LAW & INEQUALITY

UNIVERSITY OF MINNESOTA LAW SCHOOL

UNIVERSITY OF MINNESOTA LAW SCHOOL • VOLUME XXXIX WINTER '21

MINNESOTA JOURNAL OF LAW & INEQUALITY

ARTICLES

VOLUME XXXIX Winter 2021 NUMBER 1

THE UNIVERSITY OF MINNESOTA LAW SCHOOL

Cite as: LAW & INEQ.

Minnesota Journal of Law & Inequality is published twice a year at the University of Minnesota Law School.

Back issues and volumes are available from William S. Hein & Co., Inc., 24 East Ferry Road, Buffalo, New York 14209.

Law & Inequality invites manuscripts addressing issues of inequality in law and society. We welcome articles from professors in law and other disciplines and practicing attorneys and judges in all areas of law. We accept articles in traditional legal format and also welcome pieces in less traditional forms—e.g., fiction, essays, letters. Please submit manuscripts electronically in Microsoft Word 2007 or newer. For more information about submissions, visit https://lawandinequality.org/submissions/.

Articles are considered for their focus on issues of inequality, substantive merit, professional interest, appeal to readers both within and outside the legal profession, clarity of expression, timeliness, and style. The Editorial Board of *Law & Inequality* reserves the right to condition acceptance of articles for publication upon revision of material to conform to our criteria and subjective review for substantive accuracy.

Opinions expressed in *Law & Inequality* are those of the contributors and are not the views of *Law & Inequality*, its editors and staff, or the University of Minnesota Law School.

Address all correspondence to *Law & Inequality*, University of Minnesota Law School, 229 19th Avenue South, Minneapolis, Minnesota 55455. Email: lawineqj@umn.edu.

ISSN 0737-089

MINNESOTA JOURNAL OF LAW & INEQUALITY

VOLUME XXXIX Winter 2021 NUMBER 1

EDITORIAL BOARD

STAFF MEMBERS

FACULTY ADVISOR

ALUMNI ADVISORY BOARD

Founded in 1981 by Catharine MacKinnon

Published Twice a Year by Law Students of the University of Minnesota

PROLOGUE

Navin Ramalingam and Hillary Richard†

The *Minnesota Journal of Law & Inequality* (*JLI*) co-hosted the *2020 Summit for Civil Rights* in partnership with the Institute on Metropolitan Opportunity and Georgetown University Law Center's Workers' Rights Institute.[1] The *2020 Summit for Civil Rights* took place virtually on July 30 and 31, 2020.[2]

The *2020 Summit* occurred amidst profound social, political, and economic strife. At the time of the *Summit*, the COVID-19 pandemic was already responsible for over 100,000 deaths in the U.S. alone.[3] At the time of publication, over 1.9 million people have died from COVID-19 globally.[4] America's deeply entrenched health inequities and disparities put racial and ethnic minority groups at an increased risk of contracting and dying from COVID-19.[5] Black Americans are more than twice as likely to die from COVID-19 as White Americans.[6]

---

†. Navin Ramalingam is the Editor-in-Chief, and Hillary Richard is a Staff Member, of *Minnesota Journal of Law & Inequality*, Volume 39.

1. *See 2020 Summit for Civil Rights – Opening Statements*, MINN. J. OF L. & INEQ., (Nov. 16, 2020), https://lawandinequality.org/2020/11/16/2020-summit-for-civil-rights-opening-statements/. *JLI* and the Institute on Metropolitan Opportunity co-hosted the first *Summit* in 2017. For more information on and links to streams of the *2017 Summit*, see *The Summit for Civil Rights: Law & Inequality: A Journal of Theory and Practice Symposium*, UNIV. OF MINN. L. SCH., https://www.law.umn.edu/events/summit-civil-rights.

2. *See* SUMMIT FOR CIVIL RIGHTS, https://summitforcivilrights.org/ [https://perma.cc/P2WQ-39P6].

3. Dan Barry, Larry Buchanan, Clinton Cargill, Annie Daniel, Alain Delaquérière, et al., *Remembering the 100,000 Lives Lost to Coronavirus in America*, N.Y. TIMES (May 24, 2020), https://www.nytimes.com/interactive/2020/05/24/us/us-coronavirus-deaths-100000.html [https://perma.cc/J3D5-TH6S].

4. Ensheng Dong, Hongru Du & Lauren Gardner, *An Interactive Web-Based Dashboard to Track COVID-19 in Real Time*, 20 LANCET INFECT. DIS. 533, published online at *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE)*, JOHNS HOPKINS UNIV. & MED.: CORONAVIRUS RES. CTR., https://coronavirus.jhu.edu/map.html.

5. *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC (July 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html [https://perma.cc/J4GY-RPSC] ("Long-standing systemic health and social inequities have put many people from racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19.").

6. Nat'l Ctr. For Health Stat., *Deaths Involving Coronavirus Disease 2019 (COVID-19) by Race and Hispanic Origin Group and Age, by State*, CDC, https://data.cdc.gov/NCHS/Deaths-involving-coronavirus-disease-2019-COVID-

A severe economic downturn ensued, proving a crisis for many, but impacting most severely women, workers of color, lower-wage earners, and those with less education.[7] National unemployment rates in the U.S. rose drastically from 3.7% in January 2020 to 14.7% by April 2020.[8] By then, more than half of all Black American adults were unemployed.[9] The remaining Black workers make up a disproportionate share of the essential labor force; they are at increased risk of dying from COVID-19 and are more likely to be on the front lines of the COVID-19 labor market.[10]

In the midst of the pandemic, on May 25, 2020, officers from the Minneapolis Police Department brutally killed Mr. George Perry Floyd—an unarmed, forty-six-year-old Black American—during an arrest on suspicion of using a counterfeit $20 bill to purchase cigarettes.[11] Darnella Frazier, a teenage bystander, filmed the egregious and horrific killing; her video quickly circulated throughout the world.[12] Despite the worsening COVID-19 pandemic, Minnesotans poured into the streets to protest the race-

19/ks3g-spdg (last visited Nov. 27, 2020). The numbers are ratios of age-adjusted death rates standardized to the 2000 U.S. standard population. *See COVID-19 Hospitalization and Death by Race/Ethnicity*, CDC (Nov. 30, 2020), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html [https://perma.cc/GU9C-D5V9].

7. Betsey Stevenson, *The Initial Impact of COVID-19 on Labor Market Outcomes Across Groups and the Potential for Permanent Scarring*, (Brookings, Hamilton Project Essay 2020-16, July 2020), https://www.brookings.edu/wp-content/uploads/2020/07/Stevenson_LO_FINAL.pdf [https://perma.cc/VW3P-38R4].

8. *See* U.S. Bureau of Labor Stat., *Labor Force Statistics from the Current Population Survey: Unemployment Rat*e, https://data.bls.gov/timeseries/LNS14000000.

9. Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus—Racism and Economic Inequality*, ECON. POL'Y INST. (June 1, 2020), https://www.epi.org/publication/black-workers-covid/ [https://perma.cc/R7CD-AF95].

10. *Id.*

11. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/H2F9-PQ95]. An officer knelt on George Floyd's neck for over 8 minutes and 15 seconds. Nicholas Bogel Burroughs, *8 Minutes, 46 Seconds Became a Symbol in George Floyd's Death. The Exact Time Is Less Clear*, N.Y. TIMES (June 20, 2020), https://www.nytimes.com/2020/06/18/us/george-floyd-timing.html [https://perma.cc/5PR8-SF8W]. For a more detailed description of the manner in which Mr. Floyd was killed, see *George Floyd: What Happened in the Final Moments of His Life*, BBC (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726 [https://perma.cc/VP3A-JMYG].

12. *PEN America to Honor Darnella Frazier, Young Woman Who Documented George Floyd's Murder*, PEN AM. (Oct. 27, 2020), https://pen.org/press-release/pen-america-to-honor-darnella-frazier-young-woman-who-documented-george-floyds-murder/ [https://perma.cc/L358-EJ2K].

based police killing that occurred on their streets.[13] Protests spread across the U.S.[14] and the world,[15] making the 2020 movement for Black lives the largest in U.S. history.[16]

The *Summit* convened within this context. The event inspired a multiracial and intergenerational gathering of the nation's top civil rights leaders to timely respond, including Minnesota Attorney General Keith Ellison, University of Minnesota Law School's Professor Myron Orfield, Dr. Beverly Daniel Tatum, Professors Keeanga-Yamahtta Taylor, Sheryll Cashin, Theodore M. Shaw, john a. powell, John C. Brittain, and Eric Foner, Bishop Reginald T. Jackson, Author Richard Rothstein, AFL-CIO President Richard Trumka, leaders at the NAACP, AFL-CIO, Rockefeller Foundation, Spencer Foundation, Century Foundation, and Ford Foundation, and numerous other elected officials, union leaders, activists, and community organizers. The *Summit* examined the "deeper, historical structures of racial apartheid in America['s] institutions and their meaning, especially at this juncture, for working people of *all* backgrounds and the implications for political action, multi-racial power, and a meaningful and transformative policy agenda."[17] *JLI* will publish papers from the *Summit* in Volumes 39 and 40.

13. Libor Jany, *Minneapolis Police, Protesters Clash Almost 24 Hours After George Floyd's Death in Custody*, STAR TRIB. (May 27, 2020), https://www.startribune.com/minneapolis-police-marchers-clash-over-death-of-george-floyd-in-custody/570763352/ [https://perma.cc/SBD4-3CQR].

14. Richard Luscombe & Vivian Ho, *George Floyd Protests Enter Third Week as Push for Change Sweeps America*, THE GUARDIAN (June 2, 2020), https://www.theguardian.com/us-news/2020/jun/07/george-floyd-protests-enter-third-week [https://perma.cc/LET4-YMAA].

15. Damien Cave, Livia Albeck-Ripka & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 6, 2020), https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html [https://perma.cc/N665-TGSB].

16. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/QR75-6WYH].

17. *See* SUMMIT FOR CIVIL RIGHTS, https://summitforcivilrights.org/ [https://perma.cc/P2WQ-39P6].

Remarks by Chairman Robert C. "Bobby" Scott[1] (VA-03)

2020 Summit for Civil Rights | University of Minnesota Law School, Georgetown University Law Center
Friday, July 31, 2020 | 10:10 AM CDT

Thank you, Dean Treanor,[2] for your very kind introduction.

I want to thank the University of Minnesota Law School, Workers' Rights Institute,[3] Building One America,[4] NAACP,[5] and all the organizations that helped organize this year's *Summit*.

---

1. "Congressman Robert C. 'Bobby' Scott has represented Virginia's third congressional district in the U.S. House of Representatives since 1993. . . . Congressman Scott has the distinction of being the first African-American elected to Congress from the Commonwealth of Virginia since Reconstruction and only the second African-American elected to Congress in Virginia's history. Having a maternal grandfather of Filipino ancestry also gives him the distinction of being the first American with Filipino ancestry to serve as a voting member of Congress. Congressman Scott currently serves as the Chairman of the Committee on Education and Labor." *Congressman Bobby Scott Biography*, HOUSE.GOV, https://bobbyscott.house.gov/about/biography [https://perma.cc/H3C3-VJHK].

2. "William M. Treanor is the Dean and Executive Vice President of Georgetown University Law Center, and he holds the Law Center's Paul Regis Dean Leadership Professorship." *William M. Treanor*, GEORGETOWN L., https://www.law.georgetown.edu/faculty/william-m-treanor/ [https://perma.cc/R6HF-ZLT5].

3. "Launched in the summer of 2019, the Workers' Rights Institute focuses on innovative legal and policy initiatives to support workers' rights and empowering the nation's most vulnerable workers to access existing labor protections." *Workers' Rights Institute*, GEORGETOWN L., https://www.law.georgetown.edu/workers-rights-institute/ [https://perma.cc/3W5K-PC7S].

4. "Building One America was launched . . . to discuss the common challenges confronting older, developed towns . . . as well as to create a national network for shared organizing, training and leadership development . . . . Building One America promotes the goals of social inclusion, racial justice, sustainability and economic opportunity by addressing regional housing policy, land use, municipal and educational fiscal structures, major infrastructure investments and jobs." *About Building One America*, BUILDING ONE AM., https://buildingoneamerica.org/content/about-building-one-america-0 [https://perma.cc/4DKZ-FDT7].

5. "Founded in 1909 in response to the ongoing violence against Black people around the country, the NAACP (National Association for the Advancement of Colored People) is the largest and most pre-eminent civil rights organization in the nation. . . . Our mission is to secure the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons." *About the NAACP*, NAACP, https://www.naacp.org/about-us/ [https://perma.cc/87RL-GDTC].

I also want to recognize Mark Pearce for his leadership as the former Chair of the National Labor Relations Board and, now, the Executive Director of the Workers' Rights Institute. Mr. Pearce had compelling testimony before the Committee last May on the need to strengthen labor rights that was critical for the passage of the Protecting the Right to Organize Act, the PRO Act.[6]

This year's gathering of community leaders could not come at a more urgent time. Across the country, the COVID-19 pandemic is highlighting racial disparities throughout our society, from the disproportionate health impacts of the virus[7] to the inequities in access to remote education.[8]

But, to meaningfully close these gaps, we must look beyond the pandemic. As you know, COVID-19 didn't cause the disparities. It has exacerbated *existing* disparities for underserved communities of color, particularly the African American community.[9]

For generations, federal, state, and local governments have allowed, and even contributed, to many of these injustices.[10]

---

6. On May 8, 2019, Mark Gaston Pearce provided testimony on the PRO Act before the House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions on how the Act would significantly improve the effectiveness of the nation's labor law. Mark Gaston Pearce, *Testimony on Protecting the Right to Organize Act*, HOUSE.GOV, https://edlabor.house.gov/imo/media/doc/Pearce%20testimony%20final-%205.3.19%20(002).pdf [https://perma.cc/4T6E-QKUU]. The PRO Act amends the National Labor Relations Act and related labor laws to extend protections to union workers. *See* H.R. 2474, 116th Cong. (2019).

7. *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC (July 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html [https://perma.cc/J4GY-RPSC] ("Long-standing systemic health and social inequities have put many people from racial and ethnic minority groups at increased risk of getting sick and dying from COVID-19.").

8. Benjamin Herold, *The Disparities in Remote Learning Under Coronavirus (in Charts)*, EDUCATIONWEEK (Apr. 10, 2020), https://www.edweek.org/ew/articles/2020/04/10/the-disparities-in-remote-learning-under-coronavirus.html [https://perma.cc/Z2ST-7VB3] ("Among the most significant are gaps between the country's poorest and wealthiest schools around access to basic technology and live remote instruction, as well as the percentages of students who teachers report are not logging in or making contact . . . . [The survey] also revealed big differences in how high- and low-income districts approached distributing schoolwork . . . . Similarly, teachers in rural districts were far more likely than their urban and suburban counterparts to say they've provided student work in person.").

9. *See* Aaron van Dorn, Rebecca E. Cooney & Miriam L. Sabin, World Report, *COVID-19 Exacerbating Inequalities in the US*, 395 LANCET 1243, 1243 (2020); *see also Health Equity Considerations*, *supra* note 7.

10. Report prepared by Stephen Menendian, Marguerite Spencer, Lidija Knuth, john powell, Sara Jackson, Fran Fajana, Andrew Grant-Thomas, Jason Reece, Eva Paterson & Kimberly Rapp to U.N. Comm. for the Elimination of Racial Discrimination, *Structural Racism in the United States*, at 2 (2008),

Accordingly, we have had a responsibility, since well before the pandemic, to be part of the solution.

That's why the Committee on Education and Labor, which I chair, is working hard to confront the *roots* of the inequities in our job market, workplaces, schools, and health care system.

The first thing the Committee has done to reduce the wage gap is to increase wages for those at the bottom. That's why the House passed the Raise the Wage Act to increase the minimum wage gradually to $15 an hour by 2025.[11]

Higher education has also been the key to better jobs and that's why the Committee reported the College Affordability Act[12] to make sure that everybody can afford college. That's how it was when the Higher Education Act was passed. President Johnson said it meant that every student in every state could apply to any college or university and not be turned away because the family is poor.[13] That's not the case now. You have to take on crushing debt to be able to go to college[14] and the College Affordability Act will reverse that trend.

And, although it's not within our jurisdiction, home ownership is the key to dealing with wealth disparities because that's where most middle class families get their wealth—gradually.[15] It's also

---

https://www.racialequitytools.org/resourcefiles/Structural_Racism.pdf [https://perma.cc/5EF6-AECY] ("[T]he U.S. has rationalized racial discriminatory effects as not covered by U.S. law. Sometimes these effects are caused by explicit government policies. At other times they are caused by private actors. Frequently, it is a combination of both.").

11. H.R. 582, 116th Cong. (2019).

12. H.R. 4674, 116th Cong. (2019).

13. President Lyndon B. Johnson, Remarks at Southwest Texas State College upon Signing the Higher Education Act of 1965 (Nov. 8, 1965) (transcript available at AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965 [https://perma.cc/ZN47-3Z2E]) ("It means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.").

14. *See* Zack Friedman, *Student Loan Debt Statistics in 2020: A Record $1.6 Trillion*, FORBES (Feb. 3, 2020), https://www.forbes.com/sites/zackfriedman/2020/02/03/student-loan-debt-statistics/?sh=7fc20b58281f [https://perma.cc/URH2-V46W] (explaining there are 44.7 million U.S. borrowers with an average student loan debt of $32,731).

15. DANYELLE SOLOMON, CONNOR MAXWELL & ABRIL CASTRO, CTR. FOR AM. PROGRESS, SYSTEMATIC INEQUALITY: DISPLACEMENT, EXCLUSION, AND SEGREGATION 1 (Aug. 2019), https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/ [https://perma.cc/77CQ-8GJY] ("Homeownership and high-quality affordable rental housing are critical tools for wealth building and financial well-being in the United States.").

generational wealth[16] because it's inherited generation after generation. And, so, we have to reverse some of the discriminatory policies that have been allowed to exist over the decades[17] and make sure that everyone has an opportunity to buy and own their own home.

We also have to preserve equality by making sure we enforce and strengthen anti-discrimination laws. The Committee has passed, and the House has passed, several bills: the Paycheck Fairness Act for women, Pregnant Workers Fairness Act, and the Equality Act for the LGBTQ community.[18] We know that we have to fight discrimination everywhere. Martin Luther King said, "Injustice anywhere is a threat to justice everywhere."[19]

Well, discrimination anywhere is an invitation for discrimination everywhere, so we have to make sure we're fighting discrimination to make sure there are equal opportunities.

To support Black workers and workers of color, the Committee passed legislation to strengthen workers' rights, particularly the right to organize.[20]

Throughout our history, the labor movement and the struggle for racial equality have been inextricably linked. With the United States' pending entry into World War II, A. Phillip Randolph led the March on Washington Movement to demand equal opportunity for Blacks in the defense industry.[21] Because of his leadership, President Franklin D. Roosevelt signed Executive Order 8802 in

16. *See* David Kleinhandler, *Generational Wealth: Why Do 70% of Families Lose Their Wealth in the 2nd Generation?*, NASDAQ (Oct. 9, 2018), https://www.nasdaq.com/articles/generational-wealth%3A-why-do-70-of-families-lose-their-wealth-in-the-2nd-generation-2018-10 [https://perma.cc/EES8-VEN8] ("Generational wealth is an aspect of financial planning that is geared toward passing down stable, significant financial resources to future generations.").

17. *See, e.g.*, MICHELA ZONTA, CTR. FOR AM. PROGRESS, RACIAL DISPARITIES IN HOME APPRECIATION 1 (July 2019), https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/ [https://perma.cc/UA4T-8U2P] (describing "[s]egregation, disparate access to credit and homeownership, and the consistent devaluation of homes in black neighborhoods" as policies contributing to wealth disparities).

18. Paycheck Fairness Act, H.R. 7, 116th Cong. (2019); Pregnant Workers Fairness Act, H.R. 2694, 116th Cong. (2020); Equality Act, H.R. 5, 116th Cong. (2019).

19. Letter from Rev. Dr. Martin Luther King, Jr. from Birmingham Jail (Apr. 16, 1963) (transcript available at UNIV. OF PENN. AFRICAN STUD. CTR., https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [https://perma.cc/EB7Q-PZAP]).

20. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020).

21. The Martin Luther King, Jr. Resch. and Educ. Inst., *Randolph, A. Philip*, STANFORD UNIV., https://kinginstitute.stanford.edu/encyclopedia/randolph-philip [https://perma.cc/6UAF-DATJ].

1941—the *first ever* presidential action to prohibit employment discrimination by private employers operating federal contracts.[22] In short, federal contractors in receipt of federal dollars were barred from discriminating on the basis of race, religion, color, or national origin.

In other words, organized labor has partnered with civil rights organizers to help all workers achieve higher pay, better benefits, safer working conditions, and the ability to work and retire with dignity.

In fact, the 1963 "March on Washington" was the "March on Washington for Jobs and Freedom"—and unions, obviously, were very much involved.

Today, union members of color have almost five times the median wealth as non-union counterparts, and about two-thirds of the workers covered by a union contract today are women, people of color, or both.[23] For Black workers, specifically, collective bargaining agreements can eliminate the racial income gap because, in a union contract, everybody is paid equal pay for equal work.

Simply put, strong collective bargaining means strong civil rights.

Unfortunately, persistent attacks on unions have weakened our core labor laws and eroded union membership, fueling the nation's income inequality.

That's why the House came together in February to pass the PRO Act[24]—the most comprehensive legislation in recent history to protect workers' collective bargaining rights. Ensuring that workers can decide whether to form a union without employer interference is essential because democracy in the workplace should be a right, not a fight.

House Democrats have also introduced the Public Service Freedom to Negotiate Act,[25] a strong response to the 2018 *Janus v.*

---

22. *Id.*; Exec. Order No. 8,802, 3 C.F.R. 1941 Supp. 128 (1942) ("All contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin . . . .").

23. Christian E. Weller & David Madland, *Union Membership Narrows the Racial Wealth Gap for Families of Color*, CTR. FOR AM. PROGRESS (Sept. 4, 2018), https://www.americanprogress.org/issues/economy/reports/2018/09/04/454781/union-membership-narrows-racial-wealth-gap-families-color/ [https://perma.cc/V3X7-KHUW].

24. Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020).

25. H.R. 3463, 116th Cong. (2019).

AFSCME[26] decision, which prohibited fair-share fees in the public sector. This decision undermined unionizing among public sector workers by making "right-to-work" the law in every state. Congress cannot overturn the Supreme Court decision in *Janus*, but this bill provides workers in *every* state the freedom to negotiate with their employers.

We were scheduled to take up this bill. Unfortunately, the House essentially suspended all Committee consideration of bills unrelated to COVID-19. When we get back to doing our work, that bill will be one of those we take up.

In K-12 education, the Committee is working to close the persistent academic achievement gap. Last April, we began work regarding our unfinished business to eliminate racial segregation in education sixty-six years after *Brown v. Board of Education*.[27] The [Government Accountability Office] found that segregation in public schools today is as bad as it was in the 1960s and getting worse.[28] We know separate schools have never been equal.

Recently, Committee Democrats have been focused on ensuring that we do something about segregated schools. We reported two bills:

1. The Equity and Inclusion Enforcement Act,[29] which establishes a private right of action for people in localities to bring lawsuits challenging practices or policies that have a racially disparate impact. Because of a Supreme Court decision about twenty years ago,[30] these suits can now only be brought by the Department of Education, and the Department is not bringing such cases.

2. The Strength in Diversity Act[31] is a grant program for school districts who want to *voluntarily* develop school integration plans. As you know, in Louisville, Kentucky and Seattle, Washington, the Supreme Court set aside

---

26. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

27. 347 U.S. 483 (1954).

28. U.S. GOV'T ACCOUNTABILITY OFF., K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION 10–15 (2016).

29. H.R. 2574, 116th Cong. (2020).

30. Alexander v. Sandoval, 532 U.S. 275 (2001).

31. H.R. 2639, 116th Cong. (2019).

> voluntary plans as being unconstitutional.[32] You can do them, but this grant program will give the resources and technical assistance so that you can do them right and so that you can overcome Supreme Court challenges.

To confront the pandemic, the House has also passed more than $200 billion in emergency education funding.[33] This includes funding to address extreme inequality in our nation's school infrastructure, which I originally proposed in the Rebuild America's Schools Act[34] in January.

We have also passed nearly $1 trillion in relief for state and local governments in the Heroes Act,[35] which is pending in the Senate now, to preserve funding for public education. Without relief to state and local governments, they will be forced to make painful cuts to education to balance their budgets.

In the pending Senate bill,[36] there is no funding for state and local governments. You're going to find that state and local governments will have to cut their budgets, and the little money that there is for education in the Senate bill will only partially offset the massive cuts to education required by state and local governments to balance their budgets.

Finally, to expand equitable access to health care, the Committee is working to protect and strengthen the Affordable Care Act.[37] This landmark legislation expanded access to health care for tens of millions of Americans and reduced the share of Black Americans without health care coverage by at least a third.[38]

---

32. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (barring voluntary integration programs based on race as violative of the Equal Protection Clause when a jurisdiction has not been found by a court to be illegally segregated).

33. *See* HEROES Act, H.R. 6800, 116th Cong. (2020); Fact Sheet, Comm. on Edud. & Lab., Heroes Act (H.R. 6800): Education and Community Support Provisions (May 12, 2020), https://edlabor.house.gov/imo/media/doc/2020-05-12%20Heroes%20Act%20-%20Education%20Fact%20Sheet.pdf [https://perma.cc/XEV4-CZ9W] (providing $100 billion in direct emergency educational funding and up to $10,000 in debt relief for more than 20 million student loan borrowers).

34. H.R. 865, 116th Cong. (2020) (suggesting that funds be provided for making sure educational facilities are safe, including need-based grants for local schools).

35. H.R. 6800, 116th Cong. (2020).

36. *See* CARES Act, S. 3548, 116th Cong. (2020). This version of the CARES Act was introduced in the Senate in June 2020, and is sponsored by Senator Mitch McConnell (R-KY).

37. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

38. *See* Samantha Artiga, Kendal Orgera & Anthony Damico, *Changes in Health*

Unfortunately, the ACA has consistently been under attack from Republican lawmakers and this Administration.[39]

In response, House Democrats passed the Patient Protection and Affordable Care Enhancement Act[40] this past June. This legislation builds on the ACA by lowering the cost of health care, expanding Medicaid, and strengthening protections for patients with pre-existing conditions. The legislation also shields consumers from short-term health care plans, or what we call "junk plans," that actually raise costs for those without insurance and abandon consumers when they actually need care.

These are just a few of the initiatives the Committee and House Democrats have undertaken to address the nation's continued legacy of systemic racism.

It can be difficult to be optimistic about these proposals amidst all of the chaos in Washington. However, as we continue to confront the pandemic, the House Education and Labor Committee remains committed to our ultimate goal: rooting out racial disparities and achieving equity for all Americans. In that, we all stand firm with our recently departed brother, Congressman John Lewis, to work with you to make *good trouble*.[41]

So, thank you all for participating in today's *Summit* and for your good work to realize the promise of liberty and justice for all.

Coverage by Race and Ethnicity Since the ACA, 2010–2018, KFF (Mar. 5, 2020), http://files.kff.org/attachment/Issue-Brief-Changes-in-Health-Coverage-by-Race-and-Ethnicity-since-the-ACA-2010-2018.pdf [https://perma.cc/RZL8-MHDT].

39. *E.g.*, Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011) (introduced on January 5th that year, this bill was one of the very first things the new Republican House attempted). *See generally* C. STEPHEN REDHEAD & JANET KINZER, CONG. RSCH. SERV., LEGISLATIVE ACTIONS IN THE 112TH, 113TH, AND 114TH CONGRESSES TO REPEAL, DEFUND, OR DELAY THE AFFORDABLE CARE ACT (Feb. 7, 2017).

40. H.R. 1425, 116th Cong. (2020).

41. "Do not get lost in a sea of despair. Be hopeful, be optimistic. Our struggle is not the struggle of a day, a week, a month, or a year, it is the struggle of a lifetime. Never, ever be afraid to make some noise and get in good trouble, necessary trouble. #goodtrouble" John Lewis, @repjohnlewis, TWITTER (June 27, 2018, 10:15 AM), https://twitter.com/repjohnlewis/status/1011991303599607808 [https://perma.cc/64CL-2H59].

Still Strangers in the Land: Achievement Barriers, Burdens, and Bridges Facing African American Students Within Predominately White Law Schools

Cristal E. Jones, M.B.A.†
University of Oregon School of Law

This Article examines the barriers to an environment where African American law students no longer view themselves, and no longer are viewed as, what American abolitionist Harriet Tubman coined, "a stranger in a strange land."[1] *In this Article, I explain the research on the structural, psychological, and social factors that face the African American community, and more specifically, the African American legal community. I discuss the implications of these factors for African American law students and law schools. Finally, I make recommendations to help overcome the achievement gap experienced by African American law students. The prognosis is one of optimism.*

Introduction

> These black students had "put aside" their problems about race, which is to say, they had internalized the self-hate engendered and sustained by societal pressures on all blacks, and resolved them by a determination to win white acceptance by becoming carbon copies of their white peers.[2]

---

†. Cristal E. Jones is a third-year law student at the University of Oregon School of Law. She would like to thank two institutional treasures: her advisor, Erik J. Girvan, and her mentor, Suzanne Rowe. She would like to thank the University of Oregon School of Law Dean, Marcilynn Burke, as well as the administrators, faculty, friends, and peers who championed this lens. Last, but certainly not least, she would like to thank her mother, Rosa J. Lilly Grant, who lived through the dehumanizing era of "black" Codes and Jim Crow legislation, yet reminds that the achievement gap was never a reason for African American mediocrity. This paper is in tribute to the life and legacy of George Floyd and the countless Black lives who were similarly lost before and after his murder.

1. Derrick A. Bell, Jr., *Black Students in White Law Schools: The Ordeal and the Opportunity*, 2 U. TOL. L. REV. 539, 539 (1970) (quoting AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 146 (Am. Cont. Series ed. 1956)).

2. *Id.* at 544.

> But the success was as black students trying hard to be white, accepting all manner of slights and insults, intended and unconscious, and attempting all too successfully not to remember that it was all a charade and that whatever the quality of the performance, it would never be accepted as truly authentic by the audience for whose benefit it was performed.[3]

> I survived the class and somehow succeeded in my studies despite what seemed at the time the necessity of providing my classmates, most of whom were well-meaning, but few of whom had any prior contact with blacks, with a liberal education on race relations.[4]

> The inability or plain unwillingless [sic] of faculties to adhere to the basic principle of teaching—start where the students are—constitutes the single most serious cause of black students' failure to adjust to white law schools.[5]

Each statement above was written in 1970 by the late Derrick Bell, Jr., Dean of Oregon School of Law, in the article *Black Students in White Law Schools: The Ordeal and the Opportunity*. Each statement was written fifty years ago, when African American law students entered and often graduated from white law schools as "stranger[s] in a strange land . . . ." Many of those sentiments still ring true today.[6]

The quote "stranger in a strange land"[7] refers to the alien experience described by American abolitionist Harriet Tubman after she escaped from slavery in the South to freedom in the North.[8] As one of a small number of African Americans living in the North while free, Tubman was astonished to learn that this freedom would call her to live life in the North as an outsider within a white community.[9] That community seemed to accept her presence but did not welcome it. Today, that same feeling of admission yet exclusion is a sentiment widely held by African American law students.[10]

---

3. *Id.* at 544–45.

4. *Id.* at 545 (noting that he "charged no tuition for a course that included explanations").

5. *Id.* at 548.

6. *Id.* at 539.

7. *Id.*

8. *Id.*

9. *See id.* (comparing the experiences of African American law students today with Harriet Tubman's experience as an outsider).

10. *Id.* (analogizing to the "ambivalence so emotionally disorienting" of an African American's decision to go to law school and noting the continuing "systemic denial of black humanity" that still exists in the law today).

These students, comprising a small racial group in law school, "cross[] the line"[11] into a predominately white environment and struggle to pursue law as outsiders within a white community that seems to accept their presence but does not always welcome it.[12]

Hundreds of years before Harriet Tubman, when the first African slave arrived in Jamestown, America's societal ills began to infect the African American community.[13] Those societal ills, namely racial legacies that resulted in disparities and inequities, are still deeply rooted within the American pillars of education, government, health, housing, and commerce.[14] While many of those racial legacies have been repealed and nullified, including the acts once wielded against African Americans by the Supreme Court, those legacies still influence how African American law students relate to the persistent structural, psychological, and social barriers.[15] These barriers profoundly contribute to the African American law student achievement gap.

Although law school's first year can be "academically and psychologically traumatic"[16] for all entering students because of the unique mental challenges of legal analysis, for African American students, the first year of law school can be even more traumatic.[17] Certainly, many African American law students succeed, yet some do not.[18] It is difficult to surmise what specifically about the law school culture contributes to a negative or positive consequence

---

11. *Id.* at 539.

12. *Id.* at 539–40. There are 200 accredited law schools in the United States. *ABA-Approved Law Schools*, AM. BAR ASS'N https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/ [https://perma.cc/62T3-LSDD]. Only six of these are Historically Black Colleges and Universities. *Law Schools at Historically Black Colleges and Universities*, LAW CROSSING https://www.lawcrossing.com/article/2518/Law-Schools-at-Historically-Black-Colleges-and-Universities/ [https://perma.cc/LH3Y-886W].

13. *See* Michael Katz, *Black Law Students in White Law Schools: Law in a Changing Society*, 2 U. TOL. L. REV. 589, 596–97 (1970).

14. *See* MICHELLE ALEXANDER, THE NEW JIM CROW 22–40, 194 (2012) (discussing how polices of segregation were replaced by polices of "law and order" that likewise functioned to keep African Americans at the bottom of the racial caste system).

15. *See id.*; *see also* Katz, *supra* note 13, at 597 (speaking specifically to the Supreme Court's use of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to "nullify the advances" of African Americans); Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past*, 12 T. MARSHALL L. REV. 415, 422–23 (1986) (discussing how decisions like *Dred Scott v. Sandford*, 60 U.S. 393 (1857), left a legacy of difficulty for African American law students—including disparities in wealth and education).

16. Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 573 (1983).

17. *Id.*

18. *See* Bell, *supra* note 1, at 551.

because the Law School Admission Council (LSAC) data only reports three student credentials: the type of school attended, Undergraduate Grade Point Average (UGPA), and the Law School Admission Test (LSAT) score.[19] Although the data provided by LSAC regarding the law school atmosphere is limited, data models and research suggest that atmosphere significantly impacts the achievement of African American law students.[20]

In this Article, I offer specific explanations about how the law school culture contributes to negative or positive consequences for African American law students. Further, I describe the research on the structural, psychological, and social factors that face the African American community, and more specifically, the African American experience in the law school environment.[21] I discuss the implications for African American students and law schools. Finally, I make recommendations to help overcome the academic achievement gap experienced by African American law students.

For the purposes of group identification, I will use the term "African American," "students of color," "white," and "dominant culture." These terms are used to reflect the socially recognized distinctions within the United States' racial hierarchy. The terms "African American" and "students of color" are used to reference citizens of the United States with African ancestry. The terms "white" and "dominant culture" are used to reference the citizens of the United States with European ancestry. This is a generalization for the purposes of a broader discussion and is not meant to negate or overlook the individual nuances that are collapsed within each group identification category.

---

19. Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law Students?*, 101 NW. U. L. REV. 1759, 1803 (2007).

20. *Id.* at 1806. An alternative view is the mismatch theory. This theory is based on the idea that the fast-paced nature and competition of law school increases disparities between those with stronger and weaker academic credentials. *See, e.g.*, Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 450 (2004); Adam Shatz, *The Thernstroms in Black and White*, AM. PROSPECT (Dec. 10, 2001), https://prospect.org/features/thernstroms-black-white/ [https://perma.cc/Q59E-ZGKA]. This view has been largely debunked. *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1839 (2005).

21. The Author recognizes that numerous barriers contribute to learning trauma within other group perspectives. This paper is meant to provide an African American perspective. Although African Americans are underrepresented in many professions, the underrepresentation within the legal profession is particularly problematic given the role that the legal profession plays in shaping social policy and societal norms. Disillusionment, alienation, and frustration have led African Americans to pursue career paths outside of law.

This Article seeks to examine those barriers and burdens faced by African Americans in the pursuit of law as outsiders, while offering bridges of hope for the future. My goal is to make visible the barriers that impede African American success within the law school environment and articulate practices that can narrow, and even eliminate, the achievement gap. I believe that "[t]he road may be rough, the journey may be tough and the experience may be bitter, but they are stepping stones to our future thrones."[22] This future is an unstigmatized realization of academic achievement. I hope that in another fifty years, the African American law student will no longer exist as a "stranger in a strange land."

I. Origin: I Am Who I Am

The first group of factors that likely contribute to the academic achievement gap experienced by African American law students are antecedent and can be classified into their origin. Origin, in the ordinary meaning, is "ancestry, parentage."[23] The ancestry or parentage of an individual, specifically an African American individual, is the framework from which one understands, perceives, and engages the world. This framework evolves from the early stages of life and is a dynamic accumulation of experience and information.[24] While this framework can be wholly fluid on one hand, it can be equally rigid and primal on the other hand, particularly when dominated by historical, political, cultural, and familial correlations.

Generally, law students operate under widely held perceptions of how to succeed within the framework of academia.[25] This framework, a product of organic cultivation, tends to standardize the prerequisites necessary to acquire a satisfactory body of legal knowledge.[26] For instance, all law students must learn the terms of the law as well as the methods to learn the law.[27] The terms of the

22. Bamigboye Olurotimi, *Quotations*, BAMBIGBOYE OLUROTIMI (Nov. 21, 2014), http://bamigboyeolurotimi.blogspot.com/2014/11/quotations-by-bamigboye-olurotimi.html [https://perma.cc/B8B4-7R9T].

23. *Origin*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/origin [https://perma.cc/UZ4E-DYSZ].

24. *See* MATTHEW DESMOND, ON THE FIRELINE: LIVING AND DYING WITH WILDLAND FIREFIGHTERS 30, 170–72 (2007) ("[W]e possessed shared histories and competences, a country-masculine habitus, that helped us adjust to the demands of firefighting and coordinate our actions vis-a-vis one another.").

25. *See* YUNG-YI DIANA PAN, INCIDENTAL RACIALIZATION 7 (2017).

26. *Id.* ("For many law students, learning such rules also compels them to take on the associated values, thus forever changing their moral outlook.").

27. *Id.*

law can be various terms of art.[28] The method of learning law can be Socratic.[29] Because this framework, and the law, are derived from the dominant culture, those students who mirror that racial frame are preconditioned with some level of familiarity that facilitates the learning experience.[30] However, for the African American student, the familiarity instilled by a different racial frame must be acclimated to the prevailing worldview.[31]

Acclimation to that prevailing worldview is challenged by the reality that African Americans are underrepresented in legal education and the profession.[32] These students often lack role models to provide guidance on how to prepare and succeed in this new environment.[33] This dilemma is further exacerbated by the fact that African American law students are less likely to have friends or family members who are lawyers, or even law students, when compared to white students.[34] Accordingly, African American students may enter the law school environment excluded from the "intra-institutional" methods that white students rapidly acquire from upper-class students, administrators, and faculty about the expectations and norms of their new role.[35] Such intra-institutional methods may include group study, course selection, word-of-mouth advice, and exam preparation.[36] Matriculating without that insight can create a knowledge void that breeds delay, tension, and blind spots, which constrain the learning experience.[37] Those consequences are further stoked by the resignation that legal achievement is "stacked in favor of white males of the middle and upper middle class . . . ."[38] For these reasons, origin is likely a primary contributor to the variance in the academic performance of African American law students.

---

28. *See* Kevin Deasy, *Enabling Black Students to Realize Their Potential in Law School: A Psycho-Social Assessment of an Academic Support Program*, 16 T. MARSHALL L. REV. 547, 562 (1991).

29. *Id.*; Hamlar, *supra* note 16, at 575.

30. *See* PAN, *supra* note 25, at 88–89.

31. Leslie P. Culver, *White Doors, Black Footsteps: Leveraging White Privilege to Benefit Law Students of Color*, 21 J. GENDER RACE & JUST. 37, 44, 48 (2017) (expressing how the white man's perspective frames the foundation of this country, its ideologies, and its institutions).

32. *Id.* at 44–45.

33. Deasy, *supra* note 28, at 562.

34. *Id.*

35. *Id.* at 560, 562–63; Hamlar, *supra* note 16, at 574.

36. Hamlar, *supra* note 16, at 574. It might also include the mere comfort that a classmate would feel if that classmate's parent were an academic at the university.

37. *Id.*

38. DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION HIERARCHY 78 (1983).

Origin and origin factors, as depicted in Figure 1, can be broken down into three different concepts: (1) general habitus, (2) linguistic habitus, and (3) culture. Habitus is "the presence of social and organizational structures in individuals' bodies in the form of durable and generative dispositions that guide their thoughts and behaviors."[39] In other words, "habitus is the source of one's practical sense."[40]

Origin Factors
A. General Habitus
B. Linguistic Habitus
C. Culture

Fig. 1

A. General Habitus

General habitus can be understood as the way in which an individual is cultivated to envision and encounter the world from the early stages of childhood and adolescence.[41] This notion points to knowledge that is not formally learned and serves as a deeper source of competence.[42] As it relates to law school, general habitus suggests that African American law students enter the building with preconditioned notions of the learning environment that are largely different than the preconditioned notions of their dominant culture peers. These differences in preconditioned notions, left unguarded, can lead to an African American achievement gap.

American sociologist, professor, and author Matthew Desmond used wildland firefighters to illustrate general habitus as it relates to the unique competency of wildland firefighters.[43] In this illustration, Desmond observed that wildland firefighters generally work together in small teams during the fire season, which begins in early May and ends in late August.[44] These small teams, known as firecrews, are stationed in woodland areas throughout the United States.[45] During fire season, these firecrews eat, sleep, socialize, and travel together in between fighting fires.[46]

39. DESMOND, *supra* note 24, at 12.
40. *Id.*
41. *Id.*
42. *See id.*
43. *See id.*
44. *Id.* at 2.
45. *Id.*
46. *Id.*

Many wildland firefighters possess a pre-existing knowledge about firefighting tools and forest landscape.[47] Specifically, these firefighters have a unique knowledge about the equipment, roads, forest, and terrain that is fixed before their basic training.[48] This unique knowledge is attributed to the fact that these firefighters are often descendants of family members who "chased smoke," so firefighting comes naturally and is "in [their] blood."[49] This know-how was coined by Desmond as *country competence*.[50]

The majority of wildland firefighters have very limited advanced exposure to wildfires, and usually have only seen a few fire seasons under twenty acres of land.[51] Hence, the proclamation that they "had to see it burn to learn . . . ."[52] Yet, even those firefighters with limited advanced experience were able to respond with swiftness, skill, and coordination.[53] Their fireline capacity spanned beyond experience and into another source of competence—general habitus.[54] In this illustration, these firefighters were able to easily adapt and respond in communities without ever having been there before.[55] These firefighters seemed to possess an inscribed know-how.[56]

From Desmond's interview with a wildland firefighter, the firefighter explains:

> My crewmembers easily found the isolated mountain community, though they had never been there before, because the roads they drove to find smoke in the summer were the same ones they drove to find deer in the winter. Since many crewmembers took their driver's license test in the seat of a four-by-four pickup, it was not difficult for them to adjust to driving the chase truck or the engine. J.J., George, and I knew how to swing an ax to destroy a half-burned porch because we had been chopping our parents' and grandparents' wood since we were children. We knew how to observe the forest because our eyes had been searching the tips of pines and the trunks of oaks for years. Our ears knew what to listen for; our noses knew what the forest was supposed to smell like. Our footing and balance, posture and hiking style, sense of touch and movement

47. *See id.* at 12 (describing "corporeal knowledge").
48. *See id.* at 20.
49. *Id.*
50. *Id.* at 171.
51. *Id.* at 169.
52. *Id.*
53. *Id.*
54. *See id.*
55. *Id.* at 170–71.
56. *Id.* at 170.

> were attuned to the forest, and this heightened awareness, this woodsy know-how inscribed in our histories and in our very bodies, allowed us to adapt quickly to the challenges of the fire.
>
> When [we] returned to fire camp after doing battle on the line, our faces, necks, arms, and legs were caked with a thin crust of dried sweat, ash, dirt, and hardened foam. Our filthy fire shirts and pants bore evidence of the dirty work of firefighting; globs of mud stuck to our boots; and we smelled of body odor and smoke. But we were used to getting dirty. As children, we were encouraged to muck around in the outdoors, and as teenagers, we were urged to muddy ourselves on the football field.[57]

Country competence facilitates wildland firefighting expertise.[58] It is the general habitus—the unspoken skills and knowledge that lie below the surface. General habitus preconditions the wildland firefighters to the demands of the forest and the fire.[59]

Applying this illustration to the law school environment, general habitus can be discerned in the difference between how African Americans and their dominant culture peers navigate the learning environment. For instance, while dominant culture peers rapidly forge relationships with upper-class students, faculty, and peers, African American students may find it difficult to identify and cultivate those same relationships.[60] Such relational challenges may be reflected in the subtle neglect, rejection, and isolation that African American students experience by virtue of being different.[61] These differences, likely the result of general habitus, can lead to a navigational, relational, and organizational gulf. When left unchecked, that gulf can quickly devolve into an insurmountable disadvantage that "follows its targets onto campus," which affects speaking in class, seeking help, and peer connection.[62] General habitus is likely a dominant contributor to the African American academic achievement gap.

B. Linguistic Habitus

Linguistic habitus is another component of origin that can factor into the achievement gap of African American law students.

---

57. *Id.* at 171.

58. *Id.*

59. *See id.*

60. Deasy, *supra* note 28, at 562–63; *see also* Hamlar, *supra* note 16, at 574 (giving examples of African American students being excluded at school).

61. Deasy, *supra* note 28, at 562; Hamlar, *supra* note 16, at 574.

62. Ayres & Brooks, *supra* note 20, at 1839 (quoting Claude M. Steele, *Expert Report of Claude M. Steele*, 5 MICH. J. RACE & L. 439, 445 (1999)).

Linguistic habitus refers to the language skills that take root early in childhood, adolescence, or young adulthood.[63] These language skills serve as a common code that both forms and informs a shared, historic competency.[64] Returning to the example of the wildland firefighters, the possession of a shared linguistic habitus enables firefighters to seamlessly and safely orchestrate routine and fireline tasks.[65] The firefighters who possess a shared linguistic habitus, evidence an uncanny ability to understand and act upon commands that are bantered in hasty, broken, or abrupt words.[66] Shouted commands like "[d]on't use too much water" or "[l]et's use a foam nozzle instead of a forester" rang familiar in the ears of those who had shared experiences.[67] Those shouted commands rang familiar because of their shared experience as youth football players under coaches who also yelled short orders and quick plays from the sidelines.[68] This shared language creates a chemistry that is forged in prior, high pressure circumstances.[69] As one firefighter summarized, this common voice enables a firefighter to be ready for the fire even before one foot is set on the fireline.[70]

Turning to the law school environment, linguistic skills are clearly important features of legal education. And, the linguistic differences between African Americans and the dominant culture "of whose image the entire legal system is a reflection, are obvious."[71] As a minoritized group, African Americans must discern, as opposed to embody, the common legal voice. Since much of the societal cultural norms are unwritten and dynamic, there exists a high probability that the linguistics will be mutually lost in translation: The student will be encumbered in understanding the law, and the professor will be encumbered in understanding the student. Thus, the African American student's ability to be "ready for the . . . fire before [they] set foot on the fireline" is encumbered.[72] This difference not only muddies the learning waters, but can become a filter when African American students read cases, hear

63. DESMOND, *supra* note 24, at 170.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. J. Otis Cochran, *The Law Schools' Programmatic Approach to Black Students*, 17 HOW. L.J. 358, 369 (1972).
72. DESMOND, *supra* note 24, at 170.

lectures, vocalize opinions, draft briefs, receive feedback, or take exams.

African American law students are less likely to share the common legal voice that facilitates socializing, networking, teaching, or learning, and thus, must follow a white, masculine script.[73] The African American script of communication differs from the dominant culture in pattern, tone, and structure.[74] Because that pattern, tone, and structure tend to run counter to the dominant culture, African American expressions may be mistaken as loud, abrupt, ignorant, emotional, or impassioned.[75] For example, class discussions about legal cases that have racial undertones may evoke issue surfacing,[76] recasting, or clarification by an African American student speaking with conviction. That conviction, however, expressed in tone, language, or mannerism, can be misinterpreted by white peers or faculty as anger, attitude, or aggression. Such misunderstandings, on either side of the racial line, are not uncommon and further challenge African American students' smooth entry, transition, existence, and achievement within the legal environment. Here, it may hold true that "[i]t's not how much you know when you answer the question, but whether you speak the same language as the person who asked it."[77] Linguistic habitus, thus, is likely a dominant player in the African American academic achievement gap.

C. Culture

The last component of origin is culture. Usually, when we think of culture, we think of a particular nation, people, or social group's customs, arts, institutions, or achievements.[78] Culture plays a pivotal role in the academic life of an African American law student. Chiefly, culture influences how a student manages their family, social, and financial dynamics.[79] With regard to family

73. *See* Carmen G. González, *Women of Color in Legal Education: Challenging the Presumption of Incompetence*, 61 FED. LAW. 49, 53 (2014); PAN, *supra* note 25, at 89.

74. Culver, *supra* note 31, at 75; *see* Cochran, *supra* note 71, at 369; Deasy, *supra* note 28, at 566; González, *supra* note 73, at 75.

75. González, *supra* note 73, at 53.

76. Issue surfacing is identifying a problem or social issue and giving voice to it. Sung Won Kim & Shaila M. Miranda, *A Call to Arms: A Social Movements Perspective on "Issue" Surfacing on Social Media*, 2011 ACAD. OF MGMT. PROC. 2.

77. Ralph Smith, *Double Exposure: The Sinister Magic that Would Turn Black Students into White Lawyers*, 2 LEARNING & L. 24, 28 (1975).

78. *See Culture*, MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/culture [https://perma.cc/BR78-VZTC].

79. Bell, *supra* note 1, at 549–50; Hamlar, *supra* note 16, at 535–37.

dynamics, an often-quoted line of biblical wisdom within the African American community comes to mind: To whom much is given, much is required.[80] This saying is deeply ingrained and widely modeled within the African American community and simply means that those who have the knowledge, talent, time, or wealth are expected to help those that are less fortunate. From an early age, African Americans learn that the family member who is in the greatest position to help, should help.

Tied to law school, cultural demands emerge for African Americans who are first generation college students. These students are usually the family member who is in the greatest position to help, having forgone work to advance themselves and their families after college.[81] This means that African American law students are likely called upon to prioritize and resolve their family's financial, social, or medical affairs while they also manage the pressures of law school.[82] A refusal to assist their family, even for just cause, is frowned upon. Thus, the African American culture is likely a contributor to the academic success or failure of African American law students.[83] Students on a different cultural wave than the dominant culture, as described above, may not perform as well academically. Culture is likely a dominant contributor to the African American academic achievement gap.

II. Psychological Causal Factors: To Be or Not To Be

The next set of factors that contribute to the academic achievement gap experienced by African American law students can be classified as psychological and social. Unlike origin, these factors do not occur before law school, but occur within law school. These factors are really barriers because they impede academic success by creating an inhospitable law school climate and "obscure the minorit[ized] student's natural ability."[84] Psychological and social barriers are typically subjective in nature and are centered within the African American law student's perspective or experience. Figure 2, below, depicts a list of psychological barriers and include phenomena such as imposter syndrome, stereotype threat, stereotype lift, low expectations, solo effect, and inter-role conflict.

---

80. *See Luke* 12:48 (New International) ("From everyone who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked.").

81. *See* Bell, *supra* note 1, at 549.

82. *See id.*

83. *See id.*

84. Cochran, *supra* note 71, at 364.

Psychological Factors
A. Imposter Syndrome
B. Stereotype Threat
C. Stereotype Lift
D. Low Expectations
E. Solo Effect
F. Inter-role Conflict

Fig. 2

A. Imposter Syndrome

Impostor syndrome was first identified in 1978 by psychologists Pauline Rose Clance and Suzanne Imes.[85] It is a collection of inadequate feelings that one has only succeeded due to luck, and not as a result of talent or qualifications.[86] Imposters, despite success and accomplishments, battle with internal notions of intellectual fraud and self-doubt.[87] Some researchers maintain that imposter syndrome stems from the labels parents assigned their children such as "the brainy child" or "the athletic child."[88]

As an underrepresented group in a predominately white law school, African American students often feel like outsiders and likely suffer from chronic uncertainties about their accomplishments, credentials, and competence.[89] In recounting one illustrative experience, Professor Leslie Culver recalled that she "could *not* afford to be the black student asking the perceived dumb or irrelevant question because that would reflect on my intelligence, my value, my personhood, and ultimately my entire race."[90] African American law students often struggle with a similar and perpetual feeling of being ill-perceived, accompanied by suspicions of whether they actually belong in the law school environment at all.[91] These

85. Pauline Rose Clance & Suzanne Imes, *The Impostor Phenomenon in High Achieving Women: Dynamics and Therapeutic Intervention*, 15 PSYCHOTHERAPY THEORY RES. & PRAC. 241, 241 (1978).

86. Abigail Abrams, *Yes, Imposter Syndrome Is Real. Here's How to Deal with It*, TIME (June 20, 2018), https://time.com/5312483/how-to-deal-with-impostor-syndrome/ [https://perma.cc/5KHJ-JAKH].

87. *See id.*

88. Gill Corkindale, *Overcoming Imposter Syndrome*, HARV. BUS. REV. (May 7, 2008), https://hbr.org/2008/05/overcoming-imposter-syndrome [https://perma.cc/Y7TY-NUPP].

89. *See* Smith, *supra* note 77, at 28.

90. Culver, *supra* note 31, at 51. The concern for representing the "entire race" is known as stereotype threat, discussed *infra*.

91. *Id.* at 67.

ongoing doubts, which are equally isolating and disorienting, not only erode the sense of belonging, but can trigger detached and distant learning.[92]

B. Stereotype Threat

Stereotype threat is a term used to define the fear experienced when a minoritized person performs more poorly than expected because of a stereotype that the person will actually perform poorly.[93] According to Professor Russell McClain, "[t]his fear, and its associated anxiety, creates a cognitive load that affects working memory, ability to focus, confidence, self-esteem, and effort."[94]

For example, when African American students taking the Scholastic Aptitude Test (SAT) hear that African Americans generally do not perform well on the SAT, these students may become distracted, preoccupied, or angered by this low expectation, which can lead to poor test performance.[95] Similarly, checking a box on a test form to indicate race can also trigger stereotype threat. In a high stakes testing environment, just the reminder that African Americans perform less well can lead to suppressed performance.[96]

In the white law school environment, African Americans may be separated from the very community support that helped counter negative stereotypes. As a result, African American students may quietly internalize, shun, or dispel racial stereotypes by suppressing words or conforming behaviors to avoid being seen as "the angry black woman"[97] or "the militant black woman."[98] Such

92. Hamlar, *supra* note 16, at 578, 581; Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles and Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71, 74 (2010).

93. Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1, 1 (2016).

94. *Id.*

95. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 807–09 (1995); *see* Gregory M. Walton & Geoffrey L. Cohen, *Stereotype Lift*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 456, 463 (2003).

96. Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 249 (2001).

97. González, *supra* note 73, at 51; *see also* Deo et al., *supra* note 92, at 74 (describing the isolation and microaggressions that students of color experience in higher education).

98. *See* Culver, *supra* note 31, at 66 (quoting Jordan Carter, *Legally Brown*, MS. JD (Apr. 15, 2014), https://ms-jd.org/blog/article/legally-brown [https://perma.cc/E5YN-ACDX]); Valerie Daniel, *Exploring the Label of 'the Angry Black Woman'*, #WOMENED (June 21, 2020), https://www.womened.org/blog/exploring-the-label-of-the-angry-black-woman [https://perma.cc/2D3C-5FCB].

steering, also known as code-switching,[99] makes optimal performance extremely difficult at best, particularly when African Americans believe that their success or failure is attributed not just to them, but to their entire race.

In the landmark decision *Grutter v. Bollinger*, the Supreme Court reminded that racial stereotypes cannot be reduced "with only token numbers of minority students."[100] An increase in a group from just two to three members, can permit a range of expressions, personalities, and talents that undermine the stereotype from one individual's behavior.[101]

C. Stereotype Lift

Stereotype lift is a companion to stereotype threat.[102] Stereotype lift is "the performance boost caused by the awareness that a [minoritized] outgroup is negatively stereotyped."[103] When that minoritized member's worth or ability is negatively stereotyped or called into question, the dominant group member gets a performance benefit or boost.[104] By comparing themselves with the minoritized group, the dominant group member "may experience an elevation in their self-efficacy or sense of personal worth, which may, in turn, improve performance."[105] Because negative stereotypes are so deeply ingrained within the American social and psychological fabric, either the majority or minoritized group can connect to negative stereotypes automatically, particularly as it relates to intellect or performance.[106]

For African American students, stereotyped social comparisons can trigger self-doubt, anxiety, and fear of rejection that hinder academic performance.[107] Alternatively, a performance boost may be experienced by dominant culture students.[108] For example, when taking a law school exam, the African American student may feel exacerbated pressure, while the dominant culture

---

99. Carlos D. Morrison, *Code-Switching*, ENCYCLOPEDIA BRITANNICA (2020) (explaining how African American students shift from African American dialect, which they speak to maintain status in their community, to standard English, which they need to succeed in society at large).

100. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

101. Hamlar, *supra* note 16, at 578.

102. Walton & Cohen, *supra* note 95, at 456.

103. *Id.*

104. *Id.*; Ayres & Brooks, *supra* note 20, at 1840.

105. Walton & Cohen, *supra* note 95, at 456.

106. *Id.*

107. McClain, *supra* note 93, at 1.

108. Walton & Cohen, *supra* note 95, at 456.

peer, taking the same exam, may experience a pressure relief, or lift, assuming they will perform better than classmates who are persons of color because they might automatically link their exam performance to negative stereotypes.[109] Here, the implication is an indirect advantage to the dominant culture student. Stereotype threat may exacerbate pressures experienced by African American students, while stereotype lift may alleviate pressures experienced by dominant culture students.

D. Low Expectations

President George W. Bush coined the phrase "the soft bigotry of low expectations" when he announced the No Child Left Behind Act in 2000.[110] President Bush stated that low expectations were yet another source of racial bias.[111] He further remarked that racial and socioeconomic barriers were dominant contributors to the educational achievement gap experienced by students in the United States.[112]

Although anti-discrimination laws principally guard against explicit forms of bias, implicit forms of bias, in the form of low expectations, persist. Explicit bias is a belief that is consciously endorsed, while implicit bias is a belief that is unconsciously endorsed.[113] African American law students are particularly vulnerable to low expectations from dominant culture students and faculty due to low expectations resulting from implicit bias.[114] Dominant culture students and faculty may consciously or unconsciously believe that African American students are academically unqualified or undeserving.[115] Those low expectations can take the shape of seemingly innocent and ambiguous suggestions to light-load (not taking the typical number of courses), attain additional support (through extra meetings with professors or in programs designed for "academic success"), or extend coursework timelines (postponing graduation or adding summer

109. *Id.* at 463.

110. Laurie Rubel & Andrea V. McCloskey, *The Soft Bigotry of Low Expectations and Its Role in Maintaining White Supremacy Through Mathematics Education*, 41 OCCASIONAL PAPER SERIES 113, 115 (2019); Governor George W. Bush, Campaign Speech at the NAACP Convention in Baltimore, C-SPAN, at 33:30 (July 10, 2000), https://www.c-span.org/video/?158142-1/bush-campaign-speech.

111. *Id.*

112. *Id.*

113. Erik J. Girvan, *On Using the Psychological Science of Implicit Bias to Advance Anti-discrimination Law*, 26 GEO. MASON C.R.L.J. 1, 22–23, 32 (2015).

114. *See* Bell, *supra* note 1, at 544, 553; Hamlar, *supra* note 16, at 580, 582.

115. Hamlar, *supra* note 16, at 581–82.

coursework).[116] While those suggestions may not necessarily signal a faculty member's lack of confidence or even bias, the rationale for the suggestion is still tricky for an African American student to decipher, especially in an opaque, predominately white institution. Preferential treatment, on the other hand, undermines confidence and magnifies an African American student's fear of failure.[117] Such well-intentioned assistance, like additional office hours, can feel like preferential treatment that suggests that the African American student is not on par with classmates. Even when special assistance is badly needed, the professor's lack of confidence can be a clear and painful signal that may result in the African American student's predictable, yet understandable, rejection and resentment.[118]

In response to an inquiry about the performance expectations of African American associates, one anonymous minority law firm partner said that she almost did not want to recruit students of color:

> No matter how qualified, no matter how much star quality these recruits have, they are going to be seen as people who will most likely not cut it. So, they are under the microscope from the first moment they walk in. And, every flaw is exaggerated. Every mistake is announced. And, it's like, aha. As soon as a [minoritized person] makes a mistake, they immediately say that that's what they were expecting all along.[119]

The low expectations of African American law students can create an unhealthy scholastic pressure and expectation to perform which can lead to physical and mental illness.[120] Professor Leslie Culver added that a "lifetime of ignorant incidents can take a toll on even the most confident of souls."[121]

E. Solo Effect

Upon entering the law school environment, African American students embark on an education and, subsequently, a profession with a history of discrimination and exclusion.[122] The solo effect references the isolation experienced by individuals who make up a

---

116. *See, e.g.*, Cochran, *supra* note 71, at 365, 369.

117. *Id.* at 366.

118. Bell, *supra* note 1, at 551.

119. Culver, *supra* note 31, at 54.

120. Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health*, 35 INT'L J. EPIDEMIOLOGY 888, 892, 895 (2006).

121. Culver, *supra* note 31, at 59.

122. Deasy, *supra* note 28, at 550; Katz, *supra* note 13, at 589.

small number within a larger community.[123] This isolation, triggered by actual, perceived, or imagined differences, results in an added strain that can take a toll upon an individual's sense of self or physical well-being.[124]

Law school has become infamous for an intensely competitive and inhospitable climate which is further aggravated for students of color.[125] Many African American law students find this highly competitive environment artificial, alien, hostile, and filled with patronizing and disdainful professors and peers.[126] This climate has been the subject of numerous diversity studies which describe the correlation between the law school atmosphere and the performance of African American students who feel like outsiders, given different cultural experiences, perspectives, and values.[127] Being accepted by an "in-group" can lead to self-consciousness, over- and under-conformity, and distancing as a result of being both included as a token and excluded as an outsider.[128] Again, African American students may be excluded from the intra-institutional methods by which white students tend to acquire information about how to function within their new role (as a law student), including advice from upper-class students and faculty members.[129]

Numbers matter. The number of students of color matters in terms of group representation.[130] As a critical mass, the number of students of color can help "relieve the soul-crushing isolation, the painful stigma, and the exhausting service requirements" that African American law students experience.[131]

F. Inter-role Conflict

Inter-role conflict occurs when an individual's prior reference group reacts negatively to changes in that individual's behavior. It has been said that:

> Every Negro who is higher than lower class has a sense of guilt

123. *See* Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 17 BERKELEY J. AFR. AM. L. & POL'Y 47, 47 (2016) (discussing "solo status"); Hamlar, *supra* note 16, at 576.

124. *See* PAN, *supra* note 25, at 90; Deasy, *supra* note 28, at 561.

125. Deo et al., *supra* note 92, at 73.

126. Smith, *supra* note 77, at 28.

127. *See* Deo et al., *supra* note 92, at 73–74.

128. Hamlar, *supra* note 16, at 577–78.

129. Deasy, *supra* note 28, at 562–63.

130. *See* González, *supra* note 73, at 50, 53.

131. *Id.* at 53.

> to other Negroes because he considers success a betrayal of his group and a piece of aggression against them. Hence, he has frequently what might be called a "success phobia" and occasionally cannot enjoy the fruits of his achievements.[132]

This success phobia includes demands to adopt the new role's language, mindset, behavior, and appearance.[133] Since the new role's language is not compatible with the prior reference group's language, the prior reference group may now view the individual in the new role as arrogant or "selling out."[134] Specifically, African American students in their new identity as law school students and future lawyers grapple with being viewed by their family and old friends as an "Uncle Tom" or "traitor."[135] Because their life experiences often defy the legal concepts of due process and probable cause, African Americans are also not a natural fit within the new reference group. This challenge often leads to role overload, a burdensome balance of too many obligations and expectations.[136] Many African American students are largely unprepared for their new role in the law, and for the related conflicts and pressures that arise inside and outside the law school walls.[137]

Students are typically faced with what W. E. B. Du Bois termed the "'duality' of being black in America."[138] Because African Americans place a heavy emphasis on family, the fear of being separated through education from extended family, childhood friends, and neighborhood peers, causes many African American law students to perform below academic standards.[139] And, the inability to be fully accepted by either reference group provokes the sense of being othered and unbelonging. The late Dean Derrick Bell stated that the "quasi-acceptance and role-playing that often pervade these integrated scenes are neither positive nor healthy."[140]

Dean Bell believed that African American students would never be accepted by the white audience for whose benefit the "charade" was performed, although the students' talents and ability

---

132. Bell, *supra* note 1, at 549 (quoting ABRAM KARDINER & LIONEL OVESEY, THE MARK OF OPPRESSION 316 (Meridian ed. 1962)).

133. *See id.*; Deasy, *supra* note 28, at 566.

134. Deasy, *supra* note 28, at 566; González, *supra* note 73, at 53.

135. *See* Deasy, *supra* note 28, at 566.

136. *Id.* at 567.

137. *Id.* at 561–62.

138. Smith, *supra* note 77, at 28; *see* W. E. B. DU BOIS, THE SOULS OF BLACK FOLK 5 (1903) (describing the sensation of "double-consciousness").

139. Bell, s*upra* note 1, at 549; González, *supra* note 73, at 53.

140. Bell, *supra* note 1, at 557.

to internalize the rage from "slights and insults, intended and unconscious," would yet enable them to get through law school.[141] While not an exhaustive list, the aforementioned negative psychological experiences can make the study of law a pursuit that is persistently and profoundly vacillating, agonizing, and tormenting, particularly during the first year of law school.

III. Social Causal Factors

Social factors are typically subjective in nature and shape the choices, perspectives, and experiences of African American law students. Although the list of potential social factors is limitless, Figure 3 indicates factors may include the choice and magnitude of assimilation and accommodation, racial capitalism and tokenism, and mentorship and sponsorship.

Social Factors
A. Assimilation and Accommodation
B. Racial Capitalism and Tokenism
C. Mentorship and Sponsorship

Fig. 3

A. Assimilation and Accommodation

African Americans struggle with the many facets of their identity: first as African Americans, and second, as African Americans who are raised in a European culture.[142] In his 1903 bestseller, *The Souls of Black Folk*, W. E. B. Du Bois explored this internal conflict that is experienced by African Americans who seek to reconcile their African heritage with their European upbringing.[143] There, he crafted the term "double-consciousness" and explained:

> It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.
>
> The history of the American Negro is the history of this

141. *Id.* at 544–45.
142. *See* Smith, *supra* note 77, at 28.
143. DU BOIS, *supra* note 138, at 5.

> strife—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the doors of Opportunity closed roughly in his face.[144]

In an extraordinary effort to fit in, make others feel more comfortable, or "follow the crowd," African American law students regularly face the choice to mute their identity by assimilating or accommodating to the dominant culture.[145] Sadly, such agonizing efforts are attempted and carried out in hopes of finding belonging within a legal community that looks nothing like them. Assimilation is the choice to *fully* adapt to the dominant culture by conforming one's appearance, language, decisions, principles, or perspectives.[146] Accommodation, on the other hand, is the choice to *selectively* adapt to the dominant culture by conforming one's appearance, language, decisions, principles, or perspectives.[147] For instance, the African American student's choice to wear an ethnic hair style, speak in a familial dialect, or wear culturally inspired clothing is often preceded with internal deliberation and inquiry.[148] Internal deliberation and inquiry is triggered by the reality that many decision makers in the legal community tend to mentor, sponsor, or hire individuals who look like themselves.[149] This is a "cloning effect" or effort to reproduce a social order through individuals.[150] For African Americans, in order to be cloned, or at least chosen, conforming on some level is essential.[151] Even when efforts to fit in succeed, students of color may be left feeling

144. *Id.*

145. Hamlar, *supra* note 16, at 584 (describing the "social conformity theory" of prejudice and stating that "it means 'follow the crowd' and always conform with the thoughts and decisions of others"); *see also* González, *supra* note 73, at 51 (discussing experiences of female faculty of color).

146. For a visual representation of how "communication practices . . . might be organized in relation to . . . separation, accommodation, [and] assimilation," see Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 597–98 (2018).

147. *See id.*

148. *See* González, *supra* note 73, at 51.

149. *See id.* at 52.

150. *Id.*

151. *See id.*

unsupported, alienated, and anxious because essential parts of who they are became misrepresented or not represented at all.[152]

B. Racial Capitalism and Tokenism

Racial capitalism is defined as "the process of deriving . . . value from the racial identity of another person."[153] In the article *Racial Capitalism*, Nancy Leong expressed concern about racial exploitation whereby white people, and predominately white institutions, obtain value from people of color.[154] This value is typically derived in the name of diversity.[155] Instead of helping create a truly diverse environment, students of color may be left feeling as if their identity is just a commodity in a place that once eagerly sought their presence, but now takes no stake in their racial identity.[156] While the diversity mission of predominately white institutions was justified by the Supreme Court's ruling in *Fisher v. University of Texas at Austin*, these institutions still run the risk of negatively capitalizing upon the racial identity of African American students.[157]

In the law school environment, racial capitalism can take on a tokenistic construct. Specifically, a predominately white law school may rely on the few students of color to be the face of diversity initiatives, recruitment efforts, or social activities. This is racial capitalism. The untold reductions and daily microaggressions[158] experienced in the legal environment by students of color echo the "incessant lesson . . . that [they are] insignificant and irrelevant."[159] For this reason, while African American students may want to help their school's diversity efforts, this help cannot be extended at the expense of their privacy and independence. Thus, a natural tension

152. *See id.* at 50–53.

153. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013).

154. *Id.* at 2153–54.

155. *Id.* at 2152.

156. *See id.*

157. *See id.*; Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214 (2016).

158. Microaggressions, in a racial context, are bias subtleties in word or deed. *See generally* Tori DeAngelis, *Unmasking Racial Micro Aggressions*, 40 MONITOR ON PSYCHOL. 42 (Feb. 2009) (describing the study of microaggressions and associated vocabulary). *See, e.g.*, Deo et al., *supra* note 92, at 74 (discussing the daily microaggressions experienced by African American law students); González, *supra* note 73, at 50 ("[Law] students from underrepresented groups . . . report isolation, discomfort expressing their views, and daily 'microaggressions' in the form of subtle and not-so-subtle sexist and racist affronts.").

159. Allen & Solorzano, *supra* note 96, at 249 (quoting Chester Pierce, *Is Bigotry the Basis of the Medical Problem of the Ghetto?*, *in* MEDICINE IN THE GHETTO 301, 303 (J. Norman ed., 1969)).

exists for African American students who want to increase African American presence and decrease image exploitation.

C. Mentorship and Sponsorship

In the law school environment, faculty and student interactions form the foundation of learning and socialization.[160] Therefore, building rapport and establishing a network are critical to the success of African American students.[161] Because African American students may believe that the onus is solely upon them to initiate such interactions, they may be reluctant for fear of repeat racial rejection or other prejudice.[162] It has been said that higher education is "littered with landmines and unwritten rules that may torpedo the careers of those who do not receive proper guidance and support."[163] Students of color need mentors to provide that proper guidance and support, while also offering advice, insight, and encouragement.[164] Students of color also need sponsors to advocate, leverage, and promote their contributions.[165] Mentorship and sponsorship are essential means for African American students to successfully navigate the legal journey.

IV. Institutional and Structural Realities

It has been well-established that African American life in the United States has been a life of mainstream exclusion. United States Supreme Court decisions, such as *Dred Scott v. Sandford*[166] and *Plessy v. Ferguson*,[167] served to "nullify the advances, both political and economic, that characterized the black experience during the Reconstruction period, and compelled its leadership to settle for a 'separate but equal' place in American society . . . ."[168] African American law students continue to face institutional and structural barriers in pursuit of higher education.

160. Hamlar, *supra* note 16, at 584.
161. *See* Culver, *supra* note 31, at 43–44.
162. *See* Hamlar, *supra* note 16, at 579.
163. González, *supra* note 73, at 52.
164. *See id.*
165. *Id.*
166. 60 U.S. 393 (1857).
167. 163 U.S. 537 (1896).
168. Katz, *supra* note 13, at 597.

