 39, at 16.

41. Myers, *supra* note 37, at 451 (“Organized child protection emerged from the rescue in 1874 of nine-year-old Mary Ellen Wilson”); see also Marian Eide, *The First Chapter of Children’s Rights*, AM. HERITAGE (July/Aug. 1990), <http://www.americanheritage.com/content/first-chapter-children%E2%80%99s-rights>.

42. Myers, *supra* note 37, at 451.

43. *Id.*

44. McGowan, *supra* note 39, at 17.

45. Myers, *supra* note 37, at 451–52; see also *The Setting: 1820–1870*, NYSPCC, http://www.nyspcc.org/nyspcc/history/the_setting/ (last visited Feb. 22, 2014).

46. *The Response: 1874–1875*, NYSPCC, http://www.nyspcc.org/nyspcc/history/the_response/ (last visited Feb. 22, 2014) (internal quotation marks omitted).

fulfilling its mission, rescuing seventy-two children within the first eight months of operation.⁴⁷

Shortly thereafter, and modeled after the NYSPCC, private entities formed hundreds of other nongovernmental anticruelty societies across the country.⁴⁸ With support and assistance from the federal government, these anticruelty societies played a huge role in the early protection of abused and maltreated children. These anticruelty societies continued to operate until the mid-twentieth century, which marked a shift in the child protection movement.⁴⁹

2. A Shift from Private to Public Protection

By the mid-1900s, services previously provided by private organizations, such as the NYSPCC, were now largely controlled by the states.⁵⁰ This shift occurred as a result of two effects: (1) the Great Depression, which stymied donations and funds to the privately owned societies; and (2) the federal government and states' increased recognition of the need to protect children.⁵¹

The Great Depression was a primary catalyst in the shift from private to public protection. Although the Children's Bureau was created in 1912, it was not until the 1930s, amidst the Great Depression and Congress's response to President Roosevelt's New Deal stimulus platform, where the federal government began to make its mark on child welfare.⁵² When Congress responded by passing the Social Security Act, the Act consisted of a provision that gave the Children's Bureau authority to work with state agencies and provide funds for

47. *The NYSPCC Story*, NYSPCC, http://www.nyspcc.org/nyspcc/history/the_story/ (last visited Feb. 22, 2014).

48. Myers, *supra* note 37, at 452; *see also* House of Representatives for the Second Session of the Forty-Fourth Congress, 2 United States Congressional Serial Set clxxviii (1877) (“[T]he Rochester Society for the Prevention of Cruelty to Children [was] organized October 6, 1875; the Newburgh Society for the Prevention of Cruelty to Children [was] organized November 4, 1875; . . . the California Society for the Prevention of Cruelty to Children, San Francisco, Cal. [was] organized August 30, 1876 . . .”).

49. *See* Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 PROTECTING CHILD. FROM ABUSE AND NEGLECT 23, 26–27 (1998) (explaining that by 1940, the government took control of functions once performed by private societies).

50. *See id.*

51. *See* Myers, *supra* note 37, at 453, 454; Schene, *supra* note 49, at 23, 27.

52. Myers, *supra* note 37, at 449, 453; *see also* SOCIAL SECURITY ADMINISTRATION OFFICE OF RESEARCH, EVALUATION AND STATISTICS SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 1997, at 2 (“The severe Depression of the 1930's made Federal action a necessity, as neither the States and the local communities nor private charities had the financial resources to cope with the growing need among the American people.”); McGowan, *supra* note 39, at 25 (explaining how legislation passed in the early days of the Roosevelt administration played a major role in reshaping the structure of child welfare services).

Criminal Liability Against Child Protective Services Caseworkers

the protection of abused and neglected children.⁵³ By the 1960s, with the effect the Great Depression had on the SPCCs, forcing almost all of them to close, an even greater burden fell on the federal government.⁵⁴

Additionally, starting in the earlier part of the twentieth century, America began to formally integrate and professionalize child protection work through the development of the social work profession.⁵⁵ With this new professional field of “child welfare,” states received increased calls to shift child protection from private organizations to the states and municipalities.⁵⁶ As states began to take on a more prominent role in child welfare, so did the federal government.⁵⁷

The shift toward a federally funded child protective structure, however, did not fully remedy the concerns of those who sought government participation. As society became more aware of the horrific levels of child abuse and maltreatment, and as states grew increasingly proactive, the federal government had no choice but to become more actively involved.⁵⁸

Child abuse, a once cloaked problem, was exposed to the greater public during, what one scholar terms, the “pediatric awakening.”⁵⁹ During the pediatric awakening, radiologists and psychiatrists began studying the x-rays of children who suffered skull fractures.⁶⁰ In 1962, these findings were published in an article entitled “The Battered-

53. See Social Security Act, ch. 531, § 521, 49 Stat. 620, 633 (1935).

54. Myers, *supra* note 37, at 453; see also Cassie Sikes, Child Abuse Prevention 5 (unpublished manuscript), available at http://www.academia.edu/4153140/Child_Abuse_Prevention (“The SPCC was funded by donations and with the Great Depression people could not donate to charities, such as the SPCC.”).

55. See Laura Oren, *The State’s Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 666 (1990); see also LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE—BOSTON, 1880–1960*, at 61–69 (1988) (discussing the transformation of child welfare from a charitable to professional institution).

56. See Myers, *supra* note 37, at 452 (explaining how one child advocate expressed his belief of societal acceptance toward public agency protection).

57. See *id.* at 452–53. From 1912 to 1935, the federal government took on a more significant role in child welfare. With the creation of the Children’s Bureau in 1912, the enactment of both the Sheppard-Towner Act and the Social Security Act, lack of federal government involvement in providing child welfare assistance became an antiquated notion. *Id.*

58. Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, in 8 PROTECTING CHILDREN FROM ABUSE & NEGLECT 4, 8 (1998) (“The government entity known as child protective services was born [as] a product of public outrage at the shocking physical evidence of unchecked parental power, anger, and violence.”).

59. See Oren, *supra* note 55, at 666 (citing ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 164 (1987)).

60. *Id.*

Child Syndrome” in the *Journal of the American Medical Association*.⁶¹ This research turned the focus of child abuse toward the child, which thus, detracted attention from the abuser.⁶² Society could no longer ignore these abuses and, as such, responses to these findings required immediate change.⁶³

Child abuse became a national issue as a result of the pediatric awakening and thus required a more comprehensive set of federal laws.⁶⁴ One of the first notable changes occurred as a result of action taken by the Children’s Bureau. Between 1963 and 1972, all fifty states passed a bill requiring certain professionals to report child abuse.⁶⁵ These statutes mirrored the Children’s Bureau model statute and were implemented with the purpose of funneling known cases of child abuse and maltreatment to the appropriate child protective services agency in an effort to mitigate ongoing child abuse and neglect.⁶⁶

Likewise, the Child Abuse Prevention and Treatment Act of 1974 (CAPTA) was the first major piece of federal legislation aimed at eliminating child abuse.⁶⁷ CAPTA allows the federal government to provide funding to states, helping them expand preventive programs and training for child abuse and neglect.⁶⁸ CAPTA not only provides increased funding for child protective services, but it also provides national standards that encourage states to pass laws requiring professionals to take on the role of identifying at-risk children and investigate suspected cases of child abuse and maltreatment.⁶⁹ CAPTA plays an integral part in child welfare protection because it “shap[es] the nationwide system of governmental child protective services in place today,” thus providing states with uniformed guidance

61. *Id.* at 666–67.

62. PLECK, *supra* note 59, at 170.

63. See Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 *TEX. J. WOMEN & L.* 1, 7 (2001) (“When published, [the article] ignited broad-based national efforts to address the problem of child abuse.”).

64. See Myers, *supra* note 37, at 454 (“The 1960s witnessed an explosion of interest in child abuse, and physicians played a key role in this awakening.”).

65. PLECK, *supra* note 59, at 173. For New York’s reporting requirements, see *infra* Part I.B 2.

66. JUDITH SEALANDER, *THE FAILED CENTURY OF THE CHILD: GOVERNING AMERICA’S YOUNG IN THE TWENTIETH CENTURY* 64 (2003) (discussing the purpose of the mandatory reporting statutes and their aim at ending the “evil” suffered by abused and neglected children).

67. Gerard F. Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 *J. L. & FAM. STUD.* 53, 54 (2007).

68. See 42 U.S.C.A. §§ 5101-5115; see also Oren, *supra* note 55, at 667.

69. See P.L. 93-247, 88 Stat. 4 (1974), amended by P.L. 104-235, 110 Stat. 3063 (1996); see also Schene, *supra* note 49, at 23, 27 (emphasis added).

Criminal Liability Against Child Protective Services Caseworkers

relating to the protection and safety of abused and maltreated children across the nation.⁷⁰ Luckily, for New York, this Act was merely reinforcement of the standards the state itself already set a year earlier.

B. New York City's Administration for Children's Services

In 1973, New York State enacted the Child Protective Services Act, which creates the legal authority of all the state's CPS agencies.⁷¹ The legislature found that "abused and maltreated children in [New York State were] in urgent need of an effective child protective service to prevent them from suffering further injury and impairment."⁷² The statute sought to "encourage more complete reporting of child abuse and maltreatment" and requires each county⁷³ in the state to establish a CPS agency to investigate such reports.⁷⁴

Prior to 1996, New York City was not oblivious to the inadequacies that plagued its child welfare system.⁷⁵ The existing deficiencies of the City's then CPS agency, the Child Welfare Administration (CWA), prompted the establishment of the agency currently tasked with protecting the children of New York City—the Administration for Children's Services (ACS).⁷⁶ After a highly publicized child fatal-

70. Myers, *supra* note 37, at 457.

71. N.Y. SOC. SERV. LAW § 411 (McKinney 2013); *see also* Child Protective Services Program Manual, ch. 3, at 1 (2006) ("The State legal authority for Child Protective Services is found in Social Services Law, Article 6, Title 6, Sections 411 through 428. New York regulatory authority is established in 18 NYCRR Part 432. Additionally, authority is established in the Family Court Act, Article 10.").

72. N.Y. SOC. SERV. LAW § 411 (McKinney 2013). Any child under the age of eighteen whose parent or legal guardian inflicts "serious injury by other than accidental means" or causes "substantial risk of physical injury . . . by other than accidental means" is, by definition, an abused child. § 412(1); FAM. CT. ACT § 1012(e). Likewise, any child under the age of eighteen whose parent or legal guardian fails to exercise a "minimum degree of care" as it relates to health, education, shelter and the like, or inflicts "harm, or a substantial risk thereof" is, by definition, a neglected or maltreated child. N.Y. SOC. SERV. LAW § 412(2) (McKinney 2013); FAM. CT. ACT § 1012(f).

73. New York State is comprised of several counties, however, this Comment focuses only on five counties—also known as boroughs—which collectively make up New York City: Bronx, Brooklyn, Long Island, Queens, and Manhattan.

74. *See* N.Y. SOC. SERV. LAW § 411 (McKinney 2013).

75. RUDOLPH W. GIULIANI & NICHOLAS SCOPPETTA, ADMIN. FOR CHILDREN'S SERVS., PROTECTING THE CHILDREN OF NEW YORK: A PLAN OF ACTION FOR THE ADMINISTRATION FOR CHILDREN'S SERVICES, Dec. 19, 1996, available at http://www.nyc.gov/html/acs/downloads/pdf/pub_reform_plan_1996.pdf ("On December 18, 1995, the Mayor announced that [Child Welfare Administration] would be systematically reorganized, and he put into immediate effect a number of changes in personnel selection, training, and other practices.").

76. Shannon DeRouselle, *Welfare Reform and the Administration for Children's Services: Subjecting Children and Families to Poverty and then Punishing Them for It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 419 (1999).

ity in 1995,⁷⁷ which was attributed to the ill-equipped structure of the CWA, city officials vowed to improve the City's child protection system and that improvement was to come by way of ACS.⁷⁸

ACS was the first agency in New York City solely dedicated to protect children from abuse and maltreatment.⁷⁹ The caseworkers of ACS are authorized under the Social Services Law to take certain steps to protect children who are subjected to abuse, maltreatment and/or neglect.⁸⁰

1. The Caseworkers

The work done at ACS is accomplished, for the most part, by ACS caseworkers. Caseworkers are often the first line of defense for an abused or maltreated child.⁸¹ Thus, it is imperative that caseworkers perform their responsibilities with the utmost due diligence and highest level of care.⁸² Caseworkers learn how to fulfill their investigative obligations by attending a six-week training program at the James Satterwhite Academy.⁸³ During this six-week training, caseworkers receive instruction in all areas of the practice, including the law and its theories.⁸⁴ Specifically, ACS caseworkers learn how to conduct child abuse investigations and risk assessments; effectively work with families; operate CONNECTIONS⁸⁵ and other

77. GIULIANI & SCOPPETTA, *supra* note 75 ("It was the [torturous] murder of Elisa Izquierdo on November 22, 1995 that led Mayor Rudolph W. Giuliani to order a review of the . . . Child Welfare Administration."); *see also* David Firestone, *Giuliani is Forming a New City Agency on Child Welfare*, N.Y. TIMES (Jan. 12, 1996), <http://www.nytimes.com/1996/01/12/nyregion/giuliani-is-forming-a-new-city-agency-on-child-welfare.html> ("Mr. Giuliani's abrupt new focus on child-related issues . . . was largely prompted by the beating death . . . of 6-year-old Elisa Izquierdo [in 1995].").

78. GIULIANI & SCOPPETTA, *supra* note 75 ("Mayor Giuliani established the Administration for Children's Services to stop the killing, abuse, and neglect of children in New York City and to make certain that the lives of victimized children are measurably improved."). *See generally* *Government Structure and Operations*, 2 CITY L. 9 (1996) (announcing, via a mayoral executive order, the separation of the CWA from the Human Resource Administration).

79. NYC ADMIN. FOR CHILDREN'S SERVS., <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited Feb. 22, 2014) [hereinafter NYC ACS].

80. *See* N.Y. SOC. SERV. LAW § 411(McKinney 2013) (explaining how the child protective service is responsible for investigating and protecting abused and maltreated children).

81. DeRouselle, *supra* note 76, at 422.

82. *Id.*

83. *Children's Services Graduates 137 New Child Protective Specialists*, NYC ADMIN. FOR CHILDREN'S SERVS., http://www.nyc.gov/html/acs/html/events/cps_graduation_apr09.shtml (last visited Feb. 23, 2014).

84. *Id.*

85. CHILDREN'S RIGHTS, AT THE CROSSROADS: BETTER INFRASTRUCTURE, TOO FEW RESULTS: A DECADE OF CHILD WELFARE REFORM IN NEW YORK CITY 5 (2007) (explaining that CONNECTIONS is the system for which all case documentations must be uploaded) [hereinafter CHILDREN'S RIGHTS].

Criminal Liability Against Child Protective Services Caseworkers

ACS databases; and use their discretion to effectuate the goals of the agency while mitigating trauma both for the child and the entire family.⁸⁶

2. Reporting Requirements

Pursuant to the Child Protective Services Act, Section 424 of the Social Services Law first requires ACS to “receive on a twenty-four hour, seven day a week basis[,] all reports of suspected child abuse or maltreatment”⁸⁷ Once ACS receives a report of suspected child abuse or mistreatment, it must then transmit that information to the State Central Registry (SCR).⁸⁸ Submission to the SCR makes the case “official” because the SCR will number the report and create a permanent record of the information.⁸⁹ The SCR will then screen the reports to ensure that there is sufficient information available for an ACS caseworker to conduct an investigation.⁹⁰

The SCR receives reports of child abuse in one of two ways. Section 413 of the Social Services Law requires certain persons or public officials to report allegations of abuse “when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child”⁹¹ These mandated reporters include physicians, police officers, social workers, school officials, teachers, and ACS caseworkers who operate in an official professional capacity.⁹² Notwithstanding this statutory obligation for required reporters, anyone who has reasonable cause to believe that a child is being subjected to abuse can report allegations of child abuse to the SCR.⁹³

86. *Id.* at 40.

87. N.Y. SOC. SERV. LAW § 424 (McKinney 2013). Not all reports, however, are made directly to ACS. Most reports are made to the Statewide Central Register (SCR) housed at the OCFS and then transferred to ACS. *See* § 422(2)(a). Further, the OCFS is only obligated to transfer reports to ACS when the allegations reported through the hotline can “reasonably constitute a report of child abuse or maltreatment. *Id.*; *see also* *Nicholson v. Williams*, 203 F. Supp. 2d 153, 166 (2002).

88. *See* § 424. The SCR, also known as the “Hotline,” is operated by the OCFS and receives calls dealing with allegations of child abuse, neglect and maltreatment in the state of New York. OCFS, <http://ocfs.ny.gov/main/cps/> (last visited Feb. 24, 2014); *see also* § 422-1, 2(a).

89. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.1 (“A case is established through the [SCR] numbering process”).

90. *See* N.Y. SOC. SERV. LAW § 424 (McKinney 2013).

91. § 413(1)(a).

92. *See id.*

93. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 166 (2002) (explaining that anyone who believes a child is being abused or neglected can call into the SCR and make a report).

Because successful child protection often requires assistance from multiple parties, such as police departments, the Family Court, and district attorneys offices, this open flow of communication is critical so that all parties are equally informed.⁹⁴ Accordingly, ACS is obligated to transmit information about certain cases to other state authorities. For example, for those cases involving the death of a child, physical injuries, and sexual abuse, ACS must notify the proper district attorney and local law enforcement.⁹⁵ For all other cases, ACS must provide these authorities with a timely assessment to determine if local law enforcement intervention is necessary.⁹⁶

3. Case Assignment

After the report has been properly recorded by the SCR, the case is assigned to an individual caseworker. Procedures stipulating exactly how a case is assigned to an individual ACS caseworker are not statutorily provided, but, instead, internally constructed by ACS.⁹⁷ ACS guidelines state that once the report reaches ACS (or after ACS has properly relayed the information to the SCR for enumeration and screening), an ACS field office applications worker will forward the report to a supervisor.⁹⁸ The supervisor will then assign the case to a Child Protection Specialist (ACS caseworker) who is responsible for managing and investigating the case.⁹⁹

4. Investigating Reports

ACS is legally obligated to conduct proper investigations of suspected child abuse and neglect in New York City. Pursuant to Section 424 of the Social Services Law, ACS must initiate an investigation within twenty-four hours of receiving a report.¹⁰⁰ When conducting an investigation, an ACS caseworker must first conduct a “preliminary

94. *See id.* at 166 (explaining how ACS is the primary, but not the only party, responsible for child protection).

95. *See* § 424 .

96. *See id.*

97. By law, ACS must internally create a set of policies, regulations, and practices to be maintained in a written program manual. *See* § 421(6); N.Y. COMP. CODES R. & REGS. tit. 18, § 423.6(a) (2014); *see also* NYC Charter § 1043 (“Each agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.”).

98. *See Williams*, 203 F. Supp. 2d at 166 (explaining the process of case assignments).

99. NYC ACS, *supra* note 79.

100. *See* N.Y. SOC. SERV. LAW § 424(6) (McKinney 2013).

