



# LAW & INEQUALITY

UNIVERSITY OF MINNESOTA LAW SCHOOL

## *Foreword*

JLI Vol. 44 Editorial Board

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*Illuminating the Errors of *State v. Muñoz* and the Curtailment of Due Process Rights When a U.S. Citizen is Married to a Noncitizen*

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## FOREWORD

*JLI* Vol. 44 Editorial Board

In 2021, the *Minnesota Journal of Law & Inequality*'s Volume 39 Editorial Board opted to publish a special issue entirely dedicated to pieces examining Minneapolis Police's murder of George Floyd and the history of policing and racial profiling in Minneapolis. The works of Greg Egan and David Schultz were published specifically seeking to turn a critical eye toward the legal, political, and social systems that ultimately contributed to the murder of George Floyd here in Minneapolis. In addition to the great writings these two authors contributed, the Volume 39 Editorial Board co-wrote an article titled *Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic*.

Unfortunately, this scholarship remains prevalent today as the Twin Cities faces paramilitary occupation by Immigration and Customs Enforcement. Minnesota has frequently and uniquely been situated at the center of political and social movements—a position the *Journal of Law & Inequality* was founded in order to support and address through legal critique and scholarship. This first Issue of Volume 44 is no different from the work we must continue to advance in the face of fascism. In this Issue, you will read about the impact of taxation on Tribal communities across the United States, the aims of Affirmative Action, the legal intersections at play when a person chooses to "come out," gaps within disparate impact discrimination, the racial undertones and motivations of Minnesota's cannabis statute, and immigration concerns within due process and the rise of artificial intelligence. While each of these pieces addresses varying areas of the legal landscape, each, in turn, also uniquely illuminates communities at the margins; groups the occupation threatens, isolates, and murders.

The Volume 44 Editorial Board is proud to present this first Issue, including an unedited reprint of *Refunding the Community*.



# **What Did the SFFA Court “Say to John”? White Innocents, Reciprocal Democratic Sacrifice, & the Message of Affirmative Action**

Nathan W. Dean<sup>†</sup>

## **Abstract**

*This Article rejects claims (1) that there is a moral equivalence between the racial classifications associated with Jim Crow and the racial classifications associated with affirmative action and (2) that race-conscious admissions programs punish white Americans. First, it is possible to help those in urgent need and the political community at large without wronging others. Second, a failure to acknowledge the unavoidability of reciprocal democratic sacrifice enables members of the Supreme Court of the United States and others to pretend that any burden placed on “innocents” is undue. Third, this pretension conveys the highly dangerous message that Black gain necessarily depends upon corresponding substantial and unjustifiable white loss. Finally, the Article invites the articulation of alternative messages that attempt to recover the common-sense ordinariness of affirmative action. Alternative messages of this kind would arm nonbeneficiaries with the resources necessary to reconcile themselves to the unavoidability of reciprocal democratic sacrifice and enable them to pursue accomplishments and relationships free from avoidable complicity in American society’s unexpiated crimes.*

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Imagine two college applicants from North Carolina, John and James. Both trace their family's [sic] North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's [sic] legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?<sup>1</sup>

— Justice Jackson

[W]hat would Justice J[jackson] say to John when deeming him not as worthy of admission: Some statistically significant number of white people had advantages in college admissions seven generations ago, and you have inherited their incurable sin?<sup>2</sup>

— Justice Thomas

## Introduction

### A. Identities & Responsibilities

Each one of us is obligated to accept morally compromised identities that we have not chosen,<sup>3</sup> to foster just institutional arrangements,<sup>4</sup> to avoid reinforcing injustices or perpetuating their negative consequences,<sup>5</sup> and to resist unfair and unjust schemes.<sup>6</sup> We arrive on the scene already subject to a host of unselected obligations and conflicting demands for our loyalty and allegiance.<sup>7</sup> The liberal vision's picture of a self that stands beyond the reach of its experiences—the “unencumbered self”<sup>8</sup>—is a proceduralist fantasy and a dangerous one at that.

Does this mean that we come on to the scene already saddled with a host of forward-looking responsibilities arising from contingent social relations that we did not choose? It does.

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1. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 385–86 (2023) (Jackson, J., dissenting).

2. *Id.* at 282 (Thomas, J., concurring).

3. Mark B. Brown, *James Baldwin and the Politics of White Identity*, 20 CONTEMP. POL. THEORY 1, 4 (2021).

4. TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 54 (1st prtg. 2016).

5. *Id.*

6. Candice Delmas, *Political Resistance: A Matter of Fairness*, 33 LAW & PHIL. 465, 475 (2014).

7. See Judith N. Shklar, *Obligation, Loyalty, Exile*, 21 POL. THEORY 181, 184–85 (1993); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 90 (1984) [hereinafter *Procedural Republic*]; MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? 220–25 (Farrar, Straus and Giroux ed., 2009).

8. *Procedural Republic*, *supra* note 7, at 86.

First, robust and energetic resistance to oppression just is one of the ways in which we show respect for its victims and for ourselves.<sup>9</sup> Second, the discharge of these obligations is one way in which we respect ourselves and others as well-meaning moral agents.<sup>10</sup> And, third, oft-ignored, though nevertheless perpetually convergent, spiritual and democratic interests undermine the seemingly common sense conclusion that Black gains are indistinguishable from white losses.<sup>11</sup>

#### B. Slavery & Scalia's Dad

[White Americans] are dimly, or vividly, aware that the history they have fed themselves is mainly a lie, but they do not know how to release themselves from it, and they suffer enormously from the resulting personal incoherence. This incoherence is heard nowhere more plainly than in those stammering, terrified dialogues which white Americans sometimes entertain with the black conscience, the black man in America. The nature of this stammering can be reduced to a plea. *Do not blame me. I was not there. I did not do it.*<sup>12</sup>

— James Baldwin

However, what do we say to the white applicant who never owned or transported slaves and was born long after racial segregation's de jure implementation? *He was not there. He did not do it.* In a scathing critique of Justice Powell's controlling opinion in *Regents of the University of California v. Bakke*,<sup>13</sup> then-professor Antonin Scalia observes that his own father arrived in the United States as a teenager and had probably never seen a Black man let alone "profited from the sweat of any black man's brow."<sup>14</sup> Later in the same paragraph, however, Scalia acknowledges that white ethnics had, like all whites, benefitted from "discrimination against blacks" or themselves practiced it.<sup>15</sup> His point isn't that white ethnics don't practice discrimination against Blacks let alone benefit from it, but just that "to compare *their* racial debt . . . with that of those who plied the slave trade, and who maintained a formal caste system for many years thereafter, is to confuse a mountain with a molehill."<sup>16</sup>

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9. See, e.g., Thomas E. Hill, Jr., *Moral Responsibilities of Bystanders*, 41 J. SOC. PHIL. 28, 30–31 (2010).

10. *Id.* at 37.

11. M. Broderick Johnson, "Trying to Save the White Man's Soul": Perpetually Convergent Interests and Racial Subjugation, 133 YALE L.J. 1335, 1352–60 (2024).

12. JAMES BALDWIN, *White Man's Guilt*, in THE PRICE OF THE TICKET 409, 410–11 (St. Martin's/Marek ed., 1985) (emphasis added).

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

14. Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L.Q. 147, 152 (1979).

15. *Id.*

16. *Id.* (emphasis added).

One response to this incessantly repeated “innocent white” objection<sup>17</sup> is to zero in on the unjust enrichment that even Scalia admits.<sup>18</sup> As accurate and powerful as this acknowledgement may be, I also find myself attracted to the position of those disinclined to press this potentially divisive argument.<sup>19</sup> Better perhaps is a response to the objection that simply focuses on the reality (1) that shared compensatory burdens are not at all unusual and (2) that innocent non-beneficiaries of unjust enrichment *already* suffer from non-reciprocal and unjust burdens.<sup>20</sup>

Even in the absence of compensatory motivations, the government regularly subjects segments of society to preferential treatment even though doing so necessarily burdens innocent nonbeneficiaries.<sup>21</sup> These programs are instances of affirmative action and how very odd, unfair, unjust, and bad it would be, if, as Jed Rubenfeld observes, “the only kind of affirmative action made unconstitutional under the Civil War Amendments is the kind that would offer assistance to blacks.”<sup>22</sup> A nation

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17. ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 139 (2010).

18. See James Boyd White, *What’s Wrong with Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1941 n.24 (2002) (“Being a white person in America is like buying a house that was built by slaves before the Civil War.”); see also RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 46–47 (Stephen L. Wasby ed., 1992) (“Was Allan Bakke personally responsible for any of the racism that held back the minority applicants? Very possibly not, but that is the wrong question. That makes him ‘innocent’ only *up to the point at which he applies for one of the special admission seats*. But he becomes a guilty party the moment he seeks to receive a benefit he would not qualify for without the accumulated effects of racism. At that point he becomes an accomplice in, and a beneficiary of, society’s racism. He becomes the recipient of stolen goods.”).

19. See, e.g., ANDERSON, *supra* note 17, at 139.

20. ANDERSON, *supra* note 17, at 139–40; see also Kwame Anthony Appiah, “*Group Rights*” and *Racial Affirmative Action*, 15 J. ETHICS 265, 273 (2011) (“If justice requires restitution to Japanese Americans for the wrongs they suffered in internment in World War II, I cannot complain, when my taxes are raised to pay this restitution, that I did not do the interring . . . . In a society with a history of racial inequality, whose consequences are evident in continuing unequal distributions of social goods, contributing to eradicating racial inequality is a perfectly reasonable aim.”). But see Matthew Adams, *Nonideal Justice, Fairness, and Affirmative Action*, 20 J. ETHICS & SOC. PHIL. 310, 316–17 (2021) (noting that affirmative action programs are not analogous to raising taxes for state reparations for internment).

21. Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 464 (1997) (observing that “programs that offer special opportunities to the poor,” “laws that require special accommodations for the handicapped,” and “state action that grants preferences to veterans” are “[a]ll . . . instances of affirmative action” that inflict corresponding harm on “the unoffending rich, the innocently able-bodied, [and] the law-abiding civilian population,” respectively).

22. *Id.*; see also Kermit Roosevelt III & Kellen McCoy, *Second Founding, Second Redemption*, 26 U. PA. J. CONST. L. 1369, 1418 (2024) (“The recent suit challenging FDA loan forgiveness for Black farmers is an illustration. If the FDA decided to help out potato farmers, or farmers in Wisconsin, or farmers over the age of fifty, any of those preferences

stratified on the basis of disability status surely is an unjust one, but this is no less true when it comes to race. Why, then, do so many in our society balk at *racial* affirmative action but not these other kinds?

Kermit Roosevelt, for one, prefers over what we might call “simple racism” an explanation grounded in his sense that whites “feel accused by” race-based affirmative action but not by other preferences.<sup>23</sup> This strikes me as both accurate and incomplete. White Americans do indeed seem to feel accused by affirmative action in a way that they don’t feel accused by other preferences, but that reaction may also have something to do with the extent to which they can see themselves in those other preferences.<sup>24</sup> Whites are and can become poor, disabled, veterans, and legacies but they are not and will never become Black.<sup>25</sup> Losing to these others is losing to a part of oneself, while losing to Black Americans seems to function as a unique form of group-based threat in this society.<sup>26</sup> If

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would have been acceptable, without any demonstration of wrongdoing. But a preference for Black farmers requires a specific showing of unconstitutional discrimination, and the fact that ninety-seven percent of the Trump Administration’s \$9.2 billion farm bailout went to white farmers is irrelevant as long as it did not use explicit classifications.”); John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 365 (1966) (“Certainly we see no conflict between our ideals of equality and the granting of special treatment to the handicapped. And we not only tax the poor at a lower rate than the rich but we have a whole variety of social programs which, while they do not actually produce equality, nonetheless treat the needy in a sense more favorably than the wealthy.”); Kent Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 585 (1975); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 406 (1978) (Blackmun, J., concurring in part and dissenting in part) (“[G]overnmental preference has not been a stranger to our legal life. We see it in veterans’ preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax . . . And in the admissions field . . . educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.”); *Bakke*, 438 U.S. at 375 (Brennan, J., concurring in part and dissenting in part) (“Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go . . . there is a significant likelihood that they will be treated as second-class citizens because of their color.”); Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 111–12 (1979) (“[I]t is inconceivable that a slight dose of unintended stigma could by itself render an otherwise acceptable classification unconstitutional . . . The conferral of benefits by legislation is not typically an attempt to stigmatize the beneficiaries; certainly that would be a strange explanation for veterans’ preferences or benefits to the handicapped.”) (citation omitted).

23. Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PA. J. CONST. L. 729, 746 n.59 (2015).

24. See Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 350–51 (2018).

25. See, e.g., Shklar, *supra* note 7, at 185.

26. Raea Rasmussen and coauthors, for instance, find that “liberal, moderate, and conservative White Americans alike believe that racism is a zero-sum game with gains for Black people meaning losses for White people.” Raea Rasmussen et. al., *White (but Not Black) Americans Continue to See Racism as a Zero-Sum Game; White Conservatives (but Not Moderates or Liberals) See Themselves as Losing*, 17 PERSPS. ON PSYCH. SCI. 1800, 1806 (2022). They further note, however, that liberal white Americans, moderate white Americans, and

unjust racialization itself functions as a qualification,<sup>27</sup> then white Americans are forever barred from outcompeting their Black counterparts along that dimension. My claim is not that all white Americans are equally enthralled by the prospect of this group-based threat. I do worry, however, that such sensitivity may already be a function of the extent to which they believe that racism itself is a zero-sum game that they are losing or at risk of losing.<sup>28</sup>

### C. Guilt & Rebellion

I think white males have a hard time because we are constantly blamed for being power-holding oppressors, yet we are not given many concrete ways to change. Then we just feel guilty or rebel.<sup>29</sup>

— A student at the University of Michigan

Guilt—though perhaps sometimes and in some ways effective—is, a luxury for which we do not have the time. Rebellion, doubly so. Concrete ways to change are also often difficult to articulate and even more difficult to articulate persuasively. Our mutual interest in the fruits of race-conscious admissions at selective institutions of higher learning is, however, relatively easy to express. These institutions produce the American elite; a segregated elite is an incompetent elite; and an incompetent elite is a danger to this country and to the world.<sup>30</sup>

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conservative white Americans are, nevertheless, distinguishable from one another to the extent that “[l]iberal White Americans see racism as a zero-sum game they are winning by a lot, moderate White Americans see it as a game they are winning by only a little, and conservative White Americans see it as a game they are losing.” *Id.* at 1806–07; *see also* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 217 (2011) (finding that many white Americans believe that advances in equality for Black Americans have led to anti-white discrimination that is more prevalent than anti-Black discrimination); *see also* Victoria C. Plaut, *Law and the Zero-Sum Game of Discrimination: Commentary on Norton and Sommers*, 6 PERSPS. ON PSYCH. SCI. 219, 219–21 (2011) (finding that the increasing belief in prevalent anti-white discrimination has “serious implications for antidiscrimination law.”).

27. *See, e.g.*, ANDERSON, *supra* note 17, at 157–60.

28. *See* Rasmussen et al., *supra* note 26, at 1806–07.

29. Mark A. Chesler, Melissa Peet & Todd Sevig, *Blinded by Whiteness: The Development of White College Students’ Racial Awareness*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 215, 225 (Ashley “Woody” Doane & Eduardo Bonilla-Silva eds., 2003).

30. *See, e.g.*, ANDERSON, *supra* note 17, at 98–99 (observing that whenever “advantaged groups are able to segregate themselves from the disadvantaged, they lose personal contact with the problems of the disadvantaged” and “become complacent and insular.”); Elizabeth S. Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 603 (2007) (observing that segregation “deprives multiply [sic] advantaged elites of the cultural capital that circulates in disadvantaged social circles” rendering them “less qualified to do their jobs.”); Elizabeth Anderson, *The Social Epistemology of Morality: Learning from the Forgotten History of the Abolition of Slavery*, in *THE EPISTEMIC LIFE OF GROUPS: ESSAYS IN THE EPISTEMOLOGY OF COLLECTIVES* 75, 78 (Michael S. Brady & Miranda

Overwhelmingly white elite educational spaces yield an overwhelmingly white cadre of American leaders and an overwhelmingly white cadre of American leaders—especially one educated in segregated settings—will and does feature a view of human flourishing that is “stunted and often wrong.”<sup>31</sup>

There’s also no good reason, I think, for us to saddle our model of the average white applicant with a presumption of inordinate ignorance or close-mindedness. He may, for instance, be willing to acknowledge all that has been established to this point and yet still find it a kind of “cold comfort” for his experience of exclusion. As Khiara Bridges notes, the diversity rationale in support of race-conscious admissions “attempts to comfort white people who lose out on coveted spots in an incoming class by assuring them that *other white people*—the ones who secured a seat—are winners.”<sup>32</sup> And it should surprise us not at all that white Americans, simply because they are human beings, find themselves incentivized to question and to oppose policies that “sometimes . . . operate to their detriment.”<sup>33</sup> They may justifiably wonder: How can I benefit from an integrated setting that will not have me? The key, I think, is to better characterize the exclusion itself and the nature and extent of the incidental burden that one must bear because of it.

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Fricker eds., 2016) (observing that “[s]ound moral inquiry is not only essentially social; it demands the participation of the affected parties, of those making claims on others’ conduct, as well as those to whom such claims are addressed” and that “[w]e cannot hope to get our moral thinking straight unless we include the affected parties in our moral inquiry, and include them on terms of equality.”).

31. Rachel A. Cohen, *I'm a White HLS Grad. Classroom Diversity Made Me a Better Lawyer.*, HARV. CRIMSON (Dec. 28, 2024), <https://www.thecrimson.com/article/2024/12/28/cohen-harvard-law-diversity/> [https://perma.cc/R5KL-T2MD]; see also Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 U.C. DAVIS L. REV. 1105 (2018) (noting the salience of racial and ethnic diversity in legal education); Justin Cole & Gregory Curfman, *Back to Bakke: The Compelling Need for Diversity in Medical School Admissions*, 22 YALE J. HEALTH POL'Y L. & ETHICS 60 (2023).

32. Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 138 (2022) (emphasis added).

33. *Id.*; see also CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 146 (1st prtg. 1998) (“Whites do not have to be racist to want to keep their privileges (though racism, as a rationalization, may make it morally easier); they just have to be human.”).

*D. Moral Asymmetry*

[Black Law] is law that is inexplicable and probably wrong except in the context of the courts' desire to aid the black drive for social parity.<sup>34</sup>

— Bob Comfort

We should care about group inequality precisely because its elimination or melioration is, as Glenn Loury insists, “a necessary element of what is needed to establish a just political community.”<sup>35</sup> This, in turn, renders the notion of, and the aversion towards so-called “Black Law”—“law that is inexplicable and probably wrong except in the context of the courts' desire to aid the black drive for social parity”<sup>36</sup>—quite striking in the context of American history and culture. Imagine criticizing “Disability Law” for *its* moral asymmetry—for the sense (1) that it is “law that is inexplicable and probably wrong except in the context of the courts' desire to aid the [disabled community's] drive for social parity”<sup>37</sup> and (2) that, therefore, its core aims are to protect, include, and empower the disabled rather than to ensure equal treatment on the basis of disability/nondisability status.<sup>38</sup> Presumably a candid response to such an accusation of moral asymmetry is “guilty as charged.”

Yes, it's true, we might calmly concede. “Disability Law” is indeed “inexplicable and probably wrong except in the context of” not simply the courts', but also society's “desire to aid the [disabled community's] drive for social parity.”<sup>39</sup> Social parity—equal social status for all—is the very good for which we are striving, and its pursuit is obviously inextricable from the sometimes “differentiated”<sup>40</sup> burdens that we must necessarily bear to bring it into being. The achievement of equal status for Black

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34. Memorandum from Bob Comfort to Justice Powell 49 (Aug. 29, 1977), <https://scholarlycommons.law.wlu.edu/casefiles/114/> (on file with Washington & Lee Univ. Sch. of Law); *but see* Claire Jean Kim, *Are Asians the New Blacks?*, 15 DU BOIS REV. 217, 221 (2018) (“[I]t is the law that has degraded Blackness, not the other way around.”).

35. Glenn C. Loury, *Why Should We Care About Group Inequality?*, 5 SOC. PHIL. & POL'Y 249, 260 (1987).

36. Comfort, *supra* note 34, at 49.

37. *Id.*

38. Exemplifying an asymmetrical focus on what we might call suspect *classes* combined with a symmetrical and somewhat less weighty focus on what we might call suspect *classification*. See Lawrence Blum, *Racial and Other Asymmetries: A Problem for the Protected Categories Framework for Anti-Discrimination Thought*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 182 (Deborah Hellman & Sophia Moreau eds., 2013); Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301 (2013); Anthony Sangiuliano, *Justifying Antisubordination*, 3 AM. J.L. & EQUAL. 347, 349, 367–72 (2023).

39. Comfort, *supra* note 34, at 49.

40. Danielle Allen, *Integration, Freedom, and the Affirmation of Life*, in *TO SHAPE A NEW WORLD* 146, 159 (Tommie Shelby & Brandon M. Terry eds., 2018).

Americans and other underrepresented minorities (URMs) plausibly requires asymmetrical treatment of URM<sup>s</sup> vis-à-vis non-URMs because and to the extent that they are, like our disabled fellows, "differentially situated within the opportunity structure" of our society.<sup>41</sup>

#### E. Pushing Back

If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug . . . . [T]he right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.<sup>42</sup>

— Ronald Dworkin

I submit that it is quite possible to help those in urgent need without wronging others even as and, sometimes, because we treat them differently. That we seem to recognize this ordinary truth with respect to our own families, and with respect to our disabled fellows among others, leads me to believe that we might already possess some of the necessary discursive resources to resist the zero-sum rhetorical framing that is so disturbingly popular with both the Court and white Americans.<sup>43</sup>

My goal in this Article is then to push back against what I've come to think of as Anti-Black Law by recovering some of the common-sense ordinariness of affirmative action, in general, and race-conscious admissions, in particular. As Danielle Allen reminds us, the open secret of democracy is that "some citizens are always giving things up for others."<sup>44</sup> Democracy, she observes, "puts its citizens under a strange form of psychological pressure by building them up as sovereigns and then

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41. Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1123–30 (2017); see also, Robert Westley, *White Normativity and the Racial Rhetoric of Equal Protection*, in EXISTENCE IN BLACK 97 (Lewis R. Gordon ed., 1997) ("Race' is not oppressed in American society. Black people are oppressed. Native Americans are oppressed. Chicanos are oppressed. People of color are oppressed."); Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind*, in SEX, RACE, AND MERIT 54 (Faye J. Crosby & Cheryl VanDeVeer eds., 2000) ("Reading the Equal Protection Clause to protect whites as well as blacks from racial classification is to focus upon a situation that does not and never has existed in our society."); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1767 (2001) ("Equal treatment . . . cannot be the sum total of equal protection because the application of that principle requires that the circumstances of the groups be similar. Race, however, embodies asymmetry—of resources, power, access, and social status.").

42. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (Duckworth 1977).

43. See Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351, 368–71 (2019); Rasmussen et al., *supra* note 26, at 1806–07.

44. DANIELLE ALLEN, *TALKING TO STRANGERS: CITIZENSHIP AFTER BROWN V. BOARD OF EDUCATION* 29 (2004).

regularly undermining each citizen's experience of sovereignty."<sup>45</sup> What this also means is that democratic citizenship is inextricable from the experience of "democratic sacrifice": the experience of, and the cultivation of the skills and the disposition to support, "convert[ing] loss into . . . freely given gift[s] to be reciprocated."<sup>46</sup>

I take it that when poor people and people with disabilities and veterans enjoy preferential treatment, *as well as* symmetrical protection from unjust discrimination, they are in receipt of freely given gifts bestowed in part by the unoffending rich, the able-bodied, and civilians<sup>47</sup> as a simple function of communal loss-shifting.<sup>48</sup> Of course, there are those who do not look upon these as freely given gifts at all, but I propose to set those who take that position aside for the purposes of this Essay. I want instead to leverage our broadly, if not entirely, shared intuitions regarding the justifiability of seemingly preferential treatment in other morally asymmetrical contexts to counter the Court's false, inflammatory, and pernicious contentions, (1) that there is a moral equivalence between the racial classifications associated with Jim Crow and the racial classifications associated with affirmative action; and (2) that race-conscious admissions programs necessarily punish white Americans.

#### *F. Reconsidering the Message of Affirmative Action*

My approach will be to reconsider the validity and impact of the messages that the Court is conveying to American high school students. This concern also extends to the messages that the Court is likewise conveying to all of us in and out of academia who find ourselves deeply invested in seeing American youth flourish individually and collectively as they also contribute mightily to the betterment of society. It is more than a little concerning that a number of the Court's members have been operating simultaneously as "exemplars" of public reason<sup>49</sup> *and*,

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45. *Id.* at 27.

46. *Id.* at 36.

47. Rubenfeld, *supra* note 21, at 464.

48. Christopher Edley Jr., *Affirmative Action and the Rights Rhetoric Trap*, 3 HARV. BLACKLETTER J. 9, 14 (1986).

49. JOHN RAWLS, *POLITICAL LIBERALISM* 216, 233, n.18 (1993) ("A supreme court . . . protect[s] the higher law [of the people]. By applying public reason, the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way . . . . *It must be said that historically the court has often failed badly in this role.*") (emphasis added to indicate footnote language); *see also* Jeremy Waldron, *Public Reason and "Justification" in the Courtroom*, 1 J.L. PHIL. & CULTURE 107, 129, 131 (2007) ("What courts [interpreting the United States Constitution] call 'giving reasons' is an attempt to connect the decision they are facing with some piece of abstract and ill-thought-through eighteenth-century prose. Or it is an attempt to construct desperate analogies between the present decision they face and

contrastingly, what we might call cognitive “laziness masters” in their capacity as “socially designated authorities for expert ignorance.”<sup>50</sup> They carry on the pretense (1) that inclusion is morally indistinguishable from exclusion; (2) that reciprocal democratic sacrifice is somehow avoidable; and (3) that *any* burden placed on “innocents”—no matter how insignificant, nonarbitrary, justified, and proportionate—is undue.<sup>51</sup> The implicit goal of this rhetoric is to convince the American public that, no matter whether we think that racial equality is just around the corner or an unattainable goal, the cure is worse than the disease or even that the cure *is* the disease.<sup>52</sup>

“Two wrongs don’t make a right,” “you can’t fight fire with fire,” and “[t]he way to stop discrimination on the basis of race is to stop

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other decisions that happen to have come before them (in which they were engaged in similar contortions). There is laborious discussion of precedent, even though it is acknowledged at the highest levels of adjudication that precedent does not settle the matter . . . . And all the time, the real issues at stake in the good-faith disagreement about rights get pushed to the margins. They usually take up only a paragraph or two of the twenty-pages or more devoted to an opinion, and, even then the issues are seldom addressed directly.”).

50. JOSÉ MEDINA, THE EPISTEMOLOGY OF RESISTANCE 145–46 (2013) (“Laziness masters” or “expert ignoramus” play a key role in a “social division of cognitive laziness, a social orchestration of epistemic attitudes that gives some subjects or subcommittees a special role and responsibility in engineering and instilling the epistemic deficiencies and atrophies that support active ignorance, such as the inability to challenge certain things or to ask certain questions.”); *see also* James B. Beam Distilling Company v. Georgia, 501 U.S. 529, 549 (1991) (“I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense ‘make’ law. But they make it as judges make it, which is to say as though they were ‘finding’ it—discerning what law is, rather than decreeing what it is today changed to, or what it will tomorrow be.”) (Scalia, J., concurring) (emphasis omitted); Richard Posner, *Comment on Professor Gluck’s “Imperfect Statutes, Imperfect Courts”*, 129 HARV. L. REV. 11, 13 (2015) (“[T]he law made me do it’ might be a judicial motto. Most judges would be profoundly uncomfortable having to explain that they had ‘interpreted’ a statute in a particular way because an issue had arisen that the legislators had not envisaged when they enacted the statute and so the judges resolved it in what they thought was a sensible way at least roughly congruent with what the statute seemed to be concerned with. In short, judges prefer for reasons of self-protection to be thought of as agents rather than as principals.”); Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. REFLECTION 113, 135–36 (2023) (“The Court’s failure to explain its overruling of *Grutter* [in SFFA] calls into question the Justices’ sincerity and good faith. It also injects needless confusion into the law, making it harder to comply with the Court’s holdings and contributing to further litigation. And it undermines the impersonality of the Justices’ decisionmaking and thereby risks further eroding the Court’s perceived legitimacy.”).

51. Joel K. Goldstein, *The Supreme Court’s Assault on History in SFFA*, 54 SETON HALL L. REV. 1353, 1379 (2024) (“While purporting to follow *Grutter* . . . the SFFA majority silently dropped the adverb ‘undue,’ a consequential excision that covertly converted a balancing test to minimize disadvantage to nonminorities into an absolute prohibition against using race.”); Vinay Harpalani, *Secret Admissions*, 48 J.C. & U.L. 325, 327 (2023) (observing that the Students for Fair Admissions Court “essentially transformed no ‘undue burden’ into no burden at all.”).

52. *See* Scalia, *supra* note 14.

discriminating on the basis of race.”<sup>53</sup> Some may continue to suffer through no fault of their own, the Court admits, and “societal discrimination” may be permanent, but under conditions of scarcity any effort to include one group excludes, injures, and punishes another irrespective of intent, social positioning, and ultimate effect.<sup>54</sup> Inapt as these pithy sound bites are, the Court is surely right to conclude that turnabout is *not* fair play. Our acknowledgement of the wrongness of past discrimination certainly “commits us to the view that it would also be wrong for racial discrimination to favor black people over white people *in the same sorts of circumstances*.”<sup>55</sup> But the circumstances are not at all the same and, though it surely is true that one can’t always “fight fire with fire,” surgery can be to knife wounds as race-conscious means are to the eradication of race-based advantages and disadvantages.<sup>56</sup>

The remainder of this Article proceeds as follows. Part I introduces Justice Jackson’s “John” by way of a brief story from everyday life. John, a nondisabled adult, in my hypothetical reconstruction, confronts the frustration of an empty disabled-designated parking spot in front of his favorite restaurant. The initial function of this story is simply to illustrate the salutary ubiquity of what we might call “non-pejorative” or “non-moralized” discrimination. Part II then flashes back to John at seventeen, enjoying his last days of high school and applying to colleges. Here John faces the salutary ubiquity of “non-moralized” discrimination in the form of race-conscious admissions. As with the disabled parking dispensation, the race-conscious admissions dispensation does not over-burden John

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53. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (contending that “[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”); Clarence Thomas, *Toward a Plain Reading of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOWARD L.J. 983, 992 n.37 (1987) (claiming that a color-blind Constitution “is very much a political matter, and a necessary condition for a color-blind society.”); Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 282 (2016) (“[F]or many years now, Supreme Court jurisprudence has conspired to turn our attention away from our history—and erode our shared understanding—with decisions that assume the existence of the very colorblind society that we have yet to achieve.”).

54. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 732–33 (2007).

55. DAVID BOONIN, *SHOULD RACE MATTER?* 193 (2011) (emphasis added); *see also* Bollinger, *supra* note 53, at 284 (“The symmetry championed by the Chief Justice has a legalistic resonance, but the consistency demanded by the Court is otherwise asked to bear too heavy a weight. Why is the genius of our Constitution inadequate for recognizing the difference between Topeka and Seattle? And why must we look for that answer through an ahistorical lens?”).

56. Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1270 (2002) (“There is no contradiction . . . in using race-conscious means to eradicate the causes of race-based disadvantages. Surgery is often needed to repair knife wounds.”); *see also* GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 140 (Harvard Univ. Press ed., 2021) (“Moral irrelevance does not imply instrumental irrelevance.”).

nor does it punish, stigmatize, insult, demean, or subordinate him in any way. The final substantive section of the Article, Part III, is dedicated to a consideration of the *Students for Fair Admissions v. President & Fellows of Harvard College (SFFA)*<sup>57</sup> Court's competing messages with respect to race-conscious admissions. The Court's majority, and Justice Thomas in particular, mischaracterizes the goal, function, and normative implications of race-conscious admissions as well as their depiction in the context of Justice Jackson's blistering dissent. I consider what message these mischaracterizations send to John, to American teenagers, and to the American public at large. Additionally, this Article advances the conversation towards the development of alternative messages that embrace and reflect a wholesome narrative that emphasizes relationship, community, the cultivation of a disposition to make good use of one's political power, and what we might call the "perpetually convergent" spiritual and democratic interests that we always and already share.

### I. A Portrait of the Artist as an Adult—Finding a Place to Park

[T]here is only one way to persuade our fellow citizens: not by engaging in policy analysis, not by talking about three-part tests, and not by propounding clever ways to balance fifteen different factors. If we are to persuade, we need to tell a good story.<sup>58</sup>

— L. H. LaRue

Consider John. He finishes work early, beats the rush hour traffic, and pulls onto the already busy street that leads to his favorite restaurant. He's anxious. Tonight is special. His significant other is waiting for him, things haven't been going well lately, and they always seem to count his admittedly too-frequent tardiness as an indication that he doesn't truly value his partner or the relationship.

At first it seems that *every* nearby spot is taken, but this isn't quite true. One nearby spot is open—the best one in fact. But it's a disabled-designated spot and John isn't disabled. "Dammit!", John exclaims. He doesn't really mean it, or he both means it and doesn't. John—arithmetically competent as he is—knows that the designation's elimination would have almost no impact on nondisabled drivers like himself.<sup>59</sup> And, far more importantly, he looks upon the designation as a

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57. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

58. L. H. LaRue, *Telling Stories about Constitutional Law*, 26 TEX. TECH L. REV. 1275, 1286 (1995).

59. Thomas J. Kane, *The Long Road to Race-Blindness*, 302 SCIENCE 571, 573 (2003) ("Suppose there were one parking space reserved for disabled drivers in front of a popular restaurant. Eliminating the reserved space would have a minuscule effect on the parking

kind of “freely given gift” to our disabled fellows—a societal “gift” and a “legitimate sacrifice . . . made voluntarily and knowingly”<sup>60</sup> that he might likewise individually benefit from one day even as he and we already collectively and individually benefit from the protection, inclusion, and empowerment of the disabled.<sup>61</sup>

This dispensation says nothing at all contemptuous about John, specifically, or about the nondisabled, more generally. It is good, this dispensation. It strikes John as good through and through. And even though it’s surely possible to allocate too many disabled-designated spots, the one in front of his favorite restaurant certainly seems warranted and, try as he might, he can’t think of a single disabled-designated spot that he’s ever encountered that didn’t seem likewise warranted. John also recognizes, though it feels a bit wrong to think in these terms, that most of those responsible for the current dispensation are, like him, likely to be nondisabled themselves.<sup>62</sup> This feels like it might be somewhat important because it strikes him as unlikely that the nondisabled would discriminate against themselves in favor of the disabled.<sup>63</sup> Finally, John (1) finds that he suspects that if anything there may be too few disabled-designated spots; (2) takes a couple of deep breaths to settle his nerves; (3) locates a more-distant spot; and (4) hoofs it double-time to the restaurant, his partner, and—one hopes—a relationship-salvaging evening.

Most of this seems to track, but John is wrong to conclude that discrimination is absent from the scenario. The extant dispensation is indeed indicative of discrimination. Our community has opted for a somewhat asymmetrical approach to the problem. It has chosen—we have chosen—to discriminate against the nondisabled in favor the disabled: the disabled can legally park in disabled-designated and not-disabled-designated spots while the nondisabled can only legally avail themselves of the latter. Discrimination is ubiquitous and it isn’t necessarily bad, unfair, unjust, or wrong.<sup>64</sup> John intuitively understands

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options for nondisabled drivers. But the sight of the open space may frustrate many passing nondisabled motorists looking for someplace to park.”).

60. ALLEN, *supra* note 43, at 110.

61. See Paul-Emile, *supra* note 24, at 350–51.

62. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST 170 (1980) (“Whites are not going to discriminate against all whites for reasons of prejudice, and neither will they be tempted generally to underestimate the needs and deserts of whites relative to those, say, of blacks or to overestimate the costs of devising a more finely tuned classification system that would extend to certain whites the advantages they are extending to blacks.”).

63. See Bedi, *supra* note 38, at 315.

64. All-too-often the opponent of affirmative action “trades on an ambiguity” in the term “discrimination.” THOMAS E. HILL, *The Message of Affirmative Action, in AUTONOMY AND SELF-RESPECT* 193 (1991). She starts with the “evaluatively neutral [or non-moralized]

this even if he's never given it much thought. And when he does give it some brief thought during the hustle to the restaurant, he comes to recognize that it's perhaps only when the discrimination evidences a lack of due and equal consideration for all impacted that the otherwise common and shoulder-shrug experience of discrimination is properly described as wrongful. The disabled parking dispensation, though it does treat him both differentially and, in a sense, unequally vis-à-vis his disabled fellows, doesn't fail to treat him *as an equal*.<sup>65</sup> It needn't necessarily differentiate between the disabled and the nondisabled "in a manner that ranks some"—whether that "some" refers to the disabled or to the nondisabled—"as less morally worthy than others."<sup>66</sup>

## II. A Portrait of the Artist as a Teenager—Applying to College

I find flashbacks as annoying as the next person, but let's do it anyway. John is now seventeen years old, occasionally searching for parking spots in his parents' oldish minivan and applying to colleges. He's also famous-adjacent because he finds himself featured in Justice Jackson's dissent from the majority opinion in *SFFA v. Harvard*.<sup>67</sup> In her dissent, Justice Jackson invites the reader, the American public, to consider the following hypothetical about John and a new character named James:

Imagine two college applicants from North Carolina, John and James. Both trace their family's [sic] North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's [sic] legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?<sup>68</sup>

The Opinion of the Court does not address Justice Jackson's hypothetical directly but does conclude (1) that "[e]liminating racial

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sense" in which to "'discriminate' means to 'make a distinction,' to pay attention to a difference" and "then shifts to the pejorative [or moralized] sense when [she] asserts that discrimination is always wrong." *Id.* at 193–94. It is by no means impossible that race-conscious admissions plans discriminate in both the non-moralized and the moralized sense, but such a conclusion demands actual argumentation and not merely the casual, and surely sometimes overtly disingenuous, exploitation of an ambiguity with respect to the word "discrimination." See *id.* at 187, 193–94.

65. DWORKIN, *supra* note 42, at 227; SHELBY, *supra* note 4, at 32.

66. DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 172 (2008).

67. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 385–86 (2023) (Jackson, J., dissenting).

68. *Id.* at 385–86 (Jackson, J., dissenting).

discrimination means eliminating *all* of it”<sup>69</sup> and (2) that the Harvard and the University of North Carolina (UNC) race-conscious admissions policies violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>70</sup> The Court notes, however, that “nothing in [the Court’s] opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”<sup>71</sup>

Justice Thomas, in his *SFFA* concurrence, does, however, directly address Justice Jackson’s hypothetical. He first notes that “[t]oday’s 17-year olds . . . do not shoulder the moral debts of their ancestors” and then concludes that “[o]ur Nation should not punish today’s youth for the sins of the past.”<sup>72</sup>

More specifically, Justice Thomas wonders “what would Justice Jackson say to John when deeming him not as worthy of admission.”<sup>73</sup> Would she claim that because “[s]ome statistically significant number of white people had advantages in college admissions seven generations ago” that John has, thereby, “inherited their incurable sin?”<sup>74</sup>

Before assessing the validity of Justice Thomas’s queries and what they themselves “say to John,” let’s further enrich our hypothetical understanding of John by borrowing the backstory of the not-at-all-hypothetical Cole Clemmons. Cole, also seventeen-years-old, attends a high school that is 83% white in Franklin, Tennessee, “with its highly rated school system, its median income of \$102,000 and its picturesque downtown packed with pricey boutiques.”<sup>75</sup> He was no party to the *SFFA* litigation but learned of the Court’s decision when he received a *New York Times* alert on his phone while attending a Summer International Studies program at the University of Memphis.<sup>76</sup> He immediately showed the alert to his Korean-American roommate, who responded by saying, “This

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69. *Id.* at 206 (emphasis added). Chief Justice Roberts, it must be noted, explicitly excludes from consideration the colossal and continuing effects of so-called “societal discrimination.” *Id.* at 209.

70. *Id.* at 206.

71. *Id.* at 230.

72. *Students for Fair Admissions*, 600 U.S. at 274 (Thomas, J., concurring).

73. *Id.* at 282.

74. *Id.*

75. Hannah Natanson, *After Affirmative Action, a White Teen’s Ivy Hopes Rose. A Black Teen’s Sank*, WASH. POST (Nov. 18, 2023), <https://www.washingtonpost.com/education/interactive/2023/affirmative-action-race-teen-college-applications/> [https://perma.cc/DH97-DXN8]; Post Reports, *Applying for College After the End of Affirmative Action*, WASH. POST, at 27:00 (Dec. 27, 2023), <https://www.washingtonpost.com/podcasts/post-reports/applying-for-college-after-the-end-of-affirmative-action/> [https://perma.cc/CQ43-MFWY].

76. Natanson, *supra* note 75.

is going to help me.”<sup>77</sup> Cole recalls “feeling shocked,” but then also thought to himself, “Wait. This might help me too, because I’m white.”<sup>78</sup> Black loss equals white gain—and, presumably, *Black gain equals white loss*—says the Court to our teenagers and to everyone else for that matter.<sup>79</sup>

Not long after receiving the news of the Court’s decision Cole began to consider expanding “his list of Ivies” in light of the Court’s decision and on “Aug. 1, the day the Common Application opened, [he] clicked into a separate Google search tab” on his laptop’s browser and “typed ‘prettiest Ivy league campus’” before proceeding to scroll “through images of illuminated stone archways, white-edged brick buildings and leafy quads aglow with fall colors.”<sup>80</sup>

James’s family, Justice Jackson tells us, was at least “six generations behind” John’s and that this is “because of their race.”<sup>81</sup> John doesn’t—or he needn’t—know James personally, but they are in relationship all the same. They are socially-connected<sup>82</sup>—caught in Dr. King’s “inescapable network of mutuality”<sup>83</sup>—in part because some of John’s advantages are “nonaccidentally correlated”<sup>84</sup> mirror-images of James’s disadvantages. Take away race-conscious admissions and James loses a counterbalancing advantage while John gains yet another.<sup>85</sup> In this *very* narrow sense then, James’s loss is indeed John’s gain and Black loss does indeed yield white gain.

The two young men are differentially situated at the start of the “admissions relay” even if that does not “fully determine whether either eventually crosses the finish line.”<sup>86</sup> John, again borrowing from Cole’s

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77. *Id.*

78. *Applying for College After the End of Affirmative Action*, *supra* note 75.

79. Randall Kennedy, *The Truth Is, Many Americans Just Don’t Want Black People to Get Ahead*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/07/opinion/resistance-black-advancement-affirmative-action.html> [https://perma.cc/L2W6-R838].

80. Natanson, *supra* note 75.

81. *Students for Fair Admissions*, 600 U.S. at 397 (2023) (Jackson, J., dissenting).

82. See generally, IRIS MARION YOUNG, *RESPONSIBILITY FOR JUSTICE* (2011).

83. MARTIN LUTHER KING, JR., *The Ethical Demands for Integration, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 117, 122 (James Melvin Washington ed., HarperCollins 1991) (1986).

84. SALLY HASLANGER, *RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE* 328 (2012).

85. Julian Jonker, *Affirmative Action for Non-Racialists*, 33 PUB. AFFS. Q. 195, 201 (2019); see also Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1016 (1996) (“If we wish to maintain our commitment to meritocracy and to maintain our belief that meritocracy is the normal, as well as desirable, route to success, then we are forced, in effect, to deny the degree to which history shows otherwise. We are forced to distort our history . . . We are forced to deny the extent to which the advantage, successes, and potentiality of every white person is a product of racial advantage rather than of individual merit standing alone.”).

86. *Students for Fair Admissions*, 600 U.S. at 403 (Jackson, J., dissenting).

backstory, thoughtful young man that he is, is at least somewhat aware of the extent to which he and James are both differentially situated *and* socially connected:

I definitely have privilege. For example, for the ACT, right? I was able to go and get private tutoring for that and bring up my score. Like, I brought up my math score six points because of that, I feel like, and not everyone has that ability, but just knowing other people can't and they're also applying to those same schools as me and I know they've probably worked really hard to do it their own way, I feel almost bad in a way. Those people have worked so hard, and I've just been able to use the privileges I have to get to the same spot as them.<sup>87</sup>

He identifies and acknowledges a laundry list of advantages from which he continues to benefit and then further admits that he feels "almost . . . bad in a way."<sup>88</sup> John, now completely fused with Cole, says that he almost feels bad precisely because applicants like James worked so hard and because, though he too has worked hard, he's been able to use the privileges he has to get to the same spot as James.

John's, perhaps nascent but already praiseworthy, sense of justice appears to lead him to something very much like the oft-rehearsed "parable of the foot race:"

When the race begins, one runner falls behind, and the officials notice that he has weights attached to both ankles. They stop the race, order the runners to hold their places, and remove the weights. Now, is it fair to resume the race from the positions where the runners were stopped? Obviously not. Some correction is required.<sup>89</sup>

He has already considered at least some of the import of this parable. John recognizes that, irrespective of where and how he and James started the relay, James has pretty much made it to the "same spot" despite both the disadvantages and the lack of advantages that necessarily correspond with his racialized status on top of any other disadvantages, class-based or otherwise, with which he may be saddled.

If we imagine the selves that young John and young James have fashioned in response to the world's impingements<sup>90</sup> as sculptures<sup>91</sup> and their college applications as wildly insufficient though perhaps nevertheless useful facsimiles of those sculptures,<sup>92</sup> then we can and we

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87. *Applying for College After the End of Affirmative Action*, *supra* note 75.

88. *Id.*

89. JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL: A BIOGRAPHY 457 (Fordham Univ. Press 2022).

90. Daniel C. Dennett, *The Self as a Center of Narrative Gravity*, in SELF AND CONSCIOUSNESS: MULTIPLE PERSPECTIVES 103, 110 (Frank S. Kessel, Pamela M. Cole & Dale L. Johnson eds., Routledge 2016) (1992).

91. Benjamin Eidelson, *Treating People as Individuals*, in PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 203, 214 (Deborah Hellman & Sophia Moreau eds., 2013).

92. See generally, Andrew Koppelman & Donald Rebstock, *On Affirmative Action and Truly Individualized Consideration*, 101 NW. U. L. REV. 1469 (2007).

should calibrate our understandings of their fitness for admission in such a way that we account for the effects of *both* the successive deliberative choices that led to the overall product *and* the quality of the raw materials with which each had to work. Our selection process could include, among other things, the desire to identify the applicants with the strongest potential for contributing positively to society in general and to the specific university community in particular. We recognize that to accurately identify that potential we should, in addition to many other factors, give extra weight to those aspects of an applicant's past achievement—perhaps the individual's exercise of deliberative choice<sup>93</sup>—that don't result from situational advantage.<sup>94</sup> To the extent that the previous dispensation was consistent with such (re)calibration it does not seem to unjustly discriminate against John—for it neither denigrates him nor otherwise fails to treat him as an equal—even if there may be any number of alternative and convincing arguments against it.<sup>95</sup>

### III. The Competing Messages of the SFFA Court

The Roberts majority opinion, and the Thomas concurrence, communicate, among a great many other things, (1) that moral responsibility is coextensive with the obligation to repay “moral debts;” and (2) that we do not, or should not, inherit the “moral debts” of our “ancestors.”<sup>96</sup> Justice Thomas also seems to suggest that even though the enrollment of “racially diverse classes by race-*neutral* means” confirms “the efficacy of a colorblind rule,” the practice of race-*conscious* admissions is, by contrast, necessarily zero-sum, dangerous, and both Constitutionally and morally impermissible.<sup>97</sup> In other words, a university's efforts to enroll a racially diverse class by race-neutral means, though it might also result in John's rejection, would yield “the same benefits of racial harmony and equality without any of the burdens

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93. Eidelson, *supra* note 91, at 214.

94. Thomas E. Weisskopf, *Rethinking Affirmative Action in Admissions to Higher Educational Institutions*, in EQUALIZING ACCESS 55 (Zoya Hasan & Martha Nussbaum eds., 2012).

95. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 17 (2000) (“Affirmative action expresses inclusion, not exclusion. While individual white applicants who would be admitted under a race-blind system are in fact excluded (in other words, they do suffer concrete harm), the best understanding of the practice in our culture today is not that white students are not welcome or worthy of admission.... This conclusion does not imply that affirmative action is necessarily wise policy; it may well have harmful consequences that must be weighed against its beneficial effects. But it does mean that affirmative action does not raise an Equal Protection problem.”).

96. See *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 209 (2023); *id.* at 274 (Thomas, J., concurring).

97. *Id.* at 272, 274, 277, 284.

and strife generated by affirmative action policies.”<sup>98</sup> The validity of this position depends on it actually being the case (1) that the same benefits can be achieved through race-neutral means,<sup>99</sup> and, perhaps even more importantly; (2) that race-conscious admissions plans necessarily impose additional and unfair burdens over and above race-neutral ones; and (3) that such plans cause a kind of strife that isn’t simply the upshot of John’s unwillingness to distinguish “I want” from “I ought to have”<sup>100</sup> and a craven attempt to take refuge in victimhood.<sup>101</sup>

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98. *Id.* at 284.

99. Justice Thomas’s speculation that race-neutral measures could yield the “same benefits” as race-conscious admissions program is unconvincing both because he fails to engage with most of the empirical research on the issue and because his operative notion of sameness is marked by an indifference to the distribution of students throughout our nation’s institutions of higher learning. *Students for Fair Admissions*, 600 U.S. at 284 (Thomas, J., concurring). In other words, his claim that race-neutral measures could yield the “same benefits” depends upon a lack of concern regarding the clustering of URM students. The upshot of Thomas’s view is that a race-neutral dispensation that yielded zero URM students at selective institutions could be no less integrated than a race-conscious one simply because URM students might cascade down to less and less selective institutions. See Randall Kennedy, *The Race-Neutral Delusion*, LONDON REVIEW OF BOOKS (Aug. 10, 2023), <https://www.lrb.co.uk/the-paper/v45/n16/randall-kennedy/the-race-neutral-delusion> [https://perma.cc/DHM3-LNYF] (“[A] selection scheme focused wholly on class, leaving race out of consideration, will diminish the number of Black and Latino students attaining admission to elite institutions [because] [p]oor whites constitute a large reservoir of competitors who will often be better prepared and have better credentials than their Black peers, including Blacks on higher rungs of the socioeconomic ladder.”); Kevin Woodson, *Entrenched Racial Hierarchy: Educational Inequality from the Cradle to the LSAT*, 105 MINN. L. REV. 481, 503 (2021) (observing that “racial sorting of black college students into less well-resourced and academically rigorous institutions . . . limits their law school prospects.”); Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 TUL. L. REV. 1, 37 (2021) (“Students without elite undergraduate degrees do not catch up monetarily with those with elite degrees, even by earning an advanced degree from an elite institution.”); Michael K. Brown & David Wellman, *Embedding the Color Line: The Accumulation of Racial Advantage and the Disaccumulation of Opportunity in Post-Civil Rights America*, 2 DU BOIS REV. 187, 194–95 (2005) (“When critics of affirmative action tell Black students who have been denied admission to . . . Berkeley that ‘there is nothing wrong with attending UC Riverside,’ they ignore the fact that *who you meet* at Harvard, Yale, or Princeton—or at Berkeley, Ann Arbor, or Madison—is integral to the accumulation of economic and social advantage.”); JULIE PARK, *RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA*, 68 (2018) (“[S]ocioeconomic diversity on its own neither subsumes nor replaces the positive effects linked with having racial diversity in the student body when it comes to triggering the educational benefits of diversity. Racial diversity in a student body is irreplaceable, and race-conscious policies are needed to help make that happen.”).

100. JOHN C. LIVINGSTON, *FAIR GAME?* 24–25 (1979) (observing that “[a] case for affirmative action programs . . . can be made to any white male who is still capable of distinguishing ‘I want’ from ‘I ought to have’” and contending that “[i]f our children have lost the ability to make that distinction, we have deprived them of their democratic birthright.”).

101. See Clarence Thomas, *Addresses: Victims and Heroes in the Benevolent State*, 19 HARV. J.L. & PUB. POL’Y 671, 680–81 (1996). Here, Justice Thomas admits that he is troubled by “the backlash against affirmative action by ‘angry white males.’ *Id.* He agrees with them that the “intended beneficiaries of the civil rights regime [must] break away from the ideology of victimhood” by “cherish[ing] freedom,” “accept[ing] responsibility,” and

#### A. Justice Jackson's Message: Race Matters

On the one hand, John hears Justice Jackson acknowledge that “[i]t is hardly [his] fault that he is the seventh generation to graduate from UNC” and that “UNC should permit him to honor that legacy.”<sup>102</sup>

He then hears her note that it also wasn’t “James’s (or his family’s) fault that he would be the first.”<sup>103</sup> Justice Jackson’s claim does not depend upon an assignment of fault or blame<sup>104</sup> nor does it depend upon any claim that James is a victim seeking a handout or that UNC is justified in denying one to John. Instead, her claim is just that “UNC ought to be able to consider why” it is that “James’s family was six generations behind because of their race, making John’s six generations ahead.”<sup>105</sup> Race matters today, Justice Jackson says to John and to all of us, (1) because “racial disparities may have mattered for where some applicants find themselves today;” (2) because “[n]o one benefits from ignorance;” and (3) because “ensuring a diverse student body in higher education helps *everyone*, not just those who, due to their race, have directly inherited distinct disadvantages with respect to their health, wealth, and wellbeing.”<sup>106</sup> Properly understood, there is nothing in Justice Jackson’s claims suggesting that John is being punished or that he is expected to settle the debts of another.

One key to thinking clearly about race-conscious admissions plans is, as I’ve already stressed, to rob them of their seeming abnormality. Like it or not, democracy does this kind of thing to people. Sacrifice is democracy’s preeminent ritual, Allen reminds us, and no exemption exists for children let alone young adults.<sup>107</sup> Indeed, John is simply experiencing the discomfort of initiation—the discomfort, following Dworkin’s metaphor, of missing a dose of medicine given *our* urgent need to administer it to James in his stead.<sup>108</sup> He is merely learning what it means to be a democratic citizen and he isn’t necessarily being wronged, let alone punished.<sup>109</sup> It needn’t be the case—indeed it is very unlikely to

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“demonstrat[ing] fortitude in the face of unfairness.” *Id.* Thomas insists, however, that these “angry white males” “remember that if we are to play the victim game, the very people they decry have the better claim to victim status.” *Id.* at 681.

102. *Students for Fair Admissions*, 600 U.S. at 396–97 (Jackson, J., dissenting).

103. *Id.* at 397.

104. See Sangiuliano, *supra* note 38, at 350 (“Subordination is a state of affairs that, when it is objectionable, is so regardless of whether its existence is historically attributable to the conduct of any agent(s).”).

105. *Students for Fair Admissions*, 600 U.S. at 397 (Jackson, J., dissenting).

106. *Id.* at 397, 407, 405.

107. ALLEN, *supra* note 44, at 28.

108. See DWORKIN, *supra* note 42, at 227.

109. BERNARD R. BOXILL, BLACKS & SOCIAL JUSTICE 167 (rev. ed. 1992) (observing that

be the case—that UNC or Justice Jackson and the other *SFFA* dissenters have an interest in punishing John, and the differential treatment that he'd experience would not denigrate him as a white person.<sup>110</sup> The dispensation that they endorse is safely and justifiably asymmetrical in part because John and James are, again, “differently situated within the relevant opportunity structure” of our society<sup>111</sup> and in part because its operation does not subject John to stigmatization, subordination, or denigration.<sup>112</sup>

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affirmative action “does not require young white males to pay, at additional cost to themselves, the price of their advantages. It proposes instead to compensate the injured with goods no one has yet established a right to and therefore in a way that imposes no unfair losses on anyone” and that if a white applicant “is concerned with fairness, and if preferential [treatment] makes the competition fairer, he should have no objections to it.”); MICHEL ROSENFIELD, *AFFIRMATIVE ACTION & JUSTICE* 307–08 (1991) (“Although affirmative action treats innocent white males unequally, it need not deprive them of any genuine equal opportunity rights. Provided an affirmative action plan is precisely tailored to redress the losses in prospects of success attributable to racism or sexism, it only deprives innocent white males of the corresponding undeserved increases in their prospects of success . . . . [A]ffirmative action does not take away from innocent white males anything that they have rightfully earned or that they should be entitled to keep.”); Adams, *supra* note 20, at 332 (claiming that “affirmative-action policies reflect a fair distribution of the burdens that are required to transition to a more just society,” that an “explanation for why they are fair can be presented using [a] nonideal contractualist framework,” and that “it would be rational for parties who do not know what social position they will occupy to assent to a principle that condones affirmative action.”).

110. We've known for more than a generation that disappointed white applicants typically are “not denied admission because [they are] white, *simpliciter*.” Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 COLUM. L. REV. 512, 519 (1975); *see also* Regents of University of California v. Bakke, 438 U.S. 265, 375 (1977) (Brennan, J., concurring in part and dissenting in part) (“Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.”); Ronald Dworkin, *Bakke's Case: Are Quotas Unfair?*, in *THE AFFIRMATIVE ACTION DEBATE* 103, 111 (Steven M. Cahn ed., 2002) (“[Bakke] says that he was kept out of medical school because of his race. Does he mean that he was kept out because his race is the object of prejudice or contempt? That suggestion is absurd . . . . Race is not, in *his* case, a different matter from . . . other factors equally beyond his control. It is not a different matter because in his case race is not distinguished by the special character of public insult. On the contrary, the program presupposes that his race is still widely if wrongly thought to be superior to others.”).

111. Areheart, *supra* note 41, at 1135.

112. Blum, *supra* note 38; *see also*, LAWRENCE BLUM, “I'M NOT A RACIST, BUT . . . ”: THE MORAL QUANDARY OF RACE 89 (2002) (observing that not “every group-based discriminatory policy has the effect of stigmatizing the group in question,” that “[t]he group must be vulnerable to being stigmatized,” and that “able-bodied people, or white people, are not comparably vulnerable, and policies that discriminated against them would not have the effect of stigmatizing them as groups.”).

It is easy enough for John to later comprehend the disabled parking spot arithmetic. He quickly scolds himself both because he understands the social value of the spot's designation and, less importantly, because he recognizes that his narrow self-interest is not only narrow but also just barely implicated. Were it not for the designation he'd still be driving around in a huff because someone—nondisabled or otherwise—who was unwilling to miss a single second of happy hour had already snatched up the much sought-after spot. And, likewise, were it not for UNC or Harvard's limited race-conscious admissions policies, young John would still face the likely prospect of rejection, precisely because that's what the practice of selectivity entails<sup>113</sup> and because considering what would have happened to John had he been James is *not* equivalent to considering what would have happened to John had the admissions process been race-neutral.<sup>114</sup>

The *SFFA* majority, and Justice Thomas in particular, teaches John (1) to misperceive basic social facts and, as importantly; (2) to assume a moral symmetry with respect to discrimination "on the basis of race,"<sup>115</sup> and (3) to think that moral responsibility only extends to the remediation of bad states of affairs that we have ourselves intentionally brought into being.<sup>116</sup> The *SFFA* majority acts as cognitive "laziness masters"<sup>117</sup> in

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113. Elisa Holmes, *Anti-Discrimination Rights Without Equality*, 68 MOD. L. REV. 175, 188 (2005) ("[S]urely we do not mean that all applicants should really have an equal chance of getting a place—obviously some applicants will have a better chance than others at meeting the selection criteria. That is the whole point of selection criteria.").

114. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1080 (2002) ("To consider what would have happened to a white applicant had he been black is not equivalent to considering what would have happened to that applicant had the admissions process been race-neutral."); *see also* Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 299 (2004) ("The main competition faced by middle- and low-income whites in selective admissions is, and always has been, not the few minority applicants in the pool, but rather the large sea of privileged whites and now Asians—most of whom are denied admission and would surely be among the first in line for any additional spaces freed up by eliminating affirmative action."); *see also* Jerry Kang, *Asians Used, Asians Lose: Strict Scrutiny from Internment to SFFA*, 113 CALIF. L. REV. 979, 993 (2025) ("[T]here are relatively few underrepresented minorities in elite institutions and so many more White and Asian applicants. Even if affirmative action ended, those few slots would likely be taken by some *other* White or Asian.").

115. The *SFFA* majority collapses suspect *class* with suspect *classification*. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 256 (2023) (Thomas, J., concurring). *See generally* Bedi, *supra* note 38. *See also* Jed Rubenfeld, *The Purpose of Purpose Analysis*, 107 YALE L.J. 2685, 2685 n.3 (1998) ("[T]he Court has in effect made whites a suspect class, without ever acknowledging that this result contradicts everything the Court used to say about the criteria of suspect class status.").

116. Roosevelt & McCoy, *supra* note 22, at 1420 ("[The Court] tells whites that if they have done nothing wrong as individuals—if they have not committed acts of racism—they are entitled to enjoy the benefits of the status quo free and clear, without worrying about where the status quo came from.").

117. MEDINA, *supra* note 50, at 158.

order to (1) mask and maintain structural injustice; (2) mislead us with respect to the costs and benefits of compensating for structural injustice;<sup>118</sup> and (3) teach yet another generation of Americans both that discrimination against whites in *this* society is the moral equivalent of discrimination against Blacks and that Black gain necessarily entails substantial and unjustifiable white loss.<sup>119</sup> Ultimately, the Court further activates white, and now to some extent also Asian American, identity in a counterproductive way by making it seem that there is no moral distinction between inclusion and exclusion and that indications of Black success portend calamity and justify white grievance as well as protectionist social, legal, and political mobilization.<sup>120</sup>

#### B. The SFFA Majority's Message: URM Gains Equal Non-URM Losses

[I]t is not even theoretically possible to 'help' a certain racial group without causing harm to members of other racial groups. 'It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others.'<sup>121</sup>

— Justice Thomas

The Court cultivates the mistaken impression that simply because a particular policy yields substantial immediate and clearly discernible benefits for one segment the population—URMs in this case—that that same policy also and necessarily depends upon some kind of substantial and unjustifiable sacrifice on the part of at least one other segment of the population. Race-conscious admissions programs straightforwardly benefit URMs in a great many ways even as their operation "has an almost imperceptible impact on any other applicant's chance of admission."<sup>122</sup>

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118. Allen Buchanan, *When Knowing What Is Just and Being Committed to Achieving it Is Not Enough*, 38 J. APPLIED PHIL. 725, 726 (2021).

119. See generally Blum, *supra* note 38; JULIET HOOKER, BLACK GRIEF/WHITE GRIEVANCE (2023); CLAIRE JEAN KIM, ASIAN AMERICANS IN AN ANTI-BLACK WORLD (2023).

120. See, e.g., Thomas M. Keck, *From Bakke to Grutter*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken Kersch eds., 2006).

121. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 271 (2023) (Thomas, J., concurring).

122. Brief for the United States as Amicus Curiae Supporting Respondent at 32–33 n.4, *Students for Fair Admissions*, 600 U.S. 181 (2023) (No. 20-1199) [hereinafter Brief for the United States]; see also Sherick Hughes, Dana N. Thompson Dorsey & Juan F. Carrillo, *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 EDUC. POL'Y 63, 82–83 (2016) (observing that "[a]dmissions rates for remaining applicants [at Harvard College] would change from 5.84% to 6.84% (a difference of 1%) if Black and Hispanic students were removed from the admissions pool," and "[a]dmissions rates for remaining applicants [at UNC] would change from 27.59% to 31.68% (a difference of 4.91%) if Black and Hispanic students were removed from the admissions pool."); Goodwin Liu, *The Myth*

None of this, of course, changes the fact that, even though the impact is "almost imperceptible," John's chances are indeed potentially lower with than without race-conscious admissions.<sup>123</sup> It has yet to be shown, however, that he benefits less from the previous dispensation or that, if he does in some sense benefit less from the previous dispensation, that such losses are otherwise uncompensated for or unjustified.<sup>124</sup> Justice Thomas's concurrence claims but does not show (1) that the old dispensation would "punish" John for "the moral debts of [his] ancestors";<sup>125</sup> (2) that John benefits less from the old dispensation; or (3) that John benefitting less in one sense is necessarily a bad thing. These implications are not only unargued for, but they simply do not follow.

Race-conscious admissions programs do not, or they need not, necessarily punish John for "the moral debts of [his] ancestors."<sup>126</sup> Such programs aren't necessarily punishment for anything, let alone punishment for debts incurred by another. We can tell that John is not being punished precisely because him not getting something that he wants is not the goal of race-conscious admissions programs, but merely an incidental effect of their operation. It is entirely rational to pursue a plan that aims to capture James's civic as well as academic potential<sup>127</sup> without also and at the same time pursuing a plan the purpose of which

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and Math of Affirmative Action, WASH. POST (Apr. 14, 2002), <https://www.washingtonpost.com/archive/opinions/2002/04/14/the-myth-and-math-of-affirmative-action/60096413-672b-4a4f-8dd1-8d38a7f282e9/> [<https://perma.cc/87WS-6MEQ>]; Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 320 (2015) ("Th[e] . . . innocence paradigm . . . rests on the premise that whites are 'innocent' of continuing racial inequality and that they are, thereby, 'injured' by state considerations of race that seek to redress it. As a result, the use of race to identify persons for the purpose of distributing government benefits is itself regarded as harmful, even if white plaintiffs have not been specifically denied a government benefit as a result of the contested policy itself.").

123. Brief for the United States, *supra* note 122, at 32–33 n.4.

124. See, e.g., Roosevelt, *supra* note 23, at 733 ("Any white applicant has a much larger chance of being admitted to the same schools she would have in the absence of affirmative action, and at each of those schools, the education offered will be of higher quality because of the diversity.").

125. *Students for Fair Admissions*, 600 U.S. at 274 (Thomas, J., concurring).

126. *Id.*

127. Weisskopf, *supra* note 94, at 60; see also, ANDERSON, *supra* note 17; Koppelman & Rebstock, *supra* note 92, at 1479 ("With law school admissions, . . . the real objects of concern are not the attorneys we train, but the public who will be their clients, and who will live in a society where they wield the power associated with their profession. We consider individuals, but we do so not for their sake but for the sake of the public they are going to serve. We individualize in the same way as the bricklayer fashioning a piece to go into an odd corner. He doesn't do it for the sake of the bricks. Admissions is inevitably social engineering."); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U. S.F. L. REV. 757, 775 (1997) ("Once we acknowledge the continuing existence of racism and commit ourselves to its disestablishment, the applicant who has been identified and treated by the society as a subordinated racial minority will bring to that freedom fighting enterprise a life experience that makes her peculiarly qualified for the task.").

is to exclude John.<sup>128</sup> Not everything that reduces one's chances of admission counts as a form of punishment or wrongful discrimination. Harvard's all-too-often romanticized decision to prefer "Scandinavian farm boys who skate beautifully" over "some snobs," for instance, was not a decision to exclude Boston Brahmins even though it could and did sometimes have that effect.<sup>129</sup> Finally, it surely strains, or perhaps entirely obliterates, credulity to think that institutions like Harvard and UNC are motivated by animus towards white Americans<sup>130</sup> or that affirmative action itself—as distinct from a host of other unrelated features of their admissions plans—is indicative of animus towards Asian Americans.<sup>131</sup>

In fact, were the goal to exclude John, race-conscious admissions—especially as it was hemmed in by the so-called diversity rationale—is a decidedly ineffectual way of going about it. Whites, it is crucial to note, abound even under race-conscious admissions: "In 2020, white students made up 52 percent of the high school graduating class but 57 percent of entrants to selective colleges, thus maintaining their centuries-long overrepresentation on selective college campuses."<sup>132</sup> The best way, the only truly effective way, to "punish" John—outside of explicitly excluding him as was the case with James's family and other Black families—would be to eliminate or to deemphasize those criteria of merit that selective institutions most fervently insist upon, and which also just so happen to

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128. This remains true even if the plan may have that incidental though predictable effect. See Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. 1901, 1946 (2024) (observing that the mere fact that an "actor cannot logically envision achieving her aim without the occurrence of [a] foreseen consequence" does not preclude that same official from being "motivated to increase the representation of some racial groups without being motivated to decrease the representation of others.").

129. David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL'Y & L. 158, 179 (2018) (quoting former Harvard Dean Wilbur J. Bender); see also BOONIN, *supra* note 55, at 140–46.

130. Kimberly West-Faulcon, *The SFFA v. Harvard Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355, 1418 (2024).

131. See, e.g., Jerry Kang, *Ending Affirmative Action Does Not End Discrimination Against Asian Americans*, 28 UCLA ASIAN PAC. AM. L.J. 91 (2024); Vinay Harpalani, "Bait-and-Switch": How Asian Americans Were Weaponized to Dismantle Affirmative Action, 71 DRAKE L. REV. 323 (2024); Kang, *supra* note 114.

132. Anthony P. Carnevale, Zachary Mabel & Kathryn Peltier Campbell, *Race-Conscious Affirmative Action*, CTR. ON EDUC. AND THE WORKFORCE 7 n.21 (2023), [https://cew.georgetown.edu/wp-content/uploads/cew-race\\_conscious\\_affirmative\\_action-fr-spread.pdf](https://cew.georgetown.edu/wp-content/uploads/cew-race_conscious_affirmative_action-fr-spread.pdf) [https://perma.cc/N7J5-TP8E]; see also *id.* at 10 fig.2 (showing that "[w]hite and Asian/Pacific Islander students have become more overrepresented at selective colleges since 2002 [from a 9 percentage-point gap to a 15 percentage-point gap], while Black/African American, Hispanic/Latino, and American Indian/Alaskan Native students have become more underrepresented [from a 14 percentage-point gap to a 20 percentage-point gap]."); see generally ELLEN BERREY, THE ENIGMA OF DIVERSITY 64 (2015); DAVID F. LABAREE, A PERFECT MESS 97 (2017).

contribute mightily to white overrepresentation, *with the intention and not simply the incidental effect of harming and injuring whites.*

Notice also that Justice Thomas in effect concedes, as he must, that not all selection criteria that happen to lower an applicant's chances count as punishment.<sup>133</sup> Like Justice Kennedy before him, Justice Thomas seems to think both that racially integrated schools can contribute to the "benefits of racial harmony and equality" and that such benefits can be practically and perhaps also justifiably/legally achieved through race-neutral means.<sup>134</sup>

But if racial integration is a legitimate goal and racial integration depends upon the actual presence of some number of URMs, then John still might "lose his spot."<sup>135</sup> And this, in turn, would seem to suggest that punishment is distinguishable from the incidental lowering of an applicant's chances even when those chances are lowered in the service of a race-conscious end like *racial* integration, so long as that integrative goal is achieved without reliance upon the far more candid and efficient method of explicitly using racial classifications.<sup>136</sup>

What makes this so? I can only imagine that lowered chances don't always amount to punishment because sometimes the lowering of an applicant's chances is not the object of a policy—is not, in other words, the result of some bare desire to harm a particular individual or group—but merely an incidental effect.<sup>137</sup> In using race-neutral means to achieve

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133. See Deborah Hellman, *The Zero-Sum Argument, Legacy Preferences, and the Erosion of the Distinction Between Disparate Treatment and Disparate Impact*, 109 VA. L. REV. ONLINE 185, 188, 192 (2023).

134. *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 284 (2023) (Thomas, J., concurring); see also Michael C. Dorf, *Race-Neutrality, Baselines, and Ideological Jujitsu After Students for Fair Admissions*, 103 TEX. L. REV. 269, 292 (2024) ("It is certainly notable that Justice Thomas—who is arguably the most pro-colorblind Justice ever to sit on the Supreme Court—thought (and apparently still thinks) that at least one facially race-neutral policy remains race-neutral even when used to increase or maintain racial diversity."); Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in THE CONSTITUTION IN 2020, at 101 (Jack M. Balkin & Reva B. Siegel eds. 2009) ("Even the most determined advocates of color blindness are usually willing to accept benign race-conscious motivations for facially race-neutral methods like Texas's '10 percent plan'... or class-based affirmative action. That would make little sense if they thought that there were [sic] really no difference between benign and invidious motivation.").

135. LOURY, *supra* note 56, at 132 ("As a matter of simple logic, a college with limited places to fill can achieve more racial diversity only if some black applicants are admitted who would otherwise have been rejected, while some nonblack applicants are rejected who would otherwise have been admitted. Selective institutions will naturally try to reject the least qualified of the otherwise admissible nonblack applicants while admitting the most qualified of those black applicants who would otherwise have been rejected.").

136. See *Gratz v. Bollinger*, 539 U.S. 244, 295–98 (2003) (Souter, J., dissenting); see generally Cristina M. Rodriguez, *Against Individualized Consideration*, 83 IND. L.J. 1405 (2008).

137. Cécile Laborde, *Structural Inequality and the Protectorate of Discrimination Law*,

race-conscious objectives we are not necessarily aiming to exclude/punish/victimize John even if we are, perhaps among other things, aiming to include those, like James, who continue to suffer from seemingly everlasting “societal discrimination” and its long-lingering effects.<sup>138</sup> But if we don’t necessarily punish or injure John when we incidentally diminish his chances in the service of a race-conscious end through the operation of race-neutral means, then how can it be claimed that we necessarily punish/injure, and not merely fail to satisfy the narrow interests of, John when we incidentally diminish his chances in the service of a race-conscious end through the operation of race-conscious means? The moral difference between punishment and non-punishment doesn’t seem to depend upon a distinction between the means, but upon an alternative distinction between (1) diminished chances that are the point of a policy; and (2) diminished chances that are merely an incidental and perhaps often also unavoidable byproduct of an otherwise justifiable goal.<sup>139</sup>

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POL., PHIL. & ECON., Oct. 22, 2024, at 1, 13 (“No relevant harm is done when a practice has a merely statistically disparate impact on members of a group without either communicating biased attitudes or perpetuating the broader pattern of inequality that discrimination law is designed to combat.”).

138. See Loury, *supra* note 35, at 254; see also Glenn C. Loury, *The Superficial Morality of Color Blindness: Why “Equal Opportunity” May Not Be Enough?*, 39 EAST. ECON. J. 425, 426–27 (2013); Kim Forde-Mazrui, *Alternative Action after SFRA*, 76 STAN. L. REV. ONLINE 149, 152 (2024); Chika O. Okafor, *Un-Erasing Race: Introducing Social Network Discrimination to the Law*, 102 N.C. L. REV. 1517, 1518–25 (2024).

139. Kristina Meshelski, *Affirmative Action is Not Morally Wrong*, in ETHICS, LEFT AND RIGHT 555, 560 (Bob Fischer ed., 2020) (“Those who benefit from affirmative action are obviously not harmed, and those who do not benefit are merely experiencing what must be experienced by someone. The sense in which the losers of this process are harmed is that the resources they want are not offered to everyone. This . . . is a harm, but if someone was going to be denied access, then with or without affirmative action that harm would take place.”); Edley, *supra* note 48, at 14 (“Is the disadvantaged, faultless white a victim of black aspirations, or is he simply finding himself on the expensive side of a proposition about redistribution because both the disadvantaged black and the innocent white are dealing with a problem bigger than all of us?”); see also SONU BEDI, *REJECTING RIGHTS* 176 (2009); Hellman, *supra* note 128, at 1946.

### C. The Cultivation of White Ignorance

Imagine an ignorance that resists . . . [A]n ignorance that fights back[,] . . . an ignorance militant, aggressive, not to be intimidated, an ignorance that is active, dynamic, that refuses to go quietly—not at all confined to the illiterate and uneducated but propagated at the highest levels of the land, indeed presenting itself unblushingly as knowledge.<sup>140</sup>

— Charles W. Mills

John could easily be forgiven for being confused about when he is or isn't being punished for the sins of his or someone else's great-great-great-grandparents. And this is because he is and we are caught in a reality-distortion field of which members of the Court are not the sole creators or operators, but well-situated amongst its devoted and high-profile/high-impact stewards. The Court's messaging and not simply its actions contributes mightily to the "prison of misbelief"<sup>141</sup> within which John finds himself.<sup>142</sup> He is in a very important sense unfree<sup>143</sup> to the extent that he is with good reason under the very much mistaken impression that "there is a 'moral [and] constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."<sup>144</sup> The "laws designed to subjugate" Black Americans were laws *designed* to subjugate Black Americans, that was their purpose—they were based on a bare desire to harm<sup>145</sup> and, therefore, depended upon what is both a morally and "a constitutionally inadmissible rationale."<sup>146</sup> Admissions policies that serve, in part, to counterbalance John's "six generations" worth of accumulated advantages are asymmetrical *and*, like the practice of allocating disabled parking spots, not the least bit

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140. CHARLES W. MILLS, BLACK RIGHTS/WHITE WRONGS 49 (2017).

141. Allen Buchanan, *Prisoners of Misbelief*, in THE OXFORD HANDBOOK OF FREEDOM 508, 520 (David Schmidt & Carmen E. Pavel eds., 2018).

142. Aviel, *supra* note 43, at 375.

143. Buchanan, *supra* note 141, at 508, 516–17.

144. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (citation omitted); *see* RANDALL KENNEDY, FOR DISCRIMINATION 165 (2013) ("[Justice] Thomas's equating of racial distinctions intended to impose white supremacy with racial distinctions intended to undo white supremacy is one of the silliest, albeit influential, formulations in all of American law."); TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 221 (2015) ("The implied moral equivalence between affirmative action and malicious or intentional direct discrimination is dangerous sophistry."); *see also* MILLS, *supra* note 140, at 57 (observing that "the 'white' in 'white ignorance' does not mean that it has to be confined to white people.").

145. SONU BEDI, BEYOND RACE, SEX, AND SEXUAL ORIENTATION 17, 143 (2013); Stanley Fish, *The Nifty Nine Arguments Against Affirmative Action in Higher Education*, J. BLACKS HIGHER EDUC. 79, 80 (2000).

146. BEDI, *supra* note 139, at 113.

designed to “stick it”<sup>147</sup> to anyone let alone an effort to demean, stigmatize, or subordinate nonbeneficiaries. Race-conscious admissions policies, though thoroughly insufficient to solve a great many social problems and quite flawed in a great many respects, nevertheless merely—but also crucially—serve, among other things, the noble purpose of enabling a woefully small subset of URM to compete and to cooperate with their white and Asian American peers as “co-creators in the kingdom of culture.”<sup>148</sup>

Benign purpose notwithstanding, Justice Thomas is surely correct that race-conscious admissions policies are morally impermissible if, and when, they do indeed unduly harm innocents. Reciprocal sacrifice is one thing and non-reciprocal sacrifice another.<sup>149</sup> Both Chief Justice Roberts and Justice Thomas contend that selective college admissions is a zero-sum game and that, therefore, benefits to John and to James are mutually exclusive.<sup>150</sup> But why must this be so? Surely it is not the case that John is injured by a dispensation that includes the designation of disabled parking spots. Surely, he isn’t the subject of unequal consideration<sup>151</sup> and, therefore, harmed and injured simply because he does not get something of value that he happens to want. He wants, for instance, that spot right in front of his favorite restaurant just as much as you or I do, but is it correct to say that he is necessarily harmed and injured, even if he is not punished, when it is reserved for another? It certainly *could be* that John is harmed and injured by that dispensation, but surely that isn’t *necessarily* the case.

If the spot is reserved for his disabled fellows, then not getting what he wants is—in an exceedingly important sense—precisely what John wants. What he really wants both for himself and for his fellows is equal respect and consideration rather than protection from social loss and from the ritual of reciprocal democratic sacrifice that lies at the heart of liberal democracy. This could, of course, be accomplished in other ways. Were there no disabled parking spots, he could still leave the spot in front of the restaurant open every time he makes the trip, but I suspect that typically there would be no spot to leave open because someone would have already taken it. Instead, the community takes care of the collective action problem—we settle on “the salient coordination point”<sup>152</sup>—and,

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147. BEDI, *supra* note 139, at 147; BOONIN, *supra* note 55, at 193.

148. Allen, *supra* note 40, at 148; *see also* LOURY, *supra* note 56, at 153.

149. ALLEN, *supra* note 44, at 110–11; ROSENFIELD, *supra* note 109, at 304–12, 322–28; BOONIN, *supra* note 55, at 190–94.

150. Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 218 (2023); *id.* at 272 (Thomas, J., concurring).

151. DWORAKIN, *supra* note 42, at 227.

152. Jonker, *supra* note 85, at 203.

grumble silently though he might on a particular evening when running late, John is, nevertheless, grateful because not getting what he wants *is* what he wants.<sup>153</sup> Social policy is in this instance wholly in line with his sense of justice and with what we might call his and our “perpetually convergent interests”<sup>154</sup> even if/as it frustrates his narrow self-interest. The dispensation is, if John insists on patting himself on the back, little more than an instance of loss converted into “a freely given gift to be reciprocated”<sup>155</sup> and nothing at all like the compelled donation of “in-kind benefits”<sup>156</sup> that the Court sets out to depict in the context of its affirmative action jurisprudence.

Where then is the outrage over disabled parking spots? Why don’t we think of their provision as an example of the non-disabled wrongfully discriminating against themselves in favor of the disabled? Maybe we don’t call this wrongful discrimination simply because—in addition to its capacity to satisfy a particularly urgent social need—we recognize that it in no way demeans, stigmatizes, or subordinates the nondisabled. Because we are convinced that making eager and joyful, or even begrudging, provision for our disabled fellows is neither dastardly nor supererogatory, but a simple “freely given gift” and a kind of “enabling constraint”<sup>157</sup> that follows ineluctably from our shared sense of justice. *If* this is burden and *if* this is harm, then it is not at all wrongful. It is good. It is nonarbitrary differential treatment that in no way signals a failure of equal respect and concern vis-à-vis the rights of nonbeneficiaries.

John didn’t create these problems—the “moral asymmetry” that obtains with the respect to *both* the discrimination against and stigmatization of the disabled vis-à-vis the nondisabled and the discrimination against and stigmatization of Black Americans vis-à-vis white Americans<sup>158</sup>—but now, whether he likes it or not he is the tip of the spear leveled by others. The Court, by invoking his rights and satisfying his narrow self-interest, is denying him the satisfaction of his broader interests, both spiritual and democratic.<sup>159</sup> What John really

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153. Buchanan, *supra* note 141, at 517.

154. Johnson, *supra* note 11, at 1352 (highlighting two “perpetually convergent interests:” (1) “a spiritual interest, which concerns the moral, emotional, and psychological effects of White supremacy on White people” and (2) “a democratic interest, which concerns racial subjugation’s harm to democracy.”).