Institutional and Structural Factors
A. Barriers Built into the Law
B. The Uncommon Code
C. Economic Inequality

Fig. 4

A. Barriers Built into the Law

Today, given anti-discrimination laws, those more overt forms of discrimination from the past have now made way for more covert indignities. Such indignities have become more apparent with the help of modern technology, yet a veiled "separate but equal" standard remains carefully woven into the fabric of this country's culture, policies, and practices.[169] A cursory review of the heightened rate of African American contact with the juvenile and criminal justice system along with a seemingly erratic societal perception of justice aptly demonstrates two deeply separate organisms: the African American community and the legal system.[170]

The institutional codes, societal structures, and traditional criteria of the American legal community prefer those of the white majority "of whose image the entire legal system is a reflection," and thus, the concept of law does not even carry the same meaning for African Americans.[171] Author Michael Katz once stated that large portions of the African American community no longer view law as effective or relevant to the troubles in society.[172] He further added:

> The black person in America has been excluded from the process of formulating the legal principles which constitute the normative order of our society. Therefore, the legal system constructed by white America has become both irrelevant and unresponsive to the needs of the black/poor and the deprived.[173]

169. *See id.* ("The end of Reconstruction, the violent repression of the blacks in the South and the Supreme Court's perverse interpretation of the Reconstruction Amendments combined to deny to black Americans those attributes of citizenship which the draftsmen of the Amendments believed were being accorded them. The net effect of the Supreme Court's decisions in *The Civil Rights Cases* and in *Plessy v. Ferguson* was to nullify the advances, both political and economic, that characterized the black experience during the Reconstruction period, and compelled its leadership to settle for a 'separate but equal' place in American society, to prevent even greater encroachments on its already perilous condition.").

170. *See* Cochran, *supra* note 71, at 359–60.

171. *Id.* at 369.

172. Katz, *supra* note 13, at 589.

173. *Id.*

African American citizens are needed in the legal process that controls their very destiny.[174] African American lawyers are needed to be the voice and hands of a legal revival for the benefit of their community.[175] This burden rests primarily upon law schools who were once the perpetrators of legal inequity, given the field's "lingering reputation for professional discrimination . . . ."[176] Law school administrators and faculty must now accept the higher calling of legal reformation.

B. The Uncommon Code

African American law students may not have the social capital garnered by their dominant culture peers to help navigate and decipher the secret social behaviors and norms within the legal community.[177] Because the "landmines and unwritten rules" of the academic landscape can be fatal to students who lack guidance and support, deciphering the code is essential to the academic success of African American students.[178] Without an understanding of the secret, and not so secret, social behaviors and norms that govern every day behavior, this uncommon code, or hidden curriculum, may cause African American students to miss out on opportunities that would enhance their academic and social experience in law school.[179] Such experiences include garnering insight on how to gather professional advice, participate in informal networks, or benefit from external systems of support.[180] African American students often miss out on this insight for lack of knowledge that it is needed or even exists.

C. Economic Inequality

Financial considerations also impact the African American law student's experience. Disparities in income and wealth between African American and dominant culture students necessarily result in different abilities to afford lengthy and expensive legal

174. Cochran, *supra* note 71, at 361.

175. *See id.*

176. *Id.* at 362 (quoting Peter A. Winograd, Hughes Graham & Robert B. McKay, *The Disadvantaged Student and Preparation for Legal Education: The New York University Experience*, 2 TOL. L. REV. 701, 706 (1970)).

177. González, *supra* note 73, at 52.

178. *Id.*

179. *See* Deasy, *supra* note 28, at 563 (discussing the Mellon Program, a week-long orientation and ongoing training that "addresses the problem of role discontinuity by providing preparation for, and support throughout, the black student's first year as a law student").

180. *See id.*

training.[181] Further, African American students are typically "heavily dependent on financial aid because they [are] disproportionately burdened with undergraduate debt and [have] relatively little family support compared to white students."[182] Such structural forces are compounded by the escalating costs of law school and disproportionate reductions in financial scholarships, grants, and loans.[183] Economic inequality is a structural impediment that can challenge African American law student's experience and professional journey.

V. Closing the African American Achievement Gap

Admittedly, the challenges facing African American law students, administrators, and faculty within predominately white institutions are daunting. Author Michael Katz stated:

> If the institutions of the law are not to find themselves rendered obsolete by the swift pace of events, if they are to continue to perform their traditional function of providing the necessary framework for peaceful social change, something is demanded of them that goes beyond the rigorous and diligent enforcement of the law.[184]

Law schools must carry this burden.[185]

Scholars have proposed many ideas about how to resolve the achievement gap experienced by African American students.[186] Without a drastic change in this society's social order, the gap may always exist. Yet, I can imagine a world where the achievement gap narrows. I can imagine a world where the achievement gap significantly narrows. I can even imagine a world where the achievement gap becomes imperceptible. Together, we can significantly improve the law school climate, quality, and experience—for all. If it holds true that "a journey of a thousand miles starts under one's feet,"[187] I see no need for further delay.

---

181. Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past*, 12 T. MARSHALL L. REV. 415, 416 (1986).

182. *Id.* at 437.

183. *Id.* at 446–47.

184. Katz, *supra* note 13, at 602.

185. *Id.* at 603.

186. *See, e.g.*, González, *supra* note 73, at 54 (highlighting structural reforms to "create an equitable campus climate and address the unique barriers faced by historically underrepresented groups").

187. LAO TZU, TAO TE CHING, ch. 64 (c. 4th Century B.C.E.) (Gia-fu Feng & Jane English trans., 2005), https://terebess.hu/english/tao/gia.html [https://perma.cc/6AUT-ZJ9L].

The following five institutional recommendations may help narrow the academic achievement gap experienced by African American law students within predominately white institutions. In some instances, these recommendations expand upon progressive efforts in other institutions, such as Historically Black Colleges and Universities (HBCUs).[188] There, a wide range of personalities, talents, and expressions are allowed to flourish and grow unfettered by stereotypes that can undermine a community. Generally, at HBCUs, students overperform because there are enough African American community members to provide the level of security, support, and esteem for students to function as individuals within their race, as opposed to spokespeople for their race.[189] Further, students feel less racially isolated and alone.[190] Until there is a critical mass of African American students, their problems, pressures, and personal discomfort within predominately white schools will likely persist, but can be managed.[191] There is hope.

Five ways to Help Close the Achievement Gap
A. Dispel the Hidden Curriculum
B. Dispel Negative Innuendos and Attitudes
C. Dispel Harmful Coping Mechanisms
D. Leverage Community Support
E. Equip Community in Advance

Fig. 5

A. Dispel the Hidden Curriculum

Dispelling the hidden curriculum can help overcome the achievement gap. Linking back to habitus, the hidden curriculum is a concept that refers to unspoken values, norms, and behaviors that operate within an institution.[192] These unspoken values,

188. *Cf.* Ayres & Brooks, *supra* note 20, at 1840–43 (discussing the concept of giving "empirical content to the idea of identifying the regime that would maximize the number of black lawyers"). The author is a graduate of Fisk University, an HBCU in Nashville, Tennessee.

189. *See id.* (using data to disprove an argument that removing affirmative action measures would increase "the overall probability of blacks becoming lawyers"); Hamlar, *supra* note 16, at 576–77 (noting that a critical mass of minoritized students could enable them to assert themselves as individuals, without the responsibility for the image, welfare, and ideas of their race).

190. *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2236 (2016) (discussing racial isolation).

191. *See* Deo et al., *supra* note 92, at 74.

192. Merfat Ayesh Alsubaie, *Hidden Curriculum as One of Current Issue of Curriculum*, 33 J. EDUC. & PRAC. 125, 125 (2015).

norms, and behaviors serve to promote, enforce, and influence educational practices and people.[193] Accordingly, those law students who possess this hidden knowledge or access are advantaged.[194] For example, beginning law school students are advantaged by their connections to upper-class students or graduates who can share doctrinal class notes, practice exams, and informal networks. These peer advisors, informal networks, and activities are often undetected by African American students, yet provide invaluable insight, counsel, and support to dominant culture classmates.

To dispel the law school hidden curriculum, administrators and faculty can begin by acknowledging that it even exists, and then take measured steps to understand how it takes shape within their institution.[195] With that understanding, methods and strategies can be tailored to distribute the knowledge and resources that advantage some students, but not others. Here, student affinity groups like the Black Law Students Association (BLSA) should be funded and empowered to play a larger role in equipping its members with academic resources and support. While it is not BLSA's burden, such equipping could also include assistance to form a repository for study aids along with connections to academic mentors. As first year law students, African American students should be matched with an upper-classman peer advisor who is willing to help illuminate the academic path. Programs like the Academic Excellence Program at the University of Oregon School of Law could play a greater role to help surface and dispel the hidden curriculum by providing handouts and conducting information sessions on topics that everyone is presumed to know.[196] Such support mechanisms may better equip all students with the tools, norms, and expectations necessary to succeed within their new role as law students. Dispelling the hidden curriculum helps ensure that all students, specifically African American students, possess and access the same tools to succeed in law school.[197]

---

193. *Id.*

194. *See id.*

195. *See id.* at 127.

196. *See Student Success*, UNIV. OF OR. SCH. OF L., https://law.uoregon.edu/academics/student-success#:~:text=The%20Academic%20Excellence%20Program,and%20advising%2C%20and%20academic%20advising [https://perma.cc/CM6Z-4ZHB] (discussing the Academic Excellence Program).

197. *See* Deasy, *supra* note 28, at 570 (discussing the Mellon Program at the University of Pittsburgh as a successful "academic support component . . . structured to address problems of performance that are related to the history of exclusion of blacks from legal education, and the profession in general").

B. Dispel Negative Attitudes and Innuendos

African American students should rely on their administrators' and faculty's ability to identify, navigate, and derail hidden attitudes and innuendos. Professor Culver noted that:

> "Lawyers bring to their work their implicit biases that are embedded in the dominant power and prestige of identity groups in society." Naturally, it follows then that white law professors, the flagship of the dominant group in legal academia, bring their implicit bias into the classroom, where students of color are [minoritized].[198]

These hidden attitudes and innuendos tie back to the psychological and social factors experienced by African American students, which on a good day, can crop up at least a dozen times.[199] African American students teeter between being negatively seen and being unseen. Such teetering creates a vulnerability that enters the student's classrooms and exits the professor's office.[200] In general, administrators and faculty seem largely unprepared or unwilling to address the unique needs and challenges that African American law students face, particularly in the classroom.[201] For instance, when race is featured in legal cases or class discussions, professors and peers often look to African American students for translation.[202] This appeal for translation burdens African American students to breathe context, rationale, or insight into the

198. Culver, *supra* note 28, at 64 (quoting Russell G. Pearce, Eli Wald & Swethaa S. Ballakrishnen, *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2413 (2015)).

199. *See* Allen & Solorzano, *supra* note 96, at 283 ("Understanding the pervasiveness of racial incidents inside and outside the classroom begins with acknowledging the subtle, yet stunning, insults endured by students of color on a daily basis.").

200. *See* Deo et al., *supra* note 92, at 74 ("[L]egal education continues to focus on white males as the primary recipients of legal knowledge and classroom attention . . . . This often leaves students of color feeling 'othered,' voicing concerns that their race negatively affects how they are treated by professors in the classroom. Law students of color have higher attrition rates and lower academic outcomes than whites, as many disengage from classrooms focused primarily on white students.").

201. *See* Culver, *supra* note 31, at 65 ("Minority students across the country . . . not only feel disappointment and dissatisfaction with the 'problems of diversity in the nation's law schools,' but also recognize how their educational experience is negatively impacted by a dominant viewpoint that permeates their classroom experience, often discounting various perspectives.").

202. *See id.* at 66 ("The subtle or overt forms of bias, or complete absence of social and racial context, can mean that attending class for students of color requires them to 'deal simultaneously with intellectual and discriminatory stressors.'").

legal narrative.[203] Further, this burden creates anxiety, frustration, and fatigue. African American students look to their professors to assume leadership of racially infused text and dialogue. A professor's failure to assume that leadership by laying the racial foundation, acknowledging a racial lens, or anticipating student discomfort, sends a signal of indifference, ignorance, or insignificance.[204] Professors should not miss an opportunity to acknowledge and validate other racial perspectives.

To dispel these negative attitudes and innuendos, administrators and faculty should at least make the effort to see the world and legal issues the way that African American students do. As Kent Greenwalt noted, "a white student [or faculty member] who has never talked seriously with [African Americans] will be unlikely to understand many very important things about life in the United States."[205] Such very important things may eliminate or blur stereotypes that can inhibit one's practice as an administrator, lawyer, or judge.[206] In order to see the world the way that African American students do, administrators and faculty should be required to certify, formally, as culturally competent scholars. And, that cultural competence should be recertified annually. Without formal and ongoing training to become more racially sensitive and aware, blind spots will persist at the expense of a tiny, recruited community.

Administrators and faculty should deepen their cultural understanding and connection to African American students. One lasting and effective way to deepen cultural understanding and connection, is to build a relational bridge. Administrators and faculty can actively seek feedback from students of color to gauge diversity impact and classroom impressions. Administrators and faculty should also attend a BLSA event or meeting each year. Administrators and faculty should invite students of color to stop by their office to check-in, have coffee or a sandwich, or should offer to call or set up an online conference. Administrators and faculty could also email articles of interest or support, make time to hear student viewpoints, and offer faculty viewpoints. Granted, the educational system may emphasize scholarship over service, yet

---

203. *See id.* at 66–67.

204. *See id.* at 79 n.230 (citing examples of mishandled classroom environments when discussing race).

205. Hamlar, *supra* note 16, at 584; *see also* Bell, *supra* note 1, at 548 ("If white law professors are to teach effectively black law students, however, they must at least make the effort to see the world and the legal issues as the black students see them.").

206. *See* Hamlar, *supra* note 16, at 584.

"these times do not afford [you] the opportunity to maintain [your] scholarship in an ivory tower, to be detached and self-indulgent."[207]

C. Dispel Harmful Coping Mechanisms

The law school does not provide adequate tools for minoritized people to navigate experiences when racial identity is at issue. Thus, African American students are largely unequipped to anticipate and manage the psychological and social fallout that their presence and perspective may invite.[208] As a result, many of the psychological factors previously mentioned can be triggered. For example, in class or in hallway conversations, when an African American student raises social or economic issues that are unique to the African American experience, those issues may be met with debate, ignorance, or denial.[209] When left to defend this narrative alone, African American students may quickly become at odds with other equally impassioned expressions that are narrated by dominate culture peers. From the African American student's perspective, that debate, ignorance, or denial discredits and devalues their sense of worth and worthiness within the learning environment. These negative feelings linger and are likely suppressed or unaddressed because the tools to navigate such racial dynamics are not present.

Administrators and faculty should provide effective tools to help African American students address common racial dynamics in law school. The law school's Diversity, Inclusion, and Leadership Development Director, or someone in a similar position, should create a toolbox that is tailored to the African American psychological and social experience in law school. This toolbox should include a "lunch and learn" session early in the fall semester and a "check-in" session during the semester's midpoint. These sessions should also include one joint opportunity to listen and learn with faculty. More importantly, the law school should have counselors on site who are dedicated to the mental and emotional well-being of all students, specifically African American students. The mental health statistics for legal practitioners are staggering

207. Cochran, *supra* note 71, at 379.

208. *See* Deasy, *supra* note 28, at 548–49 (explaining the theories defining "the strain experienced by many black students in entering the role of law student, a role from which black individuals were for many years largely excluded, and in which they remain severely underrepresented").

209. *See* Culver, *supra* note 31, at 63–69.

and the pursuit of law can be a breeding ground for mental crisis.[210] Law school leadership should dedicate resources for an inhouse mental support team. These tools, sessions, and support will better equip African American students to successfully navigate the racial terrain in law school.

D. Leverage Community Support

African American students need a village. Students can matriculate and spend three years in this environment largely unaware of who those village members are. Those village members are allies. These allies have demonstrated a willingness to be a part of the African American student experience and can readily speak to the common concerns and missteps in pursuit of law. Allies should be invited, regularly, to connect with students and share lessons learned, offer encouragement, counsel, and support. For African American students in a predominately white institution, ongoing conversations are essential.

To identify and leverage the village, allies within the legal community should be identified and communicated to African American students. One informal way to make this introduction is to fund an annual BLSA student dinner. This dinner will help communicate, establish, and maintain community connections. This dinner should be hosted at the beginning of the school year. A reception, also hosted at the beginning of the school year, should include administration, faculty, and BLSA members. Here, allies within the legal community can be invited and introduced. This reception should be an informal gathering. These social occasions can help provide the village that African American students need within the legal community.

It cannot be overstated how critical it is for the law school to hire African American administrators, faculty, and staff as rapidly as African American students are recruited. In addition, utilizing visiting professors until permanent positions can be hired, for even one semester, not only benefits the students, but the law school.[211] These professors, legal scholars, and trailblazers will be fully capable to stand as informative and inspirational beacons of learning and change. Their visits can serve to "bridge the gap while

210. *See* Dina Roth Port, *Lawyers Weigh in: Why Is There a Depression Epidemic in the Legal Profession?*, ABAJOURNAL (May 11, 2018), https://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession [https://perma.cc/M4QY-HGTZ].

211. Bell, *supra* note 1, at 557–58.

a number of permanent [African American] faculty and staff members are being acquired."[212]

E. Equip Community in Advance

African American students should be equipped in advance for the many institutional, social, and psychological challenges that they will face. The challenges facing African American students are common, predictable, and well-known. For this reason, administration and faculty should ensure that African American students are not left unaware or ignorant. To that end, administrators and faculty should also not be left unaware or ignorant. Experiences that trigger psychological factors such as stereotype threat or imposter syndrome are not unusual given the racial dynamics and rigors of the law school environment. Equipping African American students, administrators, and faculty, in advance, with the capacity to identify these experiences while providing these groups with the tools to cope, is essential. To disseminate these tools, law school administrations should arrange a group discussion with African American students and include representatives from the school's counseling center and equity and inclusion department. This discussion should occur externally, away from the building where the challenges will arise.

Conclusion

In 1965, during Howard University's commencement, President Lyndon B. Johnson stated:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair.[213]

While African American students may still contend with those chains in the form of structural, psychological, and social barriers, the achievement gap that they experience can be narrowed. Law schools have an obligation to create access for these students who have been historically excluded from the legal profession.[214] To that

212. *Id.* at 558.

213. Hamlar, *supra* note 16, at 534; President Lyndon B. Johnson, Commencement Address at Howard University, C-SPAN, at 13:09 (June 4, 1965), https://www.c-span.org/video/?326895-1/president-lyndon-b-johnson-commencement-address-howard-university.

214. *Id.* at 459.

end, African American students will require a more sensitive and timely approach to address their unique needs.[215] Today, admissions criteria, teaching methods, and course curriculum should reflect the African American lawyer's function and responsibility to society. As Dean Bell aptly stated, "Blacks do not expect the law schools to advocate revolution. They do, however, expect a view of the world, the law, and society more encompassing than that held by Louis XIV."[216] Law schools must lead the legal profession and our society in justice for all. Dean Bell envisioned that "[a]s the transition from a white law school with a few token [African Americans] evolves to a multi-racial law school (including faculty and administration) issues of . . . 'racist teachers,' [administrators, and students] . . . 'recede.'"[217] African American law students should no longer have to enter and graduate as "strangers in a strange land."[218] The prognosis is one of optimism.

215. *See id.* at 537 ("[L]aw schools which admit minority students and other students who have been disadvantaged by academic and/or economic inequality have a legal obligation to provide compensatory academic and financial assistance to assure equal opportunity in competition to such students.").

216. Bell, *supra* note 1, at 548.

217. Hamlar, *supra* note 16, at 584 (quoting Derrick A. Bell, *In Defense of Minority Admissions Programs*, 119 U. PA. L. REV. 364, 368–69).

218. Bell, *supra* note 1, at 540 (referencing Harriet Tubman's quote cited in AUGUST MEIER & ELLIOTT RUDWICK, FROM PLANTATION TO GHETTO 146 (Am. Cont. Series ed. 1956)).

Vote Denial and Defense: Reaffirming the Constitutionality of Section 2 of the Voting Rights Act

Hayden Johnson†

Abstract

Election law advocates and scholars have revered the Voting Rights Act (VRA) as holding "super-statute" status. But the Supreme Court in Shelby County v. Holder *rattled this view after it ruled that a core provision of the statute was unconstitutional. Since then, jurisdictions nationwide have increasingly enacted so-called "vote denial" laws, which restrict where, when, and how voters can participate in the electoral process and often disproportionately harm voters of color. At the same time, proponents of these restrictive laws are making louder and more explicit invitations for the Court to also rule unconstitutional the primary remaining VRA tool to confront vote denial laws: the Section 2 results test. Indeed, during October Term 2020, the Supreme Court will decide* Brnovich v. Democratic National Committee*, a case with significant implications for the future of Section 2.*

The arguments that Section 2 is unconstitutional fall into two main categories: (1) Section 2 exceeds Congress' enforcement power under the Reconstruction Amendments because the results test lacks "congruence and proportionality" to the harm of intentional voting discrimination; and (2) Section 2 violates the Equal Protection Clause because the results test requires excessive race-consciousness by state election decisionmakers. This article discusses both theories of Section 2's purported unconstitutionality and how the Supreme Court has handled similar challenges in related antidiscrimination contexts. It then rebuts these challenges and reaffirms that the prevailing Section 2 results test applied in the vote denial context stands on firm constitutional ground.

---

†. Legal Fellow, Campaign Legal Center; J.D. 2019, Georgetown University Law Center; B.A. 2015, University of Denver. My sincere gratitude to the *Law & Inequality* staff for their valuable edits and to Professor Paul Smith for his insightful advice and comments on this article. Most of all, thank you to my partner, Maria, for her steady encouragement and wisdom.

Table of Contents

Introduction

After decades of rampant voter suppression, the 1965 Voting Rights Act ("VRA" or "the Act") marked a long-overdue revolution for American democracy. A century beforehand at the end of the American Civil War, the abolitionist movement saw voting as the lynchpin of freedom and Frederick Douglass urged that "[s]lavery is not abolished until the black man has the ballot. While the Legislatures of the South retain the right to pass laws making any discrimination between black and white, slavery still lives there."[1] Despite backlash from even some progressive lawmakers,[2] the

1. Frederick Douglass, Address at a Business Meeting During the Thirty-Second Anniversary of the American Anti-Slavery Society (May 10, 1865), *in* NAT'L ANTI-SLAVERY STANDARD, May 20, 1865 (opposing the dissolution of the Society).

2. For example, when a proposed Fourteenth Amendment would have provided that "[n]o state, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race," Congress resoundingly rejected it. Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, [Proposed Amendments to the Constitution, 1789 to 1889] 1896-2 Ann. Rep. Am. Hist. Ass'n 165, 227–28 (1897). As

Reconstruction Amendments, in form, assured that the right to vote would be provided equally.[3] But in function, the Amendments failed to make that right a reality for many otherwise eligible minority voters.[4]

The Fifteenth Amendment facially establishes a forceful guarantee of an equal franchise: "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."[5] But the Supreme Court interpreted this provision narrowly, holding soon after its enactment that "[t]he Fifteenth Amendment does not confer the right of suffrage upon any one" and it merely "prevents the States, or the United States, . . . from giving preference" to voters based on race.[6]

In addition, Section 2 of the Fourteenth Amendment states that if the right to vote "is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, . . . the basis of representation therein shall be reduced" proportionally for the state.[7] This appears to be a harsh penalty for denials of voting rights,[8] but the text still envisions a circumscribed political class[9] and has been rendered

---

one Republican senator remarked, "[t]he right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is . . . not regarded as one of those fundamental rights lying at the basis of all society . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard), http://memory.loc.gov/cgibin/ampage?collId=llcg&fileName=072/llcg072.db&recNum=847 [https://perma.cc/8WHB-JV6L].

3. *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 122–23 (2020).

4. *See id.* at 105–06 (describing shortfalls in the Fifteenth Amendment).

5. U.S. CONST. amend. XV, § 1.

6. United States v. Reese, 92 U.S. 214, 217 (1875); *see also* Guinn v. United States, 238 U.S. 347, 362–63 (1915) ("[T]he [Fifteenth] Amendment gives no right of suffrage . . . .").

7. U.S. CONST. amend. XIV, § 2.

8. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 90 (2000) ("In its direct references to suffrage, the Fourteenth Amendment was a double-edged sword. Since most congressional Republicans—whatever their personal beliefs—were convinced that northern whites would not support the outright enfranchisement of [Black voters], the amendment took an oblique approach: any state that denied the right to vote to a portion of its male citizens would have its representation in Congress (and thus the electoral college) reduced in proportion to the percentage of citizens excluded. The clause would serve to penalize any southern state that prevented [Black voters] from voting without imposing comparable sanctions on similar practices in the North, where [Black voters] constituted a tiny percentage of the population.").

9. *See id.* at 90–91 ("Although this section of the amendment amounted to a clear constitutional frown at racial discrimination, . . . [it] tacitly recognized the

dormant because it lacks an intelligible way to be enforced in court.[10] The Fourteenth Amendment also famously guarantees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."[11] The Supreme Court could have construed these provisions to provide an affirmative and equal voting right, but it almost immediately refused to do so.[12]

Accordingly, the brief surge in minority voters' political power after the Reconstruction Amendments was fleeting, and the equal right to vote became merely a parchment promise that gave way to local discrimination during the era of Jim Crow.[13] Using poll taxes, literacy tests, and other "de facto disenfranchisement" devices,[14] many states for decades engaged in an "unremitting and ingenious defiance of the Constitution" to deny minority voters their rights.[15] At the same time, rigid segregation exacerbated the problem of unequal representation nationwide,[16] while rampant intimidation[17]

---

right of individual states to erect racial barriers."). Crucially, the Amendment also explicitly permits disenfranchisement "for participation in rebellion, or other crime," U.S. CONST. amend. XIV, § 2, which states have used to create sweeping felony disenfranchisement programs, and sometimes to effectuate a racially discriminatory purpose, Hunter v. Underwood, 471 U.S. 222, 229 (1985).

10. *See* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT 79 (2018) ("Congress never followed through with a mechanism for implementing this explosive section of the Fourteenth Amendment; it remains unenforced to date. The federal courts have rebuffed efforts to enforce the provision judicially, terming enforcement a 'political question' outside their purview."); s*ee also, e.g.*, Saunders v. Wilkins, 152 F.2d 235, 238 (4th Cir. 1945) (dismissing a Fourteenth Amendment, Section 2 legal challenge as a nonjusticiable political question).

11. U.S. CONST. amend. XIV, § 1.

12. *See* Minor v. Happersett, 88 U.S. 162, 171 (1874) (finding the Fourteenth Amendment to the Constitution "has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted"); LICHTMAN, *supra* note 10, at 77 ("[N]arrow court constructions limited [the Equal Protection Clause's] application to suffrage well into the twentieth century.").

13. *See* U.S. COMM'N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 15–18 (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [https://perma.cc/M6LP-KLCE] [hereinafter "USCCR REPORT"] ("Reliance upon tactics to suppress black voting rights expanded during the Jim Crow Era . . . and black voter registration subsequently declined dramatically.").

14. *See* LICHTMAN, *supra* note 10, at 80; KEYSSAR, *supra* note 8, at 16, 109–12.

15. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

16. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (detailing the history of intentional, government-driven housing and zoning segregation).

17. *See* United States v. Cruikshank, 92 U.S. 542, 542–43 (1875) (ruling that the

and violence[18] targeting minority groups trying to register and vote further depressed political participation. Even though this environment of disenfranchisement and discrimination was repugnant to the explicit agreement struck in the Reconstruction Amendments—and generally violative of America's foundational values of equality and government by consent of the governed—the Constitution proved impotent to address the challenge of post-Reconstruction voter suppression.[19]

During the Civil Rights Movement, Dr. Martin Luther King, Jr. echoed Frederick Douglass' century-old calls for equal suffrage. "The denial of this sacred right [to vote] is a tragic betrayal of the

---

Fourteenth Amendment did not extend to protections against voter intimidation by semi-private entities, like White supremacist organizations); LICHTMAN, *supra* note 10, at 92 ("[T]he U.S. Supreme Court further undercut efforts to protect black voters and their allies from white vigilantes . . . . White terrorists could thus intimidate black voters without fear of retribution from federal authorities and with the knowledge that white supremacist governments supported efforts to suppress the black vote by any necessary means."); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 18–20 (2015) (detailing private intimidation efforts).

18. *See, e.g.*, KEYSSAR, *supra* note 8, at 91 (detailing that in New Orleans in 1866, for example, "one of the most flagrant incidents of violence" occurred when advocates attempted to hold a constitutional convention favoring Black suffrage and thirty-four Black and four White attendees were killed, with dozens of others wounded).

19. Notwithstanding the explicit language in the Fourteenth and Fifteenth Amendments promoting free and equal access to the ballot box, the Supreme Court interpreted the Constitution in a manner that tolerated certain discriminatory practices for many decades. *See, e.g.*, Minor v. Happersett, 88 U.S. 162, 171 (1874); United States v. Reese, 92 U.S. 214, 217 (1875); Williams v. Mississippi, 170 U.S. 213, 225 (1898) (holding unanimously that Mississippi's literacy and poll-tax qualifications were constitutional because they "[did] not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them"); Giles v. Harris, 189 U.S. 475, 486–88 (1903) (Holmes, J.) (rejecting a challenge to Alabama's discriminatory voting and registration system for an apparent lack of available equitable relief, stating that "equity cannot undertake now, any more than it has in the past, to enforce political rights" of access to the ballot box); Giles v. Teasley, 193 U.S. 146, 160 (1904) (rejecting plaintiffs' revised claims at law under the political question doctrine); Newberry v. United States, 256 U.S. 232, 250 (1921) (upholding White primaries because primary elections "are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support . . . ."); Breedlove v. Suttles, 302 U.S. 277, 283 (1937) ("To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State . . . ."); Grovey v. Townsend, 295 U.S. 45, 48 (1935) (approving White primaries under the state action doctrine); Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 54 (1959) (upholding North Carolina's basic literacy test in the absence of a showing of discriminatory application).

highest mandates of our democratic tradition," Dr. King said.[20] "Give us the ballot, and we will no longer have to worry the federal government about our basic rights."[21] Congress answered this call on the heels of violent clashes in the Jim Crow South and enacted the VRA in 1965.[22] Many exalted the VRA as "the dawn of freedom"[23] because, unlike the Reconstruction Amendments, the VRA offered a toolbox of incisive, prophylactic enforcement measures to extinguish disenfranchisement wherever racial animus could fester. As the Supreme Court recognized:

> After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims . . . . [It] has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively . . . . [M]illions of non-white Americans will now be able to participate for the first time on an equal basis.[24]

But the history of enfranchisement is one of expansions and contractions,[25] and advancing the gains of the VRA requires proactive efforts in the face of renewed challenges to the Act's constitutionality.[26] In 2013, the Supreme Court in *Shelby County v. Holder* ruled unconstitutional the coverage formula used to enforce Section 5 of the VRA,[27] effectively nullifying the core mechanism for the federal government to prevent discriminatory voting laws from

---

20. Martin Luther King, Jr., Give Us the Ballot: Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957), *in* THE PAPERS OF MARTIN LUTHER KING, JR., VOLUME IV: SYMBOL OF THE MOVEMENT, JANUARY 1957–DECEMBER 1958 (Clayborne Carson et al. eds.), at 208, 210, https://kinginstitute.stanford.edu/king-papers/documents/give-us-ballot-address-delivered-prayer-pilgrimage-freedom [https://perma.cc/V275-ANXX].

21. *Id.*

22. BERMAN, *supra* note 17, at 13, 18, 35–36.

23. *See* MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 35 (1967).

24. South Carolina v. Katzenbach, 383 U.S. 301, 328, 337 (1966); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969) ("[T]he Act implemented Congress' firm intention to rid the country of racial discrimination in voting.").

25. *See generally* KEYSSAR, *supra* note 8 (describing the turbulent history of voting rights).

26. USCCR REPORT, *supra* note 13, at 277 ("The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections . . . . Voter access issues, discrimination, and barriers to equal access for voters with disabilities and for voters with limited-English proficiency continue today.").

27. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified at 52 U.S.C. § 10304(a)).

going into effect.[28] After that litigation success for opponents of the VRA, now Section 2 of the Act has become the new focus. Section 2, like Section 5, prohibits voting discrimination by purpose or in effect and employs a "results test" to cut back election laws that disproportionately burden minority voters compared to White voters under conditions of race discrimination.[29]

In the wake of *Shelby County*, and by recycling many of the arguments made during that litigation and in other voting cases, proponents of restrictive voting laws are now emboldened to contest the constitutionality of the Section 2 results test. Indeed, during October Term 2020 the Supreme Court will decide *Brnovich v. DNC*, the Court's first Section 2 case in a non-redistricting context and one that carries significant implications for the future of the VRA.[30] *Brnovich v. DNC* involves two consolidated appeals from an *en banc* Ninth Circuit opinion that held Arizona's prohibition of out-of-precinct voting and some third-party ballot collection violated Section 2's results test.[31] Petitioners seeking to maintain Arizona's restrictions (along with numerous supporting amici) have strenuously argued that the manner by which the Ninth Circuit applied Section 2 has substantial constitutional defects, and the Court should promulgate a much more onerous standard to avoid these alleged concerns.[32] Thus, the question of Section 2's constitutional status is squarely before the Supreme Court, and the

28. Shelby County v. Holder, 570 U.S. 529, 549–53 (2013) (holding unconstitutional the Section 4(b) coverage formula enforcing Section 5 of the VRA for violating the "'fundamental principle of equal sovereignty' among the states"); *see also* BERMAN, *supra* note 17, at 280 ("Roberts's opinion turned Section 5 into a zombie, a body with no life in it.").

29. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301(b); *see* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (confirming the appropriate interpretation of the revised Section 2 and its "results test").

30. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 222 (2020) (mem.); Ariz. Republican Party v. Democratic Nat'l Comm., 141 S. Ct. 221 (2020) (mem.).

31. *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 999 (9th Cir. 2020) (en banc). The court further held that Arizona enacted the third-party ballot collection law with discriminatory intent, in violation of Section 2's intent test and the Fifteenth Amendment. *Id.*

32. *See* Brief for State Petitioners at 24–33, Brnovich v. Democratic Nat'l Comm., Nos. 19-1257 & 19-1258 (U.S. Nov. 30, 2020), 2020 WL 7121776 (making scope of enforcement, Equal Protection Clause, and Elections Clause arguments against Section 2); Brief for Private Petitioners at 39–42, Brnovich v. Democratic Nat'l Comm., Nos. 19-1257 & 19-1258 (U.S. Nov. 30, 2020), 2020 WL 7121775 (making scope of enforcement and Equal Protection Clause arguments against Section 2). For amici making additional constitutional arguments, *see* Docket, Brnovich v. Democratic Nat'l Comm., No. 19-1257 (U.S.) (amici filings from December 3 to December 7, 2020).

outlook remains uncertain.[33] If the Supreme Court chooses to eliminate or curtail Section 2's results test, the potential consequence could be an unchecked rise in discriminatory practices in voting to a degree not seen since the Jim Crow era.[34]

This article confronts the most prominent constitutional challenges to the prevailing Section 2 results test. Part I discusses how practices that deny or abridge minority voters' equal access to the political process—so-called "vote denial"[35] laws—have increased nationwide in recent years,[36] and overviews the two-part results test that federal courts have developed to apply Section 2 in this context. Part II details the two primary constitutional claims against the vote denial results test, and rebuts both of those theories. Namely, proponents of vote denial laws argue that the Section 2 results test is unconstitutional because it (1) exceeds Congress' enforcement power by proscribing conduct that is too remote from the constitutional injury of intentional voting

33. *See* Matt Naham, *SCOTUS Agrees to Decide Major New Case that Lawyers Fear Will Dramatically 'Weaken' Landmark Civil Rights Law*, LAW & CRIME (Oct. 2, 2020), www.lawandcrime.com/supreme-court/scotus-agrees-to-decide-major-new-case-that-lawyers-fear-will-dramatically-weaken-landmark-civil-rights-law/ [https://perma.cc/Y3EU-ZVWY] (describing voting rights advocates' concerns about the implications for the VRA); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1391 (2015) ("*Shelby County* marks the death of the VRA as a superstatute.").

34. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1577–78 (2019) ("Since 2010 . . . *twenty-three* states have implemented new franchise restrictions. Thirteen have required identification for voting; eleven have limited voter registration; seven have reduced the timespan available for early voting; and three have delayed the restoration of voting rights for people with criminal convictions. These measures amount to the most systematic retrenchment of the right to vote since the [C]ivil [R]ights [E]ra. In geographic coverage, indeed, they surpass the franchise restrictions of Jim Crow . . . ." (emphasis in original)).

35. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–92 (2006) (applying the "VRA to practices such as felon[y] disenfranchisement, voting machines, and voter ID laws represents a new generation . . . . This article collectively refers to these practices as the 'new vote denial.'").

36. *See, e.g.*, Danielle Lang & J. Gerald Hebert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 784 (2018) ("This disconcerting trend [to enact voting restrictions] coincided with the loss of preclearance in *Shelby County*. These events have resulted in an avalanche of voting restrictions that target minority voters to minimize their political power."); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 766 (2016) (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 124 (5th ed. 2016)) (observing that the elimination of Section 5 coverage and "understandings about the 'empirical relation between turnout and election outcomes[]' produced a spate of measures in which Republican officials cut back on expansions to voting opportunities previously implemented by Democrats").

discrimination; and (2) violates the Equal Protection Clause by requiring excessive consideration of race at the expense of other interests in electoral decision-making. The article concludes, however, that these arguments are unfounded because they overlook key aspects of Congress' enforcement power in protecting voting rights, misconstrue the difficulties of succeeding on a results test claim, and conflate the nature of the interests at stake and remedies sought with other dissimilar antidiscrimination contexts. When the Supreme Court decides *Brnovich v. DNC* or any other subsequent Section 2 results test cases, it should reaffirm the constitutionality of the statute and retain the prevailing results test applied in the vote denial context.

I. Modern Voter Suppression and the Section 2 Results Test

Since *Shelby County v. Holder*, voting has become more burdensome in many states across the country.[37] Civil rights reports have detailed the rising use of electoral laws or practices that discriminate against minority voters, including the increased enactment of voter photo-ID laws, stricter registration requirements and removal programs, and cutbacks to prior expansions on where, when, and how eligible voters may cast a ballot.[38] Texas, for example, has repeatedly faced lawsuits for its persistent use of discriminatory redistricting maps and strict voter qualification laws.[39] Georgia's Governor and former Secretary of

37. *See* Stephanopoulos, *supra* note 34, at 1578 n.41.

38. *See, e.g.*, USCCR REPORT, *supra* note 13, at 60; THE LEADERSHIP CONFERENCE EDUCATION FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 12–18 (2019), http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf [https://perma.cc/EBM8-BXMX]; NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEMOCRACY DIMINISHED: STATE AND LOCAL THREATS TO VOTING POST-*SHELBY COUNTY, ALABAMA V. HOLDER* 34 (2018), https://www.naacpldf.org/wp-content/uploads/Democracy-Diminished-State-and-Local_Threats-to-Voting_Post-Shelby-County,Alabama-v.Holder__Political_Participation__.pdf [https://perma.cc/Y3VX-9MV7]; BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 3 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf [https://perma.cc/B8YT-M2PF] (examining registration data across 6,600 jurisdictions, finding that the median rate of purging across the country has increased significantly, rising from 6.2 percent of voters to 7.8 percent since 2008); BRENNAN CTR. FOR JUST., NEW VOTING RESTRICTIONS IN AMERICA 1 (2017), https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf [https://perma.cc/3XXB-KNL4] (showing rise in strict photo ID requirements, early voting cutbacks, and registration restrictions since 2010).

39. *See, e.g.*, Texas v. United States, 887 F. Supp. 2d 133, 178 (D.D.C. 2012) (ruling on the discriminatory result claim, but also noting that "record evidence may

State, Brian Kemp, also has a long history of voter suppression accusations.[40] While overseeing elections during his own gubernatorial campaign in 2018, Kemp is alleged to have closed or moved polling places in districts where minority voters live, purged nearly 670,000 voters from the registration rolls (almost 70 percent of whom were minority voters), and stifled the counting of provisional and absentee ballots that would have benefitted his opponent, Stacey Abrams, a prominent voting rights advocate.[41] North Carolina presents even more stark examples of voting discrimination. The Fourth Circuit struck down a 2014 omnibus election law for targeting minority voters with "surgical precision"[42] and the state legislature has battled in the courts for decades to retain redistricting maps that dilute minority voters' electoral strength,[43] among other discriminatory efforts.[44]

---

support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental"); Veasey v. Abbott, 830 F.3d 216, 265, 272 (5th Cir. 2016) (en banc) (invalidating a voter-ID law for discriminatory effect, but remanding for the lower court to reevaluate the plaintiff's intent claim); Texas League of United Latin Am. Citizens v. Whitley, No. CV SA-19-CA-074-FB, 2019 WL 7938511, at *1–2 (W.D. Tex. Feb. 27, 2019) (finding that a Texas registration purge program was "a solution looking for a problem" and used a process that was "inherently paved with flawed results," "ham-handed," and "exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us"); *see also* Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1149 (2019) (discussing a lawsuit involving disenfranchisement on an historically Black public university campus in rural Texas).

40. *See, e.g.*, Carol Anderson, Opinion, *Brian Kemp, Enemy of Democracy*, N.Y. TIMES (Aug. 11, 2018), https://nyti.ms/2Ou8LA5 [https://perma.cc/3YKT-9DBJ] (discussing Brian Kemp's history with voter suppression); Spencer Woodman, *Register Minority Voters in Georgia, Go to Jail*, NEW REPUBLIC (May 5, 2015), newrepublic.com/article/
121715/georgia-secretary-state-hammers-minority-voter-registration-efforts
[https://perma.cc/RU4B-HPDB] (detailing Brian Kemp's efforts as Secretary of State to restrict voting access by the threat of fraud prosecutions).

41. *See* Fair Fight Action, Inc. v. Raffensperger, 413 F. Supp. 3d 1251, 1292 (N.D. Ga. 2019) (denying a motion to dismiss a VRA Section 2 claim pertaining to discrimination in Georgia's voting and registration system); Ga. Coal. for the People's Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251, 1264–69 (N.D. Ga. 2018) (granting a preliminary injunction against a Georgia voter registration purge); Richard Fausset, *'Large-Scale Reforms' of Georgia Elections Sought in Federal Lawsuit*, N.Y. TIMES (Nov. 26, 2018), nyti.ms/2zsQpug [https://perma.cc/8638-MQ6T] (detailing Kemp's involvement in voter suppression in Georgia and a related lawsuit).

42. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016).

43. Carli Brosseau, *A Short History of the Court Battles over NC Congressional Districts*, NEWS & OBSERVER (Aug. 29, 2018, 2:57 PM), www.newsobserver.com/news/politics-government/state-politics/article217504240.html [https://perma.cc/KHL4-4J83].

44. *See* Blake Paterson, *Bipartisan Furor as North Carolina Election Law*

Minority voters also overcame extraordinary hurdles and suppression efforts to exercise their rights during the 2020 election cycle, ranging from excessive purges of voter registration lists, to polling place closures and overburdening, to widespread intimidation efforts.[45] In one particularly egregious case in North Carolina's Alamance County, police confronted Black voters marching to the polls by indiscriminately firing tear gas at the marchers, evoking scenes reminiscent of the Civil Rights Movement.[46]

These examples are abundant, increasing, and not confined to the South.[47] States ranging from New York to North Dakota to Arkansas have administered new or existing laws that make it harder to vote, and often disproportionately so for minority groups.[48] And almost all of these restrictive laws are justified by a

---

Shrinks Early Voting Locations by Almost 20 Percent, PROPUBLICA: ELECTIONLAND (Sept. 24, 2018, 5:00 AM), www.propublica.org/article/bipartisan-furor-as-north-carolina-election-law-shrinks-early-voting-locations-by-almost-20-percent [https://perma.cc/J8Z5-KL8Y] ("In June [2018], the North Carolina General Assembly passed legislation mandating that all early voting sites in the state remain open for uniform hours on weekdays from 7 a.m. to 7 p.m. . . . [but] county election officials from both parties have expressed near uniform discontent over the new requirements . . . ."); Colin Campbell, *NC Republican Party Seeks 'Party Line Changes' to Limit Early Voting*, NEWS & OBSERVER (Aug. 17, 2016), www.newsobserver.com/news/politics-government/election/article96179857.html [https://perma.cc/WXQ5-CP64] (detailing coordinated GOP election officials' efforts to reduce voting opportunities used primarily by minority voters).

45. *See, e.g.*, Sherrilyn Ifill, *No, This Election Did Not Go "Smoothly"*, SLATE (Nov, 9, 2020), https://slate.com/news-and-politics/2020/11/2020-election-voting-did-not-go-smoothly.html [https://perma.cc/8WH3-NVBK] (describing voter intimidation and long voting lines, among other concerns); Shondiin Silversmith, *Native Voters Still Find Obstacles on Election Day, but Advocates Work to Remove Barriers*, ARIZ. REPUBLIC (Oct. 31, 2020), www.azcentral.com/story/news/politics/elections/2020/10/31/advocates-work-break-down-barriers-native-voters/5980832002/ [https://perma.cc/RBE4-4RBR] (discussing the closure of polling locations); Eileen Sullivan, *A Lawsuit in Georgia Claims that Nearly 200,000 Registered Voters Were Improperly Purged*, N.Y. TIMES (Dec. 2, 2020), https://nyti.ms/39BKmGE [https://perma.cc/QV4D-GUGF] (describing efforts to restore registration status to voters who were purged from registration lists).

46. *See* Complaint, Allen v. City of Graham, No. 1:20-cv-00997 (M.D.N.C. Nov. 2, 2020); *see also* Zachery Eanes & Carli Brosseau, *March to Alamance Polls Ends with Police Using Pepper-Spray on Protesters, Children*, NEWS & OBSERVER (Nov. 3, 2020), www.charlotteobserver.com/news/state/north-carolina/article246861942.html [https://perma.cc/F8WQ-5F5J] (describing events in Alamance County).

47. *See, e.g.*, *Voting Laws Roundup 2020*, BRENNAN CTR. FOR JUST. (Feb. 4, 2020), www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2020 [https://perma.cc/M2KF-7Y8Y]; Ally J. Levine & Blake Paterson, *How Voting Laws Have Changed Since 2016*, PROPUBLICA (June 25, 2018), projects.propublica.org/graphics/voting-changes-2018 [https://perma.cc/9TLD-F9K5] (cataloguing voting laws by state).

48. *See, e.g.*, USCCR REPORT, *supra* note 13, at 82 ("At least 23 states have

fear of widespread voting fraud—a concern not supported in empirical reality and often used as a crude cover for efforts to shave off votes for the opposing political party.[49]

Congress enacted Section 2 of the VRA to strike down precisely these types of restrictions that import conditions of race discrimination into the political process and disproportionately burden minority voters.[50] As amended in 1982, Section 2 proscribes any "voting qualification or prerequisite to voting or standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color [or membership in a language-minority group]."[51] The Senate Report

---

enacted newly restrictive statewide voter laws since the Shelby County decision."); James MacPherson, *North Dakota, Tribes Fail to Reach Settlement over Voter ID Lawsuit*, ASSOCIATED PRESS (May 30, 2018), www.apnews.com/bd727123ddc542a1aafedc574b1eee03 [https://perma.cc/C4H6-9S3P]; Max Brantley, *Arkansas Voter ID Law an Impediment to Voting, Lawsuit Argues*, ARK. TIMES (Mar. 19, 2018, 2:29 PM) www.arktimes.com/ArkansasBlog/archives/2018/03/19/arkansas-voter-id-law-an-impediment-to-voting-lawsuit-argues [https://perma.cc/36XK-689P]; Sam Levine, *New York is One of the Bluest States in the Country. Its Voting Laws Are Horrendous.*, HUFFINGTON POST (Sept. 11, 2018), www.huffingtonpost.com/entry/new-york-votinglaws_us_5b97ffb9e4b0162f4731895a [https://perma.cc/C27N-UZM9]; Sari Horowitz, *Want to Vote in This State? You Have to Have a Passport or Dig Up a Birth Certificate*, WASH. POST (Feb. 19, 2016), www.washingtonpost.com/news/post-nation/wp/2016/02/19/how-kansas-has-become-a-battleground-state-for-voting-rights/ [https://perma.cc/S8CL-2UQN].

49. As one prominent election law scholar has summarized, "[t]he issue of organized voter fraud has now been put to the test in courts and in social science" and amounts to no more than "a sham perpetuated by people who should know better, advanced for political advantage." RICHARD L. HASEN, ELECTION MELTDOWN 128 (2020). For more detailed descriptions of studies debunking the myth of large-scale voter fraud, see RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 41–75 (2012); LICHTMAN, *supra* note 10, at 189–93; USCCR REPORT, *supra* note 13, at 102–21. For a discussion of how allegations of voter fraud have become the "new Southern strategy," see LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 89–90 (2010).

50. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301); Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

51. Section 2 states in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been

accompanying the 1982 amendment broadly characterized Section 2 as "the major statutory prohibition of all voting rights discrimination" that "prohibits practices, which . . . result in the denial of equal access to any phase of the electoral process . . . ."[52] In essence, Section 2 is designed to bar any laws that, by purpose or as a result, make it disproportionately harder for minority voters to participate in elections as compared to White voters because of conditions of discrimination.[53]

In the past, Section 2 advocates have most often sought relief under the results test in what is called the "vote dilution" context, which concerns how a jurisdiction's districting practices may dilute minority voting strength.[54] Section 2 applied to vote dilution follows a well-established four-part totality analysis called the "*Gingles* framework."[55] Because the nature of the harm to voters in vote dilution cases is distinct from the harm imposed by vote denial laws, the nature of the analysis and relevant considerations must also be different.[56] Accordingly, the rise of vote denial laws in the last

---

> elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

52. S. REP. NO. 97-417, at 30 (1982); *see also* Major v. Treen, 574 F. Supp. 325, 347 (E.D. La. 1983) (upholding Section 2's constitutionality and detailing the legislative discussion surrounding its scope during the 1982 amendments).

53. *See* Chisom v. Roemer, 501 U.S. 380, 404 (1991) ("[A] violation of § 2 could be established by proof of discriminatory results alone."). Congress deliberately omitted any requirement of showing intent, having "revised the statute 'to make clear that a violation [can] be proved by showing discriminatory effect alone.'" Veasey v. Abbott, 830 F.3d 216, 277 (5th Cir. 2016) (en banc) (Higginson, J., concurring) (citing Thornburg v. Gingles, 478 U.S. 30, 35 (1986)).

54. *See* Tokaji, *supra* note 35, at 703–09; *see also* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991) (detailing that as jurisdictions became more elusive in their efforts to limit minority voting, states created "second generation" barriers that dilute minority electoral power through districting or at-large election processes).

55. The framework comes from *Thornburg v. Gingles*, the paradigmatic vote dilution case in which the Supreme Court applied Section 2 to North Carolina's state legislative redistricting plan. 478 U.S. 30, 47 (1986). In an opinion by Justice Brennan, the Court established a tripartite threshold test for Section 2 vote dilution claims. Minority plaintiffs alleging a violation must establish that they are: (1) sufficiently large and geographically compact; (2) politically cohesive; and (3) often denied an equal opportunity to elect candidates of their choice because of racial polarization. *Id.* at 50–51. After proving the "preconditions" for vote dilution claims, the court then moves onto a fourth step and considers the totality of circumstances using the nine Senate Factors. *Id.* at 36–37, 49–50.

56. *See* Tokaji, *supra* note 35, at 718–23.

decade and the initial lack of a uniform Section 2 results test in that distinct context led to some brief confusion.[57]

In recent years, however, the circuit courts have mostly coalesced around the same two-part analysis: a vote denial law or practice violates Section 2 if it (1) causes a disparate impact on minority voters (2) through the law's interaction with conditions of social or historical race discrimination.[58] Vote denial plaintiffs must show more than a bare statistical disparity between the burden on minority and nonminority voting groups[59] by also proving some of the non-exhaustive, circumstantial factors listed in the 1982 Senate Report.[60] These factors indicate when disparities are likely to be an outgrowth of discrimination and lack a legitimate justification.[61]

---

57. *See id.* at 720; Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 468–69 (2019).

58. Stephanopoulos, *supra* note 34, at 1574–75. Multiple circuit courts have applied the same two-part results test in a variety of contexts. *See, e.g.*, Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1012 (9th Cir. 2020) (en banc) (in the context of out-of-precinct voting and third-party ballot collection restrictions); Veasey v. Abbott, 830 F.3d 216, 277 (5th Cir. 2016) (en banc) (in the context of a voter photo ID law); Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 626–27 (6th Cir. 2016) (relating to absentee and provisional ballot process); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) (addressing challenges to numerous laws, including restrictions on same-day registration and out-of-precinct voting); Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (addressing early voting cutbacks).

59. *See, e.g.*, Johnson v. Bush, 405 F.3d 1214, 1228 (11th Cir. 2005) (en banc) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect."); Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (rejecting a Section 2 claim using statistical evidence regarding land ownership because "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry" (emphasis in original)); Ortiz v. City of Phila. Off. of the City Comm'rs Voter Registration Div., 28 F.3d 306, 314–15 (3d Cir. 1994) (rejecting a results claim against a voter purge law that had a disparate statistical impact, but did not sufficiently demonstrate a causal nexus and presence of the Senate Factors).

60. The Senate Factors are: (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent of racially polarized voting in the elections of the State or political subdivision; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which minority group members have been elected to public office; (8) whether elected officials are unresponsive to the particularized needs of the members of the minority group; and (9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous. *See* S. REP. NO. 97-417, at 28–29.

61. *See* Rogers v. Lodge, 458 U.S. 613, 624–27 (1982) (analyzing similar factors in an intentional voting discrimination case).

Although some election law scholars have criticized aspects of the two-part framework,[62] others have indicated that the analysis strikes the balance of being flexible and probing to target even well-disguised voter suppression, while not interfering in every aspect of election management.[63] As Congress observed in 2006, "[d]iscrimination today is more subtle than the visible methods used in 1965," but efforts to deny the "minority community's ability to fully participate in the electoral process and to elect their preferred candidates" continue to suppress eligible voters.[64] The two-part vote denial results test is an effective and appropriate tool for challenging these subtler methods of disenfranchisement. The first prong indicates that a voting restriction may cause undue harm to minority voters, and the second prong weighs the totality of the circumstances to reveal whether that harm is precipitated by or further perpetuates conditions of discrimination.[65] In other words, the Section 2 vote denial results test is an effective device to diminish inequality in voting while stopping short of preventing

62. *See, e.g.*, Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 384 (2012) (suggesting plaintiffs should have to prove "*to a significant likelihood* that the electoral inequality is traceable to race-biased decisionmaking" (emphasis in original)); Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 158–60 (2018) (advancing a burden-shifting approach); Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. U. L. REV. 1, 4–6 (2018) (arguing for a balancing test for Section 2); Stephanopoulos, *supra* note 34, at 1620–21 (arguing for a "unification" of disparate impact law and grafting developed rules from Title VII and Fair Housing Act cases onto the Section 2 vote denial test); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 474, 477 (2015) (drawing from employment discrimination under Title VII and juror discrimination under the Equal Protection Clause to suggest a burden-shifting framework in Section 2); *see also* Lang & Hebert, *supra* note 36, at 782 (advocating for an intent-based strategy to enforcing Section 2).

63. *See* Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J.F. 799, 820 (2018) (claiming that disparate impact is a necessary component of Section 2 liability, but not sufficient to state a claim on its own and the Senate Factors inquiry sufficiently narrows liability); Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 701 (2014) (making a similar argument); Karlan, *supra* note 36, at 767–68 (supporting the two-part test, but warning that turnout reduction should not be a required evidentiary showing); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 597–98 (2013) (adding that courts should focus on "examin[ing] the historical racial context of discrimination" when analyzing a vote denial burden and scrutinize proof of implicit bias in the totality examination).

64. H.R. REP. NO. 109-478, at 6 (2006).

65. *See generally* Stephanopoulos, *supra* note 34, at 1578–79 (describing the origin and current application of the two-part test).

jurisdictions from managing their own elections in a non-discriminatory manner.

Proponents of vote denial measures, the myth of widespread voter fraud, and increased deference to local management of the political process have disagreed that Section 2 achieves this balance. Conservative election law commentators have increasingly challenged the constitutional status of the two-part vote denial test in legal articles and blogs.[66] Voting jurisdictions, lawmakers, and special interest groups serving as amici have explicitly argued in litigation that aspects of Section 2 are unconstitutional.[67] And even

66. *See, e.g.*, J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not*, 31 TOURO L. REV. 297, 319–21 (2015); Roger Clegg, *The Future of the Voting Rights Act After* Bartlett *and* NAMUDNO, 2008 CATO SUP. CT. REV. 35, 49–50 (2009); Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, HERITAGE FOUND.: LEGAL MEMORANDUM NO. 119, at 1, 4 (Mar. 17, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf [https://perma.cc/W98J-SHBV]; Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 2 (2017); Chris Kieser, *Federal Courts Expanding Disparate Impact Analysis in Recent Voting Rights Act Cases*, PAC. LEGAL FOUND. (Oct. 1, 2014), https://pacificlegal.org/federal-courts-expanding-disparate-impact-analysis-recent-voting-rights-act-cases/ [https://perma.cc/3UL2-YPGB].

67. The Petitioners in *Brnovich v. DNC* raise constitutional avoidance arguments to support their preferred standard, and numerous amici argue more explicitly that Section 2 is unconstitutional. *See supra* note 32. But these arguments are not unique to this case. For briefs raising arguments that Section 2 is unconstitutional because it is not a proper enforcement statute of the Reconstruction Amendments, see Petition for a Writ of Certiorari at 28, Abbott v. Veasey, 137 S. Ct. 612 (2017) (No. 16-393), 2016 WL 5390670; Brief for Appellees at 32, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788 (2017) (No. 15-680), 2016 WL 6123732; Appellant Brief at 28–33, Alabama v. Ala. State Conf. of the NAACP, No. 17-14443 (11th Cir. Nov. 13, 2017), 2017 WL 5495567; Brief Amicus Curiae of Pac. Legal Found., Ctr. for Equal Opportunity, and Project 21 in Support of Defendants-Appellees at 3–4, N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (No. 16-1468), 2016 WL 3438051; Amended Amicus Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 28, N.C. State Conf. of the NAACP v. Cooper, No. 1:18-cv-01034-LCB-LPA (M.D. N.C. Dec. 2, 2019), 2019 WL 7882013; Defendants' Motion to Dismiss Complaint for Declaratory and Injunctive Relief at 18–19, League of United Latin Am. Citizens v. Abbott, No. 5:18-cv-00175 (W.D. Tex. Apr. 9, 2018), 2018 WL 8262596; Defendants' Brief in Support of Their Motion for Summary Judgment at 24–25, One Wis. Inst., Inc. v. Nichol, No. 15-CV-324 (W.D. Wis. Jan. 11, 2016), 2016 WL 8738854; Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order at 26 n.11, Thompson v. Hood, No. 3:15-cv-620-CWR-FKB (S.D. Miss. Sept. 3, 2015), 2015 WL 10521829. For briefs raising constitutional concerns based on the Equal Protection Clause, see Petition for a Writ of Certiorari at 29, *Veasey*, 137 S. Ct. 612 (No. 16-393); Brief for Appellants at 48–49, Cooper v. Harris, 137 S. Ct. 1455 (2017) (No. 15-1262), 2016 WL 4771954; Brief for Appellees at 33–34, *Bethune-Hill*, 137 S. Ct. 788 (No. 15-680); Brief of Senator Thom Tillis et al., as Amici Curiae in Support of Defendants-Appellees and Affirmance at 21, *N.C. State Conf. of the NAACP*, 831 F.3d 204 (No. 16-1468); Brief

some circuit court judges have opined on the potential constitutional problems of the results test.[68] In this environment, voting rights advocates must not take the future of Section 2 as a given and must make strategic litigation choices to demonstrate that the vote denial results test stands on firm constitutional ground.[69] They may do so by rebutting the two prevailing constitutional challenges to Section 2 to show that the results test effectively confronts the rise of modern and widespread voter suppression, without unduly intruding into local control of elections or commanding excessive race-consciousness.

II. Constitutional Concerns About Section 2

Although no federal court decision to date has held that the results test is unconstitutional, the Supreme Court may be inclined to eliminate or limit Section 2 in the vote denial context.[70] There are several reasons why this risk to Section 2 must be taken seriously. First, the Supreme Court has explicitly left open the question of Section 2's constitutionality,[71] and over the last two decades, multiple justices have expressed serious doubts about the results

---

of the Buckeye Inst. and the Jud. Educ. Project as Amici Curiae in Support of Defendants-Appellants and Reversal at 21–22, Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016) (No. 16-3603), 2016 WL 3680235; Defendants' Brief in Support of Their Motion for Summary Judgment at 24, *One Wis. Inst., Inc.*, No. 15-CV-324.

68. *See, e.g.*, Thomas v. Bryant, 938 F.3d 134, 183–85 (5th Cir. 2019) (Willett, J., dissenting), *reh'g en banc granted*, 939 F.3d 629 (2019); Veasey v. Abbott, 830 F.3d 216, 314–18 (5th Cir. 2016) (en banc) (Jones, J., dissenting); Hayden v. Pataki, 449 F.3d 305, 333 (2d Cir. 2006) (Walker, J., concurring); Farrakhan v. Washington, 359 F.3d 1116, 1122–25 (9th Cir. 2004) (Kozinski, J., dissenting); *see also* Ala. State Conf. of NAACP v. Alabama, 949 F.3d 647, 655–59 (11th Cir. 2020) (Branch, J., dissenting) (writing that Section 2 must be significantly curtailed to comply with the Eleventh Amendment's state sovereign immunity principles); Mich. State A. Philip Randolph Inst. v. Johnson, 749 F. App'x 342, 353 (6th Cir. 2018) (excluding certain balloting programs from the reach of Section 2 altogether).

69. *See* Hayden Johnson, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEO. L.J. 449 (2019) (offering eight considerations to strategically pursue Section 2 vote denial cases).

70. *See* Elmendorf, *supra* note 62, at 382 ("Section 2 looks like a ripe target for a conservative Supreme Court."); Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 127 (2010) ("To date, however, the Supreme Court has left open the question whether section 2 is a constitutional exercise of congressional power."); *see also* Mark Joseph Stern, *The Supreme Court May Soon Deal a Final, Fatal Blow to the Voting Rights Act*, SLATE (Oct. 10, 2019, 5:45 AM), https://slate.com/news-and-politics/2019/10/supreme-court-voting-rights-act-obliteration.html [https://perma.cc/PLC3-YR36] (discussing the potential constitutional challenge to Section 2).

71. *See* Fuentes-Rohwer, *supra* note 70, at 127.

test.[72] Second, proponents of restrictive voting laws have consistently argued that Section 2 is not "congruen[t] and proportional[]" to the harm it seeks to redress under the tailoring rule established in *City of Boerne v. Flores*.[73] Third, the Supreme Court's equal protection jurisprudence has tended to be very suspicious of race-conscious governmental actions, even when viewed by some as beneficial.[74] Accordingly, the Roberts Court has generally disfavored antidiscrimination statutes that impose liability because of a challenged law or practice's disparate impact on minority groups, as seen in the Fair Housing Act[75] and Title VII[76] contexts. In sum, challengers to Section 2 contend that the statute is unconstitutional because it is purportedly untethered from its constitutional foundation and violates the Equal Protection Clause by requiring excessive consideration of race in electoral decision-making.[77]

As the Supreme Court weighs in on this long-brewing fight over Section 2,[78] it could strike down the results test altogether and reimpose an intent-based standard. After all, the Court in 1980 did precisely that in *City of Mobile v. Bolden*,[79] and the Roberts Court has shown a willingness to rebuff judicial minimalism in recent

---

72. *See* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1596 (2018) ("As many as four Justices are on record as skeptical of section 2. The Court may simply be of the view that section 2 is no longer necessary to enable voters of color to elect their candidates of choice.").

73. *See* 521 U.S. 507, 519–20 (1997) (ruling that statutory enforcement of the Reconstruction Amendments must be congruent and proportional to a record or threat of constitutional violations); *see also* Fuentes-Rohwer, *supra* note 70, at 137 ("[I]t is often noted that the Court offered the Voting Rights Act as an exemplary statute. The Court underscored often how [the Religious Freedom Restoration Act] was different in degree and kind from the VRA . . . . [However, S]ection 2 remained conspicuously absent from the discussion.").

74. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (rejecting voluntary school desegregation program and demanding colorblindness in efforts to promote racial inclusion because "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 225–27 (1995) (holding that equal protection strict scrutiny analysis applies to federal laws that discriminate based on race, even when those laws have "benign" motives).

75. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

76. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557 (2009).

77. *See* Elmendorf, *supra* note 62, at 382 (summarizing that "if it is not clear what harms Section 2 guards against, and if Section 2 in practice precipitates racial conflict, then Section 2 is probably not a reasonable congressional remedy").

78. *See* discussion *supra* note 33.

79. 446 U.S. 55, 60–61 (1980) (holding that the original Section 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself").

election law cases such as *Shelby County v. Holder*, *Citizens United v. FEC*, and *Abbott v. Perez*.[80] But the more likely route may be that the Court would follow the preferred incrementalist approach of Chief Justice Roberts,[81] by which the Court could narrow the scope of Section 2's applicability or impose more onerous evidentiary requirements (such as demanding proof of reduced minority turnout or more direct causation showings) to make successful results test litigation nearly impossible. Ultimately, though, the constitutional arguments against Section 2 should be rejected because the arguments in favor of Section 2's constitutionality are much stronger than the claims against it.

A. Forecasting the Roberts Court's View of the Section 2 Results Test

Remarkably, the Supreme Court has never explicitly upheld Section 2's results test as constitutional or even decided a Section 2 vote denial case.[82] Yet the continuous enforcement of the results test against a wide range of election laws in the lower courts and the Supreme Court's reticence to weigh in may support an inference of constitutionality.[83] The Court has also tacitly reaffirmed the constitutionality of the results test on three occasions.[84] First, soon after the 1982 amendments to the Voting Rights Act, the Court summarily affirmed a three-judge panel's decision upholding Section 2 as constitutional, sending the signal to lower courts that the results test should be followed.[85] Second, in a 1996 racial redistricting case involving Section 2, called *Bush v. Vera*, Justice O'Connor wrote a concurrence that offered tepid support for the vote

80. *See* discussion *infra* notes 90, 104–109.

81. *See* Adam Liptak, *Roberts's Incremental Approach Frustrates Supreme Court Allies*, N.Y. TIMES (July 14, 2014), https://nyti.ms/1raJ7lA [https://perma.cc/SR85-ZQD8].

82. Stephanopoulos, *supra* note 34, at 1572.

83. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 990–92 (1996) (O'Connor, J., concurring) (citing cases upholding Section 2's results test); Holder v. Hall, 512 U.S. 874, 965 (1994) (Stevens, J., dissenting) (claiming that the reinterpretation of Section 2 to limit its scope "would require overruling a sizable number of this Court's precedents").

84. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 537 (2013); *Vera*, 517 U.S. at 992 (O'Connor, J., concurring); Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002, 1002–03 (1984) (Stevens, J., concurring).

85. *See Miss. Republican Exec. Comm.*, 469 U.S. at 1002–03 (Stevens, J., concurring); *see also* Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) ("[L]ower courts are bound by summary decisions by this Court 'until such time as the Court informs [them] that [they] are not.'") (alterations in original) (internal citations omitted).

dilution results test.[86] She concluded that Section 2's repeated application means that jurisdictions should "assume the constitutionality of §2 of the VRA, including the 1982 amendments."[87] Third, and most recently, the *Shelby County v. Holder* decision referred to Section 2's permanent, nationwide cause of action and potential to seek preliminary relief as support for its conclusion that Section 5's preclearance coverage was no longer necessary.[88]

These three instances and the consistent application of Section 2's results test to vote denial laws in the lower courts may provide cold comfort to voting rights advocates in the current legal environment. In recent terms, multiple different coalitions of justices were willing to overrule longstanding precedents.[89] Concerning election law in particular, the Roberts Court has circumscribed even recent precedential decisions multiple times over the past decade.[90] And specifically related to Section 2, some election law academics have suggested that prior cases interpreting Section 2 are entitled to lesser precedential deference under the

86. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (approvingly citing twelve lower court decisions upholding Section 2 and ruling that the results test "is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting" (citing S. REP. NO. 97-417, at 4 (1982))).

87. *Id.*

88. *See* 570 U.S. at 537 (observing that "[b]oth the Federal Government and individuals have sued to enforce §2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in this case") (internal citations omitted). *But see* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 58 (2013) (disagreeing with the *Shelby County* majority that preliminary relief is actually available under Section 2, given that "the proportion of Section 2 suits in which preliminary injunctions are granted is quite small, certainly no higher than 25 percent and probably lower than 5 percent").

89. *See, e.g.*, Knick v. Twp. of Scott, 139 S. Ct. 2162, 2170 (2019) (overruling Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1492 (2019) (overruling Nevada v. Hall, 440 U.S. 410 (1979)); Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2479 (2018) (overruling Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977)); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018) (overruling Quill Corp. v. North Dakota, 504 U.S. 298 (1992)); *see also* Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 160–61 (2018) ("[D]uring the Roberts Court's first decade, the Court's textualist or textualist-leaning Justices repeatedly have called for overruling a statutory precedent, even when doing so would upset settled expectations.").

90. *See, e.g.*, *Shelby Cnty.*, 570 U.S. at 556–57 (abrogating Lopez v. Monterey Cnty., 525 U.S. 266 (1999); City of Rome v. United States, 446 U.S. 156 (1980); Georgia v. United States, 411 U.S. 526 (1973); and South Carolina v. Katzenbach, 383 U.S. 301 (1966)); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990) and overruling in part McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)).

doctrine of stare decisis.[91] Moreover, even the Court's prior swing votes, Justices O'Connor and Kennedy, were apprehensive about using Section 2 to increase electoral opportunities for minority groups at the expense of other state interests, and criticized the apparent racial divisiveness that VRA enforcement perpetuates.[92] In recent years, the Court has become more ideologically conservative,[93] particularly after the passing of the Court's staunchest VRA defender, Justice Ruth Bader Ginsburg.[94]

---

91. *See* Elmendorf, *supra* note 62, at 448–55 (suggesting that Section 2 is a "common law statute" and its precedents may be entitled to a weaker stare decisis protection); Pitts, *supra* note 62, at 4 (citing Elmendorf's proposition).

92. Justice Kennedy continuously cast doubt on the status of Section 2, writing for the Court and separately on several occasions to deliberately leave the results test's legitimacy open to challenge. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 21 (2009) (warning that too much Section 2 race consciousness would "infuse" racial considerations into every redistricting decision and that "[t]o the extent there is any doubt whether §2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause"); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 405–06 (2006) (cautioning that interpreting Section 2 to protect influence districts would "unnecessarily infuse race into virtually every redistricting"); Miller v. Johnson, 515 U.S. 900, 927 (1995) (recognizing that although the VRA "has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions," its purpose "is neither assured nor well served . . . by carving electorates into racial blocs"); Johnson v. De Grandy, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring in part and dissenting in part) ("It is important to emphasize that the precedents to which I refer, like today's decision, only construe [Section 2], and do not purport to assess its constitutional implications.") (internal citations omitted); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (writing pointedly that "[n]othing in today's decision addresses the question whether § 2 . . . , as interpreted in *Thornburg v. Gingles*, is consistent with the requirements of the United States Constitution") (internal citation omitted). Justice O'Connor echoed Kennedy's opposition to race-conscious redistricting, emphasizing that, "[r]acial 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—a goal that the Fourteenth and Fifteenth Amendments embody." Shaw v. Reno, 509 U.S. 630, 657 (1993).

93. *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), https://nyti.ms/36WTep2 [https://perma.cc/WE9C-TQYP]; Amelia Thomson-DeVeaux, *How Amy Coney Barrett Could Change the Supreme Court*, FIVETHIRTYEIGHT (Sept. 25, 2020), https://fivethirtyeight.com/features/how-amy-coney-barrett-could-change-the-supreme-court/ [https://perma.cc/4BNH-7SAL] (suggesting that, according to one empirical measure of judicial ideology, Chief Justice Roberts would "no longer be the court's median").

94. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."); *see also* Richard Hasen, *Symposium: Ginsburg Was a Champion of Voting Rights, but Mostly in Dissent*, SCOTUSBLOG (Sept. 29, 2020), https://www.scotusblog.com/2020/09/symposium-

Of the current members of the Supreme Court, Justice Thomas has provided the most sweeping critique of Section 2, specifically in the vote dilution context.[95] Justice Thomas wrote in a concurrence in the 1994 *Holder v. Hall* case that "few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act."[96] Justice Scalia signed on to Thomas' perspective,[97] and recently in the 2017 *Abbott v. Perez* case, Justice Gorsuch has followed suit.[98] But Thomas also elaborated at length in *Holder v. Hall* that Section 2 can *only* apply to voting participation restrictions, perhaps indicating that he would be more willing to find the results test is still constitutional in the vote denial context.[99]

On balance, though, Justices Thomas and Gorsuch may be hostile to non-intent focused analyses in voting[100] or other civil rights areas that could be viewed as "progressive causes"[101] and both justices could vote to curb or strike down Section 2.

---

ginsburg-was-a-champion-of-voting-rights-but-mostly-in-dissent/ [https://perma.cc/2H65-B56B].