Criminal Liability Against Child Protective Services Caseworkers

assessment” of the reported child’s safety.¹⁰¹ “Preliminary assessment of safety means an evaluation of safety factors to determine whether the child(ren) named in the report and any other child in the household may be in immediate danger of serious harm.”¹⁰² For this stage of the investigation, both face-to-face contact and telephone contact are appropriate means of fulfilling this obligation.¹⁰³

The duties of an ACS caseworker do not end with a preliminary assessment. “Safety must be continuously assessed throughout the life of an open child welfare case”¹⁰⁴ This means that throughout the investigation, the ACS caseworker must continue to assess the child’s environment; determine the severity of any risks that may exist if the child remains in the home; and determine the nature, extent, and cause of any condition listed in the report.¹⁰⁵ This ongoing assessment occurs with every contact made by the ACS caseworker, either through a home visit or other means of communication.¹⁰⁶ Particularly, and most importantly, this ongoing assessment, when utilized throughout an investigation, helps identify “present safety factors,” “threat of immediate danger,” and determines the need to intervene to facilitate safety.¹⁰⁷ In totality, a full investigation must include: face-to-face interviews with the subjects of the report, retrieval of information from the reporting source, a preliminary assessment of safety, and a minimum of one home visit.¹⁰⁸

In addition to actually conducting the investigation, ACS caseworkers must document their investigation throughout the life of an open case. The automated system used to document such information is called CONNECTIONS.¹⁰⁹ ACS caseworkers must use this system to track all data of the children and families served by the agency.¹¹⁰ Regulatory requirements and ACS manual provisions re-

101. CHILD PROTECTIVE SERVICES PROGRAM MANUAL 14 (2007) [hereinafter PROGRAM MANUAL].

102. *Id.*

103. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(i)–(iii) (2014).

104. PROGRAM MANUAL, *supra* note 101, at 14.

105. N.Y. SOC. SERV. LAW § 424(6)(a) (McKinney 2013). The ACS caseworker must also evaluate the safety of any other children in the home, even if they are not included in the initial report. *Id.* Additionally, if the ACS caseworker is being denied access to the home, he or she must immediately notify the parent or legal guardian that a court order may be sought by the agency to gain access to the child. *Id.* at § 424(6-a).

106. PROGRAM MANUAL, *supra* note 101, at 14.

107. *Id.* at 14–15.

108. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3) (2014).

109. PROGRAM MANUAL, *supra* note 101, at 14; *see also* CHILDREN’S RIGHTS, *supra* note 85, at 1.

110. PROGRAM MANUAL, *supra* note 101, at 14.

quire that documentations be made at specific intervals. Information must be entered into CONNECTIONS (1) within seven days of receiving a report, (2) within twenty-four hours of a reported child fatality, (3) within the last seven days prior to completing and submitting an investigation conclusion for approval, and (4) whenever continuing child welfare issues necessitate a continued assessment of the child's safety.¹¹¹

An ACS caseworker must also intervene on a child's behalf if the circumstances warrant intervention. Section 417 of the Social Services Law provides:

[An ACS caseworker] shall take all appropriate measures to protect a child's life and health including, when appropriate, *taking or keeping a child in protective custody* without the consent of a parent or guardian if such person has reasonable cause to believe that the circumstances or condition of the child are such that continuing in his or her place of residence or in the care and custody of the parent, guardian, custodian or other person responsible for the child's care presents an imminent danger to the child's life or health.¹¹²

Notwithstanding, taking a child into protective custody is not the only form of intervention available. If an ACS caseworker believes a child is suffering from abuse or maltreatment, but is not in imminent danger, the caseworker must offer the family abuse and maltreatment services.¹¹³ These services include, but are not limited to, continued supervision, group therapy, counseling, family planning, and day care.¹¹⁴

5. Case Dispositions

Section 424 of the Social Services Law provides that ACS must make a decision on any given case within sixty days of its commencement.¹¹⁵ Based on the information obtained throughout the investigation, the ACS caseworker must decide whether there is a credible case of abuse against the alleged perpetrator.¹¹⁶ Before the decision is finalized, the caseworker's supervisor must review the caseworker's

111. *Id.*

112. N.Y. SOC. SERV. LAW § 417(1)(a) (McKinney 2013) (emphasis added).

113. § 424(10).

114. SAM HOYT, N.Y. STATE ASSEMBLY, A GUIDE TO NEW YORK'S CHILD PROTECTIVE SERVICES SYSTEM 27-28 (2001 ed.), <http://assembly.state.ny.us/comm/Children/20011016/html/doc.html#fn1>.

115. See N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3) (2014); see also N.Y. SOC. SERV. LAW § 424(7) (McKinney 2013).

116. See tit. 18, § 432.2(b)(3); see also N.Y. SOC. SERV. LAW § 424(7) (McKinney 2013).

Criminal Liability Against Child Protective Services Caseworkers

findings and approve the intended course of action.¹¹⁷ Once the decision is approved by the supervisor, the agency will close the case as either “indicated” or “unfounded.” A case will be closed as “indicated” when there is “credible evidence of the alleged abuse or maltreatment.”¹¹⁸ If the case is indicated and ACS offers services but they are refused, ACS can petition the Family Court to make a determination that the child is in need of protective care.¹¹⁹ Additionally, ACS must close a case as “unfounded” when there is no “credible evidence of the alleged abuse or maltreatment.”¹²⁰ Finally, once the decision is made, no other state department may independently review the decision as ACS has sole discretion and authorization to determine the outcome of these investigations.¹²¹

C. ACS: Why Is the System Failing?

The recurring theme that runs throughout the historical development of child protective services is that there is a need to protect children from abuse and neglect, and the persons best suited to do so are those who are trained to properly identify and investigate such allegations. All of the statutory mandates discussed above delineate specific requirements that are to be fulfilled by caseworkers when ACS receives reports of abuse and neglect. With such training and procedures set in place, it should seem difficult to understand how cases like Marchella’s continue to occur, but it is not. Caseworkers face many challenges in this line of work, but these challenges are superseded by infrastructural deficiencies that exist within ACS, including insufficient training, insufficient oversight, and heavy caseloads.¹²² Additionally, just as ACS’s infrastructure is deficient, so, too, are the remedial responses to decrease the number of preventable child fatalities that occur in New York City.

117. See tit. 18, § 432.2(b)(3).

118. N.Y. SOC. SERV. LAW § 412(6)–(7) (McKinney 2013).

119. § 424(10)–(11).

120. § 412(6).

121. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b) (2014) (“The child protective service has the sole responsibility for making a determination within 60 days after receiving the report as to whether there is some credible evidence of child abuse and/or maltreatment so as either to ‘indicate’ or ‘unfound’ a report of child abuse and/or maltreatment.”); see also *Nicholson v. Williams*, 203 F. Supp. 2d 153, 166 (2002) (explaining that decisions made by ACS cannot be independently evaluated by the SCR or any other state department).

122. See generally U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN’S SERVS., *A NATION’S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES* 55–57 (1995) (explaining how flawed and overburdened the CPS system is in New York).

II. INADEQUATE REMEDIAL MEASURES

Throughout the years, many changes have been made in an attempt to better protect abused and neglected children.¹²³ However, these changes have not yielded a significant impact on the state of child welfare or the number of preventable deaths that occur post-ACS involvement. Notwithstanding the training, mission, and statutory obligations of ACS caseworkers, incidents like Marchella's continue to occur. Thus, what follows is a discussion exploring some of the changes—proffered or made both by the legislature and ACS—and an analysis as to why they are inadequate.

A. Quality Controls

A Child Fatality Review Team (CFRT)—a team composed of CPS caseworkers; public health care providers; and representatives from the OCFS, law enforcement, and the office of the medical examiner¹²⁴—is one of several types of controls used to help CPS agencies improve the quality of services provided to abused and neglected children. Under a 1996 CAPTA amendment,¹²⁵ each state is required to dedicate one of its Citizen Review Panels solely to child protection.¹²⁶ Thus, since 1999, New York's compliance with the CAPTA amendment has been reflected in the Social Services Law,¹²⁷ which charges CFRTs with the task of “prevent[ing] future deaths, to assist in the investigative process and improve the social services system.”¹²⁸

123. See, e.g., S.B. 4441, 2013 Leg., 236th Sess. (N.Y. 2013) (proposing changes to the existing Social Services Law that will require caseworkers to photograph all home visits made during investigations of suspected child abuse and maltreatment); Nixmary Brown's Law, S.B. 2659, 2011 Leg., 234th Sess. (N.Y. 2011) (amending section 125.27—Murder in the first degree—to now classify specific types of child abuse that result in death as first-degree murder).

124. N.Y. SOC. SERV. LAW § 422-b(3) (McKinney 2013).

125. See generally *A Brief History of Child Death Review in the United States*, CHILD DEATH REV., <http://www.childdeathreview.org/history.htm> (last visited Feb. 22, 2014) (chronicling the rise of CFRTs, starting locally in 1978 in three states, the mandate of CFRTs under the reauthorization of CAPTA in 1996, and the improvements made to CFRTs between 1996 and 2005).

126. See *State Spotlight: New York*, CHILD DEATH REV., <http://www.childdeathreview.org/spotlightNY.htm> (last visited Feb. 22, 2014).

127. S.B. 5689, 222d Leg., 1999 Reg. Sess. (N.Y. 1999) (“This legislation brings the State into compliance with the federal Child Abuse Prevention and Treatment Act (CAPTA) amendments of 1996”); see N.Y. SOC. SERV. LAW § 371-b(3) (McKinney 2013) (“Each citizen review panel shall, by examining the policies and procedures of the state and social services districts and, where appropriate, specific cases, evaluate the extent to which the agencies are effectively discharging their child protection responsibilities”).

128. See *State Spotlight: New York*, *supra* note 126; see also S.B. 5689 (“[T]he bill encourages local social services districts to establish multidisciplinary teams and standardizes their practices

Criminal Liability Against Child Protective Services Caseworkers

1. Child Fatality Review Teams in New York

With approval from the OCFS, any municipality may create local fatality review teams pursuant to Section 422(b) of the Social Services Law.¹²⁹ For example, the New York City Regional Office (NYCRO) reviews child fatalities that occur in the five boroughs.¹³⁰ The NYCRO examines ACS's case practices used both prior to and after a fatality.¹³¹ The group's findings are often issued in a "Child Fatality Report," which sometimes includes a list of considerations to improve practices moving forward.¹³²

In addition to the statutorily authorized CRFTs, ACS has established its own fatality team to assist with reviews of its child protective services operations and investigations. When a child fatality occurs, and that child was previously known to ACS, the Accountability Review Panel (ARP) will conduct an assessment of both past and current institutional practices.¹³³ In its review, the ARP identifies individual case-by-case and systemic concerns in seeking to develop ways to improve the functionality of the system.¹³⁴ Meetings are held bi-monthly and membership includes a vast variety of professionals, including, but not limited to, social workers, physicians, and mental health professionals.¹³⁵

2. ChildStat

In July 2006, ACS launched a program called ChildStat, after recognizing the need for a more comprehensive tool to assess case prac-

to provide a coordinated response to cases of child abuse or neglect, helping to diminish trauma for the subject child . . .").

129. N.Y. SOC. SERV. LAW § 422-b(1) (McKinney 2013).

130. See CHILDREN'S RIGHTS, *supra* note 85, at 132.

131. *Id.* at 133.

132. See, e.g., N.Y.C. CHILD FATALITY REV. ADVISORY TEAM, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, 2012 REPORT: UNDERSTANDING CHILD INJURY DEATHS (2012); see also SUPREME COURT OF THE STATE OF NEW YORK KINGS COUNTY, IN THE MATTER OF THE INVESTIGATION INTO R10-359, GRAND JURY REPORT PURSUANT TO CPL § 190.85(1)(c), 14-15 n.13 (2010). See generally N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, 2011 REPORT FROM THE CHILD FATALITY REVIEW TEAM: UNDERSTANDING CHILD INJURY DEATHS CHILDREN'S RIGHTS (2011) (examining trends in child fatalities, presenting strategies to improve the child welfare system and offering final recommendations).

133. See CHILDREN'S RIGHTS, *supra* note 85, at 131.

134. See, e.g., N.Y.C. ADMIN. FOR CHILDREN'S SERVS., ACCOUNTABILITY REVIEW PANEL REPORT 2009 & 2010 (2010) ("This report presents the Panel's recommendations and grounds them in trends in national child maltreatment fatalities and emerging research in the field of child welfare.").

135. See CHILDREN'S RIGHTS, *supra* note 85, at 132.

tices.¹³⁶ ChildStat's core operational component is a weekly roundtable held by the Commissioner where city officials, borough directors, and ACS zone managers are brought together to discuss and review current child welfare trends.¹³⁷ The cases reviewed during ChildStat conferences are selected at random, and the Child Protective Manager from ACS is given three days to prepare for the conference.¹³⁸ Together, the group identifies current concerns and areas for improvement, all the while focusing on accountability and building a more developed child welfare system.¹³⁹

B. Impact of Quality Controls

The overall quality of the investigations, assessments, and services are all key components needed to ensure that children are adequately protected by the system.¹⁴⁰ Thus, it is critical that CPS workers are equipped with the necessary tools to make proper determinations regarding reports of alleged child abuse and maltreatment. Such determinations help them assess the possibility and likelihood of future risks. When assessing the quality of these investigations, there proves to be two key areas of concern: (1) timeliness and comprehensiveness of investigations and (2) the quality of risk assessments, decision-making, and case supervision.¹⁴¹

Even with all the present quality controls, there are still grave deficiencies that stifle the quality of services CPS caseworkers are able to provide.¹⁴² These deficiencies include "untimely and inadequate investigations, incomplete assessments and inadequate caseworker training, support and supervision."¹⁴³

Despite the CFRTs, child fatality statistics between 2008 and 2011 have not significantly decreased.¹⁴⁴ Instead, CFRT reports show the number of child fatality reports prepared by the CFRTs actually in-

136. See N.Y.C. ADMIN. FOR CHILDREN'S SERVS., CHILDREN'S SERVICES UPDATE 1 (Fall 2007) [hereinafter ACS, CHILDREN'S SERVICES UPDATE], available at http://www.nyc.gov/html/acs/downloads/pdf/news07_fall.pdf; see also CHILDREN'S RIGHTS, *supra* note 85, at 39.

137. See ACS, CHILDREN'S SERVICES UPDATE, *supra* note 136, at 1, 5; CHILDREN'S RIGHTS, *supra* note 85, at 39.

138. ACS, CHILDREN'S SERVICES UPDATE, *supra* note 136, at 7.

139. CHILDREN'S RIGHTS, *supra* note 85, at 39.

140. *Id.* at 15.

141. See *id.* at 17.

142. See *id.* at 17 (explaining how high profile deaths like that of Marchella's and Nixzmary's shed light on ACS deficiencies that resemble those identified years ago).

143. *Id.*

144. Table 4-2 *Child Fatalities, 2007-2011*, CHILDREN'S BUREAU (May 8, 2013), <http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2011-data-tables>.

Criminal Liability Against Child Protective Services Caseworkers

creased, respectively, from 89 to 95 to 107 to 89 to 107 between the years 2006 and 2010, and they also show that seven additional fatalities occurred between 2007 and 2010.¹⁴⁵ “In each of the seven cases, ACS engaged in the repetition of the same fundamental failures in investigatory procedures and practices [previously] found by DOI”¹⁴⁶ These same fundamental failures were “inexperience, inadequate training, ineffectual supervision, untimely, incomplete and inaccurate case documentation, and a shortage or outright lack of necessary equipment and logistical support.”

ChildStat also fails to yield its intended results. Because the CPM and caseworker are given three days notice prior to a ChildStat conference, they have time to “fix” whatever deficiencies exist in their reports before they actually appear in front of the Commissioner. This inevitably has the potential to present misleading, or even worse, false information to the Commissioner regarding the status of an ongoing case. Additionally, ChildStat also forces CPS caseworkers to squander away hours of their time during the workday, as they help the Child Protective Manager prepare for the roundtable; this simultaneously leaves their caseloads and documents in limbo.¹⁴⁷ As a result of ChildStat, caseworkers have less time to spend on the same amount of cases, leaving at-risk, abused, and neglected children’s cases hanging in the balance.

C. Legislative Amendment: “Marchella Pierce’s Law”

Like quality controls, legislative changes often do little to remedy the existing problem. Legislative changes most often occur when the media exposes cases like Marchella’s to the greater population. The legislature, under pressure placed on them by child advocates, rush to change the existing laws in an attempt to rectify the current problem and ease the public’s outrage.¹⁴⁸ This cycle can be illustrated by looking at changes made after Marchella’s death.

145. See Supreme Court of the State of New York Kings County, *In the Matter of the Investigation Into R10-359*, Grand Jury Report Pursuant to CPL § 190.85(1)(c), at 15 n.13.

146. *Id.* at 54.

147. See Gonnerman, *supra* note 8 (“[ACS often held] ‘child-safety conferences’ . . . in which supervisors and caseworkers met with parents before going to court In theory, the purpose of these meetings was to give everyone a chance to discuss what would be in the children’s best interests. . . . In practice, . . . the decision about whether to remove a kid is almost always made ahead of time, rendering these meetings virtually useless. A ‘fantastic idea, terrible in actuality,’ ‘A monumental suck of time.’”).

148. Mychal L. Feldman, *The Child Welfare System and Its Implications on the Best Interests of Children*, 14 N.Y.L. SCH. J. HUM. RTS. 615, 624–25 (1998) (“Every time the press gets access

Marchella's mother starved, beat, and bound the four-year-old to death,¹⁴⁹ and after her death, the legislature determined that children, such as Marchella, "fall through the cracks, which results in substantial harm and sometimes death."¹⁵⁰ The legislature sought to seal those "cracks" by introducing Marchella Pierce's Law in 2011.

Marchella Pierce's Law seeks to amend Section 421 of the Social Services Law.¹⁵¹ Section 421(3) primarily outlines the responsibilities of the OCFS.¹⁵² It requires the department to establish uniform requirements among the local social service departments to be used during the performance of child abuse or maltreatment investigations.¹⁵³ The amendment to Section 421(3) reads as follows:

The department shall require that every caseworker, child protective services employee or any person acting pursuant to a contract for services with a local social services department who has contact

to information on another child murdered from abuse, the public is outraged and lobbies to reform the current state of our child welfare laws."); *see, e.g.*, Nixzmary Brown's Law, S.B. 2659, 234th Legis. Sess. (N.Y. 2011) (amending Section 125.27 of New York State's penal law—murder in the first degree—to now classify the type of abuse inflicted upon Nixzmary and her subsequent death as first-degree murder); Sewell Chan, *City to Adopt Changes in Handling of Abuse Cases*, N.Y. TIMES (Mar. 30, 2006), http://www.nytimes.com/2006/03/30/nyregion/30abuse.html?n=Top/Reference/Times%20Topics/Organizations/A/Administration%20for%20Children%27s%20Services&_r=2&adxnnl=1&oref=slogin&adxnnlx=138765725-GINtTkh4jIhpgUVm6z+saQ ("Responding to the killing of Nixzmary Brown, a 7-year-old girl beaten to death in January, a city panel yesterday recommended changes to improve coordination between the child welfare agency and the Police and Education Departments, including giving teachers and guidance counselors more leeway to report signs of neglect."); Feldman, *supra* note 148, at 633–64 (explaining how Elisa's Law amended Section 422 of the Social Services Law to allow officials and government agencies to pierce the veil of confidentiality surrounding an abused child's case whereas they could obtain more information to make the system more effective). When these types of preventable deaths occur, the legislature takes no issue with speaking to make the public aware of the necessary changes:

The legislature finds that the deaths of children due to abuse, neglect and maltreatment despite the involvement of government agencies charged with protecting these children is intolerable and unacceptable, and finds equally unacceptable laws which bar legitimate and appropriate inquiries about the activities of such agencies in these cases, for they frustrate the ability of the legislature to set informed policy and act in an appropriate oversight capacity; impair the ability of independent government agencies to determine the effectiveness of services, staff and funding; corrode public trust; and undermine the right of the public to determine whether abused children are being adequately protected.