155. ALLEN, *supra* note 44, at 36.

156. Kevin D. Brown, *The Road Not Taken in Brown: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1584 (2004).

157. Bernard Yack, *Toward a Free Marketplace of Social Institutions: Roberto Unger’s Super-Liberal Theory of Emancipation*, 101 HARV. L. REV. 1961, 1967–70 (1988); see JEFF SPINNER-HALEV, *SURVIVING DIVERSITY* 61 (2000); DONALD HERZOG, *Poisoning the Minds of the Lower Orders* 165 (1998).

158. Blum, *supra* note 38, at 183–84; Paul-Emile, *supra* note 24, at 331–32.

159. Johnson, *supra* note 11, at 1352.

wants, if we imagine him like any decent citizen of a well-functioning democracy, is for the basic structure of his society to be designed and maintained in such a way that, with his active and abiding support, it can effectively address those disadvantages—like being “six generations behind”—that citizens suffer through no fault of their own.<sup>160</sup> Rather than cultivate his civic virtue by allowing him to join us in freely giving to James as we freely give to our disabled fellows, he learns a very different lesson from the Court: Black loss is white gain *and* Black gain is white loss. John may wish that this wasn’t so, but the damage is already done to the extent that he comes to embrace, reluctantly or otherwise, the rhetoric surrounding the Court’s zero-sum argument.<sup>161</sup>

Young John has, or is just now beginning to have, a sense of justice.<sup>162</sup> If we let, *if we insist that*, him win yet another rigged race<sup>163</sup> then he’s going to need to deal with that psychologically.<sup>164</sup> And perhaps John does that, as Cole plans to do it, by giving back in the form of taking full advantage of his opportunities.<sup>165</sup> But surely his sense of justice is somewhat more demanding than that as it may be for Cole as well. John, it is quite true, was “not there” for slavery or for Jim Crow, but he is here now for the winning of rigged races.<sup>166</sup>

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160. HILL, *supra* note 64, at 208 (“[I]mplicit in our democratic ideals is the idea that our public institutions should be so arranged that they afford to individuals, over time, more or less equal opportunities to develop and make use of their natural talents and to participate and contribute to those institutions.”).

161. José Medina, *Color-Blindness, Meta-Ignorance, and the Racial Imagination*, 1 CRITICAL PHIL. RACE (SPECIAL ISSUE) 38, 47 (2013) (“In color blindness, the evasion of responsibility goes very deep: . . . it results in a numbness or insensitivity to racial matters that limits the agent’s capacity to respond to wrongs and to improve ethically or politically, since the subject is unable to recognize such limitation.”); Buchanan, *supra* note 118, at 733 (observing “that *both* underestimations and overestimations regarding the prospect for progress in justice can have the same effect, not contrary effects, namely, to encourage acquiescence in an unjust status quo.”).

162. Bernard R. Boxill, *How Injustice Pays*, 9 PHIL. & PUB. AFFS. 359, 362 (1980).

163. See, e.g., Kwame Anthony Appiah, *The Diversity of Diversity, in OUR COMPELLING INTERESTS* 161, 165–66 (Earl Lewis & Nancy Cantor eds., 2016) (“If we are trying to find out how good someone is at math, a test that displays her in a poor light when she’s thinking of herself in one way and a good light when she thinks of herself in another doesn’t do the job . . . . Phenomena like stereotype threat and implicit bias mean that many of the devices that we use to assign social rewards systematically fail to do what we claim for them. An SAT is meant to measure scholastic aptitude, not discover losses in self-confidence caused by negative stereotypes or gains due to positive ones.”).

164. Brown, *supra* note 156, at 1597–98; Lisa B. Spanierman & D. Anthony Clark, *Psychological Science: Taking White Racial Emotions Seriously—Revisiting the Costs of Racism to White Americans, in IMPACTS OF RACISM ON WHITE AMERICANS IN THE AGE OF TRUMP* 115 (Duke W. Austin & Benjamin P. Bowser eds., 2021).

165. *Applying for college after the end of affirmative action, supra* note 75.

166. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990) (“[T]he rhetoric of innocence obscures this question: What white person is ‘innocent,’ if innocence is defined as the absence of advantage at the expense of others?”); MARTIN LUTHER

Perhaps he arrives on campus at UNC, however, and finds himself sighing with relief because it's as diverse as he ever hoped it could be—maybe there's a Black student named James in his very dorm!—even if, technically speaking, it's less integrated than it was before. John might, as do many white students attending selective institutions after graduating from overwhelmingly white high schools, come to think that there are "already enough black and Latino students to make for a rich educational experience."<sup>167</sup> For many white students, the selective institutions that they attend for college, although they often do not come close to proportional representation, may very well be the most diverse institutions that have touched their lives with any degree of regularity. How can we then fault them for not noticing how few URM<sup>s</sup> there are when they still can't get over how *many* there are?<sup>168</sup>

#### *D. Expediency versus Justice*

I do think, however, that Justice Thomas is justifiably unsatisfied with the messages that the Court has been sending to John over the years and for demanding an alternative. The now non-existent middle-right of the Court all-too-often spoke the language of mere expediency.<sup>169</sup> And I do think that it might be fair to conclude, as does Laurence Thomas, that Justice O'Connor, in opting for expedience "at the cost of justice strictly understood," "simply . . . h[eld in *Grutter v. Bollinger*]"<sup>170</sup> that admitting an occasional minority with very low scores is worth it if that will hasten the day when the standing of minorities in society is such that [they] are no longer haunted by the stigma of racism."<sup>171</sup> I agree with Justice Thomas,

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KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 91 (Beacon Press 1968) (1967) ("To ignore evil is to become an accomplice to it.").

167. NATASHA K. WARIKOO, THE DIVERSITY BARGAIN 99 (2016).

168. *Id.* at 48, 52, 99; Daniel Kees, *Defanging Diversity: SFFA v. Harvard and Its Implications for the Diversity Rationale in Higher Education Admissions*, 14 COLUM. J. RACE & L. 1023, 1055–56 (2024) ("Students today are less likely to have grown up in socioeconomically or racially diverse neighborhoods, so many middle- and upper-class freshmen have their first substantive interactions with low-income and non-white persons on a college campus.").

169. See, e.g., Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education Over the Next Twenty-Five Years*, in THE NEXT TWENTY-FIVE YEARS 61 (David Lee Featherman, Marvin Krislov & Martin Hall eds., 2010) (arguing that "educational institutions should be permitted to consider race because prohibiting them from doing so might intensify the nation's problems, rather than eliminate them").

170. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (upholding the University of Michigan Law School's race-conscious admissions plan but also conceding "that 'there are serious problems of justice connected with the idea of preference itself'" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978))).

171. Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 941 (2004).

and with Laurence Thomas, that this is *not* the message that the high Court ought to be sending to John or to James for that matter.

Justice O'Connor tells John that, at least for the time being, he is being singled out for sacrifice and she implies—in a complete retreat from reality—that that experience of sacrifice is non-reciprocal and would be entirely avoided were he a member of an underrepresented minority group.<sup>172</sup> She hastens to assure him that this dispensation won't last forever, but Justice Thomas is surely correct to note that *wrongful* discrimination is no less wrongful today than it will be tomorrow or “in 300 months.”<sup>173</sup> Of course, to agree with Justice Thomas that the *Grutter* Court said the wrong thing to John is not necessarily to agree with him that the *SFFA* Court has now said the right thing to him. We can, and I do, share—at least as a matter of principle—in both Thomas’s rejection of Justice O’Connor’s seemingly-moderate pragmatism without at the same time conceding that white “innocents” are being (1) unduly burdened or (2) injured in any way.

We must and we can sidestep the implication that John is a being treated solely as a means to an end that he does not share.<sup>174</sup> We needn’t, as the Court has for decades now, simply dismiss him while simultaneously implying that the sacrifice of his concerns is the expedient move to make.<sup>175</sup> To John, Justice O’Connor, in effect, says something like the following:

Dear [John],

We regret to inform you that your application for admission has been rejected. Please understand that we intend no offense by our decision. We do not hold you in contempt. In fact, we don’t even regard you as less deserving than those who were admitted.

It is not your fault that when you came along society happened to not need the qualities you had to offer. Those admitted instead of you are not deserving of a place, nor worthy of praise for the factors that led to their admission. We are only using them—and you—as instruments of a wider social purpose.

We realize you will find this news disappointing. But your disappointment should not be exaggerated by the thought that this rejection reflects in any way your intrinsic moral worth. You have our sympathy in the sense that it is too bad you did

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172. Brown, *supra* note 156, at 1596; See generally Angela Onwuachi-Willig, “*I Wish I Were Black*” and *Other Tales of Privilege*, THE CHRON. OF HIGHER EDUC. (Oct. 28, 2013), <https://www.chronicle.com/article/i-wish-i-were-black-and-other-tales-of-privilege/> [<https://perma.cc/K2CN-N26P>].

173. *Grutter*, 539 U.S. at 351 (Thomas, J., concurring in part and dissenting in part).

174. See Hill, *supra* note 64, at 200.

175. See *id.* at 198.

not happen to have the traits society happened to want when you applied. Better luck next time.

Sincerely yours . . .<sup>176</sup>

Justice Thomas is wrong, however, to think that this horrific pro-affirmative action message, or something like it, is the only one on offer. Better, I think, to craft and to convey messages that embrace and reflect a wholesome narrative that emphasizes relationship,<sup>177</sup> community,<sup>178</sup> the cultivation of a disposition to make good use of one's political power,<sup>179</sup> and those "perpetually convergent" spiritual and democratic interests that we always and already share.<sup>180</sup>

John needs us in this moment<sup>181</sup> as does James. Both young men suffer from the "distinct racial damages" that follow necessarily from the American white-over-Black racial hierarchy.<sup>182</sup> And both ought to find themselves operating within a set of social institutions reflective of the collective desire to see to it that the American story—their distinct/shared narratives combined with ours—is conspicuously marked first and foremost by social solidarity and the essential and salutary practice of reciprocal democratic sacrifice. John needs to be able to look James in the eye throughout his life and not have to "feel bad in a way" or to feel the need to continually remind us that he is, as Baldwin puts it, "not responsible for the textile mills of Manchester, or the cotton fields of Mississippi."<sup>183</sup> He needs access to life paths that perpetuate neither shame nor any dependency upon a false sense of superiority continually reinforced by our insistence that he win rigged race after

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176. SANDEL, *supra* note 7, at 180.

177. See, e.g., HILL, *supra* note 64, at 206.

178. See, e.g., ALASDAIR MACINTYRE, AFTER VIRTUE 220 (2007); SANDEL, *supra* note 7, at 234; James B. White, *A Response to "The Rhetoric of Powell's Bakke*," 38 WASH. & LEE L. REV. 73, 74–75 (1981).

179. See, e.g., JUDITH SHKLAR, THE FACES OF INJUSTICE 43 (1990); Bernard Yack, *Injustice and the Victim's Voice*, 89 MICH. L. REV. 1334, 1348 (1991).

180. Johnson, *supra* note 11, at 1352–60.

181. Medina, *supra* note 161, at 57 ("[D]eveloping a positive sense of identity while taking responsibility for racial oppression is not easy for white subjects, for the recognition of responsibility can be shattering."); José Medina, *Ignorance of Racial Insensitivity, in THE EPISTEMIC DIMENSIONS OF IGNORANCE* 195–96 (Rik Peels & Martijn Blaauw eds., 2016) ("[B]ecoming epistemically sensitive is not only or primarily an individual responsibility – it is not even something that the individual can always accomplish fully by herself, in isolation. Rather, it is a shared responsibility that can only be discharged cooperatively and collectively.") (emphasis omitted).

182. Rogers M. Smith, *Black and White after Brown: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 723 (2003).

183. BALDWIN, *supra* note 12, at 411; see also JAMES BALDWIN, *Words of a Native Son, in THE PRICE OF THE TICKET* 401, 406 (Beacon Press eds., 2021) ("I know you didn't do it, and I didn't do it either, but I am responsible for it because I am a man and a citizen of this country and you are responsible for it, too, for the very same reason . . .").

rigged race after rigged race.<sup>184</sup> If we are to show John the respect that he deserves as an individual and as a citizen, we simply cannot taint his future accomplishments and relationships with *our*—not *his*—unexpiated crimes.<sup>185</sup> John “was not there,” but *we* were. And the assumption that whiteness itself offers sufficient protection from the cancer of white supremacy and its long-lingering effects is, as it always has been, not at all justified.

### Conclusion

Because I don’t believe in unencumbered selves, I don’t believe that John is—or has—one. Like the rest of us he is a “story-telling animal”<sup>186</sup> and his self a “center of narrative gravity”<sup>187</sup> that arrives on the scene already subject to a host of unselected obligations and conflicting demands for his loyalty and allegiance. Though John may not inherit moral debts—I’m somewhat uncomfortable with the language of accounting in this context<sup>188</sup>—he is both morally and politically responsible, as we all are, for morally compromised identities that he has not chosen<sup>189</sup> and for the extent to which he both benefits from and contributes to the continued existence of unjust states of affairs.

Young John is also, let’s remember, just seventeen years old. And, though his sense of justice may in fact be as well developed as anyone else’s, he quite literally—and somewhat tragically—cannot stop contributing to and benefiting from injustice on his own.<sup>190</sup> From his

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184. White, *supra* note 18, at 1940–41; Chesler, Peet & Sevig, *supra* note 29, at 223.

185. Susan Stark, *Taking Responsibility for Oppression: Affirmative Action and Racial Injustice*, 18 PUB. AFFS. Q. 205, 215 (2004) (“Morality . . . requires that whites take responsibility for racial injustice, not because any [white person] has individually caused racial injustice. But because good relationships with others and the well-being of our fellows is the responsibility of each one of us.”).

186. MACINTYRE, *supra* note 178, at 216.

187. Dennett, *supra* note 90, at 103.

188. Iris Marion Young, *Asymmetrical Reciprocity*, in *INTERSECTING VOICES* 54–56 (1997); HILL, *supra* note 64, at 198–201; HOWARD McGARY, *RACISM AND SOCIAL JUSTICE* 141 (1999).

189. Brown, *supra* note 3, at 4; Hill, *supra* note 9, at 29–30; see also MACINTYRE, *supra* note 178, at 216 (“I can only answer the question ‘What am I to do?’ if I can answer the prior question ‘Of what story or stories do I find myself a part?’ We enter human society, that is, with one or more imputed characters—roles into which we have been drafted—and we have to learn what they are in order to be able to understand how others respond to us and how our responses to them are apt to be construed.”).

190. See Robert S. Taylor, *Racial Responsibility Revisited*, 35 PUB. AFFS. Q. 161, 170 (2021) (“[W]hites are continually receiving benefits that could be refused but that, for all they know, may be tainted by racist motivations: How can whites be sure that when they are given a job offer, nice treatment in a shop or at the DMV, a warm reception to a romantic overture, and so on, they are not being benefitted (in whole or in part) for illicit racial reasons? Asymmetric information insulates white beneficiaries from will implication in such cases, but does it really insulate them from special moral responsibility . . . ?”); Delmas, *supra* note 6, at 478; Brown, *supra* note 3, at 11, 16.

perspective, if not from ours, applying to college should be more like finding a parking spot. Disappointment is understandable and we aren't always our best selves, but the social institutions of John's society should be structured in such a way that he can both comprehend and reconcile himself to reciprocal democratic sacrifice, in general, and to the reciprocal democratic sacrifice of race-conscious admissions, in particular.

John may find that his partner is furious or even gone by the time he reaches the restaurant, but wouldn't it be nice if he can simply pivot to grabbing a beer with James instead? An injury that affirmative action is meant to address is the continued denial of what Bernard Boxill aptly dubs "the benefits of fair interaction" and we mustn't ever forget, important differences with respect to moral urgency notwithstanding, that these benefits are also denied to John whenever they are denied to James.<sup>191</sup> Our estrangement from one another,<sup>192</sup> and the misunderstanding, misrepresentation, and resentment that it all-too-often breeds, is a problem for which race-conscious admissions is but a small part of the potential solution.<sup>193</sup> Finally, because the Court continues to powerfully abet and facilitate this estrangement, as well as the unshared reality<sup>194</sup> that both produces and results from it, it is no part of the solution and quite a large part of the problem.

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191. Bernard Boxill, *Affirmative Action in Higher Education*, in A COMPANION TO THE PHILOSOPHY OF EDUCATION 598–99 (Randall Curren ed., 2003); see also Robert A. Garda Jr., *Students for Fair Admissions through the Lens of Interest-Convergence Theory: Reality, Perception, and Fear*, 77 SMU L. REV. 93, 103 (2024) ("Because Whites are the most socially isolated racial group, the socializing benefit of diverse educational environments inures primarily to White students.").

192. KING, *supra* note 83, at 74 ("Racism is total estrangement. It separates not only bodies, but minds and spirits.").

193. Medina, *supra* note 161, at 64 ("The expansion of one's social sensibilities—and with it also the pluralization of one's racial consciousness—is an ongoing task that does not have an end. And it is a task that individuals cannot fully carry out all by themselves. Such a task requires sustained interactions with significantly different individuals and groups (interactions that provide disruptions and diverse forms of epistemic friction); it requires the continued critical interrogation of the collective imagination from multiple perspectives; and it also requires the cultivation of intra- and inter-group solidarities and the collaborative efforts of overlapping social movements that can create the conditions for cognitive and affective melioration.").

194. Elizabeth Anderson, *Epistemic Justice as a Virtue of Social Institutions*, 26 Soc. EPISTEMOLOGY 163, 170–72 (2012).



## Coming Out

Eliot T. Tracz<sup>†</sup>

### Introduction

The closet is an apt metaphor. It is a dark place where we go to hide—sometimes literally—and a place where we store our skeletons, those secrets so personal we fear that they may one day lead to our undoing. For many people, one of those skeletons is a queer identity. Bisexual, transgender, lesbian, or gay, some element of their being causes them to hide.<sup>1</sup> But the closet is stifling. Often people find that the burden of hiding eventually becomes too heavy, and that the desire to be free is overwhelming. The solution often involves making a life altering choice—the choice to come out.

When a person chooses to come out, they hope for a positive reaction. A woman identified as Charli, in a compilation titled *Coming Out Stories*, wrote of her coming out experience, saying:

The first person I came out to properly was my mum. She was just like, “Yeah, we know. Okay. Alright.” I don’t really know how she knew. She then spoke to my auntie, who was living with us for a while, and apparently she knew as well! I thought, “Okay, so it’s just me completely oblivious and everybody else knew.” My mum told my dad, which saved that conversation, but he was fine. We’re not the best of friends but we understand each other a lot more than we used to. I told my sisters and my brother and they were like, “Yeah, whatever.” And that was it! I was then open and out.<sup>2</sup>

For Charli, and many people, there couldn’t be a better experience.

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Professor Tracz's research focuses on issues of sexual orientation and gender identity, with particular interest in First Amendment protections as well as the intersection between bisexuality and the law. His scholarship has appeared (or is forthcoming) in the *American University Journal of Gender, Social Policy & Law*, *Connecticut Public Interest Law Journal*, and the *Hofstra Law Review*. He is the author of a forthcoming casebook titled *CASES AND PROBLEMS ON SEXUAL ORIENTATION, GENDER IDENTITY, AND THE LAW* with Aspen Publishing.

1. This article recognizes that there are many more sexual and gender identities than those listed here.

2. Emma Goswell & Sam Walker, *Coming Out Stories: Personal Experiences of Coming Out from Across the LGBTQ+ Spectrum* 106 (2021).

Unfortunately, coming out comes with the risk of rejection. Marjorie Rowland, for example, was a high school guidance counselor in Montgomery, Ohio.<sup>3</sup> Ms. Rowland's disclosure of her own bisexuality to a colleague ultimately ended up costing her job.<sup>4</sup> Others have lost more. Matthew Shepherd is a tragic example of a young, queer man whose life was cut short in a shockingly violent manner simply because of his sexuality.<sup>5</sup> In a number of jurisdictions, violent reactions to queer men identifying themselves as such were given validation by so called "gay panic defense[s]."<sup>6</sup>

Another, similarly, harrowing experience is that of a woman named Lucia, a lesbian born and raised in Ireland.<sup>7</sup> Lucia did not come out so much as she was outed by her own brother after he found a letter from a female classmate in Lucia's bag.<sup>8</sup> After her grandmother threatened to have her sent away, Lucia ran away.<sup>9</sup> Eventually, Lucia became homeless and after getting caught stealing a bicycle, a judge recommended that she see a psychiatrist.<sup>10</sup> The psychiatrist, in turn, suggested that he would perform a lobotomy on Lucia to cure her homosexuality.<sup>11</sup>

Along with the risks of coming out is the additional burden of knowing that coming out is not a singular event. A person who chooses to be out will continue to come out for the rest of their life.<sup>12</sup> This is particularly true for people who identify as bisexual, many of whom will have to reassert their bisexual identity repeatedly when in same-sex or opposite-sex relationships.<sup>13</sup>

For much of recorded history, homosexuality was seen as a set of behaviors rather than an identity.<sup>14</sup> Because of this, homosexuality could

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3. See *Rowland v. Mad River Loc. Sch. Dist.*, 730 F.2d 444, 446 (6th Cir. 1984).

4. *Id.* For a deeply insightful look at the Rowland case, see Ann E. Tweedy, *Bisexual Erasure, Marjorie Rowland, and the Evolution of LGBTQ Rights*, 46 HARV. J.L. & GENDER 265 (2023).

5. *Our Story*, MATTHEW SHEPHERD FOUNDATION, <https://www.matthewshepard.org/about-us/our-story/> [https://perma.cc/FPS4-HPNG].

6. Nakota G. Wood, *The Gay Panic Defense: A Rainbow of Reasons Calling for Abolishment and Protection in Tennessee*, 32 TUL. J.L. & SEXUALITY 111, 113 (2023); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 489 (2008).

7. GOSWELL & WALKER, *supra* note 2, at 77.

8. *Id.*

9. *Id.* at 78.

10. *Id.* at 78-79.

11. *Id.* at 79.

12. Brian Webb, *Coming Out Twice: Why the Closet Isn't a One Time Thing*, HOMOCULTURE (Apr. 22, 2025), <https://thehomoculture.com/coming-out-experience/> [https://perma.cc/GD4F-BLDC].

13. *Coming Out*, BI.ORG (Aug. 18, 2025), <https://bi.org/en/coming-out> [https://perma.cc/YZZ8-UCHD].

14. Michel Foucault, *The History of Sexuality*, Volume I: An Introduction 43 (Vintage Books Ed. 1990).

be dealt with through sodomy laws which prohibited a broad scope of sexual activities, rather than individuals themselves.<sup>15</sup> Following World War II, however, gay and lesbian individuals began to assert themselves as a social group in ways previously unseen.<sup>16</sup> Queer publications arose, challenging obscenity laws and pushing the boundaries of free speech.<sup>17</sup> Groups like the Mattachine Society and the Daughters of Bilitis provided social opportunities and political activism.<sup>18</sup> Queer people have fought for the right to express their identity through clothing, marriage,<sup>19</sup> and association.

At every step of the way, society and the law have conspired to fight back against expressions of queer identity. Sodomy laws, which existed for most of our nation's history, were selectively enforced against gay men until they were struck down by *Lawrence v. Texas*<sup>20</sup> in 2003. The Lavender Scare purged gay men from their jobs in the federal government.<sup>21</sup> Just a couple of decades later, "Don't Ask, Don't Tell" would do the same for members of the armed services.<sup>22</sup> The Reagan Administration failed to even acknowledge the AIDS epidemic during its early years,<sup>23</sup> going further as to advance the scapegoating of gay and bisexual men as spreaders of disease.

Even so, queer-identifying people have refused to go away. *RuPaul's Drag Race* has brought queer culture into our homes since 2009.<sup>24</sup> The number of people self-identifying as LGBTQ has increased with each successive generation in the United States.<sup>25</sup> LGBTQ advocacy groups

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15. See William N. Eskridge, Jr., *Dishonorable Passions: Sodomy Laws in America, 1861–2003*, at 16–17 (2008).

16. Michael Bronski, *A Queer History of the United States* 176 (Beacon Press 2011).

17. *Id.* at 180–81.

18. *Id.*

19. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution requires recognition of same-sex marriage); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

20. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

21. See David K. Johnson, *The Lavendar Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* 2 (U. Chic. Press 2023).

22. See Sharon E. Debbage Alexander & Kathi S. Wescott, *Repeal of "Don't Ask, Don't Tell": A Smooth Transition*, 15 WASH. & LEE J. C.R. & SOC. JUST. 129, 130 (2008) (estimating a purge of over 12,000 service members beginning in 1993).

23. BRONSKI, *supra* note 16, at 230–31.

24. Spencer MacNoughton & Sam Donndelinger, *How 'RuPaul's Drag Race' Queens Became the Ambassadors of Being Yourself*, GAY TIMES (Jan. 3, 2025), <https://www.gaytimes.com/uncloseted/ru-paul-drag-race-season-17-impact-alaska-sheacoulee/> [https://perma.cc/3MF4-Z9SK].

25. One recent study shows that the percentage of people identifying as LGBTQ+ is inversely related to age bracket, with people 65 and older least likely to identify as queer (1.8%); followed by people aged 50–64 (2.7%); people aged 35–49 (4.1%); people aged 25–34 (9.1%); and finally people age 18–24 (15.2%). See Jeffrey Jones, *LGBTQ+ Identification in*

exist in all corners of the world, engaging in everything from political speech to health care to adoption, and every so often news breaks about a new country legalizing same-sex marriage.<sup>26</sup>

Given the breadth of legal issues and rights disputes facing queer people, what is it that makes coming out worthy of its own Article? The simple answer is that none of these things—relationships with same-sex partners, social interaction with queer communities, understanding a need for queer representation in media—are possible without first coming out to oneself. But how does a person come out to themselves if they lack access to the information necessary to help them understand who they are? And once a person decides to share their truth with others, how does one do so? Through clothing? By attending a public event with their new partner? By requesting that others use appropriate pronouns? Bear in mind, coming out is not a singular occurrence; a person will continue to come out for the rest of their life. What if someone—the legislature, the school board, Janet down the street—wants to stop you from expressing that identity?

This Article explores the ways in which the decision to come out is affected by law and society. Part I explores the decision to come out as queer.<sup>27</sup> It begins by taking a broader view of the decision to come out. This discussion includes the process of self-defining one's identity, the appeal of remaining in the closet and the political considerations, both internal and external to the LGBTQ community, involved in the decision to come out. Part II discusses conflicts between individuals' desire to express themselves by coming out and rules and policies which chill queer self-expression.<sup>28</sup> It begins by discussing the framing of legislation forcing schools to out children to their parents. It then discusses rules and regulations preventing schools from disclosing a child's sexuality or gender identity. Part III argues that the legal rights at issue have been misstated, either deliberately or through ignorance.<sup>29</sup> It argues that framing forced outing as recognizing a form of parental rights is wrong, because it misstates who is harmed by forced outing.<sup>30</sup> Instead, laws

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U.S. Now at 7.6%, GALLUP (Mar. 13, 2024), <https://news.gallup.com/poll/611864/LGBTQ+-identification.aspx> [https://perma.cc/V262-STT4].

26. See, e.g., *LGBTQ Resources List*, GLAAD (Sep. 29, 2025), <https://glaad.org/resourcelist/> (listing U.S. based advocacy groups) [https://perma.cc/BA5Y-EXQ4]; see also *Find Bi+/Queer Resources*, BISEXUAL RES. CTR. (Sep. 29, 2025), <https://biresource.org/find-bi-resources/> (listing U.S. and international resources) [https://perma.cc/PYM4-5Z8A].

27. See *infra* Part I.

28. See *infra* Part II.

29. See *infra* Part III.

30. See *infra* Part IV.

requiring forced outing should consider the child's right to privacy as the right which ought to be protected.

A few notes before proceeding. First, because coming out is a deeply personal experience, this Article relies on a combination of legal analysis and anecdotal evidence intended to emphasize the human experience of coming out. Second, there are many sexual orientations and gender identities, which makes it impractical to try to list them all repeatedly throughout the Article. As a result, this Article uses "LGBTQ" or "queer" due to the breadth of their meanings. When necessary, specific orientations or gender identities will be referenced directly.

## I. Coming Out

### A. Self-Defining Identity

Self-determination is part of the American mythos.<sup>31</sup> Politically, self-determination—that is, the right to choose—“has its roots in the American and French revolutions.”<sup>32</sup> As a concept, it may refer to national “choices regarding the exercise of sovereignty and independent external relations,” or “to the selection of forms of government” by the people.<sup>33</sup> For purposes of this Article, and in relation to individuals, self-determination is still about the fundamental right to choose, but instead of grand questions of government and societal formation, it is used to reference a person’s concept of the “self.” Queer people (really all people, but this Article is about queer people) make these choices every day, whether in making decisions regarding the expression of their gender identity<sup>34</sup> or other indicators of their sexual orientation.

#### i. A Wealth of Orientations

Sexual orientation as an identity is relatively new. Some scholars, such as Michel Foucault, trace the beginning of homosexuality as an identity to 1870, after an article on “contrary sexual sensations” began to characterize homosexuality:

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31. See Damaris Zehner, *The Myth of Autonomy*, RESILIENCE (Oct. 18, 2019), <https://www.resilience.org/stories/2019-10-18/the-myth-of-autonomy/> [https://perma.cc/E64M-29XC].

32. Wolfgang Danspeckgruber & Anne-Marie Gardner, *Self-Determination*, PRINCETON ENCYCLOPEDIA OF SELF-DETERMINATION, <https://pesd.princeton.edu/node/656/> [https://perma.cc/75YE-ZK39].

33. *Id.*

34. Gender expression is defined as the “[e]xternal appearance of one’s gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.” *Glossary of Terms*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [https://perma.cc/G923-XMNS].

[L]ess by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.<sup>35</sup>

A more recent account from David Halperin takes a different view, claiming:

Homosexuality and heterosexuality, as we currently understand them, are modern, Western, bourgeois productions. Nothing resembling them can be found in classical antiquity.... In London and Paris, in the seventeenth and eighteenth centuries, there appear... social gathering-places for persons of the same sex with the same socially deviant attitudes to sex and gender who wish to socialize and to have sex with one another.... This phenomenon contributes to the formation of the great nineteenth century experience of "sexual inversion," or sex-role reversal, in which some forms of sexual deviance are interpreted as, or conflated with, gender deviance. The emergence of homosexuality out of inversion, the formation of a sexual orientation independent of relative degrees of masculinity and femininity, takes place during the latter part of the nineteenth century and comes into its own only in the twentieth. Its highest expression is the "straight-acting and -appearing gay male," a man distinct from other men in absolutely no other respect besides that of his "sexuality."<sup>36</sup>

Despite their differences, both point to the evolution of same-sex intimacy from simple acts that people did together into an individual identity that could be claimed by a person.

Today a person might identify as gay,<sup>37</sup> lesbian,<sup>38</sup> bisexual,<sup>39</sup> pansexual,<sup>40</sup> asexual,<sup>41</sup> or a number of other orientations. What's more,

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35. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: VOLUME I 43 (Robert Hurley trans., Vintage Books 1990) (1978).

36. David M. Halperin, One Hundred Years of Homosexuality 8-9 (1990).

37. "A person who is emotionally, romantically or sexually attracted to members of the same gender. Men, women and non-binary people may use this term to describe themselves." *Glossary of Terms*, *supra* note 34.

38. "A woman who is emotionally, romantically or sexually attracted to other women. Women and non-binary people may use this term to describe themselves." *Glossary of Terms*, *supra* note 34.

39. "A person emotionally, romantically or sexually attracted to more than one gender, though not necessarily simultaneously, in the same way or to the same degree." *Glossary of Terms*, *supra* note 34.

40. "Describes someone who has the potential for emotional, romantic or sexual attraction to people of any gender though not necessarily simultaneously, in the same way or to the same degree. Sometimes used interchangeably with bisexual." *Glossary of Terms*, *supra* note 34.

41. "Often called 'ace' for short, asexual refers to a complete or partial lack of sexual attraction or lack of interest in sexual activity with others. Asexuality exists on a spectrum, and asexual people may experience no, little or conditional sexual attraction." *Glossary of Terms*, *supra* note 34.

sexual orientation is often considered to be fluid, meaning that person's sexual orientation may evolve over time.<sup>42</sup> As a result, self-determination may not result in a permanently fixed identity.

### ii. Gender

Gender is an equally diverse and complex collection of experiences and identities beyond the simple male/female binary. A recent textbook identifies as many as twelve different genders: cisgender, trans boy, trans girl, genderqueer, non-binary, gender fluid, gender flux, agender, demigender, questioning gender, androgynous, and bigender.<sup>43</sup> Most of these identities share the fundamental aspect that they involve a person whose gender identity does not align with the gender that they were assigned at birth.<sup>44</sup>

Transgender and non-binary appear to be the most common identities, according to the demographics revealed by the 2015 United States Transgender Survey (USTS) of the transgender community in the United States.<sup>45</sup> Amongst the respondents, 62% identified as transgender men or women, while 35% identified as non-binary or genderqueer.<sup>46</sup> Among those who identified as non-binary or genderqueer, 80% were assigned female at birth, and 20% were assigned male at birth.<sup>47</sup> Non-binary respondents also tended to be young, with approximately two thirds falling within the 18–24 age range.<sup>48</sup> A final piece of evidence suggests that non-binary people are more likely to be multiracial than transgender people.<sup>49</sup>

Intersex people exist as well. People who are intersex are often born with the external sexual organs of one sex, and the internal sexual organs

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42. Sabra L. Katz-Wise, *Sexual Fluidity and the Diversity of Sexual Orientation*, HARV. HEALTH PUBL'G (Mar. 31, 2022), <https://www.health.harvard.edu/blog/sexual-fluidity-and-the-diversity-of-sexual-orientation-202203312717> [https://perma.cc/D7F7-VB9S].

43. See Carlos A. Ball, Jane S. Schacter, Douglas NeJaime & William B. Rubenstein, *Cases and Materials on Sexuality, Gender Identity and the Law* 7 (7th ed. 2022).

44. *Id.*

45. See Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* 44 (2016), <https://transequality.org/sites/default/files/docs/usts-Full-Report-Dec17.pdf> [https://perma.cc/3YY6-RYVH].

46. *Id.* at 45.

47. *Id.*

48. *Id.* at 46.

49. See Jack Harrison, Jaime Grant & Jody L. Herman, *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ PUB. POL'Y J. HARV. KENNEDY SCH. 13, 18–19 (2012) (attributing this statistic to "Q3GNLs, those who did not write their gender" in the survey question).

of a different sex.<sup>50</sup> Some intersex people find that they struggle to place themselves with the gender binary.<sup>51</sup> For example, Hil Malatino writes:

I wasn't buying the narrative that was offered me, the notion that nature had an intention that my body was somehow disobeying or belying, that I was a failed but remediable woman. It didn't resonate with me; it seemed that I failed to meet the constitutive criteria for womanhood at what I had been taught was the most basic level—the biological—and that no amount of gender appropriate dressage would change that.

That was when I began to ask myself [sic] could inhabit a specifically intersex identity. I was preoccupied, above all, with the question of what I was, now that I considered myself neither male nor female. Some big questions concerning me, in no particular order: what was wrong with conventional understandings of biological sex, if a being like me could be produced? What did being intersex mean in terms of my sexuality? Could I still be heterosexual? Homosexual? Bisexual? Did any of these sexual identities pertain?<sup>52</sup>

In this excerpt, Malatino captures the sometimes-complex relationship between sexual orientation and gender identity from a perspective that is not widely understood.<sup>53</sup>

### iii. Access to Information

But how does a person determine their sexual orientation or their gender identity? One way may be through access to information. Unfortunately, we live in a time where social and political forces conspire to make access to the necessary information more and more difficult to obtain.<sup>54</sup>

Book bans and censorship are on the rise in the United States.<sup>55</sup> 2023 saw over 1,200 “demands to censor library books, materials, and

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50. See KATRINA KARKAZIS, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 118 (2008); *Intersex*, CLEVE CLINIC (July 19, 2022), <https://my.clevelandclinic.org/health/articles/16324-intersex> [<https://perma.cc/VFX7-TBC3>] (“People who are intersex have genitals, chromosomes or reproductive organs that don’t fit into a male/female sex binary.”).

51. See Hil Malatino, *Queer Embodiment: Monstrosity, Medical Violence, and Intersex Experience* 19 (2019).

52. *Id.*

53. *Id.* at 19–20.

54. See Brooke Tanner & Nicol Turner Lee, *Children’s Online Safety Laws are Failing LGBTQ+ Youth*, BROOKINGS (July 9, 2025), <https://www.brookings.edu/articles/childrens-online-safety-laws-are-failing-lgbtq-youth/> [<https://perma.cc/9LT6-RUX2>] (explaining how online safety laws targeting children can be broadly construed to restrict access to LGBTQ+ resources for youth).

55. See Elizabeth Wolfe, *Book Bans Are Harming LGBTQ People, Advocates Say. This Online Library Is Fighting Back.*, CNN (Dec. 16, 2023),

resources" and "4,240 unique book titles targeted for censorship."<sup>56</sup> Approximately 47% of those titles contained content about LGBTQ people or people of color.<sup>57</sup> These attempts at censoring queer content have been directed to two places where children and adolescents are frequently able to go for information: school and public libraries.<sup>58</sup>

True self-determination requires a person to have the knowledge to understand who they are.<sup>59</sup> Without easy access to this information, a child or adolescent questioning their gender identity may turn to less safely regulated sources—such as the internet—or to people who reinforce feelings of shame related to the child or adolescent's sexuality or gender identity.<sup>60</sup> Similarly, lack of access to such information deprives society of a chance to better understand, and more easily accept, people who are different.<sup>61</sup> Both of these are forces which could drive children, adolescents, and even adults, into the closet.

#### *B. The Comfort and Oppression of the Closet*

Society has long given queer people incentives to hide. From anti-sodomy laws,<sup>62</sup> to political witch hunts,<sup>63</sup> to public ridicule, queer people in the United States and abroad have often faced legal and social challenges related to their sexual orientation or gender identity.<sup>64</sup> For

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<https://www.cnn.com/2023/12/16/us/queer-liberation-library-combats-lgbtq-book-bans-reaj/index.html> [<https://perma.cc/DK2C-9ZP2>] (identifying increased censorship of LGBTQ books in recent years).

56. *American Library Association Reports Record Number of Unique Book Titles Challenged in 2023*, AM. LIBR. ASS'N (Mar. 14, 2024), <https://www.ala.org/news/2024/03/american-library-association-reports-record-number-unique-book-titles> [<https://perma.cc/RQE4-TXJM>].

57. *Id.*

58. See Eliot T. Tracz, *Censorship and Book Bans: Two Non-Constitutional Arguments Against Queer Erasure*, 52 HOFSTRA L. REV. 903, 913-17 (2024).

59. See Stephen C. Denney & Alfred W. Daviso, *Self-Determination: A Critical Component of Education*, 40 AM. SECONDARY EDUC. 43, 43-44 (2012) (identifying self-knowledge as a "[component] of self-determination").

60. See Tracz, *supra* note 58, at 925.

61. Cf. *id.* at 920 (demonstrating how access to information allows children to understand themselves better which indicates that information can also help children and adults understand others better).

62. See generally ESKRIDGE, JR., *supra* note 15 (detailing the history of sodomy laws in the United States through the decision in *Lawrence v. Texas*).

63. See generally DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (1st ed. enlarged 2023) (detailing the McCarthy Era persecution of queer federal government employees).

64. As Gayle Rubin has written, "[a]s with other aspects of human behavior, the concrete institutional forms of sexuality at any given time and place are products of human activity. They are imbued with conflicts of interest and political maneuvering, both deliberate and incidental. In that sense, sex is always political." GAYLE S. RUBIN, *DEVIATIONS: A GAYLE RUBIN READER* 138 (2011).

many queer people, the safest way to escape the shame, fear, and danger associated with their queerness was, and still is, to hide.

Eve Kosofsky Sedgwick has noted that there are few of even the most openly queer people who are not still closeted in regards to some person or institution which is important in their life.<sup>65</sup> Writing in the late 1980s and early 1990s, Sedgwick noted that the closet is “the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.”<sup>66</sup>

People have found multiple ways to seek to remain closeted. One way do so is by attempting to pass as straight.<sup>67</sup> So called “passing privilege” is often ascribed to bisexual people in heterosexual relationships, therefore appearing to be straight and becoming oppressors of their gay and lesbian allies.<sup>68</sup> A related concept prevalent during the 1980s and 1990s in the Black community involves the “down-low.”<sup>69</sup> Men on the “down-low” present as straight and masculine, while hiding their same-sex attractions or activities.<sup>70</sup>

Being closeted, and hiding that deep, personal aspect of one’s life, seems, to many, to be a safe decision.<sup>71</sup> In his monumental work, *Gay New York*, George Chauncey described the decision to remain in the closet, writing:

Many gay men, for instance, described negotiating their presence in an often hostile world as living a double life, or wearing a mask and taking it off. Each image has a valence different from “closet,” for each suggests not gay men’s isolation, but their ability—as well as their need—to move between different personas and different lives, one straight, the other gay, to wear their hair up, as another common phrase put it, or let their hair down. Many men kept their gay lives hidden.... Leading a double life in which they often passed as straight (and sometimes married) allowed them to have jobs and

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65. Eve Kosofsky Sedgwick, *Epistemology of the Closet* 67–68 (1990).

66. *Id.* at 68.

67. See, e.g., Milena Popova, *Internalized Biphobia*, in CLAIMING THE B IN LGBT 51, 53 (Kate Harrad ed., 2018).

68. Eliot T. Tracz, *The Inscrutable Bisexual: An Essay on Bisexuality and Immutability*, 21 SEATTLE J. FOR SOC. JUST. 917, 920 (2023); Brittney White, *The Myth of Straight Passing Privilege*, BI.ORG (Oct. 7, 2017), <https://bi.org/en/articles/the-myth-of-straight-passing-privilege> [https://perma.cc/E3VXPSYT].

69. *Down-low*, DICTIONARY.COM, <https://www.dictionary.com/browse/down-low> (defining the down-low as “of or pertaining to men who secretly or discreetly have sex with other men.”); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 6 (2nd trade paperback ed., 2019) (footnotes omitted).

70. *Id.*

71. See Jack Drescher, *The Closet: Psychological Issues of Being In and Coming Out*, PSYCHIATRIC TIMES (Oct. 1, 2004), <https://www.psychiatrictimes.com/view/closet-psychological-issues-being-and-coming-out> [https://perma.cc/ZXL5-2HBX].

status a queer would have been denied while still participating in what they called “homosexual society” or “the life.” For some, the personal cost of “passing” was great. But for others it was minimal, and many men positively enjoyed having a “secret life” more complex and extensive than outsiders could imagine.<sup>72</sup>

But that is not so. Perhaps the most insidious aspect of the closet is the false sense of security that it offers. Remaining closeted offers safety in a world where social and political forces actively push a regression into hostility against queer people.<sup>73</sup> The cost, however, comes at the expense of living an authentic life.

### C. Coming Out

Once a person has determined who they are and—in a perfect world—decided to share their true self with the world, they may choose to come out of the closet. For others, the choice may be taken from them, either by circumstance or the intentional actions of another. Either way, coming out—or being forced out—is a major event in the life of a queer person.

#### i. Coming Out Voluntarily

In an ideal world, a person could choose the time, manner, and place of their coming out. That could include as few or as many people as the closeted person was comfortable with. It might include picking a safe setting in which to share the information, whether that be home, a café, or someplace else. On some occasions the act of coming out may be bombastic, at other times it may be something as subtle as casually referring to a same-sex partner as “my boyfriend” or “my wife” during conversation with a person who is unaware of the speaker’s sexual orientation or gender identity.

In this ideal world, coming out would be met with validation. For some, validation might look like the experience of Charli, who writes that:

The first person I came out to properly was my mum. She was just like, “Yeah, we know. Okay. Alright.” I don’t really know how she knew. She then spoke to my auntie who was living with us for a while, and apparently she knew as well! I thought, “Okay, so it’s just me completely oblivious and everybody else knew!”<sup>74</sup>

For others, validation might come differently, but ultimately the result of coming out would be acceptance.

One of the things about coming out which is not widely understood by those who have never had to come out is that it is not a one-time

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72. Chauncey, *supra* note 69, at 6–7 (footnotes omitted).

73. See Drescher, *supra* note 71.

74. GOSWELL & WALKER, *supra* note 2, at 106.

occurrence. An openly queer person will continue to come out, repeatedly, throughout their life as they meet new people,<sup>75</sup> move to new communities, or begin new jobs. What is important is that the decision be voluntary. Not everyone is so lucky.

## ii. Forced Outing

Outing someone is the act of “[e]xposing someone’s lesbian, gay, bisexual transgender or gender non-binary identity to others without their permission.”<sup>76</sup> It is generally considered a socially unacceptable act as it infringes upon the outed person’s privacy, autonomy, and potentially exposes that person to danger.<sup>77</sup> Yet outing is not always a malicious act. Here, this article discusses three ways in which a person can be outed.<sup>78</sup>

### a. *Forced Outing and Queer Politics*

Like any community, the politics of the queer community can be heated.<sup>79</sup> Kathleen Guzman, writing in 1995, argued the one tactic adopted by queer advocates included the outing of queer individuals in various publications.<sup>80</sup> As a political tool, outing was said to serve the premise that progress “requires visibility and collective action.”<sup>81</sup> Justifications for outing individuals included:

1. Heighten sensitivity to gay concerns, especially Acquired Immune Deficiency Syndrome (AIDS);
2. Increase public awareness of gay rights;
3. Provide positive gay role models; and
4. Expose the hypocrisy of those in power positions.<sup>82</sup>

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75. Or people they already know. Part of the experience of being bisexual involves coming out to people you already know when you introduce a new romantic partner of a different gender from your previous partner.

76. *Glossary of Terms*, *supra* note 34.

77. *Glossary of Terms*, *supra* note 34.

78. This article refers to all of these ways under the heading of “Forced Outing” to reference the fact that each form is involuntary.

79. See, e.g., *Resource Guide to Coming Out as Bisexual*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/resource-guide-to-coming-out-as-bisexual> [https://perma.cc/2C2M-WNSC] (recognizing the exclusion and erasure of bisexual people by other members of the LGBTQ community); see also Cassie Sheets, Andrew J. Stillman, & Rachel Shatto, *10 Reasons the Phrase “Gold Star Lesbian” Needs to Die*, PRIDE.COM (Nov. 19, 2024), <https://www.pride.com/lesbian/gold-star-lesbian> [https://perma.cc/P3CM-7DBE] (drawing attention to a unique type of discrimination within the LGBTQ community).

80. See Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. UNIV. L. Q. 1531 (1995).

81. *Id.* at 1535.

82. *Id.* at 1536 (citation omitted).

There was even discernable support for such tactics by those who acknowledged that outing people could help restructure beliefs about homosexuality.<sup>83</sup>

Supporters of outing have argued that “secrecy is more damaging than revelation, both to individual and community.”<sup>84</sup> This, of course, forecloses the right of an individual to select whom to come out to and instead demands that one come out wholeheartedly and to everyone. Unsurprisingly, there has been pushback against outing people because keeping a queer person’s secret is a convention of the queer community.<sup>85</sup>

*b. Forced Outing by Circumstance*

Sometimes a person may be forced out of the closet not through the opportunism or malice of another but simply through unfortunate circumstances. A lesbian woman identified as GJ recounts her story of beingouted to her community by a picture published in a newspaper, saying:

I went to a protest march in London. I can't remember the cause now, but I was walking in front of a "Black, Lesbian and Gay" banner and my picture got taken by someone from the Caribbean Times. In those days in Leicester, every Black person used to read the Caribbean Times. That was on a Saturday, and I think by the Wednesday word had got around about my picture ....<sup>86</sup>

While not a universal experience, GJ’s story represents the sort of events which may force a person out of the closet without the intent of someone else to cause the outing.

There are, of course, other ways in which circumstances may result in someone being outed. A parent stumbling upon search history on a shared computer, running into an acquaintance while on a date with a same-sex partner, a parent discovering gender non-conforming clothing while doing laundry. None of these circumstances involves the malice of another, yet they may still be deeply embarrassing and constitute an involuntary outing of the closeted person.

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83. *Id.* at 1536; *id.* at 1536 n. 24 (presenting the argument that there is internal debate within the gay and lesbian community towards whether a person’s sexual orientation is a public or private concern).

84. *Id.* at 1549.

85. See RICHARD D. MOHR, GAY IDEAS: OUTING AND OTHER CONTROVERSIES 29 (1992) (“[T]he presumption that every gay person will keep every other gay person’s identity secret from the public is a convention and not merely a rule. Any field anthropologist examining the folkways of the gay community would easily notice that among all the variety in the gay community—just for starters divisions of life-styles between lesbians and gay men—The Secret is *the* social convention that most centrally defines the community.”).

86. GOSWELL & WALKER, *supra* note 2, at 112.

*c. Forced Outing by Operation of Law*

A final form of outing may be caused by the operation of law.<sup>87</sup> In this scenario, a state law or regulation may actually require that when a child or adolescent has disclosed their orientation or identity to an adult employed in a school system, that school system must inform the child or adolescent's parents.<sup>88</sup> The remainder of this article is spent in discussion of this type of forced outing.

## II. Forced Outing

### A. The Supreme Court Takes a Pass

On December 9, 2024, the United States Supreme Court denied a petition for a writ of certiorari in the case *Parents Protecting Our Children v. Eau Claire Area School District*.<sup>89</sup> That case arose from the policy creation by a local school district in Wisconsin relating to the forced outing of a transgender student.<sup>90</sup> In 2021, the Eau Claire Area School District created a document called the "Administrative Guidance for Gender Identity Support," which was intended to "foster inclusive and welcoming environments that are free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression."<sup>91</sup> The document provided guides for schools to follow to "address the needs of transgender, nonbinary, and/or gender non-conforming students."<sup>92</sup>

The authors of the document noted the sensitive nature of matters involving gender identity, including the possibility that students may not feel or be safe coming out at home.<sup>93</sup> As a result, the guidelines suggest that "[s]chool personnel should speak with the student first before discussing a student's gender non-conformity or transgender status with the student's parent/guardian."<sup>94</sup>

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87. "Operation of law" is not a technical term but is used here to describe a situation where a legal rule results in the outing of an individual.

88. See MOVEMENT ADVANCEMENT PROJECT, LGBTQ YOUTH: FORCED OUTING OF TRANSGENDER STUDENTS (June 25, 2025), <https://www.lgbtmap.org/img/maps/citations-forced-outing.pdf> [<https://perma.cc/U5KW-Z8UE>].

89. 145 S. Ct. 14, 14 (2024).

90. *Id.* See also Bob Egelko, *SCOTUS Turns Down Chance to Weigh in on Forced Outing of Trans Students in Schools*, S.F. CHRON. (Dec. 9, 2024), <https://www.sfchronicle.com/politics/article/scotus-trans-students-19969541.php> [<https://perma.cc/Z32J-WDB4>] ("The court denied review Monday of a school district's refusal to require its teachers to notify parents that their child identifies as transgender.").

91. *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, 503 (7th Cir. 2024), *cert. denied*, 145 S. Ct. 14, 14 (2024).

92. *Id.*

93. *Id.*

94. *Id.*

In 2022, the School District introduced a template for a “Gender Support Plan.”<sup>95</sup> The plan records the understanding between the student and the School District regarding a student’s gender identity and the involvement of the student’s parents in the process.<sup>96</sup> It is, however, not a privileged document and may be provided to parents upon request.<sup>97</sup>

In September of 2022, Parents Protecting Our Children (Parents Protecting), an association of parents whose children attended schools within the School District, brought suit alleging that the Administrative Guidance for Gender Support Plan violated its members’ rights as parents under both the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment.<sup>98</sup> Parents Protecting was upfront about the fact that its challenge was not actually brought in response to an experience any member parent had with the School District’s implementation of the Administrative Guidance, but rather as a facial pre-enforcement challenge attempting to invalidate the entirety of the new policy.<sup>99</sup> They also alleged religious concerns.<sup>100</sup>

The District Court for the Western District of Wisconsin ruled against Parents Protecting on the grounds that they failed to allege any injury or risk of injury sufficient to establish standing under Article III’s Case or Controversy requirement.<sup>101</sup> On appeal, Parents Protecting argued, and all parties agreed, that associational standing might exist if Parents Protecting could show:

factual allegations showing that (1) at least one of the association’s members would otherwise have standing to sue in their own right; (2) the interests sought to be protected by the lawsuit are germane to the association’s purpose; and (3) neither the claims asserted nor the relief sought requires the participation of individual members in the lawsuit.<sup>102</sup>

Nonetheless, the Seventh Circuit affirmed, finding that Parents Protecting could not satisfy requirements for associational standing.<sup>103</sup>

Despite *Parents Protecting* not deciding any substantive issues, the stage is set for a new front in the culture wars. Forced outing will likely now join gender affirming care, LGBTQ+ books, and pronoun usage in the

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95. *Id.*

96. *Id.*

97. *Id.* at 503–04.

98. *Id.* at 504. The district court dismissed the case for lack of standing, so these claims were not developed. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 505.

103. *Id.* at 503.

list of litigated issues involving the rights of certain Americans to simply exist authentically.

*B. Policies Requiring the Outing of Children*

The Movement Advancement Project provides information on a number of issues affecting the queer community.<sup>104</sup> Among the issues it tracks are laws requiring the forced outing of students.<sup>105</sup> At time of writing, eight states required the outing of transgender students to their parents.<sup>106</sup> Another handful encouraged but did not automatically require the outing of transgender students.<sup>107</sup>

Alabama is one of those states which requires the forced outing of transgender students to their parents.<sup>108</sup> The law, which is codified in the guise of a healthcare statute, states that:

Section 5. No nurse, counselor, teacher, principal, or other administrative official at a public or private school attended by a minor shall do either of the following:

- (1) Encourage or coerce a minor to withhold from the minor's parent or legal guardian the fact that the minor's perception of his or her gender or sex is inconsistent with the minor's sex.
- (2) Withhold from a minor's parent or legal guardian information related to a minor's perception that his or her gender or sex is inconsistent with his or her sex.<sup>109</sup>

The law provides no exceptions for students who might be endangered by a parent learning of their gender identity.

Idaho has a similar bill, portrayed as a civil rights law, yet framed in a slightly different manner.<sup>110</sup> There, the bill states that:

- (3) An employee of a public school or public institution of higher education, regardless of the scope of such employee's official duties, shall not:

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104. See generally MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/> [<https://perma.cc/M6M2-FEVU>] (providing information on numerous state laws and pending legislation).

105. *Forced Outing of Transgender Youth in Schools*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/youth/forced\\_outing](https://www.lgbtmap.org/equality-maps/youth/forced_outing) [<https://perma.cc/5QH4-ZMFQ>].

106. S.B. 184, 2022 Leg., Reg. Sess. (Ala. 2022); S. File 496, 90th Gen. Assemb. (Iowa 2023); H.B. 538, 67th Leg., 2d Reg. Sess. (Idaho 2024); H.B. 1608, 123rd Gen. Assemb., 1st Reg. Sess. (Ind. 2023); S.B. 49, 2023 Gen. Assemb., 2023 Sess. (N.C. 2023); H.B. 1522, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); H.B. 4624, 2023–2024 Gen. Assemb., 125th Sess. (S.C. 2024); S.B. 1810, 113th Gen. Assemb. (Tenn. 2024).

107. H.B. 1468, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); S.B. 518, 68th Leg., Reg. Sess. (Mont. 2023); NEV. ADMIN. CODE § 388.880(3)(c)(2) (2018); S.B. 100, 2023 Leg., Gen. Sess. (Utah 2023).

108. See S.B. 184, 2022 Leg., Reg. Sess. § 5 (Ala. 2022).

109. *Id.* at § 5(1)–(2).

110. See H.B. 538, 67th Leg., 2d Reg. Sess. § 2 (Idaho 2024).

- (a) Knowingly and intentionally address an unemancipated minor student by a name other than the student's legal name or a derivative thereof, or by a preferred personal title or pronoun that is inconsistent with the student's sex, without the written permission of the student's parent or guardian; and
- (b) Be subject to adverse employment action for declining to address a student using a name other than the student's legal name, or a derivative thereof, or by a preferred personal title or pronoun that is inconsistent with a student's sex.<sup>111</sup>

The bill also excludes a transgender student's peers from addressing them by their preferred name or pronouns.<sup>112</sup> To top it off, it adds a cause of action for injunctive relief and money damages for any person "harmed" by a violation of the bill.<sup>113</sup> It is unclear what constitutes a "harm" under this statute.

Indiana requires that if a student requests to change their name, pronouns, or title, a parent must receive written notice within five days.<sup>114</sup> Iowa similarly requires that parents be notified of any accommodations requested by a student involving the use of a name or pronoun which differs from the name assigned to the student in the school registration forms or records.<sup>115</sup> Neither take into account the needs of the student in question, including any consideration for the child's safety at home. Instead, these statutes actively reduce transgender students to a discrete class of individuals and single them out for differential treatment. Here, the concern is that states have actively sought to determine a class of students who are singled out for no reason other than their identity and taken away their autonomy in making a major decision about their own life.

#### i. Coercively Forced Outing

Another set of states do not explicitly require the forced outing of students.<sup>116</sup> Those states do, however, sometimes resort to coercive methods to incentivize forced outing.<sup>117</sup> As a result, students in these states may face the same challenges as those in states which require forced outing.

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111. *Id.* at § 2(3).

112. *Id.* at § 2(4).

113. *Id.* at § 2(5).

114. See IND. CODE § 20-33-7.5-2.

115. See S. File 496, 90th Gen. Assemb. § 14 (Iowa 2023).

116. See H.B. 1468, 94th Gen. Assemb., Reg. Sess. (Ark. 2023); S.B. 518, 68th Leg., Reg. Sess. (Mont. 2023); NEV. ADMIN. CODE § 388.880(3)(c)(2) (2018); S.B. 100, 2023 Leg., Gen. Sess. (Utah 2023).

117. These methods include actions such as threatening employees with discipline.

Florida is one such example. The Parent's Bill of Rights states that “[a]n employee of the state, any of its political subdivisions, or any other governmental entity who encourages or coerces, or attempts to encourage or coerce, a minor child to withhold information from his or her parent may be subject to disciplinary action.”<sup>118</sup> This requirement could easily be construed to include information regarding sexual orientation or gender identity.

Arizona has a similar law which does not require the forced outing of a child but may coerce it. There, the statute grants parents:

[t]he right to request, access and review all written and electronic medical records of the minor child unless otherwise prohibited by law or unless the parent is the subject of an investigation of a crime committed against the minor child and a law enforcement official requests that the information not be released.<sup>119</sup>

Again, state employees may be subject to disciplinary action for any violation of the statute.<sup>120</sup>

While these policies do not directly force a school employee to out a student to their parents, they do two other things which coerce employees into sharing a student's information about their sexual orientation or gender identity with that student's parent. First, by requiring that all information be shared with a parent, they require school employees to take the affirmative step of sharing information about the student's orientation or identity. This has the effect of being a forced outing. Second, by threatening employees with legal consequences for choosing not to share that information with parents even if the employee is aware of potential risks to the student's health or safety, legislators encourage a system in which self-preservation becomes more important than actually protecting the needs of a vulnerable and isolated group of individuals. Ultimately, even in states that do not require forced outing, there is no choice not to comply with outing a student.

### C. Policies Preventing the Outing of Children

Against the backdrop of forced outing of children, some headway has been made to counteract the attempts at forced outing. California has adopted a so called “anti-snitch” law preventing educators from outing students.<sup>121</sup> The law includes two important provisions:

An employee or a contractor of a school district, county office of

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118. FLA. STAT. § 1014.04(3).

119. Ariz. Rev. Stat. § 1-602(A)(6).

120. *Id.* at § 1-602(C).

121. Amelia Hansford, *California Passes “Anti-Snitch” Law to Prevent the Forced Outing of LGBTQ+ Students by Teachers*, PINK NEWS (Dec. 27, 2024), <https://www.thepinknews.com/2024/12/27/california-law-stops-teachers-outing-students/> [<https://perma.cc/WCQ6-YK86>].

education, charter school, or state special school for the blind or the deaf shall not be required to disclose any information related to a pupil's sexual orientation, gender identity, or gender expression to any other person without the pupil's consent unless otherwise required by state or federal law.<sup>122</sup>

And:

A school district, county office of education, charter school, state special school for the blind or the deaf, or a member of the governing board of a school district or county office of education or a member of the governing body of a charter school, shall not enact or enforce any policy, rule, or administrative regulation that would require an employee or a contractor to disclose any information related to a pupil's sexual orientation, gender identity, or gender expression to any other person without the pupil's consent, unless otherwise required by state or federal law.<sup>123</sup>

Enacted in response to school districts requiring the forced outing of students, the law does not prevent teachers from speaking to parents. Instead, as Governor Gavin Newsom points out, school districts cannot "fire a teacher for not being a snitch."<sup>124</sup> It is Newsom's position that policing student gender identity should not be required of teachers.<sup>125</sup>

It remains to be seen how many, if any, states will follow in California's wake. There will undoubtedly be legal challenges to the "anti-snitch" law, and some organizations have decried it as unconstitutional.<sup>126</sup> At the same time, however, action is still being taken at the local level to help protect the rights of transgender children in schools.

The Administrative Guidance at issue in *Parents Protecting* is one such example. There, the complained of rules included the following language:

The following guidelines should be used to address the needs of transgender, nonbinary, and/or gender non-conforming students:

- a. A transgender, non-binary, and/or gender-nonconforming student is encouraged to contact a staff member at the school to address any concerns, needs, or requests. This staff member will notify and work with the principal/designee. Parents/guardians of transgender, non-binary, and/or gender non-conforming students may also initiate contact with a staff member at school.
- b. When appropriate or necessary, the principal or designee will schedule a meeting to discuss the student's needs and to develop a specific Student Gender Support Plan when appropriate to address

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122. A.B. 1955, 2023-24 Leg., Reg. Sess. § 5(a) (Cal. 2024).

123. *Id.* at § 6(a).

124. Hansford, *supra* note 121.

125. Hansford, *supra* note 121.

126. *Parent Secrecy Bill Passes CA Assembly Amid Heated Debate*, CAL. FAM. COUNCIL (July 1, 2024), <https://www.californiafamily.org/2024/07/parent-secrecy-bill-passes-ca-assembly-amid-heated-debate/> [https://perma.cc/SD3Z-WFHH].

these needs. Documentation shall include date, time, location, names, and titles of participants, as well as the following information. The plan shall address, as appropriate:

1. The name and pronouns desired by the student (generally speaking, school staff and educators should inquire which terms a student may prefer and avoid terms that make the individual uncomfortable; a good general guideline is to employ those terms which the individual uses to describe themselves)
2. Restroom and locker room use
3. Participation in athletics and extracurricular activities
4. Student transition plans, if any. Each individual transitions differently (if they choose to transition at all), and transition can include social, medical, surgical, and/or legal processes
5. Other needs or requests of the student
6. Determination of a support plan coordinator when appropriate.<sup>127</sup>

A magistrate judge for the Western District of Wisconsin also found that the Guidance included the language: "Some transgender, non-binary, and/or gender-nonconforming students are not 'open' at home for reasons that may include safety concerns or lack of acceptance. School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian."<sup>128</sup>

Both the California "anti-snitch" law and the Administrative Guidance attempt to place the needs of children at the forefront of the policymaking. Ideally, this means placing the needs of LGBTQ children front and center in the rulemaking process. In practice, this means acknowledging the potential tradeoff between the safety of the child and the right of the parent to be informed about the goings on in their child's life.

### III. Framing the Question of Rights

Justice Alito's dissent from the denial of certiorari in *Parents Protecting* exposes the nature of forced outing disputes. In his argument, Justice Alito seeks to frame the issue as one of parental rights, writing:

This case presents a question of great and growing national importance: whether a public school district violates parents' "fundamental constitutional right to make decisions concerning the rearing of" their children, *Troxel v. Granville*, 530 U. S. 57, 70 (2000) (plurality opinion), when, without parental knowledge or consent, it encourages a student to transition to a new gender or assists in that

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127. *Parents Protecting Our Child., v. Eau Claire Area Sch. Dist.*, 657 F. Supp. 3d 1161, 1165–66 (W.D. Wis. 2023).

128. *Id.* at 1166.

process. We are told that more than 1,000 districts have adopted such policies.<sup>129</sup>

In doing so, Justice Alito dismisses—intentionally or otherwise—the possibility the actual question implicates the rights of children themselves. It is no secret that how a question is framed can determine how that question is answered.<sup>130</sup>

One could accuse Justice Alito, as well as Justice Thomas who joined in the dissent,<sup>131</sup> of giving the game away. “Parents’ Rights” has been a rallying call for conservative parents and politicians,<sup>132</sup> and framing the question as one of violation of parent’s rights sets the stage for a conservative policy win. This is hardly objective judging.

What is equally interesting is that Justice Alito voices a concern that courts are hiding behind Article III standing as a means of avoiding difficult constitutional issues.<sup>133</sup> Put a different way, these two justices suggest that they would like to see courts ignore their own constitutional responsibilities in order to address a politically sensitive issue.<sup>134</sup> It makes sense then to consider the conflicting interests involved in the forced outing of children. This means discussing parental rights, interests, and potential harms, and considering them against the privacy interests of those children who would be outed by their teachers or counselors.

#### *A. Parental Rights*

##### *i. The Parental Rights Movement*

The Parental Rights Movement is nothing new. Even in the late 1990s legal scholars began taking note of the growing Parental Rights Movement.<sup>135</sup> Historically, as Professor Kristine Bowman points out, Parents’ Rights advocates have focused on opt-out policies involving their

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129. *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (Alito, J., dissenting from denial of certiorari).

130. See Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 2 (1994–1995) (arguing that poor issue framing may confuse how a question is answered).

131. *Parents Protecting Our Child.*, 145 S. Ct. at 14 (Alito, J., dissenting from denial of certiorari).

132. See, e.g., Libby Stanford, *Parents’ Rights Groups Have Mobilized. What Does it Mean for Students?*, EDUC. WEEK (Aug. 31, 2023), <https://www.edweek.org/leadership/parents-rights-groups-have-mobilized-what-does-it-mean-for-students/2023/08> [<https://perma.cc/MNJ7-3KFQ>] (detailing the parents’ rights movement and its impacts on politics and schools).

133. *Parents Protecting Our Child.*, 145 S. Ct. at 14–15 (Alito, J., dissenting from denial of certiorari).

134. *Id.*

135. See Linda L. Lane, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 826 (1998).

own children.<sup>136</sup> Bowman lists several areas where this has happened, including the ability to opt out of “newly integrated schools and into segregated ones, out of sex education, out of traditional public schools, and into charter schools, private schools, or homeschools.”<sup>137</sup> Each area coincides with the belief that parents should have control over the education of their children.<sup>138</sup>

Parental rights have gained the support of the federal government through the Family Education and Privacy Rights Act (FERPA)<sup>139</sup> and the Protection of Pupil Rights Amendment (PPRA).<sup>140</sup> Both of these statutes, which were enacted in the 1970s, predate the current Parental Rights Movement. Yet both potentially play a role in the targeting and forced outing of transgender children.<sup>141</sup>

FERPA was enacted in 1974 for the purpose of regulating access to and disclosure of student records. The relevant sections state that:

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that

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136. Kristine L. Bowman, *The New Parents' Rights Movement, Education, and Equality*, 91 U. CHI. L. REV. 399, 400 (2024).

137. *Id.* (footnotes omitted).

138. *Id.*

139. 20 U.S.C. § 1232g.

140. 20 U.S.C. § 1232h.

141. President Trump's January 29, 2025, executive order titled “Ending Radical Indoctrination in K-12 Schooling” specifically invokes both FERPA and PPRA as part of its attempt to strong-arm schools into abandoning trans students. *See Exec. Order 14190*, 90 Fed. Reg. 8853 (Jan. 29, 2025).

is subject to the provisions of this section.<sup>142</sup>

“Records” is not specifically defined in the statute, however the Code of Federal Regulations (CFR) has defined “education records” to mean records “(1) [d]irectly related to a student; and (2) [m]aintained by an educational agency or institution or by a party acting for the agency or institution.”<sup>143</sup> This seems to include records documenting student requests for accommodations regarding their gender identity, although it is unclear whether such requests must be documented at all.

PPRA serves a similar, though slightly different purpose. Instead of directing the disclosure of student records, PPRA seeks to protect other student information, providing that:

- (a) Inspection of instructional materials by parents or guardians. All instructional materials, including teacher’s manuals, films, tapes, or other supplementary material which will be used in connection with any survey, analysis, or evaluation as part of any applicable program shall be available for inspection by the parents or guardians of the children.
- (b) Limits on survey, analysis, or evaluations. No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning—
  - (1) political affiliations or beliefs of the student or the student’s parent;
  - (2) mental or psychological problems of the student or the student’s family;
  - (3) sex behavior or attitudes;
  - (4) illegal, anti-social, self-incriminating, or demeaning behavior;
  - (5) critical appraisals of other individuals with whom respondents have close family relationships;
  - (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
  - (7) religious practices, affiliations, or beliefs of the student or student’s parent; or
  - (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program), without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.<sup>144</sup>

The PPRA seems less applicable to forced outing on its face, but it remains to be seen how it will be applied.

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142. 20 U.S.C. § 1232g(a)(1)(A)–(B).

143. 34 C.F.R. § 99.3 (2024).

144. 20 U.S.C. § 1232h(a)–(b).

The concept of Parental Rights extends to the courts as well. The Supreme Court has found that parents have the right to oversee the “care, custody, and control” of their child.<sup>145</sup> Parents also retain the right to decide “how, where, and by whom their children are educated” and “to supplement the prescribed curriculum with other content, including religious content.”<sup>146</sup> None of these rights are particularly controversial, and each is supported by case law. For example, the ability to decide how to educate one’s children was vindicated in *Pierce v. Society of Sisters*, a 1925 case which affirmed parents’ right to choose to send their children to private schools.<sup>147</sup>

It was not until 2021, however, that the Parental Rights Movement began to shift towards its current trajectory.<sup>148</sup> Since then, anti-egalitarian views have entered the Parental Rights Movement and the focus has shifted towards extending those views onto all children, rather than simply the children whose parents adhere to such views.<sup>149</sup> This has included targeting racial education and equality by inaccurately trying to tie such information to Critical Race Theory.<sup>150</sup>

The Parental Rights Movement has also targeted LGBTQ children in a number of ways. One such way is by trying to censor queer material in both school and public libraries. The American Library Association’s Office of Intellectual Freedom (OIF) collects data regarding censorship of books, and the 2023 numbers are startling.<sup>151</sup> OIF documented challenges to 4,240 unique titles, including a 92% increase in requests at public libraries and an 11% increase in school library numbers of 2022.<sup>152</sup> Titles

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145. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

146. RESTATEMENT OF CHILD. & THE L. § 1.20 cmt. a (AM. L. INST., Tentative Draft No. 4, 2022).

147. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

148. *Bowman*, *supra* note 136 at 400–01.

149. *Id.*

150. *Id.*; see also LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L.J. 2139, 2160 (2023) (connecting the Parents’ Rights Movement with opposition to Critical Race Theory); Joshua Gutzmann, *Fighting Orthodoxy: Challenging Critical Race Theory Bans and Supporting Critical Thinking in Schools*, 106 MINN. L. REV. HEADNOTES 333, 344 (2022) (positing that teachers are less likely to acknowledge race and sex in states banning Critical Race Theory); Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61, 74 (2021) (documenting the recent political campaign against Critical Race Theory in education).

151. *American Library Association Reports Record Number of Unique Book Titles Challenged in 2023*, AM. LIBR. ASS’N (Mar. 14, 2024), <https://www.ala.org/news/2024/03/american-library-association-reports-record-number-unique-book-titles> [https://perma.cc/RQE4-TXJM].

152. *Id.*

discussing the experiences of queer people or people of color represented 47% of the books challenged.<sup>153</sup>

What has become clear is that the Parental Rights Movement is no longer concerned with the raising of one's own child but has extended to the raising of other people's children. But even if adherents were concerned solely with the raising of their own children, some questions still remain, including: what interest does a parent have in their child's identity, and what actual harms does a parent suffer if a school does not forcibly out their child?

#### ii. Parental Interests in a Child's Identity

Does a parent have a right to know if their child is gay? No, they do not. Does a parent have a right to know if their child is transgender? No, they do not. A parent does not have these rights for the simple reason that such knowledge is not a right that the state can legitimately bestow. The knowledge of a child's sexual orientation or gender identity is a privilege, earned by creating a loving and trusting relationship with the child themselves. So, what interest does a parent have in the sexual orientation or gender identity of their child?

Parents, of course have legal responsibilities towards their children, which creates an interest in the well-being of their children. These interests include the "care, custody, and control" of their children.<sup>154</sup> This includes making decisions about the child's education.<sup>155</sup> It does not, however, include making decisions about the child's gender identity or sexual orientation.<sup>156</sup> It is also important to note that while parents have an interest in making decisions about the care of their child, it is reasonable to argue that "care" should relate to the "needs" of that specific child, rather than the preferences of the parent(s).<sup>157</sup>

There are also social interests that a parent might have. Acceptance by or membership in a religious or social community may be an important factor in a parent's decision to limit their child's access to information about sexual orientation or gender identity. A 2022 study by the Pew Research Center found that American attitudes towards the transgender

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153. *Id.*

154. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

155. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

156. Thus far, no case has identified such a right.

157. Merriam-Webster defines "care" as "charge, supervision." It then places this definition in context of "responsibility for or attention to health, well-being, and safety." *Care*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/care> [<https://perma.cc/5A5P-DGCB>].KHB9-9CAV.

community are complicated and somewhat inconsistent.<sup>158</sup> While approximately 64% of Americans favored protecting transgender individuals from discrimination, 60% also believed that a person's sex is determined at birth.<sup>159</sup> A plurality of people (43%) believed that views on issues related to transgender people was changing too rapidly.<sup>160</sup> Against this background, it is not too difficult to believe that even parents who are ambivalent towards gender identity issues might favor restricting the rights of their children in order to protect both their children and themselves as the parents of queer children.

### iii. Potential Harms

It is difficult to discern what harms a parent might suffer without the benefit of policies forcing their child out of the closet. The difficulty stems not from any form of moral or medical complexity but rather from the absurdity of the premise that failing to disclose a person's gender identity or sexual orientation without that person's consent is a violation of a third party's rights.

Regardless, Parents Protecting still attempted to allege harms it had suffered by the school district's Administrative Guidance. First, they alleged that the policy transfers decision-making authority from the parents to either the school or to the parents' minor children.<sup>161</sup> This transfer alone was alleged to violate the constitutional rights of parents, though the parties could only cite to a Kansas district court decision and a thirty-year-old New York case involving distribution of condoms.<sup>162</sup>

At play in this argument is the illusion—or delusion—that parents have a say in the gender identity or sexual orientation of their child. That is not true. Mainstream medical professionals, such as the experts at the Mayo Clinic, recognize that children are able to begin identifying different

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158. Kim Parker, Juliana Menasce Horowitz & Anna Brow, Pew Research Center, Americans' Complex Views on Gender Identity and Transgender Issues 4 (2022), [https://www.pewresearch.org/wp-content/uploads/sites/20/2022/06/PSDT\\_06.28.22\\_GenderID\\_fullreport.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2022/06/PSDT_06.28.22_GenderID_fullreport.pdf) [<https://perma.cc/D9WT-ZVTA>].

159. *Id.*

160. *Id.* at 17.

161. Brief for Plaintiff-Appellant at \*21, *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 95 F.4th 501 (7th Cir. 2023) (No. 23-1534).

162. *Id.* at \*22 n.11 (citing *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at \*8 (D. Kan. May 9, 2022); *Alfonso v. Fernandez*, 195 A.D.2d 46, 48 (N.Y. App. Div. 1993)).

genders as early as 18 months.<sup>163</sup> By age three, children may begin to label their own gender.<sup>164</sup>

Parents Protecting also alleged that parents were harmed because the school district's policy denied them access to information to which they were "entitled."<sup>165</sup> While acknowledging that case law did not support their position that schools may not withhold, or as Parents Protecting phrased it, "conspire to hide," information from parents, they nonetheless maintained the position that a child's gender identity is "serious health-related information."<sup>166</sup> They attempted to supplement this argument by claiming that parents are allowed to withdraw their children from public schools—something which was not at issue in the case—but claim they are denied information that would allow them to make such a decision.<sup>167</sup>

This argument again misses the mark. First, it either misunderstands or misstates the reality of gender identity and gender dysphoria.<sup>168</sup> It attempts to pathologize being transgender in order to label information about a child's gender identity as "serious health information."<sup>169</sup> It is true that gender dysphoria is a legitimate and diagnosable medical issue.<sup>170</sup> At the same time, it is also true that some

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163. *Children and Gender Identity: Supporting Your Child*, MAYO CLINIC (Oct. 1, 2022), <https://www.mayoclinic.org/healthy-lifestyle/childrens-health/in-depth/children-and-gender-identity/art-20266811> [https://perma.cc/66TT-JZ3Q].

164. *Id.*

165. Brief for Plaintiff-Appellant, *supra* note 161, at \*28.

166. *Id.*

167. *Id.* at \*29.

168. See Jack Drescher, *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N (July 2025), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [https://perma.cc/37ZZ-392P] (defining gender dysphoria as "psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity").

169. Treating gender identity as a medical condition—that is to say pathologizing it—would be necessary in order to argue that a student's transgender status is "health information."

170. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 452 (5th ed. 2013). The DSM-5 includes criteria for diagnosing gender dysphoria:

- [a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:
  1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics ....
  2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender ....
  3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
  4. A strong desire to be of the other gender ....

transgender individuals will not experience gender dysphoria during their childhood.<sup>171</sup> Other transgender individuals will never experience gender dysphoria and will feel comfortable in their bodies.<sup>172</sup> Given that different people experience being transgender in different ways, the argument that a child's gender identity is "serious health information" seems rather weak.

Second, the argument clearly states that the members of Parents Protecting simply "do not want the adults around their young children for most of the day treating their children as the opposite sex."<sup>173</sup> This statement, which speaks to anti-trans sentiment rather than a legal right to information, is immediately followed by the argument that "[i]f this were happening, it would be directly relevant to whether [the parents] continue to send their children to public school...."<sup>174</sup> The key point here is that it wasn't happening to the plaintiffs or their children at all.

A third argument is that the policy harms parent-child relationships.<sup>175</sup> Parents Protecting argued that "[t]he very presence of this Policy, and communication by the District to students that they can keep what is happening at school secret from their parents, necessarily breeds distrust of parents and harms the parent-child relationship."<sup>176</sup> Again, this argument fails to hold water. This argument seeks to shift the blame for a poor parent-child relationship onto the school district rather than the parents themselves. Admittedly, Parents Protecting was correct in arguing that "the Constitution protects 'the relationship between parent and child' ...."<sup>177</sup> What the Constitution does not do is relieve parents of the responsibility to foster a safe home environment and build the trust necessary for a child to choose to share their gender identity with the parent rather than a school counselor. A person does not need to lead a "double life" between home and school if they are accepted at both places.

Undoubtedly, more litigation will follow, articulating additional potential harms which parents might sustain by policies prohibiting

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5. A strong desire to be treated as the other gender....
6. A strong conviction that one has the typical feelings and reactions of the other gender,...

*Id.*

171. Drescher, *supra* note 168.

172. *Gender Dysphoria*, MAYO CLINIC (Jan. 1, 2025), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> [https://perma.cc/V7S9-59XR].

173. Brief for Plaintiff-Appellant, *supra* note 161, at \*29.

174. *Id.*

175. *Id.* at \*32.

176. *Id.*

177. *Id.* (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

forced outing. While Parents Protecting's arguments fail, it is not necessarily because the alleged harms are non-existent but rather because none of the plaintiffs suffered any kind of harm.

### *B. Children's Rights*

#### i. Safety

When a person makes the conscious decision not to share their sexual orientation or gender identity with their parent, there is always a reason for doing so. One of those reasons may be an assessment that the parent is not a safe person with whom to share that information. This feeling that the parent may not be safe may arise for a number of, or combination of, reasons.

A lack of physical safety or the threat of violence is the most obvious reason why a child may choose not to come out to their parents. A 2021 study found that transgender youth suffer higher rates of psychological, physical, and sexual abuse than their cisgender peers, with children assigned female at birth experiencing the highest rate of psychological and sexual abuse and people questioning their identity experiencing the highest rate of physical abuse.<sup>178</sup> Queer youth are four times more likely to attempt suicide than their non-queer peers,<sup>179</sup> a statistic related to prior experience of abuse. For a child whose family may be likely to react violently, forced outing places the child at risk of both future self-harm and harm from external sources.<sup>180</sup>

Fear of rejection is another reason why a child may choose not to come out to a parent. The Trevor Project reports that only about one third of LGBTQ+ young people experience acceptance from their parents.<sup>181</sup> Another third choose not to disclose their identity until adulthood.<sup>182</sup> A man identified as Asad is one of those who chose to wait until adulthood to disclose his sexuality to his family.<sup>183</sup> Asad began by telling his brother

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178. Jason Rafferty, *Childhood Abuse Among Transgender Youth: A Trauma Informed Approach*, PEDIATRICS, Aug. 2021, at 1, 1 (citing Brian C. Thoma, Taylor L. Rezeppa, Sophia Choukas-Bradley, Rachel H. Salk, & Michael P. Marshal, *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, Pediatrics, Aug. 2021, at 1, 1).

179. *Facts About Suicide Among LGBTQ+ Young People*, THE TREVOR PROJECT (Dec. 15, 2021), <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/> [https://perma.cc/6UVN-3JNB].

180. Misha Valencia, *Why We Need to Stop Outing LGBTQIA Students*, PARENTS (Aug. 29, 2023), <https://www.contemporarypolicyinstitute.org/wp-content/uploads/2024/01/Why-We-Need-to-Stop-Outing.pdf> [https://perma.cc/Z79M-HEW6].

181. THE TREVOR PROJECT, *supra* note 179.

182. *Id.*

183. GOSWELL & WALKER, *supra* note 2, at 30–31.

via text, which elicited a response from the brother that he felt “sick.”<sup>184</sup> While Asad and his brother were able to come to an understanding, it was several years before Asad could bring himself to tell his father, and even then he prepared by packing a bag and asking a friend to drive by and wait to pick him up just in case things went sour.<sup>185</sup> While Asad’s father accepted him, not every child is so lucky.

Rejection carries risks that stretch beyond simple emotional harm. Those LGBTQ+ young people who experience rejection are eight times more likely to report attempting suicide.<sup>186</sup> In addition, nearly 20% of transgender individuals will experience homelessness during their lifetime, often due to family rejection or violence.<sup>187</sup> Even if a child does not fear rejection outright, the lack of validation of their gender identity or sexual orientation may cause a child to lose their sense of safety.<sup>188</sup>

Finally, by forcing school staff to out a student, that student loses a sense of safety at school as well. The Trevor Project reports that young people who could identify a higher number of supportive school staff experienced lower levels of depression and were less likely to consider suicide.<sup>189</sup> Forced outing takes away the ability of students to develop a trusting relationship with their teachers and ultimately deprives children of another safety net.