95. *See* Holder v. Hall, 512 U.S. 874, 892–93 (1994) (Thomas, J., concurring); *see also* Fuentes-Rohwer, *supra* note 70, at 142–43 ("Justices Thomas and Scalia have . . . remonstrated against the use of race in elections and the constitutionality of the VRA.").

96. *Hall*, 512 U.S. at 907; *see also* Cooper v. Harris, 137 S. Ct. 1455, 1485–86 (2017) (Thomas, J., concurring) (reiterating that compliance with Section 2 cannot be used to justify a racial gerrymander).

97. *League of United Latin Am. Citizens*, 548 U.S. at 512 (Scalia, J., concurring in part and dissenting in part) (finding that Section 2 "continues to drift ever further from the [VRA]'s purpose of ensuring minority voters equal electoral opportunities").

98. 138 S. Ct. 2305, 2335 (2018) (Thomas, J., concurring, joined by Gorsuch, J.) (voting to join Justice Thomas' "view that § 2 of the Voting Rights Act of 1965 does not apply to redistricting").

99. *Hall*, 512 U.S. at 945 (Thomas, J., concurring) (surveying the text and context of Section 2 and concluding that the results test applies "only to state enactments that regulate citizens' access to the ballot or the processes for counting a ballot").

100. *See, e.g.*, *Shelby Cnty.*, 570 U.S. at 558 (Thomas, J., concurring) (arguing the Court should have gone further to eliminate Section 5 protections altogether because "[h]owever one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5"); *Lopez*, 525 U.S. at 293 (Thomas, J., dissenting) (collecting cases discussing how "Section 5 is a unique requirement that exacts significant federalism costs").

101. Neil M. Gorsuch, *Liberals'N'Lawsuits*, NAT'L REV. ONLINE (Feb. 7, 2005), www.nationalreview.com/2005/02/liberalsnlawsuits-joseph-6/ [https://perma.cc/A4AG-VZ3U] (arguing against liberal causes using litigation to counter discrimination and warning that "as Republicans win presidential and Senate elections and thus gain increasing control over the judicial appointment and confirmation process, the level of sympathy liberals pushing constitutional litigation can expect in the courts may wither over time, leaving the Left truly out in the cold");

Justice Alito has also generally advanced more stringent views on results-oriented antidiscrimination statutes[102] and has sought to reshape the legal landscape to remove key federal oversights over local control of elections.[103] In *Abbott v. Perez*, for example, Alito wrote the majority opinion and articulated a narrow conception of Section 2's role in checking a jurisdiction's management of its elections.[104] Alito concluded that because election regulation "is primarily the duty and responsibility of the State," "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions" and the "good faith of [a] state legislature must be presumed."[105] By giving states this benefit of the doubt, the *Abbott* decision ratcheted up the burden of proving a jurisdiction acted with discriminatory intent.[106]

---

see also Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 923–24 (10th Cir. 2012) (Gorsuch, J.) (asserting a caged view of the Fair Housing Act disparate impact test related to housing for persons with disabilities).

102. For example, as a judge on the Third Circuit, Alito sought to increase the evidentiary burden for plaintiffs to prove workplace race discrimination under Title VII. *See* Bray v. Marriott Hotels, 110 F.3d 986, 999 (3d Cir. 1997) (Alito, J., dissenting). The majority opinion in *Bray v. Marriott Hotels* wholly rejected Alito's reading of the law, stating that "Title VII would be eviscerated if our analysis were to halt where the dissent suggests." *Id.* at 993 (majority opinion).

103. One scholar has broadly contended that Justices Thomas and Alito "believe that any federal interference with the state's power over voter qualifications is unconstitutional." *See* Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J.F. 171, 175–76 (2019). Justice Alito has been a consistent voice against the Supreme Court's one-person, one-vote doctrine and wrote in a job application personal statement explaining his lifelong conservatism and that his interest in constitutional law was "motivated in large part by disagreement with Warren Court decisions, particularly in the areas of . . . reapportionment." *See* Samuel Alito, Personal Qualifications Statement (Nov. 15, 1985), www.npr.org/documents/2005/nov/alito/alitoabortion.pdf [https://perma.cc/T953-P6MY]. In accordance with this view, Justice Alito in 2016 raised the possibility of changing the longstanding meaning of one-person, one-vote jurisprudence to provide states greater deference in redistricting, *see* Evenwel v. Abbott, 136 S. Ct. 1120, 1144–45 (2016) (Alito, J., concurring), which contributed to a flash point during the 2019 census citizenship question litigation, *see* Richard L. Hasen, *New Memo Reveals the Census Question Was Added to Boost White Voting Power*, SLATE (May 30, 2019, 11:59 AM), https://slate.com/news-and-politics/2019/05/census-memo-supreme-court-conservatives-white-voters-alito.html [https://perma.cc/TK42-EVHN].

104. *See Perez*, 138 S. Ct. at 2313–14 (concluding that all but one of Texas' legislative districts are lawful under Section 2).

105. *Id.* at 2324 (citing Miller v. Johnson, 515 U.S. 900, 915 (1995)). The view Alito expressed in *Abbott v. Perez* is consistent with his dissent in a prior voting registration case, in which he argued that courts must defer to local administration of elections and "begin by applying a presumption against pre-emption of" the state voting law. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 39 (2013) (Alito, J., dissenting).

106. *See* Richard L. Hasen, *Suppression of Minority Voting Rights Is About to Get*

The *Abbott* Court also reached the merits only by eschewing judicial minimalism to review the case before a final injunction order and assertively displaced the trial court's factual findings regarding intentional discrimination.[107] In response, Justice Sotomayor's dissent warned of the potentially larger import of Justice Alito's majority opinion on Section 2, claiming that the majority went "out of its way" to set aside the lower court's unanimous finding that Texas' revised electoral maps "were adopted for the purpose of preserving the racial discrimination that tainted its previous maps."[108] Moreover, Justice Sotomayor emphasized that the *Abbott* majority had prioritized the "presumption of good faith" of a legislature "at serious costs to our democracy," and contrary to the record of intentional discrimination in Texas and the purposes of Section 2.[109]

Justices Alito and Sotomayor similarly wrote opinions on opposite sides of a 2018 case called *Husted v. A. Philip Randolph Institute*,[110] which concerned the methods states may use to remove voters from their registration rolls under the National Voter Registration Act (NVRA).[111] Writing for the majority, Justice Alito concluded that Ohio's method of classifying and removing allegedly ineligible voters complied with the NVRA, including the requirement that registration programs must conform with the VRA and Section 2's results-oriented prohibition of discriminatory voting laws.[112] Dissenting, Justice Sotomayor emphasized that Ohio's registration removal "[p]rocess has disproportionately affected minority, low-income, disabled, and veteran voters"[113] and noted that in one county, "African–American–majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity since 2012, as 'compared to only 4% of voters in a suburban, majority-White neighborhood,'" a likely

Way Worse, SLATE (June 25, 2018, 2:20 PM), https://slate.com/news-and-politics/2018/06/the-abbott-v-perez-case-echoes-shelby-county-v-holder-as-a-further-death-blow-for-the-voting-rights-act.html [https://perma.cc/PZL9-QFYF].

107. *Id.*

108. *Perez*, 138 S. Ct. at 2335 (Sotomayor, J., dissenting); *see also id.* at 2360 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)) (arguing the court ignored proper procedures "to allow Texas to use electoral maps that, in design and effect, burden the rights of minority voters to exercise that most precious right that is 'preservative of all rights'").

109. *Id.* at 2346.

110. *See* Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).

111. *See id.*

112. *See id.* at 1840, 1848 (articulating the NVRA's requirements and finding that Ohio complied).

113. *Id.* at 1864 (Sotomayor, J., dissenting).

sufficient disparate impact under part one of the vote denial results test.[114] Justice Sotomayor's opinion also noted that the majority had ignored the state's history of voter suppression and the purpose behind voting rights legislation to enfranchise more people, not to justify unnecessarily removing eligible voters from the registration rolls.[115] Although *Husted* did not involve Section 2 directly, the two opinions may indicate how the Court would address a results test challenge to alleged discrimination in state maintenance of registration rolls, and the likelihood that, similar to *Abbott v. Perez*, the Court may also view Section 2 as improperly second-guessing local electoral choices.[116]

Justice Kavanaugh may prove decisive for the future of the VRA.[117] Though he never reviewed a Section 2 case as a D.C. Circuit judge, Kavanaugh's potential views may be revealed by a 2012 Section 5 case in which he wrote the majority opinion approving South Carolina's voter ID law.[118] There, Judge Kavanaugh ruled that the challenged law did not offend the even more protective

114. *Id.* (quoting Brief for NAACP & The Ohio State Conf. of the NAACP as Amici Curiae Supporting Respondents, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980)); *see also* USCCR Report, *supra* note 13, at 144–57 (documenting disproportionate impact of voter registration list purges in several states).

115. *Husted*, 138 S. Ct. at 1865.

116. *See* Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 219 (2018) ("*Husted* underscores the Supreme Court's willingness to use its limited institutional resources and massive institutional power not to protect voters, but instead to aid and abet a rollback of voting rights."); Richard L. Hasen, *Sonia Sotomayor's Dissent in the Big Voter-Purge Case Points to How the Law Might Still be Struck Down*, SLATE (June 11, 2018, 12:33 PM), https://slate.com/news-and-politics/2018/06/sonia-sotomayors-husted-dissentpoints-the-way-forward-on-racist-voter-purge-laws.html [https://perma.cc/T3Q3-YLJG].

117. *See* Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), https://nyti.ms/2N3M5d1 [https://perma.cc/RP9K-B929] (predicting that Kavanaugh's appointment will lead to "a solid five-member conservative majority that would most likely . . . uphold voting restrictions [and] strike down campaign finance regulations"). In addition, Kavanaugh's view on voting rights may also be influenced by his "colorblind" approach to the Constitution, having previously written "in a newspaper column that the Supreme Court would eventually, inevitably find that 'in the eyes of government, we are just one race.'" Ann E. Marimow, *Brett Kavanaugh Once Predicted 'One Race' in the Eyes of Government. Would He End Affirmative Action?*, WASH. POST (Aug. 7, 2018), https://www.washingtonpost.com/local/public-safety/brett-kavanaugh-once-called-a-government-program-for-native-hawaiians-a-naked-racial-spoils-system-would-he-end-affirmative-action/2018/08/07/d4123ffc-94f4-11e8-a679-b09212fb69c2_story.html [https://perma.cc/EW6V-7YVC].

118. *See* South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012) (three-judge panel).

Section 5 retrogression standard[119] because a reasonable impediment exception ameliorated the law's burden on minority voters.[120] In upholding the voter ID law, Kavanaugh brushed past the reality that the exception mitigated the discriminatory burden merely because South Carolina had broadly reinterpreted the provision during the course of litigation (a point recognized by the concurrence),[121] and only passingly acknowledged evidence of the state legislature's racially discriminatory motive.[122] Moreover, in an earlier discovery order, Kavanaugh wanted to shield material prepared by state legislature staff attorneys while drafting the voter ID law, which may have blinded the court to other potential evidence of discriminatory intent.[123] In addition, during his 2018 confirmation hearing, Kavanaugh was evasive about his stance on the constitutionality of Section 2[124] and the existence of voter fraud,[125] offering few assurances for the future of a results test applied to vote denial laws.

---

119. A voting law change violates Section 5 if data shows the status of minority voters would "retrogress" or worsen under the law when compared to the status quo ante. *See, e.g.*, Beer v. United States, 425 U.S. 130 (1976).

120. *See South Carolina*, 898 F. Supp. 2d at 39.

121. *Id.* at 54 (Bates, J., concurring); *see also* Richard Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. FORWARD 100, 108 (2016) ("There is little doubt South Carolina adopted this softening solely to obtain preclearance from the court.").

122. The record included an email between a State Representative and a supporter of the voter ID bill, with the supporter writing that Black voters "would be like a swarm of bees going after a watermelon" if they were offered $100 dollars to obtain a voter ID. The Representative responded "Amen . . . . Thank you for your support of voter ID." NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE CIVIL RIGHTS RECORD OF JUDGE BRETT KAVANAUGH, 58 (2018), www.naacpldf.org/files/our-work/FINAL_Report%20on%20Brett%20Kavanaugh_FINAL_11_22.pdf [https://perma.cc/C26M-W9S9]. The exchange took place after the bill was passed. *Id.* Judge Kavanaugh glossed over the exchange and indicated that the court was "troubled," but denied that it proved discriminatory intent. *See South Carolina*, 898 F. Supp. 2d at 45.

123. *See* Order at 9–10, South Carolina v. United States, No. 1:12-cv-00203 (D.D.C. Aug. 10, 2012) (Kavanaugh, J., dissenting).

124. Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 5, at 1:41:26–1:41:55, C-SPAN (Sept. 5, 2018), https://www.c-span.org/video/?449705-15/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-5&playEvent&start=5914 (showing video recording of Justice Kavanaugh hesitating "to pre-commit" on the constitutionality of Section 2 in response to questioning from then-Senator Kamala Harris).

125. Confirmation Hearing on the Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court Before the Senate Judiciary Committee, (Day 3), at 5:37:20–5:38:36, 115th Cong., 2d Sess. (Sept. 6, 2019), www.judiciary.senate.gov/meetings/nomination-of-the-honorable-brett-m-kavanaugh-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-3 (regarding the existence of voter fraud, Judge Kavanaugh responded to

Recently appointed Justice Barrett's record provides few reliable signposts for predicting her potential views on the VRA. In the sole voting rights merits decision she wrote during her time on the Seventh Circuit, Justice Barrett ruled against the plaintiff on his constitutional claim.[126] In a dissenting opinion in which Justice Barrett contested firearm ownership limitations imposed on certain individuals convicted of felony offenses, Justice Barrett distinguished deprivations of gun rights from voting rights by emphasizing that "founding-era legislatures imposed virtue-based restrictions" on "civic rights like voting and jury service, not to individual rights like the right to possess a gun."[127] Commentators and journalists also noted Justice Barrett's dodging answers during her 2020 confirmation hearing on even seemingly low-stakes voting rights questions, such as whether voter intimidation is unlawful under federal law or if she agreed with Chief Justice Roberts' statement in *Shelby County v. Holder* that "[v]oting discrimination still exists."[128] Thus, of the scant information available, Justice Barrett's vote to uphold an effective Section 2 results test is far from a sure conclusion.

Senator Amy Klobuchar: "I hesitate to opine on . . . something I read in the law review article or blog . . . . I would want a record in a particular case to determine what the evidence in the particular case was.").

126. *See* Acevedo v. Cook Cnty. Officers Electoral Bd., 925 F.3d 944 (7th Cir. 2019) (involving a candidate's constitutional claim concerning ballot access); *see also* Democratic Party of Wis. v. Vos, 966 F.3d 581 (7th Cir. 2020) (joining opinion rejecting constitutional voting rights claims based on standing and justiciability); McDonald v. Cook Cnty. Officers Electoral Bd., 758 F. App'x 527 (7th Cir. 2019) (rejecting constitutional voting rights claims based on mootness).

127. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

128. *See, e.g.*, Joan Biskupic, *Amy Coney Barrett Grilled on Voting Rights as 2020 Election Is Underway*, CNN (Oct. 13, 2020), www.cnn.com/2020/10/14/politics/voting-rights-amy-coney-barrett-shelby-county/index.html [https://perma.cc/8AVL-FA5C]; Press Release, The Leadership Conf. on Civ. and Hum. Rights, Nine Voting Rights and Democracy Questions Judge Barrett Refused to Answer (Oct. 20, 2020), https://civilrights.org/blog/nine-voting-rights-and-democracy-questions-judge-barrett-refused-to-answer/ [https://perma.cc/7PUR-TV74]. Justice Barrett's academic publications are also unrevealing of her potential voting rights jurisprudence, though many of her writings speak to a philosophy of judicial minimalism that prioritizes deference to the choices of political entities accountable to voters. *See, e.g.*, Amy Coney Barrett, Book Review, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 76 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE) (critiquing the author's view of judicial power, arguing that judicial review is a "power" and not a "duty," and that "the courts must be cognizant of the limits upon their judicial power").

Finally, Chief Justice Roberts' current views of the propriety of Section 2's results test may also be in question.[129] In the early 1980s after he clerked for Justice Rehnquist,[130] Roberts lobbied against the 1982 results test amendment to Section 2 and penned several memoranda to Reagan Justice Department officials making his case. In his memos, Roberts warned that a Section 2 results test would effectively impose the Section 5 retrogression standard nationwide, which he argued was in violation of the intent of the Framers and the Congress that enacted the VRA in 1965.[131] He criticized that a results standard "establish[ed] a 'right' in racial and language minorities to electoral representation proportional to their population in the community."[132] From this early point, Roberts also raised constitutional concerns about Section 2: "[T]he constitutional standard of intent is now set for the Fifteenth Amendment, and Congress cannot change that. It can change the statutory standard, in § 2, but that would be severing the statute from its constitutional base and creating great uncertainty."[133] Some of Roberts' concerns about Section 2 materialized in a 2006 vote dilution case called *LULAC v. Perry*.[134] There, Chief Justice Roberts dissented from the majority's application of Section 2, concluding that he "[did] not believe it is [the Court's] role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district . . . . It is a

129. *See* BERMAN, *supra* note 17, at 152 (quoting voting rights advocate Gerry Hebert for his view that "John [Roberts] seemed like he always had it in for the Voting Rights Act. I remember him being a zealot when it came to having fundamental suspicions about the Voting Rights Act's utility").

130. Chief Justice Roberts' jurisprudence is influenced by former Chief Justice Rehnquist, who once wrote a dissenting opinion criticizing the VRA and stating that "[t]he enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to 'get even' for wrongs inflicted on their forebears." City of Rome v. United States, 446 U.S. 156, 218 (1980); *see also* Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner*, NEW YORKER (May 25, 2009), www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy [https://perma.cc/9WL5-JYEC] (detailing Chief Justice Roberts' relationship with Justice Rehnquist).

131. *See* BERMAN, *supra* note 17, at 150–51; *see also* Records Pertaining to John G. Roberts, Jr., NAT'L ARCHIVES, www.archives.gov/news/john-roberts/accession-60-89-0372 [https://perma.cc/SY8K-TRHD].

132. Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen., Why Section 2 of the Voting Rights Act Should Be Retained Unchanged, at 2 (Dec. 22, 1981), https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf [https://perma.cc/64RS-YPXF].

133. Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen., Today's Post Ed., at 2 (Jan. 26, 1982), https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf [https://perma.cc/64RS-YPXF] (emphasis in original).

134. *See* 548 U.S. 399 (2006).

sordid business, this divvying us up by race."[135] To the extent Roberts believes Section 2's vote denial results test also requires too much race-consciousness, he may think the test violates his "colorblind" interpretation of the Equal Protection Clause.[136]

B. Two Constitutional Challenges to Section 2

The arguments Chief Justice Roberts and other justices have raised against Section 2 and related election law doctrines remain a threat to the vote denial results test, and opponents of this provision have endeavored to tee-up two questions concerning Section 2's constitutionality to test the Court's apprehension.[137] The first theory that Section 2 is unconstitutional relies upon many of the same purported federalism and enforcement power defects that arose in *Shelby County v. Holder* and *Northwest Austin v. Holder* (a precursor case to the facial challenge of the VRA's preclearance scheme).[138] The argument is that Section 2 exceeds the permissible scope of Congress' remedial power to enforce the Reconstruction Amendments "by appropriate legislation,"[139] given the tailoring rule the Supreme Court established in *City of Boerne v. Flores*.[140] This contention critically portrays Section 2 as an impermissible

---

135. *Id.* at 511 (Roberts, C.J., concurring in part, concurring in judgment in part, and dissenting in part).

136. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (rejecting voluntary school desegregation program and demanding colorblindness in efforts to promote racial inclusion because "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003) ("[R]ise of individualist and colorblind values in the generation since *Davis* now makes it necessary to consider a third issue: the affirmative tension between equal protection and disparate impact statutes.").

137. *See supra* notes 32–33, 67–68; *see also* Ho, *supra* note 63, at 824 (quoting Abbott v. Veasey, 137 S. Ct. 612, 613 (2017), and citing North Carolina v. N.C. State Conf. of the NAACP, 137 S. Ct. 1399, 1400 (2017)) (observing that in denying certiorari in the Texas and North Carolina vote denial cases, "[t]he Chief Justice pointedly noted that '[t]he issues will be better suited for certiorari review' after final judgment, all but promising that the Supreme Court will eventually take the case"); *see also* Mich. State A. Philip Randolph Inst. v. Johnson, 139 S. Ct. 50 (2018) (denying application to vacate the Circuit Court's stay of the District Court's permanent injunction of Michigan's elimination of straight-ticket voting). Justices Ginsburg and Sotomayor dissented in the denial of the application to vacate stay. *Id.*

138. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2008) (raising issues with Section 5 a year before *Shelby County*, but applying the constitutional avoidance canon to rule narrowly); Shelby Cnty. v. Holder, 679 F.3d 848, 859 (D.C. Cir. 2012) (determining that the Supreme Court has "sen[t] a powerful signal that congruence and proportionality is the appropriate standard of review").

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

140. *See* Farrakhan v. Washington, 359 F.3d 1116, 1122–25 (9th Cir. 2004) (Kozinski, J., dissenting) (analyzing whether Section 2's results test fails the *Boerne* "congruence and proportionality" test).

substantive rather than remedial statute, and often attacks Section 2's scope in two forms: temporally and geographically.

The second challenge to Section 2 concerns an alleged conflict between the disparate impact component of the results test and the Court's usual interpretation of the Equal Protection Clause to command racial neutrality in antidiscrimination laws. The Court in recent years has addressed a variation of this conflict in the Fair Housing Act context in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*[141] and Title VII context in *Ricci v. DeStefano*,[142] where the Roberts Court has remained wary of disparate impact statutes favoring racial minorities at the perceived expense of other races or interests. Proponents of restrictive voting laws argue that a disparate impact reading of Section 2 also encourages too much race-conscious decision-making, while employing a facile, retrogression-like standard to strike down useful and generally applicable electoral regulations.[143]

Both constitutional threats are analyzed below. Although the calls to reexamine the constitutionality of Section 2 have become louder in recent years from both advocates and commentators, these contentions are ultimately unfounded and the prevailing two-part results test stands on firm constitutional ground.

i. *City of Boerne* "Congruence and Proportionality" Challenge to Section 2

In *City of Boerne v. Flores*, the Supreme Court announced a new tailoring limit on congressional authority to enforce the Fourteenth Amendment: Congress' enforcement power is strictly "remedial," and statutes protecting the Amendment's substantive rights must have "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[144] Lacking such a connection, enforcement legislation may

141. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543–44 (2015) (upholding but limiting the Fair Housing Act's disparate impact standard).

142. Ricci v. DeStefano, 557 U.S. 557, 593 (2009) (upholding but limiting a disparate impact standard in the Title VII employment context).

143. *See* Johnson, *supra* note 66, at 2 (arguing that the Section 2 results test looks too much like retrogression and should be curtailed for that reason); *see also* Chief Justice Roberts' Memos, *supra* notes 130–133 and accompanying text.

144. City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997). *But see* Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting) (criticizing the *Boerne* test as "a standing invitation to judicial arbitrariness and policy-driven decisionmaking").

improperly become "substantive in operation and effect."[145] Applying this test, the *Boerne* Court held unconstitutional part of the Religious Freedom Restoration Act (RFRA),[146] which Congress passed to statutorily circumvent a then-recently narrowed interpretation of the Free Exercise Clause.[147]

Proponents of voting restrictions have repeatedly raised the *Boerne* framework as a basis for holding Section 2 unconstitutional,[148] and the decision's reasoning may be relevant to the future of the results test along several dimensions. Although *Boerne* twice pointed to the VRA as the model for appropriate enforcement legislation,[149] the decision references cases discussing Section 5, and *Shelby County* effectively nullified that provision and went to great lengths to avoid opining on the asserted *Boerne* issues.[150] The threat the *Boerne* rule poses, in a nutshell, arises from the fact that Section 2 establishes an objective, results-oriented standard, but the Reconstruction Amendments prohibit only subjective, intentional discrimination.[151] As such, the Court may

145. *Boerne*, 521 U.S. at 519–20; *see also id.* at 525 (citing The Civil Rights Cases, 109 U.S. 3, 13–14 (1883), for proposition that Congress may not pass "general legislation" under the Fourteenth Amendment, and must instead only enact "corrective legislation"); Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609, 615 (2004) (analyzing the Court's remedial limits); Nelson, *supra* note 63, at 591 (describing the "congruence and proportionality" of Section 2).

146. *Boerne*, 521 U.S. at 520 (holding unconstitutional RFRA's state and local government provisions).

147. *See id.* at 512–15; *see also* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (holding that the First Amendment's Free Exercise Clause "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" (citation omitted)); Tabatha Abu El-Haj, *Linking the Questions: Judicial Supremacy as a Matter of Constitutional Interpretation*, 89 WASH. U. L. REV. 1309, 1349 (2012) (describing *Boerne* as an assertion of judicial supremacy over the Constitution, in response to Congress' attempted disavowal of the Supreme Court's Free Exercise Clause holding in *Employment Division v. Smith*).

148. For briefs, articles, and opinions raising *Boerne*-based constitutional arguments against Section 2, see *supra* notes 32, 66–68.

149. *Boerne*, 521 U.S. at 532–33; Veasey v. Abbott, 830 F.3d 216, 253 n.47 (5th Cir. 2016) (en banc) (noting that *Boerne* used the VRA as a model of appropriately congruent and proportional legislation).

150. *See* Fuentes-Rohwer, *supra* note 70, at 137 ("[I]t is often noted that the Court offered the Voting Rights Act as an exemplary statute. The Court underscored often how RFRA was different in degree and kind from the VRA." However, "Section 2 remained conspicuously absent from the discussion.").

151. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2162 (2015); *see also* Fuentes-Rohwer, *supra* note 70, at 137 ("[I]f *City of Boerne* serves as guide,

apply *Boerne* to hold the vote denial results test unconstitutional because, like RFRA, Section 2 attempts to change the substantive constitutional right at issue and lacks a sufficient nexus to the temporal and geographic scope of intentional voting discrimination.

a. Boerne *Problem One: Judicial Supremacy and Remedial Mandate*

First, Section 2 may be at risk if the Court construes the results test as a substantive rather than remedial provision. In *Boerne*, the Court asserted its judicial supremacy to reaffirm that although Congress may have the first pass at determining what legislation is required to enforce the Fourteenth Amendment, the Court has the last word on the substantive right to be enforced.[152] In the Court's words, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[153] And while Congress may enact "[l]egislation which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States,"[154] it cannot too far exceed the Court's interpretation of the bounds of the underlying constitutional right.[155] Because RFRA came on the heels of the Court's narrowing of the Free Exercise Clause,[156] the *Boerne* Court determined that the legislation looked too much like Congress trying to use its legislative enforcement power to reinstall an

it is hard to believe that the Voting Rights Act as amended in 1982 will survive this kind of judicial review."). *But see* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1563 (2020) (noting that the Court has not been "clear about whether the intent requirement applies to the Fifteenth Amendment").

152. *Boerne*, 521 U.S. at 536 ("It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." (citations and quotations omitted)).

153. *Id.* at 519.

154. *Id.* at 518 (internal citations and quotations omitted).

155. *Id.* at 519 (rejecting "the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States" because "Congress does not enforce a constitutional right by changing what the right is"); *see also* Elmendorf & Spencer, *supra* note 151, at 2163 (analyzing the relationship between Congress and the Court); Presto, *supra* note 145, at 616 (same).

156. *See* Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 879 (1990).

overruled constitutional interpretation of individual religious rights, thereby usurping the judiciary's proper role.[157]

In a somewhat similar fashion, the 1982 Congress amended Section 2 to expressly adopt a results test as a direct response to the Supreme Court's ruling in *City of Mobile v. Bolden*, in which the Court held that Section 2's original language could only support an intent test in accordance with the Fifteenth Amendment's standard.[158] By reinstating a results test, opponents of Section 2 could argue that the 1982 Congress did not merely provide a prophylactic protection for the constitutional right to vote, but instead used a statute to amend the Constitution and redefine the substance of that right.[159] As such, the amended Section 2 is said to "be noncongruent and disproportionate because it prohibits a broad swath of conduct that is constitutionally innocuous: governmental activity that lacks a discriminatory purpose but produces a disparate impact."[160]

b. Boerne *Problem Two: Limitations on Temporal and Geographic Scope*

Second, the *Boerne* Court's tailoring restrictions on Congress' remedial power may also pose a problem for Section 2's constitutional status. The *Boerne* Court held that a Fourteenth Amendment enforcement statute must be tied with some degree of specificity to the constitutional injury it seeks to redress, both

157. *Boerne*, 521 U.S. at 536; *see also* Abu El-Haj, *supra* note 147, at 1349.

158. City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) (finding that the original Section 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself"); *see also* Fuentes-Rohwer, *supra* note 70, at 129 ("On its face, it is clear that [the original] Section 2 was only codifying the Fifteenth Amendment, and both the Attorney General and leading members of Congress said as much during the hearings in 1965."). *But see* Crum, *supra* note 151, at 1563, 1627 (challenging whether the Fifteenth Amendment requires discriminatory intent).

159. As the 1982 Senate Report made clear, the "principal reason" for statutorily overruling *Mobile v. Bolden* and rejecting an intent-based analysis "is that, simply put, the test asks the wrong question." S. REP. NO. 97-417, at 36; *see also* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2085 (2018) (comparing the history of Section 2 and RFRA); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 751 (1998) (analyzing the effect of *Boerne* on the vote dilution results test). For commentators analyzing the substantive nature of Section 2, see Presto, *supra* note 145, at 626; Fuentes-Rohwer, *supra* note 70, at 143–44; Elmendorf & Spencer, *supra* note 151, at 2158.

160. Stephanopoulos, *supra* note 34, at 1593; *see also* Morley, *supra* note 159, at 2077 (noting that *Boerne* is "[e]specially concerning from a voting rights perspective" because "the Court has taken a dim view of statutes aimed primarily at eliminating disparate impacts that do not themselves violate the Fourteenth Amendment").

temporally and geographically.[161] Temporally, the Court pointed to weaknesses in the RFRA legislative record, concluding that it "lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years."[162] The record's lack of modern examples of religious discrimination persuaded the *Boerne* Court that the statute was noncongruent and nonproportional to the constitutional harm.[163]

Notwithstanding the reality that discriminatory restrictions on voting and registration are increasingly pervasive today,[164] a constitutional claim against Section 2 may raise a similar *Boerne*-based temporal scope argument. One scholar has called this issue the "Bull Connor is dead" problem: When Congress enacted the VRA in 1965 and amended it in 1982, the record was replete with examples of intentional voting discrimination in the states, but with the use of more deceptive and subtler discriminatory practices today, Congress "may be hard-pressed to find widespread evidence of such discrimination."[165] The Supreme Court in both *Shelby County* and *Northwest Austin* expressed strong condemnation of the idea that Congress can continue providing a voting rights remedy with high perceived federalism costs based on discriminatory voting conditions supposedly eliminated decades ago.[166] As Chief Justice Roberts stated for the *Shelby County* majority, "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that

161. *See Boerne*, 521 U.S. at 529–31.

162. *Id.* at 530.

163. *See id.* at 530–32.

164. For descriptions of the rise in vote denial restrictions across the country, see generally the civil rights reports cited *supra* note 38.

165. 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, 179 (2005); *see also* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 730 (1998) (noting that Kennedy's *Boerne* opinion's "discussion of RFRA's legislative record at least raises the possibility of some kind of durational constraint" on Congress' enforcement power); Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 452–53 (2015) (noting that *Shelby County* "reflected long-standing concerns that Congress had not built a sufficient record of intentional racial discrimination in voting to justify the continued use of this particular remedy").

166. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 553 (2013) (ruling that disrupting traditional federalism and equal sovereignty principles must be done "on a basis that makes sense in light of current conditions"); Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009) (stating that the VRA "imposes current burdens and must be justified by current needs").

problem speaks to current conditions."[167] Applying this principle to the VRA's preclearance formula, the Court observed:

> Coverage [was] based on decades-old data and eradicated practices . . . . And voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.[168]

Thus, although *Shelby County* concerned the federalism costs of Section 5—which empowers greater federal oversight of local electoral control—the decision's "rejection of past discrimination as a basis for congressional prophylactic measures certainly places Section 2 in the Supreme Court's constitutional crosshairs."[169] And unlike Section 5, Section 2 is a permanent remedy in that it contains no sunset provision and does not itself require Congress to reconsider current conditions of voting discrimination.[170] Opponents of Section 2 could argue that the potential inability of Congress to identify enough modern examples of unconstitutional intentional voting discrimination shows that the results test exceeds the proper temporal scope of its Reconstruction Amendments enforcement power.[171]

Next, *Boerne* also suggests that the geographic scope of an enforcement statute must be tailored to the constitutional harm. Concerning RFRA, the Court reasoned that the statute's nationwide coverage was not justified by evidence of nationwide unconstitutional religious discrimination.[172] The Court concluded that this broad geographic reach in part distinguished RFRA from

---

167. *Shelby Cnty.*, 570 U.S. at 557. *But see* BERMAN, *supra* note 17, at 275 (challenging the evidence that Chief Justice Roberts referenced during oral argument); Ho, *supra* note 63, at 813 (detailing the statistical unreliability of Chief Justice Roberts' conclusions concerning improved voting equality).

168. *Shelby Cnty.*, 570 U.S. at 551 (citations omitted).

169. Morgan, *supra* note 62, at 127–28; *see also* Farrakhan v. Washington, 359 F.3d 1116, 1122–23 (9th Cir. 2004) (Kozinski, J., dissenting) (arguing that the lack of recent intentional voting discrimination calls into question Section 2's compliance with *Boerne*). *But see* Hayden v. Pataki, 449 F.3d 305, 333 (2d Cir. 2006) (Walker, J., concurring) (concluding that Section 2 "can serve to invalidate measures with disparate racial impact only if there is evidence in the congressional record that those measures are *part of a history and practice* of unconstitutional intentional discrimination" (emphasis added)).

170. *See* Morley, *supra* note 159, at 2085.

171. *See, e.g.*, *Farrakhan*, 359 F.3d at 1122–23 (Kozinski, J., dissenting).

172. *Boerne*, 521 U.S. at 531–32.

other permissible exercises of Congress' enforcement power.[173] Notably, Justice Kennedy's opinion referenced Section 5 as an exemplar statute that is sufficiently geographically tailored, and contrasted it with RFRA's "[s]weeping coverage," which "ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[174]

In 2000, the Supreme Court reiterated the potential geographic limits on Congress' remedial enforcement power in the *United States v. Morrison* decision.[175] The *Morrison* Court held that Congress lacked the authority to enact portions of the Violence Against Women Act (VAWA), in relevant part because VAWA's geographic scope lacked a congruent-and-proportional relationship to the Fourteenth Amendment harm of governmental gender discrimination.[176] The Court went on to contrast VAWA with two 1960s cases upholding the constitutionality of the VRA, *Katzenbach v. Morgan*[177] and *South Carolina v. Katzenbach*,[178] because the VRA's protections were "directed only to the State where the evil found by Congress existed, [or] the remedy was directed only to those States in which Congress found that there had been discrimination."[179] The Court emphasized that the gender discrimination detailed in the VAWA legislative record was not state conduct, but even if it were, "[VAWA] is also different from . . . previously upheld remedies in that it applies uniformly throughout the Nation. Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."[180]

---

173. *Id.*

174. *Id.* at 532.

175. United States v. Morrison, 529 U.S. 598 (2000).

176. *Id.* at 626–27. Concerning the Fourteenth Amendment, the *Morrison* Court primarily held that although there was pervasive gender-based discrimination and gender-motivated crime across much of the country, this was merely private conduct beyond the reach of Congress' enforcement power. *Id.* at 621–22.

177. 384 U.S. 641, 651 (1966) (viewing the Section 5 enforcement clause as a one-way ratchet that provides "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment") (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)). *But cf.* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 606 (1975) (critiquing Justice Brennan's one-way "ratchet" theory of Congressional enforcement power).

178. 383 U.S. 301, 309 (1966).

179. *Morrison*, 529 U.S. at 627 (citation omitted).

180. *Id.* at 626.

Applied here, Section 2 may lack congruence and proportionality because its nationwide coverage purportedly also exceeds the scope of disenfranchisement, which mostly consisted (and some argue still consists)[181] of localized efforts to suppress Black voters in the South.[182]

In sum, the factors upon which the *Boerne* Court and its progeny have developed the "congruence and proportionality" test—including the close examination of the remedial nature of a Fourteenth Amendment enforcement statute and the nexus of the remedy to the temporal and geographic scope of the constitutional harm to be prevented—may not bode well for the future of Section 2's results test. As one commentator concluded:

> [T]he constitutional question framed by the Court in *City of Boerne* is a question of empirical judgment. This is now a subjective inquiry about how much racial discrimination exists in voting procedures and policies. The point was easy to make in 1965, as the record was replete with evidence of racial discrimination. It remains to be seen whether . . . the new conservative majority will look to the current state of affairs and make a similar conclusion.[183]

c. Rebuttal to Boerne *Arguments Against Section 2*

Even though lower court cases discussing *Boerne*'s effect on Section 2's results test have so far upheld its constitutionality,[184] the future remains uncertain.[185] Yet the uncertainty here should

---

181. *See* Stephanopoulos, *supra* note 88, at 88–92; Tolson, *supra* note 165, at 463.

182. *See* Farrakhan v. Washington, 359 F.3d 1116, 1123–24 (9th Cir. 2004) (Kozinski, J., dissenting) (applying *Morrison* and discussing the geographic scope problem for Section 2's results test); CHARLES ABERNATHY, CIVIL RIGHTS AND CONSTITUTIONAL LITIGATION 938–39 (5th ed. 2012) (same); Morley, *supra* note 159, at 2085–86 (same).

183. Fuentes-Rohwer, *supra* note 70, at 136.

184. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 253 (5th Cir. 2016) (en banc) (noting that "the constitutionality argument by the State is short sighted and ignores the history and text of the Fifteenth Amendment" because "both the Fifteenth Amendment and Section 2 . . . explicitly prohibit *abridgement* of the right to vote"); United States v. Blaine Cnty., 363 F.3d 897, 900 (9th Cir. 2004) (vote dilution case upholding Section 2 after addressing the *Boerne* temporal and geographic scope arguments). *But see Farrakhan*, 359 F.3d at 1122–25 (Kozinski, J., dissenting) (arguing that if the results test were to be applied to felony disenfranchisement laws, Section 2 may be unconstitutional under the *Boerne* framework); Hayden v. Pataki, 449 F.3d 305, 330 (2d Cir. 2006) (Walker, J., concurring) (same).

185. As stated *supra* in note 32 and the accompanying text, the Supreme Court during October Term 2020 will potentially address the *Boerne* arguments against Section 2 in *Brnovich v. DNC*. For commentators discussing the potential *Boerne*-related problems for Section 2, *see, e.g.*, *supra* note 151.

not overshadow the strong arguments supporting the results test's compliance with the *Boerne* framework. First, regarding the remedial nature of Section 2, a direct analogy to *Boerne* is likely weak given crucial differences between the two statutes and their related circumstances. The primary difference is that RFRA was a new statute created from whole cloth to legislatively restore an overruled interpretation of the First Amendment, whereas Section 2's results test arose from Congress' explicit addition of the results-oriented language to the long-existing VRA to correct what it saw as the Supreme Court's misinterpretation of the statute.[186] It stands to reason that *Boerne* represents an assertion of judicial supremacy over the *Constitution*, not the *statutory* standards of the VRA, where Congress has more room to supersede the Court's interpretation of a statute to achieve legitimate remedial objectives.[187]

Moreover, proponents of Section 2 have persuasively asserted that the scope of Congress' authority in voting is broader than other areas because it enforces both the Fourteenth and Fifteenth Amendments,[188] and accordingly, Congress should have more latitude to affix appropriate remedies.[189] More leeway in combatting discriminatory voter suppression has a strong appeal given the fundamental nature of the right at stake[190] and the potential

186. *See* Morley, *supra* note 159, at 2085.

187. *See* James Durling, *May Congress Abrogate Stare Decisis by Statute?*, 127 YALE L.J.F. 27, 31 (2017); Fuentes-Rohwer, *supra* note 70, at 131.

188. United States v. Bd. of Comm'rs of Sheffield, 435 U.S. 110, 126–27 (1978) (holding that the VRA "is designed to implement the Fifteenth Amendment and, in some respects, the Fourteenth Amendment").

189. *See* Crum, *supra* note 151, at 1627 (making case for applying a "rationality standard" to Fifteenth Amendment enforcement statutes that "gives Congress far greater authority to interpret the Constitution and fashion remedial schemes"); Evan Tsen Lee, *The Trouble with* City of Boerne*, and Why It Matters for the Fifteenth Amendment as Well*, 90 DENV. U. L. REV. 483, 502–03 (2012) ("When Congress acts pursuant to its Fourteenth or Fifteenth Amendment enforcement powers to combat such action, those enactments must be given the widest berth possible."); *see also* Karlan, *supra* note 165, at 738 (arguing that "the Court should conclude that the risk that constitutionally innocuous conduct will be banned is outweighed by the difficulty of detecting and stopping serious constitutional injuries" to voting rights); Fuentes-Rohwer, *supra* note 70, at 134 (making similar arguments); Morgan, *supra* note 62, at 165 (same); Nelson, *supra* note 63, at 637 (same).

190. In many contexts, the Supreme Court has long recognized the fundamental nature of the right to vote. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the right to vote as a "fundamental political right"); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society."); Katzenbach v. Morgan, 384 U.S. 641, 652–54 (1966) (quoting *Yick Wo*, 118 U.S. at 370) (observing that the right to vote is "precious and fundamental" and "preservative of all rights"); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) ("[T]he right to vote is too precious, too fundamental to be

distortive effects of vote denial laws on the proper functioning of our democracy.[191] With the exception of *Shelby County*, the Court has historically assented to this view in voting,[192] and has generally acknowledged that Congress' enforcement power is at its height when acting to protect a suspect class against discrimination or to safeguard a fundamental right.[193]

Second, advocates have defended Section 2's temporal tailoring by arguing that the statute "contains a kind of durational calibration that makes the enforcement congruent with the injury."[194] Although there is no sunset provision or reauthorization process for Section 2, the results test itself encompasses timing restraints that satisfy *Boerne*'s requirements. For example, Section 2 does not itself impose a permanent ban or curtailment of any facially non-discriminatory election laws, such as voter photo-ID requirements.[195] Rather, Section 2 merely "discontinues the use of an otherwise lawful electoral practice so long as it continues to

---

so burdened or conditioned" on the ability to pay a tax.); Rice v. Cayetano, 528 U.S. 495, 512 (2000) (observing that the right to vote free of racial discrimination is a "fundamental principle" of the Constitution); Bush v. Gore, 531 U.S. 98, 104 (2000) ("[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

191. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 105–10 (1980); Nelson, *supra* note 63, at 637 ("Because of the power of the vote in our democracy—because the right to vote secures all others—Congress has determined that discrimination may not infect voting or limit it on account of race, even if such discrimination is not purposeful."); *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)) ("[W]hen the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'").

192. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 403 (1991) (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)) (observing that the VRA "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination"); City of Rome v. United States, 446 U.S. 156, 173 (1980) ("[E]ven if § 1 of the Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect."); *see also* Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 370 (2006) (observing that VRA caselaw shows that "Congress may have greater latitude under the Fourteenth Amendment in protecting rights of participation, as compared with rights of representation").

193. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 530–34 (2004); Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 735–39 (2003).

194. Karlan, *supra* note 165, at 733; *see also* Morley, *supra* note 159, at 2081 ("[T]he VRA will cease having any effect when voters no longer engage in racial bloc voting, meaning that members of all races have an equal opportunity to elect the candidates of their choice.").

195. *See* 52 U.S.C. § 10301; *see also* Nelson, *supra* note 63, at 636–37.

result in vote denial or dilution on account of race."[196] If racial inequality in America improves and neutral voting requirements no longer interact with conditions of discrimination to harm minority voters more than White voters, then results test lawsuits will also wane and Section 2 will no longer be necessary to check local electoral control.[197]

Additionally, the importance of the *Northwest Austin* and *Shelby County* decisions regarding the need for contemporary proof of intentional voting discrimination may also be overstated and distinguishable when evaluating Section 2 instead of Section 5.[198] To start with, *Shelby County* found that the VRA coverage formula was unconstitutional not based on the *Boerne* analysis, but instead on an "equal state sovereignty" doctrine that is entirely irrelevant to Section 2.[199] The majority even justified its decision to nullify Section 5 by reassuring that Section 2 remained available to enforce the VRA.[200] More generally, the Supreme Court has never applied the *Boerne* congruence and proportionality standard to voting rights

196. Nelson, *supra* note 63, at 637.

197. The Section 2 remedy "is in effect only temporary. Conditions external to the process of voting that presumably can be corrected provide the rationale for the remedy, and the remedy is no longer appropriate once those conditions cease to create a disparate impact." *Id. See also* Karlan, *supra* note 165, at 741 ("Election practices are vulnerable to section 2 only if a jurisdiction's politics is characterized by racial polarization. As the lingering effects of racial discrimination abate, . . . [excluded minorities'] ability and need to bring claims under section 2 will subside as well.").

198. But even if *Shelby County* does not provide a reason to strike down the results test altogether, its suggestion that modern voting restrictions must be supported by recent violations may have bearing on what proof is required in Section 2 results litigation. *See* Tolson, *supra* note 165, at 452–53. *But see* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1017 (9th Cir. 2020) (en banc) (detailing Arizona's "long and unhappy history of official discrimination connected to voting" and evaluating historical context as far back as 1848); Veasey v. Abbott, 830 F.3d 216, 257 (5th Cir. 2016) (en banc) (quoting *Perry*, 71 F. Supp. 3d at 636) ("[I]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts."); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 218 (4th Cir. 2016) (considering similar history in the court's disparate impact analysis, but concluding that the challenged law was enacted with discriminatory intent).

199. Shelby Cnty. v. Holder, 570 U.S. 529, 556 (2013); *see also* Austin Graham, *Unstable Footing:* Shelby County*'s Misapplication of the Equal Footing Doctrine*, 23 WM. & MARY BILL RTS. J. 301 (2014) (arguing the *Shelby County* court misapplied the equal state sovereignty doctrine); Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016) (same).

200. *Shelby Cnty.*, 570 U.S. at 537 ("Both the Federal Government and individuals have sued to enforce § 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect. Section 2 is permanent, applies nationwide, and is not at issue in this case." (citations omitted)).

legislation enforcing the Fifteenth Amendment,[201] which has numerous important textual, historical, and contextual differences compared to the Fourteenth Amendment.[202] And although *Boerne* and its progeny have mostly contrasted violative statutes with Section 5, it also cannot be ignored that many Supreme Court decisions have repeatedly held up the VRA as a model of a congruent and proportional enforcement statute.[203] Accordingly, the *Boerne* analysis and demand for a modern or widespread record of intentional discrimination may not even apply to voting rights legislation, and if it does, there are strong arguments for the Court to apply the tailoring requirement less stringently in this context.

In short, Section 2 complies with any temporal tailoring requirement because built into the vote denial test is a durational limit: If the country improves such that there are "no episodes [of voter suppression] occurring in the past 40 years," then vote denial results claims will no longer be viable.[204] Regardless, it remains to be seen whether *Boerne*'s temporal limit will be imposed on voting rights legislation at all or in the same way as it has been applied to statutes in different antidiscrimination contexts that enforce only the Fourteenth Amendment's substantive rights.

Third, the most direct argument against a *Boerne* challenge based on Section 2's nationwide scope is simply that there are many historical and current examples of successful lawsuits confronting voting discrimination across the country, and areas imposing voting restrictions now are not necessarily the same as in 1965 or 1982.

---

201. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204–06 (2009); *Shelby Cnty.*, 570 U.S. at 546–47.

202. *See generally* Crum, *supra* note 151 (proposing a rational basis-like test for determining the permissible scope of Congressional enforcement powers under the Fifteenth Amendment); Tsen Lee, *supra* note 189 (making a similar argument). *But see* City of Rome v. United States, 446 U.S. 156, 213 n.1 (1980) (Rehnquist, J., dissenting) (citing cases and claiming that the two enforcement clauses have always been treated as coextensive and that "it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers").

203. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("[M]easures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place[] on the States."); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 738 (2003) (upholding the FMLA and likening it to the VRA, which the Court described as a "valid exercise[] of Congress' § 5 power"); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001) ("The ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (distinguishing the Patent Remedy Act from the VRA on account of the "undisputed record of racial discrimination confronting Congress in the voting rights cases").

204. *See Boerne*, 521 U.S. at 530; *see also* Karlan, *supra* note 165, at 741.

For instance, North Dakota and Utah were not states subject to Section 5 preclearance or traditionally known for voter suppression, yet advocates in both states have recently used Section 2 litigation to successfully protect the rights of Native American voters.[205] Such examples demonstrate that the nationwide coverage of Section 2 makes it appropriately flexible to address voting discrimination whenever and wherever it may arise.

That the Court has previously upheld nationwide voting protections against constitutional challenge without proof of nationwide need further supports this point. In *Oregon v. Mitchell*, for example, the Court upheld the VRA's national ban on literacy tests, despite the lack of findings in the record that each state used a literacy test or imposed such a test to discriminate against minority voters.[206] Congress came to the same conclusion in the 1982 Senate Report, and asserted that "a certain amount of overinclusion is permissible" regarding the geographic coverage of an appropriate remedial statute.[207] Moreover, it was precisely the unequal treatment of states that determined *Shelby County*'s effective negation of Section 5.[208] For the Supreme Court to now hold that Section 2's results test is unconstitutional because it *does not* distinguish between states would be an incongruous and illogical outcome. Overall, the modern voting discrimination

205. For North Dakota, *see* Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *3 (D.N.D. Aug. 1, 2016), *stay granted*, No. 18-1725, 2018 WL 4559487, at *3 (8th Cir. Sept. 24, 2018); Press Release, N.D. Sec'y of State, Agreement in Principle Related to Tribal IDs for Voting (Feb. 13, 2020), http://sos.nd.gov/files/uploaded_documents/tribal-ids-for-voting-joint-press-release-20200213.pdf [https://perma.cc/65XK-NC53] (successful settlement of Section 2 claims related to voter ID); Spirit Lake Tribe v. Benson Cnty., No. 2:10-CV-095, 2010 WL 4226614, at *5 (D.N.D. Oct. 21, 2010) (successful Section 2 challenge to poll place closures). For Utah, *see* Navajo Nation v. San Juan Cnty., 266 F. Supp. 3d 1341, 1346 (D. Utah 2017) (granting summary judgment in favor of Navajo Nation on equal protection and Section 2 challenge to Utah redistricting plan), *aff'd*, 929 F.3d 1270 (10th Cir. 2019); Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty., 281 F. Supp. 3d 1136, 1165 (D. Utah 2017) (denying summary judgment to the county on a Section 2 challenge to the elimination of early in-person voting opportunities in the Navajo Nation); Press Release, ACLU of Utah, Settlement Announced in *Navajo Nation Human Rights Commission v. San Juan County* (Feb. 21, 2018), www.acluutah.org/images/18-02-21-ACLU_UT_Press_Release_NavajoVoting Rights-FINAL.pdf [https://perma.cc/Q9QY-9YQ8].

206. Oregon v. Mitchell, 400 U.S. 112, 117, 133 (1970) (upholding Congress' power to ban literacy tests nationwide, based in part on the voluminous record of "substantial, if not overwhelming" race-based discrimination in education).

207. Presto, *supra* note 145, at 627 (citing S. REP. NO. 97-417, at 42–43).

208. *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (applying the equal sovereignty doctrine to strike down Section 4's coverage formula of some but not all states). *See, e.g.*, Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 213 (2016).

problem demands an adaptable and incisive solution, and Section 2's broad reach makes it particularly fitting to forestall today's voter suppression.[209]

ii. Equal Protection Clause Challenge to Section 2

In both recent and historical Section 2 cases, courts have consistently applied the results test using a totality of the circumstances analysis, not as a bare disparate impact standard.[210] But challengers to Section 2 have framed the statute as an overly race-conscious remedy that calls into doubt any election law with the smallest statistical racial disparity.[211] In litigation, opponents of Section 2 have claimed that such an allegedly easy-to-prove standard requires election decisionmakers to think too much about race.[212] Such race-consciousness purportedly offends the Roberts Court's "colorblind" approach to ensuring access to political process, as expressed in several constitutional racial gerrymandering opinions.[213]

To understand this equal protection challenge to the results test, it is helpful to return to first principles and summarize the development of the Court's intent-favored approach to antidiscrimination laws in the 1976 *Washington v. Davis* case.[214] From this point of origin, the argument that Section 2 is in tension with the Equal Protection Clause can be viewed similarly to how

209. *See* Nelson, *supra* note 63, at 591 (listing "voter ID requirements, voter purges, restricted voting periods, stringent voter registration regulations, and felon[y] disfranchisement, among other voting rights encumbrances").

210. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 277 (5th Cir. 2016) (en banc); Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 628 (6th Cir. 2016); Feldman v. Ariz. Sec'y of State's Off., 843 F.3d 366, 379 (9th Cir. 2016); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014).

211. *See* Fuentes-Rohwer, *supra* note 70, at 152 ("[C]ritics now consider section 2 to be an all-purpose anti-discrimination provision, no different from much derided affirmative action plans."); Johnson, *supra* note 66, at 2 ("Even though *Shelby County* rejected federal oversight of state elections through Section 5, a conscious effort has been made on several fronts to resurrect federal supremacy over state control of elections under Section 2 . . . . [T]hese efforts attempt to import bare statistical tests for liability that were previously utilized under Section 5 . . . .").

212. For briefs raising equal protection constitutional claims against Section 2, *see supra* notes 32, 67.

213. *See* Fuentes-Rohwer, *supra* note 70, at 149–51 (discussing the conflict between the colorblind reading of the Constitution and purpose to protect "discrete and insular minorities" in the context of election law). *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1 (2009); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Miller v. Johnson, 515 U.S. 900 (1995); Johnson v. De Grandy, 512 U.S. 997 (1994); Shaw v. Reno, 509 U.S. 630 (1993).

214. 426 U.S. 229 (1976).

the Court had applied the reasoning from *Davis* to narrow the statutory disparate impact tests in the housing[215] and employment[216] antidiscrimination context.

In short, the argument that Section 2 violates the Equal Protection Clause relies on two critiques: (1) Section 2's results test is nothing more than a race-conscious disparate impact standard; and (2) remedial race-conscious voting protections are the equivalent of racial discrimination, and implicate the same zero-sum game of supposed competition between racial groups as seen in the allocation of employment and housing resources in the Title VII and Fair Housing Act contexts. As described below, however, the Supreme Court should reject both critiques; where other antidiscrimination statutes may affront the Roberts Court's colorblind reading of the Constitution, the Section 2 vote denial results test does not pose the same issues. As the Supreme Court itself has recognized, "States enjoy leeway to take race-based actions reasonably judged necessary under a proper interpretation of the VRA."[217]

a. Disfavored Disparate Impact Jurisprudence

In 1970, Black police officers challenged the alleged discriminatory hiring practice of the D.C. Police Department—a lawsuit that would forever change the legal landscape of antidiscrimination law.[218] The plaintiff officers opposed the Department's use of an aptitude test that they said had no relationship to job performance, but disproportionately screened out Black candidates.[219] In a 1976 Justice White opinion, the Supreme Court ushered in a new era of Equal Protection Clause jurisprudence by holding that laws with a racial disparate impact, "standing alone and without regard to whether it indicated a discriminatory purpose," do not violate the Constitution.[220] To downplay the significance of its holding, the Court portrayed the new intent rule as fitting squarely in a longstanding history of the Court preferring an intent-based approach to combat

215. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543–44 (2015).

216. Ricci v. DeStefano, 557 U.S. 557, 595–96 (2009).

217. Cooper v. Harris, 137 S. Ct. 1455, 1472 (2017).

218. *See Davis*, 426 U.S. at 229.

219. *Id.* at 235; *see also* Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 548 n.56 (1977) (noting that the plaintiffs in *Washington v. Davis* "made no claim of intentional or purposeful racial discrimination; they relied solely on disproportionate impact").

220. *Davis*, 426 U.S. at 237.

discrimination, but that history is much more equivocal than the Court led on.[221] Justice White also attempted to soften the edges of the new rule by asserting that lower courts should take a seemingly pragmatic[222] and flexible approach by aggregating results-based evidence to circumstantially prove intent, but subsequent decisions have mostly hardened around an intent standard that has minimized the importance of discriminatory results.[223]

Tellingly, the *Davis* Court expressed an awareness that almost all laws are more burdensome on minority groups, and an apprehension of a results-based cause of action that had the

221. *Compare* Gomillion v. Lightfoot, 364 U.S. 339, 340–42 (1960) (holding that the "essential inevitable effect" of redefining a city's boundaries to remove Black voters violated the Fourteenth and Fifteenth Amendments), Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) (using an effects test to uphold discriminatory public pool closures because the closure "shows no state action affecting blacks differently from whites" and "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it"), *and* Wright v. Council of City of Emporia, 407 U.S. 451, 462 (1972) ("[W]e have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."), *with* Akins v. Texas, 325 U.S. 398, 403–04 (1945) (holding that to prove an equal protection violation, "[a] purpose to discriminate must be present" and "may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination"), Griffin v. Prince Edward Cnty. Sch. Bd., 377 U.S. 218, 234 (1964) (rejecting the official closure of public schools to avoid desegregation after finding the state was motivated by "massive resistance" to desegregation efforts), Wright v. Rockefeller, 376 U.S. 52, 56 (1964) (rejecting an equal protection vote dilution claim because plaintiffs failed to prove the legislature was "motivated by racial considerations or in fact drew the districts on racial lines"), *and* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205 (1973) (ruling that "a current condition of segregation resulting from intentional state action" is an essential element of plaintiff's desegregation claim). *See generally* Perry, *supra* note 219, at 544–48.

222. *See* Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 456 (1993) (arguing that Justice White's jurisprudence reflects "realism rooted in the belief that law should reflect a pragmatic appraisal" of the facts).

223. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (ruling that discriminatory intent cannot be proven by the mere awareness of a decisionmaker that a disparate impact would result from its action); McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (upholding the constitutionality of capital punishment despite an overwhelming statistical disparity involving race and capital sentencing); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 330 (2013) (Thomas, J., concurring) ("The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists."). *Cf.* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977) (reaffirming that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact" but enumerating circumstantial factors permissible to show *prima facie* discriminatory intent, including evidence of disparate impact as a "starting point"); *Id.* at 270 n.21 (adopting the Mt. Healthy v. Doyle, 429 U.S. 274 (1977), defense that the state may "establish . . . that the same decision would have resulted even had the impermissible purpose not been considered").

potential to disrupt any number of regulatory schemes.[224] That same apprehension has endured, and is evidenced by an equal protection election law standard that prioritizes the states' interests[225] and the Roberts Court's overall adoption of an intent-favored ethos in other contexts.[226] While the *Davis* opinion left open "the choice whether to impose [statutory] disparate impact standards to legislators,"[227] the reality is that existing antidiscrimination statutes are being subjected to a similar intent-based narrowing.[228]

The contracting of statutory disparate impact tests has occurred most prominently in the Title VII and Fair Housing Act contexts, but is not exclusive to those statutes.[229] Title VII is the centerpiece of the Civil Rights Act of 1964, and uses a disparate impact test to prohibit discrimination in employment decisions

224. *Davis*, 426 U.S. at 248; *see also id.* at 248 n.14 ("[D]isproportionate-impact analysis might invalidate 'tests and qualifications for voting, draft deferment, public employment, jury service, . . . (s)ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges.' It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule."); Stephanopoulos, *supra* note 34, at 1612 (noting that "[d]isparate impacts are ubiquitous"); *see also* ABERNATHY, *supra* note 182, at 124 (contemplating whether widespread disparate impacts on minority voters should be a reason to have a results-oriented standard).

225. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190–91 (2008); Burdick v. Takushi, 504 U.S. 428, 434 (1992) (ruling that the degree of scrutiny on state election law decisions depends on the extent the challenged practice burdens voting rights); *see also* HASEN, *supra* note 49, at 40 (aptly describing the equal protection voting burden analysis as "an awful double standard").

226. *See* Nelson, *supra* note 63, at 605 (observing that since the 1982 Section 2 Amendments, "the Supreme Court's receptivity toward evidence of disparate impact" has experienced "a precipitous decline"). *See generally* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015) (overviewing the tensions in Roberts Court disparate impact jurisprudence).

227. Washington v. Davis, 426 U.S. 229, 248 (1976) (stating the "extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription").

228. *See* Primus, *supra* note 136, at 585 ("The rise of individualist, colorblind values in the generation since *Davis* now makes it necessary to consider a third issue: the affirmative tension between equal protection and disparate impact statutes."); *see also* Nelson, *supra* note 63, at 584 (discussing the same tension); Stephanopoulos, *supra* note 34, at 1595 (same).

229. *See, e.g.*, Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1787 n.4 (2019) (Thomas, J., concurring) (generally deriding disparate impact liability as relying on a "simplistic and often faulty assumption that 'some one particular factor is the key or dominant factor behind differences in outcomes' and that one should expect 'an even or random distribution of outcomes . . . in the absence of such complicating causes as genes or discrimination'"); Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001) (permitting only intent claims—not disparate impact claims—under Title VI of the Civil Rights Act of 1964).

based on race or other protected characteristics.[230] The test came under scrutiny in 2009 in *Ricci v. DeStefano*.[231] In that case, White firefighters in New Haven challenged the municipality's decision to abandon a promotions exam that would likely result in minority employees being rejected at a disproportionately higher rate.[232] New Haven claimed it discarded the exam because of Title VII disparate impact liability concerns.[233] In a 5–4 decision, Justice Kennedy ruled that New Haven violated Title VII's prohibition of disparate *treatment* of the White firefighters because the City lacked a "strong basis in evidence" that keeping the exam would result in disparate *impact* liability favoring the Black firefighters.[234] In so ruling, the *Ricci* Court heightened the burden on regulated entities seeking to prevent a discriminatory disparate impact violation pre-litigation, reasoning that even the risk of "a significant statistical disparity," without something more, would be insufficient to comply with Title VII.[235]

Justice Scalia also wrote a blistering concurrence, warning of a coming "war" between disparate impact and the Court's equal protection doctrine.[236] Justice Scalia criticized that "disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies."[237] Despite Scalia's more direct confrontation of the potential constitutional issue posed by results tests, the risk to Title VII seems to have briefly subsided.[238] But the *Ricci* opinions surfaced the Court's overall unease about statutory disparate impact tests.[239]

---

230. *See* 42 U.S.C. §§ 2000e-2(a)(1)-(2), 2000e-2(*l*); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

231. Ricci v. DeStefano, 557 U.S. 557, 593 (2009).

232. *Id.* at 562.

233. *Id.* at 563.

234. *Id.* at 593.

235. *Id.* at 587.

236. *See id.* at 594–96 (Scalia, J., concurring).

237. *Id.* at 594; *see also* Morgan, *supra* note 62, at 109 (noting that Justice Scalia's *Ricci* concurrence views the government as "effectively classifying citizens on the basis of race and making assumptions about individuals in those groups"); Clegg, *supra* note 66, at 40 (claiming that the tension "between the anti-race-conscious mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact . . . is so strong that disparate impact statutes may violate the Constitution's equal protection guarantee").

238. Just one year after *Ricci*, Justice Scalia authored a unanimous opinion applying Title VII's disparate impact test and explicitly did not challenge the statute's constitutionality. *See* Lewis v. City of Chicago, 560 U.S. 205, 216 (2010).

239. Nelson, *supra* note 63, at 609 n.156 (observing that eliminating the "good faith" defense used by employers to conform with Title VII makes pre-litigation voluntary compliance more difficult).

For the Fair Housing Act (FHA), the Roberts Court in 2015 again showed apprehension about the future of statutory disparate impact tests in *Texas Department of Housing and Community Affairs v. Inclusive Communities*.[240] There, the Court warned of potential constitutional problems if the housing disparate impact standard functioned to encourage race-conscious remedies or numerical quotas.[241] The case concerned Texas' method of allocating low-income housing tax credits in Dallas, where the housing authority had allegedly granted most credits to developments in low-income neighborhoods and denied them to developments within suburban (and predominantly White) areas.[242] This caused a disparate impact on minority residents because it perpetuated racial segregation by concentrating government housing in only certain low-income neighborhoods, in violation of the FHA.[243]

The *Inclusive Communities* Court upheld the FHA disparate impact test, but Justice Kennedy warned that difficult questions "might arise if disparate-impact liability under the FHA caused race to be used and considered in a pervasive and explicit manner . . . [that] tend[s] to perpetuate race-based considerations rather than move beyond them."[244] To remain constitutional, Justice Kennedy continued, the FHA disparate impact test must be applied in a way that avoids "inject[ing] racial considerations into every housing decision."[245] Yet the Court made sure to clarify that its unease with the FHA's test "does not impugn housing authorities' race-neutral efforts to encourage revitalization of communities that have long suffered the harsh consequences of segregated housing."[246] Thus, the final message in *Inclusive Communities* was clear, if not instructive: Housing officials "may choose to foster diversity and combat racial isolation with race-neutral tools" having *some* awareness of race, but not too much.[247]

The *Inclusive Communities* and *Ricci* decisions revealed that the Roberts Court views statutory disparate impact tests as

240. 576 U.S. 519, 543–44 (2015).
241. *Id.*
242. *Id.* at 526.
243. *Id.*
244. *Id.* at 543.
245. *Id.*
246. *Id.* at 545.
247. *Id.* (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring)); *see also* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115, 1131–33 (2016) (describing the undefined line in the *Inclusive Communities* Court's opinion).

constitutional only given the appropriate set of safeguards and circumstances. And importantly, these cases appear to reinforce the *Davis* Court's view that intent-based methods are best for rooting out discrimination. Under these circumstances, Justice Scalia's warning of a coming "war between disparate impact and equal protection"[248] may have its next major battle play out in the Supreme Court over the Section 2 results test.[249]

b. Applying the Equal Protection Arguments to Section 2

The importance of *Ricci* and *Inclusive Communities* on the future of Section 2 depends on the degree to which the Supreme Court adheres to two main Equal Protection Clause critiques: (1) the two-part results test is essentially a one-part disparate impact analysis that is too easy to prove;[250] and (2) remedial race-conscious voting remedies are the equivalent of racial discrimination, implicating what is perceived as the same zero-sum competition for finite resources between racial groups as in the employment and housing contexts.[251] On this second point, opponents of Section 2

248. Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); *see also* Siegel, *supra* note 226, at 667.

249. For scholars discussing constitutional risk to Section 2's two-part results test, *see, e.g.*, Ho, *supra* note 63, at 824; Nelson, *supra* note 63, at 635; Tokaji, *supra* note 62, at 489; Fuentes-Rohwer, *supra* note 70, at 127. For a discussion of the equal protection arguments raised in Section 2 cases, *see supra* notes 30–32, 66–68.

250. *See* Clegg & von Spakovsky, *supra* note 66, at 4 (narrowly construing Section 2); Johnson, *supra* note 66, at 1–3 ("Section 2 of the Voting Rights Act requires much more than bare statistical disparities; it requires a searching inquiry into the real-world impact of a particular law on the opportunity of minority voters to cast a ballot, as viewed within the entire landscape of electoral opportunities."); Adams, *supra* note 66, at 308 ("If Section 2 were applied to cases where a statistical disparity drove a liability finding, absent causality and supported by a broad non-qualitative package of evidence, then that version of Section 2 may well face serious constitutional challenges . . . .").

251. *See* Nelson, *supra* note 63, at 608–09 ("Implicit in the *Ricci* decision is the notion that remedial race consciousness is the equivalent of racial discrimination . . . . [C]hoosing a policy or practice with a less discriminatory impact on minorities is intentionally discriminatory toward another population. This false equivalence forms the premise of the Court's determination that preventive race-conscious measures are almost always illegal."); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2163 (2013) ("*Ricci* means that disparate-impact liability is vulnerable to constitutional attack . . . . *Ricci* characterizes a decision to abandon a promotional practice because of the race of successful candidates as a form of racial discrimination, meaning that disparate-impact liability, triggered as it is by the race of successful candidates, is a type of racial classification subject to strict scrutiny . . . [or] 'strict in theory and fatal in fact.'"); Helen Norton, *The Supreme Court's Post-racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 202 (2010) ("A post-racial discomfort with noticing and acting upon race supports such a zero-sum

may seek to draw on the Court's constitutional racial gerrymandering jurisprudence, which prohibits race considerations from "predomina[ting]" over other factors in the drawing of electoral district lines.[252] If the Court accepts these premises, the reasoning from *Ricci* and *Inclusive Communities* could present problems for the Section 2 vote denial results test.

First, opponents of Section 2 assert that the results test has been construed to conceal what is really a bare disparate impact test.[253] Under this theory, the Senate Factors that guide a probing totality of the circumstances analysis of the discriminatory conditions giving rise to the burden on minority voters are only window dressing, and if voting rights plaintiffs can show that an election law causes a racial statistical disparity, they win.[254] As such, the results test purportedly employs a "*de minimis* statistical standard" for finding a Section 2 violation, meaning that plaintiffs will prevail too easily and overly disrupt local administration of elections.[255] Some have gone so far as to claim that the results test in essence has covertly resurrected the more stringent Section 5 retrogression standard.[256]

Indeed, even Section 2 advocates have cautioned that the prevailing two-part vote denial test should not devolve into a one-part disparate impact showing.[257] As these commentators have warned, the results test applied to vote denial laws may be even more constitutionally problematic than other antidiscrimination disparate impact statutes because Section 2 does not follow a burden-shifting framework, which deprives jurisdictions of the

understanding of equality: if race no longer matters, a decision maker's concern for the disparities experienced by members of one racial group ('empathy') inevitably includes the intent to discriminate against others ('prejudice')."); Siegel, *supra* note 226, at 687 (discussing zero-sum conceptions in the Roberts Court's opinions).

252. *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1 (2009); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Miller v. Johnson, 515 U.S. 900 (1995); Johnson v. De Grandy, 512 U.S. 997 (1994); Shaw v. Reno, 509 U.S. 630 (1993).

253. Johnson, *supra* note 66, at 11–13.

254. *Id.*

255. *Id.* at 13.

256. *Id.* at 11–13 (arguing that Section 2 litigants have encouraged courts to "graft Section 5 retrogression principles onto Section 2"); Adams, *supra* note 66, at 318 (criticizing the alleged conversion of Section 2 disparate impact into Section 5 retrogression); *see also supra* note 119 for the definition of retrogression.

257. *See, e.g.*, Stephanopoulos, *supra* note 34, at 1590 (arguing that a mere statistical test is problematic because it "is too easy to satisfy" and noting that "[m]any aspects of states' electoral systems cause racial disparities, and almost all of them are suspect under the test").

opportunity to justify racial disparities past the *prima facie* stage of litigation.[258]

Second, *Ricci* and *Inclusive Communities* both suggest that compelling states to prioritize avoiding a racial disparate impact is intrinsically undesirable, and violates the Equal Protection Clause's demand of race-neutrality.[259] Applied to Section 2, the anticipation of results test liability could theoretically incentivize lawmakers to avoid statistical disparities by overly scrutinizing the racial effects of every proposed voting law or policy in advance.[260] This incentive could put jurisdictions between a rock and a hard place of litigation.[261] The argument would be that, like the city of New Haven choosing to reject its promotion exam in fear of Title VII liability in *Ricci*, jurisdictions apprehensive of Section 2 liability because of potential racial disparities would be forced to abandon an otherwise justified electoral regulation. But by choosing the Section 2 liability-avoidance route that favors protecting minority voters—even in situations presenting a significant statistical disparity and strong indication that enacting the law would violate Section 2[262]—the jurisdiction could also be subjected to equal protection liability for elevating race over other factors in election administration. This perceived incentive for jurisdictions to be more race-conscious in making election management decisions offends the Roberts Court's preference for race-neutrality. As one commentator summarized:

---

258. *Id.*; *see also* Johnson, *supra* note 66, at 5–7.

259. *See* Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 543–46 (2015); Ricci v. DeStefano, 557 U.S. 557, 585 (2009).

260. Nelson, *supra* note 63, at 585–86 ("*Ricci*'s holding that evidence of statistical disparity is not 'a strong basis in evidence' to advance a claim of employment discrimination . . . potentially informs Section 2's vote denial jurisprudence.").

261. *See, e.g.*, Morley, *supra* note 159, at 2086 (citing Cooper v. Harris, 137 S. Ct. 1455, 1469, 1472 (2017)) ("In attempting to enforce Fourteenth Amendment equal protection rights, section 2 might compel considerations of race that run afoul of them."); Mark Rush, *The Current State of Election Law in the United States*, 23 WASH. & LEE J. C. R. & SOC. JUST. 383, 393 (2017) (citing Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1273–74 (2015)) (summarizing that "states must avoid the 'trap' that the case law sets if states are unable to navigate between the Scylla of Section 2 of the VRA and the Charybdis of the Equal Protection clause of the Fourteenth Amendment").