S.B. 5959, Ch. 12, 219th Legis. Reg. Sess. (N.Y. 1996). But it's not just the legislature that speaks out; preventable child fatalities prompt other government officials to take a stand as well. *See generally* Joyce Purnick, *Metro Matters; Child Abuse and Laws Protecting Protectors*, N.Y. TIMES, Nov. 27, 1995, at 2, available at 1995 WLNR 3847825 (explaining how the Mayor criticized the pre-amended law and quoting the then-commissioner of the child welfare agency and a New York Senator, both of whom expressed their discontent with the pre-amended law).

149. *See supra* note 2.

150. S.B. 4441, 236th Legis. Sess. (N.Y. 2013).

151. *See id.*

152. N.Y. SOC. SERV. LAW § 421(3) (McKinney 2013).

153. *Id.*

Criminal Liability Against Child Protective Services Caseworkers

with a child as part of a treatment plan or supervision and monitoring, document *each* such contact with a photograph taken of the child during such visit or contact¹⁵⁴

With the current law, caseworkers do not have to document each contact made with a child.¹⁵⁵ Thus, caseworkers who fail to live up to the standards set forth by the law are able to go undetected, allowing children to experience continued suffering.¹⁵⁶

Oversight by the legislation is lacking. With the amendments, caseworkers will be required to document a child's physical conditions and his or her general emotional state.¹⁵⁷ Senator Martin Golden, sponsor of the bill, stated that this amendment will help ACS caseworkers "do a better job" because "[t]here will be a date, there will be a time."¹⁵⁸ These potential regulations promulgated by the amendment seek to force caseworkers to "timely and accurate[ly] fil[e] . . . documentation in case files, [and] prevent the manipulation of case files—such as was alleged to have occurred in Marchella Pierce's case."¹⁵⁹

D. Practicality of the Proposed Legislative Amendment

Notwithstanding the legislature's intent, the proposal will likely face challenges.¹⁶⁰ The existing documentation requirements seem to already place a heavy burden on caseworkers; balancing paperwork, while managing heavy caseloads and making the required home visits for each case of suspected abuse, is an everyday dilemma.¹⁶¹ For example, one caseworker stated that ACS management "[r]equires 80 to 100 pages of paperwork per case and prioritizes paperwork over field visits."¹⁶² This paperwork, along with the proposed picture require-

154. S.B. 4441, 236th Legis. Sess. (N.Y. 2013) (emphasis added).

155. *Id.*

156. *Id.*

157. *Id.*

158. Glenn Blain, *ACS Should Take Kids' Pictures to Help Stop Abuse*, *Brooklyn State Sen. Martin Golden Says*, DAILY NEWS (Apr. 6, 2011, 4:00 AM), <http://www.nydailynews.com/new-york/acs-kids-pictures-stop-abuse-brooklyn-state-sen-martin-golden-article-1.109662>.

159. S.B. 4441, 236th Legis. Sess. (N.Y. 2013).

160. EVERY CHILD MATTERS EDUCATION FUND, *supra* note 26, at Introduction (explaining how new policies that are created in reaction to a child fatality often do not remedy the need to make children safer).

161. Gonnerman, *supra* note 8 ("Caseworkers complained privately that ACS's managers cared more about paperwork than field visits, that there was so much paperwork to do that they couldn't possibly visit every child every two weeks—which is what they were supposed to be doing.")

162. Susan Edelman & Angela Montefinise, *ACS Staff Buried in Busywork & Stricken with Fear*, N.Y. POST, May 14, 2006, at 1, available at 2006 WLNR 8495743.

ment must be recorded in CONNECTIONS.¹⁶³ However, reports show that CONNECTIONS is “slow and confusing and has serious technical problems.”¹⁶⁴ Thus, although a new picture requirement seems so minute in the present day context, this task may further bog down caseworkers with more busy work, preventing them from focusing on the home visits and the safety of the child.

The funding needed to comply with such a requirement will also present a challenge for the agency because ACS would need to ensure that each caseworker has a device capable of capturing images. Federal funding for child welfare services constitutes half of the state’s total budget spent on child services, with the other half being sourced from a variety of state and local funding streams.¹⁶⁵ In a 2012 audit finding the Independent Budget Office conducted an audit in which the results indicated that there are indeed financial issues concerning ACS.¹⁶⁶ The cause of these concerns stems from “federal fiscal problems and an absence of savings.”¹⁶⁷ This ultimately leaves the agency with less than sufficient means of adequately protecting children. Thus, with funding issues already plaguing the agency, it is difficult to parse out from where additional funding will be sourced for the implementation of the proposed amendment. With such inadequate remedial measures, preventable child fatalities, despite ACS involvement, remain an issue.

III. CRIMINAL CULPABILITY AS A UNIQUE SOLUTION TO END PREVENTABLE CHILD FATALITIES

Since ACS’s inception, there have been ongoing concerns regarding the quality of investigation services rendered by its caseworkers.¹⁶⁸ Because caseworkers do not always properly fulfill their duties, the reporting of abuse or maltreatment to a state agency does not always prevent the untimely death of a child.

163. CHILDREN’S RIGHTS, *supra* note 85, at 5 (explaining how CONNECTIONS is the system for which all case documentations must be uploaded).

164. *Id.* See generally N.Y. STATE ASSEMBLY, TOO MUCH, TOO LITTLE, TOO LATE: AN ASSEMBLY INVESTIGATION OF CONNECTIONS—NEW YORK’S STATEWIDE CHILD WELFARE COMPUTER SYSTEM, (2001) (detailing the inadequacies of the CONNECTIONS system).

165. Kasia O’Neill Murray, *The Child Welfare Financing Structure*, PEW CHARITABLE TR. (Aug. 2, 2004).

166. See, e.g., *Preventive Services Funding Inadequate*, 18 CITY L. 4 (2012).

167. *Id.*

168. See CHILDREN’S RIGHTS, *supra* note 85, at 16 (following a CFRT investigation in 1995, serious concerns were raised about ACS’s ability to fulfill its child protective duties, falling way below legal standards).

Criminal Liability Against Child Protective Services Caseworkers

Individual CPS caseworkers have been indicted and/or held criminally liable for a variety of claims. These claims include, but are not limited to, failing to conduct proper investigations, failing to remove a child when the circumstances warrant removal, and inadequate foster care services.¹⁶⁹ Although occurring less frequently than civil law suits, criminal liability does exist, and more rarely, caseworkers have been prosecuted for criminally negligent homicide,¹⁷⁰ despite the protection of common law and statutory immunity.

A. Criminally Negligent Homicide

Caseworkers may be held criminally culpable for conduct punishable under the penal law. As a lesser offense to murder, Section 125.10 of New York's Penal Law states "[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."¹⁷¹ Criminal negligence, as defined by Section 15.05(4) of the Penal Law, holds a defendant culpable when he or she "fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."¹⁷² Thus, although the defendant may not have intended to cause death, he or she will nonetheless be found culpable.¹⁷³

169. BESHAROV, *supra* note 22, at 4 ("[C]aseworkers have been civilly sued or criminally prosecuted for all aspects of child protection work.").

170. *Id.* at 1.

171. N.Y. PENAL LAW § 125.10 (McKinney 2014).

172. N.Y. PENAL LAW § 15.05(4) (McKinney 2014); *see also* People v. Boutin, 555 N.E.2d 253, 254 (N.Y. 1990). Unlike other homicide charges, a defendant facing a charge of criminally negligent homicide has been charged for his or her *failure* to perceive the risk of death in a situation where he or she has a legal duty to be aware of the risk (emphasis added). *See* People v. Stanfield, 330 N.E.2d 75, 77 (N.Y. 1975) (citing People v. Haney, 284 N.E.2d 564, 565 (N.Y. 1972) ("The essential distinction between the crimes of manslaughter, second degree, and criminally negligent homicide is the mental state of the defendant at the time the crime was committed."). *Compare* N.Y. PENAL LAW § 125.10 ("A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person."), *and* N.Y. Penal Law § 15.05, subd. 4 ("A person acts with *criminal negligence* with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists." (emphasis added)), *with* N.Y. PENAL LAW § 15.05, subd. 3 ("A person acts *recklessly* with respect to a result or circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstances exists." (emphasis added)).

173. *See* People v. Davis, 49 A.D.2d 437, 444 (N.Y. App. Div. 1975), *rev'd*, 356 N.E.2d 290 (N.Y. 1976).

In essence, criminally negligent homicide “involves the failure to perceive the risk in a situation where the offender has a legal duty of awareness.”¹⁷⁴ Thus, it proffers an offense for conduct that is “socially undesirable” and prompts people to be aware of the “consequences of their conduct and influence them to avoid creating undesirable risks.”¹⁷⁵ For example, in *People v. Henson*, the parents of a four-year-old boy were convicted of criminally negligent homicide in connection with the death of their son.¹⁷⁶ The New York Court of Appeals affirmed the convictions, finding that “the defendants’ failure to provide prompt medical care for their son reflected ‘a culpable failure to perceive a substantial and unjustifiable risk’ of death, constituting ‘a gross deviation from the standard of care that a reasonable (parent) would observe.’”¹⁷⁷ The court reasoned that there was an abundance of proof that would have indicated to the parents, days before the child’s death, that he was very sick and in need of medical attention.¹⁷⁸ Specifically, the parents knew that child had been congested for three consecutive days prior to his death and was told by the babysitter the night before the child died that the child was breathing abnormally heavy.¹⁷⁹ Thus, the court found that this evidence made the defendants’ guilt “perfectly clear.”¹⁸⁰

B. Limitations of Criminal Culpability: Statutory Immunity Protection

Notwithstanding a viable charge of criminally negligent homicide, caseworkers are generally protected by statutory immunity,¹⁸¹ which will preclude an otherwise valid claim. Both New York statutes and case law provide a framework for determining whether individual employees of the state (caseworkers) are immune from liability. If the components of the framework are established, statutory immunity will grant protection to an otherwise criminally culpable caseworker, thus

174. *People v. Henson*, 304 N.E.2d 358, 360 (N.Y. 1973).

175. *Id.*

176. *Id.* at 358–59.

177. *Id.* at 361.

178. *Id.*

179. *Id.* at 359, 361.

180. *Id.* at 362.

181. Common law immunity is an alternative form of protection for caseworkers. *See Sean M. v. City of New York*, 20 A.D.3d 146, 158 (N.Y. App. Div. 2005). However, common law immunity is mostly used for civil tortious law cases. *See, e.g., McLean v. City of New York*, 905 N.E.2d 1167, 1173 (N.Y. 2009) (holding that a person may not be held liable for discretionary acts).

Criminal Liability Against Child Protective Services Caseworkers

allowing them to escape liability. This section illustrates how New York courts apply such immunity in cases alleging liability against individual caseworkers for their failure to fulfill their responsibilities under the Social Services Law and Department of Social Services regulations.

1. Statutory Immunity Pursuant to the New York Social Services Law

The Social Services Law provides, in part, immunity to individual caseworkers. Pursuant to Section 419 of the Social Services Law, caseworkers are provided immunity from civil and criminal liability. Specifically, the statute provides:

Any person, official, or institution participating in good faith in the providing of a service pursuant to . . . this title, the making of a report, the taking of photographs, the removal or keeping of a child pursuant to this title, or the disclosure of [CPS] information in compliance with . . . this chapter . . . shall have immunity from any liability, civil or criminal, that might otherwise result by reason of such actions.¹⁸²

“Good faith” is presumed if two prerequisites are satisfied.¹⁸³ As long as the caseworker (1) refrained from engaging in willful misconduct or grossly negligent conduct and (2) was acting within the scope of his or her employment, immunity will be granted.¹⁸⁴ By definition, this immunity provision grants qualified immunity to caseworkers, available only to those who satisfy these conditions.¹⁸⁵ Courts have given context to both of these prerequisites, illustrating exactly how the immunity operates in practice.

New York courts have found that conduct equates to willful misconduct or gross negligence when the evidence shows that a person “failed to exercise even slight care, or exhibited a complete disregard

182. N.Y. SOC. SERV. LAW § 419 (McKinney 2013).

183. *See id.*

184. *See id.*; *see also Sean M.*, 20 A.D.3d at 156 (citing *Van Emrik v. Chemung Cnty. Dept. of Soc. Servs.*, 220 A.D.2d 952, 953 (N.Y. App. Div. 1995)) (explaining the qualifications for immunity under Section 419 of the Social Services Law).

185. Qualified immunity, unlike absolute immunity, is immunity that is conditioned upon the absence or presence of specified conduct. *See, e.g., Van Emrik*, 220 A.D.2d at 953. Alternatively, absolute immunity, by definition, is guaranteed immunity not conditioned upon the absence or presence of any specified conduct. *See Arteaga v. State*, 527 N.E.2d 1194, 1196 (N.Y. 1988) (explaining how reasonableness and bad faith have no merit in relationship to absolute immunity).

for the rights and safety of others.¹⁸⁶ For example, in *Lillian C. v. Administration for Children's Services*, the court found that the City “acted in good faith in the investigation into the allegations of abuse . . . concerning the infant [child] plaintiff and in the filing of the petition seeking the child’s temporary removal from the home.”¹⁸⁷ During the investigation, ACS found that the child’s mother and the mother’s boyfriend—who ACS confirmed had a prior criminal history for domestic violence—were involved in abusive incidents with the child.¹⁸⁸ Both the mother and the abused child disclosed this information to ACS during the investigation.¹⁸⁹ On these facts, the court held that the plaintiffs failed to show willful misconduct or gross negligence on the part of ACS in removing the children from the home.¹⁹⁰

Simply put, conduct that falls within the scope of a caseworker’s employment depends on the conduct at issue and the applicable provision of the Social Services Law.¹⁹¹ The applicable standard used to determine whether a caseworker’s conduct falls within the scope of his or her employment involves a test that assesses “whether the act is done while the employee is doing the employer’s work, no matter how irregularly, or with what disregard of instructions.”¹⁹²

2. Limitations to Statutory Immunity

Section 419’s immunity is not absolute; instead, it is rather limited. It “is confined to the making of reports, the removal of a child from the home and the provision of services pursuant to Social Services Law § 424.”¹⁹³ It “is not ‘intended to apply to failures to provide the services required by the Social Services Law.’”¹⁹⁴ For example, in

186. *Carossia v. City of New York*, 39 A.D.3d 429, 430 (N.Y. App. Div. 2007) (citing *Mendoza v. Grace Indus.*, 4 A.D.3d 272, 273 (N.Y. App. Div. 2004)).

187. *Lillian C. v. Admin. for Children's Servs.*, 852 N.Y.S.2d 86, 87 (N.Y. App. Div. 2008).

188. *Id.*

189. *See id.*

190. *Id.* (“The record contains no evidence of willful misconduct or gross negligence, which is required to overcome the statutory presumption that the Administration for Children’s Services (ACS) and the City acted in good faith in the investigation.”).

191. *See, e.g., Van Emrik v. Chemung Cnty. Dep’t of Soc. Servs.*, 220 A.D.2d 952, 954–55 (N.Y. App. Div. 1995).

192. *Moore v. Melesky*, 788 N.Y.S.2d, 679, 682 (Sup. Ct. App. Div. Third Dep’t 2005) (holding that a defendant will receive immunity even if they act intentionally and unlawfully to the detriment of a child because those are instances where the employee *is* doing the work of the employer but in an irregular way with disregard of instructions, i.e., the defendant is acting within the scope of his employment (emphasis added)).

193. *Sean M. v. City of New York*, 20 A.D.3d 146, 158 (N.Y. App. Div. 2005); *see also* N.Y. Soc. Serv. Law § 424 (McKinney 2013).

194. *Sean M.*, 20 A.D.3d at 158.

Criminal Liability Against Child Protective Services Caseworkers

Sean M. v. City of New York, the plaintiffs sued the City after allegedly being abused while in foster care.¹⁹⁵ Specifically, there were two sets of claims alleged by the plaintiffs—(1) the city failed to remove the children from their home despite allegations of abuse and neglect and (2) once placed in foster care, the City failed to investigate complaints made by the children’s biological mother alleging that the foster family was maltreating the children.¹⁹⁶ The City claimed that liability was foreclosed by Section 419 of the Social Services Law.¹⁹⁷ The court dismissed the first claim, reemphasizing that the decision to remove a child from his or her home is a discretionary act and is thus protected under absolute immunity.¹⁹⁸ The court, however, disagreed with the defendant’s argument that immunity barred liability of the second claim.¹⁹⁹ Without great discussion, the court held that Section 419 does not bar a claim against inadequate supervision because this allegation does not fall within the constructs of conduct that is granted immunity under Section 419.²⁰⁰ Thus, Section 419’s grant of immunity only extends to those who actually *participate* in the investigation of child abuse allegations, and caseworkers who *fail* to provide the services required under the law.²⁰¹

C. Statutory Immunity: Marchella’s Case

Adams was Marchella’s assigned ACS caseworker. He and his supervisor have already been subjected to criminal liability per the criminally negligent charges brought against them and the judge’s denial of their motion to dismiss.²⁰² It, therefore, follows that immunity was not extended under the given circumstances. The reason for such a denial of immunity is likely contributed to the fact that Section 419’s

195. *See id.* at 147.

196. *See id.* at 151.

197. *See id.* at 156 (explaining when Section 419 of the Social Services Law is and is not applicable).

198. *See id.* at 156 (“[T]his Court has held that the City’s negligence in the investigation of abuse complaints and the placement of children into foster care constitutes misfeasance in the performance of discretionary duties, which is non actionable.”).

199. *See id.* at 158 (explaining that plaintiff’s claims alleging inadequate supervision were not barred by statutory immunity).

200. *See id.*

201. *Id.* (emphasis added).

202. Liz Robbins, *In Judge’s Brooklyn Courtroom, Made-for-TV Drama Without the Cameras*, N.Y. TIMES, Nov. 26, 2011, at A16, available at http://www.nytimes.com/2011/11/26/nyregion/patricia-dimango-brings-own-style-to-brooklyn-court.html?pagewantedl&_r=0.

immunity will not extend to those who simply fail to execute the responsibilities required by the Social Services Law.²⁰³

Adams failed to fulfill his duties under Section 424.²⁰⁴ Specifically, he was required to conduct field visits to Marchella's home to assess her safety and enter information about these home visits into the agency's tracking system, CONNECTIONS.²⁰⁵ It is alleged that Adams never made any visits to Marchella after his first attempt, but instead updated the CONNECTIONS system—after Marchella's death—with case notes to make it appear as though he did.²⁰⁶ Certainly, this conduct falls outside the scope of immunity provided by Section 419 of the Social Services Law because these facts indicate a situation in which Adams has outright failed to fulfill his responsibilities. As a result, his conduct does not meet the required level of participation to even determine if the “good faith” standard is satisfied under Section 419 of the Social Services Law.