## ii. Dignity Interests

An oft-ignored aspect of the sexuality and gender identity of children is regard for the dignity of those children. Professor Nancy Dowd writes that dignity means “respect for children, and affirmative valuing and supporting of children. Respect for children requires confronting and dealing with subordination of children based on identities.”<sup>190</sup> Going further, Dowd argues that the question is not about whether children have dignity, but rather about “recognizing, respecting, and valuing that dignity, meaning their individual self-worth and humanity.”<sup>191</sup>

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184. *Id.* at 30.

185. *Id.* at 31–32.

186. THE TREVOR PROJECT, *supra* note 179.

187. *Housing & Homelessness, ADVOCATES FOR TRANS EQUALITY*, <https://transequality.org/issues/housing-homelessness> [<https://perma.cc/JAY5-WA9B>].

188. Valencia, *supra* note 180.

189. *The Relationship Between Caring Teachers and the Mental Health of LGBTQ+ Students*, THE TREVOR PROJECT (May 10, 2023), <https://www.thetrevorproject.org/research-briefs/the-relationship-between-caring-teachers-and-the-mental-health-of-lgbtq-students/> [<https://perma.cc/G2Q3-VTVN>].

190. Nancy Dowd, *Equality, Equity, and Dignity*, 37 LAW & INEQ. 5, 16 (2019) (emphasis omitted).

191. *Id.* at 17.

For queer people, the Supreme Court has acknowledged the liberty interest inherent in dignity. Writing for the majority in *Obergefell v. Hodges*, Justice Kennedy wrote that:

[u]nder the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.<sup>192</sup>

It stands to reason then, that the choice to openly proclaim one's sexual orientation or gender identity is one of those “personal choices central to individual dignity and autonomy.”<sup>193</sup>

Forced outing takes away the choice element in asserting a queer identity and infringes upon a person's dignity interest. There is nothing to suggest that dignity interests are different for children than they are for adults when it comes to the decision whether to share something as personal as sexual orientation or gender identity with someone else.<sup>194</sup> Nor is there any reason for courts to ignore the dignity interests of a child when evaluating whether outing that child should be a legal requirement.

### iii. Decisional Autonomy

A third consideration to take into account is a child's right to decisional autonomy. The Fourteenth Amendment's Due Process Clause “promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons . . . to define and express their identity.”<sup>195</sup> The Supreme Court has, on numerous occasions, affirmed that the Due Process Clause prohibits intrusions on deeply personal

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192. *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (citations omitted).

193. *Id.* Justice Thomas in his dissent took a different view, arguing that “human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.” *Id.* at 735 (Thomas, J. dissenting).

194. See U.S. CONST. amend. XIV, § 1 (extending due process, and therefore dignity interests, to “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof.”).

195. *Obergefell*, 576 U.S. at 651–52.

decisions such as marriage,<sup>196</sup> procreation,<sup>197</sup> sexual intimacy,<sup>198</sup> and child rearing.<sup>199</sup>

It is true that all of these cases address the decisional autonomy of adults, yet none reject the decisional autonomy of children. Rhonda Gay Hartman has argued that the heart of the problem involving adolescent decision-making involves questions about decisional capability.<sup>200</sup> And yet, the law relies on the decisional capacity of minors in courtrooms every day. A court deciding custody may consider the preferences of a child when determining with whom to place the child.<sup>201</sup> Children may be charged and tried as adults for crimes which meet a certain threshold.<sup>202</sup> To suggest that a child has the decisional ability to form the intent to commit a murder or to decide which parent they would prefer to spend their childhood with but not to correctly determine whether it is safe to inform their parent(s) of their own sexual orientation or gender identity beggars belief.

Courts should consider the decisional autonomy of children and adolescents when it comes to the decision to share their sexual orientation or gender identity with another person, regardless of whether that person is their parent or legal guardian. Arguably, such consideration is consistent with the Due Process Clause of the Fourteenth

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196. *Id.* at 675 (“These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.”).

197. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”).

198. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle . . . . Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).

199. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (“While this court has not attempted to define with exactness the liberty thus guaranteed, . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . . . The established doctrine is that this liberty may not be interfered with . . . .”).

200. Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1266 (2000).

201. See, e.g., CAL. FAM. CODE § 3042(a) (stating that if a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation); Elizabeth S. Scott, N. Dickon Reppucci & Mark Aber, *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1052 (1988) (characterizing adolescent preference as “often the dominant consideration in resolving disputes about their custody.”).

202. See, e.g., COLO. REV. STAT. § 19-2.5-802(d)(1)(A); TEX. FAM. CODE ANN. § 54.02(h).

Amendment, the opinions of the United States Supreme Court, and basic notions of decency. To do otherwise is to tell children and adolescents that their own knowledge of themselves, their personal desires for control over their destiny, and their reasoned assessments of who is safe to tell and when it is safe to tell them are all subordinate to a parent's desire for control.

### *C. The Role of Advocates and Courts*

As Professor Bowman has pointed out, the rights of parents are "still the starting point judges, scholars, and policymakers regularly use when considering children's interests."<sup>203</sup> This is the wrong place to start because the individual likely to suffer the most serious and long-lasting harm from a forced outing is the child herself.

If, however, states and courts are determined to give precedence to the rights of parents over the rights of children, steps should still be taken to mitigate potential harms to the children. Three potential measures make sense: (1) a judicial bypass system; (2) the option for a student to request to be present and accompanied by a counselor or social worker at the time that the parents are informed; or (3) mandatory follow up meetings with a counselor, social worker, or other mandatory reporter at a fixed point after the parents are informed. Each has its benefits and merits some discussion.

#### i. A Judicial Bypass System

A judicial bypass is a legal proceeding in abortion cases which allows a judge to waive parental notification if the minor is "mature enough and well enough informed" to make the decision on their own.<sup>204</sup> The judge may also grant a judicial bypass in the event that the abortion is in the minor's best interest.<sup>205</sup> Guidance—either from legislatures or courts of last resort—is thin as to what factors should be considered in determining whether the judicial bypass should be granted. As a result, decisions are "left to the subjective conclusions of individual trial judges, and are often based on inconclusive factors such as the minor's grades in

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203. Bowman, *supra* note 136, at 414 (citing Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1460 (2018)).

204. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) ("A pregnant minor is entitled in such a proceeding to show . . . that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes . . .").

205. *Id.* at 644.

school, participation in extracurricular activities, general plans for the future, and demeanor.”<sup>206</sup>

A judicial bypass could work the same way for students seeking to have their gender, pronoun, or name usage changed at school. There is no reason to even consider changing the standard. What is important, however, is to create a set of criteria to be considered when making the determination that the minor is “mature enough and well enough informed.”<sup>207</sup> A non-exhaustive list of criteria might include some of the following.

First, an ability to articulate clearly the reason why the child or adolescent desires to use a different name, different pronouns, or different gender than the one assigned to them at birth. This might be demonstrated by an expression of a strong desire to be rid of the child or adolescent’s primary and/or secondary sex characteristics because of a marked incongruence with the child or adolescent’s experienced/expressed gender, a strong desire for the primary and/or secondary sex characteristics of the other gender, a strong desire to be of the other gender, a strong desire to be treated as the other gender, or a strong conviction that the child or adolescent has the typical feelings and reactions of the other gender.<sup>208</sup>

Second, the court could consider the amount of thought the child or adolescent has put in to how they will go about life while living as a person of a different gender. Have they decided on a name? If they have decided not to use “he/him” or “she/her” pronouns, and instead opted for different pronouns, can they articulate why it is that those pronouns feel the most appropriate?<sup>209</sup>

Third, can the student articulate an understanding of the social and legal implications of changing their name, gender, and/or pronouns? Is the student able to articulate that changing their gender identifier in school documentation may, in some states, result in that student no longer being able to participate in sports?<sup>210</sup> Are they aware of any other challenges that they may encounter?

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206. Stephen Rosenberg, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent: The Ex Parte Anonymous Cases* (Alabama 2001), 34 CONN. L. REV. 1109, 1110 (2002).

207. *Bellotti*, 443 U.S. at 643.

208. Incidentally, these are all criteria for gender dysphoria as cited in the DSM-5. AM. PSYCHIATRIC ASS’N, *supra* note 170.

209. A significant number of transgender people use she/her or he/him pronouns, while others prefer they/them, and yet others opt for less well-known neopronouns such as ze or hir. Jessica A. Clark, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 957 (2019).

210. According to the Movement Advancement Project, twenty-seven states currently have laws banning participation by transgender students in sports matching the student’s

Again, these criteria should not be considered exhaustive of whether the court should grant the judicial bypass. However, a child who can answer questions related to these criteria likely demonstrates that they have both the maturity and the necessary information to make a sound decision about whether they would like to use a different name, different pronouns, or express a different gender identity. This would satisfy the standard for a judicial bypass articulated by the United States Supreme Court.<sup>211</sup>

#### ii. Counselor or Social Worker Support at the Time of Disclosure

A second possibility is to require that the parents be informed at the school, in the presence of the student. The student should also be given the opportunity to request the presence of a counselor or social worker for support at the time that the parents are informed. Ideally, the counselor or social worker would be someone trained in de-escalation and subject to mandatory reporting laws.<sup>212</sup>

The purpose of giving the student the option of having a counselor or social worker attend is twofold. First, it can provide the student with a sense of support to have a trusted—or at least neutral—party there to back them up at a time when they may feel isolated, betrayed, uncertain, or even scared. This is particularly true for children and adolescents who fear for their safety. The second reason is to provide a witness to the actual outing who is neither a parent nor the student and who is able to act in the event that the student faces imminent harm.

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gender identity. Those states include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/youth/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans) [<https://perma.cc/GF8C-BAS7>].

211. *Bellotti*, 443 U.S. at 643–44 (“A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”).

212. In many states, some individuals are, by virtue of their profession, legally required to report suspected cases of abuse or neglect. Federal law also plays a limited role in determining mandated reporter status. See *The Ultimate Guide to Mandated Reporting Laws in All 50 US States: Child & Adult Abuse/Neglect*, REMNANT COUNSELOR COLLECTIVE (Mar. 26, 2025), <https://remnantcounselorcollective.com/resources/86536/the-ultimate-guide-to-mandated-reporting-laws-in-all-50-us-states-child-adult-abuse-neglect> [<https://perma.cc/Y7N8-QPV9>]; Child Abuse Prevention and Treatment Act of 1988, Pub. L. No. 100-294, 102 Stat. 102 (1988) (codified at 42 U.S.C. §§ 5101–5106).

### iii. Mandatory Follow-up with a Counselor or Social Worker

Alternatively, or in conjunction with the previous suggestion, legislative bodies requiring forced outing should consider requiring a mandatory follow-up meeting between the outed child and a counselor, social worker, or other mandatory reporter. The meeting should be conducted without the parents present in order to allow the child to honestly express their feelings, concerns, and experiences following the forced outing, without the risk of being coerced into portraying the situation in a false light. This is particularly true for children who may have expressed fears regarding their safety.

It is important that the meeting be held with a mandatory reporter, a category which often includes “health care providers, people who interact with minors in a school or daycare setting, law enforcement officials, and members of the clergy.”<sup>213</sup> By virtue of their duties, these individuals are best positioned to begin the process of getting a child help if the forced outing leads to the child being harmed in some way. At the same time, the exclusion of the parents from the meeting allows the student the opportunity for full honesty (or at least as much honesty as can be expected from a child whose privacy was violated by the very institution employing the person they are being required to meet with) regarding their true experiences at home, as well as access to resources if they have in fact been hurt.

## Conclusion

The decision to come out for the first time—when, where, how, and to whom—is one of the most important decisions that a queer person can make during their lifetime. It is at the same time both an overt statement of self-determination and an act of trust and vulnerability. At the same time, it is not a singular act, instead it is an act which will be repeated, again and again, throughout that person’s life.

Coming out opens a queer person to substantial benefits. Some are psychological, as closeted individuals or those who lack a support system experience higher levels of depression.<sup>214</sup> Others are social, including the opportunity to find and be part of an open and accepting queer community or the ability to find a partner with whom one can live openly.

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213. Ian Ayers, Sonia Quin, & Pranjal Drall, *Racial and Gender Bias in Child Maltreatment Reporting Decisions: Results of a Random Vignette Experiment*, 21 UC L.J. RACE & ECON. JUST. 183, 187 (2024).

214. See John E. Pachankis, Susan D. Cochran, & Vickie M. Mays, *The Mental Health of Sexual Minority Adults In and Out of the Closet: A Population-Based Study*, 83 J. CONSULTING AND CLINICAL PSYCH. 890, 897 (2015) <https://britecenter.org/wp-content/uploads/2017/12/The-mental-health-of-sexual-minority-adults-in-and-out-of-the-closet-A-population-based-study.pdf> [https://perma.cc/7YHS-QKNF].

Some are medical, as treatment for gender dysphoria<sup>215</sup> often involves living as a different gender for a period of time; something one cannot do while closeted.

Opponents of the queer community, however, have in recent years been emboldened and empowered to stifle expressions of queer identity. From censoring media such as books,<sup>216</sup> to banning public drag performances,<sup>217</sup> to attacking corporate DEI policies,<sup>218</sup> anti-LGBTQ activists and politicians have promoted, pushed, and passed policies aimed at preventing young people from either learning about or affirming their own queer identities.<sup>219</sup> In instances when those policies fail to stifle a child or adolescent's understanding of their queerness, other policies may be in place to bully or threaten those young people into silence. Forced outing of children by schools is among those policies.

Forced outing employs a callous disregard for the dignity and safety of queer children by prioritizing the rights of parents over the rights of those same children. Of course, parents should be informed about important information involving their children, and therein lies the problem that forced outing cannot solve: the gender identity or sexual orientation of a child is important information that a parent should be aware of, yet that information is best obtained through earning the trust of the child. But how can trust be established if the child's orientation or identity is revealed without the child's consent?

If the goal of legislatures were to protect children, as is often alleged by promoters of anti-LGBTQ policies,<sup>220</sup> then forced outing laws should include measures aimed at ensuring the safety of those children at the time of disclosure. This article has discussed three potential measures: a

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215. E. Coleman et al, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S39 (2022) ("We suggest, as part of the assessment for gender-affirming hormonal or surgical treatment, professionals who have competencies in the assessment of transgender and gender diverse people wishing gender-related medical treatment consider the role of social transition together with the individual.").

216. See generally Eliot T. Tracz, *Censorship and Book Bans: Two Non-Constitutional Arguments Against Queer Erasure*, 52 HOFSTRA L. REV. 903 (2024) (discussing local attempts to ban books with LGBTQ-related content).

217. See generally Eliot T. Tracz, *Drag: Art. Obscenity. Crime.*, 23 CONN. PUB. INT. L.J. 46 (2024) (discussing a number of state attempts to limit or ban drag performances by attempting to brand them as a form of obscenity).

218. MOVEMENT ADVANCEMENT PROJECT, DISMANTLING DEI: A COORDINATED ATTACK ON AMERICAN VALUES (2024), <https://www.mapresearch.org/file/2024-DEI-report-MAP.pdf> <https://www.mapresearch.org/2024-dei-report> [<https://perma.cc/UL7A-T5P6>].

219. Michael S. Broder, Anti-LGBTQ Laws Claiming to Protect Children Actually Harm Them, University Experts Say, S.F. STATE UNIV.: SFSU NEWS (June 12, 2023), <https://news.sfsu.edu/news/anti-lgbtq-laws-claiming-protect-children-actually-harm-them-university-experts-say> [<https://perma.cc/V992-TFC9>.F3SR-DE8S].

220. *Id.*

judicial bypass option, offering the student the support of a counselor or social worker at the time of disclosure, and mandatory follow-up with a mandatory reporter. Such steps would send the message that the goal of forced outing laws is not to target queer young people for disparate treatment, although there is little evidence to suggest that there is any other legitimate purpose of these laws, but rather to allow parents the information necessary to fulfill their responsibilities towards their children.

Alternatively, policymakers could leave the decision to come out to those people to whom the decision matters most—those queer children or adolescents themselves. Respect for the autonomy, dignity, and humanity of individuals demands that a person be afforded the opportunity to decide for themselves when to share their identity and orientation, which often requires a difficult personal journey of self-reflection and self-discovery. So, why not grant queer, young people the right to decide if and when to come out? After all, self-determination is the American way, and individuals, not federal, state, or local government, should decide when to break free of the closet.

## Illuminating the Errors of *State v. Muñoz* and the Curtailment of Due Process Rights when a U.S. Citizen is Married to a Noncitizen

Kavya Mahesh<sup>†</sup>

### **Introduction**

The Due Process Clause of the Fifth Amendment provides that the United States government owes its citizens the due process of law when depriving them of life, liberty, or property.<sup>1</sup> This due process can be either procedural or substantive.<sup>2</sup> Procedural due process is the requirement that there be certain procedures a citizen is entitled to before they are deprived of their life, liberty, or property, such as notice and opportunity to be heard.<sup>3</sup> Substantive due process, on the other hand, entails that the government can only limitedly interfere with certain fundamental rights that an individual has.<sup>4</sup>

There has been an ongoing debate over whether the Due Process Clause should be understood to protect only procedural rights, or to also include substantive rights that are implied in the word “liberty” and not enumerated in the text of the Fifth Amendment.<sup>5</sup> Critics of substantive due process take an originalist approach and argue that the “substantive conception of due process rights” and the fundamental rights associated with it are unsupported by the text or pre-ratification history of the Due Process Clause.<sup>6</sup> However, substantive due process rights have been recognized in several Supreme Court decisions.<sup>7</sup> These decisions identify a category of liberty interests that are so fundamental that they “forbid[]

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1. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .”).

2. See 16C C.J.S. *Constitutional Law* § 1820.

3. See *id.* § 1822.

4. *Id.* § 1821.

5. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411–12 (2010) (introducing substantive due process).

6. See, e.g., *id.* at 412.

7. See *id.* at 427 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

the government to infringe" upon them unless the infringement is "narrowly tailored to serve a compelling state interest."<sup>8</sup>

A foreign national who does not possess U.S. citizenship has very few rights available to them on U.S. soil.<sup>9</sup> The plenary power and the consular nonreviewability doctrine, rooted in the Supreme Court's interpretation of the Commerce, Naturalization, Migration and Importation, and War Power clauses of the Constitution, and recognized in *Ping v. United States* and *Nishimura Ekiu v. United States*,<sup>10</sup> limit due process protections for foreign citizens as well.<sup>11</sup> These legal doctrines give Congress unfettered power in its authority to admit or exclude noncitizens, delegate this authority to consular officials without any limitations, and restrict judicial interference in these matters.<sup>12</sup>

Complications arise when the sphere of the rights foreign nationals do not possess and the sphere of the rights U.S. citizens are guaranteed intersect, as in a marriage between a noncitizen and a U.S. citizen. The right to marriage is a fundamental due process right guaranteed to all citizens, and marriage has been defined by the Supreme Court to include living with one's spouse.<sup>13</sup> However, a foreign national cannot reside with their spouse in the U.S. without appropriate visa procedures.<sup>14</sup> An infringement on the right to marriage would typically trigger due process protections.<sup>15</sup> But, in a marriage between a U.S. citizen and a foreign

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8. *Id.* (citations omitted).

9. See Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013) (depicting how the rights of immigrants have decreased over time).

10. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. I, § 8, cl. 11; *Ping v. United States*, 130 U.S. 581 (1889); *Ekiu v. United States*, 142 U.S. 651 (1892).

11. See SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE § 16:1, Westlaw IMMILS2D; James Lockhart, Annotation, *Construction and Application of Doctrine of Consular Nonreviewability*, 42 A.L.R. Fed. 2d 1 (2009).

12. See DIZON & DADHANIA, *supra* note 11, § 16:1 (explaining the plenary power as the principle that immigration discretion is a federal institution that lies in the hands of the legislative and executive branches with limited judicial review); *see generally* Lockhart, *supra* note 11, § 2 ("The doctrine of consular nonreviewability prevents courts in most cases from reviewing the decisions of consular officers regarding the grant or denial of a visa to an alien wishing to enter the United States.").

13. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (writing that the word liberty in the Due Process Clause substantively includes the right to marry); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage . . . creat[es] the most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution . . ."); *infra* Section I.C. Marriage is characterized as a social institution that highlights the union between two individuals.

14. U.S. CITIZENSHIP & IMMIGR. SERVS., BRINGING SPOUSES TO LIVE IN THE UNITED STATES AS PERMANENT RESIDENTS (2018), <https://www.uscis.gov/family/bring-spouse-to-live-in-US> [https://perma.cc/HEG5-X4WQ] (explaining that in order for a noncitizen spouse to reside with their U.S. spouse in the U.S., a petition and subsequent visa application must be filed).

15. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. at 399 (enumerating the right to marry in a

national, how can the citizen's guarantee of due process be reconciled with their noncitizen spouse's lack of the same?

As this Note will discuss further, there are several instances in which the Supreme Court and other federal district courts have undermined the U.S. citizen's due process rights to reconcile the two sets of rights.<sup>16</sup> The judicial focus has been on the absence of a noncitizen's rights rather than the need to vindicate the citizen's liberty. A prime example of this is *State v. Muñoz*, a recent Supreme Court decision.

Sandra Muñoz, a U.S. citizen, married Luis Asencio-Cordero, a foreign national from El Salvador, in 2010.<sup>17</sup> While building a life and raising a child together in the U.S., they began the immigration process of adjusting Cordero's status to lawful permanent resident.<sup>18</sup> Following appropriate visa procedures, Muñoz first completed a petition to prove the validity of their marriage, which would render Cordero eligible to immigrate as an immediate relative.<sup>19</sup> Upon its approval, Cordero underwent consular processing for his visa, and he was required to leave the U.S. and be interviewed in his country of origin, El Salvador.<sup>20</sup> If his visa was granted, Cordero could then return to the U.S.<sup>21</sup> After numerous rounds of interviews with several consular officials, Cordero was notified that his visa was denied.<sup>22</sup> The officials referred to the statutory provision of 8 U.S.C. § 1182(a)(3)(A)(ii) in the Immigration and Nationality Act (INA), which prevents the admission of noncitizens if there is reason to believe that the noncitizen would engage in what the INA calls "unlawful activity."<sup>23</sup> They provided no other explanation for Cordero's visa denial.<sup>24</sup>

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non-exhaustive list of rights contained in the Fourteenth Amendment's conception of liberty) and *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that a statute that prohibits interracial marriage infringes on a citizen's fundamental due process right to marriage).

16. See *Dep't of State v. Muñoz*, 602 U.S. 899 (2024); *Kerry v. Din*, 576 U.S. 86, 101 (2015); *Swartz v. Rogers*, 254 F.2d 338 (D.C. Cir. 1958). In all three cases, the decisions state that even though the due process right of marriage is alleged to have been infringed, the right actually asserted is the right to have their spouse live in the U.S. There is, in these cases, a reframing of the due process right through an immigration lens. See also *infra* Section II.A (discussing these issues and tensions within the context of *Muñoz*).

17. *Dep't of State v. Muñoz*, 602 U.S. at 904 (2024).

18. *Id.*

19. See *id.*; Alison Moodie, *Form I-130, Explained*, BOUNDLESS (Aug. 31, 2025), <https://www.boundless.com/immigration-resources/form-i-130-explained/> [<https://perma.cc/XN6X-2G4Z>] (explaining that the first step in acquiring a marriage-based visa is the I-130 form, also called the "Petition for Alien Relative." This form proves the authenticity of a marriage for the purposes of immigrating to the U.S.).

20. *Dep't of State v. Muñoz*, 602 U.S. at 904.

21. *Id.*

22. *Id.*

23. See *id.*; 8 U.S.C. § 1182(a)(3)(A)(ii) (1952).

24. *Dep't. of State v. Muñoz*, 602 U.S. at 904.

Cordero had no criminal record at the time of this visa decision, and both he and Muñoz could only guess how consular officials came to the opposite conclusion.<sup>25</sup> While consular officials' discretion in granting or denying a visa is almost unfettered, *Kleindienst v. Mandel* offers an exception in that a U.S. citizen is required to be given a facially legitimate and bona fide reason if their constitutional rights are infringed upon by a visa decision.<sup>26</sup> Muñoz claimed that Cordero's visa denial infringed her right to marriage (as encompassed in one's substantive due process rights) in hopes of getting a more concrete reason of why she could not continue the life she built with Cordero in the U.S.<sup>27</sup> The *Muñoz* Court denied her request, holding that a U.S. citizen has no due process rights infringed upon when their noncitizen spouse's visa is denied.<sup>28</sup>

This Note argues that the Supreme Court erroneously decided *State v. Muñoz*. Further, this Note posits that the Supreme Court's holding adversely affects the rights of a unique category of individuals: U.S. citizens who are married to noncitizens. The reasoning in *Muñoz* is wrong on two accounts: 1) it fails to apply the *Mandel* exception<sup>29</sup> and 2) it misunderstands the right that has been infringed upon. The Court focused on Muñoz's claim from an immigration standpoint and displayed a desire to override due process protections due to an unfounded fear of undermining the plenary power and consular nonreviewability.<sup>30</sup> This Note is not about immigration reforms or the strength of the right of marriage; rather, it is about the need to vindicate a U.S. citizen's constitutionally protected due process rights.

The first part of this Note will lay the foundation for why the Court's reasoning in *Muñoz* is erroneous. First, I will provide a more in-depth overview of the immigration standards and the *Mandel* exception. I will then discuss the Court's precedent on the *Mandel* exception and a citizen's substantive due process right of marriage in their noncitizen spouse's

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25. *Id.*

26. See *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (holding that if a U.S. citizen's First Amendment rights are infringed upon as a result of a noncitizen's visa denial, judicial review may be permitted so long as there is no facially legitimate and bona fide reason for the visa decision).

27. Dep't of State v. Muñoz, 602 U.S. at 904.

28. *Id.* at 919.

29. *Id.*

30. *Id.* at 912 (engaging in a substantial discussion of Congress's plenary power and consular nonreviewability in its reasoning to ultimately hold there is no due process right infringed). By including such a lengthy discussion, it appears that Justice Barrett is using Congress's broad discretion in immigration matters as a reason for concluding that no due process right has been infringed upon. However, it is possible to respect both Congress's immigration authority as well as a U.S. citizen's due process rights as seen in Section III.A of this note. Congress's discretion does not have to be compromised in order to vindicate due process rights. See *infra* note 126.

visa denial. From there, this Note will analyze the Court's misapplication of precedent and its flawed reasoning in *Muñoz*.

## I. Background

### A. An overview of immigration doctrine and the Mandel exception.

Under the plenary power doctrine, the federal government has full authority over any and all immigration matters.<sup>31</sup> The broad discretion to admit or exclude individuals is shared between the executive and legislative branches, and the judiciary has very limited authority to review any immigration decision.<sup>32</sup> This power comes from the Supreme Court's interpretation of several clauses in the Constitution.<sup>33</sup> Relying on the Commerce Clause in *Edye v. Robertson*, the Supreme Court upheld a federal statute that imposed a head tax on any foreign national entering the U.S., permitting federal authority over matters affecting immigration.<sup>34</sup> In *I.N.S. v. Chadha*, the Supreme Court held that Congress has plenary power over immigration issues regarding the admission and exclusion of noncitizens under the Naturalization Clause.<sup>35</sup> In *Ping v. United States* and *Ekiu v. United States*, the Supreme Court maintained that Congress has the broad authority to admit and exclude noncitizens.<sup>36</sup> This expansive power is also reflected in other constitutional Clauses. The Migration and Importation Clause limits migration and importation to

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31. *See, e.g.*, DIZON & DADHANIA, *supra* note 11 ("The plenary power doctrine establishes the authority of the federal government over immigration matters.").

32. *Id.* (explaining that the principles of the plenary power doctrine include that the authority over immigration matters is "shared between the executive and legislative branches of the federal government" and that "the judicial branch has very limited power to review immigration decisions.").

33. *See id.* (illustrating through several examples that this doctrine arose from the Supreme Court's interpretations of different clauses in the Constitution that grant the federal government enumerated powers, such as the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the War Power Clause).

34. *See Edye v. Robertson*, 112 U.S. 580, 600 (1884) ("[C]ongress having the power to pass a law regulating immigration as part of the commerce of this country with foreign nations, we see nothing in the statute by which it has here exercised that power forbidden by any other part of the constitution."); U.S. CONST. art. I, § 8, cl. 3.

35. DIZON & DADHANIA, *supra* note 11; *INS v. Chadha*, 462 U.S. 919, 939 (1983); U.S. CONST. art. I, § 8, cl. 4.

36. *See Ping v. United States*, 130 U.S. 581, 603 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."); *Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("The supervision of the admission of aliens into the United States may be intrusted by congress either to the department of state . . . or to the department of the treasury, . . . and congress has often passed acts forbidding the immigration of particular classes of foreigners . . .").

"persons as any of the States . . . shall think proper to admit."<sup>37</sup> Through the War Power Clause, the federal government possesses the authority to prevent the entry of foreign nationals deemed to be the "enemy" and to remove them from the U.S.<sup>38</sup>

The doctrine of consular nonreviewability is derived from Congress's plenary power and states that, as a general rule, visa decisions are not subject to judicial review.<sup>39</sup> However, there is a narrow exception to the blanket bar from judicial review.<sup>40</sup> This exception can be traced back to *Kleindienst v. Mandel*, a Supreme Court case which held that if an individual's visa denial results in an infringement of a First Amendment right of a U.S. citizen, judicial review may be permitted so long as there is no facially legitimate and bona fide reason for the visa decision.<sup>41</sup>

In *Mandel*, Ernest Mandel, a Belgian national, applied for a temporary nonimmigrant visa to participate in an academic conference.<sup>42</sup> Mandel was a Marxist theoretician and was invited to the conference to discuss his ideologies.<sup>43</sup> His visa was denied by a consular official who cited a statutory provision in the INA that barred individuals "who advocate the economic, international, and governmental doctrines of world communism."<sup>44</sup> The *Mandel* Court recognized an infringement of the First Amendment rights of the scholars at the conference, who wanted to engage in unconstrained academic discourse.<sup>45</sup> However, before allowing judicial review of the visa decision because it infringed a U.S. citizen's rights, the Court analyzed whether there was a facially legitimate and bona fide reason behind the denial.<sup>46</sup> The threshold for what counts as a facially legitimate and bona fide reason is extremely low.<sup>47</sup> Essentially, a reference to a statutory provision in the INA that an officer believes the applicant does not comply with is adequate.<sup>48</sup> The consular

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37. DIZON & DADHANIA, *supra* note 11 (quoting U.S. CONST. art. I, § 9, cl. 1); see *Smith v. Turner*, 48 U.S. 283 (1849); *New York v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883).

38. DIZON & DADHANIA, *supra* note 11; U.S. CONST. art. I, § 8, cl. 11.

39. LOCKHART, *supra* note 11, § 2 (citing *Lem Moon Sing v. United States*, 158 U.S. 538 (1895) as cited in *Kleindienst v. Mandel*, 408 U.S. 753 (1972)).

40. *Id.*

41. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972).

42. *See id.* at 757.

43. *See id.* at 756–57.

44. *Id.* at 755–56 (citing Immigration and Nationality Act of 1952, 8 U.S.C. § 212(a)(28)(D)).

45. *See id.* at 760.

46. *Id.* at 770.

47. *See Trump v. Hawaii*, 585 U.S. 667, 703 (2018) (depicting *Mandel's* standard of review as narrow and deferential).

48. *Kleindienst v. Mandel*, 408 U.S. at 770 (1972) (holding that pointing to a finding of inadmissibility under INA § 212(a)(28), which said aliens who advocate doctrines of communism are ineligible to receive visas, was a facially legitimate and bona fide reason

official's citation to INA § 212(a)(28)(D) and (G)(v) counted as a facially legitimate and bona fide reason, and the Court therefore declined to grant judicial review.<sup>49</sup>

As illustrated by later decisions, the Supreme Court has since applied the *Mandel* exception to constitutional rights outside of the First Amendment context.<sup>50</sup> For instance, *Trump v. Hawaii* determined the constitutionality of an executive proclamation issued by the President that restricted travel to the U.S. by citizens from eight countries, predominantly those that practice Islam as a religion.<sup>51</sup> The Court analyzed whether the President had the authority to suspend entry into the U.S. for a broad class of foreign nationals, even when doing so would affect the interests of U.S. citizens seeking to be united with their noncitizen family members.<sup>52</sup> In this opinion, Chief Justice Roberts recognized the separation of family members as a result of visa denials as a "sufficiently concrete" injury that is an "adequate ground for standing."<sup>53</sup> He cited *Mandel*, among other cases, in his statement that "[t]his Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals."<sup>54</sup> After citing *Mandel*, Chief Justice Roberts reaffirmed that a U.S. citizen suffers "concrete hardship" if their immediate relative is denied entry into the U.S.<sup>55</sup> Additionally, the Court stated that "our opinions have reaffirmed and applied [*Mandel*'s] deferential standard of review across different contexts and constitutional claims."<sup>56</sup> It recognized a "conventional application of *Mandel*," which is an inquiry

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such that the Court need not review the decision).

49. *Id.*

50. See, e.g. *Fiallo v. Bell*, 430 U.S. 787, 795 (1977). This case addresses the consequences of excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, citing Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952 as a cause of this preferential treatment. The Court cited *Mandel* to hold that its narrow exception does not apply, and Congress's plenary power should not be undermined in this context; *Trump v. Hawaii*, 585 U.S. at 703 (2018); *Kerry v. Din*, 576 U.S. at 103–04, 106 (2015) (Kennedy, J. concurring).

51. *Trump v. Hawaii*, 585 U.S. at 667 ("The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.").

52. See *id.* at 698.

53. *Id.*

54. *Id.*

55. *Id.* at 698–99 ("[O]ne of our prior stay orders in this litigation recognized that an American individual who has a bona fide relationship with a particular person seeking to enter the country... can legitimately claim concrete hardship if that person is excluded.") (citation omitted).

56. *Id.* at 703.

into whether an action has a facially legitimate and bona fide reason if there is an infringement of a U.S. citizen's rights.<sup>57</sup>

*Kerry v. Din* is another decision that applies *Mandel*'s reasoning to a constitutional right outside of the First Amendment. The facts in *Din* are strikingly similar to those of *State v. Muñoz*. Fauzia Din, a U.S. citizen, attempted to contest the visa denial of her husband, a foreign national from Afghanistan, using the *Mandel* exception by claiming the infringement of her right to marriage.<sup>58</sup> The plurality opinion foreshadowed *State v. Muñoz* by holding that "Din was not deprived of 'life, liberty, or property'" when her husband was denied admission into the U.S., and that no due process right was therefore infringed upon.<sup>59</sup> In his binding concurrence, however, Justice Kennedy explicitly indicated that *Mandel* is applicable in the denial of a noncitizen spouse's visa, implying that there is a valid infringement of a citizen's rights in those instances.<sup>60</sup> In his application of *Mandel*, Justice Kennedy determined that a citation to a statutory provision barring individuals from entry into the U.S. for terrorism related concerns constitutes a facially legitimate and bona fide reason so as to leave the visa decision undisturbed.<sup>61</sup>

The ultimate conclusion of both the plurality and the concurrence in *Din* are the same: the visa decision must be left undisturbed with no room for judicial review.<sup>62</sup> The plurality reached this result by asserting that the denial of a visa for a noncitizen spouse does not infringe the rights of a U.S. citizen, whereas Justice Kennedy's walk-through of the *Mandel* test illustrated that it is possible to arrive at the same conclusion while still recognizing a protected liberty interest.<sup>63</sup> *Din* left the question of whether a U.S. citizen has a due process right in the visa decision of their noncitizen spouse for a future court to decide, which is where *State v. Muñoz* enters the picture.

Therefore, if a visa denial infringes on a constitutional right of a U.S. citizen and there is no facially legitimate and bona fide reason provided at the time of the decision, an individual may seek judicial review.<sup>64</sup>

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57. *Id.* at 704.

58. See *Kerry v. Din*, 576 U.S. 86 (2015).

59. *Id.* at 101; see *Dep't of State v. Muñoz*, 602 U.S. 899, 909 (2024).

60. *Kerry v. Din*, 576 U.S. at 103–04 (Kennedy, J., concurring) ("The reasoning and the holding in *Mandel* control here. . . . *Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.'").

61. See *id.* at 106.

62. *Id.* at 101, 106.

63. *Id.*

64. 3A AM. JUR. 2D *Aliens and Citizens* § 920, Westlaw (database updated May 2025).

*B. The due process right of marriage and its interaction with a noncitizen spouse's visa denial in circuit caselaw precedent.*

The right to marriage has been revisited by the Supreme Court time and time again. It was recognized as a substantive due process right in *Meyer v. Nebraska*.<sup>65</sup> In decisions where the right of marriage of a U.S. citizen has been vindicated, the Court defined marriage as more than just a legal contract and recognized cohabitation of spouses as an essential component of it.<sup>66</sup>

One notable example is *Loving v. Virginia*, in which the Court struck down a statute that prohibited interracial marriage because it infringed on a citizen's fundamental right to marry whomever they choose.<sup>67</sup> In *Obergefell v. Hodges*, another famous example, the Court recognized same-sex marriage as lawful by again upholding the right to marriage.<sup>68</sup> In its reasoning, the *Obergefell* Court highlighted the importance of marriage to household stability and companionship, especially in raising children.<sup>69</sup> By vindicating the right to marry in a variety of situations, it is apparent that the Court recognizes marriage as a fundamental due process right and gives it substantial weight when it is infringed upon.

While the Supreme Court had left unanswered the question of whether there is an infringement of due process rights in a noncitizen spouse's visa denial until the *State v. Muñoz* decision, the Ninth Circuit has consistently held that there is an infringement of the right of marriage in these instances.<sup>70</sup> In *Bustamante v. Mukasey*, the court stated that “[f]reedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause.”<sup>71</sup> The Ninth Circuit's approach in *Bustamante* and subsequent cases can be readily summarized as follows. First, with a citizen's constitutionally protected right being at stake, the *Mandel* exception is triggered.<sup>72</sup> An

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65. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the word liberty in the Due Process Clause substantively includes the right to marry).

66. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[Marriage is] an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”); *Maynard v. Hill*, 125 U.S. at 211–12 (espousing marriage as a fundamental cornerstone of personal and civilizational stability).

67. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

68. *Obergefell v. Hodges*, 576 U.S. 644, 681 (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

69. See *id.* at 667 (reasoning that another basis “for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”).

70. See *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Muñoz v. Dep't of State*, 50 F.4th 906 (9th Cir. 2022).

71. *Bustamante v. Mukasey*, 531 F.3d at 1062.

72. See *id.* (“[W]e hold that under *Mandel*, a U.S. citizen raising a constitutional challenge

inquiry into whether a facially legitimate and bona fide reason was provided at the time of the denial is then set into motion, and upon finding such a reason, like a citation to a statutory provision in the INA, the decision is left undisturbed.<sup>73</sup>

*C. State v. Muñoz's treatment of the Mandel exception and due process rights.*

In *State v. Muñoz*, Justice Amy Coney Barrett did not apply the *Mandel* exception in her analysis of whether there was an infringement of Sandra Muñoz's rights when her husband's visa was denied.<sup>74</sup> She stated that "procedural due process is an odd vehicle for Muñoz's argument, and *Mandel* does not support it."<sup>75</sup> In her discussion of *Mandel*, Justice Barrett wrote that "the 'facially legitimate and bona fide reason' in *Mandel* was the justification for avoiding a difficult question of statutory interpretation," as the Court did not address whether there would be a constitutional challenge available to individuals in which no justification at all was provided in their visa denial.<sup>76</sup> This, she stated, has nothing to do with due process.<sup>77</sup>

Justice Barrett strictly adhered to the facts of *Mandel*, where an individual asserted an infringement of a First Amendment right, and differentiated First Amendment rights from due process rights to explain why *Mandel* would not apply in Muñoz's situation.<sup>78</sup> Justice Barrett wrote that a First Amendment claim is an independent constitutional right that is different from due process, with no further elaboration on what an independent constitutional right is.<sup>79</sup> Additionally, her basis for why *Mandel* is not an appropriate test is her emphasis that the substantive due process right Muñoz asserted was her right to bring her noncitizen spouse to the U.S.<sup>80</sup> Justice Barrett wrote that in order for *Mandel* to apply, the right asserted must be constitutionally protected, and because the right to bring your noncitizen spouse to the U.S. is not deeply rooted in the tradition of this country, it is not a substantive due process right at

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to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision. As long as the reason given is facially legitimate and bona fide the decision will not be disturbed."); *see also* Muñoz v. Dep't of State, 50 F.4th at 909 ("Where the denial of a visa affects the fundamental rights of a U.S. citizen, judicial review of the visa decision is permitted if the government fails to provide 'a facially legitimate and bona fide reason' for denying the visa . . . .") (citing *Mandel*).

73. *See* Bustamante v. Mukasey, 531 F.3d at 1062.

74. *See* Dep't of State v. Muñoz, 602 U.S. 899, 919 (2024).

75. *Id.*

76. *Id.* at 918.

77. *Id.*

78. *Id.* at 919.

79. *Id.*

80. *Id.*

all.<sup>81</sup> She acknowledged that precedential cases like *Trump v. Hawaii* and *Kerry v. Din* reaffirmed the narrow *Mandel* exception, but disregarded that both cases found there to be an infringement on the right to marriage when a noncitizen spouse's visa is denied.<sup>82</sup> Justice Barrett offered no elaboration as to why she simultaneously recognized *Mandel* as applying to substantive due process rights (by arguing that Muñoz did not assert a substantive due process right) while also claiming that *Mandel* differentiates "independent constitutional right[s]" from due process ones.<sup>83</sup>

In Justice Barrett's due process analysis, she argued that while Muñoz invoked the "fundamental right of marriage," the right asserted was actually "the right to reside with her noncitizen spouse in the United States."<sup>84</sup> She claimed that this right is not merely spousal cohabitation, but a right for Muñoz's husband to immigrate to the U.S.<sup>85</sup> She reasoned that there is an "entitlement to bring Asencio-Cordero to the United States."<sup>86</sup> Justice Barrett subsequently treated this as a novel due process right and applied the appropriate test of whether the asserted right is "deeply rooted in this Nation's history and tradition."<sup>87</sup> Justice Barrett then provided an in-depth analysis in how a "right to immigrate" is not consistent with the U.S.'s history and tradition, in that it would conflict with the plenary power and the doctrine of consular nonreviewability.<sup>88</sup> The opinion stated that while Congress frequently prioritizes the unity of an immigrant family, this is "a matter of legislative grace rather than fundamental right" as provided in the Constitution.<sup>89</sup> There is no further explanation on why Justice Barrett chose to focus on the right to marriage in this instance through an immigration lens, rather than vindicating Muñoz's due process rights as a U.S. citizen. Based on the above reasoning, the Court held that a U.S. citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.<sup>90</sup>

Adding more confusion to the substantive versus procedural due process debate, Justice Barrett constantly switched between saying the asserted right to immigrate is procedural and that it is substantive throughout the opinion.<sup>91</sup> Justice Barrett has generally been described as

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81. *Id.*

82. *Id.* at 908.

83. *Id.* at 919.

84. *Id.* at 910.

85. *Id.*

86. *Id.*

87. *Id.* at 903 (quoting *Washington v. Glucksberg*, 521 U. S. 702, 720–721 (1997)).

88. *See id.* at 911–16.

89. *See id.* at 916 (quoting *Kerry v. Din*, 576 U.S. 86, 97 (2015)).

90. *Dep't of State v. Muñoz*, 602 U.S. 899, 919 (2024).

91. *Id.* at 918–19 ("Muñoz would have to claim that the denial of Asencio-Cordero's visa

an originalist.<sup>92</sup> In one of her law review articles, she claimed that while the “basic existence of substantive due process doctrine is no longer subject to challenge,” originalists may refuse to read precedent expansively due to their skepticism that the Due Process Clause protects substantive rights as well as procedural rights.<sup>93</sup> The *Muñoz* opinion offers no additional insight into whether Justice Barrett leans one way or the other on this debate. However, the reasoning in *Muñoz* leads one to wonder whether the Court’s holding that no liberty interest is infringed when a spouse’s visa is denied is a result of Justice Barrett’s hesitation to interpret the Due Process Clause substantively due to her originalist ideology.

## II. Analysis

The reasoning underlying the *Muñoz* decision is erroneous for two reasons. First, the Court failed to invoke the *Mandel* exception and disregarded its own precedent in doing so. Second, the Court grounded its decision on a misunderstanding of the right that was infringed upon. The discussion that follows analyzes each error in more detail.

### A. The *Muñoz* opinion’s error in its failure to apply the *Mandel* test.

The first error by the *Muñoz* Court was its failure to apply the *Mandel* test. The roundabout manner in which Justice Barrett discussed *Mandel* and its application is confusing and does not clarify why the exception is not appropriate in *Muñoz*’s situation.<sup>94</sup> Justice Barrett made two separate arguments in her opinion: 1) there is a narrow exception when a U.S. citizen’s substantive due process rights are infringed upon, but the right *Muñoz* asserted is a right to immigrate, which is not a due

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violated her substantive due process right to bring her noncitizen spouse to the United States .... [P]rocedural due process is an odd vehicle for *Muñoz*’s argument.”).

92. See, e.g., Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution ‘Doesn’t Change Over Time’*, NPR (Oct. 13, 2020, at 10:08 ET) <https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time> [https://perma.cc/H8EU-QE93].

93. Amy C. Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1736 n. 146 (2013); see also Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022) (noting that Justice Barrett was part of the majority in *Dobbs* that overturned well-settled substantive due process precedent); Nicholas Serafin, *Obergefell after Dobbs and the Future of Substantive Due Process*, 52 N. KY. L. REV. 215, 215 (2025) (“The [Dobbs] decision itself – which Chief Justice Roberts described as dealing ‘a serious jolt to the legal system’ – signaled a willingness to upend settled substantive due process precedent regardless of public opinion and regardless of the effect such a decision would have on related state and federal law ....”). Justice Barrett siding with the majority in such a decision corroborates a skepticism around substantive due process rights.

94. See *Dep’t of State v. Muñoz*, 602 U.S. 899, 918-19 (2024).

process right;<sup>95</sup> and 2) *Mandel* can be differentiated as a test for “independent constitutional right[s],” such as a First Amendment free speech claim, and therefore *Mandel*’s holding does not extend to due process rights.<sup>96</sup> These two assertions are paradoxical in that they simultaneously recognize the place of the *Mandel* exception in due process claims but also state that the exception should not be applied to such claims.

The distinction between independent constitutional rights and due process also leads to confusion. It is unclear what Justice Barrett means by the phrase “independent constitutional right.”<sup>97</sup> She does not further elaborate on this term, other than mentioning that free speech is such a right.<sup>98</sup> It is well-established that constitutional rights are individual rights guaranteed by the Constitution.<sup>99</sup> Due process rights clearly constitute constitutionally guaranteed rights since they are written into the text of the Fifth Amendment.<sup>100</sup> While substantive due process rights, such as the right to marriage, are not explicitly mentioned in the Constitution, there is Supreme Court precedent recognizing them as individual constitutionally guaranteed rights.<sup>101</sup> These are decisions that have not yet been overturned, and it is incorrect for the Court to disregard its precedent.<sup>102</sup> Without prior indication that those rights are not independent, or at least an explanation for why they are not, it is erroneous for Justice Barrett to make such a distinction and provide a different view of what *Mandel* stands for on that basis.

This brings us to the failure to apply the *Mandel* exception. As discussed earlier in this Note, the Supreme Court has recognized the *Mandel* exception which applies to constitutional rights, not limited to those similar to the First Amendment.<sup>103</sup> Previously the Court has

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95. *See id.* at 919.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See, e.g.*, 13 CAL. JUR. 3D *Constitutional Law* § 200, Westlaw (database update Apr. 2025) (“Indeed, constitutional rights like the guarantees that all citizens enjoy equal protection of the laws and due process of law are not structural limitations on government power in the Supremacy Clause sense, but they are rights given to individual citizens which limit governmental power generally . . .”).

100. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”).

101. *See supra* Section I.B.

102. *See* Min K. Lee, *Stare Decisis on Thin Ice: Mulling Over the Supreme Court After Ramos v. Louisiana*, 45 SETON HALL LEGIS. J. 295, 307–11 (2021) (“In place to ensure that courts will decide similar cases in a consistent manner, . . . stare decisis is the legal principle for awarding precedential force to prior court decisions, and it transfers a court decision from the hands of the judge into the realm of either binding or strongly persuasive legal principles.”).

103. *See, e.g.*, *Trump v. Hawaii*, 585 U.S. 667, 698 (2018); *Kerry v. Din*, 576 U.S. 86, 103–

validated the *Mandel* exception's application in scenarios where a U.S. citizen has an immediate relative who is a foreign national and they are denied entry into the country.<sup>104</sup> Justice Barrett acknowledged prior precedent from *Trump v. Hawaii* and *Kerry v. Din*, but only to affirm that the *Mandel* exception exists.<sup>105</sup> In her discussion of both *Trump* and *Din*, she disregarded the Supreme Court's recognition that the hardship a U.S. citizen would experience as a result of their family member's visa denial is concrete enough to suggest an infringement of constitutional rights.<sup>106</sup>

In failing to apply the *Mandel* exception, Justice Barrett ignored the infringement of the U.S. citizen's right to marriage and focused instead on the absence of a noncitizen's right to immigrate. A proper application in *Muñoz* of the *Mandel* holding would be as follows: prior precedent suggests that a noncitizen spouse's visa denial infringes on the U.S. citizen's due process right to marriage.<sup>107</sup> The *Mandel* exception would then be triggered, setting into motion an inquiry into whether a facially legitimate and bona fide reason was provided at the time of Asencio-Cordero's visa decision.<sup>108</sup> Because the consular official referenced a specific statutory provision at the end of the decision-making process, a court would find this sufficient and would not permit judicial review.<sup>109</sup> The Court's own precedent, as it stands, favors leaving Asencio-Cordero's visa denial undisturbed. This approach would vindicate the U.S. citizen's rights while respecting Congress's plenary power and the doctrine of consular nonreviewability.

While Justice Sonia Sotomayor's dissent also emphasizes the *Mandel* test as a remedy in this situation, it ignores the practical reality of its application.<sup>110</sup> Her argument is that the *Mandel* test will result in the

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04, 106 (2015) (Kennedy, J., concurring).

104. See *Trump v. Hawaii*, 585 U.S. at 698.

105. Dep't of State v. *Muñoz*, 602 U.S. 899, 908 (2024).

106. See *id.*; *Kerry v. Din*, 576 U.S. at 103-04, 106 (Kennedy, J., concurring); *Trump v. Hawaii*, 585 U.S. at 698.

107. See *Trump v. Hawaii*, 585 U.S. at 698 ("This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals."); *Kerry v. Din*, 576 U.S. 86, 103-04, 106 (2015) (Kennedy, J., concurring) (indicating in his binding concurrence that *Mandel* is applicable in a noncitizen spouse's visa denial and thus implying that there is an infringement of a citizen's right to marriage in that instance).

108. See, e.g., *Trump v. Hawaii*, 585 U.S. at 704.

109. See *Kerry v. Din*, 576 U.S. at 103-04, 106 (Kennedy, J., concurring); *Trump v. Hawaii*, 585 U.S. at 704.

110. See Dep't of State v. *Muñoz*, 602 U.S. 899, 936 (2024) (Sotomayor, J., dissenting) ("[W]hen a visa denial burdens a noncitizen's constitutional rights, . . . a court should accept the Government's 'facially legitimate and bona fide reason.' That minimal requirement ensures that courts do not unduly intrude on 'the Government's sovereign authority . . .' while also ensuring that the Government does not arbitrarily burden citizens' constitutional rights.") (citations omitted).

citizen-noncitizen couple receiving a factual basis for the visa denial.<sup>111</sup> The reality, however, is that this test almost never leads to judicial review such that the factual basis for the visa denial would be revealed.<sup>112</sup> Given the extremely low threshold for what counts as a bona fide and facially legitimate reason that must be provided at the time of a visa decision, there is a more significant importance in applying the *Mandel* test: simply, the recognition that a due process right has, in fact, been infringed upon.<sup>113</sup> The *Mandel* test is not triggered unless a U.S. citizen's rights are infringed upon.<sup>114</sup> Even if the resulting outcome is that no factual basis for the visa denial is revealed, the application of the test itself in this case acknowledges the infringement of a right, thereby respecting the due process rights of U.S. citizens. Further, the dissent continues to look at the issue through an immigration lens as Justice Sotomayor discusses the idiosyncrasies of immigration law and its potential avenues of reform at length.<sup>115</sup> Similar to Justice Barrett's majority, a focus on immigration law draws the attention away from the curtailment of a U.S. citizen's due process rights.

The reasoning in *Muñoz* is confusing in its inconsistent application and interpretation of *Mandel* to situations where a U.S. citizen asserts an infringement of their right to marriage in their noncitizen spouse's visa denial. It is unclear why Justice Barrett offers two contradictory arguments regarding *Mandel*'s application to due process rights and why she makes the distinction between due process rights and "independent constitutional right[s]."<sup>116</sup> The lack of clarity and explanation will create subsequent confusion to lower courts when they attempt to discern what the appropriate interpretation of *Mandel* actually is.

#### *B. The Muñoz opinion's error in its due process analysis.*

The second error the *Muñoz* Court makes is in its analysis of whether there is a due process right infringed upon in the instance of Asencio-Cordero's visa denial. The Court concludes that there is no constitutionally protected right implicated.<sup>117</sup> Despite *Muñoz* invoking the infringement of her right of marriage when her husband's visa was

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111. *Id.* at 939–40 ("The Government's exclusion of Muñoz's husband entitles her at least to the remedy required in *Mandel*: a 'facially legitimate and bona fide reason' for the exclusion.")

112. *See supra* notes 41–48.

113. *See, e.g.*, Dep't of State v. Muñoz, 602 U.S. at 934 (Sotomayor, J., dissenting).

114. *Id.*

115. *Id.* at 922–23 (Sotomayor, J., dissenting).

116. *See id.* at 919.

117. *Id.* at 919 (2024) ("[The argument that Asencio-Cordero's visa denial violated Muñoz's substantive due process rights] cannot succeed . . . because the asserted right is not a longstanding and 'deeply rooted' tradition in this country.") (citation omitted).

denied,<sup>118</sup> Justice Barrett argued that Muñoz is actually claiming a right to have her husband immigrate to the U.S.<sup>119</sup> This is a recurring argument in similar cases that hold a U.S. citizen does not have a constitutional liberty interest in their noncitizen spouse's visa denial.<sup>120</sup> This assertion is conclusory and skips a few steps in its reasoning.

Considered within the context of Sandra Muñoz and Luis Asencio-Cordero's situation, it cannot be said that she asserted a right for him to immigrate to the U.S. When Sandra and Luis got married, they were aware that they had to subsequently go through the appropriate immigration procedures for Luis to lawfully reside in the U.S.<sup>121</sup> By following the correct legal procedures to apply for a visa after their marriage, the couple showed an understanding that marriage does not guarantee automatic passage to the U.S.<sup>122</sup> The fact that the couple participated in the administrative hurdles of immigration procedures is incompatible with an assertion of a right to immigrate, which assumes that one has the entitlement to enter and live in a country as they wish. Therefore, this is likely an incorrect interpretation of the right Sandra Muñoz claimed has been infringed and must be re-evaluated.

A more apt approach for the Court would have been to analyze whether there is an infringement on the right to marriage as pled by Sandra Muñoz, without characterizing it as something different. As discussed above, the right to marriage has substantial weight in the eyes of the Supreme Court.<sup>123</sup> Spousal cohabitation is seen as an essential component of marriage, which is itself viewed as a harmonious union between two individuals whose joint life provides a better outcome for the development of children.<sup>124</sup>

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118. *Id.* at 910 ("Muñoz invokes the 'fundamental right of marriage,' but the State Department does not deny that Muñoz (who is already married) has a fundamental right to marriage.")

119. *Id.* ("Muñoz claims something distinct: the right to *reside with her noncitizen spouse in the United States*. That involves more than marriage and more than spousal cohabitation—it includes the right to have her noncitizen husband enter (and remain in) the United States.").

120. See, e.g., *Kerry v. Din*, 576 U.S. 86, 89 (2015) ("[The denial of a noncitizen spouse's visa is] nothing more than a deprivation of her spouse's freedom to immigrate into America."); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) ("But the essence of appellants' claim [against the deportation of her husband], when it is analyzed, is a right to live in this country.").

121. See *Dep't of State v. Muñoz*, 602 U.S. at 904–05.

122. See *id.* at 922 (Sotomayor, J., dissenting) ("Marriage is not an automatic ticket to a green card. A married citizen-noncitizen couple must jump through a series of administrative hoops to apply for the lawful permanent residency that marriage can confer.").

123. See *supra* Section I.B.

124. *Id.*

Based on this description of marriage from the Supreme Court's own precedent, it is difficult to rationalize how the right of marriage would not be infringed when two spouses are separated because of a visa decision. In such a separation, the so-called "harmonious union" ceases to exist, and there is no joint life they can continue to build together. Luis Asencio-Cordero and Sandra Muñoz had built a home and raised a child together during their marriage of over fourteen years.<sup>125</sup> When that life came to an abrupt halt because of her spouse's visa denial, it would be natural to conclude that Sandra Muñoz would feel deprived of her ability to enjoy that marriage to the same degree as she did prior to her husband's denial of entry. To assert otherwise is to undermine marriages between citizen-noncitizen spouses as compared to citizen-citizen spouses.<sup>126</sup> As discussed later in this section, it is possible to acknowledge the infringement of the right of marriage without claiming a right for the noncitizen spouse to immigrate, contrary to what Justice Barrett argues.

A solution offered by courts is that the U.S. citizen can relocate to the country of the noncitizen spouse to avoid physical separation.<sup>127</sup> However, then, the U.S. citizen's right to reside in America is infringed upon, and that is one of the most intrinsic and fundamental rights associated with being an American citizen.<sup>128</sup> Given the availability of these rights to other U.S. citizens who are not married to noncitizens, the Court not recognizing their infringement undermines these rights in the specific instance of their connection to a noncitizen.

It appears as though the Court is reluctant to agree there is an infringement of due process rights in fear of stepping on the toes of the plenary power and the doctrine of consular nonreviewability. This is apparent in the lengthy discussion of the history and the strength of Congress's authority in these matters as detailed in the *Muñoz* opinion.<sup>129</sup>

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125. Dep't of State v. Muñoz, 602 U.S. at 927 (Sotomayor, J., dissenting) ("They have been married since 2010 and have a child together.").

126. See *id.* at 931–33 (Sotomayor, J., dissenting) ("There can be no real question that excluding a citizen's spouse from the country 'burdens' the citizen's right to marriage as this Court has repeatedly defined it."). Compare *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015) (emphasizing that the act of living with another is integral to the purpose of marriage) with *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) (positing that cohabitation is a mere physical condition that marriage does not depend on).

127. *Swartz v. Rogers*, 254 F.2d at 339 ("The physical conditions of the marriage may change, but the marriage continues.").

128. See, e.g., *Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://my.uscis.gov/citizenship/information> [<https://perma.cc/H5VV-C37Z>] ("You have the right to live in the United States.").

129. Dep't of State v. Muñoz, 602 U.S. at 911–12 ("[O]nce Congress began to restrict immigration, 'it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States.'") (citing *Kerry v. Din*, 576 U.S. 86, 96). In its discussion of the congressional authority in all matters relating to immigration, the Court continues to emphasize Congress's restrictive nature in admitting

However, recognizing the infringement of constitutionally protected rights does not undermine immigration law or the broad discretion for Congress to exclude or admit foreign nationals with limited judicial interference. As Ninth Circuit precedent and the discussion in Section I, Part B of this Note indicates, it is perfectly possible to vindicate a U.S. citizen's individually guaranteed rights while still leaving a visa decision undisturbed by following the *Mandel* test.<sup>130</sup> Because of how narrow the *Mandel* exception is, there will be no room for judicial review as long as a visa decision has a citation to a statutory provision in the INA. The low threshold for what counts as a facially legitimate and bona fide reason to satisfy the *Mandel* test suggests that, in practice, asserting an infringement of the right to marriage is essentially asking for a sliver of more information for a spouse's visa denial beyond a statutory provision in the INA. It is not a claim that the noncitizen spouse should be residing in the U.S., but a request for an explanation as to why a married couple cannot live together, even after following proper visa procedures.

By characterizing the right to marriage as a right to immigrate instead, the Court limited its discussion to immigration law, thereby ignoring and undermining the due process rights issues of the U.S. citizen involved. Instead of attempting to vindicate a U.S. citizen's rights while still respecting Congress's plenary power and the doctrine of consular nonreviewability using the *Mandel* test, the Court resorted to incorrectly assuming the issue to be concerned with immigration and refused to fully engage in it.

In arguing that Sandra Muñoz claimed a right to immigrate, Justice Barrett claimed that she is asserting a new due process right.<sup>131</sup> A new due process right is only recognized if it is deeply rooted in the Nation's history and tradition.<sup>132</sup> If Muñoz was asserting a right for her noncitizen spouse to immigrate, it would be correct to conclude that it is not deeply rooted in the Nation's history and tradition, given the scope of Congress's authority in the plenary power and the doctrine of consular nonreviewability.<sup>133</sup> But, as the analysis above indicates, Sandra Muñoz was in fact asserting a right to marriage, *not* claiming her spouse has a

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foreign nationals. *Id.* at 912–14.

130. *See supra* Section I.B; *Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008); *Muñoz v. Dep't of State*, 50 F.4th 906 (9th Cir. 2022), *rev'd sub nom.*, *Dep't of State v. Muñoz*, 602 U.S. 899 (2024).

131. *Dep't of State v. Muñoz*, 602 U.S. at 903 (“To establish this premise, she must show that the asserted right is ‘deeply rooted in this Nation’s history and tradition.’”).

132. *See id.*; *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (“[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’....”).

133. *See Dep't of State v. Muñoz*, 602 U.S. at 919.

right to immigrate. The Court cannot deny that the right of marriage is deeply rooted in the Nation's history. The right of marriage has extensive precedent that illustrates the Court's commitment in prioritizing this right.<sup>134</sup> This approach would vindicate the U.S. citizen's due process rights without undermining the plenary power or the doctrine of consular nonreviewability.

*C. The consequences of Muñoz's errors and a pattern of unfair curtailment of U.S. citizens' rights if they are married to noncitizens.*

*State v. Muñoz* highlights a recurring pattern of the Supreme Court curtailing a U.S. citizen's rights when they have a connection to a noncitizen by marriage.<sup>135</sup> The Court tends to prioritize a noncitizen's absent rights instead of vindicating the U.S. citizen's due process rights.<sup>136</sup> The preferential treatment between a citizen-citizen couple and a citizen-noncitizen couple becomes crystal clear in the following comparison between *Obergefell v. Hodges* and *Kerry v. Din*.

As mentioned in Section I, Part B, *Obergefell v. Hodges* is a landmark decision that is celebrated for its expansion of the right to marriage to include same-sex couples.<sup>137</sup> By broadening the scope of this right to legalize same-sex marriage, the decision is inclusionary and reaffirms the notion that marriage is a socially rewarding endeavor that brings fulfillment in the union of two people building a life together.<sup>138</sup> Framing marriage in this way makes it clear that marriage is not a mere contract.

However, *Kerry v. Din* has an entirely different approach to the meaning of the right to marriage. The *Din* Court describes marriage in a contractual manner. The argument here is that if the marriage is still legal, the right to marriage has not been infringed upon.<sup>139</sup> But as with Fauzia Din's situation following her husband's visa denial, a marriage where the two spouses are physically separated with no indication of when they will be reunited is reduced to being merely contractual. The right to marriage as defined in the *Obergefell* decision simply does not align with the Court's description of marriage in the *Din* opinion.

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134. *See supra* Section II.B.

135. *See supra* Section I.B.

136. *See supra* Section I.A.

137. *See Obergefell v. Hodges*, 576 U.S. 644 (2015).

138. *Id.* at 681 ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.").

139. *Kerry v. Din*, 576 U.S. 86, 94 (2015) ("[T]he Federal Government here has not attempted to forbid a marriage.").

The decisions of *Obergefell* and *Din* were made *eleven days* apart.<sup>140</sup> Because they were decided within only eleven days from one another, the discrepancy in the treatment of the institution of marriage appears more likely to be the result of the factual and societal context instead of an evolution in the legal understanding of marriage over time. The Court seems to approach marriage expansively with regard to same-sex marriage rights, yet restrictively when evaluating a marriage between a citizen and noncitizen. The stark contrast between *Obergefell's* view of marriage as an opportunity for two people to build a life together and *Din's* view that spousal cohabitation is a mere physical condition of marriage suggests that the right to marriage is not given equal weight when a U.S. citizen is married to a foreign national.

Another result of this approach is the infringement upon the right of marriage in another aspect: raising children. *Obergefell* and other Supreme Court decisions concerning the right to marriage are straightforward in emphasizing the importance of marriage in the development of children.<sup>141</sup> In *Obergefell*, the right to marriage is upheld in part because of the benefit to children of being raised in a stable household.<sup>142</sup> By holding that the separation of spouses is just a physical condition, the Court undermines the effect that spousal separation can have on the children involved.<sup>143</sup> In *State v. Muñoz*, the majority opinion makes no mention of Luis Asencio-Cordero and Sandra Muñoz's child—the existence of their child is only apparent in Justice Sotomayor's dissent.<sup>144</sup> Scientific research confirms that the distress experienced due to the separation of families through immigration procedures after developing emotional ties is positively correlated with the emergence of physical and depressive symptoms.<sup>145</sup> Because it can affect the mental and physical health of children, and thereby their development, it is not appropriate for the Court to depict the separation of families as a simple physical condition with no other effects.

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140. *Obergefell v. Hodges*, 576 U.S. 644 (June 26, 2015); *Kerry v. Din*, 576 U.S. 86 (June 15, 2015).

141. See *Obergefell v. Hodges*, 576 U.S. at 667–68 (2015) (“A third basis for protecting the right to marry is that it safeguards children and families . . . . Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (explaining that the concept of liberty discussed in the Fourteenth Amendment includes the rights to marry and bring up children, among others).

142. *Obergefell v. Hodges*, 576 U.S. at 668.

143. See *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958) (stating that cohabitation is a mere physical condition that marriage does not depend on).

144. Dep't of State v. Muñoz, 602 U.S. 899, 921 (2024) (Sotomayor, J., dissenting).

145. See Thania Galvan, Dana Rusch, Melanie M. Domenech Rodriguez & Luz M. Garcini, *Familias Divididas [Divided Families]: Transnational Family Separation and Undocumented Latinx Immigrant Health*, 36 J. FAMILY PSYCH. 513, 513 (2022).

From these instances, it is clear that the Court's judicial focus on legal issues concerning a citizen-noncitizen couple through an immigration lens has direct consequences of undermining the U.S. citizen's right to marriage, a constitutionally guaranteed due process right.

### **Conclusion**

The Supreme Court decision of *State v. Muñoz* is erroneous on two accounts: 1) it failed to apply the *Mandel* exception and 2) it misunderstood the right that was allegedly infringed upon. The Court focuses on the issue of an infringement of a U.S. citizen's constitutionally protected rights from an immigration standpoint. But as a result, the Court undermined the due process rights of U.S. citizens. It is imperative for the Court to vindicate the rights of the United States citizen in their marriage with a noncitizen moving forward. While seemingly irreconcilable, the Court should work towards rectifying the interaction of constitutionally protected rights for a U.S. citizen with the lack thereof for noncitizens. This Note illustrates that it is possible to do so with the use of the *Mandel* test, but there might be other approaches that would prove to be efficient, constructive resolutions to this issue.



## Mind the Gap: Time to Rehabilitate Section 504 to Prohibit Disparate Impact Discrimination

Shawn Grant<sup>†</sup>

### Abstract

*Section 504 of the Rehabilitation Act of 1973 is a landmark civil rights statute that prohibits disability-based discrimination by recipients of federal funding. While the statute plays a crucial role in protecting the rights of people with disabilities in the United States, the scope of the discrimination it prohibits remains unsettled. Amid growing judicial skepticism, executive rollbacks of diversity and inclusion initiatives, attacks on disparate impact theory and the erosion of administrative enforcement mechanisms, the statute's continued viability as a tool for challenging disparate impact discrimination is at risk.*

*This Article argues that disparate impact liability under § 504 is essential for addressing the often unintentional, but harmful exclusion of individuals with disabilities, frequently resulting from acts of "thoughtlessness, indifference and benign neglect." It explores the ambiguity regarding whether § 504 provides a private right of action for disparate impact claims, addresses the critical role of agency enforcement and examines the growing threats posed by the broad exercise of executive power and judicial and administrative retrenchment.*

*In conclusion, the Article calls for urgent Congressional action to amend § 504 or enact clarifying legislation. Recognizing that federal reform may not be forthcoming, the Article also suggests alternative strategies, including state-level legislation and grassroots advocacy, as means to preserve and advance the protections that disparate impact theory affords to people with disabilities.*

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## Introduction

Several decades ago, Congress took affirmative steps to establish broad civil rights protections for individuals with disabilities. Section 504 of the Rehabilitation Act of 1973 (§ 504)<sup>1</sup> was a landmark piece of legislation and remains a cornerstone of federal anti-discrimination law. A precursor to the Americans with Disabilities Act (ADA),<sup>2</sup> § 504 was groundbreaking in its reach, prohibiting discrimination in any program or activity by governmental and private recipients of federal funding<sup>3</sup> through the Congressional Spending Clause.<sup>4</sup> As one of the earliest legal protections for individuals with disabilities, § 504 has been pivotal in the effort to secure basic civil rights in areas such as education, employment, housing, and healthcare, among other areas of public life. In the fight for equality, disparate impact discrimination claims, alleging liability for seemingly neutral policies or practices that disproportionately impact a protected group, have been critical to supporting disability rights. Individuals with disabilities are frequently disadvantaged by practices and policies that, while not intentionally discriminatory, still result in unequal outcomes. However, despite § 504's foundational role, it remains unclear whether it prohibits and provides a private right of action for both disparate treatment and disparate impact discrimination.

In the current climate, in which the executive branch is making significant efforts to dismantle so-called diversity, equity, and inclusion (DEI) and diversity, equity, inclusion, and accessibility (DEIA) initiatives

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1. 9 U.S.C. § 794.

2. 42 U.S.C. §§ 12101-12213.

3. Section 504's prohibition on discrimination reaches any "program or activity receiving Federal financial assistance" and includes federal executive agencies and the U.S. Postal Service. 29 U.S.C. § 794(a). By comparison, the ADA extends further to include entities that do not receive federal financial assistance, including state and local governments. The ADA does not apply to federal executive agencies or the U.S. Postal Service; rather, these entities are covered under § 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794(a). In many cases, the definition of "program or activity" under § 504 has been interpreted broadly. 29 U.S.C. § 794(b). *See* Brief for National Conference of State Legislatures et al. as Amici Curiae Supporting Petitioners, *CVS Pharmacy, Inc. v. Doe*, No. 20-1374 (U.S.), (citing 29 U.S.C. §794(a)) (2018) (defining "program or activity" broadly to include "all operations of" any government instrumentality "any part of which is extended Federal financial assistance"). *See also*, JARED P. COLE, CONG. RSCH. SERV., LSB10459, APPLICABILITY OF FEDERAL CIVIL RIGHTS LAWS TO RECIPIENTS OF CARES ACT LOANS (2020).

4. U.S. CONST. art. 1, § 8, cl. 1.

in both the public<sup>5</sup> and private sectors<sup>6</sup> and simultaneously targeting disparate impact theory,<sup>7</sup> critical to identifying the individual impact of systemic discrimination, there is increased urgency to strengthen statutory safeguards for vulnerable populations, such as the people with disabilities. These efforts, coupled with the lack of clarity in the text of the statute, pose a serious threat to the continued viability of § 504 as a tool for fully enforcing the rights of people with disabilities.

Currently, both private rights of action for disparate impact claims and agency enforcement mechanisms face threats.<sup>8</sup> Unlike claims of intentional discrimination, the availability of a private right of action for disparate impact hangs precariously on a forty-year-old Supreme Court precedent, and the federal courts remain split on the issue.<sup>9</sup> Recent Supreme Court decisions and shadow docket activity<sup>10</sup> demonstrate a growing willingness to overturn precedent and a progressive narrowing of disparate impact theory. The Court's recent decisions have also imposed substantial constraints on the powers of federal administrative agencies, which play a key role in ensuring the comprehensive enforcement of protections provided under § 504 and other

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5. During the first days in office for his second term, President Trump issued four initial executive orders directly aimed at eliminating policies promoting diversity, equity and inclusion in the public sector. *See Initial Rescissions of Harmful Executive Orders and Actions*, Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025); *Ending Radical and Wasteful Government DEI Programs and Preferencing*, Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025); *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025); and *Ending Radical Indoctrination in K-12 Schooling*, 90 Fed. Reg. 8853 (Jan. 29, 2025).

6. *See, e.g.*, Memorandum on Preventing Abuses of the Legal System and the Federal Courts, 2025 DAILY COMP. PRES. DOC. NO. 00387 (Mar. 21, 2025); Addressing Risks from Perkins Coie LLP, Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 6, 2025) (directing the EEOC to look at large, influential, or industry leading law firms and their compliance with race-based and sex-based non-discrimination law).

7. President Trump issued Restoring Equality of Opportunity and Meritocracy, Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025), calling for the repeal of disparate impact regulations under Title VI, as well as directing all federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," and directing the Attorney General and the Chair of the EEOC to review all pending matters that rely on a theory of disparate-impact liability and to "take appropriate action" consistent with the policy stated in the Executive Order.

8. *See infra* Part III.

9. *See Alexander v. Choate*, 469 U.S. 287 (1985). *See infra* Section II.B.i.

10. The term "shadow docket," coined by Professor William Baude, refers to the set of decisions and orders issued by the United States Supreme Court outside of the regular, public docket of argued and fully briefed cases. *See William Baude, Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015). The growing use of the shadow docket has drawn increasing attention from legal scholars, lawmakers and the public. *See, e.g.*, Stephen I. Vladeck, *Putting the "Shadow Docket" in Perspective*, 17 HARV. L. & POL'Y REV. 289, 289–90 (2023).

antidiscrimination statutes.<sup>11</sup> For example, the Department of Justice recently revoked previously issued guidance clarifying how disparate impact may be assessed under Title VI, which served as a model for § 504.<sup>12</sup>

This Article emphasizes that without clarification of the scope of § 504, the rights of people with disabilities are increasingly vulnerable to legal challenges, especially given the current political and legal pressures. The continued uncertainty will further undermine protections against disparate impact discrimination, weakening disability rights. The rollback of DEI and DEIA initiatives, and the erosion of federally mandated supports and services under § 504 for many students with disabilities, further underscores the urgent need for Congress to act. Part I of this Article discusses the importance of disparate impact theory in protecting the rights and equal access of people with disabilities. It also discusses the role of § 504 in prohibiting discriminatory practices, while highlighting some of the concerns raised by entities subject to § 504, such as compliance challenges and the scope of its application. Part II demonstrates why the existence of a private right of action for disparate impact discrimination under § 504 is in question, by examining its text, judicial rulings, and recent significant legal challenges. Part III discusses the judicial trends and executive actions that potentially threaten the protections of § 504 through either private suits or agency enforcement. These include Supreme Court decisions that suggest that, if the questions were presented to the Court, it would reject the existence of disparate impact claims and nullify the regulations prohibiting disparate impact discrimination. Part IV advocates for Congress to act by either amending § 504 or issuing clarifying legislation. However, as such action may be unlikely in the current political environment, it suggests state legislation and grassroots advocacy as the most viable pathways towards reform.

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11. Enforcement is carried out by the federal agency that provides the financial assistance to the relevant program or activity. For example, the U.S. Department of Housing and Urban Development (HUD) enforces § 504 with respect to HUD funded programs and is one of several agencies that have implemented regulations incorporating § 504's protections. In 1988, HUD issued its § 504 regulations for federally conducted programs and activities. *See General Prohibitions Against Discrimination*, 24 C.F.R. § 9.130.

12. *See Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281*, 28 C.F.R. pt. 42, (Dec. 10, 2025) (rescinding portions of the regulations that prohibit conduct having a disparate impact) *See also U.S. DEP'T OF JUST., CIV. RTS. DIV., TITLE VI LEGAL MANUAL, SECTION IV-INTERPLAY OF TITLE VI WITH TITLE IX, SECTION 504, THE FOURTEENTH AMENDMENT, AND TITLE VII* (2024) ("Title VI served as the model for several subsequently promulgated statutes that prohibit discrimination on other grounds in federally assisted programs or activities, including Title IX (sex discrimination in education programs) and Section 504 (disability discrimination)).

## I. The Importance of Disparate Impact

The legal system generally recognizes both disparate treatment and disparate impact discrimination. The Supreme Court's decision in *Griggs v. Duke Power Co.* marked a key moment in the development of disparate impact doctrine under Title VII of the Civil Rights Act of 1964 (CRA).<sup>13</sup> The case involved an employment criterion for obtaining higher-paying jobs at an electricity generating plant that disproportionately and adversely impacted Black employees and was shown to be unnecessary for performing the jobs in question.<sup>14</sup> Despite Duke Power's claim that the requirement was neutral and not intentionally discriminatory,<sup>15</sup> the Court ruled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."<sup>16</sup> In the wake of *Griggs*, disparate impact has spread to other areas of the law beyond employment law. The Supreme Court, for example, has interpreted the doctrine to apply, *inter alia*, to housing, under the Fair Housing Act (FHA),<sup>17</sup> as well as to disability.<sup>18</sup> While disparate impact theory has not been without its detractors, the courts have generally adopted it as a means to address unintentional discrimination.<sup>19</sup>

### A. Disability Rights

As with racial discrimination in employment, discrimination based on disability is frequently the result of facially neutral laws and policies that are disparate in "effect" rather than "by design."<sup>20</sup> Discrimination<sup>21</sup>

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13. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

14. *Id.* at 431-32.

15. *Id.* at 432.

16. *Id.* at 431.

17. *Tex. Dep't of Hous. & Cnty. Affs. v. Inclusive Cnty. Project, Inc.*, 576 U.S. 519, 539 (2015) ("Recognition of disparate-impact claims is consistent with the FHA's central purpose . . . [T]he FHA . . . was enacted to eradicate discriminatory practice within a sector of our Nation's economy.").

18. *See Alexander v. Choate*, 469 U.S. 287, 299 (1985).

19. For example, in two pivotal opinions decided by the Supreme Court, Justice Thomas opposed disparate impact theory. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (Thomas, J., concurring) ("The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact."); *see also Tex. Dep't of Hous. and Cnty. Affs.*, 576 U.S. at 547 (Thomas, J., dissenting) ("[T]he foundation on which the Court builds its latest disparate-impact regime—*Griggs v. Duke Power Co.*—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis*, I would not amplify its error by importing its disparate-impact scheme into yet another statute.") (internal citations omitted).

20. *Alexander v. Choate*, 469 U.S. 287, 297 (1985).

21. Section 504 uses the term "discrimination" without specifying the scope of the

against people with disabilities is often unintentional, resulting from acts of "thoughtlessness and indifference—of benign neglect,"<sup>22</sup> but is still harmful to individuals. These everyday instances of neglect are ubiquitous: voters are deprived of their rights because ballot return methods are inaccessible;<sup>23</sup> otherwise qualified applicants are denied employment solely because they are deaf or hearing impaired;<sup>24</sup> access to lifesaving medical treatments are limited when disability is inappropriately considered in eligibility criteria;<sup>25</sup> and students with disabilities are denied equal educational opportunities because platforms, websites, or other course materials provided are inaccessible or accommodations are lacking.<sup>26</sup> These and many other practices, while not always intended to exclude, systemically disadvantage people with disabilities and reinforce ableism. Prior to the enactment of § 504, individuals with disabilities had no recourse under federal law to challenge such policies.<sup>27</sup> Today, the ability to bring claims based on disparate impact remains essential to protecting disability rights and fully realizing the anti-discrimination goals of § 504 and Title II of the ADA.<sup>28</sup>

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discrimination covered. 29 U.S.C. § 794 provides that: "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

22. *Alexander v. Choate*, 469 U.S. at 295.

23. See *Cal. Council of the Blind v. Weber*, 758 F. Supp.3d 1054,1055–56 (2024).

24. See Complaint at 1, *U.S. Equal Emp. Opportunity Comm'n v. United Parcel Service*, No. 1:23-cv-14021 (N.D. Ill. Sep. 22, 2023).

25. See *Preventing Discrimination in the Treatment of COVID-19 Patients: The Illegality of Medical Rationing on the Basis of Disability*, DISABILITY RTS. EDUC. & DEF. FUND (2020), <https://dredf.org/the-illegality-of-medical-rationing-on-the-basis-of-disability/> [<https://perma.cc/XC9P-RJ36>]; Sam Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical Rationing Protocols*, 130 YALE L.J.F. 1, 2–3 (2020) (discussing how medical treatments during COVID, due to state guidelines that permit the rationing of health care services during health emergencies, disproportionately lead to the denial of treatment to people with disabilities based on quality-of-life assumptions).

26. See *Payan v. L.A. Cnty. Coll. Dist.*, 11 F.4th 729, 732–33 (9th Cir. 2021).

27. Federal legislation addressing the needs of people with disabilities began with support for veterans. The Rehabilitation Act of 1973 was preceded by a disability rights movement that emerged following World War I, as injured veterans returned home seeking support and reintegration. The Vocational Education Act of 1917 was enacted in response to studies by the Federal Board for Vocational Education, which examined veterans' disabilities and sought to provide "rehabilitation and reintegration" through vocational training. This effort was later expanded by the Rehabilitation Act of 1920. Wendi Maloney, *World War I: Injured Veterans and the Disability Rights Movement*, LIBR. OF CONG. BLOGS (Dec. 21, 2017), <https://blogs.loc.gov/loc/2017/12/world-war-i-injured-veterans-and-the-disability-rights-movement/> [<https://perma.cc/8ZJJ-XHKZ>].

28. See, e.g., 42 U.S.C. §§ 12117(b), 12201(a). The ADA and the Rehabilitation Act are

While there is limited accessible data distinguishing disability discrimination complaints alleging both disparate treatment and disparate impact from those alleging disparate treatment alone, the effects of each are no less salient. For example, in fiscal year 2024, the Equal Employment Opportunity Commission (EEOC) received over 29,000 charges alleging disability discrimination under the ADA.<sup>29</sup> That same year, the Department of Education's Office of Civil Rights (OCR) resolved 7,164 complaints alleging discrimination under § 504>Title II of the ADA.<sup>30</sup> Additionally, over 52% of discrimination claims filed with the Department of Housing and Urban Development (HUD) were based on disability.<sup>31</sup> These figures highlight the systemic nature of disability based bias, which often manifests through policies or practices that result in disparate impact. Without legal recognition of disparate impact liability, many of the most pervasive and harmful forms of disability exclusion would remain unchallenged.