262. *See Ricci*, 557 U.S. at 584 (declining to hold "that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case"); *cf. Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (citing *Ricci*, 557 U.S. at 585, and setting the standard that legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance").

> [W]hen the government acts based on the racial outcomes of its programs or policies, the government is effectively classifying citizens on the basis of race and making assumptions about individuals in those groups in a process that facilitates and encourages essentialization of minority and non-minority citizens alike and therefore presents an affront to the dignity of the individual.[263]

Third, the argument against race-consciousness in regulating elections also relies on a zero-sum understanding of government resource allocation. Opponents of disparate impact tests assume that antidiscrimination laws purportedly create competition between racial groups.[264] Under this framing, the Roberts Court has at times viewed preventative or remedial measures to abate racial disparate impacts as direct causes of injury to non-minority groups, in violation of Equal Protection.[265] As Justice Scalia warned in *Ricci* concerning Title VII, "disparate-impact provisions place a racial thumb on the scales," in favor of minority groups and in purported detriment to non-minority applicants.[266]

A similar zero-sum understanding could be applicable in the vote dilution context, where the Title VII analogy is said to be relevant because legislators also have a finite amount of districts by which to divide the state.[267] Along these lines, the Court has cautioned that if the VRA unjustifiably compels legislators to have race "predominate" in redistricting choices, race-neutral interests are unlawfully "subordinated."[268] In other words, employment or redistricting decisionmakers can be viewed as choosing between two racial groups pitted against each other to split the pie of a finite

263. Morgan, *supra* note 62, at 109 (footnotes omitted) (citing *Ricci*, 557 U.S. at 584).

264. *See* Nelson, *supra* note 63, at 608–09 (summarizing these arguments); Siegel, *supra* note 226, at 687 (summarizing the same arguments).

265. *See, e.g.*, Fisher v. Univ. of Texas, 136 S. Ct. 2198, 2237 (2016) (observing that race-consciousness is a "highly suspect tool"); *Ricci*, 557 U.S. at 579–80 ("Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.").

266. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

267. Nelson, *supra* note 63, at 611 ("In the context of redistricting, like employment, the potential zero-sum calculation predominates . . . . For example, drawing voters into one district versus another may potentially impact the electability of one group's preferred candidate versus another group's.").

268. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995) ("[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations."); *see also* Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573–94 (2002) (collecting cases and discussing the subordination issue).

resource: If a minority candidate gets the job or a racially polarized state draws a Section 2 majority-minority electoral district, then the White candidate is not hired, or the state overlooks districting principles that could benefit non-minority voters. The ostensible conflict is that anticipating results test liability makes lawmakers unfairly put additional resources in favor of minority voters' interests.[269] The many weaknesses of this argument related to vote dilution are beyond the scope of this Article,[270] but as discussed below, the *Ricci* analogy that favoring one race inextricably harms another is particularly unfounded in the vote denial context.

The reasoning from *Inclusive Communities* is perhaps more relevant to vote denial because, unlike employment decisions, FHA funding does not necessarily present the same zero-sum dynamic. Instead, both the FHA and Section 2 vote denial cases can be reframed as concerning enlarge-the-pie objectives because creating more affordable housing and additional opportunities to register and vote could benefit everyone, not just minority groups.[271] But issues related to zero-sum framing may still present problems for the vote denial results test.[272] In *Inclusive Communities*, the Court warned of rigidity in housing choices as a response to disparate impact liability concerns.[273] For Justice Kennedy, the FHA does not promote one vision of affordable housing development, and results liability should not be used to elevate a minority groups' interests over other considerations.[274] Doing so may chill the innovation and

269. *See, e.g.*, Cooper v. Harris, 137 S. Ct. 1455, 1469–72 (2017) (examining the tension in the vote dilution context between Section 2 and the Equal Protection racial gerrymandering jurisprudence). *But see* Hinds Cnty. Republican Party v. Hinds Cnty., 432 F. Supp. 3d 684 (S.D. Miss. 2020) (rejecting a group of White voter's Section 2 vote dilution claim).

270. For a discussion of these arguments, see generally Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041 (2013); Morley, *supra* note 159.

271. *See* Stephanopoulos, *supra* note 34, at 1609 ("[W]ith a nonrivalrous good like voting, there is no risk of such collateral damage. A ruling that makes it easier for minority citizens to vote does not impede nonminority citizens from casting ballots. In fact, it *helps* them to vote, thus yielding innocent *beneficiaries* rather than victims—a dynamic that could plausibly induce courts to err on the side of liability in section 2 litigation.").

272. *See* Tex. Dept. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539–40 (2015) (discussing issues with focusing on only statistical disparities).

273. *Id.* at 540 ("The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.").

274. *See id.* at 541–42 (discussing other considerations that "housing authorities and private developers" must take into account).

flexibility necessary to improve and distribute housing options in the "vibrant and dynamic free-enterprise system."[275] According to the Court, local housing authorities may legitimately (and permissively) "choose to foster diversity . . . and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[276] But the Court imposed a limitation on this principle, stating that diversity-fostering objectives may not be sought in a way that encourages the adoption of numerical racial quotas or makes race the overriding consideration.[277]

Section 2 applied to vote denial could be misconstrued to operate similarly. If the risk of Section 2 results test liability incentivizes lawmakers to overly structure their election rules to foster access for minority groups, opponents of Section 2 would argue that the results test is stunting innovation in electoral management and unconstitutionally subordinates other non-racial interests (like the common refrain of preventing voter fraud).[278] Even if such race-consciousness imposes no concrete injury on other voters—based on race or otherwise in a so-called "visible-victims" theory[279]—challengers of Section 2 may still claim that simply having race-neutral interests "subjected to a discriminatory competitive process is a legally cognizable injury."[280]

In sum, opponents of Section 2 argue that the results test is on a collision course with the Equal Protection Clause[281] because it

---

275. *Id.* at 533.

276. *Id.* at 545.

277. *Id.* at 542 (warning that "serious constitutional concerns" arise if states are encouraged to adopt racial quotas).

278. For detailed analyses of the myth of widespread voter fraud, see sources cited *supra* note 49.

279. *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36 (1976) ("The voting test suspension remedies have been relatively uncontroversial because they do not frustrate the legitimate expectations of third parties or prefer the intended beneficiaries to others similarly situated . . . ."); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1381 (2010) (noting that VRA remedies generally do not create visible victims); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1346–48 (2011).

280. *See* Rosenthal, *supra* note 251, at 2200 (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–19 (2007); Gratz v. Bollinger, 539 U.S. 244, 260–62 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 211 (1995)).

281. *See* Clegg, *supra* note 66, at 40 (citing Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring)) (arguing there is a tension "between the anti-race-conscious mandate of prohibiting disparate treatment and the race-conscious mandate of prohibiting disparate impact . . . so strong that disparate impact statutes may violate the Constitution's equal protection guarantee").

purportedly (1) is too easy to prove by a bare statistical disparate impact on minority voters, and (2) encourages too much race-consciousness in election management at the perceived cost to non-minority voters and race-neutral interests.

c. Rebuttal to the Equal Protection Arguments Against Section 2

The Supreme Court should reject the Equal Protection Clause arguments against Section 2 in the vote denial context. Addressing the first critique, advocates are wise to reinforce that the results test promulgates a totality of the circumstances analysis, *not* a bare disparate impact standard. Although certain aspects of the vote denial results test are still forming, all circuit courts have agreed that the two-part framework requires proving much more than a statistical disparity to establish a violation.[282] In other words, evidence of a disparate impact on minority voters is necessary, but not sufficient, to strike down an election law for its discriminatory effects.[283] Arguments against the results test have largely ignored the second part of the analysis that requires Section 2 plaintiffs to prove a causal nexus to conditions of discrimination using the Senate Factors. This burden on plaintiffs to link the identified disparate impact to conditions of discrimination and the jurisdiction's lack of a legitimate, race-neutral justification provides a liability-limiting function for Section 2,[284] and the totality of the circumstances inquiry is perhaps even more cabining of the vote denial test than the vote dilution test.[285]

Further, Section 2 advocates are well-positioned to disprove that the results test has actually superimposed the Section 5

282. "Section 2 rejects reliance on '[a]n inflexible rule,'" Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1970 (2018) (quoting Johnson v. De Grandy, 512 U.S. 997, 1018 (1994)), and Section 2 requires "a searching practical evaluation of the past and present reality, and on a functional view of the political process." Katz, *supra* (citing Thornburg v. Gingles, 478 U.S. 30, 45 (1986)). *See also* Stephanopoulos, *supra* note 34, at 1569.

283. Ho, *supra* note 63, at 822.

284. *Id*. (emphasizing the second prong analyzing the Senate Factors as a key aspect of the Section 2 vote denial test).

285. *See* Ellen Katz, Margaret Aisenbrey, Anna Baldwin & Emma Cheuse, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 660 (2006) (finding that of sixty-eight lawsuits satisfying the *Gingles* preconditions, "courts engaged in only a perfunctory review of the Senate Factors," and only eleven decisions ruled against plaintiffs at this second step).

retrogression standard that *Shelby County* effectively nullified. The Supreme Court has explicitly recognized that "[r]etrogression is not the inquiry in [Section] 2 dilution cases."[286] And unlike Section 5 retrogression, which analyzes a voting changes' effect on access for minority voters as compared to the status quo ante, inherent in Section 2's language is a comparison of a voting law's effects *between* minority and nonminority groups.[287] The two tests applied to vote denial laws ask fundamentally different questions and claims that the Section 2 test has somehow stealth-revived the Section 5 retrogression standard are entirely meritless.[288]

More fundamentally, Section 2's results-based and totality-focused analysis is the best way to protect against even subtle forms of unconstitutional voting discrimination and should be preferred to a standard built on intent. Focusing on unjustified disparate impacts in election laws can "smoke out"[289] prejudicial intent without the smoking gun evidence rarely available in modern discrimination cases.[290] Intent-based tests also have practical barriers to their effectiveness, which could be avoided by a results standard.[291] First, there are substantial obstacles to ascertaining and aggregating the intent of the legislative body that enacted an election law.[292] Second, judges may face interpersonal disincentives

286. Holder v. Hall, 512 U.S. 874, 884 (1994) (citing 42 U.S.C. § 1973(a); S. REP. NO. 97-417, at 68 n.224).

287. *See* Katz, *supra* note 282, at 1976–80 (discussing cases denying and allowing the use of retrogression); Muller, *supra* note 57, at 469–70 (comparing Section 2 and Section 5); Tokaji, *supra* note 62, at 456 (same).

288. *See* Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524, 551–56 (6th Cir. 2014) (rejecting Ohio's argument that the Section 2 test improperly adopts Section 5's retrogression analysis, considering the Section 2 "benchmark" is not past practice, but instead is the minority group's status "compared to other groups of voters"); League of Women Voters of N.C. v. N.C., 769 F.3d 224, 241–42 (2014) (rejecting the retrogression argument).

289. Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring); *see also* Veasey v. Abbott, 830 F.3d 216, 236 (5th Cir. 2016) (en banc) (finding that "neutral reasons can and do mask racial intent" and disparate impact tests can help smoke out discriminatory intent in voting).

290. Lang & Hebert, *supra* note 36, at 780; Primus, *supra* note 279, at 1376; Stephanopoulos, *supra* note 34, at 1605.

291. *See* Tolson, *supra* note 165, at 447–48 n.65 (citing Rogers v. Lodge, 458 U.S. 613, 629 (1982) (Powell, J., dissenting)) (finding that the "problems with the discriminatory intent standard—i.e., adducing the amount/kind of evidence sufficient to prove a violation—continued to confound plaintiffs and scholars").

292. Regarding older laws, an intent test is "hopelessly ineffective" because legislative histories are not maintained in many jurisdictions and "those who enacted ancient voting requirements could not be subpoenaed from their graves." United States v. Blaine Cnty., 363 F.3d 897, 908 (9th Cir. 2004). Present-day legislators are also often "protected from testifying about their motives by legislative immunity."

to finding intent from circumstantial factors. After all, a finding of discriminatory intent inevitably puts judges in the challenging position of essentially labeling their fellow public servants as racist, often without direct proof.[293] Therefore, an intent test for voting discrimination could contradictorily foster the type of problematic racial divisiveness that the Supreme Court labors to avoid,[294] while a disparate impact-based standard best serves the important Reconstruction Amendment objective to eliminate discrimination in voting.[295]

Turning to the second Section 2 results test critique that is based on arguments raised in *Ricci* and *Inclusive Communities*, the Supreme Court cannot ignore crucial distinctions between antidiscrimination efforts in voting compared to employment or housing. Primarily, the vote denial context does not present a zero-sum game of racial groups competing for a scarcity of resources. Invalidating discriminatory voting burdens "will not visit negative consequences on any racial group. Unlike in the employment context, . . . the right to vote can be extended to countless individuals without denying others access to that right."[296]

Id. (citing S. REP. NO. 97-417, at 36–37); *see also* Bogan v. Scott-Harris, 523 U.S. 44, 45 (1998) (discussing legislative immunity). Even if the intent of a legislator can be determined, the issue is compounded if intent must be proved as to the enacting governing body as a whole. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (citing Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977)) ("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor . . . ."); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–18 (1997) (arguing against statutory intentionalism, Scalia recognized the impossibility of determining the single, motivating intent of a legislature). Without clear public statements of motivation, advocates often cannot prove an intent claim without relying mostly on circumstantial factors and the law's disparate impact, which alone is typically insufficient to make a *prima facie* case. *See, e.g.*, NAACP v. McCrory, 831 F.3d 204, 231 (4th Cir. 2016) (noting that in vote denial intent claims "[s]howing disproportionate impact . . . suffices to establish one of the circumstances evidencing discriminatory intent").

293. *See* Karlan, *supra* note 165, at 735 ("Judges, after all, often live in the same milieu as other public officials and far away from the plaintiffs who bring racial vote dilution lawsuits. If they are compelled to call their acquaintances evil in order to do justice, then they may find themselves tempted to shade their judgment in even remotely close cases."); Primus, *supra* note 136, at 520 (making similar arguments).

294. *See* S. REP. NO. 97-417, at 36 (finding that "the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," and could exacerbate purposeful discrimination); *see also* Siegel, *supra* note 226, at 685–86 (observing that the Roberts Court focuses on ensuring "interventions designed to heal social division should be implemented in ways that do not aggravate social division").

295. *See* discussion of Reconstruction Amendments at *supra* notes 7–19 and accompanying text.

296. Nelson, *supra* note 63, at 611.

Accordingly, opponents of Section 2 have difficulty articulating an apolitical, neutral reason for why reducing discriminatory disparate impacts on minority groups actually harms non-minority voters; they instead resort to an amorphous vote-dilution-by-fraud harm that lacks any empirical support and itself reveals racially discriminatory assumptions about minority voters' participation in the political process.[297] At bottom, successfully applying Section 2 to ease burdens on voting has no adverse consequences based on race and instead offers ancillary benefits for everyone who faces barriers to participating in the political process.

Also, unlike housing and employment, there can be no market-based reason to limit the franchise. Denials of voting access cannot be justified by "business necessity" like in Title VII cases, or the need for unencumbered "profit-related decisions" like in the FHA.[298] While opponents argue that race-consciousness in voting laws has a chilling effect on creating allegedly justified election restrictions,[299] the analogy to the potential competing interests outlined in *Ricci* and *Inclusive Communities* is hollow because any urgent interest in profit maximization is off the table and the overriding state interest in voting should be maximizing participation by all eligible voters.[300] A state's interests in cost-minimization, administrative convenience, or confronting speculative concerns over voter fraud should always be secondary to the chief purpose of election administration: enfranchising eligible voters.[301] Section 2's results test is in step with this order of priority.

---

297. *See id.* ("[T]he individual and collective right to vote can be adversely impacted when the franchise is extended impermissibly. Voting power is diluted when unlawful votes are cast. With respect to modern vote denial measures such as voter ID laws and excessive voter purge practices, however, proof of unlawful voting is negligible . . . ."); *see also* Bognet v. Sec'y of Pa., 980 F.3d 336, 358 (3d Cir. 2020) (rejecting that vote-dilution-by-fraud injuries are sufficient to confer standing).

298. *See* Stephanopoulos, *supra* note 34, at 1608 (citing Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 533 (2015)).

299. *See* Clegg, *supra* note 66, at 39 (arguing that "whenever the government bans actions (public or private) that merely have racially disparate impact, . . . actions that are perfectly legitimate will be abandoned").

300. *See* Stephanopoulos, *supra* note 34, at 1571 (comparing interests related to voting and housing).

301. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 237 (5th Cir. 2016) (en banc) (summarizing testimony that addressing voter fraud has long been used as the proffered rationale for a range of election laws that were nonetheless rejected for their discrimination); Stewart v. Blackwell, 444 F.3d 843, 869 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973), to support the proposition that potential "[a]dministrative convenience" or cost-cutting rationales by election officials are "simply not a compelling justification in light of the fundamental nature of the right" at stake).

Finally, finding a Section 2 vote denial violation does not require any problematic analysis that separates people into racial categories at the expense of other traits.[302] While such alleged "racial sorting" is a common argument against the vote dilution results test, it is not a coherent critique in the vote denial context.[303] This is because vote denial claims do not prompt courts to categorize voters in a way that could precipitate racial polarization, do not require data showing how minority voters might prefer certain candidates in conflict with the preferences of non-minority voters, and do not demand proportional representation or any political outcomes at all.[304] In short, Section 2 vote denial results claims call for no race-based assumptions—or in Chief Justice Roberts' words: "divvying us up by race"[305]—that could aggravate instead of improve perceived racial divisions.

Conclusion

For voting rights advocates seeking to stem the rise of voter suppression, it cannot be ignored that opponents of Section 2 are making increasingly explicit claims against the constitutionality of the vote denial results test,[306] and a conservative majority of the Court could adopt any one of these arguments to do serious damage to the VRA. Some commentators have suggested that the best way to protect Section 2 is by adopting a different test that further limits liability and offers a greater platform to the state's proffered justifications.[307] But the concerns about Section 2's constitutionality are overstated and should be rejected on their merits.

The Supreme Court should affirm rather than limit the last best VRA mechanism for protecting an equal right to vote. Section 2 is

302. *See* Clegg, *supra* note 66, at 39 (claiming that the results test makes jurisdictions adopt "surreptitious—or not so surreptitious—racial quotas . . . so that the action is no longer racially disparate in its impact"); Primus, *supra* note 279, at 1342 (agreeing it is problematic if Title VII "requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification").

303. In vote dilution, by contrast, some commentators have argued that Section 2 results claims seem to require courts to "engage in *ad hoc* determinations of the voting behaviors of minority and non-minority groups" and separate them accordingly, which could be misconstrued as presenting an affront to individual dignity of voters or adopting racial quotas for minority representation. *See* Morgan, *supra* note 62, at 109, 113.

304. *Id.* at 116.

305. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, J., dissenting).

306. *See supra* notes 32, 66–68.

307. *See supra* note 62.

appropriately remedial and sufficiently tailored legislation to enforce the substantive Reconstruction Amendments' right of equal suffrage in today's voter suppression environment. And the vote denial results test safeguards principles of equality in the political process rather than offending them.

In 1965, President Lyndon B. Johnson captured the essence of these two truths about the VRA when signing the bill into law:

> This act flows from a clear and simple wrong. Its only purpose is to right that wrong. Millions of Americans are denied the right to vote because of their color. This law will ensure them the right to vote. The wrong is one which no American, in his heart, can justify. The right is one which no American, true to our principles, can deny.[308]

Section 2 of the VRA remains faithful to these principles and the results test continues to be an effective, restrained, and constitutionally justified tool for addressing the "clear and simple wrong"[309] of voter suppression. Inequality in the political process is not merely an isolated problem or vestige of the past, and Section 2 is urgently needed to confront modern threats to American democracy.

308. Lyndon B. Johnson, President, U.S., Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act [https://perma.cc/R789-FJF7].

309. *Id.*

The Edges are Bleeding: Constitutional Proxies and Imprisoned Trans Bodies in *Edmo* and *Gibson*

Jen L. Davison†

No one ever thinks of us as human
because we are more ghost than flesh,
because people fear that my gender expression is a trick,
that it exists to be perverse,
that it ensnares them without their consent,
that my body is a feast for their eyes and hands
and once they have fed off my queer,
they'll regurgitate all the parts they did not like.
They'll put me back into the closet, hang me with all the other skeletons.
I will be the best attraction.
Can you see how easy it is to talk people into coffins,
to misspell their names on gravestones.[1]

The human body historically has been conferred certain rights in law. For centuries, rights, privilege, and status could accrue only to male bodies (in some cases in British, European, and American societies, only to Caucasian, light-skinned, male bodies.) Women and other non-white men were chattels, servants, or little more than beasts of burden, and were frequently regarded as lacking the capacity to reason, even lacking souls. Particular qualities: autonomy, authenticity, authority, dignity—and rights: privacy, freedom, and equality—attach to, or conversely are denied, a corporeal presence.[2]

---

†. J.D. Candidate (2021), University of Minnesota Law School; B.A., Honors English (2011), University of British Columbia; B.A., Religion (2008), Summit Pacific College. The author expresses gratitude to Professor Perry Moriearty, Stephanie Gruba, Abigail Hanson, Navin Ramalingam, Abigail Rauls, Alena Simon, Heather Chang, Ivy Marsnik, Gabrielle Maginn, Katie McCoy, Esther Raty, Jeremy Walls, Kristin Trapp, Kevin Thomson, Anna Berglund, James Holden, and to my partner, Micah Davison.

1. Lee Mokobe, *A Powerful Poem About What It Feels to Be Transgender*, Fine Acts Collective, https://fineacts.co/lee-mokobe [https://perma.cc/CXR2-CTX7].

2. Jamison Green, *"If I Follow the Rules, Will You Make Me a Man?" Patterns in Transsexual Validation*, 34 U. LA VERNE L. REV. 23, 24 (2012) (citation omitted).

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.*[3]

The endowment of certain unalienable rights for certain bodies was declared obvious by the Founding Fathers of the United States. More than 200 years later, the category of "men" whose rights were presumed has produced a long-fought war waged at battlefronts including slavery's abolition, women's liberation, and a front at hand—transgender rights.[4] The 1960s second-wave feminist movement and the 1970s intersex and transgender movements argued that identity and gender were social constructs, challenging "the essentialist biologically based conceptualization of gender" rigidly curtailing some bodies' rights.[5] Nevertheless, American culture widely continued to view gender-nonconformism as a disorder, where only biologically-derived gender identities were normatively correct.[6] The dissonance of these norms with the

---

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

4. *See* ANNE-MARIE CUSAC, CRUEL AND UNUSUAL: THE CULTURE OF PUNISHMENT IN AMERICA 120 (2009) (observing second-wave feminism, gay liberation, and Black power caused increasing anxiety for cultural conservatives); *see also* Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 508 (2016) (noting the torch has been passed from LGB to T recently and the next civil rights frontier belongs to transgender people).

5. Mairéad Losty & John O'Connor, *Falling Outside of the 'Nice Little Binary Box': A Psychoanalytic Exploration of the Non-binary Gender Identity*, 32 PSYCHOANALYTIC PSYCHOTHERAPY 40, 41 (2018). The World Health Organization currently observes the social construction of gender as a known fact:

> Gender, typically described in terms of masculinity and femininity, is a social construction that varies across different cultures and over time. There are a number of cultures, for example, in which greater gender diversity exists and sex and gender are not always neatly divided along binary lines such as male and female or homosexual and heterosexual. The Berdache in North America, the fa'afafine (Samoan for "the way of a woman") in the Pacific, and the kathoey in Thailand are all examples of different gender categories that differ from the traditional Western division of people into males and females. Further, among certain North American native communities, gender is seen more in terms of a continuum than categories, with special acknowledgement of "two-spirited" people who encompass both masculine and feminine qualities and characteristics. It is apparent, then, that different cultures have taken different approaches to creating gender distinctions, with more or less recognition of [the] fluidity and complexity of gender.

Genomic Resource Centre Gender and Genetics: Genetic Components of Sex and Gender, WORLD HEALTH ORG., https://www.who.int/genomics/gender/en/index1.html [https://perma.cc/M98M-NB73].

6. Losty, *supra* note 5, at 41 (noting this is still the case in particular for non-binary individuals where "legitimate" trans-persons are trans-men or trans-women);

American ideals of equality and independence lingers, but recently there have been some dissonance-reducing gains for some Americans whose rights the Constitution has historically failed to protect.[7]

If we take the Founding Fathers at their aspirational word, the Constitution's protections are for every American, regardless of their body.[8] Constitutional protections are big ideas actualized by proxies. A proxy is "the agency, function, or office of a deputy who acts as a substitute for another."[9] Like representational signifiers for reality that gesture towards what is real, proxies are stand-ins for larger values that can be hard to realize in everyday life—particularly when their course flows through the rapids of normative social change. The law, its interpreters, and every doctrine and test they employ are such proxies.

Among such rapids of normative change, for decades courts have been considering whether the treatment of transgender[10]

---

see also Elvira Prusaczyk & Gordon Hodson, *The Roles of Political Conservatism and Binary Gender Beliefs in Predicting Prejudices Toward Gay Men and People Who Are Transgender*, SEX ROLES 1, 2 (2019) (arguing that according to social dominance theory, societies are organized into hierarchical groups maintained through the legitimizing myths of rightly-apportioned power in hierarchy-enhancing ideologies—which for Americans have been right-leaning ideologies that justify and rationalize prejudice and discrimination against non-Anglo, non-hetero, non-male bodies). Prusaczyk & Hodson further observe that "[r]esearch shows that those on the political right tend to express more negativity toward LGBTQ+ people" driven by an epistemic need to protect their ideology through "resistance to change and opposition to equality." *Id.*

7. Gay marriage rights, for example, were recognized by the Supreme Court in *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015). The Ninth Circuit's ruling in *Edmo v. Corizon, Inc.*, 935 F.3d 757, 767 (9th Cir. 2019) (per curiam), is another such example—and is a focus of this Note.

8. THE DECLARATION OF INDEPENDENCE, *supra* note 3.

9. *Proxy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/proxy [https://perma.cc/ALP7-MBRT].

10. *See* Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 15–16 n.2 (2003). Recognizing words and naming have power as Spade suggests, this Note will use the terms "transgender" and "trans" as umbrella terms for people who "transgress the rules of binary gender." *See* Scott R. Chaiet, MD, MBA; Shane D. Morrison, MD, MS; Carl G. Streed, Jr., MD, *Gender Confirmation Surgery and Terminology in Transgender Health*, 152 JAMA SURGERY 1089, 1089 (2017). Accordingly, this Note will not use "transsexual," typically the medicalized term used to describe a subcategory among transgender people experiencing acute gender dysphoria often treated with hormones and surgery, because this term is outdated, stigma-reinforcing, and in the process of being retired by many national and international organizations. *See* Jens U. Berli, Gail Knudson, Lin Fraser, Vin Tangpricha, Randi Ettner, Frederic M. Ettner, Joshua D. Safer, Julie Graham, Stan Monstrey & Loren Schechter, *What Surgeons Need to Know About Gender Confirmation Surgery When Providing Care for Transgender Individuals: A Review*, 152 JAMA SURGERY 394, 394 (2017) (putting some numbers to the

imprisoned persons experiencing gender dysphoria (GD),[11] including through gender confirmation surgery (GCS),[12] falls within—or expands the definition of—medical necessity, activating Eighth Amendment protections against a deliberately indifferent government.[13] This debate came to a head in 2019 when two federal circuit courts came to opposite conclusions on two cases of imprisoned persons experiencing severe GD. In *Gibson v. Collier*, the Fifth Circuit held that it was not cruel and unusual punishment for the State to deny GCS to an incarcerated individual named

population on which this Note will focus, approximately 0.4% to 1.3% of the population worldwide experiences gender dysphoria (GD)); *see also* Cynthia S. Osborne & Anne A. Lawrence, *Male Prison Inmates With Gender Dysphoria: When Is Sex Reassignment Surgery Appropriate?*, 45 ARCHIVES SEXUAL BEHAV., 1649, 1649 (2016) (noting in Western countries, it is estimated that male-to-female (MtF) transgenderism is present in about 1 in 10,000 to 1 in 12,000, but research suggests a higher prevalence among male imprisoned persons in the U.S.); Yvette K. W. Bourcicot & Daniel Hirotsu Woofter, *Prudent Policy: Accommodating Prisoners with Gender Dysphoria*, 12 STAN. J. C.R. & C.L. 283, 286 (2016) (estimating the transgender population in the U.S. to be approximately 700,000 individuals, with 16% reporting being imprisoned at some point). *But c.f.* Osborne, *supra,* at 1650 (observing firsthand a prevalence of about 1 in 500 male imprisoned persons identifying as transgender, estimating that "there could easily be 3000–4000 males with GD in U.S. prisons"); Erin McCauley, Kristen Eckstrand, Bethlehem Desta, Ben Bouvier, Brad Brockmann & Lauren Brinkley-Rubinstein, *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, 3 TRANSGENDER HEALTH 34, 34 (2018) ("One in six transgender individuals have been incarcerated at some point in their lives. For [B]lack transgender people, the rates of incarceration are even higher; some estimates indicate that nearly half (47%) have been incarcerated at some point.").

11. *See* THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (Am. Psychiatric Ass'n ed., 5th ed. 2013) [hereinafter DSM-V] (explaining GD "refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender"); *see also* AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA (2013), https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf (clarifying why the DSM-V replaced the category "gender identity disorder" in previous editions with "gender dysphoria" to officially recognize that gender nonconformity is not a mental disorder).

12. *See* Osborne, *supra* note 10, at 1650 (Gender Confirmation Surgery (GCS), also known as Gender Reassignment Surgery (GRS), Gender Reaffirming Surgery (GRS), Sex Confirmation Surgery (SCS), Sex Reassignment Surgery (SRS), a Sex Change Operation, Sexual Reassignment Surgery (SRS), or Bottom Surgery, encompasses surgical procedures performed to align an individual's primary and secondary sex characteristics aesthetically and/or functionally to resemble those of their gender identity). For a better understanding of surgical measures that may be taken—and how binary their conceptualization is in the medical field, *see* Berli et al., *supra* note 10, at 398. For an overview of related terminology, *see generally* Lee Harrington, *Traversing Gender: Understanding Transgender Realities* (2016) (ebook).

13. *See* Norsworthy v. Beard, 87 F. Supp. 3d 1164 (2015); De'lonta v. Johnson, 708 F.3d 520 (4th Cir. 2013); Fields v. Smith, 653 F.3d 550 (7th Cir. 2011); Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987).

Vanessa Lynn Gibson.[14] In *Edmo v. Corizon, Inc.*, the Ninth Circuit held that GCS was medically necessary for an incarcerated individual named Adree Edmo and that responsible prison authorities were deliberately indifferent to this need in violation of the Eighth Amendment.[15]

This Note will explore this circuit rift and the arguments mobilized for and against locating GCS under Eighth Amendment protections. Part I will provide an overview of GD and GCS, a brief history of the principle of medical necessity and the Eighth Amendment, and a review of the *Gibson* and *Edmo* decisions. Part II will argue that the Ninth Circuit's decision to treat GCS as a medical necessity for Edmo, while problematic, is part of an objectively and normatively right progression that can and should be adopted by other circuits and the Supreme Court. Finally, Part III will explore what the *Edmo* and *Gibson* decisions are telling us about the American conscience, the dissonance between our Eighth Amendment ideals and the medical necessity proxy we use to actualize them, and the resulting need to elevate prison practices that induce self-harm or suicidality to proxies in their own right. Using medical necessity as a proxy for our Eighth Amendment consciences is producing mixed results that allow American citizens and legal professionals to tolerate cruel and unusual punishments.

I. Background for the *Edmo* and *Gibson* Decisions

In order to contextualize the *Edmo* and *Gibson* cases, this first Part will provide a brief historical context for these decisions, an overview of the GD both Edmo and Gibson experienced, and a description of the GCS they hoped to be evaluated for and/or receive. Since GD and GCS are medical in nature, they fall under the medical necessity doctrine as a proxy for Eighth Amendment protections, which will also be discussed here. This Part will then conclude with review of how each court applied the medical necessity doctrine to *Edmo* and *Gibson*.

A. The Historical Context for Court-Ordered Gender Confirmation Surgery

The Eighth Amendment, ratified in 1791, reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

14. Gibson v. Collier, 920 F.3d 212, 215 (5th Cir. 2019).
15. Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019) (per curiam).

unusual punishments inflicted."[16] It is understood to forbid practices contrary to eighteenth-century notions of civilized behavior through to today's contemporary social mores.[17] Unfortunately, there is no one place we assemble our norms and then systematically realign our behaviors and institutions in society to match them. Even if there were, knowing the norms is not enough; you must also be aware of current practices to locate misalignments. When it comes to the criminal justice system, imprisoned persons and the punitive pains they suffer have become largely hidden from ordinary citizens who do not "recognize convicts as fully our own nor see the centrality of pain to our culture."[18] This makes court cases an important window into the hidden experiences of incarcerated Americans with the potential to expose equally hidden dissonances with our prevailing norms.

It was not until 1976 that the Supreme Court considered the Eighth Amendment's protections for incarcerated individuals.[19] In *Estelle v. Gamble*, the Court agreed that one key measure of such punishment is in the deprivation of medical care for a "serious

16. U.S. CONST. amend. VIII. Imprisoned persons who seek to challenge prison officials' decisions impacting their constitutional rights may bring either a § 1983 or a *Bivens* action, depending upon whether the official is a state or federal employee, and may then seek damages and injunctive relief as per 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . [,]

or as per *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395–96 (1971) (recognizing a similar cause of action to § 1983 and allowing claims against federal actors).

17. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 84–85 (5th ed. 2017) (discussing the history of what is objectively cruel and unusual punishment).

18. CUSAC, *supra* note 4, at 13; *see also* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 972 (2009) ("Banished into nonexistence, prisoners are noticed, if at all, only at the moment of sentencing or upon release, or when through an escape or some other notorious act they force themselves upon the public consciousness. But if the public benefits from this (temporary) freedom from the company of those deemed unfit to live in society, it does so only because the state commits to providing for the ongoing care and protection of the people society wishes to exclude during their incarceration."); *cf.* BRIAN JARVIS, CRUEL AND UNUSUAL: PUNISHMENT AND U.S. CULTURE 14 (2004) ("The mythology of the Land of the Free can be seen as an ideological smokescreen designed to obscure the systematic deprivation of liberty and infliction of punishments, both cruel and unusual.").

19. MUSHLIN, *supra* note 17, at 63 (discussing how the Court arrived at *Estelle v. Gamble*, 429 U.S. 97 (1976)).

medical need,"[20] coining the legal standard "deliberate indifference" that governs specific isolated actions of prison officials.[21] According to the deliberate indifference standard, the State is required to provide a level of medical care that meets routine and emergency health care needs, including physical, dental, and psychological or psychiatric care.[22] If an imprisoned person believes they are being denied or unreasonably delayed access to necessary medical care by deliberately indifferent state officials, they are entitled to claim that those officials violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[23]

Meanwhile in the medical world, 1979 saw the development of the first widely-recognized standards of care for persons experiencing gender identity dissonances, and as of 2020 these standards are in their seventh version.[24] These World Professional Association for Transgender Health (WPATH) Standards of Care have a widely accepted treatment plan for those experiencing acute

20. The definition of what is a serious medical need remains vaguely defined and open to each court's subjective perception. *Id.* at 389–95. For a discussion of circuit treatment of GD, *see* Bourcicot, *supra* note 10, at 295–96 (arguing the majority of circuits recognize GD as a serious medical need, with the Fifth and Tenth Circuits as anomalies). *See also* Susan S. Bendlin, *Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy*, 61 CLEV. ST. L. REV. 957, 967 (2013) ("To the extent that the circuits differ, it is not over whether Gender Dysphoria constitutes a serious medical need, but over whether treatment is warranted in a specific case, and if so, what type of treatment should be provided. The objective prong of the test under § 1983—'serious medical need'—can typically be satisfied by the inmate.").

21. Estelle v. Gamble, 429 U.S. 97 (1976) (creating the rule that deliberate indifference to an imprisoned person's serious medical needs by prison guards or doctors constitutes cruel and unusual punishment under the Eighth Amendment and gives rise to a civil rights cause of action under 42 U.S.C. § 1983); *see also* MUSHLIN, *supra* note 17, at 65.

22. Bendlin, *supra* note 20, at 977 ("When the State takes someone into custody and deprives him of the ability to take care of himself, the State assumes some duty to provide for his basic needs such as food, shelter, clothing, personal safety, and medical care."); *see also* MUSHLIN, *supra* note 17, at 371–73 (noting incarcerated individuals are wholly dependent on prison staff for medical care, which is especially significant because studies suggest imprisoned persons have a higher than average need for medical care—both from statistically higher medical concerns coming into prison such as mental illness, HIV/AIDS, etc., as well as from the probability of sustained injuries and newly-arising health concerns during—and arguably resulting from—incarceration).

23. *Estelle*, 429 U.S. at 104–05.

24. Rudolph Alexander, Jr. & Jacquelyn C. A. Meshelemiah, *Gendered Identity Disorders in Prisons: What Are the Legal Implications for Prison Mental Health Professionals and Administrations?*, 90 PRISON J. 269, 274 (2010).

GD involving three sequential steps: 1) hormone therapy, 2) a period of time living as the opposite gender, and 3) GCS.[25]

It is important to note that some in the trans community and their advocates are resistant to the pathologizing of GD.[26] Instead of understanding transgenderism as "a matter of natural diversity" that is not "inherently pathological or negative," the powerfully coercive force of the dominant binary understanding of gender relegates trans bodies to the unnatural.[27] Those who do not conform to traditional gender binaries face pervasive social and economic discrimination, leading to a greater likelihood of being in the criminal justice system.[28] Physicians—a small medical elite—have traditionally been our gatekeepers regulating gender nonconformity. Physicians control access to medical diagnostic categories that have reinforced sexist/heterosexist norms, recognizing only those who can narrate their gender experiences

25. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, INC., STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 1–7, 27–28 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf?_t=1605186324 [https://perma.cc/BYL6-PNJZ] [hereinafter WPATH]. For a discussion of criticisms of these standards, *see* Osborne, *supra* note 10, at 1650–51 ("Although they were formulated by experienced clinicians and scholars, most SOC recommendations are based on low-quality evidence, such as case series and expert opinion. The SOC also do not represent the experiences and practices of all GD experts, and some provisions of the SOC seem to reflect political considerations rather than scientific evidence or clinical experience." (citations omitted)).

26. *See* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 952 (2015) (discussing transgender community feelings on their medicalization); *see also* Bendlin, *supra* note 20, at 961 ("The issue is a sensitive one because the diagnosis of Gender Dysphoria as a medical illness has a negative connotation to members of the transgender community. If, however, the condition is not recognized as an illness, then medical treatment may not be deemed necessary.").

27. Levasseur, *supra* note 26, at 946–47 (noting that "[t]his simplistic understanding of sex, as two fixed binary categories, is medically, scientifically, and factually inaccurate, but still broadly enforced by courts"); *see also* Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Settings*, 28 T. JEFFERSON L. REV. 167, 169 (2005) ("[G]eneralizations about the biological differences between men and women often petrify into rigid and inaccurate stereotypes . . . so barnacled with associations that we can no longer separate out the purely biological from its cultural appendages."); Green, *supra* note 2, at 78 ("Visible external genitalia, presumed chromosomal make-up, and presumed reproductive capacity are viewed as primal, objective, fixed, and 'true' only because the external genitalia is the first observable differentiator—or characteristic of social significance—that people see in an infant. However, to define 'sex' as the fixed point of a compass that always tells us the 'truth' about a person is both archaic and naive.").

28. Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 167–68 (2006) (discussing transgender persons' exclusion from the legitimate economy).

within those categories.[29] Thus, like homosexuality, being transgender was placed in the American Psychiatric Association's DSM-V where the medical voice of authority originally called it a disorder.[30] The trans community has fought for decades to see this stigmatization of transgenderism removed.[31]

Like homosexuality, GD has been migrating towards normalization. Homosexuality was removed as a disorder from the DSM in 1973, and the original Gender Identity Disorder (GID) was reclassified as GD in 2013, signifying a shift in understanding gender as distinct from binary sex.[32] While mental distress or impairment is a common symptom or comorbid symptom of GD, many now claim it is an organic disorder that should be treated as a physical problem, not pathologized.[33] While this progress is positive, the trans community still faces a serious medical/legal dilemma:[34] rely on the Eighth Amendment to seek gender-affirming medical care but legitimize medical authority and reinscribe the problematic medical/legal model,[35] or insist on broader systemic change while—for the foreseeable future—sacrificing basic rights that include the right to medical care?[36]

---

29. *Id.* at 174.

30. DSM-V, *supra* note 11; GENDER DYSPHORIA, *supra* note 11.

31. Walter Bockting, *The Impact of Stigma on Transgender Identity Development and Mental Health*, *in* GENDER DYSPHORIA AND DISORDERS OF SEX DEVELOPMENT: PROGRESS IN CARE AND KNOWLEDGE 319, 321–22 (Baudewijntje P. C. Kreukels et al., eds., 2014).

32. GENDER DYSPHORIA, *supra* note 11; Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. (BASEL) 565 (2015).

33. *See* Alexander, *supra* note 24, at 271 (discussing the push to depathologize GD).

34. *See* Silpa Maruri, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 CORNELL J.L. & PUB. POL'Y 807, 807 (2011) (observing that labeling GD as a mental illness is "a double-edged sword" that is "at odds with the transgender community's conceptualization of itself" because "while it allows access to hormone therapy, it does so by describing transgender individuals as somehow sick or infirm").

35. *See* Tarzwell, *supra* note 28, at 189 (discussing the medical/legal model of GD).

36. *See* Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 214 (2000) (including the right to competent medical and professional care regardless of "chromosomal sex, genitalia, assigned birth sex, or initial gender role"); *see also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (asserting the Declaration applies to everyone regardless of sex in Article 2 and affirming everyone's right to medical care in Article 25). *Compare* Stephen B. Levine, *Reflections on the Legal Battles over Prisoners with Gender Dysphoria*, 44 J. AM. ACAD. PSYCHIATRY L. 236, 240 (2016) (arguing these rights-based advocacy

B. An Overview of Gender Dysphoria and Its Medical Treatment

The rise of transgender rights activism has been resisted as an assault on the United States' heteronormative empire, where assumptions about the stability of biological sex and residual Western philosophies of a sex-based natural order are gradually being called emperors with no clothes.[37] Nevertheless, medical professionals have generally accepted standards of care for gender-nonconformists—"based on the best available science and expert professional consensus"—that they can and should follow.[38] WPATH, creator of the transgender Standards of Care, is an international multidisciplinary association promoting evidence-based clinical care for gender non-conforming people.[39] WPATH asserts that the expression of gender characteristics is not something assigned by biological sex at birth, and its expression is not inherently pathological whether it conforms to that assigned sex or not.[40] GD is fundamentally an experience of being out-of-sync with that assigned sex at birth accompanied by the associated gender role and sex characteristics expected by society.[41] When that dissonance rises to a significant level of distress, GD is diagnosed as acute and has indicated treatments.[42] In the context of a social hierarchy that legitimizes and empowers traditionally gender-conforming bodies, such dissonances are inevitable.[43] Treatment for

approaches to trans medical care are harmfully agenda-driven because "[c]ombining science and advocacy produces problems" where "[s]cience provides a dispassionate view of what seem to be the facts" while "[a]dvocacy aims at attaining a specific goal, and it musters the facts that support that goal"), *with* Green, *supra* note 2, at 30 (arguing science only goes so far in changing norms because "[s]cientific discoveries are interesting, even exciting for some people, but they are heresies for others, dismissible, irrelevant, mere theories until they are validated by whatever system has been allocated greater authority").

37. *See* Rena Lindevaldsen, *A State's Obligation to Fund Hormonal Therapy and Sex-rReassignment Surgery for Prisoners Diagnosed with Gender Identity Disorder*, 7 LIBERTY U. L. REV. 15, 27–28, 45–47 (2012) (defending the heteronormative status quo and arguing science, medicine, and the law are being hijacked by politically liberal ideologies trying to "play[] God" by denying that "gender is an immutable trait, is binary in nature, and coincides from birth with an individual's sex" and that gender identity is something a child's family fosters "by teaching the child gender-appropriate behavior").

38. WPATH, *supra* note 25, at 1.

39. *Id.*

40. *Id.* at 4.

41. *Id.* at 5.

42. *Id.*

43. This Note follows the premise that American society has created the rigid rules that members of its society existentially cannot follow, then pathologized

GD began in the second half of the twentieth century with a growth of awareness among medical professionals of the severity of the dissonances being experienced.[44] Changes in gender expression, psychotherapy, hormone therapy, and surgery have been typical treatment options.[45]

To meet the currently accepted standards of care for a patient with GD, a medical professional must evaluate a patient's GD, provide information about treatment options and risks, assess and treat relevant mental health concerns, and then refer a patient for the chosen treatment.[46]

GCS to change primary or secondary sex characteristics typically includes altering the chest/breasts, external or internal genitalia, facial features, or body contouring,[47] and it is "often the last and the most considered step in the treatment process for gender dysphoria."[48] WPATH has found such surgeries to be indicated, effective, and medically necessary for some patients.[49] To say these surgeries are medically necessary means that they are not merely elective procedures,[50] but are provided only when patients

---

and/or punished the results. *See* CUSAC, *supra* note 4 (documenting the intertwined nature of Christianity and American cultural norms, including the protection and reinforcement of those norms through the scapegoating of norm-transgressors and their subsequent punishment). This ritual of the scapegoat—one who legitimizes and reinscribes an organizing myth through symbolic punishment—is a common theme in Christianity. *See Leviticus* 16:21–22 (telling how, in the Old Testament, the nation of Israel would send a sacrificial lamb into the wilderness to be killed once a year, heaped symbolically with their collective transgressions); *John* 1:29 (telling how, in the New Testament, Christ becomes this sacrificial "Lamb of God," heaped symbolically with the sins of the world). In the American myth, we orient and cleanse ourselves by sending Black Americans, those experiencing systemic poverty, and the gender nonconforming—among others—to prison, heaped symbolically with our culture's transgressions.

44. WPATH, *supra* note 25, at 8.

45. *Id.* at 9–10.

46. *Id.* at 23–28.

47. *Id.* at 10.

48. *Id.* at 54. Of those opting for surgical treatment, satisfaction rates across studies ranged from 87% of male-to-female (MtF) patients to 97% of female-to-male (FtM) patients, with regrets about this choice being an extremely rare 1–1.5% of MtF patients and <1% of FtM patients. *Id.* at 8.

49. *Id.* at 54–55.

50. *See* Jody Marksamer & Harper Jean Tobin, *Standing with LGBT Prisoners: An Advocate's Guide to Ending Abuse and Combating Imprisonment*, NAT'L CTR. FOR TRANSGENDER EQUAL., 55 (2013) ("[B]oth the American Medical Association ('AMA') and the American Psychological Association ('APA') have adopted public statements that reject the misconception that transition-related medical care is 'cosmetic' or 'experimental,' and recognize such care as effective, therapeutic, and a 'medical necessity . . . for appropriately evaluated individuals.'") (citing AM. MED. ASS'N HOUSE OF DELEGATES, AMA RESOL. 122 (A-08) and AM. PSYCHOL. ASS'N, APA POLICY STATEMENTS ON LESBIAN, GAY, BISEXUAL & TRANSGENDER CONCERNS (2009)).

meet specific criteria: 1) persistent, well-documented GD; 2) capacity to give informed consent; 3) age of majority; 4) reasonably well controlled medical or mental health concerns; 5) twelve continuous months of hormone therapy; and 6) twelve continuous months of living in a gender role congruent with their gender identity.[51] As some of these criteria suggest, GD is often accompanied by mental health concerns, including anxiety, depression, self-harm, a history of abuse and neglect, compulsivity, substance abuse, sexual concerns, personality disorders, eating disorders, psychotic disorders, and autistic spectrum disorders.[52] When an individual with acute GD is denied the option for surgical intervention, they commonly experience depressive symptoms that may include suicidal ideation.[53]

The WPATH Standards of Care specify that "[h]ealth care for . . . gender-nonconforming people living in an institutional environment [such as prison] should mirror that which would be available to them if they were living in a non-institutional setting within the same community."[54] As a result, prison policies regarding gender-nonconforming populations are in various stages of incorporating these new norms.[55] The 2019 *Edmo* decision was the first time that a federal appeals court has ordered the State to pay for an incarcerated person's GCS under the Eighth Amendment.[56]

---

51. WPATH, *supra* note 25, at 60 (noting that these are the criteria for a metoidioplasty or phalloplasty in FtM patients and for a vaginoplasty in MtF patients).

52. *Id.* at 24.

53. *See* Osborne, *supra* note 10, at 1655 (documenting this suicidality indicator); *see also:*

> I had come so far in my transition, and the actions by the hospital felt like a complete rejection of who I am. I had rejected myself for 29 years; having my surgery canceled brought back all of those feelings, despite five years of progress and acceptance. It made me feel like I wanted to crawl out of my own skin again.

Evan Minton, *What It Was Like to Be Denied Medical Care Because of My Gender*, VICE (June 29, 2018), https://www.vice.com/en_us/article/evk34n/denied-medical-care-transgender-lawsuit [https://perma.cc/VC4M-KQ].

54. WPATH, *supra* note 25, at 67; *see also Position Statement on Transgender Health Care in Correctional Settings*, NAT'L COMM. ON CORR. HEALTH CARE (2009), https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care [https://perma.cc/X4GD-HU73] (suggesting that the proper approach to transgender medical care is to follow the WPATH Standards of Care).

55. *See generally* Tarzwell, *supra* note 28 (analyzing forty-four states' practices and policies on the management of transgender imprisoned persons).

56. Lateshia Beachum, *Idaho Must Pay for an Inmate's Gender Confirmation Surgery, a Court Says. The Governor Is Fighting It.*, WASH. POST (Aug. 27, 2019),

C. The Eighth Amendment and Its Enforcement Through the Medical Necessity Doctrine

The Eighth Amendment is a normative chameleon that prohibits "cruel and unusual" punishment.[57] Early Supreme Court cases observed the difficulty of defining "cruel and unusual." The first proxy was a "manifestly cruel" standard which "forbade only the most extreme punishments" likened to torture—crucifixion, beheading, burning alive, quartering, disembowelment, and similar practices.[58] In 1968, Judge Blackmun observed that "the limits of the Eighth Amendment's proscription are not easily or exactly defined," but that its "applicable standards are flexible," guided by "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ."[59] Thus, it absorbs its standards from the society around it; it is as cruel as we are.

The idea that incarcerated individuals have a right to health is also rooted in the Eighth Amendment.[60] When a person is lawfully incarcerated, they are deprived of certain rights and privileges, but in general they still retain their constitutional protections.[61] Specific to this Note's focus, under current interpretations, the State has an Eighth Amendment obligation to provide appropriate medical care for incarcerated persons.[62] To fail

---

https://www.washingtonpost.com/dc-md-va/2019/08/27/idaho-must-pay-an-inmates-gender-confirmation-surgery-court-says-governor-is-fighting-it/ [https://perma.cc/9JHX-UURM] (reporting on this historic decision).

57. U.S. CONST. amend. VIII.

58. Bourcicot, *supra* note 10, at 290 (citing the Court's prohibition of such practices in In re *Kemmler*, 136 U.S. 436, 446–47 (1890) and *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878)). *See* CUSAC, *supra* note 4, at 33, 48–49, 53, 99, 104, 212, 241 (noting that nevertheless, execution, physical restraints, gags, water punishments, beatings, pulley systems for stretching, sweat boxes, solitary confinement, and stun belts are just some of the range of cruelties that have been imposed on U.S. imprisoned persons—some disallowed, others lingering on, some disallowed and then reallowed, and some disallowed but likely to return). Though it is easy to think of these norms as linear progress, they are not. The progression of these cruelty norms is cyclical, with periodic resurgences of practices previously thought cruel and outmoded, such as the resurgence of solitary confinement. *Id.* at 63, 241.

59. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

60. Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments."). "Health," like what is "cruel and unusual," is a dynamic concept. It depends not only on appropriate clinical diagnosis and treatment for those experiencing GD such as Edmo and Gibson, but also on "social and political climates that provide and ensure social tolerance, equality, and the full rights of citizenship," necessitating "legal reforms that promote tolerance and equity for gender and sexual diversity and that eliminate prejudice, discrimination, and stigma." WPATH, *supra* note 25, at 1–2.

61. *See* Brown v. Plata, 563 U.S. 493, 510–11 (2011).

62. *Estelle*, 429 U.S. at 103.

to do so would make imprisonment cruel. In this way, serious medical needs become proxies for suffering that is cruel to allow, where suffering has been medicalized into symptoms. Prison officials are given wide discretion in determining medical treatment for imprisoned persons and are presumed to be providing appropriate care.[63] However, when officials fail to provide necessary medical care with deliberate indifference to an imprisoned person's known serious medical need, the Eighth Amendment is violated.[64] This proxy test for violation of the Eighth Amendment is known as the doctrine of medical necessity.

A person imprisoned who seeks to prove the violation of their Eighth Amendment protections embodied in medical necessity must meet both an objective and subjective threshold.[65] They must *objectively* show that: 1) denying the needed medical care was against any competent recognized medical authority;[66] 2) at the time of denial they were experiencing a severe and obvious illness or injury;[67] 3) the denial was not due to mere negligence by the prison official(s), but demonstrates instead deliberate indifference;[68] and 4) resulting harm.[69] Thus, the objective threshold is a heavily fact-dependent analysis in which courts must

63. *See, e.g.*, Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014); Jones v. Falor, 135 F. App'x 554, 556 (3d Cir. 2005).

64. *Estelle*, 429 U.S. at 104; Miller v. Calhoun County, 408 F.3d 803, 812 (6th Cir. 2005).

65. Smith v. Carpenter, 316 F.3d 178, 183–84 (2d Cir. 2003) ("The objective 'medical need' element measures the severity of the alleged deprivation, while the subjective deliberate indifference element ensures that the defendant prison official acted with a sufficiently culpable state of mind.").

66. Important to GD, the objective test requires that the medical treatment is necessary, not optional or elective, although more than mere labels are required to make an "elective" determination. *See* Garrett v. Elko, No. 95-7939, 1997 U.S. App. LEXIS 21271, at *3 (4th Cir. Aug. 12, 1997) ("[P]rison officials cannot avoid [E]ighth [A]mendment liability for denying a prisoner treatment necessary to address a serious medical need simply by labeling the treatment 'elective.'").

67. The severity of the illness or injury being intentionally ignored is typically determined by a court through consideration of the effect of denying treatment. Miller v. Beard, 699 F. Supp. 2d 697, 707 (E.D. Pa. 2010).

68. Farmer v. Brennan, 511 U.S. 825, 836–37 (1994). *See* Dolovich, *supra* note 18, at 972–73 (discussing how *Farmer* shows the Supreme Court fundamentally misunderstands the collective bargain struck between the State and civil society when it "accord[s] state actors the same privilege of disregard and even obliviousness to the fate of imprisoned offenders that the public takes for granted"—resulting in a virtual "guarantee that the people being held in those prisons will suffer gratuitous physical and psychological harm").

69. *E.g.*, Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970) (the harm of permanent disfigurement); Kelley v. Hicks, 400 F.3d 1282, 1284 (11th Cir. 2005) (the harm of exposure to environmental tobacco smoke (ETS)).

weigh each incarcerated individual's particular circumstances at the time of the alleged rights violation.

An incarcerated person must also *subjectively* show the State was deliberately indifferent to their serious medical need. "Deliberate indifference" to an imprisoned person's Eighth Amendment rights subjectively exists where a prison official: 1) knows of the person's treatment need but intentionally refuses to provide it; 2) delays necessary medical treatment for non-medical reasons; or 3) prevents the person from receiving needed or recommended treatment.[70] "This does not mean that every prisoner complaint requires immediate diagnosis and care, but that, under the totality of the circumstances, adequate medical treatment be administered when and where there is reason to believe it is needed."[71] This subjective threshold is typically met when there is potential deprivation of life itself or infliction of permanent injuries.[72] Thus, the bar for the doctrine of medical necessity is high.

D. The 2019 Edmo *and* Gibson *Decisions Created a Federal Circuit Split*

With this Eighth Amendment analysis in mind, this Note will turn to the facts and outcomes of the Ninth Circuit's *Edmo* and the Fifth Circuit's *Gibson*, two cases decided in 2019 in which incarcerated individuals experiencing acute GD alleged a violation of their Eighth Amendment rights under the doctrine of medical necessity.

---

70. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976); *see Farmer*, 511 U.S. at 839 (likening the "cruel and unusual" standard under the Eighth Amendment to the subjective recklessness standard used in criminal law); *see also* Bourcicot, *supra* note 10, at 294 ("The wide discretion afforded prison officials allows them to weigh inmates' medical needs against ancillary factors—such as the availability of treatment, the cost of treatment, and administrative difficulties in administering treatment—without necessarily running afoul of the Eighth Amendment.").

71. Mills v. Oliver, 367 F. Supp. 77, 79 (E.D. Va. 1973); *see* Bourcicot, *supra* note 10, at 294 (stating prison officials have been found deliberately indifferent when they used cost as the sole basis for deciding not to provide treatment, when they consciously chose an "easier and less efficacious" treatment, when they ignored medical advice, or when "extreme bureaucratic inefficiencies or passive resistance" resulted in inadequate medical care).

72. *See, e.g.*, McCollum v. Mayfield, 130 F. Supp. 112, 115 (N.D. Cal. 1955) ("A refusal to furnish medical care when it is clearly necessary, such as is alleged here, could well result in the deprivation of life itself; it is alleged that plaintiff suffered paralysis and disability from which he will never recover. This amounts to the infliction of permanent injuries, which is, to some extent, a deprivation of life, of liberty and of property. Since these rights are protected by the Fourteenth Amendment to the Federal Constitution, the complaint sufficiently alleges the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States.").

i. Adree Edmo's Ninth Circuit Case Affirmed GCS as a Medical Necessity

In *Edmo v. Corizon*,[73] the question before the court was whether GCS was medically necessary for Adree Edmo, a transgender incarcerated individual.[74] The Ninth Circuit decision, a unanimous opinion written by Judges M. Margaret McKeown, Ronald M. Gould, and Robert S. Lasnik, observed that this question

73. Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019). This Note will focus on Parts I and III of the opinion, dealing with GD, GCS, medical necessity and the Eighth Amendment. Part II considers the Prison Litigation Reform Act, the injunction issued by the lower court, and mootness. To briefly summarize, the district court had granted injunctive relief ordering GCS. The Ninth Circuit affirmed that the district court made the "need-narrowness-intrusiveness" findings required under 18 U.S.C. § 3626(a)(1)(A) to maintain the injunction and thus, the appeal was not moot. Because the permanent injunction had not expired, but was simply stayed, the Ninth Circuit denied the State's motion to dismiss. Further, the injunction was held to be appropriate against the individuals in their personal or official capacities who participated in depriving Edmo of her Eighth Amendment rights. *Id.* at 782–84.

74. Adree Edmo was born in 1987 and grew up on the Shoshone-Bannock Indian reservation in Fort Hall, Idaho. *LOCKED: I'm Not a Monster like Most People Think*, BOISE ST. PUB. RADIO (episode 1, July 8, 2019), https://www.boisestatepublicradio.org/topic/locked [https://perma.cc/ZWT9-43QP]; *see* Amended Complaint at 37, Edmo v. Idaho Dep't of Corr. (D. Idaho Sept. 1, 2017) (No. 1:17-cv-00151-BLW). Her mother, Michaeline "Micki" Edmo, testified in court she considered her own care of her children to have been sometimes inadequate, noting that she permitted them to be exposed to situations that she now regrets. LOCKED, *supra*. Described by those who knew her as a child as "strong-willed," "sassy," possessed of a "great sense of humor," and a lover of the musician Selena's work, Adree Edmo's gender identity was always complicated. *Id.* It was only as a young adult that she identified herself as "two-spirit." *See* Amended Complaint, *supra* at 39. "Two-spirit" is a newer term for the concept shared by some Native American tribes in which an individual identifies as both a male and a female—"tainna wa'ippe" on the Shoshone-Bannock reservation, literally translating "man-woman." LOCKED, *supra*. *See also* Harlan Pruden & Se-ah-dom Edmo, *Two-Spirit People: Sex, Gender & Sexuality in Historic and Contemporary Native America*, NAT'L CONG. AM. INDIANS POL'Y RES. CTR., http://www.ncai.org/policy-research-center/initiatives/Pruden-Edmo_TwoSpirit People.pdf [https://perma.cc/3LHR-NJVU]. Shoshone-Bannock elder and former judge, Clyde Hall, notes that traditionally many Native American cultures accepted those who did not conform to just one gender, but with colonization and the arrival of Christian missionaries, Native American peoples were told such non-binary people were an "abomination." LOCKED, *supra*. Since entering the criminal justice system, Edmo has apologized and expressed regret for her criminal actions, citing her alcoholism as a weakness that derailed her from her plans to become a physician. *Id.* "I'm not a monster like most people think," Edmo has stated. *Id.* When the Ninth Circuit decided in Edmo's favor, she released this statement: "I am relieved and grateful the court recognized my right to necessary medical treatment, and that I will get the surgery I need. I hope my case helps the State of Idaho understand that they can't deny medical care to transgender people." Press Release, Nat'l Ctr. Lesbian Rts., Federal Appeals Court Rules Idaho Department of Corrections Must Provide Gender Confirmation Surgery to Transgender Woman (Aug. 23, 2019), http://www.nclrights.org/press-room/press-release/federal-appeals-court-rules-idaho-department-of-corrections-must-provide-gender-confirmation-surgery-to-transgender-woman/ [https://perma.cc/PA3R-8SSN].

invoked the Eighth Amendment that must normatively "take[] [into] account . . . developing understanding"—in this case—"of increased social awareness" on "transgender health care."[75] The court affirmed the U.S. District Court for the District of Idaho finding that Edmo had established her[76] Eighth Amendment rights were violated because GCS was medically necessary in her particular case.[77] The court ordered the State to provide the surgery.[78] In doing so, Judges McKeown, Gould, and Lasnik acknowledged that their decision contradicted that of the Fifth Circuit in *Gibson v. Collier*, but observed the reason for the different outcome was that "*Gibson* relie[d] on an incorrect, or at best outdated, premise: that 'there is no medical consensus that GCS is a necessary or even effective treatment for gender dysphoria.'"[79]

Edmo's case facts read, at first glance, as a typical "case of dueling experts."[80] The supporting evidence for Edmo included that she was a MtF transgender imprisoned person,[81] that she experienced GD because her sex at birth (male) was different from her gender identity (female),[82] that this resulted in ongoing mental distress that limited her ability to function,[83] that she had a pattern of self-harm,[84] and that twice she had attempted life-endangering self-castration.[85] Experts established that Edmo's GD was a serious medical condition requiring the medically-recognized treatment of GCS.[86] In doing so, they relied on the WPATH Standards of Care[87] and agreed that while GCS is not the appropriate course of treatment for all who experience GD, Edmo's was acute and necessitated treatment through GCS.[88] In their opinions, without

75. *Edmo*, 935 F.3d at 803.

76. This Note will follow the Ninth Circuit's use of Ms. Edmo's preferred female pronouns.

77. The Ninth Circuit specifically limits its decision to this set of facts. *See Edmo*, 935 F.3d at 767. However, the court holds that where a prison has "a *de facto* policy or practice of refusing treatment for gender dysphoria to prisoners," this would amount to deliberate indifference. *Id.* at 781.

78. *Id.* at 803.

79. *Id.* at 795 (quoting Gibson v. Collier, 920 F.3d 212, 223 (5th Cir. 2019)) (adding "[t]he Fifth Circuit is the outlier").

80. *See id.* at 787.

81. *Id.* at 767.

82. *Id.*

83. *Id.*

84. *Id.* at 774.

85. *Id.* at 767.

86. *Id.*

87. The court finds the WPATH Standards of Care "are the gold standard on this issue." *Id.* at 788–89.

88. *Id.* at 767.

this treatment, Edmo would continue to suffer irreparable harm, both mentally and physically.[89] Thus, failure to provide GCS constituted deliberate indifference in the face of Edmo's obvious ongoing suffering.[90]

The State argued that while Edmo's suffering met the threshold to trigger the Eighth Amendment, its agents were not deliberately indifferent to her suffering because they used medically-accepted standards of care to determine the appropriate course of treatment for Edmo was not GCS.[91] The State's physician who treated Edmo, Dr. Scott Eliason, evaluated Edmo's GD in 2016 using the WPATH Standards and his own professional understanding of GD to determine GCS was not medically necessary.[92] In his opinion, GCS would only be necessary where there was "(1) 'congenital malformations or ambiguous genitalia,' (2) 'severe and devastating dysphoria that is primarily due to genitals,' or (3) 'some type of medical problem in which endogenous sexual hormones were causing severe physiological damage.'"[93] Eliason had determined Edmo did not meet any of these criteria.[94] The court found the State's evidence "illogical and unpersuasive."[95]

The State also argued that its facility staff did not fail to act; rather, they were affirmatively providing medical care they believed to be appropriate.[96] Eliason had prescribed treatment through hormone therapy and counseling, with continued monitoring and future assessments.[97] This course of treatment was based on Eliason's belief that Edmo's mental health was not under the adequate control required to consider more serious interventions, such as GCS, as well as that Edmo had not lived in her identified gender role for twelve months in the world outside of prison.[98] The

89. *Id.* at 776.
90. *Id.* at 785.
91. *Id.* at 773.
92. *Id.* at 773–74.
93. *Id.* at 773.
94. *Id.*
95. *Id.* at 789. One of Edmo's experts, Dr. Ryan Gorton, testified that Eliason's three criteria were inconsistent with the WPATH Standards of Care: the first was inapplicable because it related to intersex conditions, not those experiencing GD; the second required severe and devastating gender-focused dysphoria when WPATH required only "clear and significant dysphoria;" and finally, the third was simply described as "bizarre." *Id.* at 778.
96. *Id.* at 793.
97. *Id.* at 773.
98. *Id.* at 774. These are among the WPATH criteria for GCS, *supra* note 25.

court found this evidence unconvincing as well, concluding the State had indeed violated Edmo's constitutional rights.[99]

ii. Vanessa Lynn Gibson's Fifth Circuit Case Denied GCS as a Medical Necessity

In *Gibson v. Collier*,[100] the question the court chose to answer was whether the lower court erred in finding that there was "no genuine dispute as to any material fact" in the Eighth Amendment case brought by Vanessa Lynn Gibson[101] and thus, that the lower

---

99. *Id.* at 792. The district court found that Edmo's self-harm was not evidence of a lack of mental health control, but rather evidence of a denial of medically necessary care. *See id.* at 781. The court agreed with experts who stated that there is no WPATH requirement that the twelve months of living in an identified gender role can only happen outside of prison. *Id.* Further, the court noted "a prisoner need not prove that he was completely denied medical care" to make out an Eighth Amendment claim. *Id.* (citing Lopez v. Smith, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc).

100. Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019).

101. Vanessa Lynn Gibson has lived as a female since the age of 15. Complaint at ¶ 10, Gibson v. Livingston (W.D. Tex. June 8, 2015) (No. 6_15-cv-00190). Details available about Gibson's life prior to prison are few, but one source claims she had a seventh-grade educational level prior to being imprisoned and has the goal of becoming a paralegal. *Scott Gibson #699888*, WRITEAPRISONER, https://writeaprisoner.com/inmates/scott-gibson-699888/education [https://perma.cc/ZWG8-AMBX]. Once imprisoned, Gibson described her situation in an interview as follows:

> I feel like my constitutional rights are being violated because [the TDCJ is] indiscriminately denying us medical care for no reason . . . . Having male genitalia, it makes me literally sick. I'm talking about to the point that I hate my life and it's an everyday thing.

David Artavia, *Supreme Court Rejects Inmate's Case for Gender Confirmation Surgery*, ADVOCATE (Dec. 10, 2019), https://www.advocate.com/transgender/2019/12/10/supreme-court-rejects-inmates-case-gender-confirmation-surgery [https://perma.cc/RBV3-SQ]. Gibson had asked a prison physician if she could receive a sex-reassignment surgery and was told she could only be treated with hormones "because TDCJ-ID has a Ban on Sex Reassignment Surjery [sic]." *Supra*, Complaint at ¶ 20. When she was denied GCS, she asked prison officials if "she could have a pass to live as a female, to dress as a female and to keep her hair at least 7 inches long," but that, too, was denied. *Id.* at ¶ 23. While imprisoned, Gibson's art and poetry have been posted online. *Justice for Vanessa Gibson,* JUSTICE FOR VANESSA, https://justiceforvanessa.wordpress.com [https://perma.cc/B37W-6R3Z]. On the experience of being a transgender person, she wrote:

> and I'm not ashamed of my tears / we have had our bones broken / faces smashed / eyes blackened / and faces sliced wide open, / and some of our bones will never be found / because they're rotting in a shallow grave / knowing this, / I refuse to be anyone you want me to be. / I'd rather die for our rights / then to let you win.

I See Your Hate, JUSTICE FOR VANESSA (Apr. 19, 2016), https://justicefor vanessa.wordpress.com/2016/04/19/i-see-your-hate-a-poem-by-vanessa/ [https://perma.cc/CPF5-T34Q]. After the Fifth Circuit's decision, Gibson wrote:

> For years the court system have [sic] allowed prison officials to get away

court correctly held the named state officials of the Texas prison were "entitled to judgment as a matter of law."[102] The Fifth Circuit's majority opinion, written by Judge James C. Ho, claimed to travel the well-trodden path of established precedent that the Eighth Amendment does not guarantee whatever medical care an imprisoned person requests.[103] Instead, the care required by the Constitution is calibrated to "society's minimum standards of decency."[104] The substantive, normative question was whether the deprivation of GCS was against those minimum standards.[105] The legal question was procedural: had the lower court impermissibly dismissed a case when there was a real dispute?[106] The majority affirmed the U.S. District Court for the Western District of Texas in finding that there was no genuine dispute of material fact because medical necessity rested on a medical treatment being indicated, and here the majority agreed there was no medical consensus for the treatment of GD on which to base medical necessity.[107]

The majority further argued if these procedural flaws were not sufficient dismissal grounds, the substance also allowed the court to dismiss Gibson's appeal as a matter of law.[108] Judge Ho looked to the plain text and original meaning of the Eighth Amendment's "cruel and unusual" language and found that only what was routine, regular, or customary was "usual."[109] Since "cruel and unusual" is conjunctively joined, cruelty alone was found permissible under the Eighth Amendment as long as it was not *also* unusual.[110] Thus, evidence of Gibson's suffering that might otherwise indicate cruelty was present—self-harm and suicidality translated into medical symptoms—was irrelevant unless and until

---

> with beating inmates, denying us medical care, murdering inmates, allowing gay inmates to be beaten and raped by coward ass gang members, and there is basically nothing we can do about it! If we can't trust the court and believe that it will protect us—what are we supposed to do?

Response to Lawsuit Dismissal: Gibson vs Brad Livingston, JUSTICE FOR VANESSA (Apr. 26, 2019), https://justiceforvanessa.wordpress.com/2019/04/26/response-to-lawsuit-dismissal-gibson-vs-brad-livingston/ [https://perma.cc/M95H-D3FW].

102. *Gibson*, 920 F.3d at 219 (quoting FED. R. CIV. P. 56(a)). The district court was actually asked to decide summary judgment based on TDCJ's qualified immunity and Eleventh Amendment immunity claims, but also *sua sponte* decided summary judgment on the merits as well.

103. *Id.* at 216.

104. *Id.* (quoting Kosilek v. Spencer, 774 F.3d 63, 96 (1st Cir. 2014)).

105. *Id.*

106. *Id.* at 219.

107. *Id.* at 223, 226.

108. *Id.* at 228.

109. *Id.* at 226–27.

110. *Id.* at 226.

most prisons in the U.S. routinely, regularly, or customarily provide GCS to incarcerated individuals.[111]

Gibson, a MtF transgender imprisoned person[112] and a *pro se* plaintiff,[113] was experiencing acute distress, depression, and self-harming urges that had risen to multiple attempted suicides.[114] She[115] asked the court to remand her case so that "[s]he [could] present evidence of [her] individual need for sex reassignment surgery."[116] She meanwhile provided the WPATH Standards of Care as support for her claim, as well as her affidavit, grievance records, psychiatric records, correspondence with her penitentiary healthcare team, and Texas Department of Criminal Justice (TDCJ) Policy G-51.11.[117] TDCJ Policy G-51.11 required that Gibson, as a transgender imprisoned person, have her individual case and treatment evaluated by appropriate medical and mental health professionals using "[c]urrent, accepted standards of care."[118]

Where *Edmo* is replete with case facts, *Gibson* is sparse. The TDCJ Director presented Gibson's grievance records, medical records, and G-51.11 to demonstrate Gibson received medical treatment according to G-51.11.[119] While not cited by the State, the

111. *Id.* at 227. This reductive grammatical argument fails to adequately capture the meaning of "cruel and unusual" because the two are not wholly discrete. They are more like a Venn diagram—and a Venn diagram in constant motion as society wrestles with its norms over time. Here, the Fifth Circuit insisted that if these particular legal norms change, it would not be through their courtroom, pinning the courtroom to courtrooms of the past. To be credible, the court needed to acknowledge that normative lines of the Eighth Amendment move and admit that their Circuit would move the line only when less change-averse sister circuits had already sufficiently paved the way.