Likewise, the same reasoning applies for Adams's supervisor. His supervisor had a duty to oversee Adams's cases and ensure that he was meeting all of his obligations. If Adams never updated CONNECTIONS, then there is no way his supervisor could have properly done her job to make sure Marchella was being protected. Upon noticing that CONNECTIONS was not updated, Adams's supervisor, pursuant to the requirements of the Social Services Law, should have taken action and demanded an adequate report from Adams detailing the status of Marchella's case. The supervisor's action should have consisted of a thorough review of Adams's files on Marchella in the CONNECTIONS system and oversight that would have led her to find that the visits were not being made. Thus, because the supervisor failed to follow through with her statutory obligations, her conduct would not meet the level of participation to even lead to a determination of whether the “good faith” presumption is satisfied.

203. See *supra* Part III.B.2.

204. See *supra* Part I.B.4 (explaining an ACS caseworker's responsibility to conduct an ongoing safety assessment until the case is closed); see also *Child Welfare Workers Speak Out; Conviction of Two N.Y. Workers in Negligent Homicide Case Causes Other to Rethink Careers*, CHARLESTON DAILY MAIL (Apr. 5, 2011, 17:42:06), <http://charleston-daily-mail.vlex.com/vid/welfare-negligent-case-causes-rethink-268052542>.

205. Grand Jury Report Pursuant to CPL § 190.85(1)(c), In the Matter of the Investigation Into R10-359 (N.Y. Sup. Ct. 2012) (“From January through September 2010, the Pierce household was under the supposed supervision of ACS, whose staff was charged with ensuring compliance by Marchella's mother with preventive care services and the safety of the [three] children who were allowed to remain in the mother's [care].”).

206. See Grand Jury Report Pursuant to CPL § 190.85(1)(c), *supra* note 205.

Criminal Liability Against Child Protective Services Caseworkers

Regarding the homicide charges, Adams and his supervisor have been fortunate enough to strike a plea deal with the government where they pled guilty to misdemeanor charges²⁰⁷ relating to Marchella's death.²⁰⁸ As of December 2013, the caseworkers signed paperwork agreeing to the deal in exchange for serving 250 to 500 hours of community service.²⁰⁹ Had they not accepted this deal, the government would have had to show that Adams and his supervisor failed to perceive a substantial and unjustifiable risk that illustrates a gross deviation from the standard of care a reasonably careful caseworker should demonstrate—the standard required for a finding of criminally negligent homicide.

Although Adams and his supervisor no longer face jail time, all of the occurrences leading up to this plea deal should place other caseworkers on alert. The indictments against Adams and his supervisor leave a lasting imprint on the state of child protective services in New York. From beginning to end, the homicide charges against Adams and his supervisor have stirred up great debate and discussion as to whether such an alternative, although viable, is a suitable solution to remedy the real issue at hand.

V. THE ADVANTAGES AND DISADVANTAGES OF USING CRIMINAL CULPABILITY AS A UNIQUE SOLUTION

If Adams and his supervisor were tried and found guilty of criminally negligent homicide, such an outcome would have had a grave effect on child protective services and individual caseworkers. Because this type of criminal culpability (criminally negligent homicide) is rare,²¹⁰ such a finding against an ACS caseworker would open the floodgates and exacerbate a number of existing problems. The magni-

207. Adams pled guilty to falsifying business records, official misconduct and endangering the welfare of a child. David Sims, *Bell/Adams in the Chief-Leader*, SOC. SERV. EMPs. UNION 371 (Dec. 26, 2013, 11:50), <http://www.sseu371.org/news/4-belladams-chief-leader-3252>. His supervisor pled guilty to one count of endangering the welfare of a child. *Id.*

208. Mosi Secret, *Ex-Child Welfare Caseworkers Plead Guilty in Death of a 4-Year-Old*, N.Y. TIMES, Dec. 18, 2013, at A24, available at http://www.nytimes.com/2013/12/18/nyregion/ex-child-welfare-caseworkers-plead-guilty-in-death-of-a-4-year-old.html?_r=0; see also 2 *Former ACS Workers Avoid Prison in Girl's Death*, CBS N.Y. (Dec. 17, 2013, 7:14 PM), <http://newyork.cbslocal.com/2013/12/17/2-former-acsworkers-avoid-prison-in-girls-death/>.

209. Secret, *supra* note 208.

210. BESHAROV, *supra* note 22, at 1 (explaining that in 1987, with caseworker liability on the rise, a mere total of four caseworkers had been criminally charged for negligent homicide); see also Neal Shechter, *Marchella Brett-Pierce: Expanding Criminal Negligence Liability for Third-Party Actions (Part II)*, AM. CRIM. L. REV. (Dec. 5, 2011, 10:13), <http://www.american-criminal->

tude of this type of impact is supported by the resulting debate that ensued after Adams and his supervisor's arrest and indictment. This debate involves those who criticize the government for moving forward with homicide charges and those who support this gesture in hopes that it will serve as deterrence for future caseworker misconduct. These two diverging arguments form the basis of the pros for and cons against imposing this type of criminal liability on individual caseworkers.

A. Pros

Holding an individual ACS caseworker responsible for the death of a child can potentially yield benefits for child welfare. Deterrence is the primary, positive result that this type of liability can provide. One scholar stated "criminal liability can serve as a deterrent to the most egregious forms of malpractice."²¹¹ More specifically, these types of indictments will send a message to all child protective caseworkers, letting them know that the government, if necessary, will be examining their work and using the court of law as a vehicle to improve the services offered to abused and maltreated children.²¹²

Criminalization for caseworker misconduct can also serve as a catalyst for change in the child protective services industry, bringing together professionals from other fields to engage in critical discussions relating to the advancement of child protective services.²¹³ Although criminalization would be new in its application to caseworker misconduct, it has the potential to help facilitate corrective action. As illustrated above, both ACS and the New York state legislature have tried their hand at many "fixes." Criminalization can serve as the new fix that moves child protective services closer toward its goal of protecting abused and neglected children.

lawreview.com/Drupal/blogs/blog-entry/marchella-brett-pierce-expanding-criminal-negligence-liability-third-party-actions-.

211. BESHAROV, *supra* note 22, at 2.

212. See Graham Rayman, *Brooklyn D.A. Charles Hynes Responds to Voice Cover Story; We (Still) Rest Our Case*, VILLAGE VOICE BLOGS (Jan. 17, 2013, 1:38 PM), <http://blogs.villagevoice.com/runninscared/2013/01/hynes.php>; *Ex-Caseworkers Indicted in Deaths of Infants*, N.Y. TIMES (Apr. 14, 1988), <http://www.nytimes.com/1988/04/14/us/ex-caseworkers-indicted-in-deaths-of-infants.html>.

213. See, e.g., Don Lash, *Criminalizing Caregivers*, SOCIALISTWORKER.ORG (Mar. 31, 2011), <http://socialistworker.org/print/2011/03/31/criminalizing-caregivers>.

Criminal Liability Against Child Protective Services Caseworkers

B. Cons

Notwithstanding the benefits of individual caseworker criminal liability, there is grave pushback from child welfare advocates regarding the negative implications that such liability will have on the state of child welfare. This primarily stems from the fact that there are significant drawbacks to individual culpability for CPS caseworkers. If the individual caseworkers are blamed, some of the deficiencies that exist within child welfare institutions might be exacerbated. To support this assertion, many opponents of criminal liability have voiced that such liability runs the risk of creating more harm than help to an already fragile system.²¹⁴

1. Caseworker Retention and High Turnover Rates

If criminal culpability becomes a growing trend, this may threaten efforts to attain and attract well-qualified caseworkers.²¹⁵ Turnover rates continue to be problematic for CPS agencies and they cause cases to be passed from caseworker to caseworker, making it all the more difficult to ensure that a victimized child receives the attention needed.²¹⁶ Because of the dangers caseworkers face on a day-to-day basis, visiting some of the most dangerous neighborhoods in New York City, it is crucial that the profession is, and remains, attractive to caseworkers in an effort to reduce the high turnover rates.²¹⁷ This profession, like many others, can be made attractive to talented

214. See, e.g., Raquel Arellano & John Kelly, *supra* note 24. Mike Arsham, executive director of the Child Welfare Organizing Project and opponent of criminal prosecution against social workers stated, “I don’t know anyone knowledgeable about the [child welfare] system who supports these prosecutions.” *Id.*

215. See Neal Shecter, *Why Qualified Immunity Should Protect Employees of Child Protective Service Agencies from Criminal Liability*, AM. CRIM. L. REV. (Apr. 2, 2012, 10:22 PM), <http://www.americancriminallawreview.com/Drupal/blogs/blog-entry/why-qualified-immunity-should-protect-employees-child-protective-service-agencies-c>; see also Raquel Arellano & John Kelly, *supra* note 24; Mirela Iverac, *After Conviction of Mom and Grandmother in Tot’s Death, Focus to Shift to Girl’s Caseworkers*, WNYC NEWS (June 7, 2012), <http://www.wnyc.org/story/215103-blog-after-conviction-mom-and-grandmother-tots-death-focus-shift-girls-caseworkers/> (“[This type of criminal liability] could embolden other prosecutors to pursue caseworkers in similar kinds of situations That may not be good for most children who are in the child welfare system and for most people who are trying to do the right thing as caseworkers in that system.”) (internal quotation marks omitted).

216. See generally *A Critical Look at the Child Welfare System Caseworker Turnover*, LIFTING THE VEIL, <http://www.liftingtheveil.org/turnover.htm> (last updated July 8, 2003) (explaining the effects of high turnover rates in child protective services).

217. *Saratoga County Has 3rd Highest Turnover Rate of CPS Caseworkers in NY State*, EXAMINER.COM (Apr. 14, 2011), <http://www.examiner.com/article/saratoga-county-has-3rd-highest-turnover-rate-of-cps-caseworkers-ny-state> (“Instability in the child welfare workforce has a direct impact on the quality of services provided to families.” (internal quotation marks omitted)).

caseworkers by offering competitive salaries and benefits; requiring licensures;²¹⁸ and even incentives, such as student loan forgiveness. However, this profession lacks all these attractive features²¹⁹ and surely this type of individual criminal liability will only compound efforts to sustain or increase caseworker retention.

2. An Unwarranted Spike in Child Removal Rates

This type of liability also has the potential to reverse efforts made toward decreasing the number of children who are rapidly removed from their homes in situations that do not warrant removal. It is almost certain that in light of the possibility of criminal charges, a spike in child removal rates will occur as caseworkers begin to rely on foster care placements in fear of prosecution.²²⁰ As history has shown, this effect is possible.

For example, when Congress first passed the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which required states to have a plan for foster care and adoption assistance,²²¹ its effect in exacerbating child fatalities was unexpected. The Act required child welfare agencies to make “reasonable efforts” to preserve the family and thus, “prevent or eliminate the need for removal of the child from his home.”²²² The amendment created an effect that caused caseworkers to make reasonable efforts to preserve the family even when the threat of immediate danger to a child existed.²²³ Such a policy caused the number of child deaths to soar to an all-time high. Thus, Congress again amended the Social Security Act by enacting the

218. If licensures were required, ACS caseworkers would, arguably, be more inclined to better perform the duties of their job because the consequences of misconduct would include not only being fired, but also loss of a hard-earned license to work in the profession.

219. See Cara Buckley & Mosi Secret, *Caseworkers are Dispirited Over Charges in Girl's Death*, N.Y. TIMES, Mar. 25, 2011, at A20 (discussing how an ACS advertisement aimed at recruiting “top-flight talent” failed to mention one of the main drawback to the job—a starting salary of \$42,000); City of New York Department of Citywide Administrative Services Application Unit, *Notice of Examination: Child Protective Specialist*, <http://home2.nyc.gov/html/dcas/downloads/pdf/noes/201404317000.pdf> (last visited Feb. 23, 2014) (listing a baccalaureate degree as the only requirement for eligibility to become employed as a CPS caseworker).

220. Raquel Arellano & John Kelly, *supra* note 24.

221. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980). Congress declined to define “reasonable,” leaving such a determination to individual states. Kelli M. Mulder-Westrate, *Waiting for the Justice League: Motivating Child Welfare Agencies to Save Children*, 88 NOTRE DAME L. REV. 523, 532 n.37 (2012).

222. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. (2012)).

223. DeRouselle, *supra* note 76, at 420.

Criminal Liability Against Child Protective Services Caseworkers

Adoption and Safe Families Act of 1997.²²⁴ The main purpose of this Act was to clarify the meaning of “reasonable efforts” and in turn, make “the child’s health and safety . . . the paramount concern[.]”²²⁵ The practical effect here caused caseworkers to place an emphasis on removing the child from the home, and as a result, the number of children placed in foster care soared to an all-time high.²²⁶

New York state law further complicates this conflict. New York’s Social Services Law places an emphasis on preservation and reunification,²²⁷ similar to the AACWA. Particularly, the law takes the focus away from “the child’s health and safety” and centers it on providing services to the family. When compared to the federal law, this conflicting language of the state law inevitably increases the likelihood of preventable child deaths because it creates a scapegoat for caseworkers to leave children in potentially life threatening situations based on the premise that services will remedy the existing issue in the home. This application would be beneficial for abused and neglected children in New York *if* there were adequate funding to carry out these services. Funding in New York for purposes of child welfare is limited²²⁸ and thus, continues to create a constant barrier for ACS caseworkers to provide adequate services. Therefore, if the state’s willingness to prosecute caseworkers is perceived as a shift toward criminal culpability—a new common approach to hold caseworkers accountable for their misconduct—caseworkers, knowing that there are inadequate funds to properly provide services for the family, will be inclined to remove children from their homes at a rapid rate, despite the fact that such a removal may be unwarranted. Removals can have long-lasting psychological effects on a child²²⁹ and thus, unwarranted removals would not only be pointless, but also unjust.

224. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997); see Libby S. Adler, *Essay: The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 23 (2001) (“Before long, CWA’s emphasis on family preservation was reversed with the passage of ASFA in 1997.”).

225. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997).

226. See DeRouselle, *supra* note 76, at 420.

227. See N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (“[T]he state’s first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home . . .”).

228. See *Preventive Services Funding Inadequate*, *supra* note 166.

229. See generally Joseph J. Doyle, Jr., *Child Protection and Child Outcome: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007) (examining the various negative effects of child removals).

CONCLUSION

Preventable child fatalities are a pressing concern for the State of New York. Children like Marchella continue to die from abuse and neglect even after ACS involvement. These children deserve better, but better does not come by way of criminal prosecution. As demonstrated, when caseworkers fail to fulfill their obligations under the Social Services Law, this opens the door for liability—both civil and criminal. The willingness of prosecutors to bring charges of criminally negligent homicide against caseworkers is intended to serve as a deterrent against caseworker misconduct and thus, have a positive effect on child welfare, but it is likely that such an implication will be more harmful than helpful.

Despite the viability of criminal culpability, it is not a suitable solution. As Professor Bob Behn stated, “Every organization has dysfunctional procedures and incentives. Identifying and [fixing] them is essential. Punishing individuals who, working within these procedures . . . make the inevitable mistakes only discourages entrance and makes the problem worse.”²³⁰ ACS caseworkers are overworked, understaffed, and not properly supervised by ACS and the state. Given the availability of criminal culpability, caseworkers must simultaneously deal with pressures both from the state (which is providing inadequate resources) and from parents and guardians who are fighting to keep their families together. These pressures ultimately leave most ACS caseworkers with less than sufficient means to conduct adequate investigations that will ultimately protect abused and neglected children. Hopefully, states, if not the federal government, can look to other alternatives that *will* benefit these children’s interest and help decrease the number of preventable child fatalities that occur in New York. Until that right solution is birthed, caseworkers should not be subjected to criminal prosecution for the death of a child, because when weighed against the best interest of a child, the effects of criminal liability will be more detrimental than beneficial to the state of child protective services.

230. ROBERT D. BEHN, BOB BEN’S PERFORMANCE LEADERSHIP REPORT ON WHY ALL PUBLIC OFFICIALS NEED TO REMEMBER NOT ONLY EXIT, VOICE, AND LOYALTY—BUT ALSO ENTRANCE (2013).

COMMENT

Section 342 of the Dodd-Frank Act Does Not Adequately Consider Education and Poverty

DAYNE JOHNSON*

INTRODUCTION	1072
I. BACKGROUND ON THE DODD-FRANK ACT.....	1073
A. The Formation of the Office of Minority and Women Inclusion Thru Section 342	1076
B. Affirmative Actions Taken by OMWI to Create Opportunity for Minorities and Women	1078
II. OBSTACLES FACING MINORITIES AND WOMEN	1078
A. Increasing Early Childhood Education for Minorities and Women	1079
B. Women Majoring in Soft Majors.....	1081
C. Minorities Without a College Degree	1082
D. Case Law and Statutes That are Obstacles to Achieving the Education to be Competitive Under the Dodd-Frank Act	1083
E. No Child Left Behind	1085
III. ECONOMIC STRUGGLES OF MINORITIES AND WOMEN	1088
IV. IMPROVING SECTION 342 OF THE DODD- FRANK ACT.....	1094

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A. Solving the Lack of Educational Improvements in
the Dodd-Frank Act 1095
B. Changing Education by Using a Mentor Program .. 1103
CONCLUSION 1105

INTRODUCTION

Alasdair MacIntyre is a profound philosopher and a world-famous savant who believed that oppression, which causes low levels of education for minorities and women, within a society could only be solved by returning to virtue ethics. The United States of America legislators should consider the importance of the virtue of prudence in order to achieve the goal of a virtuous society because a society that does not understand the virtue of prudence will be unjust and based on a multiplicity of individualist ideals, rather than social group responsibility. A social group responsibility is the role that each human being must play within a society based on mutual respect for one another. Human beings must respect each other and strive toward moral perfection while also contributing to the society's moral perfection. If the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") is going to achieve its goals, the legislators must use prudence to amend the Dodd-Frank Act.

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, which would reshape the financial industry.¹ The Dodd-Frank Act has a special provision that is supposed to help minorities and women by creating diversity in three areas: (1) management, (2) business activities, and (3) employment in the financial industry.²

Although the Dodd-Frank Act has provisions related to providing jobs in the financial sector to minorities and women, the Act falls

1. See Jesse Lee, *President Obama Signs Wall Street Reform: "No Easy Task,"* WHITE HOUSE BLOG (July 21, 2010, 2:22 PM), <http://www.whitehouse.gov/blog/2010/07/21/president-obama-signs-wall-street-reform-no-easy-task>; see also Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 21, 2010, http://www.nytimes.com/2010/07/22/business/22regulate.html?_r=1& (discussing the effects of signing the bill and the Democrats response to the signing of the bill); Mark Koba, *Dodd-Frank Act: CNBC Explains*, CNBC (May 11, 2012, 4:01 PM), <http://www.cnbc.com/id/47075854> ("[Dodd-Frank Act] became the law of the land in 2010 and was named after Senator Christopher J. Dodd (D-CT) and U.S. Representative Barney Frank (D-MA), who were the sponsors of the legislation.").