However, in the absence of clear statutory language, as discussed below,<sup>32</sup> the availability of disparate impact claims under § 504 currently relies on the application of decades old precedent. In *Alexander v. Choate*,<sup>33</sup> a case decided almost forty years ago, the Supreme Court “assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon” people with disabilities.<sup>34</sup> Fifteen years later, in *Alexander v. Sandoval*,<sup>35</sup> the Court concluded that the text of § 602 of Title VI, on which § 504 was modeled, did not provide a private cause of action for disparate impact discrimination.<sup>36</sup>

In the last few years, there were two significant legal challenges to disparate impact claims under § 504. These Ninth Circuit cases, involving health care<sup>37</sup> and higher education,<sup>38</sup> respectively, and the public

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interconnected, with the Rehabilitation Act incorporating the definition of disability. *See* 29 U.S.C. 794(a); Derek Warden, *The Rehabilitation Act at Fifty*, 2023 CALIF. L. REV. ONLINE 54, 59.

29. *Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0> [<https://perma.cc/P7FE-PWLC>].

30. U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 2024 FISCAL YEAR ANN. REP. 52.

31. LINDSAY AUGUSTINE ET AL., NAT'L FAIR HOUS. ALL., 2024 FAIR HOUSING TRENDS REPORT 4 (2024), [https://nationalfairhousing.org/wp-content/uploads/2023/04/2024-Fair-Housing-Trends-Report-FINAL\\_07.2024.pdf](https://nationalfairhousing.org/wp-content/uploads/2023/04/2024-Fair-Housing-Trends-Report-FINAL_07.2024.pdf) [<https://perma.cc/ZV7M-E5UF>].

32. *See infra* Section II.

33. 469 U.S. 287, 299 (1985).

34. *Id.*

35. 532 U.S. 275, 291 (2001).

36. *Id.*

37. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208–09 (9th Cir. 2020).

38. *Payan v. L.A. Cnty. Coll. Dist.*, 11 F.4th 729, 731–33 (9th Cir. 2021).

pressure and attention the cases received, underscored the importance of disparate impact liability under § 504 for people with disabilities. The public attention and amicus briefs also made clear that the continued lack of statutory clarity creates difficulties for entities subject to § 504 and its implementing regulations.<sup>39</sup>

Similarly, the COVID-19 pandemic revealed the urgent need for effective application of these protections, as the crisis exacerbated systemic inequalities and highlighted the harmful effects of unintentional discrimination in hospitals and healthcare facilities. People with disabilities, particularly within marginalized communities of color, faced disproportionately poor medical outcomes during the pandemic<sup>40</sup> and were overrepresented among patients requiring hospitalization and experiencing death due to COVID-19.<sup>41</sup> In accordance with “crisis standards of care,”<sup>42</sup> hospitals are permitted to ration medical care during public health emergencies leading, in many cases, to denials of lifesaving treatment to patients with disabilities and terminal illnesses based on quality of life assessments.<sup>43</sup> Black and Indigenous communities, who generally experience higher rates of disability,<sup>44</sup> were more likely to receive adverse medical evaluations of their quality of life, resulting in denials of life sustaining treatments such as ventilators.<sup>45</sup>

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39. See *infra* Part II.D. More recently, two other challenges to § 504, have emerged. While neither of these cases specifically addresses the issue of disparate impact, decisions in each could have an important effect on disability rights. In *Texas v. Becerra* (now titled *Texas v. Kennedy*), the attorney generals of seventeen states filed a complaint to block an amendment of the § 504 (and ADA) definition of disability that would include gender dysphoria. Complaint at 1–2, *Texas v. Kennedy*, No. 5:24-CV-00225 (N.D. Tex. Sep. 26, 2024). In *A.J.T. v. Osseo Area Sch.*, the Eighth Circuit addressed the level of intent that a plaintiff must prove to establish liability for failure to provide educational accommodations under § 504 and the ADA. 96 F.4th 1058, 1061 (8th Cir. 2024), *cert. granted*, 145 S. Ct. 1915 (2025).

40. See *Payan*, 11 F.4th at 732–33.

41. See ADMIN. FOR CMTY. LIVING, IMPACT OF THE COVID-19 PANDEMIC ON PEOPLE WITH DISABILITIES (2022), [https://acl.gov/sites/default/files/COVID19/ACL\\_Research\\_ImpactC19-PWD.pdf](https://acl.gov/sites/default/files/COVID19/ACL_Research_ImpactC19-PWD.pdf) [https://perma.cc/PMX8-LEJV].

42. See also Jasmine Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 32 (2020).

43. *Id.* at 32–34 (examining how crisis standards of care, the “rationing [of health care] on the categorical basis of disability” may lead to intersectional medical discrimination against COVID patients).

44. Brook Dorsey Holliman et al., *Disability Doesn’t Discriminate: Health Inequities at the Intersection of Race and Disability*, FRONTIERS REHAB. SCI., July 6, 2023, at 1, 1 (“Recent estimates indicate that 26% of US adults experience disability, with higher rates of disabilities in Black, Indigenous, and people of color (BIPOC) communities. For example, compared to 26.6% of white persons with disabilities (PWD) ages 45–64, 35.5% of Black and Hispanic adults in that same age group are living with a disability in the US.”) (internal citations omitted).

45. See Infographic of Adults with Disabilities by Ethnicity and Race, in *Infographic*:

COVID-19 also exacerbated existing disparities in access to healthcare and essential services, further underscoring the need for disparate impact claims.<sup>46</sup>

In response to these challenges both in the courts and in the healthcare system during the pandemic, the incorporation of § 504 by reference into § 1557 of the Affordable Care Act (ACA)<sup>47</sup> has become increasingly significant in addressing some aspects of disability discrimination in healthcare. Section 1557 stipulates that individuals cannot be excluded from, denied benefits from, or discriminated against in any health program or activity receiving federal funds based on the basis of race, color, national origin, sex, age, or disability – incorporating Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or § 504 of the Rehabilitation Act of 1973 by reference.<sup>48</sup> Cases such as *Doe v. BlueCross BlueShield of Tennessee*,<sup>49</sup> *Schmitt v. Kaiser Found. Health Plan of Wash.*,<sup>50</sup> and *Doe v. CVS*<sup>51</sup> highlight ongoing efforts to challenge healthcare policies that disproportionately impact individuals with disabilities under § 504 and § 1557. As such, § 1557 is a critical tool in advocating for equitable healthcare for people with disabilities. However, as discussed below, the Sixth Circuit's interpretation of § 504 narrows its application by challenging the viability of disparate impact claims and rejecting the availability of a private cause of action under the statute.<sup>52</sup>

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*Adults with Disabilities: Ethnicity and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 7, 2025), <https://www.cdc.gov/disability-and-health/articles-documents/infographic-adults-with-disabilities-ethnicity-and-race.html> [https://perma.cc/6J5E-HKFC]; NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, NAT'L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA 9 (2019), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf> [https://perma.cc/LA8Q-S33V].

46. See Shawn Grant, *Lessons from the Pandemic: Congress Must Act to Mandate Digital Accessibility for the Disabled Community*, 55 U. MICH. J. L. REFORM 45, 67–68 (2021).

47. Pub. L. No. 111-148, tit. I, § 1557, 42 U.S.C. § 18116.

48. 42 U.S.C. § 18116(a).

49. *Doe v. BlueCross BlueShield of Tenn.*, Inc., 926 F.3d 235, 237–38 (6th Cir. 2019) (addressing whether BlueCross Blue Shield of Tennessee's policy of requiring HIV positive beneficiaries to obtain their medication exclusively through a pharmacy network discriminates in violation of § 504 and § 1557 of the ACA); *see infra* Part II.C.ii.

50. *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 948–49 (9th Cir. 2020) (addressing whether a health insurer discriminated in violation of § 504 and § 1557 of the ACA by excluding all hearing devices except cochlear implants, disproportionately affecting individuals with hearing disabilities).

51. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208–13 (9th Cir. 2020) (addressing whether policy of requiring HIV/AIDS drugs to be obtained exclusively through CVS's specialty pharmacy network to qualify for in-network benefits and forcing individuals to use mail order services violated § 504 and § 1557 of the ACA). *See infra* Part II.D.

52. *See infra* Part II.C.ii.

Further, disparate impact laws are needed to help address the disproportionate negative effects of artificial intelligence (AI) discrimination on people with disabilities. The increasing use of AI technologies in all areas of life—such as employment, marketplace, healthcare, education and the criminal justice system—has had a disparate impact on vulnerable communities.<sup>53</sup> For example, as algorithms are based on a statistical average, AI frequently engages in implicit bias against individuals with disabilities.<sup>54</sup> As individual motives are difficult to detect, disparate impact liability provides legal remedies for people with disabilities and other marginalized groups who are victims of “algorithmic discrimination.”<sup>55</sup> The availability of disparate impact claims is clearly of great (and increasing) significance for the disabled community, particularly under § 504.

#### *B. Concerns of Recipients of Federal Funding*

While protection of the rights of people with disabilities is of paramount concern, the current uncertainty regarding the scope of § 504 may also present hardships for recipients of federal funding, particularly small businesses, an additional reason why Congress should act. This is due in part to the far-reaching scope of government funding, which extends § 504’s protections to a wide variety of programs and settings to

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53. See, e.g., Anthony Kimery, *Disparate Impact Laws Are Needed to Combat AI Discrimination, Says Policy Analyst*, BIOMETRIC UPDATE (Sep. 19, 2024), <https://www.biometricupdate.com/202409/disparate-impact-laws-needed-to-combat-ai-discrimination-says-policy-analyst> [https://perma.cc/Q8SV-DJN2] (discussing the recent call upon Congress to develop legislation to prevent “algorithmic discrimination”). See New York City Bar Ass’n Presidential Task Force on Artificial Intelligence & Digital Technologies, *Task Force Dashboard*, <https://www.nycbar.org/committees/task-force-on-digital-technologies/> [https://perma.cc/ZA2A-D4D7]; New York City Bar Ass’n Presidential Task Force on Artificial Intelligence & Digital Technologies, *The Impact of the Use of AI on People with Disabilities* (June 12, 2025), <https://www.nycbar.org/reports/the-impact-of-the-use-of-ai-on-people-with-disabilities/> [https://perma.cc/35MK-JKNM] (documenting harms to people with disabilities caused by existing AI systems and the likelihood of continued or future harm, including findings that disabled people are frequently stereotyped, objectified, or rendered invisible in AI-generated content due to flawed training data).

54. Cf. U.S. DEP’T OF JUST., CIVIL RIGHTS DIV., ALGORITHMS, ARTIFICIAL INTELLIGENCE, AND DISABILITY DISCRIMINATION IN HIRING (2022), <https://www.ada.gov/resources/ai-guidance/> [https://perma.cc/3EBL-9QNA]. See also Jessica Hallman, *AI Language Models Show Bias Against People with Disabilities, Studies Find*, PA. STATE UNIV., INFO. SCIS. & TECH. (Oct. 13, 2022), <https://www.psu.edu/news/information-sciences-and-technology/story/ai-language-models-show-bias-against-people-disabilities> [https://perma.cc/8U2J-F8QM] (reporting that all tested algorithms and thirteen natural-language models exhibited significant implicit bias against people with disabilities).

55. See Chiraag Bains, *The Legal Doctrine That Will Be Key to Preventing AI Discrimination*, BROOKINGS (Sep. 13, 2024), <https://www.brookings.edu/articles/the-legal-doctrine-that-will-be-key-to-preventing-ai-discrimination/> [https://perma.cc/34XV-SGJZ].

address the practical realities faced by individuals.<sup>56</sup> However, advocates representing states, businesses, organizations, and programs subject to § 504, have expressed concerns about permitting such claims.<sup>57</sup> Similar to concerns about the proliferation of lawsuits over website accessibility under Title III of the ADA,<sup>58</sup> many commentators and amici for the petitioners in *CVS v. Doe* focus on the potential economic impact of increased litigation.<sup>59</sup> As § 504 applies to thousands of schools, some argue that increased disparate impact litigation will lead to increased education costs, including higher tuition rates.<sup>60</sup> Additionally, there is concern that plaintiffs' attorneys may exploit the threat of § 504 claims to pressure settlements, as defendants may seek to avoid the high costs of legal proceedings and the risk of loss of federal funding.<sup>61</sup>

These concerns about the potential economic impact of disparate impact claims under § 504 also raise broader legal questions about the law's scope and constitutional implications. For instance, some commentators have argued that if the Supreme Court should rule that § 504 includes a private cause of action for disparate impact claims, the law's broad definition of "programs and activities" could have wide-reaching consequences.<sup>62</sup> They argue that the reach of disparate impact liability could make it legally applicable to nearly every aspect of state action extending to areas such as law enforcement and state hospitals,<sup>63</sup>

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56. Shariful Khan, *An Expansive View of "Federal Financial Assistance"*, 133 YALE L.J.F. 691, 694 (2024).

57. See Brief of Washington Legal Foundation and Independent Women's Law Center as Amici Curiae Supporting Petitioners at 14, *CVS Pharmacy, Inc. v. Doe*, 141 S. Ct. 2882 (2021) (No. 20-1374) [hereinafter Brief of Washington Legal Foundation] ("It is hard to overstate the disastrous and costly effects of recognizing disparate-impact claims under Section 504."), *cert. dismissed*, 142 S. Ct. 480 (2021).

58. See Grant, *supra* note 46, at 77.

59. Brief of Washington Legal Foundation, *supra* note 57, at 20 (noting that recognizing claims "will open the courts to a flood of Section 504 suits against other entities").

60. Cf. Brief of Washington Legal Foundation, *supra* note 57, at 17 (criticizing the Ninth Circuit's interpretation of § 504 by asserting that it places "no limit to the possible suits against colleges and universities" resulting in either increased spending or a loss of educational opportunities to students).

61. See Brief of Washington Legal Foundation, *supra* note 57, at 4 (asserting that plaintiffs' counsel hoped "to extort settlements from less-capitalized defendants."); see also Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 4, *CVS Pharmacy, Inc. v. Doe*, 141 S. Ct. 2882 (2021) (No. 20-1374) (expressing concerns about the potential for increased litigation raised by the Ninth Circuit's decision and its impact on the healthcare system), *cert. dismissed*, 142 S. Ct. 480 (2021).

62. Khan, *supra* note 56, at 696.

63. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 4(b), 102 Stat. 28, 29 (codified at 29 U.S.C. § 794(b)) (clarifying the definition of "program or activity" under Section 4(b) § 504 of the Rehabilitation Act of 1973 to include all of the operations of an entire corporation, partnership, or other private organization, or an entire public entity, any

and could extend beyond states and localities to include, for example, federal recipients of Paycheck Protection Program (PPP) loans<sup>64</sup> and Federal Emergency Management Agency (FEMA) funds.<sup>65</sup> Further, some states have challenged the constitutionality of § 504, arguing that its scope is ambiguous, challenging their ability to voluntarily and knowingly accept federal funds from Congress.<sup>66</sup> Under the Spending Clause, Congress is allowed to attach conditions to federal funding, essentially creating a contractual agreement where recipients agree to comply with certain conditions to receive the funds.<sup>67</sup> Some states contend that this lack of clarity undermines the principle that states must “knowingly and voluntarily” accept federal funding conditions.<sup>68</sup>

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part of which receives federal financial assistance). Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents at 10, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) (noting that Section 504 non-discrimination provisions extend to any program or activity receiving federal financial assistance), *cert. dismissed*, 142 S. Ct. 480 (2021).

64. Paycheck Protection Program (PPP) Loans were authorized under the Coronavirus Aid Relief and Economic Security Act (CARES Act) and the Coronavirus Response and Relief Appropriations Act and distributed by the small business administration. Such funds are categorized as federal assistance, thereby obligating recipients of such loans to act in accordance with antidiscrimination statutes. JARED P. COLE, CONG. RSCH. SERV., LSB10459, APPLICABILITY OF FEDERAL CIVIL RIGHTS LAWS TO RECIPIENTS OF CARES ACT LOANS 1 (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10459> [https://perma.cc/LRN7-2B3D]. *See id.*; *see also* Khan, *supra* note 56, at 697 (noting that low-interest federal loans may also qualify as federal financial assistance).

65. Brief of the States of Louisiana et al. as Amici Curiae in Support of Petitioner at 4-15, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) (“If the Court now recognizes disparate-impact liability under Section 504, it will throw wide the federal courthouse doors to similarly improper attacks” and “open the doors to similar attempts at rewriting valid state policy through federal litigation.”), *cert. dismissed*, 142 S. Ct. 480 (2021). *But see* Brief for the United States as Amicus Curiae Supporting Respondents at 16-17, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) (emphasizing need for expansive application of § 504 to ensure institutions receiving federal funding cannot circumvent the law by isolating those funds to specific programs.), *cert. dismissed*, 142 S. Ct. 480 (2021).

66. Congress makes federal funds available, subject to stated conditions, and a recipient knowingly and voluntarily accepting the funds and the conditions. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Knowing and voluntary acceptance is what lends Spending Clause legislation its legitimacy. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002); Complaint at ¶¶ 228-32, *Texas v. Kennedy*, No. 5:24-CV-00225 (N.D. Tex. Sep. 26, 2024) [hereinafter *Texas v. Kennedy Complaint*].

67. The U.S. Constitution grants Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States.” U.S. CONST. art. 1, § 8, cl. 1. Several federal laws, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Section 1557 of the Affordable Care Act, operate under the Spending Clause. The Court has emphasized that entities receiving federal funds must voluntarily and knowingly accept the terms of this contractual relationship and be aware of the penalties they may be subject to if they breach the contract. *See Pennhurst*, 451 U.S. at 17.

68. *Texas v. Kennedy Complaint*, *supra* note 66.

In addition, conflicting decisions in the courts regarding the scope of § 504 may put recipients of federal financial assistance in the untenable situation of a loss of funding because they lack a clear understanding of what constitutes unintentional discriminatory conduct.<sup>69</sup> Statutory clarity is also important with respect to the spending clause and federal funding scheme under § 504.<sup>70</sup> As violations of § 504 and its implementing regulations can trigger a loss of federal funding by recipients, a lack of understanding of which acts are prohibited by law with respect to the scope and remedies under § 504 will undoubtedly affect programs and organizations that receive federal funding, as well as the beneficiaries of federal funding. Some recipients may implement facially neutral discriminatory policies under the mistaken belief that they are in compliance with the statute because of a lack of understanding of what constitutes unintentional discriminatory conduct. This implementation may also be due to dissonance between the plain meaning of the text of § 504 and agency implementing regulations which, in many cases, explicitly prohibit disparate impact discrimination. In the context of education, the loss of federal funding due to a lack of compliance could be crippling for states that are dependent upon the federal government to supplement state school funding, including those funds necessary to meet § 504's requirement that public schools offer accommodations to eligible students with disabilities.<sup>71</sup> The loss of educational funding is more likely to have a outsized effect in those states where incomes are lowest.<sup>72</sup> As people with disabilities, their families and

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69. Presumptively, without notice as to whether the scope of § 504 prohibits disparate impact discrimination, a recipient of federal funding pursuant to the Congressional Spending Clause may be unaware they are engaging in actions in violation of the federally imposed grant conditions. *See Barnes v. Gorman*, 536 U.S. 181, 188 (2002).

70. Enacted under the Spending Clause, § 504 authorizes Congress to condition federal funding on compliance with anti-discrimination statutes. As with contractual terms, recipients must have clear notice of their legal obligations. *See Pennhurst*, 451 U.S. at 17 ("[T]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); *see also Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 229–30 (2022) (holding that under the Spending Clause, emotional distress damages are unavailable where federal funding recipients lack clear notice of such liability in the Statute).

71. *See, e.g., Federal Funding and the "Strings" Attached to It*, N.J. COMMON GROUND (Jan. 17, 2025), <https://njcommonground.org/federal-funding-and-the-strings-attached-to-it/> [<https://perma.cc/C7GH-ANKQ>] ("If federal education funding were significantly reduced or eliminated, [due to noncompliance] New Jersey would lose hundreds of millions of dollars in federal funding. This could force cuts in services, teacher positions, and educational support programs. Along with other cuts to education, a loss of federal funding would strain the state's ability to maintain its current level of special education services.").

72. *See* Samantha Wilkerson, *Exploring the Nexus of Property Taxes, Housing Disparities*

their allies are powerful consumers, comprising a substantial market segment,<sup>73</sup> a legal interpretation of § 504 by the courts which negatively impacts disability rights could have additional financial implications for culpable businesses that violate the statute.<sup>74</sup>

These issues underscore the need for clearer legislative guidance. To address this, Congress could amend § 504 or introduce new legislation, which could resolve the existing uncertainty surrounding the law, providing clarity on the law's scope and application.<sup>75</sup>

## II. In Search of a Private Right of Action for Disparate Impact Claims Under § 504

The absence of a clear definition of discrimination under § 504, coupled with the search for a private right of action for disparate impact claims, creates uncertainty and undermines the statute's ability to effectively protect people with disabilities. Gaps in both the language and legislative history of § 504 leave the statute open to legal challenges, which may lead to additional discord among the circuit courts and could ultimately result in an adverse Supreme Court decision that narrows the scope of § 504's protections. Although forty years have passed since the

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*and Educational Access for Black and Brown Youth in Major U.S. Cities*, CONG. BLACK CAUCUS FOUND., <https://www.cbcfinc.org/capstones/education/exploring-the-nexus-of-property-taxes-housing-disparities-and-educational-access-for-black-and-brown-youth-in-major-u-s-cities/> [https://perma.cc/US89-CVUY] (highlighting that reliance on property taxes for school funding exacerbates disparities, as communities with lower property values have less funding for their schools, adding to existing persistent funding gaps and disproportionately impact low income students of color). These and other educational disparities will likely be exacerbated by the elimination of the U.S. Department of Education under Executive Order, with a disproportionately negative impact on black students with disabilities. See Tim Walker, *How Dismantling the Department of Education Would Harm Students*, NEA TODAY (Mar. 20, 2025), <https://www.nea.org/nea-today/all-news-articles/how-dismantling-department-education-would-harm-students> [https://perma.cc/HU8K-ANF5].

73. People with disabilities make up a \$1 billion market segment. John Burbank, *Measuring the Impact of Consumers with Disabilities*, NIELSEN (Apr. 2017), <https://www.nielsen.com/news-center/2017/measuring-impact-consumers-disabilities/> [https://perma.cc/D4PL-SBNE]; see also U.S. Department of Labor, Office of Employment, "Diverse Perspectives: People with Disabilities Fulfilling Your Business Goals" <https://www.dol.gov/sites/dolgov/files/odep/topics/508-odepcardrakbusines2020feb5.pdf>.

74. For instance, culpable businesses may face consumer boycotts. In response to the allegations against CVS that their prescription drug benefits program discriminated against people with HIV, there was public pressure to boycott CVS. See e.g., Ged Kenslea, *Corporate Vampire Suck' Ads by AHF Skewer CVS*, AIDS HEALTHCARE FOUND. (July 10, 2021), <https://www.aidshealth.org/2021/07/corporate-vampires-suck-ads-by-ahf-skewer-cvs/> [https://perma.cc/Z2VP-2SWR]; CVS v. Doe *Explained*, DREDF (Nov. 2, 2021), <https://dredf.org/cvs-v-doe-explained/> [https://perma.cc/8W89-E9WZ] ("We need to come together to tell CVS to pull this case from the Supreme Court. Please tweet and tag CVS to drop the appeal. You can also tell CVS why Section 504 matters to you personally.").

75. See *infra* Part IV.A.

Supreme Court last directly addressed this issue in *Alexander v. Choate*,<sup>76</sup> Congress has yet to provide clarifying guidance on the matter. Recent judicial challenges have continued to highlight the lack of clarity in § 504's provisions, underscoring the need for legislative action.

#### *A. Statutory Text and Legislative History*

The statutory text and legislative history of § 504 provide only limited guidance regarding whether the statute grants a private cause of action for disparate impact claims. The text of § 504 specifies that it is unlawful to discriminate against an otherwise qualified individual with a disability in the United States.<sup>77</sup> Specifically, it states:

No otherwise qualified individual with a disability in the United States, as defined in sections 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.<sup>78</sup>

Section 504, as enacted, does not define "subjected to discrimination" and the plain meaning of the text does not indicate whether the covered discrimination extends beyond disparate treatment to include disparate impact claims.<sup>79</sup> As further discussed below, defendants facing allegations of violating § 504 based on disparate impact discrimination assert that the statute's language does not support this type of claim and that it is not backed by legislative history.<sup>80</sup> The following discussion focuses on the vulnerabilities of § 504 to that may lead to negative litigation outcomes, underscoring the urgent need for Congressional action.

##### *i. Statutory Text*

The plain meaning of the text of § 504, does not explicitly address or prohibit disparate impact discrimination.<sup>81</sup> Some commentators suggest that, at the time of § 504's enactment, disparate impact theory

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76. 469 U.S. 287 (1985). *See infra* Part II.B.i.

77. The definition is found in 29 U.S.C. § 705(9)(B), which incorporates the ADA's definition from 42 U.S.C. § 12102 by reference. The term "disability" under the statute means, "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."

78. 29 U.S.C. § 794(a).

79. *See* 29 U.S.C. § 794.

80. *See infra* Part II.A.

81. The language of § 504 states that individuals with disabilities shall not be excluded, denied benefits, or subjected to discrimination under federally funded programs "solely by reason of her or his disability." 29 U.S.C. § 794(a). Legal interpretations of this text differ.

had not yet fully developed, which may explain its absence from the statute.<sup>82</sup> Further, some argue that the passive voice structure of “by reason of” in § 504 suggests that the identity of the actor engaged in the alleged discrimination is less important than the discriminatory act itself.<sup>83</sup> Therefore, disparate impact liability is arguably implied within § 504.<sup>84</sup> However, this interpretation, that the use of passive voice in legal drafting broadens the statutory scope, could be vulnerable to challenge by a textualist approach to statutory interpretation, which emphasizes the plain meaning of the statute’s language. Currently, the Supreme Court generally favors interpreting statutes based on the language’s plain meaning. As Justice Elena Kagan noted, “We’re all textualists now,” reflecting on the Court’s increasing reliance on textual clarity in legal interpretation.<sup>85</sup> In this light, the use of passive voice in legal texts, such as § 504, could function to maintain clarity and formality rather than signaling a broader substantive reach.<sup>86</sup>

Whereas Title VII, as amended, explicitly includes protections against disparate impact discrimination,<sup>87</sup> § 504 does not directly reference the effects of discrimination. This lack of explicit mention has

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82. While disparate impact discrimination existed prior to the *Griggs v. Duke Power* decision, its application through other statutes was not immediately clear. See Patricia Pattison & Phillip E. Varca, *The Demise of Disparate Impact Theory*, 29 AM. BUS. L.J. 413, 420 (1991). Additionally, there was no definitive legislative history indicating that Title VII was intended by Congress to include disparate impact discrimination. *Id.* at 416; *see also* Derek Warden, *The Rehabilitation Act at Fifty*, 14 CAL. L. REV. ONLINE 54 (2023), <https://doi.org/10.15779/Z38DR2P96R> (responding to the passage of the codification of disparate impact discrimination within the passage of the 1991 Civil Rights Act (42 U.S.C. § 2000e-2)).

83. See Joshua M. Alpert, *Disability Environmental Justice: How § 504 of the Rehabilitation Act Can Be Used for Environmental Justice Litigation*, 59 HARV. C.R.-C.L. L. REV. 403, 410 (2024) (“[The] . . . use of [the] passive voice suggests the focus of § 504 is the action rather than the intent behind it . . . ”).

84. *Id.* at 410–12 (“If ‘by reason of’ refers to *intent*, then only intentional discrimination is prohibited, whereas if ‘by reason of’ refers to *causation*, then both unintentional (disparate impact) and intentional (disparate treatment) discrimination are prohibited.”). Notably, Alpert does not approach his analysis from the textualist perspective.

85. JUSTICE ELENA KAGAN, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:29 (Nov. 17, 2015), <https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/FW27-ZADJ>].

86. As not all scholars agree that passive voice broadens statutory interpretation, we cannot rely on the textualist Court to interpret disparate impact liability. See generally BRYAN A. GARNER & ANTONIN SCALIA, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2011) (arguing that courts should focus on the actual meaning of the text and the ordinary meaning of words rather than expanding the scope of the law beyond what is explicitly written); *see also* Anita S. Krishnakumar, *Passive Voice References in Statutory Interpretation*, 76 BROOK. L. REV. 941, 945–46 (2011) (suggesting that passive constructions are often used to avoid assigning responsibility, thereby maintaining neutrality and preventing the statute from being interpreted as expanding its scope).

87. Congress amended Title VII to include disparate impact discrimination when it passed the Civil Rights Act of 1991 at 42 U.S.C. § 2000e-2(k).

led some commentators to interpret the statute's prohibition on discrimination "solely by reason of" disability as a limiting clause, suggesting that § 504 might not cover claims based solely on the disproportionate impact of neutral policies.<sup>88</sup>

## ii. Legislative History

There is sparse legislative history regarding § 504.<sup>89</sup> Because § 504 was adopted by Congress as a floor amendment, it bypassed the usual Committee hearings and reports, resulting in a lack of legislative history.<sup>90</sup> This absence leads to uncertainty regarding both the definition of discrimination and the scope of § 504's provisions. During the proceedings of the 92nd Congress leading up to the adoption of § 504,<sup>91</sup> there is no record of discussions as to the scope of the discrimination prohibited by the statute, nor do the proceedings address whether or not disparate impact discrimination is covered by the section.<sup>92</sup>

Some commentators attribute the lack of floor discussion regarding the statute to the drafters' original intent to amend Title VI of the CRA of 1964 by incorporating the language of § 504, thereby expanding its protections to people with disabilities.<sup>93</sup> However, fearing Senate opposition to further expansion of the CRA that might jeopardize its approval, the protections that would later become § 504 were included in the reauthorization of the Rehabilitation Act of 1973.<sup>94</sup> Since its adoption,

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88. See Alpert, *supra* note 83, at 434–35 (suggesting that the language "solely by reason of" heightens the level of analysis required to prove a *prima facie* claim of disparate impact liability, but does not imply that such claims are not available under the statute).

89. See Bianca Chamusco, *Revitalizing the Law That "Preceded the Movement": Associational Discrimination and the Rehabilitation Act of 1973*, 84 U. CHI. L. REV. 1285, 1291–92 (2017). See also Ralph D. Rouse, Jr., Presentation on Section 504 of the Rehabilitation Act, 21 J. EDUC. LIBR. 196, 198 (1981) ("Section 504 was passed by Congress with no debate and no legislative directive, and the job of the U.S. Department of Health was extremely difficult as they were charged with developing implementing regulations").

90. *Id.* at 1292 CYNTHIA BROUGHER, CONG. RSCH. SERV., RL34041, SECTION 504 OF THE REHABILITATION ACT OF 1973: PROHIBITING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE, (Sept. 29, 2010).

91. See *Alexander v. Choate*, 469 U.S. 287, 295 n.13 (1985) (noting the "lack of debate devoted to § 504 in either the House or Senate when the Rehabilitation Act was passed in 1973"); NAT'L COUNCIL ON DISABILITY, REHABILITATING SECTION 504, 15 (2003), [https://www.govinfo.gov/content/pkg/GOVPUB-Y3-D63\\_3-PURL-LPS97246.pdf](https://www.govinfo.gov/content/pkg/GOVPUB-Y3-D63_3-PURL-LPS97246/pdf/GOVPUB-Y3_D63_3-PURL-LPS97246.pdf) [https://perma.cc/L9H6-PXVJ] ("One of the nation's first laws barring discrimination based on disability was enacted without fanfare and with little notice. No hearings were held, no debate took place on the floor of either house of Congress, and the name of the provision's author has long been forgotten.").

92. NAT'L COUNCIL ON DISABILITY, *supra* note 91.

93. Chamusco, *supra* note 89, at 1285, 1290–92.

94. *Id.* at 1290–91; see also *Alexander v. Choate*, 469 U.S. at 295 n.13 (1985) (discussing the process by which the antidiscrimination principle as applied to people with disabilities became part of Title V of the Rehabilitation Act of 1973, as amended).

the Rehabilitation Act—particularly § 504—has been amended several times, but the legislative history of those amendments provides no significant insight into Congressional intent regarding the scope of the discrimination prohibited at the time the statute was enacted.<sup>95</sup>

Some courts have attempted to infer Congressional intent to prohibit disparate impact discrimination by drawing on cases such as *Alexander v. Choate*.<sup>96</sup> As discussed below, the Court in *Choate* opined in dicta that Congress *likely* intended to allow some disparate impact discrimination claims to be covered under § 504.<sup>97</sup> The Court reasoned that without allowing such claims “much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach . . .”<sup>98</sup> Courts and commentators have invoked the legislative history of other civil rights statutes enacted after § 504, and the ADA in particular, to identify Congressional intent that § 504 was intended to cover disparate impact discrimination claims.<sup>99</sup> Although the language of the ADA does not explicitly address disparate impact discrimination,<sup>100</sup> unlike § 504, the ADA does have a robust language emphasizing Congressional intent to redress not just “outright intentional exclusion[,]” but also “discriminatory effects.”<sup>101</sup> It remains unclear, however, whether these interpretations would withstand a

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95. *Alexander v. Choate*, 469 U.S. at 306 n.27 (“The year after the Rehabilitation Act was passed, Congress returned to it with important amendments that clarified the scope of § 504. While these amendments and their history cannot substitute for a clear expression of legislative intent at the time of enactment . . . their history do shed significant light on the intent with which § 504 was enacted.”) (citations omitted).

96. See, e.g., *Payan v. L.A. Cnty. Coll. Dist.*, 11 F.4th 729, 734 (9th Cir. 2021).

97. *Alexander v. Choate*, 469 U.S. at 294 n.11.

98. *Id.* at 296–97.

99. Among civil rights statutes enacted after § 504, the ADA’s history is particularly significant because it was modeled after § 504. See *infra* note 126; Brief for Amici Curiae The Arc of the United States and the American Association of People with Disabilities et al. in Support of Respondent John Doe at 27–28, *CVS Pharmacy, Inc. v. Doe*, No. 20-1374 (U.S. Sept. 30, 2021) (Noting that while Title II of the ADA does not explicitly reference disparate impact, its legislative history suggests that Congress intended through Title II “to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services’ of state and local government” and that furthermore “Section 504 recognizes that discrimination results from actions or inactions, and that discrimination occurs by effect as well as by intent or design.” (emphasis removed)). In addition, Title III of the ADA, explicitly references disparate impact discrimination. 42 U.S.C. § 12182(b)(1)(D)(i).

100. 42 U.S.C. § 12132 (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

101. In 42 U.S.C. § 12101(a)(5), Congress declared its intent to address “outright intentional exclusion” as well as “the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices . . .”

direct legal challenge outside of Title II and Title III. Given the lack of express statutory language and of relevant legislative history, it is not surprising that the case law is not settled regarding whether disparate impact discrimination is prohibited under § 504.

#### *B. Supreme Court Precedent*

While the Supreme Court has not resolved whether § 504 permits disparate impact liability claims, two cases are often cited as opining the Court's stance on disparate impact with respect to § 504. However, neither case directly addresses the reach of § 504 or definitively resolves the issue of whether the section provides a private right of action for disparate impact. As a result, lower courts have continued to interpret and apply § 504 inconsistently, with some allowing disparate impact claims and others rejecting them—creating uncertainty in the legal landscape.

##### *i. Alexander v. Choate*<sup>102</sup>

As one of several cost saving measures, Tennessee proposed reducing, from twenty to fourteen, the number of in-hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient.<sup>103</sup> Respondents, disabled Medicaid recipients, demonstrated that, in the previous year, "27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care."<sup>104</sup> Thus, the potential disparate impact of this measure was undisputed. Respondents argued that this reduction would, therefore, have a disparate impact on disabled Medicaid recipients and was discriminatory in violation of § 504.<sup>105</sup>

The first question addressed by the Court in *Choate* was whether § 504 reached disparate impact claims or only claims of intentional discrimination.<sup>106</sup> Relying largely on Congressional remarks regarding § 504 and its predecessor, the Court observed that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."<sup>107</sup> However, the Court

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102. 469 U.S. 287 (1985).

103. *Id.* at 289.

104. *Id.* at 289–90.

105. *Id.* at 290. Respondents also argued that any annual limitation on days of hospitalization would have a disproportionate effect on the disabled and suggested alternative approaches. *Id.* at 290–91.

106. *Id.* at 292.

107. *Id.* at 296–97.

deemed the countervailing consideration to be “the desire to keep § 504 within manageable bounds.”<sup>108</sup> That is, the Court theorized that “[b]ecause the handicapped typically are not similarly situated to the nonhandicapped,”<sup>109</sup> if the statute reached all actions that had a disparate impact, covered entities, before taking any action, might ultimately be required to produce “Handicapped Impact Statements,”<sup>110</sup> similar to environmental impact statements. Given that sort of burden, the Court questioned “whether Congress intended § 504 to embrace all claims of disparate-impact discrimination.”<sup>111</sup>

The Court opted to apply a “meaningful access” standard to determine whether § 504 had been violated instead of directly addressing the scope of disparate impact under the statute.<sup>112</sup> Rather than focusing solely on whether there is a disparate impact with respect to the denial of access to a particular service to people with disabilities, meaningful access only requires an assessment of whether people with disabilities are given equal access to services or benefits, without requiring the court to engage in an empirical examination of the nature and extent of that access.<sup>113</sup> Under this standard, a defendant may have to make reasonable modifications to the program but need not fundamentally alter the nature of the service or benefit provided to eliminate all disparities.<sup>114</sup>

Applying the meaningful access standard to the facts of the case, the Court determined that the fourteen-day limitation was neutral on its face and did not deny individuals with disabilities meaningful access to or exclude them from the Medicaid services.<sup>115</sup> The Court noted that the change in coverage would “leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation.”<sup>116</sup> The Court also rejected any argument that because those with disabilities potentially required longer inpatient stays, they should not be subject to any durational limitations.<sup>117</sup> Rather, the Court concluded, the Medicaid statute and regulations did not require

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108. *Id.* at 298.

109. *Id.*

110. *Id.* at 298–99.

111. *Id.* at 299.

112. *Id.* at 301. The Court stated that the meaningful access standard represented the balance struck in its decision in *Se. Cnty. Coll. v. Davis*, 442 U.S. 397 (1979) (noting that *Davis* “struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs.”).

113. 469 U.S. at 304.

114. *Id.* at 300.

115. *Id.* at 302.

116. *Id.* at 302.

117. *Id.* at 302–03.

a state “to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users.”<sup>118</sup> Ultimately, the Court “assume[d] without deciding” that a cause of action for disparate impact exists under § 504 “reaches at least some conduct that has an unjustifiable disparate impact” on people with disabilities.<sup>119</sup>

The Court’s interpretation of meaningful access in *Choate* emphasizes a formal equality standard, which focuses on equal treatment, rather than a substantive equality approach that would account for the differential impacts experienced by people with disabilities.<sup>120</sup> This interpretation permits the conclusion that meaningful access exists even when people with disabilities experience worse outcomes, so long as they are not explicitly denied program or service.<sup>121</sup> Such a view has been criticized for failing to address the systemic inequalities that disproportionately affect individuals with disabilities—particularly in essential areas such as healthcare, housing, education, and economic opportunity.<sup>122</sup> Legal scholars, such as Mark Weber, have argued that the *Choate* framework, as applied by the court, is too narrow and insufficiently responsive to real world disparities.<sup>123</sup> Weber calls for the courts to adopt a more empirically grounded analysis of what constitutes “meaningful access,” contending that the current standard often equates equal opportunity with equal treatment without examining whether adverse outcomes stem from structural discrimination.<sup>124</sup>

Therefore, while some commentators have viewed *Alexander v. Choate* as opening the door to disparate impact claims, as it recognizes that § 504 prohibits “at least some” disparate impact discrimination, the Court’s failure to specify which claims fall under the statute has led to challenges regarding not only the scope of discrimination covered by § 504 but also of statutes incorporating it by reference, such as § 1557 of the Affordable Care Act.<sup>125</sup> The Court’s decision in *Choate* left unclear the

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118. *Id.* at 305–06.

119. *Id.* at 299.

120. *Id.* at 289.

121. Cf. Mark Weber, *Meaningful Access and Disability Discrimination: The Role of Social Science and Other Empirical Evidence*, 39 CARDozo L. REV. 649, 653 (2017).

122. Cf. *id.* at 650.

123. *Id.* at 655.

124. *Id.*

125. Section 1557 of the Affordable Care Act incorporates the procedures and remedies of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act. 42 U.S.C. § 18116(a). There is an unresolved question, however, regarding how and to what extent those statutes are incorporated. In 2016, the Obama administration’s regulation under 1557 to include a private cause of action for disparate impact claims. Under this interpretation, if the Supreme Court determines that Section 504 does not prohibit disparate impact discrimination

extent to which disparate impact claims are permissible, allowing courts to make this determination under an evolving meaningful access standard, which does not require an empirical consideration of the effects of disparate impact.<sup>126</sup> The Supreme Court's equivocation and ambiguity regarding disparate impact discrimination in *Choate* leaves § 504 vulnerable to future legal challenges concerning the statute's scope and application.<sup>127</sup>

ii. *Alexander v. Sandoval*<sup>128</sup>

The second Supreme Court decision impacting the question of disparate impact claims under § 504 did not involve that statute. Sixteen years after *Choate*, the Supreme Court addressed the issue of whether a private cause of action for disparate impact exists under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin by recipients of federal funds.<sup>129</sup> The majority opinion pronounced that "three aspects of Title VI must be taken as given."<sup>130</sup> The first was that "private individuals may sue to enforce § 601 and obtain both injunctive relief and damages."<sup>131</sup> The second was "that § 601 prohibits only intentional discrimination."<sup>132</sup> As to the third, the Court "assume[d] for purposes of deciding this case that regulations

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against people with disabilities by recipients of federal funds, a private cause of action would still be available to enforce Section 1557. However, for courts following *Doe v. BlueCross BlueShield of Tennessee*, 926 F.3d 235, 239 (6th Cir. 2019), a limitation on private causes of action to enforce claims of disparate impact under Section 504 would also apply to Section 1557 under the Affordable Care Act. In 2020, the 2016 regulation was reversed and rescinded leaving uncertainty with respect to "independent" private causes of action under Section 1557. Jennifer Sheller & Andrew Stevens, *Court Denies Attempt to Prevent Closure of Lone Maternity Ward Under Section 1557 of ACA and Disparate-Impact Theory of Discrimination*, JD SUPRA (Oct. 21, 2020), <https://www.jdsupra.com/legalnews/court-denies-attempt-to-prevent-closure-13227/> [https://perma.cc/3CD9-JSPY].

126. Weber, *supra* note 121, at 651–52.

127. Any future court ruling might also impact Title II of the ADA. See BROUGHER, *supra* note 90, at 7–8 ("The Americans with Disabilities Act was modeled on the statutory language, regulations, and case law of § 504."). To create consistent standards between the two statutes, the definition of disability under § 504 was also amended by the ADA Amendments Act of 2008 to conform with the definition of disability under the ADA. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 7, 122 Stat. 3553, 3559. Unlike Title I and Title III of the ADA which lists all of the types of actions included within the term discrimination, "[Title II]" essentially simply extends the anti-discrimination prohibition embodied in Section 504 to all actions of state and local governments." See *Pathways Psychosocial v. Town of Leonardtown*, 133 F. Supp.2d 772, 782 (D. MD. 2001).

128. 532 U.S. 275 (2001).

129. See *Alexander v. Sandoval*, 532 U.S. at 293 (holding that there is no private right of action to enforce Title VI's disparate-impact regulations); Civil Rights Act of 1964 tit. VI, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in federally funded programs).

130. *Alexander v. Sandoval*, 532 U.S. at 280.

131. *Id.* at 279.

132. *Id.* at 275.

promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”<sup>133</sup>

This led the Court to the central question: whether a private cause of action exists to enforce a disparate impact regulation promulgated under Title VI. The majority held that Title VI does not include a private right of action to enforce disparate impact regulations nor was there evidence of Congressional intent to make it so.<sup>134</sup> The Court explained, “We . . . begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI.”<sup>135</sup> The Court’s decision in *Sandoval* overturned decades of precedent which supported a private cause of action under Title VI.<sup>136</sup>

Although the decision did not address § 504 specifically, *Sandoval* raised additional questions as to whether (because § 504 was modeled after and adopted the language of Title VI) § 504 might be similarly interpreted to exclude a private right of action for disparate impact.<sup>137</sup> Thus going forward, post-*Sandoval*, any judicial analysis of § 504 should address two questions: (1) In addition to prohibiting intentional discrimination, does the statute also prohibit disparate impact discrimination? (2) Does the statute provide a private right of action as a mechanism of enforcement? As to the first question, *Choate* only “assume[d]” but did not decide that some disparate impact was prohibited. *Sandoval* found that § 601 did not prohibit disparate impact discrimination but assumed that § 602 permitted agencies to promulgate

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133. *Id.* at 275. Section 602 of Title VI the Civil Rights Act of 1964 directs federal departments and agencies that provide financial assistance to issues rules and regulations implementing § 601. 42 U.S.C. § 2000d-1 (2018).

134. *Alexander v. Sandoval*, 532 U.S. at 289-93.

135. *Id.* at 288. The Equity and Inclusion Enforcement Act of 2021 was introduced by Rep. Robert C. “Bobby” Scott (D-Va.), Chair of the House Committee on Education and Labor, and Rep. Jerrold Nadler (D-N.Y.), Chair of the House Judiciary Committee. If passed, the bill would restore a private right of action for disparate impact discrimination claims under Title VI. H.R. 730, 117th Cong. (2021). A prior version had been proposed in 2019 and passed in the House of Representatives but failed to move to the Senate. H.R. 2574, 116th Cong. (2019). The 2021 bill was last reported in the House of Committee of Education and Labor in November 2021. See H.R. REP. 117-177 (2021).

136. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (Stevens, J., dissenting). Justice Stevens, joined by Justice Ginsberg, Souter and Breyer, issued a scathing 24-page dissent, in which they assailed the majority for engaging in “judicial fiat” by ignoring not just their own precedent, but the reliance demonstrated by the lower court opinions that have followed the Supreme Court’s interpretation—not to mention the reliance by victims of discrimination that this avenue would be available to them. *Id.* at 295. In short, according to the dissent, the majority got it wrong, as the issue had already been settled. *Id.*

137. Section 504 of the Rehabilitation Act mirrors the language of Section 602 of Title VI, which prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance. See 42 U.S.C. § 2000d; 29 U.S.C. § 794.

regulations proscribing such discrimination.<sup>138</sup> With respect to the second question, *Choate* implies that there is a private right of action to the extent that § 504 prohibits disparate impact discrimination.<sup>139</sup> However, *Sandoval* concludes that there is no such private right of action because disparate impact under Title VI can only be prohibited by regulation.<sup>140</sup> More broadly, after *Sandoval* questions remain regarding the relationship between Title VI and § 504 and the impact of the decision on that section and on other legislation modeled after Title VI. Few courts have dealt directly with the question of whether *Sandoval* in effect overruled *Choate*.

### C. Circuit Court Split

For almost three decades after *Choate*, circuit courts faced with the question accepted that disparate impact claims were available under § 504. Eventually, a Sixth Circuit decision<sup>141</sup> created a circuit split that has yet to be resolved by the Supreme Court. Two pandemic era decisions in the Ninth Circuit potentially presented the opportunity to resolve the split.<sup>142</sup> The circumstances under which those cases avoided Supreme Court review underscores the significance of the issue to the disabled community.<sup>143</sup>

#### i. Post-*Choate* Cases

Following *Choate*, the circuit courts accepted the potential viability of claims of disparate impact under § 504, often without extended discussion or analysis.<sup>144</sup> However, the courts did grapple with questions

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138. *Sandoval*, 532 U.S. at 286. By analogy, the question remains open as to whether agencies are empowered under Section 504 to implement disparate impact regulations.

139. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

140. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

141. *Doe v. BlueCross BlueShield of Tenn, Inc.* 926 F.3d 235 (6th Cir. 2019). In *Nicholas v. Fulton Cnty. Sch. Dist.*, No. 1:20-cv-3688, 2022 WL 2276900, at \*18-19 (N.D. Ga. June 23, 2022), the district court followed the Sixth Circuit's reasoning in deciding that § 504 does not prohibit disparate impact discrimination, while noting, however, that the Eleventh Circuit had not directly addressed the issue, citing *Berg v. Fla. Dep't of Lab. and Emp. Sec.*, 163 F.3d 1251, 1254 (11th Cir. 1998) and *Forsyth v. Univ. of Ala. Bd. of Trustees*, No. 20-12513, 2021 WL 4075728, at \*6 (11th Cir. Sep. 8, 2021).

142. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), *cert. dismissed*, 142 S. Ct. 480 (2021); *Payan v. Los Angeles Community College Dist.*, 11 F.4th 729 (9th Cir. 2021).

143. See *infra* Part II.D.

144. See, e.g., *Nathanson v. Medical College of Pennsylvania*, 926 F. 2d 1368, 1384 (3d Cir. 1991) (noting that the *Choate* Court "emphasized that the Rehabilitation Act was directed particularly at unintentional conduct . . . ."); *Am. Council of the Blind v. Paulson*, 525 F. 3d 1256, 1260 (D.C. Cir. 2008) ("The Supreme Court has instructed that section 504 does not require proof of discriminatory intent . . . ."); *Ruskai v. Pistole*, 775 F.3d 61, 78 (1st Cir.

about how to apply the meaningful access standard. For instance, has the plaintiff properly identified a benefit to which meaningful access has been denied?<sup>145</sup> Further, *Choate* admonished that “[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled.”<sup>146</sup> How broadly or narrowly, then, is the benefit to be defined?<sup>147</sup> What degree of deprivation is required before the plaintiff lacks meaningful access to the benefit?<sup>148</sup> The *Choate* Court also recognized that “to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.”<sup>149</sup> How then does the meaningful access standard affect the measure of reasonableness and even the question of whether the plaintiff is “otherwise qualified?”<sup>150</sup>

## ii. Post-Sandoval Cases

After the Supreme Court’s decision in *Sandoval* rejecting disparate impact claims under Title VI,<sup>151</sup> the Tenth Circuit, in *Robinson v. Kansas*, stated that “[t]he decision in *Sandoval* does not affect plaintiffs’ right to

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2014) (noting that although the Supreme Court has not revisited the issue of disparate impact claims under § 504 since *Choate*, “[w]e nevertheless think it well established what the Court assumed to be so is so—proof of discriminatory animus is not always required in an action under Section 504.”).

145. *Ruskai*, 775 F.3d at 79 (holding that a Petitioner with a metal implant who was subject to TSA pat down procedures had failed to identify a benefit to which she was denied meaningful access, having received “full and complete access to the secure side of the checkpoints . . . and to TSA’s security screening procedures.”).

146. *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

147. See, e.g., *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 199 (2d Cir. 2014) (“[T]he relevant benefit is the opportunity to fully participate in [the Board of Elections’] voting program. This includes the option to cast a private ballot on election days. Indeed, to assume the benefit is anything less, such as merely the opportunity to vote at some time in some way, would render meaningless the mandate that public entities may not ‘afford [ ] persons with disabilities services that are not equal to that afforded others.’” (citations omitted)); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 505 (4th Cir. 2016) (“On the whole, then, we think it is far more natural to view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny for compliance with the ADA and the Rehabilitation Act.”).

148. See, e.g., *Am. Council of the Blind v. Paulson*, 525 F.3d at 1269 (discussing issues of visibility related to impaired persons’ ability to use paper currency, stating that “the Rehabilitation Act’s emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of a third persons . . . [and that] coping mechanisms and alternate means of participating in economic activity do not address the scope of the denial of access that the [plaintiffs have] shown.”).

149. *Alexander v. Choate*, 469 U.S. at 301.

150. *Brennan v. Stewart*, 834 F.2d 1248, 1261–1262 (5th Cir. 1988) (“The question after [Choate] is the rather mushy one of whether some ‘reasonable accommodation’ is available to satisfy legitimate interests of both the grantee and the handicapped person.”).

151. *Alexander v. Sandoval*, 532 U.S. 275, 276 (2001).

bring a disparate impact claim under section 504....”<sup>152</sup> The court observed that even though the language in the relevant sections of § 504 and Title VI were “essentially” identical, *Choate* had “laid out the different aim of the Rehabilitation Act as well as the different context in which the Act was passed.”<sup>153</sup>

Six years later, the Ninth Circuit, in *Mark H. v. Lemahieu*, did not rule out the possibility that, post-*Sandoval*, plaintiffs could state a claim to enforce regulations promulgated under § 504 regarding the requirement to “provide a free appropriate public education to each qualified handicapped person” even if those claims might be considered disparate impact claims.<sup>154</sup> Considering both *Sandoval* and *Choate*, the court concluded that, “[f]or purposes of determining whether a particular regulation is ever enforceable through the implied right of action contained in a statute, the pertinent question is simply whether the regulation falls within the scope of the statute’s prohibition.”<sup>155</sup> Because the parties had treated the regulations under the Individuals with Disabilities Education Act (IDEA)<sup>156</sup> as identical with those promulgated under § 504, the case was remanded to the district court to give the plaintiffs “an opportunity to amend [their] complaint to specify which § 504 regulations they believe were violated and which support a privately enforceable cause of action.”<sup>157</sup>

However, in *Doe v. BlueCross BlueShield of Tennessee, Inc.*, the Sixth Circuit declared that “[w]e now resolve what *Choate* did not and conclude that § 504 does not prohibit disparate-impact discrimination.”<sup>158</sup> The particular facts involved a claim that the defendant health insurer violated § 1557 of the ACA by requiring that the plaintiff’s HIV medication, among other medications, could only be obtained at in network prices through a specialty network, so only by either mail delivery or at specified pharmacies.<sup>159</sup> Having concluded that the plan did not intentionally discriminate against those with disabilities, the court turned to the question of disparate impact claims under § 504.<sup>160</sup> The court looked first at the language of the section, which bars discrimination against any individual “solely by reason of her or his

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152. 295 F.3d 1183, 1187 (10th Cir. 2002).

153. *Id.*

154. *Mark H. v. Lemahieu*, 513 F.3d 922, 929 (9th Cir. 2008).

155. *Id.* at 938.

156. Individuals with Disabilities Act, 20 U.S.C. §§ 1400–1482.

157. *Mark H.*, 513 F.3d at 939.

158. 926 F.3d 235, 241 (6th Cir. 2019).

159. *Id.* at 237–38.

160. *Id.* at 241. The court had already rejected Doe’s argument that § 1557 allowed him to apply the standard of care or enforcement mechanism of any of the statutes incorporated by reference in § 1557. *Id.* at 238–39.

disability.”<sup>161</sup> The court reasoned that such language “does not encompass actions taken for nondiscriminatory reasons.”<sup>162</sup> Similarly, in the court’s view, the prohibition in Title VI, after which § 504 was patterned, prohibits discrimination on the basis of a protected characteristic, and in *Sandoval*, the Supreme Court concluded that such language did not reach disparate impact discrimination.<sup>163</sup>

Considering *Choate*, the Sixth Circuit observed that the Court declined to decide the issue and subtly criticized the Court for minimizing or disregarding the similarities between § 504 and Title VI.<sup>164</sup> Accordingly, the Sixth Circuit “remain[ed] free to hold that § 504 does not cover disparate-impact claims.”<sup>165</sup>

It might be easy to regard *BlueCross BlueShield* as an outlier, and indeed, the court notes that other courts of appeals had reached a different conclusion as to disparate impact claims.<sup>166</sup> However, as discussed below, the court’s reasoning, particularly as to the language of the statute, may be a harbinger of how the Supreme Court might rule should the question of disparate impact under § 504 be presented to the Court again.<sup>167</sup>

#### D. Recent Legal Challenges to § 504

The Ninth Circuit did not follow the Sixth Circuit in a pair of cases that drew widespread attention. What was particularly interesting in both cases was that the defendant chose not to seek Supreme Court review, presumably due to publicity and pressure from the disabled community, its supporters, and advocates, leaving the issue of the scope of § 504 open.

##### i. *Doe v. CVS Pharmacy, Inc.*<sup>168</sup>

The first case, *Doe v. CVS Pharmacy, Inc.*, was brought under § 1557 on facts remarkably similar to those in *Doe v. BlueCross BlueShield*. The

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161. *Id.* at 241.

162. *Id.* at 242.

163. *Id.*

164. *Id.* (“[The *Choate* Court] then chose to ‘assume without deciding’ that § 504 means something different than its twin.”).

165. *Id.* The court’s conclusions seem to be significantly influenced by what it viewed as a meritless claim and the perception that the *Choate* Court’s concern of unleashing a floodgate of complaints had materialized. *Id.* (“With thirty years of hindsight, we can go one step further. Even entertaining the idea of disparate-impact liability in this area invites fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions, as this case aptly shows.”).

166. *Id.* at 242–43.

167. See *infra* Part III Judicial Trends and Executive Actions That Threaten the Protections of § 504.

168. 982 F.3d 1204 (9th Cir. 2020).

plaintiffs were individuals living with HIV/AIDS whose pharmacy benefits manager now required them to get their specialty medications through either mail delivery or from a CVS pharmacy in order to get in network pricing, potentially thousands of dollars less than out of network prices.<sup>169</sup> The plaintiffs alleged that the disproportionate impact of an employer sponsored medication plan on people living with HIV violated § 504 and § 1557 of the ACA.<sup>170</sup> Among the specific harms alleged were that the process resulted in delays in delivery, damaged and stolen shipments, difficulties with prescription changes and ensuring current medication dosages, and, in some cases, violations of medical privacy.<sup>171</sup> In addition the plaintiffs alleged that the program forced them to forego consultation with their specialty pharmacists, which was critical to managing their medication regimens.<sup>172</sup>

The petition was granted as to the first question only on July 2, 2021.<sup>173</sup> The case was fully briefed, including nineteen amicus briefs.<sup>174</sup> Argument before the Supreme Court was scheduled for December 7, 2021.<sup>175</sup> In the interim, a significant outcry was raised by the disabled community and their advocates and the case became national news.<sup>176</sup> For instance, a banner headline on the ACLU website proclaimed: "CVS Wants the Supreme Court to Gut Non-Discrimination Protections For People With Disabilities. It Could Set Us Back Decades."<sup>177</sup> Presumably in response to these public reactions,<sup>178</sup> on November 11, 2021, CVS took the extraordinary step of withdrawing its petition and thus removed the

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169. *Id.* at 1207.

170. *Id.* at 1208–09.

171. *Id.* at 1207–08.

172. *Id.* at 1208.

173. CVS Pharmacy, Inc. v. Doe, 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), *cert. dismissed*, 142 S. Ct. 480 (2021).

174. No. 20-1374 *Proceedings and Orders*, SUP. CT. OF THE U.S.: DOCKET SEARCH, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1374.html> [<https://perma.cc/NWE4-DE3M>].

175. *Id.*

176. See, e.g., Michael Roppolo, *Supreme Court Case Could "Rip" Laws That Protect People with Disabilities, Advocates Warn*, CBS NEWS (Nov. 5, 2021), <https://www.cbsnews.com/news/supreme-court-cvs-doe-disabilities-laws/> [<https://perma.cc/VG2D-ZVPD>].

177. Susan Mizner, Arlene B. Mayerson & Aaron Madrid Aksoz, *CVS Wants the Supreme Court to Gut Non-Discrimination Protections for People with Disabilities. It Could Set Us Back Decades.*, ACLU: NEWS & COMMENT. (Oct. 29, 2021), <https://www.aclu.org/news/disability-rights/cvs-wants-the-supreme-court-to-gut-non-discrimination-protections-for-people-with-disabilities-it-could-set-us-back-decades> [<https://perma.cc/66Q7-BLHW>].

178. Michelle Diament, *CVS Drops Supreme Court Case over Disability Community Concerns*, DISABILITY SCOOP (Nov. 12, 2021), <https://www.disabilityscoop.com/2021/11/12/cvs-drops-supreme-court-case-over-disability-community-concerns/29593/> [<https://perma.cc/66Q7-BLHW>].

issue from Supreme Court consideration.<sup>179</sup> Thus, the Court did not have the ability to resolve the issue, left open by Congress and *Choate*, of whether § 504 prohibits disparate impact discrimination.

ii. *Payan v. Los Angeles Community College District*<sup>180</sup>

The Ninth Circuit's decision in *Payan v. L.A. Community College District* presented another potential opportunity for the Supreme Court to address the issue of whether a private cause of action for disparate impact is cognizable under § 504. In *Payan*, among other questions, the Ninth Circuit directly addressed the issue of whether a private cause of action under § 504 to enforce disparate impact discrimination survived *Sandoval*.<sup>181</sup> At the time of the suit, the plaintiffs, who are blind, were enrolled in classes at Los Angeles City College (LACC), part of the public community college district serving Southern California (the Los Angeles Community College District or LACCD).<sup>182</sup> While taking classes, the students encountered accessibility barriers with respect to in-class materials, textbooks, educational technology, websites, and computer applications, as well as research databases in the LACC library.<sup>183</sup> The plaintiffs sued the LACCD alleging violations of § 504 and Title II of the ADA<sup>184</sup> and the case reached the Ninth Circuit on appeal after a grant of partial summary judgment and a bench trial, which resulted in each plaintiff receiving some relief.<sup>185</sup>

The court addressed what it identified as the open question regarding whether there is a private right of action to enforce disparate impact claims, post-*Sandoval*, under § 504 and Title II of the ADA.<sup>186</sup> The court rejected the defendant's position that, because the three statutes share the same statutory language and remedies, the Supreme Court's elimination of a private right of action under Title VI in *Sandoval* should

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179. See Joint Stipulation to Dismiss, CVS Pharmacy, Inc. v. Doe, 982 F.3d 1204 (9th Cir. 2020) (2021) (No. 20-1374), cert. dismissed, 142 S. Ct. 480 (Nov. 12, 2021); see also Diamant, *supra* 178.

180. 11 F.4th 729 (9th Cir. 2021).

181. *Id.* at 734.

182. *Id.* at 732.

183. *Id.* at 731–33.

184. The district court granted partial summary judgment with respect to some of the claims and instructed the plaintiff to reframe their disability discrimination arguments through a disparate impact framework. *See id.* at 733. Subsequent to their amended complaint, the court entered judgment for one plaintiff, Payan, after a two-day bench trial and for another plaintiff, Mason, after a three-day jury trial. *See id.* at 733. Applying the meaningful access standard to the plaintiffs' disparate impact claims, the court found that the LACCD violated Title II of the ADA and § 504 with respect to the inaccessible handbook, website and library databases. *See id.* at 733–734. The district court did not raise the issue of a private right of action under § 504. *Id.* at 734.

185. *Id.* at 733–34.

186. *Id.* at 734.

also apply to § 504 and Title II of the ADA.<sup>187</sup> Distinguishing Title VI, the court noted that the Supreme Court's decision to limit the availability of private rights of action to intentional discrimination was not based on the statutory language of Title VI but on its review of prior equal protection jurisprudence.<sup>188</sup> Based on that analysis, the court "reject[ed] LACCD's invitation to limit the enforceability of disparate impact disability discrimination claims based on inapplicable reasoning found in cases interpreting Title VI" and concluded that "disparate impact disability discrimination claims remain enforceable through a private right of action" under § 504 and Title II of the ADA.<sup>189</sup>

Ultimately, the Board of Trustees voted not to petition for Supreme Court review, seeking instead to settle the dispute with the plaintiffs through mediation.<sup>190</sup> This decision followed petitions and public protests against the district, which had indicated an intent to seek Supreme Court review.<sup>191</sup>

Although the *CVS* and *Payan* cases avoided Supreme Court review, there is a strong possibility, based on the Court's previous grants of certiorari, that it may once again grant certiorari in a future case.<sup>192</sup> The Supreme Court's previous grant of a writ of certiorari in *CVS* could signal that it may consider the lack of clarity regarding § 504 to be an issue which "could have national significance, might harmonize conflicting

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187. *Id.* at 735.

188. *Id.* at 735–37. The court noted that in *Sandoval*, the Supreme Court turned to its prior decisions in *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582 (1983), *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *Washington v. Davis*, 426 U.S. 229 (1976), where it considered the scope of Title VI and reached its decisions based on the reach of the Fourteenth Amendment's Equal Protection Clause jurisprudence. *Payan*, 11 F.4th at 736–37. The Ninth Circuit cited Justice White's plurality opinion from *Guardians*: "in *Bakke*, five Justices, including myself, declared that Title VI on its own bottom reaches no further than the Constitution, which suggests that, in light of [*Washington v. Davis*], Title VI does not of its own force proscribe unintentional racial discrimination." *Payan*, 11 F.4th at 736 (citing *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 589–90).

189. *Payan*, 11 F.4th at 737.

190. William Boyer, *LACCD Drops Supreme Court Review for Mediated Settlement on ADA Issue*, CULVER CITY CROSSROADS (Mar. 3, 2022), <https://culvercitycrossroads.com/2022/03/03/laccd-drops-supreme-court-review-for-mediated-settlement-on-ada-issue/> [https://perma.cc/J9LZ-2EU].

191. Colleen Shalby, *Protests Intensify as a Disability Rights Case Nears Deadline for Supreme Court Petition*, L.A. TIMES (Mar. 2, 2022), <https://www.latimes.com/california/story/2022-03-02/disability-rights-case-against-laccd-could-go-to-supreme-court> [https://perma.cc/7VYN-L5J2].

192. See Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 934 (2022). The Supreme Court is most likely to grant certiorari where there is a conflict. *Id.* at 925, 934 ("The Roberts Court... seems to favor granting review in cases that invite the Court to overrule precedent....").

decisions in the federal Circuit courts, and/or could have precedential value.”<sup>193</sup>

### III. Judicial Trends and Executive Actions That Threaten the Protections of § 504

Limitations on the availability of disparate impact discrimination claims, stemming from restrictive judicial interpretations, diminished administrative agency authority, and adverse executive actions, pose significant challenges to the enforcement of a private right of action under § 504. These developments threaten to erode the protections the Rehabilitation Act was designed to provide, as suggested by the Court in *Choate*, potentially leaving many individuals with disabilities without recourse to challenge discriminatory practices absent a showing of discriminatory intent.<sup>194</sup> Thus, congressional action to codify disparate impact under § 504 is both necessary and urgent.

#### A. Failure to Adhere to Precedent

These challenges are amplified by the Supreme Court’s increasing willingness to disregard *stare decisis* and previously accepted, though unenumerated, constitutional rights and other protections grounded in longstanding judicial precedents. Most notably, the Court’s decision in

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193. *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures> [https://perma.cc/M4PV-PZDX]. Although it was not a direct challenge to the availability of disparate impact claims, the complaint in *Texas v. Becerra* (now titled *Texas v. Kennedy*) presented a different threat to § 504. Complaint, *Texas v. Becerra*, (N.D. Tex. Sept. 26, 2024) (No. 5:24-CV-00225). Seventeen State Attorneys General filed a complaint against the Secretary of the U.S. Department of Health and Human Services (“HHS”), challenging a Biden Administration HHS rule that amended the definition of disability under § 504 and the ADA to include “gender dysphoria.” *See id.* at 1. The plaintiffs sought permanent injunctive relief from the enforcement of the rule and a declaration that § 504 was unconstitutional. *See id.* at 42. As of this writing, the case is currently stayed, with the parties submitting monthly status reports and no briefing schedule has been set at this time. As noted in the most recent status report, HHS continues to evaluate its position in light of President Trump’s Executive Order 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, which provides that agencies shall not “promote or otherwise inculcate gender ideology.” *See* Joint Status Report at 2, *Texas v. Kennedy*, No. 5:24-cv-00225-C (Apr. 11, 2025); Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025). Although the plaintiffs stated in their April 2025 status report that they do not intend to ask the court to declare § 504 unconstitutional on its face, the complaint was not amended to reflect this position. *See* Joint Status Report at 2, *Texas v. Kennedy*, No. 5:24-cv-00225-C (Apr. 11, 2025). An order was issued staying proceeding in the case on April 17. *See* Joint Status Report, *Texas v. Kennedy*, No. 6:24-cv-211-JDK. (Apr. 17, 2025). In the most recent status report the parties agreed to the continued stay of District Court proceedings. *See* Joint Status Report at 2, *Texas v. Kennedy*, No. 6:24-cv-211-JDK (Jun. 12, 2025). There are no recent updates on the current status of this case.

194. *Choate*, 469 U.S. at 296–97.

*Dobbs v. Jackson Women's Health Organization*<sup>195</sup> overturned *Roe v. Wade*<sup>196</sup> and *Planned Parenthood v. Casey*,<sup>197</sup> reversing nearly fifty years of precedent on abortion rights and destabilizing a broader body of privacy rights jurisprudence.<sup>198</sup> Similarly, the Court's decision to overturn *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>199</sup> in *Loper Bright Enters. v. Raimondo*,<sup>200</sup> discussed below,<sup>201</sup> marked a significant shift in administrative law, eliminating a foundational principle of deference to agency interpretations that had guided courts for decades.<sup>202</sup> These decisions appear to reflect a broader judicial philosophy that is increasingly skeptical of precedent, particularly when it involves unenumerated rights or interpretations grounded in implied congressional intent.<sup>203</sup>

The *Dobbs* ruling also disproportionately impacts millions of women at the intersections of race, disability, sexual orientation, socio-economic status, and other identities.<sup>204</sup> By shifting regulatory authority to the states, the decision in *Dobbs* effectively limits access to reproductive rights and reproductive healthcare, with broader implications for people with disabilities who already face significant challenges accessing healthcare and exercising their right to bodily

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195. 597 U.S. 215, 264 (2022) (Alito, J.) (stating "that *stare decisis* is 'not an inexorable command'" and declining to uphold *Roe v. Wade*, despite its longstanding precedent).

196. 410 U.S. 113 (1973).

197. 505 U.S. 833 (1992).

198. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a constitutional right to privacy); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (recognizing the rights of individuals with disabilities to live in community settings under the ADA); see also Melissa Murray, *The Symbiosis of Abortion Precedent*, 134 HARV. L. REV. 202 (2020) (arguing that abortion jurisprudence has been central to the Court's understanding of precedent and that dismantling it threatens the stability of broader privacy doctrines); cf. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade* and rejecting precedent based on substantive due process grounds).

199. 467 U.S. 837 (1984).

200. 603 U.S. 369 (2024).

201. See *infra* Part IV.C.1.

202. *Loper Bright*, 603 U.S. at 412.

203. See generally *Dobbs*, 597 U.S. 215 (2022); *Loper Bright*, 603 U.S. 369 (2024).

204. Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez & Nambi Ndugga, *What Are the Implications of the Dobbs Ruling for Racial Disparities?*, KFF (Apr. 24, 2024), <https://www.kff.org/womens-health-policy/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities/> [https://perma.cc/7BFM-NDJN] (discussing how the *Dobbs* decision has had significant implications for racial and ethnic disparities in health care, particularly among Black, American Indian, and Alaska Native women); see also Robyn Powell, *Dobbs, Disability, and the Assault on Reproductive Autonomy*, AM. BAR ASS'N: HUM. RTS. MAG. (July 18, 2025), <https://www.americanbar.org/groups/crsj/resources/human-rights/2025-july/dobbs-disability-assault-reproductive-autonomy/> [https://perma.cc/PGL2-BN9L] (discussing how the *Dobbs* decision has further eroded reproductive autonomy by compounding existing high rates of sexual violence, coercion, and poverty experienced by people with disabilities).

autonomy.<sup>205</sup> In many states with restrictive abortion laws,<sup>206</sup> individuals with disabilities often face heightened risks to their health and autonomy as they may be forced to carry pregnancies to term under conditions that may worsen their disabilities—or lead them to seek illegal means of pregnancy termination, putting their lives at risk.<sup>207</sup> Beyond pregnancy, the *Dobbs* decision has also contributed to broader barriers in healthcare access for disabled individuals and other groups.<sup>208</sup> Moreover, Justice Thomas's concurrence in *Dobbs*, suggesting that the Court should reconsider other substantive due process precedents, may signal the potential rollback of other critical civil rights protections.<sup>209</sup> Among those at risk are cases such as *Olmstead v. L.C. ex rel. Zimring*, which for twenty-five years has affirmed the fundamental right of individuals with disabilities to live in the least restrictive environment possible.<sup>210</sup>

Given this trend, it is plausible that the Supreme Court could revisit, and potentially overturn, *Alexander v. Choate*.<sup>211</sup> The Court has previously overturned three decades of precedent by limiting disparate impact claims under Title VI in *Alexander v. Sandoval*.<sup>212</sup> The Court's demonstrated willingness to reconsider established precedent suggests that other key legal interpretations of disparate impact discrimination may also be at risk. If this trajectory continues, there is a real possibility

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205. See Asha Hassan, Lindsey Yates, Anna K. Hing, Alanna E. Hirz & Rachel Hardeman, *Dobbs and Disability: Implications of Abortion Restrictions for People with Chronic Health Conditions*, 58 HEALTH SERVS. RSCH. 197 (2023), <https://doi.org/10.1111/1475-6773.14108>; Robyn M. Powell, *Forced to Bear, Denied to Rear: The Cruelty of Dobbs for Disabled People*, 112 GEO. L.J. 1095 (2024).

206. Talia Curhan edited by Peter Ephross, *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans> [<https://perma.cc/W9AD-JA29>].

207. Powell, *supra* 205, at 1119 ("Forced pregnancies reinforce the systemic ableism that underlies much of the opposition to reproductive rights and justice and threatens to exacerbate the harm that already marginalized people face in accessing reproductive health services and information and asserting their fundamental human rights.").

208. See Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022), <https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/> [<https://perma.cc/E53S-ES3J>] (describing how restrictions on access to abortion have also in some states resulted in the inability of some individuals with disabilities to access medications for chronic conditions).

209. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.") (citations omitted).

210. 527 U.S. 581, 599 (1999) (holding that unnecessary institutionalization of individuals with disabilities violates the ADA and their substantive due process rights by depriving them of their liberty and autonomy).

211. 469 U.S. 287 (1985). See *infra* Part III.B.1.

212. 532 U.S. 275 (2001). See *infra* Part III.B.2.

that *Choate* could be similarly dismantled, a move that would severely undermine civil rights protections for people with disabilities and others who rely on disparate impact claims to challenge systemic discrimination.

### B. Narrowing Disparate Impact Doctrine

Decisions of the Supreme Court in the last several years have sought to narrow the scope of disparate impact discrimination, affecting the enforcement of § 504. In addition, the executive branch, during the past and current Trump Administrations, has contributed to the weakening of civil rights protections.

#### i. The Supreme Court

More recent decisions of the Supreme Court reflect a reluctance to recognize or provide remedies for disparate impact claims. For example, in *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.*,<sup>213</sup> the Court held that the reimbursement structure of an employee health benefit plan, which provided lower reimbursement rates for outpatient dialysis than for in-hospital treatment, did not violate the Medicare Secondary Payer statute's non-discrimination provision, which only prohibited differentiation in benefits provided based on the existence of end-stage renal disease (ESRD).<sup>214</sup> The Court reasoned that because the terms of the benefit plan applied uniformly to all the covered individuals, there was no disparate treatment.<sup>215</sup> Moreover, the Court found, the statute did not "encompass a disparate-impact theory" because the text "[did] not ask about 'the effects of non-differentiating plan terms that treat all individuals equally.'"<sup>216</sup>

In contrast, Justice Kagan's dissenting opinion emphasized the potential consequences of this narrow interpretation, arguing that, although the law was applied uniformly, it had a disproportionate impact on patients receiving outpatient dialysis.<sup>217</sup> She cited cases in which the Court had recognized that status and conduct can serve as proxies for one another, thereby supporting findings of impermissible disparate impact discrimination.<sup>218</sup> Joined by Justice Sotomayor, Justice Kagan argued that outpatient dialysis served as a proxy for ESRD, and thus the health benefit

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213. *Marietta Mem'l Hosp. Emp. Health Benefit Plan v. DaVita Inc.*, 596 U.S. 880 (2022).

214. *Id.* at 882.

215. *Id.* at 885–886.

216. *Id.* at 886.

217. *Id.* at 888 (Kagan, J., dissenting).

218. *Id.* at 888–90 ("[A] penalty for 'homosexual conduct' is a penalty for 'homosexual persons.' And likewise, a 'tax on wearing yarmulkes is a tax on Jews.'" (citations omitted) (first quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); and then quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)).

plan's policy amounted to disparate impact discrimination against individuals with ESRD.<sup>219</sup>

The Court's majority opinion in *Marietta Memorial Hospital* and other cases discussed below may signal its waning recognition of disparate impact claims.<sup>220</sup> In other areas involving disparate impact discrimination, such as challenges under the Voting Rights Acts, the Court has issued rulings that complicate efforts to protect minority voters. For example, *Brnovich v. Democratic National Committee*<sup>221</sup> involved a challenge under § 2 of the Voting Rights Act to an Arizona law that criminalized the collection and delivery of early voting ballots by third parties.<sup>222</sup> This method was frequently used by minority voters participating in early voting by mail who, due to historic inequities, would utilize neighbors or family members to deliver their ballots.<sup>223</sup> Although the Court acknowledged the law's disparate effect, it upheld the Arizona law, downplaying the significance of the statistical disparity on communities of color and asserting that it may be "virtually impossible for a State to devise rules that do not have some disparate impact."<sup>224</sup> In another example, the Court in *Alexander v. South Carolina Conference of the NAACP* upheld a redistricting map that appeared to sort voters along racial lines, ruling instead that the fact that race predominated was incidental to a political gerrymander and not the result of unconstitutional racial gerrymandering.<sup>225</sup> The Court's decision in this racially disparate districting case could make it more difficult for minority voters to challenge discriminatory effects of partisan gerrymandering. It may also signal a broader judicial reluctance to address disparate impact claims.

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219. *Marietta Mem'l Hosp.*, 596 U.S. at 890–891.

220. *Id.* at 888.

221. 594 U.S. 647 (2021).

222. *Id.* at 662 ("For those who choose to vote early by mail, Arizona has long required that [o]nly the elector may be in possession of that elector's unvoted early ballot. § 16-542(D). In 2016, the state legislature enacted House Bill 2023 (HB 2023), which makes it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed. §§ 16-1005(H)–(I).").

223. See *Brnovich*, 594 U.S. at 662; Brief for Navajo Nation as Amicus Curiae Supporting Respondents at 3, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021) (Nos. 19-1257 & 19-1258) (arguing that the "law criminalizes ways in which Navajos historically participated in early voting by mail" due to the remoteness of where they reside and lack of transportation).

224. *Brnovich*, 594 U.S. at 677.

225. 602 U.S. 1, 37 (2024).

## ii. The Executive Branch

During his 2017–2021 term and his current tenure, President Trump implemented policies and executive orders aimed at rolling back or limiting certain statutory civil rights protections. During his first administration, efforts to limit the scope and availability of disparate impact liability were illustrated by his actions involving the FHA.<sup>226</sup> In 2019, President Trump issued Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents,”<sup>227</sup> emphasizing that the only binding rules on the public are those duly enacted and lawfully promulgated and indicating that agencies sometimes do not follow the rulemaking process.<sup>228</sup> This executive order significantly weakened the HUD’s 2013 Discriminatory Effects Rule under the FHA (2013 HUD Rule)<sup>229</sup> which had formalized the agency’s policies prohibiting discriminatory effects discrimination on the basis of protected characteristics under the FHA by creating a burden shifting framework.<sup>230</sup> The 2013 HUD Rule was superseded by the Trump Administration’s guidance (2020 HUD Rule) which raised the burden of proof and added procedural hurdles, making it significantly more difficult for plaintiffs from protected classes to bring disparate impact claims.<sup>231</sup>

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226. Fair Housing Act, 42 U.S.C. §§ 3601–3619; see DAVID H. CARPENTER, CONG. RSCH. SERV., R48113, FAIR HOUSING ACT (FHA): A LEGAL OVERVIEW, (June 27, 2024). (“The FHA prohibits discrimination [in housing] on the basis of ‘race, color, religion, sex, handicap, familial status, or national origin.’ The FHA does not expressly prohibit discrimination [on] the basis of sexual orientation or gender identity. However, courts have construed the [FHA’s] prohibition against sex discrimination to encapsulate discrimination on the basis of sexual orientation and gender identity in line with the Supreme Court’s 2020 decision in *Bostock v. Clayton County*.”) HUD codified the prohibition against gender identity and sexual orientation in its final rule for the Reinstatement of HUD’s Discriminatory Effects Standard. See 88 Fed. Reg. 19450 (Mar. 31, 2023).

227. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019). HUD issued regulations implementing Executive Order 13891 under 85 Fed. Reg. 60694 (Sept. 28, 2020).

228. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019).

229. See 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) (“Through this final rule, HUD formalizes its long-held recognition of discriminatory effects liability under the [Fair Housing] Act....”). Under the 2013 Discriminatory Effect Rule, HUD defined a housing practice with a “discriminatory effect” as one that “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.” *Id.* at 11467–68. The 2013 HUD discriminatory effects rule was later amended in 2020 to better reflect the Supreme Court’s ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, which held that disparate impact liability was cognizable under the Fair Housing Act. See *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519 (2015); 85 Fed. Reg. 60288 (Sept. 24, 2020).

230. 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013).

231. 85 Fed. Reg. 60288 (Sept. 24, 2020).

The 2020 HUD Rule faced multiple legal challenges and was ultimately blocked by a federal court before taking effect.<sup>232</sup>

The Biden Administration sought to restore protections under the FHA by revoking Executive Order 13891, and in March 2023, HUD released a final version titled *Restoring HUD's Discriminatory Effects Standard*, which formally revoked the first Trump Administration's 2020 HUD Rule and restored the original framework.<sup>233</sup> Despite these reversals, however, the current Trump Administration has renewed its efforts to limit the enforcement of disparate impact discrimination claims under the FHA by cutting HUD staffing and cancelling fair housing grants to the private organizations that help protect disabled and other minority applicants from housing discrimination by filing complaints.<sup>234</sup> The current administration has also revoked a rule previously proposed by the Biden Administration that would have reinstated the Affirmatively Furthering Fair Housing (AFFH) rule, first implemented by the Obama Administration.<sup>235</sup> The AFFH rule required localities to track and address patterns of segregation in housing or risk losing federal funding.<sup>236</sup> These targeted administrative actions could be interpreted as part of a broader strategy by the current administration to eliminate disparate impact liability across the federal government.