112. *Id.* at 216–17.

113. *Id.* at 218. It is possible Gibson's *pro se* status impacted the outcome of her case, although it is difficult to draw any meaningful conclusions from this procedural point that differentiates *Gibson* from *Edmo*.

114. *Id.* at 217.

115. Although the Fifth Circuit used male pronouns following the Texas Department of Criminal Justice, this Note will use Ms. Gibson's preferred female pronouns.

116. *Id.* at 223–24 (citing Oral Argument at 11:35–12:10, 13:27–16:22, Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019)).

117. *Id.* at 220–21, 232.

118. *Id.* at 217–18 (citing Texas Department of Criminal Justice, Policy G-51.11: Treatment of Offenders with Intersex Conditions, or Gender Dysphoria, Formerly Known as Gender Identity Disorder (2017), https://www.tdcj.texas.gov/divisions/cmhc/docs/cmhc_policy_manual/G-51.11.pdf [https://perma.cc/9UDQ-AS3F] [hereinafter G-51.11]).

119. Texas Department of Criminal Justice Step 1 Offender Grievance Form, Grievance No. 2015096265 filed by Scott L. Gibson (2015) ("Your allegation is unsubstantiated. You are receiving treatment for Gender Dysphoria per the policy . . . G-51.11.").

Fifth Circuit invoked a persuasive First Circuit case from four years earlier called *Kosilek v. Spencer*, which found there was no medical consensus requiring provision of GCS to incarcerated individuals experiencing acute GD.[120] Effectively importing *Kosilek*'s fact record, Judge Ho used that case to find Gibson's mere preference for GCS was not a basis for a claim of deliberate indifference when the course of treatment was medically-disputed.[121] The majority grounded its holding in its Eighth Amendment Fifth Circuit precedent that has historically rejected "claims in cases involving medical disagreement."[122] Without a medical consensus as per *Kosilek*, the court found the facts were all on TDCJ's side; Gibson raised no genuine dispute of material fact that her constitutional rights were being violated.[123]

In her dissenting opinion, Judge Rhesa Hawkins Barksdale argued that there are a number of problems with the majority's decision and that the case should have been remanded.[124] First, the dissent observed procedural inadequacies. The lower court's summary judgment decision itself was improper under Rule 56(f) of the Federal Rules of Civil Procedure because its *sua sponte* departure from the basis for the motion to make its decision deprived Gibson of notice and a chance to respond.[125] Additionally, both Judge Ho and the district court improperly placed the burden of discovery on Gibson, the non-moving party, rather than on the State as per summary judgment procedures.[126] The State did not meet this burden because it failed to present evidence that showed

120. *Gibson*, 920 F.3d at 220–21 (citing Kosilek v. Spencer, 774 F.3d 63, 68 (1st Cir. 2014) and observing the First Circuit "exhaustively detailed the underlying expert testimony" to demonstrate "objective evidence that the medical community is deeply divided about the necessity and efficacy of sex reassignment surgery" in Gibson's case). While *Kosilek* included expert testimony that treated GCS both positively and negatively, the court simply notes the positive exists in one sentence after dedicating over a page and a half recounting the negative. *Id.* at 221–23.

121. *Id.* at 220, 226. Ironically, Gibson had not requested GCS as a treatment; she had asked to be medically evaluated and prescribed a course of treatment appropriate to her medical evaluation as per her original grievance form: "NOTE: I AM NOT REQUESTING A SEX CHANGE AT THIS TIME!" Texas Department of Criminal Justice Step 1 Offender Grievance Form, *supra* note 119. For similar reasoning to the Fifth Circuit here on patient preferences, *see also* Lamb v. Norwood, 899 F.3d 1159, 1161 (10th Cir. 2018) (holding an imprisoned person named Michelle Renee Lamb, who was born male but identifies as female, was not entitled to GCS because her current hormone and counseling treatments were determined to be adequate by prison officials despite Lamb's strong disagreement).

122. *Gibson*, 920 F.3d at 225.

123. *Id.* at 224.

124. *Id.* at 228.

125. *Id.* at 228–30.

126. *Id.* at 231.

the absence of a dispute.[127] The majority also improperly borrowed evidence from *Kosilek* to support the State—a past case that the State did not cite as support in district court.[128] Thus, where the lower court improperly offered a *sua sponte* decision for the defendant, here the majority improperly offered a *sua sponte* fact record for the defendant. Additionally, in the territory of the Eighth Amendment that is sensitive to changes in norms over time, substituting a past case's fact record to presume present norms is inappropriate.[129] Indeed, Judge Barksdale cited to the District of Idaho's *Edmo* decision to demonstrate that the normative winds showed a change since *Kosilek*.[130]

In addition to identifying these procedural errors, the dissent argued that the majority erred in formulating its substantive question as well. The question was not whether there was a lack of medical consensus about GCS, but "whether there [was] a disagreement about the efficacy of the treatment for this particular prisoner, based on this prisoner's individual needs."[131] Because the Eighth Amendment requires a fact-specific inquiry, the majority could not affirm a lower court that decided such a case without the facts—and it certainly could not affirm it by substituting in facts from another case.[132] In fact, it remained unclear *what* Gibson's individual medical needs were, since G-51.11 "prohibit[ed] [imprisoned persons] from even seeing a Doctor to be evaluated to see whether or not they need Sex Reassignment Surjery [sic] to adeqaty [sic] treat their illness."[133] Gibson wanted *to be evaluated*, the very medical care guaranteed to her by G-51.11, and the very information required for the court to make an indifference determination.[134] Instead of recognizing such evaluative evidence was necessary to decide the merits of Gibson's case, the majority instead nonsensically considered Kosilek's medical needs as per her

127. *Id.* at 232.

128. *Id.*

129. *Id.* The majority argues that "[t]here is no reason why—as a matter of either common sense or constitutional law—one state cannot rely on the universally shared experiences and policy determinations of other states." *Id.* at 224. The convincing Supreme Court counterargument to this, given by Judge Blackmun over fifty years earlier, is that the Eighth Amendment is norm-sensitive. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

130. *Id.* at 234 (citing Edmo v. Idaho Dep't of Corr., 358 F. Supp. 3d 1103, 1127 (D. Idaho 2018)).

131. *Id.* at 240.

132. *Id.*

133. Complaint at ¶ 27, Gibson v. Livingston, 2016 U.S. Dist. LEXIS 195724 (W.D. Tex. Aug. 31, 2016) (No. W-15-CA-190).

134. *Gibson*, 920 F.3d at 233.

medical experts.[135] However, Kosilek and Edmo were evaluated individually, and the dissent opined that Gibson should also have been evaluated based on her own medical needs.[136] Finally, the dissent noted that the Fifth Circuit was not at liberty to perform an originalist analysis of the proxies for the Cruel and Unusual Punishment Clause of the Eighth Amendment because the Supreme Court already established those standards in 1976 through *Estelle*.[137]

Two Circuits enforcing two markedly different rights standards for two Americans within the space of a few months of each other, but just one governing law: the Eighth Amendment. What makes Edmo's treatment cruel and unusual as decided in 2019, and how can that be reconciled with the dismissal of Gibson's similar case that same year? Where should the Supreme Court align itself given the circuit divide? The next Part of this Note will explore the tensions at play in these cases and argue that the Ninth Circuit's decision, while still problematic, is normatively right and should be adopted by the Supreme Court.[138]

II. The Reasons Why the Supreme Court Should Follow *Edmo*'s Lead

This next Part will analyze each court's application of the doctrine of medical necessity to illustrate that the Ninth Circuit correctly applied the doctrine, whereas the Fifth Circuit did not. While this might provide some indication of which Circuit's precedent the Supreme Court should follow, the current conservative-leaning Court may hold out additional challenges against adopting a stance that could be viewed as socially-progressive. Thus, this Part will also discuss and rebut arguments

135. *Id.* "The majority apparently believes Gibson was never entitled to due process for this claim because *Kosilek*, an out-of-circuit opinion, has foreclosed any advancement in the law and medical research in this area." *Id.* at 238.

136. *Id.* at 237. In fact, TDCJ's Dr. Greene wrote a clinic note in Gibson's file that read: "Please schedule [Gibson] with unit MD *for evaluation for referral for sex change operation* and evaluation for medical pass for gender identity disorder." *Id.* The evaluation never occurred because G-51.11 was understood to not allow it. *Id.* The dissent argued this alone likely provided sufficient grounds to allege indifference. *Id.* at 239.

137. *Id.* at 242 (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The dissent's exasperation is clear; the majority has needlessly waxed eloquent on Eighth Amendment standards while refusing to correctly apply them.

138. The Supreme Court did not take up either *Gibson* or *Edmo* for appeal. Gibson v. Collier, 205 L.Ed.2d 384 (U.S. 2019); Idaho Dep't of Corr. v. Edmo, No. 19-1280, 2020 U.S. LEXIS 4867 (Oct. 13, 2020).

that might be employed in the Supreme Court to defend following the Fifth Circuit's more conservative *Gibson* decision.

A. The Ninth Circuit Correctly Applied the Doctrine of Medical Necessity

Since the facts of *Edmo* and *Gibson* were strikingly similar, the question of which Circuit made the right decision is primarily a question of law: Which Circuit applied the medical necessity doctrine correctly? The first step to answering this question requires a review of the circumstantial facts that surrounded the denial of GCS to Edmo and Gibson: What symptoms had prison staff observed? What were their current medical diagnoses? What harmful effects were being risked by the denial of GCS?[139]

In *Edmo*, the Ninth Circuit discussed the symptoms of acute GD that Edmo experienced at length.[140] These included distress "that impairs or severely limits the person's ability to function in a meaningful way" reaching a threshold that requires intervention;[141] that causes an individual to feel depressed, embarrassed, disgusted, tormented, and hopeless,[142] potentially leading to coping mechanisms including addiction, self-harm, or suicide;[143] that is an "everyday recurring thought,"[144] including regular thoughts of self-harm;[145] that may lead to self-medication, including "cutting" one's body because "the physical pain helps to ease the 'emotional torment' and mental anguish."[146] Without "an appropriate treatment plan[,] [GD] can expose . . . individuals to a serious risk of psychological and physical harm;"[147] and risks "further emotional decompensation,"[148] "ongoing mental anguish and possible physical harm,"[149] and "debilitating distress, depression, impairment of function, substance use," "self-injurious behaviors," and suicide.[150]

---

139. For generally accepted medical steps that should guide such questions, *see* WPATH, *supra* note 25, at 23–28.

140. Edmo v. Corizon, Inc., 935 F.3d 757, 772–73 (9th Cir. 2019). *But see* Levine, *supra* note 36, at 244 (arguing we should mistrust these facts about representations of psychological pain because they may frequently be the manipulations of individuals with pathologies fueling a "motive to annoy").

141. *Edmo*, 935 F.3d at 769 (quoting the DSM-V, *supra* note 11, at 453, 458).

142. *Id.* at 772.

143. *Id.* at 773.

144. *Id.* at 772.

145. *Id.* at 774.

146. *Id.*

147. *Id.* at 771.

148. *Id.* at 787.

149. *Id.* at 785.

150. *Id.* at 769.

In this detailed context, Edmo's physician knew Edmo had clinically "significant" distress leading to repeated self-castration attempts likely to continue, and yet did not reevaluate or change the ineffective treatment plan.[151] Thus, the court had little trouble affirming the district court's finding that the State was deliberately indifferent to Edmo's GD when—despite full knowledge[152]—it denied her the generally accepted treatment in the face of the present and future risk of serious harm.[153] That deliberate indifference was cruel and unusual punishment.

In contrast, the Fifth Circuit appeared fact-averse in its *Gibson* decision. The court offered a cursory review of GD, noting symptoms included "clinically significant distress or impairment in social, occupational, or other important areas of functioning."[154] Judge Ho then observed Gibson had demonstrated acute distress, depression, attempts to castrate or otherwise self-harm, suicidal ideation, and three suicide attempts.[155] The majority noted that while these symptoms were observed, it was not Gibson's specific symptoms that were critical to the case; rather, it was G-51.11.[156] G-51.11 did not designate GCS as the treatment protocol for Gibson, and so the medical staff were not deliberately indifferent in providing it to her despite her known symptoms.[157] Of this blanket, categorical denial, the *Edmo* court observed that such a "*de facto* policy or practice . . . amounts to deliberate indifference" in and of itself.[158] The *Gibson* court thus fails to apply the medical necessity doctrine correctly because its conclusion relies on the wrong facts; it is not prison policy that determines medical care, but an assessment of an individual's particular serious medical needs in light of generally-accepted treatments—regardless of whether the prison policies accept those treatments or not.[159]

Once the circumstantial facts regarding an individual's observed symptoms, diagnoses, and risks of harm have been reviewed, a court also must determine what the accepted course of medical treatments are and if one was appropriately selected given

151. *Id.* at 793.
152. *Id.* at 767.
153. *Id.* at 781.
154. Gibson v. Collier, 920 F.3d 212, 217 (5th Cir. 2019) (quoting the DSM-V, *supra* note 11, at 453).
155. *Id.* at 217, 219.
156. *Id.* at 223–24.
157. *Id.* at 217–18.
158. *Edmo*, 935 F.3d at 781, 796–97.
159. *Id.* at 797 (citing Kosilek v. Spencer, 774 F.3d 63, 91 (1st Cir. 2014)).

these facts.[160] Both the Fifth and Ninth Circuits agreed that *if* there are widely accepted medical treatment standards for GD, these set a chain reaction in motion for potential Eighth Amendment claims.[161] The primary tension here is that the Fifth Circuit showed a marked resistance to accepting that such standards exist and include GCS, whereas the Ninth Circuit was among a majority consensus that accepts there are such standards.[162] This makes sense given that normative changes see resistance, but at this point it is a weak argument that transgender medical care has not been widely accepted.[163] The Ninth Circuit observed this, noting that the

160. The medical system and its treatments are often portrayed as providing equal care for all bodies, but we know this is not the case. Comedian and political commentator John Oliver recently observed that "if you are a woman and/or a person of color in the US, you may well have a very different relationship to our healthcare system than a white man." Adrian Horton, *John Oliver: Bias in Medical Care Is a 'Discussion That We Need to Have'*, THE GUARDIAN (Aug. 19, 2019), https://www.theguardian.com/culture/2019/aug/19/john-oliver-last-week-tonight-recap-medical-care-bias [https://perma.cc/HEM4-BQRA]. This is because biases have profoundly shaped the medical field through the use of the White male body as a stand-in for all bodies in the studies that have resulted in our medical diagnoses criteria. *Id.* Such biases have caused misdiagnoses and a needless "mortality gap" for non-White, non-male bodies. *See, e.g.*, Lili Barouch, *Heart Disease: Differences in Men and Women*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/heart_vascular_institute/centers_excellence/womens_cardiovascular_health_center/patient_information/health_topics/heart_disease_gender_differences.html [https://perma.cc/MV4F-6PML]; Roni Caryn Rabin, *Huge Racial Disparities Found in Deaths Linked to Pregnancy*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/health/pregnancy-deaths-.html [https://perma.cc/DB4J-W4KN]. These biases have also led to a medical community that lacks knowledge about transgender bodies as well:

> It is simply easier to say "we don't know" than it is to apply resources to verify a physical origin of [transgenderism], especially when only a relative few people are affected . . . . [N]ot knowing contributes to the ease with which trans people continue to be marginalized and treated as less than human. Not knowing also allows for religious opinion to be asserted as fact, and for the media to exercise its imagination in search of profits at trans people's expense.

Green, *supra* note 2, at 84.

161. *Gibson*, 920 F.3d at 223; *Edmo*, 935 F.3d at 787.

162. *Gibson*, 920 F.3d at 223; *Edmo*, 935 F.3d at 795.

163. The WPATH Standards of Care have been accepted by:

> the American Medical Association, the American Medical Student Association, the American Psychiatric Association, the American Psychological Association, the American Family Practice Association, the Endocrine Society, the National Association of Social Workers, the American Academy of Plastic Surgeons, the American College of Surgeons, Health Professionals Advancing LGBTQ Equality, the HIV Medicine Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus, and Mental Health America.

Edmo, 935 F.3d at 769; *see also* Bourcicot, *supra* note 10, at 307 ("Sex reassignment surgery has been accepted in the medical community for decades as an appropriate and sometimes necessary treatment for gender dysphoria."). Interestingly, the WPATH Standards of Care are actually cited in G-51.11 itself, a fact seeming to contradict the Fifth Circuit's position. G-51.11, *supra* note 118.

Fifth Circuit was the outlier fighting the last battle against this change.[164] Indeed, the labors the Fifth Circuit's resistance required in *Gibson* are a window into the effort and tools courts may use to defend an increasingly untenable status quo. The dissent in *Gibson* rightly identified a procedural breach of summary judgment rules, a refusal to allow the case facts to be presented, a substitution of facts from an entirely different case, and an insistence that while reviewing the merits of the case was beyond the case's scope, nevertheless ink would be spilled on the merits in order to cement the Eighth Amendment in place—a futile, Sisyphean task to arrest a clause built to move over time. The Supreme Court will need to contend with the reality of an existing medical consensus which strongly favors following the *Edmo* court's decision.

Once there is an accepted medical treatment—which the Fifth Circuit does not admit—medical necessity claims require that treatment must then be delayed, denied, or otherwise hampered by officials who know or should know the care the particular individual's case necessitates.[165] This denial cannot simply be negligent but must be knowing and intentional.[166] Here, the *Gibson* court argued GCS was not an accepted treatment, and therefore could not be delayed, denied, or otherwise hampered by the State.[167] The *Edmo* court, accepting the WPATH Standards, found Eliason's refusal to follow them and to provide GCS treatment when Edmo's GD showed acute symptoms amounted to deliberate indifference.[168] Thus, when the Supreme Court faces a question of medical necessity for GCS, the outcome will largely depend on whether it accepts that GCS is a valid medical treatment.

B. Why Might the Supreme Court Resist Edmo *and Follow* Gibson*?*

The Ninth Circuit observed that it was "not the first to speak on the subject [of transgender health care], nor [would it] be the last."[169] The Supreme Court can, and likely will, speak on the

164. *Edmo*, 935 F.3d at 795. Green argues that in the twenty-first century, we are seeing a legal trend where such medically-based arguments have seen "traction in securing affirmative recognition for trans people and their civil (in the U.S.) or human rights (in the U.K. and Europe)." *Supra* note 2, at 63–64.

165. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

166. Farmer v. Brennan, 511 U.S. 825, 836–37 (1994).

167. *Gibson*, 920 F.3d at 228.

168. *Edmo*, 935 F.3d at 797.

169. *Id.* at 803.

subject to resolve this circuit split in the future.[170] The previous section details the Ninth Circuit's persuasively superior use of the medical necessity doctrine to suggest the Supreme Court should follow its precedent as a matter of law. Nevertheless, while unlikely to repeat the gross procedural irregularities of the Fifth Circuit, there are counterarguments that a majority conservative Supreme Court might rely on to delay realizing these new gender norms for an unpopular incarcerated subpopulation.

Behind a number of the following arguments is the premise that what is happening within trans medical standards of care is either the apolitical, scientifically fact-based, morally-right status quo of pathologizing GD through an impartial, binary sex-based assessment, or the political, advocacy-driven, norm-upsetting minority rights agenda usurping it.[171] Yet science is not apolitical, facts must be selected for use or left to disuse, and knowledge advances through the questions normatively permitted and funded.[172] Raising the accusation that for medical science to explore non-binary gender is for medicine to *become* political is thus a false claim. Furthermore, the claim that even when trans health is

170. MUSHLIN, *supra* note 17, at 490. A writ of certiorari may be granted by the Supreme Court when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . as to call for an exercise of [the Supreme] Court's supervisory power." SUP. CT. R. 10. The number of circuits whose decisions typically must join a divide for the Court to grant certiorari on a question is difficult to calculate, but studies consistently show that while not a guarantee, the Court is far more likely to review requests implicating a circuit court conflict, with such conflict cases comprising roughly one-third of the Court's docket. *See* Deborah Beim & Kelly Rader, *Evolution of Conflict in the Courts of Appeal* 3 (2015 Midwest Pol. Sci. Ass'n Ann. Meeting, Preliminary Draft, (June 25, 2015)) http://dx.doi.org/10.2139/ssrn.2623304. The greater the number of circuits who have taken a position, the greater the likelihood a question will be resolved by the Court, although splits between only two circuits have still seen grants of certiorari. *Id.* at 19. And of course, the Court can only take up a question when there is an existing petition for certiorari. *Id.* at 23–24.

171. These strongly felt political divides over sex and gender were reflected in the Fifth Circuit's recent justification for refusing to use a transgender person's preferred pronouns while claiming this refusal was a neutral and impartial position. *See* United States v. Varner, 948 F.3d 250, 256 (5th Cir. 2020) (noting federal courts today must "decide cases that turn on hotly-debated issues of sex and gender identity" and to use the pronouns litigants request, even for "the most benign motives[,]" may convey a court's "tacit approval" and raise the appearance of bias). In response, one commentator noted, "Good for Judge Duncan for both adhering to the letter of the law and for defiantly standing athwart the modern cultural Left's pernicious insistence on gaslighting the American citizenry into thinking that words may not mean what they so clearly do, in fact, mean." Josh Hammer, *Culture War in the Courts: Federal Appeals Panel Rejects Transgender Pronouns*, DAILY WIRE (Jan. 17, 2020), https://www.dailywire.com/news/culture-war-in-the-courts-federal-appeals-panel-divides-on-transgender-pronouns [https://perma.cc/NJ9A-KW5B].

172. *See* discussion of medical bias, *supra* note 160.

explored, there is no consistent scientific evidence supporting normative changes is patently false.[173] With this ideological struggle as background, the following are some arguments that could support a Supreme Court decision to follow *Gibson*.

First, like the Fifth Circuit, some will undoubtedly argue that the time has not yet arrived to recognize GCS as the "usual" medical care for severe GD.[174] The Fifth Circuit argued that an incarcerated individual's suffering from a serious medical need does not alone activate Eighth Amendment protections without a "universal" medical consensus on treatment.[175] If outdated assumptions about the binary nature of gender are still "usual" and there remain medical professionals who hold them, hormone therapy and surgery may be viewed as misguided "collaboration[s] with psychosis."[176] To avoid "indulg[ing] a [transgender] prisoner's improper self-image," the proper treatment is still long-recognized counseling to help the

173. The proof is in the results. Osborne, *supra* note 10, at 1652 ("SRS, in conjunction with cross-sex hormone therapy, has repeatedly been demonstrated to be associated with substantial reduction in GD symptoms, high levels of patient satisfaction, few significant complications, and minimal instances of regret." (citations omitted)). *See* NCD 140.3, Transsexual Surgery, DAB No. 2576, 1, 8 (U.S. Dep't Health & Human Servs. May 30, 2014), https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf [https://perma.cc/GM69-4ANR] ("We have no difficulty concluding that the new evidence, which includes medical studies published in the more than 32 years since issuance of the 1981 report . . . demonstrates that [transgender] surgery is safe and effective and not experimental."); *see also* Green, *supra* note 2, at 61 (observing that, unfortunately, such new medical evidence can be hard to incorporate into the law with its focus on consistency and precedent guarded by judges who may feel compelled "to reduce complexity and even reject inconvenient new information" to privilege such values); *What Does the Scholarly Research Say About the Effect of Gender Transition on Transgender Well-Being?*, CORNELL U.: WHAT WE KNOW (2020), https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/ [https://perma.cc/F9EB-7EQJ] (analyzing all peer-reviewed articles on gender transition published between 1991 and June 2017, with fifty-one studies concluding gender transition "improves the well-being of transgender people," four having "mixed or null findings," and none indicating "overall harm").

174. *See* Bourcicot, *supra* note 10, at 311 ("Challengers who claim that they need surgical intervention should expect prisons and courts to resist ordering that taxpayer dollars be spent on various sex reassignment surgeries for a condition that is not well-understood by the general public and that is rare in society writ large.").

175. Gibson v. Collier, 920 F.3d 212, 219–20 (5th Cir. 2019).

176. Green, *supra* note 2, at 25–26; *see also* Levine, *supra* note 36, at 241 (suggesting some transgender imprisoned persons will "sacrifice genitalia to give a new organizing purpose to life" based on this pathology); Lindevaldsen, *supra* note 37, at 26 (arguing GD is a belief that does not align with reality, and "an anorexic is not encouraged to believe she is overweight and in need of losing weight; she is encouraged to attain a proper understanding of the role of food in her life and a healthy self-perception"). *But cf.* Osborne, *supra* note 10, at 1657 (arguing "it is legally and ethically obligatory to make SRS available to inmates for whom it is medically necessary").

transgender individual accept their birth-sex gender.[177] However, this withholding of WPATH Standards of Care because its treatments have not become "usual" enough or because they grate against beliefs about binary gender norms belongs to normative outliers.[178] Ignoring the robust medical consensus that our understanding of gender has changed—in the context of a judicial test that is supposed to do the very opposite on behalf of incarcerated persons—seems distastefully draconian.[179] Given this backdrop, it is unlikely the Supreme Court would make a decision that does not genuinely grapple with the medical consensus that gender is not simply binary, counseling alone is not an adequate remedy for many with GD, and that GCS is the indicated treatment for some with acute GD.[180]

Perhaps some will argue WPATH Standards are the *best* possible medical care—the kind allegedly not necessary to provide to imprisoned persons.[181] *Best* here seems to bleed into notions of *elective* care, but elective according to the public mob rather than the medical professional. For example, many emphasized that no taxpayer funding should be used for what is perceived as elective on a national petition demanding GCS be withheld from an imprisoned person.[182] This denial of tax funding appears to scratch a flagrantly

177. Bendlin, *supra* note 20, at 977.

178. Edmo v. Corizon, Inc., 935 F.3d 757, 795 (9th Cir. 2019).

179. *See* Kosilek v. Maloney, 221 F. Supp. 2d 156, 160 (D. Mass. 2002) ("Prisoners in the United States have a right to humane treatment, including a right to adequate care for their serious medical needs. The Constitution does not protect this right because we are a nation that coddles criminals. Rather, we recognize and respect this right because we are, fundamentally, a decent people, and decent people do not allow other human beings in their custody to suffer needlessly from serious illness or injury.").

180. *See* Bendlin, *supra* note 20, at 979 (observing that "physicians, psychologists, judges, insurance agents, and even the Tax Court have weighed the evidence and have concluded that psychotherapy and psychiatric medications are not 'adequate' treatment in most [acute GD] cases").

181. Gibson v. Collier, 920 F.3d 212, 220 (5th Cir. 2019) (quoting Mayweather v. Foti, 958 F.2d 91, 91 (5th Cir. 1992) (noting imprisoned persons are not entitled to "the best [treatment] that money c[an] buy")). The "cheap and custodial quality of institutional care" has been justified by the belief that dependence is a "manifestation of an inferior and hopeless condition"—a condition being punished by a society embracing a protestant ethic seasoned with capitalism that believes to fail in the marketplace is to fail morally. CUSAC, *supra* note 4, at 129–30, 132.

182. *No Sex Change for Prison Inmate*, MOVEON, https://sign.moveon.org/petitions/no-sex-change-for-prison?fbclid=IwAR1JeLDYvveUnzwCV5pKC-ZzzgkuJA_RLu92jDdPre0IwtQBlofNkOr2us4&r_hash=Hgoo1HVS&source=s.icn.fb [https://perma.cc/BVV8-MXEL] (Carrie H. commented, "My tax dollars should never go to a convicted felon and child sex offender. He deserves nothing but a noose!" Spencer F. commented, "So if I do a crime, I get free cosmetic surgery? You loose [sic]

retributivist itch where the guilty require punishment and that punishment should—overtly or implicitly—not avoid unpleasantness, particularly when it is less expensive to do nothing.[183] This sentiment appears further exacerbated by the U.S. medical system where care is expensive and not guaranteed to its citizens, magnifying the perception that it is unjust and unfair that incarcerated persons are guaranteed free medications, psychotherapy, and even surgery.[184] Nevertheless, difficult as this may be for some, once we have "tolled the bell" for an incarcerated person, "whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not."[185] Additionally, the cost of GD treatments is "not unusually expensive" and is "actually less costly than other types of medical care that many prisoners receive."[186] And certainly mob standards are not medical standards; while the WPATH Standards recognize that the standards represent flexible guidelines, they are not intended to flex in contravention of "the many core principles that undergird

---

your rights to be a person and have rights when you commit a crime. You go to jail, to prison, and you have no rights. Have him pay for it himself when he gets out." Darlene D. commented, "[N]o way should taxpayers have to pay for this[]. 'IT' can pay for it when it gets out !!!!!!! [sic]") [https://perma.cc/XAK9-9PWA]. See generally Carol S. Steiker, *Death, Taxes and—Punishment? A Response to Braithwaite and Tonry*, 46 UCLA L. REV. 1793, 1797 (1999), including:

> [Q]uite apart from serving as a subtle proxy for race or class hatred, harsh penological practices give people a new 'outsider' to hate, at a time when so many other outsiders have become more assimilated into society. Criminals, after all, are *criminals* . . . . Why it should be that people need some 'outsider' to hate and blame is a good question; but that people seem to need such a scapegoat is supported by much of human history.

(emphasis in original).

183. *See* Green, *supra* note 2, at 30 ("Institutionalized transphobia makes hatred, abuse, and inhumane treatment appear logical, natural, and even correct."). Green observes such naturalizing of transphobia shows our cost-conscious efficiency concerns are pretextual and are fundamentally about the scapegoating of transgender people because we fear violated boundaries. *Id.*

184. Bendlin, *supra* note 20, at 976.

185. *Id.* at 978 (quoting Justice Blackmun, Address by the Chief Justice, 25 Rec. of the Ass'n of the Bar of the City of N.Y. 14, 17 (Mar. 1970 Supp.)). In an age of mass incarceration, America is a society of frenetic bellringing. As Dolovich observes, "[t]he greater society's appetite for imprisoning convicted offenders, the greater the burden." *Supra* note 18, at 972.

186. For example:

> In *Fields v. Smith*, the court refuted and discredited the earlier *Maggert* dicta about the high cost of Gender Dysphoria treatments by pointing to evidence that the cost of hormone therapy varies between $300 and $1,000 per inmate per year whereas a common anti-psychotic drug costs the prison more than $2,500 per inmate per year. Additionally, although gender-reassignment surgery costs roughly $20,000, the Department of Corrections "paid $37,244 for one coronary bypass surgery and $32,897 for one kidney transplant surgery."

Bendlin, *supra* note 18, at 965.

the [Standards of Care]"—including non-pathologizing respect for nonconforming gender identities, care that reduces the distress of GD, a pursuit of GD knowledge, and treatment approaches tailored to specific patient needs and goals.[187] These principles set the floor for care, not a ceiling below which we may choose lesser-but-still-adequate care.[188] And it goes without saying that the long-term solution, of course, "is not to take away medical care from prisoners; it is to improve the availability of health care to all citizens."[189]

Some will likely argue that the relevant harms are self-inflicted and common to this trans subpopulation, regardless of their housing situation and their course of medical treatment.[190] Correlation and causation cannot be easily untangled. What we know is that "[s]uicide is the leading cause of death in jails and 85[%] of U.S. prison systems report that self-injurious behavior occurs at least once a week."[191] The Department of Justice notes that "[t]he rates of inmate suicide are far higher than the national averages, and even higher still for special populations (including

187. WPATH, *supra* note 25, at 3.

188. Even if some will argue that these WPATH principles do not set the floor, the pitting of tax savings against incarcerated health seems a gesture of short-term thinking, fostering a hostile separation that does not likely lend itself to post-incarceration reintegration.

189. Bendlin, *supra* note 20, at 976.

190. *See* Osborne, *supra* note 10, at 1653 ("Community-dwelling persons with GD display an elevated prevalence of comorbid mental health problems, including mood disorders, anxiety disorders, and suicidality and these comorbid conditions do not significantly improve after SRS. Comorbid psychiatric conditions usually do improve, at least initially, after cross-sex hormone therapy. But while subsequent SRS usually ameliorates GD and increases overall life satisfaction, it appears to confer little or no additional improvement in other psychiatric symptoms." (citations omitted)); *see also* Levine, *supra* note 36, at 240, 242 (arguing that excuses are made for trans individuals to externalize rather than own their pathologies, where "[a]ny concurrent mental symptoms, such as anxiety states, suicidal preoccupations, suicide attempts, or substance abuse and unempathic aggression toward others, are viewed as consequences of social rejection," which, in turn, serves a misguided medical community that refuses to admit they are failing to appropriately treat depression).

191. Further:

> Suicide is the leading cause of death in local jails, accounting for over one-third of jail deaths in 2013; it is less frequent in prison settings but still accounted for nearly 6[%] of the deaths of people in state custody in 2013. Although suicide rates in jail declined steadily from 129 deaths per 100,000 people in 1983 to 47 deaths per 100,000 in 2002, the rate of suicide increased by 12[%] between 2008 and 2013 and the suicide mortality rate is three times higher in jail populations than in either prison populations or the community.

Leah Pope & Ayesha Delany-Brumsey, *Creating a Culture of Safety: Sentinel Event Reviews for Suicide and Self-Harm in Correctional Facilities*, VERA INST. OF JUST. 2–3 (2016), https://www.vera.org/publication_downloads/culture-of-safety-sentinel-event-suicide-self-harm-correctional-facilities/culture-of-safety.pdf [https://perma.cc/LF6K-AEGL].

juvenile and LGBTI inmates) . . . ."[192] Self-harm in correctional settings lacks comprehensive national data, but research estimates "up to 15[%] of adults and up to 24[%] of young people engage in non-suicidal self-injury while in custody (defined as 'deliberate, self-inflicted tissue damage without intent to die'); rates are even higher when the person has a mental health disorder (up to 61[%])."[193] We also know that GCS is not a cure-all, and suicide rates ten years after GCS are still high.[194] Yet studies also show that depressive symptoms and suicidal ideation increase among imprisoned persons with GD when treatment is unavailable or when expression of their gender is constrained.[195] Additionally, studies suggest that GCS provides relief to many experiencing GD and that regret rates are low.[196] Moreover, this argument ignores what creates the duty for these medical professionals under the Eighth Amendment. The duty is created because the State limits and controls access to

192. *Suicide in Corrections*, NAT'L INST. CORR., U.S. DEP'T JUST., https://nicic.gov/suicide-in-corrections [https://perma.cc/9CN8-J28U]. *See* Holly Hedegaard, Sally C. Curtin & Margaret Warner, *Suicide Mortality in the United States, 1999–2017*, NCHS DATA BRIEF NO. 330 Nov. 2018, at 1, https://www.cdc.gov/nchs/data/databriefs/db330-h.pdf [https://perma.cc/M5TN-CZQV] (noting suicide has been the tenth leading cause of death for all ages in the U.S. since 2008 and has been on an increasing trend with approximately 14 deaths by suicide per 100,000 Americans in 2017 for a total of 47,173 suicides that year); *see also* McCauley, *supra* note 10, at 35 ("In the 2015 U.S. Transgender Survey, nearly 40% of transgender people reported experiencing serious psychological stress in the month before the survey (compared with 5% of the U.S. population broadly), 7% attempted suicide in the year before the survey (compared with 0.06% of the U.S. population broadly), and 40% had attempted suicide in their lifetime (almost nine times the U.S. rate).").

193. Pope, *supra* note 191, at 3; *see also* Donna Gillies, Maria A. Christou, Andrew C. Dixon, Oliver J. Featherston, Iro Rapti, Alicia Garcia-Anguita, Miguel Villasis-Keever, Pratibha Reebye, Evangelos Christou, Nagat Al Kabir & Panagiota A. Christou, *Prevalence and Characteristics of Self-Harm in Adolescents: Meta-analyses of Community-Based Studies 1990–2015*, 57 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 733, 736–37 (2018) (finding about 17% of adolescents will self-harm in their lifetime, with self-cutting as the most common form of self-harm); Tori DeAngelis, *Who Self-Injures?*, 46 AM. PSYCHOL. ASS'N 60, 60 (2015), https://www.apa.org/monitor/2015/07-08/who-self-injures [https://perma.cc/P4B5-4L7L] (finding that adults have a reported lifetime self-harm rate of about 5%).

194. *See* Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L.V. Johansson, Niklas Långström & Mikael Landén, *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLOS ONE, e16885, 2011, at 2 (citing various follow-up studies noting post-GCS suicides were still attempted and/or completed at varying rates, with more studies needed); *see also* Osborne, *supra* note 10, at 1653 (noting GCS "appears to confer little or no additional improvement in other psychiatric symptoms").

195. Osborne, *supra* note 10, at 1655.

196. WPATH, *supra* note 25, at 8 (noting recent GCS satisfaction rates were at 87% for MtF patients and 97% for FtM patients, with the regret rate hovering around 1%); *see also* Osborne, *supra* note 10, at 1652 (observing GCS has repeatedly been demonstrated to reduce GD symptoms and produce both high patient satisfaction and low regret rates).

medical care, assuming responsibility for each incarcerated person's wellbeing[197]—even for subpopulations who might not choose (or be able to choose) to access such care in the general population, or who enter prison terminally ill. For example, take an individual with poorly managed asthma, a history of self-cutting, terminal cancer, or someone who, through the effects of poverty, has delayed a necessary surgery. These individuals, once incarcerated, are no less entitled to necessary medical care simply because they would have suffered constricted breathing, self-inflicted injuries, an inevitably painful course of treatment ending in death, or the pain of a surgery's delay outside of the institution. As soon as the State assumes responsibility for incarcerated persons, the Eighth Amendment applies without regard to medical outcomes that might have occurred in an imprisoned person's non-incarcerated alternative reality.

Others may argue that imprisoned persons are an atypical subpopulation of the trans community, and therefore, transgender standards of health care simply were not designed—nor can they be—with such persons in mind.[198] This is directly countered by the WPATH Standards themselves which clearly intend to encompass the transgender prison population.[199] Some argue that we are in a catch-22 because in order to determine what medical standards of care are appropriately tailored to imprisoned transgender persons, we must be allowed to do medical experimentation on those imprisoned subjects, which would be viewed as unethical.[200] However, this argument merely points out the inevitable knowledge gap all medicine faces since we also consider children, pregnant women, fetuses, mentally disabled persons, and economically or educationally disadvantaged individuals to be unable to consent to studies, though some argue we should rethink this ethical

197. Bendlin, *supra* note 20, at 977 ("When the state takes someone into custody and deprives [them] of the ability to take care of [themself], the state assumes some duty to provide for [their] basic needs such as food, shelter, clothing, personal safety, and medical care.").

198. Osborne, *supra* note 10, at 1651 ("Inmates who seek treatment for GD typically display little resemblance to the patients who present for treatment in the community, and prison life bears little resemblance to life in the community. The [Standards of Care] were not developed with the complexities, vulnerabilities, and life circumstances of incarcerated persons in mind.").

199. WPATH, *supra* note 25, at 67 (noting the WPATH Standards are applicable irrespective of housing situations, including for gender-nonconforming people living in institutions).

200. Levine, *supra* note 36, at 241.

paradigm.[201] Furthermore, this argument does not provide any reason to deviate from the currently-accepted standards of care for the broader, non-incarcerated trans population while we await better research.[202] Some counter this by arguing that applying these same standards may actually be harmful because imprisoned persons in particular are not able to satisfy the WPATH criterion requiring twelve months of living as the desired gender outside of the artificial world of the penal institution.[203] As the argument goes, incarcerated persons are not in their "real life." Yet the regrettably disproportionate rate of trans individuals who face incarceration makes this argument less weight-bearing; for too many transgender Americans, prison *is* real life.[204]

Finally, some who admit binary sex does not reflect reality will argue that fundamentally remaking the gendered systems and spaces of criminal justice is impractically cost prohibitive, even if there might be resulting benefits. Recognizing transgender imprisoned persons as their identifying gender over their biological sex would necessitate "a fundamental reconceptualization of [a] societal order" built on the male/female binary.[205] The jail or prison that acknowledges a transgender person's trans-gender must decide

---

201. *See, e.g.*, Stephanie S. Park & Mitchell H. Grayson, *Clinical Research: Protection of the "Vulnerable"?*, 121 J. ALLERGY CLINICAL IMMUNOLOGY 1103, 1103–04 (2008).

202. After all, we provide medical treatment to women in the U.S. when, by this logic, we should stop treating them for a variety of issues since medical studies have used male subjects to such an extent that even common diseases are poorly understood for women—for example, heart disease. *See* Barouch, *supra* note 160.

203. Edmo v. Corizon, Inc., 935 F.3d 757, 774 (9th Cir. 2019) (noting one of the reasons Eliason believed the WPATH Standards for GCS were not satisfied was "because Edmo had not lived in her identified gender role for 12 months outside of prison"); *see also* Osborne, *supra* note 10, at 1659 (observing changes in life circumstances can affect the severity of GD symptoms and the desirability of GCS, potentially leading to post-release regret about having undergone GCS).

204. *See* McCauley, *supra* note 10, at 34 (noting the high rates of incarceration for transgender people); *see also* Osborne, *supra* note 10, at 1659 (observing the prison environment can be a stabilizing space free from restraining forces of a transgender person's outside relationships, allowing individuals to more freely confront feelings of GD, acquire knowledge and language about their experience, and find transgender role models).

205. Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism"*, 4 MICH. J. GENDER & L. 275, 302 (1997) (arguing fear of such social upheaval "may be a major factor in the law's lack of compassion for [transgender individuals]"); *see also* Green, *supra* note 2, at 72–73 (arguing courts find it "difficult to permit the grotesque to mingle with the orderly social body that the law attempts to preserve" by recognizing transgender people "as full members of society").

how they fit into the existing male/female system or must change the system itself.[206]

Housing locations, privacy, staffing, searches, safety, and a host of other penitentiary protocols are built on the binary sex system.[207] It is undeniable the forward march of norms in the area of gender identity will inevitably create a host of costly challenges for our institutions across society.[208] Such costs are likely more easily quantifiable than the benefits of moving to systems that better represent the reality of our genders. While these big picture concerns may drive and even be articulated by the Supreme Court, such a view strays too far afield from the individually-situated facts of a particular incarcerated person who will raise their need for GCS in a real case that prompts the review. The settled jurisprudence of the Eighth Amendment's medical necessity doctrine requires a "fact-specific analysis" of an incarcerated individual's symptoms and risks of serious harm, available accepted treatments, and whether the treatment provided "was the product of sound medical

206. The American Medical Association recently issued a press release that "challenge[d] the status quo of prisons and jails in the United States that house transgender prisoners according to their birth or biological sex[,] . . . urg[ing] that housing policies be changed to allow transgender prisoners to be placed in correctional facilities that are reflective of their affirmed gender status." Press Release, *AMA Urges Appropriate Placement of Transgender Prisoners*, AM. MED. ASS'N (June 11, 2018), https://www.ama-assn.org/press-center/press-releases/ama-urges-appropriate-placement-transgender-prisoners [https://perma.cc/W9A8-9YWD].

207. Benish A. Shah, *Lost in the Gender Maze: Placement of Transgender Inmates in the Prison System*, 5 J. RACE, GENDER & ETHNICITY 39, 42–43 (2010) (providing a helpful overview of the many existing sex-based prison policies that determine prison placements).

208. Gender-neutral restrooms are probably the spaces most widely associated with gender identity changes in American society today. Jeannie Suk Gersen, *Who's Afraid of Gender-Neutral Bathrooms?*, NEW YORKER (Jan. 25, 2016), https://www.newyorker.com/news/news-desk/whos-afraid-of-same-sex-bathrooms [https://perma.cc/56KR-Z856] ("One practical reason we can't change to unsegregated bathrooms overnight is that municipal, state, and federal legal codes, many with origins in the nineteenth century, mandate that there be separate facilities for each sex, in businesses and places of work."). While the author was writing this Note, the University of Minnesota Law School was in hot debate over the need for more easily accessible gender-neutral restrooms for its staff and students. Disappointingly, the restrictions of state building codes were cited as the ultimate basis for taking little remedial action. The Administration noted:

> [W]e learned that we were constrained from pursuing efforts to convert any of the building's multi-stall restrooms into gender-inclusive restrooms by current state building code requirements. The state building code mandates specific plumbing count requirements that remain gender-specific and also control restroom-signage requirements. . . . Should the building code change, we will again explore converting our multi-stall restrooms.

E-mail from Garry Jenkins, Dean, Univ. of Minn. Law Sch., to the Law School Community (Jan. 28, 2020, 12:21 PM) (on file with author).

judgment, negligence, or deliberate indifference."[209] Thus, to counter the inevitable future need to de-gender our institutions would require the Supreme Court to whittle the medical necessity doctrine away to nothing against its own precedent, which it is unlikely to do. There are larger implications for acknowledging the rights of transgender persons, but the doctrine of medical necessity is too strong and specific to allow for these big-picture fears to trump.

III. Hearing and Seeing What *Edmo* and *Gibson* Are Telling Us

This final Part will take a step back to look at the broader cultural and legal landscape in which the *Edmo* and *Gibson* decisions were made. Rooting ourselves in the reality of what Edmo and Gibson experienced as incarcerated transgender people—a pain-filled reality so acute as to prompt self-injury—demonstrates that medical necessity is not effectively actualizing the Eighth Amendment. This Part will then explore that dissonance and its consequences in American society and the legal profession, campaigning for the adoption of proxies that better close the gap between constitutional ideals of equality and independence and our consciences.

A. The Mistake of Dismissing Imprisoned Transgender People's Experiences

At this point, some readers may agree that the Supreme Court should probably let this imprisoned subpopulation have their surgeries, end of discussion. Actually, the discussion is just beginning. *Edmo* and *Gibson* are liminal bodies in liminal legal spaces, and the liminal spaces are often where we can confront the lines we have artificially drawn to see whether or not they reflect reality.[210]

The problem with dismissing experiences not considered "central" in American society is that it gives us cultural myopathy. To see ourselves, we need to listen to *Edmo* and *Gibson*. America's prison system has demonstrated since its Puritan beginnings that,

209. Edmo v. Corizon, Inc., 935 F.3d 757, 794 (9th Cir. 2019).

210. To say "[i]t is emphatically the province and duty of the judicial department to [s]ay what the law is" puts courts in the business of drawing these lines that may seem rational, arbitrary, inclusive, or exclusive, depending on where you sit in relation to them—and ultimately allows courts to create and reinforce what we express and repress in American society. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

in America—contrary to the word of the Declaration of Independence—all people are not equal; dependence is preferred for norm-transgressors.[211] Further, history has shown that what we condone as normatively acceptable for our incarcerated members tends to become a part of our norms beyond prisons: punishment creeps out into our culture.[212] We may say our American values are equality and independence, but if we foster inequality and dependence in our prisons, we foster it in the places we work, the schools we and our kids attend, the scientific discoveries we sponsor and pursue, and the art that frames our understanding of life.[213] If the edges are bleeding, the center will eventually be red too. *Edmo* and *Gibson* tell us the edges are bleeding.

B. Proxies for Proxies for Proxies: Remembering What Our Doctrines and Laws Signify

At some point, we need to remember what things stand in for to see how our proxies relate to our original intent.[214] Are *Edmo* and *Gibson* telling us medical necessity is an effective proxy for the Eighth Amendment? Are they telling us medical necessity itself encapsulate proxies that should be recognized in their own right under the Eighth Amendment? Are they reminding us what the Eighth Amendment itself is a proxy for in American society?

i. Is Medical Necessity an Effective Proxy for the Eight Amendment?

In *Edmo* and *Gibson*, the Ninth and Fifth Circuits used the same medical necessity test to come to different answers for

211. CUSAC, *supra* note 4, at 51.

212. *Id.* at 73–74, 163 ("Ideas about punishment and punishment practices are not static things. Not only do they evolve, they also move laterally through society, affecting our popular culture and American homes, religious institutions, and schools.").

213. For examinations of this phenomenon in art, *see, e.g.*, CUSAC, *supra* note 4, at 186–87 (observing radio and television have historically been—and are—full of "cop shows" such as Law and Order, CSI, Criminal Minds, and more—all including enactments of violent crimes and implicitly or explicitly violent punishments) *and* JARVIS, *supra* note 18 (considering the centrality of punishment in American literature, including in *The Scarlet Letter* and Herman Melville's works, as well as in various films, including *The Shawshank Redemption* and *Dead Man Walking*).

214. This is not in the originalist sense of a return to dictionary definitions from centuries ago or letters between Founding Fathers to reach a regressive outcome that resists normative change and typically maintains power for a status quo of privileged symbolic and literal bodies. *See* Bourcicot, *supra* note 10, at 290 (noting the Supreme Court struggled to pin down the meaning of "cruel and unusual" from the beginning because these are aspirational concepts that resist being fixed to a past moment or meaning).

individuals with similar experiences of acute GD. Interestingly, where they aligned was in the need to answer why medical necessity is effectively working to protect Eighth Amendment obligations, labors suggesting that medical necessity alone fails to stand in entirely for the Eighth Amendment (and this Note will argue, for the American conscience). Both circuits argued medical necessity was an effective proxy, but for different reasons—and held up strikingly different cultural mirrors for Americans in doing so.

The *Edmo* court emphasized *longevity* and *harm prevention*. Judges McKeown, Gould, and Lasnik noted that the values embodied by the Eighth Amendment have been upheld through the doctrine of medical necessity for forty years by the Supreme Court.[215] The suggestion is that stare decisis is confirmation over time that we have located a correct proxy for what is cruel and unusual. The test is working because it can adapt over time to "area[s] of increased social awareness" and our "developing understanding" of medical conditions and treatments.[216] In addition to this, the court located irreparable harm at the center of what the Eighth Amendment seeks to prevent. The irreparable harm at stake for Edmo was both physiological and constitutional. Physiologically, her "severe, ongoing psychological distress and the high risk of self-castration and suicide she face[d] absent surgery constitute[d] irreparable harm."[217] Additionally, deprivation of adequate medical care violating the Eighth Amendment "cannot be adequately remedied through damages and therefore generally constitute[s] irreparable harm."[218] Thus, the Ninth Circuit argues that because medical necessity prevents irreparable harms as we understand them over long periods of time, the test remains a good proxy for the Eighth Amendment.

The *Gibson* court focused on *usualness* and had no qualms about suggesting the Eighth Amendment allows for the usual cruelties. Judge Ho argued that behind medical necessity—and before indifference to it—are those actions or inactions American society sets its face against.[219] It is not the Fifth Circuit that is cruel; it is the American people who are cruel.[220] The court argued medical necessity is a numbers game to be played, with enough momentum from lower and sister courts to creep forward the line until both

215. Edmo v. Corizon, Inc., 935 F.3d 757, 766 (9th Cir. 2019).
216. *Id.* at 803.
217. *Id.* at 797–98.
218. *Id.* at 798 (quoting Nelson v. NASA, 530 F.3d 865, 882 (9th Cir. 2008)).
219. Gibson v. Collier, 920 F.3d 212, 227 (5th Cir. 2019).
220. *Id.*

cruel and unusual are satisfied, as the court argued has occurred in the halted practice of executing juveniles.[221] The *Gibson* majority made much of the need for consensus, even as it averted its gaze from the already existing evidence of medical consensus that would sway the Ninth Circuit a few months later. In this way, the *Gibson* court exposed the weakness of the legal doctrine of medical necessity as a proxy for what is cruel and unusual: changing norms are resisted, especially by society's institutions.[222] To delay the demons of change, the Fifth Circuit compelled itself to needlessly address the merits of the case.[223] The court's focus on usualness is strained by the existing WPATH Standards and the District of Idaho's *Edmo* decision, so the court belabored the past *Kosilek* decision and resurrected Justice Scalia's originalist ghost to produce its desired outcome: "It cannot be deliberately indifferent to deny in Texas what is controversial in every other state."[224] The numbers are just not there yet, and the court argued this shows why medical necessity is a good proxy for the Eighth Amendment. In other words, medical necessity works because, while it allows cruelty, it does not allow unjustifiable cruelty.

Thus, where the Ninth Circuit celebrated medical necessity as an effective proxy for keeping imprisoned Americans free from irreparable harms, the Fifth Circuit lauded medical necessity for its ability to precisely reflect the unvarnished reality of American mores. In the Ninth Circuit's America, we do not forsake protecting the fundamental rights of Americans when those lives are experienced behind prison bars. In the Fifth Circuit's America, we offer only those protections that minimum decency allows; if you lose your liberty, the pursuit of happiness and even life may also be withheld.[225] If the doctrine of medical necessity can give us two such different Americas,[226] then there is room to question whether medical necessity is the standard-bearing Eighth Amendment proxy Justice Blackmun envisioned.[227]

---

221. *Id.*

222. Dolovich observes that the courts themselves have "become sites of institutional cruelty." *Supra* note 18, at 978.

223. *Gibson*, 920 F.3d at 218, 226–27.

224. *Id.* at 228.

225. DECLARATION OF INDEPENDENCE, *supra* note 3.

226. This Note argues the Fifth Circuit incorrectly applied the doctrine, and therefore, it is difficult to make a firm conclusion that medical necessity is or is not an effective proxy for the Eighth Amendment based on these two cases.

227. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

ii. Does Medical Necessity Encapsulate Proxies that Should be Recognized in Their Own Right?

If we de-medicalize the symptoms of Edmo and Gibson's acute gender dysphoria, we are left with depression of the desperate strain that attempts escape or solution by self-harm and/or suicide.[228] Our proxies for cruel and unusual punishment, it follows, should guard against imposing circumstances that are likely to result in higher rates of self-harm and suicidality for incarcerated persons.[229] These life threats are, themselves, appropriate proxies for the Eighth Amendment, wholly apart from medical necessity.[230] If the State is imposing circumstances it knows or should know increase the likelihood of self-harm and/or suicidality to statistically significant levels, it should be found deliberately indifferent to providing appropriately dignified and humane conditions for incarcerated persons in violation of the Eighth Amendment.[231]

Such a proxy would, for example, make the practice of solitary confinement a violation of a person's Eighth Amendment rights. Solitary confinement was first introduced in American prisons under the belief that the right conditions for repentance could correct the wayward criminal soul.[232] It soon became apparent that

228. Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019); *Gibson*, 920 F.3d at 217.

229. *But see* Levine, *supra* note 36, at 244 (arguing the State should not become one more victim at the hands of imprisoned persons' manipulative personalities since imprisoned individuals will make threats of self-injury that may be just as likely rooted in a "motive to annoy" as they are in an expression of "genuine psychological pain").

230. To some extent we have recognized this, since the subjective threshold of medical necessity is typically met when there is potential deprivation of life itself or infliction of permanent injuries. *See* McCollum v. Mayfield, 130 F. Supp. 112, 115 (N.D. Cal. 1955) ("A refusal to furnish medical care when it is clearly necessary, such as is alleged here, could well result in the deprivation of life itself; it is alleged that plaintiff suffered paralysis and disability from which he will never recover. This amounts to the infliction of permanent injuries, which is, to some extent, a deprivation of life, of liberty and of property. Since these rights are protected by the Fourteenth Amendment to the Federal Constitution, the complaint sufficiently alleges the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States.").

231. MUSHLIN, *supra* note 17, at 453–54 ("The fact that suicide is an action taken by the inmate is irrelevant; there is a clear duty 'to protect prisoners from self-destruction or self-injury.'" (quoting Lee v. Downs, 641 F.2d 1117, 1121 (4th Cir. 1981)) (citing Martin v. Harrison Cnty. Jail, 975 F.2d 192, 192–93 (5th Cir. 1992) (holding that prison guards had a duty to try to stop suicide and, when they struck an imprisoned person who was attempting self-injury, there was no liability))).

232. CUSAC, *supra* note 4, at 48–49, 59.

solitary confinement induced suicide.[233] The Supreme Court in 1890 observed that as a result of solitary confinement:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community . . . .[234]

One hundred years later in the 1990s, the use of solitary confinement increased again—despite being previously found cruel and ineffective.[235] Research conclusions about solitary confinement at the turn of this century find "[t]here are few if any forms of imprisonment that appear to produce so much psychological trauma and in which so many symptoms of psychopathology are manifested."[236] Prisons and courts continue to acknowledge these known facts.[237] Nevertheless, the practice of solitary confinement

---

233. *Id.* at 54, 63; *see* Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 133–34 (2003) (observing common psychopathological symptoms of isolation include ruminations or intrusive thoughts, irrational anger, an oversensitivity to external stimuli, confused thought processes, social withdrawal, chronic depression and sadness, emotional flatness, fainting spells, nervousness and anxiety, sweaty palms, chronic lethargy, headaches, troubled sleep, nightmares, trembling, difficulties with attention and memory, headaches, heart palpitations, mood swings, talking to oneself, violent fantasies, perceptual distortions, hallucinations, and thoughts of suicide).

234. *In re* Medley, 134 U.S. 160, 168 (1890).

235. CUSAC, *supra* note 4, at 241. Note that this is an example of the cyclical nature of punishment norms.

236. Haney, *supra* note 233, at 125. Haney also explains:

> In assessing the mental health concerns raised by supermax prisons, it is important to acknowledge an extensive empirical literature that clearly establishes their potential to inflict psychological pain and emotional damage. Empirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in these kinds of environments. Despite some methodological limitations that apply to some of the individual studies, the findings are robust.

Id. at 130. That such clear, robust, longstanding evidence of irreparable harm continues to escape protection under the Eighth Amendment is evidence self-injury should be made a proxy in its own right.

237. *See, e.g.*, Palakovic v. Wetzel, 854 F.3d 209, 229 (3d Cir. 2017) (holding prison officials were deliberately indifferent to an imprisoned person's rights when they knew of his history of self-harm and suicide attempts and yet still "repeatedly subjected [him] to the harsh and unforgiving confines of solitary confinement" even though their own prison policy acknowledged "solitary confinement can increase the potential for suicide due to the 'inherent stress' of those conditions").

continues—as does the need for better proxies for Eighth Amendment violations.

iii. What is the Eighth Amendment a Proxy for in American Society?

The Eighth Amendment and medical necessity are ultimately proxies for the American conscience. The society we shape with these proxies is a signifier for our moral identity; we make the culture we are, and in turn, it makes us. "Humaneness, empathetic comprehension of an individual's suffering, belief in a person's ability to change[,] . . . elections where racial minorities have a voice equivalent to their numbers, communal generosity to the vulnerable, and, finally, democracy . . . are all at risk" when we dull our consciences to the private pain of our incarcerated fellow human beings.[238] This is true even if it is not the accepted opinion of our political group, religious text, professional association, or lived bodily experience.[239]

The Eighth Amendment and medical necessity are also proxies for the American legal professional's conscience. Perhaps nowhere (other than the minds and bodies of its victims) is the dissonance between American conscience and Eighth Amendment proxy felt more keenly than in our judges. These individuals are asked to set aside their own consciences in favor of proxies that, despite even the best intentions, may in fact be cruel. Worse, they must legitimize those proxies, "legally transforming the cruelty of institutional indifference to prisoners' suffering into *not*-cruelty by validating the harmful effects of that indifference as consistent with the Eighth Amendment."[240] Herein lies a moral rot: We have a toxic legal confirmation bias where we insist judges "suppress any instinctive sympathy they may have for fellow human beings who have experienced gratuitous suffering" to enforce our legal standards and to avoid even the appearance of judicial bias—regardless of the cost

238. CUSAC, *supra* note 4, at 255.

239. In the U.S. in the year 2020, our consciences (and scientific facts) are buried under our confirmation biases, and our citizenry is as divided as traditional gender binary norms. *See* Douglas T. Kenrick, Adam B. Cohen, Steven L. Neuberg & Robert B. Cialdini, *The Science of Antiscience Thinking*, 319 SCI. AM. 36 (2018); Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation's Top Priorities Should Be*, PEW RSCH. CTR. (Feb. 5, 2019), https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/ [https://perma.cc/X7RU-CYY7].

240. Dolovich, *supra* note 18, at 978.

of the suffering that purchases it.[241] When consistent, impartial justice requires a dulling of conscience, it is not justice.

Edmo and *Gibson* invite a reawakening of the consciences of Americans and their legal professionals. "Only the repeated experience of hearing persons with genital anatomic GD describe their anguish is likely to help others understand the psychological reality of this condition and the medical necessity of SRS as a treatment for it."[242] Arguably, this must be paired with listening to trans voices who feel this anguish, but debate the value of its medicalization.[243] And above all, this must be done by listening to, looking at, and acknowledging the individual pain being experienced. If we acknowledge our biases and listen to the experiences of Americans across the expanses of sex, race, and gender, we will see the effects of punishment produced by—and producing—our fable of what it means to be American.[244] This

241. *Id.* ("[C]ourts play a key role in sustaining and even creating the cruel conditions currently found in many American prisons and jails. In this sense, judges, too, become agents of cruelty. Just as prison officials learn cruelty through repeated exposure to prisoners in a context that denies their shared humanity, judges develop a cruel disposition toward prisoners through the repeated demand that they validate as not cruel conditions that are clearly at odds with the state's carceral burden. Existing constitutional standards require courts to find for the state even when prisoners face obvious risks of serious physical or psychological harm."); *see also* United States v. Varner, No. 19-40016, 2020 U.S. App. LEXIS 1346, at *10 (5th Cir. Jan. 15, 2020) ("Even [the] appearance of bias, whether real or not, should be avoided.").

242. Osborne, *supra* note 10, at 1653.

243. *See, e.g.*, Alice Dreger, *Why Gender Dysphoria Should No Longer Be Considered a Medical Disorder: It Does More Harm than Good*, PAC. STANDARD MAG. (June 14, 2017), https://psmag.com/social-justice/take-gender-identity-disorder-dsm-68308 [https://perma.cc/M4XJ-4QAF].

244. Herald, *supra* note 27 at 169–70 (observing that cognitive bias causes us to resist new information if it counters long-held beliefs, both by disregarding information that contradicts our beliefs and by adopting denial strategies to avoid re-examining those beliefs). These biases include how we understand our bodies. "How we see, read, and interpret the human body is filtered through many forms of knowledge and belief such as education, personal experience, cultural standards, racial prejudice, sexism, religious edicts and moral principles." Green, *supra* note 2, at 30. Speaking to the legal community's bias-stoppered ears, it is important to note that we are particularly susceptible to allowing legal precedent to give us a comforting confidence in siding with our preexisting biases. *Id.* at 33. Too often "judges are selective in their acceptance of medical authority, ridicule and belittle [transgender] people, and are reluctant to grant them legal status in their affirmed sex because they have the 'ability to explode settled social expectations and to destabilize the very social framework within which the law moves.'" *Id.* at 73. When the legal profession refuses to overtly recognize the explicit rights of different classes, races, and sexes, it effectively reenacts a pattern of sustained colonialism. *Id.* at 85. And yet, when it does overtly recognize these different rights, it may reinforce its social hierarchy in ways that limit those rights in the longer term. We must grapple with this.

bodily pain, trauma, and death must be acknowledged, and we must create spaces for these silent centers of unspeakable hurt that we do not co-opt for medicine, or law, or science, or any other tool of methodology to justify being the content-controlling speaker that denies, excludes, contextualizes, or colonizes through narration—instead of hearing and seeing. Only when we are willing to honestly acknowledge just what cruelty we are allowing can we contend with the dissonance between our American values of equality and independence and what our institutions—including the law—have created instead.[245]

Conclusion

America continues to criminalize and punish those whose very bodily existence transgresses "hegemonic fables of American national identity" through institutionalized forms of racism, misogyny, and transphobia.[246] Yet ideas of equality and independence enshrined in the protections of America's Constitution provide tools to struggle with the resulting dissonances. Adree Edmo and Vanessa Lynn Gibson stand at the edge of American society as transgender, imprisoned people experiencing acute GD, but their legal cases in the Ninth and Fifth Circuits speak to the heart of some of the most central normative rifts that divide us—in particular here, beliefs and scientific evidence about sex and gender. Because of these divides, Edmo's access to Eighth Amendment protections and GCS stands in stark

245. For one example proposing how to do this work, *see* Neil Barsky, *How to Fix Our Prisons? Let the Public Inside*, MARSHALL PROJECT (Dec. 17, 2019), https://www.themarshallproject.org/2019/12/17/how-to-fix-our-prisons-let-the-public-inside [https://perma.cc/8MAF-CCA9]. In addition, there is no need to probe the American conscience without other reference points. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) *and* Charter of Fundamental Rights of the European Union, Dec. 12, 2007, 2007 O.J. (C 303) 1.

246. JARVIS, *supra* note 18, at 14; *see also* Green, *supra* note 2, at 29 ("The term 'transphobia' is often used to describe intolerance and aversion toward transgender . . . people (in parallel to 'homophobia'). Transphobia is frequently characterized as a fear of difference, but it can be argued that transphobia is more rightly a fear of change. People fear the destabilization of gender and sex. They do not want to be 'fooled or deceived into thinking a person is something—or someone—that they are not entitled to claim to be."); Prusaczyk, *supra* note 6, at 1 (noting a recent study found that "those more conservative in ideology were more likely to display prejudice toward gender non-conformists in part due to their greater endorsement of binary gender beliefs[,]" suggesting such beliefs "function as a legitimizing myth to bolster existing hierarchical relations between gender conforming versus gender non-conforming people").

contrast to Gibson's denial of the same.[247] The resulting dissonance in the application of an identical doctrine of medical necessity is, in part, due to the Fifth Circuit's misapplication of the doctrine; but more importantly, it is due to the conscience-dulling gap between medical necessity as a proxy for the Eighth Amendment, and the Eighth Amendment itself that stands in for our consciences.

This Note argues that we need to acknowledge the circumstances our criminal justice system creates that cause—or fail to stop—profound pain in the minds and bodies of imprisoned people. We must also acknowledge that this cruelty is able to slip through the medical necessity doctrine's cracks.[248] Prison practices known to increase the likelihood of self-injury—such as the denial of GCS when it is indicated or the imposition of solitary confinement—cannot be allowed to continue based on doctrinal technicalities or vague fears. We must return to the Eighth Amendment afresh, acknowledging and submitting the mighty weight of bias we bring in all its myth-sustaining glory to the higher ideals to which we aspire as Americans and world citizens. We must actualize the normative changes our new understanding of sex and gender identity demand. This begins with a Supreme Court that should follow the Ninth Circuit's lead. It continues with new legal proxies that allow imprisoned people, lawyers, judges, and citizens to call ignoring unconscionable pain in prisons exactly what it is when we can do something about it (and the imprisoned cannot)—cruel.

247. Edmo received her long-awaited GCS in July 2020. *See* Amanda Peacher, *In a First, Transgender Inmate Receives Court-Ordered Surgery*, INDIAN COUNTRY TODAY (Aug. 14, 2020), https://indiancountrytoday.com/news/in-a-first-transgender-inmate-receives-court-ordered-surgery-vZ-dsBYYxk2-jsRrwnejUA [https://perma.cc/38PZ-9TSE].

248. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (observing that when "prejudice against discrete and insular minorities" has had the effect of "curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities . . . correspondingly more searching judicial inquiry" may be necessary).

A Disability Studies Perspective on the Legal Boundaries of Fat and Disability

Katie Warden†

Table of Contents

Abstract

Since the passage of the ADA, the question of who counts as disabled has been a heavily contested legal issue. Within this context, individuals who claim that their weight constitutes a disability challenge stereotypes of disabled people as innocent, unfortunate victims of personal tragedy. Their claims highlight both the tension

†. Ph.D. 2020, University of Oregon, Sociology Department; J.D. 2011, George Washington University Law School; Staff Attorney at the Oklahoma Disability Law Center, part of the Protection and Advocacy System. I would like to thank Professors Stephen Meyers and Richard York for their feedback and assistance with this manuscript.

between the social and medical models of disability, which are intertwined in the ADA, and the ways in which perceptions and stereotypes, rather than impaired bodies, can create disability. Drawing on theoretical insights from fat studies literature, this article examines the circumstances under which courts conclude that being fat is a status that deserves anti-discrimination protection under the ADA. Using content analysis and logistic regression models, I find that fat plaintiffs fared worse (1) when their claims were based on perceived (rather than actual) disability and (2) when courts required them to prove the underlying cause of their weight. Findings suggest that the social model of disability has not been fully implemented under the ADA, and fat and disability rights activists must carefully consider the way they frame cases to prevent the perpetuation of negative stereotypes of individuals in both categories.

Introduction

In 1990, Congress passed the Americans with Disabilities Act (ADA) to protect the rights of people with disabilities.[1] Over the next twelve years the Supreme Court narrowed the scope of the law, effectively diminishing the ADA's power.[2] During the same period, there was significant public outcry against the law based on two assumptions: that it provided disabled people unfair benefits and that it unduly burdened businesses.[3] Due to both these judicial decisions and the political climate, a heated debate emerged in the legal community about who counts as disabled under the law.[4] Individuals not typically considered disabled, such as fat people,[5] were a focal point of this controversy. This study assesses whether

1. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1)–(4).

2. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

3. *See* MARY JOHNSON, MAKE THEM GO AWAY: CLINT EASTWOOD, CHRISTOPHER REEVE & THE CASE AGAINST DISABILITY RIGHTS (2003).

4. *See* BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS (Linda Hamilton Krieger ed., 2003) [hereinafter BACKLASH].

5. I use the word "fat" as a descriptor, following many fat studies scholars who want the word to become just an ordinary term similar to "tall" or "dark-haired." Medical researchers, the media, and legal actors overwhelmingly use the terms "obese" or "overweight" and thus I sometimes use those terms when engaging with these mainstream contexts. Additionally, I use both "people with disabilities" and "disabled people," interchangeably. *See* Erin E. Andrews, Anjali J. Forber-Pratt, Linda R. Mona, Emily M. Lund, Carrie R. Pilarski & Rochelle Balter, *#SaytheWord: A Disability Culture Commentary on the Erasure of "Disability"*, 64 REHABILITATION PSYCHOL. 111 (2019); Barbara J. King, *'Disabled': Just #SayTheWord*, NPR, (Feb. 25, 2016), https://www.npr.org/sections/13.7/2016/02/25/468073722/disabled-just-saytheword [https://perma.cc/X6MX-PP4M].

fat is an ADA-protected status in the realm of employment discrimination and examines the judicial reasoning underlying the pertinent court decisions. The results reveal that courts continue to use disability status to differentiate between individuals deemed worthy of social support, such as the anti-discrimination protection examined in this paper, and those considered undeserving. Further, judges tend to use a medical model of disability, rather than a social model, to demarcate the line between the deserving and the undeserving; specifically, judges reinforce the medical model of disability by focusing on determining an underlying medical cause for a person's impairment.

The ADA defines disability according to a hybrid social–medical model. Under the ADA, disability is defined as "a physical or mental impairment that substantially limits [a] major life activit[y]."[6] Importantly, however, a person is considered disabled either if they actually have such an impairment or if they are perceived as having one.[7] Thus, the definition itself recognizes the importance of stereotypes and perceptions in creating the experience of disability.[8] Beginning in the late 1990s, the Supreme Court interpreted this definition quite narrowly, and thus excluded people with a variety of impairments from the statute's protection, including any person whose impairment could be mitigated through medication, prosthesis, or other forms of treatment, such as individuals with diabetes, epilepsy, mobility impairments, back problems, and even polio survivors.[9] By excluding these individuals from the category of disability, the court effectively ruled that discrimination on the basis of these conditions was permissible.

In making these determinations, the courts relied on traditional understandings and common-sense stereotypes of disability as a condition of dependency, helplessness, inability, and lack—the very stereotypes the ADA sought to change[10]—to decide who was deserving of disability-based anti-discrimination

6. 42 U.S.C. § 12102(1)(A).

7. *Id.* § 12102(1)(A)–(C).

8. *See* 29 C.F.R. § 1630.2(*l*) app. (2012) ("This third prong of the definition of disability was originally intended to express Congress's understanding that 'unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions.' 2008 Senate Statement of Managers at 9.").

9. *See* SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 35–37 (2009); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 26–27 (2000).

10. *See* Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Construction of the Meaning of Disability*, *in* BACKLASH, *supra* note 4, at 122–23.

protection. In response to these decisions (which many scholars have characterized as a "judicial backlash"), Congress passed the ADA Amendments Act (ADAAA) in 2008, which explicitly overturned the Supreme Court's decisions regarding the definition of disability.[11] The ADAAA affirmed that the ADA should be interpreted in a way that provides protection to a broad range of disabled people.[12] In addition, the Amendments Act sought to shift the focus of legal disputes from the detailed analysis of an individual's bodily limitations to the evaluation of claims of discrimination and the determination of the reasonableness of potential accommodations.[13] Even after the passage of these amendments, however, the issue of which conditions count as legally protected disabilities continues to be a subject of debate among legal scholars as well as a frequent focus of court rulings.[14]

Within this context of judicial skepticism toward disability claims, the court experiences of fat individuals serve as a fruitful arena for examining the legal reasoning around disability. In these lawsuits, stereotypes of fat and stereotypes of disability clash and judges draw on competing logics of personhood to determine who is "truly disabled."[15] This article employs a mixed-methods approach, combining content analysis and regression modeling to identify which factors influence judicial decisions pertaining to whether fat is classified as a disability under the ADA, decisions that have important implications for social justice. Defining fat as a disability allows fat individuals to fight employment discrimination via currently existing legislation, shifts blame from individuals to social structure, and highlights the way in which prejudicial attitudes create disablement.