2. Dodd-Frank Wall Street Reform and Consumer Protection Act § 342, 12 U.S.C. § 5452 (2012); see also *Office of Minority and Women Inclusion (OMWI)*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, <http://www.occ.gov/about/who-we-are/careers/omwi.html> (last visited Jan. 9, 2014).

short because it fails to address issues related to poverty. Specifically, the education levels needed for financial sector jobs are higher than what many minorities and women experiencing poverty have obtained. Thus, this Comment proposes that the Dodd-Frank Act be amended to include: (1) a mentoring program for minorities and women, (2) more accountability for teachers of minorities and women students, (3) funding for parental involvement in minorities and women education, (4) funding for early childhood education for minorities and women, (5) and funding for charter schools in marginalized minority communities.

Part I of this Comment provides a background of the Dodd-Frank Act. Part II examines the obstacles preventing minorities and women from reaching the level of education needed to enjoy the new opportunities provided by the Dodd-Frank Act. Part III argues that economic struggles facing minorities and women create additional difficulties to achieving the necessary education to enjoy the benefits of the Dodd-Frank Act. Lastly, Part IV proposes solutions to the lack of educational qualifications by minorities and women, so they can enjoy the benefits from the Dodd-Frank Act.

I. BACKGROUND ON THE DODD-FRANK ACT

On July 21, 2010, the Dodd-Frank Act was signed into law to address the 2008 collapse of the United States financial system.³ The destruction of the financial system was based on various factors.⁴ First, the Federal Reserve slashed interest rates making credit cheap for Americans.⁵ Then, homebuyers were reckless with the cheaper

3. Jason M. Breslow, *The State of Reform: Dodd-Frank at Two Years Old*, FRONTLINE PBS (July 19, 2012, 4:44 PM), <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/money-power-wall-street/the-state-of-reform-dodd-frank-at-two-years-old/>; see also Koba, *supra* note 1 (“In simple terms, Dodd-Frank is a law that places major regulations on the financial industry. It grew out of the Great Recession with the intention of preventing another collapse of a major financial institution like Lehman Brothers.”). The Dodd-Frank Act contains over 2,000 pages of legislation.

4. See Joe Miller & Brooks Jackson, *Who Caused the Economic Crisis?*, FACT CHECK (Oct. 1, 2008), <http://www.factcheck.org/2008/10/who-caused-the-economic-crisis/>; see also KATALINA M. BIANCO, *THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN* 3 (2008), http://www.business.cch.com/bankingfinance/focus/news/Subprime_WP_rev.pdf (discussing the various theories of what led to the mortgage crisis); *Enough Blame To Go Around*, ECONOMIST (Sept. 30, 2008, 6:00 PM), http://www.economist.com/blogs/democracyinamerica/2008/09/the_bailout_and_the_elite (suggesting that the mortgage meltdown was caused by multiple layers of irresponsibility).

5. See Miller & Jackson, *supra* note 4; see also BIANCO, *supra* note 4, at 4.

credit, causing inflated home prices in excess of their true values.⁶ Congress then promoted mortgage tax deductions that led homebuyers to purchase excessively expensive homes.⁷ Real estate agents convinced homebuyers to purchase homes they could not afford.⁸ Mortgage brokers provided homebuyers with risky loan arrangements called subprime loans, which deceived homebuyers with low initial payments, then large balloon payments.⁹ Wall Street firms created mortgage-backed securities using risky loans, which were used as collateral for bond issuances.¹⁰ The Dodd-Frank Act was passed because of these blunders of the professionals maintaining the capital markets.

The Dodd-Frank Act will help prevent future financial crisis or meltdowns. The purpose of the Dodd-Frank Act is “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”¹¹ The Dodd-Frank Act was enacted to serve many regulatory functions.¹² First, the Dodd-Frank Act helps minorities and women

6. See Miller & Jackson, *supra* note 4; see also *The Subprime Blame Game: Where Were the Realtors?*, U. PA. (Oct. 17, 2007), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1824> (discussing the role of realtors to the subprime mortgage crisis).

7. See Miller & Jackson, *supra* note 4; see also U.S. GOV'T ACCOUNTABILITY OFFICE, UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, & QUESTIONS 12 (2005).

8. See Miller & Jackson, *supra* note 4; U. PA., *supra* note 6.

9. See Miller & Jackson, *supra* note 4; see also *Wall Street's Role in the U.S. Mortgage Crisis Examined*, PBS NEWS HOUR (Aug. 20, 2008), http://www.pbs.org/newshour/bb/business/july-dec-08/econtrouble_08-20.html (discussing Paul Muolo's investigation into Wall Street's connection to the housing and mortgage crisis); cf. Bill Thomas et al., *What Caused the Financial Crisis?*, WALL ST. J. <http://online.wsj.com/article/SB10001424052748704698004576104500524998280.html> (last updated Jan. 27, 2011, 12:01 AM) (explaining that global economic forces and failures in American policy caused the financial crisis).

10. See Miller & Jackson, *supra* note 4; see also PBS NEWS HOUR, *supra* note 9.

11. Dodd-Frank Wall Street Reform and Consumer Protection Act § 342, 12 U.S.C. § 5452 (2012); cf. Peter Wallison, *The Dodd-Frank Act: Creative Destruction, Destroyed*, WALL ST. J., <http://online.wsj.com/article/SB10001424052748703369704575461714115902100.html> (last updated Aug. 31, 2010, 12:01 AM) (arguing that the Dodd-Frank Act theme is fear of instability and change). *But see* Justin Menza, *Dodd-Frank Won't Prevent Another Financial Crisis: Pros*, CNBC (Sept. 12, 2012, 12:08 PM), <http://www.cnbc.com/id/49003944> (“Richard Kovacevich, former CEO of Wells Fargo, agrees. ‘There were five safety values that usually keep things under control that all failed,’ he said, pointing the finger at the credit rating agencies, Fannie and Freddie Mac, the Securities and Exchange Commission, bank regulators and state regulators.”).

12. See Ben Protess, *Deconstructing Dodd-Frank*, N.Y. TIMES (Dec. 11, 2012, 1:55 PM), <http://dealbook.nytimes.com/2012/12/11/deconstructing-dodd-frank/>. *But see* Menza, *supra* note 11 (“Kovacevich noted the regulatory mechanisms haven't been capable of reining in the risk of financial institutions. He expects banks will continue to fail and that ‘there's nothing in Dodd-Frank that would have prevented the last financial crisis, nor will it prevent the next crisis.’”).

Section 342 of the Dodd-Frank Act

by creating accountability in consumer protection regulation.¹³ During President Obama's speech in Osawatimie, Kansas, he asserted that: "Regulators who were supposed to warn us about the danger of all this [reckless leverage of capital by banks], but looked the other way or didn't have the authority to look at all."¹⁴ Second, the Dodd-Frank Act makes it more difficult for minorities and women to be harmed by unregulated mortgage lenders and mortgage brokers.¹⁵ Third, the Dodd-Frank Act creates new regulations for payday lenders and credit card companies that tend to prey on innocent Americans, which includes minorities and women.¹⁶ The Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB"), which supervises credit unions, banks, other financial companies, and enforces new and old consumer financial laws.¹⁷ The duties of the CFPB encompass education, research, and enforcement.¹⁸

The CFPB created a new regulation that requires mortgage disclosure in a simple form that cautions consumers about the risks and costs of a loan.¹⁹ Moreover, the CFPB also tries to ensure that consumers are not surprised or harmed by expensive overdraft programs.²⁰ The CFPB tries to make it easier for students to determine the best colleges that will meet all their aspirations and are also economically affordable.²¹ A Financial Aid Shopping Sheet containing the aid packages from different colleges and universities will do this.²² The CFPB made it harder for credit-card companies to raise rates on existing accounts.²³ To prevent harm to consumers, mortgage brokers may not profit from selling mortgages to individuals who are unable to

13. See 12 U.S.C. § 5452(c)(1); see also *Wall Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, <http://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> (last visited Jan. 9, 2014).

14. Press Release, President Barack Obama, Remarks on the Economy in Osawatimie, Kansas (Dec. 6, 2011, 12:59 PM), available at <http://www.whitehouse.gov/the-press-office/2011/12/06/remarks-president-economy-osawatimie-kansas>.

15. See The Dodd-Frank Act § 1411(2)(a)(1), 15 U.S.C. § 1639c(a)(1); *Wall Street Reform: The Dodd-Frank Act*, *supra* note 13.

16. See 12 U.S.C. § 5364, 5514(a)(1)(E); *Wall Street Reform: The Dodd-Frank Act*, *supra* note 13.

17. 12 U.S.C. § 5491(a); see also Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, WHITE HOUSE BLOG (Jan. 4, 2012, 11:13 AM) <http://www.whitehouse.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog>.

18. 12 U.S.C. § 5492(a)(4); see Slack, *supra* note 17.

19. See 12 U.S.C. § 5532(a); Slack, *supra* note 17.

20. See Slack, *supra* note 17.

21. *Id.*

22. *Id.*

23. See 15 U.S.C. § 1639; see also Slack, *supra* note 17.

afford them.²⁴ These are several of the benefits of the Dodd-Frank Act, but these benefits fail to consider the educational level of minorities and women.

However, to fully comprehend the Dodd-Frank Act, the history of American financial reform must be contemplated. The Securities Act of 1933 and the Securities Exchange Act of 1934 were products of the 1929 stock-market crash and the Great Depression. Their enactment followed the inauguration of President Franklin Roosevelt in 1933.²⁵ Ever since the South Sea Bubble three hundred years ago, only after a catastrophic market collapse can legislators overcome the opposition of the financial community in order to implement comprehensive reform legislation.²⁶

However, Yale Law School Professor Roberta Romano believes that legislation enacted during a crisis is usually hasty and ill-conceived.²⁷ Professor Romano's conclusion is based on the notion that legislatures are not adequately considering financial policies when faced with a crisis.²⁸ Although the Dodd-Frank Act provides some benefits to minorities and women, it still fails to create legislation based on the present poverty and educational situations of minorities and women.

A. The Formation of the Office of Minority and Women Inclusion Thru Section 342

Section 342 of the Dodd-Frank Act requires forming an Office of Minority and Women Inclusion (“OMWI”).²⁹ The objective of Sec-

24. See Slack, *supra* note 17.

25. John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1020 (2012); see also *Timeline*, SEC HIST. SOC'Y, <http://www.sechistorical.org/museum/timeline/> (last visited Jan. 9, 2014) [hereinafter *Timeline*, SEC HIST. SOC'Y].

26. Coffee, *supra* note 25, at 1020. The South Sea Company was a British joint-stock company that was founded in 1711 and created as a public-private partnership to consolidate and reduce the cost of national debt. The company was also granted a monopoly to trade with South America, hence its name. At the time it was created, Britain was involved in the War of the Spanish Succession and Spain controlled South America. There was no realistic prospect that trade would take place and the company never realized any significant profit from its monopoly. Company stock rose greatly in value as it expanded its operations dealing in government debt, peaking in 1720 before collapsing to little above its original flotation price. This became known as the South Sea Bubble. *Id.*

27. *Id.* at 1022–23 (explaining that the corporate death of Enron and WorldCom provided an opportunity for Congress to enact the Sarbanes-Oxley Act in 2002); see also *Timeline*, SEC HIST. SOC'Y, *supra* note 25.

28. Coffee, *supra* note 25, at 1024.

29. 12 U.S.C. § 5452.

Section 342 of the Dodd-Frank Act

tion 342 is to provide opportunities for minorities and women in the financial sector.³⁰ First, the Director of the OMWI will be responsible for many duties, including: (1) creating greater opportunities for minority and woman owned businesses to participate in contracts with the agency, (2) making sure that entities regulated by the agency have good faith diversity policies, (3) developing standards for minorities and women to have equal employment prospects in senior management of the agency, and (4) providing feedback to the agency administrator in regard to the influence of agency policies on women and minority-owned companies.³¹

Furthermore, the Director of the OMWI will have the power to determine whether an agency contractor or subcontractor has acted in good faith to include minorities and women.³² Although the Director will not have the power to terminate a contract for lack of diversity, he or she will be able to make a recommendation to the agency administrator.³³ An agency administrator, after receiving a recommendation for termination of a contract from a director, can then take one of three courses of action: (1) “terminate the contract,” (2) “make a referral to the Office of Federal Contract Compliance Programs of the Department of Labor,” or (3) “take other appropriate action.”³⁴

Each office must submit an annual report to Congress about the initiatives taken to create more opportunities for minorities and women. The report must include: (1) the amount of money paid to minorities and women contractors, and (2) the successes and problems faced by the agency in creating improved opportunities for minorities and women.³⁵

Section 342 of Dodd-Frank Act requires each agency to take affirmative steps to create diversity in the workplace of the agency.³⁶ These steps include: (1) recruiting from black colleges, (2) creating employment opportunities by internship and summer jobs, and (3) marketing employment in media sources directed at women and minorities.³⁷

30. *See id.*; *see also Office of Minority and Women Inclusion, supra* note 2.

31. *See* 12 U.S.C. § 5452(b)(2)–(3).

32. *See id.* § 5452(c)(3)(A).

33. *See id.* § 5452(c)(B)(i).

34. *See id.* § 5452(c)(3)(B)(ii)(I)–(III).

35. *See id.* § 5452(e)(1)–(3).

36. *See id.* § 5452(f).

37. *See id.*

B. Affirmative Actions Taken by OMWI to Create Opportunity for Minorities and Women

The Office of the Comptroller of the Currency (“OCC”) is one of the federal agencies that must create an annual report to Congress. The OCC’s *OMWI 2011 Annual Report to Congress* listed certain accomplishments. First, the OCC provided 38.44% of their procurement contracts to minorities and women owned businesses in 2011.³⁸ Second, in the first quarter of 2012, the OCC awarded 33.95% of its procurement contracts to women and minority owned businesses.³⁹ Third, the OCC mandated that all contracts over \$150,000 have a clause requiring good faith efforts to include minorities and women.⁴⁰

The OCC has made progress recruiting minorities and women, but there are still difficulties in recruiting enough women and Hispanics.⁴¹ Specifically, the OCC Annual Report states that recruitment has been difficult for attracting Hispanics for non-mission critical occupations.⁴² The OCC is trying hard to maximize the participation of women in the bank examiner occupation.⁴³

II. OBSTACLES FACING MINORITIES AND WOMEN

A major obstacle in the way of minorities and women achieving the benefits provided by Section 342 of the Dodd-Frank Act is the lack of sufficient education. For example, an entry-level job offered by the OCC as a National Bank Examiner (NBE) requires a four-year bachelor’s degree in majors including: (1) accounting, (2) banking, (3) commercial or banking law, (4) finance, (5) economics, or (6) business

38. OFFICE OF THE COMPTROLLER OF THE CURRENCY, U.S. DEP’T OF THE TREASURY, OFFICE OF MINORITY AND WOMEN INCLUSION SECTION 342: 2011 ANNUAL REPORT TO CONGRESS, at 1 (2012).

39. *Id.* at 2.

40. *Id.*

41. *Id.* at 4 (“The OCC faces two primary challenges as a result of its low participation of (a) Hispanics in our overall workforce, specifically in non-mission critical occupations, and (b) females in our national bank examiner (NBE) occupation.”).

42. *Id.* (“The mission-critical occupations for the OCC are NBEs, attorneys, and economists, which account for 75% of our total workforce.”).

43. *Id.* (“The OCC is committed to increasing the recruitment, hiring, and retention of our diverse workforce, with concerted efforts on maximizing the participation of Hispanics in our non-mission critical occupations, and females in our bank examiner occupation.”).

administration.⁴⁴ However, a large percentage of minorities do not even graduate from high school.⁴⁵

According to the Department of Education, 3,128,022 public school students graduated in 2009–2010, but 514,238 public school students dropped out of school, which means the average freshman graduation rate is 78.3%.⁴⁶ The number of minorities dropping out is much higher than their white counterparts.⁴⁷ According to the Department of Education, the average freshman graduation rate for white students is 83% compared to 69.1% for black students and 71.4% for Hispanic students.⁴⁸ Black students' drop out rate was 4.8% in 2009, Hispanic students' dropout rate was 5.8%, while the dropout rate for white students was 2.4%.⁴⁹ Furthermore, 25% of African American and 20% of Hispanic students attend schools where graduating is not expected.⁵⁰ Studies show that every twenty-nine seconds a high school student withdraws before graduating.⁵¹ When only minorities males are considered, the dropout rate is between 50% and 60%.⁵² If Congress is serious about providing opportunities for minorities it has to address the high dropout rate.

A. Increasing Early Childhood Education for Minorities and Women

If minorities and women are going to qualify for the financial sector jobs and procurement contract advantages offered by Section 342 of the Dodd-Frank Act, they are going to need better early childhood

44. See *Entry-Level Bank Examiners*, OFFICE OF THE COMPTROLLER OF THE CURRENCY U.S. DEP'T OF THE TREASURY, <http://www.occ.gov/about/who-we-are/careers/entry-level-bank-examiner.html> (last visited Jan. 9, 2014).

45. *Public School Graduates and Dropouts from the Common Core of Data: School Year 2009–10*, INST. OF EDUC. SCIS. NAT'L CTR. FOR EDUC. STATISTICS (Jan. 2013), <http://nces.ed.gov/pubs2013/2013309/findings.asp>. The minorities I am discussing are black Americans, Hispanic Americans, and Native Americans. Asian Americans are not included because they generally have higher levels of education than most of the minorities listed above.

46. *Id.*

47. *Id.*

48. *Id.*

49. Emmeline Zhao, *High School Dropout Rates for Minority and Poor Students Disproportionately High*, HUFFINGTON POST (Feb. 14, 2012, 12:22 AM), http://www.huffingtonpost.com/2011/10/20/high-school-dropout-rates_n_1022221.html; see also *Public School Graduates and Dropouts from the Common Core of Data: School Year 2009–10*, *supra* note 45.

50. *Dropout Crisis Facts*, AMERICA'S PROMISE ALLIANCE, http://www.americaspromise.org/Our-Work/Grad-Nation/Dropout-Facts.aspx#_ednref (last visited Jan. 15, 2014).

51. EDITORIAL PROJECTS IN EDUC. RES. CTR., NATIONAL GRADUATION RATE KEEPS CLIMBING; 1.1 MILLION STUDENTS STILL FAIL TO EARN DIPLOMAS 2 (2012).

52. *Id.* (explaining that some schools have such a poor graduation rate that some students are expected not to graduate).

education. Early childhood success is a strong indicator of later success in school and work.⁵³ Specifically, studies show that children with sufficient interpersonal and academic skills at age eleven are more likely to graduate high school and college and earn higher incomes.⁵⁴ The Brookings Institution research is based on a core competencies model that includes: (1) academic skills, (2) social-emotional skills, and (3) physical health.⁵⁵ Moreover, the Brookings Institution found that only 62% of American children have core competence by fifth grade.⁵⁶ When considered by racial group, 71% of white children have core competence by fifth grade compared with 39% for black children and 55% for Hispanic children.⁵⁷ If minority students are not developing core competence by fifth grade, they will not have the education necessary to enjoy the benefits of Section 342 of the Dodd-Frank Act.