President Trump signed Executive Orders 14173 and 14281, reshaping the civil rights landscape by seeking to eliminate DEI and DEIA policies in the federal and public sectors and curbing the use of disparate impact theory.<sup>237</sup> Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," calls for eliminating the use of disparate

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232. The rule was met with strong opposition from fair housing organizations and advocacy groups. See, for example, *Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020), a lawsuit brought by advocacy groups which resulted in a preliminary nationwide injunction that halted the implementation of the rule the day before it was to take effect on October 25, 2020.

233. See 88 Fed. Reg. 19450 (Mar. 31, 2023).

234. See, e.g., *Four Fair Housing Groups Sue HUD and DOGE Over Cancelling FHIP Contracts*, NAT'L LOW INCOME HOUS. COAL. (Mar. 17, 2025), <https://nlihc.org/resource/four-fair-housing-groups-sue-hud-and-doge-over-canceling-fhip-contracts> [<https://perma.cc/QAW5-BMRD>] (reporting that four fair housing nonprofits filed a class action lawsuit on March 13, 2025, against HUD, DOGE, and Scott Turner over the cancellation of grants intended to support investigations of discrimination complaints, public education on fair housing laws, and testing for housing discrimination).

235. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8516 (proposed Feb. 9, 2023).

236. See *id.*; see also Katy O'Donnell, *Trump Scraps Biden-era Fair Housing Rule*, POLITICO (Feb. 26, 2025), <https://www.politico.com/news/2025/02/26/trump-scrap-fair-housing-initiative-00206274> [<https://perma.cc/8LKH-JWHG>] (reporting on the rescission of the Biden-era fair housing rule).

237. Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025); Exec. Order No. 14,281, 90 Fed. Reg. 28257 (Apr. 28, 2025).

impact liability in all contexts to the maximum degree possible.<sup>238</sup> In carrying out the directive set forth in Executive Order 14173, the U.S. Attorney General issued a memorandum instructing all federal agencies to revise their guidance to “narrow the use of ‘disparate impact’ theories that effectively require use of race- or sex-based preferences.”<sup>239</sup> The memorandum also directs agencies to emphasize that statistical disparities alone do not automatically constitute disparate impact discrimination.<sup>240</sup> The order excludes “lawful Federal or private-sector” preferences for veterans and people with certain disabilities.<sup>241</sup> However, its broad limitations on disparate impact theory are still likely to affect these groups given the intersectional nature of discrimination. While agencies have begun the implementation of this executive order, it will undoubtedly face legal challenges.<sup>242</sup>

This directive, along with President Trump’s executive orders and recent Supreme Court decisions, signal a significant shift in the federal government’s approach to civil rights enforcement and paves the way for broader efforts to curtail the interpretive and enforcement authority traditionally exercised by administrative agencies and affecting the enforcement of disparate impact discrimination under § 504.

### *C. Limiting Administrative Agency Enforcement Power*

Statutory interpretation and enforcement often depend on federal agencies using their expertise to provide guidance and enact regulations that clarify and implement broad and often vaguely worded congressional statutes that are intended to extend rights and protections.<sup>243</sup> This has been especially true with respect to § 504. After

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238. Exec. Order No. 14,281, 90 Fed. Reg. 175373 (Apr. 23, 2025).

239. OFF. OF THE U.S. ATT’Y GEN., MEMORANDUM FOR ALL DEPARTMENT OF JUSTICE EMPLOYEES ON ELIMINATING INTERNAL DISCRIMINATORY PRACTICES (Feb. 5, 2025), <https://www.justice.gov/ag/media/1388556/dl?inline> [https://perma.cc/J23U-9FEG].

240. *Id.*

241. Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8635 (Jan. 31, 2025). The executive order excludes blind individuals with disabilities covered under the Randolph-Sheppard Act, 20 U.S.C. §§ 107 et seq., which established a program to provide blind vendors the opportunity to operate vending facilities on federal property for remuneration.

242. Lori Sommerfield & Chris Willis, *HUD’s New Direction in Fair Housing Act Enforcement and Rescission of Certain Office of Fair Housing and Equal Opportunity Guidance*, Consumer Financial Services Monitor (Sept. 29, 2025), <https://www.consumerfinancialserviceslawmonitor.com/2025/09/huds-new-direction-in-fair-housing-act-enforcement-and-rescission-of-certain-office-of-fair-housing-and-equal-opportunity-guidance/> [https://perma.cc/7L67-9PBZ] (reporting that HUD, in response to Executive Order 14281, issued memoranda rescinding “guidance documents related to disparate impact and redlining,” and deprioritizing enforcement of the FHA).

243. Justice Elena Kagan has frequently critiqued Congress’s penchant for drafting laws which require agency expertise for implementation. *See, e.g.* Loper Bright Enterprises v.

the passage of the Rehabilitation Act,<sup>244</sup> one of the primary challenges was establishing a mechanism for enforcing § 504.<sup>245</sup> It took four years of sustained sit-ins, occupations, demonstrations, protests, government lobbying, and legal action by people with disabilities and civil rights advocates before the Department of Health, Education, and Welfare (HEW) finally issued implementing regulations.<sup>246</sup> Federal agencies were subsequently directed to incorporate these regulations into their operations.<sup>247</sup> Recognizing the importance of addressing both disparate treatment and disparate impact discrimination, many agencies voluntarily included prohibitions against disparate impact discrimination into their § 504 regulations.<sup>248</sup> As such, agency authority has been essential in protecting disability rights and enforcing disparate impact liability under § 504.<sup>249</sup> However, the combined effect of recent Supreme Court decisions, along with deregulatory reforms and anti-DEIA policies of the executive branch, threatens § 504, and disability rights more broadly, by undermining the efficacy of the administrative state.

### i. The Supreme Court

The Supreme Court recently issued a series of decisions that have significantly curtailed agency decision-making authority, and the level of deference courts are expected to give to agency interpretations of statutes. These rulings also made it easier for regulated parties to

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Raimondo, 603 U.S. 369, 451–52 (2024) (Kagan, J., dissenting) ("[S]tatutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress 'consciously desired' the administering agency to fill in aspects of the legislative scheme . . . Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight.").

244. See Serene K. Nakano, *The Handicapped and Mass Transportation: The Effectiveness of Section 504 in Implementing Equal Access*, 9 FORDHAM URB. L.J. 895, 897–900 (1981) (discussing the implementation of § 504). Of course, the passage of § 504 faced the challenge of escaping the presidential veto. *Id.* at 898. President Nixon vetoed the Rehabilitation Act twice. *Id.* at 898.

245. *Id.* at 900. Unlike Title VI, § 504 does not have its own rulemaking authority. *Id.* Individuals with disabilities rely on federal agencies to enforce § 504. *Id.*

246. See Derek Warden, *The Rehabilitation Act at Fifty*, 14 CAL. L. REV. 54, 56 (2023) (noting that the implementing regulations were required to be signed by the head of what was at that time the Department of Health, Education and Welfare in order for the statute to have the force of law).

247. 29 U.S.C. § 794(b).

248. For example, the U.S. Department of Labor regulations address both disparate treatment and disparate impact discrimination. See 29 C.F.R. § 32.4(b)(1) and 29 C.F.R. § 32.4(b)(4). Neither *Alexander v. Choate*, *Alexander v. Sandoval*, nor *Doe v. BlueCross BlueShield* addressed the issue of the scope or validity of the implementing regulations should the court find that § 504 is limited to intentional discrimination.

249. Several agencies' § 504 implementing regulations include specific reference to disparate impact liability, although it is not specifically included in the statute itself. See 29 C.F.R. § 32.4(b)(1), (b)(4).

challenge agency regulations in court. For example, in *U.S. Securities and Exchange Commission (SEC) v. Jarkesy*, the Court eliminated the ability of the SEC to seek civil penalties for securities fraud through its own tribunals rather than in federal civil court proceedings, holding that adjudicating such matters in-house are a violation of the Seventh Amendment right to a jury trial.<sup>250</sup> In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Court broadened the scope of judicial review under the Administrative Procedure Act (APA) by holding that the six-year statute of limitations by which plaintiff may challenge an administrative agency rule begins to run when the plaintiff suffers an injury from a final agency action, rather than when the final rule is first issued, effectively allowing plaintiffs to challenge decades old rules.<sup>251</sup>

The Court has also continued to limit the power of the Environmental Protection Agency (EPA) in various ways. In *West Virginia v. EPA*, the Court invoked the major questions doctrine, holding that agencies must have clear congressional authorization when they seek to decide issues of vast economic and political significance.<sup>252</sup> This decision further restricts agency flexibility, particularly in areas such as environmental regulation, by introducing a higher bar for regulatory action. In *Sackett v. EPA*, the Court took a narrow view of the EPA's authority under the Clean Water Act, ruling that protections for wetlands only extend to those directly adjoining navigable waters, ignoring statutory language that had long been interpreted to cover wetlands "adjacent" to such waters.<sup>253</sup> This reading effectively undermines decades of environmental regulation and destabilizes a regulatory framework that existed for more than fifty years.<sup>254</sup> Most recently, in *City and County of San Francisco, California v. EPA*, the only 5-4 decision mentioned in this section, the Court further narrowed the EPA's regulatory power under the Clean Water Act by requiring clear and specific guidelines regarding how to comply with water quality standards and potentially limiting the agency's ability to adapt to new and emerging pollution problems where quick action might be necessary to respond to an environmental crises before the agency can produce specific measurable rules.<sup>255</sup>

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250. 603 U.S. 109, 110 (2024).

251. 603 U.S. 799, 799 (2024).

252. 597 U.S. 697, 700-01 (2022).

253. 598 U.S. 651, 651 (2023).

254. By adopting the "continuous surface connection" test, the Supreme Court significantly narrowed the scope of the "significant nexus test" and effectively overturned aspects of the regulatory framework for defining jurisdictions waters of the United States that had been in place since the adoption of the Clean Water Act in 1972. *See id.* at 715.

255. 604 U.S. 334, 335-36 (2023).

The most consequential of these decisions in terms of broad impact across agencies occurred in *Loper Bright Enterprises v. Raimondo*, in which the Court effectively overturned forty years of precedent by discarding the *Chevron* doctrine.<sup>256</sup> Adhering to the Supreme Court's precedent in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts had generally deferred to an administrative agency's reasonable interpretation of ambiguous statutory provisions.<sup>257</sup> Under *Chevron's* framework, courts followed a two-part process to interpret federal statutes—first, determining whether the statute clearly delineates the answer.<sup>258</sup> If the statute was silent or ambiguous, the court would defer to the interpretation of the federal agency charged with enforcing the statute if the agency's interpretation was based on a permissible construction of the statute.<sup>259</sup> By essentially rejecting this approach, the Court shifted interpretive authority away from agencies and back to the judiciary, signaling a dramatic realignment in administrative law.<sup>260</sup> As the enforcement power of § 504 and articulation of disparate impact liability thereunder rests with administrative agency regulations, this decision will likely have far reaching consequences for litigants bringing cases under § 504.

Taken together, these cases could reflect a broader trend within the Court to revive doctrines like the nondelegation doctrine, which limits Congress's ability to transfer lawmaking authority to executive agencies.<sup>261</sup> The practical result could be a judiciary more skeptical of agency expertise and less willing to defer to administrative interpretations, especially in politically or economically significant areas.<sup>262</sup> Consequently, unless administrative agencies are able to show a delegation of congressional authority to add disparate impact discrimination to the regulations implementing § 504, a court could

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256. See 603 U.S. 369, 369 (2024).

257. 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

258. *Id.* at 843.

259. *Id.* at 843.

260. See Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, Vox (June 28, 2024), <https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab> [<https://perma.cc/WNH8-8L2K>].

261. Jonathan H. Adler, *The Delegation Doctrine*, Summer 2024 HARV J.L. & PUB. POL'Y: PER CURIAM No. 12, (June 20, 2024).

262. *Id.* at 2 (discussing the Supreme Court's application of the major questions doctrine as illustrative of its reluctance in some cases to recognize administrative authority that is not expressly delegated and emphasizing in those decisions "that administrative agencies are born without any regulatory authority in the domestic sphere.").

invalidate disparate impact liability in those regulations as an impermissible exercise of congressional authority.<sup>263</sup>

In addition, the *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* decision also introduces new uncertainty regarding challenges to agency actions under the APA.<sup>264</sup> The Court in *Corner Post* held that the APA's six-year statute of limitations begins not when the rule is issued, rather when a plaintiff is first injured by the agency action.<sup>265</sup> This departure has major implications, especially for regulations that are decades old, like those implementing disparate impact standards under § 504. Under *Corner Post*, rather than being time barred, a newly affected party may now bring a timely APA claim, even if the regulation in question is decades old.<sup>266</sup> Hence, a plaintiff claiming recent harm under § 504 could challenge the application of the disparate impact regulation under the APA as exceeding statutory authority. This could invite renewed legal challenges to disparate impact regulations by conservative legal organizations, state governments, or regulated entities who may argue that such regulations impose significant burdens without clear authorization from Congress.

Another significant limitation on enforcement of disparate impact protections under § 504 arises from the Court's increasingly restrictive approach to implied private rights of action. Since the mid-1970s, the Supreme Court has been narrowing the availability of implied private rights of action to enforce federal statutes by applying a four-prong test.<sup>267</sup> Implied private rights of action are now generally foreclosed to enforce federal regulations in the absence of statutory text and structure

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263. See Alison Somin, *Disparate Impact as a Non-Delegation Violation and Major Question*, Summer 2024 HARV J.L. & PUB. POL'Y: PER CURIAM No. 18, at 2 (June 20, 2024) (asserting that disparate impact is a non-delegation issue because it "violates the Constitution's prohibition on delegation of congressional power").

264. See *Corner Post, Inc.*, 603 U.S. at 799 (2024).

265. *Id.* at 809 (holding that the statute of limitations does not accrue until the plaintiff suffers an injury from a final agency action).

266. See *id.* at 809.

267. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (Brennan, J.) (setting forth a four-part test to determine the availability of an implied private right of action). The test asks whether:

- (1) the plaintiff [is in] the class for whose especial benefit the statute was enacted; ...
- (2) there is any indication of legislative intent, explicit or implicit, either to [deny or to create a private right to enforce]; ...
- (3) [a private right to enforce would be] consistent with the underlying purpose of the legislative scheme; ... [and] ...
- (4) the cause of action [is] one traditionally relegated to state law, ... [such that] it would be inappropriate to infer a cause of action based solely on federal law.

*Id.* (internal quotations omitted).

evidencing the intent of Congress to create a new right.<sup>268</sup> While the “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, it may not create a right that Congress has not.”<sup>269</sup> Given these patterns, it is possible that the Court would be cautious in determining whether to extend a private right of action for disparate impact claims under § 504.

## ii. Executive Actions

The executive and judicial branches intersect in their influence on administrative agencies. In recent administrations, the executive branch has taken steps to limit and shift the scope of authority granted to administrative agencies by issuing executive orders, proposing new regulations, and directing agencies to alter their policies—setting the stage for challenges that may eventually reach the Supreme Court.

Under the current administration, there have been major policy shifts toward the elimination of Diversity, Equity, Inclusion, and Accessibility (DEIA).<sup>270</sup> However, there has been little discussion of the importance of these frameworks in fostering inclusive policies and environments for individuals with disabilities. DEIA helps to support anti-discrimination laws such as § 504 by fostering the creation of policies that put statutes into practice and filling the gaps between law and practice.<sup>271</sup> For instance, without these policies, individuals with disabilities may face additional challenges in workplaces that may be less accessible or lack inclusive hiring practices. Loss of DEI policies has impacted access to research grants, many of which were focused on

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268. *Alexander v. Sandoval*, 532 U.S. 275, 285–90 (2001).

269. *Id.* at 291.

270. *See, e.g.*, Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025).

271. DEI policies help to effectuate the goals of anti-discrimination laws and policies by addressing significant biases in areas such as employment. *See, e.g.*, *Making Equal Opportunity Real: How Diversity, Equity, and Inclusion Efforts Combat Workplace Discrimination*, NAT'L INST. FOR WORKERS' RTS. 2 (May 20, 2025), <https://niwr.org/wp-content/uploads/2025/05/2025-NIWR-Policy-Brief-Making-Equal-Opportunity-Real.pdf> [<https://perma.cc/DH9E-6J8J>] (“Diversity, equity, and inclusion initiatives are not only *consistent* with the law but are often *necessary* to ensure compliance with it, as indicated in recent guidance from state attorneys general.”); MASS. & ILL. OFFS. OF THE ATT'Y GEN., MULTI-STATE GUIDANCE CONCERNING DIVERSITY, EQUITY, INCLUSION, AND ACCESSIBILITY EMPLOYMENT INITIATIVES 1 (Feb. 13, 2025), <https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download> [<https://perma.cc/DW3G-KQLW>] (“Employment policies incorporating diversity, equity, inclusion, and accessibility best practices are not only compliant with state and federal civil rights laws, but they also help to reduce litigation risk by affirmatively protecting against discriminatory conduct that violates the law. Effective policies and practices foster the development of inclusive and respectful workplaces where all employees are supported and encouraged to do their best work.”).

addressing inequities in healthcare.<sup>272</sup> Education and learning environments have been particularly impacted and there are efforts to eliminate the Department of Education which assists states in funding programs to provide accommodations for students with disabilities in accordance with § 504 and the IDEA.<sup>273</sup>

The administration has also taken steps that may undermine the independence of federal agencies considered to be independent. Although the President is generally prohibited from removing the heads of independent agencies except for cause—such as “malfeasance” or “neglect of duty”—there is active litigation regarding President Trump’s removal of members of the National Labor Relations Board (NLRB), the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission (FTC) and most recently, the Consumer Products Safety Commission (CPSC).<sup>274</sup> The executive actions could also set a precedent with respect to independent agencies that provide essential services and assistance for individuals with disabilities, such as the Social Security Administration and the U.S. Access Board.

Other actions taken by the Trump Administration directly impact the availability of private rights of action under § 504 and other anti-discrimination statutes. In the absence of a private right of action for disparate impact discrimination, parties are forced to depend on administrative agencies such as the EEOC, OCR, and the DOJ to bring their

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272. See Katrina Miller, *Accessibility Initiatives Are Taking a Hit Across the Sciences*, N.Y. TIMES (Feb. 22, 2025), <https://www.nytimes.com/2025/02/22/science/trump-accessibility-research.html> [<https://perma.cc/KMP8-TTLB>]; Alana Semuels, *Trump Administration Cuts Funding for Autism Research—Even As It Aims to Find the Cause*, TIME (Apr. 22, 2025), <https://time.com/7279068/trump-administration-autism-research-cuts/> [<https://perma.cc/9UYY-MMZ6>].

273. 20 U.S.C. §§ 1400, et seq. In the midst of cuts to DEI and DEIA programs and services which help support students with disabilities, there are extant efforts to eliminate the Department of Education. See Sarah Mervosh & Michael C. Bender, *No Education Department? No Problem. Trump’s Education Secretary Says*, N.Y. TIMES (Oct. 23, 2025), <https://www.nytimes.com/2025/10/21/us/education-department-shutdown-layoffs.html> [<https://perma.cc/33NW-QC2E>].

274. On May 22, 2025, the Supreme Court granted the government’s emergency application for a stay of a district court order requiring the reinstatement of members of the NLRB and the MSPB who had been removed by the President without cause. *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025). Although the Court did not issue a full opinion, the decision to grant the stay without a clear statement reaffirming *Humphrey’s Executor v. United States* appears to signal a shift away from that precedent, which had limited the President’s power to remove officials from independent agencies except for “inefficiency, neglect of duty, or malfeasance in office.” *See id.; Humphrey’s Ex’r*, 295 U.S. 602, 623 (1935). *See also President Trump Removes EEOC and NLRB Officials*, SULLIVAN & CROMWELL: LEGAL DEVS. AFFECTING THE WORKPLACE (May 27, 2025), <https://www.sullcrom.com/insights/blogs/2025/May/President-Trump-Removes-EEOC-NLRB-Officials> [<https://perma.cc/7SQH-8BLE>] (detailing the timeline of EEOC and NLRB officials’ removals and subsequent lawsuits).

claims. In the current environment, where agencies are likely to be largely understaffed, this becomes less likely.<sup>275</sup> Further, as mentioned above, the power and authority of these agencies has been limited under the current administration in addition to being directed to shift their priorities.<sup>276</sup> These and other developments underscore the urgency of addressing the current gaps in enforcement mechanisms and the broader implications, especially for individuals with disabilities seeking redress.

#### IV. Recommendations

While these concerns raise significant economic and legal questions, they also highlight the need for clearer legislative guidance with respect to § 504. To that end, Congress is best positioned to address these issues through amended or new legislation. For any legislative effort to be effective, it must resolve the current uncertainty surrounding the law, providing clarity about its scope and application. Clear legislative guidance is essential not only to protect the rights of individuals with disabilities but also to remedy the ambiguity surrounding whether § 504 provides a private right of action for disparate impact discrimination.

If congressional action proves unlikely, however, alternative pathways through state legislation and grassroots advocacy may offer interim or supplemental protections. The following recommendations outline potential avenues to address this issue.

##### A. Congress Should Amend § 504 or Enact a Clarifying Statute

If disparate impact claims are to be consistently recognized under § 504, their availability should not be left up to the judicial interpretation. As discussed, recent Supreme Court decisions indicate a strong possibility that such claims may be curtailed or eliminated for disparate impact, a decision which would be detrimental to people with disabilities. As Justice Kagan wrote in her dissent in *Marietta Memorial Hospital*, such

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275. See Ashley Lopez, *Employee Cuts at Social Security Are Leaving Remaining Workers Struggling to Keep Up*, NPR (Apr. 26, 2025), <https://www.npr.org/2025/04/26/nx-s1-5368480/social-security-workforce-cuts> [https://perma.cc/QH8V-R6SG] (explaining that the employee cuts at the Social Security Administration have led to delayed and halted services).

276. See, e.g., U.S. EQUAL OPPORTUNITY COMM'N, REMOVING GENDER IDEOLOGY AND RESTORING THE EEOC'S ROLE OF PROTECTING WOMEN IN THE WORKPLACE (Jan. 28, 2025), <https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace> [https://perma.cc/E7EN-UUSE] (explaining that Trump issued a directive to EEOC to shift away from pursuing cases of discrimination against transgender individuals); Brigid Harrington, Amy Fabiano, Gerard T. "Gerry" Leone, Jr. & Hunton Andrews Kurth, *Layoffs at the Dept. of Education May Impact Office for Civil Rights Enforcement*, NAT'L L. REV. (Mar. 25, 2025), <https://natlawreview.com/article/layoffs-dept-education-may-impact-office-civil-rights-enforcement> [https://perma.cc/C29X-U57K] (discussing the massive staffing reductions in the OCR of the Department of Education).

outcomes may once again leave Congress needing to “fix a statute [that] this Court has broken.”<sup>277</sup>

The Constitution vests all legislative powers in Congress<sup>278</sup> and under the separation of powers, it is Congress—not the Judiciary or the Executive—that holds the authority to legislate.<sup>279</sup> However, Congress frequently abdicates this function to administrative agencies for the sake of expediency<sup>280</sup> To ensure that individuals with disabilities have a private cause of action to enforce disparate impact claims and to guarantee these protections, Congress must amend § 504 or the Rehabilitation Act or pass new legislation. This legislation should explicitly recognize protections against disparate impact discrimination that are at least coextensive with its implementing regulations.

Congress has precedent for doing so. In response to the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*, which made disparate impact discrimination under Title VII more difficult to prove,<sup>281</sup> Congress enacted the Civil Rights Act of 1991 (Act of 1991).<sup>282</sup> The law

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277. *Marietta Mem'l Hosp. Emp. Benefit Plan v. DaVita Inc.*, 596 U.S. 880, 891 (2022) (Kagan, J., dissenting).

278. U.S. CONST. art. I, § 1; *see Art I.S1.4.1 Overview of Delegations of Legislative Power*, CORN. L. SCH.: LEGAL INFO. INST. <https://www.law.cornell.edu/constitution-conan/article-1/section-1/overview-of-delegations-of-legislative-power> [https://perma.cc/ZB67-MEBS].

279. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

280. *See supra* note 243 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 451 (2024) (Kagan, J., dissenting) (discussing Congress’s delegation of authority to administrative agencies)).

281. 490 U.S. 642, 660 (1989) (requiring the burden of persuasion to stay with the plaintiff to prove the absence of a business justification by the employer) (“[I]n disparate-treatment cases . . . the plaintiff bears the burden of disproving an employer’s assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.”).

282. *See* 42 U.S.C. §§ 2000e to 2000e-17 (comprising subchapter VI-Equal Employment Opportunities of ch. 21-Civil Rights under tit. 42-The Public Health and Welfare, which had several provisions amended by the Act of 1991). The 1991 Civil Rights Act amended Title VII to read:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or  
(ii) the complaining party makes the demonstration described in paragraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

clarified and reinstated the framework for analyzing disparate impact under Title VII.<sup>283</sup>

However, given the current political climate, amending § 504 may not be feasible. Congressional gridlock, competing legislative priorities, fiscal concerns, and the risk of presidential veto all present significant obstacles that may prevent legislation from moving forward. Even with a Democratic majority in both chambers of Congress, internal party divisions or opposition to disparate impact protections, particularly under a Trump Administration which has pursued a narrowing of disparate impact liability, could stall progress. In light of the possibility of limited congressional action, alternative avenues including state law and advocacy must also be considered.

#### *B. State Law*

In the absence of congressional action or a favorable Supreme Court ruling, people with disabilities and their advocates may need to increasingly rely on state and local laws where applicable. Strengthening or enacting state level anti-discrimination statutes can be an effective strategy for countering the negative effects of executive orders and other federal policies aimed at limiting or eliminating protections against disparate impact discrimination in areas such as education, housing, or employment.

For instance, New York state lawmakers are working to codify federal housing protections that explicitly prohibit disparate impact discrimination into state law.<sup>284</sup> This initiative would act as a safeguard

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(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

42 U.S.C. § 2000e-2(k)(1).

283. 42 U.S.C. § 2000e-2(k)(1).

284. See Brian Kavanagh, *To Combat Trump, NY Dems Want Federal Housing Protections in State Law*, N.Y. STATE SENATE: NEWSROOM (Feb. 3, 2025), <https://www.nysenate.gov/newsroom/in-the-news/2025/brian-kavanagh/combat-trump-ny-dems-want-federal-housing-protections> [https://perma.cc/SZ26-8FZX].

against efforts to eliminate such protections under the FHA by ensuring claimants receive state housing protections against discrimination.<sup>285</sup> New York's Human Rights Law already prohibits discrimination in employment, housing, education, credit, and public accommodations based on disability and other protected characteristics.<sup>286</sup> In addition to New York, several other states have anti-discrimination statutes which expressly prohibit disparate impact discrimination on the basis of disability, or other protected characteristics. For example, California<sup>287</sup> and Illinois<sup>288</sup> also have statutes that expressly prohibit disparate impact on the basis of disability.

Addressing disparate impact discrimination through state legislation, however, is limited. It could not address discrimination on the federal level, or as a means of enforcement withhold federal funding for violations. There are also challenges with having a patchwork of state laws that lack the consistency and uniform protection that a federal mandate would provide.

### *C. Advocacy Organizations and Grassroots*

Advocacy and public opinion can be powerful impetuses for social change. The disability rights movement, which drew inspiration from the Civil Rights Movement of the 1960s, took root as a grassroots effort led by people with disabilities and their allies.<sup>289</sup> Frustrated by widespread discrimination, inaccessibility, and institutionalization, activists mobilized at the local level to demand equal rights, inclusion, and independence.<sup>290</sup> These movements helped to shift public perception, influence policy, and secure legislative victories such as the signing of the implementation and the enactment of the ADA.<sup>291</sup>

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285. *Id.*; see also Assemb. B. 4040A, 2025 Leg., 2025–2026 Reg. Sess. (N.Y. 2025) (proposing to amend the executive law to codify the disparate impact standard in human rights law).

286. See N.Y. EXEC. LAW §§ 290–301 (Consol. 2025); N.Y.C. ADMIN. CODE §§ 8-101 to -134.

287. See California Disabled Persons Act, CAL. CIV. CODE § 54–55.32 (West 2025).

288. See Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/5-101 to 5/10-105 (2025).

289. Marisa Wright, *A Shared Struggle for Equality: Disability Rights and Racial Justice*, NAACP LEGAL DEF. FUND (July 31, 2023), <https://www.naacpldf.org/disability-rights-and-racial-justice/> [https://perma.cc/2GWK-NLC2] (“If it weren’t for the civil rights movement, the disability rights movement, and resulting civil rights protections for individuals with disabilities, would probably never have existed. The civil rights movement inspired individuals with disabilities to fight against segregation and for full inclusion under the law.”).

290. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (Oct. 17, 2017), <https://dredf.org/the-history-of-the-americans-with-disabilities-act/> [https://perma.cc/RD2C-DQZV] (discussing how grassroots activism by people with disabilities and their allies led to the signing of the ADA).

291. *Id.*

The outcomes in both the *Payan* and *CVS* cases illustrate the continuing importance of disability organizations, activists, and legal advocates. Confronted with those cases, the undermining of § 504, and the weakening of other disability rights laws, these groups mobilized and rallied against those organizations.<sup>292</sup> By highlighting the instances of disparate impact in education, healthcare, and housing, advocacy groups can pressure policy makers to reconsider their stance on § 504 and take action.

Moreover, public advocacy could also encourage state level action as state legislatures may be more receptive to their local constituent's concerns. Increased visibility of the issue concerning disparate impact liability under § 504, the ADA, and disparate impact liability as a cause of action more generally through the media and grassroots movements could push state lawmakers to act, even if federal legislation is difficult to accomplish under the current administration.

### Conclusion

As the Supreme Court retreats from curing legislative ambiguities and overturns longstanding precedents, there is an even greater need for Congress to clarify and address gaps in statutory protections. The judiciary can be the “least dangerous” branch when and if Congress does its job.<sup>293</sup> However, it is apparent, as of the writing of this article, that under the current administration, any efforts to pass congressional legislation attempting to codify an explicit prohibition of disparate impact discrimination under § 504 may be ineffective.<sup>294</sup> As the law continues to grapple over the scope of the protections provided by § 504, people with disabilities face increasing widespread barriers to inclusion and equitable access in our society. Instances of invidious and overt discrimination are increasingly prevalent due to the elimination of diversity, equity, inclusion, and accommodation policies. The current administration, in rolling back civil rights protections and limiting disparate impact, has created additional obstacles for individuals with

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292. See *supra* Part II.D.1 (describing the coordinated advocacy by disability rights groups in *CVS Pharmacy, Inc. v. Doe*, including amicus briefs and public pressure campaigns); *supra* Part II.D.2. See generally *Payan v. Los Angeles Cnty. Coll. Dist.*, 11 F.4th 729 (9th Cir. 2021); *Doe v. CVS Pharmacy, Inc.* 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), *cert. dismissed*, 142 S. Ct. 480 (2021) (demonstrating how advocates pushed for a mediated resolution to avoid a potentially harmful Supreme Court ruling).

293. THE FEDERALIST NO. 78 (Alexander Hamilton) (defining the judiciary as the least dangerous of the three branches of government and extolling the importance of an independent judiciary and judicial review).

294. See Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NPR (May 11, 2022), <https://www.npr.org/2022/05/11/109f7980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely> [https://perma.cc/9V8W-RCFL].

disabilities. In addition, in the current climate, the disability rights bar may be reluctant to bring cases for fear that those cases may potentially make their way to the Supreme Court and result in decisions which have a negative impact on disability rights.<sup>295</sup> As a result, disparities in health, education, employment, and other forms of systemic discrimination perpetuated through seemingly neutral laws, may go unaddressed. Thus, there is an urgent need to address this issue.

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<sup>295</sup>. See Eric Garcia, *How This Supreme Court Is Setting Back Disability Rights — Without Even Trying*, MSNBC (July 5, 2022), <https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-s-hostility-disability-rights-discouraging-n1296795> [https://perma.cc/C29X-U57K].

## Immigrants vs. Artificial Intelligence: The Human Cost of AI in Asylum Decisions

Jems Guirguis<sup>†</sup>

### Abstract

*The rapid deployment of artificial intelligence (AI) technologies in immigration proceedings presents a new frontier in how governments process asylum claims and manage border security. Although AI facilitates the efficient analysis of large-scale data, it also presents significant challenges related to fairness, bias, and discrimination, with particularly acute implications for vulnerable groups, including asylum seekers.<sup>1</sup> These systems, such as facial recognition software and predictive algorithms, often contain intrinsic biases that disproportionately affect people of color and others from marginalized groups.<sup>2</sup> Relying on AI to predict asylum claim outcomes can discriminate against refugees and expose them to life-threatening risks, including forced return to countries where they face persecution.<sup>3</sup> There is evidence that the expansion of AI “leads to an increase in deaths by pushing migrants trying to cross illegally towards more remote and dangerous routes.”<sup>4</sup> This issue is critical because AI’s use in asylum adjudication directly affects due process rights under the U.S. Constitution and international refugee protections, including the principle of non-refoulement. In particular, U.S. courts must ensure that asylum seekers receive their constitutionally guaranteed right to due process.<sup>5</sup>*

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1. See Hannah Tyler, *The Increasing Use of Artificial Intelligence in Border Zones Prompts Privacy Questions*, MIGRATION POL’Y INST.: MIGRATION INFO. SOURCE (Feb. 2, 2022), <https://www.migrationpolicy.org/article/artificial-intelligence-border-zones-privacy> [<https://perma.cc/FY2C-SPGQ>] (explaining the growth of the use of artificial intelligence in the immigration context).

2. See Sandra Wachter, Brent Mittelstadt & Chris Russell, *Bias Preservation in Machine Learning: The Legality of Fairness Metrics Under EU Non-Discrimination Law*, 123 W. VA. L. REV. 735, 767–68 (2021).

3. Madeline Forster, REFUGEE PROTECTION IN THE ARTIFICIAL INTELLIGENCE ERA: TEST CASE FOR RIGHTS, Chatham House 10 (2022), <https://www.chathamhouse.org/sites/default/files/2022-09/2022-09-07-refugee-protection-artificial-intelligence-era-forster.pdf> [<https://perma.cc/R4Z4-M75H>].

4. See Tyler, *supra* note 1.

5. CHERI L. HO, AS UPDATED BY THE OFF. OF STAFF ATT’YS U.S. CT. OF APPEALS FOR THE NINTH

## Introduction

Countries like Canada and Germany are beginning to explore automated systems for immigration decisions, highlighting the potential to improve efficiency and shorten processing times.<sup>6</sup> Automated decision-making encompasses systems ranging from simple decision-support tools to fully autonomous models. These systems analyze data patterns to generate predictions, and in the context of immigration, they can produce decisions that affect individuals' lives.<sup>7</sup> However, immigration applications are inherently complex and even two human officers reviewing the same evidence can arrive at entirely different conclusions.<sup>8</sup> These complexities raise concerns about how an automated system would navigate the nuanced aspects of individual applications.<sup>9</sup> Scholars have expressed concerns about bias in AI systems, where error rates are disproportionately higher for non-Caucasian individuals.<sup>10</sup> For instance, a study by the National Institute of Standards and Technology (NIST) found that facial recognition algorithms are up to 100 times more likely to misidentify Black and Asian faces than Caucasian ones.<sup>11</sup> This bias raises alarms when considering the role of AI in asylum proceedings, where incorrect decisions could violate the rights of individuals seeking refuge. Relying on AI to make decisions on asylum claims can lead to discrimination and biased decisions that would likely result in life and

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CIR., DUE PROCESS IN IMMIGRATION PROCEEDINGS, E-1 (2024), <https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immigwest/E.pdf> [<https://perma.cc/ZC2X-J8DS>] (citing *Angov v. Lynch*, 788 F.3d 893, 898 (9th Cir. 2015) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))) (noting that generally migrants “who have once passed through [the] gates, even illegally,” are afforded the full panoply of procedural due process protections.”).

6. Ana Beduschi, *International Migration Management in the Age of Artificial Intelligence*, 9 MIGRATION STUDS. 576, 576 (2021).

7. See JESSICA BITHER & ASTRID ZIEBARTH, MIGRATION STRATEGY GRP., AUTOMATING DECISION-MAKING IN MIGRATION POLICY: A NAVIGATION GUIDE (2021), <https://policycommons.net/artifacts/8032486/automating-decision-making-in-migration-policy/8942807/> [<https://perma.cc/FSV4-87MN>] (explaining the automated decision-making systems in migration policy, discussing efficiency and the technical accuracies required and the biases that are inputted in the decision-making algorithms).

8. See Sherine El Taraboushi-McCarthy, Lilian Miles, Sebastian Ille & Felicity Kersting, COMPLEXITY OF CHOICE IN ASYLUM SEEKER DECISION-MAKING, UNITED NATION UNIV. (2023), [https://collections.unu.edu/eserv/UNU:9159/complexity\\_asylum\\_seeker\\_decision\\_making.pdf](https://collections.unu.edu/eserv/UNU:9159/complexity_asylum_seeker_decision_making.pdf) [<https://perma.cc/KYI9-AKUP>] (explaining the complexities of asylum law and the difficulties that many migrants face in the asylum process).

9. BITHER & ZIEBARTH, *supra* note 7.

10. Tyler, *supra* note 1.

11. Chad Boutin, *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NIST: NEWS (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software> [<https://perma.cc/W4DW-PRS3>] (explaining and highlighting how accurately facial recognition software tools identify people of varied sex, age, and racial background, and how there are many errors associated with the software).

death consequences causing the return of refugees to places where they face persecution.<sup>12</sup> The use of AI systems like the CBP One app<sup>13</sup> increases this risk because it relies on facial recognition technology and has been found to discriminate against darker-skinned users.<sup>14</sup>

This issue is essential because the use of AI in immigration contexts impacts due process rights under the Fourteenth Amendment,<sup>15</sup> as well as international refugee protections like the principle of non-refoulement.<sup>16</sup> From a policy perspective, the U.S. government's implementation of the CBP One app, which employs AI-driven facial recognition to screen travelers, including refugees and those seeking asylum, has created significant barriers to the asylum process, making it more difficult for many migrants to access protection and raising concerns about discrimination.<sup>17</sup> AI and algorithms might be in violation of these protections because of the intrinsic bias leading to "a great risk that such systems will misinterpret cultural signifiers."<sup>18</sup>

The principle of non-refoulement prohibits returning individuals to countries where they face persecution.<sup>19</sup> Under international human

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12. Forster, *supra* note 3, at 10.

13. See *CBP Link Mobile Application*, U.S. CUSTOMS & BORDER PROT. (last modified Jun 10, 2025), <https://www.cbp.gov/about/mobile-apps-directory/cbplink> [https://perma.cc/S9LY-SKEA]; AM. IMMIGR. COUNCIL, CBP ONE: AN OVERVIEW, (2025), [https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/04/cbp\\_one\\_an\\_overview\\_0325.pdf](https://www.americanimmigrationcouncil.org/wp-content/uploads/2025/04/cbp_one_an_overview_0325.pdf) [https://perma.cc/3X2G-SMPH].

14. See *The New Asylum Rule: CBP One*, HILSC: BLOG (May 31, 2023), <https://houstonimmigration.org/the-new-asylum-rule-cbp-one/> [https://perma.cc/3GHR-G82R] (explaining the introduction of the new app that migrants at the border are required to use it to hold their place in line for asylum proceedings).

15. U.S. CONST. amend. XIV, § 1.

16. See ICRC, *Note on Migration and the Principle of Non-refoulement*, 904 INT'L REV. RED CROSS 345 (2018), [https://international-review.icrc.org/sites/default/files/irrc\\_99.pdf](https://international-review.icrc.org/sites/default/files/irrc_99.pdf) [https://perma.cc/J2A8-WQQQ].

17. Bernd Debusmann Jr., *At US Border, Tech Issues Plague New Migrant Applications*, BBC (Mar. 8, 2023), <https://www.bbc.com/news/world-us-canada-64814095> [https://perma.cc/AM9Z-B3KC] (noting that the CBP One app's facial-recognition system often fails to register darker-skinned users, creating a bias that disproportionately blocks Black asylum seekers from accessing appointments).

18. Access Now, USES OF AI IN MIGRATION AND BORDER CONTROL: A FUNDAMENTAL RIGHTS APPROACH TO THE ARTIFICIAL INTELLIGENCE ACT at 5 (2021), [https://edri.org/wp-content/uploads/2022/05/Migration\\_2-pager-02052022-for-online.pdf](https://edri.org/wp-content/uploads/2022/05/Migration_2-pager-02052022-for-online.pdf) [https://perma.cc/9E4P-7WQK].

19. *The Principle of Non-refoulement Under International Human Rights Law*, UNITED NATIONS, HUM. RIGHTS: OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> [https://perma.cc/9KMJ-QP3X]. Persecution is defined as a crime of "severe discrimination [leading to] denial" of basic human rights. Center for Constitutional Rights, *What is Persecution?*, CCR [https://ccrjustice.org/sites/default/files/attach/2015/11/Smug\\_infosheets\\_3.pdf](https://ccrjustice.org/sites/default/files/attach/2015/11/Smug_infosheets_3.pdf) [https://perma.cc/UDZ3-Y8DQ].

rights laws, the principle of non-refoulement is explicitly enshrined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).<sup>20</sup> Individuals may face threats that rise to the level of persecution when they are targeted for discrimination or harm based on certain protected characteristics. Similarly, the U.S. Constitution holds that, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>21</sup> Specifically, asylum seekers are entitled to the same due process protections as migrants “who have once passed through [the] gates, even illegally.”<sup>22</sup> If there is a reliance on AI on asylum decisions, there must be assurances that these rights are not violated.

In this Note, I will explore the risks associated with AI in immigration decisions, particularly in the context of asylum applications. This Note examines the biases inherent in algorithmic tools, the limitations of AI in capturing the human nuances essential to asylum adjudications, and the potential for AI to undermine due process protections. I propose that the solutions to these issues include more comprehensive and transparent legislation, as well as humans making the final or near-end decision in asylum cases and implementing AI safely.

## I. The Immigration Asylum Process, Due Process, the 14th Amendment, and the Rise of Artificial Intelligence

### A. Constitutional Background

The Fourteenth Amendment contains several key provisions, including the Due Process Clause which prohibits states from depriving “any person of life, liberty, or property, without due process of law . . . .”<sup>23</sup> This clause has served as the foundation for many landmark Supreme Court decisions concerning civil rights, personal liberties, and government accountability and has been interpreted in two ways: procedural due process and substantive due process.<sup>24</sup> Due process is

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20. *The Principle of Non-refoulement Under International Human Rights Law*, *supra* note 19.

21. U.S. CONST. amend. VIII.

22. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

23. U.S. CONST. amend. XIV, § 1.

24Legal Info. Instit., *Substantive Due Process*, CORN. L. SCH., [https://www.law.cornell.edu/wex/substantive\\_due\\_process](https://www.law.cornell.edu/wex/substantive_due_process) [https://perma.cc/GT62-YPBK] (“Substantive due process is the principle that the Fifth and Fourteenth Amendments of the U.S. Constitution protect fundamental rights from government interference. Specifically, the Fifth and Fourteenth Amendments prohibit the government from depriving any person of ‘life, liberty, or property without due process of law.’”); David

indispensable in immigration and asylum law, functioning as a real safeguard against arbitrary government action. For undocumented immigrants,<sup>25</sup> who occupy the most precarious position in the legal system, it ensures that fundamental principles of fairness and accountability are not reduced to empty promises.<sup>26</sup> Undocumented immigrants are “protected by the constitution’s stated right to due process—even a person who illegally entered or stayed in the country.”<sup>27</sup>

#### *B. The Various Types of Artificial Intelligence Used in Society*

The capacity of AI to replicate human decision-making has generated a growing “demand for ‘automated’ or ‘algorithmic’ processes” that can replace the human element.<sup>28</sup> AI could be, and has been, used in the marketing sector or the business of decision-making. For example, American Express utilized AI to analyze billions of transactions to identify patterns of activity and to detect whether the activity was fraud or not, with the emphasis of focusing on patterns.<sup>29</sup>

In the medical field, one way AI is implemented is by utilizing “data from past patients to more accurately diagnose and treat present patients,” also referred to as “black-box medicine.”<sup>30</sup> “[B]lack-box medicine” refers to the use of advanced AI systems in healthcare where the reasoning behind their decisions is opaque, making it difficult for humans to understand how conclusions or recommendations are reached.<sup>31</sup> Although AI offers many advantages in this context, its use is

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Hudson, *How Due Process Ensures Fairness and Protects from Governmental Overreach*, THE FIRE (Nov. 1, 2022), <https://www.thefire.org/news/how-due-process-ensures-fairness-and-protects-governmental-overreach> [https://perma.cc/TRX7-EGK8].

25. See Roberto Ramirez, *Migrant vs. Immigrant: How Two Letters Can Change a Society*, GMFUS, <https://www.gmfus.org/news/migrant-vs-immigrant-how-two-letters-can-change-society> [https://perma.cc/DZU5-2G5Y] (“The word ‘migrant’ connotes a person who moves from place to place, but has yet to reach a final destination. In contrast, an ‘immigrant’ is a person who leaves one place of residence for another with the goal to reside there permanently.”).

26. Kirby J. Fullerton, *What is Due Process for Immigrants?*, CARMAN & FULLERTON (Aug. 14, 2025), <https://carmanfullerton.com/what-is-due-process-immigrants/> [https://perma.cc/P5SF-P875].

27. *Id.*

28. Forster, *supra* note 3, at 3 (internal quotations omitted).

29. Ryan Owen, *Artificial Intelligence at American Express – Two Current Use Cases*, EMERJ (Dec. 6, 2021), <https://emerj.com/artificial-intelligence-at-american-express/> [https://perma.cc/8FJP-SP7B].

30. Jennifer W. Elrod, *Trial by Siri: AI Comes to the Courtroom*, 57 Hous. L. REV. 1083, 1087 (2020) (explaining the use of AI in the courtroom and the impact it has on criminal cases in assisting judges in the courtroom).

31. Hanhui Xu & Kyle Michael James Shuttleworth, *Medical Artificial Intelligence and the Black Box Problem: A View Based on the Ethical Principle of “Do No Harm”*, 4 INTELLIGENT MED. 52, 52 (2024) (discussing the challenges of opaque decision-making in medical AI systems, often described as the “black box” problem).

not without flaws. For instance, UnitedHealthcare has been accused of using AI algorithms in its claims determination process that denied elderly patients' claims.<sup>32</sup> In that situation, the AI tools did not assist and make individuals' lives better, but rather hurt them due to the problems associated with automated decision-making and the use of AI.<sup>33</sup> The wrongful denial of these claims by health insurers relying on AI tools jeopardizes access to much-needed healthcare, because if it was not for the use of AI, these claims would have been properly evaluated.<sup>34</sup> Overall, automated systems are not entirely foolproof and tend to create instability that shakes the lives of many, leading to distress whether in the medical context or other settings.<sup>35</sup>

Outside of the medical context, AI use has been detrimental in discriminating against individuals due to their age. In 2023, the tutoring company iTutor Group used AI-powered recruiting software that would reject female applicants who were fifty-five years old and older, as well as male applicants who were sixty years old and older.<sup>36</sup> The iTutor case highlights the potential for AI systems to perpetuate age discrimination, underscoring the need for rigorous oversight and ethical safeguards to ensure fairness and prevent harm in recruitment and other decision-making processes.<sup>37</sup> Without proper oversight, AI systems may unintentionally reinforce biases, making it essential to implement ethical guidelines and transparency measures to promote fairness and equality.

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32. Anne Tyler Hall, *Lawsuit Claims UnitedHealthcare Uses AI to Deny Majority of Medicare Advantage Extended-care Facility Claims*, JD SUPRA (Jan. 18, 2024), <https://www.jdsupra.com/legalnews/lawsuit-claims-unitedhealthcare-uses-ai-8036102/> [https://perma.cc/7ZQN-BW8C].

33. See Brendan Pierson, *Lawsuit Claims UnitedHealth AI Wrongfully Denies Elderly Extended Care*, REUTERS (Nov. 14, 2023), <https://www.reuters.com/legal/lawsuit-claims-unitedhealth-ai-wrongfully-denies-elderly-extended-care-2023-11-14/> [https://perma.cc/M235-89VM] ("When these coverage denials are appealed to federal administrative law judges, about 90% are reversed, the complaint said, demonstrating the 'blatant inaccuracy' of the algorithm."); Est. of Lokken v. UnitedHealth Grp., Inc., 766 F. Supp. 3d 835, 840 (D. Minn. 2025).

34. See Pierson, *supra* note 33.

35. Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L. J. 797, 800 (2021) ("Systems cut, denied, or terminated individuals' benefits without explanation in violation of due process guarantees.").

36. Thor Olavsrud, *11 Famous AI Disasters*, CIO (Oct. 2, 2024), <https://www.cio.com/article/190888/5-famous-analytics-and-ai-disasters.html> [https://perma.cc/24PA-V8CQ].

37. *Id.*

### C. Overview of Immigration in the Asylum Process

The Refugee Act of 1980 formalized the right of individuals to seek asylum in the U.S.<sup>38</sup> The act defines a refugee as someone outside their country of nationality “who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of [past] persecution or a well-founded fear of persecution.”<sup>39</sup> The asylum process consists of three pathways: (1) affirmative asylum, (2) defensive asylum, and (3) asylum processing rule.<sup>40</sup> Specifically, this Note will focus on those individuals arriving at the U.S.-Mexico border pursuing asylum in general, under one of those three umbrellas, and in instances that require a “credible fear interview” (CFI) to be done before expedited removal in order to not violate international and domestic laws.<sup>41</sup> A CFI results from a screening process that evaluates whether a person placed in expedited removal proceedings might qualify for asylum.<sup>42</sup> There are two types of fear interviews: “credible fear” and “reasonable fear.”<sup>43</sup> An individual has a “credible fear” of persecution that entitles them to asylum if they demonstrate a “significant possibility” of qualifying for asylum or withholding of removal under the Immigration and Nationality Act, or for relief under the Convention Against Torture (CAT).<sup>44</sup> Such a risk is considered established when the individual shows they are likely to face harm in their home country based on factors like their religion, nationality, or membership in a social group.<sup>45</sup> Conversely, a “reasonable fear” requires a higher likelihood of being eligible for relief from removal, like persecution or torture, which requires an elevated standard of review when compared to credible fear.<sup>46</sup> The integrity of the asylum process at the border hinges on the judgment exercised by the officers, prompting federal regulations that require these officers to “receive special training

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38. See Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 458 (1992) (explaining the procedures and organizational framework established for U.S. asylum officers).

39. 8 U.S.C. § 1101(a)(42) (requiring that persecution be based on at least one of five protected grounds: (1) race; (2) religion; (3) nationality; (4) political opinion; and/or (5) membership in a particular social group).

40. *Asylum in the United States*, AM. IMMIGR. COUNCIL (May 9, 2025), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> [https://perma.cc/5QKL-QJMR].

41. *Id.*

42. 8 C.F.R. § 208.30(e)(2), (3).

43. HOLLY STRAUT-EPPSTEINER, ANDORRA BRUNO, AUDREY SINGER & HILLEL R. SMITH, CONG. RSCH. SERV., R48078, CREDIBLE FEAR AND DEFENSIVE ASYLUM PROCESSES: FREQUENTLY ASKED QUESTIONS 11–12 (2024), <https://www.congress.gov/crs-product/R48078> [https://perma.cc/5Y3M-BE7C].

44. *Id.* at 1.

45. 8 U.S.C. § 1101(a)(42).

46. See STRAUT-EPPSTEINER ET. AL., *supra* note 43, at 11–12.

in international human rights law [and] non-adversarial interview techniques.”<sup>47</sup> Currently, due to the informal nature of adjudicating asylum claims, there tends to be a lack of transparency and hostility due to biases in the decision-making process.<sup>48</sup> In other words, there are fewer record-keeping requirements under the Administrative Procedure Act (APA), resulting in agencies having more discretion on what to record, and courts generally refer to agency discretion in immigration contexts.

### i. AI Use at the Border: Primarily in Immigration Proceedings

Relying solely on AI to assess asylum claims poses significant ethical concerns. Automated decisions lack the nuanced understanding, empathy, and moral judgment needed to adjudicate individual circumstances, potentially leading to incorrect decisions that overlook the unique experiences of asylum seekers.<sup>49</sup> AI is being used and implemented instead of human decision-makers in assessing the validity of asylum claims through strict requirements that require a complex analysis. For example, “[a]ssessments require decision-makers to have regard to the future possible risks to individuals refused entry or returned to their country of origin; such assessments also rely on complex and nuanced tests associated with confirming identity and credibility.”<sup>50</sup> To uphold fairness in border proceedings, asylum officers are required by federal regulation to receive training in international human rights law and non-adversarial interview techniques.<sup>51</sup> This special training entails the need to filter through asylum applicants and to avoid approving fraudulent asylum cases.<sup>52</sup> However, as Anna Welch and Sara Cressey

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47. 8 C.F.R. § 208.1(b).

48. See Anna R. Welch & Sara P. Cressey, *Due Process Denied: A Case Study on the Failures of U.S. Affirmative Asylum*, HARV. INT'L L.J. (June 1, 2023), <https://journals.law.harvard.edu/ilj/2023/06/due-process-denied-a-case-study-on-the-failures-of-u-s-affirmative-asylum/> [https://perma.cc/WVJ6-3H7Q] (explaining the downfalls of the asylum system and process in the United States, especially the impact it has on those fleeing their home countries due to persecution).

49. See Felicity Kersting, *Why Compassion Matters in Asylum Policy*, UNU CPR (June 28, 2023), <https://unu.edu/cpr/blog-post/why-compassion-matters-asylum-policy> [https://perma.cc/UY2G-X74] (explaining the need for compassionate policies at the center of the asylum process because it's proven to work and promotes well-being which the 1951 Refugee Convention and the 1967 Protocol, as foundational texts, require); see also Petra Molnar, *Using AI in Immigration Decisions Could Jeopardize Human Rights*, CIGI (Oct. 11, 2018), <https://www.cigionline.org/articles/using-ai-immigration-decisions-could-jeopardize-human-rights/> [https://perma.cc/99ZS-LVHP] (explaining that automated decision systems refer to technologies that replace the judgments of human decision-makers which use machine learning and statistics, and that such decision systems can make complex determinations, i.e., “whether people should be given protection on ‘humanitarian and compassionate’ grounds.”).

50. Forster, *supra* note 3, at 6.

51. 8 C.F.R. § 208.1(b).

52. *Fact Sheet: Asylum Fraud and Immigration Court Absentia Rates*, NAT'L. IMMIG. F. (Oct.

point out, “[t]he more informal, non-adjudicative framework for adjudicating asylum claims in the asylum offices lacks transparency and creates an opportunity for hostility and bias to permeate the decision-making process.”<sup>53</sup>

## ii. Use of the CBP One App

This risk of bias is heightened when use of AI intersects with the CBP One app at the border for those individuals seeking asylum.<sup>54</sup> Requiring applicants to take and upload a real-time selfie exposes a key flaw in the CBP One app: its facial-recognition system routinely performs poorly for people with darker skin tones and other marginalized groups.<sup>55</sup> The CBP One app was launched in 2020 and is utilized for those who arrive at the U.S.-Mexico border seeking asylum to schedule appointments and maintain eligibility for asylum.<sup>56</sup> Use of the app is meant to be simple in that it merely requires submitting a selfie to ensure the submission is by a live person.<sup>57</sup> Once the selfie upload is completed, the migrant is assigned an officer to perform a CFI.<sup>58</sup> After the asylum seeker is determined to be credible, they can officially file for asylum where the AI systems may be continued to be used to assess whether the migrant is being honest or not.<sup>59</sup> However, the utilization of AI technology tends to discriminate against African and Haitian migrants because the tool fails to recognize photos of people with darker skin tones.<sup>60</sup> Bias and discrimination have been formalized and quantified in many different

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8, 2021), <https://immigrationforum.org/article/fact-sheet-asylum-fraud-and-immigration-court-absentia-rates/> [https://perma.cc/LD7V-7AQ7].

53. Welch & Cressey, *supra* note 48.

54. See Joel Rose, *Illegal Border Crossings are Down: One Big Reason Why is Now Part of a Court Fight*, NPR (July 19, 2023), <https://www.npr.org/2023/07/19/1188438846/illegal-border-crossings-are-down-one-big-reason-why-is-now-part-of-a-court-fight> [https://perma.cc/4VMD-3ZY6] (demonstrating that there are many risks of incorporating the CBP in immigration asylum proceedings especially migrants at the U.S.-Mexico border are limited in resources, where the CBP app acts as an additional barrier in the asylum proceeding).

55. USA: Mandatory Use of the CBP One Application Violates the Right to Seek Asylum, Research Briefing, AMNESTY INT'L at 9–11, (May 2023), <https://www.amnesty.org/en/wp-content/uploads/2023/05/AMR5167542023ENGLISH.pdf> [https://perma.cc/A4E-DZD3].

56. AM. IMMIGR. COUNCIL, *supra* note 13, at 1.

57. *Id.* at 5.

58. 8 U.S.C. § 1225(b)(1)(A)(ii).

59. Estefania McCarroll, *Weapons of Mass Deportation: Big Data and Automated Decision-making Systems in Immigration Law*, GEO. IMMIGR. L.J. 705, 724 (2020) (examining the decision-making systems used in the immigration context and focusing on the deportation proceedings, impacts, and human rights violations that appear due to these practices).

60. *Id.*

ways through the use of algorithms used at borders, such as those in the European Union, to assess claims and make decisions.<sup>61</sup>

### iii. Use of RCA and ATA AI Tools

Similarly, there is a Risk Classification Assessment (RCA) tool that uses algorithms which determine whether an immigrant is dangerous to society.<sup>62</sup> RCA limits many immigrants' rights because it mistakes those who are not a high risk and usually discriminates against them and sends them to be wrongfully detained.<sup>63</sup> One example of this type of discrimination is through the Asylum Text Analytics (ATA), an AI tool that evaluates asylum and withholding requests, identifying and tabbing those suspected of being fraudulent, including claims based on deception.<sup>64</sup> This is problematic because the tool might pick up something mistakenly. For example, an Afghan refugee used an automatic translation tool that "had swapped the 'I' pronouns in the woman's statement to 'we.'"<sup>65</sup> The U.S. court denied the asylum claim because of this error, as it caused the written application to not match the story that was initially told at the interview—ultimately, "[m]achine-learning translations are not yet in a place to be trusted completely without human review."<sup>66</sup> On the other hand, the Department of Homeland Security launched a pilot program

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61. See Yiran Yang, Frederik Zuiderveen Borgesius, Pascal Beckers & Evelien Brouwer, *Automated Decision-Making and Artificial Intelligence at European Borders and Their Risks for Human Rights* 17–20 (SSRN, Working Paper No. 1, Apr. 10, 2024) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4790619](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4790619) (discussing how algorithmic risk-assessment and biometric systems at European borders can reproduce and formalize discrimination, including profiling based on nationality, ethnicity, or other protected characteristics).

62. Mica Rosenberg & Reade Levinson, *Trump's Catch-and-Detain Policy Snare Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018), <https://www.reuters.com/investigates/special-report/usa-immigration-court/> [<https://perma.cc/NS4V-T5M2>].

63. Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 30 MDPL 5, 7–10. (2016) (analyzing how RCA risk scores are used to determine immigrant detention, as a flawed system for over-classifying risk and resulting in unnecessary immigrant detention).

64. Yael Schacher, *Harvard Law Clinic and Jenner & Block LLP Sue for Information Refugees International Requested on AI's Role in Asylum Decisions*, REFUGEES INT'L. (Dec. 20, 2024), <https://www.refugeesinternational.org/statements-and-news/harvard-law-clinic-and-jenner-block-llp-sue-for-information-refugees-international-requested-on-ais-role-in-asylum-decisions> [<https://perma.cc/D7SS-TX7Y>].

65. Andrew Deck, *AI Translation Is Jeopardizing Afghan Asylum Claims*, REST OF WORLD (Apr. 19, 2023), <https://restofworld.org/2023/ai-translation-errors-afghan-refugees-asylum/> [<https://perma.cc/W494-RAEV>].

66. *Id.* (quoting Sara Haj-Hassan, the chief operations officer of a nonprofit connecting refugee and asylum seekers with translation services) (explaining that "you need human attentiveness. The machine, it can be your friend that you use as a helper, but if you're using that as the ultimate [solution], if that's where it starts and ends, you're going to fail this person.").

that trains immigration officers to conduct interviews with “individuals seeking refugee status,” using generative AI as a tool.<sup>67</sup> This is problematic because of the biases that have been found in the use of AI.

#### iv. Training of Asylum Officers

Another issue that arises with AI is the training of asylum officers. The Immigration and Nationality Act’s asylum provision requires asylum seekers to prove a well-founded fear of persecution based on “race, religion, nationality, membership in a particular social group, or political opinion,” which grants U.S. immigration officials legal authority to decide on asylum claims at the U.S. border.<sup>68</sup> Immigration officials are presently trained using generative AI that demonstrates countless errors and biases.<sup>69</sup> Relying on generative AI to train immigration officials is problematic because of biases in the training data.<sup>70</sup>

### D. Due Process and Technology

Due process is a constitutional right that protects people from being deprived of life, liberty, or property without due process of law.<sup>71</sup> The elements of a fair hearing, as stated by Henry Friendly, typically are: (1) an unbiased tribunal, (2) notice of the proposed action and the grounds asserted for it, (3) an opportunity to present reasons why a proposed action should not be taken, (4) the right to call witnesses, (5) the right to know evidence against oneself, (6) the right to have decisions based only on the evidence presented, (7) the right to counsel, (8) making of a record, (9) statements of reasons, (10) public attendance, and (11) judicial review.<sup>72</sup> Using “[a]lgorithmic decision-making and the use of machine learning technologies violate[s] most—if not all—of these identified

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67. Edward Graham, *DHS Generative AI Pilot Embraces Hiccups of Emerging Tech*, NEXTGOV (July 11, 2024), <https://www.nextgov.com/artificial-intelligence/2024/07/dhs-generative-ai-pilot-embraces-hiccups-emerging-tech/397982/> [https://perma.cc/E8ML-NP7C].

68. 8 U.S.C. § 1158.

69. See Branson Brooks, *DHS Using Generative AI to Train Officers*, EXECUTIVEGOV (July 12, 2024), <https://executivegov.com/2024/07/dhs-using-generative-ai-to-train-officers/> [https://perma.cc/3FKE-RLVU]; see also Graham, *supra* note 67 (explaining that generative AI is being used for trainings on conducting asylum interviews, with leadership embracing AI’s errors because inconsistencies better simulate real interviews).<https://www.nextgov.com/artificial-intelligence/2024/07/dhs-generative-ai-pilot-embraces-hiccups-emerging-tech/397982/?oref=ng-home-top-story> [https://perma.cc/5DJ6-P96D] (describing how the DHS has embraced the hallucinations of generative AI tools, which can “mirror[] the actual conversations [officers] are likely to have with asylum seekers.”).

70. See James Holdsworth, *What is AI Bias?*, IBM, <https://www.ibm.com/think/topics/ai-bias> [https://perma.cc/TAE5-R868].

71. U.S. CONST. amend. XIV, § 1.

72. Henry J. Friendly, *“Some Kind of Hearing”*, 123 U. PA. L. REV. 1267, 1279–95 (1975).

elements of a fair hearing.”<sup>73</sup> “A mere assertion that an algorithm *might* result in [an] unfair benefit[] is not sufficient to provide standing for a due process challenge.”<sup>74</sup> Additionally, the non-refoulement principle prohibits the return of refugees to a country “where they face serious threats to their life or freedom.”<sup>75</sup> AI might be in violation of these laws because of intrinsic biases by developers creating these tools leading to a great risk that it will misinterpret cultural signifiers. Since AI tools rely on past data, there will likely be some trouble in training and using these tools to assess new data that is focused on personalized assessments, which are prevalent in the asylum context.<sup>76</sup>

Outside of the immigration context, a Wisconsin court held in *State v. Loomis* that relying on AI-enabled analysis raises due process concerns about individualized sentencing, especially when judges are presented with algorithmic risk assessments that may be misused.<sup>77</sup> The risk assessment could not be effectively contested because the methodology underlying the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) tool,<sup>78</sup> including how it assigned weights to the different factors, was not transparent.<sup>79</sup> In that case, the court rejected the due process argument, agreeing that while the

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73. Chris C. Goodman, *AI, Can You Hear Me? Promoting Procedural Due Process in Government Use of Artificial Intelligence Technologies*, 28 RICH. J.L. & TECH. 700, 711 (2022).

74. *Id.* at 712.

75. The 1951 Refugee Convention, UNHCR, <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention> [https://perma.cc/EJW2-7XMK]; *The Principle of Non-Refoulement Under International Human Rights Law*, *supra* note 19. See also Agbolade Omowole, *Research Shows AI is Often Biased. Here's How to Make Algorithms Work for All of Us*, WORLD ECON. F. (July 19, 2021), <https://www.weforum.org/stories/2021/07/ai-machine-learning-bias-discrimination/> [https://perma.cc/V6C6-3BBB] (discussing the prevalence of bias in AI algorithms and implications for equitable decision-making to the use of AI in asylum and immigration determinations.); see also <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention> [https://perma.cc/2SYA-G6V2] (explaining the key refugee policies established in the United Nation's Convention, including the principle of non-refoulement).

76. See Forster, *supra* note 3, at 14 (“So long as AI-enabled capacities rely on group-based or past historic cases, their exclusive use in government decision-making will often fall short of international legal standards where individualized assessments are expected.”).

77. *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

78. Alexandra Taylor, *AI Prediction Tools Claim to Alleviate an Overcrowded American Justice System... but Should They Be Used?*, STANFORD POLS. (Sep. 13, 2020), <https://stanfordpolitics.org/2020/09/13/ai-prediction-tools-claim-to-alleviate-an-overcrowded-american-justice-system-but-should-they-be-used/> [https://perma.cc/5KTT-K26F].

79. *Id.*; see also Ed Yong, *A Popular Algorithm Is No Better at Predicting Crimes Than Random People*, THE ATLANTIC (Jan. 17, 2018), <https://www.theatlantic.com/technology/archive/2018/01/eqvant-compas-algorithm/550646/> [https://perma.cc/Z5MZ-TYN9] (explaining lack of transparency with COMPAS and the risk of courts relying on a system that cannot be fully understood, challenged, or held accountable).

use of such a tool raised due process concerns, cautious and selective use of COMPAS was acceptable.<sup>80</sup>

AI systems learn by projecting past patterns onto the future; when historical data reflect biases, these systems perpetuate those biases.<sup>81</sup> Applying such algorithms without considering societal structures can result in “algorithmic oppression.”<sup>82</sup> Algorithms undermine due process by restricting access to their source code, which prevents individuals from fully understanding how scores are calculated.<sup>83</sup> Thus, defendants cannot effectively challenge or contest the scores assigned to them.<sup>84</sup> Specifically because due process and the adjudication of these claims require a balancing and there is need for innovation in the process, these AI tools will lack that specific creativity and ability to account for new variables that come with the complexity and variety of asylum cases.<sup>85</sup>

Significantly, the U.S. Court of Appeals for the Federal Circuit issued a decision in a case where a teachers’ union had a viable due process claim because teachers were denied access to an algorithm that the school district used for professional evaluations, finding that withholding the algorithm was a violation of due process rights.<sup>86</sup> Accordingly, there is some hope that if the Federal Circuit’s ruling is to set precedent then “anyone seeking to challenge agencies’ use of artificial intelligence on due

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80. Felicity Bell, Lyria B. Moses, Michael Legg, Jacob Silove & Monika Zalnieriute, *AI Decision-Making and the Courts: A Guide for Judges, Tribunal Members and Court Administrators*, 54 (2022), <https://ssrn.com/abstract=4162985> [<https://perma.cc/4ZNV-QGXR>].

81. Zhisheng Chen, *Ethics and Discrimination in Artificial Intelligence-Enabled Recruitment Practices*, 10 HUMANS. & SOC. SCI. COMM’NS 1, 7–11 (2023), <https://www.nature.com/articles/s41599-023-02079-x> [<https://perma.cc/8UDG-UKU5>] (examining how AI recruitment systems replicate bias and proposing ethical safeguards).

82. Apura Vohra, Social Order in the Age of Artificial Intelligence: The Use of Technology in Migration Governance and Decision-Making (Oct. 19, 2023) (LL.M. thesis, The University of British Columbia) (on file with the Allard Research Commons, The University of British Columbia).

83. Katherine Freeman, *Algorithmic Injustice: How the Wisconsin Supreme Court Failed to Protect Due Process Rights in State v. Loomis*, 18 N.C. J.L. & TECH. 75, 87 (2016) (explaining and analyzing the due process violations through the use of algorithmic decision-making in *Loomis* and potential solutions); *see also* *Source Code: Developer’s Guide*, SONAR SOURCE, <https://www.sonarsource.com/resources/library/source-code/> [<https://perma.cc/6QUN-DFQP>] (“Source code is the set of instructions that a programmer writes to create software.”).

84. Freeman, *supra* note 83, at 88.

85. Paul W. Grimm, Cary Coglianese & Maura R. Grossman, *AI in the Courts: How Worried Should We Be?*, 107 JUDICATURE No. 3, 65, 67 (2024), <https://judicature.duke.edu/articles/ai-in-the-courts-how-worried-should-we-be/#> [<https://perma.cc/29MJ-M8LQ>].

86. Cary Coglianese, *AI, Due Process, and Trade Secrets*, REGUL. REV. (Sep. 4, 2023), <https://www.theregreview.org/2023/09/04/coglianese-ai-due-process-and-trade-secrets/> [<https://perma.cc/8JP7-QQYU>]; *see* Hou. Fed’n of Teachers, Local 2415 v. Hou. Indep. Sch. Dist., 251 F. Supp. 3d 1168 (S.D. Tex. 2017).

process grounds" would be able to do so.<sup>87</sup> If the Supreme Court applies the reasoning from Houston Federation of Teachers, asylum adjudicators who rely on AI may violate due process rights.<sup>88</sup> This case raises the possibility of establishing a legal rule that prohibits the use of AI in immigration decision-making.

## II. The Risks of AI – Problems with AI Adjudicating Asylum Cases

### A. Biases and Impacts on Migrants: Marginalized Communities and Ethnicities

AI tools like U.S. Citizenship and Immigration Services' (USCIS) Asylum Text Analytics, CBP's Risk Assessments, and Immigration and Customs Enforcement's (ICE) Facial Recognition are streamlining immigration processes and enhancing security. USCIS's Asylum Text Analytics detects fraud in asylum applications, while CBP's Port of Entry Risk Assessments uses AI to analyze trade and travel data for border security.<sup>89</sup> ICE's Facial Recognition Service aids in identifying individuals involved in serious crimes, and USCIS's Person-Centric Identity Services Deduplication Model centralizes biographical and biometric data for a comprehensive view of immigration histories.<sup>90</sup> These tools are intended to streamline immigration processes, reducing delays and enabling more timely, informed decisions.<sup>91</sup> The issue with these tools is that the developers are the ones at fault for bias in the these tools "because they are the ones selecting the data and making the labelling to train the systems."<sup>92</sup> Part of the problem, according to many, is that a lack of

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87. Coglianese, *supra* note 86.

88. Brandon L. Garrett, *Artificial Intelligence and Procedural Due Process*, 27 U. PA. J. CONST. L. 933, 959 (2025).

89. Monique O. Madan, *The Future of Border Patrol: AI is Always Watching*, GovEXEC. (Mar. 22, 2024), <https://www.govexec.com/technology/2024/03/future-border-patrol-ai-always-watching/395167/> [https://perma.cc/7ZTQ-GW42] (discussing the use of AI at the border and the use of the risk assessment through the incorporation of AI, which is riddled with bias and other issues that impact migrants greatly); U.S. Dep't of Homeland Security, *Artificial Intelligence Use Case Inventory Library*, (June 30, 2025), <https://www.dhs.gov/publication/ai-use-case-inventory-library> [https://perma.cc/WL4T-CXSE].

90. U.S. Dep't of Homeland Security, *Artificial Intelligence Use Case Inventory Library*, <https://www.dhs.gov/publication/ai-use-case-inventory-library> [https://perma.cc/WL4T-CXSE].

91. Margaret W. Wong & Assocs., *Department of Homeland Security Artificial Intelligence Use Case Inventory*, IMWONG (Dec. 13, 2023), <https://www.imwong.com/2023/12/13/department-of-homeland-security-artificial-intelligence-use-case-inventory/> [https://perma.cc/58F7-LX4H].

92. See McCarroll, *supra* note 59, at 709 ("Some proponents argue that, regardless of the developers' choices, AI can minimize bias over time to the degree that it is statistically insignificant. This argument falls short because if the system is continuously fed by new data gathered within the framework of institutions and structures infected by bias, there is no

diversity within AI administration can inform the bias in the model itself—particularly regarding race and gender.<sup>93</sup>

Scholars have expressed concerns about bias in AI systems, particularly in areas like facial recognition, where error rates are disproportionately higher for non-white individuals.<sup>94</sup> For instance, a study by the NIST found that facial recognition algorithms are significantly more likely to misclassify Black and Asian individuals compared with their white counterparts, with error rates up to 100-fold higher.<sup>95</sup> This bias raises alarms when considering the role of AI in asylum proceedings, where incorrect decisions could violate the rights of individuals seeking refuge. The use of the CBP One app increases the risk of this bias because it relies on facial recognition technology and has been found to discriminate against darker-skinned users.<sup>96</sup> One study found that facial analysis software tends to show an error rate of “0.8 percent for light-skinned men, [while the error rate was] 34.7 percent for dark-skinned women.”<sup>97</sup> Furthermore, AI algorithms tend to be more biased against identifying women than men.<sup>98</sup> Therefore, the broader use of AI may heighten risks for migrants, leading them to take more hazardous and deadly paths when trying to cross the border illegally, which could result in serious harm or even fatal outcomes.<sup>99</sup>

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way ADM Systems can correct for these biases without intervention. Recognizing the biases before creating the system would allow developers to introduce technical fixes to the algorithms.”).

93. Stephanie Weber, *How Artificial Intelligence is Transforming the Criminal Justice System*, THOUGHTWORKS, INC. (Jan. 10, 2018), <https://www.thoughtworks.com/insights/blog/how-artificial-intelligence-transforming-criminal-justice-system> [<https://perma.cc/63QF-9EJ4>]; see, e.g., *Immigration Decision-Making: Artificial Intelligence May Violate Human Rights*, SETZER IMMIGR. L., <https://www.setzerimmigration.com/articles/immigration-decision-making-artificial-intelligence-may-violate-human-rights/> [<https://perma.cc/WVX9-WKW9>] (“AI decision-makers rely on stereotypical factors – such as appearance, religion or travel patterns – and may often ignore more relevant data when making decisions. This imbeds bias into the automated decision-maker.”).

94. See Tyler, *supra* note 1.

95. See Boutin, *supra* note 11.

96. See HILSC, *supra* note 14.

97. Larry Hardesty, *Study Finds Gender and Skin-type Bias in Commercial Artificial-intelligence Systems*, MASS. INST. TECH. (Feb. 11, 2018), <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212> [<https://perma.cc/H3PX-YKMU>].

98. Brianna Lifshitz, *Racism is Systemic in Artificial Intelligence Systems, Too*, GEORGETOWN SEC. STUD. REV. (May 6, 2021), <https://georgetownsecuritystudiesreview.org/2021/05/06/racism-is-systemic-in-artificial-intelligence-systems-too/> [<https://perma.cc/UDY5-FYKW>] (“[An AI] service misidentified women for men 19% of the time and darker-skinned women for men 31% of the time, but for lighter-skinned males, there was no error.”).

99. Tyler, *supra* note 1, (“Researchers have found evidence that surveillance systems can have a ‘funnel effect,’ leading migrants to avoid areas where they might be detected and instead are more likely to head to areas where they face increased risk of dehydration,

*B. The Risk of Using AI: Why a Human is Needed and Not AI*

AI seems equally unable to duly consider concepts that require human intuition, without which justice cannot be administered fairly.<sup>100</sup> Without proper oversight, AI's involvement in immigration decisions can lead to severe consequences, including wrongful deportations and violations of human rights, violating the *refoulement* principle.<sup>101</sup> The technology's flaws, coupled with the lack of a comprehensive legal framework that provides guidance and regulation, leads to risks for asylum seekers whose complex, individual circumstances would likely be difficult for algorithms to interpret.<sup>102</sup>

Accordingly, asylum decisions heavily rely on human elements that sometimes cannot be computed, especially when they have life-altering consequences for individuals facing persecution or other dangers in which there is a moral element.<sup>103</sup> Further, "research finds that the moral dilemmas asylum judges encounter lead to identity conflicts between their professional *role* identity as judges and their *person* identity as compassionate – or less so – individuals."<sup>104</sup> Additionally, decisions are made based on the political dynamics, public references, and other external pressures that could sway immigration officers making the decision.<sup>105</sup> Human decisions are furthermore important because a person's identity plays a central role in shaping the decision-making process, and there tends to be some influence through one's values, beliefs, and social norms that, most of the time, should not be ignored when making decisions.<sup>106</sup>

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hyperthermia, injury, and exhaustion.").

100. Lifshitz, *supra* note 98.

101. Evie Bellino, *Automated Borders, Human Consequences: The Use of AI in Migration Control and the Legal Limits of International Refugee Law*, AM. U. INT'L REV., <https://auilr.org/2025/09/15/automated-borders-human-consequences-the-use-of-ai-in-migration-control-and-the-legal-limits-of-international-refugee-law/?utm> [https://perma.cc/26NG-EAYQ] (examining the emerging use of AI in border enforcement systems and discussing how the use of this technology may violate non-refoulement obligations and other foundational refugee protections under international law).

102. Madeleine Forster, *Refugee Protection in the Artificial Intelligence Era: A Test Case for Rights*, CHATHAM HOUSE (Sep. 7, 2022), <https://www.chathamhouse.org/2022/09/refugee-protection-artificial-intelligence-era/2-near-future-ai-and-asylum> [https://perma.cc/QY5Q-2RT5] (examining the integration of AI into asylum procedures and highlighting the importance of considering the individual circumstances of asylum seekers, emphasizing that AI systems may struggle to fully account for the nuanced and personal situations of applicants, which are critical to ensuring fair and just outcomes).

103. Katerina Glyniadaki, *Deciding on Asylum Dilemmas: A Conflict Between Role and Person Identities for Asylum Judges*, 50 J. ETHNIC & MIGRATION STUD. 2879, 2880 (2024).

104. *Id.* (emphasis in original).

105. *Id.* at 2886.

106. *Id.* at 2887.

There is a need for empathy, especially in asylum cases. Lest the law become sterile and bureaucratic, we must embrace judicial passion, which Justice Brennan defined as “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.”<sup>107</sup> More importantly, immigration cases involve very personal and emotional experiences that require a human element throughout assessment.<sup>108</sup> Every year, people seek refuge in the U.S. due to persecution or fear on account of their “race,” “religion,” or “nationality.”<sup>109</sup> As Justice Brennan suggests, judicial passion—an emotional connection to the facts of the case—becomes crucial in recognizing the humanity of asylum seekers and ensuring their experiences are understood within the broader context of law.<sup>110</sup> Here, empathy allows for a more compassionate and just evaluation of everyone’s unique circumstances, ensuring that legal decisions go beyond the black letter law.

Although there are inherent biases, a human element is a huge deal in the asylum decision-making process because humans are uniquely capable of understanding and responding to emotional cues—something that AI, for all its advancements, still struggles with.<sup>111</sup> Emotional intelligence plays a significant role in assessing cases as a whole with empathy and intuition to protect an immigrant’s humanitarian needs, not just recognizing it from a legal standpoint.<sup>112</sup> A human decision-maker can apply discretion and context in evaluating these situations and make

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107. Stephen Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDozo L. REV. 179, 179 (1988) (quoting William J. Brennan, Jr., *Reason, Passion, and The Progress of the Law*,” 10 CARDozo L. REV. 3, 9 (1988)).

108. Orane Cole, *AI in Immigration Law: Why Embracing Human Expertise Beats the Hype*, CILA (July 2, 2024), <https://cila.co/ai-in-immigration-law-why-embracing-human-expertise-beats-the-hype/> [https://perma.cc/82ZK-F3FH].

109. *Asylum*, USCIS, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum> [https://perma.cc/B3KK-E6P8]; see also *Refugees, Asylum Seekers and Migrants*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> [https://perma.cc/PL8E-5EE5] (“Millions flee from armed conflicts or other crises or violence. Some no longer feel safe and might have been targeted just because of who they are or what they do or believe – for example, for their ethnicity, religion, sexuality or political opinions.”).

110. See Wizner, *supra* note 107, at 179–80; see also Cole, *supra* note 108 (explaining the value of human expertise when assisting with asylum applications).

111. See generally Robert Cook, *Decoding the Divide: 6 Reasons Why AI Isn’t EI*, TRUE COLORS (Jan. 4, 2024), <https://www.truecolorsoftl.com/tciblog/decoding-the-divide-five-reasons-why-ai-isnt-ei> [https://perma.cc/3NQ7-RE52] (discussing the challenges faced with AI due to the fact of the constant struggles that AI faces regarding emotional cues and how AI lacks the emotional intelligence that humans are equipped with).

112. See Savannah Averitt, *Opinion: We Must Consider the Human Element in Voting on Immigration Policy*, PORTLAND PRESS HERALD, (Oct. 26, 2024), <https://www.pressherald.com/2024/10/26/opinion-we-must-consider-the-human-element-in-voting-on-immigration-policy/> [https://perma.cc/SPV8-ZJFZ].

informed decisions even in the absence of complete evidence regarding a migrant claiming persecution or other humanitarian violations.<sup>113</sup> Many asylum seekers face significant language barriers that make it difficult to communicate their case effectively.<sup>114</sup> Asylum interviews often require applicants to articulate complex and emotionally charged stories, and the failure to communicate effectively due to language or translation issues can affect the outcome of the decision and even lead to denial of factual asylum claims.<sup>115</sup>

### i. Why Machines Might Be Better

On the other hand, others might argue that machines are the better decision-makers, and empathy in decision-making is not required. For example, when employers are making hiring decisions, certain tools like the situational judgement test can be used to provide insight on how an employee will behave.<sup>116</sup> Tools like these utilize algorithms and are used best with assessment tools because humans are “inherently” biased, whether consciously or unconsciously, and machine learning can be trained to focus strictly on objective and relevant data, saving time and costs.<sup>117</sup> At the same time, humans might be unpredictable and susceptible to emotional influences, and, depending on an immigration judge or officer, their mood might change from day to day.<sup>118</sup> Alternatively, machine learning might provide algorithms that consistently produce the same result—having more consistency that can allow immigration officers to apply the same standard and criteria is vital to immigration policy.<sup>119</sup>

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113. Cole, *supra* note 108. *See generally* Averitt, *supra* note 112 (describing the humanitarian needs causing people to seek refuge and asylum).