I develop my argument as follows: First, I review the pertinent literature; this summary includes a discussion of the scholarly insights from disability studies and fat studies, highlighting both tensions and overlap between these two fields, followed by an overview of the ADA, the judicial backlash against the ADA, and

11. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 § 2(a)(3)–(7); *see generally* BACKLASH, *supra* note 4 (discussing judicial and societal backlash against the ADA).

12. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(b)(1).

13. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(b)(6).

14. *See* BAGENSTOS, *supra* note 9; Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027 (2013).

15. *See* BAGENSTOS, *supra* note 9, at 38.

key judicial decisions about whether fat is a disability. Second, I describe the data and methodology used in the study. Third, I present the empirical results. Finally, I conclude with a discussion of the significance of the findings for political activism around fat rights, the need for disability rights activists to carefully consider the ways in which anti-discrimination litigation medicalizes disability, and the barriers that stereotypes continue to pose for both fat and disabled people seeking equal treatment in the employment sector.

I. Literature Review

A. Disability Studies

Traditionally, disability has been understood as bodily lack, excess, or flaw; as a personal tragedy; and as a medical problem.[16] Disability studies scholars assert that moving past medicalized assessments would benefit all disabled people.[17] Both historically and currently, disability serves as a category to distinguish between the deserving and undeserving poor, and medicine plays a key role in making this distinction.[18] When the rise of industrial factories and the standardization of the pace and modes of production left no room for impaired people to participate in the labor market, institutions, such as the poorhouse and workhouse, arose to house individuals who could not work.[19] In this context, disability came to serve as a proxy for worthiness, used to distinguish between those who could not work and those who would not work.[20] The medicalization of disability played a key role in this process by acting as a legitimating device capable of identifying and distinguishing between able-bodied workers who were shirking their duties and blameless disabled people. Disabled people were

16. Rosemarie Garland-Thomson, *Misfits: A Feminist Materialist Disability Concept*, 26 HYPATIA 591, 591 (2011). *See generally* THE DISABILITY STUDIES READER (Lennard Davis ed., 5th ed. 2017); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT (1990).

17. *See, e.g.*, PETER CONRAD, THE MEDICALIZATION OF SOCIETY: ON THE TRANSFORMATION OF HUMAN CONDITIONS INTO TREATABLE DISORDERS 148–61 (2007). *See generally* THE DISABILITY STUDIES READER, *supra* note 16.

18. *See* RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE (2001); DEBORAH A. STONE, THE DISABLED STATE (1984).

19. *See* Vic Finkelstein, *Disability and the Helper/Helped Relationship: An Historical View*, *in* HANDICAP IN A SOCIAL WORLD (Ann Brechin, Penny Liddiard & John Swain eds., 1981); BRENDAN GLEESON, GEOGRAPHIES OF DISABILITY 99–126 (1997); OLIVER, *supra* note 16.

20. *See* O'BRIEN, *supra* note 18; STONE, *supra* note 18, at 32–39.

viewed as incapable of work and therefore deserving of support.[21] Unfortunately, this medicalized perspective continues to hinder disabled people today; the ADA has not improved disabled people's high rates of unemployment,[22] and disability rights advocates continue to fight stereotypes of disabled people as juvenile, innocent, and unable to work.

The disability studies literature seeks to shift this understanding to a conception "of disability as a social construction whose meaning is determined primarily through discourse," power, and knowledge.[23] An early step in this movement was the development of the social model of disability,[24] which separates impairment and disability (similar to the sex/gender distinction developed by feminist scholars).[25] Impairment refers to the abnormal body, whereas disability arises from a specific type of societal organization that excludes and devalues impaired people.[26] This shift from understanding disability as a personal tragedy to understanding disability as a problem of social justice was "theoretically groundbreaking"[27] and the latter remains the primary conception employed by disability rights activists today. The ADA and ADAAA implement the social model of disability by including individuals who are "perceived" or "regarded" as disabled (i.e., those who are disabled by the prejudices of others) within the law's protection—these individuals' disabilities do not arise directly from their bodies, but rather from the stereotypes held by others.[28]

---

21. *See* Finkelstein, *supra* note 19; GLEESON, *supra* note 19; OLIVER, *supra* note 16; Marta Russell & Ravi Malhotra, *Capitalism and Disability*, 38 SOCIALIST REG. 211 (2002).

22. *See* Michelle Maroto & David Pettinicchio, *The Limitations of Disability Antidiscrimination Legislation: Policymaking and the Economic Well-being of People with Disabilities*, 36 L. & POL'Y 370, 370–71 (2014).

23. *See* SIMI LINTON, CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY (1998); Garland-Thomson, *supra* note 16, at 591.

24. *See* OLIVER, *supra* note 16, at 78–94.

25. GAYLE S. RUBIN, DEVIATIONS: A GAYLE RUBIN READER 39 (2011) (describing "sex" as the "biological raw material of human sex and procreation" and "gender" as the "human, social intervention" that relentlessly rearranges "sex" for society into social conventions).

26. *E.g.* OLIVER, *supra* note 16, at 78–94; *but see* TOBIN SIEBERS, DISABILITY THEORY (2008); Tom Shakespeare, *The Social Model of Disability*, *in* THE DISABILITY STUDIES READER, *supra* note 16 (arguing that both impairment and disability are socially constructed and that the social model discounts the embodied experience of impairment or disability).

27. *See* Garland-Thomson, *supra* note 16 at 592.

28. *See* 42 U.S.C. § 12102(3)(A); ADAAA, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 4(a)(3); *see also* 29 C.F.R. § 1630.2(*l*) app. (2012) ("Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an

In the disability studies literature, disability encompasses a broad range of bodily differences. As scholar Rosemarie Garland-Thomson explained, "In short, the concept of disability unites a heterogeneous group of people whose only commonality is being considered abnormal."[29] Disability studies scholars tend to consider fat a disability both because negative stereotypes and cultural myths surround fat bodies and because inaccessible social structures may impose actual limitations on a fat body. Garland-Thomson and Lennard Davis, two of the most well-known disability studies scholars, have argued that fat should be considered a disability—for example, Lennard Davis wrote that the outcome in *Cook* (a First Circuit ruling considering morbid obesity to be a disability) "led to an enlightened land"[30]—and most scholars in the field follow this recommendation. This categorization of fat as a disability relies directly on the social model of disability, in which disability arises from both stereotypes, such as contempt for abnormal bodies, and social structures. Garland-Thomson concluded that "[t]he fat body is disabled because it is discriminated against in two ways: first, fat bodies are subordinated by a built environment that excludes them; second, fat bodies are seen as unfortunate and contemptible."[31]

B. Fat Studies

For fat studies scholars and activists, the fit between fat and disability is somewhat more complicated. Fat studies arose out of the work of grassroots political organizing and seeks to bring these

---

actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be 'regarded as having such an impairment.' In short, to qualify for coverage under the 'regarded as' prong, an individual is not subject to any functional test. See 2008 Senate Statement of Managers at 13.").

29. Rosemarie Garland-Thomson, *Re-shaping, Re-thinking, Re-defining: Feminist Disability Studies* at 2, *in* BARBARA WAXMAN FIDUCCIA PAPERS ON WOMEN AND GIRLS WITH DISABILITIES (Ctr. for Women Pol'y Stud., 2001), https://www.womenenabled.org/pdfs/Garland-Thomson,Rosemarie,Redefining FeministDisabilitiesStudiesCWPR2001.pdf [https://perma.cc/HAL2-E4VF].

30. Still, there is more work to be done. Lennard J. Davis, *Bending Over Backwards: Disability, Narcissism, and the Law*, 21 BERKELEY J. EMP. & LAB. L. 193, 211 (2000) (citing Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17 (1st Cir. 1993)) ("While the plaintiff in *Cook* ultimately prevailed amid this orgy of purple prose and the journey of the court led to an enlightened land, the metaphors used still tell us that the court is out there in the dark. Despite the heroic efforts of this decision and the self-referential congratulations for this exploration and bringing of light to the darkness, which perhaps comprehendeth it not, the basic problem remains.").

31. Rosemarie Garland-Thomson, *Feminist Disability Studies*, 30 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 1557, 1582 (2005).

radical politics into the academy.[32] The discipline unites work from a variety of fields based on a shared focus on critiquing the negative stereotypes and stigma placed on the fat body.[33] Contemporary cultural discourses portray fat bodies as ugly, lazy, and unhealthy.[34] Sociologist Abigail Saguy suggested that the current dominant discourse frames fat as a public health crisis caused by a lack of personal responsibility.[35] Samantha Kwan and Jennifer Graves referenced both the health frame and the aesthetic frame, concluding that "current cultural discourses stigmatize fat bodies as ugly and unhealthy."[36] Fat studies scholars seek to subvert these dominant perspectives, asserting that fat bodies can be both healthy and beautiful. In addition, the field questions the prevalent assumption that weight is mutable and controllable.[37]

Fat individuals living in the context of the widespread anti-fat culture of the United States face discrimination, prejudice, and mistreatment in many aspects of their lives.[38] The stigma surrounding obesity limits social, educational, and employment opportunities.[39] This bias develops early in life—researchers have found that "children would rather play with other children who had missing legs or eyes than children who were obese; adults would rather be deaf or blind than fat."[40] Further, people report that if given the choice, they would prefer to be of normal weight and poor than fat and a millionaire.[41] Fat Americans may be less likely to attend prestigious schools, obtain desirable professions, and receive equal pay for their work.[42]

---

32. *See* MARILYN WANN, FAT! SO? (1998).

33. *See* SONDRA SOLOVAY, TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION (2000).

34. *See* SAMANTHA KWAN & JENNIFER GRAVES, FRAMING FAT. COMPETING CONSTRUCTIONS IN CONTEMPORARY CULTURE (2013); ABIGAIL C. SAGUY, WHAT'S WRONG WITH FAT? (2014).

35. *See* SAGUY, *supra* note 34.

36. *See* KWAN & GRAVES, *supra* note 34, at 101.

37. *See* Esther D. Rothblum, *Why a Journal on Fat Studies?*, 1 FAT STUD. 3, 4 (2012) ("[F]at activists felt that the terms 'overweight,' 'underweight,' and 'normal weight' all imply that there is an attainable 'ideal' weight when in fact there is a great diversity in weight.").

38. Jane Korn, *Too Fat*, 17 VA. J. SOC. POL'Y & LAW 220–23 (2009).

39. *Id.* at 221.

40. *Id.* (citing ELLEN RUPPEL SHELL, THE HUNGRY GENE: THE INSIDE STORY OF THE OBESITY INDUSTRY 18–19 (2002)).

41. *Id.*

42. *Id.*

Fat has been subjected to medicalization[43] through its association with medical problems such as osteoarthritis, cancer, cardiovascular disease, diabetes, gallbladder disease, hypertension, infertility, liver disease, pancreatitis, and sleep apnea.[44] According to a 1998 report by the National Institutes of Health (NIH), obesity (excess fat) is "a complex multifactorial chronic disease" caused by "social, behavioral, physiological, metabolic, cellular, and molecular" factors.[45] Critical scholars have begun to research the role of environmental toxins such as endocrine disrupters (which are present in many products and foods) in individuals' weight gain as well as the faulty assumptions in many of the studies that have found a correlation between fat and negative health outcomes.[46] For example, in a series of experiments conducted with mice, scientists found that although both the control and experimental groups were given the same amount of food and exercise, the latter group, which was exposed to endocrine disrupters, gained more weight.[47] These studies suggest, at the very least, that the cause of an individual's body size is up for debate. Finally, no studies using a large enough sample to permit generalization have demonstrated that long-term weight loss is possible or improves health.[48]

Thus, both fat and disabled people have bodies that are subject to medicalization, stigma, and structural or architectural exclusion. Like people with "traditional" disabilities, people who are fat encounter limitations in public places such as when they do not fit into spaces designed for average-sized people. For example, "[t]hey may not fit in the seats in a movie theatre; they may not be able to fit into a chair in a restaurant or on a ride in an amusement park."[49] Lawyer and fat studies scholar Sondra Solovay argued that severely

43. CONRAD, *supra* note 17, at 4 ("'Medicalization' describes a process by which nonmedical problems become defined and treated as medical problems, usually in terms of illness and disorders.").

44. *Overweight & Obesity Statistics*, 2017 NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES (2017), https://www.niddk.nih.gov/health-information/health-statistics/overweight-obesity [https://perma.cc/587H-S584]; NHLBI OBESITY EDUC. INITIATIVE EXPERT PANEL ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OBESITY IN ADULTS (US), CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS xi, 19 (1998) [hereinafter NHLBI OBESITY EDUC. INITIATIVE].

45. NHLBI OBESITY EDUC. INITIATIVE, *supra* note 44, at 27.

46. *See* JULIE GUTHMAN, WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM (2012); SAGUY, *supra* note 34.

47. GUTHMAN, *supra* note 46.

48. Paul Campos, Abigail Saguy, Paul Ernsberger & Eric Oliver, *The Epidemiology of Overweight and Obesity: Public Health Crisis or Moral Panic?*, 35 INT'L J. OF EPIDEMIOLOGY 55 (2005).

49. Korn, *supra* note 38, at 226–27.

obese people "are substantially limited in a major life activity that the average person has no difficulty with—navigating all places of public accommodation during the course of an ordinary day."[50]

Several fat studies scholars have examined the connections between fat and disability, highlighting the shared experience of stigma. Charlotte Cooper described how the social model of disability spoke to her own experience of fatness, remarking, "[f]at and disabled people encounter discrimination in all areas of our lives, from our families, from strangers on the street, in the workplace and in society, where we are constantly reminded that there is something wrong with us."[51] Cooper found commonalities between fat and disabled people in terms of physical access (fitting into spaces), experiences of shame and pity, a lack of appropriate media representation, and a shared "low social status."[52] Lucy Aphramor also identified parallels between the two groups, describing similarities in discrimination against fat job applicants and little people applying for jobs: in both instances, discrimination is related to stereotypical beliefs about abilities and fear of customers' negative reactions.[53] April Herndon made a parallel comparison between disability and fat, in this case exploring discrimination toward fat and Deaf people.[54] Finally, two recent theoretical articles suggested that fatness can be considered a disability.[55]

Despite the similarities between these models of fat and disability, fat activists have not generally aligned themselves under the umbrella of disability, instead seeking to pass size-based anti-discrimination laws.[56] Fat rights activists explain this approach as reflecting a desire not to be associated with the characteristics

---

50. SOLOVAY, *supra* note 33, at 148.

51. Charlotte Cooper, *Can a Fat Woman Call Herself Disabled?*, 12 DISABILITY & SOC'Y 31, 36 (1997).

52. *Id.* at 32, 36.

53. Lucy Aphramor, *Disability and the Anti-obesity Offensive*, 24 DISABILITY & SOC'Y 897, 903 (2009).

54. *See* April Herndon, *Disparate but Disabled: Fat Embodiment and Disability Studies*, 14 NWSA J. 120 (2002).

55. *See* Toby Brandon & Gary Pritchard, *'Being Fat': A Conceptual Analysis Using Three Models of Disability*, 26 DISABILITY & SOC'Y 79 (2011); Nathan Kai-Cheong Chan & Allison C. Gillick, *Fatness as a Disability: Questions of Personal and Group Identity*, 24 DISABILITY & SOC'Y 231 (2009).

56. *See* ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD (2008) [hereinafter FAT RIGHTS]; Anna Kirkland, *What's at Stake in Fatness as a Disability?*, 26 DISABILITY STUD. Q. 1 (2006); Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance Movement*, 42 L. & SOC'Y REV. 397 (2008) [hereinafter *Think of the Hippopotamus*]; SAGUY, *supra* note 34.

stereotypical of disability: lack, dependency, and inability.[57] For example, in her interviews with fat rights activists, Kirkland found that they resisted an association with disability "because it complicated their arguments that fat people are fully functional and healthy."[58] In an exception to this pattern, activist Marilyn Wann suggested that using the disability label was a pragmatic choice, observing that "[i]n the dark times, you use whatever you have."[59] Overall, however, fat rights advocates have rejected the disability label because of its continued medicalization, which construes the problem of disability as arising from the body's limitations.[60] Fat activists see the fat body as healthy and beautiful—problems result not from fat bodies, but rather from society's negative response to fat people. This view aligns with a strong version of the social model of disability embodied by the ADA, in which disability arises not from the impaired body, but from society's reaction to such bodies.

One final perspective on the way fat fits, sometimes uneasily, as a disability is related to what Kirkland has called "logics of personhood," which are defined as "the ways we talk to each other . . . about whether a person's difference should matter for what she deserves, and why."[61] Anti-discrimination protection for disabled people has been justified by historical discrimination and segregation, as well as the view that their differences do not materially affect their ability to work.[62] In *Fat Rights*, Kirkland attempted to fit fat within the overall field of anti-discrimination law by examining logics of personhood. For example, the logic of actuarial personhood can justify race and gender protections.[63] Because these traits relate primarily to appearance and do not change an individual's functional ability, an employer should ignore these traits and focus on the abilities of the worker. However, this logic does not apply to someone who has a functional difference, such as an employee who uses a wheelchair and may require a sink to be lowered in the bathroom or a fat employee who may need a chair without armrests. In these cases, courts use a different logic of personhood, which Kirkland calls managerial individualism and defines as "a process-focused, context-specific approach to

57. Kirkland, *What's at Stake in Fatness as a Disability?*, *supra* note 56; Kirkland, *Think of the Hippopotamus*, *supra* note 56.

58. Kirkland, *Think of the Hippopotamus*, *supra* note 56, at 417.

59. *Id.* at 420 (quoting Marilyn Wann).

60. *Id.* at 422.

61. FAT RIGHTS, *supra* note 56, at 27.

62. *Id.* at 40–41.

63. *Id.* at 20–23.

differences that requires an organization to do something to accommodate the person with a disability."[64] Kirkland suggested that the logic of managerial individualism (a focus on the unique qualities of individual bodies and personal accommodations) depoliticizes identity groups, and that, in practice, including fat people within the ADA's category of disability would further medicalize fat and hinder the affirmatory politics desired by fat activists.[65] Specifically, under the ADA, fat people would be subject to the same medicalized court assessments of their "functional capacities" as other disabled people.[66]

Cases in which fat is alleged to be a disability reveal the differences between stereotypes of disabled people—who are perceived as deserving of pity or as unfortunate victims, helpless, and unable to work in or contribute to the labor market—and stereotypes of fat people—who are perceived as lazy, blameworthy, and victims of their lack of self-control rather than victims of bad luck. The pity reserved for disabled people in U.S. culture is not usually extended to fat people.[67] Studying fat as disability highlights the way that these stereotypes and the resulting prejudice, as well as physical architectural barriers, construct the experience of disability. Disability studies scholars assert that the devaluation of bodies considered "abnormal" constitutes a barrier to the social inclusion of disabled people and to the formation of an identity category based on bodily abnormalities.[68] Even when an individual obtains physical access to a space, the behaviors and attitudes of others may effectively eliminate the accessibility of the space.

C. Passage of the ADA and Subsequent Backlash

The ADA seeks to remedy the historical isolation, segregation, and discrimination that people with disabilities have encountered and to reaffirm the right of people with disabilities to participate

64. *Id.* at 22.

65. *Id.* at 133.

66. *Id.*

67. *See* SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE AND THE BODY 185–86 (Tenth Anniversary ed., 2003) (describing the "massive and multifaceted nature" of the industries built to promote slender bodies and how preoccupation with fat pushes women especially to police their own bodies).

68. *See, e.g.*, Irving Kenneth Zola, *Bringing Our Bodies and Ourselves Back In: Reflections on a Past, Present, and Future "Medical Sociology"*, 32 J. HEALTH & SOC. BEHAV. 1 (1991); Nick Watson, *Well, I Know This Is Going to Sound Very Strange to You, but I Don't See Myself as a Disabled Person: Identity and Disability*, 17 DISABILITY & SOC'Y 509 (2002).

fully in all aspects of society.[69] Passed with bipartisan support in 1990, top liberal and conservative supporters framed the bill as a way to move disabled people off of welfare and into the workforce. The ADA received such broad support because it appealed to both conservative cost-cutting interests and the liberal impetus to increase anti-discrimination protections.[70]

The ADA's language is not particularly revolutionary or different from the language used in other anti-discrimination laws, yet the law provides a unique legal solution. Under the ADA, employers must provide disabled workers with reasonable accommodations necessary for them to be effective in their jobs.[71] Unlike other anti-discrimination laws, which only provide monetary damages, the ADA gives workers the power to change their workplace environment to meet their needs and forces employers to adapt business practices to better serve their workers.[72]

Soon after its passage, courts began interpreting the ADA in ways that stripped it of its potential.[73] Specifically, courts narrowed the ADA's definition of disability to restrict the potential impact of the law by limiting the number of people it protected.[74] Ruth Colker provided empirical evidence of this restriction. According to Colker, from 1992 to 1998, 93 percent of ADA employment discrimination cases were decided in favor of employers, most often because employees were not considered disabled as defined by the ADA.[75]

The ADA implements a hybrid medical–social model of disability. Although the preamble of the legislation explicitly recognizes that disability arises from certain social relations rather than being the automatic outcome of having an impaired body,[76]

---

69. Americans with Disabilities Act, 42 U.S.C. § 12101(a)(1)–(8) (1990).

70. *See* BAGENSTOS, *supra* note 9, at 5 (observing that "[b]oth liberal and conservative supporters of the ADA tapped into authentic aspects of disability rights thinking" and that "[t]hose aspects converged in support for the statute as it proceeded through Congress."); BACKLASH, *supra* note 4, at 273 (noting the ADA is supported by "the liberal terms of equal rights" and by "conservative cost-efficiency rationales.").

71. 42 U.S.C. § 12111(9)(A)–(B).

72. *See* Befort, *supra* note 14; Diller, *supra* note 9, at 39–47.

73. *See* BACKLASH, *supra* note 4.

74. *See* BACKLASH, *supra* note 4; BAGENSTOS, *supra* note 9; Diller, *supra* note 9, at 26–27.

75. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999); *see also* Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001).

76. 42 U.S.C. § 12101(a)(1) (2012) ("[P]hysical or mental disabilities in no way

legal analysis continues to focus on an individual's body as the site of disability. Under the ADA:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.[77]

This definition serves a gate-keeping function because meeting it is a threshold issue for employee-litigants in determining whether they are protected by the ADA.[78] An individual "who does not qualify as disabled * * * does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment."[79]

In defining disability, the ADA attempts to move away from a strict medical understanding of disability. Determining whether an individual is disabled under the statute is supposed to be an individualized assessment based on a person's specific abilities and not a medical diagnosis.[80] There is no inherent or "per se" disability.[81] This individualized inquiry requires courts to move away from broad generalizations, stereotypes, and assumptions about disabled peoples' abilities. In practice, however, stereotypes

---

diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination[.]"); *see also* 42 U.S.C. § 12101, § 2(a)(2), 122 Stat. 3553 (2008) ("[I]n enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.").

77. 42 U.S.C. § 12102(1)(A)–(C) (2012).

78. *See* 29 C.F.R. § 1630.2(g) app. (2012) (citing STATEMENT OF THE MANAGERS TO ACCOMPANY S. 3406, 110TH CONG. (2008) ("The first of these is the term 'disability.' 'This definition is of critical importance because as a threshold issue it determines whether an individual is covered by the ADA.' 2008 Senate Statement of Managers at 6.")).

79. 29 C.F.R. § 1630.1(c) (2012) (quoting H.R. REP. NO. 110-730 at 6 (2008)).

80. *See* 29 C.F.R. § 1630.2(j)(1)(v) app. (2012) ("The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.").

81. 29 C.F.R. § 1630.2(j)(3) app. (2012) ("As the regulations point out, disability is determined based on an individualized assessment. There is no 'per se' disability. However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability.").

and medical diagnoses continue to play key roles in these individualized assessments.

The third prong of the ADA's definition, "being regarded as having such an impairment" recognizes the role stereotyping plays in excluding disabled people. This aspect of the ADA's disability definition is particularly important for non-traditionally disabled people, such as the fat people whose cases are examined in this study. Legislative history indicates that Congress intended this prong of the definition to address "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities [which] are often just as disabling as actual impairments . . . ."[82] The Equal Employment Opportunity Commission (EEOC) uses the example of physical disfigurement to explain perceived disability:

> The third part of the definition protects individuals who are regarded and treated as though they have a substantially limiting disability, even though they may not have such an impairment. For example, this provision would protect a severely disfigured qualified individual from being denied employment because an employer feared the "negative reactions" of others.[83]

In effect, a fat employee bringing a claim of perceived disability discrimination argues that the way others viewed and treated them based on their weight, rather than their weight in and of itself, made them disabled.

A final critical aspect of the disability definition for fat employees is the word "impairment." Although the ADA does not define impairment, various EEOC regulations do. For example, in the context of employment at the federal Institute of Museum and Library Services, a physical impairment is defined as "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine . . . ."[84] In addition, the Appendix to the EEOC regulations includes language distinguishing impairments and other physical characteristics: "The definition of the term 'impairment' does not include physical

82. 29 C.F.R. § 1630.2(*l*) app. (2012).

83. *The ADA: Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 1, 2002), https://www.eeoc.gov/eeoc/publications/adaqa1.cfm [https://perma.cc/KP53-GL23].

84. 45 C.F.R. § 1181.103(1).

characteristics such as eye color, hair color, left-handedness, or *height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder*."[85] Some courts have interpreted this guidance to mean that weights within the normal range can be an impairment if caused by a physiological disorder,[86] while others have held that to be an impairment, weight must be both outside the normal range and caused by a physiological disorder.[87]

In 2008, Congress passed the ADAAA for the explicit purpose of reversing the Supreme Court's narrow interpretation of who is considered disabled under the law.[88] Congress urged courts to shift their focus from whether an individual is disabled "enough" under the law to issues such as whether a discriminatory act had occurred or whether the accommodations an individual requested were reasonable.[89] The ADAAA eclipsed prior interpretations of the law and removed the substantial limitation requirement from the definition of a perceived disability.[90] Under the new statute, a person is categorized as disabled if they are treated adversely

85. 29 C.F.R. § 1630.2(h) app. (2012) (emphasis added) ("It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments.").

86. *See* Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997) (suggesting that plaintiffs' weights, which were not beyond a normal range, might be qualifying impairments if plaintiffs had "alleged that they suffer from a physiological disorder (which, for example, has produced excessive weight or lack of fitness despite their individual efforts)"); Francis v. City of Meriden, 129 F.3d 281, 286 (2nd Cir. 1997) (noting that simple (not morbid) obesity may be a qualifying impairment when it "relates to a physiological disorder"); Tudyman v. United Airlines, 608 F.Supp. 739, 746 (C.D. Cal. 1984) (distinguishing a situation in which a plaintiff bodybuilder's weight was in the normal range and exceeded an employer limit from a hypothetical case in "which the plaintiff's weight was involuntary—e.g., the result of a glandular problem").

87. *See* Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997); Francis v. City of Meridan, 129 F.3d 281, 286 (2nd Cir. 1997); EEOC v. Watkins Motor Lines, 463 F.3d 436, 443 (6th Cir. 2006); Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1111 (8th Cir. 2016).

88. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(a)(3)–(7); BACKLASH, *supra* note 4.

89. *Id.* § 2(b)(4)–(6).

90. *Id.* § 2(b)(3)–(6); *see also* 29 C.F.R. § 1630.2(*l*) app. (2012) ("Accordingly, the ADA Amendments Act broadened the application of the 'regarded as' prong of the definition of disability. 2008 Senate Statement of Managers at 9-10. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress's intent to allow individuals to establish coverage under the 'regarded as' prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment. Joint Hoyer-Sensenbrenner Statement at 3.").

because of an actual or perceived impairment.[91] They do not need to prove that the impairment substantially limits a major life activity.[92] At least one study has found that employees with a variety of disabilities have won a significantly higher proportion of cases since the passage of the ADAAA. In an examination of 237 ADA decisions, Stephen F. Befort found that before the ADAAA, district courts decided nearly 75 percent of cases in favor of employers on the basis that the employees were not disabled, while after the ADAAA, only 46 percent of district court cases had similar outcomes.[93] These results suggest that the ADAAA had its intended effect of applying the ADA's protections to a broader range of employees.

D. A Review of Case Law: Fat as Disability

Under the ADA, eighteen cases[94] alleging employment discrimination on the basis of fat have reached appellate courts (15 before the application of the ADAAA and three after).[95] These cases

91. *See* 29 C.F.R. § 1630.2(*l*) app. (2012) ("To illustrate how straightforward application of the 'regarded as' prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.").

92. *See* 29 C.F.R. § 1630.2(j) app. (2012) ("In any case involving coverage solely under the 'regarded as' prong of the definition of 'disability' (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is 'substantially limited' in any major life activity. See 2008 Senate Statement of Managers at 10.").

93. *See* Befort, *supra* note 14, at 2050–51.

94. Only ten of these decisions were published, and therefore, have precedential value.

95. *See* Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17 (1st Cir. 1993); Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997); Francis v. City of Meriden, 129 F.3d 281 (2d Cir. 1997); Johnson v. Baylor Univ., 129 F.3d 607, No. 97-50194, 1997 U.S. App. WL 680835 (5th Cir. Sept. 18, 1997); Watters v. Montgomery Cnty. Emergency Commc'n Dist., 129 F.3d 610, No. 97-20118, 1997 U.S. App. WL 681143 (5th Cir. Oct. 13, 1997); Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661 (3d Cir. 1999) (not included in the sample because depression was the first claimed impairment); Pepperman v. Montgomery Cnty. Bd. of Educ., 201 F.3d 436, No. 99-1366, 1999 U.S. App. WL 1082546 (4th Cir. Dec. 2, 1999); McKibben v. Hamilton Cnty., 215 F.3d 1327, No. 99-3360, 2000 U.S. App. WL 761879 (6th Cir. May 30, 2000); Wilson v. Cap. Transp. Corp., 234 F.3d 29, No. 99-31156, 2000 U.S. App. WL 1568200 (5th Cir. Sept. 15, 2000); EEOC v. Watkins Motor Lines, 463 F.3d 436 (6th Cir. 2007); Greenberg v. Bellsouth Telecomm., Inc., 498 F.3d 1258 (11th Cir. 2007); Bass v. Lockheed Martin Corp., 287 F. App'x 808, No. 08-10549, 2008 U.S. App. WL 2831988 (11th Cir. 2008); Cordero v. Fla. Dep't of Env't Prot., 300 F. App'x 679, No. 08-11213, 2008 U.S. App. WL 4902656 (11th Cir. Nov. 17, 2008); Spiegel v. Schulmann, 604 F.3d 72 (2d Cir. 2010); Wilkerson v. Shinseki, 606 F.3d 1256 (10th Cir. 2010); Lescoe v. Pa. Dep't of Corr.-SCI Frackville, 464 F. App'x 50, No. 11-2123,

have focused on two primary issues: First, is fat an impairment (i.e., a physiological disorder)? Second, does a person's weight act as a substantial limitation? Importantly, many of these cases illuminated the role of stereotypes in disabling fat workers. Ten plaintiffs brought only claims of perceived disability, in effect arguing that being fat was a disability only because others perceived them as unable to do their jobs.[96] The first case of employment discrimination based on fat as a disability to reach a federal court of appeals laid out a framework that was later employed in subsequent litigation. In this case, Bonnie Cook brought and won a claim of perceived disability, arguing that she was disabled because of the erroneous, stereotypical beliefs of her employer regarding her weight.[97] Cook, an institutional attendant with a "spotless" work record, was not rehired after taking a voluntary leave because the hospital, her former employer, believed that her morbid obesity "compromised her ability to evacuate patients in case of an emergency and put her at greater risk of developing serious ailments . . . ."[98] Although Cook did not claim that she, personally, was disabled by fat, she needed to prove that fat was an impairment that could form the basis of a claim of disability discrimination under the ADA.[99] Thus, Cook presented expert testimony that morbid obesity is a "physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular systems."[100] In addition, Cook demonstrated that morbid obesity is immutable; her expert witness testified that metabolic dysfunction continues even after weight loss.[101]

Other circuits interpreted *Cook* and the expert testimony presented in a variety of ways. The requirement that a fat litigant prove that their weight is (1) a physiological disorder itself or (2) caused by a physiological disorder shaped appellate decisions in the

2012 U.S. App. WL 505896 (3d Cir. Feb. 16, 2012); Morriss v. BNSF Ry. Co., 817 F.3d 1104 (8th Cir. 2016); Kelly v. Univ. of Pa. Health Sys., 708 F. App'x 60 (3d Cir. 2017).

96. *See Spiegel*, 604 F.3d 72; *Greenberg*, 498 F.3d 1258; *EEOC*, 463 F.3d 436; *Wilson*, No. 99-31156, 2000 WL 1568200; *Walton*, 168 F.3d 661; *Francis*, 129 F.3d 281; *Watters*, No. 97-20118, 1997 WL 681143; *Johnson*, No. 97-50194, 1997 WL 680835; *Andrews*, 104 F.3d 803; *Cook*, 10 F.3d 17.

97. *Cook*, 10 F.3d at 22.

98. *Id.* at 20–21.

99. *Id.* at 23.

100. *Id.*

101. *Id.* at 24.

Second, Sixth, and Eighth Circuits.[102] In 1997, the Second and Sixth Circuits decided cases in which firefighters and police officers, respectively, challenged weight limits.[103] In both cases, the plaintiffs argued that their employers perceived them as disabled because they failed to meet weight limits.[104] However, neither court affirmed that the plaintiffs were disabled. The Second Circuit concluded that the firefighters had not shown that their weights were related to a physiological condition and the Sixth Circuit found that the officers did not allege that their weights were out of the normal range or caused by a physiological condition. Notably, both the Second and Sixth Circuit rulings addressed obesity, but not morbid obesity.[105] Both courts were concerned that extending the ADA to fat employees contradicted the law's purpose.[106] In justifying these decisions, the courts distinguished fat litigants from the "truly disabled," arguing:

> The ADA "assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by

102. Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1112–13 (8th Cir. 2016) ("In sum, we conclude that for obesity, even morbid obesity, to be considered a physical impairment, it must result from an underlying physiological disorder or condition. This remains the standard even after enactment of the ADAAA, which did not affect the definition of physical impairment. Because Morriss failed to produce evidence that his obesity was the result of an underlying physiological disorder or condition, the district court properly concluded that Morriss did not have a physical impairment under the ADA."); Francis v. City of Meriden, 129 F.3d 281, 286 (2d Cir. 1997) ("Francis's claim fails because obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning of the statutes."); Andrews v. Ohio, 104 F.3d 803, 810 (6th Cir. 1997) ("Because a mere physical characteristic does not, without more, equal a physiological disorder, where an employee's failure to meet the employer's job criteria is based solely on the possession of such a physical characteristic, the employee does not sufficiently allege a cause of action under these statutes.").

103. *Francis*, 129 F.3d at 282; *Andrews*, 104 F.3d at 805–06.

104. *Francis*, 129 F.3d at 282; *Andrews*, 104 F.3d at 805–06.

105. *Francis*, 129 F.3d at 285 ("Francis only alleges that his employer disciplined him for failing to meet a general weight standard. He does not claim that his employer regarded him as suffering from a physiological weight-related disorder."); *Andrews*, 104 F.3d at 810 ("The officers herein do not allege that their weights or their cardiovascular fitness are beyond a normal range, nor have they alleged that they suffer from a physiological disorder (which, for example, has produced excessive weight or lack of fitness despite their individual efforts).").

106. *Francis*, 129 F.3d at 286; *Andrews*, 104 F.3d at 810 ("To hold otherwise would (to paraphrase the Fourth Circuit) distort the 'concept of an impairment [which] implies a characteristic that is not commonplace' and would thereby 'debase [the] high purpose [of] the statutory protections available to those truly handicapped.'").

> anyone whose disability was minor and whose relative severity of impairment was widely shared."[107]

In 2006, the Sixth Circuit extended the requirement of proving a physiological cause to morbid obesity.[108] More recently, the Eighth Circuit held that even after the ADAAA, employee-litigants must show that their morbid obesity is related to a physiological cause.[109]

A second group of appellate decisions focused not on whether fat was an impairment or a physiological condition, but instead on whether fat was a substantial limitation for plaintiffs. As in the first group of cases, fat employees in these cases also brought claims of perceived disability, as highlighted by the unpublished Fifth Circuit case *Johnson v. Baylor University*.[110] Johnson, a fat pilot, was terminated for failure to lose weight; Baylor University believed Johnson's weight had a negative impact on potential university donors flying in his plane.[111] As the court summarized, "Johnson's position put him in contact with many important university benefactors and therefore required a certain comeliness on Johnson's part that might not otherwise be required."[112] Johnson argued that his employer's perception of him as disabled was the basis for his termination.[113] The court concluded, however, that Johnson was not perceived as disabled, arguing that to prove this claim he would need to show that Baylor perceived him as being substantially limited in his ability to work in a broad range of jobs, not just jobs in which appearance must have a positive impact.[114] The Third, Sixth, and Eleventh Circuits have decided cases on similar grounds, finding that employees did not fit the disability definition because their impairments were not substantially limiting.[115]

---

107. *Francis*, 129 F.3d at 286 (quoting Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986)).

108. EEOC v. Watkins Motor Lines, 463 F.3d 436, 443 (6th Cir. 2007).

109. Morriss v. BNSF Ry. Co., 817 F.3d 1104, 1111 (8th Cir. 2016).

110. Johnson v. Baylor Univ., No. 97-50194, 1997 WL 680835 (5th Cir. Sept. 18, 1997).

111. *Id.* at *1.

112. *Id.*

113. *Id.* at *3.

114. *Id.* at *4 (citing 42 U.S.C. § 12102(2)(C)) ("The 'regarded as,' or 'perception,' prong of the 'disability' definition requires that a plaintiff provide evidence that the *employer thought* that other employers would not hire him because of his obesity.").

115. Lescoe v. Pa. Dep't of Corr.-SCI Frackville, No. 11-2123, 2012 WL 505896, at *2 (3d Cir. Feb. 16, 2012) (quoting Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 185 (2002)) ("Although this Court has not definitively reached a position regarding

Since the *Cook* ruling, only the Tenth and Eleventh Circuits have treated fat as a disability under the ADA in published decisions.[116] In an unpublished decision, the Third Circuit considered a plaintiff's weight to be a protected disability; however, the plaintiff lost her case because her employer had articulated a non-discriminatory reason for her termination.[117] Thus, only three circuits have precedential decisions considering fat a disability. Given these precedents, it is not surprising that most law review articles on this topic have concluded that fat is rarely considered a disability by courts.[118] Further, these articles seem to assume

---

whether obesity is a disability under the ADA that limits a major life activity, the District Court did not err in finding that Lescoe did not establish any major life activities that were adversely affected by his weight. He passed numerous medical and physical exams to obtain the position as well as a five-week training program. Moreover, Appellant 'must further show that the limitation on the major life activity is substantial.'"); McKibben v. Hamilton Cnty., No. 99-3360, 2000 WL 761879, at *5 (6th Cir. May 30, 2000) ("Although McKibben has not explicitly identified the 'regarded as' prong under which he proceeds, his arguments fall under the first prong. He insists that his alleged 'morbid obesity' constitutes an impairment and that the defendants regarded his weight as substantially limiting the major life activity of working. We disagree. Even if his alleged 'morbid obesity' qualifies as a physical or mental impairment that does not substantially limit the major life activity of working, McKibben has not offered any evidence that the defendants regarded his weight as such a substantial limitation."); Greenberg v. Bellsouth Telecomm., Inc., 498 F.3d 1258, 1264 (11th Cir. 2007) ("Greenberg has not shown that he has an impairment that substantially limits him in one or more major life activities. First, a person is 'substantially limited' in a 'major life activity' if he cannot care for himself; on this point, the evidence indicates that Greenberg bathed and dressed himself and could perform household chores.").

116. In so ruling, the Tenth Circuit explained:

> Here there are two potentially qualifying disabilities: obesity and diabetes. The question of whether the defendant is disabled was not decided by the district court. The district court stated that: 'For the sole purpose of determining whether summary judgment is appropriate in this case, this Court will . . . assume that Plaintiff has met his burden in proving that he is a disabled person.' . . . . On appeal, neither side has fully briefed this question nor is there a record on which to base a decision on whether Mr. Wilkerson is disabled. Further, we find other aspects of the analysis dispositive. Thus, like the district court, we will assume that Mr. Wilkerson has met this prong of the analysis.

Wilkerson v. Shinseki, 606 F.3d 1256, 1262–63 (10th Cir. 2010). *See also* Bass v. Lockheed Martin Corp., No. 08-10549, 2008 WL 2831988, at *3 (11th Cir. 2008) (holding that Bass did not show that the proffered reasons for his termination were pretextual).

117. Kelly v. Univ. of Pa. Health Sys., 708 F. App'x 60, 63–64 (3d Cir. Sept. 11, 2017).

118. *See, e.g.*, M. Neil Browne, Virginia Morrison, Barbara Keeley & Mark Gromko, *Obesity as a Protected Category: The Complexity of Personal Responsibility for Physical Attributes*, 14 MICH. ST. U. J. MED. & L. 1, 20 (2010) ("[O]bese plaintiffs alleging employment discrimination under the ADA or RHA have been met with fervent opposition."); Jeffrey Garcia, *Weight-Based Discrimination and the*

common-sense understandings of fat and disability, such as the notion that individuals are not at fault for being disabled but are at fault for being fat, rather than understandings put forth by disability and fat studies scholars.[119]

Americans with Disabilities Act: Is There an End in Sight?, 13 HOFSTRA LAB. L.J. 209, 228 (1995) ("In most cases, however, excess weight, without a related medical condition or other impairment, has not been considered a handicap."); Carol R. Buxton, *Obesity and the Americans with Disabilities Act*, 4 BARRY L. REV. 109, 127 (2003) ("Unless obesity is determined to be a disease, the Americans with Disabilities Act is not the place for the obese to seek shelter, with the exception of the perceived disability prong."); Patricia Hartnett, *Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers*, 24 RUTGERS L.J. 807, 821 (1993) ("Though the proposed regulations acknowledge that obese plaintiffs may argue that their status constitutes a disability protected by the ADA, the Act states that it is generally not to be construed as providing such protection."); Abigail Kozel, *Large and in Charge of Their Employment Discrimination Destiny: Whether Obese Americans Now Qualify as Disabled Under the Americans with Disability Act Amendments Act of 2008*, 31 HAMLINE J. PUB. L. & POL'Y 273, 327 (2009) ("Before 2009, essentially no claims for protection under an obesity-as-a-disability ADA protection stood a chance of success."); Elizabeth Kristen, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 81 (2002) ("[C]ourts have been generally unsympathetic to claims by fat plaintiffs under the [ADA] and the Rehabilitation Act."); Shannon Liu, *Obesity as an "Impairment" for Employment Discrimination Purposes Under the Americans with Disabilities Act Amendments Act of 2008*, 20 B.U. PUB. INT. L.J. 141, 166 (2010) ("[P]ast case law has not considered obese individuals as disabled or obesity as an impairment for ADA purposes."); Amie A. Thompson, *Obesity as a Disability Under the Americans with Disabilities Act Amendments Act and the Amendments' Effect on Obesity Claims Under the Pennsylvania Human Relations Act: Should Employers Anticipate a Big Change?*, 12 DUQ. BUS. L.J. 259, 271 (2010) ("[M]ost [courts] that have addressed the argument [that obesity is a handicap or disability] have found it unpersuasive."). *But see, e.g.*, Elizabeth E. Theran, *"Free to Be Arbitrary and . . . Capricious": Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL'Y 113 (2001) (arguing that more courts will likely find obesity a protected disability).

119. For example, as Browne, Morrison, Keeley and Gromko describe:

> The cause of obesity properly plays a major role in our response to the treatment of obese persons under the law. In the extreme, suppose obesity were akin to childhood cancer. As a community, we would see the obese as vulnerable, as humans in need of our legal and financial sympathy.
>
> On the other hand, suppose obesity is similar to the effects of choosing to walk into the direct path of a raging rhinoceros. While we might want to claim that no one could make such a choice, there is too much extant evidence that many, and quite seemingly sensible, people make choices that have almost certain destructive consequences.
>
> In this latter instance, wherein obesity is the result of voluntary choices that reasonable people should understand as having severe consequences, the legal reaction to obesity would be to hold people accountable for their actions. We would treat the obese as responsible adults who knowingly chose a lifestyle of which obesity was a highly probable result. Thus, the obese should face the consequences of their actions, just as should anyone whose choices we sanction.

Browne et al., *supra* note 118, at 39–40. For other examples, see also:

> Imagine a healthy, active man who is involved in a tragic car accident. The

II. Methods

A. Sample

To collect this data set, I conducted multiple searches of Westlaw (a database used by legal scholars to collect and examine legal documents, including judicial opinions) using the key terms "obesity," "obese," "morbid obesity," "fat," and "Americans with Disabilities Act." These searches produced a list of hundreds of cases, which I then refined by retaining only those brought under the ADA and excluding cases brought under state and other anti-discrimination statutes.[120] I further narrowed the sample by focusing on instances of employment discrimination, which is a common practice in ADA research and ensures that cases share a similar underlying structure and present similar claims.[121] Finally, I restricted the sample to cases in which obesity or morbid obesity was the primary claimed impairment, excluding cases in which fat was included as part of a list of four or more medical diagnoses.[122]

> accident leaves him paralyzed from the waist down and he can no longer walk. He remains as active as he possibly can, with the aid of his wheelchair. Medical technology, as advanced as it has become, cannot restore the use of his legs. Compare him to a five-foot six-inch woman who began gaining weight at the age of eighteen. By the time she is 22, her weight has swelled to 385 pounds. Most likely due to her large body size, she is constantly hungry and sometimes eats six meals a day—mostly at fast food restaurants.
>
> Unlike the man in the wheelchair, she can change her condition, and she did. Under a doctor's supervision, she changed her eating habits and began an exercise routine. In the span of fifteen months, she lost one hundred pounds. Though at times difficult and seemingly impossible, she worked towards her goal and was able to achieve it. Now ask that man in a wheelchair what he would be willing to do to walk again. One can only guess what his answer would be. Congress seemingly recognized the immutability of a disability and the need for a law to protect the truly disabled.

Buxton, *supra* note 118, at 113; Kristen, *supra* note 118, at 82 ("[U]sing disability antidiscrimination laws is problematic from an ideological perspective, since most fat people would argue that they are not disabled and are in fact perfectly capable of doing the same work as thin people.").

120. I also included cases brought under the Rehabilitation Act because this is the statute under which federal employees bring claims of disability employment discrimination. *See* Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797 (2018).

121. *See generally* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75 (studying outcomes in ADA employment discrimination cases); Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 75 (finding that plaintiffs bringing disability claims in court are more successful if their discrimination is charged with the EEOC).

122. For example, I excluded the Third Circuit decision in *Walton v. Mental Health Ass'n of Southeastern Pennsylvania* because Walton's primary impairment is depression. *See* Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661, 665 (3d Cir. 1999).

This process resulted in a data set of eighty-seven cases that occurred between 1993 and 2018. The data include every judicial opinion available on Westlaw in which fat was the primary claimed disability in an ADA employment lawsuit from 1990 to 2018. Unlike traditional legal research, the sample includes both commonly cited appellate cases and more obscure district court opinions. In addition, the sample includes unreported opinions (i.e., opinions that the ruling court regarded as having insufficient precedential value and thus are not available for citation as legal precedent).[123] The final sample includes cases from all twelve circuits, or legal regions. Each circuit is legally independent from the others, although the ADA, as a federal statute, applies equally in each region. An appellate court decision in a circuit sets the legal interpretation for lower district courts to follow, but the high courts in other circuits may interpret the ADA differently.

The sample has three notable limitations. First, relatively few acts of employment discrimination result in litigation[124] and the majority of cases settle out of court.[125] Therefore, this study of case law may not be representative of all disability discrimination in the workplace. Second, the sample does not include claims brought under state disability anti-discrimination statutes or claims seeking disability supplemental security income (SSI) benefits or workers' compensation. This choice was strategic. Although the extant research suggests that the ADA has not increased disabled people's employment rates[126] and that most people who bring cases under the ADA lose them,[127] scholars have found that the ADA holds symbolic meaning for many disabled people, even those who do not actively use the law.[128] Finally, not all states and circuits are

123. The lack of precedent does not affect the current analysis, which focuses not on legal precedent, but on how the ADA disability definition is applied to fat employee-litigants.

124. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L. & SOC'Y REV. 525, 545 (1980).

125. *See* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010).

126. *See* Maroto & Pettinicchio, *supra* note 22, at 373.

127. *See* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75, at 100.

128. *E.g.*, DAVID ENGEL & FRANK MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003) (demonstrating how the ADA plays a role in the positive identity formation of some disabled Americans). Based on in-depth interviews, Engel and Munger found that disability rights affirmed their respondents' belief in themselves as capable people and changed their thinking about their bodily difference. As a federal civil rights statute, the ADA may hold even more symbolic power in shaping disability identity.

equally represented in the sample, most likely due to specific state and municipal laws. The sample includes only one case from Michigan and no cases from California. The lack of cases from Michigan is likely the result of a state law prohibiting weight-based discrimination under which lawyers could bring a claim (Michigan is the only state with such a law).[129] Similarly, the absence of cases from California is likely the result of lawyers being able to bring claims under multiple municipal laws.[130] Municipalities in New York, Wisconsin, Illinois, and the District of Columbia also have weight-based protections that may have influenced the shape of this sample.[131]

B. Coding

I coded each legal opinion for the type of disability claim made by employees: actual disability, perceived disability, or both. I also coded for the year, court circuit (region), procedural stance, intersectional claims, expert witness testimony, and the primary legal issue. With respect to plaintiffs' demographic characteristics, I coded for gender, occupation, and weight (morbid or simple obesity). The dependent variable is whether the court considered the plaintiff disabled, which is a preliminary requirement to receiving anti-discrimination protection under the ADA. Because the research question examines whether fat is a disability under the ADA, the analysis focuses on the disability determination rather than whether the plaintiff won or lost the claim. To ensure inter-coder reliability, a second attorney reviewed and coded a random sample of 10 percent of the cases. There was full agreement between coders on all variables.

C. Variables

Many of the variables, such as procedural posture, year, and circuit, were explicitly listed in judicial opinions. Others required a further step to determine; for example, gender was identified through pronoun usage and first names. I coded opinions for weight by categorizing plaintiffs as either obese or morbidly obese, based

129. *See* Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.2101–2803 (West 1976). *See also Equality at Every Size*, NAT'L ASS'N TO ADVANCE FAT ACCEPTANCE, (September 18, 2020), https://naafa.org/eaes [https://perma.cc/6Z7A-ZLBD].

130. *See Equality at Every Size*, *supra* note 129 (describing both the San Francisco Administrative Code and the Santa Cruz Municipal Code).

131. *Id.* (discussing legal protections in Binghamton, NY; Madison, WI; Urbana, IL; and Washington, DC).

on the height/weight listed in the opinion or the courts' language use (e.g., describing a plaintiff as morbidly obese). Although fat studies scholars use the simple descriptor "fat," judicial opinions exclusively employed the medicalized terms "obese" and "morbidly obese." In three cases I could not determine whether an employee was considered obese or morbidly obese;[132] in the rest of the sample, sixty-four individuals were categorized as morbidly obese and twenty were categorized as obese. The variable "expert witness" identified cases in which the plaintiff presented testimony from a medical expert, physician, or nurse regarding their impairment or limitations. Using the coding system developed by Jonsson et. al., occupation was coded as either manual or non-manual and as belonging to one of ten meso-classes (classical professions, managers and officials, other professions, sales, clerical, craft, lower manual, service workers, primary [agriculture], or proprietors);[133] in three cases, I was unable to identify the plaintiff's occupation.[134]

Because prior research has found that employee-litigants who bring intersectional claims (more than one identity-based claim of discrimination) fare worse than those who bring single-focus claims,[135] I coded for whether the plaintiffs brought claims based on gender, racial, or age discrimination as well as disability. The independent variable for claim type (actual disability, perceived disability, or both) was easily determined based on court analysis in most cases, but I was unable to determine claim type in three cases.[136] In addition, I coded for the dispositive legal issue (the issue

132. *See* Lowe v. Am. Eurocopter, LLC., No. 1:10CV24–A–D, 2010 WL 5232523, at *6 (N.D. Miss. Dec. 16, 2010) ("Plaintiff claims that she is disabled due to her weight."); Marsh v. Sunoco, Inc., No. 06-CV-2856, 2006 WL 3589053, at *3 (E.D. Pa. Dec. 6, 2006) ("Plaintiff alleges that Sunoco regarded him as disabled on account of his weight and discriminated against him on that basis in violation of the ADA."); Watters v. Montgomery Cnty. Emergency Commc'n Dist., 129 F.3d 610, No. 97-20118, 1997 WL 681143, at *2 (5th Cir. Oct. 13, 1997) ("In her Second Amended Original Complaint, Watters claims that she was perceived 'to be disabled because of her weight' and that her weight was perceived as severely restricting her 'ability to perform various job related tasks.'").

133. Jan O. Jonsson, David B. Grusky, Matthew Di Carlo, Reinhard Pollak & Mary C. Brinton, *Microclass Mobility: Social Reproduction in Four Countries*, 114 AM. J. SOCIO. 977, 997 (2009).

134. *See* Smaw v. Va. Dep't of State Police, 862 F. Supp. 1469 (E.D. Va. 1994); Funk v. Purdue Emps. Fed. Credit Union, 334 F. Supp. 2d 1102 (N.D. Ind. 2004); Bird v. County of Greene, No. 06-1281, 2007 WL 626106 (W.D. Pa. Feb. 23, 2007).

135. *See* Rachel Kahn Best, Linda Hamilton Krieger, Lauren B. Edelman & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 L. & SOC'Y REV. 991, 994–95 (2011).

136. *See* Franz v. Kernan, 951 F. Supp. 159 (E.D. Mo. 1996); Redd v. Rubin, 34 F. Supp. 2d 1 (D.D.C. 1998); Willis v. San Antonio ISD, No. SA-16-CA-00887-ESC, 2017 WL 3470944 (W.D. Tex. Aug. 11, 2017).

on which the case was decided): whether the plaintiff's fat was a physiological condition, whether the plaintiff was substantially limited, whether discrimination occurred, or another issue. Finally, I created dummy variables to control for precedent; these variables categorized circuits as having positive appellate decisions (a ruling that fat was a disability), no appellate decisions, or negative appellate decisions (a ruling that fat was not a disability).

The dependent variable, whether the court ultimately considered the plaintiff disabled or non-disabled, was based on a close reading of the judicial opinions. In some of the cases coded as disabled (fourteen cases, or sixteen percent of the sample), the court did not directly rule that the specific employees were disabled, but rather "assumed" that these employees were disabled as defined by the law in order to analyze the remainder of their legal claims. Determining whether an employee-litigant is disabled as defined by the law is a threshold issue—to evaluate a claim of discrimination, the court must necessarily consider a person disabled, otherwise the law would simply not apply to the situation. Courts that assume employees are disabled to proceed with an evaluation of their claims of discrimination are following Congress' intention, as expressed in the ADAAA, that the determination of disability "not demand extensive analysis . . . ."[137] Thus, these cases were coded as disabled. In contrast, in cases that were coded as not disabled, the courts had explicitly ruled that the ADA did not apply to a specific plaintiff because they were not disabled.

D. Analysis

I conducted two logistic regression models because "this is the standard procedure for analyzing binary dependent variables."[138] The relatively small sample size placed constraints on the multivariate statistical analyses due to limited degrees of freedom and low statistical power. Because of these challenges, the inclusion of a large number of independent variables in the models would have reduced statistical efficiency and almost certainly ensured that no factors would have a significant effect. Therefore, I selected control variables particularly carefully.

---

137. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3554 § 2(b)(5) ("[T]o convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . . .").

138. *See* Richard York, *Kyoto Protocol Participation: A Demographic Explanation*, 24 POPULATION RSCH. & POL'Y REV. 513, 520 (2005).

III. Results

Table 1 includes a list of all cases in the sample as well as the year and region in which the final decision was published. The table also shows the types of claims made by employees (perceived/actual) and whether the court considered the employee disabled under the ADA. In addition, the percentage of employees considered disabled is listed next to the circuit name.

Table 1: All Cases by Circuit with Year, Claim Type, and Disability Decision

First Circuit (75%)		**Second Circuit (54%)**		**Third Circuit (60%)**	
Cook 1993, P	D	*Smallwood* 1995, A	D	*Motto* 1997, P	D
Nedder 1995, P A	D	*Francis* 1997, P	N	*Polesnak* 1997, P	D
Ridge 1999, P	N	*Hazeldine* 1997, A	D	*McCarron* 2001, A	D
Perez 2009, P A	D	*Butterfield* 1998, P A	D	*Goodman* 2005, P	N
		Furst 1999, P A	N	*Marsh* 2006, P	N
		Honey 2002, A	D	*Bird* 2007, A	D
		Connor 2003, P	D	*Ni* 2010, A	N
		Warner 2003, P	D	*Lescoe* 2011, P A	N
		Alfano 2006, P A	D	*Clem*^ 2017, P A	D
		Spiegel 2006, P	N	*Kelly*^ 2017, A	D
		Caruso 2008, P A	N		
		Frank 2010, P A	D		
		Sibilla^ 2012, P	N		
Fourth Circuit (20%)		**Fifth Circuit (55%)**		**Sixth Circuit (29%)**	
Smaw 1994, P A	N	*Texas Bus* 1996, P	D	*Andrews* 1997, P	N
Pepperman 1999, A	N	*Johnson* 1997, P	N	*Miller* 1997, A	D
Hill 2009, P A	N	*Watters* 1997, P	N	*McKibben* 2000, P	N
Michaels 2011, A	N	*Wilson* 2000, P	N	*Brantley* 2006, A	N
Bucklew 2012, A	D	*Whaley* 2002, P	N	*Cox* 2006, A	N
		Magnant 2006, A	D	*Watkins* 2006, P	N
		Melson 2009, A	D	*Hopkins* 2007, P R	D
		Tedford 2010, A	N		
		Lowe^ 2010, P A	D		
		Resources^ 2011, P	D		
		Willis^ 2017, -	D		
Seventh Circuit (45%)		**Eighth Circuit (50%)**		**Ninth Circuit (67%)**	
Bryant 1997, P	D	*Morrow* 1996, A	D	*Beem* 2011, A	D
Clemons 1997, P	N	*Franz* 1996, -	D	*Hayes* 2011, A	D
Bochenek 1998, P A	N	*Fredergill* 1997, P	N	*Valtierra*^ 2017, P A	N
Zarek 1998, P	N	*King* 2000, P A	N		
Funk 2004, P A	D	*Whittaker*^ 2014, P A	D		
Barrett 2009, A	D	*Morris*^ 2016, P A	N		
Revolinski 2011, P A	N				
Budzban 2013, A	D				
Luster-Malone 2013, A	N				
Richardson^ 2017, P	N				
Shell^ 2018, P	D				
Tenth Circuit (100%)		**Eleventh Circuit (33%)**		**D.C. Circuit (100%)**	
McDonald 1995, A	D	*Barnett* 1997, A	D	*Redd* 1998, -	D
Wilkerson 2010, A	D	*Murray* 1999, P	N	*Bunyon* 2002, A	D
Carpentier^ 2018, P	D	*Coleman* 2000, P A	N		
		West 2000, A	N		
		Cordero 2007, A	D		
		Dale 2007, P	N		
		Greenberg 2007, P A	N		
		Bass 2008, A	D		
		Cristia 2008, P A	N		
		Middleton 2008, P A	N		
		Powell^ 2014, P A	N		
		White^ 2017, P A	D		

NOTE: ^ indicates that the ADA Amendments Act of 2008 applied. D indicates that the court treated an employee as disabled and reviewed the rest of the claim. N indicates a determination that the employee was not disabled. P refers to a claim of perceived disability, A refers to a claim of actual disability, and R refers to having a record of disability. – indicates that the court opinion did not explain whether an employee-litigant brought a perceived or actual disability claim. The percentage of cases in which employees were deemed disabled is listed next to each circuit heading.

The opinions were split evenly, with employees considered disabled by the courts in 50.57 percent of the cases and explicitly deemed not disabled as defined by the ADA in 49.43 percent of the cases. The percentage of employees considered disabled varied dramatically across circuits, however, from 20 percent in the Fourth Circuit to 100 percent in the Tenth Circuit. In eight of the twelve regions or circuits, 50 percent or more of employees were considered disabled under the ADA; three of these circuits had published appellate court decisions ruling that an obese or morbidly obese employee was not disabled.[139]

There was also variation in disability determinations over time. In the first decade covered in the study, 1990 to 2000, thirty-three cases were brought, and 42 percent of these employee-litigants were considered disabled. From 2001 to 2008, twenty-four cases were brought, and 50 percent of employee-litigants were considered disabled. Finally, from 2009 to 2018, thirty cases were brought, and 60 percent of these employee-litigants were deemed disabled under the law. These fluctuations over time may reflect Supreme Court decisions and the 2008 passage of the ADAAA by Congress (the potential effects of these events are discussed in more detail below). Among cases decided after the amendments act went into effect on January 1, 2009, the rate of employees deemed disabled rose to 64 percent (nine out of fourteen cases).

139. *See* Francis v. City of Meridan, 129 F.3d 281 (2d Cir. 1997); Spiegel v. Schulmann, 604 F.3d 72 (2d Cir. 2010); Lescoe v. Pa. Dep't of Corr.-SCI Frackville, 464 F. App'x 50 (3d Cir. 2012); Morriss v. BNSF Ry. Co., 817 F.3d 1104 (8th Cir. 2016).

Table 2: Logistic Regression Results for Disability Determinations

	Model 1 Log-odds coefficient (Standard error)	*Model 2* Log-odds coefficient (Standard error)
Only Actual Claim	1.164 (0.571)*	
Only Perceived Claim	-0.127 (0.613)	
Positive Appellate Decision	0.437 (0.558)	
Period 1993–2000	-0.573 (0.591)	-0.790 (0.659)
Period 2001–2008	-0.278 (0.597)	-0.196 (0.711)
Period 2009–2018 (reference)		
Any Appellate Decision		0.408 (0.596)
Physiological Cause		-3.013 (0.726)*
Substantial Limitation		-2.284 (0.603)*
Constant	-0.217 (0.499)	1.517 (0.585)
N	84	87
Pseudo R^2	0.08	0.263

***p < .05**

The regression models revealed three statistically significant variables: bringing only an actual (as opposed to a perceived) disability claim, a court focus on physiological condition, and a court focus on substantial limitation. Some seemingly important variables, including gender, occupation, bringing intersectional claims, and providing expert witness testimony, were not statistically significant in the models. However, given the small sample size, these results do not necessarily indicate that these factors are not relevant.

In Model 1, bringing only a claim of actual disability increased the likelihood that a plaintiff would be considered disabled by the courts. Negative appellate decisions did not have a statistically significant effect. Claim type (perceived disability, actual disability, or both) was statistically significant in many iterations of Model 1, suggesting that courts have struggled to understand the social model of disability, in which disability can and does arise when individuals act on stereotypical beliefs.

Model 2 confirmed that both aspects of the ADA's disability definition (1—possession of physical or mental impairment; 2—substantial limitation of major life activities) pose significant hurdles for fat plaintiffs. The requirement in certain districts that plaintiffs present expert testimony that their weight either (1) is a physiological condition or disorder or (2) is caused by such a condition or disorder hindered plaintiffs' claims that their weight is

a physical impairment. When this type of medicalization was the primary legal issue, as it was in twenty cases, plaintiffs were significantly less likely to be deemed disabled by a court. To my knowledge, this requirement is unique to fat plaintiffs (although there are no parallel studies in which researchers analyzed all or most cases for other specific categories of disability) and likely reflects the pervasive influence of negative stereotypes that portray fat as a character flaw rather than a medically neutral impairment.

A comparison to prior research[140] and legal scholarship[141] shows that with respect to the second aspect of the ADA's definition of disability (substantial limitation of major life activities), fat plaintiffs fared similarly to other potentially disabled people. When courts focused on this aspect of the disability definition (relative to the impairment aspect), fat litigants were significantly less likely to be considered disabled under the ADA. However, this finding may be less important in the future because the ADAAA specifically sought to lower the bar for proving a substantial limitation. Of the twenty-six cases in the sample that focused on substantial limitations, only six occurred after the passage of the ADAAA. Because the ADAAA did not, however, change the definition of impairment, determining whether fat is a physiological condition may remain an obstacle for fat plaintiffs.

IV. Discussion

Since the passage of the ADA in 1990, courts have struggled to determine whether obesity is an ADA-protected disability. The finding that 50 percent of employee-litigants were considered disabled and thus legally protected, while 50 percent were not, highlights the lack of a legal consensus on this issue. This result may also represent a failure to equitably apply the ADA to similarly situated employees, although the pattern makes sense in the context of the ADA's mandate that courts individually assess a plaintiff's condition. Further, the results align with prior empirical studies of the ADA, which have found that prior to the ADAAA, most people bringing a claim of disability employment discrimination lost because courts did not consider them

140. *See* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75; Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 75; Befort, *supra* note 14.

141. *See* BACKLASH, *supra* note 4; O'BRIEN, *supra* note 18. *See, e.g.*, BAGENSTOS, *supra* note 9 (examining the definition of "disabled" through the creation of disability law).

disabled.[142] While the experiences of fat employees who bring ADA claims is typical of ADA employee claimants overall—courts have struggled to determine the disability status of employees with a variety of impairments—the requirement that an individual prove an underlying cause for their impairment appears to be unique to fat plaintiffs. This requirement, along with judicial reluctance to accept fat people's claims of perceived disability, suggests that traditional, individualized, and medicalized understandings of disability continue to hold sway in the courts. Within these traditional perspectives, disability is understood as arising from an individual's body rather than social structures; this understanding allows space for anti-fat stereotypes to influence legal judgments.

Employee-litigants who argued that they were actually disabled by their fat, and not just stereotyped as disabled, were more likely to be considered disabled by the courts and thus covered by the ADA. Their weight may have substantially limited their abilities more than the weights of employees bringing only perceived disability claims. However, weight was not a statistically significant predictor of disability outcomes, and the content analysis revealed no relationship between weight and the likelihood of being considered disabled. Alternatively, courts may have been more comfortable with actual disability claims because these claims reflect common-sense ideas of disability (i.e., that a disability is primarily the result of an individual's physical deficit). Claims of perceived disability, in contrast, reflect the social model of disability (espoused by disability rights activists, scholars, and parts of the ADA itself) in which the major limitations of disability arise because of societal discrimination, prejudice, and stereotyping. The limitations resulting from the physical impairment itself are less important in the social model. This understanding of disability has not yet overtaken more traditional perspectives in mainstream society. Fat studies argues for a strong version of the social model, asserting that nothing is inherently wrong with fat. Instead, fat becomes a limitation when others perceive it to be a character flaw, a moral failing, or a sign of an individual's weakness.

These perceptions of fatness likely underlie some of the courts' requirements to prove that a person's weight is a physiological condition or is caused by a physiological condition. The ADA and Rehabilitation Act have no requirement that employees must prove

142. *See* Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, *supra* note 75; Colker, *Winning and Losing Under the Americans with Disabilities Act*, *supra* note 75; Befort, *supra* note 14.

the cause of their impairment.[143] The EEOC regulations defining impairment state that a physical impairment is any physiological disorder (not something caused by a physiological disorder) that affects a major bodily function.[144] Thus, this requirement seems to reflect judicial discomfort with the notion that fat individuals are disabled. Further, the notion that fat individuals contributed to their weight is not the only belief underlying this discomfort, as shown by the treatment of other conditions that can be caused by an individual's conduct. Recent EEOC regulations include lists of expected ADA-protected disabilities (conditions that are usually, but not always, disabilities under the ADA) that are not traditionally thought of as disabilities and that may be caused by an individual's conduct, such as diabetes, cancer, skin burns, and HIV.[145] Indeed, many recognized disabilities may be caused in some part by an individual's conduct. Sky-diving accidents can lead to mobility impairments, poor judgment can lead to amputations, Deaf people sometimes choose not to have curative surgery. Therefore, the requirement that an individual must prove the cause of their fatness may have less to do with actual causation and more to do with proving their deservingness.

As Anna Kirkland argued in her analysis of logics of personhood, courts rely on different rationales to determine who is worthy and deserving of anti-discrimination protection.[146] Historically, disability has been used as a medicalized rationale to differentiate the undeserving and deserving poor. In the focal cases, courts turned to this medicalized tradition to determine whether fat employees are worthy of anti-discrimination protection. Specifically, some courts attempted to make this determination via the requirement of cause. Is fatness a trait that deserves protection? Or is it a trait that society should discourage by not providing legal protection? This shift toward the use of disability as a medicalized rationale is ironic, given the disability rights movement's calls to

143. As the First Circuit has explained:

> The Rehabilitation Act contains no language suggesting that its protection is linked to how an individual became impaired, or whether an individual contributed to his or her impairment. On the contrary, the Act indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS, diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like.

Cook v. R.I., Dep't of Mental Health, Retardation, and Hosps., 10 F.3d 17, 24 (1st Cir. 1993).

144. 29 C.F.R. § 1630.2(h)(1) (2012).

145. 29 C.F.R. § 1630.2(j)(3)(iii) (2012).

146. *See* FAT RIGHTS, *supra* note 56.

move away from medicalized understandings of disability. More importantly, the view that fat people are not disabled hurts claims for social inclusion of traditionally disabled people by solidifying negative stereotypes about the "truly disabled."

Many of the courts that focused on identifying physiological causes stated in their decisions that it was the court's role to distinguish the "truly disabled" from fat people, whose limitations were characterized as relatively minor.[147] This understanding of disability contradicts the work of disability rights activists and scholars, as well as those involved in fat studies, in two ways. First, this perspective emphasizes a view of disabled people as radically different from non-disabled people because of the severity of their impairments, and it attempts to locate disability in the body, instead of in society. However, survey and interview data suggest that most people with disabilities identify stereotypes as the primary barrier they encounter, not limitations resulting from their impairment.[148] Many disability studies scholars argue that disabled people do not want a cure for their impairments, they want access and equal treatment,[149] which suggests that the impairments of people considered traditionally disabled are not as severe as commonly thought. Second, this understanding of disability ignores a key insight of the social model of disability. What counts as a disability will necessarily change over time because disability arises from the interaction of the social world and an impairment.[150] Therefore, definitions of disability must consider the way cultural values give rise to disability. At one moment in history, a society may view an impairment as a valuable difference while at another, it may view the same impairment as a tragedy or a defect. Under the social model of disability, an impairment becomes a disability

147. *See, e.g.*, Coleman v. Ga. Power Co., 81 F.Supp.2d 1365, 1370 (N.D. Ga., 2000) (observing the court's conclusion that Coleman's obesity was not a disability was "necessary in order to avoid a dilution of the ADA" which "was meant to protect people who are truly disabled").

148. *See, e.g.*, Harlan Hahn, *Paternalism and Public Policy*, 20 SOC'Y 36 (1983); Micheal L. Shier, John R. Graham & Marion E. Jones, *Barriers to Employment as Experienced by Disabled People: A Qualitative Analysis in Calgary and Regina, Canada*, 24 DISABILITY & SOC'Y 63 (2009); Dana Wilson-Kovacs, Michelle K. Ryan, S. Alexander Haslam & Anna Rabinovich, *'Just Because You Can Get a Wheelchair in the Building Doesn't Necessarily Mean that You Can Still Participate': Barriers to the Career Advancement of Disabled Professionals*, 23 DISABILITY & SOC'Y 705 (2008).

149. *See* ELI CLARE, BRILLIANT IMPERFECTION: GRAPPLING WITH CURE 184 (2017) ("Cure promises us so much, but it will never give us justice."); Garland-Thomson, *supra* note 16.

150. Garland-Thomson, *supra* note 16 at 591 (arguing that disability is derived from social incompatibility rather than an individual's shortcoming). *See generally* Shakespeare, *supra* note 26.

when society creates policies and structures that isolate, discriminate against, and culturally devalue the people who possess that physical characteristic.

Conclusion

In conclusion, fat fits within a strong social model of disability, a model that truly understands that disability arises from cultural reactions to a devalued body, not the body itself. The ADA reflects a strong social model through the claim of perceived disability. As disability and fat rights advocates bring claims under the ADA, they should carefully consider whether to emphasize the physical limitations of their clients or the stereotypical understandings that create disabling limitations. Courts currently reward those who conform to traditional notions of disability as arising from the limited body, however, this representation of disability may not benefit the disability rights movement as a whole. Instead, it may further medicalize disability. Future research should examine fat-as-a-disability determinations at the state level, within other federal statutes, and internationally. Although many states follow the ADA interpretations in analyzing state law claims, New York, which has found fat to be a covered disability in the past, is a notable exception.[151] Further, the Canadian Transport Agency recently affirmed in an adjudication that fat could give rise to disability based on particular social structures and contexts.[152] Future research could identify more jurisdictions in which fat has been treated as a disability. Policy makers and disability rights activists should consider fat studies scholars' assertions that there is nothing wrong with the fat body. This perspective aligns with research on disabled people's lived experiences, which has shown that stereotypes are the primary barrier people report. Courts must move away from the current medicalized understanding of disability and recognize that, for both fat and disabled people, stereotypes give rise to disablement.