The Brookings Institution studies show that girls are better students than boys in all measured outcomes except math.⁵⁸ However, for girls to benefit from the opportunities under Section 342 of the Dodd-Frank Act, they have to perform better in math.⁵⁹ As stated above, most of the opportunities afforded by Section 342 of the Dodd-Frank Act require exceptional math skills.⁶⁰ Thus, if Congress was serious about offering opportunities under Section 342 of the Dodd-Frank Act to women, it would have taken steps to improve the math abilities of girls.

53. See J. LAWRENCE ABER ET AL., CTR. ON CHILDREN & FAMILIES AT BROOKINGS INST., MIDDLE CHILDHOOD SUCCESS AND ECONOMIC MOBILITY 3 (2013), <http://www.brookings.edu/~media/Research/Files/Papers/2013/02/15%20education%20success%20economic%20mobility%20aber%20grannis%20owen%20sawhill/15%20education%20success%20economic%20mobility%20aber%20grannis%20owen%20sawhill.pdf>.

54. See *id.*

55. See *id.* (“Our definition of academic success requires a child to master the math and reading skills which are considered appropriate for fifth graders by the end of that school year. In math, this includes multiplication and division, fractions, and the ability to solve word problems. . . . We define social-emotional success as demonstrating the ability to pay attention in class, control one’s temper, stay organized, persist in completing tasks, and other skills that indicate self-control and ability to learn. We also include the absence of problem behaviors such as arguing, fighting, and anger in the social-emotional domain because of likely links to educational attainment, future earnings, and crime A child who is limited or preoccupied by health concerns cannot dedicate the required energy to her schooling, especially if she must miss a significant portion of the school year.”).

56. *Id.* at 4.

57. *Id.*

58. *Id.*

59. See *Entry-Level Bank Examiners*, *supra* note 44.

60. See *id.*

In addition, the Brookings Institution studies show that many factors cause the difference between core competence of white children and black children. First, minority students are more likely to attend classes with high student-teacher ratios.⁶¹ Second, minority students often have teachers who are less qualified and less experienced than white students.⁶² Third, minority students experience greater teacher turnover than white students.⁶³ Fourth, minority students tend to fall behind during summer time because of lack of academic stimulation compared to white students.⁶⁴ White students are eighteen percentage points higher than black students with regard to kindergarten readiness.⁶⁵ The gap increases thirty-two percentage points by the time each race reaches fifth grade.⁶⁶ Minorities are falling behind early in life, making it almost impossible to attain the education necessary to enjoy the benefits of Section 342 of the Dodd-Frank Act.

B. Women Majoring in Soft Majors

Women face an obstacle of not being influenced to major in subjects that require a large amount of math expertise, which is necessary to enjoy the benefits of Section 342 of the Dodd-Frank Act.⁶⁷ According to *Forbes*, women prefer to major in education, English, and psychology.⁶⁸ Studies show women prefer career paths where they can have a positive influence on society.⁶⁹ However, an increasing number of women are majoring in business because they believe it will provide them with better job opportunities.⁷⁰

61. See ABER ET AL., *supra* note 53, at 8.

62. *Id.* at 10.

63. *Id.*

64. *Id.*

65. *Id.* at 12; see also Isabel V. Sawhill, *Opportunity in America: The Disadvantages Start at Conception*, BROOKINGS INST. (Jan. 9, 2012), <http://www.brookings.edu/research/opinions/2012/01/09-opportunity-disadvantages-sawhill> (“Second, low-income children enter school far behind their more advantaged peers in vocabulary and learning-related behaviors such as the ability to sit still or follow directions.”).

66. ABER ET AL., *supra* note 53, at 12.

67. See Roberta L. Nutt, *Prejudice and Discrimination Against Women Based on Gender Bias*, in *THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION* 129–30 (Jean Lau Chin ed., 2010) (“There is still evidence that young women’s career aspirations are typically lower than their abilities, and young women are still often guided into traditional teaching, nursing, and other service careers. They are frequently steered away from science, math, and computers or discriminated against when they try to enter a male-dominated career area.”).

68. See Ruchika Tulshyan, *Top 10 College Majors for Women*, FORBES (Mar. 2, 2010, 6:00 PM), <http://www.forbes.com/2010/03/02/top-10-college-majors-women-forbes-woman-leadership-education.html>.

69. *Id.*

70. See *id.*

Nevertheless, women face the problem of being paid less than men when they pursue a business career.⁷¹ For example, women are paid twenty percent less than men and are paid \$4,600 less after acquiring a business school degree while in their first job.⁷² If Congress wants more women who are qualified to take advantage of Section 342 of the Dodd-Frank Act, it is going to have to find a way to create equal pay for men and women.

In addition, the Department of Labor reports that in 2008, most women were working in low paying jobs, including: (1) secretaries, (2) administrative assistants, (3) registered nurses, and (4) elementary and middle school teachers.⁷³ The Labor Department report shows that women are not entering fields that require a great deal of math.⁷⁴ If Section 342 of the Dodd-Frank is going to accomplish its goal of offering more opportunities to women, then it should be encouraged that math is a rewarding field of study.⁷⁵

C. Minorities Without a College Degree

Many of the opportunities offered by Section 342 of the Dodd-Frank Act require a college degree, something many minorities lack. A Brookings Institution study shows that only thirty-two percent of Americans at the age of twenty-five and older have obtained a bachelor's degree.⁷⁶ Studies show a direct relationship between education and entrepreneurship.⁷⁷ Since minorities are not graduating from college at the rate of white Americans, they are less likely to be able to start businesses to take advantage of the benefits of procurement contracts offered by Section 342 of the Dodd-Frank Act.

According to the U.S. Department of Education, only 50% of Hispanic students and 39% of black students completed a bachelor's

71. *See id.*

72. *See id.*

73. *See* Jenna Goudreau, *Best-Paying Jobs That Women Aren't In*, FORBES (Feb. 17, 2010, 4:30 PM), <http://www.forbes.com/2010/02/17/best-paying-jobs-women-forbes-woman-leadership-career.html>.

74. *See id.*; *see generally* Nutt, *supra* note 67, at 127 ("Girls learn to defer to boys, assign greater value to neatness than creativity, emphasize appearance over intelligence, and fear and avoid science and math.").

75. *See* John Villasenor, *In Defense of Equal Tuition for All Majors*, BROOKINGS INST. (Jan. 7, 2013), <http://www.brookings.edu/research/opinions/2013/01/07-equal-tuition-villasenor>.

76. JONATHAN ROTHWELL, METROPOLITAN POLICY PROGRAM AT BROOKINGS INST., EDUCATION, JOB OPENINGS, AND UNEMPLOYMENT IN METROPOLITAN AMERICA 1 (2012), <http://www.brookings.edu/~media/research/files/papers/2012/8/29%20education%20gap%20rothwell/29%20education%20gap%20rothwell.pdf>.

77. *See* Villasenor, *supra* note 75.

Section 342 of the Dodd-Frank Act

degree after starting college.⁷⁸ Furthermore, only 59% of females from public institutions and 67% of females from private nonprofit institutions graduate with a bachelor's degree after beginning a college program.⁷⁹ The cost of college has been increasing.⁸⁰ For example, between 2010 and 2011, the cost for a year at a college to obtain a bachelor's degree was \$13,600 at a public university and \$36,300 at a private nonprofit school.⁸¹ Simply put, with the rising cost of education and the significant percentage of minorities who fail to graduate after starting college, agency administrators or legislators should have considered ways to help minorities overcome these obstacles.

D. Case Law and Statutes That are Obstacles to Achieving the Education to be Competitive Under the Dodd-Frank Act

Section 342 of the Dodd-Frank Act fails to consider the legal obstacles to achieving the educational levels to enable minorities and women to competitively participate in the opportunities provided. The government's role in education was clearly and persuasively stated in *Brown v. Board of Education*.⁸² The Supreme Court explained that:

Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it 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. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.⁸³

In order for minorities and women to reach the educational levels necessary to be competitive under Section 342 of the Dodd-Frank Act, they will have to overcome the government's policy failures in the area of regulating education.

78. *Fast Facts: Graduation Rates*, INST. OF EDUC. SCIS. NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=40> (last visited Jan. 10, 2014).

79. *Id.*

80. *Id.*

81. *Fast Facts: Tuition Costs of Colleges and Universities*, INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=76> (last visited Jan. 10, 2014).

82. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

83. *Id.* at 493.

One of the major difficulties for minorities receiving a great education is the lack of school financing. The first attempt to legally change such an injustice was struck down by the Supreme Court.⁸⁴ In *San Antonio Independent School District v. Rodriguez*, the plaintiffs alleged that their rights under the Equal Protection Clause of the United States Constitution had been violated because Texas school-financing system, based on local property taxation, caused poor families to receive inadequate education.⁸⁵ The Supreme Court held that education was not a fundamental right under the United States Constitution; therefore, the plaintiffs would not be able to assert a Fourteenth Amendment Equal Protection violation.⁸⁶ However, the Supreme Court was not finished placing obstacles in the way of minorities; it also held that the marginalized are not a suspect class, so they are not able to use the protection of the Equal Protection Clause.⁸⁷

Another limitation on minorities receiving the education required to take advantage of Section 342 of the Dodd-Frank Act is the Establishment Clause. The Establishment Clause states “there should be no law respecting an establishment of religion.”⁸⁸ The Establishment Clause is an obstacle to minorities because it prevents states from using creative methods to deal with failing schools, like using voucher programs.⁸⁹ Further, the Establishment Clause was explained in the famous case *Lemon v. Kurtzman*,⁹⁰ where the Court set out the three-element test for determining if a state’s action violates the Establishment Clause:⁹¹ (1) “the statute must have a secular legislative purpose,” (2) “its principal or primary effect must be one that neither advances nor inhibits religion,” and (3) “the statute must not foster ‘an excessive government entanglement with religion.’”⁹²

84. See C. Cora True-Frost, *Beyond Levittown Towards a Quality Education for All Children: Litigating High Minimum Standards for Public Education the CFE Case*, 51 SYRACUSE L. REV. 1015, 1023–24 (2001).

85. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 5–6 (1973).

86. *Id.* at 37 (“We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive.”).

87. *Id.* at 28.

88. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (citation omitted).

89. See Brian L. Wright, Comment, *Potential Federal and State Constitutional Barriers to the Success of School Vouchers*, 49 U. KAN. L. REV. 889, 901 (2001).

90. *Id.* at 902.

91. *Kurtzman*, 403 U.S. at 612–13.

92. *Id.*

However, the application of the *Lemon* test has not been consistent.⁹³ In *Agostini v. Felton*, the Supreme Court modified the *Lemon* test stating that (1) “a statute must not have secular purpose,” and (2) a statute “primary effect must not advance or inhibit religion.”⁹⁴ However, in *Mitchell v. Helms*, the Supreme Court held that neutrality of a statute is sufficient to meet the Establishment Clause requirements.⁹⁵ Therefore, given the inconsistent rulings of the Supreme Court, it is difficult for States to execute voucher programs that might help minorities reach the educational requirements needed for Section 342 of the Dodd-Frank Act because most private schools that would receive funding from such programs are religious based.⁹⁶ An issue arises whether voucher programs are a violation of the Establishment Clause because it would cause excessive government entanglement with religion.⁹⁷

E. No Child Left Behind

Another obstacle to minorities and women obtaining the education needed to be competitive under Section 342 of the Dodd-Frank Act is No Child Left Behind (“NCLB”) because it stymies the quality of education that minorities and women receive.⁹⁸ On January 8, 2002, President Bush signed into law No Child Left Behind.⁹⁹ The purpose of NCLB federal legislation is to improve the quality of education in United States public schools.¹⁰⁰ NCLB mandated that by 2013–2014, children in the United States should be assessed as proficient for their grade level.¹⁰¹ Moreover, NCLB changed the balance of power in the realm of education between the federal and state government.¹⁰²

Before the signing of NCLB, states played the predominate role in education policy.¹⁰³ The first few federal policies related to educa-

93. Wright, *supra* note 89, at 902.

94. *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997); *see also* Wright, *supra* note 89, at 902.

95. *Mitchell v. Helms*, 530 U.S. 793, 794–95, (2000); *see also* Wright, *supra* note 89, at 903.

96. Wright, *supra* note 89, at 907.

97. *Id.*

98. Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 650 (2006) (“The opportunities that [No Child Left Behind] provides to create failing schools are numerous . . .”).

99. 20 U.S.C. § 6301 (2012); *see also* Rentschler, *supra* 98, at 637.

100. Rentschler, *supra* 98, at 637.

101. *See id.* at 638.

102. *See id.* at 641.

103. *See id.* at 640.

tion only played a limited role in regulating education.¹⁰⁴ For instance: (1) the National Defense Education Act of 1958 gave money to improve science and math programs in secondary school, (2) the Elementary and Secondary Education Act provided money to disadvantaged children and supported early special education programs, and (3) the Improving America's Schools Act of 1994 required assessment standards and measurement of students progress.¹⁰⁵

The federal government, with the large amount of money it offers to states, has established a powerful federal precedent in the area of education.¹⁰⁶ Although the Tenth Amendment reserves the power of education to states, the federal government has gained increased powers in education by federal courts' interpretation of the Fourteenth Amendment's Due Process and Equal Protection Clauses.¹⁰⁷ Even though most of the direct funding of education is achieved by state and local taxes, the federal government still has the power to shape education policy.¹⁰⁸ In addition, Thomas Rentschler writes:

Although Congress can claim no enumerated power in NCLB legislation, Congress can justify the act in the interest of promoting the general welfare of the United States. The Spending Clause of Article I, Section 8, Clause 1 of the Constitution provides for federal spending that promotes the general welfare of the citizens. Promoting the general welfare is a powerful justification for federal education spending because our country and its leaders have long proclaimed that education is the important leveler in our society and is the key to our continued growth and prosperity. Under this rationale, Congress may attach conditions on the states in exchange for the receipt of federal funds.¹⁰⁹

NCLB is a problem because it prohibits states from developing assessments that measure student achievement by considering a student's work in order to determine his progress.¹¹⁰ Before Congress passed NCLB, states would create their own accountability standards, which resulted in the students being given a sufficient academic evaluation based on standards created by each state.¹¹¹ However, under NCLB, the progress of students in a public school is determined on

104. *See id.* at 639–40.

105. *Id.*

106. *Id.* at 641–42.

107. *Id.* at 643.

108. *Id.*

109. *Id.* at 645.

110. *See id.* at 648.

111. *See id.*

their test scores rather than on various academic evidence of achievement including: (1) writing sample, (2) test scores, (3) projects, (4) homework, and (5) graduation projects.¹¹² Also, because NCLB relies so heavily on standardized tests, it takes the people closest to the students out of the student progress determination.¹¹³ NCLB's emphasis on annual tests of math and reading skills makes it difficult for teachers to implement creative learning experiences for their students.¹¹⁴

Another problem with NCLB is that it creates too many opportunities for creation of a failing school, which will likely hurt minorities and women's chances of reaching competitive educational levels for the employment opportunities offered by Section 342 of the Dodd-Frank Act.¹¹⁵ First, NCLB requires the division of students into subgroups (i.e., minority students or students in poverty), which makes it difficult for the school not to be labeled as failing because of the educational disadvantages already present within each subgroup and the inability to consider students as a whole.¹¹⁶ Second, if under NCLB a school is assessed as failing to meet the proficiency standards required, then those students in the failing school with the lowest proficiency scores will be able to transfer to a non-failing school, which will likely cause that school receiving these students to become a failing school.¹¹⁷ The process of passing around failing students does not provide the help the students need, but only creates more failing schools.¹¹⁸ Therefore, if Section 342 of the Dodd-Frank Act is going to help minorities and women, it will have to help change these failing education policies.

Legislators on the state and federal level are aware of the education obstacles facing minorities and women, but they refuse to fix them.¹¹⁹ States, in responding to strict NCLB standards, have devised means of lowering test standards in order to prevent the loss of federal funding.¹²⁰ The federal government, under its NCLB approach, has not challenged these lower standards because of its policy of giv-

112. *Id.*

113. *Id.*

114. *See id.* at 649 (noting the NCLB's emphasis on math and English to the detriment of other subjects).

115. *Id.* at 650.

116. *Id.*

117. *Id.* at 651.

118. *Id.*

119. *See* Kurtis D. Behn, Note, *Finding A Coherent Federal Education Policy Where Adequacy Litigation and No Child Left Behind Meet*, 40 *SUFFOLK U. L. REV.* 439, 439-40 (2007).

120. *Id.* at 460-61.

ing states the right to determine those standards.¹²¹ Minorities and women are going to need better education policies if they are to have a chance of completing or attending college.

Although President Obama has corrected many of the problems with NCLB, it has still not been repealed by the Congress.¹²² President Obama wrote, “Congress hasn’t been able to do it, so I will,” and “[s]tarting today, we’ll be giving states more flexibility to meet high standards.”¹²³ President Obama’s new policies allow states to apply to the Department of Education for waivers, which will be granted if states agree to improve the quality of their teachers and create new accountability standards for their schools.¹²⁴ Moreover, states granted waivers will have to use various indicators to evaluate teachers and schools, like the number of students headed to college or students that took Advanced Placement exams.¹²⁵ Some critics argue that allowing waivers to states will cause states to forget minority students and marginalized children.¹²⁶ However, Secretary of Education Arne Duncan said, “To label an improving school a failure is the worst thing you can do.”¹²⁷ Nevertheless, some argue that schools, if they do not teach their students’ basic math or reading they should not be allowed to be labeled a success.¹²⁸ As politicians argue about improving education more minorities and women fall behind in failing schools.

III. ECONOMIC STRUGGLES OF MINORITIES AND WOMEN

In order for minorities and women to attain the education necessary to be competitive under Section 342 of the Dodd-Frank Act, they also must overcome economic struggles. According to the 2011 Census, households with lower levels of education were more likely to

121. *Id.*

122. See Sam Dillon, *Obama to Waive Parts of No Child Left Behind*, N.Y. TIMES, Sept. 23, 2011, http://www.nytimes.com/2011/09/23/education/23educ.html?_r=0.

123. *Id.*

124. *Id.*

125. Motoko Rich, *‘No Child’ Law Whittled Down by White House*, N.Y. TIMES, July 6, 2012, http://www.nytimes.com/2012/07/06/education/no-child-left-behind-whittled-down-under-obama.html?pagewanted=all&_r=1&.

126. See *id.* (arguing that the lowest-performing schools are given higher priority for waivers).

127. Michael Gerson, *The Quiet Overturn of No Child Left Behind*, WASH. POST, July 19, 2012, http://articles.washingtonpost.com/2012-07-19/opinions/35488645_1_nclb-african-american-fourth-graders-teachers-unions.

128. See *id.*

remain in or move into poverty.¹²⁹ Many households still have not recovered from the 2001 recession.¹³⁰ African American household incomes declined 2.7% between 2010 and 2011.¹³¹ The poverty rate in 2011 was 15%, which is 46.2 million Americans living in poverty.¹³² Moreover, the poverty rate for African Americans was 27.6%, which is 10.9 million people.¹³³ In addition, the poverty rate for women is 16.3%.¹³⁴ As the numbers show, minorities and women are currently confronting record levels of poverty.