114. My Khanh Ngo & Noelle Smith, *The Government Denies People Access to Asylum Because of Language Barriers. We're Fighting Back*, ACLU (Apr. 18, 2024), <https://www.aclu.org/news/immigrants-rights/the-government-denies-people-access-to-asylum-because-of-language-barriers-were-fighting-back> [https://perma.cc/R6L3-7MA7].

115. *Id.* Laura Belfield, *Why Machines are Better Than Humans and Why I Hate Simon Sinek*, SAPIA.AI (Feb. 28, 2020), <https://sapia.ai/resources/blog/why-machines-make-better-decisions-than-humans-oh-and-why-i-hate-simon-sinek/> [https://perma.cc/X2HQ-ST3R].

116. Nathan Thompson, *Situational Judgment Tests: Higher Fidelity in Pre-Employment Testing*, ASC (Nov. 30, 2024), <https://assess.com/situational-judgment-tests> [https://perma.cc/3ZVE-ATE4].

117. *Id.*

118. *See generally id.* (explaining how AI is more consistent than humans).

119. *See generally* Vyoma Raman, Catherine Vera & CJ Manna, *Bias, Consistency, and Partisanship in U.S. Asylum Cases: A Machine Learning Analysis of Extraneous Factors in Immigration Court Decisions*, in *Equity and Access in Algorithms, Mechanisms and Optimization* (EAAMO '22) 1–14 (2022) (explaining the inequalities in the asylum decision-making process and the recommendations made on how to address these issues).

### III. Balancing Efficiency and Fairness – A Proposed Approach

#### A. The Hybrid Approach: Humans Should Make the Final Decision

A hybrid approach that combines both AI and the human element should be implemented in the asylum setting. This would leverage speed, accuracy, and efficiency in processing the initial claims but require a human at the end of the asylum process to make the final decision.<sup>120</sup> Humans are creative, and, when faced with new variables, they can think of decisions and solutions that AI is incapable of.<sup>121</sup> Although AI can analyze large and small data sets, humans are still more nuanced and creative, and there is a constant need for emotional intelligence in our society that AI cannot provide.<sup>122</sup> Humans have the ability to connect very disparate and complex ideas that, as of now, AI lacks.<sup>123</sup> Scholars have found that, in order to limit bias and discrimination in making decisions in asylum cases, AI tools should be used in a support capacity rather than as the primary “decision-making tool.”<sup>124</sup>

An example of this occurred when two sisters fled Somalia.<sup>125</sup> Their asylum claim was “based on a fear of sectarian and gender-based violence from militant Islamist groups.”<sup>126</sup> These sisters, initially recognized as refugees and Kenyan citizens who entered Canada using a study permit under a false identity, truly compromised their credibility, leading to the rejection of their persecution claim.<sup>127</sup> A photo comparison generated using facial recognition software was the primary evidence against

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120. *AI Decision Making: What Is It, Benefits & Examples*, INTELLIAS (May 16, 2025), <https://intellias.com/ai-decision-making/> [https://perma.cc/3SDD-CVPW] (discussing the effects and impacts of utilizing AI to make final decisions, how efficient these tools can be, and whether AI tools will replace human judgment).

121. Michelle Newblom, *AI vs. Human: Creativity, Abilities, and Skills in 2025 (Which is Better?)*, FIVERR (Nov. 24, 2024), <https://www.fiverr.com/resources/guides/business/ai-vs-human> [https://perma.cc/Q8EL-538K] (providing a breakdown on the differences between AI and humans, and how humans are needed for emotional intelligence).

122. *See id.*

123. *See id.*

124. Hilary Evans Cameron, Avi Goldfarb, & Leah Morris, *Artificial Intelligence for a Reduction of False Denials in Refugee Claims*, 35 J. REFUGEE STUD. 493, 504 (2022) (discussing why some asylum cases are denied and the potential of AI as a support tool that to human evaluation that might alleviate uncertainty issues in the decision-making process).

125. Francesca Palmiotto, *When is a Decision Automated? A Taxonomy for a Fundamental Rights Analysis*, 25 GERMAN L.J. 210, 229 (2024), <https://www.cambridge.org/core/journals/german-law-journal/article/when-is-a-decision-automated-a-taxonomy-for-a-fundamental-rights-analysis/362AF985585D28E5E762F4FEEF4719B7> [https://perma.cc/YR8A-5PU6] (“Asha Ali Barre and Alia Musa Hosh are two sisters who fled Somalia and sought asylum in Canada based on a fear of sectarian and gender-based violence from militant Islamist groups.”).

126. *Id.* at 229.

127. *Id.*

them.<sup>128</sup> In this case, it was noted that the automated system did not make the final decision but instead aided in the decision-making process while a human “review[ed] and [took] into account other factors” to come to a decision.<sup>129</sup> Overall, including the human element is warranted because it enables nuanced judgment, contextual awareness, and consideration of individual circumstances—factors that algorithms alone frequently fail to capture effectively today.<sup>130</sup>

Having humans make the final decision also removes another layer of potential discrimination and bias when deciding asylum claims, as the data collected in using the AI is riddled with bias and lacks creativity in assessing every claim.<sup>131</sup> Humans are natural problem solvers and are fully capable of making decisions when a new variable is in play.<sup>132</sup> This is important because each asylum case is complex and has variations which AI will likely have challenges if unaided by human oversight and creativity with it throughout.<sup>133</sup>

#### *B. Following the European Union’s Approach: A Proposal for More Transparency and Guidance*

The U.S. must prepare for AI and ensure the right parameters and laws are set in place. More transparency and regulation will be helpful in utilizing the new and emerging technology. As technology and innovation continue to advance, the government must be urged to implement regulations that embody fairness, equity, and efficiency.<sup>134</sup> The European Union’s (EU) Artificial Intelligence Act (AI Act) is the first comprehensive regulatory framework designed to ensure the ethical use of AI in decision-making, balancing efficiency through innovation but with strict protections for fundamental rights and due process.<sup>135</sup> The EU is ensuring

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128. *Id.* (citing *Barre v. Canada*, 2022 FC 1078, para. 54 (Can. Ont.) (noting that when Asha and Alia applied for judicial review, the court found the decision to vacate their status unreasonable and in breach of procedural fairness).

129. *Id.* at 229 (citing Data Protection Working Party, *Guidelines on Automated Individual Decision-making and Profiling for the Purposes of Regulation 2016/679*, COM (2017) WP251 final (Feb. 6, 2018) [<https://perma.cc/FGJ6-8DLP>]).

130. See, e.g., Cole, *supra* note 108 (explaining the value of human expertise when assisting with asylum applications); see generally Newblom, *supra* note 121 (explaining the differences between human judgment and AI).

131. See Holdsworth, *supra* note 70.

132. Janine Brooks, *The Art of Problem Solving and its Translation into Practice*, 9 *BDJ IN PRAC.* 21, 21 (2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9442556/> [<https://perma.cc/7G93-8PSR>].

133. See generally *Asylum in the United States*, *supra* note 40 (describing the asylum process and its complexity).

134. *How Should We Balance Efficiency and Equality*, CHI. BOOTH REV. (Aug. 30, 2018), <https://www.chicagobooth.edu/review/how-should-we-balance-efficiency-and-equality> [<https://perma.cc/X9QX-P5B2>].

135. *EU AI Act: first regulation on artificial intelligence*, EUR. PARL.: TOPICS (Aug. 6, 2023),

compliance with due process concerns and protections when using AI to support decision-making.<sup>136</sup> The EU has proposed some guidance in using AI, also known as the “AI Act,” which is the first comprehensive regulation of AI systems at a supranational level.<sup>137</sup>

Specifically, “the AI Act focuses on the quality of training, validation, and testing data sets of AI systems.”<sup>138</sup> This focus is crucial, as putting these AI tools to the test and ensuring the tools are used properly provides agencies with clear guidelines on how to use AI.<sup>139</sup> The Act’s provision of clear obligations for providers of high-risk AI systems is another key component, ensuring that these systems are subject to rigorous oversight and accountability mechanisms.<sup>140</sup>

In the context of immigration, the U.S. could greatly benefit from adopting aspects of the EU’s AI Act, particularly as AI technologies are increasingly being used in decision-making processes related to border control, asylum applications, and immigration enforcement. The EU’s AI Act specifically addresses the need for transparency, fairness, and human oversight in AI applications, ensuring that high-risk AI systems—especially those affecting individuals’ rights—are held to strict ethical standards.<sup>141</sup> The EU’s AI Act also places a strong emphasis on the quality of data used to train AI systems, which is particularly relevant in immigration contexts.<sup>142</sup> Inaccurate or biased data can lead to unjust outcomes in immigration procedures, such as wrongful denial of asylum or the misidentification of individuals.<sup>143</sup> Adhering to guidelines on data

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<https://www.europarl.europa.eu/topics/en/article/20230601ST093804/eu-ai-act-first-regulation-on-artificial-intelligence> [https://perma.cc/7LTX-LQ5K].

136. Commission Regulation 2016/679, art. 14(2)(g), 15(1)(h), General Data Protection Regulation (GDPR), 2014 J.O. (L 119) 1–3.

137. See generally Lilian Edwards, *Expert Opinion: Regulating AI in Europe*, ADA LOVELACE INST. (2022), <https://www.adalovelaceinstitute.org/report/regulating-ai-in-europe/> [https://perma.cc/5ALK-3BPH] (providing a breakdown and reasoning of the new AI act passed by the European Union, strengthening the argument as to why passing more regulatory frameworks and policy will be beneficial if the ultimate decision is to implement AI in asylum process safely).

138. See Palmiotti, *supra* note 125, at 218 (“Additionally, it places a clear set of horizontal obligations on providers of high-risk AI systems, ranging from document keeping to the duty of information and collaboration in case of risks. Once in compliance with the legal requirements, AI systems must undergo a conformity assessment procedure based (in the large majority of cases) on internal control. Providers themselves assess the compliance of their systems with legal requirements, draw up a declaration of conformity, and affix a CE marking.”).

139. *Id.*

140. *Id.* at 213.

141. *EU AI Act: first regulation on artificial intelligence*, EUR. PARLIAMENT: TOPICS (Aug. 6, 2023), <https://www.europarl.europa.eu/topics/en/article/20230601ST093804/eu-ai-act-first-regulation-on-artificial-intelligence> [https://perma.cc/7LTX-LQ5K].

142. *Id.*

143. See Molnar, *supra* note 49.

quality, the U.S. could ensure that AI systems used in immigration decisions are based on unbiased decisions and data, reducing the risk of discriminatory outcomes.<sup>144</sup> By requiring transparency in how decisions are made and ensuring that there is a clear record of AI system operations, the U.S. Government could help safeguard against arbitrary decisions, which is crucial in ensuring there is a fairness and trustworthiness in the asylum process that is designed to help migrants pursue a better life.<sup>145</sup>

### Conclusion

Immigration cases are inherently complex and multifaceted. With each case having very specific details, there is a genuine requirement for nuanced, creative, and contextual interpretation.<sup>146</sup> Regarding credibility determinations, there is a reliance on consistency; but if the data inputted causes these immigration decisions to have biases that ultimately are based on nationality, race, or gender, this algorithm will most likely mirror these biases in its determinations.<sup>147</sup> Although humans are biased as well, a well-trained immigration officer or immigration judge should know how to set biases aside and properly consider unique variables while making a final decision.<sup>148</sup> Ultimately, AI is not ready to make decisions that humans need to make because there are certain qualities like “empathy, ethics and morality” that need to be taken into account, and which many algorithms cannot properly analyze.<sup>149</sup> Until and unless AI gets to a level of sufficient humanization in making decisions, it is likely not ready to be utilized fully in the asylum process.<sup>150</sup> Balancing both AI and human elements in the decision-making process of asylum claims should be the answer because humans are creative and empathetic, which are qualities essential in processing individual and unique asylum

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144. See Pierson, *supra* note 33.

145. Marlaina Wright, *Asylum Seekers: The Search for Basic Human Right to Healthcare in Industrial Countries*, 35 EMORY INT'L L. REV. 135, 135 (2021) (noting that many asylum seekers pursue migration to achieve safety, education, and a better standard of living).

146. See Cole, *supra* note 108.

147. Elena Abrusci & Richard Mackenzie-Gray Scott, *The Questionable Necessity of a New Human Right Against Being Subject to Automated Decision-making*. 31 INT'L J.L. AND INFO. TECH. 114, 124 (2023).

148. Mary Smith, Michael B. Hyman & Sarah E. Redfield, *Addressing Bias Among Judges*, STATE CT. REP. (Sep. 14, 2023), <https://statecourtreport.org/our-work/analysis-opinion/addressing-bias-among-judges> [https://perma.cc/7UPW-TVQR] (discussing the importance of judges having effective bias training).

149. Joe Kendrick & Andy Thurai, *AI Isn't Ready to Make Unsupervised Decisions*, HARV. BUS. REV. (Sep. 15, 2022) at 1, 3, <https://hbr.org/2022/09/ai-isnt-ready-to-make-unsupervised-decisions> [https://perma.cc/7PEE-7JRF].

150. Chris Gosier, *How Should AI Be Used in Immigration? Cautiously, Experts Say*, FORDHAM NOW, Mar. 13, 2025, <https://now.fordham.edu/university-news/how-should-ai-be-used-in-immigration-cautiously-experts-say> [https://perma.cc/P5PK-23PU].

claims while not violating due process.<sup>151</sup> Due to the expansion of AI, there is an “increase in deaths by pushing migrants trying to cross illegally towards more remote and dangerous routes.”<sup>152</sup> Undocumented immigrants are entitled to due protection under due process and are “protected by the [C]onstitution’s stated right to due process—even [if they] . . . illegally entered or stayed in the country.”<sup>153</sup>

To ensure that AI is used ethically and in accordance with due process, it is crucial that any AI-driven decision-making system in immigration proceedings is transparent. AI systems need to undergo rigorous testing to ensure they do not perpetuate discrimination or undermine the protections guaranteed to asylum seekers under U.S. law and international law. Without these safeguards, reliance on AI in asylum decisions risks exacerbating existing injustices and violating the basic and due process rights of those seeking refuge. Ultimately, technology and innovation cannot be slowed, but increasing transparency and implementing regulations can support immigration officers and help streamline asylum proceedings in the future.

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151. Joel Anderson & Adam Gerace, *Trait Empathy and the Treatment of Asylum Seekers in Australia*, 60 AUSTL. PSYCH. 207, 210 (2024).

152. Tyler, *supra*, note 1.

153. See Fullerton, *supra* note 26.



## Tribal Sovereignty, Sales Tax, and States Interference: Why Tax Compacts May Be the Best Way Forward

Emiliana Almanza Lopez<sup>†</sup>

### **Abstract**

*Tribes as sovereigns have the power of taxation. When states seek to impede this power by imposing their own taxes on non-member transactions on Reservations, Tribes must decide if imposing their own Tribal tax outweighs the risk of increased prices deterring business and business partnerships. This is the issue of double taxation. This Note investigates paths of remedy that address the burden of double taxation specific to sales taxes. Specifically, it looks at tax preemption, litigation, and policy. Preemption is difficult, and the existing case law framework on state tax preemption in Indian Country is complex, fact specific, and generally favors the state. Current federal policies fail to address this issue, and states are unlikely to preempt their own taxes without gaining something in return. Tribe-state tax compacts offer a compromise that relieves some of the burden borne by Tribes, but also requires concessions. This Note argues that while imperfect, these tax compacts may be the best remedy to double taxation in Indian Country and offers suggestions for how these binding agreements between sovereigns can be used to enforce state respect for Tribal sovereignty.*

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<sup>†</sup> J.D. Candidate 2026, University of Minnesota Law School and the Managing & Research Editor of the *Minnesota Journal of Law & Inequality*, Vol. 44. I first want to thank my grandparents for their unfettered support of my education and for teaching me the joy that comes with a love for learning. To my parents and family, thank you for shaping me into the person I am today. To all my loved ones, thank you for grounding me in the strength of community throughout law school. To my legal mentors, thank you for exposing me to so many realms of the legal field, for teaching me that legal excellence does not come at the cost of creative problem solving, and for showing by example how to practice with integrity. Last but not least, I would like to thank everyone who has helped shape this Note, including my faculty advisor and my fellow journal editors and staffers. To the readers, my hope is that this Note serves as a concise and detailed resource illustrating potential paths of remedy. This Note should not be used to tell Indigenous tribes and nations what they should or should not do. Tribal sovereignty must always be respected.

## Introduction

Federally recognized Indian tribes ("tribes")<sup>1</sup> retain the power to tax as an essential part of sovereignty.<sup>2</sup> Tax collection provides sovereigns with revenue to support the functioning of their government.<sup>3</sup> The possibilities of tax-based revenue sources for tribes are limited by the impracticality of tribal income tax and property taxes,<sup>4</sup> leaving tribes with sales tax and severance tax as feasible sources of tax revenue.<sup>5</sup>

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1. Indigenous people identify differently, for example as "Indigenous," "Native," "Indian," as is their right. This Note uses the term "Indian" consistent with Federal Indian law. The word "Tribe" will be capitalized when referencing a specific tribe and be uncapitalized when referring to tribes and tribal nations generally as a category of sovereigns. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02 [2], (Nell Jessup Newton & Kevin K. Washburn eds., 2024) [hereinafter COHEN'S HANDBOOK] ("The term 'Indian tribe' has distinct and different meanings for Native people and for federal law . . . . [F]ederal law ordinarily uses the term 'Indian tribe' to designate a group of Native people with whom the federal government has established some kind of political relationship or 'recognition' . . . . [S]uch recognition do not always reflect tribal understandings.").

2. *See* RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 21 (AM. LAW INST. 2024) ("(a) Indian tribes have the inherent power to tax income, property, and activities on Indian lands. (b) Tribal power to tax nonmembers on nonmember lands within Indian country is subject to separate limitations on the inherent power of tribes to regulate nonmembers."); COHEN'S HANDBOOK, *supra* note 1, § 10.04 [1] (citations omitted) ("Because the power to tax derives from a tribe's inherent sovereign powers, federal authorization of tribal taxes is not required . . . Congress in general has affirmed the tribal taxing power, as has the executive branch."); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) ("The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.").

3. U.S. TREASURY DEP'T ADVISORY COMM., TREASURY TRIBAL ADVISORY COMMITTEE: SUBCOMMITTEE ON DUAL TAXATION REPORT 4 (Dec. 9, 2020) (citation omitted) ("Every government relies on tax revenues to fund essential services and public goods, including building and maintaining infrastructure (such as roads, broadband, water and waste water systems); permitting and licensing businesses and professions; enforcing contracts and resolving disputes; ensuring public safety, educating children and workers; enforcing building codes and other safety measures; insuring against unemployment and worker injury; and more.").

4. *See* Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L.J. 1, 12 (2022) [hereinafter *Sacrificing Sovereignty*] (first citing *Tribal Governance: Taxation*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance/taxation> [<https://perma.cc/UR55-P6MF>]; then citing Matthew L. M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 774–84 (2004) (explaining tribal economic development activities); and then citing *McCulloch v. Maryland*, 17 U.S. 316, 316 (1819)) ("As a practical matter, tribes do not impose income tax, because they lack a sustainable tax base among their Members. As a legal matter, tribes cannot impose ad valorem property taxes upon land within the reservation that is held in trust by the federal government."). *See generally* KELLY CROMAN & JONATHAN TAYLOR, WHY BEGGAR THY INDIAN NEIGHBOR: THE CASE FOR TRIBAL PRIMACY IN TAXATION IN INDIAN COUNTRY 7 (2016), [https://www.bia.gov/sites/default/files/dup/assets/asia/raca/pdf/2016\\_Cromam\\_why\\_beggar\\_thy\\_Indian\\_neighbor.pdf](https://www.bia.gov/sites/default/files/dup/assets/asia/raca/pdf/2016_Cromam_why_beggar_thy_Indian_neighbor.pdf) [<https://perma.cc/HQ89-XAC9>] (describing and arguing for fair solutions to the issues arising from states' attempts to assert primacy over tribal taxation powers).

5. *Sacrificing Sovereignty*, *supra* note 4, at 12–13; *see also* Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal*

However, while a tribe's ability to impose a tax and benefit from that revenue is inherent in their taxing power, it can be, and has been, limited by state infringement.

The existing literature lays out a complex web of case law regarding tribal taxing power and contains an array of economic and policy arguments for why tribal taxing authority is important to Indigenous sovereignty. The current literature on tribe-state tax compacts generally focuses on specific taxes like cigarettes and fuel taxes or severance taxes.<sup>6</sup> By focusing on tribal sales tax of "tangible goods," this Note speaks directly to a niche of tribal tax that is often overlooked.

Generally, states may only tax non-member activity in Indian Country,<sup>7</sup> and cannot tax Members.<sup>8</sup> This means that states are able to collect revenue from economic activity within the boundaries of another sovereign. When the two taxing authorities overlap in Indian Country,<sup>9</sup> tribes are left with a hard decision: forego taxing non-member transactions and lose a revenue source, or carry the burden of double

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*Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 103–04 (2005) [hereinafter *Double Taxation in Indian Country*] (discussing examples of how severance or consumption taxes may be used by tribes).

6. This Note refers to these tax agreements as "tribe-state tax agreements" or "tribe-state tax compacts;" however, "state-tribe" and "state-tribal" are also used when directly citing a source.

7. See RESTATEMENT OF THE LAW OF AMERICAN INDIANS PDF § 30 (AM. LAW INST. 2024) ("States may tax nonmember activities in Indian country, except when the state tax: (1) conflicts with an express federal statutory prohibition, (2) is impliedly preempted by federal law, or (3) infringes on tribal self-governance."); RESTATEMENT OF THE LAW OF AMERICAN INDIANS PDF § 32 (AM. LAW INST. 2024) ("State taxation of tribal members or Indian tribes in Indian country is barred unless federal law clearly authorizes the taxation."). For clarity, this Note uses the terms "Indian Country" and "Reservation" both to refer to land within the boundaries of a tribe's jurisdictional territory.

8. The term "non-members" refers to persons who are not enrolled Members of a given tribe. The term "non-member" is not capitalized as it can refer to what some case law and secondary sources refer to as a "non-Indian" (someone without any formal tribal affiliation), or a "non-member Indian" (someone who is an enrolled Member of a tribe different than the tribe where a given action occurs). The term "Member" refers to someone who is an enrolled Tribal Member of the tribe where an action occurs or put differently the tribe being discussed at hand. "Member" is capitalized as its legal relevance of membership status reflects a specific political-governmental affiliation.

9. See Stacy Leeds & Lonnie Beard, *A Wealth of Sovereign Choices: Tax Implications of McGirt v. Oklahoma and the Promise of Tribal Economic Development*, 56 TULSA L. REV. 417, 461 (2021) ("The only express definition of 'Indian country' provided by the Court was by reference to 18 U.S.C. § 1151 as including 'formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States.'"); 18 U.S.C. § 1151 (defining "Indian country" as "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.").

taxation for non-member activity.<sup>10</sup> State sales taxes limit tax revenue, impose tangible tax-related administrative burdens on a tribe, and can disincentivize outside businesses from partnering with a tribe or developing in Indian Country.<sup>11</sup> Meaning, that when states impose their own sales tax on non-member transactions in Indian Country, it can threaten tribal economic development.<sup>12</sup> However, tax agreements between a state and tribe are an avenue for mitigating these harms by making an explicit market space for the imposition of a tribal sales tax. These agreements often require that tribes share the sales tax revenue collected from sales tax on transactions in Indian Country with the state.<sup>13</sup> By cohesively assessing accessible tribe-state tax agreements, laying out existing case law, and addressing federal and state policy options, this Note will collect the major research components relevant to a sales tax dispute between a tribe and state, and make the argument for why tribe-state tax compacts may be the best way forward.

Part I breaks down the taxation jurisdiction relevant for a tribal “sales tax” on tangible goods. It inspects the current legal understanding of whether a tribe can impose a sales tax on non-member buyers in Indian Country<sup>14</sup> and summarizes the functions of a tribe-state tax compact. Part II provides an overview of the avenues tribes may take to remedy the burden of double taxation, through litigation to enjoin the application of state sales tax in Indian Country and through establishing a tribe-state tax compact (also referred to as “tax agreement”); it then touches on policy remedies.

This Note argues for the inclusion of certain provisions in tribe-state tax compacts, critiques the existing litigation avenues for remedying tribe-state tax disputes, and provides suggestions for policy and legislative actions that could help alleviate the issue of double taxation in Indian Country. By highlighting the issue of double taxation this Note

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10. See *Sacrificing Sovereignty*, *supra* note 4, at 13; CROWMAN & TAYLOR, *supra* note 4, at 3–4.

11. See Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 3, 57 (2008) (“For example, if the statute says that a sales tax is imposed on a product’s purchaser, and an on-reservation purchaser is not an Indian, the tax is likely to be valid even if the Indian tribe bears the economic burden of the tax.”); *see id.* at 91 (describing the potential deterrence of investors due to concern over tribal tax, how it may impact economic development, and how the notion of economic development, or specific kinds of economic development are not always desired by a tribe or tribal Members).

12. See generally *Sacrificing Sovereignty*, *supra* note 4, at 1 (examining broadly the limitations of such additional taxation on tribal economic development).

13. See generally Mark Cowan, *State-Tribal Tax Compacts: Stories Told and Untold*, POL’Y DISCUSSION PAPER SERIES (Ctr. for Indian Country Dev., Minneapolis, Minn.), Sept. 2021 (reviewing the background, takeaways, challenges, and shortcomings of these agreements).

14. This Note will not focus on the sales tax of liquor, cigarettes, oil, or gas. See COHEN’S HANDBOOK, *supra* note 1, § 10.04[1] (“The Supreme Court . . . has created certain limitations with respect to [tribal] taxation of nontribal members on nontribal lands.”).

aims to inform legal professionals and bolster respect and recognition of tribal sovereignty.

## I. Background

It is important to acknowledge the long history between tribal, state, and federal taxation.<sup>15</sup> The history of Federal Indian policy is often thought of in terms of eras. The Department of the Interior organizes this history into eight: the “Treaty-Making Era,” the “Removal Era,” the “Reservation System Era,” the “Allotment and Assimilation Era,” the “Reorganization Policy Era,” the “Termination Era,” the “Self-Determination Era,” and the current era of “Self-Governance.”<sup>16</sup> While all of this history is important to contextualize the ways in which the United States and states themselves have repeatedly tried to disenfranchise and strip tribes of their inherent rights as sovereigns, this Note will condense these eras to highlight the aspects of them most relevant to tribal sales tax.

The Removal and Allotment eras aimed to dismantle tribal sovereignty by enacting laws that broke up tribal territory and took tribal lands. The Indian Removal Act of 1830 “resulted in forced migrations by numerous tribes from the eastern United States.”<sup>17</sup> Forced land secession were further advanced by the Federal Allotment Act of 1887 (the “Dawes Act”), which broke up tribally owned land by allotting the “acreage to individual Indians to own in fee simple.”<sup>18</sup> Allotment often resulted in non-members gaining ownership of this land through sale.<sup>19</sup> Put simply,

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15. *See generally* COHEN’S HANDBOOK, *supra* note 1, § 10.01[2] (discussing the historical background of taxation in Indian Country); *see generally* *Sacrificing Sovereignty*, *supra* note 4 (discussing how the history of colonialism, Federal Indian policy and case law impact taxation in Indian Country).

16. U.S. DEP’T OF THE INTERIOR, *Federal Law and Indian Policy Overview*, <https://www.bia.gov/bia/history/IndianLawPolicy> [<https://perma.cc/ZCW3-RVCM>].

17. Pippa Browde, *From Zero-sum to Economic Partners: Reframing State Tax Policies in Indian Country in the Post-COVID Economy*, 52 N.M. L. REV. 1, 6 (2022) (citing Indian Removal Act, Pub. L. No. 21-148, ch. 148, 4 Stat. 411 (1830)).

18. *Id.* at 6 (citing General Allotment Act of 1887, Pub. L. No. 49-105, ch. 119, §1, 24 Stat. 388, 388, *repealed* by Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-461 §§ 101-03, 114 Stat. 1991 (codified at 25 U.S.C. §§ 2201-2219 (2020)). For the purposes of this Note, the term “fee land” generally refers to land held in “fee simple” by a non-member. The term “fee simple” refers to complete ownership of a parcel of land. *See Fee*, BLACK’S LAW DICTIONARY (11th ed. 2019).

19. *Sacrificing Sovereignty*, *supra* note 4, at 10-11 (citing FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 & nn.14-15, 25-31 (Nell Jessup Newton ed., 2017)) (“Within fifty years of allotment policy the amount of land was reduced to forty-eight million acres.”); *see* COHEN’S HANDBOOK, *supra* note 1, § 2.08[3][b] (citations omitted) (discussing how the Burke Act of 1906 authorized the Secretary of Interior to unrestrict the fee simple patents distributed through allotment prior to the expiration of those parcel’s trust period, meaning that the parcel were subject to state and federal tax, and could be seized to pay debts).

"[t]he effect of the Dawes Act was to diminish tribal sovereignty, erase reservation or Indian territory boundaries, and force assimilation."<sup>20</sup> Today, one of the consequences of the Dawes Act is felt in the presence of fee land throughout Indian Country, which (as will be discussed) helped open the door to state taxing authority of non-members in Indian Country.

The Indian Reorganization Act of 1934 ("IRA") briefly brought about a new era of federal recognition of tribes' sovereign powers and aimed to "restore tribal land to tribes and develop tribal economies."<sup>21</sup> However, the Termination Era quickly followed. Termination stripped many tribes of their sovereign status in order to end the United States' trust relationship with them, and "ultimately [to] subjugate Native American Indians to United States federal, state, and local laws."<sup>22</sup> The Termination Era ended federal programs that provided services to tribes and their Members, "including health, educational and welfare services, and amounted to widespread loss of land by tribes."<sup>23</sup> The removal of federal service programs also "allowed states to expand their civil and criminal jurisdiction within Indian Country."<sup>24</sup> Terminations and the cut of federal funding and services weakened tribes economically and "exacerbated poverty" in Indian Country.<sup>25</sup> This damage left many tribal communities without "sustainable tax base among their [M]embers,"<sup>26</sup> and can be seen as a causal factor behind tribal income tax impracticability. Moreover, tribes whose federal recognition was terminated by the United States government during this Era became prohibited from applying their own tribal tax laws.<sup>27</sup> Like the Dawes Act,

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20. Browde, *supra* note 17, at 6 (citing *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 254 (1992)).

21. *Id.* at 7 (citing Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101-121)).

22. *Sacrificing Sovereignty*, *supra* note 4, at 10 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 & nn.19 (Nell Jessup Newton ed., 2017)); see *Bureau of Indian Affairs Records: Termination, NATIONAL ARCHIVES*, <https://www.archives.gov/research/native-americans/bia/termination> [<https://perma.cc/G75R-NCQT>].

23. Browde, *supra* note 17, at 7 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (Nell Jessup Newton ed., 2012)).

24. *Id.* (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 nn.1-33 (Nell Jessup Newton ed., 2012)).

25. See *Sacrificing Sovereignty*, *supra* note 4, at 10-11.

26. *Id.* at 12 (citing *Tribal Governance: Taxation*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/tribal-governance/taxation> [<https://perma.cc/UR55-P6MF>]) ("As a practical matter, tribes do not impose income tax, because they lack a sustainable tax base among their members.").

27. *Id.* at 10-11 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 & nn.24-25 (Nell Jessup Newton ed., 2017)).

termination effectively expanded state taxing authority, and thus helped pave the groundwork for today's issue of double taxation.<sup>28</sup>

The cornerstone "idea of the [S]elf-[D]etermination policy is that tribes should be 'the primary or basic governmental unit of Indian policy.'"<sup>29</sup> In an effort to promote tribal sovereignty, programs of this Era shifted from being managed by the Bureau of Indian Affairs ("BIA") to being managed "at the tribal level."<sup>30</sup> One example of such efforts is the establishment of the National Congress of American Indians "to help promote tribes' ability to develop their 'own programs' and 'solve their own problems.'"<sup>31</sup> However, the question remains: how does a tribe develop "their own programs" when their ability to raise sustainable revenue through taxation is narrowed by past policy's expansion of state and federal jurisdiction over their sovereignty? Thus, while these policies are a step in the right direction, it is important to contextualize this positive shift in Federal Indian policy as policies that function concurrently with the legacy of the Removal, Allotment, and Termination Eras.<sup>32</sup>

#### A. Tribal Taxing Power Overview

Tribes retain the power of taxation as a "core aspect of tribal sovereignty."<sup>33</sup> Taxing power provides a sovereign with control and

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28. *Id.*

29. *Id.* at 12 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 & nn.3-4 (Nell Jessup Newton ed., 2017)); *see also* Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 5361-5368.); *see also* Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, tit. III, 108 Stat. 4250 (1994) (codified as amended at 25 U.S.C. § 450a note and § 458aa et seq.).

30. *Sacrificing Sovereignty*, *supra* note 4, at 11-12 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 & nn. 81-82 (Nell Jessup Newton ed., 2017)); *see also* STEPHEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES 252 (Oxford Univ. Press, 5th ed. 2024) (1983) (discussing Congress's 1982 enactment of the Indian Tribal Government Tax Status Act, which explicitly exempted Tribes from most of the taxes that states were exempt from, and the subsequent IRS regulations adopting its position that "tribal income [was] not subject to federal income taxation"); 26 U.S.C. § 7871 (codifying the Indian Tribal Government Tax Status Act).

31. *Sacrificing Sovereignty*, *supra* note 4, at 11 (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 & n.13 (Nell Jessup Newton ed., 2017)).

32. *See id.* (citing FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 & nn.81-82 (Nell Jessup Newton ed., 2017)) ("Specifically in the economic development arena, where land and inheritance issues are complicated by the ownership of land by non-Indians.").

33. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (noting taxation is a foundational instrument of "self-government and territorial management," as it establishes and maintains revenue sources for essential governmental services); *id.* at 144 (stating that explaining how a tribe's taxing power also can derive from their power to exclude as it "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation."). *See generally* COHEN'S HANDBOOK, *supra* note 1, § 10.04[1] (discussing tribal

finances governmental services necessary for self-governance.<sup>34</sup> There are two main factors to consider regarding a tribe's taxing authority: membership status, and whether the tax occurs in Indian Country. Tribes can impose a sales tax on Member transactions in Indian Country,<sup>35</sup> and states cannot.<sup>36</sup> Tribal taxing authority over non-members in Indian Country "has long been recognized as a core aspect of tribal sovereignty" by both Congress and the executive branch, but has been constrained by Supreme Court decisions.<sup>37</sup> Taxing authority is further complicated by a state's often concurrent ability to collect sales tax from non-member transactions that occur in Indian Country.<sup>38</sup> So whose taxing authority applies to non-member activity in Indian Country? It depends. Generally, the answer hinges on who is burdened by the "legal incidence of a tax."<sup>39</sup>

The "legal incidence of a tax" refers to the person or entity on which the tax burden falls.<sup>40</sup> Put differently, it is an administrative burden that "falls on the party" required by statute "to actually file a tax return and remit the tax to the government."<sup>41</sup> Legal incidence of a tax is different than the economic incidence of tax, where the bearer of the economic incidence of a tax is the person or entity who actually pays the tax and is economically worse off because of it.<sup>42</sup> Because this Note focuses on sales tax—which places the legal incidence on the purchaser—the issue of legal

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authority to tax).

34. CROMAN & TAYLOR, *supra* note 4, at 1 (referencing *Merrion*, 455 U.S. 130).

35. *See Merrion*, 455 U.S. at 140–41.

36. *See generally* *Leeds & Beard*, *supra* note 9, at 461; *see also* *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

37. COHEN'S HANDBOOK, *supra* note 1, § 10.04[2][b] (citations omitted); *see also id.* ("But in *Montana v. United States*, the Court held that absent treaty or statutory provisions to the contrary, tribes have no inherent authority to regulate non-Indians on non-Indian fee land within reservation boundaries" absent certain exceptions being met, tribal taxing authority had not been divested by the branches of the United States government); *see Montana v. United States*, 450 U.S. 544, 565 (1981); *see also* PEVAR, *supra* note 30, at 264 (citing *Washington v. Confederated Tribes of Colville Indian Rsr.*, 477 U.S. 134, 151–53 (1980)) ("[I]n 1980, the Court held that non-Indians can be required to pay a tribal sales tax when they buy goods from Indian vendors on tribal land."); Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1204 (2010).

38. *See Confederated Tribes of Colville*, 477 U.S. at 160.

39. *Sacrificing Sovereignty*, *supra* note 4, at 16; *see Okla. Tax Comm'n*, 515 U.S. at 458 ("The initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of a tax."); *see Williams v. Lee*, 358 U.S. 217 (1959) (defining the infringement on tribal sovereignty test); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (defining the preemption balancing test).

40. Cowan, *supra* note 13, at 7 (citing Richard Westin, WG&L TAX DICTIONARY 345 (2000)); *see also* *Confederated Tribes & Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1084 (9th Cir. 2011).

41. Cowan, *supra* note 13, at 7.

42. *Id.*

incidence boils down to whether the purchaser of a good in Indian Country is a Member of the tribe where the good was purchased.<sup>43</sup>

If the purchaser of a good is a Member state sales tax will not apply; it may only apply if the purchaser is a non-member. This is because when a state imposes a tax in Indian Country whose legal incidence “falls on a tribe or its [M]embers,” the tax is generally void “absent a federal statute permitting such taxation.”<sup>44</sup> If the legal incidence of a state tax falls on a non-member, the state may generally impose the tax even if the economic activity happens within Indian Country.<sup>45</sup> However, if said state tax is “preempted by federal law, or if it interferes with a tribe’s ability to exercise its sovereign functions, it *does not apply to non-Indians in Indian [C]ountry.*”<sup>46</sup>

Other possible constraints of a tribe’s authority to impose a sales tax on non-members are extremely narrow applications of federal statutes,<sup>47</sup> including a possible requirement to have tax related tribal legislations approved by the Secretary of the Interior.<sup>48</sup> Despite these constraints, tribes have the power to impose a sales tax on non-member transactions

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43. See *The Burden of Sales and Excise Taxes*, BRITANNICA MONEY, <https://www.britannica.com/money/sales-tax/The-burden-of-sales-and-excise-taxes> [https://perma.cc/D8VC-AEVW]. See generally *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005); *Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

44. *Sacrificing Sovereignty*, *supra* note 4, at 16; see also *Oklahoma Tax Comm’n*, 515 U.S. at 458; *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976) (citing *Oklahoma Tax Comm’n v. United States*, 319 U.S. 598, 613–614 (1943) (Murphy, J., dissenting)) (“This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community.”).

45. See *CROMAN & TAYLOR*, *supra* note 4, at 7 (citing *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 459 (1995)).

46. *Id.* at 7 (first citing *Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982); and then citing *White Mountain Apache Tribe v. Bracker*, 488 U.S. 136, 142 (1980)) (emphasis in original).

47. See COHEN’S HANDBOOK, *supra* note 1, § 10.04[2][c] (citing 25 U.S.C. § 1302(a)(5), (a)(8)) (explaining that the Indian Civil Rights Act (“ICRA”) provisions “most relevant to tribal taxing authority are the requirements that tribes pay just compensation for taking of property and that tribes not deny any person due process or equal protection of the laws.”); *id.* (citing U.S. CONST., art. I, § 8, cl. 3) (“The federal constitutional commerce clause, which gives Congress the power to ‘regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes,’ is another potential source of constitutional limitation on the tribal taxing power.”); *id.* at § 10.04[2][d] (citing 25 U.S.C. §§ 261–264) (“The Indian trader statutes are another potential source of limitation of the tribal taxing power.”); *id.* (first citing 25 U.S.C. § 177; then citing *id.* at § 18.03[2]) (“The federal restraint on alienation of Indian trust property is a potential source of limitation on the tribal power to tax.”).

48. See COHEN’S HANDBOOK, *supra* note 1, § 10.04[2][d] (citations omitted) (“Some tribal constitutions adopted under the [Indian Reorganization Act] require approval by the Secretary of the Interior for all or some tribal legislation. Others require secretarial approval only for tribal taxes on nonmembers.”); see also 25 U.S.C. §§ 5109, 5124 (relevant reclassified sections of the Indian Reorganization Act of 1934).

in Indian Country.<sup>49</sup> To assess the regulatory authority of a tribe to impose a tribal sales tax on non-members, and when that authority overlaps with a state's taxation authority, courts look to the facts of each case.<sup>50</sup>

*B. Tribal authority to impose a sales tax on non-members in Indian Country depends on the land ownership of where the tax occurs.*

*Merrion v. Jicarilla Apache Tribe* held that a Tribe has the power to tax non-members on Tribally owned land.<sup>51</sup> The Court complicates this in *Atkinson Trading Co. v. Shirley* and *Nevada v. Hicks* by constraining a Tribe's power to tax non-member activity in Indian Country.<sup>52</sup> *Atkinson's* opinion is applicable to taxation that occurs on non-member fee land, whereas in *Hicks* the relevant land was an allotment parcel held in trust for a Member. To understand the limitations of tribal taxing power over non-member transactions conducted in Indian Country, it is necessary to appreciate the constraints of *Atkinson* and *Hicks*.

The *Atkinson* and *Hicks* Courts' narrow readings of *Montana v. United States*<sup>53</sup> also limit the two *Montana* exceptions to the general

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49. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141–42 (1982) (“[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax.”).

50. See CROMAN & TAYLOR, *supra* note 4, at 6 (quoting Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX L. 897, 1220–21 (2010) (citations omitted) (“Case-by-case adjudication by a court is a notoriously difficult way of imposing order and coherence on a body of doctrine . . . The Supreme Court has not distinguished itself [in the area of Indian tax law], mischaracterizing the tax before it, abusing precedent, lapsing into *ipse dixit* reasoning, misreading or ignoring history, and retreating into formalism.”).

51. *Merrion*, 455 U.S. at 141–42 (“[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax.”).

52. See generally *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001) (the land at issue in *Atkinson* is non-member fee land); *Nevada v. Hicks*, 533 U.S. 353, 371 (2001) (the land at issue in *Hicks* was Tribal Land the case's limitation on tribal taxing authority over non-members is understood to be applicable to non-member fee land as tribal taxing authority is strongest when the action occurs on tribal land). It is important to note that both *Atkinson* and *Hicks* are Supreme Court decisions made during the Federal Indian policy era of “Self-Governance.” See U.S. DEPT OF THE INTERIOR, *Federal Law and Indian Policy Overview*, <https://www.bia.gov/bia/history/IndianLawPolicy> [https://perma.cc/ZCW3-RVCM]. This illustrates that even when Federal Indian policy is facially “progressive” tribal sovereignty is still subject to attack by the United States government.

53. See *Montana v. United States*, 450 U.S. 544, 565 (1981) (outlining the first *Montana*

court-made rule that “tribes lack regulatory authority over [non-members] on non-Indian fee land within [a] [R]eservation.”<sup>54</sup> For a tribal sales tax on non-members to withstand the *Atkinson* and *Hicks* holdings, a tribe must either 1) establish an consensual private relationship between the non-member and the tribe with a nexus to the claim,<sup>55</sup> or 2) show that an individual’s tax directly imperils the tribe’s economic security, political integrity, or general health and welfare.<sup>56</sup>

Even when constrained by *Atkinson* and *Hicks*, *Montana*’s first prong is satisfied in the context of a tribal sales tax applied to a purchase from a tribally owned store. This is because an explicit contractual relationship between the purchaser and tribe is established through the offer and acceptance of buying the good. However, this relationship between the non-member and tribe is not so clearly met if the owner of that store is not a tribe, or tribal Member. When a non-member purchases a good from a store owned by a non-member in Indian Country, the purchaser has a contractual relationship with the non-member store owner not with the tribe whose jurisdiction the store is located within.<sup>57</sup> In these cases a tribe must look to the second *Montana* exception to assert their tax. *Atkinson* requires courts to focus on the direct effect of non-member’s actions when assessing the second *Montana* exception.<sup>58</sup>

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exception as a Tribe’s ability to “regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”); *id.* at 566 (outlining the second *Montana* exception as a Tribe’s “retain[ed] inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe.”).

54. *Montana v. U.S.*, U.S. DEP’T OF JUST., <https://www.justice.gov/enrd/indian-resources-section/montana-v-us> [<https://perma.cc/6WVD-K62U>]; see *Montana v. United States*, 450 U.S. 544 (1981); *Atkinson*, 532 U.S. 654, 656. “Reservation” is capitalized because it holds political and legal meaning, as refers to the boundaries of a sovereign government.

55. See *Atkinson*, 532 U.S. at 656 (holding that “Montana’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.”) is understood to stand for requiring an explicit contractual relationship to satisfy the “consensual relationship” referenced in *Montana*); see also *Hicks*, 533 U.S. at 371 (limiting the consensual relationship between the Tribe and non-member be private and not government-to-government). While the land at issue in *Hicks* was Tribal Land, this limitation remains in place regardless of land ownership.

56. See *Atkinson*, 532 U.S. at 656-57 (focusing the direct effect on the individual non-member’s threat or impairment on the Tribe’s sovereign functioning).

57. See *id.* at 655 (citing *Montana*, 450 U.S. at 565) (“The consensual relationship must stem from ‘commercial dealing, contracts, leases, or other arrangements’...and a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.”); *see id.* at 656 (“Montana’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.”).

58. *See id.* at 657.

So how would a non-member purchase directly effect a tribe? A logical answer is that that the ability to tax non-member transactions in Indian Country regardless of retailer ownership directly effects a tribe's ability to generate revenue for governmental services like police and fire departments or emergency medical services. Unfortunately, the Court has not given this logic much weight. Meaning, that in Indian Country tribes have the power to tax non-members on tribal land,<sup>59</sup> but that this generally does not "extend to businesses run by non-Indians on" non-member fee simple land.<sup>60</sup>

The constraints of the *Montana* exceptions highlight the importance of whether or not a tribe is a retailer in assessing sales tax jurisdiction in Indian Country. A tribe is considered a "retailer" in cases where a non-member "purchase[s] goods or services from tribes or tribal enterprises within Indian Country."<sup>61</sup> In these situations, state sales tax may be imposed on the non-member customer,<sup>62</sup> as courts have held that allowing tribes to omit state sales tax when selling goods on-Reservation to non-members would create an unfair market advantage.<sup>63</sup> A tribe may also be considered a retailer when they function as a "partner" by engaging "in commercial transaction with non-Indian businesses or investors in Indian Country."<sup>64</sup> Even when a tribe functions as a partner, the state may still "assert various business taxes, including income or business-operation taxes, on the non-Indian businesses."<sup>65</sup> In short,

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59. See *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 153 (1980) ("Federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity.").

60. *Sacrificing Sovereignty*, *supra* note 4, at 15–16 (citing *Atkinson*, 532 U.S. at 653, 659).

61. *Id.* at 14.

62. *Id.*

63. See *PEVAR*, *supra* note 30, at 257 (first citing *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 477 U.S. 134, 151 n.27 (1980); and then citing *Confederated Tribes & Bands of the Yakima Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 to 1088 (9th Cir. 2011)) ("[Tribes] are not entitled to such an 'artificial' advantage when they sell products imported from outside the reservation to non-Indians."); *see also Sacrificing Sovereignty*, *supra* note 4, at 19 (citation omitted) ("[W]ith respect to economic development opportunities for tribes acting as retailers, the law does not allow a tribe to 'market a tax exemption' from state taxation as a means of attracting consumers."). This judicial reasoning, however, doesn't seem to apply to other domestic sovereigns such as states. For example, Minnesota has no sales tax on clothing, and this incentivizes customers to come to the state to benefit from that lower cost of goods. Minnesota's taxing scheme also increases economic activity at commercial places like the Mall of America. Imagine a Wisconsin resident drives an hour to the Mall of America to buy back to school clothes for their child. It would be inconceivable for them to be charged a Wisconsin sales tax. Understanding that the boundaries of two states differ from the boundaries of a reservation that is entirely within the borders of a single state, all these boundaries are fundamentally between two sovereign governments and should be treated as such.

64. *Sacrificing Sovereignty*, *supra* note 4, at 14.

65. *Id.* (the use of the permissive word "may" indicates that the ability of a state to impose taxes when a tribe is a partner is only possible, not a given). It is easier to predict

generally when a tribe is a retailer or a partner, both the tribal and state sales taxes may be imposed on the non-member customer.<sup>66</sup> This overlap in taxation authority of non-member transactions in Indian Country results in the issue of double taxation.

*C. A tribe's limited remedy for double taxation through litigation rests on unclear and ineffective balancing tests.*

When faced with the burden of double taxation, a tribe's remedial options are generally forgo imposing their own tax, limit their own tax, enter a tax agreement with a state, or fight to have the state's tax invalidated in court. The Supreme Court has invalidated state taxes issued on non-member activity in Indian Country through balancing tests.<sup>67</sup>

In *White Mountain Apache Tribe v. Bracker*, the Supreme Court of the United States invalidated a state "motor carrier license tax" and "use fuel tax" that "applied to a nonmember logging company doing business on the [R]eservation."<sup>68</sup> The *Bracker* Court's analysis in determining the validity of the state tax is the most common judicial approach to this kind of issue. First, the Court looked to see if Congress had clearly expressed a federal preemption of the state tax, and held that they did not.<sup>69</sup> The Court then turned to the facts of the case to balance the weight of the State's interest on one hand, and the interests of the Tribe and federal government on the other—this became known as the *Bracker* balancing test.<sup>70</sup> The Court found that there was a strong federal interest in the issue at hand, as federal law had established an overarching regulatory scheme for the harvest and sale of timber on the Apache Reservation.<sup>71</sup> The Court also concluded that the State's interest was merely to raise revenue.<sup>72</sup> For these main reasons, the *Bracker* Court held that the State tax was invalid because the State's interest in raising revenue was not sufficient to

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the likelihood of a court upholding a state tax imposed on non-members in Indian Country when a tribe is a retailer compared to when a tribe is acting as "partner." See *Id.* at 19–20.

66. *Id.* at 14.

67. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982).

68. Richard Ansson, Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter into Taxation Compacts with Their Respective State*, 78 OR. L. REV. 501, 516–17 (1999); see *Bracker*, 448 U.S. 136.

69. *Bracker*, 448 U.S. at 143–44.

70. See *id.*; *Sacrificing Sovereignty*, *supra* note 4, at 18.

71. *Bracker*, 448 U.S. at 145–49.

72. *Id.* at 150 ("They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads.").

constitute an interest<sup>73</sup> and that allowing the tax would disrupt the federal regulatory scheme.<sup>74</sup>

Two years later in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, the Court “invalidated a state’s gross receipts tax” that applied to a non-member contractor who was “hired by a Tribal school board to construct a school for Indian children on the Tribe’s [R]eservation.”<sup>75</sup> The *Ramaha Navajo School Board* Court also rooted their opinion in the facts, holding that the state had failed to assert a legitimate regulatory interest that would justify their taxation.<sup>76</sup> However, the Court quickly shifted to a pattern of upholding state taxes.

In *Cotton Petroleum Corp. v. New Mexico*, the Supreme Court upheld a State tax on a non-member company’s profits “made from selling an Indian [T]ribe’s oil and gas which the company had extracted from [T]ribal [L]ands pursuant to a contract with the [T]ribe.”<sup>77</sup> Despite the extensive federal regulation of the petroleum industry,<sup>78</sup> the *Cotton Petroleum* Court held that there was no federal regulatory scheme that preempted the State tax.<sup>79</sup> This leaves the question, what exactly is a sufficient tribal or federal regulatory interest to preempt state tax? Case law offers no clear answer.

What we do know is that when determining a state’s ability to impose a tax on non-members in Indian Country courts generally use the *Bracker* balancing test.<sup>80</sup> Under the *Bracker* test, state “taxes that impact only non-Indians—including income, personal property, real estate, and sales taxes—typically are valid.”<sup>81</sup> However state taxes on non-members can be considered invalid, when “the state is attempting to tax the income earned by a non-Indian for providing goods or services to an Indian tribe (or to its [M]embers).”<sup>82</sup> For cases who’s facts do not overlap with these guide posts, a court will look to:

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73. *Id.* at 150–51.

74. *Id.* at 152.

75. Ansson, Jr., *supra* note 68, at 518; *see Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Bracker*, 448 U.S. 136.

76. *Ramah Navajo Sch. Bd.*, 458 U.S. at 840–44.

77. PEVAR, *supra* note 30, at 262; *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

78. *Cotton Petroleum*, 490 U.S. at 177–78.

79. *Id.* at 186–87.

80. PEVAR, *supra* note 30, at 261.

81. *Id.* (first citing *Thomas v. Gay*, 169 U.S. 264 (1898) (personal property tax); then citing *Agua Caliente Band of Cahuilla Indians v. Riverside County*, 2017 WL 4533698 (C.D. Cal. 2017), aff’d, 749 Fed. Appx. 650 (9th Cir. 2019) (tax on the value of a lease of tribal land); *Utah & No. Ry. v. Fisher*, 116 U.S. 28 (1885) (real estate tax); then citing *Loveness v. Arizona Dept. of Revenue*, 963 P.2d 303 (Ariz. App. 1998), cert. denied, 525 U.S. 1178 (1999) (income tax); and then citing *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995)).

82. *Id.*; *see also id.* at 263 (“[A]ny tax on non-Indians for providing goods or services to

- (1) Whether "the activity in question was already subject to substantial federal regulation."<sup>83</sup>
- (2) Whether the burden of paying the state tax "would ultimately fall on the tribe or its [M]embers," including if it fell on a non-member business who would subsequently raise their prices "by an amount equal to the tax," which would then be paid by Members.<sup>84</sup>
- (3) Whether the state was providing few if any services relevant to the taxes it "sought to collect."<sup>85</sup>

These factors show how the balancing test to determine the legality or validity of a state tax on non-member activity in Indian Country is significantly fact dependent.

The interests present in the balancing test become more difficult to parse out when a tribe is acting as a partner-retailer, as the lines between tribal and non-member interest and involvement can blur.<sup>86</sup> When a state tax is not invalidated this can impact a non-member business's desire to partner with a tribe, "given that they can be taxed by both the state and the tribal entity."<sup>87</sup> Thus, the potential for double taxation not only limits a tribal revenue source, it also has negative effects on the likelihood of non-members entering into business partner relationships with tribes.<sup>88</sup> This diminishment of tribal and non-member business partnerships

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a tribe will harm the tribe's ability to be economically self-sufficient and is inherently inconsistent with the federal policy of fostering tribal self-sufficiency.").

83. *Id.* at 262; *see also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151–53 (1980).

84. PEVAR, *supra* note 30, at 262 ("[A] company building a tribal school will charge the tribe more money to build the school if it has to pay state taxes, and similarly, a company harvesting tribal timber for resale will pay the tribe less for its timber if the transaction is subject to state taxation. Therefore, it would be the *tribe* paying the tax, and courts have invalidated state taxes in such situations.").

85. *Id.* ("In each case [where a state tax is invalidated], the state was merely 'revenue raising' at the tribe's expense.").

86. *See Sacrificing Sovereignty, supra* note 4, at 18–20.

87. *Id.* at 20; *see also id.* at 5 (first citing Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 95 (2005); and then citing Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 638, 691–92 (2021)) ("A number of factors, including lack of infrastructure, uncertainties in the application of commercial law, complications with transacting on land held in trust by the federal government, barriers to capital and lending, and geographic isolation, all work against a tribe seeking to attract investment and foster economic development.").

88. *See id.* at 20 (citation omitted) ("[W]here a non-Indian business is engaged in transactions with the tribe as a partner, actual or potential state taxation on the non-Indian business can chill outside investment."); *see also* Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 725 (2021) ("State taxes absolutely kill private investment in Indian Country."); PEVAR, *supra* note 30, at 263 ("Non-Indians will be discouraged from engaging in commercial transactions with Indian tribes, and when they do work with them will likely charge tribes a higher fee if their transactions are subject to state taxation.").

ultimately can have a negative impact on a tribe's economic development.<sup>89</sup>

*D. Tribe-state sales tax agreements as an avenue to avoid double-taxation.*

Tax compacts between a state and a tribe can be used to lighten the burden of double taxation of non-member transactions in Indian Country. A compact between a state and a tribe is a working agreement that creates a binding relationship similar to a contract. However, unlike a contract, a compact agreement also "resolve[s] jurisdictional or substantive disputes and recognize[s] each entity's sovereignty."<sup>90</sup> Compacts make visible tribes' sovereign status, as they inherently "represent [] that the transacting parties are sovereign entities, engaging in intergovernmental agreements."<sup>91</sup> However, negotiating a compact's terms with the state also require some concession of control.<sup>92</sup>

Tribe-state tax agreements are a subset of compacts that can touch on a wide variety of taxes, sales tax being just one of them. Of the tribe-state tax compacts publicly available, there are relatively few that include sales tax agreements.<sup>93</sup> Gaining access to these compacts is difficult, as there is "no comprehensive database of state-tribal tax compacts," and those that are available may only provide researchers with a summary of the agreement rather than the compact's actual text.<sup>94</sup> To discern key components of a tribe-state sales tax agreement it is helpful to look at both tribe-state tax agreements at large, and specifically tribe-state tax agreements that include sales tax such as those of Minnesota and Michigan.<sup>95</sup>

Generally, before a tribe-state compact is created a state's legislature must enact legislation "that specifically allows state actors to negotiate and compact with tribes."<sup>96</sup> For example, in Minnesota the

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89. U.S. TREASURY DEP'T ADVISORY COMM., TREASURY TRIBAL ADVISORY COMMITTEE: SUBCOMMITTEE ON DUAL TAXATION REPORT 2 (Dec. 9, 2020) ("With the outside state and local government taxes setting the tax rate floor, Tribal governments are deprived of the ability to use tax policy to attract businesses to their lands in the manner available to all other governments seeking to grow their economies to support their citizens.").

90. *Sacrificing Sovereignty*, *supra* note 4, at 21 (citation omitted).

91. *Id.* (citation omitted).

92. *Id.*

93. See Cowan, *supra* note 13, at 12 (describing the relative difficulty of finding and reviewing many tribal-state tax compacts).

94. *Id.*

95. *Id.* at 26 ("[I]t is difficult to find agreements . . . that embrace sales taxes.").

96. *Sacrificing Sovereignty*, *supra* note 4, at 21 (citing David Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 147 (1993); *see also id.* at 21-22 (citations omitted) ("These statutes come in various forms, including statements of policy

"commissioner [on behalf of the Department of Revenue] is authorized to enter into a tax refund agreement with the governing body of any federally recognized Indian Tribe in Minnesota."<sup>97</sup> And in Michigan the "state treasurer, or [their] authorized representative, [may] on behalf of the department" enter into such agreements with a "federally recognized Indian tribe within the state of Michigan."<sup>98</sup> Both Minnesota's and Michigan's enabling statutes also include explicit language enabling sales tax to be part of any potential tribe-state tax compacts.<sup>99</sup>

Many tribe-state tax compacts have what Pippa Browde refers to as "non-substantive provisions" that are "similar to other intergovernmental agreements not specific to tax," and tax specific "substantive provisions that resolve or address juridical taxation, tax enforcement, or both between sovereigns."<sup>100</sup> Non-substantive provisions include basic information like identifying parties and defining terms.<sup>101</sup> They also generally include reference to state legislation that enables state-actors the authority to enter the compact, and relevant state and tribal law.<sup>102</sup> Non-substantive provisions also "provide for administrative issues such as enforcement, termination, and dispute resolution,"<sup>103</sup> and "usually articulate the goal or purpose of the intergovernmental agreement, which is often to resolve the potential consequences of juridical taxation."<sup>104</sup>

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'encouraging cooperation,' such as in Montana and Nebraska. Other such laws grant specific authority to negotiate certain types of taxes, such as cigarette or other excise taxes. Still other statutes approve and incorporate tax compacts with tribes as a matter of state statutory law."); MINN. STAT. § 270C.19, Subd. 2(a) (2024) (granting authority to the department of revenue to engage in compact negotiation with federally recognized tribes); MICH. COMP. LAWS § 205.30c (2013) (granting authority to the department of revenue to engage in compact negotiation with federally recognized tribes).

97. MINN. STAT. § 270C.19, Subd. 1(a) (2024).

98. MICH. COMP. LAWS § 205.30c(a) (2013).

99. *See* MICH. COMP. LAWS § 205.30c (12)(c)(i) (2013) ("[P]rovisions of a tribal agreement must include [c]ollection of taxes levied under the general sales tax act . . . on the sale of tangible personal property or the storage, use, or consumption of tangible personal property not exempt under the agreement."); MINN. STAT. § 270C.19, Subd. 2(a) (2024) ("The commissioner is authorized to enter into a tax agreement with the governing body of any federally recognized Indian Tribe in Minnesota, that provides for the state and the Tribal government to share sales, use, and excise tax revenues generated from on-reservation activities of non-Tribal members and off-reservation activities of Tribal members.").

100. *Sacrificing Sovereignty*, *supra* note 4, at 23.

101. *Id.* at 23–24 (citations omitted) ("The parties to the agreement are usually a state, local government, or branch of the state government and the compacting tribal nation or branch of tribal government."); *see id.* at 25 (citation omitted) ("The definition of terms usually specifies the geographic location over which the tribe and state both assert taxing authority.").

102. *Id.* at 24 (citation omitted) ("Compacts provide the authority the state has to enter the agreement.").

103. *Id.* at 23–24 (citations omitted).

104. *Id.* at 24 (citations omitted). Juridical taxation simply refers to a

In tribe-state tax compacts, the type of tax or taxes “subject to the agreement” are plainly stated.<sup>105</sup> In identifying which kinds of taxes are subject to the compact, many compacts explicitly narrow the agreement’s applicability only to a portion “of transactions for which states have actual or potential taxing authority.”<sup>106</sup> Tribe-state tax compact substantive provisions “depend on whether the agreement addresses juridical taxation or tax enforcement and administration issues.”<sup>107</sup> Substantive provisions may include setting an applicable tax rate, minimum tax rate, establishing tax revenue sharing portions, establishing which sovereign funds governmental services (which services these will be), and addressing tax administration issues.<sup>108</sup>

Some of the most important components in a tribe-state tax compact are the provisions that address the issue of double taxation.<sup>109</sup> By specifying the applicable taxes and rates for economic activity in Indian Country, the harm of double taxation may be minimized.<sup>110</sup> One way double taxation is addressed is to have a single sales tax rate apply to transactions in Indian Country.<sup>111</sup> Alternatively, some tribe-state tax compacts set a “minimum rate as a floor but do not cap a maximum rate, allowing a tribe to increase the rate of tax imposed within its jurisdiction if desired.”<sup>112</sup>

Revenue sharing provisions in tribe-state tax compacts detail how the tax revenue will be allocated between the sovereigns. Unsurprisingly, revenue sharing provisions in tribe-state tax compacts vary based on who is being taxed and what taxes are being collected. There are “all-or-nothing propositions,” percentage-based sharing provisions, “per capita” allocation, and other revenue allocations based on more complex

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sovereign/government’s authority to tax an individual.

105. *Id.* (citations omitted).

106. *Id.* at 24 (citations omitted).

107. *Id.* at 25.

108. *See id.* at 25–30.

109. *See, e.g., id.* at 5 (citations omitted).

110. *See generally id.* at 25–26 (outlining various ways to balance specific state and tribal tax rates to produce a uniform taxable amount).

111. *Id.* at 25–26 (citations omitted) (“[I]f the agreement between a tribe and state is that a single layer of taxation at an agreed rate should apply to a given transaction, there are three ways that can be achieved. First, a compact can specify the state rate of taxation over a transaction, allowing the state tax to override tribal taxation of the transaction. Second, a compact can specify the opposite—that the tribal tax be imposed at the same rate as the state, and that the state exempt the transaction from taxation. Third, a compact can create a combination of lower state and tribal taxes to equal the agreed amount.”).

112. *Id.* at 26 (citing DOUGLAS B.L. ENDRESON, RESOLVING TRIBAL-STATE TAX CONFLICTS 16 (1991)); *see also id.* (“If a tribe does not impose a rate greater than the state rate, the juridical tax is eliminated, but the tribe creates a situation where the higher tax rate discourages consumption.”).

formulas.<sup>113</sup> For example in Michigan's tribe-state tax compacts, the allocation of sales tax revenues are expressly set by percentages "between the compacting tribe and state."<sup>114</sup> These percentages depend "on the annual gross receipts of sales, and whether the tribe itself has its own sales tax or is just enforcing the state tax."<sup>115</sup> A case study of Minnesota's tribe-state tax agreements highlight the use of per-capita refunds and splitting tax revenue for Member and non-member sales tax in half between the state and the respective tribe.<sup>116</sup> Tribe-state tax compacts may also contain provisions that limit a tribe's spending of said tax revenue—these can be specific, or as broad as "essential governmental service" spending delegations.<sup>117</sup>

Administrative provisions are important for tribe-state tax agreements because they flesh out the practicalities of imposing a tax. Administrative provisions may include "issues such as recordkeeping, remittance and payment, auditing, and enforcing noncompliance," all of which are especially important details because of the parties' sovereignty.<sup>118</sup> Tribe-state tax compacts that include sales or retail tax will often explicitly address "who bears the legal obligation" for the taxes imposed on non-member transactions in Indian Country.<sup>119</sup> Some tribe-state tax compacts require the state to take on administrative responsibilities, including enforcement.<sup>120</sup> Other tribe-state tax compacts

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113. *Id.* at 26–27 (citations omitted).

114. *Id.* at 26 (citing TAX AGREEMENT BETWEEN THE BAY MILLS INDIAN COMMUNITY AND THE STATE OF MICHIGAN § III(B), Dec. 20, 2002).

115. *Id.* at 26 (citation omitted).

116. See Cynthia Bauerly, *Tax Agreements Between the State of Minnesota and Tribal Governments: A Case Study*, POL'Y DISCUSSION PAPER SERIES (Ctr. for Indian Country Dev., Minneapolis, Minn.), Nov. 2021, at 7–8.

117. *Sacrificing Sovereignty*, *supra* note 4, at 28 (citations omitted).

118. *Id.* at 28; *see also id.* ("The administrative provisions in tax compacts allow states to avoid tribal sovereign immunity enforcing the terms of the tax agreement.").

119. *Id.* at 28 (citing FUEL TAX AGREEMENT BETWEEN THE PYRAMID LAKE PAIUTE TRIBE AND THE STATE OF NEVADA § 3.9.2, Apr. 5, 2002); *see id.* at 28–29 (citing INTERGOVERNMENTAL AGREEMENT BETWEEN ARIZONA DEPARTMENT OF TRANSPORTATION AND NAVAJO TAX COMMISSION: ESTABLISHING COOPERATIVE FUEL TAX ADMINISTRATION § 3.7, May 7, 1999 [hereinafter Navajo-Arizona Agreement]) ("Provisions often address keeping records" and processes "auditing, information sharing, and disclosures."); *see id.* at 27 (citing CROW TRIBE-MONTANA TOBACCO TAX AGREEMENT, Crow Tribe-Mont. Dep't of Revenue § 7, May 13, 2005, <https://mtrevenue.gov/?mdocs-file=57501> [<https://perma.cc/THU4-N72N>]) (discussing another example of such a compact).

120. *Sacrificing Sovereignty*, *supra* note 4, at 29 (citing NAVAJO-ARIZONA AGREEMENT at § 3.7); *see id.* (citations omitted) ("In order to accomplish this type of taxing structure, the legal incidence of the tax must fall on the wholesaler or distributor *before* the goods arrive in Indian Country for retail sale. This may free a tribe from the cost of running its own tax enforcement agency, but it can also leave the tribe vulnerable to potential abuse from state enforcement.").

include administrative enforcement provisions absent any revenue sharing between the sovereigns.<sup>121</sup>

For example, the tribe-state tax agreements in Minnesota “provide that state sales tax is imposed on all transactions, regardless of the [tribal membership] status of a purchaser.”<sup>122</sup> The seller remits the sales tax “in its entirety . . . to the state,” who in turn refunds the sales tax collected from Member purchases to the tribal government.<sup>123</sup> The state also issues a payment to the tribal government “representing fifty percent of the remaining sales tax revenue from non-member transactions from that seller,” thereby “reflecting the right of the tribal government to levy taxes on both [M]ember and non-member transactions that occur on tribal reservations.”<sup>124</sup> Similarly, the tribe-state tax agreements in Michigan generally have a provision that provides that the tribe, tribal entity, or Member who is a seller, collect and remit the state “sales tax or use tax, as applicable, on all sales to Non-Tribal Members and non-Resident Tribal Members and on all other Taxable Sales that occur within the Tribal and Trust Lands.”<sup>125</sup> Michigan then remits part of the sales tax collected to the tribe, as that specific tribe’s tax compact details.<sup>126</sup>

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121. *Id.* at 29; *see id.* at 29 n.180 (citing COOPERATIVE AGREEMENT BETWEEN NEW MEXICO TAXATION AND REVENUE DEPARTMENT AND PUEBLO DE COCHITI DIVISION OF REVENUE: Resolution No. 2006-01, § 1, Mar. 23, 2006, <https://www.tax.newmexico.gov/governments/tribal-governments/tribal-cooperative-agreements> [https://perma.cc/WB3K-EXPN]) (“For example, the state of New Mexico does not have revenue sharing compacts. However, it has numerous compacts that address tax administration across tribal territorial borders.”).

122. *See* Cynthia Bauerly, *Tax Agreements Between the State of Minnesota and Tribal Governments: A Case Study*, POL’Y DISCUSSION PAPER SERIES (Ctr. for Indian Country Dev., Minneapolis, Minn.), Nov. 2021, at 2.

123. *Id.*

124. *Id.*

125. The Sixth Amendment to the Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State Of Michigan § III(B), June 24, 2024. *See* COHEN’S HANDBOOK, *supra* note 1, § 18.03(1) (“As a description of property interests, ‘trust land’ refers to land held in trust by the United States for the benefit of a tribe or individual Indian. The land may be located within or outside the boundaries of a reservation. But courts often distinguish ‘trust land’ from ‘fee land’ when delineating areas within Indian reservations for jurisdictional purposes.”); *id.* § 18.02(1)(a) (“Title to tribal lands held in fee simple is owned under the same terms as title held by non-Indians . . . For jurisdictional purposes, however, tribal fee land may be categorized as Indian [C]ountry if it is located within a [R]eservation”); *id.* § 18.03(1) (citations omitted) (“Federal law splits title to tribal land between tribal nations and the United States. The Supreme Court has held that the United States holds ‘legal title’ to [R]eservation lands, with the tribal nation holding ‘beneficial ownership’ of the land and resources.”); *see also* Johnson v. M’Intosh, 21 U.S. 543, 592 (1823) (discussing difference between “ultimate title” and “title of occupancy”); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (discussing trust responsibility of the United States); Worcester v. Georgia, 31 U.S. 515, 561 (1832) (discussing the trust relationship of the United States and tribal nations as akin to a sovereign state “holding [their] right of self government under the guarantee and protection of one or more allies”); United States v. Shoshone Tribe, 304 U.S. 111, 115–16 (1938) (discussing trust relationship in relation to natural resources).

126. The Sixth Amendment to the Tax Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State Of Michigan § III(B), June 24, 2024.

## II. Analysis

### A. Why litigation is a costly and uncertain way to preempt state sales tax in Indian Country.

*Tulalip Tribes v. Washington* is an example of how tribes can use litigation to fight the burden of double taxation.<sup>127</sup> The legal framing of *Tulalip Tribes v. Washington* provides a better understanding of the importance of Tribal tax power, as it highlights arguments that State and local municipalities may use to try and discredit a Tribe's legitimate interests and thus impede on Tribal resources for self-government.<sup>128</sup>

In *Tulalip Tribes v. Washington*, the Tulalip Tribes (the "Tulalip"), a federally recognized Indian Tribal government, and the Consolidated Borough of Quil Ceda Village (the "Village"), a political subdivision of the Tulalip, sued the State of Washington (the "State") and Snohomish County (the "County") over taxes.<sup>129</sup> The United States intervened on behalf of the Tulalip and Village (collectively the "Plaintiffs").<sup>130</sup>

The Plaintiffs claimed that the Village transformed hundreds of acres of Trust Land into a "thriving municipality and economic center" which drove "hundreds of millions of dollars in economic activity each year."<sup>131</sup> The Complaint further provided that the State and the County imposed "sales and use, business and occupation, and personal property taxes" on the businesses and their customers.<sup>132</sup> The State and County were collecting millions of dollars annually from the taxes they imposed onto the Village businesses and patrons, the majority of which went to the State's "general fund for general statewide expenditures."<sup>133</sup>

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127. *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).

128. See *Sacrificing Sovereignty*, *supra* note 4, at 34–37.

129. See *Tulalip Tribes*, 349 F. Supp. 3d 1046.

130. United States' Complaint in Intervention at 2, *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018) (No. 15-CV-940) ("This complaint seeks prospective declaratory and injunctive relief to protect the Tribe's right under the United States Constitution and federal law to collect tribal tax revenues within a tribally chartered municipality designed, financed, built, regulated, and managed by the Tribe and the United States on land within the Tulalip Reservation that the United States holds in trust for the Tribe, and to restrain Defendants from taxing the economic activities on these lands in a manner inconsistent with federal law.").

131. Plaintiffs' Complaint for Declaratory and Injunctive Relief at 2, *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018) (No. 15-CV-940) [hereinafter Plaintiffs' Complaint]; see also Maya Srikrishnan, Shannon Shaw Duty & Joaquin Estus, *Tribes Need Tax Revenue. States Keep Taking It*, CTR. FOR PUB. INTEGRITY (Dec. 20, 2022) <https://publicintegrity.org/podcasts/integrity-out-loud/tribes-need-tax-revenue-states-keep-taking-it/> [https://perma.cc/6BF6-Q38X] ("The Tulalip invested approximately \$153 million in physical infrastructure to support commerce, including roads, freshwater and sewage treatments, electrical lines, highway interchanges and a fiber telecommunication system.").

132. Plaintiffs' Complaint, *supra* note 131, at 2.

133. *Id.* (stating that the County and State, "to the exclusion of Tulalip and the Village,

The Plaintiffs filed a complaint for declaratory and injunctive relief to restrain the State and County from “administering and enforcing their taxes within the Village.”<sup>134</sup> They alleged that the taxes unlawfully burdened the Tulalip and “commerce on the Tulalip Reservation,” and were “preempted by federal law” because they “unlawfully interfere[d] with Plaintiffs’ sovereign right of self-government.”<sup>135</sup> In short, the Plaintiffs argued that the State and County taxes on non-member activity in the Village prevented the Tulalip from imposing their own municipal tax code without forcing non-members to face double taxation and higher prices—effectively displacing and nullifying “Tulalip’s sovereign taxation authority with respect to those activities.”<sup>136</sup>

The district court in *Tulalip Tribes* applied the “standard” steps in determining if the State and County taxes on the Village businesses and patrons were valid. In doing so, the district court focused on three things. First, a standard preemption test to see “if the comprehensiveness of federal regulation over the activity that is subject to taxation.”<sup>137</sup> Second, the court looked at “the weight of the respective interests the parties have in whether the taxes at issue are allowed.”<sup>138</sup> And third, it weighed “the value of the services the parties provide to the Quil Ceda Village customers and businesses, on whom the burden of the taxes at issue falls.”<sup>139</sup> The second and third inquiries reflect the court’s use of the *Bracker* balancing test.

First, the *Tulalip Tribes* district court found that there were insufficient federal regulatory schemes regarding the taxation of non-member transactions in non-member businesses in the Village, despite the fact that said businesses were on land leased to them by the Tulalip.<sup>140</sup>

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annually collect tens of millions of dollars” in taxes); *see id.* at 18 (“Pursuant to RCW Chapters 82.08, 82.12, and 82.14, Defendants administer and enforce state and county sales and use taxes on retail sales and services provided within Quil Ceda Village . . . [I]n 2013 [the State’s department of revenue] collected an estimated \$37 million in sales and use taxes on activities within the Village.”); *see also* Srikrishnan, Duty & Estus, *supra* note 131 (“At issue was more than \$40 million the state and county were collecting annually from the [T]ribes’ Quil Ceda Village shopping center while leaving the Tulalip with the bill for typical government functions.”).

134. Plaintiffs’ Complaint, *supra* note 131, at 3.

135. *Id.*

136. *Id.* at 21.

137. *Tulalip Tribes*, 349 F. Supp. 3d at 1050; *see also* Warren Trading Post Co. v. Arizona State Tax Comm’n, 380 U.S. 685, 688–91 (1965) (discussing the preemption of state law due to clear congressional intent through the enactment of specific acts).

138. *Tulalip Tribes*, 349 F. Supp. 3d at 1050.

139. *Id.*

140. *Id.* at 1049 (“Many of the businesses at Quil Ceda Village, however, merely lease land from Tulalip, and are neither Indian-owned nor operated, and employ few members of the Tulalip Tribes.”); *see id.* at 1055–56 (“If this Court were to find that these statutes provided the extent of federal regulation necessary to satisfy the standard applied in *Bracker*, state authority over nearly all economic activity within the Tulalip [R]eservation—and indeed,

Stating that the “cases are clear that the existence of extensive federal regulation in leasing on tribal land does not operate to preclude state taxation of non-leasing activities.”<sup>141</sup>

Second, the district court looked at the weight of the interests of the State, the Tulalip, and the federal government. One of the considerations for a Tribe’s interest is if a Tribe or Tribal enterprise adds “a service or adds value to a product.”<sup>142</sup> If so, such good or service “may be immune from state taxation in that tribe’s Indian [C]ountry if the balance of interests favors the tribe.”<sup>143</sup> The district court rejected the Plaintiffs’ argument that they added value to the purchasing of goods by developing the Village’s shopping center into a shopping experience.<sup>144</sup> And while the court acknowledged that the Tulalip have “legitimate and substantial sovereign interests in the development and operation” of the Village, it found that Tulalip Member employment and Tribal economic independence was not enough to win the *Bracker* analysis,<sup>145</sup> as “a tribe’s interest cannot be, and has not been, defined with unlimited breadth.”<sup>146</sup>

The court focused the preemption inquiry as “one into the Tribes’ interests specifically in the activity subject to taxation, and whether the challenged tax ‘interferes or is incompatible with’ those interests.”<sup>147</sup> The district court’s analysis of only the act of taxing non-member transactions at non-member businesses in the Village reflects a narrowing of interest similar to that of the *Atkinson* Court’s constraints to the *Montana* exceptions.<sup>148</sup> The district court also found that even if the State’s

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virtually all tribal [R]eservations—would potentially be preempted.”).

141. *Id.* at 1056 (citing *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1237 (9th Cir. 1996)) (“[M]ere existence of federal oversight over leasing of Indian lands’ does not preempt state sales tax where ‘tax would not interfere with the use and development of the Tribe’s property.”).

142. CROMAN & TAYLOR, *supra* note 4, at 13; *see also* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987), superseded by statute, Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), codified at 25 U.S.C. §§ 2701-21 (1988), *as recognized in Michigan v. Bay Mills Indian Cnty.*, 572 U.S. 782 (2014) (holding there was significant Tribal interest in the activity taxed because “the Tribes [were] not merely importing a product onto the reservations for immediate resale to” non-members, as they “built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the [R]eservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide.”).

143. CROMAN & TAYLOR, *supra* note 4, at 13.

144. *See Tulalip Tribes*, 349 F. Supp. 3d at 1058-59.

145. *Id.* at 1058 (citations omitted) (internal quotations omitted) (“The imposition of state taxing authority at issue here is not on the Tribes’ active role in generating activities of value on its reservation, but on the value of the non-tribal goods being sold, and the Tribes’ interest is therefore at a minimum.”).

146. *Id.*

147. *Id.* at 1058 (emphasis omitted) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)).

148. *See infra* Part I.B.; *see also* *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 (2001) (discussing the narrowing of the second *Montana* exception to direct effect of the specific

collection of the taxes at issue eroded the Tulalip's potential tax revenue by impairing them from imposing a Tribal tax, it did not "tip the balance" of the *Bracker* analysis in their favor.<sup>149</sup>

Third, while the district court acknowledged that the Tulalip provided "many of the government services available to the taxpayers while they [were] within the Village, including in particular to the [Village] businesses, which reside[d] there," it found that this too did not tip the *Bracker* analysis because the State also provided general service schemes.<sup>150</sup> This reasoning echoes the Supreme Court's opinion in *Cotton Petroleum v. New Mexico*, which stands for the understanding that there is no requirement that state services be proportional to the amount of taxes collected.<sup>151</sup> The district court doubled down on this notion, stating that "[n]othing in the case law requires an examination closer than this."<sup>152</sup>

The district court found that the County's police department services provided to the Village, in conjunction with the State services provided, "more than justif[ied] imposition of the taxes at issue."<sup>153</sup> The court also found that the State and County "provide[d] a substantial portion of services that support Quil Ceda Village and the Tulalip [R]eservation, in the form of public education, health and human services, maintenance of roads, and law enforcement and justice systems."<sup>154</sup>

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action taxed on a Tribe.).

149. *Tulalip Tribes*, 349 F. Supp. 3d at 1059 (first citing *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1191 (9th Cir. 2008); and then citing *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1116 (9th Cir. 1981)) ("It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs.").

150. *Id.* at 1060 (citation omitted) ("These services include law enforcement, fire protection and emergency medical services, and utilities and road maintenance, at an estimated annual cost to the Tribes of \$12-13 million .... The Defendants have also established, however, that both Tulalip and its [M]embers, and the taxpayers at issue in this case—the QCV customers and businesses—regularly rely on services provided by the State and County as well.").

151. *See id.; see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185-86 (1989) (holding that there is no requirement that a state tax collected be proportional to the amount of services the state provided on-Reservation, instead positioning the question as whether there was or was not state involvement in providing services).

152. *Tulalip Tribes*, 349 F. Supp. 3d at 1062 (first citing *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107, 1116 (9th Cir. 1997); and then citing *Gila River Indian Cnty. v. Waddell*, 91 F.3d 1232 (9th Cir. 1996)) ("[T]he Supreme Court has noted that there is no requirement that a tax imposed on non-Indians for reservation activities be proportional to the services provided by the State.").