---

151. *See* Frank v. Lawrence Union Free Sch. Dist., 688 F. Supp. 2d 160, 169 (E.D.N.Y. 2010) (comparing *State Div. of Human Rights on Complaint of McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 219 (N.Y. 1985), in which "clinically diagnosed" obesity was found to constitute a disability under the New York State Human Rights Law, with *Delta Air Lines v. New York State Div. of Human Rights*, 91 N.Y.2d 5, 72–73 (N.Y. 1997), in which plaintiffs had to establish they were "medically incapable of meeting Delta's weight requirements").

152. Estate of Eric Norman v. Air Canada, Decision No. 6-AT-A-2008, CAN. TRANSP. AGENCY (Jan. 10, 2008), https://www.otc-cta.gc.ca/eng/ruling/6-at-a-2008 [https://perma.cc/8V7R-CNDT].

A Call to Congress: A Constitutional Indian Child Welfare Act is *Not* a Flawless Indian Child Welfare Act

Maci Burke†

In 1978, Congress enacted the Indian Child Welfare Act (ICWA),[1] to regulate the removal and placement of Indian children in foster care, the termination of parental rights, preadoptive placement, and adoptive placement.[2] The ICWA was enacted "to address rising concerns over 'abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.'"[3] The ICWA refers to Native Americans as "Indians," thus, I will also refer to Native Americans as "Indians" to employ consistent language with the ICWA. The ICWA's stated purpose is to:

> protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .[4]

Unfortunately, Congress' goals of protecting Indian children while also maintaining Indian culture sometimes conflict.[5] Most

†. J.D. Candidate 2021, University of Minnesota Law School; B.A. English & Political Science 2018, University of Nebraska-Lincoln. I thank Professor Carol Chomsky for her guidance and feedback to make this Note the strongest possible. I am also thankful to the *Minnesota Journal of Law and Inequality* staff for all their edits and contributions. Finally, I thank my family and friends, specifically my mother, Trisha Burke, and my "brother," Dennis Metcalf, for their unwavering love and support throughout this process.

1. Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963.

2. 25 U.S.C. § 1903(1).

3. Brackeen v. Bernhardt, 937 F.3d 406, 416 (5th Cir. 2019) (quoting Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989)).

4. 25 U.S.C. § 1902.

5. *See* Adoptive Couple v. Baby Girl, 570 U.S. 637, 638 (2013) (holding, in part, that the ICWA does not protect parents from involuntary termination of parental rights for Indian children where the parent never had custody of the child); Miss.

recently, the ICWA has been challenged on Fourteenth Amendment equal protection grounds in *Brackeen v. Bernhardt*.[6] *Brackeen* is the first case challenging the ICWA on equal protection grounds to be decided in a federal Circuit Court of Appeals.[7] In *Brackeen*, the Fifth Circuit grappled with the ICWA's definitional boundaries, particularly whether the definition of an "Indian child" constitutes a race-based or political classification.[8] Race-based classifications are subject to strict scrutiny review,[9] while political classifications are subject to rational basis review.[10] Because surviving strict scrutiny review is nearly impossible,[11] a holding that the ICWA's "Indian child" definition[12] is race-based, and subject to strict scrutiny, would likely result in a court overturning the ICWA in its entirety.[13]

While the U.S. District Court for the Northern District of Texas agreed with the plaintiffs in *Brackeen*, holding the ICWA unconstitutional, the Fifth Circuit disagreed, holding that the "Indian child" classification is political and constitutional.[14] However, the Fifth Circuit has ordered the case be reheard *en*

Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 51–53 (1989) (holding that children were domiciled on an Indian reservation despite a parent choosing to give birth off the reservation to facilitate their adoption by non-Indian parents, and that they would therefore still be covered under the ICWA umbrella); A.D. by Carter v. Washburn, 2017 WL 1019685, at *6–8 (2017) (dismissing equal protection challenges to the ICWA's active efforts provision, adoptive placement preferences, and burdens of proof for Indian child removal and termination of parental rights for lack of standing).

6. *See Brackeen*, 937 F.3d at 416.

7. *See* Kurtis A. Kemper, Annotation, *Validity, Construction, and Application of Placement Preferences of State and Federal Indian Child Welfare Acts*, 63 A.L.R.6th 429 (cumulative supp.) (originally published in 2011).

8. *Brackeen*, 937 F.3d at 426–29.

9. *Id.* at 425 (citing Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995)).

10. *Id.* (citing Morton v. Mancari, 417 U.S. 535, 555 (1974)).

11. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 664 (5th Cir. 2014) (discussing the stringency of strict scrutiny); *see also* Sarah Krakoff, *Inextricably Political: Race, Membership and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1055 n.57 (2012) (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLE AND POLICIES 671 (3d ed. 2006)) ("Strict scrutiny is virtually always fatal to the challenged law."); Douglas Linder, *Levels of Scrutiny Under the Equal Protection Clause*, UNIV. MO.-KANSAS CITY: EXPLORING CONSTITUTIONAL CONFLICTS, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm [https://perma.cc/6J4N-DUSR] ("Usually, strict scrutiny will result in invalidation of the challenged classification . . . .").

12. 25 U.S.C. § 1903(4).

13. *See Brackeen*, 937 F.3d at 426 (citing Morton v. Mancari, 417 U.S. 535, 552 (1974)) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the U.S. Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

14. *Id.* at 427–28.

banc.[15] The question of whether the ICWA's definition of "Indian child" is a race-based or political classification will remain contested until the U.S. Supreme Court rules on the question, resolving how the balance will be struck between protecting Indian culture and enforcing the best interests of Indian children.

Part I of this Note discusses the background of the ICWA, including the history and policies behind the ICWA's adoption, judicial policies that resulted from the ICWA, and the ICWA U.S. Supreme Court cases. Part II examines the Fifth Circuit holding in *Brackeen v. Bernhardt* that the "Indian child" definition is a political, rather than race-based, classification, and argues that the Fifth Circuit correctly held that the "Indian child" definition is a political classification. Part III, however, notes the ICWA's "Indian child" definition, although constitutional as a political classification under the Equal Protection Clause, is flawed, requiring Congress to revisit the ICWA's "Indian child" definition.

I. Background on the Indian Child Welfare Act

The ICWA was implemented in response to a national trend of Indian children being removed from their homes at disproportional rates.[16]

A. The Federal Government's Historical Treatment of Indian Children and Culture

> *But we all survived, though at times the Indianness was almost beaten out of us.*[17]

Before Congress implemented the ICWA to protect Indian children and culture, the federal government worked to "[k]ill the Indian, save the man" by replacing Indian traditional ways of life with American culture through forcefully removing and placing Indian children in boarding schools beginning in 1869.[18] All in all,

15. Brackeen v. Bernhardt, No. 18-11479, 2019 WL 5847349 at *1 (5th Cir. Nov. 7, 2019) (per curiam). Oral arguments were heard in January, 2020. Julia Dreyer, *Fifth Circuit Hears Oral Argument on ICWA Case*, NAT'L COUNCIL OF URB. INDIAN HEALTH (Jan. 23, 2020), https://www.ncuih.org/policy_blog?article_id=345 [https://perma.cc/BKF3-7DQK].

16. S. REP. NO. 95-597, at 1 (1977).

17. Jon Reyhner, *American Indian Boarding Schools: What Went Wrong? What is Going Right?*, 57 J. AM. INDIAN EDUC. 58, 59 (2018).

18. *See History and Culture: Boarding Schools*, NATIVE PARTNERSHIP,

the government operated as many as 100 boarding schools.[19] Minnesota, for example, had sixteen boarding schools.[20] The federal government left many Indian families no choice but to forfeit guardianship of their children for months and years on end.[21] Many argue that the boarding schools were tools of ethnic cleansing.[22] At these boarding schools, Indian children were stripped of their Indian identities, forced to cut their hair, made to surrender their traditional clothing, forbidden from speaking their languages, told to forget their traditional religions, and taught about White American history.[23] Indian children "were taught that their cultures were inferior."[24] Additionally, the children were often physically and sexually abused.[25] And rather than returning the Indian children home to their families and tribes, "[i]t became standard policy . . . to adopt them out to white families, all with an eye toward white acculturation."[26]

After decades of such cruelty, Congress took some compensatory steps by enacting the Indian Reorganization Act (IRA) of 1934. The purpose of the Act was to "conserve and develop Indian lands and resources; to extend to Indians the right to form

---

http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools [https://perma.cc/PH9L-AS9E] (quoting Col. Richard Henry Pratt, founder of the Carlisle Indian School); Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008), https://www.npr.org/templates/story/story.php?storyId=16516865 [https://perma.cc/H6FZ-3NY5] (further quoting Pratt, who stated that "[a] great general has said that the only good Indian is a dead one . . . [.] In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.").

19. *See* Bear, *supra* note 18.

20. *See* Denise K. Lajimodiere, *The Sad Legacy of American Indian Boarding Schools in Minnesota and the U.S.*, MINNPOST (June 14, 2016), https://www.minnpost.com/mnopedia/2016/06/sad-legacy-american-indian-boarding-schools-minnesota-and-us/ [https://perma.cc/XA8W-YBS4].

21. *See Boarding Schools*, NAT'L MUSEUM OF THE AM. INDIAN, https://americanindian.si.edu/education/codetalkers/html/chapter3.html [https://perma.cc/4GFM-A5JG].

22. *See, e.g*, Reyhner, *supra* note 17, at 72.

23. *See id.*; *Boarding Schools*, *supra* note 21.

24. *Boarding Schools*, *supra* note 21.

25. Dan Gunderson, *'I've Never Told Anyone': Stories of Life in Indian Boarding Schools*, MINN. PUB. RADIO (Oct. 3, 2019), https://www.mprnews.org/story/2019/10/03/stories-of-life-in-indian-boarding-schools [https://perma.cc/Q3GT-QRBJ] ("She started whispering about being sexually abused and she said, 'I don't know why I'm telling you. I have not told anybody.' Almost every survivor in the book experienced sexual abuse, or they witnessed it.").

26. *See* Lia Kvatum, *Who Should Get to Adopt Native American Children?*, WASH. POST MAG. (Apr. 3, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/04/03/feature/who-should-get-to-adopt-native-american-children/ [https://perma.cc/CG48-AQMY] (quoting Matthew Fletcher, a Tribal Law expert and an Anishinaabe Indian).

business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; [and] to provide for vocational education for Indians . . . ."[27] The IRA, however, still required Indians to replace their traditional ways of life by adopting White American culture.[28] In fact, Indian historians have argued that "[t]he IRA was the last great drive to assimilate the American Indian. It was also a program to colonize the tribes."[29]

B. Indian Child Welfare Act Statutory Provisions

In 1978, after over a century of Indian children being removed from their families and culture, Congress responded by enacting the Indian Child Welfare Act.[30] In enacting the ICWA, Congress recognized that a disproportionate number of Indian children were "separated from their natural parents through the actions of nontribal government agencies or private individuals or private agencies . . . ."[31] In particular, Congress found that in 1974 "approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions."[32] Thus, the ICWA was enacted "to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society."[33]

i. Definitions

The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]"[34] The ICWA does not define tribal membership eligibility requirements. Further,

27. Indian Reorganization Act, ch. 576, 48 Stat. 984, 984 (1934) (codified at 25 U.S.C. § 5101).

28. *See 1934: President Franklin Roosevelt Signs the Indian Reorganization Act*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/timeline/452.html [https://perma.cc/JKF2-JBD5] ("[I]n general the new tribal constitutions and bylaws were standardized and largely followed the Anglo-American system of organizing people. Traditional Indians of almost every tribe strongly objected to this method of organizing and criticized the IRA as simply another means of imposing white institutions on the tribes.").

29. *See* Tim Giago, *Good or Bad? Indian Reorganization Act Turns 75*, HUFFPOST: BLOG (Sept. 13, 2009), https://www.huffpost.com/entry/good-or-bad-indian-reorga_b_284940 [https://perma.cc/7VB7-SKGY] (quoting Rupert Costo, Cahuilla historian, publisher, and journalist).

30. 25 U.S.C. §§ 1901–1963.

31. S. REP. NO. 95-597, at 1 (1977).

32. H.R. REP. NO. 95-1386, at 9 (1978).

33. *Id.* at 23.

34. 25 U.S.C. § 1903(4).

"Indian tribe" is defined as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . [.]"[35]

ii. Jurisdiction over ICWA Proceedings

The ICWA imposes jurisdictional limits on "Indian child" custody proceedings. Indian tribes have sole jurisdiction regarding child custody proceedings over Indian children that fall within the definition of "Indian child" that are "domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."[36] A state court lacks jurisdiction regarding foster care placement or termination of parental rights "in the absence of good cause to the contrary . . . ."[37] If, however, a state court begins a legal proceeding regarding a foster care placement or termination of parental rights of an "Indian child," then that Indian child's tribe has the right to intervene in the proceeding at any point.[38] Thus, to avoid tribal intervention in an involuntary state court proceeding regarding foster care placement or termination of parental rights, courts are required to notify the Indian child's family and tribe.[39]

iii. Placement Preference

The ICWA contains strict placement preferences for Indian families. In the event parents aim to put their child up for adoption, the parents' tribe may intervene and override their expressed wishes under the ICWA.[40] An "Indian child" up for adoption, "in the absence of good cause to the contrary," shall be placed with: "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[41] Likewise, strict placement preferences are implemented for "Indian child" foster care and preadoptive placements.[42]

---

35. § 1903(8).
36. § 1911(a).
37. § 1911(b).
38. *Id.*
39. § 1912(a).
40. § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).
41. § 1915(a).
42. These preferences are as follows:

C. Tribal Enrollment Requirements

Tribal enrollment requirements can broaden the number of "Indian children" and the scope of the ICWA. The U.S. Supreme Court has "recognized that Indian tribes have a right to define tribal membership as each tribe sees fit."[43] Historically, tribes have embraced eligibility mechanisms such as "[l]anguage, residence, cultural affiliation, recognition by a community, degree of 'blood,' genealogical lines of descent, and self-identification . . . ."[44] Blood quantum is now the most generally used eligibility mechanism to determine tribal membership.[45] For example, the Minnesota Chippewa Tribe requires a one-quarter blood quantum for tribal membership eligibility.[46] Conversely, the Cherokee Nation does not rely on blood quantum. The tribe requires that the individuals must be either original enrollees listed on the Dawes Commission Rolls or descendants of said enrollees.[47] Although many tribal eligibility requirements are more stringent than the Cherokee Nation's, tribes will likely amend their tribal eligibility requirements in the near future, making their eligibility requirements more lenient as blood quanta continue to dilute due to intermarriage.[48] Thus, as time persists and tribes amend their tribal eligibility requirements, more and more Indian children will fall subject to the ICWA's "Indian child" definition.

(i) a member of the Indian child's extended family;
(ii) a foster home licensed, approved, or specified by the Indian child's tribe;
(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

§ 1915(b).

43. Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 1 (2012).

44. NAT'L RSCH. COUNCIL, CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 105 (Gary D. Sandefur, Ronald R. Rindfuss & Barney Cohen eds., 1996).

45. *Id.* at 106 ("Individuals enrolled in federally recognized tribes also receive a Certificate of Degree of Indian Blood . . . from the Bureau of Indian Affairs, specifying a certain degree of Indian blood, i.e., a blood quantum.").

46. MINN. CHIPPEWA TRIBE ENROLLMENT ORDINANCE § IV(A)(3) (2003).

47. CHEROKEE NATION CONST. art. IV, § 1; *see also Dawes Rolls*, NAT'L ARCHIVES (Oct. 4, 2016), https://www.archives.gov/research/native-americans/dawes/tutorial/intro.html [https://perma.cc/8WD7-TDBJ] (Dawes Rolls "are the lists of individuals who were accepted as eligible for tribal membership in the 'Five Civilized Tribes': Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles.").

48. NAT'L RSCH. COUNCIL, *supra* note 44 ("[I]t has been projected that within the next century, the proportion of those with a one-half or more blood quantum will decline to only 8 percent of the American Indian population, whereas the proportion with less than one-fourth blood quantum will increase to around 60 percent.").

D. The Existing Indian Family Exception

Although the ICWA's definition of "Indian child" has not been amended since its enactment in 1978, states have attempted to limit its scope through the judicially-created "existing Indian family" exception.[49] This exception originated in a 1982 Kansas Supreme Court case, In re *Baby Boy L.*, where the court held that the ICWA did not apply to the proceeding because the ICWA's purpose is to protect an existing Indian family, and that Baby Boy L. was not part of an existing Indian family because his Indian father never had custody of him.[50] After In re *Baby Boy L.*, several more states adopted the "existing Indian family" exception,[51] but Kansas has since overturned its precedent.[52] In one case in particular, In re *Bridget R.*, a California Court applied its own version of the existing family exception, holding that the ICWA was unconstitutional if its application was based solely on racial classification, but that it could be upheld if its application was based on race and other factors.[53] Thus, the ICWA was constitutional if its application was based not only on a child's race but also whether the biological parents maintain a "significant social, cultural, or political relationship with the Tribe."[54] However, In re *Bridget R.* has been superseded and is no longer good law in California.[55]

The "existing Indian family exception" has been subject to much disagreement among the states. The exception is still valid law in Alabama, Indiana, Kentucky, Louisiana, Missouri, and Tennessee.[56] In 2016, the Department of Interior expressly rejected the exception.[57] The existence and use of the exception illustrates widespread attempts to limit the ICWA's application, while its

---

49. *See ICWA Guide Online: Topic 1. Application*, NAT'L INDIAN L. LIBR., https://narf.org/nill/documents/icwa/faq/application.html [https://perma.cc/KF9U-6QYC].

50. *In re* Baby Boy L., 643 P.2d 168, 174–75 (Kan. 1982).

51. *See* Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996); *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988); *In re* Morgan, 1997 Tenn. App. LEXIS 818 (Tenn. Ct. App. 1997); Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995); C.E.H. v. L.M.W., 837 S.W.2d 947 (Mo. Ct. App. 1992); S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990).

52. *See In re* A.J.S., 204 P.3d 543 (Kan. 2009) (abandoning the court's application of the Existing Indian Family Exception due to the conflict between the exception and the ICWA language).

53. *In re* Bridget R., 41 Cal. App. 4th 1483, 1530 (Cal. Ct. App. 1996).

54. *Id.* at 1491.

55. *In re* Vincent M., 150 Cal. App. 4th 1247, 1251 (Cal. Ct. App. 2007) (abandoning the court's application of the Existing Indian Family Exception).

56. *See supra* note 51.

57. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 114, 38782 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23) (stating that the existing Indian family exception "has no basis in ICWA's text or purpose").

rejection in other states shows such limitations remain controversial. *Brackeen v. Bernhardt*, however, presents the U.S. Supreme Court with the opportunity to resolve both the growing definitional issues and the validity of the existing Indian family exception.[58]

E. United States Supreme Court ICWA Cases

The U.S. Supreme Court has heard two cases involving the ICWA.[59] These cases, *Miss. Band of Choctaw Indians v. Holyfield* (*Holyfield*) and *Adoptive Couple v. Baby Girl* (*Adoptive Couple*), were decided over two decades apart. The cases illustrate the Court's changing views of the ICWA's applicable scope.[60]

In *Holyfield*, an unwed mother and father, both enrolled members of the Mississippi Band of Choctaw Indians, conceived twins.[61] However, the couple purposefully gave birth over two hundred miles away from the reservation and voluntarily placed the twins up for adoption.[62] The twins were adopted by a non-Indian couple and soon after, the Mississippi Band of Choctaw Indians tribe intervened, moving to vacate the adoption decree on grounds that under the ICWA, tribal courts shall have exclusive jurisdiction regarding Indian children.[63] The biological parents argued that the ICWA did not apply because the children were born off of the reservation, and thus were never domiciled on the reservation as the Act requires.[64] Domicile is not defined in the ICWA, and therefore the Court considered the domicile definition, ultimately holding that the twins were domiciled on the reservation, and that the Tribe had jurisdiction.[65] Here, the ICWA overrode the parents' wishes to put their children up for adoption. The Court's broad interpretation of domicile strengthened tribal rights under the ICWA by allotting tribal jurisdiction over a larger range of "Indian children."

---

58. *See* Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019).

59. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

60. *Holyfield*, 490 U.S. at 51–53 (broadening the ICWA's scope by adopting an expansive definition of "domicile," giving Indian tribes jurisdiction over more Indian child proceedings); *Adoptive Couple*, 570 U.S. at 649–51 (narrowing the ICWA application of termination of parental rights by holding, in part, that the ICWA does not protect parents from involuntary termination of parental rights for Indian children where the parent never had custody of the child).

61. *Holyfield*, 490 U.S. at 32.

62. *Id.* at 37, 51.

63. *Id.* at 38.

64. *Id.* at 39.

65. *Id.* at 53.

Conversely, in *Adoptive Couple v. Baby Girl*, the Court restricted some tribal powers under the ICWA. In *Adoptive Couple*, a baby girl who was 1.2% Cherokee was classified as an "Indian child" under the ICWA because she met the Cherokee tribe's eligibility requirement.[66] The child's biological mother and father were unwed, and the biological father was a member of the Cherokee Nation.[67] The biological father, even though capable, provided no financial assistance to the biological mother or child.[68] The biological father relinquished his parental rights via text message before the child's birth.[69] The biological mother voluntarily put the child up for adoption, and the child was adopted by a non-Indian couple.[70] The biological father objected to the adoption on grounds that ICWA §§ 1912(d)[71] and (f)[72] bar the termination of his parental rights.[73] The Court rejected the biological father's arguments because § 1912(f) applies to situations of "continued custody," but here, the biological father never had custody of the child.[74] Additionally, § 1912(d) "applies only in cases where an Indian family's 'breakup' would be precipitated by the termination of the parent's rights."[75] Here, the biological mother and father were already separated; therefore, the breakup had "long since occurred."[76]

Unlike in *Holyfield*, in *Adoptive Couple*, the Court limited the ICWA's applicability by applying a narrow reading of the Act's provisions. While *Adoptive Couple* does not overturn *Holyfield*, it indicates that the Court may have changed its perception of the ICWA's scope. As more constitutional challenges to the ICWA arise,

66. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013).

67. *Id.* at 643–44.

68. *Id.* at 637.

69. *Id.* at 643.

70. *Id.* at 643–44.

71. 25 U.S.C. § 1912(d) (1978) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.").

72. § 1912(f) ("No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.").

73. *Adoptive Couple*, 570 U.S. at 647.

74. *Id.* at 648.

75. *Id.* at 651.

76. *Id.* at 652.

such as that in *Brackeen v. Bernhardt*, how the Court interprets the ICWA's scope may determine the Act's constitutionality.

II. The Fifth Circuit Court of Appeals' Holding in *Brackeen v. Bernhardt* Should Be Upheld upon the Rehearing *en Banc*

This section does two things. First, it outlines the District Court's and the Fifth Circuit's holdings as well as explains race-based and political classifications. Second, it argues that the Fifth Circuit should uphold its decision upon its rehearing of *Brackeen en banc* because statutory text, legislative history, and prior U.S. Supreme Court case law support the Fifth Circuit's original decision holding the definition of "Indian child" is a political classification and therefore constitutional.

The *Brackeen* plaintiffs consisted of three families seeking adoption of Indian children who were denied because the children fell under the ICWA umbrella.[77] The three couples struggling to adopt Indian children brought a Fifth Amendment equal protection challenge to the ICWA, arguing that the ICWA's definition of "Indian child" is a race-based classification and therefore unconstitutional.[78] Underlying the plaintiffs' argument in *Brackeen* is the idea that the definition of "Indian child" is overly broad and does not effectively work in the best interests of the child or of Indian culture as Congress originally intended. The District Court held that the ICWA's definition of an "Indian child" is race-based, and therefore, subject to strict scrutiny.[79] The Fifth Circuit reversed the District Court's decision, holding that the ICWA's "Indian child" definition was a political classification, and therefore, subject to rational basis review.[80] This Note argues that the Fifth Circuit's original holding should be affirmed when it is reconsidered *en banc*.

A. Political Classifications v. Race-Based Classifications

Challenges under equal protection analysis are considered under strict scrutiny, intermediate scrutiny, or rational basis review, depending on the nature of the classification.[81] Race-based

77. Brackeen v. Bernhardt, 937 F.3d 406, 418–20 (5th Cir. 2019).

78. *Id.* at 425–26.

79. Brackeen v. Zinke, 338 F. Supp. 3d 514, 534 (N.D. Tex. 2018).

80. *Bernhardt*, 937 F.3d at 429.

81. Kristapor Vartanian, *Equal Protection*, 9 GEO. J. GENDER & L. 495, 498 (2008). Some argue there is also a "fourth level of scrutiny, 'rational basis with bite.'" *Id.* at 531 (citation omitted).

classifications are subject to strict scrutiny review,[82] while political classifications are subject to rational basis review.[83] In *Brackeen*, the District Court and the Fifth Circuit classified the ICWA's definition of "Indian child" differently. The Northern District of Texas District Court based its race-based classification holding on the premise that the ICWA's definition of "Indian child" is a "blanket exemption for Indians,"[84] which mirrors *Rice v. Cayetano*, not *Morton v. Mancari*. In *Rice*, the Court overturned a Hawaiian voting statute which restricted voter eligibility to only "native Hawaiians" and those with Hawaiian ancestry for positions in a state agency.[85] The *Rice* Court held that the voting preference "used ancestry as a racial definition and for a racial purpose."[86] In *Mancari*, a Bureau of Indian Affairs (BIA) Indian hiring preference which "applies 'only to *members* of "federally recognized" tribes,'" and "operates to exclude many individuals who are racially to be classified as 'Indians,'"[87] was upheld as a political classification.[88] The U.S. Supreme Court limited the *Mancari* holding, recognizing that applying its decision more broadly would raise the "obviously more difficult question that would be presented by a blanket exemption for Indians."[89] Because an Indian child may be considered an "Indian child" under the ICWA's definition due to tribal eligibility,[90] rather than actual tribal affiliation,[91] the District Court found that the ICWA's definition of "Indian child" "uses ancestry as a proxy for race"[92] and is, therefore, a race-based classification, like *Rice*.

The Fifth Circuit reversed the District Court, holding that the ICWA's definition of "Indian child" is a political classification, subject to rational basis review.[93] The Fifth Circuit employed four main arguments. First, Congress maintains broad power to regulate Indians and Indian tribes both on and off the reservation.[94]

---

82. *Zinke*, 338 F. Supp. 3d at 534.

83. *Bernhardt*, 937 F.3d at 429.

84. *Zinke*, 338 F. Supp. 3d at 533 (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)).

85. *Id.* at 532.

86. *Id.* (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

87. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

88. *Id.* (quoting *Mancari*, 417 U.S. at 555).

89. *Id.* at 533 (quoting *Mancari*, 417 U.S. at 554).

90. 25 U.S.C. § 1903(4).

91. *Mancari*, 417 U.S. 535, 538 (1974) (stating the BIA hiring preference that was based on tribal affiliation).

92. *Zinke*, 388 F. Supp. 3d at 534.

93. Brackeen v. Bernhardt, 937 F.3d 406, 429 (5th Cir. 2019).

94. *Id.* at 428.

Second, the "eligibility" qualifier in the ICWA's definition of "Indian child" does not subject all Indian children to the ICWA's jurisdiction; therefore, the "Indian child" definition is not based solely on tribal ancestry or race.[95] Because the ICWA reserves Indian tribes the right to determine tribal eligibility requirements, tribes have the freedom to determine to whom they offer membership. Thus, tribes may elect to admit members without Indian blood, or tribes may choose to not admit certain Indian persons because they do not fall within the tribal membership requirements. Third, the ICWA, unlike the voting preference law in *Rice*, is a federal law congressionally enacted to protect Indian children and tribes.[96] Fourth, the state election preferences in *Rice* were state affairs, while ICWA adoption proceedings are affairs involving states, tribes, and Congress.[97] Due to these considerations, the Fifth Circuit overturned the District Court decision and held that the ICWA's definition of "Indian child" is a political classification subject to rational basis review.[98]

The courts' different decisions classifying the ICWA's definition of "Indian child" are crucial because whether the definition is classified as race-based or political is dispositive. Under the Equal Protection Clause, political classifications are subject to rational basis review, while race-based classifications are subject to a higher standard of review, strict scrutiny review.[99] Application of strict scrutiny review requires courts to determine whether the classification at issue is narrowly tailored to serve a compelling governmental interest.[100] Surviving strict scrutiny review is nearly

95. *Id.* at 429.

96. *Id.*

97. *Id.*

98. *Id.*

99. Loving v. Virginia, 388 U.S. 1, 11 (1966) (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Korematsu v. United States, 323 U.S. 214, 216 (1944)) (repudiating "'[d]istinguishing between citizens solely because of their ancestry,' as being 'odious to a free people . . .'" and emphasizing that, therefore, "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'"). *See also Bernhardt*, 937 F.3d. at 425 (explaining that while challenges to a state statute on equal protection grounds are brought under the Fourteenth Amendment, challenges to a federal statute on equal protection grounds are brought under the Fifth Amendment Due Process Clause, in which the Equal Protection Clause is implicitly included).

100. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (referencing Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (concurring opinion)) ("Our action today makes explicit [that] . . . Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

impossible.[101] Conversely, a statute is considered a political classification if it is based on political characteristics and legitimate non-racial goals, such as protecting tribal sovereignty.[102] Political classifications are subject to rational basis review.[103] Rational basis review only requires a rational justification for the statutes be provided—it is a low bar.[104] Thus, a holding that the ICWA's "Indian child" definition is a racial classification will likely find the ICWA, in its entirety, unconstitutional, whereas its classification as politically-based will preserve the Act's constitutionality.[105]

B. The ICWA's "Indian Child" Definition Is a Political Classification

Despite the ICWA's faults, this Article concludes that the "Indian child" definition is a political rather than a racial classification.[106] The Fifth Circuit correctly examined U.S. Supreme Court precedent and the history of government special treatment of Indian affairs in *Brackeen v. Bernhardt*.[107] The ICWA's statutory text, legislative history, and U.S. Supreme Court precedent support the Fifth Circuit's initial holding that the ICWA's "Indian child" definition is a political classification.

i. Statutory Text

The ICWA's statutory text advances the argument that the ICWA's definition of "Indian child" is a political, not racial, classification. The ICWA states "that Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources"[108] and that the ICWA's purpose is to "protect the best interests of Indian children and to promote the stability

101. *See* discussion *supra* note 11.

102. Morton v. Mancari, 417 U.S. 535, 554 (1974) (classifying a BIA hiring preference as politically-based because the "preference is reasonably and directly related to a legitimate, nonracially based goal").

103. *Bernhardt*, 937 F.3d at 425.

104. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (applying rational basis review and upholding a statute because defendant must only show that the statute is rational).

105. *Bernhardt*, 937 F.3d at 426 (quoting *Mancari*, 417 U.S. at 552) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

106. *See id.* at 429.

107. *Id.* at 426–29.

108. 25 U.S.C. § 1901(2).

and security of Indian tribes and families . . . ."[109] These statements establish Congress' broad interest and assertion of duty to Indian culture and welfare that motivated the ICWA's enactment. It is these non-racial goals that were the driving force leading to the enactment of the ICWA.

The operative provisions of the statute reflect the same non-racial purpose. First, the ICWA favors placement with extended family and tribal members so placements "reflect the unique values of Indian culture . . . ."[110] Family is a core element in Indian cultures.[111] In many Indian communities, the responsibilities of educating and caring for youth is shared by parents, extended family, and the entire community.[112] Indian homes are often multigenerational, housing great-grandparents, grandparents, parents, and children.[113] Retaining children within their extended family and tribe is of utmost importance to Indian cultures.[114] Accordingly, the ICWA's placement preferences help Congress achieve its goal to protect and promote stability in Indian culture.

Second, the ICWA's definition of "Indian child" allots tribes, rather than Congress, discretion to identify parameters for defining an "Indian child."[115] The definition states that a child will be considered an "Indian child" if the child meets tribal eligibility requirements.[116] The ICWA, however, does not define tribal eligibility requirements. Each tribe maintains discretion to determine its own tribal membership requisites. "Among tribal nations in the U.S., many different enrollment requirements

109. *Id.* § 1902.

110. Allison Krause Elder, *"Indian" as a Political Classification: Reading the Tribe Back into the Indian Child Welfare Act*, 13 NW. J.L. & SOC. POL'Y 417, 421 (2018) (quoting 25 U.S.C. § 1902).

111. *See* Paul Boyer, *Young and Old Alike: Children and the Elderly Are a Priority in Native American Cultures*, 3 J. AM. INDIAN HIGHER EDUC. 4 (1992), https://tribalcollegejournal.org/young-alike-children-elderly-priority-native-american-cultures/ [https://perma.cc/97DE-TWQY] (describing some typical family dynamics in Indian cultures).

112. *Id.*

113. *Living Conditions*, NATIVE AM. AID, http://www.nativepartnership.org/site/PageServer?pagename=naa_livingconditions [https://perma.cc/L6T4-7DUE].

114. H.R. REP. NO. 95-1386, at 9–10 (1978).

115. The ICWA does not set tribal membership requirements, so part (b) of the "Indian child" definition may be as expansive as tribes desire. *See* 25 U.S.C. § 1903(4).

116. *Id.*

exist,"[117] including blood quantum,[118] lineal descendancy,[119] and residency.[120] As discussed by the Fifth Circuit in *Brackeen*, tribes may restrict or extend membership to any spectrum of children: children without any Indian blood may be extended tribal membership and children with one-quarter Indian blood quantum may be denied membership.[121] The ICWA's definition of "Indian child" is not a hardline racial or ancestral limitation and is, therefore, not a racial classification. Additionally, offering Indian tribes a voice in defining their people recognizes tribes' sovereignty, promoting the stability of Indian tribes.

Third, Congress secured Indian tribes the right to intervene and reverse a mutually settled adoption of an "Indian child," further protecting tribal sovereignty and cultural connection. [122] To ensure the right of intervention, the ICWA mandates that tribes be notified upon custody hearings involving "Indian children."[123]

Congress's political intentions for the ICWA were clear—remedying years of separation of Indian children from their culture, which tarnished Indian culture and sovereignty. Each of the three aforementioned ICWA provisions set Congress's goals for the ICWA and Indian culture in motion. Therefore, Congress not only "talked

---

117. Jessica Bardill, *Tribal Sovereignty and Enrollment Determinations*, AM. INDIAN & ALASKA NATIVE GENETICS RES. CTR., http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm [https://web.archive.org/web/20200129090559/http://genetics.ncai.org/tribal-sovereignty-and-enrollment-determinations.cfm].

118. CROW CREEK SIOUX TRIBE CONST. art. II, § 2 ("Any child, of one-fourth (1/4) or more Indian blood born to any member of the Tribe who at the birth of such child resided on the reservation shall be entitled to membership.").

119. CHEROKEE NATION CONST. art. IV, § 1 ("All citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls . . . ."); Bardill, *supra* note 117 (describing the Cherokee Nation's tribal membership requirement).

120. Bardill, *supra* note 117 ("A residency rule requires that the tribal member live within, maintain a residence, or have an allotment among the tribal lands . . . . The Cedarville Rancheria, Modoc County, Cedarville, California appears to be the only U.S. tribe that still maintains a residency requirement, in combination with a lineal descent requirement, for members.").

121. Brackeen v. Bernhardt, 937 F.3d 406, 428 (5th Cir. 2019).

122. 25 U.S.C. § 1914 ("Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.").

123. 25 U.S.C. § 1912(a) ("[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . . .").

the talk" but also "walked the walk" by designing the ICWA to reflect their political rather than racial purposes.

ii. Legislative History

The ICWA's legislative history bolsters the argument that the ICWA's "Indian child" definition is a political classification. Prior to the ICWA's passage, Congress discussed and documented the importance of protecting Indian children and the Indian community,[124] noting that Indian children are placed in foster care or in adoptive homes five times more frequently than non-Indian children, sometimes due to ignorance of Indian familial cultural values and social norms.[125] A House Report discusses the circumstances that affect Indians, which inspired legislative action through the ICWA.[126] Similarly, a Senate Hearing reviewing the implementation of the ICWA echoes the House Report statements, confirming the purpose of the ICWA is to protect Indian children as well as ongoing traditions and cultures of the tribes and families.[127] As aforementioned in the discussion of the statutory text, Congress delegated Indian tribes the right to define what constitutes an "Indian child," and therefore, the statute does not racially classify all children that maintain Indian blood or Indian ancestry as "Indian children." Thus, Senate and House discussion regarding the protection of "Indian children" is not race-based, but political because the legislative materials, like the ICWA's statutory text, discuss "Indian children" with the definitional understanding that the ICWA applies only to those children that fit within the ICWA's definition of "Indian child."

Further, the House Report documents that the Committee of Interior and Insular Affairs and Department of Justice considered the potential Fifth Amendment Equal Protection issue regarding the ICWA's definition of "Indian child" before the ICWA was enacted. Then Assistant Attorney General Patricia M. Wald raised a series of potential concerns regarding the ICWA to the House Committee of Interior and Insular Affairs, including whether the "Indian child" definition was a racial classification and, therefore, subject to strict scrutiny. However, Wald concluded that:

---

124. H.R. REP. NO. 95-1386, at 9–10 (1978).

125. *Id.*

126. *Id.* at 8–10.

127. *Oversight on the Implementation of the Indian Child Welfare Act of 1978: Hearing Before the S. Comm. on Indian Affairs*, 98th Cong. 1–2 (1984) (statements by Senator Mark Andrews, Chairman, S. Comm. on Indian Affairs and John W. Fritz, Deputy Assistant Secretary for Indian Affairs, Bureau of Indian Affairs).

> [t]his problem has been, for the most part, eliminated in the subcommittee draft, which defines 'Indian child' as 'any unmarried person who is under age 18 and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.'[128]

It is telling that the legislators and the Department of Justice considered but dismissed the potential Fifth Amendment equal protection issue because it shows they did not think it was a valid concern. The Fifth Circuit should follow Wald's lead, finding the ICWA's definition of "Indian child" as a political, not racial, classification.

iii. Prior Case Law that Supports the Fifth Circuit's Decision

Beyond *Brackeen v. Bernhardt*, no other cases have decided whether the ICWA's definition of "Indian child" is a racial classification.[129] The U.S. Supreme Court has, however, addressed issues regarding racial classifications, specifically in *Morton v. Mancari* and *Rice v. Cayetano*, which support finding that the definition of "Indian child" is politically-based.[130] As aforementioned, *Mancari* and *Rice* present two different holdings, and *Mancari* controls in *Brackeen*.

In *Morton v. Mancari*, plaintiffs alleged that employment preferences for qualified Indians in the BIA, as provided in the IRA of 1934, constituted race-based classifications and discrimination, violating the Fifth Amendment's Due Process Clause.[131] The Court disagreed with the plaintiffs, holding the BIA Indian hiring preference was a political classification, subject to rational basis review.[132] To justify the holding, the Court examined the legislative history behind the hiring preferences, determining the purpose was to "give Indians a greater participation in their own self-

128. H.R. REP. NO. 95-1386, at 39 (1978).

129. *But see* A.D. by Carter v. Washburn, 2017 WL 1019685, *1–2, 11 (2017) ("[A]dult Plaintiffs and those who have undertaken to speak for the child Plaintiffs attempt to challenge parts of the [ICWA] as unconstitutional racial discrimination . . . . [A]ll of the pending motions to dismiss the Amended Complaint will be granted, and the Amended Complaint will be dismissed for lack of jurisdiction and lack of standing.").

130. *See* Rice v. Cayetano, 528 U.S. 495 (2000); Morton v. Mancari, 417 U.S. 535 (1974).

131. *Mancari*, 417 U.S. at 537.

132. *Id.* at 554–55.

government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[133] Thus, the Court found that the tribal sovereignty goal behind the BIA hiring preference aligns with political classifications.[134] Like the *Mancari* BIA hiring preference, the ICWA's "Indian child" definition implicates tribal sovereignty. Without culturally connected Indian youth, tribes will cease to exist, undermining the existence of tribal sovereignty. The ICWA's purpose of preserving Indian culture should, therefore, align with political classifications.

Additionally, like the ICWA's "Indian child" definition, the *Mancari* hiring preference was enacted as part of a federal act, the IRA of 1934.[135] A court holding that either the BIA Indian hiring preference or the ICWA's "Indian child" definition are racial classifications would completely overturn both Acts, not solely challenged provisions.[136] Even further, as the courts in *Mancari* and *Brackeen* state, overturning the ICWA as a race-based classification would call into question an entire Title of the U.S. Code, and damage the federal government's relations with Indians as it calls into question Indian welfare altogether.[137]

Congress enacted the IRA and the ICWA due to the "belief that institutional changes were required."[138] Both Acts were a response to U.S. governmental behavior that exploited and destroyed Indian interests.[139] Like the *Mancari* BIA hiring preference, which was established with the goal to improve Indian welfare through increased sovereignty, the ICWA was established to preserve Indian culture through future generations of children. Thus, the ICWA's definition of "Indian child" and the BIA hiring preference were enacted for reasons beyond race.[140]

The *Mancari* Court noted that the BIA Indian hiring preference statute is a "provision applying to a very specific

133. *Id.* at 541–42.

134. *Id.* at 555.

135. *Id.* at 542.

136. Brackeen v. Bernhardt, 937 F.3d 406, 426 (5th Cir. 2019) (quoting *Mancari*, 417 U.S. at 552).

137. *Id.*

138. *Mancari*, 417 U.S. at 553.

139. *Id.* at 541 (stating that the purpose of the BIA Indian hiring preference was to instill greater Indian participation in their own government); *see also* H.R. REP. NO. 95-1386 (1978), at 8 (stating the purpose of the ICWA).

140. *Mancari*, 417 U.S. at 554 ("Here, the preference is reasonably and directly related to a legitimate, nonracially based goal.").

situation"—protecting tribal sovereignty.[141] Although the ICWA does not explicitly justify its enactment in relation to Indian tribal government sustainability, protecting and preserving Indian culture through Indian children is effectively related to tribal sovereignty. Indian children are future tribal leaders. Without Indian children connected to their Indian tribes, tribal sovereignty is temporary. So, the ICWA's goal to preserve and cultivate Indian culture is political.

Unlike the *Mancari* BIA Indian hiring preference, which is limited to Indians applying for BIA positions, the ICWA's "Indian child" definition is more encompassing.[142] This broader definition, however, should not be determinative for two reasons. First, the BIA Indian hiring preference and the ICWA only apply to federally recognized tribes.[143] There are only 574 federally recognized tribes.[144] The exact number of non-federally recognized Indian tribes is unknown, but the number is substantial.[145] In fact, in 2012, the U.S. Government Accountability Office (GAO) reported the existence of around 400 non-federally recognized tribes.[146] Accordingly, the ICWA, like *Mancari*, "operates to exclude many individuals who are racially to be classified as 'Indians.'"[147] Second, the Fifth Circuit notes in *Brackeen* that the "Indian child" definition is not based solely on race or tribal ancestry because the definition refrains from defining tribal membership requirements.[148] Instead, tribes have the right to form their own membership laws.[149] Thus, federally recognized tribes may extend membership to any child

141. *Id.* at 550.

142. *See* 25 U.S.C. § 1903(4) (defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

143. *Mancari*, 417 U.S. at 553 n.24 (stating the BIA Indian hiring preference applies "only to members of 'federally recognized' tribes"); *see also* 25 U.S.C. § 1903(8) (defining "Indian tribe").

144. *See Tribal Nations & the United States: An Introduction*, NAT'L CONG. OF AM. INDIANS, http://www.ncai.org/about-tribes [https://perma.cc/JEB4-W8QW].

145. Christopher M. Drake, *From Invisibility to Liminality: The Imposition of Identity Among Non-federally Recognized Tribes Within the Federal Acknowledgement Process* 15 (Jan. 5, 2018) (unpublished M.A. thesis, City University of New York) (on file with CUNY Academic Works) ("The exact number of non-federally recognized tribes is not known. According to Russell Thornton's analysis of the 1990 census, only 60% of those identifying as American Indian belonged to a federally recognized tribe.").

146. *Id.* at 15.

147. *Mancari*, 417 U.S. at 555 n.24.

148. Brackeen v. Bernhardt, 937 F.3d 406, 428 (5th Cir. 2019); *see also* 25 U.S.C. § 1903(4).

149. *See* discussion *supra* note 115; 25 U.S.C. § 1903(4).

they wish, whether or not the child has Indian blood.[150] In sum, the ICWA's "Indian child" definition should be considered a political classification because it aligns with *Mancari*.

In *Rice v. Cayetano*, plaintiffs claimed that a Hawaii statute, which only allowed "Hawaiians"[151] the right to vote for state trustees of the Office of Hawaiian Affairs (OHA), violated the Fifteenth Amendment and the Fourteenth Amendment's Equal Protection Clause.[152] The Court held the Hawaii election preferences violated the Fifteenth Amendment. Further, the Court refrained from acknowledging a Fourteenth Amendment Equal Protection violation, yet effectively applied a Fourteenth Amendment analysis, insisting that "[t]he State's electoral restriction enacts a race-based voting qualification."[153] The *Rice* holding sets a new limitation on political classifications that implicate race: If political classifications are employed in democratic electoral processes, the classification, even if presenting a previously non-suspect classification, will be considered a suspect race-based classification and violate the Fifteenth Amendment.[154] Therefore, *Rice* complicates political classifications, forcing analysis of the activity in which the racial group is engaged and raising uncertainty about the future protection that racial groups, like Indians, will be afforded through political classifications.

The *Rice* holding does not control *Brackeen* for two reasons. First, the definitions of "Native Hawaiian" and "Hawaiian" in Hawaii's voting preference, unlike the ICWA's definition of "Indian child," immediately excluded all individuals who did not fit into the ancestral classification from voting.[155] As discussed in further detail above in the "Statutory Text" section,[156] the ICWA's definition of "Indian child" operates much differently, allotting each Indian tribe discretion in their membership eligibility requirements.[157] The ICWA's definition invites Indian tribes to evaluate who they view

150. *Brackeen*, 937 F.3d at 428.

151. Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 3 MICH. L. REV. 491, 497 (2000) (defining "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778").

152. Rice v. Cayetano, 528 U.S. 495, 522 (2000).

153. *Id.* at 517.

154. *Id.* at 495–96.

155. *Id.* at 514–17 ("Ancestry can be a proxy for race . . . . Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name.").

156. *See supra* section II.B.i.

157. 25 U.S.C. § 1903(4).

as an "Indian child."[158] Second, the Court dismissed the State's argument that the Hawaii voting preference should receive the same political classification that the Indian hiring preference in *Mancari* was assigned. The Court acknowledged that the Court and Congress have a long history of recognizing special status and preferences for Indians, and the Court displays hesitancy to apply that special status—particularly the political classification—to Hawaiians and Native Hawaiians.[159] Unlike *Rice*, *Brackeen* addresses an issue related to Indians,[160] and the Court has historically allotted special preferences for Indians. Thus, *Mancari*, not *Rice*, should control *Brackeen*, and the Court should hold that the ICWA's definition of "Indian child" is a political classification subject to rational basis review.

In conclusion, the Fifth Circuit's original holding in *Brackeen v. Bernhardt* was correct. The ICWA's statutory text, legislative history, and precedent all support the finding that the ICWA's definition of "Indian child" is a political classification. Upon rehearing the case, the Fifth Circuit should affirm its prior holding, classifying the ICWA's "Indian child" definition as political.

III. A Call to Congress: The ICWA's "Indian Child" Definition Deserves to Be Revisited

The ICWA's definition of "Indian child" has not been amended since enactment in 1978.[161] Congress should revisit the ICWA to improve the effectiveness of the statute. Protecting Indian culture should remain at the forefront of discussion, but everyone—Representatives, Senators, social workers, and Indians—should contribute to reach an improved ICWA. The ICWA must better serve the interests of Indian children. There must be a preferable solution that offers: 1) continued preservation of Indian culture; 2)

158. *Id.*

159. *Rice*, 528 U.S. at 518–19 (describing Congress' long history and ability to afford Indians special treatment under the law).

160. Native Hawaiians are not considered "Indians" in the eyes of the federal government, which does not maintain any government-to-government relationship with Native Hawaiians as it would with a federally-recognized tribe. *See* Michael Grass, *As Feds Hold Hearings, Native Hawaiians Press Sovereignty Claims*, ROUTE FIFTY (Aug. 12, 2014), https://www.route-fifty.com/management/2014/08/hawaii-sovereignty-department-interior-hearings/91247/ [https://perma.cc/X4KH-SEEE]; Press Release, U.S. Dep't of the Interior, Interior Considers Procedures to Reestablish a Government-to-Government Relationship with the Native Hawaiian Community (Apr. 26, 2016), https://www.doi.gov/news/pressreleases/interior-considers-procedures-to-reestablish-a-government-to-government-relationship-with-the-native-hawaiian-community [https://perma.cc/7UCM-GABP].

161. 25 U.S.C. § 1901.

greater deference to Indian parents' regarding how their children are raised; and 3) Indian children more avenues for adequate homes. This Note is a call to reexamine, amend, and advocate for an improved "Indian child" definition and an improved ICWA. This section provides themes to be considered upon revisiting the ICWA.

A. Burden of Proof

The ICWA imposes a higher burden of proof to terminate parental rights of Indian children from troubling home situations than non-Indian children from similar situations.[162] The ICWA requires a finding "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" to terminate parental rights of an "Indian child."[163] Unlike the burden of proof required under the ICWA, in *Santosky v. Kramer*, the U.S. Supreme Court refused to apply the "beyond a reasonable doubt" requirement found in the ICWA to non-Indian cases because "the psychiatric evidence ordinarily adduced at commitment proceedings is rarely susceptible to proof beyond a reasonable doubt."[164] Because of the broadness of the ICWA's definition of "Indian child," many Indian children struggle from limited protection under the ICWA. Thus, as Congress reevaluates the ICWA and its definition of "Indian child," Congress should consider the high burden of proof required to remove Indian children from troubling situations. But Congress must also remember that these higher burdens of proof regarding removal of "Indian children" were implemented in response to the disproportionately high number of Indian children being removed from their families, threatening Indian culture.[165]

---

162. *Compare* 25 U.S.C. § 1912(e) (stating that the placement of an "Indian child" in foster care requires a finding of "clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"), *and* § 1912(f) (stating that termination of parental rights over an "Indian child" requires the same finding, but "supported by evidence beyond a reasonable doubt," *with* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (declining to adopt the "beyond a reasonable doubt" standard to terminate non-Indian parental rights).

163. 25 U.S.C. § 1912(f).

164. *Santosky*, 455 U.S. at 768–69.

165. S. REP. NO. 95-597, at 1 (1977).

B. Geography and Blood Quantum

Congress should reconsider the ICWA's definition of "Indian child" in light of tribes' changing tribal enrollment requirements and geographic locations. There are 574 federally recognized American Indian tribes.[166] Of the nearly 5.2 million Indians in the U.S., as of 2010, only about 22 percent lived on Indian reservations or other trust lands, leaving 78 percent of Indians geographically distanced from their tribal lands.[167] Regardless of their geographic location, each child who qualifies as an "Indian child" remains subject to the ICWA because the child's tribe always has a right to intervene at any point or invalidate a termination of parental rights and foster care placement.[168] Thus, children with little to no preexisting ties to their Indian heritage are subject to the ICWA's stringent restrictions.

Not all Indian tribes have blood quantum enrollment requirements,[169] and each Indian tribe has the right to determine the minimum blood quantum requirement should they choose to implement the requirement.[170] Due to high levels of interracial marriages and relationships throughout the years, Indian blood quanta have weakened,[171] excluding countless Indians from tribal enrollment as they are unable to meet their particular tribe's specific blood quantum enrollment requirements. In response, tribes have begun discussions regarding loosening tribal enrollment requirements to allow more Indians to qualify, implicating individuals geographically distanced from tribes.[172] While

166. *See Tribal Nations & the United States: An Introduction*, *supra* note 144.

167. *See Living Conditions*, *supra* note 113.

168. 25 U.S.C. § 1911(c).

169. *See, e.g.*, CHEROKEE NATION CONST. art. IV, § 1 ("All citizens of the Cherokee Nation must be original enrollees or descendants of original enrollees listed on the Dawes Commission Rolls . . . .").

170. Abi Fain & Mary Kathryn Nagle, *Close to Zero: The Reliance on Minimum Blood Quantum Requirements to Eliminate Tribal Citizenship in the Allotment Acts and the Post-adoptive Couple Challenges to the Constitutionality of ICWA*, 43 MITCHELL HAMLINE L. REV. 801, 805 (2017).

171. *See* Haeyoun Park, *Who Is Marrying Whom*, N.Y. TIMES (Jan. 29, 2011), https://archive.nytimes.com/www.nytimes.com/interactive/2011/01/29/us/20110130 mixedrace.html?ref=us [https://perma.cc/93PU-BZ6C] (demonstrating that Native Americans have the highest rate of interracial marriage of all studied racial groups).

172. *See* Nicole MartinRogers & Tom Gillaspy, *Minnesota Chippewa Tribe Population Projections: Methodology Report*, WILDER RESCH. 8 (May 2014), https://www.mnchippewatribe.org/pdf/MCT%20Methodology%20Report.pdf [https://perma.cc/R8XV-RHQG]. The Minnesota Chippewa Tribe conducted a study to examine population projections and membership requirements. The study found that over 28,000 individuals are "multi-race American Indian with some relationship

expanding tribal enrollment requirements may be beneficial to tribes and some newly qualifying individuals, expansion will likely place more Indian children under the ICWA umbrella from more remote geographic locations.[173] Therefore, the less stringent tribal enrollment requirements are, the more remote connections individuals will have to their eligible tribes.[174] Challenges to the ICWA regarding children with minute blood quantum levels and few ties to tribes will likely increase upon tribal enrollment expansions as more children will fall under the ICWA umbrella. Thus, Congress must consider trends in Indians' geographic locations as well as implications for expansive tribal enrollment requirements upon revisiting the ICWA's definition of "Indian child."

Conversely, Congress should also consider that as more Indians are distanced further from their tribes, both due to geography and blood quantum, there is a greater need than ever to retain the broad definition of "Indian child" to protect Indian culture.

C. The ICWA's Deterrence Effect

The ICWA enforces a preference system for adopting or fostering Indian children that aims to place the children with other Indian families.[175] However, too often, there are not enough Indian foster families across the nation, forcing tribes to place the children in non-Indian homes.[176] Unfortunately, the difficulties the ICWA

---

to the Chippewa" who live in the five-state area (Montana, North Dakota, Minnesota, Wisconsin, and Michigan) but who are not enrolled Chippewa members. It is projected that about 50% of these 28,451 non-enrolled individuals are likely eligible under the tribe's current one-quarter blood quantum enrollment requirement. If, however, the Minnesota Chippewa Tribe lowers the enrollment minimum to a one-eighth requirement, about 75% of these individuals would likely qualify for enrollment. Chippewa tribal members recognize that their culture cannot be carried on without a tribe, thus the Chippewa Tribe is considering its options.

173. *Id.* at 7 (stating that if the Minnesota Chippewa tribe expands tribal enrollment requirements, the number of Indian adults and children implicated within the five-state area could dramatically increase).

174. *See* Fain & Nagle, *supra* note 170, at 810 (quoting Complaint, A.D. v. Washburn, 2017 WL 1019685 (D. Ariz. July 26, 2017) (No. 2:15-CV-01259-NVW)) ("[I]n many instances, children with only a minute quantum of Indian blood and no connection or ties to the tribe are subject to ICWA and relegated to the tribe's exclusive or concurrent jurisdiction.").

175. 25 U.S.C. § 1915(a) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.").

176. *See* Debra Utacia Krol, *Inside the Native American Foster Care Crisis Tearing*

imposes on non-Indian individuals adopting Indian children, such as the tribe's unconditional right to intervene in "Indian child" adoptions, deters non-Indian individuals from fostering Indian children.[177] Therefore, Congress should discuss the ICWA's potential deterrence effect upon fostering Indian children and its potential ramifications on Indian children upon review of the ICWA's "Indian child" definition. During these deliberations, Congress might consider narrowing the ICWA's definition of "Indian child"[178] or amending and limiting the scope of tribal ability to intervene in any foster care or adoption proceeding regarding an "Indian child."[179]

D. Policy Propositions

Improving the ICWA's definition of "Indian child" should be a joint effort between Indian leaders and Congress. Protecting Indian culture is essential, and the ICWA attempts to act as a protective guide; however, it is flawed. Without sufficient support mechanisms, Indian foster homes, and resources, the statute cannot perform as intended. There must be a better way to ensure protection and preservation of Indian culture while also placing a stronger emphasis on the best interests of Indian children. Without further explanation, Judge Amy Pellman, a family law judge in Los Angeles stated, "some tweaks in the law" might fix the ICWA's challenges.[180] Although there is consensus that the ICWA is flawed, the mode to remedy the flaws is unclear. What is clear, though, is that jointly, Congress and Indians should review the ICWA's definition of "Indian child" and discuss its positive and negative effects on Indian culture and Indian children.

Families Apart, VICE (Feb. 7, 2018), https://www.vice.com/en_us/article/a34g8j/inside-the-native-american-foster-care-crisis-tearing-families-apart [https://perma.cc/6C6Q-P3WA] ("With a disproportionate number of Native kids removed from their homes each year, the need for Native foster homes is huge—and there aren't enough to meet the need. That shortage leads to non-Native foster parents taking in kids from tribal communities. Sometimes, those foster parents decide they want to adopt the foster child even though the law is supposed to prevent virtually all such non-Native adoptions. This has led to nasty fights over custody[.]").

177. In the U.S. Supreme Court's most recent case regarding the ICWA, the Court recognized the ICWA's potential deterrence effect regarding adoption of Indian children and sought to mitigate those negative consequences. Adoptive Couple v. Baby Girl, 570 U.S. 637, 653–54 (2013).

178. 25 U.S.C. § 1903(4).

179. § 1911(c).

180. *See* Gabby Deutch, *A Court Battle Over a Dallas Toddler Could Decide the Future of Native American Law*, THE ATLANTIC (Feb. 21, 2019), https://www.theatlantic.com/family/archive/2019/02/indian-child-welfare-acts-uncertain-future/582628/ [https://perma.cc/V9P3-JN63].

The parties may consider the following when discussing potential amendments to the ICWA's definition of "Indian child." If the ICWA's definition of "Indian child" was narrowed by striking or limiting part (b),[181] the "eligibility" provision, Congress might consider publishing a formal document encouraging and requesting the foster care system to work together and form strong alliances with Indian tribes to carry out goals that preserve Indian culture while also acting in the best interests of Indian children. For example, tribes and state and tribal foster care systems can offer Indian cultural education sessions for Indian children placed in non-Indian homes and sessions for non-Indian foster and adoptive parents. These cultural education sessions could teach the children and adults about an Indian child's particular tribal history as well as Indian culture and history more generally. Additionally, the tribes and state and tribal foster care systems could organize support groups or big-brother/big-sister type relationships for Indian children placed with non-Indian parents to explore their cultural ties.

If, however, the definition of "Indian child" is not adapted, Congress might add a provision to the ICWA allowing parents of a qualifying "Indian child" an election right to opt out of the ICWA. A provision of this type relates to the issue presented in *Miss. Band of Choctaw Indians v. Holyfield*. As aforementioned, in *Holyfield*, the Indian parents purposefully left the reservation to give birth to their twins in hopes that their children would not be considered domiciled on the reservation and the ICWA would not apply.[182] Regardless of the parents' purposeful actions to avoid the ICWA, the Court held that the twins, who were adopted by a non-Indian couple, fell subject to the ICWA.[183] An amendment of this nature would offer parents autonomy over their children's future, which to a certain extent, the ICWA's current form prevents. Additionally, as discussed above, Congress might also consider an amendment that lowers the currently demanding burden of proof the ICWA requires to remove Indian children to temporary foster care and to terminate parental rights. The goal behind these propositions is to sustain the ICWA's emphasis on protecting Indian culture while also finding a happy medium regarding the best interests of Indian children.

181. 25 U.S.C. § 1903(4)(b).
182. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37–39 (1989).
183. *Id.* at 53.

These propositions require more discussion and evaluation; however, they demonstrate ideas aiming to support Indian cultural preservation and improve the ICWA's treatment and applicability to the "Indian child." Again, reviewing and improving the ICWA's definition of "Indian child" must be a joint effort between Indian leaders and Congress.

Conclusion

American Indians have historically faced cruelty at the hands of the U.S. government comparable to the type of cruelty the U.S. ferociously fought against in World War II.[184] Addressing the U.S.' past failure to respect and preserve American Indian culture cannot and should not be forgotten. The ICWA works to preserve Indian culture.[185] Without it, many "[t]ribes fear that invalidating the ICWA on a racial basis has the potential to create a domino effect, bringing down the rest of American Indian law with it."[186] However, the ICWA has faults that require attention. There must be a better solution.

This Note examines a recent Fifth Circuit case, *Brackeen v. Bernhardt*, which challenges the ICWA's definition of "Indian child" on equal protection grounds, claiming the definition is race-based, and therefore, subject to strict scrutiny.[187] The Fifth Circuit correctly overturned the District Court, holding that the ICWA's definition of "Indian child" is a political classification, not a race-based classification, and therefore, subject to rational basis review.[188] The ICWA's statutory text, legislative history, and precedent indicate that the ICWA's definition of "Indian child" was designed with a particular political purpose: protecting Indian culture and Indian children. The Fifth Circuit's holding that the definition of "Indian child" is a political classification allows Indian children to receive the special protections they deserve. It is, however, the U.S. government's and Indian leaders' responsibilities

184. *See Hitler Studied U.S. Treatment of Indians*, INDIAN COUNTRY TODAY (Aug. 8, 2016), https://newsmaven.io/indiancountrytoday/archive/hitler-studied-u-s-treatment-of-indians-pYDkk-692Ei3XkztuwKVhg [https://perma.cc/F3VC-SHAX] (explaining that Hitler studied U.S. policies implemented against Indians as models for how he would treat Jewish people); *see also* ZIIBIWING CTR. OF ANISHINABE CULTURE & LIFEWAYS, AMERICAN INDIAN BOARDING SCHOOLS: AN EXPLORATION OF GLOBAL ETHNIC & CULTURAL CLEANSING 18 (2011) [https://perma.cc/27CY-GVJQ] (describing Hitler's admiration and knowledge of the Indian boarding schools, genocide, and internment camps organized by the U.S.).

185. 25 U.S.C. § 1902 (stating the ICWA's purpose).

186. *See* Deutch, *supra* note 180.

187. Brackeen v. Bernhardt, 937 F.3d 406, 425–26 (5th Cir. 2019).

188. *Id.* at 429.

to ensure these special protections do not disadvantage Indian children along the way. I do not have the answer to solve the issues facing the ICWA's definition of an "Indian child." However, growing up in a rural community within twenty miles of two Indian Reservations and observing close friends fostering Indian children, I have seen Indian culture regaining strength through its youth; but I have also seen the ICWA fail to protect Indian children. The conversation regarding the ICWA and the ICWA's definition of "Indian child" must be reignited for the sake of both Indian culture and Indian children. Negative consequences resulting from the ICWA and its definition of "Indian child" will not cease without conversation, decisions, and cooperation. Congress owes this effort to American Indians and their culture.

Fly in the Face of Bias: Algorithmic Bias in Law Enforcement's Facial Recognition Technology and the Need for an Adaptive Legal Framework

By: Peter N.K. Schuetz†

Table of Contents

†. J.D. Candidate 2021, University of Minnesota Law School; B.A. Psychology & Legal Studies 2017, University of Wisconsin-Madison. The author would like to thank Prof. Jane Anne Murray for her guidance and support, as well as the staff and editors of the Minnesota Journal of Law & Inequality for their dedication in preparing this article for publication. Finally, the author would like to thank his friends and family for putting up with his tendency to spontaneously write ideas on napkins.

In July 2018, the American Civil Liberties Union (ACLU) ran a sample of photos depicting members of the 115th United States Congress through Amazon's "Rekognition" software,[1] a software designed to provide "highly accurate facial analysis, face comparison, and face search capabilities," among other services.[2] The ACLU compared the congressional members' photos to a database of 25,000 publicly available arrest photos.[3] Despite none of the congressional members actually being depicted in the arrest photo database, Amazon's Rekognition software found twenty-eight matches between the congressional members' photos and the mugshots in the database.[4] Upon human examination, it was clear these twenty-eight matches were caused by mistakes in the Rekognition software.[5] Frighteningly, the twenty-eight mismatches were disproportionally people of color.[6] Despite attaining some of the most honorable positions in the nation, these Congressional Members were confused with criminals.[7]

In recent years, Facial Recognition Technology (FRT), like Amazon's Rekognition, has become increasingly popular in a variety of industries.[8] FRT is revolutionizing many activities that require a form of identification or verification.[9] For example, FRT is

1. Jacob Snow, *Amazon's Face Recognition Falsely Matched 28 Members of Congress with Mugshots*, ACLU (July 26, 2018), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/amazons-face-recognition-falsely-matched-28 [perma.cc/PL69-FWQL].

2. *What is Amazon Rekogniton?*, AMAZON, https://docs.aws.amazon.com/rekognition/latest/dg/what-is.html [perma.cc/WHQ4-R55R].

3. Snow, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.* ("Nearly 40 percent of Rekognition's false matches in our test were of people of color, even though they make up only 20 percent of [the 115th United States] Congress.").

7. *Id.*

8. *See Facial Recognition: Top 7 Trends (Tech, Vendors, Markets, Use Cases, and Latest News)*, THALES (Sept. 12, 2020), https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/facial-recognition [perma.cc/89ME-RW34].

9. *See, e.g.*, Sintia Radu, *The Technology That's Turning Heads*, U.S. NEWS (July 26, 2019), https://www.usnews.com/news/best-countries/articles/

now a crucial part of how social media companies identify users in photos, how people unlock their phones, and how plane passengers check in to their flight.[10] The recent proliferation of FRT is due to a major boom in artificial intelligence and, specifically, machine learning.[11] Although the increased use of this novel technology may seem exciting and convenient, machine learning systems have been found to harbor forms of bias that can maintain and often increase inequalities.[12] FRT is no exception to this frightening trend of "algorithmic bias," which is defined as systematic errors in a computer program that lead to unfair outcomes.[13] FRT manifests bias through a substantially better identification rate for faces with lighter skin and faces that exhibit traditionally-male facial features than faces with darker skin and faces that exhibit traditionally-female facial features.[14]

FRT's algorithmic bias can be an offensive annoyance when it mistakenly tags people of color as other people[15] or categorizes people of color as inhuman species,[16] but these algorithmic mistakes

---

2019-07-26/growing-number-of-countries-employing-facial-recognition-technology [https://perma.cc/N9QZ-2CNA].

10. *Id.*

11. Nick Statt, *The AI Boom Is Happening All Over the World, and It's Accelerating Quickly*, VERGE (Dec. 12, 2018), https://www.theverge.com/2018/12/12/18136929/artificial-intelligence-ai-index-report-2018-machine-learning-global-progress-research [perma.cc/M2XW-2FQ7].

12. CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION 3 (2016) ("The math-powered applications powering the data economy were based on choices made by fallible human beings. Some of these choices were no doubt made with the best intentions. Nevertheless, many of these models encoded human prejudice, misunderstanding, and bias into the software systems that increasingly managed our lives. Like gods, these mathematical models were opaque, their working invisible to all but the highest priests in their domain: mathematicians and computer scientists. Their verdicts, even when wrong or harmful, were beyond dispute or appeal. And they tend to punish the poor and the oppressed in our society, while making the rich richer.").

13. *See* Nicol Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS INST. (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/ [https://perma.cc/97L9-F2YS].

14. Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classifications*, 81 PROC. MACH. LEARNING RESCH. 71, 88 (2018), http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf [perma.cc/D24E-9JK6].

15. *See* TED, *How I'm Fighting Bias in Algorithms | Joy Buolamwini*, YOUTUBE (Mar. 29, 2017), https://www.youtube.com/watch?v=UG_X_7g63rY [perma.cc/SGC2-X3L3].

16. For example, in 2015:

> Google came under fire this week after its new Photos app categorized

become a matter of life and liberty when considering law enforcement agencies' increased reliance on FRT in identifying suspects.[17] FRT's utility for law enforcement is undeniable.[18] With FRT, law enforcement can cross-reference camera footage showing a criminal suspect with their database of mugshots and other possible photo databases to identify the suspect.[19] However, law enforcement's increased use of FRT, combined with FRT's demonstrated algorithmic bias, may lead to a stream of disproportionate misidentifications that are deemed correct due to the perception that FRT is "objective."[20] Due to the potential

---

> photos in one of the most racist ways possible. On June 28th, computer programmer Jacky Alciné found that the feature kept tagging pictures of him and his girlfriend as "gorillas."
>
> . . . .
>
> . . . Nikon and other consumer camera companies have also had a history of showing bias to white faces with their facial recognition software. Zunger says that Google has had similar issues with facial recognition due to inadequate analysis of skin tones and lighting.

Loren Grush, *Google Engineer Apologizes After Photos App Tags Two Black People as Gorillas*, VERGE (July 1, 2015), https://www.theverge.com/2015/7/1/8880363/google-apologizes-photos-app-tags-two-black-people-gorillas [perma.cc/MQD3-2ZEQ].

17. FRT adds an additional layer where discrimination can occur in law enforcement:

> [A] demographic group that is underrepresented in benchmark datasets can nonetheless be subjected to frequent targeting. . . . False positives and unwarranted searches pose a threat to civil liberties. Some face recognition systems have been shown to misidentify people of color, women, and young people at high rates (Klare et al., 2012). Monitoring phenotypic and demographic accuracy of these systems as well as their use is necessary to protect citizens' rights and keep vendors and law enforcement accountable to the public.

Buolamwini & Gebru, *supra* note 14, at 2; *see also* CLARE GARVIE, ALVARO M. BEDOYA & JONATHAN FRANKLE, GEORGETOWN LAW CTR. ON PRIV. & TECH., THE PERPETUAL LINE-UP: UNREGULATED POLICE FACE RECOGNITION IN AMERICA 2–4 (2016), https://www.perpetuallineup.org/sites/default/files/2016-12/The Perpetual Line-Up - Center on Privacy and Technology at Georgetown Law - 121616.pdf [perma.cc/94GN-SJQ8].

18. *See, e.g.*, Drew Harwell, *Oregon Became a Testing Ground for Amazon's Facial-Recognition Policing. But What if Rekognition Goes Wrong?*, WASH. POST (April 30, 2019), https://www.washingtonpost.com/technology/2019/04/30/amazons-facial-recognition-technology-is-supercharging-local-police/ [perma.cc/M639-KR3M] (providing an example of how law enforcement can utilize FRT to assist in arrests).

19. *See id.*

20. *See* Deven R. Desai & Joshua A. Kroll, *Trust but Verify: A Guide to Algorithms and the Law*, 31 HARV. J.L. & TECH. 1, 4 (2017) ("Both critics and advocates can stray into uncritical deference to the idea that big data and the algorithms used to process the data are somehow infallible science. . . . [A]lthough algorithms are decidedly *not* mystical things or dark magic, algorithms are not well understood outside the technical community."); Nanette Byrnes, *Why We Should*

disparate impact law enforcement's use of FRT may have on communities of color, law enforcement's use of FRT must be carefully scrutinized to support law enforcement's interest in investigative advancements while limiting the misuse of a software that has the potential to severely injure civil liberties.

Part I of this Note will explain the basic science behind machine learning and demonstrate how well-intended programmers can create biased algorithms through the use of program training material that does not represent the United States' diverse population. Part II of this Note will explore FRT's utility for police investigations, then survey various agencies' existing protocols for the use of FRT as well as how FRT is used in conventional practice. Part III of this Note will examine what role, if any, existing constitutional protections and statutory provisions can have in law enforcement use of FRT when considering concerns of algorithmic bias. Part IV of this Note will canvass pending and proposed legislative options for managing law enforcement's use of FRT and curbing algorithmic bias. Part V of this Note will analyze the potential avenues for balancing law enforcement investigative efforts with concerns of disparate infringement on civil liberties and algorithmic misidentification. This Note will conclude by encouraging legislative bodies to adopt adaptive frameworks to constrain the concerning prospects of FRT and algorithmic bias without crippling advancements in police investigative technology.

Part I: Facial Recognition Technology and Algorithmic Bias

A. Facial Recognition Technology: The Basics of Machine Learning

"Machine learning is a method of data analysis that automates analytical model building."[21] The process begins by giving a computer program, or algorithm, a set of test data and then instructing it to perform a specific task with that data.[22] As the algorithm sorts through the data in an attempt to achieve its

Expect Algorithms to Be Biased, MIT TECH. REV. (June 24, 2016), https://www.technologyreview.com/2016/06/24/159118/why-we-should-expect-algorithms-to-be-biased/ [perma.cc/5HNP-KQ8T] ("[A] broader trend that Fred Beneson, Kickstarter's former data chief, calls 'mathwashing': our tendency to idolize programs like Facebook's as entirely objective because they have mathematics at their core.").