In 2011, 31.2% of families with a female head of the household lived in poverty.¹³⁵ The Dodd-Frank Act's social welfare reforms fail to solve the problem of poverty among women. "Categorizing a person as 'in poverty' or 'not in poverty' is one way to describe his or her economic situation."¹³⁶ These failed social welfare reforms also affect white Americans because they account for 63.2% of the total population and represent 41.5% of the human beings in poverty.¹³⁷ Hispanic Americans had the highest poverty rate at 25.3% in 2011, which is 13.2 million Americans.¹³⁸

The problem of poverty can also be considered in relation to areas of concentrated poverty. According to a Federal Reserve study, minorities and women living in poverty are living outside the middle-class norm, which is called a culture of poverty.¹³⁹ Within the culture

129. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 4 (2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf> (providing information about the current poverty rates for minorities and women).

130. *Id.* at 5 (assessing real median household incomes for each race and Hispanic-origin group).

131. *Id.* at 6 tbl.1, 8.

132. *Id.* at 13 fig.4.

133. *Id.* at 15.

134. *Id.*

135. *Id.* at 17 tbl.4 (providing information about the poverty rate for families in which the female is the sole earner or the highest paid).

136. *Id.* at 17.

137. *Id.* at 13.

138. *Id.* at 15.

139. ALAN BERUBE ET AL., BROOKINGS INST., THE ENDURING CHALLENGE OF CONCENTRATED POVERTY IN AMERICA: CASE STUDIES FROM COMMUNITIES ACROSS THE U.S. 4 (2008), http://www.frbsf.org/cpreport/docs/cp_fullreport.pdf ("This more recent focus on concentrated poverty grew largely out of concern about the nation's inner cities in the wake of ongoing deindustrialization, civil unrest in the late 1960s, and the rapid suburbanization and out-migration that followed. In most cases, these poor inner-city locations were populated predominantly by minorities, and many featured large public housing developments. Accounts of life in these neighborhoods lent support to the view that poor Americans, especially those in very poor inner-city locations, lived outside the middle-class norms in what some authors terms a 'culture of poverty.'").

of poverty is: (1) joblessness, (2) crime, (3) welfare dependency, (4) single parenthood, and (5) low level of skills.¹⁴⁰ Some claim the culture of poverty is caused by: (1) industrial transition, (2) employment suburbanization, and (3) racial segregation.¹⁴¹ If legislators were serious about offering opportunities with Section 342 of the Dodd-Frank Act they would have created corrective measures to address these problems.

According, to Cynthia Duncan's study of communities, one of the main reasons for generational poverty is the isolation of the marginalized from the wealthy.¹⁴² An area is considered a high poverty area "if at least 40 percent of its residents live in families with incomes at or below the federal poverty line."¹⁴³ From 1970 to 1990, the number of people living in high poverty areas doubled to 3.7 million, however, from 1990 to 2000 that number decreased because of exceedingly good economic growth.¹⁴⁴ Nevertheless, in 2000, one in three Hispanics and black Americans were living in high-poverty areas.¹⁴⁵ Also, the Native American poverty rate in 2000 was three times higher than the national average.¹⁴⁶ If minorities are living in areas of concentrated poverty, they will likely not be able to acquire the education to compete under Section 342 of the Dodd-Frank Act.

Minorities are not achieving the necessary level of education because of lack of confidence and drive caused by economic isolation in their communities. As Benjamin Zimmer, stated, "in the domain of education, many studies suggest that in socioeconomically diverse environments the higher academic aspirations of wealthier students can be 'contagious' and raise the aspirations and motivation of poorer students."¹⁴⁷ However, when minorities are placed in an environment with similar peers with limited economic resources and lower aspirations, it creates a culture of failure.¹⁴⁸ Further, when human beings are placed in an environment of failure they tend to imitate and adopt those same qualities, which leads to perpetual cycle of failure.¹⁴⁹

140. *Id.*

141. *Id.*

142. *Id.* at 5.

143. *Id.*

144. *Id.* at 6.

145. *Id.* at 8.

146. *Id.*

147. Benjamin Zimmer, *A Deregulatory Framework for Alleviating Concentrated African-American Poverty*, 9 HASTINGS RACE & POVERTY L. J. 555, 575 (2012).

148. *See id.*

149. *Id.* at 576.

Section 342 of the Dodd-Frank Act

Hispanic Americans are the hardest hit by the latest recession and will have a hard time obtaining the level of education to be competitive under Section 342 of the Dodd-Frank Act.¹⁵⁰ According to the Pew Research Center, 54% of Latinos claim that they were the hardest hit racial group in America due to the recent recession.¹⁵¹ Furthermore, 59% of Latinos claim that they or a member of their household has not been able to find employment in the past year.¹⁵² In 2011, the Latino unemployment rate was 11%, which is 6.3% higher than it was before the Great Recession in December 2007.¹⁵³ The household wealth of Latinos fell by 66% between 2005 and 2009.¹⁵⁴ In addition, Latinos have been the racial group hardest hit by the housing foreclosure catastrophe (11.9% completed foreclosures from 2004 to 2008).¹⁵⁵ Latinos are the largest minority group in the United States, which makes it unlikely that a program designed to benefit minorities can work without addressing the financial problems of Latinos.¹⁵⁶

Younger generations of Latinos are struggling with record levels of poverty, which might be a substantial hindrance to them being able to reach the level of education to be competitive under Section 342 of the Dodd-Frank Act.¹⁵⁷ According to the Pew Research Center, in 2010, 6.1 million Latino children lived in poverty.¹⁵⁸ Further, in 2010, 37.3% of poor children were Latino, compared with 30.5% for white and 26.6% for black children.¹⁵⁹ Since 2007, the poverty rate of Latino children has increased at an alarming rate; from 2007 to 2010 the Latino child poverty rate increased by 6.4%, while the poverty rate for black children increased at 4.6%, and for white children the lowest at 2.3%.¹⁶⁰ Latino families with only a mother present had the highest poverty rate at 57.3% while a two-family household had a poverty rate of 25.3%.¹⁶¹ Among Latino families those with a least a college

150. See PEW RES. CTR., *HISPANICS SAY THEY HAVE THE WORST OF A BAD ECONOMY* 4 (2012).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 4.

156. See *id.* at 6.

157. PEW RES. CTR., *THE TOLL OF THE GREAT RECESSION CHILDHOOD POVERTY AMONG HISPANICS SETS RECORD, LEADS NATION* 4 (2011).

158. *Id.*

159. *Id.*

160. *Id.* at 6.

161. *Id.* at 9.

degree had the lowest poverty rate at 8.7% in 2010.¹⁶² As Pew Research Center studies show, Latino children are falling into deep poverty, which will make it impossible for them to acquire the level of education for them to be competitive and enjoy the benefits of Section 342 of the Dodd-Frank Act.

Most Americans believe that those in poverty should be helped, but there is no consensus on how to help. According to the Institute for Education Leadership, the Senate, the House of Representatives, and Cabinet departments all have resources directed at ending poverty, yet they still cannot solve the problem.¹⁶³ The amount of money spent on the 126 federal programs to end poverty is \$668 billion annually, and state and local governments spend about \$284 billion, which amounts to about one trillion dollars combined.¹⁶⁴ If legislators were serious about creating opportunities by using Section 342 of the Dodd-Frank Act, they would provide for better programs to address the poverty problems facing minorities and single parent women.

Ronald Reagan stated, “We fought a war on poverty and poverty won.”¹⁶⁵ In 1973, the United States had its lowest level of poverty at 11.1%, but by 1983, the poverty rate rose to 15.2%.¹⁶⁶ The reason the United States has not been able to end poverty is based on various factors including: (1) many Americans working in low paying jobs, and (2) many families living in single parent households.¹⁶⁷ Census Bureau studies show that one-third of the United States population with a family of three makes less than \$38,000, which is not enough to meet the monthly expenses of most families.¹⁶⁸ According to the Economic Policy Institute, half of the employment opportunities in America pay only \$34,000 a year, and one-fourth of the jobs pay less than \$23,000.¹⁶⁹ Wages have only increased seven percent since 1973 for those working in the bottom half of American jobs.¹⁷⁰ In addition, six million Americans depend solely on food stamps, which provides

162. *Id.*

163. Gary E. MacDougal, *The Wrong Way to Help the Poor*, N.Y. TIMES, Oct. 10, 2012, http://www.nytimes.com/2012/10/11/opinion/americas-ineffective-antipoverty-effort.html?_r=0.

164. *Id.*

165. Peter Edelman, *Poverty in America: Why Can't We End It?*, N.Y. TIMES, July 28, 2012, <http://www.nytimes.com/2012/07/29/opinion/sunday/why-cant-we-end-poverty-in-america.html?pagewanted=all>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

\$6,300 a year to a family of three and is about equal to one-third of the Americans at the poverty line.¹⁷¹ The number of Americans receiving food stamps increased to 46 million from 26.3 million in 2007.¹⁷² If Section 342 of the Dodd-Frank Act is going to provide opportunities to the poor, it must address the alarming rate of food stamps being used because of the lack of sufficient income for minorities and women. Minorities and women will not be able to reach competitive educational levels for a job under Section 342 of the Dodd-Frank Act if they are living on food stamps.

Another reason minorities lack the ability to achieve the education to be competitive under Section 342 of the Dodd-Frank Act is failed government policies regarding concentrated poverty. These failed government policies include: (1) project-based subsidies, (2) tenant and homeowner-based subsidies, and (3) inclusionary zoning.¹⁷³

An example of a failed project-based subsidy is the Low-Income Housing Tax Credit (“LIHTC”), which is the largest affordable housing program.¹⁷⁴ LIHTC provides “tax credits for developers who set aside at least 20 percent of units as low-rent dwelling for qualifying households.”¹⁷⁵ The failure of LIHTC is that it can be used to build housing in already marginalized areas and become occupied by the marginalized, which does not serve the purpose of decreasing poverty concentration.¹⁷⁶ Local authorities control programs like LIHTC with constituents who do not want to see mixed neighborhoods, which makes it difficult to execute a development plan that will have a substantial impact on concentrated poverty.¹⁷⁷

An example of a failed tenant and homeowner-based subsidy is Section 8 vouchers, which is the largest federal housing subsidy—it is issued to 1.8 million households.¹⁷⁸ The Section 8 program provides money that “allows poorer households earning less than half the median income in an area to rent something close to the median-priced apartment in their area without having to spend more than 30% of

171. *Id.*

172. *Id.*

173. Zimmer, *supra* note 147, at 579.

174. *Id.* at 580.

175. *Id.*

176. *See id.*

177. *Id.* at 581.

178. *Id.* at 587–88.

their own income in the process.”¹⁷⁹ Further, the Section 8 program fails to create real change to concentrated areas of poverty because most of the individuals receiving Section 8 vouchers still live in high poverty areas.¹⁸⁰

Another example of an unsuccessful policy is inclusionary zoning.¹⁸¹ Inclusionary zoning is mandated by a municipality and requires that a certain amount of all future developments be for affordable housing, which can take the form of requiring “from 5% to 35% of new developments be sold or rented at price-controlled rates.”¹⁸² Inclusionary zoning fails because developers will not build homes if the prices are too low, and if they are built, the buyers (i.e. marginalized) are unable to achieve real wealth because of low price mandates on resale, consequently they stay poor.¹⁸³ As these failed policies show, real change to concentrated poverty will take creative measures and not blind mandates for social welfare like Section 342 of the Dodd-Frank Act.

IV. IMPROVING SECTION 342 OF THE DODD-FRANK ACT

The Declaration of Independence states that all men have “unalienable rights,” [which are] Life, Liberty, and the pursuit of Happiness.”¹⁸⁴ The Declaration of Independence asserts that mankind comes together within a government for protection of these rights by their consent.¹⁸⁵ Lincoln stated in his Gettysburg Address, “Four score and seven years ago, our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”¹⁸⁶ Willmoore Kendall and George W. Carey explained:

The Constitution and The Federalist which add up to the following rules: Thou shalt govern thyself under God, through the deliberate sense of the community, of the generality of men amongst thee; thou avoid fanaticism; thou shalt preserve thy sense of humor, remembering that pride goeth before a fall; thou shalt try, above all, to be a virtuous people, made up of virtuous individuals, because

179. *Id.* at 587.

180. *Id.* at 588.

181. *Id.* at 591.

182. *Id.* at 590.

183. *Id.* at 591–92.

184. WILLMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 81 (1995).

185. *Id.*

186. *Id.* at 88.

Section 342 of the Dodd-Frank Act

only a virtuous people can do justice, remain untyrannical, as it governs itself through deliberation about the general good.¹⁸⁷

Congress failed to consider equality when enacting Section 342 of the Dodd-Frank Act because minorities and women are not equal to white male Americans in regards to education and poverty level. Therefore, better legislation should have been provided.

A. Solving the Lack of Educational Improvements in the Dodd-Frank Act

Education reform that Congress should have implemented is that used by the State of Tennessee in its race to the top program.¹⁸⁸ First, Tennessee created a new accountability system for teachers by using data from schoolroom evaluations and an annual assessment that are based on student learning.¹⁸⁹ Second, Tennessee changed its tenure system to incorporate results from its new accountability system.¹⁹⁰ Third, Tennessee upgraded its feedback mechanisms to create a more uniform state wide system called TELL Tennessee Survey.¹⁹¹ Fourth, Tennessee provided more resources for improved professional development in the areas of: (1) “parental involvement,” (2) leadership improvement, and (3) school culture.¹⁹² Fifth, Tennessee provided its districts with methods of improving teacher instructions, which included: (1) “90,000 hours of available online course training,” (2) training “in the use of value added data,” and (3) training in the “use of formative assessment practices.”¹⁹³ Sixth, Tennessee improved statewide access to resource in the areas of: (1) science, (2) technology, (3) engineering, and (4) math.¹⁹⁴ Seventh, Tennessee improved its recruiting ability by encouraging university and college students with high grades in math and science to earn teaching certificates.¹⁹⁵ Lastly, Tennessee adopted a comprehensive plan to increase charter schools.¹⁹⁶

187. *Id.* at 152.

188. Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 WASH. U. J.L. & POL’Y 181, 249–50 (2012).

189. *Id.* at 250–52.

190. *Id.* at 250–51.

191. *Id.* at 251.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Tennessee education reform narrowed the achievement gap in fourth grade reading a few percentage points between white and black Americans from 21.8% to 20.4%.¹⁹⁷ Also, the fourth grade achievement gap between Hispanic and white Americans was narrowed from 17.5% to 15.2%.¹⁹⁸ Tennessee was able to narrow the “[achievement gaps for] fourth grade math [scores] between white and black Americans from 28.9% to 24%.”¹⁹⁹ The creative education reforms in Tennessee were able to increase college enrollment among its minority population, except for Hispanics.²⁰⁰ Further, Tennessee education reform led to an increase in college course completion by minorities.²⁰¹ Although Tennessee’s education reform only provides minorities with a small increase in educational ability, it is a step forward that Congress failed to accomplish or even contemplate. “No educational reform will succeed if it does not address both sides of the same coin: systemic racial discrimination in and beyond the classroom . . . and self-empowerment.”²⁰²

The Dodd-Frank Act can be improved by adopting the policies of Tennessee into the language of the statute. First, if the Dodd-Frank Act was amended to make teachers more accountable for the learning in classrooms, similar to Tennessee’s policy for accountable teachers, such a provision would have the immediate effect of increasing the education that minorities and women receive in the classroom. Currently, minorities and women are not receiving an education from teachers who are accountable for the learning obtained by their students.²⁰³ Thus, minorities and women are not graduating high school and are falling behind with the skills needed to compete in the job markets of the future.²⁰⁴ A student that receives an adequate lesson plan in the classroom from a teacher who cares about them succeeding is more likely to graduate high school and attend college.²⁰⁵ So when minorities and women receive an adequate education from accountable teachers, they will be on the path to receiving the level of educa-

197. *Id.* at 249–50.

198. *Id.*

199. *Id.* at 250.

200. *See id.*

201. *Id.*

202. *Id.* at 256.

203. *See* ABER ET AL., *supra* note 53, at 10.

204. *See Public School Graduates and Dropouts from the Common Core of Data: School Year 2009–10*, *supra* note 45.

205. *See* Maurice R. Dyson, *supra* note 188, at 250–52.

tion that will make them more viable applicant for jobs created by the Dodd-Frank Act.

Likewise, if the Dodd-Frank Act had a clause that mandated more resources to parental involvement in schools and leadership development in students, like the Tennessee policies, there would be an increase in the education gained by minorities. A lack of parental involvement in a child's education decreases the chances of them graduating high school and going on to college.²⁰⁶ Minorities living in single parent households tend to lack sufficient involvement by their parents in their schools' parent teacher meetings because their parents have to work to provide for the family.²⁰⁷ In some cases, minority parents are not educated about the importance of regularly being involved in their children's education.²⁰⁸ Parents that are involved in their children's education can help teachers deal with challenges facing their children at an early stage when the problem can be mitigated or eliminated. If the Dodd-Frank Act adopts Tennessee policies for parental involvement, then minority parents will be more knowledgeable about being involved in the education of their children and make more time to help in the academic success of their children. Thus, if the Dodd-Frank Act provides more resources to minorities' parental involvement in school, then more minorities will finish high school and attend college so they can be competitive for the opportunities provided by the Dodd-Frank Act.

Lastly, if the Dodd-Frank Act mandated the creation of more charter schools, it would enable more minorities and women to escape failing schools located in their neighborhood. Minorities and women are more likely than white males to attend a failing school because they tend to live in marginalized neighborhoods.²⁰⁹ These marginalized neighborhoods have a lower tax base to support the public schools in their neighborhoods so minorities and women end up attending failing schools that cause them to fall behind their white male counterparts.²¹⁰ As a result, minorities end up dropping out of high school and never attend college.²¹¹ If the Dodd-Frank Act mandated more funding for charter schools in poor neighborhoods, minorities

206. *Id.* at 251.

207. See EDITORIAL PROJECTS IN EDUC. RES. CTR., *supra* note 51.

208. See J. LAWRENCE ABER ET AL., *supra* note 53, at 4.

209. See *Public School Graduates and Dropouts from the Common Core of Data: School Year 2009–10*, *supra* note 45.

210. See *id.*

211. See EDITORIAL PROJECTS IN EDUC. RES. CTR., *supra* note 51.

would be more likely to graduate high school and attend college because they would be receiving a better education at a charter school than a failing school in their neighborhood. Thus, legislators must become more serious about providing adequate education to all minorities and women if their policy goals are going to succeed.