153. *Id.*

154. *Tulalip Tribes*, 349 F. Supp. 3d at 1062; *see id.* at 1060-61 (stating that the Defendants established that State sales tax and business and occupation taxes raised money for public schools, and that because a few of these schools were located on the Tulalip Reservation "it is reasonable to conclude that many of the employees and customers have been educated by the Washington public school system to at least some extent."); *id.* at 1061

Further, the court wrote that the state-provided services were a necessity for “a *civilized society* generally, and operations at Quil Ceda Village specifically,” and that this “cannot be reasonably disputed.”<sup>155</sup>

Lastly, the court discredited the Plaintiffs’ arguments that the State and County taxes interfere with their sovereignty.<sup>156</sup> The district court in *Tulalip Tribes* stated that there is “little case law offering guidance on how a tribe’s sovereignty claim should be evaluated,” and the court interpreted what does exist as precedent that “counsels against a finding that the collection of taxes at issue in this case infringes on tribal sovereignty.”<sup>157</sup> The court used two points of reasoning. The court first posited that “Tulalip’s sovereignty interests [in the case] are at a minimum, where the taxes in question are keyed solely on goods manufactured off the reservation, and on transactions between non-Indians.”<sup>158</sup> Secondly, the court stated that “the only sovereignty interest being impeded in this case is the Tribes’ ability to collect the full measure

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(“Washington also funds and administers programs and enforces regulations related to workplace safety, worker’s compensation, unemployment insurance, business licensing, and consumer protection. Such services are generally available to customers and businesses at Quil Ceda Village.”). “Generally available” is an important term here because state civil regulatory power does not extend to Members on Reservation except for in extremely narrow and extraordinary circumstances. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1422 (W.D. Wis. 1987). Further, state civil regulatory power does not extend to non-members on Reservation if they are preempted, lose the balancing test, or infringe on a tribe’s treaty rights. *See Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that a state does not have civil jurisdiction if such jurisdiction would hinder Indian self-governance).

155. *Tulalip Tribes*, 349 F. Supp. 3d at 1062 (emphasis added). The term “civilized society” holds great weight, and the court’s use of it holds no legal significance to the case’s legal analysis. It’s use perpetrates the “othering” of Indigenous peoples and reflects the violent history of colonization, including the use of the Doctrine of Discovery and manifest destiny to justify the forceful “conquering” of what is now known as the United States. *See JOHN A. POWELL & STEPHEN MENENDIAN, BELONGING WITHOUT OTHERING: HOW WE SAVE OURSELVES AND THE WORLD* 4 (2024) (“Othering” is a clarifying frame that reveals a set of common processes, conditions, and dynamics that propagate and maintain social group inequality and marginality.”); *id.* at 61–62 (“The labels *Native American* or *American Indian* describe a vast and often vastly diverse groupings of peoples” who are “linked largely by the fact that they are indigenous to North America, and by a shared or similar historical experience;” collectively they are “a constitutive ‘other’ to the construction of the United States as a nation-state, and as such, the broad identity of Native American, however imperfect, performs critical work.”); *Johnson v. M’Intosh*, 21 U.S. 543, 592 (1823) (discussing how the Doctrine of Discovery gave the United States “ultimate title” to Native Land); COHEN’S HANDBOOK, *supra* note 1, §§ 2.01–2.12 (providing a more detailed context and references for further general understanding on “The History of Federal Indian Law and Policy”). This Note will not touch on the linguistic history and importance of this term’s use, but readers are encouraged to conduct more research on the topic if they are unfamiliar.

156. *See Tulalip Tribes*, 349 F. Supp. 3d at 1062.

157. *Id.*

158. *Id.* at 1062–63 (citing *Washington v. Confederated Tribes of Colville Indian Rsv.*, 447 U.S. 134, 157 (1980)).

of its own taxes—an interest that is essentially little more than financial.”<sup>159</sup> These points of reasoning require setting aside the widely accepted understanding that tax revenue is essential to create, expand, and maintain governmental services (a factor the court uses in favor of the Defendants in its own balancing test), and that taxing power is an inherent right of a sovereign.<sup>160</sup> After an eight-day bench trial, the district court issued its opinion in favor of the Defendants<sup>161</sup> and the parties subsequently reached a settlement in 2020 to avoid further litigation.<sup>162</sup>

*Tulalip Tribes* is an important reminder of taxation jurisdiction’s complexity in Indian Country and illustrates how courts can value State and Tribal interests in litigation. It highlights how case law regarding tribal taxation produces a complex web of fact-specific outcomes based on the membership status of the retailer and the buyers. The district court’s application of the *Bracker* test shows how the test itself forces tribes to be simultaneously on the offensive and defensive in litigation and how establishing tribal interests can be unsuccessful despite extensive research, data, witnesses and expert testimony. It also shows that while litigation is an option for a tribe to get state or municipal sales tax preempted, it can be costly.<sup>163</sup> One of the largest takeaways from the *Tulalip Tribe* litigation is that the parties settled after five years of litigation, and from that settlement a tribe-state tax agreement was developed.<sup>164</sup>

*B. Tribe-state tax compact components that support tribal sovereignty.*

Tribe-state tax compacts are each a product of a unique political and economic landscape. It can be difficult to distill general best practices solely based on existing compacts because “what is fair for one state-

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159. *Id.* at 1063; *see also id.* (citations omitted) (noting that “[w]hile this interest is valid, there is no evidence in the record that the State and County collection of taxes here has impeded the Tribes’ ability to thrive financially. The governments of the Tulalip Tribes and the Consolidated Borough of Quil Ceda Village have also thrived, irrespective of the imposition of State and County taxes, as Tulalip’s experts and others testified at trial”).

160. *See, e.g., Sacrificing Sovereignty, supra* note 4.

161. *Tulalip Tribes*, 349 F. Supp. 3d at 1048 (“Having heard eight days of live trial testimony in this matter, and having reviewed dozens of witness declarations and expert reports and hundreds of exhibits, the Court now finds and rules as follows.”); *see id.* at 1063 (“[T]he Court hereby finds in favor of Defendants on all claims, and dismisses this case.”).

162. *See* Srikrishnan, Duty & Estus, *supra* note 131; TAX SHARING COMPACT BETWEEN THE TULALIP TRIBES AND THE STATE OF WASHINGTON, Jan. 8–20, 2020 <https://www.hca.wa.gov/assets/program/tax-sharing-compact-tulalip-tribes-of-wa-and-wa-state.pdf> [<https://perma.cc/UU6W-XPU9>].

163. *See* Srikrishnan, Duty & Estus, *supra* note 131 (discussing the costs associated with the Tulalip Tribe’s litigation).

164. *See id.*

tribal compact may be unfair for another.”<sup>165</sup> The perceived pros and cons of tribe-state tax compacts may not be generally applicable due to the rich diversity of tribal needs.<sup>166</sup> Understanding this difficulty, the following tribe-state tax compact components are ones that have the potential to further tribal economic development, sovereignty, and help eliminate the issue of double taxation: explicit acknowledgment of sovereignty, nonwaiver of rights, communication requirements, audit processes, amendment procedures, termination procedures, and notice requirements.

A provision acknowledging the sovereignty of both parties can be included in a tribe-state tax compact to make explicit a state’s respect of the sovereign status of the tribe with which it is entering into the agreement.<sup>167</sup> This is not always done. In his policy discussion paper for the Federal Reserve Bank of Minneapolis’s Center for Indian County Development, Professor Mark Cowan examined ten tribe-state tax compacts and found that only half of them “had explicit language acknowledging the sovereign status of the tribe.”<sup>168</sup> Federal Indian policy has shifted dramatically over the years, and these policy landscapes impact the pressure points that lead a state to agree to enter a tribe-state tax compact. Memorializing state respect for tribes’ sovereign status via compact may be a proactive measure against a possible turn for the worse in Federal Indian Policy.

A nonwaiver of rights provision may bolster a tribe’s legal standing and avoid a voluntary waiver of sovereign immunity argument in potential litigation.<sup>169</sup> A nonwaiver of rights provision can specify that “by entering into the agreement, none of the parties are waiving their rights or enlarging or reducing their taxing power or sovereignty” unless explicitly stated by the agreement.<sup>170</sup> A tribe may wish to include a specific and narrow mutual waiver of sovereign immunity—where both the tribe and the state agree to waive their respective sovereign immunity—for the purpose of enforcing the agreement. And a tribe could use such a provision to establish a pathway to bring suit against a state in non-compliance with the agreement.

A provision detailing communication requirements between the parties in a tribe-state tax compact can aid in preventing potential conflict

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165. Cowan, *supra* note 13, at 29.

166. See *Sacrificing Sovereignty*, *supra* note 4, at 30 (citations omitted) (“Each of the fifty states and each of the 574 federally recognized Indian tribes (plus additional state recognized tribal governments) have their own economies, resources and governmental priorities.”).

167. See Cowan, *supra* note 13, at 14.

168. *Id.* at 24.

169. *Id.* at 14 tbl. 1.

170. *Id.*

from reaching a point that requires litigation or outside mediation.<sup>171</sup> Accordingly, it may also help resolve issues in a less time-intensive manner, like the years-long litigation seen in *Tulalip Tribes*.<sup>172</sup> Communication requirements vary depending on the specific needs of a given tribe and state but may include the establishment of an annual meeting between the parties, defining what a formal permanent “open line[] of communication” means, and establishing protocols to maintain such lines of communication.<sup>173</sup>

An audit process provision can provide transparency for the parties of a tribe-state tax compact. Establishing audit processes that allow for “each government [to] audit the records of the other” can serve as a mechanism to ensure compliance where trust is absent.<sup>174</sup> Including practical details in an audit process provision may also proactively minimize conflict between the parties. Such details might include the identity of the auditor (a governmental actor or outside certified public accountant), timelines for audit turnarounds, and determining which party will pay for the audits.

Notice provisions are also important for maintaining transparency between the parties.<sup>175</sup> With state taxes being subject to change with new state legislation, a provision establishing notice requirements that mandates the state “formally notify the tribe of a change in the tax law” is likely a helpful provision.<sup>176</sup> Notice of changes in state tax law is especially important in compacts where the Tribe has agreed “to maintain a tax equal to the state tax,”<sup>177</sup> as notice ensures that a Tribe can swiftly adjust their own tax per the compact.<sup>178</sup> It also allows the Tribe to adjust their revenue expectations and request an audit if necessary in tax compacts where the Tribe and state split revenue from state taxes imposed on non-member activity in Indian Country.

Provisions that detail amendment procedures and termination procedures can also aid in minimizing conflict between tribal and state governments. By establishing procedures and required notice periods for agreement amendments and termination the parties have documented expectations they can rely on. This is important as economic and political realities may shift throughout the term of a tribe-state tax compact.

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171. *See id.* at 28.

172. *See Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046 (W.D. Wash. 2018).

173. Cowan, *supra* note 13, at 28.

174. *Id.* at 14 tbl. 1.

175. *See id.*

176. *Id.*

177. *Id.*

178. *Id.*

Michigan, for example, uses amendments to keep their various tribal tax compacts up to date.<sup>179</sup>

In addition to the above provisions, tribe-state tax compacts may include a statement of purpose, definitions of terms, citations to tax laws at issue, detailed descriptions of the tax allocation process(es), and explicit mention of the taxes included and excluded in the compact.<sup>180</sup> Some tribe-state tax compacts have provisions on prior claims where the compact “may expressly address or exclude pre-compact tax revenue collected by [the] other government” or “no litigation” provisions in which the “parties agree to refrain from litigation over taxing jurisdiction with respect to the tax at issue for the duration of the agreement.”<sup>181</sup> Prior claims and “no litigation” provisions can be considered by tribes entering into or amending a tax compact with a state, but their utility will be based on the sovereigns’ needs. Likewise, provisions regarding dispute resolution may or may not be beneficial for a tribe depending on their terms. For example, a compact could force a tribe to remedy a wrong through a disadvantageous and possibly hostile forum, while another could provide a tribe with a favorable forum.<sup>182</sup> Thus, these provisions are more difficult to assess.

Relatedly, it is important to reiterate the difficulty in generalizing beneficial tribe-state tax compact provisions, as each agreement reflects tribal and state law, economic considerations and local issues.<sup>183</sup> Looking at various kinds of tribe-state tax compacts provides a more holistic picture of what is possible to achieve through such an agreement. And due to the difficulty of gaining access to tribe-state tax compacts generally, and compacts that pertain to sales tax specifically, existing provisions offer only a jumping off point.

### *C. Possible federal and state tax policy remedies for double*

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179. See, e.g., *Grand Traverse Band of Ottawa and Chippewa Indians*, MICH. DEP’T OF TREASURY, <https://www.michigan.gov/taxes/tribes/agreements/grand-traverse-band-of-ottawa-and-chippewa-indians> [<https://perma.cc/9XLB-4ZCY>]; *Tax Information for Native Americans*, MICH. DEP’T OF TREASURY, <https://www.michigan.gov/taxes/tribes> [<https://perma.cc/LNA9-83VY>] (providing more resources, including a generic “State-Tribal Tax agreement” and specific tribes’ agreements and amendments).

180. See Cowan, *supra* note 13, at 14.

181. *Id.*

182. See *id.* at 15–23 tbl. 2 (providing summaries of various compacts, including their respective dispute resolution provisions).

183. *Id.* at 13.

*taxation.*

Understanding that tribe-state tax agreements are a compromise between sovereigns, that a tribe may be subject to inequitable bargaining powers at the negotiation table, and that litigation may lead to unpredictable results—what other options are there? Both federal and state policy offer solutions that could simplify this legal mess and give both the United States and the states themselves the opportunity to voluntarily recognize and respect tribal sovereignty.

Federal tax policies offer opportunities for clarifying tribal taxing authority, while state tax policies offer opportunities to proactively build better working relationships with tribes. The United States Treasury Departments' Treasury Tribal Advisory Committee stated in a 2020 report that “[t]ax policy is key to achieving the goal of economic self-sufficiency,” and that “[n]on-tribal governments and policy makers regularly fail to adequately understand or incorporate tribal fiscal prerogatives in striking fair tax apportionments.”<sup>184</sup> The report also voiced concern that non-tribal government may at times “view Indian [C]ountry as a potential source of revenue rather than as a polity with inherent public finance requirements.”<sup>185</sup> The best approach for federal and state governments is to include tribes in the tax policy creation, and for this involvement to tangibly and meaningfully incorporate a tribe’s interests in the policy outcome.<sup>186</sup> Taking this into account, the policy-based solutions this Note discusses offer a variety of suggestions.

i. Federal legislative actions.

The first avenue for change could be the enactment of federal legislation that eliminates “state and local government taxation in Indian [C]ountry . . . based on the citizenship status of businesses and customers.”<sup>187</sup> This would mean that “Tribes could be afforded the same comprehensive and exclusive tax authority that states now have in their geographic jurisdictions.”<sup>188</sup> This kind of legislation would dramatically shift the economic realities of many tribes, states, and local

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184. U.S. TREASURY DEP’T ADVISORY COMM., *supra* note 3, at 5.

185. *Id.* (citing SUSAN JOHNSON, JEANNE KAUFMANN, JOHN DOSSETT, SARAH HICKS & SIA DAVIS, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 1 (2d ed. 2009)).

186. *See id.* at 10 (“The Department of Treasury should, in consultation with tribes, commit resources to reviewing all tax regulations and economic policy impacting Tribal nations and develop guidance that recognizes the sovereign authority of tribes to be the sole taxing authority on their lands.”).

187. CROMAN & TAYLOR, *supra* note 4, at 26. Here “citizenship status” is interchangeable with membership status as defined in this Note, and “businesses” is equivalent to this Note’s use of term retailer.

188. *Id.*

municipalities, it may also “entail the transfer of responsibility for some governmental functions,” between the sovereigns.<sup>189</sup> In enacting such legislation, Congress would eliminate the massive complex web of tribal tax case law, simplify the taxing jurisdictions, and remedy the issue of double taxation.

Congress could alternatively enact legislation exempting state tax “where a substantially equivalent tribal tax is imposed.”<sup>190</sup> This approach would also help remedy the issue of double taxation. However, Congress’s intent to exempt state tax in these instances would need to be plain and clear in the statutory language.<sup>191</sup> Without such explicit intent, this approach could practically result in an inconsistent elimination of double taxation across the United States.<sup>192</sup> Additionally, Congress could specifically act on a “subset of state taxes, such as sales or excise taxes; could permanently extend tax credits available to employers in Indian [C]ountry; [or] could broaden the availability of tax-exempt bond financing in Indian [C]ountry by giving tribes the same latitude that state and local governments have to finance [development] projects.”<sup>193</sup> However, enacting narrower federal legislation also holds the potential for inconsistent conformity in taxing authority in Indian Country absent plain and clear statutory language.

## ii. Federal administrative policy.

Establishing federal policies that “recognize[] the sovereign authority of tribes to be the sole taxing authority on their lands” is another potential—yet partial—remedy to the double taxation issue.<sup>194</sup> This policy would seemingly clear up the jurisdictional gray area surrounding taxation authority in Indian Country and thus remedy the issue of double taxation. Alternatively, the Bureau of Indian Affairs (“BIA”) could comprehensively update the Indian Trader regulations at 25 C.F.R § 140, to create an “analysis and guidance on tax related to all business activities in Indian [C]ountry.”<sup>195</sup>

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189. *Id.*

190. *Id.* at 27.

191. *See Solem v. Bartlett*, 465 U.S. 463 (1984) (establishing a need for Congressional intent to be clear if it diminishes Indian land or boundaries); *see also McGirt v. Oklahoma*, 591 U.S. 894 (2020).

192. *See Pevar, supra* note 30, at 252 (citation omitted) (“Congress may abolish a tax immunity. If the immunity was provided to the tribe by a federal law or treaty, it is considered a form of private property protected against loss by the Just Compensation Clause of the Fifth Amendment to the Constitution and, therefore, compensation must be paid to the tribe equal to the value of the immunity. The Supreme Court has held that a tax immunity will remain in effect until Congress expresses a clear intention to abolish it.”).

193. *CROMAN & TAYLOR, supra* note 4, at 27.

194. *U.S. TREASURY DEP’T ADVISORY COMM., supra* note 3, at 10.

195. *CROMAN & TAYLOR, supra* note 4, at 27; *see also U.S. TREASURY DEP’T ADVISORY COMM.,*

The Department of Treasury's Treasury Tribal Advisory Committee stated additional policy recommendations in a 2020 report,<sup>196</sup> including that the Department of Treasury consult "with tribes [to] conduct an economic impact study for the purpose of quantifying all taxes generated by Indian [C]ountry economic development to ascertain the impact of eliminating [double] taxation barriers."<sup>197</sup> Such reports could provide litigation support for claims of state tax preemption by providing data showing tribal interests. With courts applying balancing tests similarly to the *Tulalip Tribes* district court, having this data could be pivotal in potential litigation, the renewal of or amendments to tribe-state tax agreements, and add further support to "the well-established fact that encouraging tribal economic development through good tax policy helps state and local economies."<sup>198</sup>

### iii. State policy.

State legislation and policy may be better positioned to address local and context-specific circumstances.<sup>199</sup> States could exemplify their respect of tribal sovereignty by adopting "existing federal law and case law that recognizes tax exemptions in Indian [C]ountry, such as the BIA leasing regulations adopted in 2012 and the underlying federal statutes, which exempt significant property and activities from state tax."<sup>200</sup> State legislatures could also enact legislation that "eliminate[s] state and local taxes in Indian [C]ountry that are based on the [membership] status of businesses and customers."<sup>201</sup> A potential downside of state-based solutions is that it results in inconsistent outcomes across the United States.<sup>202</sup>

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*supra* note 3, at 10 (citing National Congress of American Indians, Resolution #Sd-15-045 (2015)) ("The Department of Interior should continue the Indian Trader Regulations (25 C.F.R §140) comprehensive update with proper government to government consultation in the compilation of the draft and final regulation. These updates should explicitly pre-empt state taxation for commerce on Indian lands; prohibit Indian country business activity from state regulation and taxation, and preserve and not interfere in tribal taxation authority over Indian Commerce.").

196. See U.S. TREASURY DEP'T ADVISORY COMM., *supra* note 3, at 9-11.

197. U.S. TREASURY DEP'T ADVISORY COMM., *supra* note 3, at 10.

198. CROMAN & TAYLOR, *supra* note 4, at 27.

199. Generally, states do not have regulatory authority over Members in Indian Country. See *Williams v. Lee*, 358 U.S. 217, 220-21 (1959) ("Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," but "when 'Congress has wished the States to exercise this power it has expressly granted them jurisdiction.'"); *see also COHEN'S HANDBOOK*, *supra* note 1, § 1.03 ("Unless Congress has so authorized, states have no powers over tribal governments or Indian people within tribal nations.").

200. CROMAN & TAYLOR, *supra* note 4, at 29.

201. *Id.* at 27.

202. *Id.*

State policies offer the states an opportunity to take a step in the right direction of building working relationships with Tribes over taxing jurisdiction. And while states may be unwilling to voluntarily part with the revenue that they take from economic activity in Indian Country, doing so may be mutually beneficial. These government-to-government relationships are informed by the particular historical and present relationship between a state and a given tribe, and they are influenced by current political landscapes. However, states can benefit from strong tribal economic development, as spill over from economic activity in Indian Country increases their own economies.<sup>203</sup>

### Conclusion

Taxing power is understood as an inherent sovereign power that cannot be taken from a tribe absent clear and plain Congressional action. Tribal taxing authority is an essential mechanism to building and maintaining economic development in Indian Country. When states impede on a tribe's ability to tax economic activity in Indian Country, they block tribes from collecting tax revenue and create a burden of double taxation. Absent clear federal statutory or policy guidance, the current case law leaves courts with the responsibility of applying balancing interest tests to determine if a state's tax on non-member transactions in Indian Country is valid. This has led, and will continue to lead to inconsistent outcomes, frustrating both states and tribes. Tribe-state tax compacts are a potential tool in remedying this jurisdictional taxation issue, albeit imperfectly.

Tribe-state tax compacts vary greatly, as tribes and tribal nations are not a monolith, and each tribe's relationship to a state is unique. While there are certain provisions that can support state recognition and respect of tribal sovereignty, they require fact-specific analysis to determine what is best for a tribe. Policy and legislation both at the federal and state level can serve as another tool in cleaning up the complex legal web of Indian tax law. Federal policy can create uniform change, while state policy can better address unique and contextual issues between a given state and tribe. However, these policies can only enact positive change if implemented with tribal interests through the meaningful consultation of tribes and tribal nations.

Tribe-state tax compacts may be the best path forward, with federal and state policy changes serving as a potential catalyst for more equitable

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203. *Id.* at 17; see, e.g., Jonathan Taylor, *Economic and Fiscal Impacts of Indian Tribes in Washington, WASH. INDIAN GAMING Ass'N* (2012), <https://www.washingtonindiangaming.org/wp-content/uploads/2018/04/wigaeconceptup3.pdf> [https://perma.cc/C37P-3SKM] (describing the economic benefits of tribal economic growth to the state of Washington).

power between the sovereigns. More research is needed to collect data on the impact of tribal economies on their bordering states. A database of current tribe-state tax compacts should be developed by the BIA or Department of Treasury to provide tribes, states, and practitioners with better data to understand the economic realities of relationships between sovereigns. Lastly, a comprehensive comparative analysis of these tax compacts would provide more informational data points on the details of how these agreements have taken, and continue to take form, and thus enable states and tribes to enter tax compacts. With much work yet to do, this Note is an attempt to consolidate a vast and complex area of law so that it may serve as a tool for practitioners.

## High Expectations? Minnesota's Cannabis Social Equity Statute Falters

Claire Cavanagh<sup>†</sup>

### Introduction

In 2023, Minnesota became the twenty-third state to legalize cannabis, and, following suit from other states to pass similar legislation, it included a social equity provision to give qualified applicants a preferred status when applying for a cannabis business license.<sup>1</sup> As in other states, Minnesota's social equity provision seeks to provide individuals who have suffered negative repercussions from the criminalization of cannabis and its prohibition with increased chances to receive highly coveted cannabis business licenses through lower entry costs and separate license lottery windows.<sup>2</sup>

However, Minnesota's statute is subject to the same issues that other states face—it is vague, inaccessible, and offers too many avenues for qualification.<sup>3</sup> Surprisingly, Minnesota did not appear to incorporate the suggestions and critiques that were well-publicized in other states.<sup>4</sup> The Minnesota Legislature nonetheless congratulated itself on its

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1. See MINN. STAT. § 342.09 (2023) (legalizing personal adult use and possession of cannabis); § 342.17 (2023) (defining "social equity applicants"); § 342.18, subd. 3(1) (2023) (awarding application points for status as a social-equity applicant); *see also Cannabis Law, OFFICE OF CANNABIS MANAGEMENT*, <https://mn.gov/ocm/laws/cannabis-law.jsp> [<https://perma.cc/6ZC8-M8BW>] (providing that Minnesota is the twenty-third state in the United States to legalize adult-use cannabis).

2. See Tim Walker, *Cannabis conferees successfully hash out differences, expand bill's scope*, MINNESOTA HOUSE OF REPRESENTATIVES (May 15, 2024), <https://www.house.mn.gov/sessiondaily/Story/18393> [<https://perma.cc/436N-SFWZ>] (explaining that the intent of the social equity provision is to repair some of the harms associated with the prohibition of cannabis); *see also* MINN. STAT. § 342.14, subd. 4 (2024) (stating that individuals who qualify as social equity applicants will be entered into two lotteries for cannabis business licenses, increasing their chance of receiving one).

3. See MINN. STAT. § 342.17 (2023).

4. See, e.g., Garrett I. Halydier, *We(ed) the People of Cannabis, in Order to Form a More Equitable Industry: A Theory for Imagining New Social Equity Approaches to Cannabis Regulation*, 19 U. MASS. L. REV. 225, 228 (2024) (explaining that social equity provisions in several states have failed to effectively achieve their goals of social equity and instead often compound the divide in equitable outcomes).

progressive social equity framework.<sup>5</sup> Minnesota's social equity provision also fails to address the fact that the Black population undeniably suffered the most harm and therefore should be recognized as such when making qualification determinations.<sup>6</sup> A provision that is intended to address harms related to cannabis prohibition should ensure that individuals most adversely affected by prohibition are accorded priority in the licensing process. The Minnesota Legislature could have provided language to qualify the Black population in statute and made the application process equitable. Instead, the broad language easily allows individuals who were not the intended target of this legislation or adversely impacted by cannabis prohibition to qualify. As it currently stands, the positive impact of this legislation is negligible and in fact is likely harmful to Black applicants' chances of receiving cannabis business licenses through this provision.

Minnesota Statutes Chapter 342 attempts to provide people who have experienced adverse effects of cannabis prohibition with avenues to more easily enter the cannabis market.<sup>7</sup> The social equity provision lists seven broad "qualifying factors" that are used to determine if an applicant meets the social equity threshold.<sup>8</sup> An applicant only needs to prove to the Minnesota Office of Cannabis Management (OCM) that they meet one of these qualifying factors to attain social equity applicant status, which is an objectively low threshold that is easy to achieve.<sup>9</sup> In its capacity as a state agency, OCM does not have the authority to use discretion when interpreting the social equity provision of Chapter 342.<sup>10</sup> Thus, the

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5. See Tim Walker, *House Passes Cannabis Legislation Aiming to Speed Up Retail Sales*, MINNESOTA HOUSE OF REPRESENTATIVES (Apr. 18, 2024), <https://www.house.mn.gov/sessiondaily/Story/18324> [<https://perma.cc/CQ3H-SSMD>]; See also Sen. Lindsey Port, *Social Equity Cannabis Licensing Process Upholds Minnesota's Values*, MINN. SENATE DFL (Nov. 25, 2024) <https://senatedfl.mn/social-equity-cannabis-licensing-process-upholds-minnesotas-values/> [<https://perma.cc/635S-LGVY>] (claiming that Minnesota's social equity provision "corrects the harms and failures of cannabis prohibition.").

6. See sources cited *infra* note 21.

7. See MINN. STAT. § 342.17 (2024) (providing the qualifying factors an individual must meet to attain social equity applicant status).

8. *Id.*

9. *Id.* (providing that an individual must only demonstrate that they meet one of the seven qualifying factors to achieve social equity applicant status); see also MINNESOTA OFFICE OF CANNABIS MANAGEMENT, CANNABIS LICENSE SOCIAL EQUITY VERIFICATION 6 (2nd ed. 2025), [https://mn.gov/ocm/assets/2411002\\_OCM\\_Social\\_Equity\\_Verification\\_Guide\\_v2.0\\_tcm12\\_02-664847.pdf](https://mn.gov/ocm/assets/2411002_OCM_Social_Equity_Verification_Guide_v2.0_tcm12_02-664847.pdf) [<https://perma.cc/T5CL-JBTf>] (The breadth of the seven factors provided in the social equity provision combined with the fact that an individual only needs to meet one criterion makes social equity verification more attainable. When compared to Maryland's social equity provision, which has only three, narrow qualifying factors, Minnesota's social equity provision has a much lower threshold for verification).

10. See MINN. STAT. § 14.05, subd. 1 (2001) (stating that an agency may only adopt rules "pursuant to authority delegated by law and in full compliance with its duties and obligations.").

statute as written negates the purported positive impact on Minnesota's Black population and opens the door for abuse of a provision that was intended to repair some of the harms resulting from cannabis prohibition.

This Note argues that the vague and overbroad terms of Minnesota's social equity provision undermine the State's intent to repair the harms of cannabis prohibition and will not provide any discernible benefit to the Black community. The Note begins with an examination of the impact of cannabis prohibition on Black individuals and their broader communities, and how historical influences created disparate arrest and conviction rates for similar cannabis-related offenses between the Black and white populations. Next, this Note explains how other states have tried, and largely failed, to implement similar social equity provisions to address these racial disparities.<sup>11</sup> It then discusses how Minnesota's social equity provision ultimately fails in its implementation because its overbroad statutory language allows too many individuals to qualify and the statutory language allows those in positions of power to easily abuse the broad statute to game the system and receive an enhanced application status, while Black applicants face several barriers throughout the process. Lastly, this Note addresses potential solutions to this issue, through both legislative and non-legislative actions, that would positively impact and enrich the relationship between Black Minnesotans and the emerging cannabis market.

### **I. The Disparate Impact of Cannabis Prohibitions on Black Individuals and Their Communities.**

The official "War on Drugs" campaign heralded by President Richard Nixon in 1972 had devastating effects on Black communities across the United States.<sup>12</sup> The "War on Drugs" disproportionately impacted Black individuals and their neighborhoods through strategic policing efforts and tactics.<sup>13</sup> These efforts sought to unfairly target Black people and had started decades before its recognition in the executive office as an official campaign.<sup>14</sup> "War on Drugs" policies led to strict drug policies and enforcement practices nationwide that contributed to a significant increase in racial profiling and police violence in Black

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11. Social equity provisions in other states, like Ohio, have been intensely scrutinized and subject to various legal challenges. *See Pharmacann Ohio, LLC v. Williams*, (Ohio C. P. 2018) (challenging the legal validity of Ohio's social equity provision).

12. *See Michael L. Rosino & Matthew W. Hughey, The War on Drugs, Racial Meanings, and Structural Racism: A Holistic and Reproductive Approach*, 77 AM. J. ECON. & SOC. 849, 849 (2018).

13. *Id.* at 851.

14. *Id.*

communities.<sup>15</sup> This movement was tied to strong racist sentiments flooding the United States in the nineteenth century.<sup>16</sup>

Throughout the 1900s, Black communities experienced increased policing and police violence, which subsequently, and intentionally, led to increased arrests for low-level cannabis-related offenses.<sup>17</sup> Fearful and racist sentiments regarding Black men, jazz musicians, and street criminals in the 1930s contributed to the eventual federal prohibition of cannabis, even though cannabis was primarily trafficked by white people and less frequently used by people of color.<sup>18</sup> Notably, white people are more likely to have ever tried cannabis than Black people, yet are less likely to be arrested for low-level cannabis-related offenses than their Black counterparts.<sup>19</sup> While the official “War on Drugs” campaign eventually dialed back in the 2000s, the racialized effects from its policies are still felt today.<sup>20</sup> Increased incarceration rates, police violence in Black communities, and false perceptions surrounding the Black population’s drug use are social problems that still pervade Minnesota and the entire United States.<sup>21</sup>

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15. *Id.*

16. See Katrina Phillips, *How 19th-Century Anti-Black and Anti-Indigenous Racism Reverberates Today*, SMITHSONIAN MAGAZINE (Sep. 1, 2020), <https://www.smithsonianmag.com/smithsonian-institution/how-19th-century-anti-black-and-anti-indigenous-racism-reverberates-today-180975692/> (stating that racial tensions from the Civil War continued to exist even after the war ended, which led to outspoken racism and violent acts).

17. See Rosino, *supra* note 12, at 857 (explaining how drug-war policies and racialized narratives facilitated intensified policing in Black communities, producing disproportionate arrests for minor drug offenses).

18. *Id.*

19. *Id.* at 858 (describing that cannabis use by people of color was less prevalent than use by whites); see also Silvia S. Martins et al., *Racial and Ethnic Differences in Cannabis Use Following Legalization in U.S. States With Medical Cannabis Laws*, 4 JAMA NETWORK OPEN (2021) (showing that today cannabis use is similar to the nineteenth century).

20. See *War on Drugs*, HISTORY (May 28, 2025), [https://www.history.com/topics/crime/the-war-on-drugs#section\\_7](https://www.history.com/topics/crime/the-war-on-drugs#section_7) [<https://perma.cc/G2MY-4TTM>] (stating that “[b]etween 2009 and 2013, some 40 states took steps to soften their drug laws, lowering penalties and shortening mandatory minimum sentences,” which reflects a shift in attitudes towards more progressive drug policies and policing).

21. See *Criminal Justice Fact Sheet*, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> [<https://perma.cc/Q5WX-W8S7>] (reporting that Black individuals are disproportionately arrested and incarcerated for low-level drug offenses despite similar usage rates); see also *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU, <https://www.aclu.org/publications/tale-two-countries-racially-targeted-arrests-era-marijuana-reform> [<https://perma.cc/Z6DV-NDYV>] (documenting that Black people are far more likely than white people to be arrested for marijuana possession nationwide, even in states that have reformed cannabis laws).

*A. Minnesota's Racialized Enforcement of Cannabis Offenses.*

In 1935, two years before cannabis was criminalized at the federal level, the Minnesota Legislature passed legislation that prohibited cannabis possession, production, and sale.<sup>22</sup> Perceptions surrounding cannabis in Minnesota were deeply influenced by the poor race relations throughout the state.<sup>23</sup> The popular local newspaper, the Minneapolis Tribune, published several articles describing cannabis as a dangerous drug and, in as early as 1885, referred to it as "The Loco Weed."<sup>24</sup> Additional articles were published that associated cannabis with people of color and Mexico, which furthered the notion that people of color were more likely to use cannabis.<sup>25</sup>

After the criminalization of cannabis in Minnesota, there was a marked increase in both the arrest rate and the number of people of color (especially Black Minnesotans) sentenced to prison compared to their proportion of the total population.<sup>26</sup> As "tough on crime" and harsh drug enforcement policies gained traction across the United States throughout the 1960s and 1970s, the proportion of Black individuals arrested and sentenced to prison skyrocketed in Minnesota.<sup>27</sup> The national crime policies, racialized rhetoric surrounding drugs, and the "War on Drugs" campaign shaped the implementation of racially motivated state-level cannabis policing efforts, which continue to the present day.

In Minnesota, the 2023 Uniform Crime Report shows that cannabis was related to a high percentage of all drug abuse arrests.<sup>28</sup> That year, charges for possession or concealment of cannabis were associated with 8,593 of all 10,480 drug arrests, demonstrating a high level of

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22. See Tanner Berris, *The Racial History of Cannabis Prohibition in Minnesota*, MINN. CANNABIS COLL. (June 19, 2023), <https://mncannabiscollege.org/race-and-cannabis/> [<https://perma.cc/3TT3-QAMH>] ("The original legislation enforcing cannabis prohibition in Minnesota was instituted in 1935, a mere two years before the national criminalization. Chapter 321 forbade the possession, production and sale of 'Cannabin' . . .").

23. See Jennifer Delton, *Labor, Politics, and American Identity in Minneapolis, 1930–50*, 57 MINN. HIST. 418, 420 (2001) (describing discrimination, segregation, and restrictive covenants that existed in Minneapolis in the 1930s and 1940s).

24. Berris, *supra* note 22.

25. *Id*; see also *Hope to Outlaw Dope Weed Seen in '33*, 81 ST. PAUL PIONEER PRESS, (Mar. 1, 1934).

26. *Id*.

27. Rosino, *supra* note 12, at 858 ("In the 1960s, the state implemented drug laws and 'tough on crime' policies as a tool for social control against progressive social movements, including the civil rights movement. In the 1970s, the development of the Drug Enforcement Agency intensified and militarized drug law enforcement practices, justifying wars overseas and a war on people of color at home. In the 1980s, racially biased sentencing guidelines and racialized moral panics around the 'crack epidemic' further augmented and racialized drug penalties and the prison population.").

28. 2023 *Uniform Crime Report*, MINN. DEP'T. OF PUB. SAFETY, BUREAU OF CRIM. APPREHENSION (2024).

enforcement in Minnesota.<sup>29</sup> Of these drug-related arrests, the Black population was disproportionately represented, making up 25.03% of all arrests despite comprising just 7.9% of Minnesota's population.<sup>30</sup> As a result of the historical and current inequities in cannabis policing and enforcement, Black Minnesotans are more likely to be/have been incarcerated and more likely to have a criminal drug record involving cannabis.<sup>31</sup>

Black Minnesotans' higher likelihood of interaction with the criminal justice system unfairly contributes to the racial disparities present throughout society.<sup>32</sup> Specifically, interaction with the criminal justice system is associated with a variety of negative consequences.<sup>33</sup> There are numerous fees, fines, and debts associated with the criminal justice system.<sup>34</sup> Further, individuals with criminal records face obstacles when seeking employment because roughly 9 in 10 employers across the United States conduct background checks during the hiring process.<sup>35</sup> Employers are far less likely to hire an individual with a criminal record, making it more difficult for those with criminal records to secure high-paying, stable employment.<sup>36</sup> Without secure employment, it is almost insurmountable for individuals to provide for themselves, let alone pay the costs of incarceration.<sup>37</sup> There are even more devastating effects on individuals with families who have dependents who rely on them for their basic needs.<sup>38</sup> This has led to families with current or previously incarcerated family members obtaining 50% less wealth and incurring significantly more debt than households without.<sup>39</sup>

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29. *Id.*

30. QUICK FACTS: MINNESOTA,  
<https://www.census.gov/quickfacts/fact/table/MN/PST045224>.

31. *Black People Five Times More Likely to Get Arrested for Marijuana in Minnesota*, ACLU OF MINNESOTA, (Apr. 20, 2020), <https://www.aclu-mn.org/en/press-releases/black-people-five-times-more-likely-get-arrested-marijuana-minnesota> [<https://perma.cc/V4Q2-FPYA>].

32. *Id.*

33. Christian E. Weller, Akua Amaning & Rebecca Vallas, *America's Broken Criminal Legal System Contributes to Wealth Inequality*, CTR. FOR AM. PROGRESS (Dec. 13, 2022). <https://www.americanprogress.org/article/americas-broken-criminal-legal-system-contributes-to-wealth-inequality/> [<https://perma.cc/C89L-5RWG>].

34. Karin D. Martin, Bryan L. Sykes, Sarah Shannon, Frank Edwards & Alexes Harris, *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIM. 471, 473 (2021).

35. See Weller et. al, *supra* note 33 ("Appropriately, particular attention has been paid to the dramatic toll that a conviction and/or incarceration record takes on an individual's employment and earnings prospects in an era when roughly 9 in 10 U.S. employers use background checks in hiring.").

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* ("Households with a currently or previously incarcerated family member have about 50 percent less wealth than households not affected by incarceration, on average.").

Additionally, individuals with criminal records are more likely to have poorer health outcomes, even if they were not incarcerated.<sup>40</sup> This has been attributed to the trauma and anxiety resulting from police interactions, which is compounded for Black individuals due to the long history of police violence towards the Black community.<sup>41</sup> For individuals with mental health illnesses who have been incarcerated, their conditions are often made worse during incarceration due to poor-quality treatment or lack thereof.<sup>42</sup> A criminal record can also preclude an individual from enrollment in federal benefits and programs.<sup>43</sup> Moreover, once released from prison, individuals have a high rate of recidivism.<sup>44</sup> This creates a cyclical process that continually harms those who have interacted with the criminal justice system, which is disproportionately Black individuals.<sup>45</sup>

## II. How States Have Attempted to Address the Harms Associated with Cannabis Prohibition Within Their Cannabis Laws

### A. *Critiques of Other States' Social Equity Provisions*

Social equity provisions have been implemented in several other states, have often been criticized regarding their effectiveness, and have faced legal challenges surrounding their implementation.<sup>46</sup> Maryland was the first state to separate and reserve the first round of cannabis business licenses for social equity applicants.<sup>47</sup> License seekers were eligible under Maryland's social equity program if they:

[L]ived in a [d]isproportionately [i]mpacted [a]rea ... for five of the last ten years ... , (2) attended a public school in a ...

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40. Ram Sundaresh, Youngmin Yi, Brita Roy, Carley Riley, Christopher Wildeman & Emily A. Wang, *Exposure to the US Criminal Legal System and Well-Being: A 2018 Cross Sectional Study*, 110 AM. J. PUB. HEALTH S116, S116 (2020).

41. *Id. See also* Timonthy J Geier, History of Racial Discrimination by Police Contributors to Worse Physical and Emotional Quality of Life in Black Americans After Traumatic Injury, 11 J. Racial and Ethnic Health Disparities 1774, 1781 (2023) (stating that "prior discriminatory experiences detrimentally impact physical and mental health recovery. The implications of these results are further magnified by the recent civil unrest in the wake of widely publicized murders of unarmed Black Americans at the hands of police and the disproportionate effect of the COVID-19 pandemic on Black American communities, including an increase in injury.").

42. *See Criminal Justice Fact Sheet*, *supra* note 21.

43. *Id.*

44. *What is the sequence of events in the criminal justice system*, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/justice-system> [<https://perma.cc/AE3X-GK8>].

45. *Id.*

46. *See* sources cited *infra* notes 47-55 (detailing the social equity provisions in Maryland, California, and Ohio and how they have been challenged legally or criticized).

47. UNITED STATES: LEGAL LEAF CANNABIS ALERT MARYLAND CANNABIS UPDATE, <https://plus.lexis.com/api/permalink/c8626221-1aef-4b70-8161-e7fce96af354/?context=1530671> [<https://perma.cc/GU74-H3H7>].

[disproportionately impacted area] for at least five years; or (3) for at least two years, attended a four-year institution of higher education in Maryland where at least 40% of attendees are eligible for a Pell Grant.<sup>48</sup>

Maryland's social equity factors are noticeably more stringent than Minnesota's and have been subject to several lawsuits that challenged their validity.<sup>49</sup> One of the lawsuits challenging the validity of Maryland's social equity provision argued that it violated the dormant Commerce Clause.<sup>50</sup> The court determined, however, that the dormant Commerce Clause does not apply to adult-use cannabis because it is a federally prohibited activity.<sup>51</sup>

Social equity provisions in California were also subject to criticism in their implementation. The city of Costa Mesa adopted a social equity program that aimed to offer opportunities to those negatively impacted by the historic criminalization of cannabis.<sup>52</sup> Costa Mesa was sued for delegating social equity license determinations to its city manager without requiring the input of the city council.<sup>53</sup> Costa Mesa was accused of impropriety and favoritism towards certain applicant types regarding the social equity lottery and of excluding or disfavoring “applicants ‘most impacted’ by the war on drugs.”<sup>54</sup> Similarly, in Ohio, the decision-making process for social equity licenses was challenged as unconstitutional, arguing that it violated due process.<sup>55</sup> The implementation of social

48. Regina Desantis & Austin Ownbey, *New Lawsuit Challenges Maryland Cannabis Administration's Social Equity Program Under 'Dormant Commerce Clause,' Seeks Injunction Against Issuing Licenses*, JD SUPRA (Feb. 28, 2024), <https://www.jdsupra.com/legalnews/new-lawsuit-challenges-maryland-9963142/> [<https://perma.cc/B6D2-3433>].

<sup>49</sup> See *id.* (stating that the Maryland social equity provision was challenged for violating the dormant Commerce Clause "by discriminating against out-of-state applicants").

50. See *Regina Desantis & Austin Ownbey, Litigation Update: Maryland District Court Finds That 'Dormant Commerce Clause' Does Not Apply to Adult-Use Cannabis in Maryland, Denies Injunction*, JD SUPRA (Mar. 1, 2024), <https://www.jdsupra.com/legalnews/litigation-update-maryland-district-5100382/> [https://perma.cc/P5MR-U9UZ]; see also U.S. CONST. ART. I, § 8, cl. 3 (granting Congress the power to regulate interstate commerce).

51. *Id.*

52. Sara Cardine, *Cannabis hopefuls up in arms as Costa Mesa's application process rolls on without them*, DAILY PILOT (Sep. 2, 2021), <https://www.latimes.com/socal/daily-pilot/news/story/2021-09-02/cannabis-hopefuls-up-in-arms-as-costa-mesas-application-process-rolls-on-without-them> [https://perma.cc/CB9F-FXJR].

53. See CANNABIS CO. SAYS CALIF. CITY FADED SOCIAL EQUITY PROGRAM, <https://plus.lexis.com/api/permalink/8b5905ad-5121-4dc0-b840-3219a43cb076/?context=1530671> [<https://perma.cc/BS3R-7EAJ>].

54. *Id.*

55. Pharmacann Ohio, LLC v. Williams, No. 17-CV-010962, 2018 WL 7500067, at 1 (Ohio Com.Pl. Nov. 15, 2018), <a href="https://1.next.westlaw.com/Document/I6e4a97703c3b11e987fd8441446aa305/View/FullText.html?originationContext=typeAhead&amp;transitionType=Default&amp;contextData=(sc.Default) [https://perma.cc/9MQU-BHRW].</a>

equity provisions in other states has been subject to intense scrutiny and has not occurred without issue.

#### *B. Minnesota's Approach to a Cannabis Social Equity Provision*

The Minnesota Legislature enacted a social equity provision within the larger cannabis statute to address some of the harms caused by the state's historical prohibition of cannabis.<sup>56</sup> The social equity provision initially provided these qualifying factors: (1) "a military veteran who lost honorable status due to a cannabis related offense;" (2) someone who has lived for the past five years in an area "that experienced a disproportionately large amount of cannabis enforcement as determined" by the office, or (3) someone who has lived for the last five years in low-income areas.<sup>57</sup> The initial version of the social equity provision, with only three qualifying factors, still failed to adequately reflect that the Black community had been most negatively affected because the factors do not account for the racial disparity associated with cannabis's prohibition.<sup>58</sup>

As Chapter 342 made its way through the legislative process, significant amendments ultimately broadened the scope of the social equity provision to the expansive seven-factor provision currently in effect.<sup>59</sup> By expanding the purview of the social equity provision, the Legislature effectively excluded the Black community from realistically reaping any of the purported benefits the provision aims to provide. By widening the pool of individuals who qualify under the social equity provision, the Legislature lessened Black Minnesotans' chances of receiving a cannabis license and further limited them from receiving the financial benefits of cannabis legalization.

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56. See Peter Callaghan, *Walz supports changes to Minnesota's recreational marijuana law to strengthen 'social equity' provisions*, MINNPOST (Feb. 14, 2024), <https://www.minnpost.com/state-government/2024/02/walz-supports-changes-to-minnesotas-recreational-marijuana-law-to-strengthen-social-equity-provisions/> [https://perma.cc/B7S9-EFUZ] (stating that OCM asked the Minnesota Legislature "to amend the 2023 recreational marijuana law to make it easier for people and neighborhoods who suffered most from prohibition to get into the business."); *see also* MINN. STAT. § 342.17 (2024) (the current social equity provision that the Minnesota Legislature added in response to OCM's proposal).

57. See H.F. 100, 93rd Leg. (Minn. 2023) (the initial introduction of the cannabis bill into the Minnesota House of Representatives which originally only had three criteria that could qualify an applicant for social equity application status).

58. *Id.* (the initial version of the bill had fewer qualifying factors than the final bill that was promulgated).

59. See MINN. CONF. COMM. REP., H.F. 100., (2023) (demonstrating the change in the statutory language in the final Minnesota Chapter 342 cannabis bill that added four additional qualifying factors that individuals may use to assert social equity application status).

### III. Chapter 342's social equity provision fails to accomplish the Minnesota Legislature's intended goals.

In the last few years, nearly half of the states have passed legislation legalizing recreational adult-use cannabis.<sup>60</sup> In most states, legislators have attempted to address the harms that the prohibition of cannabis had on the Black population through social equity provisions laid out in statute.<sup>61</sup> The intended effect of social equity provisions is to give individuals and communities adversely affected by cannabis prohibition an advantage or priority to enter the market and accumulate wealth through profits.<sup>62</sup> In theory, social equity provisions appear to, albeit slightly, take accountability for the harm cannabis prohibition has caused and provide an actionable, tangible benefit which increases access and participation in the legal cannabis market to generate wealth. However, in practice, the supposed benefits are difficult to assess, and the statutory language is often written vaguely, allowing individuals to game the system and take advantage of their positions of power to garner profits from cannabis when they were not the intended target of the legislation. These problems exist within the current version of Minnesota's social equity provision.

#### A. *The statutory language is overly broad and inclusive, thus allowing individuals to qualify who were not harmed by the prohibition of cannabis.*

The governing statute, Minnesota Statutes Chapter 342.17, provides that specific individuals may qualify for Social Equity Applicant (SEA) status, which is intended to boost applicants' chances of receiving a cannabis license through the lottery system.<sup>63</sup> The state Legislature gave OCM authority to determine the number of cannabis licenses it will issue, which, to balance supply and demand, will be significantly lower than the

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60. See *Cannabis Law*, *supra* note 1.

61. See Beau Kilmer, Jonathan P. Caulkins, Michelle Kilborn, Michelle Priest & Kristin M. Warren, *Cannabis Legalization and Social Equity: Some Opportunities, Puzzles, and Trade-Offs*, 101 BOS. U. L. REV. 1003 (detailing how cannabis prohibition has disproportionately affected the Black population and that social equity provisions have attempted to mitigate the harms associated with cannabis policy).

62. See Walker, *supra* note 2.

63. MINN. STAT. § 342.17 (2024); see also Media Release, Minnesota Office of Cannabis Management, Minnesota Office of Cannabis Management opens window for social equity applicant verification (Jan. 15, 2025) <https://content.govdelivery.com/accounts/MNOCM/bulletins/3cca2eb> [https://perma.cc/Z6U6-WV2P] (quoting the director of OCM, who stated that "[OCM's] main goal in the months ahead is to issue licenses and launch Minnesota's adult-use cannabis program promptly while preserving the benefits for qualified social equity applicants envisioned in the law.").

number of people who apply for licenses.<sup>64</sup> This process is very competitive, and SEA status can substantially influence an applicant's statistical chances of receiving a license.<sup>65</sup> Unfortunately, the statutory language is overly broad, it provides too many ways for individuals to qualify, and thus allows applicants who should not necessarily qualify for SEA status to take the benefits away from the intended populations.

Minnesota Statutes Chapter 342.17, subdivision a, lists seven qualifications individuals can use to assert their SEA status.<sup>66</sup> The qualifiers state that an individual qualifies as an SEA if the applicant:

- (1) was convicted of an offense involving the possession or sale of cannabis or marijuana prior to May 1, 2023;
- (2) had a parent, guardian, child, spouse, or dependent who was convicted of an offense involving the possession or sale of cannabis or marijuana prior to May 1, 2023;
- (3) was a dependent of an individual who was convicted of an offense involving the possession or sale of cannabis or marijuana prior to May 1, 2023;
- (4) is a military veteran, including a service-disabled veteran, current or former member of the national guard;
- (5) is a military veteran or current or former member of the national guard who lost honorable status due to an offense involving the possession or sale of cannabis or marijuana;
- (6) has been a resident for the last five years of one or more subareas, such as census tracts or neighborhoods:
  - (i) that experienced a disproportionately large amount of cannabis enforcement as determined by the study conducted by the office pursuant to section 342.04, paragraph (b), or another report based on federal or state data on arrests or convictions;
  - (ii) where the poverty rate was 20 percent or more;
  - (iii) where the median family income did not exceed 80 percent of the statewide median family income or, if in a metropolitan area, did not exceed the greater of 80 percent of the statewide median family income or 80 percent of the median family income for that metropolitan area;

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64. See MINN. STAT. § 342.14, subd. 1a (2024) (describing that the Office of Cannabis Management is tasked with meeting market demand for cannabis flower and products, ensuring market stability, and maintaining a competitive market); *see also Application and License Holder Data*, MINN. OFF. OF CANNABIS MGMT., [mn.gov/ocm/businesses/licensing/application-data/](http://mn.gov/ocm/businesses/licensing/application-data/) [https://perma.cc/5CB5-JAMR] (demonstrating that certain license types have a limited number of licenses available. For example, there were 854 applicants for retailer licenses, but only 150 licenses available).

65. See MINN. STAT. § 342.14, subd. 4 (2024) (explaining that social equity applicants are entered into two lottery pools: one for only social equity applicants and then, if not selected, those applicants are entered into a lottery pool with all applicants; thus, increasing an individual's chances of being selected in the cannabis license lottery).

66. MINN. STAT. § 342.17, subd. (a) (2024).

- (iv) where at least 20 percent of the households receive assistance through the Supplemental Nutrition Assistance Program; or
- (v) where the population has a high level of vulnerability according to the Centers for Disease Control and Prevention and Agency for Toxic Substances and Disease Registry (CDC/ATSDR) Social Vulnerability Index; or
- (7) has participated in the business operation of a farm for at least three years and currently provides the majority of the day-to-day physical labor and management of a farm that had gross farm sales of at least \$5,000 but not more than \$100,000 in the previous year.<sup>67</sup>

Individuals only need to prove they meet one of these seven broad qualifications to attain SEA status.<sup>68</sup> Further, the qualifying factors are overly inclusive, allowing individuals who have not experienced hardship due to cannabis prohibition to reap the benefits and generate profits from the social equity provision. This was not the intent of the Minnesota Legislature.<sup>69</sup> The ascribed goal of the social equity provision is to purportedly repair some of the harm created by the prohibition of cannabis by allowing affected individuals and their communities to economically benefit from the public retail sale of cannabis, thus generating revenue for SEA-owned businesses and their surrounding communities.<sup>70</sup> Black Minnesotans are undoubtedly the demographic that cannabis's prohibition has most harmed.<sup>71</sup> Yet, Minnesota's SEA criteria continues to marginalize the Black community because the broad statute allows too many individuals to qualify, many of whom did not face historical repercussions from cannabis prohibition. As a result, Black applicants have a reduced chance of receiving a cannabis business license through the lottery to reap the financial benefits proffered by the social equity provision.

Several of the individual factors listed in the social equity provision present issues regarding the over-inclusivity of the provision as a whole. Specifically, subparts four, six, and seven appear over-inclusive considering the supposed purpose of the social equity provision. Subpart four states that any "military veteran, including a service-disabled veteran, current or former member of the national guard" qualifies for

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67. *Id.*

68. See MINN. STAT. § 342.17 (2024) (statutory language stating that applicants need only meet one criterion for classification as a social equity applicant).

69. See Walker, *supra* note 2 (demonstrating that "people harmed by over-prosecution of cannabis laws in the past" were the intended target of the social equity provision).

70. See MINNESOTA HOUSE OF REPRESENTATIVES *Commerce finance and policy law focuses on cannabis, consumer data privacy protections*, <https://www.house.mn.gov/NewLaws/story/2024/5591> [<https://perma.cc/82QM-QVYE>] (describing the intent of the social equity provision found in Minnesota Statute Chapter 342).

71. Kilmer et al., *supra* note 61.

SEA status.<sup>72</sup> However, military veterans and National Guard members have not been historically over-policed or disproportionately incarcerated for cannabis use or possession.<sup>73</sup> Subpart five specifically encompasses instances where military veterans or National Guard members have lost honorable status due to cannabis offenses.<sup>74</sup> Accordingly, subpart four is unnecessarily broad and includes thousands of additional potential social equity applicants who might not have experienced harm due to the prohibition of cannabis.

Subpart six presents a similar issue—it allows anyone who has lived in certain statutorily designated areas for five years or more to qualify for SEA status.<sup>75</sup> The following items highlight categories that are inherently relevant to challenges faced by Black individuals, because their communities were overpoliced and more likely to be impoverished.<sup>76</sup> However, the sweeping scope of the qualifiers allows them to be interpreted by other racial groups. This allows white individuals, who may fit into one or more categories but did not actually experience harm, to qualify for SEA status. The breadth of this subpart allows savvy applicants to essentially “argue” their SEA status based on the data and statistics surrounding their census tract or neighborhood rather than their individual circumstances.<sup>77</sup> This is especially notable in gentrified neighborhoods where areas of the same census tract experience strikingly different levels of income and social capital.<sup>78</sup> For individuals living in urban areas, policing efforts and wealth distribution can vary significantly from block to block; thus, using such a broad form of measurement (like census tracts or neighborhoods) permits individuals to capitalize on the circumstances of their surroundings.<sup>79</sup> This type of

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72. MINN. STAT. § 342.17 (2024).

73. See Kelly Lynn Clary, Megan Habbal, Douglas C. Smith & Iulia Fratila, *The Green Sheep: Exploring the Perceived Risks and Benefits of Cannabis Among Young Military Members and Veterans*, 4 CANNABIS 31 (2021) (demonstrating that veterans are generally not worried about being arrested for cannabis use).

74. MINN. STAT. § 342.17 (2024).

75. See MINN. STAT. § 342.17(6) (2024).

76. See *Poverty rate in the United States in 2023, by race and ethnicity*, STATISTA, <https://www.statista.com/statistics/200476/us-poverty-rate-by-ethnic-group> [https://perma.cc/3DSJ-4UBV].

77. See MINN. STAT. § 342.17(6)(i) (2024) (stating that applicants may submit “another report based on federal or state data on arrests or convictions . . . ”).

78. See *On the Cusp of Greatness: Hamline-Midway, Crime, and Transformation*, CURA TWIN CITIES GENTRIFICATION PROJECT, <https://gentrification.umn.edu/hamline-midway> [https://perma.cc/DA92-PMW7] (describing how the St. Paul “Midway” neighborhood has experienced significant gentrification stemming from the construction of the light rail and soccer stadium. Midway residents relayed differing sentiments regarding the changes in the neighborhood, with more affluent white people raising concerns about crime levels, and longtime residents [many of whom are people of color] citing concerns about increased rent prices and greater police presence).

79. See RICH BLOCKS POOR BLOCKS, <https://www.richblockspoortblocks.com/>

factor is not equitable because of the high degree of variability that can occur in small sectors of urban areas.<sup>80</sup>

Subpart seven includes individuals who have participated in the business operation of a farm for at least three years and meet other requirements.<sup>81</sup> This subpart does not appear to address social equity as it relates to cannabis and the effects of its prohibition. Agricultural producers were not disproportionately prosecuted for cannabis-related offenses. It is unclear why farmers were included as part of the social equity provision. Regardless, this subpart serves to exclude actually harmed individuals from benefiting from the social equity program because it increases the number of applicants and competition for SEAs.

As enacted, Minnesota Statutes Chapter 342 failed to narrow the scope of the social equity provision to include only those populations who experienced negative effects resulting from cannabis prohibition, namely the Black community. Black Minnesotans have historically faced the highest levels of prosecution and experienced the most disparate negative outcomes associated with the prohibition of cannabis, especially those related to policing.<sup>82</sup> The focus of a proposed “social equity” provision should have prioritized Black applicants. As it currently stands, the social equity provision does not address the racial disparities it intended to address. Black Minnesotans are not provided a discernible edge in the social equity license lottery when the broad statutory language allows too many individuals to gain SEA status without having experienced harm from cannabis prohibition.

i. The social equity application process presents barriers to access that exclude the Black population.

The application process and materials required for the application are barriers to accessing SEA status, as an individual must possess significant social and financial capital to navigate the complex process.

Applicants with the means to hire a lawyer or who possess education and knowledge about legal principles will fare much better in the application process. There are additional barriers to entry, such as application fees and business plan requirements, that serve to gatekeep

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[<https://perma.cc/THN2-KGHA>] (demonstrating the varying degrees of wealth and income disparity in Minneapolis, Minnesota).

80. *Id.*

81. See MINN. STAT. § 342.17(7) (2024) (stating that an applicant qualifies under subpart seven of the social equity provision if they have “participated in the business operation of a farm for at least three years and currently provide[] the majority of the day-to-day physical labor and management of a farm that had gross farm sales of at least \$5,000 but not more than \$100,000 in the previous year.”).

82. *Criminal Justice Fact Sheet*, *supra* note 21; *see also* 2023 Uniform Crime Report, *supra* note 28.

the process. Though there is no fee for social equity verification, there are still license fees that are required under Chapter 342.<sup>83</sup> These fees can reach up to \$70,000 for certain license types, but for others still range from \$250 to \$2,000.<sup>84</sup> This is often a barrier to entry for individuals who aim to use a cannabis business as a means to accumulate wealth and do not currently have a significant amount of financial capital or savings. Individuals who attempt to apply independently and are ultimately rejected are then worse off financially and are barred from access to the cannabis industry.

Further, the license fees are due to OCM before the business would expect to generate a profit, which may force businesses to pay the fee on credit. Individuals with low socioeconomic status often have poor access to credit and are forced to turn to predatory lending facilities, putting them at an increased risk of incurring insurmountable debt. The social equity program essentially requires applicants to possess financial capital or access to funds. If an applicant does not have ready access to funds, they may exclude themselves from this program or put themselves in a precarious financial position with credit lenders.

The application itself has many components that an average individual may find confusing or require assistance with to assert their qualifications for SEA status adequately. For example, Minnesota's social equity provision requires cannabis business applicants to disclose ownership and control, which includes any true parties of interest.<sup>85</sup> Though this requirement may have administrative value, it inherently requires an understanding of business association law and governance, which requires knowledge that is dependent upon an individual having at least a post-secondary education.<sup>86</sup> Only 33.7% of Black Minnesotans have an Associate degree or higher.<sup>87</sup> With such a small percentage of Black Minnesotans attaining an educational status that likely has familiarity with the idiosyncratic knowledge required to demonstrate business ownership and control, this provision effectively serves to further exclude a portion of the Black population from SEA status.

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83. MINN. STAT. § 342.11 (2024).

84. *Id.*

85. See MINN. STAT. § 342.14, subd. 1(a)(2) (2024).

86. See Thomas Peele, *Study Shows Benefits of Higher Education Beyond dollars and Cents*, EDSOURCE (Aug. 31, 2023), <https://edsource.org/updates/study-shows-benefits-of-higher-education-beyond-dollars-and-cents> [https://perma.cc/93XQ-F74G] (explaining that postsecondary education benefits individuals in all aspects of their lives).

87. See Minnesota Office of Higher Education, EDUCATIONAL ATTAINMENT: A 2023 MINNESOTA MEASURES REPORT 3 (2023), [https://mnmeasures.highered.mn.gov/wp-content/uploads/2024/08/MNMeasures\\_2024-Report\\_EducationalAttainment\\_ADA.pdf](https://mnmeasures.highered.mn.gov/wp-content/uploads/2024/08/MNMeasures_2024-Report_EducationalAttainment_ADA.pdf) [https://perma.cc/EUS4-46XK] (reporting 2024 statistics on adult educational attainments in Minnesota).

Further, Minnesota Statutes Chapter 342 states that an individual “that experienced a disproportionately large amount of cannabis enforcement as determined by the study conducted by the [OCM] . . .” qualifies for SEA status.<sup>88</sup> However, OCM subsequently explained that due to a “lack of relevant data,” the agency was unable to conduct the study on cannabis enforcement levels.<sup>89</sup> The agency website states that “[a]pplicants who believe they meet this criterion may submit a study or report, based on federal or state data on arrests or convictions at the community level, as in the neighborhood or census tract, to OCM. OCM will then evaluate the submitted data to determine if it meets the specified criteria.”<sup>90</sup>

As a consequence of OCM’s failure to conduct the study on disproportionate cannabis enforcement, the onus falls onto the SEA to prove that they qualify. OCM has allowed applicants to submit their own reports based on federal or state data on cannabis arrests and convictions.<sup>91</sup> However, that means that SEAs need to have the knowledge and wherewithal to analyze data and translate that information into a report for OCM to review. This additional burden is a significant threshold to overcome. It also compounds the inequities experienced by applicants with lower social or financial capital. It is contrary to the intent and purpose of social equity to place the responsibility upon the applicants to prove this qualification when the social equity provision is supposed to level the playing field.<sup>92</sup>

Instead, the burdensome requirements make it more difficult for individuals with low socioeconomic status to attain SEA status and compete with applicants who have more resources to invest into their applications. The State of Minnesota requires applicants to provide supplemental information when making determinations regarding the administration of social benefits, like requiring proof of income when determining Supplemental Nutrition Assistance Program (SNAP) eligibility.<sup>93</sup> However, the issue here is that the type of supplemental

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88. See MINN. STAT. § 342.17, subd. (a)(6)(i) (2024).

89. See *Social Equity Qualifications*, MINN. OFF. OF HIGHER EDUC., <https://mn.gov/ocm/businesses/equity-applicants/qualifications.jsp> [https://perma.cc/LE5V-8E4W] (qualifying that the agency was unable to conduct the study they were directed to by statute).

90. *Id.*

91. *Id.*

92. See Halydier, *supra* note 4, at 265–68 (describing the origin of social equity provisions in the context of the 2020 Black Lives Matter protests); see also *Division of Social Equity Overview*, MINN. OFF. OF CANNABIS MGMT, <https://mn.gov/ocm/social-equity/overview/> [https://perma.cc/HJM5-4WHP] (explaining that the Division of Social Equity at OCM works to ensure equity in Minnesota’s cannabis industry).

93. See *Mandatory Verifications-SNAP*, MINNESOTA DEP’T OF HUMAN SERVS., [https://www.dhs.state.mn.us/main/idcplg?IdcService=GET\\_DYNAMIC\\_CONVERSION&Rev](https://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&Rev)

information required by the social equity provision requires resources that the target demographic typically does not have.

#### **IV. Potential Solutions That Would Increase the Effectiveness of the Social Equity Provision and Better Support Black Minnesotans Who Seek to Enter the Legal Cannabis Market.**

##### *A. Legislative Solutions*

###### *i. Amend the Current Statute to Narrow Who May Qualify for Social Equity Applicant Status.*

If the Minnesota Legislature amended the current statute, it could remedy the present statutory gap and effectively designate SEA status to those who were actually harmed by cannabis prohibition. An amendment or change to the present statute could further designate *who* the social equity provision was intended to encompass and clarify agency discretion when OCM makes determinations regarding qualification status. Specifically, if an amendment narrowed the seven factors to only those that were pertinent to Black Minnesotans, the social equity provision would have much more success in its goal of remedying cannabis prohibition harm.<sup>94</sup> Narrowing these subparts is inherently difficult because a significant portion of Minnesota's population falls into several of the "factors" that determine an individual's qualification for SEA status. Therefore, the challenge is to isolate factors that are specific to the Black population.

###### *ii. The Use of Racial Qualifiers Within An Amended Statute Will Bring Legal Challenges.*

However, codifying racially-based qualifications presents a new set of legal concerns. The Students for Fair Admissions decisions at the University of North Carolina and Harvard University set a dangerous precedent for social equity programs that seek to repair harms that inherently fall along racial lines.<sup>95</sup> If race-based admissions are unconstitutional, then the logical next step is to find that race-based social

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isionSelectionMethod=LatestReleased&dDocName=cm\_00101802  
[<https://perma.cc/4RQ5-YACU>].

94. See generally MINN. STAT. § 342.17 (2024) (demonstrating the current criteria employed by Minnesota's social equity provision).

95. See generally Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023) (holding that race-based affirmative action programs violate the Equal Protection Clause of the Fourteenth Amendment); Students for Fair Admissions, Inc. v. Univ. of N.C., LEXIS 169181 (2019) (explaining that the Supreme Court held that race-based factors for college admission determination violated the Equal Protection Clause of the Fourteenth Amendment).

programs are unconstitutional. The Fourteenth Amendment's Equal Protection Clause should be interpreted to bolster diversity in spaces that non-diverse individuals have predominantly occupied.<sup>96</sup> This rings true for college admissions and other social programs where diversity is needed to support equitable outcomes for all individuals.<sup>97</sup>

It is much more challenging to undo the historic, racialized, policing and prosecution efforts of cannabis-related crimes and provide more equitable opportunities for both licensing and diversity than to allow diversity, equity, and inclusion efforts to support underserved populations.<sup>98</sup> Race-based college admissions work in the same way as social programs like the social equity provision, which is available to all potential cannabis business license applicants for Minnesota's program.<sup>99</sup> The rulings in these cases could have devastating effects on Black applicants seeking enrollment in programs like the cannabis social equity program and on future Black Minnesotans who could undoubtedly benefit from an increase in diversity within the cannabis industry.

### iii. Increase OCM's Agency Discretion to Determine Who May Qualify for Social Equity Applicant Status.

The Minnesota Legislature should have tasked OCM with developing the social equity provision and the associated qualifying factors. If the Legislature delegated rulemaking authority to OCM, the agency could adopt rules that align with the intent of the social equity provision, thereby increasing equity in the cannabis licensing process.<sup>100</sup> As an agency dedicated to cannabis management in Minnesota, OCM is better positioned to determine the qualifying factors for SEA status.<sup>101</sup> OCM has

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96. See Peder Humlen, *Promoting Equal Protection and Regulatory Remedies for Balanced Civic Education*, 14 CIVIC ENGAGEMENT, JUST. & L. NAT'L & INT'L CONTEXT, 1, 15 (2025). See generally U.S. CONST. AMEND. XIV (establishing equal protection under the law as a constitutional requirement. The Fourteenth Amendment supports programs like Minnesota's social equity verification process under the Equal Protection Clause because there are valid reasons to give SEAs an advantage toward entering the cannabis industry).

97. See Jason M. Scott, *The Imperative to Promote Diversity Post-Students for Fair Admissions Analyzing the Effects of Student-Body Diversity on Attrition, GPA, and Bar Passage in Law Students and Graduates*, 96 J. HIGHER EDUC. 596 (2025) ("[S]tudents of all races and institutional selectivity levels in the sample who were exposed to more diverse learning environments had better odds of earning licensure to practice law.").

98. See generally Kilmer et al., *supra* note 61 (discussing opportunities and challenges associated with various proposals for social equity programs).

99. See Leanne Salazar Montoya, *Equity, Diversion, and Inclusion: What's In a Name?*, 22 SEATTLE J. SOC. JUST. 621, 628 (2024) (stating that diversity, equity, and inclusion efforts "foster[] environments that are inherently more inclusive, culturally aware, and adept at responding to the diverse needs of students, thereby enriching the educational landscape.").

100. See Jody Freeman & Jim Rossi, *Improving Interagency Coordination in Shared Regulatory Space*, 38 ADMIN. & REG. L. NEWS 1134, 1135 (2013) (explaining that there are distinct benefits to "harness[ing] the expertise and competencies of specialized agencies.").

101. *Id.*; see also Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency*

resources to research the effects of cannabis prohibition and which populations were most negatively impacted.<sup>102</sup> OCM could compile data and its research to develop qualifying factors that would have a significant impact on the population most harmed by cannabis prohibition—the Black population.

Concerns about agency overreach or lack of oversight if the social equity provision were to be drafted by OCM instead of following the traditional lawmaking procedure fall short. Legislatures frequently rely on agencies to draft more technical or specific provisions of statutes. Agency rulemaking in Minnesota is a multi-step process that involves multiple public comment periods, the use of an advisory committee, and Administrative Law Judge review to determine whether the proposed rules are needed and reasonable.<sup>103</sup> These steps provide a “check” on the agency to develop well-written, appropriate rules and allow for additional feedback. Through its agency rulemaking power, OCM presently cannot adopt rules that contradict the social equity provision without overstepping its rulemaking authority, as statutes maintain supremacy over agency rules.<sup>104</sup> The Legislature would need to amend or repeal the existing social equity provision and then direct OCM to adopt rules governing a new provision.

#### *B. Non-Legislative Solutions*

##### i. Develop Social Programs That Assist Black Cannabis Business License Applicants with the Application and Financial Barriers.

If better outcomes and equity for Black cannabis business license applicants cannot be achieved through legislative means, perhaps social programs that work alongside the governing statute could be implemented to alleviate some of the burdens and barriers to access that exist for Black applicants. A social program could offer services that assist with filling out the application form, creating business plans, and

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*Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2023 (2015) (“[T]he basic concept that the agencies should preside over specialized information is hard-wired into the design of the administrative state.”).

102. See 2026-2027 Enacted Biennial Budget, MINNESOTA MGMT. AND BUDGET, <https://mn.gov/mmb/budget/current-budget/current-enacted-budget/> [<https://perma.cc/7NBH-N6CT>].

103. See *Rulemaking*, OFF. OF THE MINNESOTA SEC'Y OF STATE <https://www.sos.state.mn.us/about-the-office/rulemaking-data-practice/rulemaking/> [<https://perma.cc/GN8U-2J2L>].

104. See MINN. STAT. § 14.45 (2024); see also *Wangen v. Comm'r of Pub. Safety*, 437 N.W.2d 120, 124 (Minn. Ct. App. 1989) (citing *Guerrero v. Wagner*, 246 N.W.2d 838, 841 (Minn. 1976)) (stating that “a rule must be consistent with the statutory authority under which it was promulgated” in order to be valid).

completing other administrative tasks that may require advanced skills or niche understanding. This would ensure that Black applicants are able to submit a complete and effective application to be reviewed by OCM. A program could also offer grants or scholarships that provide assistance with the application fees for applicants who demonstrate financial need as a barrier to the application process.

A program such as this could greatly reduce the number of applications rejected due to incomplete or inadequate information, thus directly bolstering the effectiveness of the social equity provision for Black applicants. It could also increase the number of applications OCM receives from Black applicants, explicitly providing more equality within the social equity program.

This proposed program could be operated privately or through the state, with delegation of funds for social equity application fee grants allocated by the Minnesota Legislature. However, a state-run, race-based social program would likely be subject to constitutional legal challenges as discussed above. A privately-run program would have greater opportunity and leeway to make a significant positive impact, as it likely would not face as many legal obstacles in its implementation. Without state funding, the program would require significant financial capital to undertake the operation and execution of the program's services and scholarship opportunities. However, similar, privately-run nonprofits have found success in their missions. Black Men Teach is a Minnesota-based nonprofit organization that provides educational services and funding to Black men seeking careers in the education profession.<sup>105</sup> Accordingly, a program for Black social equity cannabis business applicants could work to achieve the ultimate goal of the social equity provision and address some of the harms the Black community has experienced.

### Conclusion

The Minnesota Legislature intended to create a plan that would bolster those adversely affected by cannabis prohibition, but failed in its execution. The Minnesota Legislature should have provided language that would qualify the Black population in the statute and made the application process equitable or given OCM rulemaking authority to write qualifying factors that would most benefit Black Minnesotans. With the

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105. See *Black Men Teach Empowering the Growth of Black Male Teachers*, BLACK MEN TEACH at 3 <https://www.blackmenteach.org/annual-report-2024/page-3> [<https://perma.cc/NFQ2-EGDM>] (explaining that the Black Men Teach organization's mission is to address the lack of representation of Black male teachers in Minnesota by offering "programs, partnerships, and supports designed to recruit, prepare, place, and retain Black male teachers in elementary schools.").

current version of the social equity provision, the system can be exploited by those with power to find loopholes in the law, gain special application status, and ultimately marginalize Black Minnesotans once again. Social programs could be introduced to assist Black applicants with the application process, which could help applicants overcome some of the barriers to access.

The Minnesota Legislature failed to incorporate feedback related to issues present in other states' social equity provisions that would have improved and increased equitable outcomes. Other states have attempted to implement social equity provisions, but have largely failed. The Minnesota Legislature should have taken note of the critiques of other states' social equity attempts. Instead, it missed the opportunity to enact a more effective social equity statute. The Minnesota Legislature is grandstanding the impacts of this legislation when, in reality, the progressive outcomes for the intended communities will be minimal. As other states across the United States legalize cannabis, their legislatures should examine the challenges Minnesota has faced regarding an equitable implementation of the social equity provision and implement solutions that will benefit Black communities and start to repair the harms associated with cannabis prohibition.



## Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic

*JLI* Vol. 39 Editorial Board<sup>1</sup>

“(The police) are a very real menace to every black cat alive in this country. And no matter how many people say, ‘You’re being paranoid when you talk about police brutality’—I know what I’m talking about. I survived those streets and those precinct basements and I know. And I’ll tell you this—I know what it was like when I was really helpless, how many beatings I got. And I know what happens now because I’m not really helpless. But I know, too, that if he (police) don’t know that this is Jimmy Baldwin and not just some other nigger<sup>[2]</sup> he’s gonna blow my head off just like he blows off everybody else’s head. It could happen to my mother in the morning, to my sister, to my brother . . . [.] For me this has always been a violent country—it has never been a democracy.” – James Baldwin<sup>3</sup>

“Fuck Tha Police,”<sup>4</sup> rapped the revered American hip-hop group N.W.A from Compton, California in their seminal debut studio album, “Straight Outta Compton.”<sup>5</sup> In six short minutes, Emcees Ice Cube, Ren, and Eazy-E, serve as effective prosecutors—with Dr. Dre presiding as a

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1. The *Minnesota Journal of Law & Inequality*’s (*JLI*) editorial board includes both the editors and the staff members. The article was drafted by Anna Berglund, Articles Editor; Sam Brower, Lead Online Editor; Abigail Hanson, Lead Managing Editor; Navin Ramalingam, Editor-in-Chief; and one more Editor. Thanks to Jen Davison, Lead Articles Editor, for her feedback; Abby Rauls, Executive Editor, and Hillary Richard, Staff Member, for their inputs. Thanks are also due to Adam Johnson and Chris Lund, Online Editors, for their help editing this article. Thanks, most of all, to *JLI* for providing a space for all us to come together, learn, and advocate for much-needed legal reform in this country.

2. *JLI*’s Vol. 39 does not have a single Black Editor. *JLI* acknowledges its own role in perpetuating racial inequality by not having Black voices in positions of power within the Journal. *JLI* strives to diversify its membership, authorship, and readership, and has measurable goals to achieve these objectives in the next few years. We chose to publish the n-word unredacted because it was part of a Baldwin quote. We do not possess the intellectual chutzpah to edit or censor a quote by James R. Baldwin. Not redacting the word while providing this context is our best solution to make peace with these competing tensions.

3. See Liz Kaufman, *6 James Baldwin Quotes About Race*, PBS: AM. MASTERS (Aug. 4, 2020), <https://www.pbs.org/wnet/americanmasters/6-james-baldwin-quotes-race/15142/> [perma.cc/73KR-SE49] (quote from Baldwin’s 1969 interview on the Dick Cavett Show).

4. N.W.A., *Fuck tha Police*, on STRAIGHT OUTTA COMPTON (Universal Music Grp., Ruthless Records, Priority Records 1988).

5. *Id.*; see also Preezy Brown, *Tale of the Tape: N.W.A.’s “Fuck Tha Police”*, REVOLT (Feb. 21, 2019), <https://www.revolt.tv/2019/2/21/20824193/tale-of-the-tape-n-w-a-s-fuck-tha-police> [perma.cc/T3ZS-B8XY].

judge in the case of *N.W.A. v. The Police Department*<sup>6</sup>—against the Los Angeles Police Department (LAPD) for possessing the “authority to kill a minority.”<sup>7</sup> The LAPD, like police departments in other American cities,<sup>8</sup> had a notorious reputation for corruption,<sup>9</sup> using excessive force, racial profiling, and harassing minority communities in the Greater Los Angeles area.<sup>10</sup> While some citizens<sup>11</sup> and the police<sup>12</sup> gave it their all to curb the

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6. *N.W.A.*, *supra* note 4, at 0:08.

7. *Id.* at 0:38. See also “*Fuck Tha Police*”, *N.W.A.*, CLARKU: HIP-HOP & POLITICS, <https://wordpress.clarku.edu/musc210-hhp/hip-hop-culture-politics-exploring-the-narrative-and-power-of-rap-lyrics/fuck-tha-police-n-w-a/> [perma.cc/AHL7-LFHD]; Kory Grow, *How N.W.A.’s ‘Fuck tha Police’ Became the ‘Perfect Protest Song’*, ROLLING STONE (June 9, 2020), <https://www.rollingstone.com/music/music-features/nwa-fuck-tha-police-protest-song-1010355/> [perma.cc/44RE-SLW3].

8. See, e.g., CLARENCE TAYLOR, FIGHT THE POWER: AFRICAN AMERICANS AND THE LONG HISTORY OF POLICE BRUTALITY IN NEW YORK CITY (2018); Hollie A Teague, *Black and Blue in North Texas: The Long-Neglected History of Anti-Black Police Violence in North Texas, 1880-1930*, 49 J. BLACK STUD. 756 (2018); Safia Samee Ali, *George Floyd’s Death a Painful Reminder of Chicago’s History of Police Brutality*, NBC NEWS (June 3, 2020), <https://www.nbcnews.com/news/us-news/george-floyd-s-death-painful-reminder-chicago-s-history-police-n1224076> [perma.cc/NV43-TMMN]; Arun Rath, *Looking Back on Police Brutality and Racism in Boston*, GBH NEWS (June 14, 2020), <https://www.wgbh.org/news/local-news/2020/06/14/looking-back-on-police-brutality-and-racism-in-boston> [perma.cc/H5AX-2C7S]; Rebecca Gordon, *San Francisco’s Police Problem*, THE NATION (Feb. 23, 2016), <https://www.thenation.com/article/archive/san-franciscos-police-problem/> [perma.cc/ZY4H-YQZZ]; Levi Pulkkinen, *Feds: Seattle Police Show ‘Pattern of Excessive Force’*, SEATTLEPI (Dec. 16, 2011), <https://www.seattlepi.com/local/article/Feds-findings-in-Seattle-Police-abuse-2407378.php> [perma.cc/3FXM-KXH]; Radley Balko, *Albuquerque’s Long History of Police Abuse, Cover-Up, and Scandal*, WASH. POST (Apr. 14, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/04/14/albuquerque-s-long-history-of-police-abuse-cover-up-and-scandal/> [perma.cc/DX46-75WX].

9. See *Rampart Scandal Timeline*, PBS: FRONTLINE (May 2001), <https://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> [perma.cc/368W-BJ2D].

10. See Karen Grigsby Bates, *‘It’s Not Your Grandfather’s LAPD’—and That’s a Good Thing*, NPR: CODE SWITCH (Apr. 26, 2017), <https://www.npr.org/sections/codeswitch/2017/04/26/492848045/-it-s-not-your-father-s-lapd-and-that-s-a-good-thing> [perma.cc/F9PS-T8H5]; Peter J. Boyer, *Bad Cops*, NEW YORKER (May 13, 2001), <https://www.newyorker.com/magazine/2001/05/21/bad-cops> [perma.cc/685P-4MQS]; Sara Kate, *The 12 Biggest LAPD Screw-Ups of All Time*, RANKER (Sept. 18, 2020), <https://www.ranker.com/list/the-13-biggest-lapd-screw-ups-of-all-time/sarakate> [perma.cc/87DP-EG44].