21. *Machine Learning: What It Is and Why It Matters*, SAS, https://www.sas.com/en_us/insights/analytics/machine-learning.html [perma.cc/5XA2-3URT].

22. *Id.*

designated task, the algorithm is able to gradually perceive patterns and categories that allow it to achieve its designated task more efficiently.[23] This process of developing patterns and categories is the crux of machine learning.[24] Through these patterns, a machine learning system is able to determine what products a consumer may like due to their past purchases, who may default on a loan based on past financial choices, and answer many more predictive or analytical questions.[25]

An FRT system functions similarly to other forms of machine learning.[26] During development of an FRT system, like Amazon's Rekognition, the FRT system is given a set of test data—which is composed of a series of images containing things such as scenery, people, and other objects—and then told to sort between the faces and the other things present in these images.[27] Once the FRT system is able to consistently distinguish faces from other objects, then the programmers task the algorithm with distinguishing one person's face from another.[28] The system develops an understanding of how different people's facial features, their facial shape, and various other facial attributes can help the algorithm tell people apart.[29] Eventually, the program will be able to process new photos and compare the featured faces to those already in its memory in order to place a name to the face.[30]

B. Algorithmic Bias: How Seemingly Objective Machines Further Inequality

A machine learning program is only as accurate as its test data trains it to be.[31] A lack of foresight from programmers can inadvertently lead to test data either being unrepresentative of reality or reflective of existing biases.[32] For example, in 2016,

23. Yufeng Guo, *The 7 Steps of Machine Learning*, MEDIUM: TOWARDS DATA SCI. (Aug. 31, 2017), https://towardsdatascience.com/the-7-steps-of-machine-learning-2877d7e5548e [perma.cc/EL7V-JLMY].

24. *See id.*

25. *See, e.g.*, Desai & Kroll, s*upra* note 20.

26. *See* Oleksii Kharkovyna, *An Intro to Deep Learning for Face Recognition*, MEDIUM: TOWARDS DATA SCI. (June 26, 2017), https://towardsdatascience.com/an-intro-to-deep-learning-for-face-recognition-aa8dfbbc51fb [https://perma.cc/4868-BUE6].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* SAS, s*upra* note 21.

32. *See* Karen Hao, *This Is How AI Bias Really Happens—and Why It's So Hard*

ProPublica examined the accuracy of a tool called COMPAS, which has been used in determining an appropriate sentence for convicted criminals.[33] ProPublica found that COMPAS was almost twice as likely to falsely flag Black defendants as recidivists compared to White defendants.[34] These disparities stemmed from questions the COMPAS model used in its recidivism risk evaluation, such as: "Was one of your parents ever sent to jail or prison?"[35] By relying on data hued by existing inequalities,[36] the COMPAS system mistakenly propagated inequalities based on supposedly race-neutral questions like parental incarceration.[37]

As an FRT program is learning, it is presented with test data, which, to achieve accurate results, should feature images of diverse faces that are representative of society.[38] However, recent research suggests FRT test data principally features lighter-skin and

---

to Fix, MIT TECH. REV. (Feb. 4, 2019), https://www.technologyreview.com/s/612876/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix/ [perma.cc/6VE9-3F3S].

33. Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kircher, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [perma.cc/3VTJ-K5GP].

34. *Id.*

35. *Id.*

36. Smith and Levinson describe these inequalities:

> The disproportionate incarceration of minorities is one of the American criminal justice system's most established problems. In spite of a societal backdrop in which descriptive claims of a 'post-racial' America prosper, the problematic racial dynamics of criminal justice persist. The numbers are stark and clear: one out of every twenty-nine black adult women and men are currently incarcerated compared with only one out of every 194 whites.

Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 795 (2012).

Further:

> [I]mplicit favoritism is important because it helps to drive racial disparities in the criminal justice system. Social scientists have linked implicit favoritism to the ability of jurors to accurately remember damning details of an alleged offense, to the evaluation of whether negative actions taken by another are the result of one's disposition or instead to the circumstances that constrained one's choices, and to the degree of empathic response to human pain. Implicit white favoritism has serious ramifications for criminal law and procedure because it can operate in a range of powerful ways that can be distinguished from traditional race-focused examples: in the way, for example, white drivers are pulled over less often than unseen drivers, in the way legislators might see white "meth" addicts as suffering from an illness and black "crack" addicts as criminals, and in the way prosecutors and jurors view a crime as more aggravated if the victim is white or see a white juvenile offender to be more capable of redemption.

Robert J. Smith, Justin D. Levinson & Zoe Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 875–76 (2015) (footnotes omitted).

37. Angwin et al., *supra* note 33.

38. Kharkovyna, *supra* note 26.

traditionally-male facial features.[39] This leads FRT programs to not be appropriately trained on how to identify and/or distinguish people with darker skin or people with traditionally-female facial features.[40] This heightened error rate for people with darker skin or people with traditionally-female facial features was likely not noticed by programmers initially because overall FRT is very accurate.[41] It is only when an algorithm's error rates are dissected along demographic lines that these concerns emerge.[42]

Not all FRT programs exhibit the same magnitude of demographically-based error rates.[43] In December 2019, the National Institute of Standards and Technology (NIST)—a government agency tasked with advancing measurement science, standards, and technology[44]—evaluated 189 different FRT algorithms from ninety-nine developers to see how these programs performed across variations of race, age, and sex.[45] NIST's study tested the programs on both "one-to-one" matching[46] and "one-to-

---

39. *See* Steve Lohr, *Facial Recognition Is Accurate, If You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html [perma.cc/MAV4-8LP8] ("A.I. software is only as smart as the data used to train it. If there are many more white men than black women in the system, it will be worse at identifying the black women.").

40. For example:

> LFW, a dataset composed of celebrity faces which has served as a gold standard benchmark for face recognition, was estimated to be 77.5% male and 83.5% White (Han and Jain, 2014). Although (Taigman et al., 2014)'s face recognition system recently reported 97.35% accuracy on the LFW dataset, its performance is not broken down by race or gender. Given these skews in the LFW dataset, it is not clear that the high reported accuracy is applicable to people who are not well represented in the LFW benchmark.

Buolamwini & Gebru, *supra* note 14, at 3.

41. *See id.* at 12 ("We found that all [three gender] classifiers performed best for lighter individuals and males overall. The classifiers performed worst for darker females."). In the aggregate, gender classification accuracy ranged from 87.9% to 93.7%, within marketable range. *Id.* at 11.

42. *See* Clare Garvie & Jonathan Frankle, *Facial-Recognition Software Might Have a Racial Bias Problem*, ATLANTIC (Apr. 7, 2016), https://www.theatlantic.com/technology/archive/2016/04/the-underlying-bias-of-facial-recognition-systems/476991/ [perma.cc/N2QS-K6FC].

43. *See* PATRICK GROTHER, MEI NGAN & KAYEE HANAOKA, NAT'L INST. OF STANDARDS & TECH., FACE RECOGNITION VENDOR TEST (FRVT) PART 3: DEMOGRAPHIC EFFECTS 2 (2019).

44. NIST is a physical sciences laboratory and a non-regulatory agency of the United States Department of Commerce that is tasked with advancing measurement science, standards, and technology. *See NIST Mission, Vision, Core Competencies, and Core Values*, NIST (Jan. 26, 2017), https://www.nist.gov/about-nist/our-organization/mission-vision-values [perma.cc/7KDS-T9P7].

45. GROTHER ET AL., *supra* note 43, at 1.

46. *NIST Study Evaluated Effects of Race, Age, Sex, on Face Recognition Software*, NIST (Dec. 19, 2019), https://www.nist.gov/news-events/news/

many" matching.[47] NIST found that the majority of tested programs exhibited a higher false positive rate across each test, meaning a higher rate of misidentification, when the program was asked to evaluate non-White faces and faces with traditionally-female characteristics.[48] The authors noted, "differentials in false positives in one-to-many matching are particularly important because the consequences could include false accusations."[49] Although some programs exhibited a minimal error rate,[50] NIST expressed a general concern about organizations using FRT not appropriately researching or scrutinizing the specific programs their organization employs.[51] FRT program designers have acknowledged these problems and are working to improve them,[52] but as things stand currently, FRT programs are laced with algorithmic bias.[53]

Part II: Law Enforcement's Use of FRT: Investigative

2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software [perma.cc/3N8U-Q49K] (describing "one-to-one" matching as "confirming a photo matches a different photo of the same person in a database . . . [which] is commonly used for verification work, such as unlocking a smartphone or checking a passport").

47. *Id.* (describing "one-to-many" matching as "determining whether the person in the photo has any match in a database").

48. GROTHER ET AL., *supra* note 43, at 2 (noting the tested programs varied in their false positive error rates "by factors of 10 to beyond 100 times").

49. *E.g.*, NIST, *supra* note 46.

50. MICHAEL MCLAUGHLIN & DANIEL CASTRO, INFO. TECH. & INNOVATION FOUND., THE CRITICS WERE WRONG: NIST DATA SHOWS THE BEST FACIAL RECOGNITION ALGORITHMS ARE NEITHER RACIST NOR SEXIST 2 (2020), https://itif.org/publications/2020/01/27/critics-were-wrong-nist-data-shows-best-facial-recognition-algorithms [perma.cc/MS3N-P2HE] ("[T]he most accurate algorithms—which should be the only algorithms used in government systems—did not display a significant demographic bias . . . . [S]ome highly accurate algorithms had false-positive demographic differentials that were so small as to be 'undetectable' for one-to-many searches.").

.

51. GROTHER ET AL., *supra* note 43, at 3 ("Operational implementations usually employ a single face recognition algorithm. Given algorithm-specific variation, it is incumbent upon the system owner to know their algorithm . . . . Since different algorithms perform better or worse in processing images of individuals in various demographics, policy makers, face recognition system developers, and end users should be aware of these differences and use them to make decisions and to improve future performance.").

52. *See* Sean Hollister, *Google Contractors Reportedly Targeted Homeless People for Pixel 4 Facial Recognition*, VERGE (Oct. 2, 2019), https://www.theverge.com/2019/10/2/20896181/google-contractor-reportedly-targeted-homeless-people-for-pixel-4-facial-recognition [perma.cc/N8FH-25UN].

53. *E.g.*, Buolamwini & Gebru, *supra* note 14.

Potential, Procedures, and Practices

A. FRT's Potential for Criminal Suspect Identification

Law enforcement agencies across the United States have been rapidly adopting FRT as a crucial part of their investigative procedures.[54] Federal, state, and local agencies have partnered with FRT designers like Amazon, Google, and others to increase their capabilities in identifying and tracking suspects.[55] Currently, law enforcement agencies primarily use FRT to identify suspects from images captured by surveillance footage or by a witness's camera, but the uses of FRT will potentially expand in the near future.[56] The government "facial biometrics" market is expected to grow nearly threefold within the next decade.[57] Currently, at least one fourth of state or local police departments have the ability to conduct searches through a face recognition system.[58]

Law enforcement's use of FRT is expected to revolutionize law enforcement's ability to identify suspects in a similar way to the spread of forensic DNA identification in the late 1980s.[59] Like DNA evidence, FRT allows officers to take a small piece of biometric evidence recovered from a crime scene and then cross-reference this

54. *See generally* Jon Schuppe, *Facial Recognition Gives Police a Powerful New Tracking Tool. It's Also Raising Alarms.*, NBC NEWS (July 30, 2018), https://www.nbcnews.com/news/us-news/facial-recognition-gives-police-powerful-new-tracking-tool-it-s-n894936 [perma.cc/8YCS-UYKG] (discussing law enforcement's use of facial recognition).

55. *See id.*

56. JENNIFER LYNCH, ELEC. FRONTIER FOUND., FACE OFF: LAW ENFORCEMENT USE OF FACIAL RECOGNITION TECHNOLOGY 1 (Gennie Gebhart ed., 2020) ("Today, law enforcement officers can use mobile devices to capture face recognition-ready photographs of people they stop on the street; surveillance cameras boast real-time face scanning and identification capabilities; and federal, state, and local law enforcement agencies have access to hundreds of millions of images of faces of law-abiding Americans. On the horizon, law enforcement would like to use face recognition with body-worn cameras, to identify people in the dark, to match a person to a police sketch, or even to construct an image of a person's face from a small sample of their DNA.").

57. *See* Jon Schuppe, *How Facial Recognition Became a Routine Policing Tool in America*, NBC NEWS (May 11, 2019), https://www.nbcnews.com/news/us-news/how-facial-recognition-became-routine-policing-tool-america-n1004251 [perma.cc/4JZ5-2758] ("The government 'facial biometrics' market . . . is expected to soar from $136.9 million in 2018 to $375 million by 2025 . . . .").

58. GARVIE ET AL., *supra* note 17, at 2.

59. *See generally* Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit*: *DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635, 640 (2000) (discussing different DNA initiatives led by the United States Department of Justice and the Federal Bureau of Investigation in support of law enforcement).

evidence with their department's databases to obtain a comprehensive list of information about the target suspect.[60] Unlike DNA analysis, FRT does not require a suspect to have left some of their bodily tissue, fluids, or other biological material at the crime scene.[61] FRT only requires an image of the suspect captured through closed-circuit television (CCTV) or some other method.[62]

Already, FRT has led to the apprehension of serious criminals that had evaded capture for months or even years. For example, in December 2018, the York Area Regional Police Department was able to identify a man who had electronically manipulated and eventually sexually assaulted a fifteen-year-old girl in July 2016.[63] Despite the suspect leaving his sunglasses at the crime scene, which were processed for DNA and fingerprints, police were unable to identify the suspect until they finally received a match using facial recognition software.[64] After months of cross-referencing the photos the suspect sent the victim with driver's license photos, mugshots, and other sources of facial identification, law enforcement found a match. Law enforcement got a lucky break when the suspect updated his driver's license photo to more closely resemble how he appeared at the time of the assault.[65] The York Area Regional Police Department's successful location of a suspect is just one of many examples of FRT assisting law enforcement when other methods of identifying suspects have failed.[66] FRT can greatly enhance law

60. *See* Schuppe, *supra* note 57.

61. *See id.*

62. *See id.*

63. *See* Daniel Rosler, *Facial Recognition Software Led to the Arrest of a Scranton Man for Alleged Sexual Assault of Teen*, ASSOCIATED PRESS (Dec. 18, 2018), https://apnews.com/article/e0a56374618840cf88e78637428d63d0 [perma.cc/Q2K3-FWKD].

64. *See id.*

65. *See id.*

66. *See* Marco della Cava & Elizabeth Weise, *Capital Gazette Gunman Was Identified Using Facial Recognition Technology That's Been Controversial*, USA TODAY (June 29, 2018), https://www.usatoday.com/story/tech/talkingtech/2018/06/29/capital-gazette-gunman-identified-using-facial-recognition-technology/744344002/ [perma.cc/XH5X-496U] (explaining law enforcement's use of facial identification technology "because the system for getting the identification off his fingerprints was working slowly . . . ."); Ryan Lucas, *How a Tip — and Facial Recognition Technology — Helped the FBI Catch a Killer*, NPR (Aug. 21, 2019), https://www.npr.org/2019/08/21/752484720/how-a-tip-and-facial-recognition-technology-helped-the-fbi-catch-a-killer [perma.cc/BCH5-XNMH]; Amy B. Wang, *A Suspect Tried to Blend in with 60,000 Concertgoers. China's Facial-Recognition Cameras Caught Him.*, WASH. POST (Apr. 13, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/04/13/china-crime-facial-recognition-cameras-catch-suspect-at-concert-with-60000-people/ [perma.cc/MZ4L-HRVP] (describing the use of FRT to track one individual at a 60,000-person event in China).

enforcement's capabilities,[67] and potentially lead to fewer mistakes.[68]

B. Current Police Procedures and Unadvised Practices

Most agencies follow the same five-step process in using FRT to identify a suspect.[69] First, officers obtain a visual representation of a criminal suspect.[70] Second, officers prepare the visual representation to be entered into the FRT.[71] Third, the FRT compares the visual representation with the system's catalogue of faces, typically composed of mugshots.[72] Fourth, the FRT produces a list of possible facial matches for an inquiring officer to review; each match typically comes with a coinciding confidence level, which demonstrates how certain the system is that the listed person is the targeted suspect.[73] Lastly, an officer reviews the list produced by the FRT and determines if any of the potential matches should be investigated further.[74]

Many law enforcement agencies, including the Federal Bureau of Investigation (FBI)[75] and the New York Police Department

---

67. The use of FRT has been successful in many cases:

> Recently, the work of the facial identification team led to the arrest of a man accused of raping a worker at a day spa, and another charged with pushing a subway passenger onto the tracks. We have made arrests in murders, robberies and the on-air assault of a TV reporter. A woman whose dismembered body was found in trash bags in two Bronx parks was identified. So was a woman hospitalized with Alzheimer's, through an old arrest photo for driving without a license.

James O'Neill, *How Facial Recognition Makes You Safer*, N.Y. TIMES (June 9, 2019), https://www.nytimes.com/2019/06/09/opinion/facial-recognition-police-new-york-city.html [perma.cc/G6L2-CC6P].

68. *See id.* ("The software has also cleared suspects. According to the Innocence Project, 71 percent of its documented instances of false convictions are the result of mistaken witness identifications. When facial recognition technology is used as a limited and preliminary step in an investigation . . . these miscarriages of justice are less likely.").

69. *See* Schuppe, *supra* note 57.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*; *see also* Matt Leonard, *Why Confidence Matters in Facial Recognition Systems*, GCN (Aug. 6, 2018), https://gcn.com/Articles/2018/08/06/trust-facial-recognition.aspx?Page=1 [perma.cc/U624-34UH] (discussing the importance of setting a high confidence threshold for FRT programs when used by law enforcement because a program's threshold confidence level determines the occurrence of false positives).

74. *See* Schuppe, *supra* note 57.

75. *See Facial Recognition Technology: Part II: Ensuring Transparency in Government Use*: *Hearing Before the H. Comm. on Oversight and Reform*, 116th

(NYPD),[76] treat the results of an FRT inquiry as an "investigative lead only."[77] An "investigative lead" means officers must find additional investigative material to reach the level of probable cause needed for a legitimate arrest.[78] However, the FBI is currently considering dropping the "investigative lead only" protocol and allowing an FRT match to reach the level of probable cause based on confidence in its program and expected expansion.[79] Other law enforcement agencies, like Oregon's Washington County Police Department, will only run a facial recognition search after establishing probable cause that a crime has been committed in order to locate the specific perpetrator.[80]

Although there are currently some discrepancies in procedures related to FRT, there appears to be even larger discrepancies between field usage of FRT and best practice suggestions.[81] A May 2019 report from Georgetown Law's Center on Privacy &

Cong. 4 (2019) (statement of Kimberly J. Del Greco, Deputy Assistant Director, Criminal Justice Information Services, Federal Bureau of Investigation) [hereinafter *Del Greco Hearing Statement*].

76. *See* Clare Garvie, *Garbage In, Garbage Out: Face Recognition on Flawed Data*, GEORGETOWN L. CTR. ON PRIV. & TECH. (May 16, 2019), https://www.flawedfacedata.com/ [perma.cc/99ZP-SSY9].

77. *Id.*

78. *Id.*; *see also* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T JUST., FACE RECOGNITION POLICY DEVELOPMENT TEMPLATE 3 (2017) [hereinafter BJA TEMPLATE] ("[FRT] is not being used as an all-knowing big brother that keeps track of an individual's weekly—or daily—trips to a business. More accurately, it is a lead generator for law enforcement to investigate criminal activity, akin to a more reliable eye witness [sic].").

79. *See* Garvie, *supra* note 76 ("[A]n official for the Federal Bureau of Investigation (FBI), which runs its own face recognition system, has indicated that the agency plans to do away with the 'investigative lead only' limitation altogether. At a conference in 2018, FBI Section Chief for Biometric Services Bill McKinsey said of the FBI: 'We're pretty confident we're going to have face [recognition] at positive ID in two to three years.'").

80. Shirin Ghaffary, *How to Avoid a Dystopian Future of Facial Recognition in Law Enforcement*, VOX: RECODE (Dec. 10, 2019), https://www.vox.com/recode/2019/12/10/20996085/ai-facial-recognition-police-law-enforcement-regulation [perma.cc/U4ZH-FV8V] ("[A public information officer at the Washington County, Oregon Police Department] told Recode that officers only use the [facial recognition] tools when there's probable cause that someone has committed a crime, and only matches it to jail booking photos, not DMV databases. (This sets Washington County apart—several other police departments in the US do use DMV databases for facial recognition searches.) He also said the department doesn't use Rekognition to police large crowds, which police in Orlando, Florida, tried to do—and failed to do effectively, after running into technical difficulties and sustained public criticism.").

81. *See* Bryan Menegus, *Defense of Amazon's Face Recognition Tool Undermined by Its Only Known Police Client*, GIZMODO (Jan. 31, 2019), https://gizmodo.com/defense-of-amazons-face-recognition-tool-undermined-by-1832238149 [perma.cc/K568-CGB7].

Technology expressed concern with the NYPD's FRT practices.[82] The report found that NYPD officers would enter "probe photos" of suspects into their FRT program and then pursue the people their system listed as potential suspects.[83] These "probe photos" included composite drawings as well as "a suspect's celebrity doppelgänger."[84] In addition, when NYPD officers received a sub-par image of a suspect from surveillance footage or a witness's camera, they would modify the picture in order to bring it closer to the style common in mugshots by inserting open eyes, mirroring a partial face to make it full, or substituting other identity points.[85] Georgetown researchers found these procedures to greatly diminish the validity of any inquiry list produced by the NYPD's FRT.[86]

During the summer of 2020, news outlets reported the first documented wrongful arrests caused by FRT. Two Black men from Michigan, Robert Williams[87] and Michael Oliver,[88] both suffered

82. Garvie, *supra* note 76 (criticizing NYPD's facial recognition practices involving "probe photos" and photo edits that "amount to the fabrication of facial identity points").

83. *Id.* ("There are no rules when it comes to what images police can submit to face recognition algorithms to generate investigative leads. As a consequence, agencies across the country can—and do—submit all manner of 'probe photos,' photos of unknown individuals submitted for search against a police or driver license database.").

84. *Id.* ("One detective from the Facial Identification Section (FIS), responsible for conducting face recognition searches for the NYPD, noted that the suspect looked like the actor Woody Harrelson, known for his performances in *Cheers*, *Natural Born Killers*, *True Detective*, and other television shows and movies. A Google image search for the actor predictably returned high-quality images, which detectives then submitted to the face recognition algorithm in place of the suspect's photo. In the resulting list of possible candidates, the detectives identified someone they believed was a match—not to Harrelson but to the suspect whose photo had produced no possible hits.").

85. *Id.* ("Editing photos before submitting them for search is common practice . . . . One technique that the NYPD uses involves replacing facial features or expressions in a probe photo with ones that more closely resemble those in mugshots—collected from photos of other people.").

86. *Id.* (finding that common FRT procedures reflect "at best an attempt to create information that isn't there in the first place and at worst the introduction of evidence that matches someone other than the person being searched for.").

87. Paresh Dave, *Facial Recognition Leads to First Wrongful U.S. Arrest Activists Say*, REUTERS (June 24, 2020), https://www.reuters.com/article/us-michigan-facial-recognition/face-recognition-vendor-vows-new-rules-after-wrongful-arrest-in-u-s-using-its-technology-idUSKBN23V1KJ [https://perma.cc/A88U-5KC7] ("Robert Williams, who is Black, spent over a day in Detroit police custody in January after Rank One's face recognition software connected his driver's license photo to surveillance video of someone shoplifting, the American Civil Liberties Union of Michigan (ACLU) said. . . . In a video shared by ACLU, Williams says officers released him after acknowledging 'the computer' must have been wrong.").

88. Kris Holt, *Facial Recognition Linked to a Second Wrongful Arrest by Detroit*

from flawed investigations. In each case, Detroit Police ran blurry surveillance footage through their department's FRT, then showed the generated lineup to a witness of the offense.[89] Upon minimal examination, it should have been clear these men were misidentified. Michael Oliver, who has extensive tattoos on his neck and arms, noted the surveillance footage which led to his arrest "looked nothing like" him and the actual offender "didn't even have tattoos."[90] Robert Williams—who was arrested in front of his wife and their young daughters in his driveway—stated he felt "empty" and "humiliated" by the experience.[91] After Robert Williams case came to light, Detroit Police Chief James Craig admitted their FRT system is heavily flawed.[92] Chief Craig noted at a public meeting that "[i]f we were just to use the technology by itself, to identify someone, I would say 96 percent of the time it would misidentify."[93] It is unclear at this time how many cases like Robert Williams' and Michael Oliver's have gone unreported.

Like any law enforcement tool or tactic, FRT comes with a substantial list of inspiring prospects and concerning potentials. FRT can revolutionize how law enforcement identifies and locates suspects, but its implementation needs to follow proper procedures

---

Police, ENGADGET (July 10, 2020), https://www.engadget.com/facial-recognition-false-match-wrongful-arrest-224053761.html [https://perma.cc/VJ9C-FLX3] ("[P]olice in the city arrested a man for allegedly reaching into a person's car, taking their phone and throwing it, breaking the case and damaging the screen in the process. Facial recognition flagged Michael Oliver as a possible suspect, and the victim identified him in a photo lineup as the person who damaged their phone. Oliver was charged with a felony count of larceny over the May 2019 incident. He said he didn't commit the crime and the evidence supported his claim.").

89. *Id.*; Paresh Dave, *supra* note 87.

90. Elaisha Stokes, *Wrongful Arrest Exposes Racial Bias in Facial Recognition Technology*, CBS NEWS (Nov. 19, 2020), https://www.cbsnews.com/news/detroit-facial-recognition-surveillance-camera-racial-bias-crime/ [https://perma.cc/7HA5-TZKP].

91. Ahiza García-Hodges, Chiara Sottile & Jacob Ward, *Man Wrongfully Arrested Due to Facial Recognition Software Talks About 'Humiliating' Experience*, NBC NEWS (June 26, 2020), https://www.nbcnews.com/business/business-news/man-wrongfully-arrested-due-facial-recognition-software-talks-about-humiliating-n1232184 [https://perma.cc/25KF-6Q7H] ("Their oldest daughter nearly started hyperventilating and couldn't do her homework without getting emotional since her dad usually helps her with it. The couple also said they'll never forget how Williams missed a small but important milestone while in police custody. 'I wasn't there for her first tooth,' Williams said. 'Even though it was one day, I still missed a milestone in her life.'").

92. Jason Koebler, *Detroit Police Chief: Facial Recognition Software Misidentifies 96% of the Time*, VICE: MOTHERBOARD (June 29, 2020), https://www.vice.com/en/article/dyzykz/detroit-police-chief-facial-recognition-software-misidentifies-96-of-the-time [https://perma.cc/XH55-4JY2].

93. *Id.*

to ensure effective results and avoid misuse. Although some law enforcement agencies have done a satisfactory job of self-regulating their FRT use, it is critical to consider what formal legal approaches can moderate law enforcement use of FRT, especially considering FRT's tendency to harbor algorithmic bias.

Part III: Limits to Law Enforcement Use of FRT and Algorithmic Bias from the Constitution and Existing Civil Rights Statutes

A. Fourth Amendment Protections from Unreasonable Arrest

The Supreme Court recently determined that novel forms of technology may require long-running constitutional doctrines to adapt to circumstances once unimaginable.[94] The Fourth Amendment, which has been one of the primary ways to regulate police action,[95] has had to adapt to modern expectations of privacy and novel methods of police intrusion into those expectations of privacy.[96] Although the Court has made some progress, many scholars have expressed dissatisfaction with the pace at which the Court is choosing to adapt the Fourth Amendment to the realities of technology in modern life.[97] Based on the novelty of law

94. *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (uprooting the long-held presumption that defendants forfeit all of their Fourth Amendment privacy interests when they turn over material to a third party).

95. Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109, 116 (2017).

96. *See, e.g.*, Riley v. California, 573 U.S. 373, 403 (2014) (distinguishing electronic devices from other objects for purposes of the search incident to arrest warrant exception); United States v. Jones, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring) (quoting Illinois v. Lidster, 540 U.S. 419, 426 (2004)) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations . . . . And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'"); Kyllo v. United States, 533 U.S. 27, 33–34, 40 (2001) (holding that the use of advanced technology to examine the internal affairs of a residence constitutes a search under the Fourth Amendment and stating "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology . . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy").

97. *See* Eli R. Shindelman, *Time for the Court to Become "Intimate" with Surveillance Technology*, 52 B.C. L. REV. 1909, 1911–12 (2011) ("These advancements in surveillance technology have far outpaced the evolution of Fourth Amendment jurisprudence. Many scholars have argued that the current state of

enforcement's use of FRT, it is unsurprising that the Supreme Court has yet to tackle the issue of whether, or how, Fourth Amendment protections limit law enforcement's use of FRT as of the writing of this Note.[98]

Due to the current lack of precedent, scholars are left to speculate as to whether an FRT scan constitutes a search in accordance with the Fourth Amendment.[99] Less attention has been given to FRT's role in establishing grounds for an arrest. As stated above, the FBI currently holds that FRT identification can only be used as an "investigative lead."[100] However, with law enforcement's growing confidence in FRT, the question of whether an FRT identification could reach the level of probable cause to support a lawful arrest under the Fourth Amendment will likely soon arise.

Probable cause has been described as a "fluid concept—turning on the assessment of probabilities in particular factual contexts"[101] and thus requires the "totality-of-the-circumstances analysis" in each individual case.[102] Because law enforcement agencies have compared FRT matches to "a more reliable eye witness,"[103] it is useful to compare FRT matches to eyewitness or informant testimony. In the context of police informants, officers must show there are sufficient "indicia of reliability" to trust the testimony of an informant.[104] While an anonymous tip must be supported by facts that can be corroborated, the testimony of a credible informant—who had provided officers with information in the past—can be enough to independently establish probable cause.[105] With this said, the weight of an FRT match toward a

Fourth Amendment jurisprudence lacks a genuine understanding of privacy given the realities of modern technology. These scholars argue that because there has been widespread development in forms of technology that are capable of impinging on a person's privacy, courts must interpret the Fourth Amendment broadly to adequately protect individual liberty.").

98. *See* Katelyn Ringrose, *Law Enforcement's Pairing of Facial Recognition Technology with Body-Worn Cameras Escalates Privacy Concerns*, 105 VA. L. REV. ONLINE 57, 64 (2019).

99. *See* Kelly Blount, *Body Worn Cameras with Facial Recognition Technology: When It Constitutes a Search*, 3 CRIM. L. PRAC., Fall 2017, at 61. *See generally* Mariko Hirose, *Privacy in Public Spaces: The Reasonable Expectation of Privacy Against the Dragnet Use of Facial Recognition Technology*, 49 CONN. L. REV. 1591 (2017).

100. *Del Greco Hearing Statement*, *supra* note 75, at 4.

101. Illinois v. Gates, 462 U.S. 213, 232 (1983).

102. *Id.* at 238–39.

103. BJA TEMPLATE, *supra* note 78, at 3.

104. Florida v. J. L., 529 U.S. 266, 270 (2000).

105. *See* Adams v. Williams, 407 U.S. 143, 146–47 (1972).

probable cause determination will rest on whether judges believe FRT is sufficiently reliable to justify a showing of probable cause.[106]

In determining the perceived reliability of FRT, an analogy between FRT matches and DNA matches is appropriate because both are founded in biometric identification.[107] The reliability of all DNA matches was widely contested until courts began allowing for judicial notice of DNA's reliability.[108] This holding allowed courts to assume DNA matches are accurate enough to be admissible as long as the expert properly performed the techniques involved in analyzing a specific DNA specimen.[109] In the coming years, FRT matches could progress from being treated in the same way as an eyewitness identification to being seen more like DNA evidence—as inherently reliable absent proof of technical mistakes. However, an important component of courts extending judicial notice to DNA matches' reliability was the near unanimous acceptance of the genetic theories underlying DNA analysis by the relevant scientific community.[110] Currently, there is not a unanimous scientific consensus supporting the validity of FRT due to continuing concerns of algorithmic bias and general efficiency.[111] Therefore, the prospect of informed judicial notice of FRT seems unlikely at the current time. As FRT advances it should be met with the same, if not more, skepticism than DNA evidence underwent during its infancy.[112]

---

106. *Cf.* United States v. Jakobetz, 955 F.2d 786, 799–800 (2d Cir. 1992) (holding that DNA profiling evidence can be reliable enough for a court to take judicial notice).

107. *See* LYNCH, *supra* note 56, at 4 (listing "face recognition" and "DNA" as examples of biometric identification that are becoming more popular).

108. *See Jakobetz*, 955 F.2d at 799–800 ("[I]t appears that in future cases with a similar evidentiary issue, a court could properly take judicial notice of the general acceptability of the general theory and the use of these specific [DNA analysis] techniques . . . . Beyond such judicial notice, the threshold for admissibility should require only a preliminary showing of reliability of the particular data to be offered, i.e., some indication of how the laboratory work was done and what analysis and assumptions underlie the probability calculations.") (citation omitted).

109. *See id.*

110. *Id.* at 799 ("[T]he general theories of genetics which support DNA profiling are unanimously accepted within the scientific community.").

111. *See, e.g.*, Buolamwini & Gebru, *supra* note 14, at 3 (discussing research covering "[f]ace detection and classification algorithms" used by law enforcement that indicates lower accuracy "for people labeled female, Black, or between the ages of 18–30 than for other demographic cohorts").

112. *Cf.* Tracy & Morgan, *supra* note 59, at 636, 638 ("[T]he current proliferation of DNA databases and their likely further expansion raise three significant policy issues and attendant questions. First, how do we utilize this new technology, while protecting against misuse and abuse? . . . Although technology makes certain advances possible, are these advances truly necessary? . . . [W]ill DNA databases provide law enforcement and the subsequent criminal prosecutions with measurable and significant effects on crime?").

The Fourth Amendment has typically not been a respite for those concerned with discriminatory policies.[113] Invasions of privacy or seizures of one's person or belongings that comply with probable cause but are based on discriminatory intent are not considered violations of the Fourth Amendment.[114] The Court has determined the subjective, potentially discriminatory, intent of an arresting officer plays no role in ordinary, probable cause Fourth Amendment analysis.[115] The constitutional basis for objecting to law enforcement's intentionally discriminatory application of laws is the Fourteenth Amendment's Equal Protection Clause, not the Fourth Amendment.[116] It is unclear how precisely the Fourth Amendment would be applied to unintentional discriminatory actions related to programs controlled by algorithmic bias, but it is most likely that algorithmic bias would influence the determination of whether probable cause is actually present in a given case.

B. Equal Protection Clause as a Response to Algorithmic Bias

It is worth considering how the Equal Protection Clause of the Fourteenth Amendment could remedy concerns of algorithmic bias. Plaintiffs pursuing a race-based[117] Fourteenth Amendment Equal Protection Clause claim against the government have one of two routes to prevail on their claim.[118] The first route requires the contested government policy to contain an explicit racial

---

113. *See* Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 516 (2019).

114. Whren v. United States, 517 U.S. 806, 813 (1996).

115. *Id.* (quoting Scott v. United States, 436 U.S. 128, 136, 138 (1978) (referencing United States v. Robinson, 414 U.S. 218, 236 (1973))) ("[W]e said that 'subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.' We described *Robinson* as having established that 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.' We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

116. *Id.* ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

117. Feingold, *supra* note 113. This article uses race-based Equal Protection Clause doctrine as an example because it is often reviewed with the strictest level of scrutiny, as opposed to, for example, gender-based Equal Protection Clause claims which are only reviewed with intermediate scrutiny. Therefore, race-based Equal Protection Clause analysis provides the best potential for exploring the effectiveness of Equal Protection claims in this area.

118. *Id.* at 516–17.

classification.[119] The plaintiff then must show this racial classification does not withstand strict judicial scrutiny.[120] Strict scrutiny means the government policy containing the racial classification must be shown to lack either a compelling government interest or a narrowly tailored approach to fulfilling the policy's governmental interest.[121]

The second route for an Equal Protection Clause claim requires a plaintiff to show "[p]roof of racially discriminatory intent or purpose"[122] in the adoption or maintaining of the contested government policy.[123] A plaintiff need not demonstrate discrimination was the dominant or primary purpose of the contested governmental policy, but a plaintiff must show discrimination was at least a consideration of those instituting the policy or enforcing the policy.[124] The requirement of discriminatory intent under the Equal Protection Clause means a plaintiff cannot pursue a disparate impact claim under this Clause.[125]

Scholars have critiqued this bifurcated approach to the Equal Protection Clause, which favors facial neutrality and is only concerned with disparate treatment.[126] This judicial approach has led to many societal issues without an appropriate avenue of recourse in the courts.[127] One of the clearest examples is the well-known sentencing disparities between crack cocaine and powder cocaine offenses.[128] Scholars have expressed further concern about

---

119. *See* City of Richmond v. J.A. Cronson Co., 488 U.S. 469, 490 (1989).

120. The Court in *City of Richmond* found:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

Id. at 493.

121. *Strict Scrutiny*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [perma.cc/YB9Q-2QX8].

122. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

123. Rogers v. Lodge, 458 U.S. 613, 617 (1982).

124. *Arlington Heights*, 429 U.S. at 265.

125. Adams v. City of Indianapolis, 742 F.3d 720, 726 n.3 (7th Cir. 2014).

126. Feingold, *supra* note 113.

127. Ashlee Riopka, *Equal Protection Falling Through the Crack: A Critique of the Crack-to-Powder Sentencing Disparity*, 6 ALA. C.R. & C.L. L. REV. 121, 122 (2015).

128. *Id.* at 124, 129 (explaining that while the sentencing disparity between crack and powder cocaine was originally 100:1 in the Anti-Drug and Abuse Act of 1986, the Fair Sentencing Act of 2010 still contained a disparity of 18:1). Riopka continues:

the Court's presumption that "facially neutral evaluative tools produce racially neutral results."[129] Scholars have noted that the Equal Protection Clause is not an appropriate avenue for disparities caused by algorithms due to the Court's bifurcated approach solely being concerned with disparate treatment, which requires a showing of discriminatory intent.[130]

C. Civil Rights Statutes as a Response to Algorithmic Bias in Police Systems

Civil rights statutes are often viewed as a set of tools—more flexible than the Equal Protection Clause—that aggrieved plaintiffs can use to seek justice. For police conduct and policy there is a diminished set of tools available compared to discrimination in fields like housing,[131] employment,[132] or public accommodations.[133] Each of these fields of discrimination, besides police conduct and policy,[134] have a simple disparate impact route for aggrieved plaintiffs to pursue.[135] Police conduct and policy, on the other hand, are usually addressed through 42 U.S.C. § 1983,[136] which allows for civil suits against a person acting under color of law stemming from

> Since the Fair Sentencing Act is facially race-neutral, its racially disparate impact provides the most obvious evidence of an equal protection violation. Unfortunately, defendants who rely solely on this method of proof will face a multitude of challenges. While the Supreme Court has not specifically invalidated disparate impact theory as a method of proving discriminatory intent in equal protection challenges, additional hurdles make disparate impact arguments difficult. Under the current trend of equal protection jurisprudence, evidence of racial disparity remains constitutionally insignificant unless it is accompanied by evidence of disparate treatment or intentional discrimination.

Id. at 131.

129. *See* Feingold, *supra* note 113, at 528–29 ("[E]qual protection doctrine rests on the presumption that facially neutral evaluative tools produce racially neutral results. This presumption spans Justices and ideological spectrums . . . . [However] decades of research on implicit bias and stereotype threat reveals that common measures of merit, although facially neutral, fail to produce racially neutral results.").

130. *Id.* at 539–40.

131. *See, e.g.*, David J. Frizell & Ronald D. Cucchiaro, *Fair Housing Act—Disparate Impact*, 36 N.J. PRAC., LAND USE LAW § 20.28 (3d ed. 2019).

132. *See, e.g.*, *Title VII of the Civil Rights Act of 1964—Burden of Proof; Disparate Impact*, OH. EMPL. PRAC. L. § 2:16 (2019).

133. *See, e.g.*, B.E. Witkin, *Economic Criteria and Disparate Impact*, 8 WITKIN SUM. 11TH CONST. L. § 1012 (2020).

134. *See* Alisa Tiwari, *Disparate-Impact Liability for Policing*, 129 YALE L.J. 252 (2019).

135. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

136. Stephen R. McAllister & Peyton H. Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 J. KAN. B. ASS'N 14, 22 (1998).

the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[137]

The protections extended under § 1983 are inherently linked to other laws through the language "secured by the Constitution and laws."[138] An aggrieved plaintiff must pinpoint a violation of either one of their constitutional rights or a right granted by statute to have a chance of prevailing in their § 1983 claim.[139] In terms of police use of investigative tools exhibiting algorithmic bias, there is no clear constitutional right to which a plaintiff suing under § 1983 can point, and only a minimal chance for a statutory right. As discussed above, in sections III(a) and III(b), the Fourth Amendment and the Equal Protection Clause—the two most likely constitutional provisions applicable to algorithmic bias—are not appropriate means for a plaintiff suing under § 1983 in those circumstances. With regard to statutory rights, a likely candidate for plaintiffs to attach their § 1983 claim is Title VI of the Civil Rights Act of 1964.

Title VI, which is codified at 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance,[140] including many law enforcement organizations.[141] While a private citizen can link a civil claim through § 2000d, this base provision "prohibits only intentional discrimination."[142] Government agencies can promulgate regulations under § 2000d-1 that "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under" § 2000d.[143] Unfortunately, the Supreme Court determined that private individuals may not sue to enforce disparate-impact regulation promulgated through § 2000d-1.[144] This ruling leaves private actors with no clear method to combat police use of investigative tools

137. 42 U.S.C. § 1983.

138. *Id.*

139. Martin A. Schwartz, *Introduction: Section 1983 Rights Are "Personal"*, SEC. 1983 LITIG. CLAIMS & DEFENSES § 3.01 (4th ed. 2020).

140. 42 U.S.C. § 2000d.

141. INIMAI CHETTIAR, LAUREN-BROOKE EISEN & NICOLE FORTIER, BRENNAN CTR. FOR JUST., REFORMING FUNDING TO REDUCE MASS INCARCERATION 3 (2013) ("Washington spends billions of dollars each year to subsidize state and local criminal justice systems. Specifically, the Justice Department administers dozens of criminal justice grants. In 2012, just some of the largest programs, including the Community Oriented Policing Services and Violence Against Women Act grants, received more than $1.47 billion.").

142. Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

143. *Id.* at 281.

144. *Id.* at 282.

exhibiting algorithmic bias. Although § 2000d-1 cannot assist private actors in their complaints, it does provide a potential course for federal departments and agencies to regulate police use of investigative tools exhibiting algorithmic bias through disparate impact regulation.

Part IV: Novel Legislative Responses to Law Enforcement Use of FRT and Algorithmic Bias

A. Moratoriums on Law Enforcement Use of FRT and Legislators' Expressed Concerns

Concerns about law enforcement use of FRT has led several municipalities to pass moratoriums, or outright bans, on law enforcement's use of the technology to pursue suspects or monitor crowds.[145] In May 2019, San Francisco became the first U.S. city to ban law enforcement use of FRT.[146] Advocates for the ban stated FRT "as it exists today is unreliable, and represent[s] an unnecessary infringement on people's privacy and liberty."[147] Additionally, advocates for the ban argued FRT is "error prone, particularly when dealing with women or people with darker skin."[148] The lead sponsor for a similar piece of legislation, which passed in Somerville, Massachusetts near the end of 2019, stated many of his constituents "are worried about the consequences of [FRT] whose capabilities are outpacing the public's understanding of its power."[149] A small but growing number of cities have passed similar bans as San Francisco and Somerville.[150]

---

145. *See* Nicole Martin, *The Major Concerns Around Facial Recognition Technology*, FORBES (Sept. 25, 2019), https://www.forbes.com/sites/nicolemartin1/2019/09/25/the-major-concerns-around-facial-recognition-technology/#256162984fe3 [perma.cc/BA6V-LFEL].

146. Dave Lee, *San Francisco Is First US City to Ban Facial Recognition*, BBC (May 14, 2019), https://www.bbc.com/news/technology-48276660 [perma.cc/5W6X-ASH4].

147. *Id.*

148. *Id.*

149. Sarah Wu, *Somerville City Council Passes Facial Recognition Ban*, BOSTON GLOBE (June 27, 2019), https://www.bostonglobe.com/metro/2019/06/27/somerville-city-council-passes-facial-recognition-ban/SfaqQ7mG3DGulXonBHSCYK/story.html [perma.cc/RL5E-PN9T].

150. *See* Nikolas DeCosta-Klipa, *Cambridge Becomes the Largest Massachusetts City to Ban Facial Recognition*, BOSTON (Jan. 14, 2020), https://www.boston.com/news/local-news/2020/01/14/cambridge-facial-recognition [perma.cc/JL76-G7Z3]; Sarah Ravani, *Oakland Bans Use of Facial Recognition Technology, Citing Bias Concerns*, S.F. CHRON. (July 17, 2019), https://www.sfchronicle.com/bayarea/article/Oakland-bans-use-of-facial-recognition-14101253.php#:~:text=The# [perma.cc/XHQ2-4CV5].

Concern about the proliferation of FRT is a surprisingly bipartisan issue considering our polarizing time.[151] Democrats have shown apprehension toward FRT due to FRT's algorithmic bias.[152] Senator Cory Booker clearly expressed this concern in proposing the "No Biometric Barriers to Housing Act" when he stated "[u]sing facial recognition technology in public housing without fully understanding its flaws and privacy implications seriously harms our most vulnerable communities . . . ."[153] Republicans have concerns about government expansion, a sentiment made clear by a spokesperson for Rep. Jim Jordan, who stated "[f]acial recognition is concerning from the perspective of government having too much power . . . . It's an instinctive civil libertarian and constitutionalist perspective."[154] These bipartisan concerns demonstrate both the breadth of unease towards FRT as well as the real possibility of a joint, productive legislative response to FRT at the federal level.

B. Algorithmic Accountability Laws: Bringing Machine Bias into the Light

For many years, companies and law enforcement agencies operated and distributed their FRT programs in a secretive way.[155] Only recently have companies and law enforcement agencies become slightly more transparent when it comes to their relationship and the joint use of FRT.[156] A recent troubling example

---

151. *See* Shirin Ghaffary, *How Facial Recognition Became the Most Feared Technology in the US*, VOX: RECODE (Aug. 9, 2019) https://www.vox.com/recode/2019/8/9/20799022/facial-recognition-law [perma.cc/EV9E-2CCR].

152. *See, e.g.*, Chris Mills Rodrigo, *Booker Introduces Bill Banning Facial Recognition Tech in Public Housing*, THE HILL (Nov. 1, 2019), https://thehill.com/policy/technology/468582-booker-introduces-bill-banning-facial-recognition-tech-in-public-housing [perma.cc/34UR-6DKE] ("Sen. Cory Booker (D-N.J.) on Friday introduced a bill banning the use of facial recognition technology in public housing, mirroring legislation proposed in the House in July . . . . [House legislation was] introduced by Reps. Yvette Clarke (D-N.Y.), Ayanna Pressley (D-Mass.) and Rashida Tlaib (D-Mich.) . . . .").

153. *Id.*

154. Ghaffary, *supra* note 151.

155. *Accord* Amrita Khalid, *Microsoft and Amazon Are at the Center of an ACLU Lawsuit on Facial Recognition*, QUARTZ (Nov. 4, 2019), https://qz.com/1740570/aclu-lawsuit-targets-amazons-rekognition-and-microsofts-azure/ [perma.cc/UWB7-KBR4] ("The government has not disclosed which companies are providing these dystopian tools to spy on the public.").

156. *Cf.* Kashmir Hill, *The Secretive Company that Might End Privacy as We Know It*, N.Y. TIMES (Feb. 10, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html [perma.cc/7SL8-YWKC] (documenting an investigation into a company that sells FRT, which at first remained very private but eventually has been more willing to discuss their software with journalists).

of this secrecy, and at times overt deception, is the small tech start-up called Clearview AI.[157] Clearview AI devised a groundbreaking facial recognition app, which became subject to public scrutiny in January 2020 after the publication of a New York Times article by technology reporter Kashmir Hill.[158] Despite having limited knowledge about how Clearview AI works or who is behind it, hundreds of law enforcement agencies have begun using Clearview AI.[159] Clearview AI has now been shown to purposefully obfuscate investigations into its practices and to deceive its partners.[160] As Hill was investigating Clearview AI, it became apparent that Clearview AI was purposefully trying to inhibit her from finding information.[161] Additionally, Clearview AI has claimed that they only intend to provide their powerful tool to law enforcement agencies, but ample reporting has demonstrated this is untrue.[162] In response to public outcry, Clearview AI has tried to display more transparency. One such effort included Clearview AI releasing a study that claims they found no algorithmic bias in their system,[163]

---

157. *Id.*

158. *Id.*

159. *Id.* ("Federal and state law enforcement officers said that while they had only limited knowledge of how Clearview works and who is behind it, they had used its app to help solve shoplifting, identity theft, credit card fraud, murder and child sexual exploitation cases . . . . But without public scrutiny, more than 600 law enforcement agencies have started using Clearview in the past year, according to the company, which declined to provide a list.").

160. *Id.*

161. The Daily, *The End of Privacy as We Know It*, N.Y. TIMES, at 11:08 (Feb. 10, 2020) https://www.nytimes.com/2020/02/10/podcasts/the-daily/facial-recognition-surveillance.html? [perma.cc/KG6E-PJYZ] (describing how Clearview AI specifically made it so no facial recognition matches would appear when law enforcement searched for Kashmir Hill and that Clearview AI would call law enforcement agents if they ran a search for her).

162. *See, e.g.*, Kashmir Hill, *Before Clearview Became a Police Tool, It Was a Secret Plaything of the Rich*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/05/technology/clearview-investors.html [perma.cc/R3KP-UL7Q] ("[F]or more than a year before the company became the subject of public scrutiny, the app had been freely used in the wild by the company's investors, clients and friends. Those with Clearview logins used facial recognition at parties, on dates and at business gatherings, giving demonstrations of its power for fun or using it to identify people whose names they didn't know or couldn't recall."); Caroline Haskins, Ryan Mac & Logan McDonald, *Clearview's Facial Recognition App Has Been Used By the Justice Department, ICE, Macy's, Walmart, and the NBA*, BUZZFEED NEWS (Feb. 27, 2020), https://www.buzzfeednews.com/article/ryanmac/clearview-ai-fbi-ice-global-law-enforcement [perma.cc/K5YJ-P5YP] ("Clearview AI has also been aggressively pursuing clients in industries such as law, retail, banking, and gaming and pushing into international markets . . . .").

163. Caroline Haskins, Ryan Mac & Logan McDonald, *The ACLU Slammed a Facial Recognition Company that Scrapes Photos from Instagram and Facebook*,

however some groups have taken issue with the methodology used in these self-evaluations and call for third-party oversight.[164]

Cases of private companies, like Clearview AI, falsely claiming to self-regulate have caused some lawmakers to demand more transparency and accountability for the implementation of increasingly common algorithmic systems.[165] One method of legislating the AI field is the use of "Algorithmic Impact Statements," similar to environmental impact statements, which demand private organizations and government agencies to self-evaluate the efficacy and potential discriminatory effects of their algorithms.[166] In April 2019, three members of Congress proposed the first federal legislation following the Algorithmic Impact Statement Model.[167] Their bill, titled the Algorithmic Accountability Bill of 2019, would authorize the Federal Trade Commission (FTC) to create regulations requiring companies under its jurisdiction to conduct impact assessments of highly sensitive automated decision systems.[168] In supporting the bill, Representative Yvette D. Clark stated that "[a]lgorithms shouldn't have an exemption from our anti-discrimination laws. Our bill recognizes that algorithms have authors, and without diligent oversight, they can reflect the biases of those behind the keyboard."[169]

The Algorithmic Accountability Bill of 2019 would only cover private companies through the FTC's oversight capacity,[170] but subsequent legislation has been introduced to address government use of algorithms. One example in the field of law enforcement is Representative Mark Takano's Justice in Forensic Algorithms Act.[171] In expressing concern for criminal defendants' due process rights, Representative Takano has stated:

> Forensic algorithms are black boxes, and we need to be able to look inside to understand how the software works and to give

---

BUZZFEED NEWS (Feb. 10, 2020), https://www.buzzfeednews.com/article/carolinehaskins1/clearview-ai-facial-recognition-accurate-aclu-absurd [perma.cc/4LFB-4SD9].

164. *Id.*

165. *See* Press Release, U.S. Sen. Cory Booker of N.J., Booker, Wyden, Clarke Introduce Bill Requiring Companies to Target Bias in Corporate Algorithms (Apr. 10, 2019), https://www.booker.senate.gov/?p=press_release&id=903 [perma.cc/U8XT-35GU].

166. Selbst, *supra* note 95, at 110.

167. Press Release, U.S. Sen. Cory Booker, *supra* note 165.

168. Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. (2019).

169. Press Release, U.S. Sen. Cory Booker, *supra* note 165.

170. Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. (2019).

171. Justice in Forensic Algorithms Act of 2019, H.R. 4368, 116th Cong. (2019).

> defendants the ability to challenge them. My legislation will open the black box of forensic algorithms and establish standards that will safeguard our Constitutional right to a fair trial.[172]

Notably, the Justice in Forensic Algorithms Act would amend the Federal Rules of Evidence to prohibit the use of trade secret privileges to prevent defendants from accessing algorithms used in their prosecution.[173] The Justice in Forensic Algorithms Act would also direct NIST to establish Computational Forensic Algorithms Standards and a Computational Forensic Algorithms Testing Program.[174] In developing these standards, NIST would be directed to consider a variety of factors including algorithms' potential for disparate impact across protected classes in standards and testing.[175] After NIST establishes their standards, federal law enforcement would then be required to follow them.[176] These pieces

---

172. Press Release, U.S. Congressman Mark Takano of Cal.'s 41st Dist., Rep. Takano Introduces the Justice in Forensic Algorithms Act to Protect Defendants' Due Process Rights in the Criminal Justice System (Sept. 17, 2019), https://takano.house.gov/newsroom/press-releases/rep-takano-introduces-the-justice-in-forensic-algorithms-act-to-protect-defendants-due-process-rights-in-the-criminal-justice-system [perma.cc/K38E-32MN].

173. The bill provides:

> In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if—
>
> > (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and
> >
> > (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software.

Justice in Forensic Algorithms Act of 2019, H.R. 4368, 116th Cong. (2019).

174. Press Release, U.S. Congressman Mark Takano, *supra* note 172.

175. *Id.* ("In developing standards NIST is directed to: collaborate with outside experts in forensic science, bioethics, algorithmic discrimination, data privacy, racial justice, criminal justice reform, exonerations, and other relevant areas of expertise identified through public input; address the potential for disparate impact across protected classes in standards and testing; and gather public input for the development of the standards and testing program and publicly document the resulting standards and testing of software.").

176. Justice in Forensic Algorithms Act of 2019, H.R. 4368, 116th Cong. (2019) ("Any Federal law enforcement agency or crime laboratory providing services to a Federal agency using computational forensic software may use only software that has been tested under the National Institute of Standards and Technology's Computational Forensic Algorithm Testing Program and shall conduct an internal validation according to the requirements outlined in the Computational Forensic Algorithm Standards and make the results publicly available. The internal validation shall be updated when there is a material change in the software that triggers a retesting by the Computational Forensic Algorithm Testing Program.").

of proposed legislation allow for some degree of oversight, but as of the writing of this Note it is unclear if they will actually become law.

C. Legislative Suggestions from Scholars on FRT and Algorithmic Bias

University-affiliated experts[177] and non-profit groups[178] have drafted model legislation calling for a variety of reforms related to the use of algorithms generally and specifically as they apply to FRT. Clare Garvie, a senior associate at the Georgetown University Center on Privacy and Technology, believes a moratorium on the use of FRT should be put in place until FRT regulations are passed requiring "minimum photo quality standards, accuracy testing, and publicly available reports . . . on how the government uses facial recognition tech."[179] Garvie further calls for a private right of action if law enforcement did not follow these best practices.[180] In addition to suggesting formal legislation, Garvie also provided a list of thirty recommendations for a variety of actors involved in the production, utilization, and potential regulation of FRT.[181] Of note, Garvie recommended that NIST "[r]egularly include tests for algorithmic bias along the lines of race, gender, and age in facial recognition competitions," along with four other recommendations for NIST.[182]

Kartik Hosanagar, a University of Pennsylvania technology professor, takes a more expansive view on algorithmic accountability. Hosanagar proposes an "Algorithmic Bill of Rights" to manage the many risks and benefits that come with continued proliferation of algorithms in the United States' most vital

177. GARVIE ET AL., *supra* note 17, at 102–19.

178. *Community Control over Police Surveillance*, ACLU, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/community-control-over-police-surveillance?redirect=feature/community-control-over-police-surveillance [perma.cc/5UJV-5H33].

179. Khari Johnson, *Facial Recognition Regulation Is Surprisingly Bipartisan*, VENTURE BEAT (Nov. 11, 2019), https://venturebeat.com/2019/11/11/facial-recognition-regulation-is-surprisingly-bipartisan/ [perma.cc/7NQB-X9JG].

180. GARVIE ET AL., *supra* note 17, at 114 ("Any person who is subject to targeted identification or attempted identification through targeted continuous face recognition in violation of this Act may in a civil action recover from the [state] investigative or law enforcement officer or the state or [federal law] enforcement agency which engaged in that violation such relief as may be appropriate.") (alterations in original).

181. *Id.* at 62–71.

182. *See also id.* ("Recommendation 24: Increase the frequency of face recognition competitions, ideally testing on an annual or biennial basis . . . . Recommendation 25: Continue to update tests to reflect state-of-the-art advances in face recognition and mobile biometrics . . . . Recommendation 26: Develop tests that closely mirror law enforcement workflows, and issue best practices for accuracy testing . . . . Recommendation 27: Develop and distribute diverse datasets of photos.").

systems.[183] Sigal Samuel from Vox News spoke with ten experts in the field of AI, including Kartik Hosanagar and Joy Buolamwini,[184] to compose a formal list of ten rights Americans would have under an "Algorithmic Bill of Rights."[185] This composite of rights echoes the themes of transparency and redress emphasized in the proposed Algorithmic Accountability Act of 2019 and the Justice in Forensic Algorithms Act of 2019. Two specific rights proposed—"Freedom from Bias"[186] and "Independent Oversight"[187]—are critical to the management of algorithmic bias and FRT. The two rights would ensure algorithms were regularly tested for bias and that the tests were performed by third-party organizations in real-world situations.[188] This collaborative list from a variety of concerned experts in the field of AI could provide legislators with a substantial framework for future legislative proposals.

Part V: Finding the Balance Between Investigative Advancements and Civil Liberties

Like forensic DNA before it, FRT will revolutionize law enforcement's investigative effectiveness.[189] Law enforcement's increased capacity to identify, and potentially locate, suspects with only a photo or a still image from a video is expected to lead to an increase in the apprehension of evasive criminals,[190] prevention of

183. KARTIK HOSANAGAR, A HUMAN'S GUIDE TO MACHINE INTELLIGENCE: HOW ALGORITHMS ARE SHAPING OUR LIVES AND HOW WE CAN STAY IN CONTROL 218 (2019).

184. *See generally* Buolamwini & Gebru, *supra* note 14.

185. Sigal Samuel, *10 Things We Should All Demand from Big Tech Right Now*, VOX (May 29, 2019), https://www.vox.com/the-highlight/2019/5/22/18273284/ai-algorithmic-bill-of-rights-accountability-transparency-consent-bias [https://web.archive.org/web/20201107235745/https://www.vox.com/the-highlight/2019/5/22/18273284/ai-algorithmic-bill-of-rights-accountability-transparency-consent-bias].

186. *Id.* ("We have the right to evidence showing that algorithms have been tested for bias related to race, gender, and other protected characteristics — before they're rolled out. The algorithms must meet standards of fairness and nondiscrimination and ensure just outcomes.").

187. *Id.* ("We have the right to expect that an independent oversight body will be appointed to conduct retrospective reviews of algorithmic systems gone wrong. The results of these investigations should be made public.").

188. *Id.* ("Eric Topol, a physician and the author of *Deep Medicine*, told me too many algorithms are validated only on computers, not in real-world clinical environments. 'We have already learned that there is a chasm between the accuracy of an algorithm, especially determined this way, and a favorable impact on clinical outcomes' he said, explaining that just because an algorithm appears to work great in a computer simulation doesn't mean it'll work as intended in all doctors' offices.").

189. Tracy & Morgan, *supra* note 59.

190. O'Neill, *supra* note 67.

acts of mass violence,[191] and recovery of victims of human trafficking.[192] As with most law enforcement processes, the express intent of law enforcement's increased reliance on FRT is to protect our society and achieve a feeling of justice for the victims of criminal behavior.[193] However, these intended objectives need to be reconciled with the fact that powerful police efforts often affect historically marginalized communities more than others.[194] Although law enforcement may have the best of intentions, human

191. Ivan Moreno, *AI-Powered Cameras Become New Tool Against Mass Shootings*, ABC NEWS (Aug. 30, 2019), https://abcnews.go.com/Technology/wireStory/threat-mass-shootings-give-rise-ai-powered-cameras-65285382 [perma.cc/P2CC-T35E] ("There was no threat, but Hildreth's demonstration showed what's possible with AI-powered cameras. If a gunman were in one of his schools, the cameras could quickly identify the shooter's location and movements, allowing police to end the threat as soon as possible, said Hildreth, emergency operations coordinator for the Fulton County School District. AI is transforming surveillance cameras from passive sentries into active observers that can identify people, suspicious behavior and guns, amassing large amounts of data that help them learn over time to recognize mannerisms, gait and dress. If the cameras have a previously captured image of someone who is banned from a building, the system can immediately alert officials if the person returns. At a time when the threat of a mass shooting is ever-present, schools are among the most enthusiastic adopters of the technology . . . .").

192. Tom Simonite, *How Facial Recognition Is Fighting Child Sex Trafficking*, WIRED (June 19, 2019), https://www.wired.com/story/how-facial-recognition-fighting-child-sex-trafficking/ [perma.cc/NTN6-JTYZ] ("One evening in April, a California law enforcement officer was browsing Facebook when she saw a post from the National Center for Missing and Exploited Children with a picture of a missing child. The officer took a screenshot of the image, which she later fed into a tool created by nonprofit Thorn to help investigators find underage sex-trafficking victims. The tool, called Spotlight, uses text- and image-processing algorithms to match faces and other clues in online sex ads with other evidence. Using Amazon's facial recognition technology, Spotlight quickly returned a list of online sex ads featuring the girl's photo. She had been sold for weeks. The ads set in motion some more traditional police work. 'Within weeks that child was recovered and removed from trauma,' Julie Cordua, CEO of Thorn, said, recounting the case at an Amazon conference in Las Vegas this month.").

193. O'Neill, *supra* note 67.

194. Selbst, *supra* note 95 at 119–20 ("Police act with incredible discretion. They choose where to focus their attention, who to arrest, and when to use force. They make many choices every day regarding who is a suspect and who appears to be a criminal. Examined in the aggregate, all of those choices exhibit disproportionate impacts on poor people and people of color. This is the result of bias built into policing as an institution, as well as unconscious biases of individual police officers. Thus, where police use predictive policing technology, the purpose is not only to detect hidden patterns, but also to inject a 'neutral,' data-driven tool into the process to prevent unconscious police biases from entering the equation. Predictive policing promises both to provide auditable methods that will prevent invidious intentional discrimination and to mitigate the unconscious biases attending police officers' daily choices. But at the moment, such a promise amounts to little more than a useful sales tactic.").

implicit bias, and now algorithmic bias, can result in atrocious disparities and mistreatment.[195]

The Equal Protections Clause's jurisprudence, as it currently stands, is not designed to remedy the modern problem of police use of systems containing algorithmic bias. The requirement to prove discriminatory intent under the Equal Protection Clause makes it difficult to apply to a seemingly unintended and unexpected source of discrimination, namely algorithmic bias.[196] The misleading perception that machines are inherently objective and "infallible"[197] further complicates this issue and may actually conceal discriminatory human intent behind mechanical objectivity.[198]

The Fourth Amendment also does not appear to be a likely avenue to address algorithmic bias. The Court's decision in *Whren v. United States* makes it clear that the Fourth Amendment's probable cause analysis should not factor in an officer's subjective intent.[199] The Court's ruling in *Whren* makes it appear that discriminatory undertones have no role in determining the presence of a Fourth Amendment violation.[200] However, algorithmic bias may affect the Fourth Amendment's probable cause analysis by drawing into question the reliability of FRT matches in meeting the necessary standard of proof.[201] Police use of FRT matches could be compared to the police consulting with an informant known to be unreliable.[202] However, because the Fourth Amendment's probable cause analysis is so flexible, it is unlikely judges will find an FRT match, combined with other minor information, does not reach the level of probable cause, even given FRT's algorithmic bias.[203]

Legislative or agency action is the most fitting way to address the quickly evolving prospects associated with law enforcement's increased use of FRT because of the adaptive approach these routes can provide. Constitutional solutions, even if they were viable, may be too rigid to appropriately balance the nuanced and ever-changing

195. *Id.*

196. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (noting that *Washington v. Davis*, 426 U.S. 229 (1976), has been repeatedly relied on to reaffirm the need for "proof of racially discriminatory intent or purpose" in a variety of contexts).

197. Desai & Kroll, *supra* note 20.

198. *See* Buolamwini & Gebru, *supra* note 14.

199. 517 U.S. 806, 813 (1996).

200. *Id.*

201. *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) (discussing the standard of proof for finding probable cause).

202. *See, e.g.*, Florida v. J.L., 529 U.S. 266, 270 (2000).

203. *See Gates*, 462 U.S. at 232.

interests at play with law enforcement's use of FRT.[204] The Court has admitted when discussing the canon of constitutional avoidance that settling an issue through a constitutional decision can limit legislative flexibility.[205] Additionally, if the legislature assigned regulatory power to an executive agency, as proposed in the Algorithmic Accountability Bill of 2019[206] or the Justice in Forensic Algorithms Bill of 2019,[207] then the assigned agency could use its expertise to generate fitting responses to advancements in technology and investigative tactics.[208]

Specifically, NIST must have the authority to set clear standards about algorithmic bias and FRT specifically, which federal law enforcement and local law enforcement receiving federal funds would be required to follow. It is in the best interest of the United States for Congress to follow the suggestions of Representative Mark Takano[209] and Clare Garvie[210] in assigning power to NIST. As algorithms proliferate in American society, and more concerningly, the criminal justice system, there needs to be a central regulator that guides these rapid advancements. NIST has made some advancements in this role through studies like the Facial Recognition Vendor Test, which showed the majority of FRT programs exhibit bias.[211] However, NIST needs greater authority to act on these sorts of findings. For example, NIST should be able to: (1) mandate federal law enforcement to use those FRT programs that exhibit the lowest demographically-based error rate;[212] (2) draft strict protocol outlining best practices for law enforcement use of FRT;[213] (3) perform regular audits of law enforcement use of FRT;[214] and (4) require law enforcement agencies to be transparent

204. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 508–09 (1979) (Brennan, J., dissenting).

205. *See id.* at 509 (quoting Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926)) ("[A]mendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation.").

206. Press Release, U.S. Sen. Cory Booker, *supra* note 165.

207. Press Release, U.S. Congressman Mark Takano, *supra* note 172.

208. *See generally* Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429 (Spring 1999).

209. Press Release, U.S. Congressman Mark Takano, *supra* note 172.

210. GARVIE ET AL., *supra* notes 17, 180–182.

211. GROTHER ET AL., *supra* note 43 (finding bias in the form of demographic differentials in contemporary face recognition algorithms).

212. *See id.*

213. GARVIE ET AL., *supra* note 17.

214. Justice in Forensic Algorithms Act of 2019, H.R. 4368, 116th Cong. (2019).

in their use of FRT and their partnerships with manufacturers.[215] NIST could also use 42 U.S.C. § 2000d-1 to establish regulations that would allow NIST to enforce disparate impact theories related to FRT. Until this sort of authority is given to a responsible government agency or the legislature imposes some clear regulatory system, we are left hoping that FRT companies and law enforcement behave themselves,[216] because existing legal frameworks are not suitable to this new wave of invasive discrimination.[217]

Conclusion

Law and technology have always been engaged in a cat and mouse chase, with law unsuccessfully trying to catch up to advancements in technology. FRT and algorithmic bias are some of the most recent examples of technology evolving just outside the reach of judicial precedent. The more adaptive portions of government, namely the legislature and government agencies, need to work towards creating a comprehensive framework to deal with FRT and algorithmic bias before the proliferation of these systems reaches a critical mass. There are examples worldwide of countries

---

215. Samuel, *supra* note 185 ("We have the right to know when an algorithm is making a decision about us, which factors are being considered by the algorithm, and how those factors are being weighted.").

216 *Compare* Isobel Asher Hamilton, *Outrage over Police Brutality has Finally Convinced Amazon, Microsoft, and IBM to Rule Out Selling Facial Recognition Tech to Law Enforcement. Here's What's Going On*, BUS. INSIDER (June 13, 2020), https://www.businessinsider.com/amazon-microsoft-ibm-halt-selling-facial-recognition-to-police-2020-6 [https://perma.cc/WYJ4-8JNQ] ("Three of the world's biggest tech companies have backed off selling facial recognition to law enforcement amid ongoing protests against police brutality."), *with* Julia Horowitz, *Tech Companies Are Still Helping Police Scan Your Face*, CNN BUS. (July 3, 2020) https://www.cnn.com/2020/07/03/tech/facial-recognition-police/index.html#:~:text=Tech%20companies%20are%20still%20helping%20police%20scan%20your%20face&text=As%20Black%20Lives%20Matter%20protests [https://perma.cc/DAS2-A62R] ("[IBM, Amazon, and Microsoft] aren't the top suppliers of facial recognition software used by law enforcement, meaning police departments will still be able to buy from plenty of vendors. Clearview AI, Japan's NEC and Ayonix, Germany's Cognitec and Australia's iOmniscient have all said they intend to maintain their relationships with US police forces.").

217 Hamilton *supra* note 216 ("'From a US perspective, these announcements confirm the serious harm that unregulated facial recognition technology in the hands of law enforcement has already caused Black and other [minority] groups to suffer' . . . [Dr. Nakeema Stefflbauer] added: 'In my opinion, this is the moment when US and EU governments must take technology regulation seriously and pass comprehensive legislation: failure to do so is nothing less than giving permission for an unchecked assault on human rights.'").

already using FRT at a near dystopian level.[218] In the United States, we need to cultivate an adaptive legal framework before FRT, and its underlying algorithmic bias, get further out of hand.[219] Proactive solutions, like the proposed and model legislation described above, must be instituted to reduce the gap between legal theory and technological realities.

218. Emily Feng, *How China Is Using Facial Recognition Technology*, NPR (Dec. 16, 2019), https://www.npr.org/2019/12/16/788597818/how-china-is-using-facial-recognition-technology [perma.cc/QN64-P2PB] ("In the dataset Wethington found, people were indexed by information, like their criminal history, with facial recognition data, like if they were bearded or wearing a mask, and even what ethnicity they were, Han, the ethnic majority here in China, or Uighur, a predominantly Muslim ethnic minority China has detained by the hundreds of thousands in the region of Xinjiang in the name of anti-terrorism."); Kelvin Chan, *UK Police Use of Facial Recognition Tests Public's Tolerance*, ABC NEWS (Jan. 16, 2020), https://abcnews.go.com/Technology/wireStory/uk-police-facial-recognition-tests-publics-tolerance-68321764 [perma.cc/BD28-5PJD] ("Police in Britain are testing the real-time use of facial recognition to scan crowds for wanted people and then detain any suspects for questioning. . . . The real-time surveillance being tested in Britain is among the more aggressive uses of facial recognition in Western democracies and raises questions about how the technology will enter people's daily lives."); Laura Mackenzie, *Surveillance State: How Gulf Governments Keep Watch on Us*, WIRED (Jan. 21, 2020), https://wired.me/technology/privacy/surveillance-gulf-states/ [perma.cc/49XE-JXX5] ("[Dubai] police have been rolling out a program called Oyoon (Eyes) that implements facial recognition technology and analysis across the city. They basically have thousands of video feeds from cameras across the emirate that feed back into a central command center.").

219. Lane Brown, *There Will Be No Turning Back on Facial Recognition*, N.Y. MAG: INTELLIGENCER (Nov. 12, 2019), https://nymag.com/intelligencer/2019/11/the-future-of-facial-recognition-in-america.html [perma.cc/WH3Z-W35Z] ("We also heard that spooked lawmakers banned police use of facial recognition in Oakland; Berkeley; Somerville, Massachusetts; and San Francisco, of all places, where Orwellian tech products are the hometown industry. But everywhere else and in all other contexts, facial recognition is legal and almost completely unregulated—and we heard that it's already being used on us in city streets, airports, retail stores, restaurants, hotels, sporting events, churches, and presumably lots of other places we just don't know about.").

VOLUME XXXIX | SPRING '21

LAW & INEQUALITY

UNIVERSITY OF MINNESOTA LAW SCHOOL