Another way to improve the education of minorities and women to meet the education standards necessary to be competitive under Section 342 of the Dodd-Frank Act is to have the federal government acknowledge the significance of education in the lives of all Americans and provide the resources that will ensure that sufficient public education is delivered.²¹² Programs such as “Head Start and Follow Through, which emphasize early education, parental involvement, and the use and development of community resources” can help minorities and women achieve higher standards of education.²¹³ Studies of the National Assessment of Educational Progress (“NAEP”) math and reading scores of southeast black students increased when the federal government provided “compensatory education.”²¹⁴ If Congress wanted to provide opportunities under Section 342 of the Dodd-Frank Act, it would have improved the federal government support of “achieving and maintaining equal educational opportunity.”²¹⁵ Charles Hamilton Houston “maintained that exploitation and oppression were directly related to the denial of education and equal opportunities.”²¹⁶

The Dodd-Frank Act should contain language that mandates an increase in the funding for early childhood education as suggested by NAEP. If the Dodd-Frank Act requires minorities and women to receive early childhood education similar to Head Start, minorities and women will increase their level of education by graduating from high school, making them more likely to attend college, and thus place them in a position to acquire the skills needed to take advantage of the Dodd-Frank Act. Minorities and women are falling behind early in life,²¹⁷ so the Dodd-Frank Act must have clauses that decrease the insufficient education received at a young age. A federal agency

212. Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 135–36 (1991).

213. *Id.* at 130.

214. *Id.* at 114–15.

215. *Id.* at 115.

216. GENNA RAE MCNEIL, *GROUNDWORK CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 198 (1983).

217. *See* J. LAWRENCE ABER ET AL., *supra* note 53, at 4.

Section 342 of the Dodd-Frank Act

should be created that enables families of young minority children to obtain early childhood education in their respective communities. The agency should focus on children from birth to age three because this span is the most significant period of intelligence building.²¹⁸ The agency would encourage parents to read to their children and participate with their children in activities such as arts and crafts because these types of activities are associated with a child's literacy development.²¹⁹ In order to provide these services, the agency should form local alliances with schools and churches, which can be easily accessible to students and parents with busy schedules. Modeled after the Head Start program, the students in grade five in local communities would participate in a program run by the agency that enables them to read books to younger children. Success of this program would largely depend on the agency's use of social media, advertisements in the local community, and YouTube to explain to minority parents that to a large extent, a child's language and literacy development tends to be cultivated within the home as opposed to a formal school setting. States lack the resources or the political will to provide sufficient early childhood education,²²⁰ so the federal government, by the use of the Dodd-Frank Act must take the lead in educating minorities and women if they seek to accomplish their objective of more diversity in the financial sector.

Another means that legislators should use to fix the education problem facing minorities and women, which makes it impossible for them to enjoy the employment and procurement opportunities offered by Section 342 of the Dodd-Frank Act, is to pass an Equal Education Amendment.²²¹ The Equal Education Amendment would be similar to the bill introduced in the House of Representative by Jesse Jackson, Jr. in 2005.²²² Moreover, the Equal Education Amendment would state, "Section 1. Equality of Education opportunity under the

218. See Renee R. Hanson, *A Pathway to School Readiness: The Impact of Family on Early Childhood Education*, in *THE State of Black America 2008: In the Black Woman's Voice* 89 (2008).

219. *Id.* at 90–92.

220. See NEA, *Early Childhood Education*, <http://www.nea.org/home/18163.htm> (last visited Jan. 10, 2013) (explaining the importance of early childhood education and policies to help make it a reality for the United States.); see also Department of Education, *Early Learning: America's Middle Class Promise Begins Early*, <http://www.ed.gov/early-learning> (last visited Jan. 10, 2013) ("The goal is to enable every American 4-year-old to attend a quality preschool program—one characterized by well-organized learning experiences, guided exploration, art, and storytelling, led by a skilled teacher.").

221. See Sarah Jane Forman, *Ghetto Education*, 40 *WASH. U. J.L. & POL'Y* 67, 107 (2012).

222. *Id.* at 108.

law shall not be denied or abridged by the United States or any state on account of [(1)] race, [(2)] sex, [(3)] income, or [(4)] place of residence.”²²³ Under Section 2 of the Equal Education Amendment Congress would be provided the power to enforce the amendment similar to the Fourteenth Amendment.²²⁴ The Equal Education Amendment would provide a solid foundation for national reform and provide minorities with a constitutional remedy for failed and unfair state financing of public schools.²²⁵

Building a broad based coalition of minorities and women will pass the Equal Education Amendment. “The civil rights movement and antiwar protests demonstrate the efficacy of mass uprisings in which individual participants in those movements perform heroic acts, often at tremendous personal cost.”²²⁶ The best means to force those in power to make changes is by actively motivating local groups of people behind a single idea.²²⁷ Cornell West explained that local activists must become the leaders in the fight for any education reform by keeping elected leaders accountable to problems in education.²²⁸ Intellectuals and the community can keep elected leaders accountable by active involvement in policy decisions rather than short-term political gains or social status.²²⁹

223. *Id.*

224. *Id.* (“Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

225. *See id.* at 112–13.

226. JOY JAMES, *TRANSCENDING THE TALENTED TENTH: BLACK LEADERS AND AMERICAN INTELLECTUALS* 171 (1997).

227. *Id.* at 172 (“[Bell] maintains: ‘Academics who claim that simply by writing about the need for change, they are fighting to make that change set a standard for judging themselves which they will not and cannot meet. . . .’ For Bell, mere academic activity ‘will neither move those in power nor create the groundswell that will force those in power to move.’”); RICHARD NED LEBROW, *THE ART OF BARGAINING*, at XII (1996) (“Strategies can be evaluated only in terms of the tasks they are expected to perform. Competitive bargaining is most appropriate when it is important to get the best possible deal.”).

228. JAMES, *supra* note 226, at 158 (“‘Local activists must become more and more at the center of how we think about the condition for the possibility of social motion and social movement.’ . . . ‘Critiques of leaders in the limelight must be relentless,’ West asserted, ‘because moments of weakness generate highlighting of leaders who are unconnected, or less and less connected, to those anonymous, invisible local activists who carry the ball courageously and heroically between moments of social motion.’”).

229. *Id.* at 172 (“[Bell] argues that ‘effective intellectual effort requires active involvement.’ . . . On the battlefield, we find the most difficult and productive sites of knowledge production and the most unsettling lessons for accountability.”); *see also id.* at 158–59 (“[Cornell West] theorizes that because of their limited perceptions, nonelite blacks fail to see the life of the mind as ‘possessing intrinsic virtues nor harboring emancipatory possibilities’; rather, they seek only ‘short-term political gain and social status.’”); *cf.* Interview with Henry L. Marsh III, Senator, Va. Gen. Assembly, in Washington, D.C. (Nov. 12, 2013) (discussing that the only means to keep

Minority leaders of a broad-based coalition for the Equal Education Amendment must overcome the false ideas of “The Talented Tenth.”²³⁰ Du Bois writes:

Some years ago I used the phrase “The Talented Tenth,” meaning leadership of the Negro race in America by a trained few. Since then this idea has been criticized. It has been said that I had in mind the building of an aristocracy with neglect of the masses. This criticism has seemed even more valid because of emphasis on the meaning and power of the mass of people to which Karl Marx gave voice in the middle of the nineteenth century, and which has been growing influence ever since. There have come other changes in these days, which a great many of us do not realize as Revolution through which we are passing. Because of this, it is necessary to examine the world and us and our thoughts and attitudes toward it. I want then to re-examine and restate the thesis of the Talented Tenth which I laid down many years ago.²³¹

C. L. R. James believed that only the mass of people could solve large societal problems like education because of the “creative impetus toward change.”²³²

Creating strong leaders within the broad based coalition on the local level will pass the Equal Education Amendment because people must be led to achieve the goal.²³³ The leaders of the coalition must articulate the goal of equal education in a manner that encompasses the values of the members so the each individual finds the goal impor-

elected leaders accountable is to stay informed or get elected to that position to directly implement that change).

230. JAMES, *supra* note 226, at 18 (“In collective amnesia, many either overlook or underestimate Du Bois’s later repudiation of black elites as reliable leaders for an oppressed people. Race memory misleads as it fails to recall that the greatest promoter of black elite agency became, in time, its most severe critic. . . . Discussions of contemporary U.S. black leadership are foregrounded by, and sometimes frozen in, Du Bois’s early construction of black intellectualism embodied in the Talented Tenth, of a progressive leadership of responsible Negro elites dedicated to black development.”).

231. *Id.* at 18.

232. *Id.* at 15 (“[C. L. R. James] believed that ‘the mass seeking to solve the great problems which face them in their daily lives’ would be the creative impetus toward change. The intellectual activities of millions of workers dealing with economic, political, and cultural realities, James asserts, would be recognizable to intellectual elites ‘only when they see and feel the new force.’”).

233. JOHN J. GABARRO, *MANAGING PEOPLE AND ORGANIZATIONS* 103 (1992) (“Consider a simple military analogy: a peacetime army usually can survive with good administration and management up and down the hierarchy, coupled with good leadership concentrated at the very top. A wartime army, however, needs competent leadership at all leadership at all levels. No one yet has figured out how to manage people effectively into battle; they must be led.”).

tant to them.²³⁴ Moreover, leaders of the coalition must collect the ideas of the local community on ways to help pass the Equal Education Amendment because it gives members of the coalition a sense of control.²³⁵ “Finally, good leaders recognize and reward success, which not only gives people a sense of accomplishment but also makes them feel like they belong to an organization that cares about them. When all this is done, the work itself becomes intrinsically motivating.”²³⁶ Lastly, the coalition shall provide the younger individuals a chance to be active participants in the fight for the Equal Education Amendment by mentoring their peers about the importance of equal education.²³⁷

Moreover, NCLB should be repealed because it does not help minorities and women reach the education standards required by Section 342 of the Dodd-Frank Act.²³⁸ When minorities and women are provided an education where they are only being taught to prepare for a standardized test they will not receive sufficient education.²³⁹ “After a decade of NCLB, the achievement gap continues to grow”²⁴⁰ Congress should have repealed NCLB if it wanted to provide opportunities to minorities and women. Thus, the Dodd-Frank Act should be amended to include language that repeals the NCLB because it will increase the level of education of minorities and women.

Legislators must use the Dodd-Frank Act as a comprehensive piece of legislation to reshape the quality of education provided to minorities and women, if they are going to achieve the goal of more minorities and women in the financial sector. It is not wealth that defines the United States of America but the nature of its heart. Many governments believe that in finding and building monetary

234. *Id.* at 110 (“Good leaders motivate people in a variety of ways. First, they always articulate the organization’s vision in a manner that stresses the values of the audience they are addressing. This makes the work important to those individuals.”).

235. *Id.* (“Leaders also regularly involve people in deciding how to achieve the organization’s vision (or the part most relevant to a particular individual); this gives people a sense of control.”).

236. *Id.*

237. *See id.* at 111 (“Perhaps the most typical and most important [factor in creating a leader] is significant challenge early in a career. Leaders almost always have had opportunities during their twenties and thirties to actually try to lead, to take a risk, and to learn from both triumphs and failures. Such learning seems essential in developing a wide range of leadership skills and perspectives. It also teaches people something about both the difficulty of leadership and its potential for producing change.”).

238. *Id.* at 113.

239. *Id.*

240. *Id.* at 104.

funds, happiness is achieved. But, the United States must acknowledge the abuse of economic power that has created a system that degrades minorities and women to the level of merchandise. This system can be changed by reforming education using the Dodd-Frank Act.

Further, the United States must realize the perils of wealth and gain a new appreciation of what Jesus meant when he warned of riches because of the government-destroying divinity Mammon, which grips large parts of the world in a cruel stranglehold.²⁴¹ If the United States better balances the interest of economic growth and the quality of education provided to all citizens, it would facilitate the advantages of the Dodd-Frank Act.

B. Changing Education by Using a Mentor Program

Harold McDougall, a professor at Howard University School of Law, explains that the best method to close the achievement gap in education is to create mentoring programs.²⁴² The mentoring programs would start in elementary schools teaching soft skills, which would provide an opportunity to engage the neighborhood in the workings of their schools.²⁴³ Moreover, the mentoring program would continue up the educational ladder all the way up to community colleges.²⁴⁴ The students who were mentored would then continue the legacy of the program by becoming mentors themselves and helping those students younger than them.²⁴⁵ Professor McDougall writes, “Grass-roots mobilization fueled passage of the Fair Housing Act, the Equal Employment Opportunity Act, and the Voting Rights Act. . . . [A] massive, well-organized social movement to close the achievement gap [could work to create a Fair Education Act].”²⁴⁶ The mentoring programs will directly address the disorganization that exists in minority communities that leads to a lack of educational attainment.²⁴⁷ The mentoring programs will help communities establish the value of edu-

241. *See Luke* 8:14.

242. Harold A. McDougall, *Closing the Achievement Gap: An Obama Signature Program?*, HUFFINGTON POST (Dec. 1, 2012, 12:39 PM), http://www.huffingtonpost.com/harold-a-mcdougall/closing-the-achievement-g_1_b_1927457.html.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. MARELLUS ANDREWS, *THE POLITICAL ECONOMY OF HOPE AND FEAR: CAPITALISM AND THE BLACK CONDITION IN AMERICA* 191 (1999) (“[A] large part of the difficulty is that the problem of low levels of school performance in poor communities is only partly about funding; the social disorganization of poor neighborhoods that is both cause and consequence of poverty and unemployment also eats away at teaching and learning in these neighborhoods.”).

cation as a pathway out of poverty and economic success.²⁴⁸ “Black middle-class men and women have something to learn from the experience of Asian Americans, whose economic success is partly due to the fact that Asian Americans are a very well-educated population.”²⁴⁹ The only way for minority communities to lower the achievement gap between black and white Americans is to invest more time and energy into knowledge and schooling.²⁵⁰

The mentoring programs will sustain pressure on local school boards to keep them accountable for improving the level of education of minority students in their district. “Organization is indispensable to successful, sustained political leadership, especially in the interest-group process of bargaining and compromise, which is characteristic of aspects of politics in the United States.”²⁵¹ The mentoring programs will unite the black middle-class and the black lower-class in order to build a coalition with enough people to convince local school boards to consider the organization’s policy suggestions seriously. Although the lower-class black Americans and the middle-class black Americans have been divided since the civil rights movement.²⁵² Professor McDougall asserts that respect and the building of trust on both

248. *Id.* at 176 (“Some portion of each generation—especially those children who are unlucky enough to come from poor families or families that have modest educational attainments—will perform poorly enough in schools that they are barred from high-wage employment.”); *see also id.* 175–76 (“We have survived slavery, segregation, and the modern jail-industrial complex. We can, in time, win the merit wars too. . . . Further, the logic of American meritocracy is that some portion of each generation of students *must* fail in the competition for good schools and jobs.”).

249. *Id.* at 174.

250. *Id.* (“While this may be so, simple economic sense suggest that middle-class black Americans can greatly improve their lot in the long term by investing in knowledge and schooling, even if it means that current generations of blacks must forego the decidedly mixed benefits . . . of extensive schooling.”); *see also id.* at 174–75 (“However, though conservatives’ success in ending affirmative action is a reminder that blacks’ enemies are still quite busy, blacks can adjust to the new competitive realities by consuming less, studying harder, and investing in an intellectual infrastructure of teachers, scholars, schools, libraries, magazines, booksellers, and test-breaking routines that improve black chances in the merit wars.”).

251. RONALD W. WALTERS & ROBERT C. SMITH, *AFRICAN AMERICAN LEADERSHIP* 15 (1999).

252. *Id.* at 23 (“The distance between the relatively small, active, middle-class Negro leadership stratum and the relative inactive, desperately poor Negro lower class had been variously describing as simply class envy The relationship probably does not constitute a ‘fundamental class antagonism,’ but rather class-cultural suspiciousness and envy. The problem is two-pronged: (1) there is the lack of knowledge of and empathy with the mass of lower-class Negroes among some upper-class elements of the established leadership group, and (2) more importantly, there is a ‘more or less conscious repugnance on the part of the Negro lower classes to follow them.’” (citations omitted)).

sides can bridge this divide.²⁵³ “Most middle-class blacks live in predominantly black suburbs that are not uniformly middle class; the majority do not live in predominantly white suburbs or distinctly middle-class black ones.”²⁵⁴ Thus, middle-class black Americans and lower-class black Americans must unite to increase the level of education received in their neighborhoods. Accordingly, if Congress wanted to create real educational change to help achieve its objectives it would have supported a grass-roots educational program.

CONCLUSION

Although Section 342 of Dodd-Frank tries to provide opportunities to minorities and women, it falls short because it fails to consider the educational backgrounds of the groups it seeks to benefit. If Congress wants to create real opportunities for minorities and women in the financial sector they should adopt the education reform measures that target early education. Congress should also create a constitutional amendment that makes education a fundamental right. Prudence is the intellectual virtue that rightly directs particular human acts, through rectitude of the appetite, towards a good end. Moreover, it should be acknowledged that truth is the good of the intellect. Human beings need prudence to achieve the perfection of the intellect, which is truth. Furthermore, prudence is necessary in order to know how to act in the right way. Prudence also enables a human being to be able to discern the mid-point between excess and defect. For example, if an individual has the virtue of prudence, which enables him to perceive that bravery is the midpoint between being a coward (defect) and being rash (excess). As Aristotle claims, “To act virtuously is to act from inclination that has been cultivated by virtue.”²⁵⁵ A virtuous person acts through knowledge and judgment.

253. Interview with Harold A. McDougall, Professor, Howard Univ. Sch. of Law, in Washington, D.C. (Nov. 8, 2013) (explaining that trust can be built by respecting the other individual and actually listening to their points of view).

254. KARYN R. LACY, *BLUE-CHIP BLACK: RACE, CLASS, AND STATUS IN THE NEW BLACK MIDDLE CLASS*, at XII (2007). *Contra id.* at 22 (“But recent studies suggest that the pattern of imposed racial residential segregation which dominated the twentieth century may be changing due to two new trends in the spatial patterns of Americans. First, the number of stable, integrated neighborhoods is slowly increasing in the United States. Second, growing numbers of middle-class blacks are opting to settle in majority-black, distinctly middle-class suburban enclaves.”).

255. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY OF MORAL THEORY* 149 (2007); see also Dayne Johnson, *Prudence in Society*, YAHOO (Sept. 28, 2010), <http://voices.yahoo.com/prudence-society-6836146.html?cat=4>.

MacIntyre asserts, Intelligence and Moral virtue are inseparable.²⁵⁶ MacIntyre believed that a prudent individual has to possess a keen intellect in order to discover and not misconstrue the midpoint between excess and defect.²⁵⁷

However, to comprehend the virtue of prudence, an individual must understand that an education in the virtues teaches an individual that his good as a man is one and the same as the good of those others with whom he is bound up in human community. Congress must learn to view government as a community united in a shared vision of the good for man as prior to and independent of any summing of individual political interests. It is by prudent deliberation about challenges facing minorities and women that Congress will be able to provide the level of quality education that minorities and women need to take advantages of the opportunities afforded by the Dodd-Frank Act. Moreover, there is a lack of certainty with prudence, so Congress must use prudence in judgment of its policies to create a society that enables minorities and women to be valuable citizens. Therefore, a prudent Congress has to have the capacity to implement right action in various, unique situations. If the Congress is serious about helping minorities, they must use prudence to determine the right amendments to the Dodd-Frank Act to make it sufficient to help minorities and women.

256. MACINTYRE, *supra* note 255, at 154.

257. *Id.* at 154-55.