11. See Rich Goldstein, *A Brief History of the Phrase ‘F\*ck the Police’*, DAILY BEAST (Apr. 24, 2017), <https://www.thedailybeast.com/a-brief-history-of-the-phrase-fck-the-police> [perma.cc/52MD-852U] (describing how the album *Straight Outta Compton* was among the first to receive a Parental Advisory sticker after advocacy from the group Parents Music Resource Center).

12. See Steve Knopper, *The True Story of N.W.A. Playing “Fuck Tha Police” Live in Detroit*, GQ (July 21, 2020), <https://www.gq.com/story/nwa-fuck-the-police-live-detroit> [perma.cc/7C3S-CYBB]; *Fuck Tha Police*”, *N.W.A.*, CLARKU, *supra* note 7 (citing a letter from the Assistant Dir. of the FBI Off. of Pub. Affairs to Priority Records); Kory Grow, *N.W.A.’s ‘Straight Outta Compton’: 12 Things You Didn’t Know*, ROLLING STONE (Aug. 8, 2018), <https://www.rollingstone.com/feature/n-w-as-straight-outta-compton-12-things-you->

popularity of the track, the song, the album, and the hip-hop group themselves would go on to achieve blockbuster status. In the summer of 2020, after the brutal killing of George Floyd<sup>13</sup>—an unarmed Black man—by a police officer<sup>14</sup> with the Minneapolis Police Department (MPD), the popularity of the thirty-two-year old anti-police-brutality anthem skyrocketed.<sup>15</sup> The very existence of an audio track called “Fuck Tha Police” and its enduring and unwavering appeal among large swaths of Americans over multiple decades perfectly encapsulates the story of modern American policing, especially its relationship to racial and ethnic minority groups in the United States.

In four sections, this Article (1) looks at the history of policing in the United States and the city of Minneapolis; (2) surveys the ineffective internal reforms the MPD and the City have undertaken over the past few decades; (3) proposes urgent and effective responses to prevent the deaths of Black Americans, like Floyd, and other racial and ethnic minorities at the hands of the MPD; and (4) concludes why refunding the community, by defunding the MPD, is a pragmatic and timely response to the MPD killing Black and Brown Minnesotans.

## I. The True History of Policing in the United States and Minneapolis

This past summer, Americans and people around the world watched in horror as pictures and videos of police officers in heavily militarized gear and war-time weapons subjected peaceful protestors across the United States to extraordinary violence.<sup>16</sup> The scale and

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didnt-know-707207/ [perma.cc/S6JF-L46Z] (“Law enforcement flat out refused to protect N.W.A. on tour,” and “[t]heir contract forbade them from performing ‘Fuck tha Police’ and ‘Straight Outta Compton’ . . . but they chose to do so anyway . . .”).

13. See Evan Hill, Ainara Tiefenthaler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [perma.cc/2M5M-VUXL].

14. See Doha Madani, *Derek Chauvin, Ex-officer Charged with Murder in George Floyd Case, Released on \$1M Bond*, NBC NEWS (Oct. 7, 2020), <https://www.nbcnews.com/news/us-news/derek-chauvin-ex-officer-charged-murder-george-floyd-case-released-n1242433> [perma.cc/NFL7-UCK4].

15. See Jonathan Bernstein, *Streams of N.W.A.’s ‘F—k tha Police’ Nearly Quadruple Amid Nationwide Protests*, ROLLING STONE (June 3, 2020), <https://www.rollingstone.com/music/music-news/fuck-tha-police-streams-protest-songs-george-floyd-1009277/> [perma.cc/UD5Y-6ET8]; Charlotte Krol, *Streams of N.W.A.’s “Fuck Tha Police” Grow by 272 per Cent amid George Floyd Protests*, NME (June 3, 2020), <https://www.nme.com/news/music/streams-of-n-w-a-as-fuck-tha-police-grow-by-272-per-cent-amid-george-floyd-protests-2681270> [perma.cc/R2SP-GZPM].

16. See Shawn Hubler & Julie Bosman, *A Crisis that Began with an Image of Police Violence Keeps Providing More*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> [perma.cc/8T9W-A5SF]; Daniel Politi, *Activists Create Public Online Spreadsheet of Police*

intensity of violence the police inflicted upon Americans exercising their constitutionally-protected first amendment rights begged the question—exactly *who* are these police officers sworn to “protect and serve?”<sup>17</sup> Any meaningful survey tracing the roots of modern American policing begins with its relationship to that purported North Star of American prosperity<sup>18</sup>—private property.<sup>19</sup>

The first documented death of Black men by law enforcement in what would become the United States happened in 1619 when a Dutch slave ship landed in Virginia.<sup>20</sup> Enslaved Africans aboard the ship were killed “because of overcrowding, unsanitary conditions, and inadequate provisions on the ships.”<sup>21</sup> Their situation did not improve after they landed.<sup>22</sup> The highly impactful Barbadian Slave Codes,<sup>23</sup> used by the British “to justify the practice of slavery and legalize the planters’ inhumane treatment of their enslaved Africans,” inspired American colonies to draft their own slave codes.<sup>24</sup> The first of these codes, drafted by Maryland and Virginia, defined enslaved people as “piece[s] of

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Violence Videos, SLATE (June 6, 2020), <https://slate.com/news-and-politics/2020/06/george-floyd-public-spreadsheet-police-violence-videos.html> [perma.cc/63PG-MHSW]; Taylor Lorenz, *People Can’t Stop Watching Videos of Police and Protesters. That’s the Idea.*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/02/style/police-protests-video.html> [perma.cc/Q8SZ-9AF5]; Jay Corbett, *2020 George Floyd Protests – Police Brutality Compilation – The 29th of May to the 2nd of June*, YouTube (June 5, 2020), <https://www.youtube.com/watch?v=Dn6pAOIjgQg>.

17. See Jeremiah P. Johnson, *A Hippocratic Oath for Policing*, NAT'L POLICE FOUND., <https://www.policefoundation.org/a-hippocratic-oath-for-policing/> [perma.cc/Q66F-VPB] (discussing Professor David Kennedy’s proposal for a Hippocratic Oath in policing).

18. See Roger Pilon, *16. Property Rights and the Constitution*, in CATO HANDBOOK FOR POLICY MAKERS (8th ed. 2017), [https://www.cato.org/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution](https://www.cato.org/cato-handbook-policy-makers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution) [perma.cc/8AN6-8TQJ] (referring to property as “the foundation of all rights” in American law).

19. See Jack Hurbanis, *History of Policing in America: Starts and Ends with Protecting Private Property*, WUWM 89.7 (June 2, 2020), <https://www.wuwm.com/podcast/spotlight/2020-06-02/history-of-policing-in-america-starts-and-ends-with-protecting-private-property#stream/0> [perma.cc/YRV3-B2JV].

20. Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint from January 1, 2015, Through December 31, 2015*, 48 J. BLACK STUD. 551, 552 (2017).

21. *Id.*

22. Mary Elliott & Jazmine Hughes, *Four Hundred Years After Enslaved Africans Were First Brought to Virginia, Most Americans Still Don’t Know the Full Story of Slavery*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html?mtref=undefined&assetType=REGIWALL&mtrref=www.nytimes.com&gwh=2AB56260100AE928A4AE9A12CB77E790&gwt=regi&assetType=REGIWALL> [perma.cc/KX95-MDTU].

23. See Sir Hilary Beckles, *On Barbados, the First Black Slave Society*, BLACK PERSPECTIVES (Apr. 8, 2017), <https://www.aaibs.org/on-barbados-the-first-black-slave-society/> [perma.cc/92Bj-683K].

24. Robinson, *supra* note 20, at 552–53.

property" possessing no human rights, unlike their White owners.<sup>25</sup> The enslaved essentially had the same "status of farm animals or chattel."<sup>26</sup> While Americans enslaved the Africans starting in the early seventeenth century, the history of modern policing itself goes back to thirteenth-century England.

William Blackstone, the eighteenth-century English lawyer, jurist, author of "Commentaries on the Laws of England," and Tory politician the American common law judges love to love,<sup>27</sup> called the modern police's predecessors King's men.<sup>28</sup> These men kept the "king's peace" since as early as the thirteenth century.<sup>29</sup> Even after Americans overthrew the king—with Thomas Paine famously proclaiming "the law is king"<sup>30</sup>—Americans retained the King's men. Since the thirteenth century, the constable, an officer of the King's court, was aided by a group called the "watch."<sup>31</sup> The watch was composed of able-bodied adult male volunteers from the community who alerted authorities when there was trouble and operated mostly at night.<sup>32</sup> In the early American colonies, these watches streamlined. Boston, New York, and Philadelphia formed their official night watches in the seventeenth century and their day watches in the early nineteenth century.<sup>33</sup> The goal of these watches was to "warn of impending danger" including activity that would break the law.<sup>34</sup> In the early colonies, and up until the mid-nineteenth century, slavery was legal in large parts of the United States.<sup>35</sup> This meant that any action that subverted slavery, like escaping it, was *breaking the law*.

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25. *Id.* at 552.

26. *Id.*

27. See Greg Bailey, *Sir William Blackstone in America*, VARSITYTUTORS, <https://www.varsitytutors.com/earlyamerica/early-america-review/volume-2/sir-william-blackstone-in-america> [perma.cc/LYL5-SGZ7]; cf. Neal Devins & David Klein, *The Vanishing Common Law Judge?*, 165 U. PENN. L. REV. 595 (2017).

28. Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police> [perma.cc/CZP2-T6EY].

29. *Id.*

30. *Paine on the Idea that the Law Is King* (1776), LIBERTY FUND: ONLINE LIBR. OF LIBERTY, <https://oll.libertyfund.org/quote/paine-on-the-idea-that-the-law-is-king-1776> [perma.cc/VU6F-J3QK].

31. Gary Potter, *The History of Policing in the United States, Part 1*, E. KY. UNIV.: POLICE STUD. ONLINE (June 25, 2013), <https://plsonline.eku.edu/insidelook/history-policing-united-states-part-1> [perma.cc/9J9H-W34N].

32. Lepore, *supra* note 28; Potter, *supra* note 31.

33. GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES 2* (2013), <https://plsonline.eku.edu/sites/plsonline.eku.edu/files/the-history-of-policing-in-us.pdf> [perma.cc/7EB6-RUEU].

34. *Id.*

35. See *American Slavery: Separating Fact from Myth*, THE CONVERSATION (June 19, 2017), <https://theconversation.com/american-slavery-separating-fact-from-myth-79620> [perma.cc/X9MU-VNQ8].

*A. Modern American Policing is a Loyal Descendant of the  
Original Slave Patrols*

"It was part of my business to arrest all slaves and free persons of color who were collected in crowds at night, and lock them up. It was also part of my business to take them before the Mayor. I did this without any warrant, and at my own discretion. Next day they were examined and punished. The punishment is flogging. I am one of the men who flog them. They get not exceeding thirty-nine lashes. I am paid 50 cents for every negro I flog. The price used to be sixty-two and a half cents. I am paid fifty cents for every negro I arrest, and fifty cents more if I flog him. I have flogged hundreds. I am often employed by private persons to pursue fugitive slaves. I have been thus employed since 1838. I never refuse a good job of that kind." - John Capeheart, Norfolk, Virginia's Constable<sup>36</sup>

"... the paddy rollers would come an' horse whip every las' one of 'em, jes' cause poor souls were praying to God to free 'em from dat awful bondage." - Minnie Fulkes, formerly enslaved, Work Projects Administration interview, March 5, 1937<sup>37</sup>

Historian Jill Lepore argues slavery is "not a rule of law . . . [but] a rule of police."<sup>38</sup> Policing in the early United States followed two distinct but ultimately complementary approaches in the North and the South.<sup>39</sup> In the South, following the adoption of the aforementioned slave codes, slave patrols were formed in the early eighteenth century, the first one in the Carolinas in 1704.<sup>40</sup> The enslaved Africans called the slave patrols "patrollers," "patty rollers," or "paddy rollers" who used what would eventually become known as "paddy wagons," an older version of the modern-day police van, to scour the counties for the runaway enslaved.<sup>41</sup> These slave patrols were formed under state laws, organized by counties,

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36. SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 83 (First Harvard University Press paperback ed. 2003) (2001).

37. Lincolnquakers, *Loudon County and the Paddy Rollers*, NEST OF ABOLITIONISTS (Sept. 9, 2020), <https://lincolnquakers.com/2020/09/09/loudoun-county-and-the-paddy-rollers/> [perma.cc/VRA2-NYTT].

38. Lepore, *supra* note 28.

39. See *The Racist Roots of American Policing: From Slave Patrols to Traffic Stops*, THE CONVERSATION (June 4, 2019), <https://theconversation.com/the-racist-roots-of-american-policing-from-slave-patrols-to-traffic-stops-112816> [perma.cc/8HDR-PZ5H].

40. POTTER, *supra* note 33, at 3.

41. Shem El, *From Slave Patrols to Paddy Wagons*, MOORISH AM. NEWS (May 2, 2015), <http://moorishamericannews.com/from-slave-patrols-to-paddy-wagons> [perma.cc/LGR2-YBKH].

and bankrolled by taxes.<sup>42</sup> The same slave patrols would go on to inspire the Ku Klux Klan's "night riders" after the end of the Civil War in 1865.<sup>43</sup>

Following the Carolinas, the other southern colonies, Virginia, Tennessee, Georgia, and, after independence, states such as Kentucky, all formed slave patrols in the eighteenth century to protect the properties of White slave owners.<sup>44</sup> These laws were further strengthened following the slave revolts led by Abolitionists like Nat Turner, Gabriel Prosser, and Denmark Vesey in the early nineteenth century.<sup>45</sup> The goals of these slave patrols were multifold: (1) apprehend the runaway enslaved; (2) provide organized terror to deter revolt by the enslaved; and (3) maintain extra-judicial discipline for enslaved workers.<sup>46</sup> These slave patrols shed light on not only the origins of American law enforcement but also its primary motive—"the need to police enslaved Africans and control the behavior of Black people."<sup>47</sup>

Though slave patrols originated in the Southern states, Northern states are not off the hook for their own contributions. Northern states like New York and Connecticut passed laws controlling the enslaved who escaped from the South to the Northern states.<sup>48</sup> The Northern States also helped Congress pass Fugitive Slave Laws in 1793—which were strengthened again in 1850—that "allowed for runaway enslaved Africans to be returned to their owners."<sup>49</sup>

In the early nineteenth century, American cities experienced huge population growth through immigration and industrialization.<sup>50</sup> Industrialization also increased urbanization.<sup>51</sup> Although public disorder—public drunkenness and prostitution—seemed to have increased with swift urbanization, "evidence of an actual crime wave [was] lacking."<sup>52</sup> But this did not stop the "emerging commercial elite"<sup>53</sup> nativists<sup>54</sup> from using the fear of purported "outsiders"—mostly immigrants and Blacks—to whip up fear and establish "a mechanism to

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42. *Loudon County and the Paddy Rollers*, *supra* note 37.

43. *Id.*

44. Robinson, *supra* note 20, at 553.

45. *Id.*

46. POTTER, *supra* note 33, at 3.

47. Robinson, *supra* note 20, at 533.

48. *Id.*

49. *Id.* at 533–34.

50. Lepore, *supra* note 28.

51. See Stuart M. Blumin, *Driven to the City: Urbanization and Industrialization in the 19th Century*, COLLEGE BD.: AP CENTRAL, <https://apcentral.collegeboard.org/series/america-on-the-world-stage/urbanization-industrialization-nineteenth-century> [perma.cc/7LY4-XD56].

52. POTTER, *supra* note 33, at 3.

53. *Id.* at 4.

54. Lepore, *supra* note 28.

insure a stable and orderly work force, a stable and orderly environment for the conduct of business, and the maintenance of what they referred to as the 'collective good.'"<sup>55</sup> Around the same time, starting in the early 1830s, almost every major American city—Boston, New York City, Albany, Chicago, New Orleans, Cincinnati, Philadelphia, Newark, and Baltimore—had established centralized, bureaucratic police forces.<sup>56</sup> Professor Michael A. Robinson of the University of Georgia argues that the goal of early police departments was "to protect the financial interest of the wealthy, much like the slave patrols protected financial interests of enslaved African owners."<sup>57</sup>

While early policing in America targeted and terrorized enslaved Black people, early policing efforts also took aim at other non-White populations. Indigenous communities were forcibly moved and held indefinitely in military detention, including at Minnesota's Fort Snelling Concentration Camp, which held over 1,600 Dakota people during the winter of 1862–63.<sup>58</sup> It is estimated that up to 300 Dakota detainees died in the camp.<sup>59</sup> The Texas Rangers reorganized shortly after in the 1870s to address the pressing "native question."<sup>60</sup> More recently, in 2016–2017, law enforcement officers in North Dakota inflicted extraordinary violence against Native water protectors at Standing Rock.<sup>61</sup> Over 300 police-inflicted injuries were reported among those protesting the Dakota Access Pipeline.<sup>62</sup>

Although slave patrols were formally dissolved after the Civil War, the formerly enslaved promptly came under the Black Codes.<sup>63</sup> These Codes restricted where Black Americans could travel and live, and were brutally enforced by the newly formed police departments in both the North and the South.<sup>64</sup> The Black Codes were followed by (1) the Jim Crow laws (a "new kind of slave code");<sup>65</sup> (2) the emergence of state police

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55. POTTER, *supra* note 33, at 4.

56. *Id.* at 2–3.

57. Robinson, *supra* note 20, at 555.

58. *The US-Dakota War of 1862*, HISTORIC FORT SNELLING, <https://www.mnhs.org/fortsnelling/learn/us-dakota-war> [perma.cc/986Y-UUV6].

59. *Id.*

60. Andrew R. Graybill, Rangers, Mounties, and the Subjugation of Indigenous Peoples, 1870–1885, *GREAT PLAINS QUARTERLY*, Spring 2004, at 82, 83.

61. See Julia Carrie Wong & Sam Levin, *Standing Rock Protesters Hold Out Against Extraordinary Police Violence*, *THE GUARDIAN* (Nov. 29, 2016), <https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation> [perma.cc/9VVD-FHX2].

62. *Id.*

63. *Racist Roots of American Policing*, *supra* note 39; *Jim Crow Laws*, HISTORY.COM (Mar. 26, 2021), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [perma.cc/FE4A-9RUG].

64. *Racist Roots of American Policing*, *supra* note 39.

65. Lepore, *supra* note 28.

forces and union busting<sup>66</sup>—a proud American tradition<sup>67</sup>—during the Progressive Era; (3) the bipartisan “War on Crime” led by Presidents Lyndon Johnson and Richard Nixon;<sup>68</sup> and (4) the 1990s’ so-called Tough-on-Crime bills.<sup>69</sup> Lepore succinctly articulates the vicious cycle of the self-fulfilling prophecy that is the policing of Black Americans in the United States:

Police patrolled Black neighborhoods and arrested Black people disproportionately; prosecutors indicted Black people disproportionately; juries found Black people guilty disproportionately; judges gave Black people disproportionately long sentences; and, then, after all this, social scientists, observing the number of Black people in jail, decided that, as a matter of biology, Black people were disproportionately inclined to criminality.<sup>70</sup>

Today, there are approximately eighteen thousand law-enforcement agencies or police departments in the United States.<sup>71</sup> Between them, they have nearly seven hundred thousand police officers. These agencies have received more than “seven billion dollars’ worth of surplus military equipment” from the Pentagon in the past two decades.<sup>72</sup> In its treatment of its Black population, especially through its police force, Minneapolis is no different from any other major American city.

#### *B. Minneapolis—A Unique American Subculture Yet All Too Common American Policing Problems*

“Would [the killing of Philando Castile by an officer in a suburb of St. Paul] have happened if those passengers, the driver and the passengers, were white? I don’t think it would have. So, I’m forced to confront, and I think all of us in Minnesota are forced to confront, that this kind of racism exists and that it’s incumbent upon all of us to vow that we’re going to do whatever we can to see that it doesn’t happen, doesn’t continue to happen.” - Governor Mark Dayton of Minnesota,

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66. See Frank Olito, *Photos Show How Policing Has Evolved in the US Since Its Beginnings in the 1600s*, INSIDER (Apr. 26, 2021), <https://www.insider.com/history-of-police-in-the-us-photos-2020-6> [perma.cc/8KMU-LTAY].

67. See G. William Domhoff, *The Rise and Fall of Labor Unions in the U.S., WHO RULES AMERICA?* (Feb. 2013), [https://whorulesamerica.ucsc.edu/power/history\\_of\\_labor\\_unions.html](https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html) [perma.cc/J43H-KFZ9].

68. See Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), <https://time.com/3746059/war-on-crime-history/> [perma.cc/LMF6-JWTT].

69. See Ed Chung, Betsy Pearl & Lea Hunter, *The 1994 Crime Bill Continues to Undercut Justice Reform—Here’s How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019), <https://www.americanprogress.org/issues/criminal-justice/reports/2019/03/26/467486/1994-crime-bill-continues-undercut-justice-reform-heres-stop/> [perma.cc/6CLR-33TF].

70. Lepore, *supra* note 28.

71. Robinson, *supra* note 20, at 552.

72. Lepore, *supra* note 28.

July 7, 2016<sup>73</sup>

Minneapolis has long been described as a paradox.<sup>74</sup> It is part of one of the wealthiest metropolitan areas in the country, but this has been primarily true only for its White residents.<sup>75</sup> Minneapolis is a bastion of progressive politics,<sup>76</sup> but is also a racially segregated city despite a history of welcoming refugees and immigrants from all around the world.<sup>77</sup> The current chief of the MPD, as a young lieutenant, once joined a lawsuit filed against his own department for tolerating racism.<sup>78</sup> Only 7 percent of MPD officers live in the city.<sup>79</sup> Some commute from predominantly White suburbs like Anoka or even exurbs like Hudson, Wisconsin.<sup>80</sup> This disparity has worsened in the past two decades after Governor Jesse Ventura signed a law revoking the requirement that Minneapolis and St. Paul police officers live in the cities in which they worked.<sup>81</sup>

Excessive force complaints against the eight-hundred-plus-officer strong MPD are commonplace.<sup>82</sup> Black Americans account for twenty percent of the city's population, but "accounted for more than 60 percent of the victims in Minneapolis police shootings from late 2009 through May 2019."<sup>83</sup> Black Minneapolis are also more likely "to be pulled over, arrested and have force used against them than white residents,"<sup>84</sup> which MPD's own data demonstrates.<sup>85</sup>

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73. PBS NewsHour, *Minn. Governor: Castile Shooting Outcome Would Have Been Different If He Was White*, YOUTUBE (Jul. 7, 2016), <https://www.youtube.com/watch?v=E6Qf7zjYNHc>.

74. Ricardo Lopez, *Minnesota's Decades-Long Failure to Prevent Police Abuse*, NEW YORKER (June 10, 2020), <https://www.newyorker.com/news/news-desk/minnesotas-decades-long-failure-to-confront-police-abuse> [perma.cc/8HMU-EMFA].

75. *Id.*

76. See Matt Furber, John Eligon & Audra D. S. Burch, *Minneapolis Police, Long Accused of Racism, Face Wrath of Wounded City*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2020/05/27/us/minneapolis-police.html> [perma.cc/Q5LC-FUT8].

77. See generally MYRON ORFIELD, Draft, INTEGRATION AND NEO-SEGREGATION IN MINNESOTA (Dec. 2018), [https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/orfield\\_neosegregation\\_draft.pdf](https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/orfield_neosegregation_draft.pdf) [perma.cc/7PDV-BWP3].

78. See Furber et al., *supra* note 76.

79. Jessie Van Berkel & Liz Navratil, *Minnesota Human Rights Department Launches Probe into Minneapolis Police*, STAR TRIB. (June 30, 2020), <https://www.startribune.com/minn-officials-push-for-systems-change-at-minneapolis-police-dept/570958652/> [perma.cc/MPY2-H5E6].

80. Lopez, *supra* note 74.

81. News Release, Representative Rich Stanek, Stanek Residency Freedom Bill Becomes Law (Mar. 15, 1999), <https://www.house.leg.state.mn.us/GOP/goppress/Stanek/0309rsresidency.htm> [perma.cc/XW7A-NN3P].

82. See Furber et al., *supra* note 76.

83. *Id.*

84. *Id.*

85. Joseph Schneider & Alfred Ndungu, *Does the Minneapolis Police Department Traffic*

Today in Minneapolis, Native individuals experience more stops and searches relative to their population frequency.<sup>86</sup> In the U.S., Native Americans are more likely to be killed by the police than any other racial or ethnic group.<sup>87</sup> For those who survive police encounters and end up incarcerated in Minnesota, Native inmates are 1.8 times more likely than their White counterparts to be placed in solitary confinement.<sup>88</sup> Native organizers have rallied against police brutality for many years: The American Indian Movement (AIM) was formed in 1968, in part due to police brutality against Native people in Minneapolis.<sup>89</sup> Minnesota's Native communities continue to protest the state-sanctioned violence against non-White bodies and affirm that Native Lives Matter.<sup>90</sup>

In 2015, an MPD officer killed Jamar Clark, a Black man, claiming that Clark tried to take another officer's weapon.<sup>91</sup> The Hennepin County Attorney, Mike Freeman, declined to press charges, claiming the shooting was justified. In 2016, a suburban police officer fired seven shots and killed Philando Castile, a Black man, in front of Castile's four-year-old daughter, and girlfriend, even after Castile informed the officer he had a licensed gun on his person.<sup>92</sup> In 2018, Thurman Blevins, a Black man, begged two White police officers closing in on him to not shoot him and leave him alone. Blevins was still shot in a fatal encounter captured on camera.<sup>93</sup> Only one percent of complaints against MPD officers "that have been adjudicated since 2012 have resulted in disciplinary action."<sup>94</sup> The only MPD officer to be convicted of an on-duty, fatal shooting was "a Black MPD officer who shot and killed Justine Ruszczyk, a white woman, in

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Stop Data Reveal Racial Bias?, INEQUALITY INQUIRY (Nov. 24, 2020), <https://lawandinequality.org/2020/11/24/does-the-minneapolis-police-department-traffic-stop-data-reveal-racial-bias/> [perma.cc/65SS-KCMG].

86. Matthew Harvey, *Fatal Encounters Between Native Americans and the Police*, FED'L RESERVE BANK OF MINNEAPOLIS (Mar. 25, 2020), <https://www.minneapolisfed.org/article/2020/fatal-encounters-between-native-americans-and-the-police> [perma.cc/99DN-UCL7].

87. *Id.*

88. Andy Mannix & Jeff Hargarten, *Minnesota Sending Black, Native American Prisoners to Solitary Confinement at Higher Rates than Whites*, STAR TRIB. (Jan. 17, 2020), <https://www.startribune.com/minnesota-sending-black-native-american-prisoners-to-solitary-confinement-at-higher-rates-than-whites/567087582/> [perma.cc/6US3-WQXL].

89. See Katrina Phillips, *Longtime Police Brutality Drove American Indians to Join the George Floyd Protests*, WASH. POST (June 6, 2020), <https://www.washingtonpost.com/outlook/2020/06/06/longtime-police-brutality-drove-american-indians-join-george-floyd-protests/> [perma.cc/CBT7-A3W3].

90. *Id.*

91. See Lopez, *supra* note 74.

92. *See id.*

93. Barbara Marcolini, *Minneapolis Police Video Shows Moments Before Thurman Blevins Was Shot*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/video/us/100000006031561/minneapolis-police-video-thurman-blevins-shot.html>.

94. See Furber et al., *supra* note 76.

2017.”<sup>95</sup> Ruszczyk’s family received a \$20 million settlement from the city of Minneapolis. Minneapolis Police Union’s then-president has called Black Lives Matter a “terrorist organization”<sup>96</sup> and “openly wore a white power patch on his motorcycle jacket.”<sup>97</sup> MPD, like many other police departments, has tried unsuccessfully to reform itself many times over the past few decades.

## II. Current Efforts at Reform

### A. Trial and Error—A Decades-Long Story of the City and the MPD’s Inability to Create Meaningful Change

“We’re tired of weak reforms like body cameras, tweaks to civilian oversight, and new signs in police cars . . . 150 years after MPD was founded and 3 years after they murdered Jamar Clark, the problems they cause in our communities haven’t changed. We want a better return on the investment of our tax dollars.” - Hani Ali, Black Visions Collective, Nov. 1, 2018.<sup>98</sup>

George Floyd.<sup>99</sup> Jamar Clark.<sup>100</sup> David Smith.<sup>101</sup> Tommie Baker.<sup>102</sup> Quincy Smith.<sup>103</sup> Dominic Felder.<sup>104</sup> Christopher Burns.<sup>105</sup> Mark

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95. Kandace Montgomery & Miski Noor, *Decades of Tensions Between Minneapolis Police and Black Communities Have Led to This Moment*, VOX (June 1, 2020), <https://www.vox.com/first-person/2020/6/1/21276309/george-floyd-police-protests-minneapolis-black-lives-matter> [perma.cc/X6AD-43TF].

96. *Id.*

97. Haven Orecchio-Egresitz, *A 2007 Lawsuit Said the President of the Minneapolis Police Union Wore a ‘White Power’ Patch on His Motorcycle Jacket and Discriminated Against Officers of Color*, INSIDER (May 29, 2020), <https://www.insider.com/president-minneapolis-police-union-wore-white-power-patch-lawsuit-2020-5> [perma.cc/5V2H-W3US].

98. Press Release, Black Visions Collective, FACEBOOK (Nov. 1, 2018), <https://www.facebook.com/LitBLVC/posts/for-immediate-release-november-1-2018reclaim-the-block-coalition-demands-5-dives/316155155638538/>.

99. See Hill et al., *supra* note 13.

100. See Jamar Clark Shooting, One Year Later, MPR NEWS, [https://live.mprnews.org/Event/Black\\_Lives\\_Matter\\_protests\\_in\\_Minneapolis\\_Fourth\\_Pre\\_cinct?Page=24#](https://live.mprnews.org/Event/Black_Lives_Matter_protests_in_Minneapolis_Fourth_Pre_cinct?Page=24#).

101. See Randy Furst, *May 25: Minneapolis Pays \$3 Million in Police Misconduct Case*, STAR TRIB. (June 1, 2013), <https://www.startribune.com/may-25-minneapolis-pays-3-million-in-police-misconduct-case/208912661/> [perma.cc/BS57-6CBV].

102. See COMMUNITIES UNITED AGAINST POLICE BRUTALITY, STOLEN LIVES IN MINNESOTA: PEOPLE WHO HAVE LOST THEIR LIVES THROUGH ENCOUNTERS WITH LAW ENFORCEMENT AUTHORITIES 3 (Oct. 18, 2018), [https://d3n8a8pro7vhmx.cloudfront.net/cuapb/pages/17/attachments/original/1556948828/Minnesota\\_Stolen\\_Lives\\_Names\\_2018.pdf?1556948828](https://d3n8a8pro7vhmx.cloudfront.net/cuapb/pages/17/attachments/original/1556948828/Minnesota_Stolen_Lives_Names_2018.pdf?1556948828) [perma.cc/N7FC-3P5B].

103. See *Minneapolis Agrees to Pay \$3 Million for Police Misconduct*, PINTAS & MULLINS (May 31, 2013), <https://www.pintas.com/blog/minneapolis-agrees-to-pay-3-million-for-police-misconduct/> [perma.cc/HR2F-H8LB].

104. See Brandt Williams, *Family of Man Shot by Mpls Police Wins \$1.8M Award*, MPR NEWS (Oct. 25, 2010), <https://www.mprnews.org/story/2010/10/25/excessive-force-verdict> [perma.cc/Y4UU-T93P].

105. Alejandra Matos & Matt McKinney, *13 Excessive Force Complaints Against*

Henderson.<sup>106</sup> Philando Castile. Thurman Blevins. How much longer will we engage in a process of trial and error that results in Black and Brown people shot and killed?<sup>107</sup> Racially discriminatory policing in Minneapolis is not a recent phenomenon,<sup>108</sup> and any suggestion<sup>109</sup> that the issue can be solved through incremental policy changes faces a difficult task in explaining why this time will be different. George Floyd's tragic murder was preceded by decades of unrestrained police misconduct and decades of ineffective reform measures.<sup>110</sup> The experience of Minneapolis, one of the most "progressive" cities in the United States,<sup>111</sup> demonstrates that good intentions and internal solutions are not enough to counteract the repressive and systemic racism that has been intrinsic to police forces from the outset.<sup>112</sup> When it comes to constraining excessive use of force and holding MPD accountable, we have fallen woefully short.

Complicating Minneapolis' reputation for racist policing<sup>113</sup> are the City's progressive attitudes and prior attempts to constrain the use of force. In 2016, MPD issued a new policy creating a "duty to intervene" for officers in circumstances where they see a fellow officer use excessive

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*Minneapolis Police Officer Involved in Terrence Franklin Shooting*, STAR TRIB. (July 1, 2013), <https://www.startribune.com/13-excessive-force-complaints-against-minneapolis-cop-involved-in-shooting/213718651/> [perma.cc/HWM9-K4S2].

106. Mara Klecker, *Woodbury Reaches \$1.5 Million Settlement with Mother of Man Killed by Police in 2012*, STAR TRIB. (Apr. 17, 2019), <https://www.startribune.com/woodbury-reaches-1-5-million-settlement-with-mother-of-man-killed-by-police-in-2012/508709872/> [perma.cc/SQ46-C2E9].

107. Jeff Hargarten, Jennifer BJORHUS, MaryJo Webster & Kelly Smith, *Every Police-Involved Death in Minnesota Since 2000*, STAR TRIB. (Apr. 27, 2021), <https://www.startribune.com/every-police-involved-death-in-minnesota-since-2000/502088871/> [perma.cc/CFQ5-UV63].

108. See Jamiles Lartey & Simone Weichselbaum, *Before George Floyd's Death, Minneapolis Police Failed to Adopt Reforms, Remove Bad Officers*, THE MARSHALL PROJECT (May 28, 2020), <https://www.themarshallproject.org/2020/05/28/before-george-floyd-s-death-minneapolis-police-failed-to-adopt-reforms-remove-bad-officers> [perma.cc/ZWC8-5HY].

109. E.g., Jason C. Johnson & James A. Gagliano, Opinion, *Defunding the Police Isn't the Answer*, CNN (June 9, 2020), <https://www.cnn.com/2020/06/09/opinions/defunding-police-is-not-the-answer-johnson-gagliano/index.html> [perma.cc/G2HB-N9FL].

110. MPD150, ENOUGH IS ENOUGH: A 150 YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT (Expanded ed. 2020), [https://www.mpd150.com/wp-content/uploads/reports/report\\_2\\_compressed.pdf](https://www.mpd150.com/wp-content/uploads/reports/report_2_compressed.pdf) [perma.cc/65X8-9F5A]; see also Lopez, *supra* note 74.

111. See John Eligon & Julis Bosman, *How Minneapolis, One of America's Most Liberal Cities, Struggles with Racism*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/06/01/us/minneapolis-racism-minnesota.html> [perma.cc/QFZ2-RGVU].

112. See Lepore, *supra* note 28; MPD150, ENOUGH IS ENOUGH, *supra* note 110.

113. See Furber et al., *supra* note 76.

force.<sup>114</sup> That same year, MPD unveiled its “sanctity of life” policy,<sup>115</sup> which set forth a requirement of de-escalation for officers in “dangerous situations.”<sup>116</sup> In 2017, the Department implemented body cameras to be worn by its officers,<sup>117</sup> a measure viewed by some as “key to police reform.”<sup>118</sup> There was also cause for optimism when, in August 2017, Medaria Arradondo was appointed the City’s first Black police chief.<sup>119</sup> Arradondo had previously joined other Black police officers in Minneapolis in suing the MPD for racial discrimination; the case eventually settled for \$740,000.<sup>120</sup>

In 2018, the City Council shifted \$1.1 million of the MPD budget to fund community-led public safety initiatives.<sup>121</sup> However, the City Council added \$8.2 million to the department budget in December of 2019.<sup>122</sup> In April of 2019, Minneapolis Mayor Jacob Frey announced that the City would ban “warrior-style” training that police officers were allowed to use when they were off-duty, one of the first bans of its kind in the nation.<sup>123</sup> These policies and reform measures failed to prevent George Floyd’s killing, when former-Officer Derek Chauvin knelt on Floyd’s neck

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114. MINNEAPOLIS POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL 5-301 § III(C)(2) (“Regardless of tenure or rank, any sworn employee who observes another employee use any prohibited force, or inappropriate or unreasonable force (including applying force when it is no longer required), must attempt to safely intervene by verbal and physical means, and if they do not do so shall be subjected to discipline to the same severity as if they themselves engaged in the prohibited, inappropriate, or unreasonable use of force.”). *See also* Lopez, *supra* note 74; Bernard Condon & Todd Richmond, *Duty to Intervene: Floyd Cops Spoke Up but Didn’t Step In*, ASSOCIATED PRESS (June 7, 2020), <https://apnews.com/article/george-floyd-american-protests-us-news-ap-top-news-minneapolis-police-reform-0d52f8accbbdab6a29b781d75e9aeb01> [perma.cc/4MW5-M3TM].

115. MINNEAPOLIS POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL 5-301 § I.

116. Libor Jany, *Minneapolis Police Reveal Changes to Use-of-Force Policy*, STAR TRIB. (Aug. 9, 2016), <https://www.startribune.com/minneapolis-police-reveal-changes-to-use-of-force-policy/389509371/> [perma.cc/2LUS-DKNH].

117. *See* Tim Nelson, *Bodycam Use by Minneapolis Police Hits Record Highs This Year*, MPR NEWS (Aug. 14, 2019), <https://www.mprnews.org/story/2019/08/14/bodycam-use-by-minneapolis-police-hits-record-highs-this-year> [perma.cc/HJ8B-4UXF].

118. *See* Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWSHOUR (June 25, 2020), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [perma.cc/7QYF-AN7E].

119. *Minneapolis Police Name First Black Chief in Wake of Shooting*, NBC NEWS (Aug. 21, 2017), <https://www.nbcnews.com/news/nbcblk/minneapolis-police-name-first-black-chief-wake-shooting-n793956> [perma.cc/X84L-2PPV].

120. *See* Oreccchio-Egresitz, *supra* note 97.

121. *See* Montgomery & Noor, *supra* note 95.

122. *Id.*

123. Cinnamon Janzer, *Minneapolis Bans “Warrior-Style” Training for Police Officers*, NEXT CITY (Apr. 30, 2019), <https://nextcity.org/daily/entry/minneapolis-bans-warrior-style-training-for-police-officers> [perma.cc/MJ27-8QTT].

for—at least—8 minutes and 46 seconds.<sup>124</sup> Nor do these policies, even with the added weight of public scrutiny after Floyd's murder, give any assurance that they will be sufficient to prevent another instance of police brutality.

An inability to prevent MPD officers from using excessive force against Black and Brown people has led to reliance on other avenues, beyond internal reform, to seek accountability for the officers involved.<sup>125</sup> MPD 150—a collective of local organizers, researchers, artists, and activists—have compiled resources that analyze the history of the Minneapolis Police Department.<sup>126</sup> In the late 1960s, the City Council created a “Civil Rights Commission” designed to provide an outlet for investigating civilian complaints about police officers.<sup>127</sup> Shortly thereafter, Mayor Charles Stenvig, who had previously served as head of the police union, revoked the Civil Rights Commission’s authority to conduct investigations, leaving the Minneapolis Police Department as the only entity capable of investigating police misconduct.<sup>128</sup> The issues that led to the creation of the Civil Rights Commission persisted in its absence, and the City created the “Civilian Review Authority” in 1990.<sup>129</sup> Unfortunately, the Civilian Review Authority was stripped of power by the Minnesota Legislature in 2012—at the request of the Minneapolis Police Federation—and replaced by the City with the Office of Police Conduct Review.<sup>130</sup>

The current process of filing complaints against Minneapolis police officers is complicated, based on theories of self-accountability, and is, ultimately, ineffective.<sup>131</sup> In its current form, the Office of Police Conduct Review works to investigate charges of police misconduct and provides “recommendations regarding the merits of such complaints to the chief

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124. See Hill et al., *supra* note 13.

125. See Lartey & Weichselbaum, *supra* note 108 (quoting Valerie Castile, mother of Philando Castile) (“We still have that big question: Why? Why does this keep happening and why no one is being held accountable?”).

126. MPD 150: *A People’s Project Evaluating Policing*, <https://www.mpd150.com/>. See MPD150, ENOUGH IS ENOUGH, *supra* note 110.

127. MPD150, ENOUGH IS ENOUGH, *supra* note 110, at 12.

128. *Id.*

129. *Id.* at 13.

130. *Id.* at 15; Randy Furst, *New Law Throws Minneapolis Police Oversight in Turmoil*, STAR TRIB. (Apr. 6, 2012), <https://www.startribune.com/new-law-throws-minneapolis-police-oversight-in-turmoil/146497655/> [perma.cc/Z38F-FZRG]; *Office of Police Conduct Review*, MINNEAPOLIS CITY OF LAKES <https://www2.minneapolismn.gov/government/departments/civil-rights/opcr/> [perma.cc/UN74-KJ77].

131. See Jennifer Bjorhus, Liz Sawyer & Star Tribune Staff Writers, *Minneapolis Police Officers Disciplined in Fraction of Cases*, STAR TRIB. (June 9, 2020), <https://www.startribune.com/minneapolis-police-officers-disciplined-in-fraction-of-cases/571120852/> [perma.cc/F6EJ-QSEX].

of police.”<sup>132</sup> Any such recommendations are interceded by another layer of review, whereby a review panel composed of two MPD officers and two civilians provides an opportunity for MPD to prevent issues from reaching the Chief’s desk.<sup>133</sup> Despite the fact that hundreds of police misconduct complaints against the MPD are brought each year, only three percent of complaints result in discipline, and the vast majority of complaints result in no action, while a moderate corrective action of “coaching” serves as an alternative.<sup>134</sup>

Even if a complaint does reach a recommendation of officer discipline, another obstacle looms: arbitration. Internal disciplinary decisions are finalized after binding arbitration, which regularly reverses firings and other punishments.<sup>135</sup> Between 2013 and 2018, MPD fired five officers and demoted one officer from its 800-person force.<sup>136</sup> When asked to comment or respond to these jarring numbers, MPD did not respond,<sup>137</sup> apparently running from scrutiny rather than facing it. In more recent years, some have observed the Minneapolis Police Department engaging in a pattern of “stonewalling, evading and deflecting the slightest suggestion of police brutality” in response to racially discriminatory policing.<sup>138</sup> Although there are a host of reasons why racially discriminatory policing continues in Minneapolis, lack of accountability is a common thread.

The inability or unwillingness to hold MPD accountable or prevent its officers from using excessive force has damaging consequences for Black Minneapolis and other minorities. According to a 2015 report from the American Civil Liberties Union, Black people in Minneapolis were 8.7 times more likely than White people to be arrested for low-level offenses and 25 times more likely to be arrested for “loitering with intent

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132. MINNEAPOLIS, MINN. CODE OF ORDINANCES § 172.10, available at [https://library.municode.com/mn/minneapolis/codes/code\\_of\\_ordinances?nodeId=COOR\\_TIT9FIPOPR\\_CH172POCOOV](https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=COOR_TIT9FIPOPR_CH172POCOOV).

133. *Id.* at § 172.40.

134. Bjorhus et al., *supra* note 131, tbl.

135. Solomon Gustavo, *What We Know (and Don’t Know) So Far About the Effort to Dismantle the Minneapolis Police Department*, MINNPOST (July 9, 2020), <https://www.minnpost.com/metro/2020/07/what-we-know-and-dont-know-so-far-about-the-effort-to-dismantle-the-minneapolis-police-department/> [perma.cc/5M7T-T6CW].

136. Bjorhus et al., *supra* note 131 (“Of the 1,600 police misconduct complaints filed in Minneapolis from 2013 through 2018 . . . only 45 resulted in an officer being disciplined. . . . Five officers were successfully fired during that six-year period, and one was demoted.”); Furber et al., *supra* note 76 (referring to Minneapolis’ “800-plus officer force”).

137. Bjorhus et al., *supra* note 131.

138. Todd Baer, Opinion, *The Minneapolis Police Department Has a Long History of Brutality*, AL JAZEERA (June 11, 2020), <https://www.aljazeera.com/opinions/2020/6/11/the-minneapolis-police-department-has-a-long-history-of-brutality/> [perma.cc/42YU-BUTE].

to commit a narcotics offense.”<sup>139</sup> Despite constituting only 6 percent of the population of Minneapolis, “Black people accounted for more than 60 percent of the victims in Minneapolis police shootings from late 2000 through 2018.”<sup>140</sup> Carrying on with the status quo is an act of complicity to the cruelty Black people in Minneapolis experience on a daily basis.<sup>141</sup>

*B. Recent Attempts at Reform Demonstrate the Difficulty of Achieving Substantive and Meaningful Change*

The killing of George Floyd, an unarmed Black man, by a White Minneapolis police officer on May 25, 2020, fueled renewed outrage towards the racist policing of the MPD. Floyd was murdered with a knee to his neck as onlookers pleaded for his release and captured a video that would spur protests in at least 140 cities across the United States.<sup>142</sup> In Minneapolis, the reaction to the death was swift: thousands gathered in protest the next day, the four officers involved were fired, the protests grew rapidly, Governor Walz declared a peacetime emergency, and for over a week crowds swelled, shutting down the city and demanding change.<sup>143</sup> The officer who had forced his knee on Floyd’s neck was charged with third degree murder just four days after Floyd’s death.<sup>144</sup>

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139. *Picking Up the Pieces: A Minneapolis Case Study*, ACLU (Apr. 15, 2015), <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/picking-pieces?redirect=feature/picking-pieces> [perma.cc/ZP5M-YSTZ].

140. Montgomery & Noor, *supra* note 95 (citing Jeff Hargarten, *Minneapolis Police Shootings Since 2000: A Deeper Look at Who and Where*, STAR TRIB. (July 15, 2018), <https://www.startribune.com/minneapolis-police-shootings-since-2000-a-deeper-look-at-who-and-where/435882213/> [perma.cc/QDZ5-45RV]).

141. See Audrey McNamara, *Minneapolis Declares Racism a Public Health Emergency*, CBS NEWS (July 17, 2020), <https://www.cbsnews.com/news/minneapolis-racism-public-health-emergency/> [perma.cc/3MDW-8U64] (“The resolution notes that ‘the killings of unarmed Black men are associated with an increase in depression and emotional issues for Black people.’ Dr. Jess Clemons . . . told ‘CBS This Morning’ . . . ‘We’re expected to not only present with symptoms, but also have nowhere to go, because lack of access, the stigma, and barriers associated with it.’”); RESOLUTION BY JENKINS AND CUNNINGHAM, DECLARING RACISM A PUBLIC HEALTH EMERGENCY IN THE CITY OF MINNEAPOLIS, <https://lims.minneapolismn.gov/Download/RCA/14012/Declaring%20Racism%20a%20Public%20Health%20Emergency%20Resolution.pdf> [perma.cc/DB3E-QJ7D].

142. See Derrick Bryson Taylor, *Floyd Protests: A Timeline*, N.Y. TIMES (Mar. 28, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [perma.cc/DK92-2WH3].

143. See Greta Kaul, *Seven Days in Minneapolis: A Timeline of What We Know About the Death of George Floyd and Its Aftermath*, MINNPOST (June 1, 2020), <https://www.minnpost.com/metro/2020/05/what-we-know-about-the-events-surrounding-george-floyds-death-and-its-aftermath-a-timeline/> [perma.cc/3XG2-E7DK].

144. See Jeannie Suk Gersen, *How the Charges Against Derek Chauvin Fit into a Vision of Criminal-Justice Reform*, NEW YORKER (June 17, 2020), <https://www.newyorker.com/news/our-columnists/how-the-charges-against-derek-chauvin-fit-into-a-vision-of-criminal-justice-reform> [perma.cc/WWW4-AG9S] (“After criminal charges against Chauvin were announced, on May 29th, protesters decried their

This powerful reaction suggested that substantive change of the MPD might finally be in reach.

The cause advanced by the protesters was distilled by their rallying cries to abolish the police and defund MPD,<sup>145</sup> a cause that community groups such as Black Visions<sup>146</sup> and Reclaim the Block<sup>147</sup> have been championing for several years. As pressure mounted to take action, the Minneapolis City Councilors responded. On June 7, 2020, a majority of City Councilors pledged to dismantle the MPD in its current form<sup>148</sup> and on June 26, the Council unanimously passed an ordinance seeking an amendment to the City Charter.<sup>149</sup> The City Charter currently contains a provision, § 7.3(c), requiring that a police department be funded by the Council in an amount proportional to the City's population.<sup>150</sup> The amendment, which would need approval by the Charter Commission, Mayor, and voters of Minneapolis, would mark a major transition from how the MPD is currently funded and change the shape of policing in the city.

The charter amendment process hit immediate hurdles, showing the difficulty of sustaining momentum for change. The Charter Commission, an unelected body whose members skew White, stymied any hope of having the amendment appear on the November 3, 2020 ballot.<sup>151</sup> They voted to take the full 150 days to review the City Council's proposed amendment, meaning that the multi-stage process was stalled while the energy from the summer protests dissipated.<sup>152</sup> The Commission rejected the Council's proposal in November.<sup>153</sup> In December

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insufficient severity.").

145. See Miguel Otárola, *Movement to Defund Police Sees Minneapolis as Proving Ground*, STAR TRIB. (June 9, 2020), <https://www.startribune.com/movement-to-defund-police-sees-minneapolis-as-proving-ground/571116932/?refresh=true> [perma.cc/M8HJ-C7ED].

146. See *Values*, BLACK VISIONS, <https://www.blackvisionsmn.org/values> [perma.cc/8PX6-ZGLL].

147. See RECLAIM THE BLOCK, <https://www.reclaimtheblock.org/> [perma.cc/U2YE-F9WC].

148. Dionne Searcey & John Eligon, *Minneapolis Will Dismantle Its Police Force, Council Members Pledge*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/minneapolis-police-abolish.html> [perma.cc/FTN7-GJAD].

149. David Schuman, *Mpls. City Council Votes Unanimously to Dismantle MPD*, CBS MINN. (June 26, 2020), <https://minnesota.cbslocal.com/2020/06/26/minneapolis-city-council-takes-another-step-toward-dismantling-police-department/> [perma.cc/4JJE-4JAN].

150. MINNEAPOLIS, MINN. CODE OF ORINANCES, CHARTER § 7.3(c), available at [https://library.municode.com/mn/minneapolis/codes/code\\_of\\_ordinances?nodeId=CH\\_A\\_RTVIAD](https://library.municode.com/mn/minneapolis/codes/code_of_ordinances?nodeId=CH_A_RTVIAD).

151. See Andrew Hazzard, *Minneapolis Charter Commission's Slow-Rolling of Public Safety Amendment Follows Pattern*, SW. J. (Aug. 19, 2020), <https://www.southwestjournal.com/news/2020/08/minneapolis-charter-commissions-slow-rolling-of-public-safety-amendment-follows-pattern/> [perma.cc/4TDY-WLSJ].

152. *Id.*

153. Brandt Williams, *Charter Commission Rejects Minneapolis Council's Public Safety*

2020, the City Council voted to divert \$8 million from the MPD to the Office of Violence Prevention and other city services.<sup>154</sup> This amount reflects just 4.5% of MPD's budget.<sup>155</sup> The City Council narrowly voted to not diminish the size of the police force, keeping it above the threshold size required by the City Charter.<sup>156</sup> These acts are a far cry from the expansive vision of reform demanded after Floyd's killing.

Monumental change to the MPD was never going to be easy. Though protests suggested mass support for the idea of defunding the police, a local poll found that 44% of residents oppose a reduction in the size of the force, while 40% support it.<sup>157</sup> There are legitimate concerns regarding changing the current mechanisms of public safety, and those concerns are not only expressed by White suburbanites. The same poll found that residents who identify as Black were more likely to oppose the reduction than their White counterparts.<sup>158</sup> Black residents of Minneapolis' North Side report mixed feelings about the proposal; some acknowledge the need to have an authority to call when a crime is committed while also having encountered racist policing themselves.<sup>159</sup> When something goes wrong, people still want someone to count on to protect their families.<sup>160</sup>

One of the major sticking points for residents about the City Council proposal is that it does not map out a vision for what type of services would replace a police department presence.<sup>161</sup> Everyone from Mayor Jacob Frey to the Charter Commission to community activists have

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*Amendment*, MPR NEWS (Nov. 5, 2020), <https://www.mprnews.org/story/2020/11/04/charter-commission-rejects-councils-public-safety-amendment> [perma.cc/9RLL-R9WN].

<sup>154</sup> Jenny Gross & John Eligon, *Minneapolis City Council Votes to Remove \$8 Million from Police Budget*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/us/minneapolis-police-funding.html> [perma.cc/LH65-AR7Q].

<sup>155</sup> *Id.*

<sup>156</sup> See MINNEAPOLIS, MINN. CODE OF ORINANCES, CHARTER § 7.3(c); Liz Navratil, *With 2021 City Budget, Minneapolis Council Leaves Its Mark on Police and Public Safety*, STAR TRIB. (Dec. 10, 2020), <https://www.startribune.com/with-2021-city-budget-minneapolis-council-leaves-its-mark-on-police-and-public-safety/573361181/> [perma.cc/R2SP-RMC8].

<sup>157</sup> Star Trib., MPR News & Kare 11 Minn., *Poll: Mayor Frey, the City Council and Defunding Minneapolis Police*, STAR TRIB. (Aug. 16, 2020), <https://www.startribune.com/minnesota-poll-full-results-minneapolis-defund-police-department-city-council-mayor-jacob-frey-dismantle-reform-george-floyd-mpd/572109911/?refresh=true> [perma.cc/U7ZK-WQ5T].

<sup>158</sup> *Id.*

<sup>159</sup> John Eligon, *Distrust of the Minneapolis Police, and Also the Effort to Defund Them*, N.Y. TIMES (Apr. 5, 2021), <https://www.nytimes.com/2020/08/04/us/minneapolis-defund-police.html?auth=linked-google> [perma.cc/63BH-EJD3].

<sup>160</sup> *Id.* (quoting Raeisha Williams, community activist) ("When my house is broken into, I want to be able to call the police. When my security alarm goes off, I want to know they're going to arrive and protect my family.").

<sup>161</sup> *Id.*

expressed frustration and reluctance towards the City Council's lack of a plan.<sup>162</sup> Members of the Council, however, insist that the lack of detail is part of the design and will allow them to spend time with stakeholders devising a workable replacement.<sup>163</sup>

The national backlash over George Floyd's killing was swift and powerful; the City Council's reaction was equally fast, but progress stalled when anti-democratic barriers emerged. Now residents are left wondering whether change will ever happen and, if so, what it will look like.

### III. Solutions

The recent barriers faced by the Minneapolis City Council reveal the difficulties in challenging the MPD's entrenched power. Throughout the history of the MPD, systemic hurdles have prevented progress, societal racism has hindered change, and community concerns about alternative safety strategies have cast doubt on new proposals. Yet, since 2000, the officers tasked with protecting and serving Minneapolis residents have killed 34 individuals, 22 of whom were Black.<sup>164</sup>

Compounding the statistics about loss of life is real concern about the effectiveness of the MPD. Statistics cited after the killing of George Floyd show the MPD has cleared only 56% of homicide cases in 2019, along with just 22% of rapes in 2016.<sup>165</sup> These clearance rates trend lower than those nationally, where, in corresponding years, 61% of murder offenses<sup>166</sup> and 41% of rape offenses<sup>167</sup> were cleared. Additionally, we should be able to "resolve confusion over a \$20 grocery transaction without drawing a weapon or pulling out handcuffs."<sup>168</sup> Clearly, the current system is not working.

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162. Emily Haavik, *Public Can Now Weight In on City Council Plan to Replace the Minneapolis Police Department*, KARE 11 (June 29, 2020), <https://www.kare11.com/article/news/local/minneapolis-city-council-plan-to-replace-minneapolis-police-department-open-for-public-comment/89-8b87a698-29f5-4f56-95ce-895c1127c60e> [perma.cc/5FYQ-43XU].

163. *Id.*

164. Hargarten et al., *supra* note 107.

165. Susan Du, Emily Cassel & Hannah Jones, *Defund & Dismantle: Minneapolis Looks Toward a Police-Free Future*, CITY PAGES (July 1, 2020), [<https://web.archive.org/web/20200824074336/http://www.citypages.com/news/defund-dismantle-minneapolis-looks-toward-a-police-free-future/571575191>].

166. U.S. DEP'T OF JUST., FED'L BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2019 – OFFENSES CLEARED (2020), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/clearances.pdf> [perma.cc/FDB8-Y3CZ].

167. *Clearances*, FBI: UCR: 2016 CRIME IN THE UNITED STATES, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances#:~:text=Overview,by%20arrest%20or%20exceptional%20means> [perma.cc/4KB5-MNNC].

168. Steve Fletcher, *I'm a Minneapolis City Council Member. We Must Disband the Police—*

We argue for a two-prong response: defund the MPD and decriminalize or legalize certain non-violent offenses. These approaches are feasible and focus on local change. Altering police funding mechanisms and decriminalizing low-level crimes potentially provide the quickest and most direct impact for Minneapolis residents.

#### *A. Defund MPD, Refund the Community*

Our first proposed change is defunding the MPD. As used in this article, defunding encompasses both reducing the budget of the police *and* reducing police responsibilities. Common critiques from outside,<sup>169</sup> as well as inside,<sup>170</sup> the police force describe the many roles a police officer is expected to play: social worker, mental health practitioner, traffic liaison, investigator, and more. “Unbundling” those roles from a police officer’s duties would divert funds from the police department to other city departments or community resources that address housing, mental health, and preventative violence.<sup>171</sup>

Shifting funds to service providers outside of the police department would reduce potential violent interactions between community members and police. It would address societal issues closer to their roots, as opposed to the temporary solutions that the police can provide. While the goal of defunding is to shrink the police department, it would still retain a police force to address serious threats to public safety which would calm the fears of many described above.

##### 1. Redirect MPD Funding

Many cities across the nation have started *defunding* their police departments by *funding* alternative safety programs. Although Minneapolis may not be able to reduce the size of the police force and thereby dramatically cut funding without a charter amendment, the city had initial success with community safety programs and should build on

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*Here's What Could Come Next*, TIME (June 5, 2020), <https://time.com/5848705/disband-and-replace-minneapolis-police/> [perma.cc/X8RC-GAJE].

169. See Opinion, *Are We Asking Police to Do Too Much? 7 Experts Debate the Role Cops Should Play in Today's Society*, PHILA. INQUIRER (Feb. 28, 2019), <https://www.inquirer.com/opinion/commentary/role-of-police-law-enforcement-expert-opinion-20190228.html> [perma.cc/VM5A-K5FH].

170. See, e.g., German Lopez, *One of the Biggest Problems with American Policing: We Rely on Cops Way Too Much*, VOX (Jan. 24, 2016), <https://www.vox.com/2016/1/24/10816536/police-reliance-melvin-russell> [perma.cc/SV8J-5BJ6] (citing Baltimore Police Lt. Colonel Melvin Russell); CBSDFW, *Dallas Police Chief We're Asking Cops to Do Too Much in This Country*, YOUTUBE (July 11, 2016), <https://www.youtube.com/watch?v=3RtnQ2GqBeg>.

171. Derek Thompson, *Unbundle the Police*, THE ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/> [perma.cc/UL6P-N3PW].

those successes by shifting more funds from the police department budget. In 2018, the Office of Violence Prevention (OVP) was established within the Minneapolis Health Department (MHD).<sup>172</sup> Since its inception, the OVP has implemented programs which are designed to treat community violence as a public health concern.<sup>173</sup> Three program highlights include:

- i. Project LIFE, a group violence intervention initiative, focuses its efforts on group-involved gun violence.<sup>174</sup> The program serves individuals with prior exposure to violence and provides them with wrap-around support services that address health, housing, and other basic needs. Since the start of the program in 2016, non-fatal gang affiliated shootings in Minneapolis have dropped from 93 to 27.<sup>175</sup>
- ii. Next Step, a program in partnership with Hennepin Healthcare, seeks to interrupt community violence by connecting young people who have suffered a violent injury to resources such as job training, educational support, or housing.<sup>176</sup> Since 2016, the program has helped 400 individuals connect with community support, and less than 7% have returned to a partner hospital with the same or similar injuries.<sup>177</sup>

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172. *History of the Office of Violence Prevention*, MINNEAPOLIS: CITY OF LAKES (May 17, 2021), <https://www2.minneapolismn.gov/government/departments/health/office-violence-prevention/violence-prevention-history> [perma.cc/HKT7-4ZFJ].

173. See Phillip Cunningham, *Reimagination of Public Safety Should Start with This Principle*, STAR TRIB. (July 18, 2020), <https://www.startribune.com/reimagination-of-public-safety-should-start-with-this-principle/571809282/> [perma.cc/2AAK-6XS9].

174. See *Project Life – Lifestyle Intervention for Empowerment*, NORTHPOINT HEALTH & WELLNESS CENTER, <https://northpointhealth.org/project-life> [perma.cc/725W-24TB]; Jessica Lee, *After Positive Results, Minneapolis Looks to Expand Anti-Violence Program*, MINNPOST (Nov. 18, 2019), <https://www.minnpost.com.metro/2019/11/after-positive-results-minneapolis-looks-to-expand-anti-violence-program/> [perma.cc/D9FR-QUZZ].

175. Minneapolis City Council Meeting, *Policy & Government Oversight: Community Safety Workgroup Presentation* (Aug. 6, 2020) (presentation of Sasha Cotton, Dir. of Minneapolis Off. of Violence Prevention), recording available at <https://mpls.dev.implex.net/?p=9460> (2:33:20).

176. *Next Step Program*, HENNEPIN HEALTHCARE, <https://www.hennepinhealthcare.org/support-services/next-step-program/> [perma.cc/DSG7-PV7B].

177. Minneapolis City Council Meeting, *Policy & Government Oversight: Community Safety Workgroup Presentation* (Aug. 6, 2020) (presentation of Sasha Cotton, Dir. of Minneapolis Off. of Violence Prevention), recording available at <https://mpls.dev.implex.net/?p=9460> (2:28:50).

iii. Most recently, the OVP rolled out MinneaplUs.<sup>178</sup> Modeled after Cure Violence,<sup>179</sup> a successful nationwide community safety program, MinneaplUs staff members act as violence interrupters. The program will provide informal mediation and de-escalation, while offering connections for community support.

Additionally, the OVP has helped to fund<sup>180</sup> successful community programs such as MAD DADS,<sup>181</sup> St. Stephen's Homeless Outreach,<sup>182</sup> and the Domestic Abuse Project.<sup>183</sup> Yet the OVP received roughly \$3.7 million in funding from the city in 2020 compared to the MPD's \$192 million. Though OVP resources are slated to substantially increase in 2021,<sup>184</sup> Minneapolis should more aggressively fund and expand OVP programming. While "there are not deep literatures on [community safety programs] individually, there is evidence that combinations of these programs are under appreciated causes of reduced crime over the past several decades."<sup>185</sup> The recent movement of \$8 million from the MPD's 2021 budget to violence prevention still leaves a police force with a suspect community safety culture largely intact.<sup>186</sup>

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178. See Liz Navratil, *Outreach Workers in Minneapolis Walk a Beat to Turn People Away from Violence*, STAR TRIB. (Oct. 13, 2020), <https://www.startribune.com/new-minneapolis-outreach-workers-walk-a-beat-to-turn-people-away-from-violence/572733161/> [perma.cc/E9XV-PKVP].

179. CURE VIOLENCE GLOBAL, <https://cvvg.org/> [perma.cc/V7WA-YEPY].

180. See *Violence Prevention Initiatives*, MINNEAPOLIS: CITY OF LAKES (May 17, 2021), <https://www2.minneapolismn.gov/government/departments/health/office-violence-prevention/violence-prevention-initiatives/> [perma.cc/GL56-DSVD].

181. MAD DADS OF MINNEAPOLIS, <http://minneapolismaddads.org/> [perma.cc/GB5Z-HZC9].

182. *What We Do*, ST. STEPHENS, <https://ststephensmpls.org/our-programs> [perma.cc/46F4-FSCB].

183. DOMESTIC ABUSE PROJECT, <https://www.mndap.org/> [perma.cc/PZ6U-7PTC].

184. CITY OF MINNEAPOLIS, 2021 MAYOR'S RECOMMENDED BUDGET 365-71 (2020) [<https://web.archive.org/web/20201103075652/https://www2.minneapolismn.gov/www/groups/public/@finance/documents/webcontent/wcmsp-226229.pdf>].

185. *Center for Policing Equity Releases Critical Steps for Exploring How Public Safety Resources Are Allocated*, CTR. FOR POLICING EQUITY (July 27, 2020), <https://policingequity.org/newsroom/press-releases/critical-steps-exploring-public-safety-resources-allocation> [perma.cc/3LYB-TRSA].

186. See Solomon Gustavo, *What Minneapolis' Budget Debate Actually Means—for the City, the MPD, and Future of Policing in the City*, MINNPOST (Dec. 14, 2020), <https://www.minnpost.com.metro/2020/12/what-minneapolis-budget-debate-actually-means-for-the-city-the-mpd-and-future-of-policing-in-the-city/#:~:text=In%20response%20Frey%20proposed%20a,cuts%20for%20almost%20every%20department> [perma.cc/6EML-ABKC]; Shannon Gibney, *A Black Mother Contemplates What It Means to Defund the Police*, TWIN CITIES PBS: ORIGINALS, <https://www.ptporiginals.org/a-black-mother-contemplates-what-it-means-to-defund-the-police/> [perma.cc/9NAK-JYDT].

In addition to violence prevention initiatives, increased funding should be directed to programs which bolster the ability of mental health practitioners to respond to those in crisis. A robust mental health response beyond current police capabilities is imperative, as “the risk of being killed during a police incident is 16 times greater for individuals with untreated mental illness than for other civilians approached or stopped by officers.”<sup>187</sup> Since 2006, Hennepin County, in which Minneapolis is located, has offered direct support for adults with mental health crises through Community Outreach for Psychiatric Emergencies.<sup>188</sup> Increased funding through Hennepin County and structural changes to the 911 response framework could help Minneapolis mirror the results seen in Oregon’s much lauded CAHOOTS program, which responded to roughly 17 percent of Eugene’s emergency calls in 2019.<sup>189</sup>

Programs without city connections are also important to the promotion of a changed relationship with community safety. Black Visions, a leader in the Minneapolis abolition movement, has coordinated “Peace Walks”<sup>190</sup> throughout Minneapolis neighborhoods and hosted teach-ins about community safety.<sup>191</sup> The American Indian Movement (AIM) has long engaged in informal community security initiatives, one being AIM Patrol.<sup>192</sup> Bolstering the funding of these non-city associated organizations through fundraising or grants will not only serve as a continued check on systemic safety powers, but also support a more community-based understanding of what safety *is*.

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187. TREATMENT ADVOCACY CTR., OFF. OF RSCH. & PUB. AFFS., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (Dec. 2015), <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [perma.cc/U4BB-6KD8].

188. *Hope from COPE*, HEALTHY HENNEPIN (Aug. 2015), <https://www.healthyhennepin.org/stories/cope> [perma.cc/X8EZ-2G3V].

189. WHITE BIRD CLINIC, CRISIS ASSISTANCE HELPING OUT ON THE STREETS (CAHOOTS), MEDIA GUIDE 2020, at 1 (2020), <https://whitebirdclinic.org/wp-content/uploads/2020/07/CAHOOTS-Media.pdf> [perma.cc/5UCD-CXVA].

190. See, e.g., @BlackVisionsMN, TWITTER (Sept. 3, 2020, 1:00 PM), <https://twitter.com/BlackVisionsMN/status/1301580785674223621> [perma.cc/3PK2-F8A6].

191. See, e.g., Black Visions, Online Event, *National Night Out Teach In*, FACEBOOK (Sept. 15, 2020), <https://www.facebook.com/events/320339325858939/> [perma.cc/C4CW-NMNL].

192. See Delilah Friedler, *What Will Replace the Minneapolis Police? The City’s Native American Community Has Some Ideas*, MOTHER JONES (June 13, 2020), <https://www.motherjones.com/politics/2020/06/american-indian-movement-patrol-defund-police-minneapolis/> [perma.cc/8JUJ-6QHM].

## 2. Disaggregate MPD Functions

In addition to redirecting funds away from the MPD, certain responsibilities should be redirected as well. Specifically, MPD officers should not be conducting traffic stops. While this article was prompted by the killing of George Floyd, the role of police in traffic stops was questioned after another tragic and unnecessary killing in Minnesota: that of Philando Castile.<sup>193</sup> In 2016, Philando Castile, a nutrition services supervisor at a local elementary school, was pulled over for a broken taillight. After notifying the officer of his legally possessed firearm, Castile was shot and killed. Castile's girlfriend and her daughter were also in the car.<sup>194</sup> In the years leading up to his shooting, Castile had been pulled over fifty-two times for traffic violations.<sup>195</sup> Removing armed police officers from these types of routine interactions could prevent the deadly escalation of commonplace encounters.<sup>196</sup>

Other cities within the nation have proposed moving towards police-less traffic stops, including Berkley<sup>197</sup> and Cambridge.<sup>198</sup> Minneapolis should follow their lead and implement a non-police traffic enforcement system. This system could be staffed with civilian employees

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193. See Pam Louwagie, *Falcon Heights Police Shooting Reverberates Across the Nation*, STAR TRIB. (July 8, 2016), <https://www.startribune.com/falcon-heights-police-shooting-reverberates-across-the-nation/385861101/> [perma.cc/LZ9C-C5NM]; Jessica Lussenhop, *Philando Castile Death: 'I Lost My Best Friend in a Police Shooting'*, BBC NEWS (June 3, 2020), <https://www.bbc.com/news/world-us-canada-52896872> [perma.cc/B69Q-T3GM]. This Article was drafted before police in Brooklyn Center, an inner-ring suburb of Minneapolis, shot and killed Daunte Wright in the course of a traffic stop in April 2021. See Denise Lavoie, *Daunte Wright: Doting Dad, Ballplayer, Slain by Police*, ASSOCIATED PRESS (Apr. 14, 2021), <https://apnews.com/article/daunte-wright-shooting-minnesota-f70fb7fc4c205740507b7ec53d7315f0> [perma.cc/DL4P-EGCY].

194. Louwagie, *supra* note 193.

195. *Philando Castile Had Been Stopped 52 Times by Police*, CBS MINN. (July 9, 2016), <https://minnesota.cbslocal.com/2016/07/09/philando-stops/> [perma.cc/7DN4-8QFD].

196. See Jordan Blair Woods, Policing, Danger Narratives, and Routine Traffic Stops, 117 MICH. L. REV. 635 (2019); Julianne Cuba, *Vision Zero Cities: Removing Police from Traffic Enforcement Is Crucial*, STREETSBLOG NYC (Oct. 21, 2020), <https://nyc.streetsblog.org/2020/10/21/vision-zero-cities-removing-police-from-traffic-enforcement-and-self-enforced-streets/> [perma.cc/ZTR8-GRUR].

197. *California City Moves Toward Removing Police from Traffic Stops*, NBC NEWS (July 15, 2020), <https://www.nbcnews.com/news/us-news/berkeley-california-police-reform-rcna48> [perma.cc/2YPB-HFQF].

198. *Cambridge Proposal: Let Unarmed City Employees Make Traffic Stops Instead of Police*, CBS BOSTON (July 29, 2020), <https://boston.cbslocal.com/2020/07/29/cambridge-police-officers-traffic-stops-proposal-city-employees/> [perma.cc/UQN9-4LNR].

and housed within the Minneapolis Regulatory Services Department,<sup>199</sup> a division which already manages Minneapolis Traffic Control.<sup>200</sup>

Demographic data shows the need for traffic stop reform. In 2019, Minneapolis was over 60 percent White,<sup>201</sup> yet 70 percent of traffic stops were of non-Whites.<sup>202</sup> If a traffic stop progressed to a search of the vehicle, 78 percent of those searches were of Black individuals' vehicles.<sup>203</sup> These extreme disparities mandate a system overhaul.

Reinforcing this need for a drastic shift in the traffic safety system is the fact that Minneapolis has attempted elements of traffic stop reform. This reform has not worked. "Lights On!," a program which allowed police officers to hand out vouchers to fix minor equipment violations, was adopted after Castile's death.<sup>204</sup> Yet Minneapolis police "issued White drivers the vouchers at a rate three times higher than Black and East African ones in equipment stops."<sup>205</sup> The outcome of the voucher disbursement is especially discouraging, given that Black drivers are pulled over at a much higher rate than White drivers.<sup>206</sup>

The removal of traffic safety responsibilities from the MPD offers an opportunity to restructure safety regulations. At a minimum, removal of armed officers correspondingly removes the potential for officer-associated violence stemming from traffic stops. At a higher level, reassigning traffic enforcement duties to a separate department would allow Minneapolis to define policies of enforcement that actively counteract operational biases produced by racism.

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199. *Regulatory Services*, MINNEAPOLIS: CITY OF LAKES (May 3, 2021), <https://www2.minneapolismn.gov/government/departments/reg-services/> [perma.cc/8R2E-53K4].

200. *Traffic Control Services*, MINNEAPOLIS: CITY OF LAKES (May 3, 2021), <https://www2.minneapolismn.gov/government/departments/reg-services/divisions/traffic-control/> [perma.cc/55Y5-CMHF].

201. *QuickFacts: Minneapolis city, Minnesota*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/minneapoliscityminnesota> [perma.cc/F6AX-XN2K].

202. Andy Mannix, *Black Drivers Make Up Majority of Minneapolis Police Searches During Routine Traffic Stops*, STAR TRIB. (Aug. 7, 2020), <https://www.startribune.com/black-drivers-make-up-majority-of-minneapolis-police-searches-during-routine-traffic-stops/572029792/> [perma.cc/8WPE-52DH] (select "Stopped" from drop-down menu on the table in the article).

203. *Id.*

204. LIGHTS ON!: A PROGRAM OF MICROGRANTS, <https://www.lightsonus.org/> [perma.cc/S6VP-Y8FL].

205. Mannix, *supra* note 202.

206. See Sarah Holder, Rachael Dottle & Marie Patino, *The Precipitous Drop of Police Traffic Stops in Minneapolis*, BLOOMBERG: CITYLAB (Sept. 14, 2020), <https://www.bloomberg.com/graphics/2020-minneapolis-police-stops/> [perma.cc/RE5Y-LDGL] (noting the disparities in the voucher program and traffic stops generally, but also an 80 percent decrease in traffic stops following George Floyd's death).

*B. Rethink What We See as a Threat in Society*

In order to change the way police interact with citizens, it is necessary to re-evaluate which situations warrant armed police intervention. Disaggregating current police functions, as discussed above, is part of the solution. But disaggregation must be accompanied by the decriminalization and legalization of activities that our society no longer views as a threat to community safety and which produce racial disparities in our criminal justice system. By both disaggregating police functions and decriminalizing certain low-level, non-violent offenses—such as legalizing recreational marijuana use for adults—high-risk interactions between police and community will decrease, and police officers and prosecutors will be able to focus on more substantial threats to community safety.

Although broad decriminalization and legalization requires legislative action, prosecutorial discretion allows for change at the local level. Prosecutors in both Hennepin and Ramsey counties have implemented policies aimed at reducing the prosecution of certain low-level crimes such as drug possession. In 2019, the Hennepin County Attorney's Office announced that it would no longer be prosecuting those in possession of small amounts of marijuana.<sup>207</sup> According to Hennepin County Attorney Mike Freeman, the policy change was motivated by a flawed Minnesota law with "grossly inappropriate" penalties that result in racial disparities in the criminal justice system.<sup>208</sup> However, the policy contains exceptions that allow for charges in situations where a person also possesses trace amounts of another illegal substance (like THC oil or wax) or a firearm.<sup>209</sup> Previous drug possession convictions, or allegations of gang activity, can also lead to charges.<sup>210</sup>

Ramsey County Attorney John Choi also implemented a similar policy regarding marijuana possession in 2019.<sup>211</sup> More recently, prosecutors in Ramsey County have opted not to pursue charges for all fifth-degree drug possession cases throughout the COVID-19 pandemic in order to ease the burden on an already backlogged court system and to

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207. David Chanen, *Hennepin County Prosecutor Won't Charge People Caught with Small Amounts of Marijuana*, STAR TRIB. (Mar. 15, 2019), <https://www.startribune.com/hennepin-county-attorney-won-t-prosecute-people-caught-with-small-amounts-of-marijuana/507174002/> [perma.cc/JU8C-66PM].

208. *Id.*

209. *Id.*

210. *Id.*

211. Memorandum from John J. Choi, Ramsey Cnty. Att'y, to All Assistant Ramsey Cnty. Att'ys in the Crim. Div. & Juv. Div. (Feb. 28, 2019), <https://www.ramseycounty.us/sites/default/files/County%20Attorney/Charging%20Policy%20Regarding%20the%20Sale%20of%20a%20Small%20Amount%20of%20Marijuana%203.1.19.pdf> [perma.cc/DCT2-G7PN].

ensure the right to a speedy trial in more serious cases.<sup>212</sup> Ramsey County Sheriff Bob Fletcher expressed his support for the policy, noting that his department had already moved away from pursuing small possession cases because “[w]e need to be thinking about where we can do the most good to keep the community safe.”<sup>213</sup> Despite some flaws, policies that give prosecutors and police the discretion to eliminate charges for low-level drug possession crimes are a step in the right direction in the face of legislative inaction. These policies should be expanded to cover more low-level non-violent crimes and implemented with accompanying tools to track the impact on reducing racial disparities in the criminal justice system.

Prosecutorial discretion and decriminalization must be accompanied by legalization of marijuana use for adults. In every state, Black people are arrested for marijuana possession at higher rates than White people, despite the fact that Blacks and Whites use marijuana at essentially the same rate.<sup>214</sup> Although possession of a small amount of marijuana in Minnesota is not technically a criminal offense, Minnesota has the eighth largest racial disparity in the United States in arrests for marijuana possession: Black people are over five times more likely than White people to be arrested.<sup>215</sup> Despite broad public support<sup>216</sup> and recent federal action towards decriminalization,<sup>217</sup> legislative pushes for legalization of recreational marijuana in Minnesota have failed.<sup>218</sup> Legalizing recreational marijuana use for adults in Minnesota would result in fewer arrests,<sup>219</sup> which in turn would reduce the number of potentially high risk interactions between armed police and community

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212. Sarah Horner, *Ramsey County Attorney's Office Stops Charging 5th-Degree Drug Possession Cases During Coronavirus Pandemic*, TWINCITIES.COM: PIONEER PRESS (June 28, 2020), <https://www.twincities.com/2020/06/28/coronavirus-ramsey-county-mn-attorney-drops-5th-degree-drug-possession-cases/> [perma.cc/BG3E-HN52].

213. *Id.*

214. ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 5 (2020), [https://www.aclu.org/sites/default/files/field\\_document/marijuanareport\\_03232021.pdf](https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf) [perma.cc/6EXK-HPKX].

215. *Id.* at 70 (state profile).

216. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, PEW RSCH. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [perma.cc/X4TU-5ASK].

217. Catie Edmondson, *House Passes Landmark Bill Decriminalizing Marijuana*, N.Y. TIMES (Dec. 6, 2020), <https://www.nytimes.com/2020/12/04/us/politics/house-marijuana.html> [perma.cc/9LFY-YXGY].

218. J. Patrick Coolican, *Minnesota Senate Rejects Legalizing Recreational Marijuana*, STAR TRIB. (Mar. 12, 2019), <https://www.startribune.com/republican-committee-to-hear-marijuana-legalization-bill-monday-in-minnesota-senate/506978532/> [perma.cc/82B5-7T7C].

219. See, e.g., Christopher Ingraham, *After Legalization, Colorado Pot Arrests Plunge*, WASH. POST. (Mar. 26, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/03/26/after-legalization-colorado-pot-arrests-plunge/> [perma.cc/V4S7-VUT4].

members. It would assist in addressing the racial disparities within the criminal justice system and promote community safety by allowing police and prosecutors to focus on more significant threats.

### Conclusion

Over the past year, “Defund the Police” became a rallying cry for racial justice activists in the United States. However, liberal establishment figures such as President Barack H. Obama<sup>220</sup> and Representative James E. Clyburn,<sup>221</sup> the highest-ranking Black member of Congress and a veteran of the civil rights movement, have acknowledged the political costs of calling for what many see as a radical response. But the severity of the problem necessitates an extreme solution. The politicization of the language of defunding obscures the end goal of this process, which is as much about *funding* community safety programs as *defunding* militarized police departments. Although the popularity of the rallying cry has garnered national attention, the important debate is not whether to use the language of defunding, but how to prevent the continuing subjugation of Black people by the police.

As a legal journal that focuses its scholarship on how the existing legal system oppresses, exploits, and discriminates against marginalized communities, we believe that the response should be multifaceted. In Section I, we traced the history of policing in the United States since its colonial days. From its racist roots in slave patrols and Black codes to today’s hyper-militarized police departments, it is clear that American policing does what it was intended to do: control Black lives through state violence. In Section II, we outlined the decades of failure to achieve meaningful progress in Minneapolis, despite the existence of “liberal” policies and procedures meant to address the unauthorized use of force against Black people. For a few months in the summer of 2020, it appeared that this was poised to change as mass protests kicked off a period of intense scrutiny of policing. However, recent efforts have fallen short of providing the substantive change they promised. In Section III, we advocated for the redirection of MPD funding to violence prevention and alternative responses, along with the decriminalization of certain low-level non-violent offenses. We recognize that neither of these

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220. Chadelis Duster, *Obama Cautions Activists Against Using ‘Defund the Police’ Slogan*, CNN (Dec. 2, 2020), <https://www.cnn.com/2020/12/02/politics/barack-obama-defund-the-police/index.html> [perma.cc/ULR9-G5RQ].

221. Matthew Brown, *Democratic Whip James Clyburn: ‘Defund the Police’ Cost Democrats Seats, Hurt Black Lives Matter Movement*, USA TODAY (Nov. 8, 2020), <https://www.usatoday.com/story/news/politics/2020/11/08/james-clyburn-defund-police-cost-democrats-seats-hurt-black-lives-matter/6216371002/> [perma.cc/B8DQ-8C5A].

approaches represent a complete solution. However, both represent viable changes to the structural problems inherent within the MPD.

As the energy from the past summer's protests fades, the cause of police reform does not become any less urgent. The sweeping promises and blanket optimism must be followed up by an ongoing commitment to the details of enacting change. Those of us who benefit from the privilege of not thinking about race every single day must remind ourselves that every day we wait for change is another day a Black man might be murdered by the state for a simple grocery store dispute.

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